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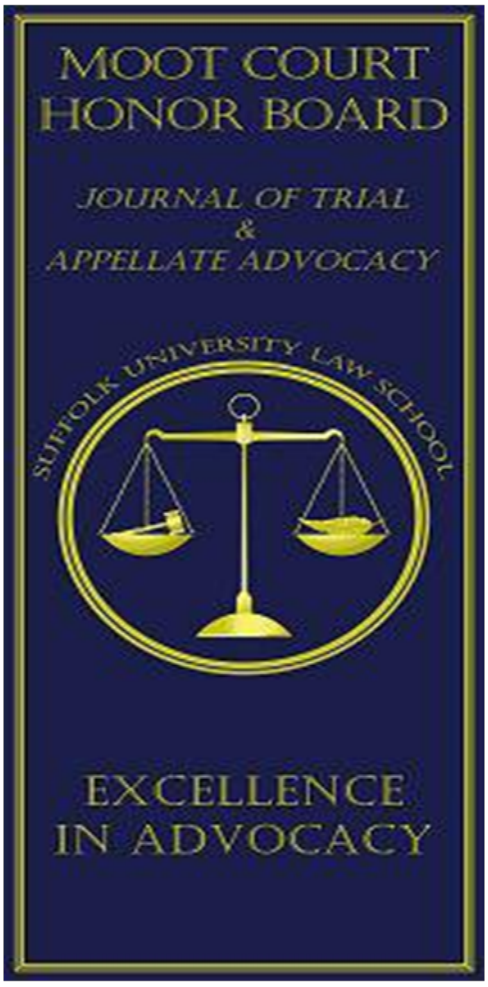

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EDITOR'S NOTE

Dear Reader:

On behalf of the Suffolk University Law School Moot Court Honor Board, I am honored to present the first issue in Volume XXVI of the *Suffolk Journal of Trial & Appellate Advocacy*. This issue contains one lead article and eight student-written pieces. Each piece is designed to provide insight and be of practical use to lawyers and judges at both the trial and appellate levels. Due to the ongoing global pandemic, this volume was edited and compiled remotely by our authors and editorial staff. Covid-19 provided unique challenges for journal, as we were unable to collaborate with each other in person. I am incredibly proud of our staff's hard work, dedication, and perseverance during this difficult time.

The lead article, *The Demise of the Law-Developing Function: A Case Study of the Wisconsin Supreme Court*, was written by Skylar Reese Croy. Attorney Croy is the Executive Assistant to the Honorable Patience Drake Roggensack, Chief Justice of the Wisconsin Supreme Court. He formerly served as her law clerk. He graduated from the University of Wisconsin Law School in 2019, magna cum laude and Order of the Coif. There, he served as Editor-in-Chief of the Wisconsin Law Review. His published work has appeared in several legal periodicals, including the Wisconsin Law Review, the Marquette Law Review, and the Georgetown Journal of Legal Ethics.

The Demise of the Law-Developing Function: A Case Study of the Wisconsin Supreme Court examines an increase in Wisconsin Supreme Court decisions with no majority opinion. This increase is partially due to conservative justices with an anti-consensus building philosophy joining the court. Pursuant this philosophy, a justice will refuse to join an opinion if the opinion does not state almost precisely what the justice believes. In this Article, Attorney Croy addresses (1) the problems associated with this philosophy, (2) how it conflicts with the law-developing function of the Wisconsin Supreme Court, and (3) proposes solutions for minimizing the number of decisions issued without a majority opinion.

The student-written pieces discuss the following legal topics and cases:

- An examination of the Supreme Court's most recent affirmation of an overlooked loophole to the Double Jeopardy Clause that undermines the Clause's guaranteed protections (Ross Ballantyne);
- An analysis of upholding the right to choose through the right to physician-assisted suicide if *Roe v. Wade* is overturned (Jennifer McCoy);
- A forecast of the California Consumer Privacy Act's impact on nationwide data breach class actions (Brendan Chaisson);
- An analysis of excessive force and whether a police officer can be held civilly liable for tasing a mentally ill person after resisting arrest (Brandon Vallie);
- A discussion of how Supreme Court jurisprudence has determined the content neutral classification for buffer zone ordinances that restrict speech near abortion facilities (Jamie Wells);

- An analysis of the cat's paw liability doctrine and its expansion to include the discriminatory intent of non-employees in case analysis (Kendra Lena);
- An examination of the shifting landscape of federal anti-LGBT discrimination protections, centering on a landmark case that used Title VII precedent to insulate queer Americans from housing discrimination (Cayla Keenan); and
- An inspection of the Second Circuit's interpretation of § 230 of the Communications Decency Act and the need to revise the statute in light of social media's advanced capabilities (Alison Eleey).

I sincerely appreciate the twenty-seven staff members of the Moot Court Honor Board, who worked diligently to edit and cite-check throughout the semester. Special thanks to our Executive Editor, Katherine Marshall, whose hard work was vital throughout the editing process; our Managing Editor, Christina Gregg, who helped solicit and polish an exceptional Lead Article; and our Associate Managing Editor, Julia Caccavo, who worked tirelessly to format this issue. I would also like to thank our Associate Executive Editors, Brinhley Alviarez, Meaghan Callahan, Kendra Lena, Jennifer McCoy, and Marissa Persichini, for providing quality editorial feedback and encouraging staff members throughout the editing process; and our Lead Article Editors, Symin Charpentier, Alexandra Sissons, and Jamie Wells, for their excellent Lead Article revisions. Finally, I extend my utmost gratitude to our Board's advisor, Professor Richard G. Pizzano, the Board's Staff Assistant, Janice Quinlan, and the Deans and Faculty of Suffolk University Law School for their continued support of the *Suffolk Journal of Trial & Appellate Advocacy.*

Thank you for reading our first issue in Volume XXVI of the *Suffolk Journal of Trial & Appellate Advocacy.* I am confident that judges, practitioners, professors, and students will benefit from our scholarship. I hope that you will find this issue to be compelling, relevant, and useful during these challenging times.

Sincerely,

Diana Hurtado

Editor-in-Chief

ARTICLE

THE DEMISE OF THE LAW-DEVELOPING FUNCTION: A CASE STUDY OF THE WISCONSIN SUPREME COURT

Skylar Reese Croy[1]

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[1] Attorney Croy is the Executive Assistant to the Honorable Patience Drake Roggensack, Chief Justice of the Wisconsin Supreme Court. He graduated from the University of Wisconsin Law School in 2019, magna cum laude and Order of the Coif. His published work has appeared in several legal periodicals, including the Wisconsin Law Review, the Marquette Law Review, and the Georgetown Journal of Legal Ethics. The author extends his utmost gratitude to Chief Justice Patience Drake Roggensack for her inspiration and guidance.

I. INTRODUCTION

Antonin Scalia was appointed to the U.S. Supreme Court to be a "consensus builder."[2] In other words, he was supposed to view himself as a member of a collegial court that worked together to create precedent. At his confirmation hearing, Senator Strom Thurmond (R-S.C.), the Chairman of the Committee on the Judiciary, stated:

> [T]hose who have been associated with Judge Scalia throughout his life—even if they might disagree with him philosophically—consistently describe him as: A person who is open-minded, a consensus builder, and an individual with a keen intellect and sense of humor. These are unquestionably qualities we desire in a person who is to be elevated to the highest court in the land.[3]

However, during his tenure, Justice Scalia was not a consensus builder. Indeed, in an interview he gave with Charlie Rose in 2016, he exclaimed, "I can't be a consensus builder":

> J. Scalia: Look, when I came on the Court, the word was, you know, Scalia will be a consensus builder, cause I'm such a charming fellow. I will be a consensus builder.
>
> Rose: Is that what they said?
>
> J. Scalia: No, they didn't say the charming part, but they did expect me to be a consensus builder, he you know, he gathers the votes. I can't be a consensus builder.

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[2] *Nomination of Judge Antonin Scalia, Hearings Before the Committee on the Judiciary United States Senate*, 99th Cong. 1-2 (1986), http://www.loc.gov/law/find/nominations/scalia/hearing.pdf.

[3] *Id.* at 2.

> Rose: Because?
>
> J. Scalia: Because I can't trade. You see [Justice] Bill Brennan, who was an evolutionist, he could deal. He could go to his colleague, you know, "I want to change the Constitution this far." And go, "God gee Bill, I can't go this far." And he'd go, "well what about this far." He can deal. Now I can't deal. If I'm, if I'm, doing the text, what can I say, you know, "half way between what the text really means and what'd you'd like it to mean?" Is that the deal I'm going to cut?
>
> Rose: Yes, that would be it.
>
> J. Scalia: You can't do it.[4]

Justice Clarence Thomas once made a similar statement, in which he suggested that compromising is inconsistent with his oath of office.[5]

Scholars have long been aware that some conservatives subscribe to an anti-consensus building philosophy. As one wrote: "As an ideologue, Justice Scalia preferred his subjectively 'correct' answer to the most mutually agreeable answer. Justice Scalia cite[d] his adherence to originalism and textualism as the reason for his inability to form coalitions."[6] Conservatives tend to value the "great dissenter," who always views the resolution of a legal dispute through his or her subjective lens.[7] Lest there be any doubt that conservatives have trouble forming coalitions, the five conservative justices authored sixty separate writings this past term at the U.S. Supreme Court.[8] The four liberals authored thirty-six.[9] Furthermore, con-

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[4] Charlie Rose, *Interview with Justice Antonin Scalia*, CBS THIS MORNING, at 0:31–1:30 (Feb. 15, 2016), https://www.youtube.com/watch?v=CNPuKv_pNks.

[5] Bill Kristol, *Interview with Clarence Thomas*, CONVERSATIONS WITH BILL KRISTOL, at 6:50–8:20 (Oct. 22, 2016), https://www.youtube.com/watch?v=Q3rZknW5gAk&t=2330s.

[6] Robert Stein, Foreword, *A Consequential Justice*, 101 MINN. L. REV. HEADNOTES 1, 9 (2016).

[7] James Allan, *One of My Favorite Judges: Constitutional Interpretation, Democracy and Antonin Scalia*, 6 BR. J. AM. LEG. STUDIES 25, 31 (2017).

[8] Nina Totenberg, Emmett Witkovsky-Eldred & Alyson Hurt, *In Supreme Court Term, Liberals Stuck Together While Conservatives Appeared Fractured*, NPR (July 15, 2020), https://www.npr.org/2020/07/15/891185410/in-supreme-court-term-liberals-stuck-together-while-conservatives-appeared-fract.

[9] *Id.*

servative justices authored fifteen "solo" separate writings, while liberal justices authored four.[10]

Of course, there have been a few famous liberal justices who were not keen on compromise; but often, the trouble for liberals seems to be psychological and not jurisprudential.[11] In fairness, conservatives have the same psychological roadblocks to compromise. However, unlike conservatives, liberals have not made an unwillingness to compromise an integral a part of their judicial philosophy. Indeed, law review articles have been authored praising liberals for their ability to form coalitions.[12]

The problem with conservatives' anti-consensus building philosophy is that high courts exist to develop the law.[13] When members of a high court refuse to work together, the result is often that the court has no majority opinion. This is a disservice to the public because it confuses, rather than clarifies, the law. As Chief Justice John Roberts explained: "I think that every justice should be worried about the Court acting as a Court and functioning as a Court, and they should all be worried, when they're writing separately, about the effect on the Court as an institution."[14] In the words of several scholars, "[w]hen the Supreme Court fails to generate a controlling precedent, the result arguably is an erosion of the Court's credibility and authority as a source of legal leadership."[15]

Conservatives' anti-consensus building philosophy has found its way to the Wisconsin Supreme Court, as demonstrated by a rise in decisions with no majority opinion. This Article has three goals: (1) to persuade conservative justices to abandon their anti-consensus building phi-

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[10] *Id.*

[11] *See* Stein, *supra* note 6, at 4.

[12] *See generally id.*

[13] Victor Eugene Flango, *State Supreme Court Opinions as Law Development*, 11 J. APPELLATE PRAC. & PROCESS 105 (2010); Skylar Reese Croy, Comment, *Step One to Recusal Reform: Find an Alternative to the Rule of Necessity*, 2019 WIS. L. REV. 623, 631–34. Notably, the Wisconsin Supreme Court and members thereof have stated that the court serves a law-developing function. *See e.g.*, State ex rel. Wis. Senate v. Thompson, 424 N.W.2d 385, 387 (Wis. 1988) ("[I]t is this court's function to develop and clarify the law."); State v. Brantner, 939 N.W.2d 546, 525 (Wis. 2020) (Roggensack, C.J., concurring) ("Part of our obligation as supreme court justices is to take complicated legal issues and decide them in a way that simplifies and explains them."); State v. Hermann, 867 N.W.2d 772, 804–05 (Wis. 2015) (Ziegler, J., concurring) ("Unlike a circuit court or the court of appeals, the supreme court serves a law development purpose; therefore, cases before the supreme court impact more than parties then before the court."). *See generally* Patience Drake Roggensack, *Elected to Decide: Is the Decision-Avoidance Doctrine of Great Weight Deference Appropriate in this Court of Last Resort*, 89 MARQ. L. REV. 541 (2006).

[14] Jeffrey Rose, *Robert's Rules*, THE ATLANTIC (Jan.–Feb. 2007), https://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/.

[15] Pamela C. Corley et al., *Extreme Dissensus: Explaining Plurality Decisions on the United States Supreme Court*, 31 JUST. SYS. J. 180, 181 (2010).

losophy, (2) to document the problems the philosophy has caused and (3) to propose solutions. This Article focuses on the Wisconsin Supreme Court; although, as it notes at various points, this problematic philosophy is likely not unique to Wisconsin's high court.

This Article proceeds in four parts. Part I summarizes the history of judicial opinion writing. This context is helpful for understanding why a rise in decisions with no majority is a threat to the legitimacy of the judiciary. Part II documents the rise in opinions without a majority and argues it largely stems from the addition to the bench of conservatives with an anti-consensus building philosophy. Part III addresses consequences of this trend. Most importantly, and most obviously, the increase in decisions with no majority opinion indicates a failure of the Wisconsin Supreme Court to perform its law-developing function. There are less intuitive problems as well. These problems primarily affect conservative jurisprudence, and their existence indicates that some conservatives ought to rethink their anti-consensus building philosophy. Part IV discusses possible solutions.

II. HISTORICAL BACKGROUND ON JUDICIAL OPINION WRITING

This Part summarizes the history of judicial opinion writing. This history is helpful for understanding why majority opinions are so important. It also discusses the concept of a collegial court. Indeed, this concept developed because an inability to author majority opinions threatened the legitimacy of the judiciary.

A. Opinion Writing in England

English courts had long utilized *seriatim* opinions at the time of America's founding. "*Seriatim*" means, "[o]ccuring in a series."[16] In the context of judicial opinions, "*seriatim* opinions" are "a series of opinions written individually by each judge on the bench, as opposed to a single opinion speaking fort the court as a whole."[17] Professor M. Todd Henderson, of the University of Chicago Law School, explains: "For almost a thousand years, decisions of multimember courts in England were delivered orally by each judge seriatim and without any prior intracourt consultation."[18] This "long and unbroken tradition" temporarily changed when

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[16] *Seriatim*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[17] *Id.*

[18] M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 292.

William Murray (later known as Lord Mansfield) became Lord Chief Justice in 1756.[19] He "introduced a procedure for generating agreement and consensus among judges and then issuing caucused opinions."[20] In essence, Lord Mansfield created what scholars today would call a "collegial court."[21] "The judges met collectively in the secrecy of their chambers, worked out their differences into compromise decisions, and then wrote what was to be delivered as an anonymous and unanimous 'opinion of the court.'"[22] Lord Mansfield hoped that his approach would bring clarity to English commercial law, which had become extremely complicated.[23] Alas, his practice was abandoned shortly after his retirement.[24] Only recently has Lord Mansfield's approach returned to England.[25]

B. Opinion Writing in the United States

England's legal traditions—including its use of *seriatim* opinions—became norms in colonial America.[26] Importantly, many courts had been operating before Lord Mansfield's innovations, so it should not be surprising that they did not follow his approach.[27] Over time, courts were inspired by Lord Mansfield, but his ideas were controversial.[28] The first court to abandon *seriatim* opinions was the Virginia Supreme Court under the leadership of Chief Judge Edmund Pendleton.[29] Notably, Chief Judge Pendleton was condemned by the likes of Thomas Jefferson, who saw the practice as illegitimate.[30] Jefferson believed that *seriatim* opinions increased transparency and made individual judges accountable.[31] Lord Mansfield's approach was abandoned in Virginia when Chief Judge Pendleton's successor took his seat, in part due to Jefferson's efforts.[32]

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[19] *Id.* at 294.

[20] *Id.*

[21] *See infra* Section I.B.

[22] Henderson, *supra* note 18, at 294.

[23] *See id.*

[24] *Id.* at 302.

[25] *Id.* at 303.

[26] *Id.* at 303–04.

[27] Henderson, *supra* note 18, at 304.

[28] *Id.* at 308.

[29] Joshua M. Austin, Comment, *The Law of Citations and Seriatim Opinions: Were the Ancient Romans and the Early Supreme Court on the Right Track?*, 31 N. ILL. U. L. REV. 19, 27 (2010).

[30] *See id.*

[31] *Id.* at 28.

[32] *Id.* at 27.

Despite the controversy, American courts soon became aware that they needed to consider Lord Mansfield's approach, or they risked being the weakest branch of government. For example, many early U.S. Supreme Court decisions were issued as *seriatim* opinions.[33] The Court was attacked by the other branches and the press, in part because of its inability to pronounce law in a clear manner; indeed, the nation's first Chief Justice, John Jay, left the Court and refused to return because he believed that the Court was unable to earn the "public confidence and respect."[34] *Calder v. Bull*[35] is a "classic" example of the confusion resulting from *seriatim* opinions.[36] Four justices participated and each authored an opinion. To this day, scholars debate the holding of this case.[37]

The Court's practice of *seriatim* opinions was ended by none other than Chief Justice John Marshall.[38] He looked closely to the example of Lord Mansfield.[39] Based on that example, Chief Justice Marshall established the practice of "opinions of the court."[40] Scholars credit Chief Justice Marshall's decision with making the judiciary a co-equal branch of government.[41] State courts soon followed suit.

Notably, Chief Justice Marshall's practice differed from the practice in use today. He normally delivered the opinions for the Court; his colleagues did not.[42] This is why a large number of opinions appear to have been "authored" by Chief Justice Marshall.[43] It took time for the modern practice of individual justices authoring opinions on behalf of the Court to evolve. However, the central idea of Chief Justice Marshall has always remained: "each generation of the Court [has] adopted Chief Justice Marshall's belief that a unified voice [i]s necessary and practicable for the sur-

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[33] Henderson, *supra* note 18, at 308; *see also* John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790–1940*, 77 WASH. U. L. Q. 137, 140 (1999).

[34] Henderson, *supra* note 18, at 308.

[35] 3 U.S. 386 (1798).

[36] Henderson, *supra* note 18, at 308.

[37] *Id.* (quoting DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 44, 45, 55 (1985)) (explaining that the "practice of seriatim opinions" creates difficulties in determining the holding of *Calder*, that "*Calder* illustrates the uncertainty that can arise when each Justice writes separately" and that the "practice of seriatim opinions . . . weakened the force of the [Court's] decisions").

[38] *Id.* at 313.

[39] *See id.*

[40] *Id.*

[41] *Id.*

[42] Kelsh, *supra* note 33, at 141.

[43] *Id.* at 144.

vival and growth of the republic."[44] As Chief Justice Marshall alluded to, high courts are legitimated by their collegial nature; it is what gives the judiciary its status as a co-equal branch of government. Furthermore, the rule of law cannot thrive when the law is unclear.[45]

Collegiality furthers the rule of law not only by making law clear, but by giving its interpretation a sense of objectivity.[46] A high court's ability to declare law extends beyond the sum-total of its members' subjective views—in a sense, a majority opinion represents an objective view of law that can be achieved only by the work of an institution. Stated otherwise, the "correct" view of the law is not merely the sum-total of the subjective views of the members of the court—it is something else altogether. Today, high courts in the United States are viewed as collegial bodies.[47] High courts have the power to declare law—individual justices do not. The role of a judge on a collegial court requires judges to work with others. Two New York University professors developed a useful illustration to demonstrate what judges on a collegial court are not.[48] They explained that in gymnastics, each judge scores the performer by giving him or her a numerical number. The numbers are then added. The score given to the performer is, in essence, an average of the score assigned by each individual judge. Indeed, the result might not be considered credible if the judges communicated ahead of time.[49] Judging on a collegial court does not work in such a manner. It is a different sort of judging. In the words of the two scholars, it is a "team enterprise" in which "collaboration and deliberation are the trademarks."[50]

The language of opinions reflects the view that courts are collegial bodies. Majority opinions do not say "*I* decide the case this way," they say, "*we* decide this case this way."[51] In the words of one Wyoming Supreme Court justice:

> A majority opinion is the product of a collegiate court and, when circulated for consideration by the other members of

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[44] Adam S. Hochschild, Note, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Context*, 4 WASH. U. J.L. & POL'Y 261, 273 (2000).

[45] Planned Parenthood v. Casey, 505 U.S. 833, 844 (1992) (plurality) ("Liberty finds no refuge in a jurisprudence of doubt.").

[46] *See generally* Meg Penrose, *Goodbye to Concurring Opinions*, 15 DUKE J. CONST. L. & PUB. POL'Y 25 (2020).

[47] *See generally* Lewis A. Kornhauser & Lawerence G. Sager, *The One and the Many: Adjudication in the Collegial Courts*, 81 CALIF. L. REV. 1 (1993).

[48] *Id.* at 4.

[49] *Id.*

[50] *Id.* at 4–5.

[51] *Id.* at 7.

> the court, or, at least, when filed, it no longer retains any proprietary aspect so far as the drafter is concerned. It becomes an institutional product that is owned only by the court.[52]

For this reason, the views represented in a majority opinion do not necessarily reflect the views of its author; they reflect the views of the court. The majority author may have drafted the opinion quite differently if he or she was unconstrained by the concerns of his or her colleagues. To be clear, there is nothing inherently wrong with separate writings. They are not inconsistent with a high court's collegial nature. A quality separate writing improves the deliberative process.[53] It is for this reason that Chief Justice William H. Rehnquist objected when critics suggested that he had an obligation to persuade his fellow justices to issue fewer separate writings.[54] The problem is not with separate writings generally; it is with the proliferation of separate writings at the expense of majority opinions.

III. THE RISE IN LEAD AND MAJORITY/LEAD OPINIONS AT THE WISCONSIN SUPREME COURT

The Wisconsin Supreme Court has forgotten the lessons of Lord Mansfield and Chief Justice Marshall. It is not operating as a collegial court. To a significant degree, this Part builds on the work of Professor Alan Ball, who teaches history at Marquette University. He has spent many years running a blog that provides empirical data on the Wisconsin Supreme Court,[55] and he has kindly allowed his raw data to be utilized for this Article. This Part first discusses the terminology used to signal that an opinion does not have the support of a majority. It then documents the rise in decisions with no majority opinion and argues that it is largely because of conservatives with an anti-consensus building philosophy joining the court.

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[52] Engberg v. Meyers, 820 P.2d 70, 170 (Wy. 1991) (Macy, J., concurring in part, dissenting in part).

[53] Kornhauser & Sager, *supra* note 47, at 9.

[54] *See generally* William H. Rehnquist, *"All Discord, Harmony Not Understood": The Performance of the Supreme Court of the United States*, 22 ARIZ. L. REV. 973 (1980).

[55] Alan Ball, SCOWSTATS, http://www.scowstats.com/.

A. The Definition of a Plurality, Lead and Majority/Lead Opinion

Understanding the rise in decisions with no majority opinion requires understanding some vocabulary. The terminology used to signal that the first opinion does not have the support of a majority varies. *Black's Law Dictionary* defines a "plurality opinion" as "[a]n opinion lacking enough judges' votes to constitute a majority but receiving more votes than any other opinion."[56] However, whether a plurality opinion needs to receive the most votes is unclear. A more accurate definition might be that a plurality opinion is an opinion that received fewer votes than a majority, but received the most votes of the opinions that agreed with the mandate.[57] A dissent, for example, could have more votes than any other opinion; in such a case, the first opinion might still be labeled a plurality. Members of the U.S. Supreme Court have often used the phrase "plurality" opinion.[58] Sometimes, they have used the phrase "lead" opinion to refer to the first opinion if the first opinion did not receive more votes than any other opinion.[59] Lead opinions are so-named because they come before other writings, such as concurrences and dissents.

Members of the Wisconsin Supreme Court occasionally have used the phrase plurality opinion;[60] however, more often, they have used the phrase lead opinion even if the first opinion garnered more votes than any other.[61] Notably, Wisconsin is not the only state to refer to such opinions as lead opinions.[62] The Wisconsin Supreme Court's Internal Operating Procedures say little about lead opinions but provide insight into their origins. As Justice Shirley Abrahamson and Justice Ann Walsh Bradley summarized:

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[56] *Plurality opinion*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[57] Nina Varsava, *The Role of Dissents in the Formation of Precedent*, 14 DUKE J. CONST. L. & PUB. POL'Y 294 (2019).

[58] *See e.g.*, Hein v. Freedom from Religion Found., Inc., 551 U.S. 587 (2007) (plurality); City of Los Angeles v. Alameda Books, Inc., 542 U.S. 507 (2004) (plurality); Albright v. Oliver, 510 U.S. 266 (1994); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (plurality).

[59] For example, in *Crawford v. Marion County Election Bd.*, the Court's first opinion, authored by Justice John Paul Stevens, garnered three votes, and a concurrence by Justice Scalia also garnered three votes. 553 U.S. 181 (2008). The justices referred to Justice Stevens' opinion as the lead opinion.

[60] State v. Deadwiller, 834 N.W.2d 362, 379 (Wis. 2013) (Abrahamson, C.J., concurring).

[61] For example, in *State v. Lopez*, the first opinion, authored by Justice Annette Ziegler, was joined in full by three justices, more than any other opinion. 936 N.W.2d 125 (Wis. 2019). A concurrence by Justice Rebecca Bradley referred to it as a lead opinion.

[62] *See* Turner v. CertainTeed Corp., 119 N.E.3d 1260 (Ohio 2018).

> The phrase "lead opinion" is not . . . defined in our Internal Operating Procedures or elsewhere in the case law. Our Internal Operating Procedures (IOPs) refer to "lead opinions," but only in stating that if, during the process of circulating and revising opinions, "the opinion originally circulated as the majority opinion does not garner the vote of a majority of the court, it shall be referred to in separate writings as the 'lead opinion.'" Wis. S. Ct. IOP II.G.4.[63]

To summarize, sometimes a justice is assigned to draft a majority opinion, and the justice's draft fails to garner the support of a majority. The draft is then referred to as a lead opinion.

The Wisconsin Supreme Court's past practice helps further clarify the nature of a lead opinion. First, a lead opinion states the mandate of the court; however, under unusual circumstances, the reasoning in the lead opinion could be at odds with the mandate.[64] For example, in *State v. Lynch*,[65] the mandate was: "As a result of a divided court, the law remains as the court of appeals has articulated it."[66] The analysis of the lead opinion, which had the support of three justices, explained that they would have reversed the Court of Appeals. Second, a lead opinion does not always have the most votes of the opinions agreeing with the mandate. Indeed, a draft initially circulated as a majority opinion that later becomes a lead opinion draft is likely to be published as the "lead opinion"—even if a concurring opinion garners more votes. This is so because of deadlines and internal court politics; time constraints may not permit an opinion that was written to read as a response to a lead opinion to be rewritten. An example of such a case is *State v. Outlaw*.[67] The lead opinion had the support of three justices while two concurring opinions each had the support of the remaining four justices.

The phrase "lead opinion" can be misleading because, sometimes, a portion of an opinion garners the votes of a majority. Some members of the Wisconsin Supreme Court have referred to such opinions, in their entirety, as lead opinions. Others have referred to the portions of the opinion that garnered less than a majority as a lead opinion while referring to the portions that garnered a majority as a majority opinion. Others have used

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[63] State v. Lynch, 885 N.W.2d 89, 125 (Wis. 2016) (Abrahamson & A.W. Bradley, JJ., concurring in part, dissenting in part).

[64] *Id.*

[65] 885 N.W.2d at 89 (lead).

[66] *Id.* at 89.

[67] 321 N.W.2d 145 (Wis. 1982) (lead).

the phrase "majority/lead" opinion. For example, in *State v. Lopez*,[68] Justice Rebecca Bradley's concurrence referred to the first opinion as a lead opinion, even though most of the opinion had the support of a majority.[69] Contrarily, Justice Daniel Kelly's concurrence referred to the first opinion as a majority opinion.[70] In *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*,[71] the first opinion was referred to as a lead opinion in Justice Annette Ziegler's concurrence, although when she cited those portions that garnered a majority, she used the phrase "majority opinion."[72] Justice Michael Gableman's concurrence referred to the first opinion in a similar manner.[73] Because portions of the first opinions in *Lopez* and *Tetra Tech* garnered a majority, Justice Ann Walsh Bradley's dissent in *Lopez* and her concurrence in *Tetra Tech* referred to the respective first opinions as a "majority/lead" opinion.[74] Justice Ann Walsh Bradley has used the phrase "majority/lead" opinion in other writings.[75] This phrase is helpful because it signals that some parts of the opinion are precedential, and others are not.

B. Documenting the Rise in Lead and Majority/Lead Opinions

Justice Abrahamson and Justice Ann Walsh Bradley noted the rise in lead opinions during the 2015–16 term, although they did not quantify it. In one separate writing, they stated, "[t]he proliferation of separate writings (as in this case) and 'lead opinions' is emblematic of the court's work this 'term' (September 2015 to June 2016)."[76] They noted:

> Although we have not done a statistical analysis, our perception is that few of the court's decisions this term have been unanimous without any separate writings, and several, including this case, have begun with "lead opinions." See, e.g., Singh v. Kemper, 2016 WI 67, 371 Wis.2d 127,

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[68] 936 N.W.2d 125 (Wis. 2019) (majority/lead).

[69] *Id.* at 173 (R. Bradley, J., concurring).

[70] *Id.* at 179 (Kelly, J., concurring).

[71] 914 N.W.2d 21 (Wis. 2018).

[72] *Compare id.* at 67 (Ziegler, J., concurring) ("I concur and write separately because the analysis that the lead opinion employs to reach its conclusion is concerning."), *with id.* (citing the "Majority op.").

[73] *Compare id.* at 74 (Gableman, J., concurring) (referring to the first opinion as a "lead opinion"), *with id.* at n.2 (joining "parts of the majority opinion").

[74] *See Lopez*, 936 N.W.2d at 180 (A.W. Bradley, J., dissenting); *see also Tetra Tech*, 914 N.W.2d at 63 (A.W. Bradley, J., concurring).

[75] State v. Coffee, 937 N.W.2d 579, 597 n.1 (Wis. 2020) (A.W. Bradley, J., dissenting).

[76] State v. Lynch, 885 N.W.2d 89, 125 (Wis. 2016) (Abrahamson & A.W. Bradley, JJ., concurring in part, dissenting in part).

> 883 N.W.2d 86 (lead op. of Ann Walsh Bradley, J., joined by Abrahamson, J.); Lands' End, Inc. v. City of Dodgeville, 2016 WI 64, 370 Wis.2d 500, 881 N.W.2d 702 (lead op. of Abrahamson, J., joined by Ann Walsh Bradley, J., and Gableman, J.); Coyne v. Walker, 2016 WI 38, 368 Wis.2d 444, 879 N.W.2d 520 (lead op. of Gableman, J. with Abrahamson, J., Ann Walsh Bradley, J., and Prosser, J., each concurring separately); State v. Smith, 2016 WI 23, 367 Wis.2d 483, 878 N.W.2d 135 (lead op. of Roggensack, C.J., joined by Prosser, J., and Gableman, J.); United Food & Comm. Workers Union, Local 1473 v. Hormel Foods Corp., 2016 WI 13, 367 Wis.2d 131, 876 N.W.2d 99 (lead op. of Abrahamson, J., joined by Ann Walsh Bradley, J.); Hoffer Props., LLC v. DOT, 2016 WI 5, 366 Wis.2d 372, 874 N.W.2d 533 (lead op. of Gableman, J., joined by Roggensack, C.J., and Ziegler, J.).[77]

Empirical data leaves little doubt that they were correct.

Professor Ball has documented a rise in "fractured opinions" dating back to 1996.[78] A fractured opinion may be either a lead or majority/lead opinion. Indeed, in the terms from 1996–97 through 2014–15, a mere 2.3 percent of decisions issued by the Wisconsin Supreme Court were fractured.[79] From the 2015–16 term on, over 9.5 percent of opinions issued each term, on average, have been fractured. The dramatic rise is shown below in Figure 1.[80]

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[77] *Id.*

[78] Alan Ball, *A Spike in Fractured Decisions*, SCOWSTATS (May 30, 2017), http://www.scowstats.com/2017/05/30/a-spike-in-fractured-decisions/.

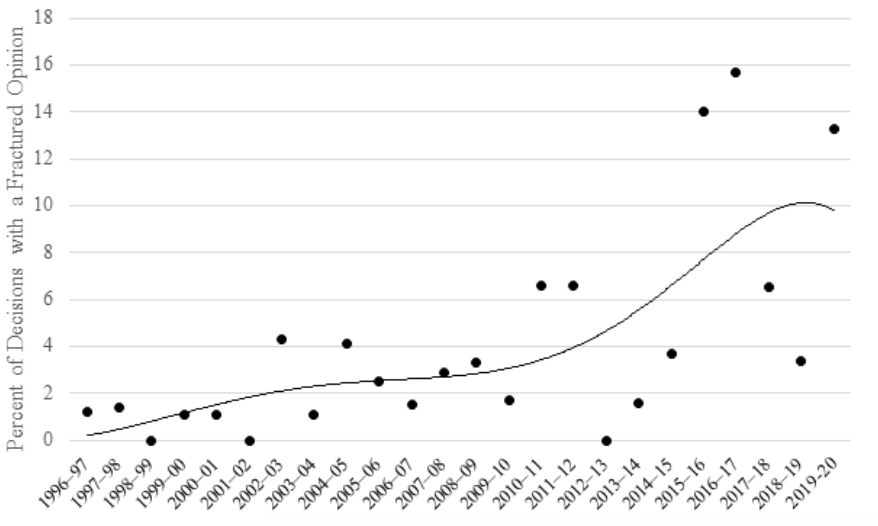
[79] *Id*.

[80] The data was compiled by Professor Ball with the exception of the data from the 2019–20 term. Note that Professor Ball excluded summary *per curiam* decisions from his data. For consistency, the same was done for data from the 2019–20 term. Recently, Professor Ball stated:

> I settled on counting cases with "lead opinions" or "plurality opinions"—as opposed to "majority opinions"—thinking that sufficient to identify instances where the court could not assemble a majority to agree on a rationale. Yet, I was never entirely comfortable with this approach, because it excluded deadlocked *per curiam* decisions, which are at least as fractured (and of no precedential value) as any other decision in this category.

Alan Ball, *The 2019–20 Term: Some More Impressions*, SCOWSTATS (July 27, 2020), http://www.scowstats.com/2020/07/27/the-2019-20-term-some-more-impressions/.

Figure 1: Percentage of Decisions with a Fractured Opinion Each Term



Notably, Figure 1 does not account for several opinions that could be described as fractured but that do not fit within the label of "lead" or "majority/lead." For example, in *Bartlett v. Evers*,[81] an important partial veto case, the court issued a *per curiam* opinion announcing the mandate. Chief Justice Roggensack authored the first opinion that followed the *per curiam* opinion, which was a partial concurrence and partial dissent.[82] Justice Ann Walsh Bradley's partial concurrence and partial dissent followed, and it was joined by Justice Rebecca Dallet.[83] The third authored opinion was a partial concurrence and partial dissent by Justice Kelly, and it was joined by Justice Rebecca Bradley.[84] The last authored opinion was a concurrence by Justice Brian Hagedorn, and it was joined by Justice Ziegler.[85] No justice signed the *per curiam* opinion in *Bartlett*, so it was not a lead opinion; therefore, it was not counted as a fractured opinion in Figure 1. However, there can be little doubt that it is an important example of a fractured court.

SEIU v. Vos[86] is another example of an opinion that arguably represents a fractured court. In *SEIU*, the Wisconsin Supreme Court announced its mandate in two majority opinions. Like *Bartlett*, *SEIU* did not have a

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[81] 945 N.W.2d 685 (Wis. 2020) (per curiam).

[82] *Id.* at 688 (Roggensack, C.J., concurring in part, dissenting in part).

[83] *Id.* at 710 (A.W. Bradley, J., concurring in part, dissenting in part).

[84] *Id.* at 719 (Kelly, J., concurring in part, dissenting in part).

[85] *Id.* at 740 (Hagedorn, J., concurring).

[86] 946 N.W.2d 35 (Wis. 2020).

lead opinion; however, having the mandate announced by two different majorities reflects divide. A third example is *State v. Roberson*.[87] For context, *Roberson* discussed whether social science could be used to formulate a rule of constitutional law. A majority of the court said that it cannot. Two paragraphs in the first opinion read:

> Historically, there have been times when social science has been used by courts as an excuse to justify disturbing decisions. Indeed, entire law review articles and book chapters have been dedicated to analyzing how Plessy v. Ferguson and the line of cases that followed Plessy grounded their decisions in the social science of the time. E.g., Herbert Hovenkamp, Social Science and Segregation Before Brown, 1985 Duke L.J. 624. . . .
>
> The United States Supreme Court cited social science in Brown, but it did so as a response to social science employed at the time of Plessy. Brown v. Board of Educ., 347 U.S. 483, 494 n.11, 74 S.Ct. 686, 98 L.Ed. 873 (1954). . . . The Court stated, "[w]hatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding [of negative psychological impact] is amply supported by modern authority." Id.[88]
>
> Justice Rebecca Bradley wrote a concurrence to state:
>
> I join the majority opinion in full, except to the extent paragraphs 41–42 [the quoted material above] suggest that courts may consult social science research to interpret the Constitution. Historically, when courts contaminate constitutional analysis with then-prevailing notions of what is "good" for society, the rights of the people otherwise guaranteed by the text of the Constitution may be trampled.[89]

Her concurrence was joined by Justice Kelly, which means that, in a sense, two paragraphs of the first opinion did not have a majority. Justice Rebecca Bradley's concurrence was probably unnecessary. The first sentence of paragraph 41 read, "[h]istorically, there have been times when social science has been used by courts as an excuse to justify disturbing deci-

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[87] 935 N.W.2d 813 (Wis. 2019).

[88] *Id.* at 207.

[89] *Id.* at 223 (R. Bradley, J., concurring) (citation omitted).

sions."[90] There was little disagreement of any significance on the use of social science, and the concurrence may breed confusion.

If *Bartlett*, *SEIU*, and *Roberson* are added to the number of lead and majority/lead opinions issued during the 2019–20 term, the percentage of decisions with fractured opinions rises to over 19 percent.[91] The empirical data in Figure 1, while demonstrating a significant problem, does not paint the full picture. The problem is even worse. A fifty-state survey of fractured opinions demonstrates the magnitude of Wisconsin's problem. From 2009 through 2019, most state high courts issued approximately one to two fractured opinions per year. In contrast, the Wisconsin Supreme Court has issued twenty-six fractured opinions since the start of the 2015–16 term. Although this problem is not unique to Wisconsin, Wisconsin has experienced an extreme version of it.

The U.S. Supreme Court is experiencing a rise like the Wisconsin Supreme Court; however, the rise at the U.S. Supreme Court is less novel. One study noted a slight rise in plurality decisions at the U.S. Supreme Court between 1953 and 2006, although the rise was not too pronounced.[92] Another study noted that the U.S. Supreme Court issued 45 plurality decisions between 1801 and 1955 compared to 195 plurality decisions between 1953 and 2006.[93] A third study found 41 plurality decisions between the 2007 and 2016 terms.[94]

C. Hypotheses that May Be Disregarded

Before discussing what has caused the rise, it is worth considering what has not triggered it. Various hypotheses have been proposed regarding why the U.S. Supreme Court has experienced a rise. Whatever merit these hypotheses may have in regard to the U.S. Supreme Court, they are not the problem in Wisconsin.

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[90] *Id*. at 207 (majority).

[91] This percentage includes summary *per curiam* decisions in the denominator but not the numerator (9 divided by 47). If the two summary *per curiam* decisions are assumed to be fractured, the percentage increases to over 23 percent (11 divided by 47).

[92] Corley et al., *supra* note 15, at 181.

[93] James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 519 (2011).

[94] Varsava, *supra* note 57, at 292–93.

1. Increasing Complexity and Controversy

One hypothesis for the rise in lead and majority/lead opinions might be that cases are becoming more complex and controversial. Commentators have noted that the U.S. Supreme Court tends to issue plurality decisions in significant cases.[95] As one student note stated, "[m]any plurality decisions address fundamental—or even politically charged—legal issues."[96] An often-cited example is *Planned Parenthood of Southeast Pennsylvania v. Casey*.[97] The decision reaffirmed a woman's right to procure an abortion.[98]

Surprisingly, lead and majority/lead opinions at the Wisconsin Supreme Court often issue in cases that present relatively simple and noncontroversial questions. The Wisconsin Supreme Court issued six lead and majority/lead opinions during the 2019–20 term. None were in cases that should have been particularly stirring. *Lopez* was a statutory interpretation case, wherein the court concluded that multiple acts of retail theft could be aggregated into a single charge.[99] *Marathon County v. D.K.*[100] was a typical mental commitment case, wherein the court concluded that the expiration of a mental commitment order did not moot an appeal because the appellant was still not allowed to own a firearm; however, the court also concluded that the appellant was dangerous such that the order was properly issued.[101] *State v. Coffee I*[102] was a sentencing dispute. *Lang v. Lions Club of Cudahy Wisconsin, Inc.*[103] dealt with the definition of agent within the context of Wisconsin's recreational immunity statute. *State v. Coffee II*[104] analyzed whether a search incident to a lawful arrest for operating while intoxicated could encompass a search of the vehicle's passenger compartment. *State v. Muth*[105] was a criminal restitution case, wherein the court concluded that a civil settlement agreement could not bar liability for

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[95] *See id.*; *see also* Pamela C. Corley, *Uncertain Precedent: Circuit Court Responses to Supreme Court Plurality Opinions*, 37 AM. POL. RES. 30, 32 (2009); John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 80–81 (1974).

[96] James A. Bloom, Note, *Plurality and Precedence: Judicial Reasoning, Lower Courts, and the Meaning of* United States v. Winstar Corp., 85 WASH. U. L. REV. 1373, 1374 (2008).

[97] 505 U.S. 833 (1992) (plurality).

[98] *Id.*

[99] State v. Lopez, 936 N.W.2d 125, 127 (Wis. 2019) (majority/lead).

[100] 937 N.W.2d 901 (Wis. 2020) (majority/lead).

[101] *Id.* at 903.

[102] State v. Coffee, 937 N.W.2d 579 (Wis. 2020) (majority/lead).

[103] 939 N.W.2d 582 (Wis. 2020) (lead).

[104] 943 N.W.2d 845 (Wis. 2020) (lead).

[105] 945 N.W.2d 645 (Wis. 2020) (lead).

restitution and analyzed the intersection of marital property and restitution. While every case the Wisconsin Supreme Court decides is important, none of these cases should have been particularly controversial. They did not, for example, deal with hotly-debated political issues. Seemingly, justices are not just disagreeing on relatively complex and controversial cases. They are disagreeing on cases that are quite ordinary.[106]

2. Increasing Opinion Length

Similarly, commentators have been quick to discuss fractured opinions and opinion length as if there is a correlation—maybe even a causation.[107] The hypothesis seems to be closely related to the hypothesis that cases are becoming more complicated. Chief Justice Roberts has questioned whether some of the most important cases in U.S. history could have been decided had the justices of the U.S. Supreme Court not been willing to author short opinions. He cites *Brown v. Board of Education*[108] to illustrate his point:

> Keep in mind, I don't know how many people could guess how long the opinion was in *Brown v. Board of Education*. It was less than 10 pages. You think it is this great decision—it is—probably the greatest decision of the Supreme Court since *Marbury v. Madison*. It was 10 pages because Warren knew that if he wrote another sentence, the unanimous consensus he had would start to fall apart.[109]

Intuitively, the longer an opinion, the more room for disagreement. Shorter opinions may further the collegial interest of a high court.[110] How-

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[106] Of course, sometimes lead and majority/lead opinions issue in complex and controversial cases. For example, the Wisconsin Supreme Court ended great weight deference to administrative agencies' interpretations of law in *Tetra Tech*, which involved a majority/lead opinion. *See* 914 N.W.2d 921 (Wis. 2018) (majority/lead).

[107] *SCOW, the Boss, and Justice Hagedorn*, ON POINT: WIS. ST. PUB. DEFENDERS (Aug. 4, 2020), http://www.wisconsinappeals.net/on-point-by-the-wisconsin-state-public-defender/scow-the-boss-and-justice-hage-dorn/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+wisconsinappeals%2FfXYi+%28On+Point%29.

[108] 347 U.S. 483 (1954).

[109] *Interview with Chief Justice John G. Roberts, Jr.*, RENSSELAER POLYTECHNIC INSTITUTE (Apr. 12, 2017), https://www.youtube.com/watch?v=TuZEKlRgDEg.

[110] Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 807–08 (1982). Of course, shorter opinions cannot become "skeletal opinions." *See, id.* In the words of Judge Frank Easterbrook, "a complete statement of the Court's rationale, of all major and minor

ever, according to Professor Ball, the length of the average opinion has not varied much at the Wisconsin Supreme Court over the past decade.[111] Furthermore, the average fractured opinion issued during the 2019–20 term was shorter than the average first opinion. The average first opinion was about twenty-seven pages; the average fractured opinion was about twenty-five pages. While efforts to decrease page length might help reduce the number of lead and majority/lead opinions, opinion length does not seem to be the cause.

3. Increasing Caseload

Another hypothesis might be that the caseload of the court has increased. In the 1970s, some scholars suggested that the rise in plurality opinions issued by the U.S. Supreme Court was caused by its increasing caseload, which was thought to take away from time that could have been spent "resolving differences."[112] But the caseload of the Wisconsin Supreme Court has not increased. Indeed, in the late 90s and early 2000s, the court heard almost double the number of cases compared to recent terms.

D. The Cause

Professor Ball has indicated that the dramatic increase in lead and majority/lead opinions may be attributable to a divide between conservative justices.[113] This is the most persuasive hypothesis because the increase correlates with two conservative justices joining the court, Justice Rebecca Bradley and Justice Kelly. For context, Justice Rebecca Bradley joined the court early in the 2015–16 term, and Justice Kelly joined the court at the start of the 2016–17 term. Notably, Justice Kelly's term recently ended; however, another conservative has joined the court: Justice Hagedorn. These justices—supposedly—are or were a part of a majority conservative bloc of the Wisconsin Supreme Court.[114] However, the statistics do not

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premises necessary to the decision, or of the limits of the holding may be invaluable. The more the Court says, the more help it offers in planning." *Id.* Skeletal opinions are also a threat to a high court's law-developing function. *See id.* at 808.

111 *See* Ball, *supra* note 78.

112 Davis & Reynolds, *supra* note 95, at 77.

113 Ball, *supra* note 78 ("[I]t is difficult to imagine the growing share of fractured decisions without justices authoring or joining separate opinions more frequently than they did just a few years ago. And here, the addition of Justices Kelly and R. Bradley may be as significant as the widening stream of concurrences and dissents flowing form the offices of the court's two liberals.").

114 According to the media, the Wisconsin Supreme Court had five conservative members, who acted as a bloc, during the 2019–20 term. *See e.g.*, Wis. Democracy Campaign, *Special In-*

demonstrate a conservative bloc at all. Rather, they demonstrate a conservative divide. The number of separate writings by these three justices is enormous. Table 1 is a breakdown of separate writings during the 2019–20 term.[115]

Table 1: Breakdown of Separate Writings During the 2019–20 Term

Justice	Number of Concurrences	Number of Dissents	Number of Concurrence/ Dissents	Total Writings	Number of Withdraws /Do Not Participate
Ann Walsh Bradley	1	4	1	6	5
Roggensack	3	2	2	7	0
Ziegler	2	1	0	3	0
Rebecca Bradley	8	7	1	16	0
Kelly	7	1	3	11	1
Dallet	3	8	1	12	2
Hagedorn	5	7	1	13	9

Table 1 shows that members of the supposed conservative bloc write separately even more than the two supposed liberal justices—Justice Ann Walsh Bradley and Justice Dallet. Justice Ann Walsh Bradley and Justice Dallet, combined, authored 18 separate writings. Justice Rebecca Bradley and Justice Kelly authored 27, despite being a part of the bloc that supposedly controls the court. Justice Hagedorn, who did not participate in 9 cases, wrote separately on 13 occasions. In contrast, two members of the supposed conservative bloc, Chief Justice Roggensack and Justice Ziegler, authored a mere 10 separate writings combined.

Curiously, every lead and majority/lead opinion issued during the 2019–20 term was authored by either Chief Justice Roggensack or Justice Ziegler. In each of the six cases, one or more of the members of the supposed conservative bloc authored a separate writing. In *Lopez*, both Justice

terests Battle on High Court Case, URBAN MILWAUKEE (May 5, 2020, 1:08 PM), https://urbanmilwaukee.com/2020/05/05/special-interests-battle-on-high-court-case/; Linda Greenhouse, Opinion, *The Supreme Court Fails Us*, N.Y. TIMES (Apr. 9, 2020), https://www.nytimes.com/2020/04/09/opinion/wisconsin-primary-supreme-court.html; *Wisconsin GOP Will Ask U.S. Supreme Court to Block Extended Absentee Voting*, L.A. TIMES (Apr. 4, 2020), https://www.latimes.com/world-nation/story/2020-04-04/wisconsin-gop-vows-supreme-court-appeal-on-extended-voting.

[115] Table 1 does not account for two summary *per curiam* decisions issued in the 2019–20 term.

Rebecca Bradley and Justice Kelly authored concurrences.[116] In both *Marathon County* and *Lang*, Justice Rebecca Bradley filed a concurring opinion joined by Justice Kelly.[117] In *Coffee I*, Justice Kelly concurred and Justice Rebecca Bradley joined his concurrence in part as well as a dissent by Justice Ann Walsh Bradley.[118] In *Coffee II*, Justice Kelly authored a concurrence and Justice Rebecca Bradley joined a dissent authored by Justice Dallet.[119] In *Muth*, Justice Kelly concurred in part and dissent in part, Justice Hagedorn dissented and Justice Rebecca Bradley joined a concurrence by Justice Dallet.[120]

The disunity of the supposed conservative bloc cannot be explained by reference to the personality of its members. The reason for the disunity is a matter of jurisprudence and not psychology. The disunity reflects a philosophical position, held by some members of the supposed bloc, that their role does not permit compromise.

Notably, the theory that conservatives are struggling to work together does not hold for all jurisdictions experiencing the problem of fractured opinions. Washington has a very liberal court, and yet, it is highly fractured. There are likely different causes depending on the jurisdiction. This Article is merely a case study of one jurisdiction, and additional research is needed to understand the larger phenomenon.

IV. PROBLEMS RELATED TO THE RISE OF FRACTURED OPINIONS

This Part explains why the rise in fractured opinions is problematic. Generally, they are confusing—a problem for everybody. There are harms, however, specific to conservative jurisprudence related to the rise in lead and majority/lead opinions. At the Wisconsin Supreme Court, fractured opinions tend to occur because conservatives cannot compromise and that places conservative jurisprudence at a disadvantage: the supposedly conservative court struggles to make conservative law. Additionally, "minority vote pooling," a concept that conservatives have fought against, has recently reappeared as a matter of popular discussion because of fractured opinions. Minority vote pooling would allow justices that disagree with the majority on an issue to cobble together with members of a different minori-

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[116] State v. Lopez, 936 N.W.2d 125 (Wis. 2019) (majority/lead).

[117] Marathon County v. D.K., 937 N.W.2d 901 (Wis. 2020) (majority/lead); Lang v. Lions Club of Cudahy Wis., Inc., 939 N.W.2d 582 (Wis. 2020) (lead).

[118] State v. Coffee, 937 N.W.2d 579 (Wis. 2020) (majority/lead).

[119] State v. Coffee, 943 N.W.2d 845 (Wis. 2020) (lead).

[120] State v. Muth, 945 N.W.2d 645 (Wis. 2020) (lead).

ty to produce a mandate. For example, a case could have four issues. As to each issue, there could be a majority in favor of affirming the lower court. However, if one justice believes that the court should reverse on the first issue, and another on the second, and so on, there could be four justices that believe the lower court should be reserved.[121] Minority vote pooling leads to bizarre results.

This Part begins by examining how Wisconsin law treats lead and majority/lead opinions. The confusing nature of these opinions cannot be fully appreciated otherwise. Furthermore, one proposed solution to the problematic nature of these opinions could be the adoption of the *Marks* rule. But understanding why the Wisconsin Supreme Court has not already adopted the *Marks* rule lessens the persuasive force of this idea. The problem must be addressed by decreasing the number of lead and majority/lead opinions.

A. Lead and Majority/Lead Opinions Under Wisconsin Law

Notably, Wisconsin law differs from federal law in its handling of fractured opinions. As explained previously, the U.S. Supreme Court uses the term "plurality." In *Marks v. United States*,[122] the Court instructed that a case with a plurality opinion can have precedential value "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds . . . .'"[123] Under *Marks*, a court does not "ask whether a single rule of decision has the express support of at least [a majority of] Justices."[124] Instead, there are two understandings of how the *Marks* rule works.[125] The first, which would seem to be the majority rule, gives precedential value to whichever opinion is narrowest. As one scholar wrote:

> *Freeman v. United States* is the most striking example [of an application of the *Marks* rule]. After the Court divided 4-to-1-to-4 on an important question of federal sentencing that affected thousands of criminal defendants, most courts

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[121] *See generally* State v. Gustafson, 359 N.W.2d 920 (Wis. 1985) (per curiam).

[122] 430 U.S. 188 (1977).

[123] *Id.* at 193 (omission in original) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality)).

[124] Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1942, 1944 (2019).

[125] Ryan C. William, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 798–99 (2017).

> applying *Marks* concluded that Justice Sotomayor's solo concurrence in the judgment should control. Yet the other eight Justices in *Freeman* thoroughly criticized Justice Sotomayor's position as "erroneous" and "arbitrary." Bizarrely, the Court's least popular view became law . . . .[126]

The other approach, according to the D.C. Circuit, searches for a "common denominator of the Court's reasoning" that "must embody a position implicitly approved by at least five Justices who support the judgment."[127]

Some state courts use the *Marks* rule,[128] but the Wisconsin Supreme Court has never applied the *Marks* rule to interpret Wisconsin case law.[129] Instead, the law in Wisconsin appears to be "that a majority of the participating judges must have agreed on *a particular point* for it to be considered the opinion of the court."[130] For example, in *Outlaw*, the lead opinion was joined by three justices.[131] *Outlaw* also included two concurrences, each joined by the four remaining justices. One of the concurrences disagreed with a conclusion in the lead opinion, believing it went too far. In *State v. Dowe*,[132] the Wisconsin Supreme Court addressed a case where the circuit court applied the rule from the lead opinion in *Outlaw* that a concurrence suggested was incorrect. *Dowe* explained that the lead opinion was binding only as to the issues on which four justices agreed; for other issues, in particular the one that had been addressed by the circuit court, the concurrences were binding.[133] Notably, one similarity between the *Marks* rule and Wisconsin practice seems to be that the conclusions of law in dissenting opinions are not to be considered.[134]

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[126] Re, *supra* note 124, at 1944–45.

[127] United States v. Epps, 707 F.3d 337, 348 (D.C. Cir. 2013) (quoting King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)).

[128] Re, *supra* note 124, at 1961.

[129] The Wisconsin Supreme Court, on numerous occasions, has applied the *Marks* rule but only in the context of interpreting U.S. Supreme Court precedent. *See* Vincent v. Voight, 614 N.W.2d 388, 406 n.18 (Wis. 2000) ("We have adopted the United States Supreme Court's treatment of plurality opinions in applying the holdings of that Court.").

[130] State v. Fitzgerald, 538 N.W.2d 249, 250 (Wis. 1995) (per curiam) (citing State v. Dowe, 352 N.W.2d 660, 662 (Wis. 1984) (per curiam)) (emphasis added).

[131] 321 N.W.2d 145 (Wis. 1982) (lead).

[132] 352 N.W.2d 660 (Wis. 1984) (per curiam).

[133] *Id.* at 662.

[134] Piper v. Jones Dairy Farm, 940 N.W.2d 701, 708 (Wis. 2020) (citing State v. Griep, 863 N.W.2d 567, 579 n.16 (Wis. 2015); State v. Coffee, 937 N.W.2d 627, 662 n.1 (Wis. 2020) (A.W. Bradley, J., dissenting)). Notably, most scholars agree that dissenting opinions should not be considered when determining the precedential value of a decision; however, one has recently challenged that assertion. *See* Varsava, *supra* note 57.

The Wisconsin Supreme Court has squabbled about the adoption of a *Marks* rule and has appeared to reject it. For example, in *Estate of Makos v. Wisconsin Masons Health Care Fund*,[135] Justice Donald Steinmetz authored a lead opinion. Justice William Bablitch authored a concurring opinion, which was joined by Justice Jon Wilcox. Justice Bablitch's concurrence stated, "I join the mandate of the lead opinion but not its rationale."[136] Justice N. Patrick Crooks also authored a concurrence. He seemed to agree with the holding set forth in the lead opinion.[137] Two weeks later, the court stated in another case that "none of [*Makos*] has any precedential value."[138] *Marks* was never mentioned. In a subsequent case, *Tomczak v. Bailey*,[139] one concurring justice wanted to apply the *Marks* rule to *Makos* and another did not.[140]

Members of the Wisconsin bar are generally under the impression that Wisconsin has no *Marks* rule.[141] For the time being, that understanding matches reality. As Justice Abrahamson and Justice Ann Walsh Bradley wrote, "[a]re lead opinions in this court comparable to plurality opinions in the United States Supreme Court? Apparently, the court of appeals considers a plurality decision of this court persuasive but does not always consider it binding."[142] Notably, in an earlier concurrence, then-Chief Justice Abrahamson stated, "[t]his court has followed *Marks* in applying plurality opinions of the United States Supreme Court and in applying plurality decisions of this court."[143] However, a cite-check of this assertion proves that it is incorrect. The writing cites three opinions; in two of them, the *Marks* rule was applied to interpret U.S. Supreme Court precedent. The only opinion cited where the *Marks* rule was applied to a Wisconsin case

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[135] 564 N.W.2d 662 (Wis. 1997) (lead), *overruled by* Aicher ex rel. LaBarge v. Wis. Patients Compensation Fund, 613 N.W.2d 849 (Wis. 2000).

[136] *Id.* at 59 (Bablitch, J., concurring).

[137] *Id.* at 67 (Crooks, J., concurring).

[138] Doe v. Archdiocese of Milwaukee, 565 N.W.2d 94, 102 n.11 (Wis. 1997).

[139] 578 N.W.2d 166 (Wis. 1998).

[140] *Compare id.* at 182–83 (Crooks, J., concurring) (asserting *Makos* had precedential value because he would apply the *Marks* rule), *with id.* at 181 (Geske, J., concurring) (asserting *Makos* had no precedential value).

[141] Philip C. Babler, *The Need for a Marks Rule in Wisconsin*, FOLEY: WIS. APPELLATE L. (Nov. 14, 2018), https://www.foley.com/en/insights/publications/2018/11/need-for-marks-rule-in-wisconsin; *Scotus May Clarify Rules for Interpreting Plurality Decisions*, ON POINT: WIS. STATE PUB. DEFENDER (Dec. 14, 2017), http://www.wisconsinappeals.net/on-point-by-the-wisconsin-state-public-defender/scotus-may-clarify-rules-for-interpreting-plurality-decisions/.

[142] State v. Lynch, 371 Wis. 2d 1, 77 (Wis. 2016) (Abrahamson & A.W. Bradley, JJ., concurring in part, dissenting in part).

[143] State v. Deadwiller, 834 N.W.2d 362, 379 (Wis. 2013) (Abrahamson, C.J., concurring).

was a concurrence in *Tomczak*, where the use of the *Marks* rule was disputed.[144]

Even if the Wisconsin Supreme Court were to adopt the *Marks* rule, lead opinions would still prove problematic. This is because a lead opinion often lacks a common legal rationale with other writings.[145] To give an example, *Koschkee v. Taylor*[146] overturned *Coyne v. Walker*.[147] As *Koschkee* noted:

> [O]ur mandate in Coyne arises from a lead opinion, joined by one justice, a two-justice concurrence, and a one-justice concurrence. When we are asked to overturn one of our prior decisions, lead opinions that have no common legal rationale with their concurrences are troublesome. For example, we cannot analyze whether "[c]hanges or developments in the law have undermined the rationale behind a decision," if there is no "rationale" to analyze. We are in such a circumstance in the matter now before us. Accordingly, for the reasons set forth below, we conclude that an independent analysis of the issues presented herein better serves the interests of the public.[148]

Of course, Wisconsin could adopt the version of the *Marks* rule that considers the narrowest opinion binding, with no need to analyze the writings for a common rationale. However, that would arguably encourage justices to write separately, and narrowly, with hopes that their view becomes binding.[149] Furthermore, that version of the *Marks* rule has been considered problematic because it has permitted bizarre legal views to become precedent.[150] Rather than adopt a version of the *Marks* rule, the better solution is to minimize the number of lead and majority/lead opinions.

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144 *Id.* (citing Vincent v. Voight, 614 N.W.2d 388, 406 n.18 (Wis. 2000); Lounge Mgmt., Ltd. v. Town of Trenton, 580 N.W.2d 156, 160 (Wis. 1998); *Tomczak*, 578 N.W.2d at 182–83 (Crooks, J. concurring)).

145 Koschkee v. Taylor, 929 N.W.2d 600, 604 n.5 (Wis. 2019).

146 929 N.W.2d 600 (Wis. 2019).

147 368 Wis. 2d 444 (Wis. 2016), *overruled by Koschee*, 929 N.W.2d 600.

148 *Koschkee*, 929 N.W.2d at 604 n.5 (internal citation omitted).

149 *See* Re, *supra* note 124, at 2000.

150 *Id.* at 1944–45.

B. A Failure of the Law-Developing Function

Evidently, lead and majority/lead opinions are the antithesis of law-development. Members of the Wisconsin bar dislike them.[151] And, no doubt, they and the public at-large are growing increasingly frustrated with the Wisconsin Supreme Court. Lead and majority/lead opinions are at odds with the law-developing function of the court for at least two reasons. First, they result in the court declaring less law. Second, they are confusing, and confusing jurisprudence—even when it garners a majority—does little to develop the law.

1. Less Law

The Wisconsin Supreme Court is a law-developing—not an error-correcting—court. As one law review article explained:

> Appellate courts have two primary functions: "error correction" to ensure that law is interpreted correctly and consistently and "law making" to provide a means for the development of law through their decisions and explanations of decisions. In states with only one appellate court, that one court must perform both functions. In states with two levels of appellate courts, the intermediate appellate court is often assigned the error-correcting role and the court of last resort, most often called the supreme court, is primarily concerned with the development and declaration of law.[152]

One of the reasons states have created intermediate appellate courts is to allow state supreme courts to focus on a limited number of cases and thereby improve the quality of their opinions.[153] Indeed, many may not realize that state intermediate appellate courts are a recent phenomenon

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[151] *See* Jeffrey A. Mandell & Barbara A. Neider, *Sea Change: No More Great Weight Deference to Administrative Agencies*, WIS. LAW., July 2018, https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=10&Issue=12&ArticleID=26460 ("The result of these fractured opinions is that most of the analysis in the lead opinion lacks enough support to be considered law and to provide clear guidance to agencies, private parties, and lower courts."); Michael B. Brennan, *Guest Post: Forbush and the Riddle of a Fragmented Court*, ON POINT: WIS. STATE PUBLIC DEFENDER (May 24, 2011), http://www.wisconsinappeals.net/on-point-by-the-wisconsin-state-public-defender/guest-post-forbush-and-the-riddle-of-a-fragmented-court/.

[152] Flango *supra* note 13, at 105.

[153] *Id.*

brought about in part because state supreme courts had excessive caseloads.[154] For example, in 1978, Wisconsin, following the lead of several other states, established an intermediate appellate court, the Wisconsin Court of Appeals. The intent was to reduce the caseload bogging down the Wisconsin Supreme Court.[155] As one student comment wrote shortly after the adoption, "Supreme Court case selection—coupled with intermediate appellate courts which hear all trial court appeals as of right—has long been seen as a solution to the problem of delayed or nonreflective high court decisions caused by increasing appellate caseloads."[156] To summarize the caseload problem:

> In the 1962 term, there were 331 filings with the supreme court. In 1971, the number grew to 765 filings. The supreme court disposed of 291 cases in the 1962 term compared with 431 in the 1971 term. More importantly, the number of unfinished cases carried over into the next term rose from forty in 1962 to 335 in 1971.[157]

Clearly, justices of the Wisconsin Supreme Court bore a heavy burden.[158] A report to the governor indicated concern that the quality of judicial opinions was suffering.[159] It stated:

> [T]o describe the increasing appellate court backlog is merely to state the most obvious, but perhaps not the most important, deficiency of our appellate system. In the rush to cope with its increasing calendar, the Supreme Court must invariably sacrifice quality for quantity. Increasing appellate backlogs necessarily produce a dilution in craftsmanship. . . . The Supreme Court is cast in the role of a "case-deciding court"—one which merely reacts to the individual cases and thus slights its law-stating function. . . . The size of this caseload can only have a detrimental effect on the quality of the Supreme Court's work.

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[154] Gary C. Karch, Comment, *Petitions for Review by the Wisconsin Supreme Court*, 1979 WIS. L. REV. 1176, 1176; *see also* Matthew E. Garbys, Comment, *A Shift in the Bottleneck: The Appellate Caseload Problem Twenty Years After the Creation of the Wisconsin Court of Appeals*, 1998 WIS. L. REV. 1547.

[155] Karch, *supra* note 154, at 1176.

[156] *Id.* at 1178.

[157] Garbys, *supra* note 154, at 1548.

[158] *Id.*

[159] CITIZENS STUDY COMM. ON JUDICIAL ORG., REPORT TO GOVERNOR PATRICK J. LUCEY 78 (1973).

> Cases involving major questions of substantive law may be decided on the basis of superficial issues.[160]

In summary, the Wisconsin Court of Appeals was created so that the Wisconsin Supreme Court could focus on its law-developing function.[161]

Wisconsin's court reform was part of a nationwide movement that viewed state supreme courts as law-developing institutions. As a group of scholars wrote in 1978, the changing structure of state appellate courts "suggested an emerging societal consensus that state supreme courts should not be passive, reactive bodies, which simply applied 'the law' to correct 'errors' or miscarriages of justice in individual cases, but that these courts should be policy-makers and, at least in some cases, legal innovators."[162] No longer were state supreme courts to hear cases for the sole purpose of correcting error; as one American Bar Association document stated, the "lawmaking function of appellate courts" became clearly recognized.[163]

The rise in lead and majority/lead opinions at the Wisconsin Supreme Court indicates that the Wisconsin Supreme Court is not developing as much law; instead, it is operating like the Wisconsin Court of Appeals. A lead opinion resolves the issue for the parties, but it provides little guidance to future litigants. In some ways, the Wisconsin Supreme Court has become a very expensive trial court, and the purpose of court reform in the 1970s was to prevent such a tragedy from occurring.

2. Confusing Law

Furthermore, lead and majority/lead opinions are confusing. Even if Wisconsin were to adopt a version of the *Marks* rule, such that fractured opinions could technically constitute precedent, the precedent that relied on the *Marks* rule would lack clarity. Much has been written about the confusion caused by plurality opinions issued by the U.S. Supreme Court.[164] A group of scholars, writing under the pseudonym "Berkolow," has stated that plurality opinions strike at the very heart of precedent. As they argue:

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[160] *Id.*

[161] Garbys, *supra* note 154, at 1548.

[162] Robert A. Kagan et al., *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961, 983 (1978).

[163] ROBERT LEFLAR, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS, 1–2, 5–6 (Am. B. Found. 1976).

[164] Berkolow, *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation After* Rapanos, 15 VA. J. SOC. POL'Y & L. 299 (2008).

> Throughout the historical development of the rule of law, there has been sensitivity to the law's role in securing predictability, stability, confirmation of investment-backed expectations, as well as confidence in the enforceability of transactions, transferability, transparency, and trustworthiness. None of these things, however, could exist without confidence in precedent.[165]

Plurality opinions, "[q]uite often (and increasingly)" force the public to "navigate the confusing cacophony that results to identify what constitutes controlling precedent."[166] Stated otherwise, "[c]onflicts created by concurrences and pluralities in court decisions may be the epitome of confusion in law and lower court interpretation."[167]

The rise in majority/lead opinions has caused further confusion: identifying what portions of an opinion are precedential. Before the 2019–20 term, readers of Wisconsin Supreme Court opinions had to search footnotes in opinions to determine what portions were joined by what justices. For example, in *Tetra Tech*, a footnote in the first opinion states:

> Justice Rebecca Bradley joins the opinion in toto. Chief Justice Roggensack joins Sections I., II.A.1., II.A.2., II.A.6. as limited in Justice Gableman's concurrence, II.B. and III. Justice Gableman joins Paragraphs 1–3, Sections I. II. (introduction), II.A. (introduction), II.A.1., II.A.2., II.A.6., IIB., and III., and the mandate, although he does not join Section II.A.6. to the extent that the first sentence of Paragraph 84 implies a holding on constitutional grounds. Therefore, this opinion announces the opinion of the court with respect to Sections I., II.A.1., II.A.2., II.B., and III.[168]

This practice stood in sharp contrast to the practice of some courts, such as the U.S. Supreme Court, which put a designation block at the beginning of the opinion. Particularly if someone is reading on Lexis or Westlaw, where footnotes appear at the end of the opinion, the reader is unlikely to realize that portions of the opinion are not precedent. Indeed, arti-

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[165] *Id.* at 301.

[166] *Id.*

[167] *Id.* at 300.

[168] Tetra Tech EC, Inc. v. Wis. Dep't of Revenue, 914 N.W.2d 21, 29 n.4 (Wis. 2018) (majority/lead).

cles about *Tetra Tech* dedicated substantial space to simply telling readers what portions of *Tetra Tech* were joined by what justices.[169]

The bar should not have to spend so much time identifying what portions of an opinion are precedent. For this reason, in the 2019–20 term, the Wisconsin Supreme Court adopted new practice: designation blocks. It adopted this practice from the U.S. Supreme Court, which has long utilized it. Table 2 provides majority/lead opinions from the term and their respective designation blocks.

[169] Mandell & Neider, *supra* note 153.

Table 2: Decisions with Lead/Majority Opinions During the 2019–20 Term

Case	Explanation
State v. Lopez	ZIEGLER, J., delivered the majority opinion of the Court, in which ROGGENSACK, C.J., KELLY, and HAGEDORN, JJ., joined. REBECCA GRASSL BRADLEY, J., filed a concurring opinion, in which KELLY, J., joined in part. KELLY, J., filed a concurring opinion. ANN WALSH BRADLEY, J., filed a dissenting opinion, in which DALLET, J., joined.
Marathon County v. D.K.	ZIEGLER, J., delivered the majority opinion of the Court with respect to Parts I., II., III., IV.A., IV.B., and IV.C.1, in which ROGGENSACK, C.J., REBECCA GRASSL BRADLEY, KELLY, and HAGEDORN, JJ., joined, the majority opinion of the Court with respect to Part V., in which ROGGENSACK, C.J., KELLY and HAGEDORN, JJ., joined, and an opinion with respect to Parts IV.C.2., and IV.D., in which ROGGENSACK, C.J., and HAGEDORN, JJ., joined. REBECCA GRASSL BRADLEY, J., filed a concurring opinion, in which KELLY, J., joined. DALLET, J., filed a dissenting opinion, in which ANN WALSH BRADLEY, J., joined.
State v. Coffee II	ZIEGLER, J., announced the mandate of the Court and delivered the majority opinion of the Court with respect to Parts I, II, III, and IV.C. and D., in which ROGGENSACK, C.J., KELLY, and HAGEDORN, JJ., joined. KELLY, J., filed a concurring opinion, in which REBECCA GRASSL BRADLEY, J., joined ¶¶59-63. ANN WALSH BRADLEY, J., filed a dissenting opinion, in which REBECCA GRASSL BRADLEY and DALLET, JJ., joined.
State v. Muth	ROGGENSACK, C.J., announced the mandate of the Court, and delivered an opinion, in which ZIEGLER, J., joined as to Parts II.A, B. and D., except for ¶¶58–60, and in which KELLY, J., joined as to Parts II.A, B., and D. DALLET, J., filed a concurring opinion, in which ANN WALSH BRADLEY and REBECCA GRASSL BRADLEY, JJ., joined, and in which ZIELGER, J., joined as to ¶¶63–70 and ¶¶72–78. KELLY, J., filed an opinion concurring in part and dissenting in part, in which HAGEDORN, J., joined as to Parts I. and II. HAGEDORN, J., filed a dissenting opinion.

The designation blocks are an improvement, but there are still problems. First, if the wording is not precise, the designation blocks could be wrong. A fair reading of the designation block in *Coffee II*—indeed, the best reading—indicates that Chief Justice Roggensack and Justice Hagedorn did not join the entirety of the majority/lead opinion. However, whether they intended to join only a portion of the opinion is unclear.

Second, the Wisconsin Supreme Court has not adopted consistent language. As already explained, members of the court have not settled on the terminology to use. For example, the designation block in *Lopez* says, "ZIEGLER, J., delivered a majority opinion." However, parts of the opinion did not have a majority.[170] Therefore, the designation block may do more harm than good. A quick reader on Lexis or Westlaw could mistakenly cite portions of *Lopez* as binding precedent, and the reader's mistake would be forgivable because the opinion designation block suggests as much.

Third, the opinion designation blocks are difficult to discern. For example, Justice Ziegler joined parts of the lead opinion in *Muth*: "Parts II.A, B. and D., except for ¶¶58–60." Ideally, readers should be able to focus on the reasoning of an opinion without questioning whether small portions of it are binding. Notably, other jurisdictions appear to have a similar problem with labeling opinions. A recent student comment in the *Washington Law Review* lamented:

> Almost 10% of the Washington State Supreme Court's 2018 decisions were fragmented. Despite lacking a clear majority opinion, Washington courts still afford precedential value to parts of these fragmented decisions. Actually determining what precedential value these decisions have, however, is a complicated endeavor. The result is that many misinterpret how these cases will apply to a lower court.
>
> Many misinterpret these cases because of the way that the Court labels its fragmented decisions. While the Court labels one opinion as the lead opinion in its fragmented decisions, this label is *mis*leading: the lead opinion does not always garner a plurality of the justices' votes, might not express the actual outcome of the case, and might not include any of the reasoning that the court used to arrive at the judgment.[171]

The labelling issue in Washington appears to be even more complicated because, according to the comment, "[t]he [Washington Supreme]

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[170] State v. Lopez, 936 N.W.2d 125, 133 (Wis. 2019) (Bradley, R., J., concurring); *id.* at 136 (Kelly, J., concurring).

[171] Rachael Clark, Comment, *Piecing Together Precedent: Fragmented Decisions from the Washington State Supreme Court*, 94 WASH. L. REV. 1989, 1991 (2019).

Court extracts precedential value from a fragmented decision when there is any single point of reasoning that at least five [of nine] justices agree with, regardless of whether they concur or dissent in the judgment."[172] As already noted, Wisconsin courts do not consider the statements of justices in the dissent for counting purposes.

Evidently, lead and majority/lead opinions are difficult to label, and that in and of itself is a problem.

C. Problems for Conservatives

In addition to confusing the law, lead and majority/lead opinions—at least in Wisconsin—are disproportionately a problem for conservatives. If conservatives cannot learn to compromise the way that liberals have, they always will be at a disadvantage in a common law jurisdiction where precedent plays a key role. Additionally, conservatives at the Wisconsin Supreme Court have long opposed minority vote pooling; however, it is unclear how much longer they can fend off requests for minority vote pooling if the court remains fractured.

1. Conservative Jurisprudence's Disadvantage

For context, much has been written about how justices of the U.S. Supreme Court vote in blocs. Interestingly, conservative justices struggle to maintain bloc cohesion while liberal justices do not. Ilya Shapiro of the Cato Institute, wrote: "[O]f the 20 cases [during the 2018 term] where the court split 5-4, only seven had the 'expected' ideological divide of conservatives over liberals. By the end of the term, each conservative justice had joined the liberals as the deciding vote at least once."[173] He concluded: "[I]f lockstep voting and a results-driven court concerns us, it isn't the conservatives we should be worried about. While senators, journalists, and academics love decrying the Roberts Five, it's the (Ruth Bader) Ginsburg Four that represent a bloc geared toward progressive policy outcomes."[174]

Other experts have made similar observations. Merrill Matthews, a resident scholar at the Institute for Policy Innovation, noted:

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[172] *Id.* at 1992.

[173] Ilya Shapiro, *Liberal Supreme Court Justices Vote in Lockstep, Not the Conservative Justices*, CATO INSTITUTE (Sept. 10, 2019), https://www.cato.org/publications/commentary/liberal-supreme-court-justices-vote-in-lockstep-not-the-conservative-justices.

[174] *Id.*

> [W]hen the issue before the court has a clear ideological or partisan divide, the four liberals march in lockstep. It's one of the court's conservatives who provides the fifth vote to give liberals a victory. . . .
>
> The irony in all this is that when Senate Democrats grill a Republican Supreme Court nominee, they scathingly predict the nominee will be closed minded and vote along ideological lines. The truth is that only liberal justices do that, which is why no liberal justice ever becomes the swing vote.[175]

Bloc voting has a negative connotation in the sense that it implies judges are result-oriented. Perhaps a better way of understanding what is happening is through the lens of judicial philosophy. Conservatives struggle to compromise, so voting as a bloc is hard.

For the 2019–20 term, the Wisconsin Supreme Court supposedly had a 5-2 conservative-liberal split.[176] If the conservatives were acting as a bloc, there should be very few lead and majority/lead opinions. But alas, the anti-consensus building philosophy of some conservatives has produced a high number of such opinions, and all of them were authored by conservative justices. At least portions of each of these opinions lack the protection of *stare decisis*.

While liberal justices may write separately in cases where another liberal justice is the majority author, they are cautious to do so when the result will be that the first opinion no longer has a majority. Less caution ex-

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[175] Merrill Matthews, Opinion, *Liberal Supreme Court Justices Never Wear the 'Swing Vote' Mantle*, THE HILL (June 23, 2020, 5:30 PM), https://thehill.com/opinion/judiciary/504134-liberal-supreme-court-justices-never-wear-the-swing-vote-mantle; *see also* Fred Barnes, *The Supreme Court's Real Bloc Is Liberal*, WASH. EXAMINER (Oct. 10, 2019, 11:00 PM), https://www.washingtonexaminer.com/opinion/columnists/the-supreme-courts-real-bloc-is-liberal; Mark Sherman & Jessica Gresko, *Roberts' Supreme Court Defies Easy Political Labels*, AP NEWS (June 28, 2019), https://apnews.com/article/222dd32b7609458f98a811cb00c44848.

[176] The labeling of justices is often inappropriate in that it suggests justices actively consider politics. It can cause substantial harm to the institution. Patience Drake Roggensack, *Tough Talk and the Institutional Legitimacy of Our Courts*, MARQ. LAW., Fall 2017, at 45, https://law.marquette.edu/assets/marquette-lawyers/pdf/marquette-lawyer/2017-fall/2017-fall-p45.pdf. Notably, judges in Wisconsin run in non-partisan elections. Moreover, to the extent that judges can be grouped together, as either conservative or liberal, those groupings may reflect shared judicial philosophy as opposed to shared politics. *See id.* at 49; *see also Scalia Discusses His Relationship With John Roberts After 'Obamacare'*, CNN (July 19, 2012), https://www.youtube.com/watch?v=TEt67H4rD9E; *Wis. Supreme Court Justice Rebecca Bradley speaks on oral arguments, briefs and research*, TMJ4 NEWS (June 17, 2020), https://www.youtube.com/watch?v=LPOUxajkoW8.

ists with respect to conservative justices. Remarkably, Justice Ann Walsh Bradley and Justice Dallet, combined, authored 13 majority opinions during the 2019–20 term; neither authored a single lead opinion. During the 2018–19 term, Justice Abrahamson, Justice Ann Walsh Bradley and Justice Dallet authored 20 majority opinions; none authored a single lead opinion. During the 2017–18 term, Justice Abrahamson and Justice Ann Walsh Bradley authored 16 majority opinions; Justice Abrahamson authored a single lead opinion.

The Wisconsin Supreme Court is destined to become a liberal court. Indeed, with the recent spring election, the court has already lost one member of the supposed conservative bloc: Justice Kelly. When it becomes liberal, the disagreement among conservative justices from the 2015–16 term on will inevitably result in many decisions being disregarded because they were not majority opinions. The future liberal court will not even have to consider *stare decisis*. Liberal justices will simply note—correctly—that the cases never constituted precedent.

2. Rehashing "Minority Vote Pooling"

Fractured opinions also lead to calls for minority vote pooling. For context, minority vote pooling goes by various names, such as "case-by-case adjudication."[177] The gist of the idea is that outcomes are determined by "pooling" together justices' votes on different issues. Two New York University professors gave the following illustration.[178]

Table 3: Minority Vote Pooling

Justices	Fourth Amendment Violated?	Fifth Amendment Violated?	New Trial (Outcome)
1	N	N	N
2	N	N	N
3	N	N	N
4	N	N	N
5	Y	Y	Y
6	Y	Y	Y
7	Y	Y	Y
8	N	Y	Y
9	Y	N	Y

[177] Kornhauser & Sager, *supra* note 47, at 15.
[178] *Id.*

In the above example, five justices agreed that the Fourth Amendment was not violated. A different five justices agreed that the Fifth Amendment was not violated. A logical case resolution would be that no new trial occurs. The scholars called this "issue-by-issue adjudication."[179] But, if the votes of the four justices who believe that the Fourth Amendment was violated are pooled with the votes of the four justices who believe that the Fifth Amendment was violated, the alliance of the two minority positions could change the outcome. Minority vote pooling is deeply inconsistent with a collegial court. To explain:

> In case-by-case adjudication, we picture the Court as expecting each Justice to express a final view on the outcome of the case, and as then simply counting noses. In issue-by-issue adjudication, in contrast, we picture the Court as expecting an expression of views on each issue, and as discouraging or at least ignoring any references made by the Justices to their personal view of the outcome, since the outcome will be a matter of simple doctrinal arithmetic.[180]

To explain further, minority vote pooling imagines a world in which the proper resolution of a case is little more than the sum-total of the individual justices' subjective views. Recall that judges on a collegial court are not like judges of a gymnastics competition. A collegial court acts collectively, not as merely the sum-total of its justices. Using the above example, the court, collectively, did not conclude that either the Fourth or the Fifth Amendment was violated. Therefore, the collective decision of the court ought to be that there is no new trial.

To illustrate the problem, imagine that the case had to be remanded with guidance. What rule of law does the lower court apply? Imagine a future court attempting to apply the precedent going forward. What do the judges in that case do? Simply put, minority vote pooling creates a substantial problem. Notably, the U.S. Supreme Court has a tradition—rejected by some justices, although perhaps they did not realize what they were doing—of minority vote pooling.[181] The Wisconsin Supreme Court has rejected the practice.[182]

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[179] *Id.* at 11.

[180] *Id.* at 16.

[181] *See generally id.*

[182] State v. Gustafson, 359 N.W.2d 920, 922 (1985) (per curiam).

In 2016, an attorney at a prominent Wisconsin law firm blogged: "[G]iven the complexity of the issues often presented to the [Wisconsin Supreme] Court and the apparent fractiousness of the current Court, is it time to consider reversing the prohibition on minority vote pooling?"[183] The attorney continued, "if vote pooling is problematic across the board, how will the Court proceed, given the frequency with which the Court seems unable or unwilling to build consensus among a majority?"[184] The attorney raises fair points; however, the conservatives of the Wisconsin Supreme Court have long been concerned with minority vote pooling because it can lead to "arbitrary and illogical results."[185]

For example, consider the recent case of *Wisconsin Legislature v. Palm*,[186] wherein the Wisconsin Supreme Court struck down most of Wisconsin's COVID-19 Safer-at-Home order. Chief Justice Roggensack authored the majority opinion, as well as a concurrence. In her concurrence, she wrote:

> We have declared that Emergency Order 28 is invalid and therefore, unenforceable. Earlier, the Legislature asked us to issue an injunction but to stay such an injunction for six days, and at oral argument, the Legislature implied that a longer stay may be appropriate if we were to enjoin Order 28.
>
> Requesting a stay for a requested injunction is a very unusual request, but we understand that it is driven by the Legislature's concern that confusion may result if Order 28 is declared invalid and actions to enforce our declaration immediately commence. People, businesses and other institutions may not know how to proceed or what is expect of them.[187]

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[183] Jeffrey A. Mandell, *Supreme Court's Non-Decision in State v. Lynch Raises Questions About How the Court Does Its Work*, STAFFORD ROSENBAUM LLP (July 21, 2016), https://www.staffordlaw.com/blog/appellate-practice/supreme-courts-non-decision-in-state-v-lynch-raises-questions-about-how-th/.

[184] *Id.*

[185] *Gustafson*, 359 N.W.2d at 922.

[186] 942 N.W.2d 497 (Wis. 2020).

[187] *Id.* at 918 (Roggensack, C.J., concurring).

She went on to state, "although our declaration of rights is effective immediately, I would stay future actions to enforce our decision until May 20, 2020."[188]

Justice Ann Walsh Bradley's dissent indicated that she and the other two dissenting justices should have been permitted to join Chief Justice Roggensack to provide a stay.[189] But this would have been illogical. The dissenting justices did not agree that the Safer-at-Home order was illegal; they completely disagreed with the majority's reasoning. Unlike Chief Justice Roggensack, who thought a stay might be prudent policy, the three dissenting justices simply disagreed with the majority opinion outright. In essence, they wanted to pool their votes for not striking down the Safer-at-Home order with Chief Justice Roggensack's vote to grant a stay. But granting a stay is entirely dependent on there being something to stay. If they were allowed to pool their votes, they would effectively have been able to block a decision from going into effect solely because they did not agree with it. A major problem with minority vote pooling is that it gives justices that agree with very little of the majority substantial power over the outcome of a particular case and the rule of law going forward.

Table 4 illustrates the vote breakdown in *Palm* to demonstrate the attempt at minority vote pooling.

Table 4: Minority Vote Pooling Attempt in *Palm*

Justices	Safer-at-Home Order Unlawful?	If Yes, Stay the Declaration?	Outcome
1	N	N/A	No Relief
2	Y	Y	Relief—Stayed
3	Y	N	Relief
4	Y	N	Relief
5	Y	N	Relief
6	N	N/A	No Relief
7	N	N/A	No Relief

As Table 4 makes clear, Justice Ann Walsh Bradley wanted to pool her minority position—that the order was lawful—with Chief Justice Roggensack's minority position—that the declaration should be stayed.

If the Wisconsin Supreme Court continues to be as fractured as it has been, additional conversations about minority vote pooling are inevitable. This is so because dissenting justices often want control—as demon-

[188] *Id.* at 919.

[189] *Id.* at 941 (A.W. Bradley, J., dissenting).

strated by Justice Ann Walsh Bradley's attempt to stay the declaration in *Palm*. A fractured court offers those in dissent the opportunity to suggest minority vote pooling. For example, after the Wisconsin Supreme Court decided *Coffee II*, it received an explicit request for minority vote pooling. For context, *Coffee II* involved interpreting *Arizona v. Gant*.[190] *Gant* states: "[W]e . . . conclude that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle."[191] Courts are split on the meaning of this statement. Some have adopted a "categorical approach." As the lead opinion in *Coffee II* summarized, under the categorical approach, a search of a vehicle is justified if the offense of arrest is the type of offense for which there might be physical evidence.[192] In contrast, other courts apply the "reasonableness approach," which involves "'looking at common sense factors and evaluating the totality of the circumstances' to determine whether it was reasonable to conclude that evidence of the crime of the arrest might be found within the vehicle."[193]

In *Coffee II*, a two-justice lead opinion interpreted *Gant* as imposing the reasonableness approach.[194] However, the lead opinion concluded that no violation of the Fourth Amendment occurred because the search was justified by the totality of the circumstances.[195] In contrast, a one-justice concurrence applied the categorical approach and concluded that the search was justified because the offense of arrest—operating while intoxicated—is a type of offense for which physical evidence might exist.[196] The remaining two justices dissented. They concluded that the reasonableness approach was correct; however, they did not believe that the totality of the circumstances justified the search.[197] Hence, four justices agreed that the reasonableness approach was the correct interpretation of *Gant*. However, the four were split between the lead and dissent. Importantly, the Court of Appeals had applied the categorical approach.[198] The State Public Defender's Office filed a motion for reconsideration, arguing:

> The court of appeals in a published decision in *State v. Coffee* . . . held "as a matter that when an officer lawfully

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190 556 U.S. 332 (2009).

191 *Id.* at 335.

192 State v. Coffee, 943 N.W.2d 845, 850–52 (Wis. 2020) (lead).

193 *Id.* at 852 (quoting United States v. Reagan, 713 F. Supp. 2d 724 (E.D. Tenn. 2010)).

194 *Id*. at 854.

195 *Id.* at 856.

196 *Id.* at 868–69 (Kelly, J., concurring).

197 *Coffee*, 943 N.W.2d at 870–71 (Dallet, J., dissenting).

198 State v. Coffee, 929 N.W.2d 245 (Wis. Ct. App. 2019).

> arrests a driver for OWI . . . a search of the interior of the vehicle, including containers therein, is lawful . . . [.]" After granting review four justices of this court rejected the court of appeals' declaration and application of a categorical approach to the 4th Amendment issue presented and ruled that U.S. Supreme Court precedent requires a totality-of-circumstances reasonableness approach. However, those four justices split two-two on the outcome when applying that standard to the particular facts, with one justice applying a categorical approach joining the two voting to affirm the judgment. . . . [T]he rejected categorical legal standard in the published court of appeals case arguably remains the law in Wisconsin, though only one justice of this court so ruled. The court is not asked to reconsider its analysis or rationale, but rather to reconsider how it characterizes the lead and dissenting opinions and to clarify its holding on the point of law a four justice majority of this court resolved.[199]

In essence, the Public Defenders wanted the Wisconsin Supreme Court to permit minority vote pooling. The court denied the motion. Therefore, arguably, lower courts in Wisconsin are bound by the Court of Appeals decision that applied the categorical approach even though four justices rejected it. That may be problematic, but it is the price that Wisconsin jurisprudence must pay if the Wisconsin Supreme Court remains fractured and continues to reject minority vote pooling.

V. POSSIBLE SOLUTIONS

This Part discusses possible solutions. Rather than fashion a *Marks*-like rule or advocate for minority vote pooling, it recommends solutions aimed at reducing the number of lead and majority/lead opinions. To do otherwise would be to propose solutions that do not go to the heart of the problem. Some of these solutions are aimed at persuading conservatives to change their judicial philosophy while others are not. This dual approach is taken because many justices have spent years developing their judicial philosophy and are unlikely to change.

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[199] Motion to Reconsider, No. 2018AP1209-CR, State v. Coffee, 943 N.W.2d 845 (Wis. 2020) (lead).

A. Judicial Humility

Judicial humility is often a value associated positively with conservative jurisprudence.[200] Broadly defined, judicial humility is "a deep awareness of the fallibility of human judgment and the risk of error when met with the difficult, sometimes excruciating, choices that must be made by a judge."[201] Judicial humility requires a "tempering" of "judicial arrogance," and it "counsels an openness to hearing the views of others and listening to the wisdom of other authorities and sources."[202] To quote Justice Kelly, "[t]o err is human, and judges are nothing if not human—especially when the mellifluousness of 'your honor' makes the humility necessary to recognize mistakes harder to maintain."[203] A humble judge ought to consider seriously the views of his or her colleagues. Arrogance is no doubt demonstrated when a judge regularly assumes that the views of his or her colleagues are incorrect.

Unfortunately, judicial humility is often discussed in terms of deference to nearly everyone but a judge's colleagues. For example, a humble judge is supposed to pause and seriously consider whether striking down legislation as unconstitutional is justified.[204] This pause comes, partly, out of respect for a co-equal branch of government, which should not be assumed to have acted unconstitutionally. But, for whatever reason, conservative judges often do not display judicial humility with respect to their colleagues.

Judges must learn to show a degree of deference to their colleagues. For example, Justice George Sutherland, who was generally considered a conservative, once wrote to his colleagues: "I was inclined the other way, but I think no one agreed with me. I, therefore, yield my not very positive views to those of the majority."[205] This statement demonstrates that Justice Sutherland was hesitant to assume that he was right

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[200] *See generally* Marath Stith McLeod, *A Humble Justice*, 127 YALE L. REV. FORUM 196 (2017).

[201] BENJAMIN L. BERGER, WHAT HUMILITY ISN'T: RESPONSIBILITY AND THE JUDICIAL ROLE 3 (2018).

[202] *Id.*

[203] Bartlett v. Evers, 945 N.W.2d 685, 729 (Wis. 2020) (Kelly, J., concurring in part, dissenting in part) (quoting McLeod, *supra* note 203).

[204] *See* Richard S. Myers, *The Virtue of Judicial Humility*, 13 AVE MARIA L. REV. 207 (2015); *see also* LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 72 (1990).

[205] Walter F. Murphy, *Marshalling the Court: Leadership, Bargaining, and the Judicial Process*, 29 U. CHI. L. REV. 640, 668 (1962).

when many of his colleagues told him otherwise. His example ought to be followed. In the words of one scholar:

> A Justice engaged in practical reasoning might, after failing to persuade his colleagues of the correctness of his own initial views, defer to their views as part of his effort to identify the correct answer on the merits. In brief, his decision to "go along" with his colleagues may signify a humility about his own tentative judgment and an overarching commitment to the process of practical reasoning as an ongoing enterprise, in light of which individual decisions matter less than the health of the continuing enterprise as a whole. In other words, in his view the "rightness" of a decision is, at least in part, grounded in the process and fact of group agreement.[206]

To summarize, forming a sincere judgment regarding the meaning of the law should be viewed as a collegial exercise. Judges should not feel that their subjective views necessarily obligate them to vote a certain way.

B. Screws *Rule*

Judicial humility may require a judge to yield to the views of his or her colleagues when he or she is not confident in his or her opinion. Occasionally, a judge might be justified in voting against his or her sincerely held belief so that the court on which he or she sits can act as an institution. *Screws* rule, as it has come to be known, may justify a judge voting against a sincerely held belief to create a mandate or to produce a majority opinion on an important point of law.

In *Screws v. United States*,[207] the U.S. Supreme Court almost deadlocked. Four justices wanted to remand, three wanted to reverse and one wanted to affirm. The remaining justice, Wiley Blount Rutledge, also wanted to affirm, which would have created a 4-3-2 split. The case would have had no mandate. Justice Rutledge voted with the four justices that wanted to remand "in order that disposition may be made of this case."[208] Justices have followed his lead in subsequent cases.[209] The authority to

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[206] Evan H. Carninker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2311 (1999).

[207] 325 U.S. 91 (1945).

[208] *Id.* at 134 (Rutledge, J., concurring).

[209] H. Ron Davidson, *The Mechanics of Judicial Vote Switching*, 38 SUFFOLK U. L. REV. 17, 18 (2004).

switch a vote to create a mandate has since been called the *Screws* rule.[210] Professor Richard M. Re, who teaches at the UCLA School of Law, has explained:

> *Screws* itself involved a Justice's vote to join the judgment of the Court, not the opinion of the Court. In other words, Justice Rutledge created a majority on the judgment but did not join the majority opinion of the Court and so avoided the creation of precedent under the majority rule. Perhaps the *Screws* rule should be limited to votes on the judgment akin to Justice Rutledge's, and so should not extend to authorize votes in favor of precedential majority opinions where the voting Justice disagrees with those opinions. But that extension is justifiable, for much the same reasons as the core use of the *Screws* rule. Compromise majorities can effectuate the Justices' views of the law, without unfairly harming a party or violating principles of candor.[211]

He continued:

> One might object that the *Screws* rule is illegitimate because it authorizes Justices to vote for dispositions that they believe are legally incorrect. *Screws* thus implicates, and arguably contravenes, the essence of judicial obligation: to decide in accordance with law. But that objection does not grapple with the crisis of legal fidelity that gives to the problem that the *Screws* rule means to solve. The relevant choice is between two plausible but imperfect means of discharging the oath of office: voting in accord with one's views to the detriment of those views' future realization, or voting differently from one's views in order to realize those views imperfectly.[212]

To explain further, Professor Re notes that sometimes a justice can make a relatively minor compromise to achieve precedent that is close to his or her views.[213] If the justice cannot join a "compromise majority,"

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[210] Re, *supra* note 124, at 1998.

[211] *Id.* at 1999.

[212] *Id.*

[213] *Id.* at 1999–2000.

then the result may be much further from the justice's ideal opinion.[214] An example of such a situation is *Coffee II*. Arguably, the precedent going forward is the categorical approach. While the dissenting justices may have disagreed with the application of the reasonableness approach by the lead opinion, the rule being the categorical approach seems much further away from their desired outcome.

Quite interestingly, while Justice Scalia was publicly opposed to consensus building, one of the best examples of a compromise majority is *Gant*, wherein Justice Scalia served as the fifth vote for the majority.[215] Indeed, it is the case that Professor Re used to illustrate the concept of a compromise majority.[216] *Gant* concluded that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search . . . ."[217] Previous precedent had been interpreted as always permitting police to search the passenger compartment incident to a lawful arrest of a recent occupant because of concerns for officer safety. Four justices would have retained this reading. Justice Scalia wanted to entirely abandon the officer safety justification. However, he compromised and joined the majority. He wrote:

> No other Justice . . . shares my view that application of [the officer safety justification] in this context should be entirely abandoned. It seems to me unacceptable for the Court to come forth with a 4-to-1-to-4 opinion that leaves the governing rule uncertain. I am therefore confronted with the choice of either leaving the current understanding of [previous precedent] in effect, or acceding to what seems to me the artificial narrowing of those cases adopted by Justice STEVENS. The latter, as I have said, does not provide the degree of certainty I think desirable in this field; but the former opens the field to what I think are plainly unconstitutional searches—which is the greater evil. I therefore join the opinion of the Court.[218]

Had Justice Scalia not compromised, great confusion would have resulted. Moreover, whether the officer safety justification, which he so strongly opposed, would have been reined in, is uncertain. However, he

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214 *See id.*; *see also* Carninker, *supra* note 206, at 2313.

215 Arizona v. Gant, 556 U.S. 332 (2009).

216 Re, *supra* note 124, at 2001.

217 *Id.* at 351.

218 *Gant*, 556 U.S. at 354 (Scalia, J., concurring).

was able to create precedent closer to what he ultimately believed was correct.[219] Similarly, Justice Thomas, who has also publicly opposed consensus building,[220] has joined majority opinions for the sake of creating precedent. In *AT&T Mobility LLC v. Conception*,[221] another example discussed by Professor Re,[222] Justice Thomas authored a concurrence, stating:

> I think that the Court's test will often lead to the same outcome as my textual interpretation and that, when possible, it is important in interpreting statutes to give lower courts guidance from a majority of the Court . . . . Therefore, although I adhere to my views . . . I reluctantly join the Court's opinion.[223]

Justice Sandra Day O'Connor has similarly joined an opinion to produce a majority. She wrote in one concurrence, "in order that the Court may adopt a rule, and because I believe the Court's rule will often lead to the same outcome as the one I would have adopted, I join the Court's opinion despite my concerns."[224]

Based on the implicit applications of *Screws* rule by Justice Scalia, Justice Thomas and Justice O'Connor, two principles can be derived. First, a justice should employ *Screws* rule only if the rule utilized by the first opinion is likely to lead to outcomes similar to those that would be produced by the justice's preferred rule. Second, the rationale for employing *Screws* rule is strongest when the failure to do so will result in jurisprudence that is even further away from the justice's desired jurisprudence.

C. Compromise Without a Separate Writing

Screws rule seems to require the judge to disclose, in a separate writing, that a compromise was made. But notably, justices have compromised without feeling obligated to write separately. There are numerous examples. Justice Lewis F. Powell, Jr. once sent a private memo to Chief Justice Warren E. Burger, stating:

> It is evident that a Court opinion is not assured if each of us remains with our first preference votes. . . . As I view

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219 Re, *supra* note 124, at 2001.

220 *Interview with Justice Thomas*, *supra* note 5, at 6:50–8:20.

221 563 U.S. 333 (2011).

222 Re, *supra* note 124, at 2001.

223 *AT&T Mobility*, 563 U.S. at 353 (Thomas, J., concurring).

224 US Airways, Inc. v. Barnett, 535 U.S. 391, 408 (2002) (O'Connor, J., concurring).

> the *Nixon* case as uniquely requiring a Court opinion, I am now prepared to defer to the wishes of you, Bill Rehnquist, and Sandra [O'Connor] and prepare a draft opinion holding that the President has absolute immunity from damage suit liability.[225]

Similarly, Chief Justice Rehnquist wrote in one private memo:

> I prefer the position taken in the most recent circulation of my proposed opinion for the Court, but I want very much to avoid a fractionated Court on this point. . . . If a majority prefers Nino's [Scalia's] view, I will adopt it. . . . If there is some "middle ground" that will attract a majority, I will even adopt that.[226]

Compromises on relatively minor points represent a simple, long-followed unwritten principle: If a court is to ever act institutionally, the majority opinion author must be given some leeway. On complex issues, a court with seven members (like the Wisconsin Supreme Court) could easily produce seven different opinions. However, American courts have long rejected the practice of *seriatim* opinions.

D. Reestablishing Dicta

One problem, perhaps unique to Wisconsin, is that the Wisconsin Supreme Court has abandoned the concept of *obiter dictum*.[227] No sentence in an opinion of the court can be disregarded. That being so, justices on the Wisconsin Supreme Court may be concerned—and fairly—that compromising on a relatively minor premise (for example, a single footnote) is problematic. A footnote on a topic unrelated to the case at hand has every bit the precedential value as the court's holding.

The reason that the Wisconsin Supreme Court got rid of *obiter dictum* may well be the reason it should bring it back. The court was concerned that if lower courts could disregard statements in its opinions, "predictability, certainty, and finality" would suffer.[228] But if the lack of *obiter dictum* is a justification for justices to write separately, whether it results in clarity is questionable.

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[225] LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 96 (1998).

[226] BERNARD SCHWARTZ, HOW THE SUPREME COURT MAKES DECISIONS 21 (1996).

[227] Zarder v. Humana Ins. Co., 782 N.W.2d 682, 694 (Wis. 2010).

[228] *Id.*

E. Moving Material that Fails to Garner a Majority to a Separate Writing

Another way to address the rise in lead and majority/lead opinions may be for opinion authors to consider authoring two writings. Material in an opinion that was circulated with the intent of garnering a majority should be removed and put in a separate writing if it fails to garner the support of a majority. *Palm* would be an example. As already mentioned, Chief Justice Roggensack wanted to stay proceedings to enforce the court's declaration. There was not a majority. Had she insisted on putting this content in the first opinion, it likely would have become a majority/lead opinion. By moving it to a concurrence, she was able to say what she wanted to without calling into question the legitimacy of the majority opinion by creating a fractured court.

F. Reducing the Issues Taken Per Case on Review

Generally, the Wisconsin Supreme Court's practice has been to grant review on all or many of the issues presented in a case. More issues may correlate with more lead and majority/lead opinions. This is so because justices may have different approaches for each issue. Some may want to write separately on one issue while others want to write separately on another. Furthermore, the overall complexity of a case may hinder the court's ability to reach a consensus on any one issue. The result may be that, instead of the court developing some law on some issues, it develops no law.

VI. CONCLUSION

To conclude, the rise of lead and majority/lead opinions at the Wisconsin Supreme Court should be of concern. It represents a demise of the court's law-developing function. Chief Justice Roberts has made consensus building at the U.S. Supreme Court a priority. As summarized by Jeffrey Rosen, a law professor at George Washington University:

> [U]nder [Chief Justice Roberts] leadership, the Court issued more consecutive unanimous opinions than at any other time in recent history. But [Chief Justice] Roberts was frustrated by the degree to which his colleagues were inclined to act more like law professors than members of a collegial court: his first term had ended in what Justice John Paul Stevens called a "cacophony" of discordant

> voices, with opposing justices addressing each other in unusually personal terms. As a result, [Chief Justice] Roberts looked to the example of his greatest predecessor—Chief Justice John Marshall, who served from 1801 to 1835, for a model of how to rein in a group of unruly prima donnas. "If the Court in Marshall's era had issued decisions in important cases the way this Court has over the past thirty years, we would not have a Supreme Court today of the sort that we have," he said. "That suggests that what the Court's been doing over the past thirty years has been eroding, to some extent, the capital that Marshall built up." [Chief Justice] Roberts added, "I think the Court is also ripe for a similar refocus on functioning as an institution, because if it doesn't, it's going to lose its credibility and legitimacy as an institution." In particular, [Chief Justice] Roberts declared, he would make it his priority, as [Chief Justice] Marshall did, to discourage his colleagues from issuing separate opinions.[229]

The concern Chief Justice Roberts voiced for the U.S. Supreme Court is actually more widespread than perhaps even he realized. It is an aspect, primarily of conservative judicial philosophy, that has found its way to the Wisconsin Supreme Court. At a minimum, steps must be taken to address the problem.

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[229] JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 7–8 (2006).

ONCE BITTEN, TWICE SHY: THE SUPREME COURT'S MISGUIDED DOUBLING DOWN ON THE DUAL SOVEREIGNS EXCEPTION TO THE FIFTH AMENDMENT'S DOUBLE JEOPARDY CLAUSE

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .[1]

I. INTRODUCTION

The Fifth Amendment's Double Jeopardy Clause is one of the most revered provisions in the Bill of Rights, as it reflects and assuages "the deeply rooted fear and abhorrence of a governmental power which allows an individual to be subjected to multiple prosecution[s] for the same offense."[2] The Clause guarantees three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense.[3] Moreover, for over forty years, defendants have been entitled to the protections against double jeopardy from the moment a jury is empaneled and sworn in.[4] Despite a period of halting progress and multiple setbacks, the Supreme Court eventually applied these protections to the states through incorporation in the late 1960's.[5] Nonetheless, a curious exception to the Double Jeopardy Clause survives today under what is known as the dual sovereigns exception ("the Exception"), where the federal government and the states are considered separate sovereign entities, such that

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[1] U.S. CONST. amend. V.

[2] *See* Ray C. Stoner, *Double Jeopardy and Dual Sovereignty: A Critical Analysis*, 11 WM. & MARY L. REV 946, 946 (1970) (noting Double Jeopardy Clause's purpose).

[3] *See* North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (summarizing applicability of Double Jeopardy Clause's guarantee), *overruled by* Alabama v. Smith, 490 U.S. 794 (1989).

[4] *See* Crist v. Bretz, 437 U.S. 28, 38 (1978) (citing Illinois v. Somerville, 410 U.S. 458, 467 (1973)) (holding "[t]he federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy.")

[5] *See* Benton v. Maryland, 395 U.S. 784, 787 (1969) (announcing incorporation of Double Jeopardy Clause).

the Double Jeopardy Clause does not prohibit one sovereign from prosecuting an individual following a prosecution by the other.[6]

Essentially, the Exception provides that "two identical offenses are *not* the 'same offence' within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns."[7] The Exception has been extensively criticized in light of the recent explosion of federal-state cooperation, the federal government's provision of financial backing to state and local law enforcement agencies, and the drastic rise in the prison population from the War on Drugs.[8] Despite this criticism, the Supreme Court recently reaffirmed the constitutionality of the Exception in *Gamble v. United States*.[9] This Note traces the historical origins of double jeopardy protection,[10] explores its centrality to the American concept of ordered liberty and due process,[11] and argues that the Supreme Court should overrule the Exception and instead deem it as: (1) an anathema to notions of popular sovereignty, (2) a manifestation of a perverse conception of federalism, and (3) a patently unfair denigration of the rights of criminal defendants.[12]

II. FACTS

A. Underlying Case

In 2015, a Mobile police officer smelled marijuana upon approaching Terance Martez Gamble's vehicle during a traffic stop and prompted

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[6] *See* Bartkus v. Illinois, 359 U.S. 121, 136-37 (1959) (finding due process does not bar state prosecution following federal acquittal). The *Bartkus* Court suggested an exception to "the Exception," whereby the Double Jeopardy Clause would prohibit successive prosecutions where the "state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution." *Id.* at 123-24; *see also* United States v. Lanza, 260 U.S. 377, 382 (1922) (holding Double Jeopardy Clause only prevents federal government from engaging in successive prosecutions).

[7] Heath v. Alabama, 474 U.S. 82, 92 (1985) (articulating dual sovereignty principle).

[8] *See* Michael A. Dawson, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 296-99 (1992) (discussing negative consequences of Exception's continued existence); *see also* Walter T. Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591, 599 (1961) (cautioning against exercise of separate sovereign prosecutorial powers); Christina Gayle Woods, *The Dual Sovereignty Exception to Double Jeopardy: An Unnecessary Loophole*, 24 U. BALT. L. REV. 177, 183-85 (1994) (questioning Exception's post-incorporation longevity); Kevin J. Hellman, Note, *The Fallacy of Dueling Sovereignties: Why the Supreme Court Refuses to Eliminate the Dual Sovereignty Doctrine*, 2 J.L. & POL'Y 149, 152-53 (1994) (challenging Supreme Court's federalism analysis undergirding Exception).

[9] 139 S. Ct. 1960, 1964 (2019) (affirming constitutionality of Exception).

[10] *See infra* Part III.

[11] *See infra* Part III, sections D-E.

[12] *See infra* Part IV.

him to initiate a search of Gamble's car; which ultimately yielded a loaded 9mm handgun.[13] Gamble's 2008 second-degree robbery conviction made his possession of the handgun a violation of an Alabama statute forbidding those convicted of violent crimes from possessing or controlling a firearm.[14] Gamble pleaded guilty to violating the state statute, but federal prosecutors later indicted him for the same single act of possession under federal law.[15] Gamble moved to dismiss the federal charge on the ground that it was for the same offense as the one to which he had previously pleaded guilty at the state level, thus impermissibly subjecting him to double jeopardy.[16] After the judge denied the motion to dismiss, Gamble pleaded guilty to the federal offense but also retained his right to challenge the motion's denial on double jeopardy grounds.[17] When Gamble subsequently exercised that right, the Eleventh Circuit affirmed the District Court's denial and held that Double Jeopardy Clause jurisprudence allows separate sovereigns to punish a defendant for the same criminal conduct.[18] The Supreme Court granted certiorari to Gamble's appeal to determine whether to overturn the Exception.[19]

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[13] *See Gamble*, 139 S. Ct. at 1964 (recounting facts of Gamble's case).

[14] *See id.* at 1964 (outlining history of Gamble's case); *see also* ALA. CODE § 13A-11-72(a) (2015) (providing no one "who has been convicted in [Alabama] or elsewhere of committing or attempting to commit a crime of violence . . . shall own a firearm or have one in his or her possession or under his or her control.") Gamble's previous offense of second-degree robbery is considered a violent crime under to Alabama law. ALA. CODE § 13A-11-70(2); *see also* Brianne Gorod et al., *Gamble v. United States*, CATO INSTITUTE (Dec. 4, 2017), https://www.cato.org/publications/legal-briefs/gamble-v-united-states (discussing history of Gamble's earlier conviction).

[15] *See* 18 U.S.C. § 922(g)(1), (9) (2020) (providing that it is unlawful for one "convicted in any court of, a crime punishable by imprisonment for a term exceeding one year [. . .] to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition . . . ."); *Gamble*, 139 S. Ct. at 1964 (recounting history of Gamble's case).

[16] *See Gamble*, 139 S. Ct. at 1964 (explaining why district court rejected Gamble's motion to dismiss); *see also* United States v. Gamble, No. CR 16-00090-KD-B, 2016 WL 3460414, at *2-3 (S.D. Ala. June 21, 2016), *aff'd*, 694 F. App'x 750 (11th Cir. 2017), *aff'd*, 139 S. Ct. 1960 (2019) (adhering to dual sovereignty precedent).

[17] *See Gamble*, 139 S. Ct. at 1964 (recounting lower court procedural history); *see also* Gorod, *supra* note 14 (discussing Gamble's sentencing). By pleading guilty to the federal charge, Gamble's prison sentence was extended by nearly three years. Gorod, *supra* note 14.

[18] *See Gamble*, 139 S. Ct. at 1964 (noting Eleventh Circuit decision); *see also* United States v. Gamble, 694 F. App'x 750, 750-51 (11th Cir. 2017) (per curiam) (refusing to deviate from Supreme Court precedent on dual sovereignty).

[19] *See Gamble*, 139 S. Ct. at 1964 (noting grant of certiorari); *see also* Gamble v. United States, 138 S. Ct. 2707, 2707 (2018) (granting Gamble's petition for writ of certiorari). The grant of certiorari attracted extensive coverage and commentary, as it represented the first time in nearly sixty years the Supreme Court would fully examine the Exception. *See*, *e.g.*, David Cole & Somil Trivedi, *It's Time to Close a Loophole in the Constitution's Double Jeopardy Rule*, ACLU (Sept. 12, 2018, 11:30 AM), https://www.aclu.org/blog/criminal-law-reform/its-time-close-loophole-constitutions-double-jeopardy-rule (arguing that Court should end Exception, deeming

B. Gamble v. United States

Gamble's attorneys set out the crux of their argument by explaining that the "[E]xception is incompatible with the text, original meaning, and purpose of the Double Jeopardy Clause."[20] Gamble accused the Supreme Court's twentieth and twenty-first century jurisprudence of hollowing out the protections guaranteed by the Double Jeopardy Clause as it was written, and overriding core tenets of American federalism.[21] Next, Gamble addressed probable concerns from the Court about its duty to adhere to prior decisions by writing that "[s]tare decisis loses its force when a decision's doctrinal underpinnings have been eroded."[22] Gamble further argued against the power of stare decisis by highlighting the "dramatic federalization of criminal law over the past 60 years" as a "foundational change" to the theoretical framework supporting the continued existence of the Exception.[23] Gamble continued to lay out his arguments based on: (1) the weight

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it "a betrayal of both the spirit and the letter of the Double Jeopardy Clause."); Garret Epps, *There's an Exception to the Double-Jeopardy Rule*, THE ATLANTIC (Dec. 5, 2018), https://www.theatlantic.com/ideas/archive/2018/12/gamble-v-united-states-case-double-jeopardy/577342/ (discussing importance of Gamble's challenge to Exception); Matt Ford, *The Supreme Court's Double-Jeopardy Dilemma*, THE NEW REPUBLIC (Dec. 6, 2018), https://newrepublic.com/article/152565/supreme-courts-double-jeopardy-dilemma (summarizing magnitude of case and history of Exception). In 1959, the Supreme Court reaffirmed its earlier *Lanza* decision by refusing to overrule the Exception, stating that doing so would be "highly impractical for the federal authorities to attempt to keep informed of all state prosecutions which might bear on federal offenses." Abbate v. United States, 359 U.S. 187, 195 (1959). While the Supreme Court has analyzed the Exception since *Abbate*, those cases were limited in focus to issues like the Exception's applicability to Puerto Rico, federal Indian tribes, and two states. *See*, *e.g.*, Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863, 1875-77 (2016) (holding Puerto Rico, as U.S. territory, is not considered separate sovereign); United States v. Lara, 541 U.S. 193, 210 (2004) (holding Native American tribes are separate sovereigns vis-à-vis federal government); Heath v. Alabama, 474 U.S. 82, 88 (1985) (allowing successive prosecutions under Double Jeopardy Clause by two states for same underlying criminal conduct).

[20] *See* Brief for Petitioner at 4-5, Gamble v. United States, 139 S. Ct. 1960 (2019) (No. 17-646) (introducing argument in favor of overruling Exception); *see also* Woods, *supra* note 8, at 179-80 (summarizing proposed versions of Double Jeopardy Clause).

[21] *See* Brief for Petitioner, *supra* note 20, at 4-7 (outlining main arguments in favor of overturning Exception). Gamble posited that "[p]ermitting consecutive prosecutions for the same offense simply because different sovereigns initiate them 'hardly serves' the deeply rooted principles of finality and fairness the [Double Jeopardy] Clause was designed to protect." *Id.* at 27-28 (quoting *Puerto Rico*, 136 S. Ct. at 1877 (Ginsburg, J., concurring)).

[22] *See id.* at 7 (addressing precedent in favor of maintaining Exception). Gamble argued that the incorporation of the Double Jeopardy Clause to the states has eliminated the Exception's doctrinal justification. *Id.* at 8, 35-41 (citing Murphy v. Waterfront Comm'n, 378 U.S. 52, 79-80 (1964) (overruling prior holding that one sovereign could utilize testimony unlawfully compelled by another) and Elkins v. United States, 364 U.S. 206, 223 (1960) (overruling "silver platter" doctrine)).

[23] *See id.* at 8 (suggesting Exception is no longer sensible where federal and state criminal jurisdictions frequently overlap).

of historical evidence and scholarship,[24] (2) the shaky jurisprudential origins of the Exception,[25] (3) the Exception's incompatibility with the purposes of American federalism,[26] and (4) the nefarious effects of the Exception's continued survival.[27]

On the other side, the United States—in a full-throated invocation of stare decisis—urged the Court not to "jettison[] [its] longstanding and embedded precedent" with respect to the Exception.[28] The government also relied on the express language of the Double Jeopardy Clause to support its position, arguing that the "constitutional text expressly distinguishes 'offences' based on the sovereign 'against' which they are committed."[29] The United States then shifted to a discussion of American federalism and how, in such a system, the Exception is not at odds with the protections afforded

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[24] *See id.* at 11-15 (cataloguing long history of jurisprudence prohibiting successive prosecutions by separate sovereigns). Here, Gamble traced the rule against a second prosecution by a separate sovereign to at least 1662, and argued that the rule's enshrinement in English common law should be instructive to understanding the Clause's meaning at the time of its late eighteenth century adoption. *Id.* at 4-5; *see also id.* at 17-19 (highlighting numerous state court decisions affirming principle that a "decision in one court will bar any farther prosecution for the same offence, *in that or any other court*") (emphasis added) (quoting State v. Randall, 2 Aik. 89, 100-101 (Vt. 1827)).

[25] *See id.* at 22 (questioning creation of Exception). Gamble argues that the seminal decision that gave birth to the Exception "said nothing" of prior cases rejecting the possibility of the Exception, "of the widely known, traditional English rule," and "why the framers would have rejected that traditional rule *sub silentio*." *Id.* (citing Moore v. Illinois, 55 U.S. 13, 22 (1852)).

[26] *See* Brief for Petitioner, *supra* note 20, at 27-28 (citing Justice Black's argument against Exception's promulgation). Notably in *Bartkus*, Justice Black dissented, writing that, "[l]ooked at from the standpoint of the individual," the idea that "a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State . . . is too subtle . . . to grasp." Bartkus v. Illinois, 359 U.S. 121, 155 (1959) (Black, J., dissenting). Gamble also invoked the Hamiltonian notion that the states and federal government are "kindred systems" to question the perpetuation of a mechanism by which "successive prosecutions after an acquittal *by a coordinate government that is part of the same national system"* are permitted. Brief for Petitioner, *supra* note 20, at 30 (emphasis added) (citing THE FEDERALIST NO. 82 (Alexander Hamilton)).

[27] *See* Brief for Petitioner, *supra* note 20, at 28 (discussing practical implications of Exception); *see also* Heath v. Alabama, 474 U.S. 82, 84-85 (1985) (presenting important precedent). One of the most significant double jeopardy decisions came in 1985 when the defendant in *Heath* was tried in Georgia and sentenced to life in prison. *Heath*, 474 U.S. at 84-85. However, the defendant was then permissibly tried again in Alabama and sentenced to death—all for the same underlying crime. *Heath*, 474 U.S. at 84-85.

[28] *See* Brief for the United States at 8, Gamble v. United States, 139 S. Ct. 1960 (2019) (No. 17-646) (summarizing main argument). "An unbroken line of [the] Court's decisions, whose origin reaches back nearly two centuries, has correctly understood the violation of a state law and the violation of a federal law as distinct 'offence[s]' under the Double Jeopardy Clause." *Id.* at 6.

[29] *See id.* at 6 (discussing meaning of Double Jeopardy Clause). The United States further argued that the "federalist structure of the Constitution likewise dictates that offenses against the laws of the several States and the United States are not 'the same.'" *Id.*

by the Double Jeopardy Clause.[30] The Government also rejected Gamble's argument that the continued existence of the Exception threatens criminal defendants' liberty interests, and noted that "[t]he necessary consequence of preserving liberty by dividing power between dual sovereigns is dual regulation."[31]

The United States concluded by discussing several potential scenarios it deemed constitutionally unworkable if the Exception was overturned, including the denial to a State of "its power to enforce its criminal laws because another State has won the race to the courthouse."[32] The Government warned that this scenario "would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines."[33] The Government then warned of the practical consequences that would result from overruling the Exception, and referenced one of the key cases in Double Jeopardy jurisprudence to aver that "if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement [would] necessarily be hindered."[34]

Ultimately, in *Gamble*, the Supreme Court ruled 7-2 in favor of maintaining the Exception.[35] Writing for the majority, Justice Alito rejected Gamble's argument, and found that the historical evidence Gamble's legal team presented was "feeble" in the face of "the [Double Jeopardy] Clause's text, other historical evidence, and 170 years of precedent."[36] Subsequently, Justice Alito dispensed with Gamble's argument regarding the meaning of the Double Jeopardy Clause, writing that "where there are

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[30] *See id.* at 14-18 (arguing Exception's recognition of distinction between federal and state offences advances federalism principles). The United States argued that, because the several states and the United States "'derive power from different sources,' each from the organic law that established it," both "ha[ve] the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each 'is exercising its own sovereignty, not that of the other.'" *Id.* at 15 (quoting United States v. Lanza, 260 U.S. 377, 382 (1922)) (citing United States v. Wheeler, 435 U.S. 313, 320 (1978)).

[31] *See id.* at 16 (discussing dangers of Gamble's proposed conflation of federalism and liberty interests).

[32] See *id.* at 18 (quoting Heath v. Alabama, 474 U.S. 82, 93 (1985)) (arguing that overturning Exception would deprive states of their sovereign powers).

[33] Brief for the United States, *supra* note 28, at 18 (quoting *Heath*, 474 U.S. at 93) (noting precedent articulating paramount prerogative of states to create and enforce their own criminal codes).

[34] *See id.* at 29 (quoting Abbate v. United States, 359 U.S. 187, 195 (1959)) (expressing concern regarding effects of overruling Exception with respect to effective law enforcement).

[35] *See* Gamble v. United States, 139 S. Ct. 1960, 1966 (2019) (announcing Court's ruling).

[36] *See id.* at 1964 (explaining Court has "long held that a crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign.")

two sovereigns, there are two laws, and two 'offences.'"[37] Thereafter, Justice Alito took cues from the United States' arguments in his discussion of the federalism implications of the Exception: "A close look at [Supreme Court Double Jeopardy jurisprudence] reveals how fidelity to the Double Jeopardy Clause's text does more than honor the formal difference between two distinct criminal codes. It honors the substantive differences between the interests that two sovereigns can have in punishing the same *act*."[38]

In a compelling dissenting opinion, Justice Ginsburg boldly criticized the majority for its "adherence to th[e] misguided doctrine [of the Exception]."[39] Justice Ginsburg continued by responding to the majority's discussion of federalism and the sovereignty implications thereof, writing that: "[The Exception] treats *governments* as sovereign, with state power to prosecute carried over from the years predating the Constitution. In the system established by the Federal Constitution, however, 'ultimate sovereignty' resides in the *governed*."[40] With heavy reliance on the Federalist writings of Alexander Hamilton, Justice Ginsburg inveighed against the Exception's continued existence for its virtual guarantee of not "shor[ing] up people's rights."[41] Justice Ginsburg's dissenting opinion was also in accord with many of the arguments Gamble advanced—she rejected the post-incorporation existence of the Exception and balked at the power of stare decisis in both the face of questionable legal analysis and changing circumstances in the reality of criminal law enforcement.[42]

In a separate dissent, Justice Gorsuch predicated his disagreement with the majority on a plea for empathy, writing that "[a] free society does not allow its government to try the same individual for the same crime until it's happy with the result."[43] In sharp contrast to Justice Alito, Justice Gor-

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[37] *See id.* at 1965 (citing Grady v. Corbin, 495 U.S. 508, 529 (1990) (Scalia, J., dissenting)).

[38] *See id.* at 1966 (emphasis added) (finding no reason to abandon sovereign-specific reading of Double Jeopardy Clause).

[39] *See id.* at 1989 (Ginsburg, J., dissenting) (articulating primary disagreement with majority).

[40] *See Gamble*, 139 S. Ct. at 1990 (Ginsburg, J., dissenting) (internal citations omitted) (quoting Arizona State Leg. v. Arizona Indep. Redistricting Comm'n, 576 U.S. 787, 820 (2015)) (accusing majority of overlooking core principles of federalism).

[41] *See id.* at 1991(2019) (Ginsburg, J., dissenting) (contending that Exception perniciously "invokes federalism to withhold liberty").

[42] *See id.* at 1991-93 (arguing Exception's post-incorporation survival "enable[s] federal and state prosecutors, proceeding one after the other, to expose defendants to double jeopardy"). Justice Ginsburg further wrote that "[i]ncorporation of the [Double Jeopardy] Clause as a restraint on action by the States . . . has rendered the [Exception] obsolete." *Id.* at 1991(citing Benton v. Maryland, 395 U.S. 784, 787 (1969)); *see also* Payne v. Tennessee, 501 U.S. 808, 828 (1991) (noting stare decisis "is not an inexorable command").

[43] *See Gamble v. United States*, 139 S. Ct. 1960, 1996 (Gorsuch, J., dissenting) (expressing disdain for majority's endorsement of Exception).

such interpreted the language of the Double Jeopardy Clause in a very straightforward manner, contending that the Exception defies all foundational principles of the Fifth Amendment.[44] Justice Gorsuch further attacked the majority for its invocation of the power of stare decisis in affirming the Exception's existence and for its failure to properly consider the merits of Gamble's arguments.[45]

C. The Federalization Of Criminal Laws

In the early case of *Fox v. Ohio*, the Supreme Court justices indicated that successive prosecutions by separate sovereigns would be constitutionally permissible, and based their finding on an understanding that such prosecutions would occur in only the most exceptional of circumstances.[46] At the time of the *Fox* decision, such thinking was perfectly sensible; in the mid-nineteenth century, the federal and state criminal justice systems existed and operated almost wholly independent of one another and rarely, if ever, overlapped.[47] Even as late as the mid-1960s, the situation was such that Justice White reasonably noted that "the States still bear primary responsibility in this country for the administration of the criminal law" and that "most crimes . . . are matters of local concern . . . ."[48]

Today, the situation is drastically different, and from one scholar's perspective: "the federal government has [now] duplicated virtually every

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[44] *See id.* (finding "no meaningful support in the text of the Constitution, its original public meaning, structure, or history" for existence of Exception).

[45] *See id.* at 2005-06 (indicating that unquestioned faith in stare decisis would leave Court "still abiding grotesque errors" made in past decisions); *see also* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting) (internal citations omitted) (describing Court's tendencies when cases involve Constitution and corrective legislation is "practically impossible").

> [I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, th[e] [Supreme C]ourt has often overruled its earlier decisions . . . [and] bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

Burnet, 285 U.S. at 406-08 (Brandeis, J., dissenting).

[46] *See* Fox v. Ohio, 46 U.S. 410, 435 (1847) (observing relative rarity of successive prosecutions by separate sovereigns).

[47] *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1138-40 (1995) (discussing historical federal and state government law enforcement roles).

[48] *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 96 (1964) (White, J., concurring) (suggesting importance of criminal law enforcement to states' viability in federalist system).

major state crime."[49] The advent of the federal government's role in the promulgation and enforcement of criminal offenses is of recent vintage, too, with a 1998 study finding that "of all federal crimes enacted since 1865, over forty percent have been created since 1970."[50] As such, the "degree of cooperation between state and federal officials in criminal law enforcement has . . . reached unparalleled levels."[51] Gamble summarized the serious threat posed to the protections of the Double Jeopardy Clause by such federalization of criminal law, cautioning "[such federalization] creates more opportunities for successive prosecutions."[52] As early as 1964, the Court sounded the alarm over the potential for abuse of and disregard for criminal defendant rights given the "age of 'cooperative federalism,' where the Federal and State Governments are waging a united front against many types of criminal activity."[53]

Cooperation between federal and state law enforcement departments, agencies, and personnel is most prevalent in areas related to terrorism and drug trafficking.[54] In the face of such extensive cooperation, even

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[49] *See* Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1, 22 (1997) (noting that federalization of crime provides additional opportunities for successive prosecutions by separate sovereigns); *see also* Brickey, *supra* note 47, at 1140-45 (charting expansion of federal criminal laws); Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1164-92 (1995) (analyzing rise of duplicative criminal offenses and advent of federal-state joint task forces).

[50] *See* James A. Strazzella, *The Federalization of Criminal Law*, AM. BAR. ASS'N, 1, 2 (1998), https://perma.cc/S5LM-VDHP (last visited Jan. 29, 2020) (demonstrating dramatic increase in number of federal criminal offenses).

[51] United States v. All Assets of G.P.S. Auto. Corp., 66 F.3d 483, 499 (2d Cir. 1995) (warning this level of cooperation "should cause one to wonder whether it makes much sense to maintain the fiction that federal and state governments are so separate in their interests that the [Exception] is universally needed to protect one from the other."); *see also* Brief for Petitioner, *supra* note 20, at 44 (contending nearly every offense may now be prosecuted at both state and federal level).

[52] Brief for Petitioner, *supra* note 20, at 44-45 (decrying consequences of increased federalization of criminal law).

[53] *See Murphy*, 378 U.S. at 55-56 (noting advent of federal and state cooperation in criminal law enforcement).

[54] *See State and Local Task Forces*, DRUG ENF'T ADMIN., https://www.dea.gov/state-and-local-task-forces (last visited Oct. 15, 2020) ("In 2016, the DEA State and Local Task Force Program managed 271 state and local task forces . . . These task forces are staffed by over 2,200 DEA special agents and over 2,500 state and local officers."); *see also* Dawson, *supra* note 8, at 297-98 (summarizing federal-state cooperation with respect to drug crimes); Guerra, *supra* note 49, at 1182-85 (summarizing War on Drugs-fueled expansion of joint task forces); *Joint Terrorism Task Forces*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/investigate/terrorism/joint-terrorism-task-forces (last visited Oct. 15, 2020) ("The first [Joint Terrorism Task Force] was established in New York City in 1980. Today there are about 200 task forces around the country, including at least one in each of the FBI's 56 field offices, with hundreds of participating state, local, and federal agencies.").

the federal government has acknowledged that some obstacle is required "to protect 'the individual from any unfairness associated with needless multiple prosecutions.'"[55] The federal government codified that obstacle, known as the *Petite* policy, following a Supreme Court decision in 1960.[56] Nevertheless, the *Petite* policy is the subject of much criticism; for instance, a Tenth Circuit decision highlighted the *Petite* policy's lack of substantive protections and noted that the policy's discrepancies have been widely recognized across circuits.[57] Courts and commentators alike have criticized the policy's application for being "erratic and unpredictable."[58] Moreover, defendants who find themselves in situations like Gamble's are prevented from raising such arguments, because "the *Petite* policy, [as] an internal policy of the Justice Department, *is not to be enforced against the government*."[59] Additionally, as Gamble argued, the *Petite* policy is strictly discretionary, meaning that "an individual's constitutional right not to be twice put in jeopardy for the same offense hinges on an individual prosecutor's secretive application of a discretionary and indeterminate policy."[60]

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[55] Brief for the United States, *supra* note 28, at 54 (quoting Rinaldi v. United States, 434 U.S. 22, 31 (1977)) (noting Department of Justice policy designed to limit frequency of successive prosecutions).

[56] *See* Petite v. United States, 361 U.S. 529, 530 (1960) (explaining "it is the general policy of the Federal Government 'that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions . . . .'"); Brief for the United States, *supra* note 28, at 54 (summarizing policy goals advanced by *Petite* policy). In essence, the policy "precludes" a successive federal prosecution based on "substantially the same act(s) or transactions involved" in a prior proceeding, and requires approval from "a senior Department of Justice official for such a prosecution to proceed." Brief for the United States, *supra* note 28, at 54 (quoting *Justice Manual*, §9-2.031(A)).

[57] *See* United States v. Barrett, 496 F.3d 1079, 1120 (10th Cir. 2007) (emphasis added) (quoting United States v. Thompson, 579 F.2d 1184, 1189 (10th Cir. 1978)) ("The problem for Barrett is that we have held, *as have many other circuits*, that the Petite policy 'is merely a housekeeping provision of the Department' that, 'at most,' serves as "a guide for the use of the Attorney General and the United States Attorneys in the field,' and *thus does not confer any enforceable rights upon criminal defendants*."); *see also* United States v. Gruttadauria, 439 F. Supp. 2d 240, 247 (E.D.N.Y. 2006) (emphasis added) (quoting United States v. Catino, 735 F.2d 718, 725 (2d Cir. 1984)) (noting that it "is well-settled that the *Petite* policy 'affords defendants no substantive rights'" but is "'merely an internal guideline for the exercise of prosecutorial discretion, *not subject to judicial review*.'")

[58] *See, e.g.*, United States v. Belcher, 762 F. Supp. 666, 673 (W.D. Va. 1991) (noting that prosecutor's decisions were "in sharp contrast to" typical *Petite* policy practices); Jon J. Jensen & Kerry S. Rosenquist, *Satisfaction of a Compelling Governmental Interest or Simply Two Convictions for the Price of One?*, 69 N.D. L. REV. 915, 927 (1993) (criticizing inconsistency in policy's application); Dawson, *supra* note 8, at 293 (calling *Petite* policy an "incomplete limitation").

[59] *See* United States v. Michel, 588 F.2d 986, 1003 n.19 (5th Cir. 1979) (emphasis added) (illustrating limitations of *Petite* policy).

[60] *See* Brief for Petitioner, *supra* note 20, at 48 (urging Court to deviate from stare decisis and discredit *Petite* policy); *see also* Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965) ("[T]he mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great.")

III. HISTORY

The Double Jeopardy Clause, as "the oldest of all the Bill of Rights guarantees," generally enjoys a very positive reputation.[61] The principle is now firmly entrenched in American jurisprudence, but protections against double jeopardy existed long before James Madison submitted the initial drafts of what eventually became the Fifth Amendment to the First Congress in 1789.[62]

A. Ancient Athens And Rome

As Justice Hugo Black recognized: "[f]ear and abhorrence of governmental power to try people twice for the same conduct . . . [has roots that] run deep into Greek and Roman times."[63] Despite the rather vague nature of his statement, Justice Black's claim is well-supported by an examination of early law in both societies.[64] In Athens, for example, the law provided that once tried, a person could not be retried on the same charge.[65] One scholar's thorough analysis of prosecutions in ancient Athens found that, by the latter half of the fifth century B.C., the "main concern of a man brought into court was to win a verdict by one means or another, *for once tried he could not be prosecuted again on the same charge* . . . ."[66] Moreover, Rome adopted numerous Greek traditions, and protecting against double jeopardy was certainly among them.[67] Such protections were found in

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[61] *See* George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. REV. 827, 828 (1988) (discussing immense value society and courts have bestowed upon protection against double jeopardy).

[62] *See* Bartkus v. Illinois, 359 U.S. 121, 151 (1959) (Black, J., dissenting) (calling protection against double jeopardy "one of the oldest ideas found in western civilization").

[63] *See id.* at 151-52 (noting long history of protections against double jeopardy).

[64] *See* David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 WM. & MARY BILL RTS. J. 193, 198 (2005) (examining early Greek and Roman double jeopardy protections); *see also* Jay A. Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 283, 283-84 (1963) (noting that despite idiosyncrasies of their legal systems, "[t]he principle of double jeopardy was not entirely unknown to the Greeks and Romans").

[65] *See* Thomas, *supra* note 61, at 836 (articulating early examples of fundamental double jeopardy principles); DEMOSTHENES, *Against Leptines*, *in* OLYNTHIACS, PHILIPPICS, MINOR PUBLIC SPEECHES, SPEECH AGAINST LEPTINES, XX § 147, at 589 (J.H. Vince trans., Harvard Univ. Press eds., 1998) (1930) (stating that "the laws forbids the same man to be tried twice on the same issue").

[66] *See* ROBERT J. BONNER, LAWYERS AND LITIGANTS IN ANCIENT ATHENS: THE GENESIS OF THE LEGAL PROFESSION 195 (Chicago University Press eds.,1927) (emphasis added) (noting early emergence of bars against successive prosecutions).

[67] *See* 2 JAMES LEIGH STRACHAN-DAVIDSON, PROBLEMS OF THE ROMAN CRIMINAL LAW 154-60 (Oxford, Clarendon Press ed.,1912) (summarizing trial and appellate procedure rules, rights, and limitations on state power).

both the Roman Republic and the Roman Empire; in the former, "a magistrate's acquittal barred further proceedings of any kind."[68] As the Republic crumbled and an empire emerged in its stead, the sovereignty of the people was predictably impaired.[69] Nevertheless, protections against double jeopardy were not wholly absent from the Roman Empire and were, in fact, routinely enhanced during the first five centuries of its existence.[70] Early Roman emperors undoubtedly challenged the strength of these protections, but they reemerged by the turn of the third century—albeit with conditions attached.[71] However, this relatively weak period of double jeopardy protections was short-lived; in the middle of the sixth century, Emperor Justinian I promulgated the compendium of jurisprudential writings known as the *Digest of Justinian*, which recognized that "[t]he governor must not allow a man to be charged with the same offenses of which he has already been acquitted."[72] The *Digest* further states that "a person cannot be charged on account of the same crime under several statutes."[73]

B. Religious Laws And Writings

As the Roman Empire approached its mid-fifteenth century end, canonical law began developing rapidly and contained its own prohibitions against double jeopardy.[74] In 1234, Pope Gregory IX promulgated a col-

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[68] *See* GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW 73 (N.Y.U Press eds.,1998) (highlighting existence of double jeopardy protections in Republican Rome).

[69] *See id.* (noting effects of shift from Republic to Empire).

[70] *See* Rudstein, *supra* note 64, at 199-200 (tracing evolution of double jeopardy protections in early Roman Empire).

[71] *See id.* at 199 (recounting instance where Emperor Tiberius attempted to undermine double jeopardy protections); *see also* THE OPINIONS OF PAULUS 4.17, *in* 1 IULIUS PAULUS, THE CIVIL LAW 323 (S.P. Scott trans., 1973) ("[A]fter a public acquittal, a defendant can again be prosecuted by his informer within thirty days, but after that time this cannot be done.")

[72] *See* DIG. 48.2.7.2 (Ulpian, Duties of Proconsuls 7), *in* 4 THE DIGEST OF JUSTINIAN 311 (Theodor Mommsen et al. eds., 1985) (summarizing Justinian-era double jeopardy protections). The principles expounded upon in the *Digest of Justinian*, although important, protected individuals from being subjected to double jeopardy by *only the same accuser*. *Id.*; 2 CHARLES PHINEAS SHERMAN, ROMAN LAW IN THE MODERN WORLD 486 (New Haven Law Book Co. eds., 2d ed. 1922) ("[A]ny Roman citizen or subject, desiring to cause anybody to be prosecuted criminally, could apply to the presiding judge of the appropriate court for permission to make an accusation against the alleged offender.") It is important to note that, under the laws of the Roman Empire at this time, criminal prosecutions were typically initiated by individuals, not the state. Sherman, *supra* note 72, at 486; *see also* Rudstein, *supra* note 64, at 200 (describing how early Roman Empire criminal prosecutions were initiated).

[73] *See* DIG. 48.2.14 (Paulus, Duties of Proconsuls 2), *in* 4 THE DIGEST OF JUSTINIAN 799 (Theodor Mommsen et al. eds., 1985) (summarizing Justinian-era double jeopardy protections).

[74] *See* MARTIN L. FRIEDLAND, DOUBLE JEOPARDY 5, 326-27 (Oxford, Clarendon Press ed., 1969) (discussing canonical protections against double jeopardy in Middle Ages).

lection and publication of papal decrees—the *Gregorian Decretals*; these decrees proclaimed that "[a]n accusation cannot be repeated with respect to those crimes of which the accused has been absolved."[75] Nearly a century earlier, a Bolognese monk published an anthology work, the *Decretum*, which collected scores of older church council canons, scriptural passages, and papal decrees.[76] At least two references to double jeopardy are found in the *Decretum*: (1) "[t]he Scripture holds, God does not punish twice in the same manner" and (2) "[w]hether one is condemned or absolved, there can be no further action involving the same crime."[77] Religious writings regarding bars to double jeopardy, however, were not limited to Christianity.[78] The Talmud—a collection of rabbinical teachings and reflections on Hebraic law—recounts the story of a Rabbi Akiba who relied upon *Deuteronomy* 25:2 to explain why Hebraic law "prohibited a person liable to a death penalty by a human tribunal from also being flogged."[79]

C. English Common Law

Modern American reverence for protection against double jeopardy—coupled with a frequent desire to ground legal concepts in common law origins—has led to overstatements about the prominence and con-

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[75] *See* R.H. HELMHOLZ, THE SPIRIT OF CLASSICAL CANON LAW 11-13, 286 (Univ. of Ga. Press ed., 1996) (summarizing double jeopardy protections contained in *Decretals*) (citing DECRETALS GREGORII IX 5.16). The chapter of the *Decretals* in which that proclamation appeared was accompanied by commentary wherein the principle was summarized as requiring "anyone . . . absolved of a crime of which he is accused . . . should not again be accused of the same thing." *Id.* at 286; *see also* Rudstein, *supra* note 64, at 200-01 (summarizing Hemmholz's work).

[76] *See* Rudstein, *supra* note 64, at 201 (introducing and discussing the *Decretum*).

[77] *See* Helmholz, *supra* note 75, at 286 (internal citations omitted) (summarizing *Decretum*'s references to double jeopardy protections).

[78] *See* Rudstein, *supra* note 64, at 197 (discussing Jewish laws and writings about double jeopardy principles); *see also* HYMAN E. GOLDIN, HEBREW CRIMINAL LAW AND PROCEDURE 108-09 & n.6 (1952) (explaining that "in capital cases verdicts may be reversed [from conviction] to acquittal, but not [from acquittal] to conviction."); SAMUEL MENDELSOHN, THE CRIMINAL JURISPRUDENCE OF THE ANCIENT HEBREWS, 150 & n.358 (2d ed. 1968) (emphasis added) (summarizing rule that "[a] verdict of conviction may be reversed by the trial court, but a verdict of acquittal can, *under no circumstances*, be reversed.")

[79] *See* Rudstein, *supra* note 64, at 197 (citing BABYLONIAN TALMUD, *Makkoth* 13b (Isidore Epstein ed., H.M. Lazarus trans., 1935)) (recounting Talmud's summary of Rabbi Akiba's pronouncements). Rabbi Akiba interpreted that verse of *Deuteronomy* to hold that "you make [the guilty man] liable to punishment for one misdeed, but you cannot hold him liable [in multiple ways] for two misdeeds." *Id.;* GEORGE HOROWITZ, 1 THE SPIRIT OF JEWISH LAW 170 (1953) (clarifying Rabbi Akiba's interpretation). Put another way, this has been taken to mean that "for one offense, only one punishment might be inflicted." Horowitz, *supra* note 79, at 170.

sistency of such protections throughout historical English jurisprudence.[80] Such overstatements are misleading, however, since there is more than scant evidence that the earliest English rulers after the Norman Conquest had little, if any regard for questions of double jeopardy protection.[81] After later jurisdictional battles with the church led Henry II to loosen his stranglehold on criminal trials and to accept, as final, more ecclesiastical court acquittals, a general protection against double jeopardy still did not exist in England.[82] Contrary to the reverential proclamation made in *Felch*, no such reference existed in the Magna Carta—which King John originally issued in 1215, and was then reaffirmed by King Edward I before the turn of the thirteenth century.[83]

This state of affairs persisted beyond the time of the early Norman rulers and was a feature of reigns throughout the fifteenth and sixteenth centuries.[84] One of the primary reasons for this halting progress was that much of Anglo-Saxon criminal law was fully dependent upon private actors initiating suits.[85] Even when criminal law enforcement shifted away from individuals to a state prerogative and attendant recognition of double jeopardy arose, such recognitions were negative in their treatment of the

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[80] *See* State v. Felch, 105 A. 23, 25 (Vt. 1918) (describing protection against double jeopardy as "of such importance that it was given a place in the Magna Charta [sic], and that it was regarded [as] so vital to the maintenance of the Anglo-Saxon concept of individual liberty.")

[81] *See* Sigler, *supra* note 64, at 286 (recounting example of monarchical flaunting of double jeopardy protections). "In one situation, William [II] tried fifty Englishmen by the ordeal of hot iron. Since they escaped unhurt, they were, of course, acquitted; upon which the monarch 'declared he would try them again by the judgment of his court, and would not abide by the pretend judgment of God.'" *Id.* (internal citations omitted); *see also* 1 JOHN REEVES, REEVES' HISTORY OF THE ENGLISH LAW, FROM THE TIME OF THE ROMANS, TO THE END OF THE REIGN OF ELIZABETH 456 (W.F. Finlason ed., 1869) (discussing monarchical ability to override prosecutorial outcomes); Rudstein, *supra* note 64, at 209 (citing *The Charter of Liberties of Henry I* (1101), *reprinted in* MICHAEL EVANS & R. IAN JACK, SOURCES OF ENGLISH LEGAL AND CONSTITUTIONAL HISTORY 49-50 (1984) (noting complete lack of double jeopardy protections in Henry I's Charter of Liberties); JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 4 (1969) (deeming it likely that "[protections against] double jeopardy w[ere] not so fundamental a privilege" in early English law).

[82] *See* Rudstein, *supra* note 64, at 204-10 (discussing slow development of English double jeopardy protections); Sigler, *supra* note 64, at 291-92 (cataloguing extent of references to double jeopardy in twelfth and thirteenth-century English legal works). Indeed, the earliest treatise on the common law—written in the latter stages of the twelfth century—contains no reference to protections against double jeopardy. Sigler, *supra* note 64, at 291-92.

[83] *See* Rudstein, *supra* note 64, at 210 (summarizing state of double jeopardy protections in thirteenth century).

[84] *See* Sigler, *supra* note 64, at 287-95 (examining slow evolution of English recognition of double jeopardy protections).

[85] *See id.* at 288 ("[D]ouble jeopardy involves a limitation upon the power of *the state* to bring suit . . . .") (emphasis added); *see also* J. LAURENCE LAUGHLIN, *The Anglo-Saxon Legal Procedure*, *in* 1 ESSAYS IN ANGLO-SAXON LAW 183, 283-84 (1905) (discussing weak protections against double jeopardy afforded to accused parties against private complainants).

principle.[86] These negative recognitions were at least partially responsible for the sixteenth century being seen as a "'dark period' in the development of rules prohibiting double jeopardy."[87]

The truly modern common law approach to double jeopardy did not begin to emerge until the latter half of the seventeenth century.[88] By this time, however, English courts addressed several double jeopardy issues and began to consistently uphold its protections.[89] From the 1660s onward, the King's Bench generally expanded and solidified protections afforded through the prohibition against double jeopardy.[90] The pedestal upon which the protections had been placed were such that the King's Bench found that an acquittal in another country prevented subsequent domestic prosecution for the same alleged offense.[91] All the while, the King's Bench was also active in eradicating trial judge practices that tended to undermine and prevent the invocation of double jeopardy protections.[92] Moreover, by the latter half of the eighteenth century, the common double jeopardy pleas of *autrefois acquit* ("previously acquitted"), *autrefois convict* ("previously

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[86] *See* Sigler, *supra* note 64, at 288 (introducing early English recognition of double jeopardy principles). During the reign of Henry VII (1485-1509), a statute was adopted providing that capital indictments could be initiated immediately at the king's urging, without any delay provided for an appeal. *Id.* The statute also provided that the older plea of *autrefois acquit*—essentially, "previously acquitted"—commonly invoked by defendants, would *not* prevent the appeal of an acquittal. *Id.* Another statute passed just two years into Henry VII's reign further codified the common law's nearly complete disregard for the notion of protection against double jeopardy; it provided that "neither a conviction *nor an acquittal* on an indictment acted as a bar to a prosecution by way of appeal, for the same offense, if the appeal was brought within a year and a day." *Id.* at 289 (emphasis added).

[87] *See* Rudstein, *supra* note 64, at 217 (analyzing long-term effects and ramifications of Henry VII-era enactments). For instance, a statute enacted in 1534 permitted those acquitted of felonies in Wales to nevertheless be tried for the same felony in the adjacent English county within two years of the alleged offense. *Id.* (citing Jill Hunter, *The Development of the Rule Against Double Jeopardy*, 5 J. LEGAL HIST. 1, 12 (1984)).

[88] *See* Sigler, *supra* note 81, at 9 (charting emergence of modern English double jeopardy rules). Sigler notes that, by this time, prosecutions by the crown (i.e., the state) had begun replacing private prosecutions by appeal as the preferred means of conducting criminal prosecutions, thereby fulfilling the prerequisite of "the state's . . . power to institute suit . . . [for] a true double jeopardy situation." *Id.*

[89] *See* Turner's Case, (1664) 84 Eng. Rep. 1068 (K.B.) (holding defendant's acquittal for burglary prevented subsequent prosecution under indictment charging him with same burglary); *see also* Jones & Bever, (1665) 84 Eng. Rep. 1078 (K.B.) (holding defendants' acquittals for burglary prevented subsequent prosecution for that and another burglary).

[90] *See* Rudstein, *supra* note 64, at 219 (summarizing notable King's Bench decisions from this period). For example, one prominent case held that prosecutors were prevented from seeking new trials following an acquittal. *Id.* (citing The King v. Read, (1660) 83 Eng. Rep. 271 (K.B.)).

[91] *See* Rex v. Hutchinson, (1667) 84 Eng. Rep. 1011 (K.B.) (holding Hutchinson's prior acquittal for murder in Portugal barred prosecution in England for same killing).

[92] *See* The King v. Perkins, (1698) 90 Eng. Rep. 1122 (K.B.) (prohibiting trial judge practice of discharging juries when acquittals appeared imminent).

convicted"), and pardon were well established in English common law.[93] The permanence of these protections by this time was such that Blackstone wrote about them in his landmark treatise on the laws of England.[94]

D. American Development & Codification

Protections against double jeopardy emerged in the colonies during the mid-seventeenth century.[95] For example, in 1639, Maryland's General Assembly enacted the Act for the Liberties of the People, which some categorized as "the first American Bill of Rights."[96] The first colonial enactment to contain an express protection against double jeopardy followed shortly thereafter.[97] With its 1648 enactment of the Laws and Liberties, Massachusetts continued its commitment to protection against double jeopardy.[98] Other colonies provided similar versions of protections against double jeopardy at this time as well.[99] In the aftermath of the Revolution-

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[93] *See* Rudstein, *supra* note 64, at 220-21 (concluding trace of double jeopardy evolution at common law).

[94] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 335 (1770) (noting "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for [the] same offence.")

[95] *See* Rudstein, *supra* note 64, at 221-23 (summarizing early colonial protections against double jeopardy).

[96] *See id.* at 221 (quoting 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 67 (1971)) (noting Maryland's enactment); MARYLAND ACT FOR THE LIBERTIES OF THE PEOPLE (1639), *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 68 (1971) (discussing statute's protections against double jeopardy). While the Act for the Liberties of the People did not contain any *express* protections against double jeopardy, it did reaffirm the principle that non-slave inhabitants of the colony would "have and enjoy all such rights liberties immunities priviledges [sic] and customs . . . as any naturall [sic] born subject of England hath or ought to have or enjoy . . ." Schwartz, *supra* note 96, at 68.

[97] *See* Schwartz, *supra* note 96, at 71 (summarizing Massachusetts' Body of Liberties); MASS. BODY OF LIBERTIES para. 42 (1641), *reprinted in* RICHARD L. PERRY, SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 153 (1959) (presenting Massachusetts's protections against double jeopardy). Paragraph 42 of Massachusetts's 1641 Body of Liberties provided that "[n]o man shall be twise [sic] sentenced by Civil Justice for one and the same Crime, offence, or Trespasse [sic]." Perry, *supra* note 87, at 153.

[98] *See* Rudstein, *supra* note 64, at 221-22 (introducing Massachusetts' codifications of protections against double jeopardy). The Laws and Liberties contained not only the double jeopardy provision from the earlier Body of Liberties, but also provided that "everie [sic] Action between partie [sic] and partie [sic] and proceedings against delinquents in *criminal* Causes shall be . . . entered in the *rolls* of [everie] [sic] Court by the Recorder thereof, that such Actions be not afterwards brought again to the vexation of any man." *Id.* (internal citations omitted).

[99] *See id.* (discussing colonial examples of double jeopardy protections). For example, the Connecticut Code of 1652 included a clause providing that "no Person shall be twice sentenced by Civil Justice for one and the same Crime . . . ." *Id.* (citing Christopher Collier, *The Common Law and Individual Rights in Connecticut Before the Federal Bill of Rights*, 76 CONN. B.J. 1, 12 (2002)); *see also* THE FUNDAMENTAL CONSTITUTIONS OF CAROLINA para. 64 (1669), *reprinted*

ary War and as the colonies became states and formed a national union, the colonial-era protections against double jeopardy faded from view—albeit briefly.[100] New Hampshire was the first state constitution to include an express protection against double jeopardy.[101] Following independence, numerous states were also acknowledging protections against double jeopardy through case law.[102]

After the failures of the Articles of Confederation, the First Congress convened on March 4, 1789, to devise a new national document.[103] On June 8th, James Madison introduced a series of proposed constitutional amendments, including those that ultimately became the Bill of Rights.[104] On August 17th, House members, sitting as a Committee of the Whole, took up debate on the clause prohibiting double jeopardy, which, by then, read: "No person shall be subject, except in case of impeachment, to more than one trial or one punishment for the same offence."[105] Two days later, the entire House began consideration of the proposed amendments; and on

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in 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2780 (Francis Newton Thorpe ed., 1909) (noting document drafted, but never enacted, providing that "[n]o cause shall be twice tried in any one court, upon any reason or pretence [sic] whatsoever").

[100] *See* Rudstein, *supra* note 64, at 222-23 (discussing post-Revolution developments). America's initial guiding document, the Articles of Confederation, contained neither a Bill of Rights nor an express protection against double jeopardy. *Id.* at 222 (citing ARTICLES OF CONFEDERATION art. IV (1778)). Most emerging state constitutions similarly lacked express guarantees against double jeopardy, although some did implicitly provide such protections by calling for the automatic enforcement of English common law absent statutory provisions to the contrary. *See, e.g.*, DEL. CONST. of 1776 art. 25 ("The common law of England . . . shall remain in force, unless [it] shall be altered by a future law of the legislature . . . ."); N.J. CONST. of 1776 para. XXII ("[T]he common law of England . . . as [has] been heretofore practised [sic] in this Colony, shall still remain in force, until [it] shall be altered by a future law of the Legislature . . . ."); N.Y. CONST. of 1777 para. XXXV ("[T]he common law of England . . . shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall, from time to time, make concerning the same.").

[101] *See* N.H. CONST. of 1784, Part I, art. XVI (providing that "[n]o subject shall be liable to be tried, after an acquittal, for the same crime or offence").

[102] *See* Rudstein, *supra* note 64, at 223-26 (cataloguing state court decisions responsible for recognizing protections against double jeopardy).

[103] *See* 1 ANNALS OF CONG. 257 (Joseph Gales ed., 1834) (recounting history of Constitutional Convention).

[104] *See id.* (summarizing Madison's proposals). Madison's original proposal for double jeopardy protection stated that "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence . . . ." *Id.*

[105] *See id.* at 451-52 (summarizing House consideration of Madison's proposed double jeopardy provision). A representative from New York objected to the "one trial or" language, arguing that the guarantee against double jeopardy was intended to prevent more than one punishment for a single offense, not, as that language suggested, to prevent an individual convicted in his first trial from challenging that conviction. *Id.*

August 21st, it adopted Madison's provision containing the double jeopardy protection, referring it the following day to a committee of representatives to send to the Senate.[106] The Senate took up the proposed constitutional amendments on September 2nd, and began its consideration of the double jeopardy clause two days later.[107] Further edits to the clause's language were made, with the "by any public prosecution" provision eliminated; on September 9th, the Senate approved the version of the clause that exists today.[108] After the House approved the Senate's revisions, and Madison's proposals were submitted to the states, the Double Jeopardy Clause became part of the Fifth Amendment following sufficient state ratification in 1791.[109]

E. Modern American Jurisprudence: Incorporation

As originally written, the protections embodied in the Bill of Rights were applicable only against the federal government and the process of enforcing the rights therein against the states— through incorporation— only began in earnest in the early twentieth century.[110] Consequently, for long stretches of American history "the Double Jeopardy Clause of the Fifth Amendment did not prohibit a state from placing an individual in jeopardy twice for the same offense."[111] The Supreme Court did not address whether due process of law protected an individual from exposure to double jeopardy at the state level until 1902.[112] This issue was not in front of the Court again for over a quarter century, until *Palko v. Connecticut*.[113]

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[106] *See id.* at 795 (recounting House adoption of proposed double jeopardy provision).

[107] *See* S.J. 1ST CONG., 1ST SESS., 19 (1789) (recounting Senate's consideration of proposed double jeopardy provision). The Senate eventually struck the words "except in case of impeachment, to more than one trial, or one punishment," and inserted the phrase "be twice put in jeopardy of life or limb by any public prosecution." *Id.* at 21, 98.

[108] *See* 1 STAT. 98 (1789) (noting Senate edits to double jeopardy provision).

[109] *See id.* (explaining ratification process and enshrinement of Double Jeopardy Clause).

[110] *See* Jerold H. Israel, *Selective Incorporation Revisited*, 71 GEO. L.J. 253, 254-57 (1982) (recounting early attempts to incorporate and failures of those attempts).

[111] Rudstein, *supra* note 64, at 233 (noting pre-incorporation limitations upon Double Jeopardy Clause protections).

[112] *See* Dreyer v. Illinois, 187 U.S. 71, 85-86 (1902) (disregarding due process claims to find retrial following mistrial did not implicate double jeopardy); *see also* Rudstein, *supra* note 64, at 235 (noting that "[t]he Supreme Court did not . . . consider the merits of Dreyer's claim.")

[113] *See* 302 U.S. 319, 323-24 (1937) (summarizing twentieth-century double jeopardy jurisprudence), *overruled by* Benton v. Maryland, 395 U.S. 784, 794 (1969). Connecticut charged Frank Palko with murder in the first degree, and a jury later convicted him of murder in the second degree. *Id.* at 320-21. Following that conviction, the trial judge sentenced Palko to life imprisonment. *Id.* at 321. Pursuant to a state statute, Connecticut appealed, claiming that the judge made legal errors prejudicial to the prosecution, including his jury instructions regarding the differences between first and second-degree murder. *Id.* The Connecticut Supreme Court of Errors

Writing for the Court, Justice Cardozo held that Palko's second trial for the same offense did not deprive him of due process of law under the Fourteenth Amendment.[114] The issue arose again just sixteen years later, and once again, the Court held that a second trial after an initial mistrial did not subject a defendant to jeopardy twice for the same offense.[115] In *Brock*, the Court stressed the importance of justice being properly served and the fact that—under the Double Jeopardy Clause—there has been a "long favored rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served."[116]

Under the leadership of Chief Justice Earl Warren in the 1960s, however, the Supreme Court radically altered its approach when considering the interactions between the Bill of Rights and the Fourteenth Amendment's Due Process Clause.[117] This revolution was sparked by *Mapp v. Ohio*, in which the Court held that the Fourteenth Amendment's Due Process Clause allows for the selective incorporation of various provisions from the first eight amendments and makes those provisions fully applicable to the states.[118] By using this approach, the Warren Court incorporated a host of key constitutional protections against the states in the context of criminal prosecutions.[119] As such, in 1969, the question of whether the

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reversed Palko's second-degree murder conviction and ordered that he be tried again for first-degree murder. State v. Palko, 186 A. 657, 662 (Conn. 1936). Palko claimed that a new trial would subject him to double jeopardy for the same offense, in violation of the Fourteenth Amendment. *Palko*, 302 U.S. at 321. The trial judge rejected Palko's claim and allowed the retrial to proceed. *Id.* at 321. After the conclusion of the retrial, the jury convicted Palko of first-degree murder and sentenced him to death. *Id.* at 321-22.

[114] *See Palko*, 302 U.S. at 328 (rejecting Palko's argument that Fourteenth Amendment due process embodies Fifth Amendment protections). After reviewing prior cases, the Court held that the rights encompassed by due process of law—as applicable against the states—were those "implicit in the concept of ordered liberty." *Id.* at 325. Pursuant to that analysis, the Court reasoned that permitting the government to appeal perceived errors of law would not subject a defendant to "a hardship so acute and shocking that our polity will not endure it." *Id.* at 328. The Court further reasoned that allowing the government to appeal those potential errors of law would not "violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" *Id.* at 328 (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).

[115] *See* Brock v. North Carolina, 344 U.S. 424, 426-27 (1953) (rejecting argument that defendant being presented for trial before second jury violates due process).

[116] *Id.* at 427-28 (finding that process of presenting defendant to new jury for retrial "does not deny the fundamental essentials of a trial . . . .").

[117] *See* Rudstein, *supra* note 64, at 238-39 (introducing jurisprudential shift); *see also* Corinna Barret Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1362-65 (2004) (summarizing Warren Court's reputation for expanding criminal procedure rights through incorporation).

[118] *See* 367 U.S. 643, 655-57 (1961) (incorporating Fourth Amendment's exclusionary rule against states).

[119] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (incorporating Sixth Amendment's right to jury trial); Washington v. Texas, 388 U.S. 14, 19 (1967) (incorporating Sixth Amendment's right to compulsory process for obtaining witnesses); Klopfer v. North Carolina,

Fourteenth Amendment's Due Process Clause applied the Fifth Amendment's Double Jeopardy Clause to the states was ripe for renewed examination, and was answered affirmatively in *Benton v. Maryland*.[120] Writing for the majority, Justice Marshall noted that "[i]n an increasing number of cases, the Court 'ha[d] rejected the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights . . . .'"[121] The majority opinion continued by referencing the extensive incorporation of criminal due process rights earlier in the decade:

> Our recent cases have thoroughly rejected the *Palko* notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of "fundamental fairness." *Once it is decided that a particular Bill of Rights guarantee is "fundamental to the American scheme of justice," the same constitutional standards apply against both the State and Federal Governments*.[122]

In concluding, Justice Marshall wrote eloquently about how the Fifth Amendment's protection against double jeopardy "represents a fundamental ideal in our constitutional heritage."[123]

F. Modern American Jurisprudence: Emergence Of The Exception

While the Exception has been most commonly invoked post-*Benton*, its theoretical origins have much older roots.[124] Indeed, the notion of the states retaining at least a modicum of their own sovereignty is a prin-

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386 U.S. 213, 223 (1967) (incorporating Sixth Amendment's right to speedy trial); Pointer v. Texas, 380 U.S. 400, 403 (1965) (incorporating Sixth Amendment's right to confront witnesses); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (incorporating Fifth Amendment's privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335, 342-43 (1963) (incorporating Sixth Amendment's right to counsel); Robinson v. California, 370 U.S. 660, 667 (1962) (incorporating Eighth Amendment's protection against cruel and unusual punishment).

[120] *See* 395 U.S. 784, 787 (1969) (finding Double Jeopardy Clause applicable to states through Fourteenth Amendment).

[121] *Id.* at 794 (quoting *Malloy*, 378 U.S. at 10-11) (noting Warren-era shift in Court's approach to determining fundamental nature of Bill of Rights guarantees).

[122] *Id.* at 795 (emphasis added) (quoting *Duncan*, 391 U.S. at 149) (recognizing "the inevitab[ility]" of finding protections against double jeopardy "fundamental to American scheme of justice").

[123] *See id.* at 794 (overruling Palko v. Connecticut, 302 U.S. 319, 329 (1937)).

[124] *See* Dawson, *supra* note 8, at 289-95 (summarizing history of dual sovereignty).

ciple at the heart of the United States' system of federalism.[125] Unhelpfully, both Federalist writings and the Constitution itself left open the question of laws concerning duplication, or situations in which both the federal and state governments enact identical laws.[126] Addressing this problem therefore fell to the courts, and in 1820 the Supreme Court adopted a doctrine whereby anytime the federal government enacted legislation directed at the same subject as a state law, the federal law would supersede the state enactment.[127] Similar views were espoused nearly thirty years later, when Justice McLean declared that "[a] concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impracticable in action [and it] involves a moral and physical impossibility."[128] At roughly the same time, though, states were actively pushing the notion that "since they had jurisdiction over offenses committed within their boundaries, they could not be deprived of [such jurisdiction] by the mere enactment of a federal statute on the same subject."[129] The states were rewarded for their efforts, as the Supreme Court quickly became involved and endorsed the dual sovereignty theory being advanced.[130] The

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[125] *See* THE FEDERALIST NO. 32 at 169 (Alexander Hamilton) (addressing anti-Federalist concerns regarding consolidation of states into United States).

> An entire consolidation of the States into one complete national sovereignty, would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, *the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, EXCLUSIVELY delegated to the United States*.

Id. (emphasis added); *see also* U.S. CONST. amend. X (reserving to states "powers not delegated to the United States by the Constitution, nor prohibited by it to the states").

[126] *See* Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306, 309 (1963) (introducing theory of concurrent jurisdiction and problems associated therewith).

[127] *See* Houston v. Moore, 18 U.S. (5 Wheat.) 1, 21-22 (1820) (holding that states cannot enter upon same ground and punish for same transgressions as Congress).

[128] *See* Smith v. Turner ("The Passenger Cases"), 48 U.S. (7 How.) 283, 399 (1849) (reaffirming principles regarding federal laws nullifying state laws).

[129] *See* Harrison, *supra* note 126, at 311 (introducing origins of claims to dual sovereignty).

[130] *See, e.g.*, Moore v. Illinois, 55 U.S. (14 How.) 13, 19-21 (1852) (emphasis added) (rejecting defendant's argument that punishment under Illinois law was improper due to supersession by federal law because "[*a*]n *offence . . . means the transgression of a law*"); United States v. Marigold, 50 U.S. (9 How.) 560, 569 (1850) (emphasis added) (" [T]he *same act* might, as to its character and tendencies, and the consequences it involved, constitute an *offence* against both the State and Federal governments, and might draw to its commission the *penalties denounced by either* . . . ."); Fox v. Ohio, 46 U.S. (5 How.) 410, 435 (1847) (emphasis added) ("[O]ffences [sic] falling within the competency of *different authorities* to restrain or punish them . . . [are] subjected to those consequences which those authorities might ordain and affix to their perpetration.")

jurisprudential reasoning that emerged in this era is best encapsulated in a decision from 1852.[131]

Thus, the early seeds of dual sovereignty were firmly planted, and the Supreme Court— some seventy years later—was comfortable invoking the Exception to permit federal prosecution following a state prosecution and conviction for the same underlying action.[132] Relying on scores of prior cases, in 1922 the *Lanza* Court averred that "[i]t follows that an act denounced as a crime by both national and state sovereignties is *an offense against the peace and dignity of both and may be punished by each*."[133] The Court reaffirmed these principles in two mid-twentieth century cases notably decided on the same day.[134]

IV. ANALYSIS

The *Gamble* decision—as it represents a major endorsement of the continued existence of the Exception—is and will remain wrongly decided unless it is overturned.[135] Under that pretext, the following sections will offer compelling reasons to, finally, eliminate the Exception.

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[131] *See Moore*, 55 U.S. (14 How.) at 20 (summarizing notion of dual sovereignty).

> The same act may be an offence or transgression of the laws of both [a state and the United States . . . .] That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; *but only that by one act he has committed two offences, for each of which he is justly punishable*.

Id. (emphasis added).

[132] *See* United States v. Lanza, 260 U.S. 377, 382 (1922) (finding that defendants committed two distinct, sovereign-specific offenses through same underlying act).

[133] *See id.* at 382-84 (cataloguing numerous decisions affirming dual-sovereignty principles) (emphasis added); *see also* Southern Ry. Co. v. Railroad Comm'n, 236 U.S. 439, 445 (1915) (noting that "punishment by one [sovereign] does not prevent punishment by the other.")

[134] *See* Abbate v. United States, 359 U.S. 187, 193-96 (1959) (holding federal prosecution following state conviction does not violate due process of law); *see also* Bartkus v. Illinois, 359 U.S. 121, 138-39 (1959) (holding state prosecution following federal acquittal does not violate due process of law).

[135] *See* Robert Barnes, *In Ruling with Implications for Trump's Pardon Power, Supreme Court Continues to Allow State and Federal Prosecutions for Same Offense*, WASH. POST (June 17, 2019, 4:48 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-reaffirms-precedent-that-allows-state-and-federal-prosecutions-for-the-same-offense/2019/06/17/aed18054-9106-11e9-b570-6416efdc0803_story.html (noting Exception "exposes defendants to the potential harassment, trauma, expense and sometimes extra punishment the [D]ouble [J]eopardy [C]lause was designed to prevent").

A. The Exception Undermines Popular Sovereignty

In the United States, there has long existed the notion that "[t]he *power of the people* lies at the foundation of American government."[136] Similar notions were also espoused by the Federalist authors, Alexander Hamilton and James Madison, and foreign observers.[137] More modern endorsements of this line of thinking exist as well.[138] The continued existence of the Exception is an affront to the power granted to the federal and state governments by the people, who, when they "assigned different aspects of their sovereign power . . . sought not to *multiply* governmental power but to *limit* it."[139] Additionally, the Exception makes a mockery of the people's popular sovereignty that undergirds the Double Jeopardy Clause and the protections it purports to afford.[140] Since the exercise of the people's ultimate sovereignty is to be final and, crucially, unappealable, the permission that the Exception grants the states and the federal government to successively prosecute an individual for the same underlying transgression undoubtedly represents an intrusion upon and disregard for that popular sovereignty.[141]

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[136] Dawson, *supra* note 8, at 282 (emphasis added) (internal citations omitted) (analyzing principle of popular sovereignty); *see also* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (supporting notion of popular sovereignty). Such beliefs were manifest in the text of the Declaration of Independence, which states that "Governments are instituted among Men, deriving their just powers *from the consent of the governed*[.]" THE DECLARATION OF INDEPENDENCE para. 2 (emphasis added); McCulloch v. Maryland, 17 U.S. 316, 404-05 (1819). Additionally, in 1819, Chief Justice John Marshall wrote that "[t]he government of the Union . . . is, emphatically and truly, a government *of the people*. In form, and in substance, it emanates *from them*. Its powers are granted *by them* . . . ." McCulloch, 17 U.S. at 404-05 (emphasis added).

[137] *See, e.g.*, THE FEDERALIST NO. 22 (Alexander Hamilton) ("The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority."); THE FEDERALIST No. 39 (James Madison) (defining a constitutionally-created republic as a government "which derives all its power directly or indirectly from the great body of the people"); 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 55 (Phillips Bradley ed. 1945) ("Whenever the political laws of the United States are to be discussed, it is with the doctrine of the sovereignty of the people that we must begin.")

[138] *See* Arizona State Leg. v. Arizona Indep. Redistricting Comm'n, 576 U.S. 787, 820 (2015) (explaining that people possess "ultimate sovereignty"); *see also* Powell v. McCormack, 395 U.S. 486, 540-41 (1969) (quoting 2 DEBATES ON THE FEDERAL CONSTITUTION 257 (J. Elliot ed. 1876)) ("[T]he true principle of a republic is, that the people should choose whom they please to govern them . . . .")

[139] *See* Gamble v. United States, 139 S. Ct. 1960, 2000 (2019) (Gorsuch, J., dissenting) (accusing majority of invoking federalism to threaten individual liberty).

[140] *See* Dawson, *supra* note 8, at 299 (calling Exception "unconstitutional").

[141] *See id.* at 284 (discussing Exception's denigration of popular sovereignty); *see also* JAMES WILSON, 1 COLLECTED WORKS OF JAMES WILSON 201(Liberty Fund, Kermit L. Hall & Mark David Hall eds., 2007) (cataloguing remarks made at Constitutional Convention).

Further, the logic underlying one of the main defenses of the exception—namely, that popular sovereignty is not denigrated by a second prosecution because the latter prosecution is before a different sovereign—crumbles under the slightest scrutiny.[142] At its core, this defense posits that, while the American people are indeed sovereign, they are also the representatives of two sovereigns simultaneously—their state government and the federal government.[143] In the context of successive prosecutions permitted by the Exception, the proponents of this defense assert that juries sitting in a state court "will represent the people of the state while the very same jurors empaneled across the street in a federal court house will represent the people of the United States."[144] What this defense suggests, then, is the rather implausible notion that somehow, "a collection of citizens empaneled in a state courthouse is different in kind from a collection of citizens empaneled across the street in a federal courthouse."[145] Such a notion is highly incompatible with the concept of popular sovereignty, under which "the federal and state governments *are but two expressions of a single and sovereign people*."[146] Proponents of the Exception–especially those who defend it against the accusation that it usurps popular sovereignty–miss the crucial point that the Constitution itself provides protection and even enhancement of the people's popular sovereignty.[147]

> Upon what principle is it contended that the sovereign power resides in the state governments? The honorable gentleman has said truly, that there can be no subordinate sovereignty. Now, if there cannot, my position is, *that sovereignty resides in the people*; *they have not parted with it* . . . [T]he proposed system sets out with a declaration that its existence *depends upon the supreme authority of the people alone*.

Id. (emphasis added).

142 *See* Dawson, *supra* note 8, at 301 (responding to defense of Exception).

143 *See id.* (explaining defense).

144 *See id.* at 301-02 (summarizing logic underlying Exception defense).

145 *See id.* at 301 (questioning substance of Exception defense).

146 Gamble v. United States, 139 S. Ct. 1960, 1999 (2019) (Gorsuch, J., dissenting) (emphasis added) (criticizing majority's assertions regarding possession of ultimate sovereignty).

147 *See* U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed."); *see also* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .") "[T]he accused shall enjoy the right to a speedy and public trial, *by an impartial jury of the State and district wherein the crime shall have been committed*[.]" U.S. CONST. amend. VI. In practice, this defense proposes that in cases like Gamble's, the jurors in his state trial were representing and protecting exclusively Alabama's interests, while the jurors in his federal trial were representing and protecting exclusively the federal government's interests. *See Gamble*, 139 S. Ct. at 1998 (Gorsuch, J., dissenting) (expressing skepticism that trials before different sovereigns are particularly distinct). However, such a proposition ignores the fact that jurors in both trials were drawn from the same population, across comparable areas. *Gamble*, 139 S. Ct. at 1998 (Gorsuch, J., dissenting); Dawson, *supra* note 8, at 301-02 (questioning "[d]iehard dual sovereigntists'" de-

The undermining effect that the Exception wreaks on popular sovereignty is especially pernicious when a successive prosecution is brought after an initial acquittal because one of the most direct and powerful ways in which the people exert and express their collective sovereignty is by serving on juries, where they serve as a final, unassailable check on governmental power.[148] Placement of the Double Jeopardy Clause into the greater Bill of Rights context underscores this point, insofar as three Bill of Rights Amendments are expressly concerned with juries.[149] Pursuant to each of these rights and guarantees, juries—as the people's representative—act as what one scholar memorably describes as "populist protectors."[150] The Constitution imbues the people with the power to exert their collective sovereignty with finality against the power and authority of the government, and to hold the government to extremely high standards in jury trials.[151] The Exception assaults this power, and removes the finality that should otherwise be inherent in a jury's initial acquittal, thereby usurping and weakening the people's popular sovereignty.[152] Indeed, some scholars have argued that the Exception's effect of usurping the people's nullification power alone is sufficient to find the Exception unconstitutional.[153] A subsequent prosecution by a separate government—following an acquittal in a prior prosecution by another government—evinces disrespect

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fense of Exception). This defense of Exception is also highly theoretical, and offers little solace to those concerned with practical considerations, including how a juror goes about expressly representing and protecting the interests of one sovereign to the exclusion of another. Dawson, *supra* note 8, at 301-02.

148 *See* Robert Matz, *Dual Sovereignty and the Double Jeopardy Clause: If at First You Don't Convict, Try, Try Again*, 24 FORDHAM URB. L.J. 353, 374 (1997) (discussing juror ability to nullify governmental power and will); *see also* De Tocqueville, *supra* note 137, at 282-83 (highlighting how juries amplify people's sovereignty).

149 *See* U.S. CONST. amend. V (establishing requirement of grand jury's involvement in criminal cases); U.S. CONST. amend. VI (guaranteeing right to jury in criminal trials); U.S. CONST. amend. VII (providing for right to jury in certain civil cases).

150 *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183-85 (1991) (discussing important role juries play).

151 *See id.* (underlining crucial role juries play in checking governmental power).

152 *See* Matz, *supra* note 148, at 374 n.127 (summarizing arguments that Exception is unconstitutional due to usurpation of jury nullification power); *see also* Jackson v. Virginia, 443 U.S. 307, 317 n.10 (1979) (noting that "the factfinder in a criminal case has traditionally been permitted to enter an unassailable but unreasonable verdict of 'not guilty.'")

153 *See, e.g.*, Dawson, *supra* note 8, at 299 (calling Exception "unconstitutional because it denigrates the principle of popular sovereignty underlying the Double Jeopardy Clause."); Robert C. Gorman, *The Second Rodney King Trial: Justice in Jeopardy?*, 27 AKRON L. REV. 57, 72 (1994) (summarizing arguments positing unconstitutionality of Exception); Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 130 (1978) (noting that "Double Jeopardy Clause . . . allows [a] jury to exercise its constitutional function as the conscience of the community in applying the law: to soften, and in the extreme case, to nullify the application of the law in order to avoid unjust judgments.")

for and disregard of perhaps the purest and most powerful expression of popular sovereignty against the government.[154]

B. The Dual Sovereigns Exception Is Patently Unfair To Criminal Defendants

The protections guaranteed by the Bill of Rights, including the Fifth Amendment's Double Jeopardy Clause, were enshrined in the Constitution to "further guard[] . . . public liberty & individual rights."[155] The Bill of Rights is premised on protecting the liberty interests of the people against governmental overreach and intrusion, and yet one of the most notable protections contained therein—the guarantee against double jeopardy—is consistently undermined by the Exception and its "failure to consider the liberty interests of the accused."[156] This undermining is rendered particularly offensive given the respect the Supreme Court routinely affords other Bill of Rights guarantees.[157]

The Court's commitment to its understanding of federalism blatantly ignores the clear concern expressed in the Bill of Rights about placing individuals in a vulnerable position against a powerful government.[158] When the people sacrificed parts of their inherent sovereign power as citizens of states to the federal government, they did so with the belief that "[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism [would] protect[] the liberty of the individual from arbitrary power."[159] In practice, though, the preservation of the Ex-

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[154] *See* Dawson, *supra* note 8, at 299 ("Having invited the popular will to check its authority, government may not simply disregard it and try again.")

[155] *See* 25 LETTERS OF DELEGATES TO CONGRESS: MARCH 1, 1788 - JULY 25, 1789 427 (Paul H. Smith ed., 1988) (reprinting Oct. 1788 letter from Madison to Jefferson regarding Madison's views on Bill of Rights); *See* 1 ANNALS OF CONG. 448-60 (1789) (quoting Madison's speech introducing Bill of Rights). Indeed, at its inception the Bill of Rights was recognized as designed to "limit and qualify the powers of Government." *See* 1 ANNALS OF CONG. at 448-60.

[156] *See* Gorman, *supra* note 153, at 72 (noting common critique of Exception).

[157] *See id.* at 73-74 (discussing generally broad interpretation of individual rights and liberties); *see also* Gouled v. United States, 255 U.S. 298, 304 (1921) ("It has been repeatedly decided that [the Bill of Rights] should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights.")

[158] *See* Gorman, *supra* note 153, at 72 (criticizing Court's "adher[ence] to its formalistic theory [of] federalism" in *Heath*); *see also* Heath v. Alabama, 474 U.S. 82, 92 (1985) (discussing use of balancing test). In fact, the *Heath* Court explicitly rejected calls to adopt a balancing test under which the liberty interests of the accused would be weighed against the government's interest in obtaining justice in a second prosecution. *Heath*, 474 U.S. at 92.

[159] *See* Bond v. United States, 564 U.S. 211, 222 (2011) (explaining that unconstrained governmental power threatens liberty of people); *see also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1774, 653-54 (1833) ("The great object of a trial by

ception permits the Court to invoke federalism in order to brush aside individual liberty interests and, instead, threaten those interests by empowering distinct governments to achieve in tandem what each alone could not do alone.[160]

The Exception—such that it permits governments to subject criminal defendants to multiple judicial proceedings—is antithetical to the Court's own recognition that being charged with and prosecuted for criminal activity exposes a defendant to "embarrassment, expense and ordeal and compel[s] him to live in a continuing state of anxiety and insecurity, as well as enhance[s] the possibility that even though innocent he may be found guilty."[161] The successive prosecutions the Exception permits exacerbate these effects and, most perniciously, increase the likelihood that an innocent defendant may be wrongfully convicted.[162] At its core, the Double Jeopardy Clause is designed to prohibit governments from working together to repeatedly harass a criminal defendant for a single act or transaction; however, this is a reality that the Exception allows and implicitly encourages in the name of justice.[163] The continued ability that state and federal governments have to successively prosecute an individual for the same underlying act or transaction gives both "an illegitimate dress rehearsal of its case and a cheat peek at the defense."[164] Accordingly, the Exception is not defensible pursuant to an argument that a second prosecu-

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jury in criminal cases, is to guard against a spirit of oppression and tyranny on the part of the rulers . . . .")

[160] *See* Mark E. Lewis, *The Conflict Between Dual Sovereignty and Double Jeopardy*, 38 ALA. L. REV. 153, 159 (1986) (reacting to *Heath* decision). Lewis opined that the *Heath* Court "[r]ather than seeing federalism as a means to protect individual interests and to provide insurance against an arbitrary government . . . viewed federalism as an end itself to be achieved at the expense of individual rights." *Id.*

[161] *See* Green v. United States, 355 U.S. 184, 187-88 (1957) (recognizing hardships inherent to being criminally prosecuted).

[162] *See* Brief of Constitutional Accountability Center, CATO Institute, American Civil Liberties Union, and American Civil Liberties Union of Alabama as *Amici Curiae* in Support of Petitioner at 4, Gamble v. United States, 139 S. Ct. 1960 (2019) (No. 17-646) [hereinafter *Amici Curiae*] (articulating how Exception undermines Double Jeopardy Clause's ability to safeguard individual liberty); *see also* Yeager v. United States, 557 U.S. 110, 117-18 (2009) (quoting *Green*, 355 U.S. at 187-88) (describing protection against double jeopardy as designed to shield individuals from "continuing state of anxiety and insecurity" that would flow from government, "with all its resources and power," being able to "make repeated attempts to convict an individual for an alleged offense").

[163] *See Amici Curiae*, *supra* note 162, at 22 (noting possibility of successive prosecutions being "especially acute in light of the increased federal-state cooperation in fighting crime").

[164] *See* Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 9-10 (1995) (praising Justice Black's *Bartkus* and *Abbate* dissents for refusing to allow such situations); *see also* Ashe v. Swenson, 397 U.S. 436, 447 (1970) (averring that Double Jeopardy Clause theoretically protects against government "treat[ing] the first trial as no more than a dry run for the second prosecution").

tion, like the previous one, would be tried before a jury and thus subject to an instrument of popular control.[165] In fact, this line of arguing is flawed on two counts, for not only does it disregard the requirement that an exercise of popular sovereignty be final and unassailable, but it also critically overlooks how a second trial heavily favors the prosecution.[166]

One of the key protections that is meant to mitigate against such unfairness is the prosecution exception promulgated by the *Bartkus* Court.[167] In reality, however, that exception is particularly narrow, if not a sham in its own right.[168] Perhaps most alarming is the fact that many of these claims are rejected and dismissed even in circumstances strongly indicative of the presence of a sham prosecution, such as a notable case where a federal prosecutor was listed as a state's witness and an FBI agent testified for the state prosecution.[169] Incredibly, a sham prosecution claim was rejected, even where a state initiated criminal proceedings against a defendant at the behest of federal authorities and the same federal authorities

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[165] *See* Dawson, *supra* note 8, at 300 (articulating flaws in such an argument).

[166] *See* Gamble v. United States, 139 S. Ct. 1960, 1999 (2019) (Gorsuch, J., dissenting) (questioning draconian nature of Exception with respect to Gamble's case).

> Imagine trying to explain the Court's [Exception] to a criminal defendant . . . Yes, you were sentenced to state prison for being a felon in possession of a firearm. And don't worry–the State can't prosecute you again. But a federal prosecutor *can* send you to prison again for exactly the same thing. What's more, the federal prosecutor may work hand-in-hand with the same state prosecutor who already went after you. They can share evidence and discuss what worked and what didn't the first time around. And the federal prosecutor can pursue you even if you were *acquitted* in the state case. None of that offends the Constitution's plain words protecting a person from being placed "twice . . . in jeopardy of life or limb" for "the same offence." Really?

Id. (quoting U.S. CONST. amend. V).

[167] *See supra* text accompanying note 6 (summarizing 'sham prosecution' loophole to Exception).

[168] *See* Dawson, *supra* note 8, at 296 (criticizing ineffectiveness of sham prosecution exception). Claims of impermissible exposure to double jeopardy predicated on the sham prosecution exception survive appeal in only the rarest of circumstances; however, more often than not, these claims are dismissed outright. *Id.* nn.110, 113, 116 (listing examples of rejections of sham prosecution claims); *see also* United States v. Bernhardt, 831 F.2d 181, 182 (9th Cir. 1987) (rejecting idea that mere "cooperation between prosecutorial sovereignties" is automatically sufficient to invoke sham prosecution exception); Bartkus v. Illinois, 359 U.S. 121, 164-66 (1959) (Brennan, J., dissenting) (questioning majority's refusal to remand on sham prosecution question in face of extensive federal-state cooperation).

[169] *See* United States v. Aleman, 609 F.2d 298, 309 (7th Cir. 1979) (deeming "[l]aw enforcement cooperation between state and federal authorities . . . a welcome invitation."); *see also Bernhardt*, 831 F.2d at 183 (escribing another instance of sham prosecution claim). In another case, a defendant's sham prosecution claim was rejected despite the fact that a deputy state attorney general was deputized to the Department of Justice as a Special Assistant U.S. Attorney and granted responsibility for the federal prosecution while still collecting his state salary. *Bernhardt*, 831 F.2d at 183.

sat with the state prosecution at trial, testified as witnesses, collected evidence for the state's case, postponed sentencing a prosecution witness until after he testified for the state, helped in witness preparation, and appointed the state prosecutor to the position of Special Assistant to the U.S. Attorney for the subsequent federal prosecution.[170] The flimsy protection that the sham prosecution exception appears to offer criminal defendants is rendered even weaker because its very existence is often doubted.[171]

Finally, the continued existence of the Exception and the ability it gives to the state and federal governments to try their cases one after the other, often gives rise to other violations of criminal defendants' constitutional rights.[172] Such violations are particularly likely where a federal prosecution follows a state prosecution, because a lengthy delay in the initiation of the federal prosecution implicates a defendant's right to a speedy trial under the Sixth Amendment.[173] These delays also implicate protections extended to defendants under the Speedy Trial Act,[174] and the discretionary power granted to courts under the Federal Rules of Criminal Procedure in the event of undue delays.[175] Claims made by defendants pursuant to these interests, however, are all too frequently rejected and dismissed.[176]

V. CONCLUSION

The Double Jeopardy Clause of the Fifth Amendment exists to protect Americans against governmental abuse of its prosecutorial power and, in theory, shields criminal defendants from the ordeal of repeated judicial proceedings. The Supreme Court, however, in *Gamble v. United States*, unwisely extended the life of the Exception, under which the protections offered in the Double Jeopardy Clause are little more than illusory. Instead of safeguarding the rights of individuals against the power and authority of

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[170] *See* United States v. Figueroa-Soto, 938 F.2d 1015, 1018-20 (9th Cir. 1991) (finding that "close collaboration" does not "amount[] to one government being the other's 'tool' or providing a 'sham' or 'cover.'")

[171] *See* United States v. Patterson, 809 F.2d 244, 247 n.2 (5th Cir. 1987) (questioning whether sham prosecution exception is valid rebuttal to Exception).

[172] *See* Matz, *supra* note 148, at 375 (analyzing secondary effects of Exception).

[173] *See* U.S. CONST. amend. VI (providing that in "all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .")

[174] *See* 18 U.S.C. § 3161 (2008) (setting time limits on various phases of criminal prosecutions).

[175] *See* FED. R. CRIM. P. 48(b) (allowing federal courts to "dismiss an indictment, information, or complaint" due to unnecessary delay in "presenting a charge to a grand jury; filing an information against a defendant; or bringing a defendant to trial").

[176] *See* Barker v. Wingo, 407 U.S. 514, 529-30 (1972) (establishing difficulty of succeeding on right to speedy trial violation claim).

government, the Double Jeopardy Clause—as currently qualified by the Exception—unforgivably operates as both a vehicle for state oppression and a violation of constitutionally enshrined rights.

The continued existence of this Exception evinces a draconian misreading of: (1) centuries of history, (2) the centrality of individual rights and liberties to the Bill of Rights, and (3) founding-era conceptions of federalism. Moreover, the Exception perpetuates a criminal justice system that degrades and disregards the rights and dignity of criminal defendants. The Exception is an affront to both the meaning and spirit of the Double Jeopardy Clause and should unquestionably be overturned at the next time of asking.

Ross Ballantyne

THE DEATH OF ABORTION: IF *ROE V. WADE* IS OVERTURNED, CAN THE RIGHT TO CHOOSE BE UPHELD UNDER THE ARGUMENTS USED TO ESTABLISH AN INDIVIDUAL'S RIGHT TO PHYSICIAN-ASSISTED SUICIDE?*

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views . . . [T]he right of personal privacy includes the abortion decision, but this right is not unqualified and must be considered against important state interests in regulation.[1]

I. INTRODUCTION

Throughout the judicial history of the United States, courts have never been tasked with establishing a man's right to control his own reproductive health.[2] However, only forty-five years ago, women fought their way up to the Supreme Court to receive recognition for the same liberties afforded to men.[3] Issued in the early 1970s, the *Roe v. Wade* decision shaped women's rights regarding their reproductive health.[4] This decision not only granted women control over their bodies, but it also emboldened them with the power to stand up for their personal reproductive rights through case law.[5] However, with the appointment of Justice Brett Kavanaugh to the Supreme Court, states are again questioning whether *Roe v. Wade* should remain valid case law in the federal judicial system.[6]

**Editor's Note: This note was written in the Fall of 2019. All representations made in this article are based on precedent and historic events that occurred between Fall 2019 and Spring 2020.*

[1] Roe v. Wade, 410 U.S. 113, 116, 154 (1973) (describing sensitive nature of women's reproductive rights).

[2] *See id.* at 117 (suggesting "what history reveals about man's attitudes toward the abortion procedure over the centuries.")

[3] *See id.* at 166-67 (holding that women have power to make reproductive decisions regarding their abortions).

[4] *See id.* at 147-52 (establishing *Roe*'s importance in context of United States history).

[5] *See Roe v. Wade: Its History and Impact*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/files/3013/9611/5870/Abortion_Roe_History.pdf (last updated Jan. 2014) (discussing impact of *Roe* on women's lives since 1973).

[6] *See* Melissa Murray, *Symposium: Party of Five? Setting the Table for Roe v. Wade*, SCOTUSBLOG (July 24, 2019, 3:18 PM), https://www.scotusblog.com/2019/07/symposium-party-of-five-setting-the-table-for-roe-v-wade/ (discussing how Justice Kavanaugh's appointment could "be a fifth vote to overrule *Roe v. Wade* and decimate the right to abortion"); Shira A.

Overturning *Roe v. Wade* not only will be catastrophic to a woman's right to control her body, but will also undo decades of well-established precedent.[7] Although abortions would not be considered unconstitutional per se, the Supreme Court could still determine that abortions should not receive special protection as a fundamental right.[8] Consequently, states would be free to pass laws that restrict abortions at any and all stages of pregnancy.[9] States could potentially revert women's reproductive rights back to the restrictive period prior to *Roe v. Wade*.[10] However, if *Roe v. Wade* is overturned and the right to abortion is no longer constitutionally protected under the Fourteenth Amendment, states may pass laws that affirmatively give women the freedom to make decisions about their own reproductive health, as opposed to reverting to the oppressive world that existed before.[11]

Scheindlin, *If Roe v. Wade is Overturned, We Should Worry About the Rule of Law*, THE GUARDIAN (May 21, 2019 8:15 AM), https://www.theguardian.com/commentisfree/2019/may/21/trump-abortion-roe-v-wade-supreme-court-judges ("[R]eshaping the supreme court through . . . [the] appointments of Justices Neil Gorsuch and Brett Kavanaugh and . . . appoint[ing] more than 100 judges to the courts of appeals and the district courts, many of whom have been openly hostile to abortion rights in their academic writings, public speeches or judicial decisions. [Trump] now expects these judges to achieve the big prize – the overturning of Roe v Wade."); Sheryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html (highlighting that SCOTUS now has conservative majority needed to overturn *Roe*).

[7] *See* Richard H. Fallon Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 611-14 (2007) (describing potential implications of *Roe* being overturned). Fallon describes one of these implications as follows: "The overruling of Roe would revitalize pre-existing abortion prohibitions in a number of states. In addition, overruling Roe would create potential legal issues about whether women and doctors could be sanctioned under pre-1973 statutes for actions in which they engaged prior to Roe v. Wade's being overruled." *Id.* at 614.

[8] *See id.* at 612-14 (stating that abortion is protected fundamental right that could be reversed).

[9] *See id.* at 611-12 (describing how states could reduce women's rights).

[10] *See Roe v. Wade: Its History and Impact*, *supra* note 5 (discussing very restrictive regulations regarding pregnancy decisions prior to *Roe*). "Many of these [abortion] laws dated back to the mid-1800s, when state legislatures moved to ban abortion despite this nation's history since colonial times of allowing abortion prior to 'quickening.'" *Id.*

[11] *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (finding rights of unmarried people are same as married people, therefore expanding right to contraceptives). Cases prior to *Roe* laid the groundwork for individual rights, specifically the right to choose. *See also* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (articulating right to marital privacy includes right to use contraceptives); Skinner v. Oklahoma, 316 U.S. 535, 542-43 (1942) (establishing fundamental right to procreate); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (concluding fundamental rights include rights of family in marriage and child rearing); Doe v. Doe, 314 N.E.2d 128, 132-33 (Mass. 1974) (holding it was woman's right to decide to get an abortion, rather than paternal father's). *Doe*, decided a year after *Roe v. Wade*, centered on an estranged husband and his pregnant wife. *Doe*, 314 N.E.2d at 129. The wife wanted to an abortion, yet her husband did not want her to terminate

Outside the scope of abortion rights, some states have passed laws that grant individuals the freedom and control over their bodies—specifically in the context of physician-assisted suicide.[12] In *Roe v. Wade*, the Court addressed the strain that legalizing a woman's right to choose may put on some physicians—a concern that was at the forefront of the argument against physician-assisted suicide.[13] Both individual states and the United States Supreme Court have used the Fourth Amendment Due Process Clause and the right to privacy to argue that people possess an "individual right" to control decisions that affect "how their bodies and mind should be treated."[14] If *Roe v. Wade* is overturned, perhaps states can use a parallel argument to those made in support of the right to physician-assisted suicide—as both discuss control over one's own body.[15] This Note will address and determine whether states may also successfully utilize this argument to preserve the women's right to choose.[16]

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the pregnancy. *Doe*, 314 N.E.2d at 129. The court held that, because of both the fundamental right of privacy and the right to choose granted in *Roe v. Wade*, it was ultimately the mother's, and not the paternal father's, decision to get an abortion. *Doe*, 314 N.E.2d at 132-33.

[12] *See* Washington v. Glucksberg, 521 U.S. 702, 705-06 (1997) (introducing notion of right to physician-assisted suicide in federal case law). "The question presented in this case is whether Washington's prohibition against 'causing' or 'aiding' a suicide offends the Fourteenth Amendment to the United States Constitution. We hold that it does not." *Id.* at 705-06.

[13] *See* Roe v. Wade, 410 U.S. 113, 116, 130-32 (1973) (describing physician's role in terminating life and adherence to Hippocratic Oath); *see also Glucksberg*, 521 U.S. at 730-32 (deliberating balance between physician's duty to prevent harm, state interest, and patient autonomy).

[14] *See Glucksberg*, 521 U.S. at 722-24, 766, 774 (questioning whether "right to die" exists and fleshing out idea of "self-sovereignty").

[15] *See id.* at 778 (Souter, J., concurring) (describing similarities between right to choose and right to physician-assisted suicide). "Constitutional recognition of the right to bodily integrity underlies the assumed right . . . ." *Id.*

[16] *See id*. (Souter, J., concurring) (comparing physician-assisted suicide and abortion rights). Souter states:

> The analogies between the abortion cases and this one are several. Even though the State has a legitimate interest in discouraging abortion . . . the Court recognized a woman's right to a physician's counsel and care. Like the decision to commit suicide, the decision to abort potential life can be made irresponsibly and under the influence of others, and yet the Court has held in the abortion cases that physicians are fit assistants. Without physician assistance in abortion, the woman's right would have too often amounted to nothing more than a right to self-mutilation, and without a physician to assist in the suicide of the dying, the patient's right will often be confined to crude methods of causing death, most shocking and painful to the decedent's survivors.

Id. (citations omitted).

II. FACTS

Recently, the Supreme Court granted certiorari to review a Louisiana law that restricts a woman's access to abortion—a decision expected to be issued by June 2020.[17] With the current conservative majority on the Supreme Court, an opportunity arises for the Court to find not only that the Louisiana law is constitutional, but also that the state's interests meet the standard of strict scrutiny—effectively overturning *Roe v. Wade*.[18] This potential decision would overturn thousands of subsequent cases that rely on *Roe*'s authority, and may also cement the current restrictive laws already enacted by many states.[19]

If the Supreme Court decides to uphold the Louisiana law, it will create a growing concern for the women's rights movement across the United States.[20] First, if these restrictions are placed on a woman's ability to have an abortion, it could potentially create traumatic experiences for rape victims, especially if their attacker was a close friend or family member.[21] Second, states will have the power to make abortions fully illegal, or alternatively, impose substantial barriers to women's access to abortions by requiring the paternal father's consent.[22] Finally, women may be subjected to possible criminal repercussions, as was the reality before *Roe v. Wade*.[23]

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[17] *See* June Med. Servs. L.L.C. v. Gee, 140 S. Ct. 35, 35 (2019) (granting certiorari to review 5th Circuit decision); June Med. Servs. L.L.C. v. Gee, 905 F.3d 787, 790-91 (5th Cir. 2018) (holding that Louisiana abortion restriction is constitutional); *June Medical Services LLC v. Russo*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/june-medical-services-llc-v-gee-3/ (last visited Mar. 1, 2020) (stating Supreme Court will hear Louisiana abortion restriction law case on March 4, 2020); Debra Cassens Weiss, *Supreme Court to Review Louisiana Abortion Law Nearly Identical to Texas Law It Struck Down in 2016*, ABA JOURNAL (Oct. 4, 2019, 9:57 AM), http://www.abajournal.com/news/article/supreme-court-to-review-louisiana-abortion-law-nearly-identical-to-texas-law-it-struck-down-in-2016 (explaining law at issue, drawing parallels to similar 2016 Texas law Court abrogated).

[18] *See* Weiss, *supra* note 17 (addressing how Kavanaugh's appointment could impact decision on Louisiana abortion restriction and overturn *Roe*).

[19] *See* Fallon, *supra* note 7, at 612 (stating that although difficult, states could reinforce restrictive anti-abortion laws). "In a number of states, statutes enacted prior to the decision of Roe in 1973 remain on the books . . . [and] the old laws would sometimes, perhaps typically, become operative and enforceable unless repealed." *Id.*

[20] See *id.* at 611-14 (stating some potential implications if *Roe* is overturned).

[21] *See* Doe v. Doe, 314 N.E.2d 128, 132 (Mass. 1974) (outlining some restrictions that would be grossly unfair following the decision in *Roe*). In the case of incestuous rape, for example, requiring a woman who wants to get an abortion to get the consent of the paternal father, who is a close family member, would force her to either have the baby or attempt to confront her abusive family member. *Id.* Regardless, such circumstances would effectively and completely take the right to abort away from her. *Id.*

[22] *See generally* Planned Parenthood v. Danforth, 428 U.S. 52, 83-84 **(**1976) (holding that requiring spousal consent for abortion is unconstitutional following *Roe*). If *Roe* is overturned, the authority that *Planned Parenthood* relied on would no longer be valid. *See id.* at 62-63.

Since 2019, many states have enacted laws restricting a woman's right to choose.[24] All of the following states have passed laws that banned abortion in some form, but many have since been overturned by a federal court judge: Alabama, Louisiana, Kentucky, Utah, Ohio, Missouri, Mississippi, Iowa, Arkansas, Georgia, North Dakota and Pennsylvania.[25] Enacting these laws revitalized the conversation whether *Roe v. Wade* could be, or should be, overturned.[26] Many of the states that passed these restrictive laws asserted that there was a compelling state interest to protect the fetus

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Therefore, states could constitutionally create laws requiring spousal consent for a woman to get an abortion. *See id.*

[23] *See* Roe v. Wade, 410 U.S. 113, 117-19 (1973) (examining Texas statute that criminalized punishment for abortions). The Texas statute that *Roe v. Wade* deemed unconstitutional criminalized abortion without the consent of the paternal father. *Id.* at 117-19.

[24] See *Abortion Restrictions*, LIFT LOUISIANA, https://liftlouisiana.org/issues/abortion-restrictions (last visited Mar. 1, 2020) (stating that Louisiana passed laws restricting abortion access); *Index Utah Code*, UTAH STATE LEGIS., https://le.utah.gov/xcode/Title76/Chapter7/76-7-P3.html (last visited Mar. 1, 2020) (stating Utah law that restricts abortion); *Kentucky Abortion Law*, FINDLAW, https://statelaws.findlaw.com/kentucky-law/kentucky-abortion-laws.html (last visited Mar. 1, 2020) (listing Kentucky laws that have restricted abortions); Timothy Williams & Alan Blinder, *Lawmakers Vote to Effectively Ban Abortion in Alabama*, N.Y. TIMES (May 14, 2019), https://www.nytimes.com/2019/05/14/us/abortion-law-alabama.html (explaining Alabama's Human Life Protection Act and its near total ban on abortion); *see also* Abortion Control Act, N.D CENT. CODE ANN. § 14-02.1 (2019), https://www.legis.nd.gov/cencode/t14c02-1.pdf (describing North Dakota law that restricts abortion); Chris Boyette & Susannah Cullinane, *Iowa Governor Says State Will Not Appeal Ruling Striking Down 'Fetal Heartbeat' Abortion Law*, CNN, https://www.cnn.com/2019/02/19/us/iowa-fetal-heartbeat-abortion/index.html (last updated Feb. 19, 2019, 4:23 PM) (discussing Iowa governor will not appeal federal court's decision that struck "Fetal Heartbeat law" unconstitutional); Niraj Chokshi & Derrick Bryson Taylor, *Federal Judge Blocks Arkansas Anti-Abortion Laws for Now*, N.Y. TIMES (July 24, 2019), https://www.nytimes.com/2019/07/24/us/abortion-arkansas-laws.html (asserting Arkansas federal court judge blocked anti-abortion law that banned abortions after eighteen weeks); Mitch Smith, *Missouri's Eight-Week Abortion Ban Is Blocked by Federal Judge*, N.Y. TIMES (Aug. 27, 2019), https://www.nytimes.com/2019/08/27/us/missouri-abortion-law.html (stating that Missouri federal judge overturned law that banned abortion after eight weeks as unconstitutional); Jonathan Stempel, *U.S. Judge Blocks Ohio 'Heartbeat' Law to End Most Abortions*, REUTERS (July 3, 2019, 3:27 PM), https://www.reuters.com/article/us-usa-abortion-ohio/u-s-judge-blocks-ohio-heartbeat-law-to-end-most-abortions-idUSKCN1TY2PK?feedType=RSS& (describing how Ohio federal judge overturned restrictive abortion law, declaring it unconstitutional); Mark Joseph Stern, *Federal Court Says North Dakota Can't Force Doctors to Promote the "Abortion Reversal" Myth*, SLATE (Sept. 10, 2019, 2:54 PM), https://slate.com/news-and-politics/2019/09/north-dakota-judge-blocks-abortion-reversal-law.html (concluding that federal judge said doctors cannot lie about ability to reverse prescription abortion). The ability to reverse prescription abortion is also known as reverse abortion. *See* Stern, *supra* note 24; Mihir Zaveri, *U.S. Judge Temporarily Blocks Georgia Abortion Law*, N.Y. TIMES (Oct. 1, 2019), https://www.nytimes.com/2019/10/01/us/Georgia-abortion-law.html (explaining Georgia judge ruled anti-abortion law banning abortion after heartbeat detected unconstitutional, to twenty-four weeks).

[25] *See supra* note 24 and accompanying text.

[26] *See* Stempel, *supra* note 24 (noting Ohio federal judge overturned abortion law but conservative Supreme Court majority likely overturn *Roe*).

after a fetal heartbeat is detected—which can occur as early as six weeks into pregnancy.[27] These laws make it extremely difficult for women to get abortions and severely restrict their access to medical contraceptive options.[28] Since eleven states adopted these restrictive bills—commonly referred to as "heartbeat bills"—women in over one-fifth of the states in the United States are extremely limited in how they may exercise their fundamental right to choose an abortion..[29]

If a state has the authority to restrict a woman's right to choose, a state also has the power to affirmatively protect that right.[30] In New York, for example, the state legislature preemptively passed the Reproductive Health Act to protect a woman's right to assert control over her reproductive health at the state level.[31] Lawmakers suggested passing the Reproductive Health Act to address the gap in New York law, which did not ensure

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[27] *See* Reis Thebault, *GOP Governor Signs Law That Bans Abortion Before Some Women Even Know They're Pregnant*, WASH. POST (Mar. 22, 2019, 9:55 AM), https://www.washingtonpost.com/health/2019/03/22/mississippi-fetal-heartbeat-law-bans-abortions-after-weeks/ (defining fetal heartbeat for purposes of abortion). "The bill . . . bans abortions after a doctor can detect a fetal heartbeat during an ultrasound, unless the mother's health is at extreme risk. Heartbeats can be found just six weeks into pregnancy — before some women even know they are pregnant." *Id.*

[28] *See id.* (describing difficulties restrictive bans on abortion would create for women).

[29] *See id.* (listing states that passed fetal heartbeat bills within last year); *What if Roe Fell?*, CTR. FOR REPROD. RTS., https://reproductiverights.org/what-if-roe-fell (last visited Apr. 11, 2020) (mapping states that would uphold women's right to choose if *Roe* was overturned) (defining fetal heartbeat bills and listing states that passed these laws).

> Between January 1, 2019, and November 15, 2019, eighteen states have enacted forty-six laws that prohibit or restrict abortion. Nine states enacted unconstitutional previability bans in 2019, including Alabama's total ban; the six-week bans enacted in Georgia, Kentucky, Louisiana, Mississippi, and Ohio; Missouri's eight-week ban; and the eighteen-week bans enacted in Arkansas and Utah. On the other hand, states such as Illinois, Maine, Nevada, New York, Rhode Island, and Vermont have enacted laws that create a state right to abortion.

What if Roe Fell?, *supra* note 29. This post suggests that in twenty-six states the right to abortion would not only be legally revoked, but criminalized once again if *Roe* fell. *What if Roe Fell?*, *supra* note 29. These states are considered "hostile" because they already passed legislation that would severely limit the right to an abortion, whether or not the law is currently enforceable. *What if Roe Fell?*, *supra* note 29.

[30] *See* N.Y. PUB. HEALTH LAW § 2599-aa (Consol. 2019) (protecting women's right to choose abortion by passing Reproductive Health Act in New York).

[31] *See id.* (defining New York's Reproductive Health Act); *see also* Katharine Bodde, *Legislative Memo: Reproductive Health Act*, N.Y. C.L. UNION, https://www.nyclu.org/en/legislation/legislative-memo-reproductive-health-act (last updated Jan. 23, 2019) (summarizing Reproductive Health Act and reasoning behind it); *Governor Cuomo Signs Legislation Protecting Women's Reproductive Rights*, N.Y. ST. GOVERNOR ANDREW M. CUOMO (Jan. 22, 2019), https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-protecting-womens-reproductive-rights (promoting Governor Cuomo's support and signing of Reproductive Health Act which codified *Roe*).

that health care providers would give the best health advice they could—potentially because there was still a risk they could be criminally prosecuted for giving abortion advice.[32]

III. HISTORY

A. History of Right to Abortion

Throughout history—as early as ancient Rome—various cultures utilized different abortion methods to prevent unwanted pregnancies.[33] It was not until the early nineteenth century, however, that morality and legality issues arose regarding abortion and states began to pass some form of restrictive abortion law.[34] Every state enacted laws that criminalized abortion and focused heavily on shutting down the facilities that performed such procedures.[35] As a result of the criminalization of abortion, a woman

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[32] *See* Bodde, *supra* note 31 (describing need to codify *Roe* in state law to protect women's rights and physicians); Bodde articulates that:

> Although rare . . . a fear of criminal prosecution offer deters health care providers in New York from offering medically necessary abortion care . . . [w]hen a doctor in New York is reluctant, or unwilling, to provide abortion care in these circumstances, a woman may be forced to travel to another state to get the care she needs – and if she can't afford to travel, she must forego care altogether.

Bodde, *supra* note 31; *see also* N.Y. PENAL LAW §125.05 (granting right to abortion up until twenty-four weeks of pregnancy).

[33] *See* Roe v. Wade, 410 U.S. 113, 130-32 (1973) (establishing origin of abortion rituals throughout history). In *Roe*, many sources are cited to establish the credibility and history of abortion, including articles from medical journals like, "*A History of Medicine*" by Arturo Castiglioni, and "*The Hippocratic Oath*" by Ludwig Edelstein. *See id.* at 130-32. *Roe* also cites articles and sources that reference the legal history of abortion, including "*Medical Abortion Practices in the United States, in Abortion and the Law*" by Kenneth R. Niswander, "*Justifiable Abortion-Medical and Legal Foundations, (pt. 2)*" by Eugene Quay, and "*The Sanctity of Life and the Criminal Law*" by Glanville L. Williams. *Id.* Finally, *Roe* cites philosophical articles that focus on the abortion morality argument that has plagued medical professionals, conservatives and lawmakers throughout history: "*The Genealogy of Gynaecology*" by James V. Ricci, "*Abortion*" by Lawerence Lader, and "*An Almost Absolute Value in History, in The Morality of Abortion*" by John T. Noonan, Jr. *Id.*

[34] *See id.* at 129, 132-36, 143 ("Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century."); GEORGE F. COLE & STANISLAW J. FRANKOWSKI, ABORTION AND PROTECTION OF THE HUMAN FETUS: LEGAL PROBLEMS IN A CROSS-CULTURAL PERSPECTIVE 20 (Kluwer Academic Publishers, 1987) ("By 1900 every state in the Union had an anti-abortion prohibition.")

[35] *See* Lynn M. Paltrow, *Roe v Wade and the New Jane Crow: Reproductive Rights in the Age of Mass Incarceration*, 103 AM. J. OF PUB. HEALTH 17, 17-21 (2013) (describing legal consequences of getting abortion through historical lens).

was held criminally responsible for manslaughter after receiving an abortion in 1971—two years before *Roe v. Wade*.[36] However, as women's rights to reproductive freedom diminished throughout the nineteenth and twentieth centuries, other fundamental rights granted under the Fourteenth Amendment expanded.[37]

The origin of an individual's right to choose can be found in the Supreme Court's Fourteenth Amendment jurisprudence, where the Court set apart the right to abortion as a fundamental right that warranted protection.[38] The Court in *Roe* held that some liberties are so important that they are deemed "fundamental rights", and the government cannot infringe upon them unless a strict scrutiny analysis is met; that is, the government's action must be necessary to achieve a compelling purpose and there is no less restrictive alternative that could accomplish those same goals.[39] Over the past sixty years, the Supreme Court analyzed the nuances of the fundamental right to choose by assessing whether this right originated from the Equal

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[36] *See* Paltrow, *supra* note 35, at 17 ("In 1971, before *Roe v Wade* [*sic*] was decided, Shirley Wheeler was arrested and prosecuted for the crime of manslaughter after hospital staff in Florida discovered her illegal abortion and reported her to the police. After . . . trial she was convicted of manslaughter . . . [with] possible penalty of 20 years' imprisonment."); Jon Nordheimer, *She's Fighting Conviction For Aborting Her Child*, N.Y. TIMES (Dec. 4, 1971), https://www.nytimes.com/1971/12/04/archives/shes-fighting-conviction-for-aborting-her-child.html (describing story of Shirley Wheeler, who was convicted of manslaughter after aborting child). Wheeler provided a heartbreaking statement regarding her conviction: "I'm a convicted felon now because I chose not to bring another child into this world that I couldn't afford to take care of . . . I was afraid of having an abortion, but I was even more afraid of having another baby." Nordheimer, *supra* note 36.

[37] *See Roe v. Wade: Its History and Impact*, *supra* note 5, at 1-3 (describing development of women's rights prior to abortion).

[38] See *Roe*, 410 U.S. at 122-23, 152-53 (establishing right to choose as fundamental right). The Court articulated:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Id. at 153. Also, the Court stated that the "[f]undamental right of single women and married persons to choose where to have children is protected by the Ninth Amendment, through the Fourteenth Amendment." *Id.* at 122.

[39] *See id.* at 155 ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.'") The Supreme Court determined that there are several questions one should ask to determine if a right is fundamental and whether it has been violated: (1) is there a fundamental right, constitutionally speaking (either codified or incorporated); (2) has the right been infringed or violated; (3) is there a compelling government interest to sufficiently justify for the infringement?; (4) are the means undertaken sufficiently related to interest?; (5) finally, are these the least restrictive means to protect or further the government's interest? *Id.* at 153-56.

Protection Clause or the Due Process Clause under the Fourteenth Amendment.[40] In *Meyer v. Nebraska*, the Court held that the unenumerated fundamental rights provided under the Fourteenth Amendment included the liberty interests of a family, such as marriage and child rearing.[41] Subsequently, the Supreme Court further expanded upon the protections afforded under the Fourteenth Amendment, specifically regarding child rearing.[42] The Supreme Court subsequently held in *Skinner v. Oklahoma* that it was unconstitutional to force an individual twice convicted of a felony to be sterilized because "marriage and procreation are fundamental to the very existence and survival of the race."[43] By the mid-nineteenth century, it became evident that the Court recognized the right to procreate under the Constitution.[44]

The Court first analyzed the use of the strict scrutiny standard for contraceptive rights in *Griswold v. Connecticut*.[45] In *Griswold*, the Court held that, because individuals possess a constitutional right to marital privacy granted to them under the "penumbra of the Bill of Rights[,]" state statutes cannot prohibit marital couples from obtaining contraceptives.[46] In *Eisenstadt v. Baird*, the Court furthered this point and stated that "[i]f the right to privacy means anything, it is the right of the individual, married or

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[40] *See id.* at 156-59 (explaining fundamental right hinged on concepts of personhood as understood in Constitution).

[41] *See* Meyer v. Nebraska, 262 U.S. 390, 398-99, 401 (1923) (stating that parents have right to raise their children as they see fit).

[42] *See* Skinner v. Oklahoma, 316 U.S. 535, 541(1965) (determining right to procreate is fundamental and government-imposed involuntary sterilization must meet strict scrutiny). The Supreme Court in *Skinner v. Oklahoma* overruled the holding of *Buck v. Bell* and recognized that there was a fundamental right to procreate under the Equal Protection Clause of the Fourteenth Amendment. at 538. Given the permanent and irreversible nature of sterilization, the Supreme Court reasoned that the government should protect, and not restrict, this fundamental right. *Id.* at 538. *But see* Buck v. Bell, 274 U.S. 200, 207-08 (1927) (holding "those who are manifestly unfit" not allowed to reproduce as it "is better for all the world").

[43] *See Skinner*, 316 U.S. at 538, 541 (outlining Court's reasoning behind holding for establishing fundamental right).

[44] *See id.* at 538 (demonstrating Court's interest in protecting procreation rights).

[45] *See* Griswold v. Connecticut, 381 U.S. 479, 486 (1965) ("We deal with a right of privacy older than the Bill of Rights . . . Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, no causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.") The sanctity and privacy between married couples and their right to choose to have a baby initiated the conversation regarding the fundamental right to control one's reproductive rights. *See id.* at 486.

[46] *See id.* at 484-85, 99 (holding that physicians can prescribe marital couples contraceptives to prevent pregnancy). In this case, the Supreme Court relied on the unenumerated marital right to privacy, which originated from the First Amendment. *Id.* Since *Griswold*, courts have used an interpretive approach which postulates that an individual has the right to make his or her own decisions, free from influence or control by the government. *Id.*

single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[47] The Court consequently adopted reproductive autonomy for all individuals, regardless of their marital status, and established a fundamental right protected under the Equal Protection Clause of the Fourteenth Amendment.[48] Despite the Court's commitment to protecting a woman's right to prevent unwanted pregnancy and society's advancements in science and medicine, the Court still had not addressed whether an abortion was considered a constitutionally protected fundamental right at the time.[49]

Roe v. Wade is the first, and perhaps most influential, case in the history of women's reproductive right to choose.[50] The Court evaluated this issue of first impression after a pregnant woman challenged a Texas state criminal abortion statute that only permitted abortions when the continuation of the pregnancy would place the mother's life in jeopardy.[51] Undergoing a strict scrutiny analysis, the government argued there were two state interests met by prohibiting abortions: (1) a health interest to protect the mother's safety after the first trimester ends, and (2) an interest to protect the viability of the unborn fetus.[52] After determining that a woman's decision to terminate constitutes a fundamental right to privacy protected under the Fourteenth and Ninth Amendments, the Court declared that any criminal abortion statute that permitted the termination of a pregnancy only when the mother's life is in danger, was unconstitutional.[53] *Roe*

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[47] *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (granting unmarried individuals right to possess contraceptives under same rationale as married individuals). The Supreme Court dismissed the government's assertion that it was protecting a legitimate interest in preventing premarital sex. *Id.* Instead, the Court articulated that individuals, married or otherwise, should be subjected to the same strict standard. *Id.*

[48] *See id.* at 453 (stating reproductive autonomy is fundamental right). "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.*

[49] *See id.* (recognizing individual right to choose); Carey v. Population Servs. Int'l, 431 U.S. 678, 685-86 (1977) (announcing right to prevent procreation denotes right to use contraception). "[I]n a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or to prevent conception are among the most private and sensitive." *Carey*, 431 U.S. at 686.

[50] *See* Roe v. Wade, 410 U.S. 113, 152-54 (1973) (granting women right to choose and declaring right to abortion pre-viability fundamental right). *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 887 (Rachel E. Barkow, et al. eds., 5th ed. 2017) (establishing background and emphasizing *Roe*'s importance).

[51] *See Roe*, 410 U.S. at 117-22 (summarizing facts of case).

[52] *See id.* at 155 (articulating government's interests tested using strict scrutiny analysis under compelling interest test).

[53] *See id.* at 152-54 (establishing women's right to choose if she wishes to terminate pregnancy).

v. Wade opened the door for women's fundamental right to choose—a right the Court has since evaluated and expanded upon over the last forty-five years.[54]

The Supreme Court attempted to balance the rights protected under *Roe v. Wade* with the states' interests.[55] In 1973, only one year after *Roe v. Wade*, the Court was tasked with determining whether laws that restrict access to abortion were constitutional in *Doe v. Bolton*.[56] This issue was distinct from *Roe v. Wade* because the *Roe* Court only evaluated the constitutionality of criminal statutes that punished those seeking abortions.[57] In 1976, the Court analyzed another nuance of the reproductive right to choose in *Planned Parenthood of Central Missouri v. Danforth*.[58] In this case, the Court declared a Missouri state statute that required individuals to obtain parental or spousal consent for abortions unconstitutional.[59] Pro-life activist groups continuously brought abortion-restriction cases to the Supreme Court for the next fifteen years, until the seminal case of *Planned*

> [T]he Constitution does not explicitly mention any right to privacy, [and] the right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Id. at 153-54. The Supreme Court, however, held that this fundamental right was not absolute and subjected to limits, largely because there was a valid state interest in protecting the life of the fetus and mother. *Id.* For example, a state must assert a compelling interest in protecting a potential life and that an abortion conducted after the first trimester would increase the danger for the mother's safety. *Id.* at 154. Additionally, if a physician determined that a fetus could survive outside of the womb during the pregnancy term, a state had the authority to limit the woman's right to choose. *Id.* at 163-64. Subsequent case law, however, resolved this issue by giving women more time to decide whether to abort during the duration of her pregnancy. *See* Planned Parenthood v. Casey, 505 U.S. 833, 844, 846 (1992) (addressing issues that arose following legalization of abortion and further defining right to choose).

[54] *See Casey*, 505 U.S. at 846 (discussing, upholding, and refining rights granted in *Roe*); *see also* Amy S. Cleghorn, *Justice Harry A. Blackmun: A Retrospective Consideration of the Justice's Role in the Emancipation of Women*, 25 SETON HALL L. REV. 1176, 1176 (1995) (reviewing Justice Blackmun's decisions that advocated women's rights throughout his tenure on Supreme Court).

[55] *See* Cleghorn, *supra* note 54, at 1176 (examining *Roe* and subsequent decisions to determine what state's interests may be upheld).

[56] 410 U.S. 179, 186, 188-89 (1973) (narrowing scope of *Roe*).

[57] *See id.* at 186, 188-89 (holding policies created to restrict abortion violated right to choose and physicians' right to practice); *see also Roe*, 410 U.S. at 126 (recounting physician prosecuted for performing abortions, even though patient consented).

[58] 428 U.S. 52, 75 (1976) (narrowing and analyzing elements of *Roe*).

[59] *See id.* at 75 (holding spousal or parental-consent requirement for abortion is unconstitutional). "The fault with § 3(4) is that it imposes a special-consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and does so without a sufficient justification for the restriction." *Id.*

Parenthood of Southeastern Pennsylvania v. Casey; this case set forth the standard that courts still follow today for evaluating state abortion restrictions.[60] The Court in *Casey* upheld the central holding of *Roe v. Wade*, but overruled *Roe*'s trimester distinctions; instead, the Court used strict scrutiny to evaluate whether the state had a compelling interest to restrict abortion.[61] The Court created a new standard that considered whether the purpose or effect of the state abortion regulation imposed an undue burden on women seeking an abortion.[62] The Court defined "undue burden" as a "substantial obstacle in path of woman seeking abortion before fetus attains viability."[63] *Casey* refined and reaffirmed the essential holdings in *Roe v. Wade*—making it the primary case law that is still followed today.[64] Supreme Court jurisprudence since *Casey* relies on the basic holding of *Roe v. Wade*, and for the most part, the judicial-system culture in America favors preserving a woman's voice and right to choose.[65]

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[60] *See* Planned Parenthood v. Casey, 505 U.S. 833, 901 (1992) (stating essential holding in *Roe* should be affirmed). The *Casey* Court upheld and affirmed *Roe's* right to choose pre-viability. *Id.* However, in *Casey*, the states were also given the power to restrict pre-viability abortions to protect the health of the mother or the fetus. *Id.* Further, *Casey* also gave states the power to restrict post-viability abortions for maternal health reasons. *Id.* at 837; *see also* Webster v. Reprod. Health Servs., 492 U.S. 490, 521-22 (1989) (striking down law that required doctors to test fetal viability before any abortion). Three Supreme Court justices at that time said they would allow abortion restrictions if those restrictions had a rational basis. *Webster*, 492 U.S. at 520. Yet, even with that lower standard of scrutiny, these restrictions announced in *Webster* did not even pass the rational basis test. *Webster*, 492 U.S. at 520; Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 444 (1983) (declaring law that required women to receive all information before undergoing abortion unconstitutional**.** In *Akron v. Akron Center for Reproductive Health*, the Supreme Court declared an Ohio law unconstitutional because it required all doctors to perform abortions after the first trimester in a hospital, following a twenty-four-hour waiting period, and with parental consent for girls younger than fifteen. *Akron,* 462 U.S. at 434. The Supreme Court found that the undue burden the ordinance placed on women outweighed the state's interest. *Akron,* 462 U.S. at 434.

[61] *See Casey*, 505 U.S. at 897 ("In keeping with our rejection of the common-law understanding of a woman's role within the family, the Court held in *Danforth* that the Constitution does not permit a State to require a married woman to obtain her husband's consent before undergoing an abortion. The principles that guided the Court in *Danforth* should be our guides today.")

[62] *See id.* at 900-01 (establishing undue burden test as new standard for determining whether states can restrict abortions).

[63] *See id.* at 901 (defining when restriction becomes undue burden).

[64] *See id.* (holding women have right to choose pre-viability). The Court used a Due Process argument to evaluate these fundamental rights, as well as the privacy notions and personal autonomy used by the *Roe* Court. *Id.* at 874. The Court has not fully defined the term "undue burden," and consequently, the definition remains vague. *Id.*

[65] *See id.* at 901 (addressing and maintaining holding from *Roe*). *But see* Gonzales v. Carhart, 550 U.S. 124, 168 (2007) (upholding federal partial abortion ban). In 2007, after evaluating President Bush's *Partial Birth Abortion Ban Act of 2003*, which restricted certain late-term abortions, the Supreme Court upheld the Act as the first federal restriction placed on a particular abortion method since *Roe*. *Gonzales*, 550 U.S. at 167-68. In *Gonzales*, the Court imposed the first federal restriction on abortion and held a compelling government interest existed: protecting the

B. History of Right to Physician-Assisted Suicide

The origin of the right to physician-assisted suicide began with the Supreme Court's evaluation of the fundamental rights created under the Due Process Clause.[66] One such fundamental right is an individual's power to control their own medical care decisions.[67] The Supreme Court previously considered whether individuals possess the right to refuse life-saving medical treatment by balancing an individual's personal right against the state's interest in protecting their citizens.[68] In 1905, in *Jacobson v. Massachusetts*, the Court determined that a Massachusetts law requiring all of its citizens to get vaccinations was constitutional because there was a compelling state interest to preserve the health and safety of all of its citizens.[69] The question remained though: could individuals refuse medical treatment to the point of ending their life?[70]

In *Cruzan v. Director, Missouri Department of Health*, the Court held that a state may require a guardian to show, by clear and convincing evidence, that an incompetent person would have wanted to discontinue lifesaving nutrition, hydration, or other medical treatment to terminate their life.[71] The strict scrutiny test used balanced the patient's right to terminate

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safety of the mother was more important than the right to choose a potentially life-threatening abortion method. *Gonzales*, 550 U.S. at 167-68; *President Bush Signs Partial Birth Abortion Ban Act of 2003*, THE WHITE HOUSE PRESIDENT GEORGE W. BUSH (Nov. 5, 2003, 1:40 PM), https://georgewbush-whitehouse.archives.gov/news/releases/2003/11/20031105-1.html (explaining bill that banned partial-birth abortion).

[66] *See* U.S. CONST. amend. V (stating individual's right to privacy defined in Constitution); U.S. CONST. amend. XVI (identifying where fundamental rights to Due Process and Equal Protection are enumerated in Constitution).

[67] *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 281 (1990) ("It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment.") The dissent also further emphasized that the Court explicitly states that the right to decide one's own medical decisions is fundamental right and is subjected to strict scrutiny. *Id.* at 302-04 (1990) (J. Brennan, J., dissenting); Jacobson v. Massachusetts, 197 U.S. 11, 23-24 (1905) (questioning whether compelling state interest defeats individual's right to refuse medical treatment).

[68] *See Jacobson*, 197 U.S. at 35 (deciding issue by balancing individual's personal right against state's interest in protecting their citizens). The Court held that an individual's right to refuse medical treatment, specifically vaccines, does not surpass the state's interest. *Id.*

[69] *See id.* at 35 (holding compelling state interest defeats individual's right to choose medical treatment).

[70] *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 302-04 (1990) (explaining right to refuse medical treatment).

[71] *See id.* at 265-69 (outlining facts of case). The parents of a long-term comatose patient sought the Court's permission to terminate their daughter's life when the hospital refused to discontinue life-saving treatment without a court order. *Id.* at 267-68. The Court stated that the parents did not meet the requisite clear and convincing evidence standard. *Id.* The parents failed to provide any evidence that their comatose daughter wanted to discontinue treatment or made any

their life against the State's compelling interest to obtain the correct, and irreversible, judgment.[72] The Court then addressed the circumstances surrounding a competent person's decision to end their own life out of a need to end their own suffering.[73] In *Washington v. Glucksberg*, the Court determined that the right to physician-assisted suicide was not a fundamental right protected under the Constitution.[74] The Court stated that, because the Fourteenth Amendment did not create a constitutionally protected right to physician-assisted suicide, it also did not prohibit states from criminalizing people who aide others in committing suicide.[75] The Court determined that the State's interest in protecting the respect for human life and preventing euthanasia did pass the strict scrutiny standard, and therefore, could not be considered a constitutionally protected fundamental right.[76] Essentially, although there is no federal protection of this right, each State can decide whether to extend the right to physician-assisted suicide to their citizens.[77] After *Glucksberg*, many states passed laws that allowed their terminally ill citizens the right to choose to end their suffering via physician-assisted suicide.[78]

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indication before the accident that suggested she would not want to continue the life-saving measures. *Id.* at 268-69.

[72] *See id.* at 273 (discussing tension between patient's due process clause interest and society's broader interest in protecting life).

> On balance, the right to self-determination ordinarily outweighs any countervailing state interests, and competent persons generally are permitted to refuse medical treatment, even at the risk of death. Most of the cases that have held otherwise, unless they involved the interest in protecting innocent third parties, have concerned the patient's competency to make a rational and considered choice.

Id. at 353-54 (*quoting In re* Conroy, 486 A.2d 1209, 1225 (1985)).

[73] *See* Washington v. Glucksberg, 521 U.S. 702, 730 (1997) (addressing right to physician-assisted suicide).

[74] *See id.* at 728 (holding no constitutional fundamental right to physician-assisted suicide). "That being the case, our decisions lead us to conclude that the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause." *Id.* at 728.

[75] *See id.* at 716 (internal citations omitted) ("The interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another.")

[76] *See id.* at 728 (stating Court's determination that right to physician-assisted suicide is not fundament right). The Court noted that, because physician-assisted suicide and euthanasia are closely linked, states may reasonably pass legislation that bans physician-assisted suicide to ensure that there is no risk of abuse. *Id.*

[77] *See id.* at 728 ("That being the case, our decisions lead us to conclude that the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Constitution also requires, however, that Washington's assisted-suicide ban be rationally related to legitimate government interests.")

[78] *See* California End of Life Option Act of 2015, CAL HEALTH & SAFETY CODE DIV. 1, Pt. 1.85 (West 2020) (codifying physician-assisted suicide in California); End of Life Options Act of

III. ANALYSIS

A. Constitutional Support for Right to Choose

If the Supreme Court overturns *Roe v. Wade*, there is a chance that many rights derived from the *Roe* decision, and its subsequent case law, will be revoked; however, federal law might uphold these rights under the protections and privileges enumerated in the Constitution.[79] The Supreme Court interpreted that all individuals are entitled fundamental privacy rights established by the Ninth and Fourteenth Amendments of the Constitution.[80] Case law established that the right to personal privacy includes decisions regarding one's marital relationship procreation, contraception, family rela-

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2016, COLO. REV. STAT. § 25-48-101–123 (2016) (West 2020) (codifying right to physician-assisted suicide in Colorado); District of Columbia Death with Dignity Act of 2016, D.C. CODE § 7-661.02 (2020) (codifying right to physician-assisted suicide in Washington D.C.); Our Care, Our Choice Act, HAW. REV. STAT. § 327L-2 (2020) (codifying right to physician-assisted suicide in Hawaii); Maine Death with Dignity Act of 2019, ME. REV. STAT. ANN. tit. 22 § 2410 (West 2019) (codifying right to physician-assisted suicide in Maine); New Jersey Dignity In Dying Bill Of Rights Act of 2019, N.J. STAT. ANN. § 26:16-4 (West 2020) (codifying right to physician-assisted suicide in New Jersey); OR. REV. STAT. ANN. § 127.805 (West 2020) (codifying right to physician-assisted suicide in Oregon); Patient Choice and Control at End of Life Act of 2013, VT. STAT. ANN. tit. 18 § 5283 (West 2020) (codifying right to physician-assisted suicide in Vermont); WASH. REV. CODE ANN. § 70.245.020 (West 2020) (codifying right to physician-assisted suicide in Washington); Compassion in Dying v. Washington, 850 F. Supp. 1454, 1455 (W.D. Wash. 1994), *rev'd* 49 F.3d 586 (9th Circuit 1995), *reh'g en banc*, 79 F.3d 790 (9th Circuit) (describing arguments both in support and against right to physician-assisted suicide); *see also See* Jonathan R. MacBride, Comment, *A Death Without Dignity: How the Lower Courts Have Refused to Recognize that the Right of Privacy and the Fourteenth Amendment Liberty Interest Protect an Individual's Choice of Physician Assisted Suicide*, 68 TEMP. L. REV. 755, 792 (1995) (analyzing right to privacy that courts used to grant individual's right to physician-assisted suicide); Christopher N. Manning, Note, *Live And Let Die?: Physician-Assisted Suicide And The Right To Die*, 9 HARV. J. L. & TECH. 513, 520 (1996) (describing codification of physician-assisted suicide statutes).

[79] *See* U.S. CONST. amend. IX (granting individuals rights that are not specifically enumerated in Bill of Rights); U.S. CONST. amend. XIV (granting individuals rights and freedoms to control their bodies as unenumerated rights).

[80] *See* U.S. CONST. amend. IV (granting individuals freedom from arbitrary government intrusion); U.S. CONST. amend. IX (enumerating federal amendment and constitutional rights to states); U.S. CONST. amend. XIV (stating privacy rights are unenumerated fundamental rights); *see also* Whisenhunt v. Spradlin**,** 464 U.S. 965, 971 (1983) (Brennan, J., dissenting) (stating fundamental rights include reproductive rights). "Without identifying the precise contours of this right, we have recognized that it includes a broad range of private choices involving family life and personal autonomy." *Whisenhunt*, 464 U.S. at 971. "These and other cases reflect the view that constitutionally protected liberty includes freedom from governmental disclosure or interference with certain kinds of intensely personal decisions." *Whisenhunt*, 464 U.S. at 971; Roe v. Farwell, 999 F. Supp. 174, 196 (D. Mass. 1998) (addressing importance of protecting privacy rights).

tionships, child rearing, and education.[81] So long as these privacy rights are upheld in the court system, it will be difficult to overturn rights that protect a woman's reproductive choice.[82] Therefore, Congress could protect women's rights to choose by codifying laws that fully define and enumerate the protections previously upheld by the Court to avoid the potentially catastrophic results of overturning *Roe*.[83]

The Due Process Clause protects the fundamental rights granted under the Fourteenth Amendment of the Constitution—such as an individual's right to privacy—which inferentially protects a women's right to choose.[84] The current interpretation of the Due Process Clause is broad enough to encompass the right for a women to make decisions concerning her own reproductive affairs, even in the absence of *Roe v. Wade*.[85] This interpretation is based on balancing the compelling government's interest in protecting the fetal life versus the individual woman's right to choose.[86] The Due Process Clause has been used in a myriad of cases to establish the

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[81] *See Farwell*, 999 F. Supp. at 196 (evaluating nuances in right to privacy); *Whisenhunt*, 464 U.S. at 971 (Brennan, J., dissenting) ("Without identifying the precise contours of this right [to privacy], we have recognized that it includes a broad range of private choices involving family life and personal autonomy.") "The intimate, consensual, and private relationship between petitioners involved both the 'interest in avoiding disclosure of personal matters, and . . . the interest in independence in making certain kinds of important decisions,' that our cases have recognized as fundamental." *Whisenhunt*, 464 U.S. at 971 (quoting Whalen v. Roe, 429 U.S. 589, 599-600 (1977)).

[82] *See* sources cited *supra* note 81 and accompanying text (highlighting Constitution may still protect women's rights even if *Roe* fell); *see also What if Roe Fell?*, *supra* note 29 (noting states have passed legislation protecting abortion rights to combat possibility of *Roe* overturning).

[83] *See* U.S. CONST. amend. IV (codifying right to privacy); U.S. CONST. amend. XIV (codifying right to Equal Protection and Due Process); *see also*, *e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 871 (1992) (refining holding from *Roe*); Roe v. Wade, 410 U.S. 113, 166-67 (1973) (establishing women's right to privacy and control over her reproductive rights); Int'l Paper Co. v. Jay, 736 F. Supp. 359, 363 (D. Me. 1990) (evaluating how to balance validity of state law against individual's fundamental right).

[84] *See* U.S. CONST. amend. XIV (establishing individual's fundamental right to due process and to privacy); *Fundamental Right*, LEGAL INFO. INST. https://www.law.cornell.edu/wex/fundamental_right (last visited Apr. 11, 2020) (defining fundamental rights in context of U.S. Constitution). If a right is safeguarded under due process, the constitutional issue lies in whether the government's interference is justified by a sufficient purpose. *Fundamental Right*, *supra* note 84.

[85] *See Casey*, 505 U.S. at 871 (using strict scrutiny standard and undue burden test to evaluate fundamental right of abortion); *Roe*, 410 U.S. at 154 (holding fundamental privacy right encompasses abortion decision); *see also Int'l Paper Co.*, 736 F. Supp. at 363 (discussing strict scrutiny standard and need for compelling state interest, especially in abortion cases). "Courts analyze with heightened scrutiny legislation that contains a suspect classification or that impinges on fundamental rights, requiring that the legislation provide the least restrictive means needed to support a compelling state interest." *Int'l Paper Co.*, 736 F. Supp. at 363.

[86] *See Casey*, 505 U.S. at 844 (discussing undue burden and strict scrutiny standard applied by modern courts); *Roe*, 410 U.S. at 163-64 (emphasizing scrutiny standard that *Roe* was evaluated under).

right to privacy, beyond just reproductive case law, which demonstrates the value courts have placed on protecting an individual's right to privacy—a core tenant of American legal rights.[87] Courts may be able to uphold fundamental rights recognized under the Fourteenth Amendment Due Process Clause on a case-by-case basis.[88] In *Planned Parenthood v. Casey*, the Court held that prior to fetal viability, the state may regulate abortions so long as those regulations are not a substantial obstacle that place an undue burden on a woman's decision whether to abort.[89] If states have the ability to regulate abortions prior to fetal viability, states should also have the power to pass legislation that protects the right to abortion at any time.[90] The state's interest in protecting these rights would meet the strict scrutiny standard of review and would not burden any of the affected parties.[91] The *Casey* Court emphasized the Due Process Clause's importance in not only establishing the right to choose under the Fourteenth Amendment but also preventing states from infringing on individuals' privacy and personal autonomy.[92] Courts and lawmakers could use this argument to support future legislation that protects abortion rights from potential critics.[93] *Hodgson v. Minnesota* further expanded on the holding in *Casey* by stating that a compelling state interest does not overrule the burden it would place on the woman's right granted under the Fourteenth Amendment Due Process

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[87] *See generally* Terry v. Ohio, 392 U.S. 1, 38 (1968) (upholding and refining right to privacy); Katz v. United States, 389 U.S. 347, 350 (1967) (establishing importance of individual right to privacy from governmental intrusion); Griswold v. Connecticut, 381 U.S. 479, 483-86 (1965) (establishing right to privacy as fundamental right in United States case law); Mapp v. Ohio, 367 U.S. 643, 655-57 (1961) (determining right to privacy).

[88] *See Roe*, 410 U.S. at 122-23 (stating abortion is fundamental right); *see also Casey*, 505 U.S. at 844 (affirming *Roe*'s holding).

[89] *See Roe*, 410 U.S. at 123 (establishing original standard that allowed women to get abortions); *see also Casey*, 505 U.S. at 844 (distinguishing itself from *Roe* by eliminating strict scrutiny test and establishing undue burden test). The new standard asks whether a state abortion regulation has the purpose or effect of imposing an "undue burden" on the woman, which is defined as a "*substantial obstacle* in the path of a woman seeking an abortion *before* the fetus attains *viability*." *Casey*, 505 U.S. at 878 (emphasis added).

[90] *See What if Roe Fell?*, *supra* note 29 (mapping states that would uphold women's right to choose if *Roe* was overturned).

[91] *See id.* (discussing burden of restrictive laws on women's reproductive rights); *see also Casey*, 505 U.S. at 846 (setting standard of review for abortion cases).

[92] *See Casey*, 505 U.S. at 846 (stating *Roe's* essential holding should be retained and reaffirmed). The *Casey* Court retained the following holdings from *Roe*: (1) the right to choose previability; (2) states' power to restrict abortions after viability for health reasons; and (3) states' power to restrict abortions if a legitimate interest exists from the outset to protect health of mother and fetus. *Id.*

[93] *See id.* at 846 (discussing *Casey* argument used by Court to protect right to choose)

Clause.[94] Therefore, courts may consider using the *Hodgson* holding to protect a woman's superior interest to that of a burdensome state law under the Due Process Clause.[95]

Furthermore, future lawmakers can preserve women's right to choose by supporting the Equal Protection argument.[96] As members of a protected class of citizens, women are granted additional protections under the Equal Protection Clause if rights that are specific to them are denied or violated.[97] If a law denies a right to everyone, then due process would be the best grounds for analysis; but, if a law denies a right to *some*, while allowing it to others, the discrimination can be challenged as offending equal protection.[98] The Equal Protection Clause should continue to protect women's rights as members of a protected class of citizens, even if *Roe* is overturned.[99] Additionally, if women cannot maintain their status as protected citizens under the Equal Protection Clause, it could potentially been viewed as lawmakers and judges favoring men's reproductive rights over women's.[100] The courts have discretion over the compelling interest test between males' and females' reproductive rights: a man controlling what a woman does to her body versus a woman controlling choices regarding her

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[94] *See* Hodgson v. Minnesota, 497 U.S. 417, 461-62 (1990) (Marshall, J., concurring in part and dissenting in part) (distinguishing itself from *Roe* by stating burden on women is more significant than state's interest).

[95] *See id.* at 461-62 (discussing balance of state's interests versus women's rights).

[96] *See* U.S. CONST. amend. XIV (stating Equal Protection Clause of Fourteenth Amendment).

[97] *See* Brian T. Fitzpatrick & Theodore M. Shaw, *The Equal Protection Clause*, THE NAT'L CONST. CENTER, https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiv/clauses/702 (last visited Apr. 11, 2020) ("[T]he Court has also held that gender, immigration status, and wedlock status at birth qualify as suspect classifications."); Editors of Encyc. Britannica, *Equal Protection*, ENCYCLOPÆDIA BRITTANNICA https://www.britannica.com/topic/equal-protection (last visited Apr. 11, 2020) (outlining history of Equal Protection Clause of Fourteenth Amendment).

[98] *See Equal Protection*, *supra* note 101 ("Equal protection, in United States law, the constitutional guarantee that no person or group will be denied the protection under the law that is enjoyed by similar persons or groups. In other words, persons similarly situated must be similarly treated."); Fitzpatrick & Shaw, *supra* note 97 (stating laws that potentially violate Equal Protection are not evaluated under rational-basis test). If the right to choose is protected under equal protection, the issue becomes whether the government's discrimination as to who can exercise the right is justified by a sufficient purpose. *See* Fitzpatrick & Shaw, *supra* note 97

[99] *See* Craig v. Boren, 429 U.S. 190, 218 (1976) (raising standard of scrutiny for sex-based discrimination under Equal Protection to intermediate scrutiny); Reed v. Reed, 404 U.S. 71, 76 (1971) (establishing first time Equal Protection Clause applies to women, specifically regarding sex-based discrimination). "To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment." *Reed*, 404 U.S. at 76.

[100] *See* Fitzpatrick & Shaw, *supra* note 97 (discussing nuances of equal protection); *see also* sources cited and accompanying text *supra* note 99.

own body.[101] Evaluating the reproductive interests of both genders clearly demonstrates that a woman's interest exceeds the standard of review and should be protected under the Equal Protection Clause.[102] The power to control reproductive decisions for one's own body is a right that should be protected for all citizens, not just for citizens of a certain gender.[103]

B. Supporting the Right to Choose Using the Right to Physician-Assisted Suicide

Other liberal states may consider passing laws that keep a woman's right to choose.[104] Some of these states, like Massachusetts, have since passed laws that grant individual's the right to end their own lives—such rights may be recognized as parallel to the right to choose because of the power to terminate life in their own body.[105] The right to physician-assisted suicide is not a fundamental right under the current case law, but the right to choose is a fundamental right.[106] Given its heightened status as a fundamental right, states should feel more comfortable granting their citizens the right to choose, especially if legislators utilize the arguments that

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[101] *See* sources cited and accompanying text *supra* note 99.

[102] *See* sources cited and accompanying text *supra* note 99. Under the intermediate standard of review today, the courts would evaluate whether the woman's reproductive interest would exceed that of a man's interest that essentially restricts that right. *See* sources cited and accompanying text *supra* note 99. The intermediate scrutiny standard does not have as high of a standard as strict scrutiny, which is the standard *Roe* and other abortion cases are analyzed under. *See* sources cited and accompanying text *supra* note 99. Therefore, courts today will likely find that a woman's interest meets the intermediate scrutiny standard; whereas, the restrictive state law that protects a man's rights will not meet such standard. *See* sources cited and accompanying text *supra* note 99; *see also* Roe v. Wade 410 U.S. 113, 154 (1973) (upholding fundamental right to privacy for women's healthcare decisions).

[103] *See Roe*, 410 U.S. at 154 (promoting and protecting reproductive interests of women).

[104] *See What if Roe Fell?*, *supra* note 29 (showing that some states have already passed laws to protect right to abortion).

[105] *See* Washington v. Glucksberg, 521 U.S. 702, 720-22 (1997) (establishing case law that deemed physician-assisted suicide constitutional); *see also* Oregon Death with Dignity Act, OR. REV. STAT. ANN. § 127.805 (LexisNexis 2019) (codifying right to physician-assisted suicide in Oregon); Washington Death with Dignity Act of 2008, WASH. REV. CODE ANN. § 70.245.020 (LexisNexis 2020) (codifying right to physician-assisted suicide in Washington).

[106] *See Glucksberg*, 521 U.S. at 720-22 (describing constitutional question at issue). The Court in *Glucksberg* articulated that even though states are prohibited from making it illegal to assist another person in committing suicide, the Fourteenth Amendment does not create a constitutionally protected right to participate in physician-assisted suicide. *Id.* at 720-22. Therefore, that decision is left to the states. *Id.* The Court attempted to protect the state's interest in the protection of human life and the prevention of euthanasia. *Id.* at 722. Though it may be similar to denying medical treatment and the right to personal autonomy, physician-assisted suicide was historically never treated as such or even granted legal protection. *Id.*

helped pass the laws that granted the right to physician-assisted suicide.[107] If states are willing to pass laws that allow individuals to control whether they live or die, those states should also be willing to pass laws that allow women to control their bodies.[108] Currently, case law protects the liberty interests for both the right to abortion and right to physician-assisted suicide, given that they are similar and established in the right to personal privacy.[109] Not only has the Court addressed the right to privacy in their arguments supporting both rights, but the Court has also used the Due Process Clause to support their arguments as well. [110] In upholding the right to choose if *Roe* is overturned, legislators can easily argue that the rationale under the Due Process Clause for the right to physician-assisted suicide is substantially similar to the right to choose. [111] Finally, because of the similar values and core tenants that these laws address, states that passed physician-assisted suicide laws may uphold women's rights by

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[107] *See* sources cited and accompanying text *supra* note 78. In 1994, Oregon was the first state to codify the right for an individual to choose physician-assisted suicide, with Washington following suit in 2008. *See* sources cited and accompanying text *supra* note 78. Since then, seven states have passed similar laws that give individuals the right to choose to end their life utilizing physician-assisted suicide. *See* sources cited and accompanying text *supra* note 78. Currently, there are a total nine states and Washington D.C that grant individuals the right to physician-assisted suicide. *See* sources cited and accompanying text *supra* note 78; *Physician-Assisted Suicide Fast Facts*, CNN LIBRARY, https://www.cnn.com/2014/11/26/us/physician-assisted-suicide-fast-facts/index.html (last updated June 11, 2019, 2:59 PM). Moreover, the supreme courts of both Montana and California have granted and upheld the right to die, which shows the legislative and judicial backing of this individual decision. *Physician-Assisted Suicide Fast Facts*, *supra* note 107; *see also* MONT. CODE ANN. §50-9-10 (West 2019); Baxter v. State, 224 P.3d 1211, 1222 (Mont. 2009) (stating reasons why physician-assisted suicide is not against public policy).

[108] *See* Robert L. Kline, *The Right to Assisted Suicide In Washington and Oregon: The Courts Won't Allow a Northwest Passage*, 5 B.U. PUB. INT. L.J. 213, 234-35 (1996) (comparing right to physician-assisted suicide and right to abortion); Manning, *supra* note 78, at 518 (concluding that personal dignity questions are addressed in both physician-assisted suicide and abortion cases).

> "Like the abortion decision, the decision of a terminally ill person to end his or her life 'involv[es] the most intimate and personal choices a person may make in a lifetime' and constitutes a 'choice central to personal dignity and autonomy.'" Therefore, the terminally ill possess a liberty interest in physician-assisted suicide just as pregnant women possess a liberty interest in abortion.

Manning, *supra* note 78, at 518 (quoting Compassion in Dying v. Washington, 850 F. Supp. 1454, 1469-60 (W.D. Wash. 1994)); *see also* MacBride, *supra* note 78, at 793 (arguing right to privacy in *Roe* expanded to include physician-assisted suicide under similar liberty interests).

[109] *See* MacBride, *supra* note 78 at 793 (noting similar individual interest in abortion and physician-assisted suicide).

[110] *See* Washington v. Glucksberg, 521 U.S. 702, 720-22 (1997) (using Due Process Clause to support right to physician-assisted suicide); Roe v. Wade, 410 U.S. 113, 154 (1973) (using Due Process Clause to support right to choose).

[111] *See* cases cited *supra* note 110; *see* Manning, *supra* note 78, at 518 (demonstrating similarities between two rights).

pointing to the similar nature of both acts.[112] This is important because it not only shows the cultural shift in the United States today, but also demonstrates the willingness of state legislatures to advocate for people's right to choose, even when it was not federally legal.[113]

Roe v. Wade changed American culture significantly over the past 50 years, embedding women's right to choose in modern culture today.[114] Even if *Roe v. Wade* is overturned, the case precedent prior to it that allowed the Supreme Court justices in *Roe* to come to their decision would still stand as binding precedent.[115] Some may argue that, if *Roe v. Wade* is overturned, there is nothing that legally entitles a woman to a say in her own reproductive rights.[116] This argument holds no ground as the case precedent is still constitutional; therefore, women would still have some legal backing to advocate for themselves instead of reverting to a world where women have no say in personal and significant decisions involving her body.[117]

IV. CONCLUSION

The history of case law in the United States shows courts' willingness to give and expand upon the rights of its citizens. The development of the women's right to choose originated out of a century of case law and

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[112] *See generally* Manning, *supra* note 78, at 518 (comparing right to physician-assisted suicide and right to abortion). Both acts relate control over one's body and permanent, life-altering decisions that an individual might make. *Id.*

[113] *See id.* (analogizing abortion and physician-assisted suicide); *see generally* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 1004-05 (Mass. 2003) (holding that individuals have fundamental right to same-sex marriage). The Massachusetts' Supreme Judicial Court determined that marriage was a privacy right so fundamental to the individual that it should not be limited to individuals of the same sex. *Goodridge*, 798 N.E.2d at 1004-05. Though Massachusetts was the first state to legalize same sex marriage, many states soon followed. *Goodridge*, 798 N.E.2d at 1004-05. This is important because it shows the changing tide in American culture and demonstrates that granting individuals more personal rights—which may not be protected at the federal level—can, and have been, protected by many states. *Goodridge*, 798 N.E.2d at 1004-05; Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (holding fundamental right to same-sex marriage is guaranteed under Due Process and Equal Protection Clause).

[114] *See generally Roe*, 410 U.S. at 113 (demonstrating *Roe's* significance as over 15,000 articles and 3,000 cases have cited it).

[115] *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (expanding right to contraceptives to include unmarried individuals); Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965) (stating that right to marital privacy includes right to use contraceptives); Skinner v. Oklahoma, 316 U.S. 535, 541-43 (1942) (establishing fundamental right to procreate); Meyer v. Nebraska, 262 U.S. 390, 399, 403 (1923) (establishing fundamental rights include rights of family in marriage and child rearing).

[116] See Scheindlin, *supra* note 6 (describing potential outcomes if *Roe* is overturned).

[117] *See supra* note 115 and accompanying text.

demonstrates that individuals—specifically women—have the right to privacy and control over their bodies. Across the country, both at the state and federal level, courts and legislatures have upheld and refined this right through the nuances of the Due Process Clause. The Due Process Clause subsequently became the nexus for the right to procreation, the right to contraception, and the right to abortion. Courts in the United States have upheld the right to abortion for nearly fifty years, a right that allows all individuals, regardless of gender, the choice to control what happens to their own bodies and reproduction.

The right to control one's own body, and in turn one's own life, was further defined when states established the right to terminate one's own life via physician-assisted suicide.—This right originated in the Due Process Clause of the Fourteenth Amendment, which states that individuals should have control over what they do with their lives and bodies. Although not every state has the right to physician-assisted suicide, it is a power and a right that the Supreme Court determined belongs to the states. Perhaps individual states can rely on *Washington v. Glucksberg*, and additional physician-assisted suicide precedent, to grant their citizens the right to abortion. States can do this because the original arguments that established the right to abortion and the right to physician-assisted suicide are very similar. Both rights are similar enough that the parallels in the legal analysis should provide some authority for states to preserve these rights in the future.

If *Roe v. Wade* is overturned, where will it stop? Who will lose their rights next? What will be overturned? Will the nation continue moving forward to a period of greater rights, or revert to a time when the majority of the population was oppressed and controlled by a select few?

Jennifer McCoy

UNTIL DATA DOES US PART—THE CALL FOR A FEDERAL ANALOG TO THE CALIFORNIA CONSUMER PRIVACY ACT: A LITIGATION PERSPECTIVE

"The world's most valuable resource is no longer oil, but data."[1]

I. INTRODUCTION

American consumers often receive emails from companies whom they have transacted with.[2] Among the seemingly endless stream of coupons and brand announcements, consumers may encounter a message that takes on a more serious tone: a company—entrusted with customers' Personally Identifiable Information ("PII")—has failed to adequately protect that information from hackers and cyber-criminals.[3]

On September 7, 2017, this message became an unfortunate reality for roughly 44% of Americans as Equifax, a credit reporting company, suffered a cyberattack so large that the company was compelled to notify citizens of the data breach.[4] The breach—likely orchestrated by high-ranking members of the Chinese military—compromised 145 million Americans' PII.[5] While no evidence existed that the hackers had misused consumers'

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[1] *See Internet Service Providers: Customer Privacy*, S. JUDICIARY COMM., 2017-18-A.B. 375 2017-18 Sess., Background (Cal. June 25, 2018).

[2] *See* Jordan Elias, *Course Correction—Data Breach as Invasion of Privacy*, 69 BAYLOR L. REV. 574, 574 (2017) (suggesting consumers typically receive notice of data breaches via email).

[3] *See* Clara Kim, Note, *Granting Standing in Data Breach Cases: The Seventh Circuit Paves the Way Towards a Solution to the Increasingly Pervasive Data Breach Problem*, 2016 COLUM. BUS. L. REV. 544, 546 (2016) (describing increasingly prevalent phenomenon of data breaches). A data breach is "the loss, theft, or other unauthorized access . . . to data containing sensitive personal information, in electronic or printed form, that results in the potential compromise of the confidentiality or integrity of the data." *Id.* (quoting 38 U.S.C. § 5727 (2012)).

[4] *See* Elizabeth Weise, *A Timeline of Events Surrounding the Equifax Data Breach,* USA TODAY (Oct. 3, 2017, 2:46 PM), https://www.usatoday.com/story/tech/2017/09/26/timeline-events-surrounding-equifax-data-breach/703691001/ (providing timeline of Equifax's notice to consumers regarding breach); *Equifax Announces Cybersecurity Incident Involving Consumer Information*, EQUIFAX (Sep. 7, 2017), https://investor.equifax.com/news-and-events/news/2017/09-07-2017-213000628 (describing information hacked). Information accessed "primarily includes names, Social Security numbers, birth dates, addresses and, in some instances, driver's license numbers." Equifax*, supra* note 4.

[5] *See* Department of Justice Office of Public Affairs, *Chinese Military Personnel Charged with Computer Fraud, Economic Espionage and Wire Fraud for Hacking into Credit Reporting Agency Equifax*, U.S. DEP'T. OF JUSTICE (Feb. 10, 2020), https://www.justice.gov/opa/pr/chinese-military-personnel-charged-computer-fraud-economic-espionage-and-wire-fraud-hacking (an-

personal information at the time consumers were notified, many Americans were left with the same question after their private information was compromised: what now?[6] In fact, consumers nationwide have increasingly asked this question as large-scale data breaches continue to infect the consumer marketplace.[7] In Equifax's case, the answer to this question relied on—as it often has in mass data breaches—the statutorily-prescribed enforcement powers of the Federal Trade Commission ("FTC"), a government agency designed to protect consumers nationwide against deceptive and unfair business practices.[8] Using its broad authority under Section 5 of the FTC Act, the FTC filed a complaint in federal district court seeking an injunction against Equifax, which ultimately resulted in the largest settlement for a data breach in United States' history.[9] In total, the parties settled for $650 million, with $300 million reserved for a "Consumer Fund" to settle the multidistrict litigation brought on behalf of the individuals affected by the breach.[10] While this judicial resolution was an ostensible success, consumers were still faced with a different set of challenges, which included increasing credit monitoring to police their exposed PII and finding an

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nouncing indictments of four members of Chinese military). "[Their actions were] a deliberate and sweeping intrusion into the private information of the American people . . . ." *Id.*

[6] *See* Elias, *supra* note 2, at 575 (acknowledging that news of Equifax breach left many "deeply rattled").

[7] *See id*. (noting that immediate fallout of data breaches results in "anxiety, embarrassment, and distress" for consumers); *see also* Kim, *supra* note 3, at 548-49 (listing recent large-scale data breaches).

[8] *See* QUEMARS S. AHMED, ET. AL., CALIFORNIA ANTITRUST AND UNFAIR COMPETITION LAW: PRIVACY ENFORCEMENT BY THE FTC, 1 CA ANTITRUST AND UNFAIR COMPETITION L. § 26.17(B)(1) (3d ed. 2019) (articulating FTC enforcement powers under FTC Act). In short:

> [T]he FTC has used its Section 5 authority to investigate and file complaints for privacy and data security violations . . . [b]roadly speaking, FTC investigations may lead to one or several of the following outcomes: (1) the agency's decision to close the investigation, (2) a settlement between the FTC and the target of the investigation, (3) the agency's filing of an administrative complaint, or (4) the agency's filing of a complaint in federal district court.

Id.

[9] *See Federal Trade Comm'n v. Equifax Inc.*, No. 1:19-cv-03297-TWT (Thrash, J., Stipulated Order for Permanent Injunction and Monetary Judgment) (N.D. Ga. July 23, 2019) (ordering settlement of FTC claims against Equifax and establishing "Consumer Fund" to pay affected consumers).

[10] *See id.* at 31 ("An amount no less than Three Hundred Million Dollars . . . must be used and administered . . . for the exclusive purpose of providing restitution and redress to Affected Consumers"); Stacy Cowley, *Equifax to Pay at Least $650 Million in Largest-Ever Data Breach Settlement*, N.Y. TIMES (July 22, 2019), https://www.nytimes.com/2019/07/22/business/equifax-settlement.html (indicating final size of settlement may change depending on several conditions applied in order).

effective way to actually collect damages from Equifax.[11] As it turned out, the FTC settlement did not account for such a large number of consumers seeking cash compensation, which meant that the amount set aside in the "Consumer Fund" was grossly underestimated; thus, a deadline was given to consumers to either file more paperwork to receive their payout or opt for a non-cash settlement.[12]

The Equifax settlement is illustrative of a common theme in data breach litigation: while government regulations may cause businesses to enhance their cybersecurity regimes, the consumer-plaintiffs harmed by data breaches face significant impediments in attempting to redress their injuries through judicial process.[13] Enabling consumer access to federal courts has become a weighty concern in the context of data breaches, with no current consensus regarding *how* the courts or legislature should address the issue.[14] The California legislature, however, has adopted a seemingly common-sense method to confer standing to individual consumers affected by data breaches.[15] With the passage of the California Consumer Privacy Act ("CCPA")[16], California residents now have a private right of action against certain businesses if their "nonencrypted and nonredacted information . . . is subject to an unauthorized access and exfiltration, theft, or

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[11] *See* Megan Leonhardt, *If You Want to Claim $125 from the Equifax Data Breach, You Have More Work To Do*, CNBC (Sep. 9, 2019, 11:11 AM), https://www.cnbc.com/2019/09/09/equifax-settlement-you-need-to-update-your-claim-to-get-125.html (outlining process for individual consumers seeking cash compensation).

[12] *See id.* ("[C]onsumers who filed for the $125 cash payout were sent an email with the subject line: 'Your Equifax Claim: You Need to Act by October 15, 2019 or Your Claim for Alternative Compensation Will Be Denied.'"). The FTC also urged consumers to pick free credit monitoring over the cash payout as it came with identity theft insurance among other benefits. *Id.*

[13] *See* Kim, *supra* note 3, at 547 (noting that consumers' class action lawsuits to redress "increasingly common occurrence of data breaches" generally fail); Elias, *supra* note 2, at 576-77 (asking federal courts to confer standing by applying common-law privacy torts in data breach cases).

[14] *See* Kim, *supra* note 3 ("[T]he current state of the law cannot fully address the complicated issues that arise from data breach incidents. The existing regulations operate in a piecemeal manner and do not adequately address the situation."); *2018 Security Breach Legislation*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 8, 2019), http://www.ncsl.org/research/telecommunications-and-information-technology/2018-security-breach-legislation.aspx (noting that all fifty state legislatures have addressed security breaches through some type of legislation); *accord* U.S. GOV'T ACCOUNTABILITY OFF., GAO 19-52, INTERNET PRIVACY: ADDITIONAL FEDERAL AUTHORITY COULD ENHANCE CONSUMER PROTECTION AND PROVIDE FLEXIBILITY 6 (2019). "No comprehensive federal privacy law governs the collection, use, and sale or other disclosure of personal information by private-sector companies in the United States." U.S. Gov't Accountability Off., *supra* note 14.

[15] *See* Mike Quartararo, *Challenges of the California Consumer Privacy Act*, ABOVE THE LAW (Oct. 29, 2019, 5:46 PM), https://abovethelaw.com/2019/10/challenges-of-the-california-consumer-privacy-act/ (noting CCPA creates private right of action to consumers). "Any consumer may bring an action [for statutory damages] under the law." *Id.*

[16] *See* CAL. CIV. CODE §§ 1798.100-199 (2020).

disclosure as a result of the business's violation of the duty to implement and maintain reasonable security procedures and practices. . . ."[17]

This Note will focus on the implementation of the CCPA and its inevitable effect on data breach class actions nationwide.[18] With California residents' claims being distinguished from the other subclasses in multidistrict litigation, it is likely that those suffering from the same data breaches will be received with stark distinctions in federal courts.[19] A brief analysis of prior data breach class actions across different circuits will further illustrate the burden that class action plaintiffs outside of California must overcome to recover damages.[20] Throughout this Note, this author will analyze the current state of data breach class actions involving both class plaintiffs and the government (FTC).[21] This Note will then forecast the outcome of conflicts arising out of favored CCPA class treatment, ultimately leading to the conclusion that a comprehensive, federal scheme of privacy legislation

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[17] CAL. CIV. CODE § 1798.150(a)(1) (2020); *see also* Dominique Shelton Leipzig et al., *The California Consumer Privacy Act*, 5 PRATT'S PRIV. AND CYBERSEC. L. REP. 39, 39 (2019) (noting that CCPA "goes well beyond" most comprehensive data privacy regulations).

[18] *See In re* Anthem, Inc. Data Breach Litig., 327 F.R.D. 299, 311 (N.D. Cal. 2018), *appeal dismissed sub nom.* No. 18-16866, 2018 WL 7890391 (9th Cir. 2018) (finding differences in state law central to class certification under Federal Rules of Civil Procedure). According to the Federal Rules of Civil Procedure, "plaintiffs must show 'that the questions of law or fact common to class members predominate over any questions affecting only individual class members.'" *Id.* (quoting FED. R. CIV. P. 23(b)(3)). "Courts should examine differences in underlying state law as part of the predominance analysis because 'in a multistate class action, variations in state law may swamp any common issues and defeat predominance.'" *Id.* at 313 (internal quotations omitted).

[19] *See In re* Hyundai & Kia Fuel Econ. Litig., 881 F.3d 679, 702-03 (9th Cir. 2018), *reh'g en banc granted sub nom.* 897 F.3d 1003 (9th Cir. 2018), and on *reh'g en banc*, 926 F.3d 539 (9th Cir. 2019) (finding district court erred in certifying nationwide consumer class before conducting choice of law analysis).

[20] *See generally* Kim, *supra* note 3, at 561-73 (acknowledging discrepancies in approaching standing for data breach class actions in district and circuit courts); *see also* Elias, *supra* note 2, at 575 (suggesting no true precedent exists on federal level to analyze standing in data breach actions).

[21] *See In re* Zappos.com, Inc., 888 F.3d 1020, 1023 (9th Cir. 2018), *cert. denied sub nom.* 139 S. Ct. 1373 (2019) (finding plaintiffs in putative data breach action "sufficiently alleged [Article III] standing based on the risk of identity theft"); *accord* Remijas v. Neiman Marcus Group, LLC, 794 F.3d 688, 696 (7th Cir. 2015) (reaching same finding that plaintiffs' injuries satisfied Article III standing requirement). *Contra* Anderson v. Hannaford Bros. Co., 659 F.3d 151, 154 (1st Cir. 2011) (dismissing class plaintiffs' claims in data breach action where future harm was not foreseeable); Rudolph v. Hudson's Bay Co., No. 18-cv-8472, 2019 U.S. Dist. LEXIS 77665, *4-5 (S.D.N.Y 2019) (finding plaintiff failed to allege "a substantial risk of future injury" but conferring Article III standing on other grounds). "A plaintiff has Article III standing if she plausibly alleges future injury, provided that 'the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.'" *Rudolph*, 2019 U.S. Dist. LEXIS at *11 (quoting Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014)) (internal quotations omitted); *see also* U.S. Gov't Accountability Off., *supra* note 14, at 44-51 (outlining FTC internet privacy enforcement actions).

is necessary to provide all American consumers the same rights to recover monetary damages in data breach class actions.[22]

II. HISTORY

The collection of consumer data has rapidly become one of the most pressing privacy issues in our legal system.[23] The proliferation of the digital world has far outpaced the government's responses to how businesses must handle consumer data, and there is still little to no comprehensive regulatory scheme in place.[24] In 2006, without a federal privacy law, "the FTC created the Division of Privacy and Identity Protection ("DPIP") to protect consumer data."[25] Since adopting this leadership role, the FTC has brought enforcement actions against companies "using its general authority under section 5 of the FTC Act. . . [which] prohibits 'unfair or deceptive acts or practices in or affecting commerce.'"[26] As demonstrated in Equifax's case, this practice may be effective in ensuring corporate compliance, but it fails to adequately redress individual consumer injuries stem-

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[22] *See* U.S. Gov't Accountability Off., *supra* note 14, at 38 (recommending that Congress develop comprehensive legislation on internet privacy to enhance consumer protection); Kim, *supra* note 3, at 591-93 (calling for overarching federal regulatory framework to solve data breach problem).

[23] *See* Internet Service Providers, *supra* note 1 ("Currently, everything from toasters and baby dolls to televisions are connected to the Internet, gathering and using a wide range of information. This technology has limitless possibilities."); *see also* U.S. Gov't Accountability Off., *supra* note 14, at 5-7 (noting increased prevalence of internet-connected devices).

> A nationwide survey that the U.S. Census Bureau conducted . . . in 2017 found that 78 percent of Americans ages 3 and older used the Internet . . . . [A]s new and more devices become connected, they increase not only the opportunities for security and privacy breaches, but also the scale and scope of any resulting consequences.

U.S. Gov't Accountability Off., *supra* note 14, at 5-7; Matt Burgess, *What is GDPR? The Summary Guide to GDPR Compliance in the UK*, WIRED (Mar. 24, 2020), https://www.wired.co.uk/article/what-is-gdpr-uk-eu-legislation-compliance-summary-fines-2018 (noting that "previous data protection rules across Europe" could not keep up with rapid technological changes).

[24] *See* U.S. Gov't Accountability Off., *supra* note 14, at 6 (stating that no "comprehensive federal privacy law governs the . . . disclosure of personal information by private-sector companies in the United States"); *The General Data Protection Regulation ("GDPR")*, 6 COMPUT. LAW §51.04 (2019) (noting that European Union's privacy law only took effect in May 2018).

[25] *See* Kim, *supra* note 3, at 555 (noting FTC is only one of major federal agencies giving guidance regarding data security preparedness). *But see* U.S. Gov't Accountability Off., *supra* note 14, at 9 (stating that FTC "currently has the lead in overseeing Internet privacy at federal level").

[26] *See* U.S. Gov't Accountability Off., *supra* note 14, at 9 (describing FTC's role in federal privacy enforcement); *see also* Kim, *supra* note 3, at 546-47 (noting that existing federal and state laws operate in "piecemeal manner" to inadequately address data breaches).

ming from data breaches.[27] Similarly, consumer class actions involving data breaches have increasingly been thwarted by federal judges at both the motion to dismiss and class certification stages of litigation.[28]

Still, from both a compliance and individual rights standpoint, global privacy law entered a new age in 2018 when the European Union adopted the General Data Protection Regulation ("GDPR") as the first attempt to create a strict, regulatory scheme that enumerates and protects consumers' rights to their personal data shared with companies.[29] The GDPR "declares the 'right to protection of personal data' to be a fundamental right held by all natural persons."[30] In its ninety-nine articles, the GDPR sets out consumers' rights and the corresponding obligations of companies "controlling" their personal information.[31] Under the GDPR, consumers are provided with eight rights, with perhaps the most prominent being the right to be informed—that is, a company must tell individuals "what data is being collected, how it's being used, how long it will be kept and whether it will be shared with any third parties."[32] Further, individuals protected by the GDPR maintain the "right to be forgotten," which allows them to request that companies erase their personal data in certain circum-

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[27] *See* Leonhardt, *supra* note 11 (describing discordant process for consumers seeking to reap benefits of FTC data breach enforcement actions); *see generally* U.S. Gov't Accountability Off., *supra* note 14, at 10 n. 24 (noting that FTC cannot impose civil penalties unless business has violated FTC order, statute, or rule "that confers civil penalty authority"); Kim, *supra* note 3, at 546-47 (describing different statutes that contribute to piecemeal federal privacy enforcement).

[28] *See* Gerald E. Arth et al., Practice Note, *Non-Statutory Grounds for Challenging Class Actions: Standing and Ascertainability*, THOMSON REUTERS PRAC. LAW (2019) (discussing defendant-friendly shift in class actions).

> For many years, it seemed as though courts considering motions for class certification were issuing "rubber stamp" decisions allowing proposed class actions to proceed. However, various developments in the case law seemingly have made it easier for defendants to deter class actions both before and at the certification stage.

Id.; *see also* Elias, *supra* note 2, at 578-79 (discussing various circuit court approaches to data breach claims). Courts have taken approaches that involve state consumer protection acts, emotional distress, actual misuse of data by hackers, and claims for negligence and breach of implied contract. Elias, *supra* note 2, at 578-79.

[29] *See* Mark Peasley, Note, *It's Time for an American (Data Protection) Revolution*, 52 AKRON L. REV. 911, 917 (2018) (stating that GDPR is "much more inclusive and comprehensive than U.S. law and reaches each and every entity that handles [EU] citizen data whether located in the [EU] or abroad.")

[30] *See id.* (analyzing GDPR).

[31] *See* Burgess, *supra* note 23 (summarizing GDPR articles).

[32] *See* Alice Baker, *The GDPR: Consumer Rights for your Personal Data*, IT GOVERNANCE (Aug. 18, 2020), https://www.itgovernance.eu/blog/en/the-gdpr-consumer-rights-for-your-personal-data (articulating all eight consumer rights granted in GDPR).

stances.[33] The GDPR's enactment put many American companies conducting business in Europe on notice and forced businesses to update their internal cybersecurity regimes to avoid hefty fines for non-compliance.[34]

A. The California Consumer Privacy Act (CCPA)

Proposed as a ballot initiative in 2018, the California Consumer Privacy Act sought to address the problem of the United States' lackluster data privacy policies and drew from our European counterparts in the adoption of a comprehensive set of regulations similar to the GDPR.[35] The national impact of this legislation is noteworthy as California is the most populous state in the nation, which means that California citizens likely comprise a large portion of the plaintiffs suffering from unauthorized disclosure and use of their PII in large-scale breaches.[36] To combat this harm, the CCPA draws from the GDPR by providing "California consumers with eight new privacy rights and [imposing] eight corresponding as well as three independent obligations on businesses processing California consumers' [PII]."[37] The CCPA, however, goes beyond the GDPR in some respects as well.[38]

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[33] *See id.* (noting circumstances where data is no longer necessary, unlawfully processed, or individual withdraws consent).

[34] *See GDPR Compliance Checklist for US Companies*, GDPR.EU, https://gdpr.eu/compliance-checklist-us-companies/ (last visited Nov. 25, 2019) (describing "extra-territorial" nature of GDPR and consequences for U.S. companies' failure to comply).

[35] *See* Internet Service Providers, *supra* note 1 (advocating for enactment of CCPA).

> This November 2018 ballot measure says: You have the right to tell a business not to share or sell your personal information . . . . You have the right to know where and to whom your data is being sold or disclosed . . . . You have the right to protections against businesses who do not uphold the value of your privacy . . . . It's your personal information. Take back control!

Id.; *see also* Leipzig et al., *supra* note 17 (explaining to companies that "[i]f you've achieved compliance with the GDPR, you are well on your way to achieving CCPA compliance.")

[36] *See* Leipzig et al., *supra* note 17 (noting that CCPA arose out of "growing concern for the volume of data collected about California Consumers").

[37] *See id.* at 40 (explaining California may request from businesses what PII is collected and sent to third parties).

[38] *See* CAL. CIV. CODE § 1798.140 (2020); Leipzig et al., *supra* note 17, at 40 (stating that "the CCPA expands definition of [PII] beyond the GDPR and well beyond that of current U.S. privacy law."). The CCPA defines PII as:

> [I]nformation that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer *or household* (emphasis added). The definition also includes personal identifiers, IP addresses, commercial information, records of personal property, products or services purchased, obtained or considered, or other purchasing or consuming histories or

In addressing the unique, American issue of standing in federal courts for data breach class actions, the CCPA provides California residents with a statutory right to damages if they are subject to "an unauthorized access, exfiltration, theft, or disclosure as a result of the business' failure to implement and maintain reasonable security procedures and practices."[39] Under this right, California consumers may: (1) recover damages not less than $100 and not greater than $750 per consumer per incident or actual damages, whichever is greater; (2) seek injunctive or declaratory relief; and/or (3) any other relief the court deems proper.[40] This fast-track to the courtroom comes with some caveats, however, as "[p]rior to initiating any action, a consumer must give the business 30 days' written notice identifying the specific CCPA provisions that have been or are being violated."[41] Still, this provision adds to a Californian plaintiff's arsenal in federal court because, if a business is notified and does not properly redress the injuries suffered, a plaintiff's future risk of harm will only increase without remedial measures.[42] Thus, the CCPA's private right of action has properly set the stage for a new era of data breach jurisprudence with federal courts at the forefront of the debate over who may join CCPA subclasses in court.[43]

B. Nationwide Data Breach Class Actions

Prior to the CCPA's enactment, the Ninth Circuit, in which California lies, pioneered a new, plaintiff-friendly era of standing in data breach class actions.[44] For standing purposes, the Ninth Circuit, along with the

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> tendencies; internet or other electronic network activity information, professional or employment-related information; or any consumer profile.

Leipzig et al., *supra* note 17, at 41 (citing CAL. CIV. CODE § 1798.140(o) (2020)) (emphasis in original).

[39] *See* CAL. CIV. CODE § 1798.150(a)(1) (2020); *see also* Elias, *supra* note 2, at 574-76 (acknowledging problems in data breach litigation include failure to address "hierarchy of personal information" and what "injuries" are compensable).

[40] *See* CAL. CIV. CODE § 1798.150(a)(1) (2020) (establishing remedies available to consumers in data breach class actions).

[41] *See* CAL. CIV. CODE § 1798.150(b) (2020); *see also* Leipzig et al., *supra* note 17, at 49 (noting that class wide statutory actions cannot commence if violation is cured within thirty days).

[42] *See* Kim, *supra* note 3, at 590 (noting "Ninth Circuit has historically followed" liberal approach of granting standing based on risk of future harm). By contrast, more conservative circuits grant standing based on current injury-in-fact. *Id.*

[43] *See generally In re* Anthem, Inc. Data Breach Litig., 327 F.R.D. 299, 317 (N.D. Cal. 2018) (stating that "[d]ata-breach litigation is in its infancy with threshold issues still playing out in the courts.")

[44] *See In re* Zappos.com, Inc., 888 F.3d 1020, 1023 (9th Cir. 2018) (embracing prior Ninth Circuit decision that conferred standing based on future risk of identity theft). "We reject Zap-

Seventh Circuit, set the legal standard for "injury in fact" as the increased risk of future harm stemming from consumers' compromised PII—a decidedly low threshold compared to other federal circuit courts, and perhaps even the Supreme Court of the United States.[45] These distinctions among courts are significant as the sheer magnitude of mass data breaches almost guarantees that many class action lawsuits will be brought against the same defendant across varying judicial districts.[46] Accordingly, it is common for the Judicial Panel on Multidistrict Litigation ("JPML")—which acts under its statutory power to determine whether a single federal district court should hear the pretrial proceedings of the case—to consider these actions for consolidation.[47] This forum selection is perhaps the most important phase for both plaintiffs and defendants, as it can be the difference between dismissal and a successful claim, and therefore serves as a proper lens to evaluate data breach class actions in a post-CCPA world.[48]

With a multitude of state and federal claims canvassing plaintiffs' complaints, the JPML, along with federal district courts, must establish a standard for analyzing how the laws should be applied on a case-by-case basis.[49] Substantively, the transferee court must apply the law of each transferor state and circuit.[50] Procedurally, however, the courts are bound to the Federal Rules of Civil Procedure, which include class certification

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po's argument that *Krottner* is no longer good law after *Clapper* [2013 Supreme Court decision analyzing standing requirements], and hold that, under *Krottner*, [p]laintffs have sufficiently alleged standing based on risk of identity theft." *Id.*

[45] *Compare* sources cited *supra* note 20 (comparing Ninth Circuit rationale to that of other courts), *with* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408-12 (2013) (discussing contemporary Supreme Court view on Article III standing).

[46] *See generally* Caroline Spiezio, *MDL Watch: Consolidation Sought in Financial Services Data Breach Litigation*, REUTERS LEGAL (September 25, 2019, 9:19 PM), https://1.next.westlaw.com/Document/I731f0da0dff411e998a5af8680d02462/View/FullText.html?transitionType=SearchItem&contextData=(sc.Category)&firstPage=true&bhcp=1&CobaltRefresh=44488 (summarizing recent data breach class actions to be heard for consolidation before JPML).

[47] *See* 28 U.S.C. § 1407 (1968) (stating that decisions to transfer should be made for convenience of both parties and witnesses to "promote the just and efficient conduct of such actions").

[48] *See* sources cited *supra* note 20 (noting differences in standing analysis among federal circuits).

[49] *See In re* Equifax, Inc., Customer Data Sec. Breach Litig., 289 F. Supp. 3d 1322, 1325 (J.P.M.L. 2017) (rejecting plaintiffs' argument that circuit split regarding Article III standing for data breaches precludes consolidation); *see also In re* Air Crash Disaster at Boston, Massachusetts on July 31, 1973, 399 F. Supp. 1106, 1108 (D. Mass. 1975) (comparing § 1407 transfer to *Eerie* Doctrine as applied to § 1404(a)); *accord In re* Four Seasons Sec. Laws Litig., 370 F. Supp. 219, 228 (W.D. Okla. 1974) (same); Phila. Hous. Auth. v. Am. Radiator & Standard Sanitary Corp., 309 F. Supp. 1053, 1055 (E.D. Pa. 1969) (same).

[50] *See In re Air Crash Disaster*, 399 F. Supp. at 1108. ("A United States District Court to which an action is transferred pursuant to 28 U.S.C.A. § 1407 must apply the substantive law of the transferor state and circuit.")

considerations and the choice-of-law analyses that accompany motions to dismiss common law claims in diversity cases.[51] In data breach class actions, the CCPA will throw a wrench in these analyses, which could spell disaster for similarly situated plaintiffs as they may watch CCPA plaintiffs enjoy what will appear to be unequal treatment under the law.[52]

Similarly, with many plaintiffs and defendants advocating for why the JPML should or should not choose a given transferee court, there is hardly a guarantee that non-CCPA classes will have their pretrial matters consolidated and heard within a favorable jurisdiction, such as the Ninth Circuit.[53] Historically, the JPML has given credence to several factors justifying consolidation, but has placed a special emphasis on consistency regarding district courts' pretrial proceedings.[54] Transferee courts typically are those with ample resources to handle these complex matters, which can concurrently decide on any non-common issues and are also convenient to the parties and witnesses.[55] These courts typically appoint plaintiffs' coun-

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[51] *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 397-99 (2010) (finding state law did not preclude FED. R. CIV. P. 23 from certifying class action); *see also In re Equifax, Inc.*, 362 F. Supp. 3d 1295,1311-12 (2019) (applying transferee court choice-of-law rules to determine that transferee court law will apply).

[52] *See generally* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350-52 (2011) (describing contemporary standards for class certification under FED. R. CIV. P. 23); *see also In re Equifax*, 362 F. Supp. 3d at 1333 (analyzing state statutory claims apart from common-law negligence or breach-of-contract claims); Kim, *supra* note 3, at 564 (stating that "data breach cases can be boiled down to state tort law questions.")

[53] *See In re* Anthem, Inc. Data Breach Litig., 327 F.R.D. 299, 317 (N.D. Cal. 2018) (explaining novel issue of data-breach actions across country). "Data-breach litigation is in its infancy with threshold issues still playing out in the courts. In the past three months alone, both the Seventh and Ninth Circuits have issued opinions addressing basic issues of standing in data-breach cases." *Id.* (internal citations omitted).

[54] *See In re* Nat'l Student Mktg. Litig., 368 F. Supp. 1311, 1317 (J.P.M.L. 1973) (quoting *In re* Library Editions of Children's Books, 297 F. Supp. 385, 386 (J.P.M.L. 1973)) (explaining that JPML "must 'weigh the interests of all plaintiffs and all defendants'" while considering litigation in light of purposes of law); *see also In re* Advanced Inv. Mgmt., L.P., Pension Fund Mgmt. Litig., 254 F. Supp. 2d 1377, 1379 (J.P.M.L. 2003) (centralizing actions to prevent inconsistent pretrial rulings).

> We also point out that transfer of all related actions to a single judge has the streamlining effect of fostering a pretrial program that: 1) allows pretrial proceedings with respect to any non-common issues to proceed concurrently with pretrial proceedings on common issues, and 2) ensures that pretrial proceedings will be conducted in a manner leading to the just and expeditious resolution of all actions to the overall benefit of the parties.

Id. (internal citation omitted); *In re* Gen. Adjustment Bureau Antitrust Litig., 375 F. Supp. 1405, 1407 (J.P.M.L. 1973) (consolidating cases where common factual issues present to prevent needless duplication of discovery).

[55] *See In re Advanced Inv. Mgmt.*, 254 F. Supp. 2d at 1379 (explaining characteristics of transferee courts).

sel to file a Consolidated Class Action Allegation Complaint for pretrial purposes, making plaintiffs' claims amenable to motions to dismiss and denial of class certification.[56] Without the oracular power to address all class action parties' interests in choosing a pretrial forum—and because some courts have found the circuit split regarding data breach standing to be immaterial for consolidation purposes—one can only hope to predict the results of class action lawsuits involving CCPA plaintiffs using the most current Supreme Court standards for nationwide class certification, with recent data breach cases serving as the backdrop.[57]

III. ANALYSIS

A. Nationwide Class Certification In The Dukes-Amchem Framework

In *Wal-Mart Stores, Inc. v. Dukes*,[58] the Supreme Court refined the traditional prerequisites to class certification under Fed. R. Civ. P. 23(a).[59] Under Rule 23(a), class action plaintiffs must demonstrate four requirements: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation.[60] *Dukes* honed in on the commonality requirement, ac-

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[56] *See In re* Premera Blue Cross Customer Data Sec. Breach Litig., No. 3:15-md-2633-SI, 2019 U.S. Dist. LEXIS 127093, at *2-3 (D. Or. 2019) (describing consolidation process with accompanying pre-trial motions).

[57] *See id.* (describing consolidation process in data breach class action); *see also In re* Equifax, Inc., Customer Data Sec. Breach Litig., 289 F. Supp. 3d 1322, 1325 (J.P.M.L. 2017) (rejecting argument that circuit split regarding data-breach standing precludes consolidation); *Wal-Mart Stores*, 564 U.S. at 349 (discussing nationwide class certification requirements under Rule 23); Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 625 (1997) (discussing certification issues in mass tort litigation). *Compare In re Premera Blue Cross*, 2019 U.S. Dist. LEXIS 127093, at *2-3 (describing consolidation process with accompanying pre-trial motions), *with In re* Target Corp. Customer Data Sec. Breach Litig., 892 F.3d 968, 973 (8th Cir. 2018) (applying abuse of discretion standard to challenge regarding certification of settlement class), *and In re Anthem, Inc.*, 327 F.R.D. at 307 (discussing nationwide class prerequisites).

[58] 564 U.S. 338, 345 (2011) (discussing contemporary standards for class certification).

[59] *See generally In re Anthem, Inc.*, 327 F.R.D. at 314 (discussing nationwide class prerequisites).

[60] *See id.* (discussing Rule 23(a) requirements).

> Rule 23(a) provides that a district court may certify a class only if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class."

Id. (quoting FED. R. CIV. P. 23(a)).

knowledging that the language of Rule 23(a)(2) is easy to misread.[61] The *Dukes* Court found that it is not proper to focus on the myriad of questions common to all plaintiffs; rather, a court considering whether to certify a class of plaintiffs should focus its analysis on the ability of the potential class-wide proceeding to generate common *answers* "to drive the resolution of the litigation."[62] Admittedly, this is still a low threshold to meet for class action plaintiffs as "even a single common question [of law or fact] will do."[63]

In data breach class actions, courts have found the occurrence of a data breach satisfies Rule 23(a)(2), and have reasoned that a defendant's failure to "adequately store" plaintiffs' PII is a common injury suffered by all class members (at least in jurisdictions that recognize such injuries for standing purposes).[64] In a post-CCPA world, however, this analysis will almost certainly look different because CCPA compliance requires heightened data security and storage measures.[65] Indeed, by raising the bar of what companies must do to "adequately" protect consumer PII, the CCPA

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[61] *See Dukes*, 564 U.S. at 349 (finding that any "competently crafted complaint" raises common questions but "reciting these questions is not sufficient to obtain class certification.") (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 131-32 (2009)).

[62] *See id.* at 350 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)) (discussing commonality requirement).

[63] *See id.* at 359 (discussing commonality requirement of Rule 23(a)); *see also In re Anthem, Inc.*, 327 F.R.D. at 308 (citing JPML decision to consolidate as evidence of commonality).

[64] *See In re Anthem, Inc.*, 327 F.R.D. at 308 (finding that nationwide class met commonality requirement); *see also id.* at 317 (acknowledging strength of plaintiffs' case turns on "[l]egal uncertainties"); *In re* Premera Blue Cross Customer Data Sec. Breach Litig., No. 3:15-md-2633-SI, 2019 U.S. Dist. LEXIS 127093, at *30-31 (D. Or. 2019) (discussing commonality requirement for data breaches within *Dukes* framework).

> [The common issues of law or fact that can be resolved in one stroke] include whether Premera's data security practices were sufficient, whether the contracts issued by Premera included enforceable data security promises, whether Premera engaged in unfair or deceptive business practices with its data security practices or response to the Data Breach, whether the Data Breach compromised class members' Sensitive Information, and whether class members are entitled to damages as a result of Premera's conduct. The Court finds that the commonality requirement is satisfied.

In re Premera Blue Cross, 2019 U.S. Dist. LEXIS 127093, at *31; Elias, *supra* note 2, at 578-79 (discussing various circuit court approaches to data breach claims that involve state consumer protection acts, "emotional distress," "actual misuse of data by hackers," and claims for negligence and breach of implied contract).

[65] *See* Stuart L. Pardau, *The California Consumer Privacy Act: Towards a European-Style Privacy Regime in the United States?*, 23 J. TECH. L. & POL'Y 68, 88-101 (2018) (discussing violations unique to CCPA regarding handling of consumer PII); *see also* CAL. CIV. CODE § 1798.150 (2020) (stating that private right of action stems from failing to implement "reasonable security procedures and practices appropriate . . . to protect the personal information . . . .").

distinguishes itself from other states' data security laws.[66] This discrepancy raises the novel issue under Rule 23(a)(2) concerning whether a defendant can "adequately store" some plaintiffs' PII under existing state laws, while simultaneously failing to meet the requirements specific to California plaintiffs.[67] In essence, if a private action is brought under the CCPA, a violation of one of the statute's many provisions would constitute negligence per se, with readily available and ascertainable statutory damages; whereas, plaintiffs in many other states must resort to pleading common law negligence claims.[68] Thus, Californian consumers will have no need to join nationwide classes with regard to these common law negligence or breach of contract claims that are subject to scrutiny under a forum state's choice of law analysis, or even negligence per se claims under Section 5 of the FTC Act.[69] This alternative process creates a degree of uncertainty for plaintiffs residing in states without strong, consumer-friendly data breach statutes because, for commonality purposes, the legal duties owed to different plaintiffs could be construed by courts as independent questions of law.[70] This factor alone may be sufficient to swamp class certification as each question of law will require a different answer as to "the extensiveness and

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[66] *See State Laws Related to Internet Privacy*, NAT'L CONF. OF STATE LEGIS. (Jan. 27, 2020), https://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-related-to-Internet-privacy.aspx (summarizing differences among state laws regulating internet privacy); *see also 2019 Security Breach Legislation*, NAT'L CONF. OF STATE LEGIS. (Dec. 31, 2019), https://www.ncsl.org/research/telecommunications-and-information-technology/2019-security-breach-legislation.aspx (noting that all fifty states have enacted "security breach notification laws" but have not afforded private right of action to citizens for breaches).

[67] *See* sources cited *supra* note 66 (noting differences in state data security laws). "California and Utah laws . . . require all nonfinancial businesses . . . the types of personal information the business shares with or sells to a third party for direct marketing purposes or for compensation." *State Laws Related to Internet Privacy*, *supra* note 66; *see also* UTAH CODE § 13-37-203 (2003) (precluding consumers from bringing class actions stemming from unauthorized disclosure of PII).

[68] *See* CAL. CIV. CODE at § 1798.150(a)(1)(A) (2020) (providing statutory damages to consumers for violations of CCPA); RESTATEMENT (THIRD) OF TORTS § 14 (AM. LAW INST. 2010) (discussing standard for negligence per se as violation of statutorily imposed duty). "An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect." RESTATEMENT (THIRD) OF TORTS § 14.

[69] *See In re* Equifax, Inc. Customer Data Sec. Breach Litig., 362 F. Supp. 3d 1295, 1321-33 (N.D. Ga. 2019) (discussing merits of each claim at motion to dismiss stage after consolidation by JPML). "The application of another jurisdiction's laws is limited to statutes and decisions construing those statutes. When no statute is involved, Georgia courts apply the common law as developed in Georgia rather than foreign case law." *Id.* at 1311-12.

[70] *See id.* at 1340-42 (dismissing Georgia and New York plaintiffs' statutory claims because neither provided private right of action). The court in *Equifax* looked to transferor states' judicial interpretations and legislative intent to determine whether a private right of action for data breaches would be "inconsistent with [those states'] legislative scheme[s]." *Id.* at 1340.

adequacy of . . . security measures [which] lie at the heart of every claim."[71]

Further, the class certification stage is perhaps the most important phase in data-breach litigation for settlement purposes.[72] Courts have distinguished the criteria for class action certification along settlement lines due to the separate goals of going to trial versus settling all claims.[73] There is currently a widely adopted policy among federal courts to favor settlements in complex class action lawsuits and, following the Supreme Court's decision in *Amchem Prod. Inc. v. Windsor*[74], courts have simply been tasked with determining whether class certification for settlement agreements are "fair, reasonable, and adequate" pursuant to Rule 23(e)(2)—with Rule 23(a)(4)'s adequacy of representation requirement spearheading the analysis.[75] In data breach actions, like many other class suits, courts have approved settlement agreements negotiated between named plaintiffs' counsel and defendants even if certain class members receive higher com-

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[71] *See id.* at 1340 (explaining significance of defendant's data security measures in data breach actions); *see also In re* Anthem, Inc. Data Breach Litig., 327 F.R.D. 299, 308 (N.D. Cal. 2018) ("The extensiveness and adequacy of Anthem's security measures lie at the heart of every claim. Moreover, the answer to those questions does not vary from Settlement Class Member to Settlement Class Member."). "Although Plaintiffs' theories withstood motions to dismiss, they have not been tested beyond the pleading stage . . . [a] finding that Anthem's security measures are inadequate is not a forgone conclusion . . . ." *In re Anthem, Inc.,* 327 F.R.D. at 317.

[72] *See In re Anthem Inc.*, 327 F.R.D. at 318 (noting that, as of date of district court's decision, "only one non-settlement data-breach class [had] been certified in federal court"); *In re* Hyundai & Kia Fuel Econ. Litig., 926 F.3d 539, 556-57 (9th Cir. 2019) ("In deciding whether to certify a litigation class, a district court must be concerned with manageability at trial. However, such manageability is not a concern in certifying a settlement class where, by definition, there will be no trial."); *In re* Premera Blue Cross Customer Data Sec. Breach Litig., No. 3:15-md-2633-SI, 2019 U.S. Dist. LEXIS 127093, at *6-7 (D. Or. 2019) (noting that different criteria apply for class certification in "litigation classes" as opposed to "settlement classes").

[73] *See In re Hyundai*, 926 F.3d at 556 (discussing Ninth Circuit judicial policy that favors settlements in complex class action litigation). "Parties seeking to overturn the [district court's] settlement approval must make a 'strong showing' that the district court clearly abused its discretion." *Id.* (citations omitted); *accord In re* Target Corp. Customer Data Sec. Breach Litig., 892 F.3d 968, 973-74 (8th Cir. 2018) (applying abuse of discretion standard to challenge regarding certification of settlement class).

[74] 521 U.S. 591, 625 (1997).

[75] *See In re Target Corp.*, 892 F.3d at 977 (discussing criteria for judicial approval of class action settlement agreement). "In determining whether a settlement agreement is fair, a district court should consider (1) the merits of the plaintiff's case[] weighed against the terms of the settlement, (2) the defendant's financial condition, (3) the complexity and expense of further litigation, and (4) the amount of opposition to the settlement." *Id.* at 978 (internal citations omitted) (quotations omitted); *see also Amchem Prod. Inc.*, 521 U.S. at 625 ("The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent.")

pensation for similarly alleged injuries.[76] This process has often resulted in "subgroup" conflicts and lengthy appeals in cases where some class members feel that the named plaintiffs of a nationwide class do not "possess the same interest[s] and suffer the same injur[ies] as [them]," which results in an unfair settlement.[77] Because of these occurrences, the *Amchem* Court sought to address "fundamental intraclass conflicts" by dividing the class and requiring separate attorneys to represent the interests of each "homogeneous subclass" in accordance with both Rule 23(e)(2) and 23(a)(4).[78] The Supreme Court indicated that, as a practical matter, this can cure any Rule 23(a)(4) adequacy concerns for settlement class certification purposes.[79] Still, when coupled with the deferential "abuse of discretion" standard

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[76] *See In re Target Corp.*, 892 F.3d at 972 (outlining district court's approval of parties' settlement agreement). In the Target data breach:

> Target agreed to pay $10 million to settle the claims of all class members and waived its right to appeal an award of attorney's fees less than or equal to $6.75 million. For those class members *with documented proof of loss*, the agreement called for full compensation of their actual losses up to $10,000 per claimant. For those class members *with undocumented losses*, the agreement directed a pro rata distribution of *the amounts remaining after payments to documented-loss claimants* and class representatives.

Id. (emphasis added); *see also* Literary Works in Elec. Databases Copyright Litig. v. Thomson Corp., 654 F.3d 242, 251 (2d. Cir. 2011) (analyzing class action settlement agreement of federal copyright claims).

> The Settlement before us "confine[s] compensation and . . . limit[s] defendants' liability" by setting an $18 million recovery and cost ceiling, and distributes that recovery by making "essential allocation decisions" among categories of claims . . . . In addition, individual Category A and B claims are "more valuable" than Category C claims, producing "disparate interests" within the class.

Literary Works in Elec. Databases Copyright Litig, 654 F.3d 242 at 251. (internal citations omitted).

[77] *See generally Amchem Prods. Inc.*, 521 U.S. at 625-26 (observing how plaintiffs in nationwide class actions will not have identical interests in settlement negotiations). In *Amchem*, class members fell into one of two mutually exclusive camps, those injured by asbestos and those with only potential future claims. *See id.*; *see also In re Target Corp.*, 892 F.3d at 973 (discussing data breach class member's appeal regarding "intraclass conflict between class members who suffered verifiable losses from the data breach and those . . . who have not").

[78] *See Amchem Prod. Inc.*, 521 U.S. at 627 (finding that there is "no structural assurance of fair and adequate representation [under Rule 23(a)(4)] for the diverse groups and individuals affected" unless each subclass is represented by counsel).

[79] *See id.* at 625-28 (finding that it remains within district court's discretion to certify settlement agreements so long as class interests are "fairly and adequately protected"); *see also In re* Premera Blue Cross Customer Data Sec. Breach Litig., No. 3:15-md-2633-SI, 2019 U.S. Dist. LEXIS 127093, at *34-35 (D. Or. 2019) (summarizing district court's rationale for certifying settlement class). "The Court also finds that the Representative Plaintiffs and class counsel will prosecute this action vigorously on behalf of the class. The Court specifically selected class

applied to Rule 23(e)(2) judicial settlement approvals, it appears that courts find little trouble in upholding arms-length settlement agreements that may provide disparate compensation to different class members—whether divided into subclasses or not.[80]

When CCPA plaintiffs become class members in nationwide data breach actions, the incentive to settle with that subclass—if allowed by the court—will likely be a beneficial strategy for defendants.[81] With a strong push for CCPA plaintiffs to be separately certified as a subclass for settlement purposes, defendants could theoretically settle each individual CCPA class member's claim for an amount somewhere in the $100-$750 statutory damages range, as opposed to past data breach settlement agreements that have provided for a maximum individual recovery of $10,000.[82] At first glance, it may appear that CCPA plaintiffs will be disadvantaged by this practice, but in reality, the more lucrative settlement agreements typically come with provisions requiring plaintiffs to demonstrate documented proof of loss or "out-of-pocket damages . . . that are plausibly traceable to" the breach, which would only reach $10,000 under extraordinary circumstances.[83] Clearly, Californian plaintiffs now carry a lesser burden of proof by

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counsel for their extensive experience in prosecuting complex class actions." *In re Premera Blue Cross*, 2019 U.S. Dist. LEXIS 127093, at *35.

[80] *See In re Target Corp.*, 892 F.3d at 976 (affirming district court's settlement class certification because interests of subclasses were "more congruent than disparate[,]" which meant differences in harm suffered were not "fundamental conflict[s] requiring separate representation"); *accord In re Premera Blue Cross*, 2019 U.S. Dist. LEXIS at *34-35 (certifying settlement class because court-selected class counsel had adequately represented interests of all class members).

[81] *See In re Premera Blue Cross*, 2019 U.S. Dist. LEXIS at *34 (noting that "Plaintiffs' expert opined that the average cost for medical identify theft is approximately $13,453" as opposed to $10,000 proposed settlement amount); *see also In re* Anthem, Inc. Data Breach Litig., 327 F.R.D. 299, 310 (N.D. Cal. 2018) (noting that differences in state laws are factor in subclass creation). While the court in *Anthem* found that "there [was] no structural conflict of interest based on variations in state law . . . and the differences in state remedies are not sufficiently substantial so as to warrant the creation of subclasses," this consideration of differing state laws in settlement class certification is instrumental in CCPA analysis. *In re Anthem, Inc.*, 327 F.R.D. at 310 (quoting Hanlon v. Chrysler Corp., 150 F.3d 1011, 1021 (9th Cir. 1998)).

[82] *See* CAL. CIV. CODE § 1798.150(a)(1)(A) (2020) (outlining statutory damages under CCPA); *see also In re Premera Blue Cross*, 2019 U.S. Dist. LEXIS at *34 (noting that parties' settlement agreement called for maximum recovery of $10,000 per consumer); *In re Target Corp.*, 892 F.3d at 972 (stating that parties' settlement agreement consisted of settlement fund of $10 million with "full compensation up to $10,000 per claimant").

[83] *See In re Anthem Inc.*, 327 F.R.D. at 319 (analyzing damages theories for individual plaintiffs).

> Plaintiffs' expert indicated that damages could be valued at $10 per individual, while Defendants' expert put damages at $4 per individual. Employing Plaintiffs' figure, damages total approximately $792 million. Thus, the $115 million Settlement Fund represents approximately 14.5% of the projected recovery that Settlement Class Members would be entitled to if they prevailed on their claims. The Court finds that this

certifying as a "CCPA subclass" and settling for statutory damages; whereas, the attendant risks of litigation will cause headaches for the millions of other class members as they negotiate compensation schemes for harm done to them.[84] Likewise, Congress has suggested that the class action bar has garnered a reputation for untrustworthiness as "many believe the only interests served by [class action] settlements are those of the class counsel."[85] This is partly the issue that the Supreme Court's ruling in *Amchem* tried to correct, but the Court's ruling also opened up more spots at the negotiation table for class action attorneys.[86] This practice may become a particular concern in future data breach actions where CCPA plaintiffs will have a strong argument in favor of subclass certification.[87]

B. Predominance Requirement

To make matters more complicated, commonality and adequacy of representation under Rule 23(a) are not the end of the analysis for class cer-

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> percentage is within the range of reasonableness after taking into account the costs and risks of litigation.

Id. (internal citations omitted).

[84] *See In re Target Corp.*, 892 F.3d at 972-73 (discussing appeal theory that settlement would not adequately redress injuries or future risk of harm); *In re Anthem Inc.*, 327 F.R.D. at 325 (discussing class members' concerns over limited time period to claim out-of-pocket losses). "Several other objectors believe that the one-year limitation on the period to submit a claim for out-of-pocket costs will cut off recovery for unforeseen future losses." *In re Anthem Inc.*, 327 F.R.D. at 325.

[85] *See* Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1599 (2008) (introducing motives behind Class Action Fairness Act of 2005 and distrust among class action lawyers). "Politicians and other CAFA [Class Action Fairness Act] proponents called class action lawyers self-interested, unscrupulous, unprincipled, and unaccountable." *Id.* at 1593-94 (internal citations omitted).

[86] *See id.*, at 1594 (noting class action lawyers' common mistrust of *Amchem*, *Ortiz*, and Rule 23 amendments).

> Each sought to tighten controls on class action lawyers to reduce abuse in light of problems of agency, autonomy, and leverage. Add to this picture the criminal prosecution of [a] firm and several of its leading partners for payments to class representatives in securities class actions, the criminal prosecution of [a] plaintiffs' attorney . . . for misappropriation of settlement funds, a similar prosecution of several . . . mass tort lawyers, and a spate of civil lawsuits against mass litigators claiming that they breached their duties to their clients, and the environment of mistrust of mass litigators becomes even clearer.

Id. at 1594-95.

[87] *See In re Anthem, Inc.*, 327 F.R.D. at 310 (noting that "substantial" differences in state remedies can warrant creation of subclasses).

tification.[88] If plaintiffs meet all four prerequisites under Rule 23(a), they then have the burden of proving that the class meets one of the three requirements under Rule 23(b).[89] As is often the case, data breach classes will seek certification pursuant to Rule 23(b)(3).[90] Under this requirement, plaintiffs must satisfy a two-part test: (1) "that the questions of law or fact common to class members predominate over any questions affecting only individual members;" and (2) "that a class action is superior to other methods of adjudication."[91] Further, plaintiffs must be wary of this test because the Supreme Court repeatedly observed that "Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)."[92] For instance, in *Comcast Corp. v. Behrend*,[93] the Supreme Court found that the issue of damages was sufficiently individualized to preclude Rule 23(b)(3) predominance and deny class certification.[94] Likewise, in *Amchem*, the Supreme Court suggested that "[d]ifferences in state law may compound" already existing disparities among nationwide class members.[95] Thus, the guarantee of statutory damages for the CCPA subgroup of plaintiffs—and the statute being the first of its kind in the United States—may "swamp any common issues and defeat predominance" required to certify a nationwide class.[96]

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[88] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 345 (2011) (stating that once 23(a) requirements are met, plaintiffs have burden to "satisfy at least one of the three requirements listed in 23(b)"); *see also In re Anthem Inc.*, 327 F.R.D. at 307 (noting that data breach classes seek certification under 23(b)(3)).

[89] *See Dukes*, 546 U.S. at 345 (describing class certification process).

[90] *See In re* Premera Blue Cross Customer Data Sec. Breach Litig., No. 3:15-md-2633-SI, 2019 U.S. Dist. LEXIS 127093 at *29 (D. Or. 2019) (stating that plaintiffs seek certification under Rule 23(b)(3)); *In re Anthem Inc.*, 327 F.R.D. at 311 (same); *accord Dukes*, 546 U.S. at 363 (noting "we think it clear that individual monetary claims belong in Rule 23(b)(3).")

[91] *See* FED. R. CIV. P. 23(b)(3).

[92] *See* Comcast Corp. v. Behrend, 569 U.S. 27, 34 (2013) (discussing predominance requirement); *see also Dukes*, 546 U.S. at 362 (discussing predominance criterion).

[93] 569 U.S. 27 (2013).

[94] *See id.* at 34 ("Questions of individual damage calculations will inevitably overwhelm questions common to the class."); *see also In re Anthem Inc.*, 327 F.R.D. at 317 (acknowledging data-breach plaintiffs raise novel issues of damages).

[95] *See* Amchem Prod. Inc. v. Windsor, 521 U.S. 591, 624 (1997) (analyzing class action through Rule 23(b)(3)'s predominance requirement); *In re Anthem, Inc.*, 327 F.R.D. at 313 (stating courts should examine differences in underlying state law as part of predominance analysis); *In re* Hyundai & Kia Fuel Econ. Litig., 881 F.3d 679, 691 (9th Cir. 2019) ("[I]n a multistate class action, variations in state law may swamp any common issues and defeat predominance.") (quoting Castano v. Am. Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996)).

[96] *See* CAL. CIV. CODE § 1798.150(a) (2020) (outlining private right of action under CCPA); *see also In re Hyundai*, 881 F.3d at 691 (suggesting that "where the consumer-protection laws of the affected [s]tates vary in material ways, no common legal issues favor a class-action approach to resolving [a] dispute.") (internal citation omitted).

On the other hand, the Supreme Court has also found that, "[t]o determine whether common questions predominate, the Court begins with 'the elements of the underlying cause of action.'"[97] If this "elements analysis" was applied to CCPA claims, a federal court will likely break § 1798.150's private right of action into its component parts to ask: (1) did the defendant possess the consumer's nonencrypted and nonredacted consumer information; (2) was that information subject to an unauthorized access and exfiltration, theft, or disclosure; and (3) was that exfiltration, theft, and/or disclosure the result of the defendant's violation of the duty to implement and maintain reasonable security procedures and practices *appropriate to the nature of the information*?[98] It will not be a stretch for a court to find that elements (1) and (2) are issues common to all class members for predominance purposes.[99] However, the more pressing question presented is whether the CCPA creates a heightened legal duty under element (3) as opposed to, for example, the legal duty owed under a common law negligence claim, because the CCPA contains other provisions, which indicate that "the nature of personal information" can vary in different contexts.[100] For instance, in breaches that implicate the CCPA's specific provision regarding businesses' execution of third party vendor contracts—that include an attendant prohibition on vendors' sale, retention, use, or disclosure of PII outside of the vendors' "direct business relationship with

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[97] *See In re* Premera Blue Cross Customer Data Sec. Breach Litig., No. 3:15-md-2633-SI, 2019 U.S. Dist. LEXIS 127093 at *37 (D. Or. 2019) (quoting Erica P. John Fun, Inc. v. Halliburton Co., 563 U.S. 804, 809 (2011)) (discussing predominance analysis in data breach class action).

[98] CAL. CIV. CODE § 1798.150(a) (2020) (stating elements of private right of action under CCPA).

[99] *See In re Premera Blue Cross*, 2019 U.S. Dist. LEXIS at *56-58 (comparing California statutory claim with common law negligence claim for predominance purposes).

> The question of whether Premera had Sensitive Information is not disputed. The question of whether Premera negligently maintained, preserved, or stored the information would be resolved on a classwide basis. The question of whether a third party (the alleged hackers) accessed the data is also a common question, because it involves common evidence regarding whether data was exported or exfiltrated from Premera's servers.

Id. at *57-58.

[100] *See In re Anthem, Inc.*, 327 F.R.D. at 314 (noting common factual and legal issues relevant to negligence claims outweigh any individualized differences). In this pre-CCPA class action, the court found that the case did not "implicate any of the state-specific issues that can sometimes creep into the negligence analysis." *Id.* In the same decision, the court rejects an argument that the "predominance requirement cannot be met because the affected state consumer-protection statutes vary in their coverage," because "the core of the [p]laintiffs' case relie[d] on the uniform aspects" of these laws. *Id.* at 315.

the business"—courts will have to decipher whether businesses employed certain, context-specific procedures to safeguard consumer PII.[101]

Subsequently, under the private right of action provision of the CCPA, courts will then have to determine whether those procedures constitute "appropriate" and "reasonable" practices given the nature of the information.[102] Courts, however, may still be inclined to rely on past data breach actions, which found that predominance was established since each individual action stemmed from a single course of conduct by a single defendant.[103] Nonetheless, the CCPA certainly invigorates the debate over predominance, and at the very least, may cause courts to err on the side of caution by certifying CCPA plaintiffs as their own subclass during pre-trial proceedings, given that lengthy appeals interpreting this landmark statute are likely foreseeable.[104]

IV. CONCLUSION

The California Consumer Privacy Act is the first law of its kind in the United States. Its global reach in protecting Californian citizen's rights to their Personally Identifiable Information has already had a profound effect on the consumer marketplace as businesses become CCPA-compliant. Some may argue that its mere enactment is the final push needed for comprehensive federal data privacy legislation. If such a result does not come to fruition, however, an overarching federal data privacy regime will be necessary after a post-CCPA data breach's tangled and unpleasant journey through the federal court system. This journey is perhaps already being put to the test after California plaintiffs brought a class suit against Ring, LLC, whose in-home video surveillance systems have continuously been hacked.[105] Although the alleged injuries suffered in this case—hackers physically viewing consumers' private lives inside their homes—are far more concrete than the exposure of consumers' PII, the class action com-

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[101] *See* CAL. CIV. CODE § 1798.140(w)(2)(A) (2020) (describing compliance requirements for third party contracts related to consumer PII).

[102] *See* Leipzig et al., *supra* note 17, at 37 (discussing guidelines for businesses' contracts with third party vendors).

[103] *See In re Anthem, Inc.*, 327 F.R.D. at 315 (finding predominance was met because vast majority of common issues regarding data breach stemmed from defendant's "common course of conduct").

[104] *See In re* Target Corp. Customer Data Sec. Breach Litig., 892 F.3d 968, 976 (discussing data breach as "one accident" that caused series of events leading to *all* plaintiffs' injuries) (emphasis added).

[105] *See In re* Ring LLC Privacy Litig., Docket No. 2:19cv10899 (C. D. Cal. Apr. 13, 2020) (Fitzgerald, J., Order Consolidating the Related Cases) (district court order allowing data breach class action to proceed with CCPA claims).

plaint brings both common-law negligence and CCPA claims on behalf of a nationwide class.[106] As this Note points out, this interplay between nationwide class members and California class members will surely be an interesting issue worth close observation.

With the FTC's confounded Equifax settlement still in sight, it is unsurprising that individual consumers continue to file data breach class actions in federal courts. The CCPA will likely muddle these pre-trial proceedings in multidistrict litigation, which could result in greatly disparate—and far more attainable—outcomes for Californian consumer-plaintiffs. The CCPA compounds the existing differences in state laws (or the lack thereof) regarding data breaches, and could be interpreted by federal courts to swamp either the commonality or predominance requirements for nationwide class certification under FED. R. CIV. P. 23(a) and (b). Likewise, the readily ascertainable damages for a CCPA subclass will have an indelible impact on data breach settlement negotiations, which will surely invigorate any adequacy of representation analyses by courts.

If such diversified treatment between citizens of different states becomes the norm for data breach class actions in federal courts, the federal government will seemingly have only two options. First, Congress could leave data breach legislation to the states, making it each state's prerogative to adopt CCPA-esque protections for its citizens, which includes a private right of action. However, such a course is symptomatic of why the CCPA was adopted in the first place: the piecemeal nature of data breach legislation on both the federal and state level is simply not an adequate means of protecting consumers' data. Alternatively, Congress could adopt its own CCPA-esque statutory scheme, granting more power and resources to the FTC to work as the sole organ of data breach litigation. In practice, such a scheme will theoretically provide uniform recovery for citizens of all fifty states, prevent needless multidistrict litigation that expends federal courts' resources, and create uniform standards for business practices related to the collection and protection of consumers' PII.

Until then, circuit splits over standing in data breach class actions and debates concerning what evidence needs to be shown to recover damages will perpetually rule the day in data breach litigation, as hackers and cybercriminals continue to infiltrate consumer data from businesses such as Microsoft, Estée Lauder, and MGM Resorts to the tune of 730.6 million consumer records.[107]

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[106] *See id.* (permitting data breach class action to proceed with CCPA claims).

[107] *See* Eugene Bekker, *2020 Data Breaches | The Worst So Far*, IDENTITYFORCE (Jan. 3, 2020), https://www.identityforce.com/blog/2020-data-breaches (providing up-to-date list of all reported data breaches by year).

CIVIL RIGHTS LAW—EXCESSIVE FORCE FOUND WHEN TASING SECTION 12 PATIENT, POLICE OFFICER GRANTED QUALIFIED IMMUNITY—*GRAY V. CUMMINGS*, 917 F.3D 1 (1ST CIR. 2019).

Law enforcement's use of excessive force is a violation of the Fourth Amendment.[1] In *Gray v.* Cummings,[2] the United States Court of Appeals for the First Circuit determined whether a police officer could be held civilly liable for tasing a mentally ill person who resisted arrest after she had been involuntarily committed.[3] The court held that there were no claims under Title II of the Americans with Disabilities Act ("ADA"), and that the police officer was entitled to qualified immunity, despite his use of excessive force in violation of the Fourth Amendment.[4]

On May 2, 2013, at approximately 4:00 a.m., Judith Gray ("Gray") was admitted to Athol Memorial Hospital after experiencing a manic episode and calling 9-1-1.[5] She was admitted to the hospital pursuant to Mass. Gen. Laws ch. 123, § 12, a statute authorizing state agents to involuntary hospitalize individuals at risk of serious harm by reason of mental illness.[6]

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[1] *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons . . . shall not be violated . . . ."); *see also* Aaron Sussman, Comment, *Shocking the Conscience: What Police Tasers and Weapon Technology Reveal About Excessive Force* Law, 59 UCLA L. REV. 1342, 1344-50 (2012) (detailing excessive force through taser usage); *When Using a Taser is Excessive Force*, HG.ORG LEGAL RESOURCES, https://www.hg.org/legal-articles/when-using-a-taser-is-excessive-force-40805 (last visited Oct. 30, 2019) (explaining excessive force in context of taser use).

[2] 917 F.3d 1 (1st Cir. 2019).

[3] *See id.* at 5 (reviewing lower court's issue).

[4] *See id.* at 9, 13 (affirming lower court's decision). The court also noted that it fairly balanced the competing concerns of the rights of the disabled and the importance of police not being "unduly hampered in the performance of their important duties." *Id.* at 20.

[5] *See id.* at 6 (explaining circumstances of Gray's hospitalization). Gray stated that "she 'really [didn't] know what happened' . . . because she 'was in a full-blown manic phase.'" *Id.* at 5. The court elicited many of the facts from Cummings's account because Gray had no memory of the event. *Id.* at 6; *see also* Harriman v. Hancock Cnty., 627 F.3d 22, 34 (1st Cir. 2010) (finding no factual dispute possible when plaintiff had no memory); Wertish v. Krueger, 433 F.3d 1062, 1065 (8th Cir. 2006) (finding police's version of events "unrefuted" when plaintiff had no memory).

[6] *See Gray*, 917 F.3d at 5 (commenting on plaintiff's mental state); *see also* MASS. GEN. LAWS ANN. ch. 123, § 12 (West 2019) (authorizing involuntary hospitalization). Section 12 authorizes involuntary emergency restraint and hospitalization of persons posing risk of serious harm by reason of mental illness. *See* § 12. The individual must be involuntarily committed by a physician or a police officer for a period not exceeding three days:

Gray escaped from the hospital later that morning, and hospital staff called the police to request that "'a section 12 patient' – be 'picked up and brought back.'"[7] Officer Cummings ("Cummings") responded and spotted Gray walking barefoot less than a quarter mile from the hospital.[8] Cummings got out of his police cruiser and told Gray that she had to return to the hospital while Gray used profanities and declared that she was not going back to the hospital.[9] Cummings subsequently followed Gray until she stopped, clenched her fists and teeth, flexed her body, and swore at Cummings while walking towards him.[10]

Cummings grabbed Gray's shirt and took her to the ground after he felt her body continue to move toward him.[11] Once on the ground, Cummings repeatedly told Gray to put her hands behind her back and warned that she would be tased if she did not comply.[12] Instead, Gray continued to swear at him—and when Cummings made one last request for her to comply—Gray refused to listen.[13] Ultimately, Cummings arrested Gray after he "removed the cartridge from his [t]aser, placed it in drive-stun mode, and tased Gray's back for four to six seconds."[14]

> Any physician . . . who, after examining a person, has reason to believe that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness may restrain or authorize the restraint of such person and apply for the hospitalization of such person for a 3-day period at a public facility . . . .

Id. Prior to committing the patient to a public facility, "the applicant shall . . . communicate with a facility to describe the circumstances and known clinical history and to determine whether the facility is the proper facility to receive such person . . . ." *Id.*

[7] *See Gray*, 917 F.3d at 6 (discussing how Gray absconded from hospital).

[8] *See id.* (exploring Cummings' method in attempting to detain Gray).

[9] *See id.* (explaining Cummings' attempt to initially detain Gray). Cummings implored Gray to go back to the hospital on numerous occasions, all of which were met with profanity and Gray eventually walking away from him. *Id.*

[10] *See id.* (detailing escalation of situation that led to Gray's arrest).

[11] *See id.* (exploring how Cummings detained Gray). Additionally, the court noted that "Cummings had a distinct height and weight advantage: he was six feet, three inches tall and weighed 215 pounds, whereas Gray was five feet, ten inches tall and weighed 140 pounds." *Id.*

[12] *See Gray*, 917 F.3d at 6 (explaining course of events that led to Gray's eventual arrest). "She did not comply. Instead, she 'tucked her arms underneath her chest and flex[ed] tightly,' swearing all the while." *Id.*

[13] *See id.* (showing Gray's refusal to obey Cummings's commands). Additionally, Gray told Cummings to "do it" in response to Cummings's warning that she would be tased. *Id.*

[14] *See id.* at 6-7 (detailing culmination of events leading to arrest). Following the taser deployment, Gray allowed Cummings to handcuff her. *Id.* at 7. Cummings then "helped Gray to her feet and called an ambulance, which transported Gray to the hospital." *Id.* Gray also mentioned that she felt "pain all over" and "must have passed out because [she] woke up in Emergency." *Id.*; *see also* Jay M. Zitter, Annotation, *When Does Use of Taser Constitute Violation of Constitutional Rights*, 45 A.L.R. 6th 1-2 (2020) (explaining taser use and effect of drive stun mode on subject).

Charges were filed against Gray for assaulting a police officer, resisting arrest, disturbing the peace, and disorderly conduct; however, the charges were all subsequently dropped.[15] Shortly thereafter, Gray sued Cummings and the Town of Athol ("the Town") in the United States District Court for the District of Massachusetts under 42 U.S.C. § 1983, Title II of the ADA, and supplemental state-law claims for assault and battery, malicious prosecution, and the Massachusetts Civil Rights Act.[16] Cummings and the Town filed a summary judgment motion, and a magistrate judge found that: (1) neither Cummings nor the Town violated the Fourth Amendment under § 1983, (2) that there were no viable state-law claims, and (3) that there had been no abridgement of the ADA because Cummings was entitled to employ an "appropriate level of force in response to an ongoing threat."[17] The magistrate judge also noted that Cummings was enti-

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> A taser may also be used as a drive stun or contact stun when the darts from a taser are removed and the taser is placed in direct contact with the subject and then electricity is cycled through. In other words, the electricity goes directly from the taser to the subject without the conduit of wires.

Zitter, *supra* note 14, at 1-2.

> [C]ritics have asserted that although coroners and officials have routinely found other causes for deaths occurring shortly after a tasering . . . many persons have died as the result of tasering by police, many of whom were unarmed, and that the cause was the tasering . . . [f]urthermore, human rights organizations are concerned about the lack of legislation or significant regulation in this area.

Zitter, *supra* note 14, at 1-2; Shaun H. Kedir, Note, *Stunning Trends in Shocking Crimes: A Comprehensive Analysis of Taser Weapons*, 20 J.L. & HEALTH 357, 363-64 (2007) (presenting debate regarding taser safety).

> Several of the medical studies, however, questioned the safety of Tasers on individuals with mitigating health factors, such as illicit drug or alcohol abuse, preexisting heart disease, pacemakers, and pregnancy. Some medical experts involved in the research speculated that individuals with these underlying health problems might be more susceptible to cardiac arrest and recommended further research on the issue. Although none of the research concluded that Taser in and of itself causes death, some studies listed Taser as a contributory cause.

Kedir, *supra* note 14, at 363-64.

[15] *See Gray*, 917 F.3d at 7 (listing charges filed against Gray).

[16] *See id.* at 4, 7. (describing initiation of civil action). The district court referred the motion to a magistrate judge, who in turn suggested that the motion be granted. *Id.*; *see also* Kedir, *supra* note 14, at 368 ("The [§ 1983] claim is independent of, and in addition to, other common law tort actions, such as assault and battery.")

[17] *See Gray*, 917 F.3d at 7 (finding no violation on any claim Gray brought against Cummings).

tled to qualified immunity as a police officer.[18] The United States Court of Appeals for the First Circuit subsequently affirmed the decision and found (1) that Gray did not have a claim under Title II of the ADA and (2) that Cummings was entitled to qualified immunity, even though a jury could have found there was excessive force in violation of the Fourth Amendment.[19]

Congress enacted § 1983 in 1871 to supply a right of action against a person, "who, under color of any statute . . . depriv[es] [another] of any rights, privileges, or immunities secured by the Constitution and laws . . . ."[20] A police officer violates an individual's Fourth Amendment rights when the officer uses excessive force to arrest said person.[21] The Supreme Court in *Graham v. Connor* decided that courts must use a totality of the circumstances approach—now commonly known as the "*Graham* factors"—to make an excessive force determination.[22] These factors include: "the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether [the suspect was] actively resisting arrest or attempting to evade arrest by flight.[23]

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[18] *See id.* (concluding no abridgment of ADA). The magistrate judge further noted that Cummings was entitled to use that amount of force "regardless of Gray's disability." *Id.*

[19] *See id.* at 7, 20 (noting holding of case-in-chief).

> [T]his is a hard case – a case that is made all the more difficult because of two competing concerns: our concern for the rights of the disabled and our concern that the police not be unduly hampered in the performance of their important duties . . . [w]e think that our ruling today . . . satisfies this exacting standard.

Id. at 20.

[20] *See* 42 U.S.C. § 1983 (1996) (detailing rights of action for people who have been deprived rights); *see also* David P. Stoelting, Comment, *Qualified Immunity for Law Enforcement Officials in Section 1983 Excessive Force Cases*, 58 U. CIN. L. REV. 243, 244 (1989) (summarizing § 1983 and qualified immunity for police officers). Police officers are never granted absolute immunity; instead, they are entitled to qualified immunity so "long as the officer's conduct did not violate the plaintiff's 'clearly established statutory or constitutional rights.'" Stoelting, *supra* note 20, at 243-44.

[21] *See* Graham v. Connor, 490 U.S. 386, 396 (1989) (showing need to balance government's interests and individual's rights). "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id.* (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

[22] See *id.* at 396 (explaining reasonableness standard for excessive force claims). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* (citing Terry v. Ohio, 392 U.S. 1, 20-22 (1968)).

[23] *See id.* (outlining specific factors courts use to determine reasonableness).

Even when excessive force is found, police officers and other government officials still have the defense of qualified immunity, which provides protection from civil damages for actions taken under color of state law.[24] To invoke the qualified immunity defense, a government official must first show that their actions did "not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[25] Secondly, they must prove "the allegedly abridged right was not 'clearly established' at the time of the defendant's claimed misconduct."[26] The second prong of the analysis has two facets, the first of which requires the plaintiff to "identify either 'controlling authority' or a 'consensus of cases of persuasive authority' sufficient to send a clear signal to a reasona-

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> Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

Id. at 396-97 (quoting Johnson v. Glick, F.2d 1028, 1033 (2d. Cir. 1973)); *see also* Estate of Armstrong v. Vill. of Pinehurst, 810 F.3d 892, 899 (4th Cir. 2016) (holding first *Graham* factor cuts in plaintiff's favor absent any crime). "When the subject of a seizure 'ha[s] not committed any crime, this factor weighs heavily in [the subject's] favor." *Armstrong*, 810 F.3d at 899 (quoting Bailey v. Kennedy, 349 F.3d 731, 743-44 (4th Cir. 2003)). For example, *Estate of Armstrong v. Vill. of Pinehurst* details a case where a bipolar and schizophrenic person left a hospital after being involuntarily committed, was subsequently found by police officers, and tased for not releasing from the four-by-four post. *Id.* at 895. The court analyzed the first *Graham* factor as favoring Armstrong because he had not committed any crime. *Id.* at 899-900. The second and third *Graham* factors weigh more favorably toward the police officer since Armstrong had the possibility of running into the street and endangering others or himself after resisting arrest. *Id.* at 901. While two out of the three *Graham* factors tipped the scale more heavily toward the police officer, the court held that the police officer—although entitled to use some force—was not entitled to use the taser in the manner that he did under the circumstances. *Id.*

[24] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding government officials shielded from liability for unknowingly violating statutory or constitutional rights); *see also* Stoelting, *supra* note 20, at 247 (explaining qualified immunity analysis).

[25] *See* Conlogue v. Hamilton, 906 F.3d 150, 154 (1st Cir. 2018) (quoting *Harlow*, 457 U.S. at 818) (explaining qualified immunity standard). "[T]he doctrine's prophylactic sweep is broad. We view claims of qualified immunity through the lens of objective reasonableness. So viewed, only those officials who should have known that their conduct was objectively unreasonable are beyond the shield of qualified immunity and, thus, are vulnerable to the sword of liability." *Id.* at 154; *see also* City of Escondido v. Emmons, 139 S. Ct. 500, 504 (2019) (analyzing objectively reasonable officer and unlawfulness of actions). In stressing the importance of the reasonable person analysis, the Court stated that "[w]hile there does not have to be a case directly on point, existing precedent must place the lawfulness of the particular [action] beyond debate." *City of Escondido*, 139 S. Ct. at 504.

[26] *See Conlogue*, 906 F.3d at 155 (quoting McKenney v. Mangino, 873 F.3d 75, 81 (1st Cir. 2017)) (noting requirements of second prong).

ble official that certain conduct falls short of a constitutional norm."[27] Second, the plaintiff must demonstrate that "an objectively reasonable official in the defendant's position would have known that their conduct violated that rule of law."[28]

As of May 2013, *Estate of Armstrong v. Vill. of Pinehurst*, *Parker v. Gerrish*, and *Ciolino v. Gikas* were the most directly related cases to the case-in-chief.[29] The plaintiff in *Armstrong*, a bipolar and paranoid schizophrenic, left the hospital after being committed and was subsequently found by police officers wrapped around a four-by-four post.[30] Armstrong was tased five times in drive stun mode after being warned that he would be tased, and the court found that since the law was "not so settled at the time [April 2011] they acted such that 'every reasonable official would have understood that' tasing Armstrong was unconstitutional" under the circumstances.[31] In *Parker*, the plaintiff also originally resisted arrest; however, even though he eventually complied, he was still tased.[32] The *Parker* court held that a jury could have found that the police officer violated the Fourth Amendment by tasing an unarmed suspect who "presented no significant 'active resistance' or threat."[33] Lastly, *Ciolino* involved a police officer who grabbed the plaintiff and forced him to the ground without giving any warning; ultimately, the court held that because "[the plaintiff] was not given a chance to submit peacefully to arrest before significant force was

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[27] *See* Alfano v. Lynch, 847 F.3d 71, 75 (1st Cir. 2017) (examining first facet of second prong); *see also* Ciolino v. Gikas, 861 F.3d 296, 305-06 (1st Cir. 2017) (showing more measured approach could have been taken before throwing person to ground); *Armstrong*, 810 F.3d at 907-08 (holding "right not to be subjected to tasing while offering stationary and non-violent resistance to a lawful seizure" not clearly established); Hagans v. Franklin Cnty. Sheriff's Off., 695 F.3d 505, 507 (6th Cir. 2012) (finding qualified immunity applied to officer when suspect died from taser); Parker v. Gerrish, 547 F.3d 1, 11 (1st Cir. 2008) (showing taser use after failure to be arrested properly was excessive force); Draper v. Reynolds, 369 F.3d 1270, 1278 (11th Cir. 2004) (examining police officer's taser use against noncompliant individual not outlier).

[28] *See Alfano*, 847 F.3d at 75 (detailing second facet of second prong).

[29] *See Ciolino*, 861 F.3d at 305-06 (holding officer not entitled to qualified immunity when throwing individual to ground for little reason); *Armstrong*, 810 F.3d at 899 (finding officer entitled to qualified immunity when tased mentally ill individual multiple times); *Parker*, 547 F.3d at 11 (holding taser use was excessive force when suspect presented no active resistance or threat).

[30] *See Armstrong*, 810 F.3d at 896 (detailing facts of *Armstrong*).

[31] *See id.* at 908 (noting court ruling of established caselaw).

[32] *See Parker*, 547 F.3d at 5 (showing relevant caselaw). The defendant was stopped for suspicion of driving while intoxicated after speeding. *Id.* at 3. It is disputed as to whether the defendant actually complied, but the court was required to defer to the defendant due to the posture of the case. *Id.* at 4-5.

[33] *See id.* at 10 (examining holding of case). The court also notes that a jury could turn to the facts about the "strong incapacitating effect of the taser and the fact that the South Portland Police Department considered the [t]aser just below deadly force in its 'continuum' of force." *Id.*

used . . . an 'objectively reasonable police officer' would have taken a more measured approach."[34]

In *Gray v. Cummings*, the United States Court of Appeals for the First Circuit narrowly addressed the question of excessive force and the application of qualified immunity in Gray's case.[35] In addressing the first prong in the analysis, the appeals court held that Cummings violated Gray's Fourth Amendment rights through his use of excessive force.[36] When applying the first *Graham* factor—the severity of the crime at issue—the court stated that because Gray had not committed any crime, the scale tipped in Gray's favor.[37] The appeals court then held that the second *Graham* factor—whether the suspect posed an immediate threat to the safety of the officers or others—also cut in Gray's favor because Gray posed a danger only to herself because she was bipolar and experiencing a manic phase.[38] However, the appeals court held that the third *Graham* factor—whether Gray was actively resisting arrest—favored Cummings; ultimately,

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[34] *See Ciolino*, 861 F.3d at 304 (quoting Raiche v. Pietroski, 623 F.3d 30, 39 (1st Cir. 2010)) (holding Fourth Amendment violated when not given chance to submit peacefully).

[35] *See* Gray v. Cummings, 917 F.3d 1, 5 (1st Cir. 2019) (stating holding of case-in-chief).

> This appeal arises at the intersection of constitutional law and disability-rights law. It touches upon a plethora of important issues. Some of these issues relate to the appropriateness of a police officer's use of a Taser in attempting to regain custody of a mentally ill person who, after being involuntarily committed, absconded from a hospital . . . In the end, we decide the case on the narrowest available grounds and affirm the entry of summary judgment for the defendants.

Id.

[36] *See id.* at 8-9 (examining holding of excessive force against Cummings). Conversely, the magistrate judge held that a reasonable jury could not have found that Cummings violated Gray's Fourth Amendment rights by using excessive force. *Id.* at 8.

[37] *See id.* at 9 (applying first *Graham* factor). Unlike the magistrate judge's assessment that this factor cut in favor of Cummings, the appeals court stated:

> [T]his assessment is insupportable: it fails to view the facts in the light most favorable to Gray . . . we think it [is] important that Cummings was not called to the scene to investigate a crime; he was there to return a person suffering from mental illness to the hospital.

Id. at 8. The appeals court also stated that the alleged assault does not tilt the scales because "a reasonable jury could find that the facts did not support the characterization of Gray's actions as an 'assault.'" *Id.* at 9.

[38] *See id.* at 9 (analyzing second *Graham* factor). The magistrate judge held that the second *Graham* factor favored Cummings because the definition of a § 12 patient entails a finding by a qualified medial professional that the "failure to hospitalize would create a likelihood of serious harm by reason of mental illness." *Id.* (quoting MASS. GEN. LAWS ANN. ch. 123, § 12(a) (West 2019)). Additionally, Cummings knew of this fact. *Id.* The appeals court differed in opinion, holding that a reasonable jury could find that "Gray – who was shuffling down the sidewalk barefoot and unarmed – only posed a danger to herself." *Id.*

the *Graham* factors "point in conflicting directions" and did not provide a clear answer.[39] When assessing all three of these factors under the totality of the circumstances, the appeals court held that a reasonable jury could have found that Cummings used excessive force.[40]

In response to Cummings's qualified immunity defense, the appeals court held that Gray's right to be free from the degree of force used was not clearly established at the time of the incident.[41] The court further stated that "an objectively reasonable police officer in May of 2013 could have concluded that a single use of the [t]aser in drive-stun mode to quell a nonviolent, mentally ill individual resisting arrest, did not violate the Fourth Amendment."[42] The appeals court also acknowledged the many cases cited by Ms. Gray, but stated that no such case was factually similar to her own.[43] Ultimately, the Court of Appeals for the First Circuit held

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[39] *See id.* (discussing third *Graham* factor and noting factors point in conflicting directions). The appeals court agreed with the magistrate judge in holding that the final *Graham* factor favored Cummings. *Id.* The court came to this conclusion because Cummings told Gray to put her hands behind her back on numerous occasions and she subsequently refused to do so. *Id.*

[40] *See Gray*, 917 F.3d at 9 (concluding reasonable jury could have found Cummings used excessive force). "Drawing those inferences beneficially to Gray and aware that Cummings not only had her down on the ground but also outweighed her by some seventy-five pounds, a reasonable jury could find that Gray had committed no crime and that she posed no threat to Cummings when he tased her." *Id.*

[41] *See id.* at 10 (restating qualified immunity two-prong inquiry). The court held that the first prong of the qualified immunity analysis, whether the defendant violated the plaintiff's constitutional rights, had been met. *Id.* However, they went on to state that the second prong, whether Gray's right to be free from the degree of force used, had not been clearly established at the time of the incident. *Id.* at 10-12; *see also* Bryan v. MacPherson, 630 F.3d 805, 829 (9th Cir. 2010) (showing force to be used differs with mentally ill persons).

> The government has an important interest in providing assistance to a person in need of psychiatric care; thus, the use of force that may be justified by that interest necessarily differs both in degree and in kind from the use of force that would be justified against a person who has committed a crime or who poses a threat to the community.

Bryan, 630 F.3d at 829.

[42] *See Gray*, 917 F.3d at 12 (analyzing whether there was controlling authority sufficient to send clear signal to police officer existed). The district court concluded that "the right not to be tased while offering non-violent stationary, resistance to a lawful seizure was not clearly established at the time of the confrontation between Ms. Gray and Officer Cummings." *Id.* at 10.

[43] *See id.* at 13 (distinguishing case-in-chief from other cases). The appeals court noted that the case on which Gray most relied, *Parker*, was factually dissimilar to the case-in-chief because Gray never complied with Cummings's command to put her hands behind her back. *Id.* at 12. The appellate court also stated that *Ciolino* was readily distinguishable from the case-in-chief because "Cummings repeatedly told Gray that she needed to return to the hospital, and she adamantly refused to obey." *Id.* The court noted that Gray's argument of "passive" rather than "active" resistance was flawed. *Id.* Additionally, there had been no subsequent taser deployments in this case, and therefore none of the cases in which multiple deployments were made were applicable. *Id.*; *see also* Meyers v. Baltimore Cnty., 713 F.3d 723, 733-34 (4th Cir. 2013) (noting no deploy-

that although there had been a violation of the Fourth Amendment, nevertheless, Cummings had qualified immunity due to a lack of factually similar caselaw.[44]

The court attempted to weigh the values of two important competing concerns: the rights of the disabled, and not hampering police officers in the performance of their duties.[45] However, the court did not place enough emphasis on the rights of the disabled and how these rights play a role in analyzing a qualified immunity defense.[46] The court incorrectly disregarded Gray's illness and its role in the qualified immunity defense analysis; instead, the court played off Cummings' ignorance as forgivable under the circumstances.[47] Although it is true that the "skimpiness of [the] information" would lead the police officer to prepare for the worst, this should neither be an excuse nor a solution for similar, future problems.[48]

Additionally, the Court of Appeals for the First Circuit did not place enough emphasis on existing caselaw.[49] Like Armstrong in *Estate of*

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ment of taser subsequent to an initial taser); Cyrus v. Town of Mukwonago, 624 F.3d 856, 859-63 (7th Cir. 2010) (acknowledging no deployment of taser subsequent to initial taser shock).

[44] *See Gray*, 917 F.3d at 12 (stating holding of case-in-chief).

[45] *See id.* at 20 (noting need to balance rights of mentally ill and protection of police officers executing duties). "We add only that this is a hard case – a case that is made all the more difficult because of two competing concerns: our concern for the rights of the disabled and our concern that the police not be unduly hampered in the performance of their important duties." *Id.*

[46] *See id*. at 12 (showing court placed some emphasis on factor of disability). Although the court stated that "a subject's mental illness is a factor that a police officer must take into account in determining what degree of force, if any, is appropriate," it did not adequately balance the rights of both parties. *Id.* at 11. Rather, the court was lenient with Cummings's failure to consider Gray's condition, reasoning that there was skimpy information. *Id.* at 12.

[47] *See id.* at 12 (criticizing weight placed on mental illness in factor analysis); *see also* Estate of Armstrong v. Vill. of Pinehurst, 810 F.3d 892, 900 (4th Cir. 2016) (showing differing level of force needed for disabled individuals). "Mental illness, of course describes a broad spectrum of conditions that does not dictate the same police response in all situations. But 'in some circumstances at least,' it means that 'increasing the use of force may . . . exacerbate the situation.'" *Armstrong*, 810 F.3d at 900 (quoting Deorle v. Rutherford, 272 F.3d 1272, 1283 (9th Cir. 2001)); Bryan v. MacPherson, 630 F.3d 805, 829 (9th Cir. 2010) (explaining differing level of force needed).

[48] *See Gray*, 917 F.3d at 11-12 (suggesting possible solution not fully discussed). One potential solution not discussed by the court is giving police officer more information about the individual upon dispatch, such as telling him or her what kind of disease from which the person may be suffering from. *Id.* at 9; *seem also* Johnny Rice II, *Why We Must Improve Police Responses to Mental Illness*, NATIONAL ALLIANCE ON MENTAL ILLNESS (Mar. 2, 2020), https://www.nami.org/Blogs/NAMI-Blog/March-2020/Why-We-Must-Improve-Police-Responses-to-Mental-Illness (explaining how increasing police training can develop better knowledge and tools to address these situations). Similarly, providing training on how to interact with a person with mental illness can significantly improve officer response and trust. *See* Rice, *supra* note 48.

[49] *See Gray*, 917 F.3d at 11 (distinguishing relevant caselaw as outlier); *see also* Ciolino v. Gikas, 861 F.3d 296, 305-06 (1st Cir. 2017) (holding no qualified immunity for police officer); *Armstrong*, 810 F.3d at 906 (noting reasonable jury could find officers violated Armstrong's

Armstrong v. Vill. of Pinehurst, Gray did not comply with commands from police while experiencing an episode due to his mental illness.[50] Similarly, Armstrong and Gray were both told that if they did not comply, they would be tased.[51] The court differentiated both *Parker* and *Ciolino* by stating that Gray had ample opportunity to comply with Cummings's commands.[52] However, the amount of force used in this situation was clearly excessive, especially as it was used on a mentally ill person.[53] Given that the facts of *Armstrong*, *Ciolino*, and *Parker* were so similar to those in *Gray*, the court was mistaken in its finding that there was no controlling authority sufficiently available to show that the police officer's conduct would fall short of a constitutional norm.[54]

Although Gray was unable to find relief with any of her claims, future litigants with cases of similar factual bases may have better opportunities for success.[55] Since the court decided that Cummings violated Gray's Fourth Amendment rights, future litigants could successfully bring a § 1983 claim, notwithstanding an asserted qualified immunity defense.[56] Although this will not give Gray the damages she deserved, this adjudication will strengthen the body of law as future cases will be able to point to controlling authority.[57] Practitioners will now be able to cite *Gray* as controlling precedent that demonstrates what acts can constitute a Fourth Amendment violation.[58]

In *Gray v. Cummings*, the Court of Appeals for the First Circuit decided whether a police officer could be held liable for tasing a mentally

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Fourth Amendment rights); Parker v. Gerrish, 547 F.3d 1, 11 (1st Cir. 2008) (holding police officer used excessive force).

[50] *See Armstrong*, 810 F.3d at 897 (showing similar facts to case-in-chief).

[51] *See Gray*, 917 F.3d at 11. (explaining similarities between *Gray* and *Armstrong*).

[52] *See id.* at 12-13 (examining how court differentiates between *Gray* and other cases); *see also Ciolino*, 861 F.3d at 306 (distinguishing from case-in-chief); *Parker*, 547 F.3d at 10 (differentiating amount of time given to comply).

[53] *See Gray*, 917 F.3d at 11-13 (balancing need to arrest versus amount of force used against mentally ill person); *see also Parker*, 547 F.3d at 10 (discussing taser use and excessive force). The court in *Parker* also points to the fact that tasers were listed just below deadly force in its continuum of force. *Parker*, 547 F.3d at 10.

[54] *See Gray*, 917 F.3d at 11-13. (disagreeing with case-in-chief regarding lack of controlling authority).

[55] *See id.* at 10 (reiterating second facet of "identify either 'controlling authority' or 'consensus of cases of persuasive authority' sufficient to send a clear signal to a reasonable official that certain conduct falls short of the constitutional norm.").

[56] *See id*. (quoting City of Escondido v. Emmons, 139 U.S. 500, 504 (2019)) ("Taken together, these steps normally require that, to defeat a police officer's qualified immunity defense, a plaintiff must 'identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment.'")

[57] *See id.* at 11-13 (developing body of caselaw for disabled persons).

[58] *See id.* at 9 (noting which acts will elicit finding of violation).

ill individual in flight from the hospital to which she had been involuntarily committed. Although the court attempted to weigh competing concerns, it did not give enough weight to the rights of the disabled and mentally ill. Additionally, the court could have placed more emphasis on existing caselaw to give Gray a remedy against Cummings. Although there is a need to make sure police officers are not unduly hampered in their duties; here, the police officer's use of a taser was an unreasonable action given the circumstances.

Brandon Vallie

CONSTITUTIONAL LAW—SEVENTH CIRCUIT UPHOLDS BUFFER-ZONE ORDINANCES TO PROTECT WOMEN ENTERING HEALTHCARE FACILITIES FROM SIDEWALK COUNSELORS—*PRICE V. CITY OF CHICAGO*, 915 F.3D 1107 (7TH CIR. 2019).

Since the late twentieth century, courts have grappled with the tension between the First Amendment's right to free speech and the government's desire to provide women with safe, unobstructed access to healthcare facilities that offer birth control and abortion services.[1] To address the interests on both sides of this scale, cities have enacted "buffer zone" ordinances, which make it illegal to approach patients who seek access to such healthcare facilities.[2] In *Price v. City of Chicago,*[3] "sidewalk counselors" asked the Court of Appeals for the Seventh Circuit to strike down a Chicago buffer-zone ordinance given recent Supreme Court decisions that arguably rendered the ordinance unconstitutional.[4] The court, however, affirmed the lower court's decision to uphold the Chicago ordinance, and concluded that the Supreme Court upheld a nearly identical or-

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[1] *See* U.S. CONST. amend. I (delineating right to freedom of speech); Madsen v. Women's Health Ctr., 512 U.S. 753, 767-68 (1994) (noting states' significant interest in protecting access to abortion); Erin Heger, '*It's All About Power': Mississippi Anti-Choice Group Targets Buffer Zone Ordinance*, REWIRE NEWS (Oct. 18, 2019, 10:57 AM), https://rewire.news/article/2019/10/18/its-all-about-power-mississippi-anti-choice-group-targets-buffer-zone-ordinance/ (describing First Amendment claims and competing safety issues); *see also* Sølvi Marie Risøy & Thorvald Sirnes, *The Decision: Relations to Oneself, Authority and Vulnerability in the Field of Selective Abortion*, 10 BIOSOCIETIES 317 (2014) (detailing gravity of decision for women choosing abortion).

[2] *See* Heger, *supra* note 1 (describing history of buffer-zone litigation and referencing case-in-chief).

[3] 915 F.3d 1107 (7th Cir. 2019).

[4] *See id.* at 1110 (describing Petitioners' claims for injunctive relief). Petitioners argue that, while the ordinance at issue is nearly identical to that upheld in *Hill v. Colorado*, the Supreme Court's later decisions in *Reed v. Town of Gilbert* and *McCullen v. Coakley* essentially overruled *Hill*. *Id.* at 1111. Thus, the Court should follow the tests for content-neutrality and narrow-tailoring from these cases. *Id.*; *see also* Reed v. Town of Gilbert, 576 U.S. 155, 173 (2015) (overturning facially content-based ordinance because it did not meet strict scrutiny); McCullen v. Coakley, 573 U.S. 464, 496 (2014) (overturning content-neutral law because it did not serve legitimate government interest); Hill v. Colorado, 530 U.S. 703, 734-735 (2000) (upholding content-neutral statute although it regulated freedom of speech).

dinance in *Hill v. Colorado* that has not yet been overruled by any recent cases.[5]

Veronica Price, David Bergquist, Ann Scheidler, and Anna Marie Scinto Mesia regularly stood on the public sidewalks outside of Chicago abortion clinics to inform patients both of the risks associated with abortion procedures and alternative courses of action available to them.[6] To their dismay, in October of 2009, the City of Chicago ("City") "amended the City's disorderly conduct ordinance to prohibit any person from approaching within eight feet of another person near an abortion clinic for the purpose of engaging in the types of speech associated with sidewalk counseling."[7] The ordinance ("Chicago ordinance") effectively banned sidewalk counseling outside of abortion clinics or healthcare facilities.[8] The aforementioned individuals—self-proclaimed "sidewalk counselors"—joined with two pro-life advocacy groups ("Petitioners") to sue the City.[9] They sought declaratory and injunctive relief against the enforcement of the ordinance; they claimed it stifled their ability to engage in their counseling practices and violated their First Amendment right to free speech.[10] Petitioners insisted that they be allowed to approach women at a close proximity as they entered abortion clinics so they could speak in soft, gentle tones and protect the person's privacy.[11]

Petitioners claimed the Chicago ordinance was a "content-based restriction on speech and [was] facially unconstitutional under strict scruti-

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[5] *See Price*, 915 F.3d at 1119 (explaining court's holding); *see also Hill*, 530 U.S. at 735 (holding statute which regulated speech was constitutional).

[6] *See Price*, 915 F.3d at 1109-10 (identifying Petitioners).

[7] *See id.* at 1110-11 (describing amendment of City's ordinance).

[8] *See id.* (citing to ordinance at issue: CHI. ILL. CODE § 8-4-010(j)(1)). The ordinance provides that a person commits disorderly conduct when he or she:

> [K]nowingly approaches another person within eight feet of such person, unless such other person consents, *for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way* within a radius of 50 feet from any entrance door to a hospital, medical clinic or healthcare facility.

Id. (emphasis added) (outlining ordinance at issue).

[9] *See id.* at 1110 (explaining how Petitioners sued City under 42 U.S.C. § 1983).

[10] *See id.* (stating Petitioners' purpose for suit); *see also* U.S. CONST. amend. I (articulating right to free speech).

[11] *See Price*, 915 F.3d at 1109-10 (describing tactical need for proximity to people entering abortion clinics). "These conversations must take place face to face and in close proximity to permit the sidewalk counselors to convey a gentle and caring manner, maintain eye contact and a normal tone of voice, and protect the privacy of those involved." *Id.*

ny."[12] Alternatively, they argued that, even if the court applied intermediate scrutiny, the ordinance failed to satisfy the narrow-tailoring requirement for content-neutral restrictions on speech and violated free speech as applied.[13] The lower court dismissed the claim, pursuant to Fed. R. Civ. P. 12(b)(6) and the Supreme Court's rejection of a similar argument for a nearly identical ordinance in *Hill v. Colorado.*[14] This appeal subsequently followed and contested the dismissal.[15] The question then became whether later Supreme Court decisions so undermined the *Hill* decision—particularly in terms of its analysis on content-neutrality and narrow-tailoring requirements—to justify an abandonment of this precedent.[16] The Court of Appeals for the Seventh Circuit affirmed the lower court's decision, decided that *Hill* still governs, and consequently foreclosed a facial First Amendment challenge to this ordinance.[17]

The First Amendment's right to free speech contravenes with states' Tenth Amendment police power to protect the health and safety of their citizens—with weighty fundamental rights on both sides of the scale.[18] The standard of review for speech restrictions differs depending on whether the restriction is content-based, which requires strict scrutiny, or content-neutral, which calls for intermediate scrutiny.[19] Restrictions are

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[12] *See id.* at 1110-11 (explaining Petitioners' claims). Petitioners raised four claims in total: (1) the ordinance infringes on their right to free speech both facially and as applied, (2) the ordinance is unconstitutionally vague, (3) the City selectively enforces the ordinance, and (4) the ordinance infringes on the Petitioners' state constitutional right to freedom of speech and of assembly. *Id.*

[13] *See id.* (explaining Petitioners' alternative argument). "Their fallback position is that the ordinance flunks the narrow-tailoring requirement of the intermediate test for content-neutral restrictions on speech." *Id.*

[14] *See id*. (articulating court reviews "a rule 12(b)(6) dismissal de novo"); *see also* Hill v. Colorado, 530 U.S. 703, 725, 730 (2000) (finding Colorado statute constitutional because it was both content-neutral and narrowly-tailored).

[15] *See id.* at 1110 (explaining procedural history).

[16] *See Price*, 915 F.3d at 1111 (discussing Petitioners' argument). "As they see it, however, *Hill* is no longer an insuperable barrier to suits challenging abortion clinic bubble-zone laws. The premise of their claim is that the Court's more recent decisions in *Reed* and *McCullen* have so thoroughly undermined *Hill's* reasoning that we need not follow it." *Id.*

[17] *See id.* at 1119 (holding "*Hill* directly controls, notwithstanding its inconsistency with *McCullen* and *Reed*.") The court further stipulated that "only the Supreme Court can bring harmony to these precedents" and affirmed the district judge's dismissal of facial challenge. *Id.*

[18] *See* U.S. CONST. amend. I (granting free speech); U.S. CONST. amend. X (describing police power); *see also* Madsen v. Women's Health Ctr., 512 U.S. 753, 768 (1994) (establishing protection of abortion access is justifiable use of police powers).

[19] *See* Frisby v. Schultz, 487 U.S. 474, 481(1988) (stating appropriate levels of scrutiny for speech restrictions); *see also* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 358-60 (2006) (explaining levels of scrutiny). Siegel discusses the origins of strict scrutiny in *Skinner v. Oklahoma* and *Korematsu v. United States*. Siegal, *supra* note 19, at 359. He emphasizes that the doctrine heightens the standard of

content-based when the government targets speech for its particular meaning or message.[20] A restriction is content-neutral when the government adopts the restriction for any reason other than to stifle the message.[21] Restrictions based on the time, place, or manner of speech are a subcategory of content-neutral speech because they do not seek to silence a particular message or meaning; rather, these restrictions regulate where, when, and how a person or entity may communicate a message, without reference to its meaning.[22] To determine content-neutrality in time, place, or manner cases, the government must satisfy the standard set forth in *Ward v. Rock Against Racism.*[23] This standard requires proving that the restriction is "justified without reference to the content of the regulated speech, that [it is] narrowly tailored to serve a significant governmental interest, and that [it leaves] open ample alternative channels for communication of the information."[24]

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review courts use in three ways: "[i]t shifts the burden of proof to the government; requires the government to pursue a 'compelling state interest;' and demands that the regulation promoting the compelling interest be 'narrowly tailored.'" Siegal, *supra* note 19, at 356, 359-60 (citing to Skinner v. Oklahoma, 316 U.S. 535 (1942) and Korematsu v. United States, 323 U.S. 213 (1944)).

[20] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791-92 (1989) (explaining Court's reasoning for determining content-neutrality). A restriction is content-based when "the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.* at 791; *see also* Reed v. Town of Gilbert, 576 U.S. 155, 164 (2015) (holding facially content-neutral laws can be meaningfully content-based). In *Reed*, the Court explained that strict scrutiny applied to facially content-based laws and to laws that, despite being facially content-neutral, "cannot be 'justified without reference to the content of the regulated speech.'" *Reed*, 576 U.S. at 164 (quoting *Ward*, 491 U.S. at 791). The Court explains that a facially content-based restriction is subject to strict scrutiny, even if the government has a benign justification for it. *Reed*, 576 U.S. at 164.

[21] *See Reed*, 576 U.S. at 163-165 (describing content-neutrality). The government's underlying purpose controls the analysis as to whether a restriction is content-neutral. *Id.* A restriction is content-neutral if the regulation is enacted to serve purposes unrelated to the content of the speech. *Id.* In *Reed*, the Court decided that determining a content-based distinction is a two-part test: whether (1) the restriction is content-based on its face, and (2) the government's purpose or justification is content-based. *Id.* The restriction is content-neutral if it passes both prongs of the test. *Id.*

[22] *See id.* at 170-71 (explaining analysis for content-neutral cases involving time, place, and manner restrictions); *see also* Richard Albert, *Protest, Proportionality, and the Politics of Privacy: Mediating the Tension Between the Right of Access to Abortion Clinics and Free Religious Expression in Canada and the United States*, 27 LOY. L.A. INT'L & COMP. L. REV. 1, 10, 19 (2005) (explaining rationale for classifying restrictions on time, place, and manner of speech as content-neutral).

[23] *See Ward*, 491 U.S. at 791 (identifying standard set forth in case).

[24] *See id.* (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)); Heffron v. Int'l. Soc'y. for Krishna Consciousness, Inc., 452 U.S. 640, 647-48 (1981) (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976)). These cases establish that:

Applying this standard in *Hill v. Colorado*, the Supreme Court upheld an ordinance that provided an eight-foot buffer zone around patients entering abortion or healthcare facilities wherein no person could approach patients for the purpose of counseling, educating, or leafletting.[25] The majority declared the ordinance content-neutral because it neither discriminated among viewpoints nor restricted "any subject matter that may be discussed by a speaker."[26] Justice Scalia's dissenting opinion attacked the majority's application of the *Ward* standard, and argued that the buffer zone was a content-based restriction because it targeted speech that "communicates a message of protest, education, or counseling."[27] Additionally, Justice Scalia's dissent stated that the actual underlying governmental interest was to protect a nonexistent "right to be let alone."[28]

Since *Hill*, the Supreme Court has decided similar cases on narrower grounds, compelling some to question whether these subsequent decisions have rendered *Hill* obsolete in abortion-speech cases.[29] The Court upheld the content-neutrality of a similar buffer zone in *McCullen v. Coakley*, but decided the thirty-five-foot radius prevented pro-life advocates from accessing the sidewalk adjacent to the driveway, and consequently "burden[ed] substantially more speech than necessary" to achieve the gov-

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> [E]ven in a public forum, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

See Ward, 491 U.S. at 791.

[25] *See* Hill v. Colorado, 530 U.S. 703, 707, 712-13 (2000) (explaining effect of statute and holding of lower court, respectively).

[26] *See id.* at 723 ("Rather, it simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners.")

[27] *See id.* at 744 (Scalia, J., dissenting) (rejecting majority's reasoning). Justice Scalia explains that not only was the ordinance content-based, but the majority also improperly considered the government interest of protecting the "right to be let alone." *Id.* at 744, 751-52.

[28] *See id.* at 741 (Scalia, J., dissenting) (providing theory for government interest at issue); *see also* Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 31-32, 38 (2003) (arguing Court wrongly decided that restriction in *Hill* was content-neutral).

[29] *See* Brief of *Amicus Curiae* Justice and Freedom Fund in Support of Petitioners at 9-11, Price v. Chicago, 915 F.3d 1107 (2019) (7th Cir. 2019) (No. 18-1516) LEXIS 2506, at *9 (explaining how *McCullen* and *Reed* changed standard for content-based restrictions); *see also* Zachary J. Phillipps, Note, *The Unavoidable Implication of McCullen v. Coakley: Protection Against Unwelcome Speech is Not a Sufficient Justification for Restricting Speech in Traditional Public Fora*, 47 CONN. L. REV. 937, 969 (2015) (explaining sufficient basis for Court's decision that *McCullen* overrules *Hill*).

ernment's interests.[30] In deciding that this ordinance was not narrowly tailored, the Court gave much import to the fact that the state had too eagerly foregone alternative measures that would have burdened speech to a substantially lesser degree.[31] Shortly after *McCullen* limited the narrow-tailoring component set by *Hill*, the Court in *Reed v. Town of Gilbert* proceeded to expand the basis for labeling a restriction content-based.[32] In *Reed*, the Court decided that even a restriction that is content-neutral on its face can be deemed content-based if the law "cannot be 'justified without reference to the content of the regulated speech.'"[33] The Court explained that any restriction targeting specific subject matter is content-based, even if it does not discriminate among viewpoints within that subject matter.[34] The Court's decisions in *McCullen* and *Reed* have substantially undermined the force of *Hill* in determining both whether a restriction is content-based and whether a restriction is sufficiently narrowly-tailored.[35] For these reasons, Petitioners unsuccessfully argued that the Court should apply the *McCullen* and *Reed* standards and reverse the lower court's decision to uphold the Chicago ordinance.[36]

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[30] *See* McCullen v. Coakley, 573 U.S. 464, 490 (2014) (outlining Court's holding). Petitioners explained that they could not distinguish between patients with whom they wished to speak to and mere passersby before the thirty-five-foot buffer zone began, which prevented them from engaging in this type of speech at all. *Id.* at 487.

[31] *See id.* at 492-94 (discussing alternative, less restrictive means of achieving goal). For example, the City could:

> [E]nact legislation similar to the federal Freedom of Access to Clinic Entrances Act of 1994 (FACE Act) . . . which subjects to both criminal and civil penalties anyone who "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services.

Id. at 491. Similarly, if the City is concerned about harassment, it "could also consider an ordinance such as the one adopted in New York City that not only prohibits obstructing access to a clinic, but also makes it a crime 'to follow and harass another person within 15 feet of the premises of a reproductive health care facility.'" *Id.*

[32] *See* Reed v. Town of Gilbert, 576 U.S. 155, 164-65 (2015) (expanding analysis for content-based determination).

[33] *See id.* at 165 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[34] *See id.* at 169 (explaining content-based regulations and providing examples of speech regulation targeted at specific subject matter).

[35] *See* Price v. Chicago, 915 F.3d 1107, 1119 (7th Cir. 2019) (noting *Reed* and *McCullen* "have deeply shaken *Hill's* foundation").

[36] *See* Petition for a Writ of Certiorari at 23, Price v. Chicago, 915 F.3d 1107 (7th Cir. 2019) (No. 18-1516) LEXIS 2068, at *13 (explaining Petitioners' argument that "*Hill* is in irreconcilable conflict with this Court's more recent First Amendment decisions, including *Reed* and *McCullen*"). The Supreme Court subsequently denied certiorari on July 2, 2020. *See* Price v. City of Chicago, No. 18-1516, 2020 U.S. LEXIS 3527 (U.S. 2020).

In *Price v. City of Chicago*, the Petitioners' argument depended on the court abandoning the *Hill* precedent in favor of the standards set forth in *Reed* and *McCullen*.[37] The court first addressed the Petitioners' stance by noting that while "[t]he [Supreme] Court's intervening decisions have eroded *Hill's* foundation . . . the case still binds [this court]; only the Supreme Court can say otherwise."[38] Next, the court emphasized the urgency and importance of free speech and acknowledged that the time and place of the speech at issue here was the most protected type.[39] Despite the Supreme Court's acknowledgement of the significance of this type of speech, it has historically applied the intermediate standard of scrutiny to abortion speech.[40] Accordingly, this court did the same.[41]

The court subsequently analyzed relevant Supreme Court decisions and acknowledged that *Hill* directly conflicts with *Reed* and *McCullen* in two critical ways: (1) its facial analysis failed to satisfy the tests set out in *Reed* and *McCullen*,[42] and (2) those later cases that explicitly rejected *Hill's* narrow-tailoring process.[43] Nevertheless, the court concluded that, because *Hill* is the controlling law and the Supreme Court has not overruled it's decision, the court's analysis of the matter at hand is controlled by *Hill*.[44] Furthermore, because *Hill's* narrow-tailoring analysis "was highly general-

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[37] *See Price*, 915 F.3d at 1111 (describing basis of Petitioners' argument).

[38] *See id.* (citing State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)).

[39] *See id.* at 1112 (explaining this type of speech is most protected on public sidewalks). "That the sidewalk counselors seek to reach women as they enter an abortion clinic— at the last possible moment when their speech may be effective— 'only strengthens the protection afforded [their] expression.'" *Id.* (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995)).

[40] *See id.* (justifying decision to apply intermediate level of scrutiny). "To date, the Supreme Court has applied the intermediate standard of scrutiny to abortion-clinic buffer zones, with mixed results." *Id.*

[41] *See id.* (noting court applied same standard of scrutiny).

[42] *See* Price, 915 F.3d at 1117-18 (explaining how *Hill's* facial analysis contradicted *Reed* and *McCullen). Hill's* facial analysis fails to satisfy the *McCullen* test because it determined that an ordinance requiring law enforcers to examine the content of the message can still be content-neutral, an idea explicitly rejected by *McCullen*. *Id.* at 1118. *Hill* predicated its decision of content-neutrality on the fact that the restrictions did not distinguish between viewpoints, but *Reed* explicitly stated that the "lack of viewpoint or subject-matter discrimination does not spare a facially content-based law from strict scrutiny." *Id.* (citing Reed v. Town of Gilbert, 576 U.S. 155, 164-65 (2015)). *Hill* also failed to satisfy *McCullen's* facial analysis because it accepted the speech's harmful effect on the listener as a reasonable justification. *Id.*

[43] *See id.* (describing how *Hill's* narrow-tailoring analysis failed *Reed* and *McCullen* standards). *Hill* justified the restriction because the alternative methods of achieving this interest—which were less burdensome on speech—were harder to enforce. *Id.* at 1118. *McCullen,* however, explicitly rejected this as an acceptable factor in a narrow-tailoring analysis. *Id.*

[44] *See id.* at 1119 (reiterating only Supreme Court can overrule *Hill*). "*Hill* directly controls, notwithstanding its inconsistency with *McCullen* and *Reed*. Only the Supreme Court can bring harmony to these precedents." *Id.*

ized," the court noted that remanding this case for a fact-specific, narrow-tailoring analysis would "deny *Hill's* controlling force."[45] In showing deference to *Hill's* power, the court emphasized that denying remand would avoid creating a circuit split.[46]

The court in *Price v. Chicago* was correct in upholding the ordinance out of deference to the *Hill* standard; however, the court should have gone a step further to address how the Chicago ordinance at issue would prevail—even if the Supreme Court abandoned the *Hill* standard in favor of *Reed* and *McCullen*.[47] Even though the Court in *Reed* unquestionably particularized the test for content-neutrality after *Hill*, the Chicago ordinance would still pass this test.[48] *Reed* explicitly noted that a restriction can be content-based because it either restricts particular viewpoints or prohibits public discussion of an entire topic or purpose.[49] The appellants in *Reed* argued that *Hill* only addressed the first of these possibilities.[50] *Hill's* failure to address the second option, however, is immaterial as applied to *Price* because the Chicago ordinance does not restrict speech based on any topic or purpose.[51] Petitioners want the court to expand the meaning of "purpose" to include broad categories of linguistic objectives such as informing,

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[45] *See id.* (providing rationale for rejecting remand).

[46] *See id.* (explaining that remanding would create circuit split).

[47] *See Price,* 915 F.3d at 1119 (affirming lower court's holding and noting Supreme Court must be one to overrule *Hill*).

[48] *See* Reed v. Town of Gilbert, 576 U.S. 155, 162-63 (2015) (reversing and deciding lower court misapplied *Hill's* content-neutrality standard). Relying on *Hill*, the lower court deemed the restriction at issue content-neutral because the city's rationale for restricting the speech was not due to a disagreement with the message and it was unrelated to the content of the message. *Id.* The Supreme Court reversed this decision, noting that:

> [P]recedents have also recognized a separate and additional category of laws that, though facially content-neutral, will be considered content-based regulations of speech: laws that cannot be "justified without reference to the content of the regulated speech," or that were adopted by the government 'because of disagreement with the message [the speech] conveys.

Id. at 164. Courts must first determine whether a restriction is content-based on its face before analyzing a law's justification or purpose; if it is content-based on its face, it must withstand strict scrutiny regardless of its purpose. *Id.* at 165.

[49] *See id.* at 167-71 (explaining content-neutrality standard).

[50] *See id.* (explaining content-neutrality standard).

> [A] speech regulation is content-based if the law applies to particular speech because of the topic discussed or the idea or message expressed . . . A regulation that targets a sign because it conveys an idea about a specific event is no less content-based than a regulation that targets a sign because it conveys some other idea.

Id. at 171.

[51] *See Price*, 915 F.3d at 1110 (summarizing ordinance at issue).

educating, or leafletting—all of which the Chicago ordinance specifically includes.[52] This interpretation, however, broadens the meaning of "purpose" beyond that intended in the *Reed* opinion and contradicts the reason behind a content-based determination in the first place.[53] Courts employ a content-based distinction primarily to trigger strict scrutiny for government restrictions that discriminate in ways that are likely to censor particular viewpoints.[54] The Chicago ordinance targets the mode of the communication, not the content of the speech, and is therefore correctly categorized as a content-neutral time, place, or manner restriction.[55] Similarly, Petitioners argue that *McMullen* contradicts *Hill* by asserting that a restriction is content-based anytime a law enforcement officer has to determine the content of speech to know if it is prohibited.[56] This distinction, however, is overly broad and irrelevant to the analysis of the Chicago ordinance because an officer would not have to listen to the content of speech to determine whether a sidewalk counselor was passing a leaflet or educating a stranger.[57]

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[52] *See* Brief for Petitioner at 25, Price v. Chicago, 915 F.3d 1107 (7th Cir. 2019) (No. 18-1516) LEXIS 2068, at *8 (explaining Petitioners' interpretation of term "purpose"); *see also* CHI. ILL. CODE § 8-4-010(j)(1) (2009) (summarizing ordinance at issue). The ordinance restricts the conduct of individuals seeking to approach patients of a healthcare facility absent clear consent from the individual. CHI. ILL. CODE § 8-4-010(j)(1). The ordinance does not restrict the topics that may be discussed with those patients. CHI. ILL. CODE § 8-4-010(j)(1).

[53] *See* Brief for Petitioner, *supra* note 52, at 25 (rejecting expansion of "purpose" definition).

[54] *See* Hill v. Colorado, 530 U.S. 730, 723 (2000) (discussing purpose of content-based determination). The majority highlighted the point Justice Scalia's raised in his dissenting opinion that "the vice of content-based legislation in this context is that it 'lends itself' to being 'used for invidious thought-control purposes.'" *Id.*; *see also* Reed v. Town of Gilbert, 576 U.S. 155, 181-82 (2015) (Kagan, J., concurring) (explaining rationale for applying strict scrutiny to content-based restrictions). Justice Kagan explained that the purpose of applying strict scrutiny to facially content-based restrictions is to address any "realistic possibility that official suppression of ideas is afoot." *Reed*, 576 U.S. at 181-82 (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992)).

[55] *See* Brief for Defendants-Appellees at 16, Price v. Chicago, 915 F.3d 1107 (7th Cir. 2019) (No. 17-2196), 2017 WL 6550745, at *5 (arguing ordinance is based on mode of communication, not content); *see also* Richard Albert, *supra* note 22, at 10 (explaining time, place, and manner restrictions' classification as content-neutral). Albert discusses that there are contexts in which speech is so "'interlaced with burgeoning violence' as to fall outside the protections of the First Amendment. Albert, *supra* note 22, at 10. Therefore, it follows that people do not have an inalienable right "to engage in such activity whenever, however, and wherever they please" and that "no one has the right to impose even 'good' ideas on unwilling recipients of the message." Albert, *supra* note 22, at 10.

[56] *See* Brief for Defendants-Appellees, *supra* note 55, at 19-20 (describing fault in Petitioners' reasoning). The City of Chicago argued that Petitioners were wrong to say *McCullen* overruled *Hill* on content-neutrality because the *McCullen* Court did not contradict *Hill* as there was nothing unconstitutional about law enforcers conducting a "cursory examination" to determine the purpose of speech. *Id.* The Court in *Hill* used an example of a common and innocuous instance of a law enforcer using a "cursory examination" to distinguish between picketing and casual conversation. *Id.*

[57] *See id.* (emphasizing futility of Petitioners' argument).

The Court should have also acknowledged that, even though *Hill's* narrow-tailoring test is undeniably different from the Petitioners' preferred *McCullen* test, the Chicago ordinance still satisfies both.[58] Petitioners focus narrowly on the stark contradictions between *Hill* and *McCullen* regarding whether a state can justify its restrictions based on concerns about the effect on listeners and the difficulty of enforcing alternative measures.[59] Petitioners fail to see, however, that even without these additional justifications, the Chicago ordinance largely satisfies the *McCullen* standards.[60] The Court decided the ordinance in *McCullen* was not narrowly tailored because the thirty-five-foot buffer zone was so large that sidewalk counselors could not distinguish patients from passersby, which prevented them from addressing patients altogether.[61] Thus, this restriction prevented more speech than was necessary to achieve the government's objective.[62] While the thirty-five-foot buffer zone in *McCullen* effectively prevented sidewalk counseling altogether, the much smaller radius at issue here renders that concern immaterial and arguably demonstrates the exact type of narrow tailoring required to resolve the over-breadth issue in *McCullen*.[63] In fact, the majority in *McCullen* suggests that to narrowly tailor their restrictions,

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[58] *See* Price v. City of Chicago, 915 F.3d 1107, 1118 (7th Cir. 2019) (noting *Hill's* narrow-tailoring test conflicts with that of *McCullen*'s).

[59] *See id.* at 1118 (discussing inconsistencies between *Reed* and *McCullen* compared with *Hill*); *see also* McCullen v. Coakley, 573 U.S. 464, 481 (2014) (disqualifying effect on listener as justification for restriction).

[60] *See* Brief for Petitioners at 35, Price v. Chicago, 915 F.3d 1107 (7th Cir. 2019) (No. 18-1516), 2017 WL 6550745, at *22-23 (explaining justifications *Hill* uses that *Reed* later bars); *see also McCullen*, 573 U.S. at 480 (noting limitations of *McCullen* narrow-tailoring requirements). *McCullen* explicitly notes that a content-neutral law does not become content-based due to its disproportionate impact on certain topics. *McCullen*, 573 U.S. at 480.

[61] *See McCullen*, 573 U.S. at 487 (describing effect of thirty-five-foot buffer zone).

[62] *See id.* (explaining consequence of restriction).

[63] *See* CHI. ILL. CODE § 8-4-010(j)(1) (2009) (establishing ordinance's limit at 50-foot radius from facility's entrance). *Compare McCullen*, 573 U.S. at 471 (providing statute at issue and demonstrating larger radius of protection). The ordinance at issue in *McCullen* protects a much larger radius that extends in a rectangle from multiple points in the property; it states:

> No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway.

McCullen, 573 U.S. at 471 (citing MASS. GEN. LAWS, ch. 266, § 120E1/2(b) (2012)); *Price*, 915 F.3d at 1109-10 (distinguishing ordinance from that in *McCullen*). Note that there is no evidence that Petitioners had trouble distinguishing patients from passersby because of the Chicago ordinance. *See Price*, 915 F.3d at 1109-10.

Massachusetts should mimic a New York statute that is very similar to the Chicago ordinance at issue here.[64]

The court should have noted that the combined effect of applying both Petitioners' preferred content-neutrality requirements and narrow-tailoring requirements would essentially subject all government restrictions of speech near abortion clinics to strict scrutiny, and thus presumptively make them invalid (although some are nondiscriminatory).[65] It is difficult to imagine any way a city could narrowly tailor a means to address its compelling interest without wandering into Petitioners' extremely over-broad world of content-based determination.[66] Regardless of the speech's goal, an ordinance that restricts all speech within eight feet of patients near abortion clinics— regardless of the goal of the speech— would fail because it would prohibit patients from uttering so much as a harmless "excuse me" on their way into the clinic.[67] Consequently, this would regulate substantially more speech than is necessary to achieve this goal; however, it is difficult to imagine how lawmakers could write laws that would allow such impersonal, harmless speech while still addressing their legitimate interests

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[64] *See McCullen*, 573 U.S. at 491 (suggesting alternative to address narrow-tailoring requirement). The Court in *McCullen* suggested that the Commonwealth adopt a statute similar to one in New York City, which "not only prohibits obstructing access to a clinic, but also makes it a crime 'to follow and harass another person within 15 feet of the premises of a reproductive health care facility.'" *Id.* (citing N. Y. C., N.Y. ADMIN. CODE § 8-803(a)(3) (2014)).

[65] *See* Reed v. Town of Gilbert, 576 U.S. 155, 179-82 (2015) (Kagan, J., concurring) (discussing problem with "entirely reasonable" speech being subjected to strict scrutiny). Justice Kagan's concurrence explains that even if speech restrictions are reasonable, the Court will strike down most of these restrictions if they must always apply strict scrutiny. *Id.* at 180; *see also* Victoria L. Killion, *Facing the FACT Act: Abortion and Free Speech (Part II)*, CONG. RES. SERV. 1, 2 (Jan. 2018), https://fas.org/sgp/crs/misc/LSB10056.pdf (explaining presumption of invalidity under strict scrutiny). Killion emphasized that in *Reed*, Justice Kagan noted that in prior cases, the Court had considered not only the wording of the challenged law, but also whether it has "the intent or effect of favoring some ideas over others." Killion, *supra* note 65, at 2. Justices Kagan, Breyer, and Ginsburg "expressed concern that applying strict scrutiny to all ostensibly content-based laws would invalidate some 'entirely reasonable' ones. The majority in Reed rejected this argument, favoring a clear rule that leaves room for content-neutral distinctions and sufficiently tailored content-based ones." Killion, *supra* note 65, at 2.

[66] *See* Brief for Petitioners, *supra* note 60, at 23-24 (oversimplifying analysis by stating Chicago ordinance at issue "bans certain categories of speech while permitting others and is therefore content-based."). Petitioners prefer that courts consider *Reed's* use of "purpose" to mean that courts should apply strict scrutiny not only to restrictions that target specific meanings or types of activism, but also to restrictions that delineate specific linguistic goals regardless of their viewpoint or message. *Id.*

[67] *See* Chen, *supra* note 28, at 38 (explaining effect of overbreadth on First Amendment cases). Chen notes that the standard for narrow-tailoring involves the government choosing a means that is not "substantially broader than necessary" to achieve its interests. *Id.*

of providing safe and unobstructed access to abortion clinics.[68] Since the Court requires narrow tailoring, it has to allow some form of limitation that does not render innocent restrictions content-based.[69]

In *Price v. City of Chicago*, the court showed deference to the *Hill* precedent and upheld a buffer-zone ordinance that restricted speech according to its time, place, and manner. The court fell short, however, in addressing the Petitioners' incorrect assertion that the Chicago ordinance is content-based. The Petitioners' argument is flawed for two reasons. First, the Chicago ordinance would pass the *Reed* and *McCullen* tests. Second, the combination of the *Reed* and *McCullen* tests, if applied as expansively as the Petitioners suggest, would subject all speech restrictions on time, manner, and place to strict scrutiny. This application would tip the judicial scale unfairly towards deregulation, and would leave states and cities with no realistic ability to address their legitimate need to provide safe and unobstructed access to healthcare facilities. Rather, the court should have taken the opportunity to influence the Supreme Court in this particularly controversial and ever-changing field of law.

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[68] *See id.* at 38 (explaining effect of over breadth on First Amendment cases). Chen notes that the standard for narrow-tailoring requires that the government choose means that are not "substantially broader than necessary" to achieve its interests. *Id.*

[69] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)) (outlining narrow-tailoring requirement); *see also* Reed v. Town of Gilbert, 576 U.S. 155, 179-82 (2015) (Kagan, J., concurring) (discussing problem with subjecting harmless speech to strict scrutiny).

EMPLOYMENT LAW—CAT'S PAW VICARIOUS LIABILITY DOCTRINE IMPUTES DISCRIMINATORY INTENT OF NON-EMPLOYEE STUDENT TO EMPLOYER—*MENAKER V. HOFSTRA UNIV.*, 935 F.3D 20 (2D CIR. 2019).

The "cat's paw" doctrine derives its name from the seventeenth century fable about a deceitful monkey stealing chestnuts from a gullible cat.[1] Adopted to some degree in most federal circuit courts of appeals, this term is used in modern employment discrimination law to describe a legal theory whereby an employer may be held vicariously liable for the discriminatory bias of its subordinate.[2] The Supreme Court of the United States recognized that employers may be held vicariously liable for a supervisor's discriminatory intent which causes adverse employment action against an employee; however, a circuit split still exists for the causation standard over the adverse employment decision that is necessary for an employee's impermissible bias to be imputed onto the employer.[3] In *Menaker v. Hofstra University*[4], the Second Circuit reviewed a district court judgment, which dismissed an employee's complaint that a private university was vicariously liable for discrimination after the university terminated the employee based on a student's sexual harassment allegations. The Second Circuit vacated the district court's ruling, remanded the case, and held that the discriminatory intent of a non-employee may be imputed to the employer if the employee presents a prima facia case that an adverse employ-

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[1] *See* Crystal Jackson-Kaloz, *Cat Scratch Fever: The Spread of the Cat's Paw Doctrine in the Second Circuit*, 67 CATH. U. L. REV. 410, 411 (2018) (defining cat's paw).

[2] *See* Rachel Santoro, Comment, *Narrowing the Cat's Paw: An Argument for a Uniform Subordinate Bias Liability Standard*, 11 U. PA. J. BUS. L. 823, 824-25 (2009) (explaining theory and noting circuit split still exists).

[3] *See* Staub v. Proctor Hosp., 562 U.S. 411, 422 (2011) (holding that "if a supervisor performs an act motivated by [discriminatory] animus that is *intended* by the superior to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable . . . ."); *see also* Bill Pipal & Jennifer K. Robbennolt, *Court Rules on 'Cat's Paw' Theory of Discrimination*, AM. PSYCHOLOGICAL ASS'N (June 2011), https://www.apa.org/monitor/2011/06/jn (discussing context of Staub's employment discrimination case).

[4] *See* 935 F.3d 20, 26 (2d Cir. 2019) (explaining when an employer can be held vicariously liable in terminating an employee).

ment action was discriminatory, and all procedural requirements have been fulfilled.[5]

On January 15, 2016, Jeffrey Menaker joined Hofstra University as the Director of Tennis and head coach of the men's and women's varsity tennis teams.[6] Michal Kaplan, a member of the women's varsity tennis team and a student at the university, approached Menaker, asked him about her scholarship, and stated that she received an oral promise from the previous head coach that she would receive a significant increase in scholarship money if she continued on the team.[7] Menaker denied knowing anything about this oral promise, but offered to increase her scholarship during her junior and senior years.[8] In July of 2016, Kaplan's lawyer sent Hofstra a letter alleging Menaker subjected Kaplan to "unwanted and unwarranted sexual harassment" and "quid pro quo threats [that] were severe, pervasive, hostile, and disgusting."[9] Menaker denied the accusations in Kaplan's letter during a meeting with university personnel and provided copies of all communications with Kaplan to refute the claims against him.[10] Although Menaker listed several names to the committee of potential witnesses who would provide information in the investigation, Hofstra never contacted them.[11] Menaker was subsequently fired for "unprofessional conduct" on September 7, 2016, and after submitting a claim of sex-based discrimination to the United States Equal Opportunity Commission, he filed suit against Hofstra on September 22, 2017, which alleged violations of Title VII of the Civil Rights Act, New York State's Human Rights Law, and the New York City Human Rights Law.[12]

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[5] *See id.* at 39-40 (discussing assignment of discriminatory intent between non-employee or employer).

[6] *See id*. at 27 (stating Menaker's position at Hofstra).

[7] *See id.* (describing promise). "Kaplan claimed that Menaker's predecessor had promised to increase her then 45 percent athletic scholarship to a full scholarship in the fall of 2016. Kaplan sought confirmation from Menaker about her scholarship increase . . . ." *Id.*

[8] *See id.* ("Menaker responded that he was unable to increase Kaplan's scholarship for the upcoming year (Kaplan's sophomore year) . . . .") Kaplan's father also called Menaker on several occasions threatening that if his daughter's scholarship was not increased, that trouble would "come back to him." *Id.* at 27.

[9] *See Menaker,* 935 F.3d at 27-28 (describing content of letter and allegations); *see also* Brief for Defendant-Appellee at 4, Menaker v. Hofstra Univ., 953 F. 3d 20 (2d Cir. 2019) (No. 18-3089), 2019 WL 268473, at *4 (discussing instances of alleged inappropriate conduct).

[10] *See Menaker*, 935 F.3d at 28 (describing Menaker's rebuttal of accusations). In May of 2016, during a phone call with Menaker, Kaplan's father threatened that if his daughter's scholarship was not increased, trouble would "come back to him." *Id.*

[11] *See id*, (describing Hofstra's short comings during investigation).

[12] *See id.* at 29 (introducing Menaker's suit against university); *see also* 42 U.S.C.A. § 2000e-2(a)(1) (West 1970) (prohibiting discrimination in employment situations based on "race, color, religion, sex, or national origin"); N.Y. EXEC. LAW § 296(1)(a) (1951) (outlawing employment discrimination to any individual based on protected class status including sex, disability

The United States District Court for the Eastern District of New York granted Hofstra's Rule 12(b)(6) motion and concluded that Menaker failed to plead sufficient facts supporting a plausible inference that his sex played a role in his termination.[13] The United States Court of Appeals for the Second Circuit vacated the judgment and remanded the case, reasoning that the court's factual findings were contrary to *Doe v. Columbia University*, which outlined the pleading standard required to establish a prima facie case of sex discrimination against a university.[14] In his complaint, Menaker also alleged that the discriminatory motivation and intent of Kaplan, a non-employee of the University, should be imputed to Hofstra.[15] The Second Circuit held that under the cat's paw theory of liability, Kaplan's discriminatory intent could indeed be imputed to Hofstra, and that the University may therefore be liable for discrimination through its implementation of her intent in its adverse employment action against Menaker.[16] The court held that Menaker adequately stated a claim of sex discrimination, and in doing so, effectively expanded the interpretation of the cat's paw doctrine in the Second Circuit to include imputing non-employees' discriminatory intent to the employer in an adverse employment action in violation of Title VII.[17]

The phrase "cat's paw" is derived from a seventeenth century tale in which a deceitful monkey convinces a cat to steal chestnuts so they can eat them together; however, when the gullible cat pulls out the last chestnut, he realizes the monkey already ate all the chestnuts, leaving the cat—that had taken all the risk—with no rewards.[18] In 1990, Judge Richard Posner first used the term "cat's paw" in relation to employment discrimi-

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etc.); N.Y.C. CODE § 8-101 (preventing discrimination in New York City against several protected classes including gender or sex).

[13] *See Menaker*, 925 F.3d at 29 (discussing procedural history); s*ee also* FED. R. CIV. P. 12(b)(6) (allowing dismissal of motion for failure to state claim).

[14] *See Menaker*, 935 F.3d at 33 (discussing reliance on precedent in *Doe v. Columbia*); *see also* Doe v. Columbia Univ., 831 F.3d 46, 48 (2d Cir. 2016) (establishing prima facie case of sex discrimination cases used by Second Circuit).

[15] *See Menaker*, 935 F.3d at 38 ("[S]o long as the agent intended and was the proximate cause of the adverse result, the [employer's] agent's discriminatory intent may be imputed to the employer under traditional agency principles.")

[16] *See id.* at 37 (distinguishing vicarious liability from cat's paw doctrine). Vicarious liability requires that the plaintiff "establish (1) that *the employer's agent* (a) was motivated by the requisite discriminatory intent, and (b) effected the relevant adverse employment action; and (2) that the agent's conduct is imputable to the employer and under general agency principles." *Id.* While the "cat's paw" theory of liability is similar, it is distinguishable because only the intent of the agent is imputed onto the employer. *Id.*

[17] *See id.* at 38 (imputing Kaplan's discriminatory intent onto Hofstra in its adverse employment action against Menaker).

[18] *See* Jackson-Kaloz, *supra* note 1, at 410 (explaining historical origins of term).

nation as an analogy for situations in which an employer is held vicariously liable for the discriminatory biases of its employees and subordinates.[19] The United States Supreme Court adopted the term to a limited degree where an adverse employment decision was influenced by a supervisor who possessed a discriminatory or retaliatory intent against an employee; however, the Court declined to consider whether the doctrine could be applied to decisions influenced by a co-worker.[20] There is no consensus among circuits in applying the cat's paw theory of liability to the discriminatory intent of a co-worker or of a non-employee, which influences the employer's decision in the adverse employment action.[21]

Title VII defines a supervisor in vicarious liability cases as an employee "empowered by the employer to take tangible employment actions against the victim."[22] Under agency theory, a master is subject to liability for the torts of his servants committed while acting "within the scope of their employment."[23] This type of vicarious liability permits plaintiffs to

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[19] *See id.* at 412 (describing how "cat's paw" applies to employment discrimination law).

> Today, the term "cat's paw" is regularly used in employment discrimination cases to refer to situations where an employee has been subjected to an adverse employment decision by his or her employer (the gullible cat)—who has no discriminatory or retaliatory bias—but who has been manipulated or influenced by a subordinate supervisor (the deceitful monkey) who does possess an impermissible discriminatory or retaliatory bias.

Id.; *see also* Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990) (presenting first decision where "cat's paw" concept of liability was incorporated into employment discrimination law).

[20] *See* Staub v. Proctor Hosp., 562 U.S. 411, 415-16 (2011) (acknowledging origins of cat's paw term and Seventh Circuit's application of theory). "We express no view as to whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment decision." *Id.* at 422, n.4.

[21] *See* Devin Muntz, *Extending the Cat's Paw Too Far into the Fire: Rejecting the Second Circuit's Extension of the Cat's Paw Theory of Liability to Co-worker Discriminatory and Retaliatory Animus*, U. CHI. LEGAL F. 709, 710 (2017) (explaining cat's paw circuit split).

> Although the cat's paw theory of liability was an accepted doctrine among the circuit courts, a lack of uniformity with respect to: (1) the appropriate standard of causation to establish employer liability and (2) the level of employee on which a cat's paw claim could be premised, created a circuit split.

Id.

[22] *See* Vance v. Ball State Univ., 570 U.S. 421, 450 (2013) (defining supervisor in Title VII liability cases); *see also* RESTATEMENT (SECOND) OF AGENCY § 219(1) (outlining agency relationship as origin for vicarious liability in employment discrimination situations). An employer may be held liable for the torts or wrongdoings of an employee if those acts are "committed while acting within the scope of their employment." RESTATEMENT (SECOND) OF AGENCY § 219(1).

[23] *See* RESTATEMENT (SECOND) OF AGENCY § 228 (explaining what conduct is within scope of employment). Conduct is generally deemed to be within the scope of employment if:

successfully bring Title VII discrimination claims against employers, even if employers themselves did not have discriminatory intent under common law agency principles.[24] Title VII of the Civil Rights Act of 1964 states:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect is status as an employee . . . to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin . . . .[25]

Title VII seeks to avoid adverse employment actions brought by employees by reducing workplace discrimination and any retaliation that would likely follow for reporting any acts of discrimination.[26] Therefore, in accordance with both agency law and Title VII, an employer is subject to liability for discriminatory animus while acting within the scope of employment, and may even be subject to liability for acts outside the scope of

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> (a) it is one of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master. (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Id. at § 228 (1), (2); *see also* RESTATEMENT (SECOND) OF AGENCY § 219 (determining whether conduct is performed with purpose to serve master).

[24] *See* Burlington Indus. v. Ellerth, 524 U.S. 742, 754 (1998) (citing agency principles as basis for imputed liability). "Congress has directed federal courts to interpret Title VII based on agency principles . . . We rely on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms." *Id.* (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) (citation and internal quotation marks omitted). Such common law agency principles provide for liability in circumstances where "the servant . . . was aided in accomplishing the tort by the existence of the agency relation," or where "the master was negligent or reckless." *Id.* at 758 (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)(d)).

[25] *See* 42 U.S.C.A. § 2000e-2(a)-(b) (West 1970) (providing Title VII's prohibitive language against discrimination in employment setting based on protected class status).

[26] *See* Jackson-Kaloz, *supra* note 1, at 424 (stating purpose of Title VII).

employment if the employer is negligent or reckless in its actions or inactions.[27]

Various circuits have different interpretations of how to apply the causation standard, or the level of influence over the adverse employment decision that is necessary for the bias to be imputed in cat's paw liability cases.[28] However, the Supreme Court has not definitively determined whether or not a cat's paw claim may be adequately pled for an adverse employment action caused by the bias of a low-level, non-supervisory employee or by a non-employee.[29] For example, in *Velázquez Perez v. Developers Diversified*, the First Circuit was the first court to impute discriminatory intent of a co-worker, rather than a supervisor, if that intent influenced the employer's adverse employment decision against the employee.[30] The Second Circuit expanded the scope of the cat's paw claim, and allowed

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[27] *See id.* at 425 (noting how employer may still be held liable for employee's actions outside scope of employment); RESTATEMENT (SECOND) OF AGENCY § 219(2) (outlining employer liability).

> A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: (a) the master intended the conduct or the consequences, or (b) the master was negligent or reckless, or (c) the conduct violated a non-delegable duty of the master, or (d) the servant purported to act . . . on behalf of the principal and there was reliance upon apparent authority.

RESTATEMENT (SECOND) OF AGENCY § 219(2); *see also* EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476, 487-88 (10th Cir. 2006) (holding more than mere influence or input is required for causation); Hill v. Lockheed Martin Logistics Mgmt., 354 F.3d 277, 289 (4th Cir. 2004) (noting standard where person must be supervisory employee and make actual decision of adverse employment).

[28] *Compare* Rose v. N.Y.C. Bd. of Educ., 257 F.3d 156, 162 (2d Cir. 2001) (highlighting instance where immediate supervisor had "enormous influence" in decision-making process), *with* Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 55 (1st Cir. 2000) (pointing to case following *Shager* where direct supervisor was in position to influence decision-maker), *and* Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990) (noting employer is only liable if employee's actions are in furtherance of business).

[29] *See* Staub v. Proctor Hosp., 562 U.S. 411, 422 (2011) (declining to address whether low-level coworkers' discriminatory animus may be imputed onto employer).

[30] 753 F.3d 265, 267 (1st Cir. 2014) (showing cat's paw applicability when discriminatory intent comes from co-worker). *Velázquez* determined that an employer was not necessarily "absolve[d] . . . of potential liability for Velázquez's discharge" simply because Martinez was not his supervisor. *Id.* at 273.

> [A]n employer can be liable under Title VII if: the plaintiff's co-worker makes statements maligning the plaintiff, for discriminatory reasons and with the intent to cause the plaintiff's firing; the co-worker's discriminatory acts proximately cause the plaintiff to be fired; and the employer acts negligently by allowing the co-worker's acts to achieve their desired effect though it knows (or reasonably should know) of the discriminatory motivation.

Id. at 274.

plaintiffs to bring actions if discriminatory intent came from any employee within the company regardless of their position.[31]

In *Menaker v. Hofstra University*, the court considered whether the discriminatory intent of a non-employee may be imputed onto an employer in a Title VII discrimination lawsuit where the employer is influenced by the intent and subsequently takes adverse employment action against an employee partially due to the non-employee's discriminatory intent.[32] Menaker argued his pleadings should be analyzed under a "cat's paw" theory of liability where the intent of the non-employee may be imputed onto the employer if the non-employee "manipulates an employer into acting as a mere conduit for his retaliatory intent" and the intent was the proximate cause of the adverse employment action.[33] The Second Circuit vacated and remanded the district court's dismissal of Menaker's Title VII claim that the University discriminated against him based on sex after Menaker was fired in response to the sexual harassment allegations by a non-employee, student-athlete.[34] The court remanded the case to the district court for a further analysis of Hofstra University's potential liability under a "cat's paw" theory, and concluded that the lower court relied on improper factual findings in its decision.[35]

The United States Court of Appeals for the Second Circuit properly held that the district court's dismissal of Menaker's Title VII claim based on sex discrimination was "erroneous and impermissible" because it relied upon improper factual assertions and did not conform with the formal procedure of Hofstra's Harassment Policy.[36] Menaker properly asserted a prima facie case of sex discrimination under Title VII by showing (1) he was within a protected class based on sex; (2) he was qualified for the position from which he was fired; (3) he was subject to adverse employment action through being fired; and (4) "the adverse employment action occurred under circumstances giving rise to an inference of discrimination."[37]

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[31] *See id.* (imputing discriminatory intent to co-workers under cat's paw theory).

[32] 935 F.3d 20, 39 (2d Cir. 2019) (outlining issue of case).

[33] *See id.* at 37-38 (internal quotation marks omitted) (citing Velázquez v. Empress Ambulance Serv., Inc., 835 F.3d 267 (2d Cir. 2016)) (explaining how discriminatory intent of non-employee may be imputed onto employer).

[34] *See Menaker*, 935 F.3d at 26 (describing holding of case).

[35] *See id.* (outlining procedural history of case).

[36] *See id.* at 35 (describing improper analysis by district court). "The District Court sought to minimize or explain away these clear procedural irregularities. In doing so, however, it failed to draw all reasonable inferences in Menaker's favor and made improper findings of fact." *Id.*

[37] *See id.* at 30 (listing requirements for establishing prima facie case under Title VII); Littlejohn v. City of New York, 795 F.3d 297, 311 (2d Cir. 2015) (presenting elements for prima facia case of employment discrimination). To establish an inference of discrimination, a plaintiff must only establish facts that give "plausible support to a minimal inference of discriminatory

While there is no dispute as to the first three prongs of Menaker's prima facie case, the Second Circuit analyzed the fourth requirement of an "inference of discriminatory motive" and concluded that Menaker properly alleged at least minimal support for discriminatory motivation.[38] Additionally, there were many procedural irregularities in the University's improper application of the "Informal Procedure" of the Hofstra Harassment Policy as this procedure is applicable only when parties reach "a mutually agreeable solution[,]" which did not occur here.[39] Instead, the "Formal Procedure" of the school's Harassment Policy, which "requires that Hofstra interview potential witnesses, provide respondents the opportunity to submit a written response, and produce a written determination of reasonable cause," was applicable.[40] The district court failed to take into consideration the significant procedural irregularities in Hofstra's firing of Menaker, which suggested a presence of bias against Menaker and favor towards the female student.[41]

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motivation." *Littlejohn*, 795 F.3d at 311; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (outlining additional elements for prima facie case). Once the plaintiff has properly pled a prima facie case of sex discrimination under Title VII, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell*, 411 U.S. at 802. If the defendant establishes a legitimate, nondiscriminatory reason, the burden then shifts again back to the plaintiff for an opportunity to show that the defendant's stated reason was merely a pretext for discrimination. *McDonnell*, 411 U.S. at 804.

[38] *See Menaker*, 935 F.3d at 30-31(explaining district court's failures in its conclusion).

[39] *See id.* at 35 (discussing "Formal Procedure" and "Informal Procedure" of Hofstra's Harassment Policy). The Hofstra Harassment Policy states:

> [The Policy] "covers the conduct of all University employees and students" and outlines proper procedures for investigating and resolving harassment claims. . . [the Policy] provides for both an "informal" process for pursuing a "mutually agreeable" resolution and "formal" procedures . . . [including] requirements that Hofstra's investigator interview potential witnesses, that accused parties have the right to submit a written response, and that Hofstra's investigator produce a written determination of reasonable cause.

Id. at 28-29 (outlining Hofstra's "Harassment Policy"); *see also* Menaker v. Hofstra Univ., No. 2:17-cv-5562, WL 4636818, at *4 (E.D.N.Y. Sept. 26, 2018) (citing App. 126, 128) (analyzing weakness in Menaker's arguments).

[40] *See Menaker*, 935 F.3d at 35 (distinguishing formal and informal procedures). Additionally, Menaker states he was officially fired for "unprofessional conduct" and not harassment explicitly. *Id.* at 35. Menaker argues he was merely fired for 'unprofessional conduct' as a pretextual front for Hofstra's underlying discriminatory action. *Id.* Furthermore, Menaker alleges Miller-Suber, Hofstra's Director of Human Resources, informed him he was terminated based on the "totality" of the circumstances and not just his "unprofessional conduct[,]" which suggested that there were other reasons for his termination. *Id.* at 36.

[41] *See id.* at 35 (stating irregularity of district court's investigative and adjudicative process).

Furthermore, the Second Circuit concluded the district court erred in limiting *Doe v. Columbia*'s application for three main reasons.[42] First, the Second Circuit rejected the district court's interpretation that the *Doe* logic applies only to plaintiffs accused of sexual assault, excluding plaintiffs accused of sexual harassment.[43] Next, the district court improperly limited *Doe*'s scope as applying only to Title IX claims, and thus only applyed to claims brought by student plaintiffs, not employees.[44] Finally, the district court did not apply *Doe v. Columbia*, and incorrectly interpreted the precedent to apply only to cases where public pressure was "particularly acute" on a university.[45] The Second Circuit agreed that public pressure "does not automatically give rise to an inference that a male who is terminated because of allegations of inappropriate . . . conduct is the victim of [sex] discrimination[,]" but states that this does not mean the public pressure must reach a particular level of "severity."[46]

The Second Circuit remanded the case for the district court to consider if Kaplan's discriminatory intent may be imputed onto Hofstra University through a "cat's paw" theory of vicarious liability.[47] To plead cat's paw liability in Title VII cases, a plaintiff must establish "(1) that *the employer's agent* (a) was motivated by the requisite discriminatory intent, and (b) effected the relevant adverse employment action; and (2) that the agent's conduct is imputable to the employer under general agency princi-

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[42] *See id.* at 32 (establishing three, unwarranted limitations on application of reasoning in *Doe*).

[43] *See id.* at 32 (highlighting district court's flaws in interpretation). The Second Circuit concludes that the logic in *Doe* to both sexual assault and harassment cases. *Id.* The court highlighted how the university's reaction to accusations of sexual misconduct are often influenced by the sexes of the parties in these matters. *Id.*

[44] *See id.* at 32 (discussing improper application of *Doe*). Precedent has long held that "Title IX bars the imposition of university discipline where gender is a motivating factor in the decision to discipline." *Id.* at 31 (quoting Yusuf v. Vassar Coll., 35 F.3d 709, 714-15 (2d Cir. 1994)) (discussing application and interpretation of Title IX); *see also* 20 U.S.C.A. § 1681 (a) (West 2020) (barring discrimination on basis of sex "under any educational program or activity receiving Federal financial assistance").

[45] *See Menaker*, 935 F.3d at 33 (rejecting district court's limitation of *Doe* to cases with heightened public pressure).

[46] *See id.* at 33 (explaining rationale for inference). "[W]hen combined with clear procedural irregularities in a university's response to allegations of sexual misconduct, even *minimal* evidence of pressure on the university to act based on invidious stereotypes will permit a plausible inference of sex discrimination." *Id.* at 33. The procedural irregularity alone already suggests an underlying bias so that just minimal presence of sex-based pressure on the university is sufficient. *Id.* at 31. The Second Circuit agrees that "[p]ress coverage of sexual assault at a university does not automatically give rise to an inference that a male who is terminated because of allegations of inappropriate or unprofessional conduct is the victim of [sex] discrimination." *Id.* at 33.

[47] *See id.* at 31 (instructing district court to consider cat's paw theory on remand).

ples."[48] While Kaplan's primary motive may have been financial, by virtue of the scholarship, it is likely that her accusations were partially motivated by Menaker's sex.[49] Kaplan's accusations alleged specifically *sexual* misconduct on the part of Menaker, which suggested that Menaker's sex was influential in her accusation, and allowed the Second Circuit to conclude that Kaplan's accusation must have been based partially on sex.[50] Secondly, Kaplan's discriminatory intent may be imputed onto Hofstra University under agency principals where the University exercised "a high degree of control" over its athletes' behaviors.[51] Thus, as Hofstra exercises a "high degree of control" over Kaplan's behavior because she is a student-athlete, her discriminatory intent may be imputed to the university because it negligently acted on her discriminatory motive in the adverse employment action they took against Menaker.[52]

The cat's paw theory of liability may be utilized based on the discriminatory intent of not only supervisors and co-workers, but also to students, if the university exercises control over them. In *Menaker*, the Second Circuit expanded the liability doctrine to apply in situations where a university uses discriminatory animus of a student in an adverse employment action against the employee as a proximate result of that complaint.

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[48] *See id.* at 37 (listing requirements for prima facia case under cat's paw liability). Cat's paw liability differs from vicarious liability because only the intent of the agent in a cat's paw case is imputed onto the employer. *Id.* The cat's paw theory applies if the agent (1) had discriminatory intent and (2) if the agent was the proximate cause to the adverse employment action on the plaintiff. *Id.* at 38.

[49] *See id.* 39 ("Title VII requires that we look beyond primary motivations . . . courts must determine whether sex was a motivating factor, i.e., whether an adverse employment action was based, even 'in part,' on sex discrimination.")

[50] *See id.* (concluding rational fact finder could infer Kaplan's accusation based in part on sex); *see also* Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 80 (1998) (discussing sexual harassment discrimination and influence of sex). Courts have historically found an inference of discrimination in male-female sexual harassment cases where the questionable actions involve rhetoric about sexual activity. *Oncale*, 523 U.S. at 80. In these situations, an inference of discrimination is drawn because it is unlikely the same sexual proposals and comments would have been made to someone of the speaker's sex. *Oncale*, 523 U.S. at 80.

[51] *See* Summa v. Hofstra Univ., 708 F.3d 115, 124 (2d Cir. 2013) (stating conduct may be imputed if university exercises "high degree of control" over its students). The *Summa* court states that a plaintiff must show that the employer "failed to provide a reasonable avenue for complaint or that it knew, or in the exercise of reasonable care should have known, about the harassment, yet failed to take appropriate remedial action." *Id.* (citing Duch v. Jakubek, 588 F.3d 757, 762 (2d Cir. 2009)) (internal quotation marks omitted).

[52] *See Menaker*, 935 F.3d at 39 (discussing reasoning for imputation of intent onto employer). Hofstra controlled Kaplan's academics, her athletic scholarship, and the process through which she brought her initial complaint. *Id.* Additionally, in terminating Menaker, the University specifically acknowledged and referred to Kaplan's accusations: it stated that she "played a meaningful role in the decision." *Id.* Therefore, because Hofstra negligently or recklessly acted on Kaplan's accusations and implemented her "discriminatory design" Kaplan's discriminatory intent may be imputed to Hofstra University. *Id.*

It is arguable that the Second Circuit's expansion of this doctrine to students is adverse to the *Doe* decision, where the Supreme Court both declined to create a bright-line rule for investigations and to expand the theory of liability to apply to co-workers. However, the *Menaker* decision is proper because it is consistent with the purpose of Title VII: "to avoid harm to employees by ridding the workplace of discrimination and any retaliation that may follow for reporting acts of discrimination."[53] While there still is an emerging circuit split that will require resolution, the Second Circuit in *Menaker* has not contravened Supreme Court precedent. Rather, the court has instead followed its own interpretation of the cat's paw theory of liability.

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[53] *See* Jackson-Kaloz, *supra* note 1, at 424 (discussing purpose of Title VII).

HOUSING LAW—NOT OVER THIS THRESHOLD: THE CRISIS OF CONTINUED HOUSING DISCRIMINATION AGAINST QUEER AMERICANS—*SMITH V. AVANTI*, 249 F. SUPP. 3D 1194 (D. COLO. 2017).

As of 2019, there are no federal laws that protect against housing discrimination for LGBTQIA+ ("queer") Americans.[1] Protections against discrimination on the basis of sex were added to the Fair Housing Act in 1974, however, there are still no federal legal protections that prevent housing discrimination against queer people.[2] In many of these discrimination cases, courts look to the expanded protections codified in Title VII of the Civil Rights Act of 1964 ("Title VII") to determine if the denial of housing is discriminatory.[3] In addition to banning discrimination based on sex, Title VII also protects against discrimination based on "sexual stereotypes."[4]

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[1] *See* 42 U.S.C.S. § 3604(b) (LexisNexis 2020) (stating illegality of housing discrimination on basis of sex). According to the Fair Housing Act—passed by Congress as part of the Civil Rights Act of 1968—it is illegal to "refuse to sell or rent . . . a dwelling to any person because of race, color, religion, sex, familial status, or national origin." *Id.*; *see also* Kerith J. Conron & Shoshana K. Goldberg, *LGBT People in the U.S. Not Protected by State Nondiscrimination Statutes*, THE WILLIAMS INST. (Apr. 2020), https://williamsinstitute.law.ucla.edu/publications/lgbt-nondiscrimination-statutes (providing data on lack of antidiscrimination protection for queer Americans).

> At the federal level and in most states, nondiscrimination statutes do not expressly enumerate sexual orientation and gender identity as protected characteristics . . . [t]here are an estimated 11 million LGBT adults in the U.S. Over 5.444 million live in states without statutory protections against sexual orientation and gender identity discrimination in housing . . . .

Conron & Goldberg, *supra* note 1.

[2] *See* 42 U.S.C.S. § 3604(b) (LexisNexis 2020) (banning discrimination on basis of sex in 1974); *see also Fair and Equal Housing Act*, THE HUM. RTS. CAMPAIGN (Mar. 10, 2020), https://www.hrc.org/resources/fair-and-equal-housing-act (citing study that found "same-sex couples experience significant levels of discrimination when responding to advertised rental housing in metropolitan areas nationwide . . . [and] heterosexual couples were favored over same-sex couples by sixteen percent.")

[3] *See* Mountain Side Mobile Est. P'ship v. Sec'y of Hous. & Urb. Dev. *ex rel.* VanLoozenoord, 56 F.3d 1243, 1251 (10th Cir. 1995) (demonstrating that Tenth Circuit historically looks to Title VII in housing discrimination cases); Honce v. Vigil, 1 F.3d 1085, 1090 (10th Cir. 1993) (highlighting historic practice of looking to Title VII for guidance in housing discrimination cases).

[4] *See* 42 U.S.C. § 2000e-2 (LexisNexis 2020) (prohibiting workplace discrimination based on sex stereotypes). According to the annotations of the statute, "Title VII prohibits hiring decisions based on stereotypical characterization of sexes." *Id.*; *see also New Supreme Court Brief*

These protections were then applied in *Smith v. Avanti*[5] where the judge used Title VII legal precedent to find that, by refusing to rent to the Plaintiffs, the Defendant had engaged in discriminatory housing practices.[6]

The Plaintiffs, Rachel and Tonya Smith ("Plaintiffs"), are a lesbian couple, one of whom is transgender, and residents of Colorado.[7] In April 2015, the Plaintiffs began searching for a new apartment as their current apartment was being sold.[8] The couple learned of a townhouse in Golds Hill, Colorado, which was advertised by Deepika Avanti, (hereinafter "Defendant"); they subsequently filled out an application and communicated their interest in renting the property.[9] The Plaintiffs viewed the available units and met the family living in the adjacent townhouse.[10] Shortly after the tour, the Defendant emailed the Plaintiffs and informed them that they were not permitted to rent any property that she owned.[11] In the email, the Defendant explained that she and her husband were dedicated to keeping "a low profile" and that the "uniqueness" of the Plaintiffs' family would damage the Defendant's reputation within the community, which she had maintained for thirty years.[12]

Calls for End of Workplace Discrimination Against LGBT People Based on Sex Stereotypes, COLUM. L. SCH. (Jul. 3, 2019), https://www.law.columbia.edu/news/archive/new-supreme-court-brief-calls-end-workplace-discrimination-against-lgbt-people-based-sex-stereotypes (providing examples of litigation based on sexual stereotypes used to discriminate). Clinic Director and "expert on gender and sexuality law," Suzanne B. Goldberg, explains that "extensive case law shows that employers sometimes rely on sex stereotypes to make workplace decisions." *Id.* "These stereotypes [include] how women and men 'should' present themselves, interact with others, and conduct their family life—help explain why fewer women than men are chosen for leadership positions, and why women earn less." *Id.* To exemplify Goldberg's point, this language prohibits terminating a man's employment because he is too effeminate, or a woman for being too aggressive and masculine. *Id.* In both cases, a court could find discrimination for firing the individuals based on stereotypes concerning how someone of their respective gender should behave. *Id.*

[5] 249 F. Supp. 3d 1194, 1203 (D. Colo. 2017).

[6] *See* 42 U.S.C. § 2000e-2 (LexisNexis 2020) (indicating Congress's intent to outlaw discrimination based on sex stereotypes). As stated in the statute's annotations: "Title VII prohibits hiring decisions based on stereotypical characterization of sexes." *Id.*; *see also Smith*, 249 F. Supp. 3d at 1203 (finding for Plaintiffs).

[7] *See Smith*, 249 F. Supp. 3d. at 1197 (providing background information about Plaintiffs).

[8] *See id*. (outlining Plaintiffs' housing search).

[9] *See id.* (detailing initial interactions between parties). Via the email correspondence, the Defendant stated that there was a "three-bedroom living space . . . available for rent, and asked Tonya to send photos of [the family]." *Id.*

[10] *See id.* (providing detail about Plaintiff's search and interest in townhouse)

[11] *See id.* at 1198 (discussing Defendant's reasons for not renting to Plaintiffs).

[12] *See Smith*, 249 F. Supp. 3d at 1198 (restating Defendant's comments leading to discrimination suit). Over the course of their email correspondence, Tonya Smith mentioned that her wife, Rachel, is transgender. *Id*. In the email rejecting their application, the Defendant went so far as to mention that she spoke to a "psychic friend" who is "a transvestite herself." *Id.*

The Plaintiffs were "shocked and upset by Deepika's emails" and decided to pursue legal action against the Defendant for her discriminatory comments, which they described as "unfair and illegal."[13] In addition, Plaintiffs could not find suitable accommodations before their old apartment was sold and, as a result, had to move in with Rachel's family for a period of time.[14] The Plaintiffs filed suit on five counts due to the hardships they endured because of the Defendant's discriminatory actions.[15] The Plaintiffs moved for summary judgement as to liability on all claims and the Motion went unopposed.[16] This case demonstrates a verifiable shift in the way cases of housing discrimination on the basis of sex and sexual orientation are litigated, and marks a departure from long-standing precedent.[17]

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[13] See *id.* at 1201 (finding that Defendant's comments relied on stereotypes). In "referring to the Smiths' 'unique relationship' and their family's 'uniqueness,' Defendant relies on stereotypes of to or with whom a woman (or man) should be attracted, should marry, or should have a family." *Id. Victory! Court Rules Landlord Discriminated Against LGBT Family*, LAMBDA LEGAL (Apr. 5, 2019), https://www.lambdalegal.org/blog/20170405_victory-colorado-housing-discrimination-case (quoting Plaintiffs' reaction to Defendant's comments).

[14] *See Smith*, 249 F. Supp. 3d at 1201 (describing hardships caused by denial of application).

> [The Plaintiffs] were able to move into another apartment on July 1, 2015, but it does not meet their family's needs as well. Defendant's Properties were of higher quality, were located in a better school district, and had nicer surroundings. The move also required an hour's commute for Rachel, whereas Defendant's Properties would have only required a 20 minutes' commute for work. Rachel has since changed jobs, which is closer to the parties' new apartment.

Id. at 1198.

[15] *See id.* (listing Plaintiffs' claims against Defendant).

> Plaintiffs filed this lawsuit asserting the following claims: (1) Count I (the Smiths) - Sex Discrimination in violation of the Fair Housing Act, 42 U.S.C. § 3604(a) & (c); (2) Count II (Smith Family) - Discrimination based on Familial Status in violation of the Fair Housing Act, 42 U.S.C. § 3604(a) & (c); (3) Count III (the Smiths) - Sex Discrimination in violation of the Colorado Anti-Discrimination Act, C.R.S. § 24-34-502; (4) Count IV (the Smiths) - Sexual Orientation Discrimination in violation of the Colorado Anti Discrimination Act, C.R.S. § 24-34-502; and (5) Count V (Smith Family) - Discrimination based on Familial Status, in violation of the Colorado Anti-Discrimination Act, C.R.S. § 24-34-502.

Id. at 1201.

[16] *See id.* at 1189 (discussing procedural posture of case).

[17] *See id.* at 1200 (noting departure from presiding law); *see also* Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007) (stating that Tenth Circuit "has explicitly declined to extend Title VII protections to discrimination based on a person's sexual orientation"); Keith Coffman, *Federal Judge Rules Fair Housing Law Protects Colorado LGBT Couple,* REUTERS (Apr. 5, 2017, 7:21 PM), https://www.reuters.com/article/us-colorado-lgbt/federal-judge-rules-fair-housing-law-protects-colorado-lgbt-couple-idUSKBN17731A (emphasizing landmark status of ruling). "'It sends a strong message: discrimination against LGBT Americans in housing and employment is illegal and will not be tolerated.'" Coffman, *supra* note 17.

In 1968, President Lyndon B. Johnson signed the Civil Rights Act of 1968 as a "follow-up" to the Civil Rights Act of 1964.[18] The Act was codified after a long and arduous battle in Congress, and likely would not have passed if not for both the galvanizing effect of Dr. Martin Luther King Jr.'s assassination in 1968 and the mounting pressure from families of fallen soldiers of the Vietnam War.[19] Many soldiers who died overseas were African American or Latinx, and their families could not purchase or rent homes due to normalized housing discrimination practices.[20] There is a notable lack of protection on the basis of sexuality or gender identity, even with additional amendments to the Act that forbid discrimination on the basis of "sex, religion, ethnic origin, family status, or disability[,]"; as of 2016, only twenty states had passed legislation that ban housing discrimination against queer people.[21] This lack of protection has led to a precipi-

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[18] *See* 42 U.S.C. § 3604(b) (LexisNexis 2020) (noting date Fair Housing Act was signed into law); *see also History of Fair Housing*, U.S. DEP'T OF HOUS.AND URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history (last visited Oct. 7, 2019) (recounting history of Fair Housing Act).

[19] *See History of Fair Housing*, *supra* note 18 (describing political pressures that led to passing of Fair Housing Act)*; see also History*, FAIR HOUSING ACCESSIBILITY FIRST, https://www.fairhousingfirst.org/fairhousing/history.html (last visited Oct. 7, 2019) (emphasizing role of Dr. Martin Luther King Jr.'s assassination in passing of Fair Housing Act); *Fair Housing Act: United States [1968],* ENCYCLOPEDIA BRITANNICA (Apr. 4, 2020), https://www.britannica.com/topic/Fair-Housing-Act (highlighting Dr. Martin Luther King Jr.'s impact on bill's passage). "One of the bill's strongest supporters was Martin Luther King, Jr. . . . [a]fter King was assassinated on April 4, 1968, President Lyndon B. Johnson encouraged Congress to pass the bill as a memorial to the slain civil rights leader before King's funeral." *Fair Housing Act: United States [1968], supra* note 19.

[20] *See Fair Housing Act: United States [1968], supra* note 19 (detailing history and legacy of Fair Housing Act).

> [P]ressure to pass the bill was also being put on the federal government by such organizations as the National Association for the Advancement of Colored People (NAACP), the American GI Forum, and the National Committee Against Discrimination in Housing. Those groups, as well as others, were outraged that the families of African American soldiers who had been killed in Vietnam were facing discrimination in matters related to housing.

Id.

[21] *See History of Fair Housing*, *supra* note 18 (discussing amendments added to Fair Housing Act that expanded protections from Civil Rights Act); *see also Fair Housing Act*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/fair-housing-act-1 (last updated Dec. 21, 2017) (describing in detail legal and applicable definitions of discrimination against protected groups).

> The Fair Housing Act . . . prohibits discrimination by direct providers of housing, such as landlords and real estate companies as well as other entities, such as municipalities, banks or other lending institutions and homeowners insurance companies whose discriminatory practices make housing unavailable to persons because of: race or color[,] religion[,] sex [,] national origin[,] familial status[,] or disability.

tous but chronically underreported rise in housing discrimination against queer Americans.[22] In 2012, the Department of Housing and Urban Development ("HUD") implemented a policy, which required that any housing providers receiving HUD funding must make their housing accessible to all persons, "regardless of sexual orientation, gender identity, or marital status"—a small but important step in protecting queer housing rights nationwide.[23]

Fair Housing Act, *supra* note 21; *Past LGBT Nondiscrimination and Anti-LGBT Bills Across the Country (2016)*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/other/past-lgbt-nondiscrimination-and-anti-lgbt-bills-across-country-2016 (last visited Oct. 7, 2019) (listing state protections for queer people, as well as anti-LGBTQIA+ legislation). "By the close of 2016, 20 states plus DC banned discrimination based on sexual orientation and gender identity or expression in employment, housing, and public accommodations, and an additional three states provided incomplete statewide nondiscrimination protections." *Past LGBT Nondiscrimination and Anti-LGBT Bills Across the Country (2016), supra* note 21.; *LGBTQ Americans Aren't Fully Protected from Discrimination in 29 States*, FREEDOM FOR ALL AMERICANS, https://www.freedomforallamericans.org/states/ (last visited Oct. 30, 2019) (providing list of states without LGBT protections).

[22] *See Victory! Court Rules Landlord Discriminated Against LGBT Family*, *supra* note 13 (discussing why such discrimination claims are underreported).

> While housing discrimination is a pervasive problem for LGBT people, it is very much underreported . . . [i]n many instances, LGBT people who are either overtly or subtly discriminated against in housing do not report the discrimination because of their immediate need to find housing or due to the costs of pursuing a claim.

Id.; *see also LGBTQ Americans Aren't Fully Protected From Discrimination in 29 States*, *supra* note 21 (listing states without nondiscrimination protections for queer Americans); Lou Chibbaro, Jr., *Study Reveals LGBT Rental Housing Discrimination*, WASH. BLADE (Jul. 3, 2017, 9:10 AM), https://www.washingtonblade.com/2017/07/03/lgbt-rental-housing-discrimination/ (noting widespread yet underreported housing discrimination against queer Americans). Specifically testing discrimination against transgender individuals, the study revealed that in "one out of every 5.6 test visits to a rental office, the rental agents or landlords offered to show a self-identified transgender applicant one fewer apartment than was shown to non-transgender applicants" and "told gay men about one fewer available rental unit for every 4.2 tests than they told heterosexual men." Chibbaro, *supra* note 22. In addition, "[t]he average yearly costs agents quoted gay men were $272 higher than the costs quoted to heterosexual men." Chibbaro, *supra* note 22; Richard Eisenberg, *Housing Discrimination: The Next Hurdle for LGBT Couples*, FORBES (Jul 2, 2015, 10:06 AM), https://www.forbes.com/sites/nextavenue/2015/07/02/housing-discrimination-the-next-hurdle-for-lgbt-couples/#48bcb3b95900 (reporting that "gay and lesbian couples emailing potential landlords were significantly less likely to get responses than heterosexual couples.").

[23] *See HUD LGBT Resources*, U.S. DEP'T OF HOUS. AND URB. DEV., https://www.hud.gov/LGBT_resources (last accessed Oct. 7, 2019) (recounting HUD efforts to protect queer housing rights).

> [A] determination of eligibility for housing that is assisted by HUD or subject to a mortgage insured by the Federal Housing Administration shall be made in accordance with the eligibility requirements provided for such program by HUD, and such housing shall be made available without regard to actual or perceived sexual orientation, gender identity, or marital status. The rule also included a definition for sexual orientation and gender identity and expanded the definition of family in most of HUD's programs.

Although there are no statutory federal protections that ban housing discrimination against queer people, there has been progress in providing queer people equal opportunities within the workforce.[24] While outlawing discrimination based on sex and sexual stereotypes did not create explicit protection against anti-queer discrimination, it did, however, open the door for courts to use this language to affect change.[25] With the limited protection of the Fair Housing Act, many courts instead look to Title VII for guidance on how to rule in anti-queer housing discrimination cases.[26] The significance of Title VII's interpretation cannot be overstated, and recent Supreme Court rulings regarding Title VII have the potential to create

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Id.

[24] *See* 42 U.S.C. § 2000e-2 (LexisNexis 2020); *see also* Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (explaining that one should not be discriminated against for failing to conform to gender-specific stereotypes). "Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII . . . both statutes prohibit discrimination based on gender as well as sex." *Schwenk*, 204 F.3d at 1202..

[25] *See* Spearman v. Ford Motor Co., 231 F.3d 1080, 1084 (7th Cir. 2000) (defining "sex" in Title VII as biological sex). "Congress intended the term 'sex' to mean 'biological male or biological female,' and not one's sexuality or sexual orientation." *Id.; see also* Hively v. Ivy Tech Cmty., 853 F.3d 339, 346-7 (7th Cir. 2017) (expanding scope of discrimination based on sex and sex stereotypes).

> [A] policy that discriminates on the basis of sexual orientation does not affect every woman, or every man, but it is based on assumptions about the proper behavior for someone of a given sex. The discriminatory behavior does not exist without taking the victim's biological sex (either as observed at birth or as modified, in the case of transsexuals) into account. Any discomfort, disapproval, or job decision based on the fact that the complainant—woman or man—dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex. That means that it falls within Title VII's prohibition against sex discrimination . . .

Hively, 853 F.3d at 346-7; Chris Johnson, *Rulings in Favor of Title VII Protections for LGBT Workers on the Rise*, WASH. BLADE (Mar. 19, 2018, 2:40 PM), https://www.washingtonblade.com/2018/03/19/rulings-in-favor-of-title-vii-protections-for-lgbt-workers-on-the-rise/ (explaining impact of recent court rulings). "As a result of these court rulings, workplace protections for LGBT people have advanced in measurable ways. . . However, the reasoning [behind said rulings] is often based on the determination that anti-LGBT discrimination is sex-stereotyping . . . ." Johnson, *supra* note 25.

[26] *See* Mountain Side Mobile Est. P'ship v. Sec'y of Hous. & Urb. Dev. *ex rel.* VanLoozenoord, 56 F.3d 1243, 1251 (10th Cir. 1995) (noting plaintiffs rely on statistical disparity in relation to Title VII in housing discrimination cases); Honce v. Vigil, 1 F.3d 1085, 1088 (10th Cir. 1993) (court looking to employment discrimination under Title VII for context concerning housing discrimination); *see also* Emily Bergeron, *Adequate Housing Is A Human Right*, AM. BAR ASS'N (Oct. 1, 2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/vol—44—no-2—housing/adequate-housing-is-a-human-right/ (delineating Fair Housing Act in relation to Title VII).

widespread changes to prevent housing discrimination against queer people.[27]

Despite several steps forward, numerous state legislatures continue to resist providing protections for queer Americans.[28] Along with religious exemptions that provide loopholes to perpetuate discrimination, many lawmakers deliberately fight against proposed bills that would expand the language in the Fair Housing Act and Title VII.[29] Within the judicial sys-

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[27] *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020) (granting certiorari for Title VII discrimination case); Altitude Express, Inc. v. Zarda, 139 S. Ct. 1599, 1599 (2019) (granting certiorari for Title VII discrimination case); R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599, 1 (2019) (granting certiorari for Title VII discrimination case); *see also* Joan Biskupic, *For LGBTQ Rights, it's a New Supreme Court,* CNN.COM, https://www.cnn.com/2019/10/08/politics/supreme-court-john-roberts-lgbtq-arguments/index.html (last updated Oct. 8, 2019, 7:19 PM) (describing impact of shifted Supreme Court majority). The Supreme Court heard arguments on three cases on Tuesday, October 8th, 2019, which involved two gay men and one transgender woman, all of whom lost their jobs and claimed discrimination on the basis of their sexual orientations and gender identity. Biskupic, *supra* note 27; Anna North, *How The LGBT Rights Cases Before The Supreme Court Could Affect All Americans,* VOX.COM (Oct. 8, 2019, 10:10 AM), https://www.vox.com/2019/10/8/20903088/supreme-court-lgbt-lgbtq-case-scotus-stephens (explaining potential consequences of Supreme Court ruling on Title VII). Though it is widely portrayed as a queer rights case, the Title VII ruling could have widespread impact. North, *supra* note 27. "A decision against the workers could affect not just employment but housing, health care, and education as well and even contribute to the epidemic of violence against trans women of color." North, *supra* note 27; Eugene Scott, *Why the Supreme Court Case on LGBT Worker Protections will be Pivotal*, THE WASH. POST (Oct. 8, 2019, 5:13 PM), https://www.washingtonpost.com/politics/2019/10/08/why-scotus-case-lgbt-worker-protections-will-be-pivotal/ (emphasizing importance and impact of Supreme Court ruling).

[28] *See Past LGBT Nondiscrimination and Anti-LGBT Bills Across the Country (2016)*, *supra* note 21 (listing anti-LGBT housing bills). In recent sessions, state legislators have proposed or passed several religious exemption bills, as well as bills preempting local protections, making it more difficult to pass protections for queer people or even legalizing discrimination outright. *Id.*; *see also Legislation Affecting LGBT Rights Across the Country*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/legislation-affecting-lgbt-rights-across-country (last updated Jan. 20, 2021) (keeping current list of anti-queer laws that updates monthly). In many of the discriminatory laws in state legislatures across the country, anti-LGBT lawmakers target "transgender" and "nonbinary people" by "pre-empt[ing] local protections and allow[ing] the use of religion to discriminate." *Legislation Affecting LGBT Rights Across the* Country, *supra* note 28.

[29] *See* Wade Goodwyn, *Business Leaders Oppose 'License to Discriminate' Against LGBT Texans*, NPR (May 6, 2019, 7:14 AM), https://www.npr.org/2019/05/06/720060927/business-leaders-oppose-license-to-discriminate-against-lgbt-texans (noting public outcry against bill that would "sanction discrimination against . . . LGBT employees").

> One of the bills would allow state licensed professionals of all stripes . . . to deny services on religious grounds. Supporters say the legislation is needed to protect religious freedoms. But opponents call them "religious refusal bills" or "bigot bills . . . ." While the legislation might be designed mainly for Texas Christians to withhold their services from LGBT people . . . it would allow discrimination against anyone as long as the motive is a sincerely held religious belief.

tem, courts in many jurisdictions do not seek to protect queer people from discrimination under Title VII, and subsequently, the Fair Housing Act.[30] The widespread hesitance of the courts to expand protections is what led progressive judges to use "sex stereotypes" as an inroad to broaden anti-discrimination holdings.[31] It is through this language that courts have begun to rule in favor of queer plaintiffs who claim discrimination.[32] Unfortunately, many courts still make a point to differentiate between using Title VII's language to protect those who simply do not conform to sexual stere-

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Id.; Mike Lillis, *Pelosi Denounces NC Law Blocking LGBT Anti-Discrimination Measures*, THE HILL (Mar. 24, 2016, 4:02 PM), https://thehill.com/blogs/blog-briefing-room/news/274233-pelosi-denounces-nc-law-blocking-lgbt-anti-discrimination (remarking on recent North Carolina law blocking anti-discrimination measures at local level); Laura Vozzella, *Va. House Panel Kills Bills to Ban Anti-LGBT Discrimination in Housing and Jobs*, WASH. POST (Feb. 8, 2018, 6:04 PM), https://www.washingtonpost.com/local/virginia-politics/va-house-panel-kills-bills-to-ban-anti-lgbt-discrimination-in-housing-and-jobs/2018/02/08/17051270-0d15-11e8-8b0d-891602206fb7_story.html (noting that many state legislatures kill anti-discrimination bills, therefore allowing for outright discrimination).

[30] *See* Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007) (demonstrating "court's reluctance to expand the traditional definition of sex in the Title VII context"); *see also* Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) (denying extension of Title VII protections). "Congress's refusal to expand the reach of Title VII is strong evidence of congressional intent in the face of consistent judicial decisions refusing to interpret 'sex' to include sexual orientation." *Medina,* 413 F.3d at 1135 (quoting Simonton v. Runyon, 232 F.3d 33, 35-36 (2nd Cir. 2000)).

[31] *See* McBride v. Peak Wellness Ctr., Inc., 688 F.3d 698, 711 (10th Cir. 2012) (laying out requirements for successful sexual stereotyping claim under sex discrimination doctrine). To succeed in a discrimination case based on sexual stereotyping, the plaintiff must prove that they were discriminated against for a "failure to conform to stereotypical gender norms." *Id.* (quoting *Etsitty,* 502 F.3d at 1223*)*; *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (broadening definition of sex discrimination to stereotyping based on biological sex).

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."

Price Waterhouse, 490 U.S. at 251 (quoting Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, n.13 (1978)).

[32] *See* Hudson v. Park Cmty. Credit Union, Inc., No. 3:17-CV-00344-TBR, 2017 U.S. Dist. LEXIS 187620, at *15 (W.D. Ky. Nov. 13, 2017) (noting Kentucky state court's failure to dismiss discrimination case based on sexual stereotypes). The Kentucky state court did not dismiss the plaintiff's claim that she was discriminated against for not falling within a feminine sexual stereotype, and found that she "alleged sufficient facts to state a cognizable claim for gender stereotyping sex discrimination." *Id.* at 15; *see also* Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762 (6th Cir. 2006) (stating "that making employment decisions based on sex stereotyping, i.e., the degree to which an individual conforms to traditional notions of what is appropriate for one's gender, is actionable discrimination under Title VII.") (quoting *Price Waterhouse*, 490 U.S. at 250).

otypes, and using that precedent to also protect queer plaintiffs from discrimination outright.[33]

In *Smith v. Avanti*, the United States District Court for the District of Colorado ruled in favor of the Plaintiffs, and found that the Defendant had violated the Fair Housing Act's ban on discrimination on the basis of sex by not renting Plaintiffs the townhouse.[34] Following existing precedent, the court looked to Title VII to determine whether discrimination on the basis of sexual stereotypes falls under discrimination on the basis of sex, though the exact language does not exist in the Fair Housing Act.[35] Specifically, the court determined that the Defendant's comments that the Plaintiffs' family's "uniqueness" barred them from renting the townhouse was discriminatory language, as it "rel[ied] on stereotypes of to or with whom a woman (or man) should be attracted, should marry, or should have a family."[36] Despite the fact that the Defendant did not oppose the Plaintiffs' Motion for Summary Judgment, the court's ruling solidifies a growing trend towards using the language of "sexual stereotypes" under Title VII to find discrimination on the basis of sex in housing cases.[37]

In finding that there was discrimination, the *Smith* court builds upon previously thin precedent and establishes a firm case for using the language of "sexual stereotypes" as a shield against housing discrimination for queer Americans.[38] Before this ruling, the language of Title VII, while

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[33] *See Hudson*, 2017 U.S. Dist. LEXIS 187620, at *15 (noting that "gender stereotyping or sexual orientation is a very fine line with the possibility of overlap."); *see also* Thomas v. Osegueda, No. 2:15-CV-0042-WMA, 2015 U.S. Dist. LEXIS 77627, at *11 (N.D. Ala. June 16, 2015*)* (differentiating between protections against sexual stereotyping and sexuality). "[E]xpanded protections for such individuals under the FHA is directly rooted in non-conformity with male or female gender stereotypes, and not directly derivative of sexual orientation . . . ." *Thomas*, 2015 U.S. Dist. LEXIS at *11..

[34] *See* Smith v. Avanti, 249 F. Supp. 3d, 1194, 1203 (D. Colo. 2017) (granting Plaintiffs' Motion for Summary Judgment).

[35] *See id.* at 1200 (stating court's deference to Title VII regulations in determining discrimination); *see also* Mountain Side Mobile Est. P'ship v. Sec'y of Hous. & Urb. Dev. *ex rel.* VanLoozenoord, 56 F.3d 1243, 1251 (10th Cir. 1995) (determining "whether discriminatory effect alone is sufficient to establish a prima facie case . . . in Title VIII housing discrimination claims."); *Etsitty*, 502 F.3d at 1222 (noting "plain meaning of 'sex' [does not] encompass[] anything more than male and female.")

[36] *See Smith*, 249 F. Supp. 3d at 1201 (finding discrimination based on sexual stereotypes). The Defendant's desire to "keep a low profile" and her belief that the makeup of the Plaintiffs' family and relationship ran counter to that desire, was plainly discriminatory, as it demonstrated a preconceived belief about how women and men should act and behave in order to fall within social and societal norms. *Id.* at 1198, 1201.

[37] *See id.* at 1203 (noting Plaintiffs' Motion was unopposed); *see also* Hively v. Ivy Tech Cmty., 853 F.3d 339, 346 (7th Cir. 2017) (providing example of courts using "sexual stereotypes" language to expand scope of discrimination).

[38] *See id.* at 1203 (ruling for Plaintiffs); *see also* Coffman, *supra* note 17 (emphasizing importance of ruling to anti-discrimination movement). The court's ruling marks a shift in housing

used to guide housing discrimination law, had not yet been applied as a way to find discrimination on the basis of sex, as outlawed by the Fair Housing Act.[39] The judge in the *Smith* case looked to the history of employment discrimination on the basis of sex and "sexual stereotypes" before transferring the logic of those rulings to *Smith v. Avanti*.[40] Although housing discrimination against queer Americans has been both rampant and underreported throughout history, hopefully the court's ruling in this case will set a new precedent for courts in other jurisdictions using Title VII's language to provide protections against housing discrimination alongside employment discrimination.[41]

Although *Smith* marks a decisive victory for progress, housing equality is still not guaranteed for queer Americans.[42] In the absence of federal protection, many states have laws that explicitly allow landlords to discriminate against potential tenants based on their sexual orientation.[43] Despite HUD's implementation of an anti-discrimination policy for any housing development receiving federal funding, private housing in unpro-

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discrimination law and is "the first in which a court has extended protections to people based on their sexual orientation or gender identity under the federal Fair Housing Act." Coffman, *supra* note 17.

[39] *See* 42 U.S.C.S. § 3604(b) (LexisNexis 2020) (outlawing housing discrimination on basis of sex under Fair Housing Act); 42 U.S.C.S § 2000e-2 ((LexisNexis 2020) (banning use of "sex stereotypes" to discriminate under Title VII); *see also Mountain Side Mobile Est. P'ship*, 56 F.3d at 1251 (stating precedent for using Title VII in housing discrimination cases); Honce v. Vigil, 1 F.3d 1085, 1088 (10th Cir. 1993) (establishing practice of looking to Title VII to guide housing discrimination cases); Coffman, *supra* note 17 (emphasizing importance of ruling in this case).

[40] *See Smith*, 249 F. Supp. 3d at 1203 (finding discrimination in employment case based on "sexual stereotypes"); *see also* Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 347 (7th Cir. 2017) (expanding discrimination on basis of sex to include assumptions based on stereotypes); Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762 (6th Cir. 2006) (stating discrimination based on sexual stereotypes violates Title VII); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (finding Title VII protects individuals who experience discrimination for not acting according to presumed gender); Johnson, *supra* note 25 (marking history of discrimination based on "sexual stereotypes" in employment cases).

[41] *See* Chibbaro, *supra* note 22 (listing reported statistics of discrimination). The report found that "the number of instances in which a landlord or rental agent appeared to discriminate against the gay or transgender testers . . . were statistically significant and clearly not due to chance." *Id.*; *see also* Eisenberg, *supra* note 22 (detailing difficulties visibly queer individuals and couples face when searching for housing); *Victory! Court Rules Landlord Discriminated Against LGBT Family*, *supra* note 13 (emphasizing how issue of discrimination often goes unreported and not litigated).

[42] *See Past LGBT Nondiscrimination and Anti-LGBT Bills Across the Country (2016)*, *supra* note 21 (listing states that do not guarantee equal protection for housing); *LGBTQ Americans*, *supra* note 21 (noting gaps in protection for queer Americans).

[43] *See Past LGBT Nondiscrimination and Anti-LGBT Bills Across the Country (2016)*, *supra* note 21 (examining anti-LGBTQ housing bills). Many states have enacted "religious exemption" laws that permit discrimination on the basis of a landlord's religious beliefs, which undercuts any progress made towards housing equality on a state level. *Id.*

tected states is still rife with discrimination.[44] Moreover, despite this step forward, the law is still woefully inadequate when it comes to the protection of queer Americans, including transgender and gender-nonbinary individuals, who may face equal if not more discrimination, and are still wholly unprotected.[45]

Thankfully, some of the uncertainty regarding the *Smith* decision has been assuaged as of June 15, 2020.[46] On October 8, 2019 the Supreme Court of the United States heard testimony regarding discrimination on the basis of sexual orientation and gender identity under Title VII.[47] Though not ubiquitous, courts have begun using the language of Title VII to shield queer plaintiffs from discrimination on the basis of their sexual orientation or gender identity.[48] However, if the Supreme Court had not ruled that

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[44] *See HUD LGBT Resources*, *supra* note 23 (outlining anti-discrimination policy for federally funded housing). In 2012, HUD enacted a policy allowing tenancy in federally funded housing "regardless of their sexual orientation, gender identity, or marital status." *Id.*; *see also LGBTQ Americans*, *supra* note 21 (listing states where discrimination is legal); Eisenberg, *supra* note 22 (discussing anti-discrimination statistics). In a survey conducted of 1,798 queer Americans "73% of them were 'strongly concerned' about housing discrimination by real estate agents, home sellers, landlords and neighbors." Eisenberg, *supra* note 22. Additionally, the survey found that "LGBT clients were not accepted by sellers despite making full-price cash offers. 'So there was clearly discrimination and there was nothing that could be done . . . We've also heard of LGBT discrimination from landlords restricting same-sex couples from renting their property.'" Eisenberg, *supra* note 22.

[45] *See* 42 U.S.C. § 3604(b) (LexisNexis 2020) (noting lack of codified protection on basis of sexual orientation or gender identity); *see also LGBTQ Americans*, *supra* note 21 (listing states without protections against gender identity discrimination). In Wisconsin, though there are protections in place against discrimination based on sexual orientation, there is still no protection to shield against discrimination based on gender identity. *See LGBTQ Americans, supra* note 21; *see also* Chibbaro *, supra* note 22 (examining heightened discrimination against transgender people). "[I]n one out of every 5.6 test visits to a rental office, the rental agents or landlords offered to show a self-identified transgender applicant one fewer apartment than was shown to non-transgender applicants . . .[y]es, trans people are treated worse. . . ." Chibbaro, *supra* note 22.

[46] *See* Ariane de Vogue & Devan Cole, *Supreme Court says Federal Law Protects LGBTQ Workers from Discrimination*, CNN (Jun. 15, 2020, 12:22 PM), https://www.cnn.com/2020/06/15/politics/supreme-court-lgbtq-employment-case/index.html (discussing Supreme Court victory against employment discrimination). "'Today's decision is one of the court's most significant rulings ever with respect to the civil rights of gay and transgender individuals,' said Steve Vladeck, CNN Supreme Court analyst and professor at the University of Texas School of Law." *Id.*

[47] *See* Altitude Express, Inc. v. Zarda, 139 S. Ct. 1599, 5991 (2019) (granting certiorari for Title VII discrimination case); Bostock v. Clayton Cnty., 140 S. Ct. 1727, 1727 (2019) (denying certiorari for Title VII discrimination case); R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599, 1599 (2019) (granting certiorari for Title VII discrimination case), *aff'd*, 140 S. Ct. 1731 (2020).

[48] *See* Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762 (6th Cir. 2006) (stating "that making employment decisions based on sex stereotyping, i.e., the degree to which an individual conforms to traditional notions of what is appropriate for one's gender, is actionable discrimination under Title VII").; Hudson v. Park Cmty. Credit Union, Inc., No. 3:17-CV-00344-TBR, 2017 U.S. Dist. LEXIS 187620, at *21 (W.D. Ky. Nov. 13, 2017) (holding plaintiff discriminated against for be-

both sexual orientation and gender identity do, in fact, fall under the purview of discrimination on the basis of sex, it would still be federally lawful to discriminate against queer Americans.[49] Additionally, the decision could have led to the appeal of any case that had found discrimination in the absence of a ruling from the Supreme Court.[50] The Supreme Court's ruling in *Bostock v. Clayton County* had the potential to overturn countless employment discrimination cases—including *Smith v. Avanti*—and reverse decades of progress.[51]

The issue the court faced in *Smith v. Avanti* was whether or not to use the language of "sexual stereotypes" could be used in a housing discrimination case. Over the years, courts have utilized this language to find anti-queer discrimination under Title VII's ban on discrimination on the basis of sex, but never in a housing case. The judge in *Smith v. Avanti* built on thin, adjacent precedent and made a progressive judgement that marks a victory for anti-discrimination movements. This landmark decision could signify the beginning of a new movement to protect LGBT queer Americans who have no federal shield against housing discrimination, and with the Supreme Court's ruling in their favor, there is hope that this victory will soon be one of many.

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ing "too butch."); *see also* Scott, *supra* note 27 (restating that courts have used language of Title VII in queer discrimination cases). In a conversation with the president of the Human Rights Campaign, Alphonso David, David stated: "[W]e have been relying on case law for the past 20 years. . . . Courts have concluded that federal civil rights laws do protect LGBTQ people from discrimination." *See* Scott, *supra* note 27; North, *supra* note 27 (detailing impact of ruling across several legal sectors).

[49] *See* North*, supra* note 27 (describing consequences of ruling against sexual orientation falling under discrimination based on sex). "LGBTQ people already face high rates of employment discrimination . . . and it's already hard to prove employment discrimination even where you are protected . . . .A decision against the workers would only make matters worse." *Id.*

[50] *See id.*(explaining impact of ruling). The Supreme Court's ruling could "decimate legal protections for LGBTQ workers in America . . . . LGBTQ people could stand to lose not just their jobs as a result of the three cases at issue . . . but also potentially their housing and access to health care and education as well." *Id.*; *see also* Scott, *supra* note 27 (stating that plaintiffs in October 8, 2019 cases asked Supreme Court "to affirm what everyone has relied on for decades—that LGBT people should be protected under federal civil rights laws.")

[51] *See* Biskupic, *supra* note 27 (confirming effect of ruling on queer rights); North, *supra* note 27 (reiterating consequences of SCOTUS ruling); *Scott*, supra note 27 (emphasizing ramifications on LGBT lives).

INTERNET REGULATION—SECOND CIRCUIT FOLLOWS MAJORITY OF COURTS IN BROAD APPLICATION OF COMMUNICATIONS DECENCY ACT IMMUNITY—*FORCE V. FACEBOOK, INC.*, 934 F.3D 53 (2D CIR. 2019).

The Communications Decency Act ("CDA") regulates the content of technology companies, including social media platforms.[1] The CDA has come under immense scrutiny, particularly regarding social media's role in facilitating attacks by terrorist organizations.[2] In *Force v. Facebook, Inc.*,[3] the United States Court of Appeals for the Second Circuit decided whether the CDA provided Facebook with immunity from claims that Facebook provided a platform for the terrorist organization, Hamas, to carry out various attacks.[4] The court held that Facebook was considered a "publisher" for purposes of the CDA, and was therefore immune from liability.[5]

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[1] *See* 47 U.S.C. § 230(c)(2) (2019) (providing immunity to computer-service providers who regulate certain content). The subsection of the statute states as follows:

> No provider or user of an interactive computer service shall be held liable on account of— (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1) [subparagraph (A)].

Id.

[2] *See* Nicole Phe, Note, *Social Media Terror: Reevaluating Intermediary Liability Under the Communications Decency Act*, 51 SUFFOLK U. L. REV. 99, 99 (2018) (outlining claims of victims' families against social media companies). The lawsuits discussed in Phe's note include a widow who sued Twitter for providing "material support" to ISIS in carrying out an attack on her husband. *Id.* In another suit, a family sued Google for its role in aiding an ISIS attack in Paris that killed their relative. *Id*. They argued that Google "'knowingly permit[ed] terrorist group ISIS to use their social networks,' and enabl[ed] them to carry out various terror attacks." *Id.*

[3] 934 F.3d 53 (2d Cir. 2019).

[4] *See id.* at 57 (stating issue of case). "The principal question presented in this appeal is whether 47 U.S.C. § 230(c)(1), a provision enacted by the Communications Decency Act of 1996, shields Defendant-Appellee Facebook, Inc., from civil liability as to Plaintiffs-Appellants' federal anti-terrorism claims." *Id.*

[5] *See Force*, 934 F.3d at 68 (stating holding); *see also* 47 U.S.C. § 230 ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."); Phe, *supra* note 2, at 68 (stating court's conclusion). Plaintiffs' argued that Facebook was not a "publisher" under the CDA because Facebook developed "matchmaking" algorithms that connected users to content that is most likely to gain interest and engage them in the platform. Phe, *supra* note 2, at 65. The court rejected this

Hamas is a Palestinian terrorist organization that has committed thousands of attacks in Israel, including five attacks against Americans between 2014 and 2016.[6] During these attacks, Hamas terrorists kidnapped and killed a teenager walking home from school, drove a car into a crowd and killed a 3-month-old baby, and stabbed three victims.[7] Hamas operatives carried out all of these attacks.[8] Hamas used Facebook to encourage attacks, celebrate the success of these attacks, and propagate their political views.[9] The Plaintiffs in *Force*, therefore, claimed that Facebook enabled Hamas to carry out the terrorist attacks and should be held liable for their role in aiding such attacks.[10]

Facebook is an "online social network platform and communications service" where users join the network and populate their pages with their own content.[11] Facebook does not review the content its users post, however, it does have a department focused on anti-terrorism.[12] These "counterterrorism specialists" use various techniques to identify terrorist

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argument, holding that based on both statutory interpretation and precedent, Facebook's matchmaking algorithm did not render it a non-publisher. Phe, *supra* note 2, at 66; Jeff Neuburger, *Facebook Shielded by CDA Immunity Against Federal Claims for Allowing Use of Its Platform by Terrorists*, PROSKAUER (Aug. 9, 2019), https://newmedialaw.proskauer.com/2019/08/09/facebook-shielded-by-cda-immunity-against-federal-claims-for-allowing-use-of-its-platform-by-terrorists/ (discussing outcome of *Force* decision and court's rejection of Plaintiffs' "matchmaking" argument).

[6] *See Force*, 934 F.3d at 57-58 (describing Hamas organization and its principal aims). "Hamas is a Palestinian Islamist organization centered in Gaza. It has been designated a foreign terrorist organization by the United States and Israel. Since it was formed in 1987, Hamas has conducted thousands of terrorist attacks against civilians in Israel." *Id.* at 57. *But see* Matthew Levitt, *Hamas from Cradle to Grave*, MIDDLE EAST Q., Winter 2004 at 3, (available at https://www.meforum.org/582/hamas-from-cradle-to-grave) (last visited Dec. 30, 2020) (recognizing opposing view of Hamas as "nationalist movement" promoting "social welfare").

[7] *See Force*, 934 F.3d at 57-58 (outlining attacks and identifying victims).

[8] *See id.* (reiterating Hamas operatives executed all attacks).

[9] *See id.* at 59 (describing Hamas use of Facebook to celebrate and promote attacks). For example, the attack that killed the baby "came after Hamas posts encouraged car-ramming attacks at light rail stations." *Id.* Additionally, Hamas supporters were able to view celebratory posts on Facebook for these attacks because Facebook "allegedly failed to remove the 'openly maintained' pages and associated content of certain Hamas leaders, spokesmen, and other members." *Id.* (citations omitted).

[10] *See id.* (stating Plaintiffs' claim that Facebook helped Hamas carry out their terrorist acts). "[P]laintiffs claim [that] Facebook enables Hamas 'to disseminate its messages directly to its intended audiences,' to 'carry out the essential communication components of [its] terror attacks . . . .'" *Id.* (citations omitted).

[11] *See id.* at 58 (setting out Facebook's business model and how it works as social media platform).

[12] *See Force*, 934 F.3d at 58 (explaining how Facebook does not review or screen users' content). "Facebook's terms of service specify that a user 'own[s] all of the content and information [the user] post[s] on Facebook, and [the user] can control how it is shared through [the user's] privacy and application settings.'" *Id.* (citations omitted).

activity and remove concerning posts to the best of their ability.[13] Nevertheless, Facebook is unable to identify and remove all terrorist activity on its platform.[14]

The Plaintiffs' first complaint alleged that Facebook was civilly liable under the Anti-Terrorism Act for aiding and abetting international terrorist activities.[15] The district court dismissed the Plaintiffs' first complaint under 47 U.S.C. § 230(c)(1) because the Plaintiffs treated Facebook as a publisher.[16] The Plaintiffs then filed an amended complaint that kept the original allegations, but added an additional claim that Facebook "concealed its alleged material support to Hamas."[17] However, the district court again denied their motion under 47 U.S.C. § 230(c)(1), to which the Plaintiffs appealed.[18] The Second Circuit Court affirmed the judgment of the

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[13] *See id.* at 60-61 (explaining work and background of counter-terrorist specialists). Facebook's Community Standards states that it "'remove[s] content that expresses support or praise for groups, leaders, or individuals involved in,' inter alia, '[t]errorist activity.'" *Id.* at 60. (citations omitted). Facebook thus employs "academics, engineers, and former prosecutors and law enforcement officers" to respond to reported posts for terrorist activity and remove content that violates its issued standards. *Id.* at 61.

[14] *See id.* at 59 (noting that Facebook failed to remove all terrorist pages from its platform); *see also* Ryan Goodman, *Why Can't Facebook Take Down All Terrorist Content?*, NEWSWEEK (Jan. 17, 2018, 8:10 AM), https://www.newsweek.com/why-cant-facebook-take-down-all-terrorist-content-782598 ("Content that Facebook declared did not violate its Community Standards included a photo of hooded gunmen aiming their weapons in an urban neighborhood with the caption, 'We Will Attack you in Your Home.'")

[15] *See Force*, 934 F.3d at 61 (detailing procedural history and Plaintiffs first complaint).

> In their First Amended Complaint, Plaintiffs claimed that, under 18 U.S.C. § 2333, Facebook was civilly liable for aiding and abetting Hamas's acts of international terrorism; conspiring with Hamas in furtherance of acts of international terrorism; providing material support to terrorists; and providing material support to a designated foreign terrorist organization.

Id.

[16] *See* Force v. Facebook, Inc., 304 F. Supp. 3d 315, 318 (E.D.N.Y. 2018) (dismissing first complaint).

> Examining the myriad opinions considering the application of that law, the court concluded that each of Plaintiffs' claims and theories of liability sought to hold Facebook liable based on its role as the 'publisher or speaker' of social media content generated by Hamas and affiliated individuals, and so were barred by the defense afforded by Section 230.

Id.

[17] *See Force*, 934 F.3d at 62 (stating contents of Plaintiffs' proposed amended complaint).

[18] *See Force*, 304 F. Supp. at 332 (dismissing Plaintiffs' motion to file amended complaint with prejudice); *see also Force*, 934 F.3d at 62 (noting Plaintiffs' appealed district court dismissal).

lower court, and held that Facebook is a publisher and therefore immune under § 230(c)(1) of the CDA.[19]

Before the enactment of the CDA, common law regulated the internet and its liability for third parties.[20] This common-law-focused model forced courts to determine which category the internet service provider ("ISP") fell under, which resulted in conflicting decisions among various jurisdictions.[21] The courts found that either: (1) ISPs would not regulate any of their content for fear of liability, or (2) ISPs overcensored the internet, which in turn inhibited free speech.[22] In *Cubby, Inc. v. Compuserve, Inc*., the district court held that a computer-database owner was a distributor, and therefore not liable for a third party's defamatory statements because they neither knew nor had reason to know about the statements.[23] A few years later, in a case with facts similar to *Cubby*, the court in *Stratton Oakmont v. Prodigy Servs. Co.* held that an online service provider was lia-

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[19] *See Force*, 934 F.3d at 57 (affirming lower court's judgement).

[20] *See* Phe, *supra* note 2, at 102 (explaining legal history of internet service providers' liability prior to CDA). This "common law liability scheme consisted of three categories: primary publishers, distributors, and conduits." *Id.* These categories meant that liability varied depending on what category the party involved in the litigation fell under. *Id.* at 103.

> Under common law, primary publishers were held to the same standard of liability as original authors because they were in the best position to monitor and control content, and as a result, could have easily avoided or mitigated the harm caused by defamation. On the other hand, a distributor is liable for the distribution of a defamatory publication only if the distributor had actual or imputed knowledge of the defamation and failed to remove the defamatory post. Distributor liability hinged on the idea that even though distributors were not in a position to monitor and control content, they had the ability to minimize the harm of the defamation by refusing to sell or stock defamatory materials.

Id.

[21] *See id.* at 104 (explaining outcome of common-law-liability scheme). "As one court insightfully noted, 'more ideas and information are shared on the Internet than any other medium. But when we try to pin down this medium of exchange, we realize how slippery our notion of the Internet really is.'" *Id.*; *see also* Michelle Jee, *New Technology Merits New Interpretation: An Analysis of the Beadth of CDA Section 230 Immunity*, 13 HOUS. BUS. & TAX L.J. 178, 184 (2013) (noting increase in conficliting court decisions as internet expanded). As internet providers created forums where users could connect on the internet, "courts had conflicting views on how to adequately address claims against website operators for defamation." Jee, *supra* note 21, at 184.

[22] *See* Phe, *supra* note 2, at 106 (explaining Congressional issue with common-law liability).

[23] *See* 776 F. Supp. 135, 141 (S.D.N.Y. 1991) (finding "CompuServe, as a news distributor, may not be held liable if it neither knew nor had reason to know of the allegedly defamatory Rumorville statements, summary judgment in favor of CompuServe on the libel claim is granted."). CompuServe provides an online information service that individuals can subscribe to and gain access to information about thousands of sources within its electronic library. *Id.* at 137. The plaintiffs claimed that one of the sources on CompuServe's website published false statements about them and CompuServe failed to remove those statements. *Id.* at 138. However, the court found that CompuServe was a distributor and could not be held liable if they did not know or have reason to know about the defamatory statements. *Id.* at 141.

ble for a third party statement because it attempted to filter its content.[24] The conflicting holdings of these cases worried Congress, which led to the formation of the CDA.[25]

In 1996, Congress passed the CDA in an effort to "control and limit the exposure of children to indecent and obscene material online."[26] One year later, the Supreme Court struck down most of the CDA because it exposed internet providers to too much liability, which consequently prompted the addition of § 230.[27] Section 230 of the CDA provides immunity for internet providers who are treated as publishers of third-party content.[28] The purpose of this immunity was largely to continue the development of the internet and "to preserve the vibrant and competitive free market . . . for the Internet and other interactive computer services" without Federal or State regulation.[29] Moreover, there are three requirements for immunity

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[24] *See* No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *13, 17 (N.Y. Sup. Ct. May 24, 1995) (holding Prodigy's "conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than [the ISP in *Cubby*] and other computer networks that make no such choice."). The court found that Prodigy controlled its content because they were controlled by their members who, in turn, controlled the electronic bulletein boards on Prodigy's site. *Id.* at *9. Further, Prodigy had an automatic software that screened content. *Id.* Therefore, Prodigy was distinguished from the ISP in *Cubby* because Prodigy chose to regulate their content, thus opening them up to liability. *Id.*

[25] *See* Phe, *supra* note 2, at 106 (explaining Congressional reaction to *Cubby* and *Stratton* decisions). "In particular, members of Congress and online intermediaries alike fretted over this nonsensical 'rule' that would result in one of two extremes." *Id.* After much debate, Congress passed the Family Empowerment Amendment ("FEA"), which provided a hands-off approach to internet regulation with limited federal intervention. *Id.* at 107. The "Good Samaritan provision" of the FEA—now known as § 230 of the CDA— allowed ISP's to self regulate. *Id*. The FEA laid the foundation of § 230. *Id.* at 108.

[26] *See* Nina I. Brown, *Fight Terror, Not Twitter: Insulating Social Media from Material Support Claims*, 37 LOY. L.A. ENT. L. REV. 1, 39 (2017) (articulating reason behind original enactment of CDA).

[27] *See id.* at 39 (providing reason for amending CDA). "[S]ection 230 was tacked on to address the growing concern that websites could be liable for content posted by third parties." *Id.* One year after the CDA was enacted, most of the Act was struck down as unconstitutional; however, § 230 was kept in tact. *Id.*

[28] *See* 47 U.S.C. § 230(c)(1) (2019) (providing immunity to internet providers for third-party content posts on their sites); *see also* Brown, *supra* note 26, at 37 ("Simply put, section 230 protects social media sites, among others, from civil liability for publishing content such as posts, pages, comments, tweets, etcetera generated by its users."); Jeff Magenau, *Setting Rules in Cyberspace: Congress's Lost Opportunities to Avoid the Vagueness and Overbreadth of the Communications Decency Act*, 34 SAN DIEGO L. REV. 1111, 1112 (1997) (discussing enactment of CDA).

[29] *See* Brown, *supra* note 26, at 39 (citing legislative purpose of § 230). Congress' main purpose and goal at the time of enacting the CDA was to encourage the development and free flow of information through the internet. *Id.* Furthermore, "[i]n passing section 230 and allowing sites to voluntarily filter content, Congress spared social media platforms from the grim choice of either performing some content-editing to remove obscene and offensive material or policing no content at all." *Id.* at 41.

under § 230 of the CDA: "(1) the defendant must be a provider or user of an 'interactive computer service'; (2) the asserted claims must treat the defendant as a publisher or speaker of information; and (3) the challenged communication must be 'information provided by another information content provider.'"[30]

In *Zeran v. America Online, Inc.*, the United States Court of Appeals for the Fourth Circuit became the first court to interpret the CDA and subsequently set the precedent of broad immunity for internet service providers.[31] The court stated that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content – are barred."[32] With the exception of the Ninth Circuit, most courts have followed the *Zeran* precedent, holding that § 230 provides broad immunity to internet providers in the interest of cultivating a dynamic and open-internet system.[33] In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, the Ninth Circuit limited § 230 and held that an ISP should not be afforded immunity because "it created and designed its registration process around questions and answers that it provided to prospective subscribers, which made Roommates.com analogous to an information

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[30] *See id.* at 43 (laying out three elements that must be satisfied for § 230 immunity).

[31] *See* 129 F.3d 327, 330 (4th Cir. 1997) (explaining application of § 230 and immunity it provides for ISPs); *see also* Jee, *supra* note 21, at 187 ("Ultimately, *Zeran v. America Online*, *Inc*. greatly expanded the scope of immunity afforded by the CDA, concluding that the distinction between 'distributor' and 'publisher' was irrelevant.")

[32] *See Zeran*, 129 F.3d at 330 (discussing legislative history and intent of § 230). "In specific statutory findings, Congress recognized the Internet and interactive computer services as offering 'a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.'" *Id.* (citations omitted).

[33] *See* Doe v. Backpage.com, LLC, 817 F.3d 12, 29 (1st Cir. 2016) (following precedent and holding internet provider not liable under CDA). *Doe* involved an internet service provider aiding in the solicitation of sex trafficking of minors. *Id.* at 16. The court stated that these circumstances "evoke outrage." *Id.* at 15. However, the court also stated that unfortunately, "Congress did not sound an uncertain trumpet when it enacted the CDA, and it chose to grant broad protections to internet publishers. Showing that a website operates through a meretricious business model is not enough to strip away those protections." *Id.* at 29. *Doe* is an example of how courts reluctantly feel bound to interpret immunity of the CDA broadly. *Id.* at 19; s*ee also* Phe, *supra* note 2, at 112 (explaining impact of *Zeran* decision). "Because *Zeran* was the first major case to interpret § 230, the Fourth Circuit's decision to eliminate notice-based liability and grant broad immunity to ISPs had far-reaching consequences: it set the tone for the judicial development and construction of § 230." Phe, *supra* note 2, at 112. *But see* FTC. v. LeadClick Media, LLC, 838 F.3d 158, 176 (2d Cir. 2016) (holding "LeadClick is an information content provider with respect to the deceptive content at issue and is not entitled to immunity under Section 230."); Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1109 (9th Cir. 2009) (finding Yahoo! not immune for matchmaking algorithms); Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003) (suggesting § 230 should be read "as a definitional clause rather than as an immunity from liability, and thus harmonize the text with the caption.").

content provider."[34] The Seventh Circuit also provided language against a broad application of the CDA, but ultimately gave immunity to the ISP.[35]

In *Force*, the court started its analysis by emphasizing the precedent courts' findings that § 230 provides broad immunity.[36] The court then implemented an ordinary meaning of the word "publisher" and categorized Facebook as such.[37] The court rejected the Plaintiffs' argument that Facebook should be liable for providing Hamas a platform to organize and reasoned that Facebook's conduct "falls within the heartland of what it means to be the 'publisher' of information under Section 230(c)(1)."[38] Furthermore, Facebook's use of algorithms and "matchmaking" tools to connect Hamas supporters did not disqualify Facebook from being considered a publisher.[39] The court stated that the bulk of an interactive computer service's job is to decide what content to display and noted there is no precedent that denied § 230 immunity based on "matchmaking."[40]

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[34] *See* 521 F.3d 1157,1175 (9th Cir. 2008) (rejecting immunity for internet service provider); *see also* Phe, *supra* note 2, at 114 (noting importance of Roommates.com as only case to limit CDA immunity). This case was one of a "few instances where a court narrowed its interpretation of § 230 and held that immunity should not extend to the ISP in question." Phe, *supra* note 2, at 114; *see also* Madeline Byrd & Katherine J. Strandburg, *CDA 230 for a Smart Internet*, 88 FORDHAM L. REV. 405, 406 (2019) (highlighting development of internet and need to adapt CDA in line with internet-expanded capabilities); Joseph Monaghan, Comment, *Social Networking Websites' Liability for User Illegality*, 21 SETON HALL J. SPORTS & ENT. L. 499, 506 (2011) (highlighting one example of broad immunity of CDA); Andrew Bolson, *The Internet Has Grown Up, Why Hasn't the Law? Reexamining Section 230 of the Communications Decency Act*, INT'L ASS'N OF PRIVACY PROFESSIONALS (Aug. 27, 2013), https://iapp.org/news/a/the-internet-has-grown-up-why-hasnt-the-law-reexamining-section-230-of-the/ (stating effect of technological advances on application of CDA).

[35] *See Doe*, 347 F.3d at 660 ("Why should a law designed to eliminate ISPs' liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?") "If this reading is sound, then § 230(c) as a whole makes ISPs indifferent to the content of information they host or transmit: whether they do . . . or do not . . . take precautions, there is no liability under either state or federal law." *Id.*

[36] *See* Force v. Facebook, Inc., 934 F.3d 53,64 (2d Cir. 2019) (laying out precedent cases' treatment of §230 immunity for internet-content providers). "In light of Congress's objectives, the Circuits are in general agreement that the text of Section 230(c)(1) should be construed broadly in favor of immunity." *Id.* at 64; *see also* Jee, *supra* note 21, at 191 (highlighting importance of deciding CDA cases based on statutory interpretation).

[37] *See Force*, 934 F.3d at 65 (explaining meaning and court's interpretation of word "publisher"). The broad interpretation of §230 immunity "has resulted in a capacious conception of what it means to treat a website operator as the publisher . . . of information provided by a third party." *Id.* (citing *Backpage.com*, 817 F.3d at 19).

[38] *See id.* at 65 (rejecting Plaintiffs' argument that Facebook is not publisher).

[39] *See id.* at 66 (finding "matchmaking" algorithms do not render internet content provider publisher). "Indeed, arranging and distributing third-party information inherently forms 'connections' and 'matches' among speakers, content, and viewers of content . . . [t]hat is an essential result of publishing. Accepting plaintiffs' argument would eviscerate Section 230(c)(1) . . . ." *Id.*

[40] *See id.* at 67 ("All of these decisions, like the decision to host third-party content in the first place, result in 'connections' or 'matches' of information and individuals, which would have

Next, the court addressed whether Facebook was a developer or creator because, if Facebook fell within either category, it would not have immunity under § 230.[41] The court rejected the Plaintiffs' argument that Facebook developed Hamas's content by directing the content to people interested in it.[42] The court reasoned that Facebook is not responsible for nor does it edit the content Hamas provides.[43] According to the court, Facebook is classified as a neutral party because the social media platform merely takes objective information from its users to "match" them with other users.[44] Facebook's act of making content more visible or available to users is part of the traditional role of a publisher and is not considered "developing" for the purposes of § 230.[45] In this instance, the court joined the majority of circuits in its broad interpretation of both § 230 of the CDA and the meaning of the word "publisher."[46]

Whether an internet provider is immune from liability for allegedly aiding a terrorist organization depends solely on the interperative mechanisms of the CDA.[47] However, courts have struggled to interpret the CDA due to the statute's lack of clearly defined terms.[48] Most circuit courts ap-

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not occurred but for the internet services' particular editorial choices regarding the display of third-party content.")

[41] *See id.* at 68 (transitioning to Plaintiffs' argument that Facebook is developer of Hamas's content). "[C]onsistent with broadly construing 'publisher' under Section 230(c)(1), we have recognized that a defendant will not be considered to have developed third-party content unless the defendant directly and 'materially' contributed to what made the content itself 'unlawful.'" *Id.* (citing FTC. v. LeadClick Media, LLC, 838 F.3d 158, 174 (2d Cir. 2016).

[42] *See Force*, 934 F.3d at 70 (holding Facebook is not developer of content). Since Facebook users own their content, they control what they write on their pages and who can see it. *Id.* Therefore, Facebook is not a developer for purposes of § 230. *Id.*

[43] *See id.* (noting Facebook also does not "suggest edits for the content its users—including Hamas—publish").

[44] *See id.* (explaining how Facebook algorithms function). "The algorithms take the information provided by Facebook users and 'match' it to other users—again, materially unaltered—based on objective factors applicable to any content, whether it concerns soccer, Picasso, or plumbers." *Id.* Facebook's act of arranging users' objective information does not render it a developer. *Id.*

[45] *See id.* at 70 (refuting Plaintiffs' argument). "But making information more available is, again, an essential part of traditional publishing; it does not amount to "developing" that information within the meaning of Section 230." *Id.*

[46] *See id.* at 68-69 (holding Facebook immune under CDA's broad application).

[47] *See* Jee, *supra* note 21, at 191 (discussing how courts determine liability under CDA). "To analyze the CDA's meaning of 'develop,' an analysis using the canons of statutory interpretation is appropriate." *Id.*

[48] *See* Magenau, *supra* note 28, at 1113 (explaining difficulties of interpreting CDA). "However, the CDA is also problematic on a more fundamental level: it is filled with ambiguities and inconsistencies of language." *Id.* at 1113; *see also* Byrd, *supra* note 34, at 408 (articulating ambiguities in CDA language). "Because CDA 230 does not define 'publisher,' its interpretation has been a central, and difficult, task for the courts." Byrd, *supra* note 34, at 408. Furthermore, it has been suggested that the CDA:

plied a broad interpretation of the CDA, and the Second Ciruit in *Force* was not an exception to this majority rule.[49] The strength of the CDA's immunity shield is highlighted in *Doe v. Backpage.com*, where the court did not morally agree with providing immunity to the defendant, but felt that the CDA required them to do so.[50] Therefore, the *Force* decision will perpetuate broad immunity under the CDA for internet providers, making it difficult for future plaintiffs to successfully sue on these grounds.[51]

Future practicioners seeking to hold internet providers liable for their actions with third-parties may find it helpful to focus on categorizing internet providers as developers.[52] If an internet provider is classified as a

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> [S]hould be amended to clarify that a party is not 'treated as the publisher or speaker of any information provided by another information content provider' unless liability is premised primarily on the actionable nature of that third-party content. This change preserves the sort of immunity from publisher liability that the drafters of CDA 230 had in mind.

Byrd, *supra* note 34, at 436; *see also* Brown, *supra* note 26, at 4 (noting confusion in applying § 230).

> The application of section 230 is unclear where liability is based not on the content posted by the third-party, but instead on the consequences of allowing that third party to use the social media platform. This is a critical distinction and presents a second unsettled question for courts confronting these cases.

Brown, *supra* note 26, at 4.

[49] *See* sources cited & accompanying text *supra* note 36; *see also Force*, 934 F.3d at 68 (holding Facebook immune under CDA's broad application); Monaghan, *supra* note 34, at 507 ("As a result of judicially extended immunity to ICPs, these social networking websites have also been consistently granted broad section 230 immunity.") Social media platforms have no incentive to protect their users "because of the broad immunity granted to them by judicial interpretation of section 230 of the Communications Decency Act (CDA)." Monaghan, *supra* note 34, at 500.

[50] *See* Doe v. Backpage.com, LLC, 817 F.3d 12, 15 (1st Cir. 2016) (articulating court's concerns of current CDA interpretation). "This is a hard case — hard not in the sense that the legal issues defy resolution, but hard in the sense that the law requires that we, like the court below, deny relief to plaintiffs whose circumstances evoke outrage." *Id.* at 15; *see also* Monaghan, *supra* note 34, at 506 (using *Backpage.com* to emphasize broad application of CDA).

[51] *See generally Force*, 934 F.3d at 64 (stating current trend in courts to interpret §230 broadly). "In light of Congress's objectives, the Circuits are in general agreement that the text of Section 230(c)(1) should be construed broadly in favor of immunity." *Id.* at 64; *see also* Neuburger, *supra* note 5 (noting significance of *Force* decision).

[52] *See Force*, 934 F.3d at 81(Katzmann, C.J., dissenting in part) (explaining how case precedent does not provide developers CDA immunity). Section 230 "does not necessarily immunize defendants from claims based on promoting content or selling advertising, even if those activities might be common among publishing companies nowadays." *Id.* at 81; *see also* Monaghan, *supra* note 34, at 503 (explaining difference between publishers and distributors). "The issue is substantial because under the law of most states, a publisher is strictly liable for defamatory statements, whereas a distributor is liable only for content it knew or should have known was defamatory." Monaghan, *supra* note 34, at 503.

content developer, they fall outside of the CDA immunity shield because they are no longer simply a publisher.[53] For example, Facebook's algorithmic capability to matchmake and create networks of users arguably goes far beyond a traditional publisher's ability.[54] Through these algorithms, Facebook is not merely placing an ad on the front page of a newspaper.[55] Rather, Facebook connects people in a way that generates new groups, followers, and the ability to reach people that would otherwise not be possible without those algorithms.[56] If plaintiffs can show how the internet has expanded its capabilities since the enactment of the CDA, they may be able to prove that these internet providers are more than simply publishers of their content.[57]

Furthermore, in *Force*, the court stated that holding Facebook liable for its use of algorithms would "turn Section 230(c)(1) upside down."[58]

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[53] *See Force*, 934 F. 3d at 68 (stating that "[i]f Facebook was a creator or developer, even 'in part,' of the terrorism-related content upon which plaintiffs' claims rely, then Facebook is an 'information content provider' of that content and is not protected by Section 230(c)(1) immunity.")

[54] *See id.* at 83 (Katzmann, C.J., dissenting in part) (quoting Facebook CEO's description of Facebook). "CEO Mark Zuckerberg has similarly described Facebook as 'build[ing] tools to help people connect with the people they want,' thereby 'extending people's capacity to build and maintain relationships.'" *Id.* (citations omitted). These actions of creating social networks go beyond the traditional editorial actions the CDA immunizes. *Id.*; *see also* Jee, *supra* note 21, at 191 (citing broad interpretation of term "developer"). The meaning of developer "encompasses a broad meaning, extending beyond mirroring the definition of creation which is to '[m]ake something new' or '[c]ome into existence.' Rather, the definition of 'develop' in the CDA, as construed by the courts, is 'to make actually available or usable (something previously only potentially available or usable).'" Jee, *supra* note 21, at 191 (citing FTC v. Accusearch, Inc., 570 F.3d 1187, 1189 (10th Cir. 2011)).

[55] *See Force*, 934 F. 3d at 83 (Katzmann, C.J., dissenting in part) (explaining Facebook's increased ability to connect users); s*ee also* Bolson, *supra* note 34 (noting possible options to amend CDA to keep up with evolving technology).

[56] *See Force*, 934 F. 3d at 83 (Katzmann, C.J., dissenting in part) (explaining how algorithms "forge real-world (if digital) connections through friend and ground suggestions").

[57] *See* Monaghan, *supra* note 34, at 505 (noting development of internet since CDA was enacted).

> Notably, however, the Internet model at the time Congress enacted the CDA was very different than what has since evolved . . . [i]t is uncertain whether Congress would have afforded the same protection at the time it enacted the CDA had it known that ISPs would deliver content in the future.

Monaghan, *supra* note 34, at 505; *see also* Phe*, supra* note 2, at 101-02 (explaining how unforeseen technological advances complicate statutory interpretation). "Nevertheless, in light of today's technological advances, the legislative objectives that § 230 once served are at risk of becoming obsolete. The changing nature of the Internet demands action, and Congress has failed in this regard." Phe*, supra* note 2, at 101-02. When the CDA was enacted, the internet was a relatively new phenomenon. Phe*, supra* note 2, at 101-02.

[58] *See Force*, 934 F.3d at 67 (stating Facebook's use of algorithms does not exclude platform from being publisher).

This argument shows just how far courts have gone in applying CDA immunity to internet providers and highlighting the need for a shift in how courts interpret and apply the CDA.[59] The CDA was enacted in 1996 when the internet had far fewer capabilities than it does today.[60] Therefore, courts should not look to the CDA as a broad immunity shield, but should instead focus on the internet providers' actual actions.[61] By shifting the focus away from sweeping CDA immunity and instead focusing on the collective effect of Facebook and other social media platforms' actions with third-parties, internet providers may be held more accountable for their specific conduct.[62] A narrower interpretation of the CDA will keep with the legislative intent of the CDA, which was to protect the role of a traditional publisher, and did not account for the algorithmic capabilities of the

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[59] *See* Phe, *supra* note 2, at 124 (explaining how terrorist organizations rely on social media platforms). The broad application of the CDA "neither incentivizes nor motivates [internet service providers] to implement measures that could have a negative impact on traffic and revenue. Victims of harmful or offensive content are often left without legal recourse because § 230 imposes a veritable challenge." *Id.* at 125; *see also* Jee, *supra* note 21, at 187 (showing sweeping effect *Zeran* decision had on immunity). The *Zeran* court feared that holding internet providers liable for "potentially tortious material would increase the costs of operation such that internet service providers would no longer seek to do business. This drastic hypothetical would run contrary to the policies the CDA was enacted to promote." Jee, *supra* note 21, at 187.

[60] *See* Monaghan, *supra* note 34, at 532 ("In the last ten years, however, technology has progressed, and social networking websites now have the means, but not the will to implement effective change."); *see also* Brown, *supra* note 26, at 7 ("About 90 percent of organized terrorism on the internet is being carried out through social media.") (citations omitted).

[61] *See Force*, 934 F.3d at 81 (Katzmann, C.J., dissenting in part) ("Section 230(c)(1) limits liability based on the function the defendant performs, not its identity."). Furthermore, "[l]ooking beyond Facebook's 'broad statements of immunity' and relying 'rather on a careful exegesis of the statutory language,' . . . the CDA does not protect Facebook's friend- and content-suggestion algorithms." *Id.* at 82 (citing Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100 (9th Cir. 2009)); *see also* Jee, *supra* note 21, at 180 (suggesting narrower approach to applying CDA to current internet platforms). The broad application of the CDA in light of the development of technology "does not necessarily align with the objectives the Zeran court sought to achieve with its broad interpretation." Jee, *supra* note 21, at 180. Therefore, a more "fact-specific inquiry considering such factors as the type of claim being brought, the specifics of the posted content, what the internet service provider or website sought to achieve with the content, and the like, more effectively balance the policy goals of promoting internet usage with deterring illegal behavior." Jee, *supra* note 21, at 180.

[62] *See* Jee, *supra* note 21, at 196 (noting importance of considering internet-platform-specific actions when deciding liability).

> By adopting a totality of the circumstances approach to CDA immunity, social networking sites would not receive such a strong grant of immunity. Instead, a court could apply the following factors to determine whether a social networking site should be afforded immunity: 1) the type of claim being brought; 2) the specifics of the posted content; 3) any actions the internet service provider or website has taken; and, 4) the policy objectives of the CDA.

Id.

internet today.[63] Perhaps a narrow interpretation of the CDA does not go far enough; instead, an update to § 230 of the CDA would be more effective in keeping up with the rise in technology and social media platforms' abilities.[64]

The Second Circuit is one of many circuit courts faced with the issue of how to apply the CDA to social media platforms. Specifically, the court considered whether Facebook was immune from liability for allegedly aiding a terrorist organization in carrying out attacks. The Second Circuit joined a majority of courts in applying a broad interpretation of the CDA, and ultimately found Facebook immune from liability. However, this application is not reflective of the original intent of the CDA, as the internet has more capabilities today to connect people and groups. By implementing these advanced capabilities, most social media platforms have transcended the role of traditional publishers and therefore should not be provided CDA immunity.

Alison Eleey

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[63] *See* Byrd, *supra* note 34, at 407 (laying out CDA's history and purpose). Congress enacted the CDA in response to a case that attempted to hold online bulletin boards liable for defamatory statements published on its site. *Id.* Therefore, Congress did not enact the CDA with the current algorithmic capabilities of internet providers today. *Id.* Instead, Congress felt that "[t]raditional publisher-style screening for actionable content would have been untenable for online services that provided forums for user-driven exchanges involving large amounts of rapidly changing content." *Id.*; *see also* Jee, *supra* note 21, at 180 (asserting broad interpretation of CDA immunity where social media websites fail to satisfy statutory intent). "Therefore, extending the grant of Communications Decency Act immunity to these new forms of technology does not necessarily align with the objectives the Zeran court sought to achieve with its broad interpretation." Jee, *supra* note 21, at 180.

[64] *See* Jee, *supra* note 21, at 180 (calling for revision of CDA).