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The Curious Incident of Trump and the Courts: Interbranch Deference in an Age of Populism

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ABSTRACT

Given President Donald Trump's generally non-deferential posture towards national political and governing institutions, why hasn't his administration produced greater tension with respect to judges, courts, and established norms of judicial independence? Increased politicization of the judiciary, deepening partisanship, and distinct attributes of the President himself all seem to set up a climate of interbranch confrontation likely to challenge judicial independence norms. But at least in the first two years of this presidency, sustained opposition to courts is not evident. This analysis documents and accounts for this puzzle, ultimately contending that the President's unexpected (and admittedly fragile) institutional comity can be traced to his personal history of relying on legal safeguards and authority as well as a complex stew of partisan and ideological uncertainty about the future direction of courts.

KEYWORDS

Comity, Federal Courts, Judicial Independence, Judicial Politics, Partisanship, Populism, Separation of Powers, Trump

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Given President Donald Trump's generally non-deferential and even antagonistic posture towards national political and governing institutions, why hasn't his administration produced greater tension with respect to judges, courts, and established norms of judicial independence? To be sure, the President has prominently tussled with the federal judiciary in connection with immigration policy (especially regarding the administration's so-called "travel ban" on immigrants and refugees from majority-Muslim countries), and he has accused courts of being "slow and political."[1] The President has singled out individual decisions for rebuke, especially regarding what he considers lenient sentencing, such as in the case of Bowe Bergdahl, a U.S. soldier who deserted his post in Afghanistan in 2009 and was subsequently captured by the Taliban.[2] And Trump has targeted the Ninth Circuit Court of Appeals in particular as having a "terrible record of being overturned" and serving as the source of "outrageous" decisions.[3]

But, on the whole, these reproaches have represented the exception rather than the rule. The President has stepped somewhat lightly around the courts, especially in comparison with his more aggressive posture towards other institutions, such as the press and intelligence community. At least in the first two years of the Trump White House, sustained opposition to courts is the proverbial dog that didn't bark—a surprising outcome given numerous factors inclining us towards heightened executive-judicial tension, and the clamorous noises otherwise emerging from the bully pulpit.

The following analysis tries to both document and account for this puzzle. I consider and probe a variety of hypotheses for why an iconoclastic and populist President Trump, otherwise suspicious if not outright hostile to governing institutions and their elite leaders, appears to be reticent to take on the judiciary, at least in any consistent or sweeping manner. Ultimately, I contend, a plausible explanation for the President's unexpected (and admittedly fragile) institutional comity can be traced to Trump's personal history of relying on legal safeguards and authority, and the complex and still bubbling stew of partisan and ideological uncertainty about the future direction of courts and parties. More broadly, this article provides a framework for understanding the separation of powers in an age of hyper-partisanship and anticipating the consequences of the inevitable future collisions between the administration's political imperatives, the courts' judgments, and the broad course of public policy hashed out in the nation's capital and fifty states.

I. The Recent Context of Interbranch Conflict

An initial expectation that the Trump administration's relations with courts are likely to be strained can be traced to two primary sources: broad trends in interbranch

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1 Brennan Center for Justice, *In His Own Words: The President's Attacks on the Courts,* Jun. 5, 2017, https://www.brennancenter.org/analysis/his-own-words-presidents-attacks-courts.

2 Merrit Kennedy, *Bowe Bergdahl's Sentence: No Prison Time*, NPR, Nov. 3, 2017, https://www.npr.org/sections/thetwo-way/2017/11/03/561852721/bowe-bergdahls-sentence-no-prison-time.

3 Derek Hawkins, *Trump Takes up GOP Tradition of Bashing 9th Circuit, a.k.a. '9th Circus,'* Wash. Post, Apr. 27, 2017, https://www.washingtonpost.com/news/morning-mix/wp/2017/04/27/trump-takes-up-hoary-gop-tradition-of-bashing-9th-circuit-aka-9th-circus/?noredirect=on&utm_term=.20a3e27d5a9f.

politics, fueled especially by deepening partisanship over the past several decades, and factors more closely tethered to the President's distinctive governance style.

A. The Politicization of Courts

We might first observe that the twenty-first century ushered in an era of greater politicization with respect to the judiciary, that is, a greater willingness by public officials (especially Republicans) to place judges, cases, and other judicial issues at the forefront of policy debates, national political discourse, and campaign rhetoric and fundraising appeals.[4] We find evidence of this in individual, politically salient confrontations over the past two decades, such as in 2005 when House Majority Leader Tom DeLay singled out Supreme Court Justice Anthony Kennedy's juvenile death penalty opinion *Roper v. Simmons*[5] as "a good ground of impeachment."[6]

But criticism of the courts for political gain has been more prevalent and systematic. Consider that from 2004-2008, four out of five of President George W. Bush's State of the Union addresses included prominent criticism of the courts, including his 2008 warning about judges who rule by "the whim of the gavel" rather than "the letter of the law."[7] In Congress, proposals to "curb" or limit the traditional powers and prerogatives of courts surged significantly in the early 2000s, averaging just over 13 such proposals every year from 2003-2008 (as opposed to an average of 4.4 proposals from 1984-2002).[8] Scholars like Mark Miller have surveyed this recent landscape and concluded that we've entered a new phase of especially combative relations with the judiciary, driven by conservative interest groups and Republican "lawyer-legislators" on the House Judiciary Committee (previously the site of vigorous defense of judges and judicial independence).[9] If Miller and comparable observers are correct, one might imagine that President Trump would be eager to contribute to this environment in which criticisms of courts are routine.[10] After all, the President has shown no qualms in taking up attacks on the legislative and executive branches—both before and during his administration.[11] Moreover, as already noted, the judiciary has periodically frustrated the President's stated policy

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4 Mark C. Miller, The View of the Courts from the Hill (2009); C. Boyden Gray et al., Panel Discussion: *Judicial Independence: Justifications & Modern Criticisms*, Georgetown University Law Center on Fair and Independent Courts: A Conference on the State of the Judiciary, Sep. 28, 2006, http:/www.law.georgetown.edu/news/documents/CoJ092806-panel1.pdf, 2006; Sandra Day O'Connor, *The Threat to Judicial Independence*, Wall St. J., Sept. 27, 2006, at A18; James Sample et al., *The New Politics of Judicial Elections, 2000-2009: Decade of Change,* Brennan Center for Justice, Aug. 16, 2010, https://www.brennancenter.org/sites/default/files/legacy/JAS-NPJE-Decade-ONLINE.pdf.

5 543 U.S. 551 (2005).

6 Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, Wash. Post, April 9, 2005, at A03.

7 The Politics of Judicial Independence: Courts, Politics, and the Public 8 (Bruce Peabody ed., 2011) (hereinafter The Politics of Judicial Independence).

8 *Id.* at 8.

9 Miller, *supra* note 4.

10 The Politics of Judicial Independence, *supra* note 7.

11 Katie Benner, *Sessions Silent as Trump Attacks His Department, Risking Its Autonomy*, N.Y. Times, February 5, 2018, at A14; Lisa Mascaro, *Trump again bashes the Republican leaders in Congress he needs to pass his agenda*, L.A. Times, August 24, 2017.

goals, including, most famously, a series of rulings against the President's so-called "Muslim ban" and his "extreme vetting" executive orders.[12]

B. The Rise of Hyper-Partisanship

These claims feed directly to a second, interrelated point: the nation's thickening atmosphere of hyper-partisanship also makes executive-judicial confrontations more likely. Trump came to power in an era of deepening partisan division.[13] Scholars have demonstrated the rise of elite level party polarization since the 1980s, including, by some measures, greater party conflict inside Congress today than at any point in the post-World War II period.[14] This enflamed partisanship has impacted U.S. national politics and triggered disputes between all three branches of national government.[15] At a minimum, an increasingly polarized set of political leaders are more likely to react to court cases, individual judges, and judicial nominations that have a salient partisan dimension—as identified by leaders, major party statements, important ideological interest groups, and, perhaps, by sharp divisions amongst judges themselves.[16] Indeed some evidence of this influence of polarization on party leaders' attitudes towards courts can be found in party platforms, where we find steady and growing interest in courts and judicial decisions as a source of political fodder (see Table 1).

With respect, specifically, to the Trump administration's attitudes towards the judiciary in this atmosphere of heightened partisanship, we can further posit that tensions between the executive branch and courts are likely to intensify when a president inherits a court system that has been staffed by predecessors of a different

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[12] Michael D. Shear & Ron Nixon, *Vetting Is Little Changed Since Calls for Travel Ban*, N.Y. Times, June 12, 2017, at A14.

[13] Marc J. Hetherington & Thomas J. Rudolph, Why Washington Won't Work: Polarization, Political Trust, and the Governing Crisis (2015).

[14] Sarah A. Binder, Stalemate: Causes and Consequences of Legislative Gridlock (2003); Marc J. Hetherington & Jonathan D. Weiler, Authoritarianism and Polarization in American Politics (2009); Frances E. Lee, Beyond Ideology: Politics, Principles, and Partisanship in the U.S. Senate (2009); Keith T. Poole & Howard Rosenthal, Congress: A Political-Economic History of Roll Call Voting (1997); Sean M. Theriault, Party Polarization in Congress (2008). Others have contended there is a comparable partisan and ideological split in the public. See, e.g., Alan J. Abramowitz, The Polarized Public: Why American Government is so Dysfunctional (2012); Shanto Iyengar & Sean J. Westwood, *Fear and Loathing across Party Lines: New Evidence on Group Polarization*, 59 Am. J. Pol. Sci. 690 (2015); Gary C. Jacobson, *Partisan and Ideological Polarization in the California Electorate*, 4 St. Pol. & Policy Q. 113 (2004). A countercurrent of research has downplayed the extent of this mass polarization. Morris P. Fiorina, Samuel J. Abrams & Jeremy C. Pope, Culture War? The Myth of a Polarized America (2004).

[15] Charles Gardner Geyh, When Courts and Congress Collide: The Struggle for Control of America's Judicial System (2008); Hetherington & Rudolph, *supra* note 13; Barbara Sinclair, Party Wars: Polarization and the Politics of National Policy Making (2006); Mark Jonathan McKenzie, *The Influence of Partisanship, Ideology, and the Law on Redistricting Decisions in the Federal Courts*, 65 Pol. Res. Q.

[16] Adam Liptak, *The Polarized Court*, N.Y. Times, May 11, 2014, at SR1.

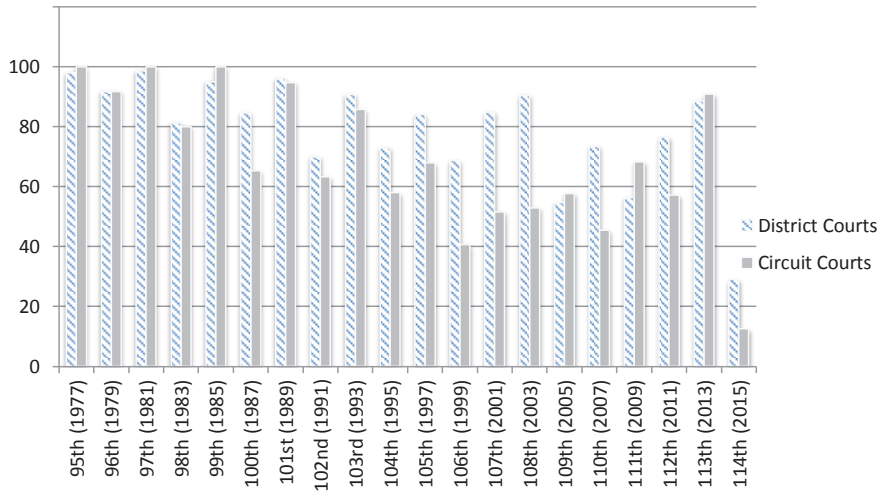
Table 1. Party Platforms Highlighting Judicial Issues and Cases (2000-2016).

Year	Democratic Platform	Republican Platform
2000	- "right to privacy" and abortion - *Olmstead v. L.C.*	- criticism of Supreme Court ruling on partial birth abortion - *Communications Workers of America v. Beck* - criticism of "exclusionary rule" - *Utah v. Evans* - support for student initiated prayer - criticism of "judicial activism"
2004		- *Elk Grove Unified v. Newdow* - *Van Orden v. Perry* - protecting Defense of Marriage Act from courts - partial birth abortion - student initiated prayer
2008	- *Boumediene v. Bush*	- immigration decisions making "deportation so difficult" - *Kelo v. City of New London* - *Boumediene v. Bush* - death penalty - abortion - *D.C. v. Heller* - ROTC access case
2012	- *Citizens United v. FEC* - using courts to protect immigration rights	- *Knox v. Service Employees International Union, Local 1000* - gay marriage/DOMA - *Hosanna Tabor v. EEOC* - public display of Ten Commandments - student prayer - *BSA v. Dale* - *Wisconsin Right to Life v. Federal Election Commission* - *Citizens United v. Federal Election Commission* - No regulation of internet speech - *DC v. Heller* - *McDonald v. Chicago* - *Kelo* - abortion - criticism of using foreign law in the courts - *NFIB v. Sebelius*
2016	- criticism of courts' role in mass incarceration - praise for drug courts and veterans' courts - praise for *Obergefell v. Hodges* - criticism of *Shelby County v. Holder; Citizens United; Buckley v. Valeo*	- *Whole Woman's Health v. Hellerstedt* - *United States v. Windsor* - criticism of judicial activism - reliance on foreign law - support for *Citizens United* and *McCutcheon v. FEC* - *Kelo* - support for *State of Wyoming v. Jewell* - *Sebelius* - criticism of *Obergefell*

Source: The American Presidency Project (http://www.presidency.ucsb.edu/)

party and ideological orientation.[17] Despite what scholars have documented as the "unprecedented level of obstruction and delay"[18] President Barack Obama faced with his judicial nominations (especially after Republicans took over the Senate in 2015), he was still able to seat over 300 Article III judges over his two terms (see Figure 1). In this way, Obama shifted a federal judicial system that was in solid Republican control in 2004 to one with a narrow majority of Democratic appointees. As Slotnick, Goldman, and Schiavoni report, "[f]rom the start of Obama's tenure to the end, the cohort of judges appointed by Democrats increased from 39.1% to 51.6%."[19] As a further measure of Obama's impact in tightening the partisan division on the federal courts, consider that in 2009, Obama faced nine out of twelve Circuit Courts of Appeals (excluding the federal circuit) with Republican-appointed majorities, but when he left office only four Circuits had Republican majorities.[20] To put all this in balder terms, when Mr. Trump took his oath of office in January 2017, the federal courts were the only branch of government not obviously held by

Figure 1. Percentage of President's nominees who were appointed (District Court and Circuit Court judges): 95th through 114th Congresses (1977-2017).



Source: Slotnick, Schiavoni, & Goldman, supra note 18.

17 Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279 (1957); Richard Funston, *The Supreme Court and Critical Elections*, 69 Am. Pol. Sci. Rev. 795 (1975); John B. Gates, *Supreme Court Voting and Realigning Issues: A Microlevel Analysis of Supreme Court Policy Making and Electoral Realignment*, 13 Soc. Sci. Hist. 255 (1989); Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 Am. Pol. Sci. Rev. 583 (2005).

18 Elliot Slotnick, Sara Schiavoni & Sheldon Goldman, *Obama's Judicial Legacy: The Final Chapter*, 5 J. L. Courts 363 (2017).

19 *Id.* at 410.

20 *Id.* at 414.

his party, and, therefore, they would seem positioned as a source of ongoing conflict and policy strain during the Trump years to come.[21]

II. Trump and the Courts

Beyond these general assertions about why recent political trends set up the Trump administration for contentious relationships with courts, we can isolate additional aggravating factors more idiosyncratic to the incumbent president. The first of these is Mr. Trump's observed personalization of politics—a phenomenon with several dimensions.

A. Personalization of Politics

The President and his subordinates frequently conflate political legitimacy and proper public service with individual loyalty.[22] To cite just one extraordinary example, in a press briefing from July 2017, the newly appointed Press Secretary Sarah Sanders and the short-lived White House Communications Director Anthony Scaramucci repeatedly expressed their "loyalty" to the President, along with their personal affection and even "love" for one another as well as the Commander in Chief. As Scaramucci elaborated:

> …I love the President, and I'm very, very loyal to the President. And I love the mission that the President has, okay? Since the early days of the campaign…I saw the love that the people had for the President.[23]

Numerous commentators have seized on the continuing centrality of this loyalty value for a man who built both his presidential campaign (and prior business empire) on family and personal connections.[24]

The other, closely related aspect of the President's personalization approach is a tendency to entangle policies and people—to treat as fungible the perceived (de)merits, value, and feasibility of different program goals and the alleged virtues (or vices) of the specific individuals backing them. President Trump has expressed

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21 After the 2016 elections, Republicans also had 33 state legislatures in their control. Eric Boehm, *Democrats Got Wrecked Again in State Legislative Races, and it Matters More Than You Might Think*, Reason, Nov. 14, 2016, https://reason.com/blog/2016/11/14/the-2016-election-turned-more-state-legi.

22 Michael McFaul, *Why Trump's Personalized Approach to Diplomacy Is Bad for America*, Wash. Post, June 28, 2018, https://www.washingtonpost.com/news/global-opinions/wp/2018/06/28/why-trumps-personalized-approach-to-diplomacy-is-bad-for-america/?utm_term=.4a78be96337d.

23 The White House, *Press Briefing By White House Principal Deputy Press Secretary Sarah Sanders and Incoming White House Communications Director Anthony Scaramucci*, Jul. 21, 2017, https://www.whitehouse.gov/briefings-statements/press-briefing-white-house-principal-deputy-press-secretary-sarah-sanders-incoming-white-house-communications-director-anthony-scaramucci-072117/.

24 Rob Crilly, *Donald Trump Values Loyalty above All Else. That Has Made Him Very Vulnerable*, Telegraph, November 24, 2017, https://www.telegraph.co.uk/news/2017/11/24/donald-trump-values-loyalty-else-could-undoing/.

this idea with respect to himself on numerous occasions, perhaps most famously in his acceptance speech at the 2016 Republican National Convention (RNC). Here he declared to the American people "I am your voice" for delivering change to everyone who has "been neglected, ignored, and abandoned" and "crushed by our horrible and unfair trade deals." As Trump further explained, only he was qualified to repair a "rigged" political system: "[n]obody knows the system better than me, which is why I alone can fix it."[25]

After being inaugurated, the President continued with this theme and celebrated political allies by recognizing their individual attributes as much as their skill, experience, or policy acumen. Thus he praised Attorney General Jeff Sessions as "an honest man," Fox News talk show host Sean Hannity as a "great guy (with great ratings)!" and lauded Supreme Court nominee Neil Gorsuch as someone who would fill the "mold" of deceased Justice Antonin Scalia. This personalization approach has also extended to the President's opponents. Indeed, many of the President's major early policy initiatives have targeted legislation or programs identified with his predecessor, including efforts to repeal the Patient Protection and Affordable Care Act ("Obamacare"), the termination of the Deferred Action for Childhood Arrivals (DACA) program, and the reversal of Obama administration criminal justice reform efforts. These moves have been justified less in terms of establishing a new policy path than in eradicating the destructive choices of others, including Mr. Obama, whom Trump called "perhaps the worst president in the history of the United States."[26]

This blurring of personal and political authority is likely to trigger friction with courts for several reasons. Perhaps most obviously, a personalized approach will tend to see unfavorable court judgments as direct attacks, or instances of disloyalty, rather than principled and impersonal judgments of law. More generally, individualized and personality-driven claims to rule are at odds with both the notion that ours is a "government of separated institutions sharing powers" and customary understandings of the rule of law.[27] In this traditional conception, law is impersonal, prospective, and stable—traits that jar against the personalization of politics embodied in much of the President's rhetoric. To take just one example of this disjuncture, consider Mr. Trump's remark during a 2016 campaign event that he could "stand in the middle of 5th Avenue and shoot somebody and I wouldn't lose voters."[28] The statement suggested that even an extreme violation of law would not diminish voters' intimate ties to, and faith in, the candidate.

Interestingly, in those instances where the President has pushed most aggressively against individual judges, independence norms, and regular judicial

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25 Full transcript available at: https://www.vox.com/2016/7/21/12253426/donald-trump-acceptance-speech-transcript-republican-nomination-transcript (accessed 11 Sept. 2018).

26 Donald J. Trump, *President Obama Will Go Down as Perhaps the Worst President in the History of the United States!* Twitter (Aug. 2, 2016, 12:07 PM), https://twitter.com/realdonaldtrump/status/760552601356267520?lang=en.

27 Richard E. Neustadt, Presidential Power and the Modern Presidents (1960); Joseph Raz, The Authority of Law: Essays on Law and Morality (1979).

28 Jeremy Diamond, *Trump: I Could 'Shoot Somebody and I Wouldn't Lose Voters,'* CNN, Jan. 24, 2016, https://www.cnn.com/2016/01/23/politics/donald-trump-shoot-somebody-support/index.html.

procedures, these personalization tactics have been especially prominent. Thus, President Trump (in)famously questioned the capacity of Federal District Court judge Gonzalo Curiel to hear a case involving Trump University fairly, on the grounds that the judge was compromised by his purported "Mexican Heritage."[29]

In a somewhat related vein, critics have charged that the President's pardon of Arizona Sheriff Joseph Arpaio (for a federal contempt of court citation) short-circuited the usual pardoning process (and Department of Justice guidelines) and undermined judicial authority in order to reward "a political friend and supporter."[30] Even Trump's intermittent claims that his opponent Hillary Clinton was "guilty as hell" and would "go to jail" if Trump were elected president implied that he would substitute his personal judgment for the due process of law.[31]

B. The President's Populist Iconoclasm

The President's well-documented populism is another vector for conflict with courts. While populism is an open, substantively thin ideology, it is distinguished by an anti-elitism in general, and skepticism toward establishment officials and institutions in particular.[32] In the populist worldview, these organizations and figures impede or obscure the actual wishes of a unified and "authentic people," and only true leaders from outside this system can overcome these enervating forces through political criticism, purification, and even reconstruction.[33]

Trump's articulation of these themes has played a steady part in his campaign and governing rhetoric. For example, his 2016 RNC speech targeted the "[b]ig business, elite media and major donors" who supported Secretary of State Hillary Clinton and betrayed the "American People." These "special interests… rigged our political and economic system for their exclusive benefit." In opposition, Trump promised to serve as a champion for ordinary "[p]eople who work hard but no longer have a voice."[34] In the days since the GOP Convention in Cleveland, the President and members of his administration have returned to and expanded these anti-elite criticisms, taking aim at the media, the election system, Congress, Republican leadership, and the Department of Justice, among others.[35]

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29 Nina Totenberg, *Who Is Judge Gonzalo Curiel, The Man Trump Attacked for His Mexican Ancestry?* NPR, Jun. 7, 2016, https://www.npr.org/2016/06/07/481140881/who-is-judge-gonzalo-curiel-the-man-trump-attacked-for-his-mexican-ancestry.

30 L.A. Times, *If Trump Pardons Arpaio, He'll Reward Defiance of the Courts, and That's Wrong*, Aug. 23, 2017.

31 Yoni Appelbaum, *Trump's Promise to Jail Clinton Is a Threat to American Democracy*, The Atlantic, Oct. 10, 2016; Tim Murphy, *Trump's Call to Imprison Hillary Clinton Was More Than a Year in the Making*, Mother Jones, November/December, 2016.

32 Cas Mudde & Cristóbal Rovira Kaltwasser, Populism: A Very Short Introduction (2017).

33 Jan-Werner Müller, What Is Populism? (2016).

34 *See* https://www.vox.com/2016/7/21/12253426/donald-trump-acceptance-speech-transcript-republican-nomination-transcript, *supra* note 25.

35 Katherine Faulders & Alexander Mallin, *President Trump Launches Commission on 'Election Integrity,'* ABC News, May 11, 2017, https://abcnews.go.com/Politics/president-trump-expected-launch-commission-election-integrity/story?id=47337222; Lauren Fox, *McConnell Praises Trump in Kentucky, Minutes after Trump Criticized Him*, CNN, Aug. 24, 2017, https://www.cnn.com/2017/08/24/politics/mitch-mcconnell-

This populist strain should also have implications for the administration's treatment of the judiciary. Most obviously, judges and court systems are an enticing target for the President's ongoing disruption of the status quo. This is especially likely for federal courts, staffed by highly educated professionals who are structurally sequestered from political and electoral forces.[36] Alexis de Tocqueville's contention that judges and lawyers in the United States form an embedded and insulated group that resist democratic impulses and the desired "movements of the social body" highlight how the legal class is ripe for populist targeting.[37] Indeed, the 2016 Republican Platform (presumably blessed by Mr. Trump, at least in its broad strokes) gave vent to some of these sentiments. It warned "against opportunistic litigation by trial lawyers," and further cautioned that "our country's constitutional order" was threatened by "an activist judiciary that usurps powers properly reserved to the people through other branches of government."[38] The Platform castigated specific Supreme Court decisions (in areas such as abortion, gay rights, and health care) as expanding "the power of the judiciary at the expense of the people" and called on Congress to use impeachment to check unaccountable judges.

III. Accounting for Presidential Deference

So far, we have identified a number of factors that would seem to place the Trump administration on a slanted political plane leading straight to confrontations with courts. Increased politicization of the judiciary, deepening partisanship (including a bench closely divided internally by partisan appointments), and, finally, distinctive attributes of the President himself (in particular his personalization of politics and populist flair) all seem to set us up for interbranch confrontations that could challenge long-held norms of judicial independence.[39] We might add to this observation the President's own declarations that he favors the great "energy" and debate produced by conflict within, and, presumably, between the branches of governance.[40]

So where is the evidence for our anticipated spike in executive-judicial skirmishes? As noted, the 2016 Republican platform was often unsparing in its critique of specific court decisions and judicial "activism." Moreover, the Trump administration has periodically and aggressively responded to what it sees as

breakfast-comments/index.html; Mathew Ingram, *President Donald Trump vs. the Media Will Be an Epic Battle*, Fortune, Nov. 11, 2016; Matthew Nussbaum & Elana Schor, *Trump Signs Russia Sanctions Bill but Blasts Congress*, Politico, Aug. 2, 2017, https://www.politico.com/story/2017/08/02/trump-signs-bipartisan-russia-sanctions-bill-241242.

36 Indeed as Slotnick, Schiavoni, and Goldman note, the profile of Obama's judicial appointees makes them especially salient as populist targets. After all, "some 44% of the Obama appointees had a prestige legal education," a figure considerably higher than his immediate predecessors. Slotnick et al., *supra* note 18 at 363.

37 Alexis de Tocqueville, Democracy in America (Harvey C. Mansfield & Delba Winthrop, trans., Univ. Chicago Press 2000) (1835).

38 *The 2016 Republican Party Platform*, Jul. 18, 2016, http://www.presidency.ucsb.edu/ws/index.php?pid=117718.

39 Ming W. Chin, *Judicial Independence: Under Attack Again*, 61 HAST. L.J. 1345 (2010).

40 Rebecca Ballhaus, *Trump Defends West Wing Turnover: 'I Like Conflict,'* Wall St. J., Mar. 6, 2018.

Table 2. Trump Twitter References to Courts and Congress (January 20, 2017-March 15, 2018).

Search Terms:	Neutral/Descriptive references	Positive references	Negative references [without travel ban references]	Total
"court;" "judge;" "justice"	47% n=23	18% n=9	35% [14%] n=17 [n=7]	100% n=49
"Congress;" "Senate;" "Representative;" "Sen.;" "Rep.;"	32% n=75	35% n=81	32% n=75	99% n=231

Source: Trump Twitter Archive (http://www.trumptwitterarchive.com/archive)

unfavorable rulings, especially where the courts have issued judgments against the President's immigration and travel restrictions (and, by extension, decisions that purportedly impede his anti-terrorism initiatives).[41] For example, White House policy adviser Stephen Miller criticized the Ninth Circuit Court of Appeals ruling against reinstating the President's "travel ban" (which had been blocked by a District Court judge in Washington State) as a "judicial usurpation of power."[42]

Notwithstanding these and other challenges, however, we have good reasons for thinking they represent less than meets the eye. A review of the official White House search engine finds, for example, no administration reference to "judicial activism" or "legislating from the bench," two charges that were popular under recent prior Republican administrations. More systematically, if we look at the President's favored communication method, Twitter, we find relatively infrequent references to courts and judges, and, particularly if we exclude tweets targeting the travel ban rulings, a mix of positive and negative statements. Table 2 summarizes the President's tweets over his first sixty weeks in office in which he mentions, respectively courts, judges, or Justices on the one hand, and Congress and lawmakers on the other.

On the whole, these results do not give us a picture of a president spoiling for a fight with the judiciary. Indeed, the President effusively praised deceased Supreme Court Justice Antonin Scalia, as well as his successor, Trump's appointee Neil Gorsuch (whose seating the President regularly identifies as one of his signature accomplishments). Three months after Gorsuch joined the Court, the president followed a nearly identical pattern with his next nominee to the nation's highest court. Thus, he hailed both retiring Justice Anthony Kennedy (as a public servant associated with "incredible passion and devotion…[and a] lifetime of distinguished

41 Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict,'* Wall St. J., June 3, 2016.

42 Philip Rucker, *Stephen Miller Says White House Will Fight for Travel Ban, Advances False Voter Fraud Claims*, Wash. Post, Feb. 12, 2017. More recently, the President chastised both a federal District Court judge, who had placed a temporary hold on an executive branch order barring some immigrant asylum seekers, and the Ninth Circuit (as "a big thorn in our side"). Kate Sullivan and Paul LeBlanc, *Trump calls 9th Circuit a 'big thorn in our side,' accuses judges of imperiling US security*, CNN, Nov. 22, 2018, https://www.cnn.com/2018/11/22/politics/trump-chief-justice-john-roberts-judges/index.html.

service"),[43] and his eventual, controversial replacement, appeals court judge Brett Kavanaugh (a "brilliant jurist… universally regarded as one of the finest and sharpest legal minds of our time").[44]

Even some of the President's "neutral" or non-valenced remarks about the judiciary imply a willingness to recognize the courts, and especially the Supreme Court, as a legitimate if not authoritative forum for conflict resolution. As the President indicated in a February 20, 2018 tweet, he hoped Republicans would challenge a Pennsylvania redistricting map, taking it "all the way to the Supreme Court, if necessary."[45] At times, the President has communicated a cautious deference with respect to the judiciary and gun control. As the President put it in a March 12 tweet: "On 18 to 21 Age Limits, [I am] watching court cases and rulings before acting."[46] Perhaps most importantly, despite sometimes intemperate remarks about judges and judicial decisions coming from the President and his staff, these rhetorical jabs have, so far, not been joined by either sustained institutional criticism or specific proposals for court-curbing or other sanctions.

As indicated, all of this is somewhat surprising. Given the heated state of judicial politics generally, and President Trump's enthusiasm for battling other institutions of government and civil society more specifically, why hasn't the current administration fostered a less hospitable landscape for judges, courts, and judicial independence?

One initial response is not very satisfying: the President is reluctant to take on a branch that still enjoys relatively high diffuse, institutional support, especially relative to Congress and even the executive branch.[47] But such a response presumes that the President thinks in institutional terms, and has a resulting sense of humility and an inclination to defer to a more popular branch. These conclusions aren't obviously supported by his behavior, demeanor, or the terms under which he assumed power.[48]

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43 The White House, *Remarks by President Trump Announcing Judge Brett M. Kavanaugh as the Nominee for Associate Justice of the Supreme Court of the United States*, Jul. 9, 2018, https://www.whitehouse.gov/briefings-statements/remarks-president-trump-announcing-judge-brett-m-kavanaugh-nominee-associate-justice-supreme-court-united-states//.

44 *Id.*

45 Donald J. Trump (@realDonaldTrump), Twitter (Feb. 20, 2018, 5:11 AM), https://twitter.com/realdonaldtrump/status/965937068907073536?lang=en.

46 Donald J. Trump (@realDonaldTrump), Twitter (Mar. 12, 2018, 6:22 AM), https://twitter.com/realdonaldtrump/status/973187513731944448?lang=en

47 Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 Am. Pol. Sci. Rev. 1209 (1986); Lydia Saad, *At 13%, Congress' Approval Ties All-Time Low. Republicans and Democrats Give Identical Ratings to the Divided Congress*, Gallup News Service, Oct. 12, 2011, https://news.gallup.com/poll/150038/Congress-Approval-Ties-Time-Low.aspx; Georg Vanberg, *Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review*, 45 Am. J. Pol. Sci. 346 (2001).

48 Clare Malone, *Americans Don't Trust Their Institutions Anymore*, Fivethirtyeight.com, Nov. 16, 2016, https://fivethirtyeight.com/features/americans-dont-trust-their-institutions-anymore/.

A. Executive Interests and Independent Courts

A related, and more plausible hypothesis is that the administration is somewhat reluctant to take on the judiciary in any sustained way because it understands, on some level, that independent courts, judicial review, and even periods of judicial activism (understood here as regular court invalidation of government action) may serve executive branch interests. In the scholarly literature, such an argument usually takes one of two basic forms. First, relatively strong and independent courts could be a way of navigating controversial and crosscutting party issues. As Mark Graber has explained, elected officials may look to the judiciary to resolve or temper disruptive political topics, with the hope that courts will remove the underlying contentious issue by withdrawing it to a judicial forum supposedly beyond the reach of ordinary politicians.[49]

A second take on the judiciary as incipient ally model understands the courts as a "vehicle of regime enforcement" or potential institutional capture.[50] In this view, presidents rely on courts to help them entrench power and strengthen governing coalitions. More specifically, scholars like Stephen Skowronek and Keith Whittington argue that favorable court rulings help presidents affiliated with an existing regime maintain their legal, policy, and ideological commitments through time, even in the face of dwindling or unstable political prospects.[51] As Whittington points out, "the law is intertemporal and partially incongruent with the current regime, and as such it may provide shelter from the prevailing political winds" or even help "resist the momentum of, or open fissures within, the dominant regime."[52] There is evidence of such a strategy in the Trump administration's early enthusiasm for seeding the bench with young, conservative appellate appointments who can make the greatest policy impact for the longest time.[53]

But both of these explanations for the (relative) comity of the Trump administration towards the judiciary are imperfect. With respect to the "issue displacement" thesis, we might note that the President has energetically *stoked* some crosscutting policy disputes within his party, often in ways that threaten to introduce or at least exacerbate intra-party tensions. For example, we can see some of these inflammatory dynamics in the President's statements about abortion as well as in his economic nationalism generally, and, more particularly, in his

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49 Mark Graber, *The Non-Majoritarian Problem: Legislative Deference to the Judiciary*, 7 Stud. Am. Pol. Dev., 35 (1993). See also George I. Lovell, Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy (2003); J. Mitchell Pickerill, Constitutional Deliberation in Congress: The Impact of Judicial Review in a Separated System (2004).

50 Whittington, *supra* note 17 at 593.

51 Stephen Skowronek, The Politics Presidents Make: Leadership from John Adams to George Bush (1997); Keith E. Whittington, Political Foundations of Judicial Supremacy The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History (2007). See also Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (2004); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 Am. Pol. Sci. Rev. 511 (2002).

52 Whittington, *supra* note 51 at 167.

53 Charlie Savage, *Courts Reshaped At Fastest Pace In Five Decades*, N.Y. Times, November 12, 2017, at A1.

imposition of protective tariffs on a variety of raw materials and manufactured products.[54] Stated differently, if the Trump administration has an inclination to cede some controversial topics to the judiciary, it's not obvious what these subjects of avoidance actually are.

As to whether Trump might be reluctant to target the judiciary on the grounds that it can help secure his party's legacy in the face of future electoral defeats, this case is stronger but still uncertain. Undoubtedly, there is some evidence the administration is pursuing this sort of long game with its appointments strategy.[55] On the other hand, one might note that Trump is the wrong sort of candidate to fit into the classic regime preservation framework articulated by scholars like Skowronek. As Whittington points out, presidents are most likely to use a hedge your bets strategy when they are "affiliated" leaders "who must manage an established but fractious political coalition while advancing the contested ideological commitments of the [existing] political regime."[56] But Trump's loyalty to his inherited Republican regime is shallow at best. He is no establishment Republican, and has been critical of his party's congressional and national leadership, and, as noted, on some important, historic GOP positions he has shown a readiness to deviate from party orthodoxy.

For these and other reasons, some scholars have suggested Trump might be better seen as what Skowronek calls a "disjunctive" president—a Chief Executive with little allegiance to the prevailing governing coalition, but a figure who tries, nevertheless, to hold it in place in the face of building political strains.[57] But even this description, which holds that Trump is more like Jimmy Carter than Ronald Reagan, fits the President inadequately.[58] Describing Trump as a disjunctive leader fails to capture his iconoclasm, populism, and other idiosyncratic characteristics that don't easily square with the prevailing Republican ideology, even though they are signature elements of the President's governing style. In other words, trying to place Trump into a scheme of regime politics—where the president is either operating within the parameters of an established philosophy of governance, or trying to smash it and forge his own—doesn't reflect his ideological flexibility, political opportunism, and the degree to which his political approach bears a personal, *sui generis* stamp. Trump seems to favor his judicial appointments for personal reasons, reflected distinction, and political payoff, and not for advancing deeply seated and long term ideological commitments.

B. Personal Familiarity and Past Reliance

Given the shortcomings of these explanations, we need to adopt a different tack. At an individual level, we might speculate that Trump's hesitancy to criticize courts could be a byproduct of familiarity. While the President has never sat in public office before occupying the White House, he has repeatedly relied on lawyers and the judiciary in his prior business career and personal life. His administration's

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54 Jonathan D. Moyer & David K. Bohl, *Why Trump's Tariffs Could Weaken U.S. Influence in the World*, Wash. Post, March 12, 2018.

55 Savage, *supra* note 53.

56 Whittington, *supra* note 17, at 594.

57 Skowronek, *supra* note 51, at 39.

58 Scott Lemieux, *Is Donald Trump the Next Jimmy Carter?,* The New Republic, Jan. 23, 2017.

zealous use of nondisclosure agreements amongst aides and other government employees suggests a comfort with litigious protections as a partial substitute for interpersonal trust.[59]

Moreover, although he has been the target of thousands of lawsuits, Trump has frequently prevailed, and, more generally, has turned to courts, litigation, and other legal transactions to protect his financial and individual interests.[60] Despite his protestation in his 1987 memoir, *The Art of the Deal* that "I don't like lawyers," the book details Mr. Trump's reliance on attorneys to navigate deals and protect his personal assets, and he describes their work in often flattering terms.[61] Moreover, the nature of the attorney-client relationship is one that produces an explicit, contractual loyalty of the sort that the President purportedly prizes.[62]

C. Partisan Disequilibrium and the Courts

Still another explanation for the administration's unexpected restraint when it comes to courts may be the most powerful. While admittedly preliminary, some recent work finds teasing indications of partisan and ideological disequilibrium with respect to longstanding perceptions of the courts.[63] As we saw, Table 1 serves as evidence of partisan politicization of courts in the twenty-first century—that is, it corroborates the idea that the two major parties have been increasingly willing to take on judicial decisions and legal controversies as part of their major policy agendas. But a more historical and nuanced consideration reveals a different and more dynamic picture.

Consider, in this regard, the trend lines revealed in Figure 2. This figure lays out what Democratic and Republican party platforms have had to say with respect to the judiciary for every four-year cycle from 1948 to 2016. Until the 1976 platform, both Democrats and Republicans appear to have been deferential to courts in these official party statements, generally avoiding reference to the judiciary entirely. Beginning in 1976, however, we can detect a notable shift in party attitudes, especially for Republicans. GOP platforms became increasingly detailed and negative in discussing courts and judges over this period (while Democrats continued to give judicial politics a low profile). Thus, with the exception of 1984, every Republican platform from 1976 has made at least some negative reference

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59 Josh Dawsey & Ashley Parker, *'Everyone Signed One': Trump Is Aggressive in His Use of Nondisclosure Agreements, Even in Government,* Wash. Post, Aug. 13, 2018, https://www.washingtonpost.com/politics/everyone-signed-one-trump-is-aggressive-in-his-use-of-nondisclosure-agreements-even-in-government/2018/08/13/9d0315ba-9f15-11e8-93e3-24d1703d2a7a_story.html?utm_term=.a8e2477272f2.

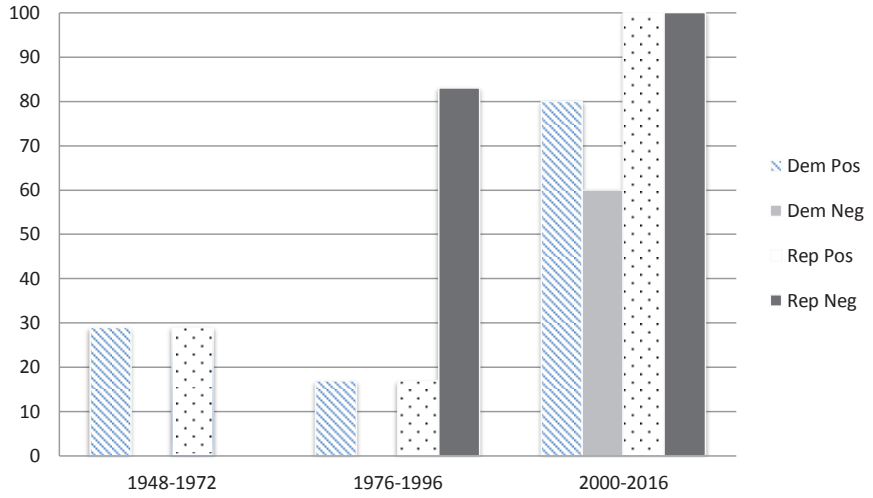
60 Ben Terris, *Lawyers upon Lawyers upon Lawyers: In Trump World, Everyone Has an Attorney*, Wash. Post, July 26, 2017.

61 Donald J. Trump & Tony Schwartz, Trump: The Art of the Deal (1987).

62 Jonathan Mahler, *All the President's Lawyers*, N.Y. Times Magazine, July 9, 2017, at 28.

63 Charles Babington, *GOP Is Fracturing over Power of Judiciary*, Wash. Post, Apr. 7, 2005 at A04; Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 Sup. Ct. Rev. 301 (2017); Ryan Grim & Sam Stein, *A New Love Affair: Republicans Rally to Defend Judges*, Huffington Post, Apr. 5, 2012, http://www.huffingtonpost.com/2012/04/05/republicans-judges-supreme-court_n_1406580.html.

Figure 2. Negative and Positive Statements about Courts in Major Party Platforms (1948-2016).



Source: The American Presidency Project (http://www.presidency.ucsb.edu/)

to courts and judges. These statements have objected to specific court decisions in such areas as prayer in school, criminal justice, and, of course, abortion. In addition, beginning with the 1980 platform, the GOP also began calling for the appointment of judges whose rulings would be consistent with their policy and ideological goals. In contrast, Democratic platforms from 1976 through 1996 were mostly silent with respect to courts, reflecting the party's resistance to having courts enter into national politics, its basic contentment with the judiciary's role in policymaking, or, most likely, both.

But as Figure 2 suggests, at least with respect to party platforms, this pattern of active Republican skepticism towards judicial authority and quiet Democratic complicity started to change in the twenty-first century. In our new century (significantly framed by the 2000 decision *Bush v. Gore* and the litigation and appointment successes of the Federalist Society and other organizations),[64] Republicans have been more willing than in the past to praise the judiciary and hail individual court decisions. Moreover, especially over the past decade, Democrats have shown some early signs of being less secure about their historic institutional alliance with courts. The gradual rise of what Steven Teles has called the "conservative legal movement"[65] in the 1970s (in which conservatives combined a plan for staffing the courts with strategies for using litigation to roll back liberal policies) helped unsettle partisan and ideological attitudes towards independent courts, which had been mostly intact following New Deal.[66]

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64 Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court,* The New Yorker, Apr. 17, 2017.

65 Steven M. Teles, The Rise of the Conservative Legal Movement: The Battle for Control of the Law 2 (2010).

66 Larry Kramer, The People Themselves: Popular Constitutionalism and Judicial Review 218-220 (2004) (discussing the New Deal "settlement").

Today, while liberals fret about such issues as the future of constitutionally protected abortion, affirmative action, civil rights, and campaign finance, many conservatives and Republicans see the courts entering favorable rulings on questions of federal power (*United States v. Lopez,*[67] *City of Boerne v. Flores*,[68] *United States v. Morrison*[69]), voting rights (*Shelby County v. Holder*[70]*)* and even civil liberties (*District of Columbia. v. Heller,*[71] *McDonald v. Chicago*,[72] *Citizens United v. Federal Election Commission*[73]). All of this has contributed to a climate in which the two major political parties, already at important crossroads with respect to their own ideological and policy futures, are doubly unsteady when it comes to assessing a complex, shifting, and unreliable federal judiciary. For the moment, broad institutional attacks against the courts (from either party) have given way to more opportunistic, transactional, and issue based litigation and policy campaigns.

In sum, a possible explanation for the relative reticence of this administration (and its congressional and interest group allies) to engage and criticize the inherited "Obama judiciary," is a perfect storm of political forces, including the competitiveness of national elections, the finely tuned partisan balance in the court system, and ideological uncertainty in both major parties about the judiciary's future direction. In the case of the GOP in particular, this ambiguity has been further clouded by the new political strains introduced by President Trump. The President's populist and nationalist flair, mercurial policy preferences, and personal governing style don't easily comport with the mainstay leaders and ideological groups that traditionally comprised the Republican party—social culture warriors, fiscal conservatives, and libertarians.[74]

Occam's razor requires that we identify one other explanation for the (temporary) low-boil of executive-judicial relations. As noted earlier, President Trump has been especially vociferous and ebullient in speaking about his judicial nominees and then appointments. He hailed his first Supreme Court appointment, Neil Gorsuch, as "one of the most qualified people ever to be nominated for this post,"[75] identifying him as "a man of great and unquestioned integrity."[76] The President has further gushed that the "best moment" of his presidency (so far) has been his successful appointment of Gorsuch, "a real legacy in a certain way, very important."[77] The President sounded similar triumphant notes in lauding his

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67 514 U.S. 549 (1995).
68 521 U.S. 507 (1997).
69 529 U.S. 598 (2000).
70 570 U.S. 2 (2013).
71 554 U.S. 570 (2008).
72 561 U.S. 742 (2010).
73 558 U.S. 310 (2010).
74 Mark Tushnet, A Court Divided: The Rehnquist Court and the Future of Constitutional Law (2005).
75 The White House, *President Trump's Weekly Address,* Feb. 3, 2017, https://www.whitehouse.gov/briefings-statements/president-trumps-weekly-address/.
76 The White House, *Remarks by President Trump and Justice Gorsuch at Swearing-in of Justice Gorsuch to the Supreme Court,* Apr. 10, 2017, https://www.whitehouse.gov/briefings-statements/remarks-president-trump-justice-gorsuch-swearing-justice-gorsuch-supreme-court/.
77 Jake Miller, *Trump: Putting Gorsuch on Supreme Court "Best Moment" of First 100 Days,* CBS News, May 1, 2017, https://www.cbsnews.com/news/trump-putting-

second Court appointee, Brett Kavanaugh.[78] More generally, the President has communicated a sense that his judicial appointments overall have been effective and marked by excellence. As he tweeted in November 2017, "we are appointing high-quality Federal District...and Appeals Court Judges at a record clip! Our courts are rapidly changing for the better!"[79]

Seen in this light, the federal judiciary is a positive reference point for the President. Especially since the U.S. Senate has now ushered in a post-"nuclear" age (in which all federal judicial nominees can be confirmed with a simple majority vote), the prospect of future court appointments may strike the President as especially enticing—a political task where Trump will face relatively little opposition, and can claim individual success. With both a cooperative Republican Senate and a list of pre-screened jurists on hand,[80] the President can expect judicial appointments to be gratifying and fairly smooth (particularly in contrast with a lawmaking process that now includes a hostile and Democratic House of Representatives).[81] Such dynamics allow the President to emphasize a personal connection to power and foster positive associations with the courts, as an institution he can depict as a direct extension of himself.

IV. Forecasting the Future

We can distill three basic components of the argument so far: First, given the national climate of partisanship, growing politicization of courts, and distinctive features of Trump's claims to power and overall stance towards governing, we had good reasons to think that his administration would usher in a period of increased combativeness with respect to courts and judges. Second, notwithstanding this context, we do not find, in the early Trump years, an especially contentious set of statements (or legislative proposals) regarding specific court decisions, judicial independence, or the judiciary as an institution. This relative deference (even, or especially, in the face of some unfavorable rulings) stands in contrast with the President's statements about other "opponents" (including the "deep state" and the news media).

But the third major claim in this piece is that we can perhaps best understand this otherwise puzzling phenomenon by appreciating the complex mix of the President's personal experiences with law and courts, the tightly competitive state of national politics, unstable attitudes towards the judiciary, and shifting

gorsuch-on-supreme-court-best-moment-of-first-100-days/.

78 The White House, *President Donald J. Trump Announces Intent to Nominate Judge Brett M. Kavanaugh to the Supreme Court of the United States*, https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-judge-brett-m-kavanaugh-supreme-court-united-states/.

79 Donald J. Trump (@realDonaldTrump), Twitter (Nov. 1, 2017, 3:03 PM), https://twitter.com/realDonaldTrump/status/925845735089889280.

80 Zoe Tillman, *After Eight Years On The Sidelines, This Conservative Group Is Primed To Reshape The Courts Under Trump,* BuzzFeed News, Nov. 20, 2017, https://www.buzzfeednews.com/article/zoetillman/after-eight-years-on-the-sidelines-this-conservative-group.

81 Peter Overby, *Democrats Vow to Rein in Trump Administration if they Win the House,* NPR, Oct. 24, 2018, https://www.npr.org/2018/10/24/657477478/democrats-vow-to-rein-in-trump-administration-if-they-win-the-house.

ideological commitments in the major political parties. We might also note that the recently lowered barriers to judicial appointments in the Senate have induced some Republicans to think of the judiciary in especially opportunistic terms.[82]

What is the wider significance of these claims? To begin with, one must concede that over the course of any administration, and, no doubt, during the Trump years in particular, interbranch armistices are fragile. As argued, given our current context of both ideological flux and major party uncertainty regarding a judiciary that is fairly balanced with respect to partisan appointments, it seems difficult to imagine that courts will consistently chafe against the elected branches over the next few years, especially if Republicans remain in power. But it also does not require great imagination to envision a controversial court decision in the area of, say, immigration or national security, or perhaps a judgment against one of the President's advisors (or family members), triggering a vituperative response from Mr. Trump and his allies. So far, Trump's disruptive demeanor has been fairly restrained when it comes to judges and courts, but he could easily find a pretext for shattering this rapprochement.

It is also an open question whether the President's unconventional governing style and ideological orientation will carry over in important ways to his judges. In particular, will the President's new federal appointees represent a different breed of appointees? Could they, for example, be more apt to give expression to populist values, or communicate directly with the public through new media, or perhaps assume a more confrontational stance with respect to their colleagues on the bench and in the other branches of government.[83] In other words, will the President's new appointments reflect his assertive and unsettling style—and perhaps challenge existing legal norms regarding such matters as institutional deference, formality, professional ethics, judicial temperament, and a commitment to interstitial (case-based) change?

While it is far too early to say anything meaningful about this question, we can note that several of the President's early nominees possess a different background and character than appointments of the past. They are less demographically diverse, less experienced, and potentially more willing to speak out against perceived mistakes by the judiciary itself.[84] In this regard, we should not forget Trump's promise to find judges in the mold of the blunt and belligerent Scalia, nor ignore the fact that the 2016 Republican Platform quoted Scalia extensively in deriding the same sex marriage case *Obergefell v. Hodges*.[85] In a related instance of using judges to criticize other judges, the Trump administration highlighted three dissenting opinions from *Washington v. Trump* (the Ninth Circuit travel ban case from March 2017).[86]

The final point one should note about the future of executive-judicial relations in the Trump era is the most important one: on a daily basis, the administration is

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82 Savage, *supra* note 53.

83 Shira Scheindlin, *Trump's Crazy Choices for the Courts*, N.Y. Times, Nov. 9, 2017.

84 Alliance for Justice, *Hearing Does Not Allay Concerns About Bush, Schiff*, June 14, 2017, https://www.afj.org/blog/hearing-does-not-allay-concerns-about-bush-schiff; Daniel Politi, *Senate Panel Votes to Turn Blogger Without Trial Experience Into a Federal Judge*, Slate, Nov. 11, 2017, http://www.slate.com/blogs/the_slatest/2017/11/11/senate_panel_approves_brett_j_talley_a_lawyer_without_trial_experience_for.html.

85 576 U.S. ___ (2015).

86 847 F.3d 1151.

laying down precedents in our brave new "post-nuclear" world. As noted, some commentators have already reported that the new administration is pursuing an especially aggressive and partisan appointments strategy, taking advantage of the distinct opportunity created by a stockpile of conservative candidates coming of age alongside the newly permissive Senate rules. These rules have already eliminated the judicial filibuster and may weaken or eliminate the "blue slip" process through which Senators can block a nominee from their own state.[87] In any event, today's court appointments require less comity, accommodation, and bipartisanship than they enjoyed in the past. Thus, the decisions of both the Trump White House and Senate leaders over the next few years will go a long way to establishing both the character of the federal bench and the future tenor of the politics of judicial nominations. Will the manner in which we select our judges and justices reflect some sense of shared professionalism and a common commitment to due process, or will it become even more hardball, bitter, and uncompromising?[88]

The latter outcome threatens to leave the judiciary understaffed and dysfunctional during periods when the Senate and president are of different parties, and "as polarized as the rest of the country" when the process runs smoothly but stocks the courts with increasingly ideological and extreme appointees.[89] This prospect should fill us with alarm, not only because it continues the trends of hyper-partisanship and division that have marred the twenty-first century, but because it threatens the very legitimacy of our courts.

As the legal scholar Tom Tyler has shown, people consider the judiciary a unique and authoritative forum for settling social conflicts. We accept the courts' judgments, even when they seem to go against our own personal interests, because we have public trust in our judges and their commitment to a procedural justice that provides everyone with a genuine and meaningful voice, and the right to be treated with impartiality and respect regardless of race, class, gender, or party.[90] But when we start to see the courts as just another venue for advancing the ideologies and preferences of party leaders, we run the risk of losing our faith in the law as a forum of principle, stability, and fairness.

87 Savage, *supra* note 53.
88 Mark V. Tushnet, *Constitutional Hardball*, 37 John Marshall L. Rev. 523 (2004).
89 Savage, *supra* note 53.
90 *See* Tom R. Tyler, Why People Obey the Law (1990).

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The U.S. Constitution's Emoluments Clauses: How History, Behavioral Psychology, and the Framers' Understanding of Corruption All Require an End to President Trump's Conflicts of Interest

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ABSTRACT

The two Emoluments Clauses in the U.S. Constitution forbid federal officials from accepting "any present, Emolument, Office, or Title, of any kind whatsoever" from foreign or domestic governments. President Donald Trump's business interests generate numerous opportunities to use public office for his personal benefit. This article examines the history of the Emoluments Clauses and the Framers' conception of corruption. The conflicts of interest alleged in pending emoluments lawsuits against President Trump would not be allowable in the private sector, and various plaintiffs argue that the Emoluments Clauses apply to all public officials, including the President. The President's lawyers have claimed he is exempt from the application of these clauses and have raised numerous procedural objections, such as challenging who might have" standing" to bring a lawsuit to compel his compliance with the clauses. Out of three cases filed in 2017, one has been dismissed, while two judges have recognized that the plaintiffs have standing. In each lawsuit, the President's lawyers insist on a conception of corruption that is quid pro quo, where only bargained for exchanges count as corruption. While the Emoluments Clauses require public officials to get Congressional permission before receiving such benefits, the President's position is that Congress must first demand an accounting of any personal benefits, rather than the burden being on the President to ask permission. Thus far, two courts have rejected that approach, and as of this writing, further appeals can be expected.

KEYWORDS

Emoluments; Conflicts of Interest; President Trump; Standing; Ethics.

CONTENTS

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Introduction

Donald Trump has stated that he can discharge his public duties as President while he benefits from—and his immediate family continues to run—his global businesses without any conflicts of interest.[1] In this article, the ethics of public service and the two Emoluments Clauses[2] of the U.S. Constitution will be examined, along with the first reported federal judicial opinions about who can bring a lawsuit under either of the two Emoluments Clauses, and what "emoluments" meant to the Framers of the Constitution. U.S. law regarding conflicts of interest in the private sector—as well as findings in behavioral psychology—will be used to compare the President's public duties with the duties of fiduciaries in the private sector.

Part I establishes the Framers' understanding of law and ethics for U.S. public service.[3] Part II considers the two Emoluments Clauses, and the arguments over whether they apply to the office of the President.[4] Part III relates some of the personal domestic and global business interests of the 45th U.S. President and how they represent potential conflicts of interest in the discharge of his public duties. Part III considers the President's plans to avoid conflicts of interest, and finds them inadequate.[5]

For business ethics, as well as ethics in public service, Part IV describes the insights of behavioral psychology to demonstrate how often people and politicians overlook their own conflicts of interest, even where those conflicts strongly influence their decisions.[6] Part V summarizes observations related to conflict of interest laws and fiduciary duties in business, lending support to the conclusion that Trump's attempt to maintain a stake in his private interests while serving in public office would be untenable in other contexts.[7] Returning to legal issues raised by the President's conflicts of interest, Part VI describes three federal lawsuits filed in 2017, two of which have survived motions to dismiss and have addressed the meaning of "emoluments" as understood by the Framers of the Constitution.[8] We conclude that both the courts and Congress as the ultimate judges of the President's conflicts of interest should support the original intent and plain meaning of the Emoluments Clauses in the U.S. Constitution.

I. Public Service Ethics and the Emoluments Clauses

Article I, Section 9 of the Constitution provides as follows: "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit

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1 "I can be president of the United States and run my business 100 percent, sign checks on my business." He also said, "The law is totally on my side, meaning, the president can't have a conflict of interest." The Editors, *Donald Trump's New York Times Interview: Full Transcript*, N.Y. Times, Nov. 23, 2016 (*hereafter*, N.Y. Times Interview).

2 The Foreign Emoluments Clause, U.S. Const. art. I, § 9, cl. 8; the Domestic Emoluments Clause, U.S. Const. art II, §1, cl. 7.

3 *See infra* notes 9–43 and accompanying text.

4 *See infra* notes 44–54 and accompanying text.

5 *See infra* notes 55–75 and accompanying text.

6 *See infra* notes 76–96 and accompanying text.

7 *See infra* notes 97–113 and accompanying text.

8 *See infra* notes 114–201 and accompanying text.

or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."[9] This is often referred to as the Foreign Emoluments Clause, a provision that should be read in light of the history that preceded the Framers' wording.[10] The Domestic Emoluments Clause provides that the President "shall not receive" any emolument, other than his fixed compensation, from "the United States, or any of them."[11] Like the Foreign Emoluments Clause, it must also be read in light of the history that preceded the Framers' choice of words.[12]

In the 17th Century, it was customary for European heads of state to give elaborate and often expensive gifts. The intent was to create a sense of obligation on the part of the recipient. In 1651, the Dutch adopted a rule prohibiting their foreign ministers from accepting "any presents, directly or indirectly, in any manner or way whatever."[13] This rule departed from long-standing European diplomatic customs whereby gift giving was regarded as a significant aid to maintaining good relations among national leaders. For example, King Louis XVI had the custom of presenting expensive gifts to departing ministers who had signed treaties with France, including American diplomats. In 1780, he gave Arthur Lee a portrait of himself set in diamonds above a gold snuff box; Lee did not want to offend the King by refusing the gift, but at the time, the Articles of Confederation had an emoluments clause quite similar to the one later adopted as Article I, section 9. Although he brought it back with him, he gave it to Congress to consider what to do with it and Congress "eventually allowed him to keep it." [14]

In 1785, the King gave Benjamin Franklin a similar miniature portrait, also set in diamonds.[15] Already a francophile, Franklin wanted to keep the box, especially as the diamonds were quite valuable. He asked Congress for permission to do so in 1785; it was granted in 1786.[16] Although Franklin was given permission, there were doubts about his loyalty to the new nation; his semi-permanent residence was Paris, and his favorable sentiments toward France were known.[17] Despite much admiration in the new Republic toward the French for their role in the American Revolution against the British, there was also apprehension that the French government had hopes of colonizing America.[18]

Divided loyalties between person and nation were very much on the minds of the Framers, who were avid readers of Edward Gibbon. In 1776, Gibbon published volume I of the *Decline and Fall of the Roman Empire* to great popular acclaim. By

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9 U.S. Const. art 1, § 9.

10 For a summary of that history, see Zephyr Teachout & Seth Barrett Tillman, *The Foreign Emoluments Clause*, *Article I, Section 9, Clause 8*, National Constitutional Center, available at https://constitutioncenter.org/interactive-constitution/interpretations/the-foreign-emoluments-clause-article-i-section-9-clause-8

11 U.S. Const. art. II, § 1, cl. 7.

12 See *infra*, notes 13-32 and accompanying text.

13 John Bassett Moore and Francis Wharton, A Digest of International Law (1906), at 579.

14 Zephyr Teachout, Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United, 24-25. (2014).

15 *Id*. at 24.

16 *Id*. at 26

17 *Id*.

18 *Id*.

the time the Articles of Confederation were ratified in 1781, Gibbon had published the second and third volumes. In 1788 and 1789, as the Constitution came into effect, the three final volumes were published. They told the story of a great republic that rose because of the "moral habits of private men in their public roles"[19] and then fell because of the increasing power and corruption of an elite group that had lost a sense of civic virtue. As Zephyr Teachout explains, the Framers were trying to avoid the mistakes of the past and create a sustainable political architecture.[20] They saw analogies to the corruption of late Rome and their direct experiences with King George III, who for many Framers was the embodiment of corruption. Franklin and Jefferson had read Gibbon avidly, and were haunted by the specter of a republic that would fail from internal corruption. Throughout the Convention and the ratification debates, the Framers refer to both Roman and Greek corruption dozens of times, frequently citing Brutus, Cassius, Cicero, and Tacitus.[21] Alexander Hamilton was well aware of potentially corrupting influences on the new republic. In Federalist Number 22, he wrote,

> One of the weak sides of republics, among their numerous advantages, is that they afford too easy an inlet to foreign corruption ... . In republics, persons elevated from the mass of the community ... to stations of great preeminence and power, may find compensations for betraying their trust, which to any but minds actuated by superior virtue, may appear to exceed the proportion of interest they have in the common stock, and to overbalance the obligations of duty. Hence it is, that history furnishes us with so many mortifying examples of the prevalence of foreign corruption in republican governments.[22]

To the Framers, then, corruption meant private interests—foreign or otherwise—influencing the exercise of public power.[23] In the republican tradition, corruption was the cancer of self-love at the expense of country.[24] Corrupt acts came about where private power was used to influence public policy, and systemic internal corruption came about where public powers were used excessively to serve private ends rather than the public good. Government could not work without virtue, and there was "no substitute for good men and office." To the Framers, a sustainable political society required an aristocracy of virtue and talent, rather than an aristocracy of power and wealth. [25]

The Framers saw their work as creating a system that would curb excessive greed and abuses of power.[26] They believed that controlling and channeling the

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19 *Id*. at 32.
20 *Id.* at 32-35.
21 *Id*. at 34-35.
22 Alexander Hamilton, James Madison, and John Jay, The Federalist (#22), Gideon Edition (1818) at 121-22.
23 Teachout, *supra* note 14, at 38.
24 *Id*. at 40. Research has shown that a self-interest bias is fairly common, coupled with related biases such as overconfidence and loss-aversion. President Trump is no exception. See *infra*, notes 85–94 and accompanying text.
25 Teachout, *supra* note 14, at 40-44.
26 *Id*. at 60-67.

self-interested motives of political leaders was the central political problem of their time. In their deliberations, the Framers expressed deep concern not only about corruption through bribery transactions—the *quid pro quo* that the U.S. Supreme Court often sees as the only kind of recognizable corruption[27]—but also the greater and more insidious potential of public officials being influenced to serve the interests of the powerful by gifts from those who would seek to influence them.

During the Convention, the anti-emolument provision that was in the Articles of Confederation was initially excluded. But at the request of Charles Pinckney, and with little or no dissent, it was restored."[28] At the Virginia convention to ratify the Constitution, Edmund Jennings Randolph explained that the clause was "provided to prevent corruption."[29] The moral impulse behind these provisions is that individuals with public service obligations should not seek to use their office for private advantage, or betray their primary duty as an agent for the state. But the history and current reality of corruption tells us such corruption is the rule rather than the exception.[30] It turns out that humans are all too prone to rationalizing their own morally questionable acts and over-estimating their own morality.[31] As Eisen, Painter, and Tribe have noted, the Emoluments Clause "... is no relic of a bygone era, but rather an expression of insight into the nature of the human condition and the prerequisites of self-governance."[32]

While human nature is not about to change, preserving honest, effective public governance for the public—and not for private gain—is nonetheless essential to preserving American democracy. The history of public governance globally since World War II amply demonstrates that nation-states can be poorly governed, especially where those in power seek self-benefit even as they claim to serve the public interest.[33]

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27 *See* Citizens United v. FEC, 558 U.S.310, 360 (2010) (Kennedy, J.). "The *McConnell* record was 'over 100,000 pages' long ... yet it 'does not have any direct examples of votes being exchanged for ... expenditures,' ... . This confirms *Buckley*'s reasoning that independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption."
Instead of seeing access and influence as corrupting factors, the majority opinion of Justice Kennedy shrank the definition of corruption down to the explicit exchange of money for votes. *See also* Lawrence Lessig, Republic Lost: How Money Corrupts Congress—and a Plan to Stop It (2011), discussing the moral confusion around corruption in the majority opinion by Justice Kennedy. *Id.* at 240-45.

28 Teachout, *supra* note 14, at 27. Pinckney had "urged the necessity of preserving foreign Ministers & other officers of the U.S. independent of external influence." *Id.*

29 Max Farrand, 3 The Records of the Federal Convention of 1787, 327 (1911).

30 *See, e.g.*, Sarah Chayes, Thieves of State: Why Corruption Threatens Global Security (2015). (Chayes' scholarship shows that historically, corruption has been a cause of disruption and disorder, drawing on political thinkers such as John Locke and Niccolo Machiavelli, as well as the great medieval Islamic statesman Nizam al-Mulk.) *See also* the Transparency International website: https://www.transparency.org/

31 See *infra*, notes 76–89 and accompanying text.

32 Norman Eisen, Richard Painter, & Laurence Tribe, *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump*. Brookings Institution, Dec. 16, 2016. (hereafter, Eisen *et al.)* https://www.brookings.edu/research/the-emoluments-clause-its-text-meaning-and-application-to-donald-j-trump/

33 Kenneth Rapoza, *Transparency International Spells It Out: Politicians Are the Most Corrupt*. Forbes, Jul. 9, 2013. "Transparency International says that politicians have a

Many Americans tend to think of public corruption as something that afflicts other countries, not the United States, seeing it as a phenomenon of foreign leaders who take public money and stash it in private Swiss bank accounts.[34] But the U.S. does not top the list of nations with the least corruption. Transparency International (TI) has tracked public corruption for many years, and ranks degrees of public corruption among nations. TI states that their mission is "to stop corruption and promote transparency, accountability and integrity at all levels and across all sectors of society. Our Core Values are: transparency, accountability, integrity, solidarity, courage, justice and democracy."[35] The United States does rank relatively well in TI's annual corruption rankings; for example, in 2016, the U.S. ranked 18th out of 176 countries, making it the 18th "least corrupt" nation.[36] Yet concerns over corruption in the U.S. political economy have risen over the past 30 years.[37] The election of 2016 saw numerous attacks on the moral character of the two major party candidates, attacks that revolved around conflicts of interest. Hilary Clinton's alleged untrustworthiness related to her alleged failures to conduct all of her official State Department business on a public e-mail server, where it could be a matter of public record, and thus transparent. Lack of transparency fits the narrative of Secretary Clinton as "secretive" and thus untrustworthy. As then-candidate Trump said, "Hillary Clinton is the embodiment of corruption. She's a corrupt person. What she's done with her e-mails, what she's done with so many things, and I see the ads up all the time, the ads. She's totally bought and paid for by Wall Street, the special interests, the lobbyists, 100 percent. She's crooked Hillary."[38]

Candidate Trump was expressing the notion—a correct one—that corruption involves more than taking cash in a briefcase in exchange for conferring special favors, or stashing bribe money in offshore accounts. His statements about Ms. Clinton are entirely congruent with the definition that "corruption is the misuse of public power

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lot of work to do to regain trust. The Global Corruption Barometer shows a worldwide crisis of confidence in political leaders and real concern about the capacity of government institutions to respond to societal needs, be it for security or in a safety net capacity." http://www.forbes.com/sites/kenrapoza/2013/07/09/transparency-international-spells-it-out-politicians-are-the-most-corrupt/#62ac6a723ab6.

34 Regarding "public corruption," private corruption is similar. Corruption is the misuse of *entrusted* power (by heritage, education, marriage, election, appointment or whatever else) for private gain. This broader definition covers not only the politician and the public servant, but also the CEO and CFO of a company as well. For public corruption in Africa, and the role of Swiss bank accounts, see Peter Fabricius, *Swiss Bankers Swear They Are Trying To Help Africa Get Its Dirty Money Back*, Quartz Africa, June 13, 2016. https://qz.com/africa/705509/swiss-bankers-swear-they-are-trying-to-help-africa-get-its-dirty-money-back/.

35 *See* Transparency International's website, at https://www.transparency.org/whoweare/organisation/mission_vision_and_values.

36 http://www.transparency.org/news/feature/corruption_perceptions_index_2016#table.

37 *See generally* Kevin Phillips, Bad Money: Reckless Finance, Failed Politics, and the Global Crisis of American Capitalism (2008) (describing how the financial sector has hijacked the U.S. political economy). *See also* Luigi Zingales, A Capitalism for the People (2011) (describing a corrupt crony capitalism and how it has come to replace competition and merit in both business and government).

38 Philip Bump, *Donald Trump's Favorite Topic While Introducing Mike Pence? Donald Trump*. Wash. Post, July 16, 2106.

by an elected official or appointed civil servant for private gain."[39] Clinton could not, according to Trump's "crooked Hilary" characterization, be an objective public servant for the average American, as she was "bought and paid for" by Wall Street.

Yet candidate Trump also received media scrutiny over potential conflicts of interest, especially when he refused to make his tax returns public. Given the global extent of his business interests, many were concerned that the public policies he would help to create as President could be strongly influenced by his private interests. For example, if substantial business debts were owed to Russian creditors in the oligarchy close to Russian President Vladimir Putin, Trump might be less inclined to be confrontational with Russia. If there were Trump-branded hotels in foreign countries, would he impose an immigration ban on nationals from those countries, or only countries with no Trump-branded hotels?[40]

Given what the Framers understood of human nature, and what behavioral psychologists confirm empirically, concern over the private interests of public officials was entirely reasonable, and in keeping with the Framers' intentions in the Emoluments Clauses. Those concerns were amplified when President-Elect Trump said, just before his Inauguration, "I can be President of the United States and run my business 100 percent, sign checks on my business."[41] Such claims implied that Mr. Trump could not even see that there might be conflicts of interest between his private business interests and the public interest. Mr. Trump then added, "The law is totally on my side, meaning, the president can't have a conflict of interest."[42] In saying this, the President-elect arguably (and erroneously) conflated a statement of law with a judgment on what is right, as if the law had already determined that Presidents could never have conflicts of interest. But he is wrong to think that all conflicts of interest are defined and resolved by law, and he is also wrong on what the law requires.

II. Legal Issues for Enforcing the Emoluments Clauses

There are at least three legal issues to consider, and for each one, the greater weight of precedent and common sense supports the view that both of the Constitution's Emoluments Clauses do in fact apply to the U.S. President, do address conflicts of interest related to the private gains of a federal office-holder such as the President, and do lay down a principle that it is not proper to personally accept items of value from foreign or state governments while serving in an executive capacity on behalf of the U.S. public. The first issue is whether the two Emoluments Clauses apply to the office of the President. The second issue is what might qualify as an "emolument." The third issue is who or what might qualify as a "King, Prince, or Foreign State" in the context of the Foreign Emoluments Clause. A fourth issue is wrapped up in both legal and political considerations; given that this is the first

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39 This is the definition of corruption provided by Corruptie.org. http://www.corruptie.org/en/corruption/what-is-corruption/.

40 Richard N. Painter and Norman L. Eisen, *Who Hasn't Trump Banned? People From Places Where He's Done Business*, NY Times, Jan. 30, 2017. https://www.nytimes.com/2017/01/29/opinion/who-hasnt-trump-banned-people-from-places-where-hes-made-money.html.

41 N.Y. Times interview, *supra* note 1.

42 *Id.*

instance of litigation related to the application of these clauses to the office of the President in nearly 230 years, judicial reticence comes into play in the form of the U.S. Supreme Court's "political question doctrine."[43]

The Emoluments Clauses do apply to the office of the president, despite President Trump's claims that he is, by law, conflict free. This is a fairly clear matter, as Article II, Section 1 provides that the President "shall hold his *office* during the term of four years." It further provides that no person except a "natural born citizen ... shall be eligible to the *office* of President," and addresses what occurs in the event of "the removal of the President from *office*."[44] In addition, the Presidential Oath Clause, and the Twelfth, Twenty-Second, and Twenty-Fifth Amendments, all refer to the President as occupying an "Office."[45]

The exact language of the Foreign Emoluments clause is this: "And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." The occupant of the Oval Office is clearly an office of Trust, with some profit as well (the Presidential salary, Air Force One, and residence in the White House, among other benefits). When President Obama was awarded the Nobel Prize for Peace, he sought and received permission from Congress. The Department of Justice Office of Legal Counsel (OLC) offered an opinion that said he could accept the prize, inasmuch as the Nobel Prize committee was not an agent or instrumentality of the Norwegian government.[46] Previous Presidents, as well, have sought and received "the Consent of the Congress."[47]

As to what an "emolument" is, the Oxford English Dictionary defines the word as meaning "profit or gain arising from station, office, or employment: reward, remuneration, salary."[48] At the time of ratification of the U.S. Constitution, "emolument" was used as a generic term for many different kinds of remuneration. James Madison warned that Alexander Hamilton was trying to conduct government through the "pageantry of rank, the influence of money and emoluments, and the terror of military force."[49] Eisen, Painter and Tribe have framed the Foreign Emoluments Clause this way:

> First it picks out words that, in the 1790s, were understood to encompass any conferral of a benefit or advantage, whether through money, objects, titles, offices, or economically valuable waivers or relaxations of otherwise applicable requirements. And then, over and above the breadth of its categories, it instructs that the Clause reaches any such transaction "of any kind whatever." [50]

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43 See *infra* notes 130-32, and 167-73 and accompanying text.

44 Emphases added.

45 Eisen *et al*., *supra* note 32, at 11–12. *See also* District of Columbia v. Trump, 315 F. Supp. 3d 875 (D. Md. 2018) (Messitte, J.).

46 Memorandum Opinion for the Counsel to the President, Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize, Dec. 7, 2009. http://www.politico.com/f/?id=00000158-b7ee-d53b-a37f-bfee7b6d0001.

47 Eisen *et al., supra* note 32, at 9–10.

48 *Id*. at 11.

49 *Id*.

50 *Id.*

As to the meaning of "King, Prince, or Foreign State," there are no judicial rulings on point. But previous opinions of the Office of Legal Counsel have established that the Nobel Prize Committee is not an agency of Norway, and thus not a "foreign state."[51] This clearly implies that subdivisions or agencies of a state—or corporations that are state-owned enterprises—may not give valuable items to the President without Congressional approval. Justice Samuel Alito, when he was an Assistant U.S. Attorney in the Department of Justice, considered whether an honorarium to a NASA engineer/scientist from the University of New South Wales was an "emolument." In Alito's Office of Legal Counsel opinion, the question was whether the University of New South Wales was an agent or instrumentality of the government of Australia.[52] Although a majority of the members of the governing Council of the University were state employees, and funding came from the government, he noted that there was no review of Council decisions by the government; he concluded that, because of its functional and operational independence from the Australian government, the University was not an agent or instrumentality of Australia for purposes of the Emoluments Clause.[53]

In summary, as to the first three issues, whether any of President Trump's foreign holdings are subject to either emoluments clause will depend on whether the "emolument" (the gain, or forgiveness of loss) is conferred on the President by a foreign state, an agent or instrumentality of that state, or a U.S. state. His numerous private interests at home and abroad provide ample room for such conflicts to flourish. U.S. judges often hesitate to get involved in a matter that many see as "political." The "political question doctrine" will be reviewed below, after exploring the President's conflicts of interest and his plan to avoid them. [54]

III. Clear and Convincing Conflicts of Interest: The Global Businessman as President

This part proceeds in two sections. First, facts and analysis about known conflicts of interest are listed. Second, Trump's plan to distance himself from his businesses is examined.

A. The President's Known Conflicts of Interest

As noted in the Introduction, corruption is the misuse of public power by an elected official or appointed civil servant for private gain. Private gain does not have to be

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51 David J. Barron, *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize*, 33 Op. O.L.C. 1, 4 (2009).

52 Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Emoluments Clause Questions Raised by NASA Scientist's Proposed Consulting Arrangement with the University of New South Wales.*

53 Memorandum for H. Gerald Staub, Office of Chief Counsel, NASA, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Emoluments Clause Questions raised by NASA Scientist's Proposed Consulting Arrangement with the University of New South Wales* at 4-5 (May 23, 1986).

54 See *infra* notes 130-32 and notes 167-73 and accompanying text.

a direct bribe or "kickback;" the Framers understood this clearly. The private gain contemplated by the Emoluments Clause includes anything of value, although the U.S. courts have seldom had opportunities to construe the clause. One of the very few cases to consider the clause was *Hoyt v. United States* (1850),[55] defining "... the term emoluments, that being more comprehensive, and embracing every species of compensation or pecuniary profit derived from a discharge of the duties of the office." In a U.S. Court of Claims case, *Sherburne v. United States*, emoluments were defined as "... indirect or contingent remuneration, which may or may not be earned, and which is sometimes in the nature of compensation, and sometimes the nature of reimbursement."[56]

Some foreign leaders have already reached out to Mr. Trump through business channels; they could easily believe that pleasing him personally could create personal or public benefits for themselves or their nations.[57] Ingratiating themselves with Mr. Trump, they think, will be generally advantageous.[58] Mr. Trump has also reached out to foreign leaders for reasons not relevant to U.S. policy interests. For example, Mr. Trump opposes wind farms because he believes that they ruin the view from his golf course in Aberdeen, Scotland. While President-Elect, he openly lobbied Nigel Farage—a British political ally of his—to oppose wind farms in the United Kingdom. While this is not an exchange of money, and nowhere near bribery, this use of public office to create private gain conflicts with his duties as a public servant. To put it more bluntly, it does not serve the U.S. public for a U.S. president, or President-elect, to spend any time or effort trying to influence wind farm policy in the United Kingdom.

As President-Elect, Mr. Trump demonstrated a willingness to use his influence to create financial gain for his enterprises and his family. His daughter, Ivanka, participated in several meetings between Mr. Trump and foreign heads of state, including those of Turkey, Argentina, and Japan. Ivanka's presence at Mr. Trump's meeting with Prime Minister Shinzo Abe of Japan is especially striking, as Ivanka was concurrently in talks with Sanei International (whose largest shareholder is wholly owned by the Japanese government) to close a major and highly lucrative licensing deal.[59]

Mr. Trump openly acknowledges that he has raised business issues in the course of calls to foreign public officials.[60] The Trump organization's debts to

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55 51 U.S. (10 How.) 109, 135 (1850).

56 Sherburne v. United States, 16 Ct. Cl. 491, 496 (1880).

57 Richard C. Paddock et al., *Potential Conflicts Around the Globe for Trump, the Businessman President* , N.Y. Times, Nov. 26, 2016. (noting concern that "in some countries those connections could compromise American efforts to criticize the corrupt intermingling of state power with vast business enterprises controlled by the political elite"). *Id.* https://www.nytimes.com/2016/11/26/us/politics/donald-trump-international-business.html.

58 *Id.*

59 Sherisse Pham, *Is Ivanka Trump Mixing Japanese Business With Politics?* CNN Money, Dec.5, 2016. http://money.cnn.com/2016/12/05/news/donald-trump-japan-ivanka-clothing-deal/.

60 Rosalind S. Helderman & Tom Hamburger, *Trump's Presidency, Overseas Business Deals and Relations With Foreign Governments Could All Become Intertwined*. Wash. Post, Nov. 25, 2016. https://www.washingtonpost.com/politics/trumps-presidency-overseas-business-deals-and-relations-with-foreign-governments-could-all-become-intertwined/2016/11/25/d2bc83f8-b0e2-11e6-8616-52b15787add0_story.html?utm_term=.86784d1c34d3.

foreigners and other civil or criminal inquiries are also worrisome. The Industrial and Commercial Bank of China—owned by the People's Republic of China—is the single largest tenant in Trump Tower. Its valuable lease will expire, and thus come up for re-negotiation, during Mr. Trump's presidency.[61] There are persistent rumors, underlined by the apparent Russian cyber-attacks and influence on the U.S. 2016 election, that the President may feel obligated to Vladimir Putin, the President of Russia; this may or may not have arisen from the Trump organization's getting loans from Russian oligarch financiers, or the "Russian mob," but rumors persist that people close to the Russian government have compromising information about his personal activities in Moscow.[62] Federal prosecutors in Brazil are in the middle of a sensitive criminal investigation into whether two pension funds that invested in the Trump Hotel in Rio de Janeiro were bribed to do so.[63] Brazilian leaders who want to "get along" with Mr. Trump may choose to slow or end the investigation. For the purpose of either emoluments clause, it matters whether the "favor" done is by a government, or an agent of the government. The above examples contrast with a situation where a major retailer chooses to continue Ivanka Trump's clothing line, even as it somehow hopes for favorable treatment from the President. In such a case, there would be no government action that would qualify as a constitutional emolument.[64]

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[61] Caleb Melby, Stephanie Baker & Ben Brody, *When Chinese Bank's Trump Lease Ends, Potential Conflict Begins*, Bloomberg, Nov. 28, 2016. https://www.bloomberg.com/politics/articles/2016-11-28/trump-s-chinese-bank-tenant-may-negotiate-lease-during-his-term.

[62] Adam Davidson, *A Theory of Trump Kompromat: Why Trump Is So Nice to Putin, Even When Putin Might Not Want Him to Be*. New Yorker, July 19, 2018. It would be hard to show that Trump's indebtedness, and seeming deference to Putin, is a violation of the Foreign Emoluments Clause. The "favors" may not have come from the government itself, but rather a network of people close to the government, yet who are not formally official agents of the government. Davidson however, notes that

> Trump's business deals ... were with tertiary figures. *Sistema* is rooted in local, often familial, trust, so it is common to see networks rooted in ethnic or national identity. My own reporting has shown that Trump has worked with many ethnic Turks from Central Asia, such as the Mammadov family, in Azerbaijan, Tevfik Arif, in New York; and Aras the Mammadov family, in Azerbaijan and Emin Agalarov, in Moscow... . Trump's partners and their rivals would likely have gathered any incriminating information they could find on him, knowing that it might one day provide some sort of business leverage—even with no thought that he could someday become the most powerful person on Earth ... . Under Putin, *sistema* has become a method for making deals among businesses, powerful players, and the people. Business has not taken over the state, nor vice versa; *the two have merged in a union of total and seamless corruption*. (emphasis added).

For U.S. judicial system, however, this seamless union is probably not sufficient to recognize that Russian funds supplied to Trump outside the regular banking system were "emoluments" from the government of Russia or "instrumentalities" of Russia.

[63] Anthony Boadle, *Brazil Prosecutor Says Trump Franchise May Have Benefitted From Corruption.* Reuters, Oct. 28, 2016. ("The structuring of the Porto Maravilha deal 'favored, in a suspicious way, the Trump Organization economic group', among others, Lopes said. The prosecutor gave no further details and was not immediately reachable for comment.") *Id*. http://uk.reuters.com/article/brazil-corruption-trump-idUKL1N1CX0Q6.

[64] Macy's, for example, might want to avoid any Trumpian "tweets" against it in order to not offend pro-Trump patrons. See also *supra* note 62, discussing "Russia's" possible

President Trump's financial relations with members of the Saudi royal family provide some indication of how his private interests could cloud his judgment about significant matters of U.S. foreign policy. Journalist Jamal Khashoggi, a citizen of both the U.S. and Saudi Arabia, was apparently murdered in Turkey by operatives of the Saudi government in September, 2018. This action precipitated widespread condemnation by the international community, but President Trump had difficulty taking the kind of public stance that many in his own party wanted him to take. His foreign policy toward Saudi Arabia is likely compromised, as his past, present, and future prospects of business with the Saudis "make it impossible for him to contemplate the kind of consequences that the Saudis deserve."[65] In short, the President seems to have a difficult time separating his personal interests from the political interests of the United States.[66]

The Saudis—along with many other foreign officials—have also made generous use of the Trump International Hotel in Washington, D.C.[67] In being both a tenant and, as President, arguably chief executive of the entity that owns the old Post Office Building on Pennsylvania Avenue, there is a direct conflict of interest between the President's private interests and compliance with the rule of law; as Judge Messitte notes in his March 2018 opinion,

> As has been reported in the press and as noted in the Amended Complaint and confirmed at oral argument, almost immediately after the President took office, federal regulations were amended so that the former U.S. Post Office, which is the site of the Trump International Hotel, which could not previously be leased to someone associated with the Federal Government, suddenly could be leased to someone despite that someone's connection with the Federal Government.[68]

The lease had provided, pursuant to pre-Inauguration regulations, that "no … elected official of the Government of the United States … shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom." This sudden reversal appears to be a clear violation of the Domestic Emoluments clause.

To make matters worse, as mentioned earlier, foreign government officials stay there in order to please the U.S. President,[69] a likely violation of the Foreign Emoluments Clause. With considerable public fanfare, the Kingdom of Bahrain

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favors to the Trump Organization before his candidacy, and why those may not be "emoluments."

65 Brian Klass, *Jamal Khashoggi's Fate Casts a Harsh Light on Trump's Friendship with Saudi Arabia*, Wash. Post, Oct. 10, 2018.

66 "In 2015, when asked about his relationship with the Saudis, Trump said: 'I get along great with all of them. They buy apartments from me. They spend $40 million, $50 million. Am I supposed to dislike them?'" *Id.*

67 Alex Altman, *Donald Trump's Suite of Power: How the President's D.C. Outpost Became a Dealmaker's Paradise for Diplomats, Lobbyists and Insiders*, Time (undated) http://time.com/donald-trumps-suite-of-power/ *See also* Jonathan O'Connell & Mary Jordan, *For Foreign Diplomats, Trump Hotel Is Place to Be*, Wash. Post Nov. 18, 2016. https://www.washingtonpost.com/business/capitalbusiness/2016/11/18/9da9c572-ad18-11e6-977a-1030f822fc35_story.html?utm_term=.55ffc8c4734b.

68 District of Columbia v. Trump, 291 F. Supp. 3d 725, 741 (2018)(Messitte, J.).

69 O'Connell & Jordan, *supra* note 67.

decided to mark the seventeenth anniversary of King Hamad bin Isa Al Khalifa's accession to the throne by hosting a reception at the Trump International Hotel.[70] The total value to Mr. Trump from hotel profits could eventually make the diamond-encrusted snuffbox gifts of Louis XVI look comparatively inconsequential. The Framers of the U.S. Constitution included explicit prohibitions on receiving any such benefits, due to a clear awareness of their potentially corrupting effects.

B. A Very Permeable Border Wall: President Trump's Plan to Avoid Conflicts of Interest

President Trump believes that he can simultaneously manage the nation's business while avoiding any serious conflicts between his own interests and the public interest. Yet as public concerns mounted after his election, he promised to work out a solution before taking office. His January 11, 2017 press conference claimed a transfer of Trump Enterprises management to his sons, along with a promise to make no new foreign deals.[71] He also set up an ethics officer to review any new domestic deals, and said he would donate any proceeds from foreign dignitaries staying in his hotels to the American people.[72] However, ethics experts have called these arrangements inadequate.[73] Mr. Trump has transferred management, but not ownership, of the Trump Organization. He retains all of his ownership rights in Trump Enterprises. He has assigned operational responsibility not to an independent arm's-length trustee, but to his sons, Eric and Donald Jr. Walter Shaub, the head of the U.S. Office of Government Ethics, responded within days in a speech to the Brookings Institution, finding the plan "far from adequate."[74] Shaub said he had been initially encouraged by a Trump tweet last year that "no way" would he allow any conflicts of interest. "Unfortunately," he said, "his current plan cannot achieve that goal."[75] Shaub cited the late Justice Antonin Scalia, often venerated by GOP politicians. "Justice Scalia warned us that there would be consequences if a president ever failed to abide to the same principles that apply to lower level officials." He added that officials needed their president to show that ethics matter, "not only through words but through deeds."[76]

Much of what Trump proposed was more show than substance; handing over control to his sons, with whom he is in regular contact, is anything but a

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70 Nolan D. McCaskill & Madeline Conway, *Bahrain to Host Event at Trump's D.C. Hotel, Raising Ethical Concerns*, Politico (Nov. 29, 2016). http://www.politico.com/story/2016/11/trump-bahrain-hotel-dc-231941.

71 Jeremy Venook, *Trump's Interests vs. America's, Dominican Republic Edition*. The Atlantic, Feb. 10, 2017. https://www.theatlantic.com/business/archive/2017/02/donald-trump-conflicts-of-interests/508382/.

72 *Id.*

73 Sam Fleming & Shawn Donnan, *Government Ethics Chief Says Trump Conflicts Plans Are Inadequate*. Fin. Times, Jan. 13, 2017. https://www.ft.com/content/f0f84aba-d814-11e6-944b-e7eb37a6aa8e.

74 Remarks of Walter M. Shaub, Jr. Director, U.S. Office of Government Ethics, delivered at the Brookings Institution, Jan. 11, 2017. https://www.brookings.edu/wp-content/uploads/2017/01/20170111_oge_shaub_remarks.pdf.

75 *Id.*

76 *Id.*

blind trust, which is the gold standard of removing conflicts for public officials. Critical financial matters will almost surely be discussed between father and sons. Despite his pledge to end all new foreign investments, the Trump Organization was reportedly pursuing new investment in the United Arab Emirates.[77] Given the frailties of human nature and Mr. Trump's particularly strong loss-aversion bias,[78] the better public policy is to follow President Reagan's "trust, but verify"[79] approach, by requiring transparency and accountability for all public officials. The Framers would undoubtedly agree.

IV. Behavioral Psychology and Conflicts of Interest

Beginning with the path-breaking work of Daniel Kahneman and Amos Tversky, social scientists have been examining the subconscious, often irrational ways we make decisions. Contrary to the prevailing assumptions of many economists, human beings are often influenced by circumstances to do things that do not maximize their personal monetary gains.[80] At the same time, experiments have shown that people will often engage in maximizing their gains unethically (cheating, for example) while maintaining a rock-solid belief in their own morality.[81] None of this is random or senseless, according to Dan Ariely and others. As Kahneman would put it, our human biases and mental shortcuts are quite systematic and fairly predictable.[82]

For any President or member of the U.S. Congress, putting the public interest ahead of personal gain is a continuing challenge. Just to remain in power, members of Congress spend 30-70% of their time soliciting campaign contributions from likely donors, most of whom hope to have the ear of the politician, and perhaps even some influence. This leaves very little time for actual discussion and deliberation.[83] This is not a *quid pro quo* kind of corruption, where cash is exchanged for a vote, but it can be remarkably close. Yet politicians are likely to claim that such influences do not affect them or deflect them from true public service. On the contrary, Lawrence Lessig cites empirical work on how members of Congress represent "funders" far more than they attend to the people's agenda. "A wide range of important work in political science," he notes, "makes it possible to argue with confidence that, first,

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77 Venook, *supra* note 71. During January and February of 2017, the Trump organization began moving forward with its plans to expand its golf course in Aberdeen, Scotland. It also renewed discussions with Ricardo and Fernando Hazoury, the brothers who own the Cap Cano resort in the Dominican Republic. *Id*.

78 *See infra*, notes 88-89 and accompanying text.

79 President Reagan had deep suspicions about the Soviets during the "Cold War." When talks were underway with the Soviets for the Intermediate-Range Nuclear Forces Treaty (INF), he often used the Russian proverb "Doveryai, no proveryai" ("Trust, but verify.").

80 Dan Ariely, Predictably Irrational (2008). (Ariely makes the case that people are constantly susceptible to irrelevant influences from their immediate environment, short-sightedness, and other forms of irrationality, contrary to the model of "economic man" as a reasoning, calculating utility maximizing machine.).

81 *Id*. at 279-90.

82 Daniel Kahneman, Thinking, Fast and Slow (2011). (Kahneman makes a thorough case that the human animal is systematically illogical. We routinely fail to assess situations, yet do so in fairly predictable patterns that are grounded in our primate ancestry.).

83 Lessig, *supra* note 27, at 138.

there is a wide gap in the policy preferences of "the funders" and "the People," and second, in the face of that gap, Congress tracks not "the People" but "the funders."[84]

In short, what Kahneman and Tversky call the self-serving bias is likely not to be noticed by politicians, the vast majority of whom must focus on fund-raising to get re-elected. Professor Robert Prentice has aptly described the self-interest bias as one that "unconsciously distorts evidence, allowing people to view themselves as 'good and reasonable.' Inevitably, self-interest clouds the ethical decision making of even the most well-intentioned people."[85]

All people have a tendency to gather information in a self-serving way and also to process that information in a way that is self-serving. Fans of two teams watching a video of a football game between the two will tend to disagree completely about which team got the most breaks from the referees.[86] Studies show that even people who are trained to be objective and skeptical, such as auditors and scientists, tend to find more persuasive the information that is consistent with their self-interest or their previously drawn conclusions. In general, people tend to see what they expect to see in the facts that they take in.

In the case of a narcissistic politician, the self-serving bias can become even more pronounced.[87] But there are two other well-known biases that are also exaggerated by this particular personality: loss-aversion and overconfidence. Empirical studies show that people enjoy their gains only about half as much as they suffer from their losses. That is, people feel losses more deeply than gains of the same value.[88] This loss aversion is connected to what Kahneman and Tversky call "the endowment effect," which is evident in the attachment most people have with what they own, and the "status quo bias," where people unconsciously yet consistently resist change.[89] For loss aversion, once someone sees an item they identify as "theirs," it usually becomes more valuable to them, often more than what the market would bear. This may partly explain why Mr. Trump finds it difficult to part with ownership of his assets, even as he cedes temporary control of them to his sons.

Overconfidence is related to over-optimism, a fairly common trait in successful business people. People who routinely view the glass as "half empty" seldom

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84 *Id.* at 151-52. *See also* Martin Gillers and Benjamin I. Page, *Testing Theories of American Politics, Elites, Interest Groups, and Average Citizens*, 12(3) Perspective on Politics 564, at 564 (2014) ("Multivariate analysis indicates that economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while average citizens and mass-based interest groups have little or no independent influence.").

85 Robert A. Prentice, *Ethical Decision Making: More Needed Than Good Intentions*, Fin. Analysts J. 63(6), (2007), at 22.

86 Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 45(1) J. Abnormal Psychol. 129-34 (1954).

87 Dan P. McAdams, *The Mind of Donald Trump*, The Atlantic, June 2016, https://www.theatlantic.com/magazine/archive/2016/06/the-mind-of-donald-trump/480771/. ("Narcissistic people like Trump may seek glorification over and over, but not necessarily because they suffered from negative family dynamics as children. Rather, they simply cannot get enough.") *Id.* It seems likely that it's just not possible for President Trump to acknowledge that he could be wrong on occasion.

88 Daniel Kahneman, Jack L. Knetsch, & Richard H. Thaler, *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5(1) J. Econ. Persp. 193, 193-206.

89 *Id.*

become business leaders. Yet many people's tendencies toward optimism are so strong that they are unknowingly led to make irrational and injurious decisions. [90] Robert Prentice makes the connection between over-optimism and overconfidence in this way:

> Decisional errors caused by over-optimism may be exacerbated by *overconfidence.* Studies have shown that high percentages of people believe they are better drivers, better teachers, better eyewitnesses, better auditors, and on and on, than their peers. Students, psychologists, CIA agents, engineers, stock analysts, financial analysts, investment bankers, investors, and many other categories of people have been studied and shown to tend toward irrational confidence in the accuracy of their decisions. Moreover, entrepreneurs, investors, stock analysts, and others who have had success in their chosen fields tend to develop a sense of invulnerability and ignore the role good fortune played in their success.[91]

This can also lead to a distinct double standard: being overly confident in your own moral compass can short-circuit your own interest in moral self-reflection. If you are overconfident, you already "know" you are a good person, having a "strong but wrong" belief that you are entirely ethical. Numerous empirical studies show otherwise. For example, a large majority of physicians who routinely get free merchandise from drug companies will deny that this compromises their objectivity in any way, but only a small percentage believed that other physicians could retain their objectivity.[92] In short, we humans routinely give our own ethics higher marks than they deserve.

Over-confidence, especially when it comes to our own ethics, is a fairly common failing.[93] In claiming that he can both run the country and run his businesses, President Trump illustrates this failing. By turning over management of Trump Enterprises—but not ownership—to the younger Trumps, he arguably demonstrates loss aversion and it is difficult to imagine that he will somehow not realize the implications of his official business decisions on his business interests. The arrangement that Trump has in place is a separate issue, but it merits mention that Trump's handing of control of his companies to his children is nowhere near the kind of "blind trust" that ethics experts recommend for a high public official who wants to avoid confusing his private interests with the public interests he has pledged to serve.[94]

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90 Prentice, *supra* note 85, at 20.

91 *Id.*

92 *Id.*

93 Marianne M. Jennings, *Ethics and Investment Management: True Reform*, 61(3) Financial Analysts Journal, 45 (2005). Studies indicate that 74 percent of us believe our ethics are higher than those of our peers and 83 percent of us say that at least one- half of the people we know would list us as one of the most ethical people they know. An amazing 92 percent of us are satisfied with our ethics and character. *Id.* at 52.

94 The trustee of a blind trust keeps certain information secret from the trust beneficiaries, who do not know the nature of the assets held in trust. Moreover, they have no power, directly or indirectly, to participate in the management or distribution of those assets. In the case of President Trump, "blindness" would be difficult at best, as he already knows the nature of his real estate assets and where his branded properties are.

V. Implications From Conflict of Interest Laws and Private Sector Fiduciary Duty

Because of the lack of judicial precedents related to the Emoluments Clauses, it makes sense to look for persuasive legal authority on conflicts of interest in areas other than constitutional law. As a matter of federal statutory law, officers of the executive branch of the federal government are barred from participating in matters that may impact their financial interests.[95] This is unambiguous in the context of federal contracting: losses or bad intent do not need to be shown, and penalties, including nullification of contracts, have been characterized as deliberately harsh.[96] Another area where conflicts of interest are addressed is in corporate governance. Numerous state corporation laws govern the conduct of officers and directors.[97] As discussed above, it is a fair summary to say that the United States now has a chief executive of the federal government, making important domestic and foreign policies, and at the same time having businesses that receive money and benefits from representatives of foreign governments and from states and the District of Columbia. Would an analogous scenario be tolerated in private enterprise? Clearly not.

In the private sector, officers and directors must adhere to fiduciary duties, serving the firm's interests above all others.[98] Although fiduciary principles related to public sector actors evolved separately from those applicable in the private sector,[99] in all three branches of government, officials are widely seen as owing fiduciary obligations to the public.[100]

Unlike the history of the Emoluments Clause described above, fiduciary duty in the context of business grew out of centuries of case law concerning trusts.[101] Starting in the 12th Century, standards and duties evolved for managing assets on behalf of someone else.[102] A theoretical debate has lingered regarding the question of whether fiduciary duties are therefore more accurately seen as rooted in contracts or property law.[103] Regardless of how its theoretical underpinnings are imagined,

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95 18 U.S.C. § 208 as cited in Appendix, 36 Fed. B. News & J. 129 (1989).

96 Padideh Ala'i, *Civil Consequences of Corruption in International Commercial Contracts,* 62 Am. J. Comp. L. 185, 191 (2014).

97 *See, e.g.*, Craig Palm & Mark A. Kearney, *A Primer on the Basics of Directors' Duties in Delaware: The Rules of the Game (Part I)* 40 Vill. L. Rev. 1297 (1995).

98 Claire Hill & Richard W. Painter, *Compromised Fiduciaries: Conflicts of Interest in Government and Business*, 95 Minn. L. Rev. 1637, 1644 (2011).

99 *See* Richard W. Painter, Getting the Government America Deserves: How Ethics Reform Can Make a Difference, 3 (2009).

100 Hill & Painter, *supra* note 98, at 1645, citing Kathleen Clark, *Do We Have Enough Ethics in Government Yet? An Answer from Fiduciary Theory*, 1996 U. Ill. L. Rev. 57, 74 ("Numerous courts have recognized the fiduciary obligation of government employees, even in the absence of specific legislative or regulatory endorsements of such duties, and these courts have imposed fiduciary-like remedies in response to violations of the conflict and influence components of that obligation."). Hill and Painter also cite Exec. Order No. 12,674 § 101(a), 3 C.F.R. 215 (1990) ("Public service is a public trust."), as modified by Exec. Order No. 12,731, 3 C.F.R. 306 (1991) (codified at 5 U.S.C. §§ 7301, 7351, 7353 (2006)).

101 *See* David J. Seipp, *Trust and Fiduciary Duty in the Early Common Law*, 91 B.U. L. Rev. 1011 (2011).

102 *Id.* at 1014-16.

103 *See* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L. J. 625 (1995).

in the corporate setting the law concerning loyalty has been characterized as comparatively "simple,[104] and, more generally, "homogenized."[105] While Julian Velasco argues that fiduciary duty can be deconstructed into five aspects, he acknowledges that it is commonly and most widely understood as entailing two main duties: the duty of care and the duty of loyalty.[106] He further explains that while alleged breaches of the duty of care have been protected by the business judgment rule, alleged breaches of the duty of loyalty have been more likely to lead to liability.[107]

While there is ambiguity surrounding several issues, such as whether the business judgment rule applies to officers and not just directors,[108] Delaware jurisprudence has reasserted that the duty of loyalty is the "the most critical" core requirement of a fiduciary.[109] As clarified by recent prominent cases, just a failure to show care can lead to the finding that there is a lack of good faith and therefore a lack of loyalty.[110] In other words, carelessness alone can provide grounds for ruling that there was a failure to be loyal. Cases where there is an overt and obvious conflict of interest are even more clearly a breach of fiduciary duty. The existence of an undisclosed conflict of interest provides shareholders with grounds to remove a director.[111] Removal (or impeachment) may not be the only remedy for conflicts of interest where federal officials—including the President—are concerned. We contend that the Emoluments Clauses provide a different, and less drastic, remedy. Declaratory relief, as well as an injunction, is the relief sought in the emoluments lawsuits against the President.[112]

VI. The Emoluments Lawsuits Against President Trump

Although President Trump has likely been—based on our foregoing analysis—in violation of the Emoluments Clause as soon as he took the oath of office on January 20, 2017, there was no likelihood that a GOP-led Congress would begin a legal challenge. Congressional GOP leaders had a large legislative agenda of their own, including infrastructure projects, tax cuts, deregulation, and ending the Affordable

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104 Julian Velasco, *How Many Fiduciary Duties Are There in Corporate Law?* 83 S. Cal. L. Rev. 1231, 1233 (2010).

105 Edwin W. Hecker, Jr., *Fiduciary Duties in Business Entities Revisited*, 61 U. Kan. L. Rev. 923, 924-25 (2013).

106 *Id.* at 1234-37.

107 *Id.* at 1233.

108 *See* Gantler v. Stephens, 965 A.2d 695, 708-09 & n.37 (Del. 2009) (holding that officers have fiduciary duties equal to those of directors, though consequences may differ), and Lawrence A. Hamermesh & A. Gilchrist Sparks III, *Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson*, 60 Bus. Law. 865 (2005) (stating that the protection of the business judgment rule should apply with equally to officers and directors).

109 Leo E. Strine, Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 Geo. L.J. 629, 696 (2010).

110 *Id.* at 694-96.

111 Elizabeth M. Dunshee et al., *Overcoming the Challenge of Director Misconduct*, Business Law Today, (American Bar Association, July, 2015); http://www.americanbar.org/publications/blt/2015/07/02_juvan.html.

112 E.g., as noted in District of Columbia. v. Trump, 315 F. Supp. 3d at 877-78.

Health Care Act.[113] Three days after the Inauguration of President Trump, the non-profit CREW (Citizens for Responsible Ethics in Washington) filed a lawsuit against President Trump based on the Emoluments Clause.[114] Although the case was dismissed in December of 2017, important issues were raised that bear on two significant cases brought in 2017 as well, cases that have thus far survived motions to dismiss, as discussed below. [115]

The legal brain trust behind CREW's lawsuit was an impressive roster of leading Constitutional law scholars, including Edward Chemerinsky, Laurence Tribe, and Zephyr Teachout. The lawsuit was filed in the Federal Court for the Southern District of New York on January 23rd, and claimed standing on the basis of the considerable drain on the organization's resources for education and research needed because of Mr. Trump's continuing foreign interests.

The standing issue is a threshold inquiry, and could be used by judges as a means to dismiss the case and avoid dealing with the more politically charged issues. A majority on the Supreme Court sided with Justice Scalia in a sequence of decisions during the 1990s creating a much stricter set of standing tests.[116] To establish "the irreducible constitutional minimum of standing," a plaintiff must "clearly ... allege facts demonstrating" that it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." [117] An "injury-in-fact" has been defined as '"an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'"[118]

These tests amount to malleable yet effective tools for dismissing cases that would involve difficult public policy issues; they have even been applied when federal laws clearly spelled out the right of any citizen to bring a suit in court.[119] CREW had a relatively weak standing claim, as its "injuries" were alleged to be the "drain on the organization's resources." CREW amended its complaint to add several plaintiffs with more concrete and particularized interests, adding as plaintiffs Jill Phaneuf, who books events for the Carlyle Hotel and the Glover Park Hotel in Washington, and Restaurant Opportunities Centers United, Inc. Both alleged tangible financial harm from the new Trump International Hotel on Pennsylvania Avenue, with more particularity than CREW could muster with its "drain on the

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113 Jessica Taylor, *GOP Leaders Ready to Pivot from 'Do Nothing' to Doing a Lot in 2017*. NPR Politics, Jan. 2, 2017. Available at https://www.npr.org/2017/01/02/507582299/gop-leaders-ready-to-pivot-from-do-nothing-to-doing-a-lot-in-2017.

114 The CREW website provided a press release dated Jan. 22, 2017, entitled "Crew Sues Trump Over Emoluments." http://www.citizensforethics.org/press-release/crew-sues-trump-emoluments/.

115 Both the Congressional Democrats case (*Blumenthal et al. v. Trump*) and the D.C.—Maryland v. Trump cases have thus far overcome the "standing" objections of the President. *See* Blumenthal et al. v. Trump, 2018 U.S. Dist. LEXIS 167411 (Sept. 28, 2018), and District of Columbia v. Trump, 315 F. Supp. 3d 875 (D. Md. 2018).

116 *See* Adam J. Sulkowski, *Ultra Vires Statutes: Alive, Kicking, and a Means of Circumventing the Scalia Standing Gauntlet in Environmental Litigation*, 14 J. Envtl. L. & Litig. (2009).

117 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

118 *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560).

119 Sulkowski, *supra* note 116.

organization's resources" allegation. [120] Indeed, they represent the parties who most obviously suffered business losses due to Trump's ownership of the new Trump International Hotel on Pennsylvania Avenue. They can point out that individuals representing foreign interests and domestic interests have opted to frequent and stay at the Trump International Hotel.[121] Representatives of foreign interests were staying at Trump's hotel so that in meetings they could mention it and compliment him.[122] According to one report, Trump's organization may be going so far as to pressure representatives of foreign interests to change their plans and take their business to his hotel in Washington.[123]

But the opinion of Judge George W. Daniels in December, 2017 rejected not only the standing of CREW, but also the standing of the additional plaintiffs.[124] Judge Daniels dismissed the CREW lawsuit granting the President's motion to dismiss for lack of subject matter jurisdiction. His analysis of the standing issue consisted of sixteen pages, and should be compared to the standing analysis of Judge Peter Messitte in another emoluments case brought by the Attorney Generals of D.C. and Maryland.[125] Judge Daniels reviewed the plaintiffs' competitive injury claims and the prospects that they could, at a trial, actually demonstrate injury that could be redressed. He concluded that the plaintiffs "have failed to properly allege that Defendant's actions *caused* Plaintiffs competitive injury and that such an injury is *redressable* by this Court. Article III 'requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and for which 'prospective relief will remove the harm.'"[126]

Judge Daniels determined it to be "wholly speculative whether the Hospitality Plaintiffs' loss of business is fairly traceable to Defendant's 'incentives' or instead results from government officials' independent desire to patronize Defendant's businesses."[127] Because the President had amassed considerable wealth and fame before he took office, he would be competing against the Hospitality Plaintiffs in any case, and it was "only natural" that interest in his properties "has generally increased since he became President."[128] Judge Daniels noted a number of reasons

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120 Sharon LaFraniere, *Watchdog Group Expands Lawsuit Against Trump*, Apr. 17, 2018, N.Y. Times. https://www.nytimes.com/2017/04/18/us/politics/trump-crew-lawsuit-constitution.html.

121 Jonathan O'Connell and Mary Jordan, *For Foreign Diplomats, Trump Hotel Is the Place to Be*, Wash. Post, November 18, 2016. https://www.washingtonpost.com/business/capitalbusiness/2016/11/18/9da9c572-ad18-11e6-977a-1030f822fc35_story.html?utm_term=.bc0de2220dc4.

122 *Id.*

123 Sophia Tesfaye, *Trump Organization Applies "Political Pressure" on Foreign Diplomats to Stay at Donald Trump's D.C. Hotel: Report*, Salon, Dec. 20, 2016. http://www.salon.com/2016/12/20/trump-organization-applies-political-pressure-on-foreign-diplomats-to-stay-at-donald-trumps-d-c-hotel-report/.

124 Citizens for Responsibility & Ethics in Washington (CREW) v. Trump, 276 F.Supp.3d 174 (S.D.N.Y. 2017).

125 Reasonable minds — and reasonable judges— can and will differ in analyzing standing issues. There is merit in Judge Daniels' opinion dismissing the CREW lawsuit for lack of standing, and there is merit in Judge Missette's opinion approving standing for D.C. and Maryland in their emoluments lawsuit.

126 CREW v. Trump, 276 F. Supp. 3d at 185.

127 *Id.* at 186.

128 *Id.*

other than Mr. Trump's Presidential profile why patrons might choose to visit Defendant's hotels and restaurants, "including service, quality, location, price and other factors related to individual preference."[129]

In addition, Judge Daniels also concluded that, at least with respect to claims under the Foreign Emoluments Clause, conflicts between Congress and the Executive Branch are best left to the political process. "If Congress wishes to confront Defendant over a perceived violation of the Foreign Emoluments Clause, it can take action. However, if it chooses not to, "it is not [this Court's] task to do so."[130]

The "political question doctrine" bars judges from deciding cases that are inappropriate for judicial resolution based on a lack of judicial authority or competence, or other prudential considerations. As stated by the Supreme Court in *Baker v. Carr,* a case may be dismissed on the basis of the political question doctrine if there exists: [l] a textually demonstrable constitutional commitment of the issue [at hand] to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[131]

Judge Davis finds that the "explicit language" of the Foreign Emoluments Clause requires dismissal for non-justiciability. That is, dismissal is required even if he had found that plaintiffs had standing. He writes:

> "As the explicit language of the Foreign Emoluments Clause makes clear, this is an issue committed exclusively to Congress. As the only political branch with the power to consent to violations of the Foreign Emoluments Clause, Congress is the appropriate body to determine whether, and to what extent, Defendant's conduct unlawfully infringes on that power. If Congress determines that an infringement has occurred, it is up to Congress to decide whether to challenge or acquiesce to Defendant's conduct. As such, this case presents a non-justiciable political question."[132]

A different judge might have construed the Foreign Emoluments Clause as not requiring Congress to demand a process of consent, but to put the initiative on the President to ask for consent. The plain language of the clause does seem to imply a Presidential duty to ask permission rather than a Congressional duty to demand information about the President's foreign or domestic emoluments. The assumption would be that in "normal times," a conscientious president would self-regulate and seek to avoid all appearance of a conflict of interest; but, as many have noted, these are not "normal times" in the U.S., nor is this a normal President. Long-time

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129 *Id*.

130 *Id.*

131 Citing Baker v. Carr, 369 U.S. 186, 217 (1962). Note that "or" denotes that any of these conditions may give rise to judicial abstention in a particular case.

132 CREW v. Trump,, 276 F. Supp. 3d at 193.

Republicans, such as Peter Wehner, have even suggested that Trump manifests "full scale corruption." He claims

> ... the greatest damage is being done to our civic culture and our politics. Mr. Trump and the Republican Party are right now the chief emblem of corruption and cynicism in American political life, of an ethic of might makes right. Dehumanizing others is fashionable and truth is relative. ("Truth isn't truth," in the infamous words of Mr. Trump's lawyer Rudy Giuliani.) They are stripping politics of its high purpose and nobility.[133]

Washington politics—especially the workings of the U.S. Congress for many years—now seem neither purposeful nor noble, and a strong case can be made that because of gerrymandering, money in political campaigns, and other factors, Congress has become radically dysfunctional.[134] While some members of Congress are concerned about the emoluments issue, they are all Democrats, and are–as of the time of this writing–in a minority in both the House and Senate. 200 Democrats brought an emoluments lawsuit in June of 2017,[135] and predictably the threshold arguments were about standing and "the political question" doctrine.[136] Norm Eisen, who is co-counsel on the case and also a principal of CREW, noted that since Judge Daniels had pointed to Congress as the appropriate branch to provide a remedy, members of Congress had "special standing" to claim injury for not being able to vote on (consent to) the President's ongoing train of emoluments.[137] In moving to dismiss the CREW lawsuit, Department of Justice attorneys had argued that Congress had a special capacity to deal with questions related to emoluments.

Attorneys for the Congressional Democrats argued that members of Congress had an individual right to vote on each emolument. [138] However, the language

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133 Peter Wehner, *The Full Spectrum Corruption of Donald Trump*, N.Y. Times, Aug. 25, 2018. https://www.nytimes.com/2018/08/25/opinion/sunday/corruption-donald-trump.html.

134 Thomas Mann & Norman Ornstein, The Broken Branch: How Congress is Failing America and How to Get It Back on Track (2006).

135 Blumenthal et al. v. Trump, 2018 U.S. Dist. LEXIS 167411 (Sept. 28, 2018) (D.C. Cir.) (Sullivan, J.).
The original complaint can be found at https://www.theusconstitution.org/wp-content/uploads/2018/01/Blumenthal_v_Trump_DDC_Original_Complaint_Final.pdf.

136 Ellis Kim, *Judge Grapples with Democrats' Standing in Trump Emoluments Lawsuit*, The Hill, Jun. 7, 2018. https://www.law.com/nationallawjournal/2018/06/07/judge-grapples-with-democrats-standing-in-trump-emolument-lawsuit/.

137 Tom Hamburger & Karen Tumulty, *Congressional Democrats to File Emoluments Lawsuit Against Trump*, Wash. Post, June 14, 2017. https://www.washingtonpost.com/politics/congressional-democrats-to-file-emoluments-lawsuit-against-trump/2017/06/13/270e60e6-506d-11e7-be25-3a519335381c_story.html?utm_term=.53e46acac41c. Rudy Giuliani, representing the President's legal team in the summer of 2018, said on Meet the Press that "Truth isn't truth." In May of 2018, regarding the Mueller investigation, Giuliani told the Washington Post interviewer that "They may have a different version of truth than we do." Rebecca Morin & David Cohen, *Giuliani: Truth Isn't Truth.* Politico, Aug. 19, 2018. https://www.politico.com/story/2018/08/19/giuliani-truth-todd-trump-788161. For a timeline of the investigation into possible connections between Russia and the 2016 campaign, see Mike Levine, *The Russia Probe: A Timeline From Moscow to Mueller*, ABC News, Aug. 28, 2018. https://abcnews.go.com/Politics/russia-probe-timeline-moscow-mueller/story?id=57427441.

138 Blumenthal v. Trump, 2018 U.S. Dist. LEXIS 167411 at 6. (D.C. Cir.)(Sullivan, J.)

of the Constitution speaks about Congress collectively, and does not seem to give individual Senators or Representatives a right to vote on every emolument. Accordingly, the President's attorneys argue that Congress must speak collectively, not individually.[139] But if the President does not ask for Congressional consent, and Mr. Trump clearly will not, what does Congress do then? Suppose a bipartisan resolution asking the President to provide a listing of all emoluments passes both chambers, but Mr. Trump then refuses to comply. Or suppose that, in 2019, the new Chair of the House Ways and Means Committee subpoenas Trump's tax returns from the IRS? Will the President order the IRS not to cooperate? Could he invoke executive privilege over tax return information about his business dealings undertaken prior to the Presidency?

Clearly, the judiciary will be involved in the "political question" at the point where one branch refuses to cooperate with the other; such non-cooperation between executive and legislative branches is no mere thought experiment. The Supreme Court confronted just such non-cooperation in the Nixon tapes case.[140] The Framers included a judicial branch to balance the Legislative and Executive branches, and the Supreme Court has had to intervene to decide whether the President was exceeding his Constitutional powers.[141]

The attorneys general of Maryland and the District of Columbia do believe that the judiciary has a role to play in interpreting and applying both the foreign and domestic Emoluments Clauses. Shortly before the Congressional Democrats filed their lawsuit, Maryland and the District of Columbia filed suit in the federal district court of Maryland.[142] In March 2018, Judge Peter J. Messitte found that the plaintiffs had standing to bring the lawsuit, and declined to dismiss on the basis of the "political question doctrine."[143] In July 2018 in a second opinion, Judge Messitte dealt extensively with the definition of emoluments.[144] As these opinions are the most in-depth examination of the two Emoluments Clauses as of September 2018, we will describe his findings and rationale for all three key issues.

A. Standing

The issues on standing are sufficiently complicated that readers may lose patience with all of the argumentation. But for the sake of completeness we will here survey Judge Messitte's findings and conclusions regarding those issues in the Maryland––D.C. emoluments case against President Trump. In brief, he finds that there are sufficient grounds to grant standing to the plaintiffs, and rejects some of the President's positions. But, as noted below, his determinations may be overturned on appeal, just as Judge Daniels' findings as to lack of standing for CREW and its individual plaintiffs may be overturned on appeal.

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139 *Id.,* at 37-39. Ultimately, Judge Sullivan rejected the President's arguments, and found that the Congressional plaintiffs have standing to argue for declaratory and injunctive relief on the basis of the foreign Emoluments Clause. *Id.* at 60-61.

140 United States v. Nixon, 418 U.S. 683 (1974).

141 Alicia Parlapiano & Wilson Andrews, *Limits on Presidents Acting Alone*, N.Y.Times, Jan. 20, 2015.

142 District of Columbia v. Trump, 291 F. Supp. 3d 725 (D. Md. 2018).

143 *Id*.

144 District of Columbia v. Trump, 315 F. Supp. 3d 875 (D. Md. 2018).

Judge Messitte recites the usual tests for standing,[145] but emphasizes that states are not "normal litigants for the purposes of invoking federal jurisdiction" and are entitled to "special solicitude" in the standing analysis.[146] There could, he noted, be an " invasion of three types of unique State interests justifying standing that were identified by the Supreme Court in being (a) sovereign interests; (b) non-sovereign interests; and (c) quasi-sovereign interests."[147] Judge Messitte's opinion focuses on the quasi-sovereign interests of both D.C. and Maryland, and includes its capability to sue based on *parens patriae*, the principle that political authority carries with it the responsibility for protection of citizens.

States in the U.S. federal system have a "quasi-sovereign-interest" in not being treated discriminatorily; to be treated so is to "deny a state its rightful status within the federal system."[148] States also have an interest in the health and well-being—both physical and economic—of their residents.[149] Taking that interest into account, the Supreme Court has said that the State may sue in its capacity as *parens patriae.* But the State must be more than a nominal party, meaning that it must allege more than an "injury to an identifiable group of individual residents."[150]

Judge Messitte dispenses with D.C. and Maryland's sovereign and non-sovereign interest claims, but does find injury in fact to its quasi-sovereign interests, as well as its *parens patriae* interests. The plaintiffs' argument was that, as states, they have been put into an "intolerable dilemma," as they are "forced to choose between granting the Trump Organization's requests for special concessions, exemptions, waivers, and the like, thereby losing revenue, and, on the other hand, denying such requests and risk being placed at a disadvantage *vis-à-vis* other States that already have been or may in the future be constrained to grant such concessions."[151] Because this dilemma supposedly violates the "fundamental principle of *equal* sovereignty among the States,"[152] Plaintiffs claim injury-in-fact, and therefore have standing to protect their "position among ... sister States."[153]

The President's position is that these claimed injuries are based on a "speculative chain of possibilities," such that they cannot be deemed "certainly impending."[154] Maryland, the President's lawyers point out, "has not alleged that it is faced with any threatened need to grant concessions to him or his Organization. In fact, according to this argument, the Amended Complaint does not even allege that the Trump Organization or the President do any business in Maryland." [155] While the District of Columbia is home to the Hotel, the President argues that if the District were to provide special treatment, it would be a "self-inflicted

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145 291 F. Supp. 3d 725,737.

146 *Id*. (citing *Massachusetts v. EPA*, 549 U.S. 497, 518, 520 (2007).

147 *Id.* at 737.

148 *Id.* at 737 (citing Alfred L. Snapp & Son, Inc., v. Puerto Rico ex rel. Barez, 458 U.S. 601, at 607).

149 *Id.*

150 *Id.*

151 *Id.* at 740.

152 *Id.* (citing *Shelby Cty. v. Holder*, 570 U.S 529, 544 (2013)). ("At the same time, as we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.").

153 *Id*. (citing *Georgia v. Pennsylvania Railroad*, 324 U.S. 439, 451 (1945)).

154 *Id*. at 741.

155 *Id*.

injury."[156] Moreover, it is "purely conjectural" that other States might grant favors or concessions to the President's businesses in violation of their own laws, and even more conjectural to suppose that he would retaliate against Plaintiffs if they failed to grant such concessions.[157] Thus, there is no "injury-in-fact" that would grant recognizable standing status under Article III.

Judge Messitte, however, notes that the Trump Organization has been granted tax concessions by at least the District of Columbia and the State of Mississippi. The District's tax authorities granted the Hotel a reduction in its 2018 tax bill for a savings of $991,367.00. Moreover, Judge Messitte stated that although tax authorities in the District of Columbia said that these tax concessions were merely "routine," there is no reason for judges to simply take their word for it; he sees a possibility that the District of Columbia may have felt itself effectively "coerced" into granting special concessions to the Hotel and that Maryland may feel itself under pressure to respond in similar fashion.[158] For example, as reported in the press, Governor Paul LePage of the State of Maine stayed at the Hotel on an official visit to Washington during the spring of 2017, met with the President, and then appeared with the President at a news conference at which the President gave something that Maine wanted; an executive order to review national monuments that are part of the National Park Service, which could apply to a park and national monument in Maine, which President Obama had established over LePage's objections in 2016.[159]

In Judge Messitte's view, these circumstances do not involve "numerous inferential leaps" to demonstrate injury to the quasi-sovereign interests of Maryland and the District of Columbia. "At least with respect to the D.C.-based Hotel's operations, Plaintiffs have adequately demonstrated that their quasi-sovereign interests in this particular way have been injured-in-fact."[160] Still, the President argues, Plaintiffs' alleged injuries are highly speculative, quite far from "certainly impending" in nature. It is not enough, says the President, for Plaintiffs to merely allege that they compete with the Hotel. They must show an "actual or imminent increase in competition, which increase ... will almost certainly cause an injury-in-fact."[161] The President claims that entities in which Plaintiffs claim a proprietary interest are not really comparable to the Hotel, and, given substantial differences between the venues and the "diffuse and competitive" hospitality market in the area, Plaintiffs have not met their burden.[162]

As to injuries to D.C.'s quasi-sovereign interests, Judge Messitte relies on the testimony of Rachel Roginsky, a private consultant with expertise in assessing competition in the hotel industry, who indicated that both the Washington Convention Center and the Hotel host events and meetings for up to 1,200 people and offer overlapping services for such events, including high-end catering and customized menu planning. Because of their close proximity—less than one mile apart—both the Washington Convention Center and the Hotel are equally accessible to federal agencies, law firms, and large businesses that would seek to use the spaces. She

156 *Id.*
157 *Id.*
158 *Id.* at 742.
159 *Id.*
160 *Id.*
161 *Id.* at 743 (quoting *Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010)).
162 *Id.*

also concludes that both facilities are of "similar class and image."[163] Additionally, Events D.C., a District of Columbia-controlled entity, caters to both foreign and domestic governments and a portion of its revenue is based on demand for use of the Washington Convention Center. He notes that the Washington Convention Center has previously hosted the Food and Drug Administration, the Treasury Department, and the Department of Commerce.[164]

The State of Maryland does have 39,000 square feet of meeting and event space at the Bethesda Marriott Conference Center, which competes directly with the Trump Hotel's 38,000 square feet of meeting and event space. The Conference Center has a large ballroom, has hosted embassy events in the past, and, compared with the Hotel, is roughly equidistant from many foreign embassies. In fact, Plaintiffs cite specific instances of foreign governments foregoing reservations at other hotels in the arena and moving them to the President's Hotel (noting that both Kuwait and Bahrain moved events from the Four Seasons and Ritz Carlton to the Hotel after the President was elected).[165] Statements from foreign diplomats have confirmed that they will almost certainly be doing likewise.

Against this, the President argues that even if Plaintiffs could bring this suit against the Federal Government, *parens patriae* standing would still fail because Plaintiffs have not alleged a concrete injury, and to bring a *parens patriae* action, the State must be "more than a nominal party," it must allege an injury suffered by a "substantial segment of its population."[166] According to the President, the Amended Complaint does not plausibly allege such an injury, positing instead a general injury caused by a single Hotel to no more than an "identifiable group of individual residents," which is not sufficient.

Yet Judge Messitte was satisfied that both the District of Columbia and Maryland are more than nominal parties. "They allege competitive injuries affecting a large segment of their populations. The Amended Complaint alleges that in 2014, visitors to the District of Columbia generated approximately $6.81 billion in spending and drove $3.86 billion in wages for 74,570 employees engaged in the hospitality industry."[167] In the Court's view, that is enough, as a "large number of Maryland and District of Columbia residents are being affected and will continue to be affected when foreign and state governments choose to stay, host events, or dine at the Hotel rather than at comparable Maryland or District of Columbia establishments, in whole or in substantial part simply because of the President's association with it."[168] He sees the Plaintiffs as trying to protect a large segment of their commercial residents and hospitality industry employees from economic harm.

These arguments could have gone the other way. A different trial judge, like Judge Daniels, could have determined that the damages were speculative, not well-enough defined, and therefore not a traceable "injury-in-fact" that would create standing. As the question of standing is a mixed question of law and fact for judges to determine, appellate judges are free to overturn such findings if they believe the law was incorrectly applied to all the facts of the case that are part of the record on

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163 *Id.* at 744.
164 *Id.* at 744-45.
165 *Id.* at 745.
166 *Id*. at 746 (citing *Snapp & Son, Inc. v. Puerto Rico ex rel Barez*, 458 U.S. at 607 (1982)).
167 *Id*. at 747-48.
168 *Id*. at 748.

appeal. The Fourth Circuit could so do without having to give a presumption of a fair hearing to the trial judge; ordinarily, appellate courts will accept a trial judge's findings of fact and conclusions of law that are not "clearly erroneous." Given the importance of this issue, the Fourth Circuit Court of Appeals could determine that the motion to dismiss should have been granted, either on standing or the political question doctrine issue.

B. The Political Question Doctrine

In his March 2018 opinion on standing, described above, Judge Messitte also addresses the political question doctrine, stating that the Emoluments Clauses do create a private right of action, that equitable relief against the President was well within the Supreme Court's earlier precedents, and disagrees with the conclusion reached by Judge Daniels in *CREW et al. v. Trump* that the Framers did not have competitors in mind when they composed the Emoluments Clauses. Judge Messitte writes that this would imply that "no competitors anywhere are ever within the zone of interests of the Clauses. But the Emoluments Clauses clearly were and are meant to protect all Americans."[169] Under the President's interpretation, he notes, only Congress would ever be able to enforce these constitutional provisions.

He first notes that only the Foreign Emoluments Clause mentions Congress.[170] "To the extent the domestic emoluments clause gives states a cause of action, it is direct. Congress has no role to play."[171] As to the Foreign Emoluments clause granting Congress the power to consent to the receipt of certain emoluments by the President, Judge Messitte does not see in the Clause a "textually demonstrable constitutional commitment of the issue to a coordinate political department."[172] For the proposition that the separation of powers doctrine[173] does not bar every exercise of jurisdiction over the President, he cites *Clinton v. Jones* (the Paula Jones case allowing a civil suit to go forward against a sitting President for acts committed prior to the Presidency).[174] Directly contrary to Judge Daniels' ruling in the CREW case, Judge Messitte finds that "a plain reading" of the Foreign Emoluments Clause "compels the conclusion that receiving emoluments ... is impermissible unless and until Congress consents."[175]

C. The meaning of "emoluments"

Judge Messitte's second opinion, from July 2018, provides the usual factual and procedural background, addresses standards for constitutional interpretation, and the meaning and application of the Emoluments Clauses.[176] In applying the clauses, he considers the President's motion to dismiss for failure to state a claim on which

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169 District of Columbia v. Trump, 291 F. Supp. 3d 725, 755 (2018).
170 *Id.*
171 *Id*. at 756.
172 *Id*.
173 *See* T.J. Halstead, *The Separation of Powers Doctrine: An Overview of its Rationale and Application*, Congressional Research Service (1999).
174 Clinton v. Jones, 520 U.S. 681, 703 (1997).
175 District of Columbia v. Trump, 291 F. Supp. 3d 725, 756 (2018).
176 District of Columbia v. Trump, 315 F. Supp. 3d 875, 901-04 (2018).

relief can be grounded under Federal Rules of Civil Procedure Rule12(b)(6). In support of the motion to dismiss, the President asserted that an emolument pertains "only to a payment made in connection with a particular employment over and above one's salary, as, say, President of the United States, so that payments to a federal official for any independent services rendered ... are entirely separate and apart from an 'emolument' paid to the President qua President."[177]

To interpret constitutional provisions, Judge Messitte relies on standard judicial processes such as considering the provision's text, history, and purpose, as well as executive branch precedents interpreting it. He rejects the argument that the Presidency is not an "Office of Profit or Trust under [the United States]."[178] The standard litany of interpretive approaches to the Constitution includes strict constructionism, originalism and original meaning, the purposive approach and the "living Constitution."[179] Strict constructionism relies heavily on the language of the text itself, coupled with the meaning of that text to those who wrote it, in this case, the Framers. Messitte surveys all parts of the Constitution to consider its various uses of "Office" and finds that an "Office of Profit of Trust" must include the Presidency. He also supplies a lengthy exegesis on the original public meaning and purpose of the words "Office of Profit or Trust," relying on the Federalist Papers, how the terms were used in dictionaries at the time, and executive branch practices over the years.[180]

As to the meaning of "emoluments," whether foreign or domestic, the Department of Justice in the Trump Administration has defended President Trump in this and other emoluments lawsuits, and its positions have been consistent: there is no "emolument" where the President in his personal capacity gains materially for non-official duties. That is, unless the President explicitly trades on his political position for some form of gift or income, there cannot be an "emolument" as the Framers understood the term. Judge Messitte does not agree. Following a process of strict construction, Judge Messitte takes a deep dive into textual analysis, the use of the term "emolument" in the Incompatibility Clause,[181] arguments over rules of construction such as *noscitur a sociis*, and comparisons between the Foreign Emoluments Clause and the Domestic Emoluments Clause.[182] He concludes that textual analysis favors a broad meaning for "emoluments" as profit, gain, or advantage; the narrower meaning urged by the President would require

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177 *Id*. at 880 (referencing Def.'s Mot. Dismiss, Sept. 29, 2017).

178 The argument was made by Professor Seth Tillman, as *amicus curiae*. Br. for Scholar Seth Barrett Tillman & The Judicial Education Project as *Amici Curiae* in Support of Def. (Oct. 6, 2017), ECF No. 27- 1 (Professor Tillman), at 2, 4. Tillman's argument was based on a distinction between appointed positions and elected ones. Judge Messitte noted the potentially "bizarre consequences" from Tillman's interpretations: District of Columbia v. Trump, 315 F. Supp. 3d 875, 884 (fn 17), citing Saikrishna Prakash, *Why the Incompatibility Clause Applies to the Office of the President*, 4 Duke J. Const. L Pub. Pol'y 143, 149-51 (2009).

179 District of Columbia v. Trump, 315 F. Supp. 3d 881.

180 *Id*. at 889 – 94 and 899 –903.

181 The Incompatibility Clause, U.S. Const. art.I, §6, cl.2, provides: "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time."

182 District of Columbia v. Trump, 315 F. Supp. 3d 881, at 885-89.

characterizing an emolument as "the receipt of compensation for services rendered by an official in an official capacity."[183] This narrowing, however, makes the taking of emoluments equivalent to the crime of federal bribery. That crime prohibits a federal public official from receiving or excepting "anything of value" in return for "being influenced in the performance of any official act."[184] Article II, Section 4 of the Constitution already addresses the crime of bribery, making it an impeachable offense.[185]

Judge Messitte also looks at the "original public meaning" of the term to consider what ordinary citizens at the time of the Nation's founding would have understood it to mean. The President cites somewhat more obscure dictionaries than the plaintiffs do, but even those included alternative definitions that aligned with the plaintiffs' interpretations.[186] Given the insistence by Justice Antonin Scalia that "original meanings" mattered in questions of constitutional interpretation, Judge Messitte plays a trump card in appealing to the four dictionaries which were deemed by Justice Antonin Scalia and Bryan A. Garner to be "the most authoritative English dictionaries from 1750–1800." These aligned with plaintiffs' interpretation of "emolument" as variously defined as "profit," "gain," or "advantage."[187] Further, in notes of the debates of the Constitutional Convention, "there are several instances of delegates discussing 'emoluments' in a sense that cannot be logically read to mean simply payment for services rendered in an official capacity."[188]

Judge Messitte also engages in a "purposive" approach to interpretation, going beyond the text to consider what purpose the Framers most likely had in mind when drafting the two Emoluments Clauses. Did they intend a bulwark against Presidential conflicts of interest where state and foreign governments might seek influence? Plaintiffs cited various Federalist Papers, comments made by delegates to the Constitutional Convention, and several pre-constitution state laws that were intended to discourage conflicts of interest by public officials. The President, by contrast, argued that the Framers were most concerned in the Foreign Emoluments clause with European sovereigns bestowing gifts on American diplomats, like the gifts from Louis XVI.[189] As Judge Messitte puts it, "The President submits that it is more likely that the Framers wanted to prevent incidents such as these rather than to prevent federal officials from maintaining private businesses."[190] As to the domestic clause, the President argued that the purpose was to make sure that the President's compensation would remain unaltered during his term of office, not prevent him from conducting private business like any other citizen; the plaintiffs' interpretation would mean that Presidents and other federal officials could not hold stock in a global company "if some of that company's earnings could be traced to foreign governments." [191]

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183 District of Columbia v. Trump, 315 F. Supp. 3d 881, at 888.
184 18 U.S.C. § 201(b)(2).
185 U.S. Const. art. II, §4 provides: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."
186 District of Columbia v. Trump, 315 F. Supp. 3d 881 at 891.
187 *Id.*
188 District of Columbia v. Trump, 315 F. Supp. 3d 881, at 892-93.
189 *Id*. at 894.
190 *Id*.
191 District of Columbia v. Trump, 315 F. Supp. 3d 881, at 896.

Judge Messitte does not find these arguments convincing. First, he critiques the President's chosen example of not being allowed to have stock in a global company that might have some earnings derived from foreign governments as being a "trifle," and that the Framers were "fundamentally concerned with transactions that could potentially influence the President's decisions in his dealings with specific foreign or domestic governments, not with *de minimis* situations."[192] Contrasting stock in a global company with Trump's ownership of his D.C. hotel, Judge Messitte finds it "highly doubtful" that such holdings would have the potential to unduly influence a public official. On the other hand, sole or substantial ownership of a business "that receives hundreds of thousands or millions of dollars a year in revenue from one of its hotel properties where foreign and domestic governments stay" would certainly raise the potential for undue influence, especially where governments are staying there with the "express purpose of cultivating the President's good graces."[193]

As to intent, or purpose, Judge Messitte sees the historical record as reflecting "an intention that the Emoluments Clauses function as broad anti-corruption provisions." [194] In essence, he agrees with Zephyr Teachout's analysis of the Framers' experience with corruption and their intent.[195] He again notes that the President's narrow interpretation of the Emoluments Clauses would make it an anti-bribery provision, not an anti-corruption provision; this makes the clauses redundant, and gives no credence to what the Framers knew so well from their experience: that people in positions of political power can be subconsciously swayed by making large sums of money from foreign and domestic governments. It is difficult to prove that someone in public life has actually engaged in a *quid pro quo* with a domestic or foreign government,[196] and corruption does not include only "bribes and theft from the public till."[197]

Thus, altogether banning offerings from domestic and foreign governments—unless Congress approves them—is the most reasonable explanation for the Constitution's Emoluments Clauses. He cites both Virginia and Pennsylvania laws and declarations from 1776 to demonstrate awareness among the Framers that beyond a fixed salary, additional "emoluments" should not accrue to a public servant because of his political position.[198] The concept here sounds familiar: elected politicians should not take bribes, should not put their hands in the public till, and should hold office as a public trust, just as a corporate officers or directors should take seriously the fiduciary duties that come with their offices.[199]

After an extensive review of Executive Branch precedent and practice,[200] Judge Messitte applies the Emoluments Clauses and finds potential violations of the Foreign Emoluments Clause with foreign governments patronizing the Trump International Hotel.[201] As to the Domestic Emoluments Clause, he finds

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192 *Id.* at 899.
193 *Id.*
194 District of Columbia v. Trump, 315 F. Supp. 3d 881, at 896.
195 See *supra*, notes 14-26 and accompanying text.
196 District of Columbia v. Trump, 315 F. Supp. 3d at 881, 897.
197 *Id.,* quoting Teachout, *supra* note 14, at 2.
198 District of Columbia v. Trump, 315 F. Supp. 3d 881, at 898.
199 See *supra* notes 95-112 and accompanying text.
200 District of Columbia v. Trump, 315 F. Supp. 3d 875, 901-05 (2018).
201 *Id*. at 905.

that the President may have unlawfully benefitted from the Government Services Administration (GSA) lease of the Old Post Office Building to the hotel,[202] and from patronage of the Hotel by state governments, and by tax concessions from the D.C. Government.[203] On a motion to dismiss by the President, a trial judge must only judge whether the allegations "plausibly state a claim" under either emoluments clause. Depending on the evidence at trial, then, the plaintiffs could establish that the President's receipt of these emoluments is unconstitutional. Discovery of relevant evidence for trial purposes was left to a joint recommendation process, with agreement due in September 2018.[204] Regardless of the outcome of the D.C.—Maryland lawsuit and the Congressional Democrats lawsuit, all the emoluments lawsuits filed since the Inauguration of the 45th U.S. President identify a fundamental problem of governance in the public interest colliding with the private interests of Donald J. Trump. He appears to see no separation, and what remains is whether either Congress or the Courts will address a Constitutional issue that has been dormant for nearly 230 years.

VII. Conclusion

The Emoluments Clauses are federal public officials' equivalent of the fiduciary duty owed by trustees and corporate managers and directors. It is difficult to discern why the public sector should have different "ethics" from the private sector, since both are managed by people with possible conflicts of interest. Absent any specific law on point, one could attempt to argue that there are differences, in that a trustee takes care of other people's money with very specific obligations to particular people, and a corporate manager has fiduciary duties ("the utmost care") to the company and its investors, while a public official's duties are to a more general set of stakeholders. However, as we have reviewed, there is a basis in the U.S. Constitution, the Federalist Papers, historical precedent, and related scholarship that public officials, like private sector managers, have duties to avoid confcts of interest.

We contend that, for purposes of interpreting the Emoluments Clauses, it is unlikely that the Framers would have assumed that the President could not have conflicts of interest. Given their historical experience, their reading of Gibbons' *Decline and Fall of the Roman Empire*, and the influence of John Locke's philosophy, the Framers would have seen the government generally—and not just particular offices of the government—as being trustee of the rights of the citizenry.[205] To the Framers, the social contract was clear: government received its power from the consent of the governed, and was to insure the rights of life, liberty, and the pursuit of happiness. The people retained the right to overthrow that government if it failed

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202 *Id*. at 906.
203 *Id*. at 907.
204 *Id*.
205 The Internet Encyclopedia of Philosophy, John Locke: Political Philosophy. ("For Locke, government is no more than a tool that continuously depends on the consent of the people and must not violate the maximum conditions of securing peace and property – to do so is to violate the trust that is afforded the institution.") http://www.iep.utm.edu/locke-po/#SH6d.

in its duties to protect those rights. In short, government (including the Executive branch) only has the power accorded to it by the people. Likewise, a trustee or a corporate manager should only exercise the powers given to them, and must do so in care of the rights of others.

This article has tried to make clear that the Framers had a clear understanding of corruption, an understanding that deeply mistrusted power and influence in all of its forms. They hoped for political leaders with civic virtue, but were realistic enough to provide a restraining effect on those public officials that might prefer power and money to serving the public good. We can see this in the separation of powers provided for in the Constitution: "checks and balances" as safeguards against what they understood to be well-known temptations and systemic corruption.

Those safeguards include the Emoluments Clauses. The notion that they were directed only toward *quid pro quo* exchanges does not withstand historical scrutiny. In that light, President Trump's businesses, his refusal to divest ownership while carrying out his sworn duties to protect and defend the Constitution of the United States, added to his apparent intention to profit from his position as President, are all violations of the Emoluments Clauses.

As of this writing, the D.C. and Maryland emoluments lawsuit may survive to enter into discovery phase. The 2018 mid-term elections resulted in a Democratic majority in the House of Representatives, triggering possible subpoenas for tax returns and other information by the House Ways and Means Committee. In either scenario, whether it is the result of litigation or a Congressional subpoena, the current constitutional crisis could escalate. Given the complexity of selling off assets that are essentially the Trump name itself, and the probability that Trump might ignore orders to do so, public pressure could increase upon the House of Representatives to take some further action, such as voting on articles of impeachment. But unless two-thirds of the Senate would vote to convict, the President would survive even that process; unless his own party were to agree, which is highly unlikely, there will be no impeachment process for the President's violations of the Emoluments Clauses.

It is emblematic of the political atmosphere in Washington, D.C. that only Congressional Democrats have brought up the Emoluments Clauses. A sustainable political society requires "an aristocracy of virtue and talent" rather than an aristocracy of power and wealth, and political leaders that will put love for the nation's well being above love of self or political power. It is likely that some segment of voters in the U.S. 2016 electorate confused power and wealth with virtue and talent.

Revelations related to potential obstruction of justice by Trump and his associates are rapidly emerging as this article is being written. The Trump presidency may well end for reasons other than conflicts of interest and repeated violations of the Emoluments Clauses. However, when a businessperson with an eponymous global brand also serves as the U.S. President, the political and judicial systems of a functioning democracy should be able to determine the boundaries of what is acceptable in terms of conflicts of interest. We remain hopeful that the U.S. judiciary, or perhaps even Congress, will acknowledge the clear text of the Emoluments Clauses, and affirm the Framers' understanding that a Republic can be corrupted from within by failing to deal with clear conflicts of interest among all of its public officials.

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Fascism-lite in America (or The Social Ideal of Donald Trump)

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ABSTRACT

What explains the election of the 45th President of the United States? Many commentators have said that Trump is a fascist. This builds on grave concerns, since Citizens United*, that democracy is being corrupted. This article suggests the long term cause, and the shape of ideology is more complex. In 1971, an extraordinary memorandum of Lewis Powell for the U.S. Chamber of Commerce urged that '[b]usiness interests' should 'press vigorously in all political arenas for support'. Richard Nixon appointed Powell to the Supreme Court, and a few years later, despite powerful dissent, a majority in* Buckley v. Valeo *held that candidates may spend unlimited funds on their own political campaigns, a decision of which Donald Trump, and others, have taken full advantage.* Citizens United *compounded the problems, but* Buckley v. Valeo *was the 'Trump for President' case. This provided a platform from which Trump could propel himself into extensive media coverage. The 2016 election was inseparable from the social ideal pursued by a majority of the Supreme Court since 1976. No modern judiciary had engaged in a more sustained assault on democracy and human rights. Properly understood, 'fascism' is a contrasting, hybrid political ideology. It mixes liberalism's dislike of state intervention, social conservatism's embrace of welfare provision for insiders (not 'outsiders'), and collectivism's view that associations are key actors in a class conflict. Although out of control, Trump is closely linked to neo-conservative politics. It is too hostile to insider welfare to be called 'fascist'. Its political ideology is weaker. If we had to give it a name, the social ideal of Donald Trump is 'fascism-lite'.*

KEYWORDS

Democracy, Fascism, Buckley v. Valeo, Citizens United, Campaign Expenditures

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I. Introduction

When the great political writer, Alexis de Tocqueville, came to witness democracy in America, many in Europe were slowly persuaded that power in the hands of the many, not just the few was the best way to govern.[1] De Tocqueville recorded a "strong and independent" community, where the American citizen had "an interest in it because he shares in its management".[2] Near the same time, in 1831, Wolfgang von Goethe famously wrote, "America, you've got it made – better than us here in the old world."[3] This was why so many people, including one Frederick Trump in 1885,[4] would emigrate to the States over the 19th century. They escaped authoritarian government, the repression of democracy and social justice, and the worst excesses of the industrial revolution. They sought the spirit of liberty. America's dream was one of a people who, as Pitt the Elder told Parliament in 1775, "prefer poverty with liberty to gilded chains and sordid affluence; and who will die in defence of their rights as men, as freemen."[5]

So it may seem natural that fascism has never yet taken hold in America. There were exceptions.[6] For example, during the 1920s and 1930s fascists had taken over Columbia University's *Casa Italiana*,[7] (attended by one Salvatore Eugene Scalia) where students pledged allegiance to Mussolini. And today, many believe Donald Trump, the embattled presidential candidate in 2016, might be another exception. Words like "fascist" often churn through 24 hour media, unconnected to essential political concepts.[8] Nevertheless, Trump has been forced to defend

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1 *See* Pericles' Funeral Oration in Thucydides' History of the Peloponnesian War Book 2, § 37 (ca 411 BC):"Our government does not copy our neighbors, but is an example to them. It is true that we are called a democracy, for the administration is in the hands of the many and not of the few".

2 Alexis de Tocqueville, De la Démocratie en Amérique ch. 5 (1835).

3 "Amerika, du hast es besser–als unser Kontinent, der alte." J.W. Goethe, Wendts Musen-Almanach (1831). Literally translated, Goethe's phrase was 'America, you've got it better – than us in the old world', but Goethe's colloquial tone suggests the phrase given in the text fits better.

4 Gwenda Blair, The Trumps: Three Generations That Built An Empire 25-26 (2001). "Friedrich Trump was not leaving home so much as fleeing three centuries of barbaric European history". She records the family history back to the Thirty Years' War, where Hanns Drumpf in 1608, an 'itinerant lawyer' was recorded as living in Kallstadt, Pfalz. The village was destroyed in the war, but the family name survived, its spelling altered by the time John Philip Trump was recorded as a taxpaying wine-grower at the century's end.

5 William Pitt, Earl of Chatham, House of Lords Debates (Jan. 20, 1775).

6 The foregoing summary is in no way intended to diminish the horrendous historical reality of the international slave trade. Indeed, one factor contributing to the 1776 revolution was Lord Mansfield's holding that slavery was unlawful at common law *in Somerset v. Stewart*, (1772) 98 Eng. Rep. 499, 510 (Lord Mansfield); it was a tragedy that it lasted almost 100 years more. There were of course other factors in the 1776 revolution, famously the demand for no tax without representation. But on this, see Alfred W. Blumrosen, *The Profound Influence in America of Lord Mansfield's Decision in* Somerset v Stuart (2007) 13 Tex. Wesleyan L. Rev. 645.

7 *E.g. Professor Prezzolini Reported to Il Duce On Casa Italiana Activities, 'Nation' Charges*, Columbia Spectator, Nov. 22, 193 at 1.

8 *e.g.* Jeffrey A. Tucker, *Is Donald Trump a Fascist?,* (July 17, 2015, 12:00pm), https://www.newsweek.com/donald-trump-fascist-354690; Jamelle Bouie, *Donald Trump is a*

himself. For example, during his campaign, after Trump quoted Mussolini in a tweet, a TV interviewer asked Trump, "You want to be associated with a fascist?" "No, I want to be associated", replied Trump, "with interesting quotes."[9] These developments are abnormal. As seen on reality TV, "the "Donald Trump" model of workplace relations" (represented by an authority figure barking "you're fired") has come to politics.[10] Of course, Trump the man, and his policies, are profoundly uninteresting in themselves: the psychological product of a damaged and insecure individual. However, the movement in politics, the claim that fascism is emerging in America, matters. We need to know the phenomenon's causes, relative nature, and consequences to protect and strengthen democracy.

This article's main argument is that America is not seeing a fascist movement, but a movement embedded in the neo-conservative politics of the last forty years. The political essence of fascism entails welfare protection of vulnerable individuals, who renounce all rights to a strong leader. The concern for welfare is lacking.[11] American politics is experiencing the consequences of monopoly capitalism, which has successfully shifted its search for economic power into the political realm, but is teetering on the brink of collapse. If we had to give it a name, this is "fascism-lite."

The long-term cause of the Trump episode begins with *Buckley* v. *Valeo* in 1976.[12] Forty years of Supreme Court decisions, and especially the decisions of the late Justice Antonin Scalia,[13] play the major role. But *Buckley* v. *Valeo* was the "Trump for President" decision because it decided, over powerful dissent, that the First Amendment to the U.S. Constitution protected unlimited spending of money on one's own political campaign. As he proclaimed during his primaries, Trump financed himself with his inherited wealth, via loans from one of his companies. *Buckley* long pre-dates the also disastrous decision in *Citizens United* v. *Federal Election Commission*.[14] But it made *Citizens United*, neo-conservatism and Trump, possible.

Fascist, (Nov. 25, 2015 11:44pm), https://www.slate.com/articles/news_and_politics/politics/2015/11/donald_trump_is_a_fascist_it_is_the_political_label_that_best_describes.html; Megan Hanna, *Is Donald Trump a Fascist? It Doesn't Matter*, (Dec. 21, 2015), https://www.newstatesman.com/politics/staggers/2015/12/donald-trump-fascist-it-doesnt-matter; Michael Kinsley, *Donald Trump is Actually a Fascist,* (Dec. 9, 2016) https://www.washingtonpost.com/opinions/donald-trump-is-actually-a-fascist/2016/12/09/e193a2b6-bd77-11e6-94ac-3d324840106c_story.html.

9 Dylan Stableford, *Donald Trump on Retweeting Mussolini: 'It's a Very Good Quote'* (28 Feb. 2016), https://www.yahoo.com/news/trump-mussolini-retweet-gawker-232519997.html?guccounter=1.

10 *See* Ewan McGaughey, *Unfair Dismissal Reform: Political Ping-Pong with Equality?,* 226 Equal Opportunities L. Rev. 16 (2012).

11 On fascist welfare, *see, e.g.,* Franz L. Neumann, Behemoth: The Structure of National Socialism 343 (1941); Otto Kahn-Freund, *The Social Ideal of the Reich Labour Court - A Critical Examination of the Practice of the Reich Labour Court* (1931) *reprinted in* Labour Law and Politics in the Weimar Republic 108 - 161 (Roy Lewis & Jon Clark eds., 1981) .

12 Buckley v. Valeo, 424 U.S. 1 (1976).

13 On Scalia, J., *see* recently Jeremy Waldron, *Postscript: Originalism and Judicial Authority*, 6(1) Brit. J. of Am. Legal Stud. 137, 142-43 (2017); Jane Marriott, *Justice Scalia: Tenured Fox in the Democratic Hen House?* 6(1) Brit. J. of Am. Legal Stud. 41 (2017).

14 Citizens United v. FEC, 558 U.S. 310 (2010). *See* Wendy L. Hansen et al., *The Effects of* Citizens United *on Corporate Spending in the 2012 Presidential Election*, 77(2) J. Pol. 535 (2015).

This article focuses on the politics of law, rather than campaign finance law.[15] But it must be noted at the outset that the First Amendment prohibition on Congress passing laws "abridging the freedom of speech" has little or nothing to do with election spending. The powerful dissenting judgments in *Buckley* explained this,[16] and their reasoning has been mirrored in other democratic countries worldwide.[17] Unlimited election expenditures by anyone, like Trump, diminish other people's freedom. Other people's voices are drowned out in scarce media resources by those with the deepest pockets. This may be changing through the internet, which could allow an essentially unlimited supply of discourse so long as network monopolies on the web remain unpriced and open. But advertising opportunities on the web, radio waves and TV channels are fewer, media channels can be purchased, and politicians can be lobbied. This is why all democracies reject that money is speech *per se*. *Buckley* was not the product of reason. It was one of the first cases after Justice William O. Douglas had to leave the Court. It was the start of a decisive change in American governance. Antonin Scalia's death, in 2016, marked a pause in a four decade phase in judicial composition,[18] but the Republican Party held out on a new appointment in Congress, won the Presidency, and got Neil Gorsuch on the Court.[19]

What led to *Buckley* v. *Valeo*? It was the crowning success of a careful plan, started by Lewis Powell, in 1971. For the U.S. Chamber of Commerce, Powell wrote

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15 *See*, as an introduction, J Seligman, *Is the Corporation the Person? Reflections on* Citizens United v. Federal Election Commission, https://www.rochester.edu/president/citizens-united/ (May 6, 2010), and in further depth, Jacob Eisler, *Judicial Perceptions of Electoral Psychology and the Deep Patterns of Campaign Finance Law,* 49(1) Conn. L. Rev., 57 (2016); Jacob Eisler, *The Unspoken Institutional Battle over Anti- Corruption:* Citizens United*, Honest Services, and the Legislative-Judicial Divide*, Cambridge Research Paper Series, Paper No 16/2016 (2016) at 19 (saying the majority in *Buckley* succeeded in 'striking down or emasculating most of the deliberative [democratic provisions]' of the Federal Election Campaign Act of 1971).

16 Buckley v. Valeo, 424 U.S. 1, 261-66 (1976) (White, J.): "Congress was plainly of the view that these expenditures also have corruptive potential; but the Court strikes down the provision, strangely enough claiming more insight as to what may improperly influence candidates than is possessed by the majority of Congress that passed this bill and the President who signed it... Without limits on total expenditures, campaign costs will inevitably and endlessly escalate.... By limiting the importance of personal wealth, §608(a) helps to assure that only individuals with a modicum of support from others will be viable candidates. This, in turn, would tend to discourage any notion that the outcome of elections is primarily a function of money."

17 For example, the leading decision in Europe is *Animal Defenders International v. United Kingdom* [2013] ECHR 362. *See* especially Baroness Hale in [2008] UKHL 15, [47]-[51] "There was an elephant in the committee room, always there but never mentioned, when we heard this case. It was the dominance of advertising, not only in elections but also in the formation of political opinion, in the United States of America...". *Cf*. Harper v. Canada (Attorney General) [2004] 1 SCR 827.

18 The decisive case, a 4 to 4 split, thereby affirming the appellate court, was *Friedrichs v. California Teachers Ass'n*., 578 U.S. _ (2016).

19 Gorsuch's views appear firmly in the same frame. *See* Riddle v. Hickenlooper, 742 F. 3d 922, 931 (10th Cir. 2014) (Gorsuch, J., concurring) (suggesting "the act of contributing to political campaigns implicates a 'basic constitutional freedom,' one lying 'at the foundation of a free society"). But interestingly Gorsuch clerked for Justice White. Spending is not contributing.

an extraordinary 'memorandum' entitled "Attack on American Free Enterprise System". It explained how to roll back democratic organization in politics and the economy for the next generation.[20] Powell, a corporate lawyer, said a concerted effort to push their 'side' of the argument had to begin in public education, and journalism where news-stand literature was "advocating everything from revolution to erotic free love". Powell also urged concerted action in the courts. As he put it,

> it is essential that spokesmen for the enterprise system -- at all levels and at every opportunity -- be far more aggressive than in the past.... There should not be the slightest hesitation to press vigorously in all political arenas for support of the enterprise system. Nor should there be reluctance to penalize politically those who oppose it. Lessons can be learned from organized labor in this respect.... It is time for American business -- which has demonstrated the greatest capacity in all history to produce and to influence consumer decisions -- to apply their great talents vigorously to the preservation of the system itself. [21]

This was largely assured when Richard Nixon appointed Powell himself to the U.S. Supreme Court. Even in 1971 it was preposterous to say, as Powell did then, that "the American business executive is truly the "forgotten man." But once *Buckley* was decided, fewer and fewer people would ever say it again.

Since *Buckley,* American society has slowly drifted into something resembling monopoly capitalism.[22] Corporate boards, banks, and asset managers monopolize the votes in the economy, almost all with "other people's money".[23] They hold immense economic influence. Economic influence is translated into politics. Policies become law. Law is used to entrench economic privilege. The modern Republican party became a wholly owned subsidiary of large corporations and financiers, and the Democratic party has struggled to resist arrest. Democracy in America needs care and attention, or there will be another conclusion. Part II of this article explains a taxonomy of social ideals by which we may try to understand politics today. Part III outlines the essence of the U.S. Supreme Court's case law. Part IV explains the social ideal of the politics of Donald Trump. Its basic argument is that Trump, and the law that makes him possible, is not fascist, but the extension

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20 Lewis F. Powell Jr, *Attack on American Free Enterprise System*, 23 Aug.,1971, available at http://law2.wlu.edu/powellarchives/page.asp?pageid=1251.

21 *Id.* at 29-30.

22 *Cf*. F Kessler, *Natural Law, Justice and Democracy – Some Reflections on Three Types of Thinking About Law and Justice* 19 Tul. L. Rev. 32, 52-3 (1944): "The founders of liberalism did not have the vision to foresee that the capitalistic system has within itself forces which, if unchecked, will inevitably change a free enterprise system into monopoly capitalism and a liberal democracy into a pluralistic society which knows nothing but divided loyalties. Once liberal democracy ceases to be a living force, positivism, despite its insistence on the strict separation of the moral and the legal and its identification of justice with legality and order, is unable to guarantee liberty."

23 *Cf*. Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, Book V, ch. 1, 536-630 §107 (1776); Louis D. Brandeis, Other People's Money and How the Bankers Use It (1914); and for today, Ewan McGaughey, *Democracy in America at Work: The History of Labor's Vote in Corporate Governance*, 42 Seattle U. L. Rev. 40 (2019).

of a system of monopoly capitalism. If we had to give it a name, the social ideal of Donald Trump may be termed "fascism-lite".

II. A Taxonomy of Social Ideals

Probably the best taxonomy of politics was suggested by a remarkable Berlin Labor Court judge, who was forced to flee Germany in 1933. Otto Kahn-Freund defined four categories of political group in terms of their "social ideal".[24] First, there was liberalism, which "condemns all combinations and leaves the structuring of social relations to the free play of social and economic forces". Second, social conservatism "places the existentially isolated, uncombined individuals of the working class under the social protection of the state". Third, collectivism "leaves the structuring of social relations to the conflict between the two classes which are party to the basic contradiction in society" – namely labor and capital. Fourth, there was fascism, a hybrid of those other ideals. It shared liberalism's dislike of state intervention, social conservatism's embrace of welfare provision for insiders, and collectivism's view that associations are key actors in class conflict. On top of violence as a means of politics and diplomacy, fascism meant private ownership, paternalism and exclusion, coupled with victory for the "leader" in total class war.

A. Liberalism, Social Conservatism and Collectivism

Kahn-Freund's categories were styled to fit with an older German politics that he saw in his day. They mirrored 'ideal types' of the bourgeoisie, *Rheinland* industrialists, socialist workers, and the brown-shirts. The purpose of his work was to explain the social ideal pursued by the Empire Labor Court (*Reichsarbeitsgericht*), in disputes between workers and employers, during the late 1920s and first years of the 1930s. In essence, Kahn-Freund had argued that the German courts had been pursuing a fascist doctrine in labor regulation, and he said it in 1931. But, as he later emphasized, it would have been wrong to imply the judiciary had any political self-awareness.[25]

What has become of those categories today? Liberalism in its older guise met a rapid death, and not so strangely, between the first and second world wars.[26] It could not maintain its place on the progressive side of politics once it had succeeded in busting the trusts and robber barons in the U.S.[27] or breaking the landed aristocracy in Britain.[28] Those elemental shifts in power produced the conditions for political democracy.

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24 Kahn-Freund, *supra* note 12, at 108-161.

25 *See* Otto Kahn-Freund, *Autobiographical Memories from the Weimar Republic*, 14(2) Kritische Justiz 183 (1981), (Ewan McGaughey trans., 2016).

26 *cf* George Dangerfield, The Strange Death of Liberal England (1935).

27 Exemplified by the Sherman Act of 1890 and the Clayton Act of 1914 in the U.S. (Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1890), *amended by* Clayton Act, 15 U.S.C. § 12-27 (1914)).

28 Exemplified by the 'People's Budget' of Lloyd George and the Parliament Act 1911 (Eng.).

Social conservatism – as it existed in Germany – would gradually diminish in its 'social' aspect over the later 20th century, as it absorbed the remnants of a liberal attitude toward economic relations. But simultaneously in continental Europe, conservatism was 'christianized' on a model that favored the coordination of the interests of members in a community. It had ceased to accept that people were unbound from moral obligations to one another.[29] The tension between this and liberalism remain. The same was not true of Anglo-American conservatism, which struggled to develop a coherent attachment to social values. Collectivism was manifested most starkly, at least in the eyes of its self-anointed believers, in 20th century communist movements. They emphasized the value of working class victory over the value of democratic organization. It collapsed with the Berlin Wall, when it became obvious that political and economic despotism was not compatible with promoting the rising popular demand for an agenda of human and social development.[30] This remains true today.

B. Fascism

Fascism, as we know, had to be defeated by military means, and at the cost of unspeakable humanitarian tragedy. But what, specifically, were the contours of fascist theory in relation to social organization? Within any association, everyone had to follow the leader. This was especially true in corporate law. A visiting scholar at Harvard, and a researcher for the German banking industry named Johannes Zahn, developed this view at length, summarized by the great contract lawyer, Friedrich Kessler, in an English language book review. In Zhan's perception, American law was a model for German law. It had grown strong in the 1920s because,

> American corporation law is based upon two fundamental principles: first, the leadership principle: the directors are the leaders of the corporation; second, the American corporation is a bundle of contractual relationships, between the corporation and the state, between directors and shareholders, between the shareholders mutually. [31]

The corporation itself was no more than a fiction that concealed contractual relations. But 'contracts' were more than legal fictions themselves; they held the status of an ethical principle. The corporate fiction concealed the true ethical basis of the relations among individuals and the state.[32] Because shareholders – like

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29 *See*, especially, Pope Leo XIII, Rerum Novarum (May 15, 1891). Such learning from the Vatican's encyclicals, and the experience from 1933 to 1945, is essential to explain cross-party support for the Tarifvertragsgesetz 1949, the Betriebsverfassungsgesetz 1952, and the Mitbestimmungsgesetz 1976, and the Christian Democrat Union of the 20th century.

30 To take just one example, *see* Charles E. Shaw, *Management-Labor Committees*, 3(2) Industrial & Labor Relations Rev. 229 (1950), on Brigadier General Smirnow declaring 'the manager's right to exercise undivided control over the plant' and 'freedom from petty tutelage by works councils' in East Germany.

31 Friedrich Kessler, *Book Review: Wirtschaftsführertum und Vertragsethik im Neuen Aktienrecht,* 83 U. PA. L. Rev. 393, 394 (1935).

32 Johannes C.D. Zahn, Wirtschaftsführertum und Vertragsethik im neuen Aktienrecht 39 (1934). The title translates as Economic Leadership and Contractual Ethics in the New Corporate Law.

all stakeholders – were irrational, strong leadership was needed by the board of directors.[33]

Of course, U.S. corporate law at that time was not as Zahn described. His analysis contained serious, and probably willful misreadings of central cases,[34] all geared toward the belief that corporate directors should have limited accountability. As Kessler wrote, Zahn had merely "discovered what he wished to discover,"[35] because Zahn's goal was to remake corporate law so that "democracy of capital will vanish just as it did in politics."[36] It was riven with nonsense:

> When a genuine leader-follower relationship develops between the board and the shareholders, the voting rights of shareholders will lose all practical meaning. In the first place, the shareholder will have much less to say than before. He will not, however, regard himself as a victim because he will trust the leadership.[37]

If this reasoning was unpersuasive, it did not matter. "The triumph of the national revolution," wrote Zahn, "has given this debate new impetus, and new direction."[38] That direction was perfected in the fascist *Aktiengesetz 1937* (Public Companies Act 1937).[39] It was drafted by a man named Ernst Geßler, but chiefly inspired by Zahn.[40]

The same views played out in the fascist regulation of labor.[41] Everyone would follow the leader of the business, and pledge allegiance to the abstract conception of the undertaking.[42] On 3 May 1933, the Nazis replaced the free trade unions with

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33 *Id*. at 95.

34 Particularly Zahn, *supra* note 33, at 91 (citing Manson v. Curtis, 223 N.Y. 313 (1918) to say a board should not be accountable. In fact, the case stands for the proposition that the board should remain accountable to multiple shareholders, and not be dominated by one. This error has, however, been repeated in S Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119(6) Harv. L. Rev. 1735, 1746 (2006)).

35 Kessler, *supra* note 32.

36 Zahn, *supra* note 33, at 93.

37 Zahn, *supra* note 33, at 95: "Wenn sich zwischen Vorstand und Aktionären ein echtes Führer-Geführten-Verhältnis entwickelt, wird das Stimmrecht des Aktionärs sehr an Bedeutung verlieren. Zunächst einmal wird der Aktionär viel weniger zu sagen haben, als bisher. Er wird dies aber gar nicht als ein Opfer empfinden, da er der Führung vertraut."

38 *Id*. at 12:"Der Sieg der nationalen Revolution hat dieser Erörterung neuen Auftrieb und zum Teil eine andere Richtung gegeben; es ist selbstverständlich, daß dieser Erörterung eine verstärkte Arbeit an der Neugestaltung folgen wird. "

39 Essential features remain today in the Aktiengesetz 1965 §§84, 101 and 135, making it difficult to remove supervisory board and executive directors, and allowing banks to appropriate shareholder voting rights.

40 W Schubert, *Einleitung* in Akademie fur Deutsches Recht 1933-1945: Protokolle der Ausschusse, Band I (Ausschuss für Aktienrecht) xlvii (W. Schubert, W. Schmid & J. Regge eds., 1986) and M Roth, *Corporate Boards in Germany* in Corporate Boards in European Law: A Comparative Analysis 277-78 (P Davies et al eds., 2013).

41 This section draws from Ewan McGaughey, *The Codetermination Bargains: The History of German Corporate and Labour Law*, 23(1) Colum. J. Eur. L. 135 (2016).

42 *See* generally, Karl Lowenstein, *Law in the Third Reich* 45(5) Yale L. J. 779 (1936); Nathan A. Pelcovtis, *The Social Honor Courts of Nazi Germany,* 53(3) Pol. Sci. Q. 350

the nationalized *Deutsche Arbeitsfront* (German Labor Front). Every person who worked for a living, eventually including employed and self-employed people alike, was socially compelled to join.[43] The DAF was a branch of the Nazi party, commanded directly by Hitler.[44] Its titular leader was Dr Robert Ley, a persistent alcoholic who committed suicide before his Nuremberg trial.

A primary task was to create 'understanding' among the 'business leaders' for their 'followers'. In return the followers were to understand the situation and possibilities of the business, by finding the common basis of their 'justified interests' so long as those were in line with Nazi principles.[45] DAF periodicals were filled with propaganda. Meetings were compulsory, but discussion was absent.[46] In each workplace, DAF officials acted, in the words of Ley, as "the soldier-like kernel of the plant community which obeys the Leader blindly. Its motto is 'the Leader is always right'".[47] The same *Führerprinzip* prevailed in labor law as it would in company law. Fascism was never content until it thrust its pathological paranoia onto every association, even clubs for playing chess and collecting stamps.[48] The consequence of this self-contradictory, psychotic ideology was conquest and murder: "an aggressive imperialist system seeking to transform markets into colonies."[49] It was not ended from within, only without.

C. Progressive Democracy

Which ideals filled the space that the decline or defeat of the others left? By far the most important was progressive democracy. It has continually prevailed over all competitors. [50] 'Progressive democracy' could probably cut across elements of

(1938). Crucially, the same general duties owed to a business were placed in the Public Companies Act 1937, the Aktiengesetz 1937 (Ger.).

43 Neumann, *supra* note 12, at 341: "Although there is no legal compulsion to join the labour Front, the pressure is so strong that it is inadvisable for anyone to stay out. The members must attend meetings, but must not enter into discussion."

44 Erste Verordnung des Führers und Reichskanzlers über Wesen und Ziel der Deutschen Arbeitsfront vom 24. Oktober 1934.

45 DAF Verordnung 1934 §7, "Interessenvertretung der Beschäftigen. Die Deutsche Arbeitsfront hat den Arbeitsfrieden dadurch zu sichern, daß bei den Betriebsführern das Verständnis für die berechtigten Ansprüche ihrer Gefolgschaft, bei den Gefolgschaften das Verständnis für die Lage und die Möglichkeiten ihres Betriebes geschaffen wird. Die Deutsche Arbeitsfront hat die Aufgabe, zwischen den berechtigten Interessen aller Beteiligten jenen Ausgleich zu finden, der den nationalsozialistischen Grundsätzen entspricht und die Anzahl der Fälle einschränkt, die den nach dem Gesetz vom 20. Januar 1934 zur Entscheidung allein zuständigen staatlichen Organen zu überweisen sind. "

46 Neumann, *supra* note 12, at 340-41 (elaborating five functions as indoctrination, taxation, securing positions for reliable party members, atomizing the working classes, and 'the exercise of certain inner trade-union functions.').

47 *Id*. at 340.

48 Karl Robert (a pseudonym), Hitler's Counterfeit Reich, 27-28 (1941).

49 Franz L. Neumann, Labor Mobilization in the National Socialist New Order, 9(3) Law & Contemp. Probs. 544, 546 (1942).

50 An alternative or additional taxonomy was developed by Mark J. Roe, Strong Managers, Weak Owners (1994) and Political Determinants of Corporate Governance (2003) using the terms 'populism' and 'social democracy'; however

each other ideal that Kahn-Freund identified, with the clear exception of fascism. It contains elements of liberalism's 'free play of social and economic forces', but would never 'condemn all combinations'. It would approve social conservatism's protection of weaker parties, but was committed to inclusion of all, and would not admit that people were 'existentially isolated'. It would endorse collectivism's desire to leave groups to govern themselves, but not accept such a thing as a 'basic contradiction in society'. Conflicts between capital and labor could be positively resolved through legislative enactment of social and economic rights,[51] to infuse law and justice into social relations of subordination and power.[52]

By itself, the concept of 'democracy' involves a basic Periclean desire to see that "administration is in the hands of the many and not of the few."[53] The desire was to socialize, not merely ownership, but power.[54] After a vote in politics was won socialists gradually shifted their emphasis from 'common ownership of the means of production' to focus on power, whether its form was property or not. They aimed for votes, not just in politics, but in the economy. Nationalization ceased to be an end in itself. In Germany, the trade unions (themselves having been nationalized by the Nazis) ceased uniformly to advocate government ownership of everything, rather than creating social ownership of specific enterprises.[55] In the UK, the post-war Labour Party, like democratic socialist parties across Europe, found state ownership, though far better than private monopolies, did not necessarily attain goals of social liberation, either at work or as citizens. This was reflected in the change of the Labour Party's clause IV, as originally written by Sidney Webb. It was amended to echo Pericles: a "democratic socialist party" which believed power should be "in the hands of the many not the few".[56] In any case, ownership of property had already ceased to be truly 'private' (in Marx's definition of 'capitalism') in Marx's own lifetime.[57] Mass production through mass enterprise, aggregating capital from millions of shareholders meant ownership had already become, not private, but social. This was why the architects of democratic socialism in Europe and the American New Deal, especially A.A. Berle, became so

these categories are insufficiently complex to provide an overall analysis of ideological development. *See* the discussion in Ewan McGaughey, Participation in Corporate Governance 46-47 (2014) from which this section draws. Considerable definitional disagreements can be drawn out if this is desired. *See* James Alexander, *The Major Ideologies of Liberalism, Socialism and Conservatism,* 63 Pol. Stud. 980 (2015).

51 *See* Campaign Address on Progressive Government at the Commonwealth Club in San Francisco, California (1932).

52 Otto Kahn-Freund, Labour and the Law 7 (1972); Sidney Webb & Beatrice Webb, The History of Trade Unionism App. VIII, 760 (1920).

53 Thucydides, *supra* note 2.

54 Clark Kerr, *The Trade Union Movement and the Redistribution of Power in Postwar Germany* , 68(4) Q. J. Econ. 535, 535, 544-45, 555 (1954).

55 *See* Ewan McGaughey, *The Codetermination Bargains: The History of German Corporate and Labour Law,* 23(1) Colum. J. Eur. L. 135, 155-67 (2016).

56 Labour Party Constitution clause IV (1918); Thucydides, *supra* note 2.

57 *See* Karl Marx, Capital vol. III, ch. 27 (1883). "In the stock companies the function is separated from the ownership of capital, and labor, of course, is entirely separated from the ownership of means of production and of surplus-labor. This result of the highest development of capitalist production is a necessary transition to the reconversion of capital into the property of the producers, no longer as the private property of individual producers, but as the common property of associates, as social property outright".

concerned with the distribution of economic power.[58] Ultimately, it implied voting in the economy had to become more equal.

There are, of course, multiple conceptions or "models of democracy",[59] which build on the basic Periclean concept: liberal, conservative, social, and so forth. The core of any mass democracy was resolution of conflicts through representative voting. Other conceptions can involve direct participation; a broader 'social contract' containing reciprocal rights and duties;[60] greater or lesser integration of human rights and the rule of law to make voting genuinely free and informed;[61] deliberative debate through an inclusive process of social communication.[62] But whichever the conception, at the centre is a commitment to moral equality among people.

The concept of "progressive" democracy was expressed admirably well by one of its historical opponents, who happened to be the "father of modern company law" in the United Kingdom.[63] Robert Lowe MP fiercely opposed the Second Reform Act 1867. This extended the franchise to more working class people for the first time since 1832, by lowering the qualification of owning property in order to vote. In the Third Reading, Lowe said this:

> This principle of equality which you have taken to worship, is a very jealous power; she cannot be worshipped by halves, and like the Turk in this respect, she brooks no rival near the throne. When you get a democratic basis for your institutions, you must remember that you cannot look at that alone, but you must look at it in reference to all your other institutions. When you have once taught the people to entertain the notion of the individual rights of every citizen to share in the Government, and the doctrine of popular supremacy, you impose on yourselves the task of re-modelling the whole of your institutions, in reference to the principles that you have set up... .[64]

As Lowe said, brooking no rival, the "progressive" among democrats seeks to increase the number of fields in life, and particularly the number of social institutions, where power is in the hands of the many, not the few. This ideal sees

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58 *See* in particular, Franklin D. Roosevelt, Campaign Address on Progressive Government at the Commonwealth Club in San Francisco, California (authored by AA Berle; Adolph A. Berle, *Property, Production and Revolution*, 65 Colum. L. Rev. 1 (1965).

59 *E.g*. David Held, Models of Democracy (3d ed. 2006) giving a broad summary. David Held also prophetically stressed the key feature while chairing a public lecture at the LSE in 2010: 'in any kind of democracy, you do need mechanisms to change your leadership. I mean, the art of democracy is you no longer have to chop off the heads of your leaders because there are ways of removing them.' See https://www.youtube.com/watch?v=CkYeKYtzZhA, at 1:06:00.

60 Plato, Crito (ca. 350 BC).

61 Conor Gearty, Civil Liberties3 (2007); and *see* Matadeen v. Pointu [1998] UKPC 9, 9-13 (Lord Hoffmann).

62 Jürgen Habermas, Between Facts and Norms ch. 7 (1996).

63 John Micklethwait and Adrian Wooldridge, The company: A Short History of a Revolutionary Idea ch. 3 (2003).

64 HC Hansard Debs, Representation of the People Bill, Third Reading (15 July 1867) col. 1543.

people as having the capacity to fulfill their potential, and "lend a helping hand" to each other by organizing a just society devoted to human development.[65]

After the fall of the Berlin Wall, it might have appeared there was no serious competitor to progressive democracy. There was, claimed Francis Fukuyama, an "end of history" when it came to American "liberal democracy".[66] Against this view, many argued convincingly that 'Varieties of Capitalism' did and would persist in an economic sense. There was no necessary convergence around a supposed 'liberal' model of law and economics.[67] But it might have been agreed that in the political sphere, the challenge was over: nobody would seek to undo the basic structure of democratic society.

D. Neo-Liberalism and Neo-Conservatism

As the 21st century opened, it became clear that there were at least two major forms of ideal that did pose a challenge, though only one was real. The two ideals are loosely (and often pejoratively) labelled as 'neo-liberal', and 'neo-conservative'. The social ideal of neo-liberalism views individuals as having the full capacity to take rational decisions, except where they organize through the 'coercive' organs of the state.[68] People acting in markets are rational, and people in government are not. Public sector administration, which is an important channel for collective action for progressive democrats, should be reduced except to set minimal "rules of just conduct".[69] Indeed, it has been argued in a growing literature that the ideals of neoliberalism have created what is known as *The Neo-Liberal State*.[70]

The trouble is that neo-liberalism – if we take its theoretical proponents at their word – has only ever existed in the pages of academic fantasy. A neo-liberal state is, in the literal sense of Robert Nozick's book title, a "Utopia".[71] You could not have the Nozick's night watchman state, based only on principles of contract, tort and unjust enrichment, without impossible levels of poverty and coercion. An end to all consumer protection, all tenancy rights, road traffic regulation, labor rights, food safety inspections, public firefighters, securities regulation, town planning, let alone public education, health and social security would be beyond serious contemplation. You could not reduce everything to Friedrich von Hayek's "just rules of the game" without the same consequences of disaster.

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65 *See* Benedict de Spinoza, On the Improvement of the Understanding §§13-14 (1677); Sidney Webb & Beatrice Webb, Industrial Democracy, 847-49 (9th ed., 1926); Amartya Sen, The Idea of Justice 228-30 (2010).

66 Francis Fukuyama, The End of History and the Last Man (1991). Note that Fukuyama's use of the term 'liberal democracy' for the situation in the U.S. sits uncomfortably with the analysis to be offered in the next sections. His work was not characterized by close institutional analysis, or historical precision.

67 Peter Hall & David Soskice, Varieties of Capitalism (2001) but *cf.* Ewan McGaughey, Participation in Corporate Governance ch.1,17(2014) (highlighting the 'remarkable functional convergence' in financial institution dominance of shareholder voting rights).

68 Represented by Robert Nozick, Anarchy, State and Utopia (1974).

69 Friedrich A. Hayek, Law, Legislation and Liberty vol. II (1976).

70 Raymond Plant, The Neo-Liberal State (2010).

71 *Cf.* Thomas More, Utopia Pt.1 (1516). This makes clear, through the words of 'Raphael Nonsenso', that the description of Utopia ('no place') is not meant to be an ideal society: on the contrary it is built with serious defects. Some of these nuances, and the humor, are sometimes lost.

To take just one example, to have an economy operating only according to Hayek's version of the "just rules of the game" would mean a return to damages for trade unions taking collective action, as before the Clayton Act of 1914 in the U.S., the Trade Disputes Act 1906 in the U.K., or the Anti-Socialist Acts of the Bismarckian era.[72] Various systems of criminalizing free association do operate today. Every despotic society has to suppress free trade unions, but that very suppression always entrenched poverty, and had to give way by overwhelming popular demand, to the creation of modern democracy. In practice, neo-liberalism could be manifested in political slogans. Margaret Thatcher said there was "no such thing as society", because collective autonomy might be replaced by "individuals and families".[73] *The Constitution of Liberty* might be pounded into a table, and declared to be "what we believe".[74] But it was a belief, not a reality. It was impossible to maintain any semblance of modern society without the apparatus of a welfare state. Without it, impossible poverty, unemployment, and riots would give way to democratic change (or its unforgiving alternatives) precisely because those things impelled social democratization to begin with.

III. The Social Ideals of the U.S. Supreme Court

While neo-liberalism has only existed in academic theory, neo-conservatism is indeed workable. Its essential trick was to utilize the state to achieve the goals of its interest groups.[75] It has been operating on the back of the jurisprudence of the U.S. Supreme Court. There are, however, effectively two Supreme Courts: the first represented by a Republican appointed majority, which presided from 1969 with a brief interlude in 2016. A second is represented by Democratic appointees. These judges largely reason and explain the law like other judges. But for the Republican appointees, what are the essential contours of their social ideal, of modern neo-conservatism?

The story must begin in 1976. *Buckley v Valeo* was one of the first decisions after Justice William O. Douglas, the last remaining judge nominated by Franklin D. Roosevelt, had become so elderly that he could no longer come to court and vote. It decided that a candidate for political office should be entitled to spend unlimited amounts of his or her money on campaigning.[76] Over the powerful dissents of Justices White and Marshall,[77] the Republican appointees struck down large parts of the Federal Election Campaign Act of 1971, especially the §608 limits on political expenditures, which served as a model for the limits in all other democratic countries.[78] Spending money was, apparently, an exercise of free 'speech' under the First Amendment.

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72 Friedrich A. Hayek, The Constitution of Liberty ch.18 (1960).

73 Interview by Douglas Keay with Margaret Thatcher, U.K. Prime Minister, Women's Own (23 Sept. 1987).

74 *See also*, the appendix on 'Why I am not a Conservative' in Hayek, *supra* note 73.

75 This is not to suggest that 'neo-conservativism' has any coherent, principled philosophy, other than shifting desires for money or power. Exemplifying this disarray, see the 41 chapters of I Kristol, Neoconservatism: The Autobiography of an Idea (1995).

76 Buckley v. Valeo, 424 U.S. 1, 250 (1976).

77 *Id*. at 260-65 (White, J.) and 288 (Marshall, J.).

78 *e.g*. in the U.K., Political Parties, Elections and Referendums Act 2000 s. 79 & Sch. 9, §3 ff.

We have good international evidence that the least democratic developing countries spend the most money on elections.[79] At its most stark, *Buckley* v. *Valeo* put American politics on the road to serfdom: politicians indentured to business, completely at odds with the will of the people.[80] Two years later in *First National Bank of Boston* v. *Bellotti*, Justice Powell held for a majority, over four dissenting votes, that state legislation could not restrict expenditure by corporations during a ballot.[81] Without these changes that *Buckley* began, the adminstrations of Reagan, the Bush family, and numerous state governors would just not have been possible. As money tried to buy both sides, it shifted all politics to the short-term interests of the rich.

After *Buckley* and *Bellotti* the Court's Republican majority entrenched a hardline 'free-enterprise' philosophy, just as Powell and the U.S. Chamber of Commerce had envisaged.[82] They took away federal rights to organize from teachers at religious schools.[83] They allowed states to ban union representatives who were not of 'good moral character'.[84] They allowed employees to be searched at work, like criminal suspects, by employing entities.[85] They hollowed out access to justice against securities fraud, allowing cases to go to arbitrators chosen by the contracting party with greater bargaining power.[86] They denied employees the right to claim for medical malpractice, when employers were the direct purchaser of a health care plan.[87] They removed protection for undocumented workers to the fundamental right to organize a union.[88] They tried to ensure that discrimination claims could not be brought where markets were themselves discriminatory.[89] They also tried to cancel discrimination claims brought after 180 days of an act, even if an employee had no way of knowing they had suffered,[90] though both decisions were reversed

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79 Paul Collier, The Bottom Billion chs. 3-5 (2008).

80 Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12(3) Perspectives on Politics 564 (2014).

81 First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (White, Brennan, Marshall & Rehnquist, JJ., dissenting). Per Justice White, 'Corporations are artificial entities created by law for the purpose of furthering certain economic goals.... the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process.' *See further* J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?* 82(4) Colum. L. Rev. 609 (1982).

82 Powell, *supra* note 21.

83 NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) (5:4 on the National Labor Relations Act (NLRA) 1935).

84 Brown v. Hotel and Restaurant Employees, 468 U.S. 491 (1984) (on the NLRA 1935).

85 O'Connor v. Ortega, 480 U.S. 709 (1987) (on the Fourth Amendment).

86 Shearson & Am. Express, Inc, v. McMahon, 482 U.S. 220 (1987) (under the Securities Exchange Act of 1934) and Rodriguez de Quijas v. Shearson & Am. Express Inc., 490 U.S. 477 (1989) (5:4 under the Securities Act of 1933).

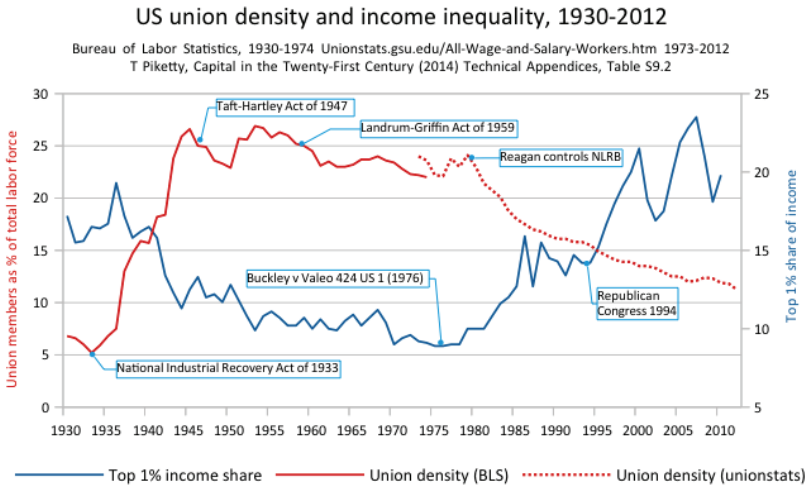
87 Mertens v. Hewitt Associates, 508 U.S. 248 (1993) (under the Employee Retirement Income Security Act of 1974).

88 Hoffman Plastic Compounds v. NLRB, 535 U.S. 137 (2002) (5:4 under the NLRA of 1935).

89 Wards Cove Packing Co v. Atonio, 490 U.S. 642 (1989) (5:4).

90 Ledbetter v. Goodyear Tire & Rubber Co, 550 U.S. 618 (2007) (5:4, Civil Rights Act 1964).

by a briefly functioning Congress. They held that votes cast in Florida could not be looked at in a recount, with the result that George W. Bush became President.[91] Then, the Supreme Court struck down a ban on handguns that had been established in Washington DC for 31 years,[92] and struck down a system for preventing southern states disenfranchising voters that had been in place for 48 years.[93] No modern judiciary has engaged in a more sustained assault on democracy and human rights. In particular, its attack on labor and democratic society made inequality soar.



But the most astonishing modern phase of jurisprudence began in *Citizens United* v. *Federal Election Commission*.[94] The Court ruled on whether the Federal Election Campaign Act 1971 §441b, which prohibited corporations and unions from using treasury money to fund 'electioneering communications', was 'constitutional'. At issue was an extended 'negative ad' called *Hillary: The Movie.* The D.C. Circuit Court held the advertisement had violated §441b, because it was paid for by a political action committee and aired within a prohibited campaign period. The five Republican appointees on the U.S. Supreme Court reversed this and held that any expenditure by a corporation or a union for the purpose of election was a necessary part of the First Amendment, and so §441b, which had come from the Bipartisan Campaign Reform Act 2002 §203, was unconstitutional.

The insight that *Citizens United* gives into the Court's social ideal is not merely its disregard for arguments that corporate money would corrupt politics, nor its view that a corporation is a 'person' like any other. Instead, the key is how it rationalized internal corporate power. When a corporation spends money, it necessarily uses resources that are generated by every stakeholder who contributes capital and labor to the enterprise: particularly the directors, shareholders, and employees. Out of

91 Bush v. Gore, 531 U.S. 98 (2000) 5:4, Fourteenth Amendment).
92 District of Columbia v. Heller, 554 U.S. 570 (2008) (5:4, Second Amendment.
93 Shelby County v. Holder, 570 U.S. 529 (2013) (5:4, Voting Rights Act 1965 §5).
94 Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

all those people – potentially millions of ultimate beneficiaries behind institutional shareholders, especially those contributing through retirement savings, and maybe thousands of employees – who should determine the corporation's political preferences? A poll of those stakeholders would usually reveal widely varying and conflicting views. In other countries, that problem is usually taken to indicate that nobody can really be said to represent a corporation and spend its money politically, or there must be a vote of some kind.[95]

Yet the U.S. Supreme Court's Republican appointees thought political spending should be determined in the same way that it thought all issues should be decided: by managerial prerogative.[96] In particular, Justice Scalia said that corporate speech was like that of a political party:

> the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf. The association of individuals in a business corporation is no different—or at least it cannot be denied the right to speak on the simplistic ground that it is not "an individual American."[97]

On this view, (which Scalia believed was how a political party should operate) people in an association are necessarily 'giving the leadership' their rights to be exercised on their behalf.[98] Supposedly, this occurs through the exercise of free will, both an implicit and chosen aspect of joining any association.

Second, in *Burwell* v. *Hobby Lobby Stores Inc*, the Supreme Court held that an employee's right to contraception under health care plans regulated by the Affordable Care Act of 2010 was subject to an employer's 'religious freedom'.[99] The Religious Freedom Restoration Act of 1993 prevented government from placing a substantial 'burden' on a 'person's exercise of religion'. The shareholders and managers of Hobby Lobby Stores Inc, which employed around 22,000 staff, claimed that the requirement to provide health care plans, which included payments for four kinds of contraception that would prevent an egg developing in the uterus, burdened their exercise of religion. The majority of the Court, while declining to finally decide that this aspect of 'Obamacare' infringed the First Amendment, held the mandate violated the corporate owners' religious rights.

During argument, Justice Scalia spoke forcefully in favor of the 'leadership' principle he had mentioned in *Citizens United.* He said "whoever controls the corporation determines what the corporation" does.[100] In the opinion for the Court, Justice Alito addressed the issue of who the legal fiction of 'personhood' of the corporation really protected:

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95 *E.g*. in the U.K., *see* the Companies Act (2006) § §366-68, 378.

96 *See* the Delaware General Corporation Law (1958), Del. Code, Ann. tit. 8, § 141(a) (1953).

97 558 U.S. 310 (2010). On theories of political parties, which bear close resemblance to Scalia's view, see R Michels, Political Parties (1909).

98 Citizens United v. Federal Election Comm'n, 558 U.S. 310, 392 (2010)(Scalia, J., concurring). *Cf*. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive Sta*te 38 Pol. Sci. Q. 472 (1923).

99 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2783 (2014).

100 Transcript of Oral Argument at 53, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Nos. 13–354, 13–356).

> the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. [101]

Thus, the corporate form is designed for 'protection for human beings'. But it protects some more than others. In essence, it protects 'whoever controls the corporation'. It allows the people in control to impose their values on others, absolutely.

Third, in *AT&T Mobility LLC* v. *Concepcion*, the Supreme Court held that a corporation may include a binding clause in standard form contracts with consumers, under the Federal Arbitration Act of 1925, excluding the right to bring a civil or class action claim. According to the majority, those arbitration agreements must simply be enforced "according to their terms."[102] This suggested that a business will select the people who decide a legal dispute, apparently even including one on compulsory consumer rights. This perfected the cases on securities arbitration in the 1980s, and a similar decision that employment rights could be taken away by contracts.[103] In the *Lochner* era,[104] the Supreme Court had struck down social and economic legislation as unconstitutional. In the *Concepcion* era, there was no longer any such need; the Republican appointees have said that any business can simply opt out of social duties. Some form of arbitration agreement is now estimated to cover a quarter of the American civilian workforce.[105] This privatization of justice means that consumers and employees have no inherent guarantee of a fair and impartial hearing, *i.e.* no rights for anyone, except for the 'leader' of the enterprise.

The result is, the U.S. Supreme Court's 'neo-conservative' ideal has three main features. First, it emphasizes the absolute autonomy of 'the leadership' whenever there is a conflict. Second, it negates all rights for other members of an association: everyone is equal in their subordination to the leader. Third, it excludes the ability of law to protect the vulnerable in supposedly market or private affairs. It differs from neo-liberalism because state power is actively used to police social relations in favor of managerial dominance. It pursues a social ideal that almost conforms with the fascist theories of the 1930s, with one major exception. Neo-conservatism has abandoned fascism's concern for the social welfare of insiders. Welfare has merely become optional, at the discretion of the leader of the organization.

This does not mean that the Republican judicial appointees were consciously pursuing any one ideology or another, that there is any documentary evidence Justice Scalia had fascist connections, or indeed that the remaining appointees do.

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101 *Id.* at 18.

102 AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); see also Volt Information Sciences v. Stanford University, 489 U.S. 468 (1989).

103 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009): nothing in law 'suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.' (Thomas, J. for the majority) Presumably unequal bargaining power is one thing, as it says in the National Labor Relations Act of 1935 §1.

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

105 Matthew W. Finkin, *America's Disappearing Labor Law* in Przyszłość Prawa Pracy (The Future of Labor Law) 573 (2015).

Justice Scalia, himself, made clear on various occasions that he simply thought the purpose of the U.S. Constitution was, not to empower the fullest participation of people in democratic life,[106] but to be a limit on government.[107] People have accused the judiciary of anti-democratic ideology before, but as Otto Kahn-Freund had said, that could overestimate "the political self-awareness of the judges."[108] Another very different judge in the U.K., Lord Sumption, seemed to frame the issue accurately;

> The process by which democracies decline is more subtle.... usually more mundane and insidious.... they are slowly drained of what makes them democratic, by a gradual process of internal decay and mounting indifference, until one suddenly notices that they have become something different. [109]

IV. The Social Ideal of Donald Trump

If nobody had noticed before 2015 that 'something different' was taking place in U.S. politics, it became painfully clear as the Republican presidential primary for 2016 gathered speed. Once again, it is important to stress that Donald Trump, the individual, is profoundly uninteresting. He contributes nothing new to political science. He has an obvious personal struggle with self-esteem. The persona and campaign he has crafted reflect this.[110] Nevertheless, the combination of policy positions serves as a useful example of what monopoly capitalism, driven by neo-conservative politics on the U.S. Supreme Court, has led to.

The defining feature of the persona Trump cultivates is hardcore managerialism. This emphasizes his personal belief that he 'wins', and this is why he can 'make America great again'. It begins with his previous reality TV show, *The Apprentice*, where Donald Trump in the 'board room' would tell candidates, who apparently sought jobs in his inherited real estate firm, each week 'you're fired'. The psychological spectacle, from the viewer's perspective, invited a strange empathy with the cult of the business leader. Who would the leader fire? Would you agree with the leader? And if you did not agree, why were you wrong? It seems unlikely that Trump acted differently in real life. For example, Trump dismissed workers

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106 *E.g*. Louis D. Brandeis, *The Fundamental Cause of Industrial Unrest* in U.S. Commission on Industrial Relations, Final Report and Testimony, Vol. 8, 7659-60 (1916).

107 LSE Public Lecture (Feb. 6, 2008) which the author was fortunate to attend. With hindsight, the assessment given by Richard A. Brisbin, *The Conservatism of Antonin Scalia* 105(1) Pol. Sci. Q. 1, 6, (1990) may be open to some qualification.

108 *See* Otto Kahn-Freund, *Autobiographische Errinerungen an die Weimarer Republik. Ein Gespräch mit Wolfgang Luthardt* Kritische Justiz 183, 194 (1978), "Ich habe in der Arbeit einen großer Fehler gemacht. Ich habe nämlich – um einmal Ihren Ausdruck zu benutzen – das politische Selbstverständnis der Richter überschätzt." Kahn-Freund, speaking in 1978 of his famous 1931 article on the German courts' pursuit of a fascist social ideal, says, "I made a great mistake in that work. Namely – to use one of their expressions – I overestimated the political self-awareness of the judges."

109 Lord Sumption, *The Limits of the Law,* 27th Sultan Azlan Shah Lecture, Kuala Lampur (Nov. 20, 2013) available at https://www.supremecourt.uk/docs/speech-131120.pdf.

110 *See* in particular, *Donald Trump speaks to Matt Frei* (July 19, 2013) Channel 4 at 2:00 to 4:00.

who were engaged in organizing a union at his hotels to improve their wages.[111] This behavior mirrors the leadership principle.

However, the key element lacking for Trump to be characterized as a real fascist is a concern for insider welfare. Like the Republican majority of the Supreme Court, Trump appears to be situated firmly in the neo-conservative frame and lacks the historical awareness to break out. Despite his talk of 'jobs' there is no commitment to full employment. There are pledges to cut the minimum wage. Despite criticizing bad trade deals, there is no commitment to putting labor and environmental standards in them. A Republican candidate, in order to complete the fascist profile, could, of course, pretend to swing sharply to the 'left' to capture voters whose living standards have stagnated and declined over the last 40 years. Elements of such a 'strategy' might have been detected in Trump denouncing the invasion of Iraq, blaming 9/11 on the Bush administration, criticizing trade agreements, or praising the National Health Service in Scotland.[112] Trump's principles are, to put it mildly, not fixed. However, it is doubtful that any coherent fascist agenda has been thought through, rather than policies being made off-the-cuff. This is why, without any serious display of concern for welfare of insiders,[113] the social ideal of Donald Trump would accurately be termed, not as fascism, but fascism-lite.

Politically, Trump's strong businessman image is consistent with key elements of fascist behavior. The same, however, is consistent with an indistinctive 'Hobbesian' monarch,[114] who would make everyone else's lives nasty, brutish and short. The infallible leader pledges order and stability, while totally denying rights for individuals. The implicit, yet unenforceable, 'social contract' is that those on the inside may be protected, while those on the outside fare less well. So, among other things, Trump has said to combat military enemies "you have to go after their families".[115] He pledges to do "a hell of a lot worse than water-boarding".[116] He says there "has to be some form of punishment" for women who have abortions.[117] He promises a mass "deportation force" to be used against around 11 million undocumented migrants.[118] Under international humanitarian law, this means war crimes, torture, violence against women, and premeditated violations of rights

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111 *E.g.* Michelle Chen, *No Surprise: Trump Is a Union Buster at His Own Hotel*, The Nation, Aug. 21, 2015.

112 *E.g.* David Millward, *Trump Under Attack as He Praises NHS Care,* Telegraph, Aug. 7, 2015.

113 It must be noted that in the fascist dictatorships of Italy and Germany, inequality and poverty became immeasurably worse, despite the supposed fact of full employment. The state quickly went bankrupt, as it began its campaign of murder. Franz L. Neumann, *Labor Mobilization in the National Socialist New Order* 9(3) Law & Contemp. Probs. 544 - 46 (1942).

114 Thomas Hobbes, Leviathan or The Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil (1651).

115 On Fox & Friends, *Donald Trump on ISIS: 'You Have to Take out Their Families'* (Dec.2, 2015) 1:40.

116 T McCarthy, *Donald Trump: I'd Bring Back 'a Hell of a Lot Worse Than Waterboarding'*, The Guardian, Feb. 7, 2016.

117 On MSNBC, *Donald Trump: Women Deserve 'Some Form of Punishment' for Abortion* (Mar. 30, 2016) 1:20.

118 *Donald Trump Wants to Deport Every Single Illegal Immigrant - Could He?* bbc.co.uk, Nov. 11, 2015.

of the child.[119] Under the U.S. Constitution this means inhumane and degrading treatment, infringing the right to privacy, and breaching due process of law.[120] That said, those very goals – minimizing torture, abolishing the right to choose, total aggression toward rights for outsiders – had been consistently supported by Justice Scalia in minority *dicta* and media interviews during his tenure on the court.[121] Trump makes what was implicit explicit, and carries the same ideals to their logical conclusion. The common thread is to proclaim an absolute right for the leader, and an absolute denial of rights for everyone else.

Why, in a democratic society, would anybody believe Trump would 'make America great', when policies are unrelated to the goal? The answer is, the 'leader' plays on systemic corruption. It is said that nothing gets done anymore, "America doesn't win anymore", and this contains an element of truth.[122] In the U.S., led by Ted Cruz, government shut down in 2013. Legislation reflecting the electorate's will has only been possible in America in four years since 1980, two in Bill Clinton's presidency, and two in Barack Obama's, before the Congress was disabled by Republican winning majorities or blocking minorities. From the perspective of the most ideological, corporate election spending must ensure, not that Republicans win to implement policy (by now this has become quite irrelevant), but win to maintain a filibustering minority in the Senate, or a House of Representatives majority, and a grip on the Supreme Court. Everything must be done to prevent the reversal of *Buckley* v. *Valeo*.[123]

Election spending must, of course, be accompanied by linguistic propaganda. Ideology often begins by taking ordinary concepts and extending them to inappropriate subject matter.[124] During the *Lochner* era of the U.S. Supreme Court, the most obvious example was 'freedom of contract'. The important value of private autonomy, which can be seen as appropriate for commercial transactions, became a constitutional doctrine that legitimized unequal bargaining power in contracts between workers and employing entities, tenants and landlords, or consumers and corporations.[125] Similarly, the Powell memorandum in 1971 used the rhetoric of 'free enterprise' to defend, not partnerships or small business, but corporate directors, sheltered by asset managers and banks, who appropriate the shareholder

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119 Provisions violated include the Fourth Geneva Convention 1949 art 3, and the United Nations Convention on the Rights of the Child art 9.

120 U.S. Const. amends. IV, V and VIII.

121 *E.g*. on torture, see *US Judge Steps in to Torture Row,* BBC News, Feb.12, 2008, available at http://news.bbc.co.uk/1/hi/world/americas/7239748.stm, accessed Nov. 8, 2018. On abortion, *see dissents* by Scalia, J. in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) and *Stenberg v. Carhart*, 530 U.S. 914 (2000). On Guantanamo Bay *see Rasul v. Bush*, 542 U.S. 466 (2004) and *Boumediene v. Bush*, 553 U.S. 723 (2008).

122 Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens* 12(3) Perspectives on Politics (2014) 564 (finding that policy preferences of most U.S. citizens ceased to have any relation to legislation in a data period from 1981 to 2002).

123 424 U.S. 1 (1976).

124 Otto Kahn-Freund, *Hugo Sinzheimer 1875-1945* in Labour Law and Politics in the Weimar Republic 102 .(1981).

125 Lochner v. New York, 198 U.S. 45 (1905). The 'Lochner era' ended with *West Coast Hotel Co v. Parrish*, 300 U.S. 379 (1937) after Franklin D. Roosevelt's threat to add judges to the bench to approve New Deal legislation.

votes in the economy with 'other people's money.'[126] In *Citizens United*, the idea of free 'speech' under the First Amendment is extended from human beings to corporations, in order to corrupt the basis of democratic discourse.[127]

Another strategy of linguistic propaganda, with similar effect, is to rebrand concepts with words favorable to the political cause. Instead of changing society to match people's perceptions of what is right, people's perceptions are changed to match society. Inheritance tax becomes 'death tax'. Global warming and environmental damage becomes 'climate change'. Oil drilling and fracking becomes 'energy exploration'. Employers, who bark 'you're fired', became 'job creators'. Language becomes, not a contextually sensitive basis for deliberative discourse,[128] but in the words of Newt Gingrich 'A Key Mechanism of Control'.[129] The essential goal is to take people's trust, and abuse it by making them vote against their own interests.[130]

The difficulty is, language games last only so long, before the politics of division will pay more. George W. Bush's 'ownership society' was sharply redefined by Barack Obama as the 'you're on your own' society.[131] Republicans who said they want 'right to work' states are called out for really wanting 'right to work for less' states.[132] The politics of division become ever more essential as government fails to solve the problems it is meant to: of escalating inequality, poverty, unemployment, and climate damage. Before 2015, the Republican Party had kept a lid on rampant racism, sexism, homophobia, while ensuring that the subtext of its policies still appealed to those sentiments. Donald Trump, however, has arrived at a time when matters are so extreme, it pays to make the implicit explicit. It spurs other politicians to do the same.

So, to distract people from the causes of social problems – of an authoritarian economy, where wealth and power are in the hands of the few – it is necessary

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126 Brandeis, *supra* note 26; Adolphe A. Berle & Gardiner Means, The Modern Corporation and Private Property (1932) Book IV, and McGaughey, *Democracy in America at Work, supra* note 24.).

127 Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

128 *See* L. Wittgenstein, Philosophical Investigations §43(1953): "the meaning of a word is its use in a language," and J Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (W. Rehg. trans., 1996).

129 Newt Gingrich, *Language: A Key Mechanism of Control* (Memo to GOPAC 1996). Frank I. Luntz, Win: The Key Principles to Take Your Business from Ordinary to Extraordinary (2011). Reviewed by A Grayson, "*Job Creators": Luntz Strikes Again*, Huffington Post(Sept. 28, 2011).

130 *cf.* W. Lippmann, Public Opinion chs XV and XX(1922), on the 'manufacture of consent' by 'leaders' among the 'rank and file' for benevolent purposes in a democracy. This older view does not seem to sufficiently embrace the dignity of each individual.

131 *E.g*. Barack Obama, *Acceptance Speech,* N.Y.T. (28 August 2008). Even that 'ownership society' was itself a corruption of the original notion that people could own their own homes, rather than being indebted to a bank for most of their lives, *cf*., Pettitt v. Pettitt [1970] AC 777, 829 (Lord Diplock) on the 'the emergence of a property-owning, particularly a real-property-mortgaged-to-a-building-society-owning, democracy'.

132 *E.g*. G. Gresham, *Call It 'Right-to-Work-for-Less,' Not Right-to-Work* (March 12, 2015) N.Y.T.. The 'right to work' state is itself a usurpation of the original right to work, by being secured a job on fair remuneration, e.g. in the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) art 23.

to divide people. Citizens are turned against new immigrants. Christians against Muslims. Union members against their colleagues. Workers against the unemployed. White people against black people. Old against young. Educated against uneducated. Straight against gay. Men against women. Mothers against their own children. The politics of division are not accidental. They are meant to inhibit people's sense of solidarity, the basis for taking collective action. They represent the essential strategy of an interest group that cannot win any other way. As all else fails, they lie and try to steal the vote. Sometimes, just sometimes, and whatever the positive law, there is an inherent right to resist, to "let justice be done, whatever be the consequence."[133]

V. Conclusion

American politics today may appear dangerous, but there is an alternative. The politics of 'democracy and social justice', to make a 'living law',[134] celebrated its 100th birthday in 2016, and remains far stronger. Social justice means everyone is empowered to achieve their fullest potential. It turns the ways of an old Platonic Republic on their head, so that instead of the individual being subordinated to society,[135] all law, every social institution, serves human freedom.[136] This means universal education, full and fair employment, social security, and democratic voice in every social institution: in government, the workplace, in enterprise, and public services. Power cannot be in the hands of the many, rather than the few until everyone can realize their potential. And people cannot realize their potential unless they have a voice in community decisions which make that possible. It is not an accident of history that half the Amendments to the U.S. Constitution since 1789 directly related to democratization, from votes for people who had no property, for people once classed as property, for women, for young people, for all.[137] When

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133 *cf*. Somerset v. Stewart (1772) 98 Eng.Rep. 499, 509 (Lord Mansfield).

134 Louis D. Brandeis, *The Living Law* 10 Ill. L. Rev. 461 (1916).

135 Plato, The Republic, Book IV, pt. V, 139 (D.Lee ed., Penguin 2007): 'the worst of evils' that 'spells destruction to our state' was 'interchange of jobs' that people were born for. But when each class 'does its own job and minds its own business that, by contrast, is justice and makes our state just.'

136 *E.g*. T. Paine, The Rights of Man Part II, ch. 3 (1792): "There is existing in man, a mass of sense lying in a dormant state, and which, unless something excites it to action, will descend with him, in that condition, to the grave. As it is to the advantage of society that the whole of its faculties should be employed, the construction of government ought to be such as to bring forward, by a quiet and regular operation, all that extent of capacity which never fails to appear in revolutions." Further, Adolf A. Berle, Power without Property: A New Development in American Political Economy 133 (1959), "the economic system shall give direct available opportunity – which is the real meaning of social justice – to all individuals. Averages and statistical aggregates are no longer enough."

137 U.S. Const. amend. XII. (presidential election procedure), U.S. Const. amend. XIII. (abolishing slavery), U.S. Const. amend. XIV. (defining citizenship), U.S. Const. amend. XV. (vote regardless of race), U.S. Const. amend. XVII. (direct Senator elections), U.S. Const. amend. XIX. (vote regardless of gender), U.S. Const. amend. XXIII. (enfranchising DC voters), U.S. Const. amend. XXIV. (prohibiting poll taxes), U.S. Const. amend. XXVI. (enfranchising people over 18 years old). This is not to

everybody can participate in the life of the law, reason, not rancor, prevails in discussion. Democracy makes the rule of law, not the rule of some man, legitimate.

The important question, in the next shift of politics, is how the interest groups that produced the Powell Memorandum, *Buckley* v. *Valeo*, and Trump, will be undone. Long-term political shifts are not about winning elections but altering the underlying forces of social power. Politics reflects this. Law entrenches barriers to democracy and social justice in three main ways. First, shareholders monopolize the votes in the economy, in corporations, over the voice of employees in general, and consumers or the public in regulated enterprises. This is the heart of "the 'Donald Trump' model of workplace relations".[138] Second, shareholder voting rights are themselves monopolized, not by people whose money is invested, but asset managers and banks with 'other people's money'.[139] This has led to an 'Enron economy' prone to financial crisis. Third, wealth discrimination blocks equal freedom to be educated, to access public and private schools and universities. Rich parents bribe their way to the front of the college line, ahead of students with more merit. The tools to achieve modern social security, universal health care, equal campaign finance, fair trade, progressive tax, and an end to climate damage are well known. But for democracy and enterprise to revitalize, we need (1) votes at work, (2) votes in the economy, and (3) an end to wealth discrimination and segregation in all education.[140]

In these problems, it should not be thought the United States is alone. Movements similar to the 'Trumped-up' Republican Party have been spreading. The 'United Kingdom Independence Party' and the 'Brexiteers', the German 'Alternative für Deutschland', the Austrian 'Freedom Party', and Putin's 'United Russia'. They thrive on social division. They have no principles, but to secure privilege for their industrial or financial masters, and their defining issue is climate damage. Russian backing for Trump and for Brexit, show its precarity.[141] Russian coal and oil are $183bn of its total $316bn in exports,[142] near 60 per cent of its export economy. So, Russia is backing political movements that deny climate damage. It will do anything to stall a zero-carbon future. For Russia's kleptocrats, breaking American democracy and the European Union are questions, not just of business sense, but economic survival, because every lump of coal, every drop of oil, will

suggest that Constitutional Amendments are always necessary, or sufficient: they are instead reflective of a change in social consensus.

138 McGaughey, *supra* note 11, at 16 (2012).

139 McGaughey, *supra* note 127.

140 For examples on point (1) see Massachusetts Laws, General Laws, pt. I, Title XII, ch 156, §23 (election of directors by employees, though voluntary and only for manufacturing companies, in force since 1919) and *see*, drafted by the U.S. for post-war Germany, Control Council for Germany, Control Council Law No 22 (10 Apr. 1946) Works Councils, for (2) see Joint Trusteeship Bill of 1989 HR 2664 for pensions, and by analogy the Dodd-Frank Act of 2010 §957 for brokers (which could be extended to all asset managers), and (3) by analogy see the Civil Rights Act of 1964, Title VII, which could be extended to education institutions, and add wealth as a protected trait.

141 *See* House of Commons, Digital, Culture, Media and Sport Committee, *Disinformation and 'Fake News': Interim Report* (29 July 2018) HC 363, 43-4, §162, explaining Russia's 'unconventional war' on the U.K. through social and state media, summarized in Ewan McGaughey, *Could Brexit Be Void?* King's L. J. (forthcoming 2019).

142 *See* Observatory of Economic Complexity: atlas.media.mit.edu/en/profile/country/rus/ .

be worthless when outcompeted by solar and wind. Compare China with fossil fuel exports under 2 per cent (but imports of 13 per cent),[143] the U.S. or U.K. under 8 percent, or France under 3 percent.[144] Russia must stop renewable energy among its UN Security Council partners at all costs. It cannot touch China, so it attacked the E.U. and U.S.[145] In 2016, climate damage became geo-political.

Where does that leave the neo-conservative politics that made Donald Trump? In this larger perspective, those business interests are in the process of being eclipsed. Coal powered the British Empire's 19th century. Oil powered the Empire State's 20th century. Renewable energy will power the 21st century. But sunshine and wind cannot be monopolized like fossil fuels. As a new plurality transforms the global economy, proprietary domination will matter less, networks more. The corporations building combustion motors, pumping oil they run on, and bankrolling oil's extraction, may dominate the global economy today, but that will not last for long.[146] The unending barrage of crisis and moral collapse is beyond words.[147] The people who are growing up with this reality, the once silenced majority in America, are building strategies to contain those interests. This is the real and necessary "wall". The United States of America risks descending into a new dark age, but the case for social transformation is compelling, and greater.

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143 *China to plow $361 billion into renewable fuel by 2020*, Reuters, Jan. 5, 2017.

144 *See* Atlas of Economic Complexity for 2015 export data for China, U.S., U.K., France, and Russia.

145 Comprehensively documented by Timothy Snyder, The Road to Unfreedom: Russia, Europe, America 104-10 and ch.6 (2018).

146 Compare the Fortune Global 500 (listed by revenue) and the FTGlobal500 (listed by market value).

147 However, some of those words are recounted in the growing list of inside story' bestsellers, such as Bob Woodward, Fear: Trump in the White House (2018) or Michael Wolff, Fire and Fury: Inside the Trump White House (2018).

Br. J. Am. Leg. Studies 7(2) (2018), DOI: 10.2478/bjals-2018-0013 sciendo

Constitutional Coup? The Case that Promulgated a New Constitution for Montana

Robert G. Natelson*

ABSTRACT

This Article examines one of the most important state court cases ever decided. In Montana ex rel. Cashmore v. Anderson, the Montana Supreme Court exercised its original jurisdiction to order, by a 3-2 margin, that the state's original constitution be replaced with one the people apparently had failed to ratify. In doing so, the court yielded to interest groups that favored replacing the original state constitution with an instrument based on radically different premises. Political threats may have caused the swing justice to vote for the new constitution, but even if that did not occur, the case represents a striking example of the failure of the rule of law. The Article also proposes reforms that may reduce the chances of a recurrence.

KEYWORDS

Constitutional Law, State Constitutional Law, Montana Supreme Court, Montana Constitution; Cashmore v. Anderson

CONTENTS

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"Government must be free to act."
— Montana Governor Forrest Anderson

"The fix was in."
—Linda S. Frey, Professor of History,
The University of Montana

I. The Most Important Montana Case Ever[1]

On August 18, 1972, the Montana Supreme Court, in a 3-2 decision, issued its judgment in *State of Montana ex rel. Cashmore v. Anderson*.[2] At the time, the case was described as the most important Montana's high court had ever decided.[3] And so it was. By resolving a contested referendum, the court replaced the state's original 1889 constitution with a new one based on very different political premises. By freeing state and local government from constitutional restrictions designed to curb corruption, special interest influence, and excessive state spending, the case paved the way for dramatic changes in state policies[4] that arguably contributed to Montana's precipitous relative economic decline in the ensuing years.[5]

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1 *Frequently cited sources*: Following are sources frequently cited in this article, along with the short citation applied:
100 Delegates: Montana Constitutional Convention of 1972 (1989) [hereinafter 100 Delegates]
Dorothy Eck, *Montana's Constitution of 1972: How It Came to Pass*, *available at* https://i2i.org/wp-content/uploads/Eck.pdf [hereinafter *Eck, Constitution*]
Larry M. Elison & Fritz Snyder, The Montana State Constitution (2000, 2011) [hereinafter Elison & Snyder]
Mike Males, *Convention 1972: Constitutional Myths Come True*, Montana Eagle, Mar. 17, 1982 [hereinafter *Males*]
Montana Constitutional Convention Commission, Montana Constitutional Convention Occasional Papers [hereinafter Occasional Paper No. ___]
Proceedings and Debates of the Constitutional Convention Held in the City of Helena, Montana, July 4th, 1889, August 17th, 1889 (State Publishing Co., 1921) [hereinafter 1889 Convention]
Montana Legislature, Verbatim Transcript, Montana Constitutional Convention, 1972 (1981) (7 vols.) [hereinafter 1972 Convention]
Ellis L. Waldron & Paul B. Wilson, Atlas of Montana Elections, 1889-1976 (University of Montana 1978) [hereinafter Atlas]

2 500 P.2d 921 (Mont. 1972), *cert. denied*, 410 U.S. 931 (1973).

3 J.D. Holmes, *The Constitution: Never Before an Issue Like This*, Great Falls Tribune, Jul. 14, 1972 at 4 (quoting a lawyer as stating, "No question of like importance, of such breadth and magnitude, has ever been submitted to this court in its existence … .").

4 *Males, supra* note 1, at 19 ("It is fair to say only one thing that has been said about the new constitution is correct: It really is the dynamo which has led to the uniquely progressive and activist Montana government of the 1970s"); Leo Graybill, Jr., *Opinion*, *id.* at 11 (the convention president, referring to "the new enlarged bureaucracy in Helena which some parts of the new Constitution fostered").

5 Robert G. Natelson, Tax and Spending Limits for Montana? Criteria for Assessing Current Proposals 5-9 (Independence Institute Issue Paper 94-10, 1994) (discussing Montana's fiscal policies in the decades after ratification).

The *Cashmore* case was distinctive for other reasons as well. Rather than allowing the case to work its way up the judicial hierarchy, the Montana Supreme Court granted a request that the court dispose of it immediately by exercising original jurisdiction. Even when a dispute over determinative facts arose shortly before the scheduled hearing the court retained the case rather than remit it to a fact-finder. Then without providing the losing side sufficient time to respond to the new factual issues, the court held a hearing limited to legal issues and soon thereafter issued its decision.

Before the case arose, there was an almost-universal understanding of the specific voter majority required for approval of a new Montana constitution. *Cashmore* not only abandoned that understanding for a different one, but did so *after* the referendum already had been held.

For a case of such consequence the majority and dissenting opinions were oddly drafted. They were indifferently researched, curiously disorganized, internally inconsistent, and occasionally incoherent. The dissent showed signs of being patched together at different times and under different circumstances. Some Montanans in a position to know believe that one justice on the five-man court changed his mind after initial drafts were prepared, thereby forcing hasty re-drafting. Some claim the vote switch was the product of political pressure.

Such a case cries out for scholarly review. But there has been almost none in the 46 years since the constitution was proclaimed. Montana's principal organ of legal analysis, the *Montana Law Review*, has published almost nothing on the subject.[6] Two professors at the law school that sponsors the *Review* penned a 250-page book on the 1972 constitution, but managed to dismiss the *Cashmore* case in a single paragraph.[7] Perhaps this silence is related to the school's deep involvement in the network that created, and continues to promote, the 1972 constitution.[8]

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6 The *Review's* sole treatment has been a three page discussion in an article on another topic, not by a legal scholar but by a political scientist. *See* Ellis Waldron, *The Role of the Montana Supreme Court in Constitutional Revision*, 35 Mont. L. Rev. 227, 259-61 (1974).

Waldron's attitude toward the 1972 constitution was not one of unbiased scholarship. He was a zealous advocate, having served as a consultant to the Legislative Council when it developed its report assailing the 1889 constitution, Occasional Paper No. 6, *supra* note 1, at ix, was a member of the Constitutional Convention Commission, Occasional Paper No. 1, *supra* note 1, at ii, and wrote its report on legislative reapportionment. Constitutional Convention Commission, Legislative Reapportionment, Memorandum # 10 (1972).

I had published several times in the *Montana Law Review* when in 2007 I offered to produce an examination of *Cashmore*. The *Review's* editors declined the offer as too controversial.

7 Elison & Snyder, *supra* note 1.

Their single paragraph contains two inaccuracies. First, it incorrectly identifies the petitioner as the Montana Farm Bureau Federation. Second, after stating that "the Montana Supreme Court ruled that the constitution had been approved," it claims a "federal district court . . . reached a similar decision." In fact, the federal court ruled only that state officials had not misled voters so as to violate the U.S. Constitution or federal law. Burger v. Judge, 364 F. Supp. 504 (D. Mont.), *affirmed,* 414 U.S. 1058 (1973).

8 The *Montana Law Review* is funded in part by the Montana Bar Association, which in turn was created by, and is largely an arm of, the state supreme court. Law school faculty and staff were deeply involved in the movement for a new constitution. Professors David

The silence on *Cashmore* has been accompanied by much celebration of the 1972 constitution itself.[9] Below the patina of satisfaction, however, the document remains controversial in some quarters.[10] In any event, it is always appropriate to inquire whether a state constitution was properly adopted. The same question is commonly asked even of our venerated American Constitution.[11] In a republic where the people are said to be the font of political power, it is best to ensure that any state constitution is truly the product of popular will.

R. Mason and William F. Crowley participated in the Legislative Council report that promoted a new instrument. Occasional Paper No. 6, *supra* note 1, at ix. Professors Mason, John McCrory, Albert Stone, and Larry Elison advised delegates, *e.g*., 4 1972 Convention, *supra* note 1, at 1016 (referring to Mason's advice); *id.* at 1206 (referring to McCrory's advice); 5 *id*. at 1318 & 1330 (following Stone's advice); *id*. at 1794 & 6 *id*. at 1851 (following Elison's advice). Crowley also served as chief of staff to Governor Forrest Anderson, who issued the controversial ratification proclamation. *Infra* notes 200-204 and accompanying text. Professor Margery H. Brown served on the Constitutional Convention Commission, Alexander Blewett, *Preface*, in Occasional Paper No. 1, *supra* note 1, at iii, *available at* https://i2i.org/wp-content/uploads/occasionalpapers1.pdf, while Professor Garner Cromwell formally advised the convention, 2 1972 Convention, *supra* note 1, at 1035; 7 *id. at* 2821, 2920, 2965 *et passim.*

Individuals affiliated with the law school continue to issue uniformly celebratory treatments, *e.g*. Fritz Snyder, *Montana's Top Document: Its Transition into the Twenty-First Century*, 34-SEP Mont. Law. 8 (2009) (chief law school librarian) (telling surviving convention delegates "[Y]ou did a wonderful job! You gave us a marvelous document!" and so forth); *see generally* Elison & Snyder, *supra* note 2 (composed by two members of the same faculty). The school (on whose faculty I served for 24 years) now bears the name of the son of the chairman of the Constitutional Convention Commission. Great Falls Tribune, May 20, 2015 (reporting on the renaming after the younger Blewett made a $10 million gift to the school).

9 *E.g. Fresh Chance Gulch*, Time Magazine, Apr. 10, 1972 (referring to the 1889 constitution as "creaky" and referring to the new one as a "model"); Kristen Inbody, *MT Constitution Lets the 'Sunshine in,"* Great Falls Tribune, Oct. 31, 2014 (celebratory "news" story). Similar favorable treatment pervades the only book on the constitution. *See generally* Elison & Snyder, *supra* note 1.

Praise for the constitution and its framers frequently approaches hagiography, *e.g.*, James C. Nelson, *Keeping Faith With the Vision: Interpreting a Constitution for This and Future Generations*, 71 Mont. L. Rev. 299 (2010) (former state supreme court justice) ("It is, in my view, the most progressive, people-friendly, and pro-civil-rights organic document of any state constitution"; *id*. at 301; "I firmly believe that Montana's Constitution is the finest, most progressive state constitution in the country," *id*. at 322).

10 From 1992 to 1996, I served as chairman of Montanans for Better Government and hosted a state public affairs radio show from 1997-99. I was a gubernatorial candidate in 1996 and 2000. I learned of the discontent on the "hustings," mostly from people with no media access.

To reveal my own bias: I believe a new constitution should have been written rather than merely patching up the old, but I find the convention's product to be neither remarkably good nor remarkably bad. It certainly could use some amendment.

11 *See* Michael Farris, *Defying Conventional Wisdom: The Constitution Was Not the Product of a Runaway Convention*, 40 Harvard. J. L. Pub. Pol. 61, 63-64 (2017) (summarizing the controversy).

II. The Law of Majorities

A. The Default Rule and Variations From It

Cashmore centered on the nature of the majority required by the 1889 Montana constitution for ratification of proposals from a new constitutional convention. Understanding the issue requires a short review of the law of majorities.

In 1760 England's Court of King's Bench decided *Oldknow v. Wainright*.[12] In that case the court, speaking through its chief justice, Lord Mansfield, held the default rule for group decision making to be a majority of those actually voting on the issue under consideration. In other words, for a proposal to pass, it need garner only more "yes" votes than "no" votes on that particular issue. Abstentions and absentees were not counted either way.

One may think of this default rule as a fraction: The numerator is the set of all voting "yes," the denominator is the number of people voting on the specific question, and for the "yes" vote to prevail, the fraction must be greater than 1/2.

However, constitutions and statutes frequently alter this default rule by raising the numerator, raising the denominator, or raising both. For example, the rule in the United States Constitution prescribing two thirds of those voting in each house of Congress to override a presidential veto[13] represents an increase in the numerator. The Constitution's rule that treaties are ratified only by two thirds of all Senators present, whether or not voting, raises both the numerator and the denominator.[14]

Like the U.S. Constitution, state constitutions commonly augment the numerator or denominator for legislative decisions.[15] Unlike the U.S. Constitution, state constitutions and other laws also authorize popular referenda, and in the course of doing so they also may raise the required numerator or denominator.[16] Two heightened denominators are particularly common in the referendum context: (1) all electors in the jurisdiction, whether or not they participate in the election[17] and (2) all electors participating in the election no matter on which issues they

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12 [K.B. 1760] 2 Burr. 1017, 97 Eng. Rep. 683.

13 U.S. Const., art. I, § 7, cl. 2.

14 *Id.,* art. II, § 2, cl. 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur").

15 *See, e.g.*, Colo. Const. art. IV, § 11 (requiring two-thirds of the members of each legislative chamber to override the governor's veto).

16 For increases in the numerator, see *e.g.*, Belknap v. City of Louisville, 36 S.W. 1118 (Ky. App. 1896) (two thirds); Missouri *ex rel.* Dobbins v. Sutterfield, 54 Mo. 391 (1873) (two-thirds); State of New Mexico *ex rel.* Witt v. State Canvassing Board, 437 P.2d 143 (N.M. 1968) (employing votes of both two thirds and three fourths). For a statutory increase in the denominator, see In re Contest of Le Sueur Election, 149 N.W. 1914 (Minn. 1914) (comparing statutes, some of which required a majority of those voting at the election with the one at issue, which required only a majority of those voting on the question).

17 *E.g.*, People *ex rel.* Davenport v. Brown, 11 Ill. 478 (1850) (construing "a majority of the voters of such county, at any general election" to mean "all the legal voters of the county").

voted or abstained.[18] The rule under consideration in *Cashmore* was of the latter kind.[19]

Judges faced with language apparently altering a decisional fraction attempt to recover what the language meant to the voters who ratified it.[20] (This is sometimes imprecisely called the determining the "intention of the framers").[21] Judges may deduce the ratifiers' understanding from the face of the instrument; but if circumstances render the language unclear, they consider other evidence.

Suppose, for example, that a court is confronted with what appears to be the heightened denominator, "all electors in the jurisdiction." Some pre-*Cashmore* courts interpreted this literally to mean all electors, whether or not they participated in the election at issue.[22] Others deemed it unlikely the ratifiers intended the bar to be that high, and construed "all electors" to mean either all electors participating in the election[23] or merely all those voting on the particular question.[24] Thus, when interpreting "all electors," the courts had split three ways.

On the other hand, there was no split on the meaning the heightened denominator at issue in *Cashmore:* all electors participating in the election.[25]

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18 *E.g.*, Colo. Const. art. XIX, § 1 (specifying that ratification of constitutional changes proposed by convention shall be "by a majority of the electors voting at the election"); *id*., art. XX, § 3 (requiring "a majority of all the electors voting in the election" to call a constitutional convention); Utah Const., art. 23, § 2 (same); *cf.* Ill. Const. of 1970, art. XIV, § 2 (alternative requirements of three-fifths or "a majority of those voting in the election").

19 Mont. Const. art. XIV, § 8 (1889):

> Said convention shall … prepare such revisions, alteration or amendments to the constitution as may be deemed necessary, which shall he submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose … and unless so submitted and *approved by a majority of the electors voting at the election,* no such revision, alteration or amendment shall take effect.
>
> Italics added.

20 *E.g.*, Hills v. City of Chicago, 60 Ill. 86 (1871) ("The first and cardinal rule is, that we must so construe it as to give effect to the intent of the people in adopting it."); Stoliker v. Waite, 101 N.W. 2d 299, 302 (Mich. 1960) (stating that the rule of decision is for the people of each state to determine).

21 *E.g.*, Belknap v. City of Louisville, 36 S.W. 1118, 1120 (Ky. 1896) ("intention of the framers"); State *ex rel.* Foraker, 23 N.E. 491 (Ohio 1890) ("The framers of the Constitution well understood the use of language … .").

22 People *ex rel.* Davenport v. Brown, 11 Ill. 478 (1850) (construing "a majority of the voters of such county, at any general election" to mean "all the legal voters of the county"); Missouri *ex rel.* Dobbins v. Sutterfield, 54 Mo. 391 (1873); Green v. State Board of Canvassers, 47 P. 259 (*Id*. 1896).

23 State *ex rel.* Blair v. Brooks, 99 P. 874, 875 (Wyo. 1909); State v. Hathaway, 478 P.2d 56 (Wyo. 1970); Bayard v. Klinge, 16 Minn. 249, 252 (1871) (reporting that the Minnesota courts had construed the language that way); Everett v. Smith 22 Minn. 53 (1875) (same).

24 *E.g.,* Walker v. Oswald, 11 A. 711 (Md. 1887) (relying on legislation governing returns as evidence of meaning).

25 *Infra* notes 50-70 and accompanying text.

B. The Meaning of "A Majority of Electors Voting at the Election" in 1889

At the time the *Cashmore* case arose, the existing state constitution—drafted and ratified in 1889—prescribed that to become effective, constitutional convention proposals had to be "approved by a majority of the electors voting at the election."[26] Thus, the 1889 constitution retained the default rule's majority numerator but raised the denominator from those voting on the issue to all electors participating in the election, no matter what issues or candidates they chose to vote on.

The 1889 framing convention spent some time considering decisional fractions. The issue arose when a convention committee produced draft language addressing future constitutional revision. The draft language prescribed that the legislature would *propose* constitutional amendments and calls for new constitutional convention while the people, voting in referenda, would *approve or reject* those proposals. Similarly, a new convention could *propose* constitutional changes, which the people would *ratify or reject*.

The committee recommended that for the legislature to propose either an amendment or a new convention, the proposal garner the affirmative vote of "two-thirds of the members elected to each house."[27] In other words, the committee recommended that legislative proposals require approval by both an augmented numerator and an augmented denominator. But for the people to ratify an amendment or to call a new convention, the committee draft recommended adherence to the default rule—that is, a majority of those voting on the issue.[28] For popular ratification of convention proposals, the committee draft suggested the default numerator but a heightened denominator: "a majority of the electors voting at the election."[29]

During general floor discussion of the committee draft, Alfred Myers of Billings moved to reduce the legislative numerator for proposing a convention to a simple majority, as in an abortive state constitution prepared five years earlier.[30] William Bickford of Missoula similarly moved to reduce the legislative numerator for proposing amendments to a majority.[31] Both motions were defeated, but they provoked an interchange on the merits of different numerators.

In addition, Louis Rotwitt of White Sulphur Springs moved to heighten the denominator for calling a convention from "those voting on the question" to "All members."[32] Apparently, he was under the impression that he was addressing a legislative rather than a popular vote. On being apprised of his error, he withdrew

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26 Mont. Const. of 1889 art. XIV, § 8:
Said convention shall … prepare such revisions, alteration or amendments to the constitution as may be deemed necessary, which shall he submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose … and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect.

27 1889 Convention, *supra* note 1, at 576 & 577.

28 *Id.*

29 *Id.*

30 *Id.*, at 577; *cf*. Mont. Const. of 1884, art. xvi, § 12.

31 *Id*., at 577-78.

32 *Id*., at 577.

his motion.[33] The convention then approved the committee draft without alteration. As a result, the finished constitution required that any future convention proposals be approved by a "majority of electors voting at the election".[34]

In adopting this "majority of electors voting at the election" standard, the 1889 convention was adopting a rule already incorporated in the constitutions of at least twelve states: Michigan,[35] Alabama,[36] Arkansas,[37] California,[38] Florida,[39] Illinois,[40] Kansas,[41] Minnesota,[42] Nebraska,[43] Nevada,[44] Texas,[45] and Virginia.[46] The proposed 1884 Montana constitution adopted the same rule twice.[47]

To understand how the rule operated in practice, posit an election in a (tiny) state with seven qualified electors. Under the law of the state (1) candidates are elected by the default rule but (2) ballot propositions must garner "a majority of electors voting at the election." The state has seven qualified electors, of whom five have deposited ballots. There are two candidates for governor and two for senator, and Propositions A and B are also at issue.

> *Elector 1 votes for governor and on Proposition A.
> *Elector 2 votes for governor, senator and on Propositions A and B.
> *Elector 3 votes for governor, senator, and on Proposition B.
> *Elector 4 votes for senator and on Proposition A.
> *Elector 5 votes on Proposition A only.

Only three votes were cast for governor and senator. Under the law of the state (the traditional default rule), a gubernatorial or senatorial candidate can win by garnering only two votes. However, because the number of "electors

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33 *Id*., at 577.

34 Mont. Const. of 1889, art. XIV, § 8:
> Said convention shall … prepare such revisions, alteration or amendments to the constitution as may be deemed necessary, which shall he submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose … and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect.

35 Mich. Const. of 1835, art. xiii, § 2 ("a majority of the electors voting at such election" necessary to approve a constitutional convention).

36 Ala. Const. of 1865, art. IX, § 2; Ala. Const. of 1867, art. XVI, 1.

37 Ark. Const. of 1874, art. XIX, § 22.

38 Cal. Const. of 1849, art. X, § 2).

39 Fla. Const. of 1868, art. XVIII, § 2.

40 Ill. Const. of 1870, art. XIV.

41 Kan. Const. of 1855, art. XVI, § 2; Kan. Const. of 1857, art. XII, § 5; Kan. Const. of 1858, art. XVIII, §§ 1, 3 & 4.

42 Minn. Const. of 1857, art. IX.

43 Neb. Const. of 1875, art. XV, § 1.

44 Nev. Const. art. XVI, § 2.

45 Tex. Const. of 1870, art. XII ("a majority of the electors so qualified voting at such election").

46 Va. Const. of 1870, art. XII ("a majority of the electors so qualified voting at such election").

47 Mont. Const. of 1884, art. xvi, § 12 (approval of new constitution), *id*., art. viii, § 4 (referendum on appropriations for capital buildings and grounds).

voting at the election" is five, a proposition must receive three "yes" votes to be successful. Proposition A passes if three of the four electors who voted on the measure voted "yes." But Proposition B loses even if both electors who voted on it voted "yes".[48]

There is no serious question that this was the dominant understanding of "majority of electors voting at the election" when the 1889 constitution was drafted and ratified. For one thing, there were at least four reported cases on the subject, and they all affirmed this meaning.[49] Moreover, the framers of the Nevada and Florida constitutions had supplemented their adoption of the rule with an easily-determined proxy for "electors voting at the election."[50] There would have been no reason for this proxy if "electors voting at the election" was a mere synonym for "those voting on the measure."

C. "A Majority of Electors Voting at the Election" between 1889 and 1972

In 1905, a federal judge surveying the field reported that "the courts construing statutes or constitutional provisions requiring a majority of the votes cast at the election have almost unanimously held that it required a majority of all voters who participated at that election, and not merely a majority of those who voted on the particular question submitted."[51]

When *Cashmore* was decided in 1972, a "majority of electors voting at the election" was still required for constitutional revision in many states,[52] and the prevailing sense of the phrase had not changed.[53]

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48 Of course, if the applicable denominator is "a majority of all qualified electors," whether or not they vote, the each proposition would need four (of seven) votes to pass.

49 Bayard v. Klinge, 16 Minn. 249 (1871); Duperier v. Viator, 35 La. Ann. 957 (1883) (construing "a majority of same voting at such election" to mean a majority of all who vote); State *ex rel.* Stevenson v. Babcock, 22 N.W. 372 (Neb. 1885) (construing "a majority of the electors voting at such election" to mean a majority of all participating in the election); *see also* State *ex rel.* Jones v. County Comm'rs, 6 Neb. 474 (1877) (construing "a majority of the legal voters of such county, voting at any general election" to mean a majority of all who vote).

50 Nev. Const., art. XVI, § 2; Fla. Const. of 1868, art. XVIII ("the highest number of votes cast at such election for the candidates for any office or on any question").

51 Knight v. Shelton, 134 F. 423, 432 (E.D. Ark. 1905). *See also* State *ex rel.* v. Foraker, 23 N.E. 491 (Ohio 1890); People *ex rel.* Wells v. Town of Berkeley, 36 P. 591 (Cal. 1894); Belknap v. City of Louisville, 36 S.W. 1118 (Ky. App. 1896); State *ex rel.* Litson v. McGowan, 39 S.W. 771 (Mo. 1897); State *ex rel.* McClurg v. Powell, 27 So. 927 (Miss. 1900); Board of Trustees for Sumner County v. Board of County Comm'rs, 60 P. 1057 (Kan. 1900).

52 2 George D. Braden, et al., The Constitution of the State of Texas: An Annotated and Comparative Analysis 826 (1977) (stating that even for simple amendments [as opposed to larger revisions] about 30 states required a majority of those voting on the question, eleven required a majority of all electors voting at the election, and the rest imposed supermajorities of various kinds.

53 *E.g.*, Rice v. Palmer, 96 S.W. 396 (Ark. 1906); State *ex rel.* Denman v. Cato, 95 So. 691 (Miss. 1923); *In re* Todd, 193 N.E. 865 (Ind. 1935); People v. Stevenson, 117 N.E. 747 (Ill. 1971).

Only in very few cases had distinctive language[54] or unique history[55] forced a different interpretation.

Courts offered several reasons for construing "electors voting at the election" to mean all those participating, irrespective of what they voted on. Some courts stated that it was the plain meaning of the language.[56] One asserted that "[t]o ratify is to affirm, and the Constitution requires in order to ratify that there be an affirmative expression of the majority of the electors to whom the question is submitted, the withholding of which is not sufficient".[57] Still another compared the rule to Swiss practice, under which majorities were required of both voters and cantons.[58]

In some cases, a party alleged that the relevant "election" was not the general election but a special election held simultaneously with it. If this was true, the decisional denominator consisted only of those voting in the special election rather than everyone who frequented the polls on Election Day.[59] Obviously, if a ballot issue was segregated into a special election, then the smaller required denominator increased the chances that the proposition would be approved.

Whether the ballot measure was offered at a special election or a general election was a mixed issue of fact and law, and judicial resolution depended on substance rather than form.[60] If language in the governing law did not resolve the issue clearly,[61] the courts weighed several factors in arriving at a conclusion. No one of these factors was determinative, but the following tended to show that the election was special:

- The governing law referred to the issue being voted on in an election being held for that particular purpose.[62]

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54 *E.g.*, State *ex rel.* Durkheimer v. Grace, 25 P. 382 (Or. 1890) (in an election to locate a county seat, "the place receiving the majority of all votes cast" necessarily meant the majority as against other places).

55 Unique history affected the results of two cases. In State *ex rel.* Larabee v. Barnes, 55 N.W. 883 (N.D. 1893), the election was governed by a federal statute that contemplated election only on a single issue, so the wording had to be interpreted in that context. In State of New Mexico *ex rel.* Witt v. State Canvassing Board, 437 P.2d 143, 152 (N.M. 1968), the court was construing a constitutional amendment designed to render further amendment easier, but the usual "majority of electors voting" interpretation would have made it more difficult.

56 *E.g.,* State *ex rel.* v. Foraker, 23 N.E. 491, 491 (Ohio 1890) ("The plain reading of this language would seem to indicate but one construction"); People v. Stevenson, 117 N.E. 747, 747 (Ill. 1971) ("The language seems plain and unambiguous").

57 State *ex rel.* Blair v. Brooks, 99 P. 874, 875 (Wyo. 1909).

58 Rice v. Palmer, 96 S.W. 396 400 (Ark. 1906)

59 *E.g.*, State *ex rel.* McClurg v. Powell, 27 So. 927 (Miss. 1900) (acknowledging that the referendum at issue could have been offered at a special election, but finding that it was in fact part of the general election).

60 City of Pasadena v. Chamberlain, 219 P. 965 (Cal. 1923).

61 *E.g.*, Harris v. Walker, 74 So. 40 (Ala. 1917) (concluding that constitutional language contemplated the referendum was a special election); Ladd v. Yett, 273 S.W. 1006 (Tex. App. 1925) (statutory emphasis on divisibility of issues); Falls Church Taxpayers League v. City of Falls Church, 125 S.E.2d 817 (Va. 1962) (reproducing a portion of the city charter, which identified the election as special).

62 Armour Bros. Banking Co. v. Board of County Comm'rs, 41 F. 321 (D. Kan. 1890); Howland v. Board of Supervisors, 41 P. 864 (Cal. 1895); Montgomery County Fiscal Court v. Trimble, 47 S.W. 773 (Ky. 1898); but *see* Belknap v. City of Louisville, 36 S.W.

- The law called for a separate return process for "the election."[63]
- The law made no provision for tallying the total number of voters.[64]
- The notice of the referendum was a different document from the notice for the general election.[65]
- The referendum was held on ballots separate from those employed in the general election.[66]
- The referendum was called or administered by an agency different from that administering the general election.[67]

If the court determined that there was a special election consisting of only one question, then the number voting at the election was the same as the number voting on that question. If the special election included several issues,[68] the denominator consisted of all voters participating in that special election, irrespective of the issues on which they voted or abstained;[69] however, it still did not include everyone who voted in the simultaneous general election.

1118 (Ky. App. 1896) (treating the referendum at issue as part of the general election despite its being called for a particular purpose).

63 Itasca v. Independent School District, 123 S.W. 117 (Tex. 1909).

64 State *ex rel.* McCue, 119 N.W. 360 (N.D. 1909). This deficiency might be filled by employing the highest number of votes cast for any candidate or measure. However, this expedient was used only when a correct certification was unavailable. State *ex rel.* Denman v. Cato, 95 So. 691 (Miss. 1923).

65 Wilson v. Wasco Co. 163 P. 317 (Or. 1917); Morse v. Granite County, 119 P. 286 (Mont. 1911). The applicability of *Morse* is questionable, however, because a comma rendered the constitutional wording ambiguous ("the approval of a majority of electors thereof, voting") and the statutory wording required "a majority of the electors"—a term often construed as meaning a majority of those voting on the question. *Supra* notes 23 & 24 and accompanying text.

66 State *ex rel.* McCue, 119 N.W. 360 (N.D. 1909); Morse v. Granite County, 119 P. 286 (Mont. 1911); In re Contest of Le Sueur Election, 149 N.W. 1914 (Minn. 1914).

67 Wilson v. Wasco Co. 163 P. 317 (Or. 1917). The court summarized:

> Called as it was for a special purpose by a special order, and by a separate and special notice, we are of the opinion that it was a special election for the purpose of voting on the question of issuing bonds. *Id.* at 319.

68 *E.g.*, City of Pasadena v. Chamberlain, 219 P. 965 (Cal. 1923) (four issues).

69 People *ex rel.* Smith v. City of Woodlake, 100 P.2d 71 (1940).

III. The Movement for a More Liberal[70] Montana Constitution

A. The Campaign Begins

During the late 1960s, government interests in conjunction with the Montana League of Women Voters, initiated a campaign to replace the state's constitution with a more "liberal" or "progressive" charter. A primary goal was to rid the state of the 1889 constitution's restraints on state and local fiscal powers.

Those fiscal restraints were extensive. Some were designed to prevent corruption.[71] Others were adopted to forestall overspending of the kind that had propelled several states into bankruptcy.[72] Among other restrictions, the 1889 constitution banned legislative appropriations lasting longer than two years,[73] capped the property tax assessment of certain mines and mining claims,[74] required that local funds be raised locally rather than be raised statewide,[75] and forbade state debt for construction of railroads.[76] Additional provisions mandated referenda for raising the general property tax beyond a certain level,[77] raising state debt beyond $100,000, raising county debt over five percent of taxable property value,[78] and increasing local government debt beyond three percent of taxable value.[79]

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[70] At this time in Montana the terms *liberal* and *progressive* were employed as synonyms, and I use them that way in this article. They signified advocacy of largely unrestricted government power to achieve ends of "social justice," including redistribution, funding of social programs, and increased regulation of the private sector.
Dorothy Eck, a self-identified liberal and progressive, was the president of the Montana League of Women Voters and later served as a convention vice president. On the League's role, see Dorothy Eck, *Transcript of Recorded Interview* (Jun. 5, 2012), Bozeman Public Library, MT ROOM 328.3 ECK, *available at* https://i2i.org/wp-content/uploads/Eck-interview.pdf. In an article on the constitution, she wrote:

> [T]hese were pro-government activists. They weren't demanding less government but were calling for strengthened, effective, efficient units of government with authority to make government work.

Eck, Constitution, *supra* note 1.

[71] *E.g.* Mont. Const. of 1889 art. v, § 29 (prohibiting payment of extra compensation after services to state are performed), § 30 (requiring competitive bidding for contacts supplying state government and prohibiting conflicts of interest), § 31 (restraining public officers' receipt of emoluments).

[72] John Joseph Wallis, *Constitutions, Corporations, and Corruption: American States and Constitutional Change*, *1842 to 1852*, 65 J. Econ. Hist. 211, 216-17 (2005) (describing defaults and near defaults due to excessive debt and infrastructure spending).

[73] Mont. Const. of 1889, art. XII, § 12.

[74] *Id.*, art. XII, § 3.

[75] *Id.*, art. XII, § 4.

[76] *Id*., art. V, § 38. This section probably served a double purpose. The bankruptcy and near-bankruptcy of several states earlier in the century had been caused by excessive spending and debt for infrastructure, *Wallis, supra* note 72, so this provision helped ensure state solvency. It also forestalled some corruption.

[77] *Id.*, art. XII, § 9.

[78] *Id.,* art. XIII, §§ 2 & 5.

[79] *Id.*, art. XIII, § 6.

Those in favor of a new constitution tapped public resources to promote their cause. Notably, they induced the Montana Legislative Council, an arm of the state legislature, to issue a report on the subject of a new constitution.[80] This report was not a balanced document. It was a political manifesto. It argued that "more than 50 percent of the Montana Constitution is inadequate for today's needs"[81] and that state constitutions should be "concerned with principles" rather than detail.[82] It further contended that the excess of detail in the 1889 constitution afforded insufficient flexibility and unduly constrained government fiscal authority:[83]

> Many of the complaints about constitutional limitations converge on the issue of the legislature's power over state finances. The restrictions, including those on maximum tax rates, authority to incur debt, borrowing discretion, requirements for a popular referendum to approve taxes and debt, and the earmarking of funds, clearly impair legislative autonomy and integrity. These provisions are viewed by some as unrealistic and as hindrances to effective state government.[84]

Regarding debt restrictions, the report alleged that they "limit[ed] the state in developing sound fiscal policies.[85]

Those advocating a new state constitution then induced the legislature to create a Constitutional Revision Commission, also publicly funded. This body issued papers criticizing limits on government authority[86] and recommending that the legislature schedule a referendum for a constitutional convention.[87] Furthermore, the Revision Commission began a public relations campaign to persuade Montanans of the need for a new charter.[88] As part of the campaign the Revision Commission authored a pamphlet published by Montana State University (MSU).[89] The pamphlet asserted

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80 Occasional Paper No. 6, *supra* note 2 (reproducing the Legislative Council Report), *available at* https://i2i.org/wp-content/uploads/occasionalpapers6.pdf.

81 *Id.* at iii (preface by Alexander Blewett).

82 *Id*. at 5.

83 *Id*. at 57.

84 *Id*.

85 *Id*. at 63.

86 *E.g.*, Occasional Paper No. 7, *supra* note 1, at 20, *available at* https://i2i.org/wp-content/uploads/occasionalpapers7.pdf (reproducing a subcommittee report claiming that "The restrictions, which so hamper imagination and flexibility in developing fiscal programs have created obstacles to sound fiscal planning, management, and organization."); *id*. at 30 (reproducing another subcommittee recommendation: "Grant as much freedom of action as possible in local affairs so that units of local government can use their own power and initiative in meeting future responsibilities.").

87 100 Delegates: Montana Constitutional Convention of 1972, 12 (1989); *See* Alexander Blewett, *Preface*, *Occasional Paper* No. 7, *supra* note 1, at iii, *available at* https://i2i.org/wp-content/uploads/occasionalpapers7.pdf.

88 Alexander Blewett, *Preface*, Occasional Paper No. 6, *supra* note 1, at iii, *available at* https://i2i.org/wp-content/uploads/occasionalpapers6.pdf (stating that the legislatively-created Constitution Revision Commission decided to "devote its efforts to carrying on a public education program on the need for constitutional revision" in advance of the November 1970 vote on whether to call a convention).

89 Montana Constitutional Revision Commission, Montana Constitutional Revision (Cooperative Extension Service, MSU Bozeman, 1972), *available at* https://

that a state constitution "should express only fundamental law and principle and omit procedural details except, of course, for procedural provisions in the Bill of Rights … . The legislature should be permitted to meet in annual sessions of unlimited length," and "[m]ore authority, fiscal and otherwise, should be granted to local governments."[90]

MSU independently published another pamphlet entitled *We, the People ... An Introduction to the Montana Constitution*.[91] It argued that the existing constitution was "cluttered with statutory details which obstruct adaptation to changing social, economic, and environmental conditions; it places restrictions on all branches of government that prevent them from dealing with modern problems … ."[92] This MSU pamphlet suggested a new constitution with a preamble modeled on that of Illinois and reciting various progressive aspirations: "to provide for the health, safety, and welfare of the people; eliminate poverty and inequality; [and] assure legal, social and economic justice … ."[93]

The times were propitious for progressive change. The Anaconda Company, generally a conservative influence in Montana politics, was in decline,[94] and liberal forces were ascendant.[95] On November 3, 1970, when the legislatively-authorized

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i2i.org/wp-content/uploads/Constitutional-Revision-Const.Rev_.Commn-MSU.pdf. *See, e.g. id.* at 33, 34, 41, 49-50, 51-52 & 54.

90 *Id*. at 18. This publication was marred by many statements of dubious accuracy. For example, American constitutions never are limited to "fundamental law and principle"; all, including the U.S. Constitution, include significant detail. The pamphlet also claimed that written constitutions were an American invention and that the framers "found few guidelines" in prior works. *Id*. at 31-32. Both of these statements are false. *See generally*, Robert G. Natelson, The Original Constitution: What It Actually Said and Meant 3-4 (3d ed. 2014) (discussing prior constitutions and sources of guidelines); *see also* Colonial Origins of the American Constitution (Donald S. Lutz, ed. 1998) (reproducing constitutional documents adopted by American colonists).

91 Lucile Speer, We, the People . . . An Introduction to the MT Constitution (Coop. Extension Service, MSU Bozeman, 1971), *available at* https://i2i.org/wp-content/uploads/Speer-We-the-People.pdf.

92 *Id.* at 100.

93 *Id.* at 101.

94 Thomas Paine, *Constitutional Retrospect and Prospect*, Montana Eagle, Mar. 17, 1982, at 4.

95 A Montana Technological University website describes the period as "Montana's Dramatic Period of Progressive Change: 1965-1980: From a Corporate Colony to a Citizen's [sic] State and the Challenge of Keeping It That Way," *available at* https://digitalcommons.mtech.edu/crucible_materials/6/. The description is typical of the unconscious bias Montana government officials often display in discussing this era. In fact, the Anaconda Company, while exercising great political influence, had not reduced the state to a "corporate colony." *See* Robert G. Natelson, *Montana's Supreme Court Relies on Erroneous History in Rejecting* Citizens United*,* Center for Competitive Politics 5-7 (2012) *available at* https://www.ifs.org/wp-content/uploads/2012/06/2012-06-Natelson-Montanas-Supreme-Court-Relies-on-Erroneous-History.pdf (outlining instances in which the Anaconda Company was unable to control Montana elections).

Although the period under discussion was an unusually liberal one, the reader should not assume that Montana is otherwise a particularly conservative state. Rather, it traditionally has shared a political affinities with the "prairie socialism" of states such as Minnesota and North Dakota. Montana's most famous political figures, U.S. Senators Mike Mansfield and Burton K. Wheeler and U.S. Rep. Jeanette Rankin were all

referendum on calling a new convention was held, the governor, lieutenant governor, secretary of state, treasurer and superintendent of public instruction were all Democrats. So were both U.S. Senators, one of the two U.S. Representatives, and the state senate.[96] (In the 1972 general election the state house was to flip to the Democrats as well).[97] Of those participating in the convention referendum, 65 percent voted to authorize a convention.[98]

The following year the legislature adopted an enabling act[99] scheduling the convention, and replacing the Constitutional Revision Commission with a Constitutional Convention Commission. The latter was to "undertake studies and research … compile, prepare and assess essential information for the delegates, without any recommendations … ."[100]

B. The Constitutional Convention

Convention delegates were elected on November 2, 1971. The elections produced an assembly tilted distinctly to the left: Of the 100 delegates elected, 58 were Democrats, 36 were Republicans and six were (generally liberal) Independents.[101] The partisan imbalance may understate liberal convention strength, for the Montana Republican party then included a large progressive element in the Theodore Roosevelt/Robert LaFollette tradition. Some Republican delegates certainly fit in this category.[102] Overall, the convention was, according to one liberal writer, "the most radical assembly the state had ever seen."[103] While some Montanans did not see the convention as an invitation to radical change,[104] some of the most influential delegates did.[105]

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progressives. Although the state has been trending in a conservative direction in recent years, Democrats still do very well in statewide races. For example, at this writing the governor, and lieutenant governor, and one of the two U.S. Senators are Democrats. There is also a tradition of relative progressivism even among Montana Republicans. *Infra* note 103.

96 Brad E. Hainsworth, *The 1970 Election in Montana*, 24 W Pol. Q. 301 (1971). *See also Political Party Strength in Montana*, *available at* https://en.wikipedia.org/wiki/Political_party_strength_in_Montana; Atlas, *supra* note 1, at 239 (summarizing 1968 election results); *id*. at 248 (summarizing 1970 election results).

97 Atlas, *supra* note 1, at 264 (summarizing 1972 election results).

98 *Eck, Constitution, supra* note 1.

99 Extraordinary Senate Bill 6 (1971).

100 100 Delegates, *supra* note 1, at 12; Extraordinary Senate Bill 6, § 20(7) (1971).

101 *Id*., at 12; *Males*, *supra* note 1, at 5 (noting the liberalism of the independents).

102 For example, delegate Jean M. Bowman was active in the liberal League of Women Voters, but was elected as a Republican and served as convention secretary. 1 Montana Constitutional Convention Proceedings 36 (1979); 100 Delegates, *supra* note 1, at 43.

103 *Males, supra* note 1, at 5. Apparently, the staff members who served the convention were even more radical. *Id.* at 19.

104 *E.g*. Olive Rice, *Constitution Should Reflect People's Will*, Gallatin County Tribune, Mar. 9, 1972, p.1 (arguing that the convention was called to revise the constitution "not to 'reform' it or rewrite it to the extent of changing its basic concepts").

105 *E.g*., *Missoula Delegate Claims Convention Fears Public*, Gallatin County Tribune, Mar. 9, 1972, p.1, 8 (reporting delegate Robert Campbell as urging radical change and arguing "We've got two and a half weeks to change this state").

The assembly met on November 29, 1971 for a three-day organizational session. As president, it elected lawyer Leo Graybill, Jr., a passionate progressive.[106] It re-convened for business on January 17, 1972[107] and met until adjournment on March 24.[108]

For all the convention's liberalism, one cannot explain its relative unanimity—all 100 delegates ultimately signed the constitution[109] and only nine eventually opposed it[110]—by its political composition alone. There were several contributing factors. One was the decision to break up the conservative minority by seating delegates alphabetically rather than by party or political composition. This decision was hailed as commendable non-partisanship, but a primary effect was to reduce the piercing examination of the majority's proposals traditionally offered by a cohesive loyal opposition.

Another factor leading to relative unanimity was a ruling by the state supreme court that state legislators could not serve as delegates.[111] This eliminated as potential candidates many who might deploy political knowledge in opposition to the convention's dominant sentiment.[112] As a result, most delegates were relatively inexperienced in government, and none, including the professors among them, seems to have had even an academic knowledge of constitutional law, history, or drafting. In that pre-Internet era, this left the delegates heavily reliant for technical information on speakers and on staff consultations and publications.

The convention leadership's series of "distinguished speakers" uniformly promoted a progressive agenda.[113] All advocated, as one journalist observed,

> the same idea of appointed officials, fewer legislators, one house instead of two, or a one-man Public Service Commissioner, with no speaker

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106 3 1972 Convention, *supra* note 1, at 16. Former Governor Stephens believes Graybill exercised a powerful influence on convention deliberations. Telephone Conversation with former Montana Governor Stan Stephens, Aug. 2, 2018.

107 3 1972 Convention, *supra* note 1, at 109.

108 7 1972 Convention, *supra* note 1, at 3046 (adjournment).

109 *A Proclamation by the Governor of the State of Montana*, Jun. 20, 1972, at 36-39, *available at* https://i2i.org/wp-content/uploads/Anderson-proclam.pdf (reproducing the signatures).

110 Atlas, *supra* note 1, at 260.

111 Forty-Second Legislative Assembly v. Lennon, 481 P.2d 330 (Mont. 1971).

112 Former governor Stan Stephens believes this had the effect of making the convention more liberal. Telephone Conversations with former Montana Governor Stan Stephens, Aug. 2, 2018 & Sept. 25, 2018.

113 The "distinguished speakers" were Jesse Unruh, the controversial Democratic speaker of the California State Assembly, 3 1972 Convention, *supra* note 1, at 217; his former staffer Larry Margolis, *id*. at 309; aviator Charles A. Lindbergh, who was then crusading for environmental causes, *id* at 387; John Gardiner, president of Common Cause, a liberal lobbying group, 6 *id*. at 1853; and former Congresswoman Jeanette Rankin, an environmentalist and peace activist, *id*. at 2207. Of those and certain other outside speakers, one journalist observed that "For the most part, the speakers were in favor of more power vested in fewer government officials." Olive Rice, *Common Cause Leader to Address Convention*, Gallatin County Tribune, Mar. 9, 1972, p.8. Rice lists Nebraska state senator Terry Carpenter as among the speakers, but he failed to attend due to illness. 3 1972 Convention, *supra* note 1, at 325.

> urging that political power be retained in the hands of the people at every level.[114]

The Constitutional Convention Commission produced a great deal of technical information for the delegates, but some of that information was biased as well. For example, the Commission reproduced the Legislative Council report discussed earlier[115] and the 1969 committee recommendations from the Constitution Revision Commission.[116] Both criticized the existing constitution at length,[117] particularly its fiscal limits,[118] but presented no alternative points of view. Similarly, the Commission reprinted a 1967 Montana Legislative Council report that compared the 1889 constitution, generally unfavorably, to those of other states.[119] The constitutions selected for comparison were those of Puerto Rico, Alaska, Hawaii, Michigan, New Jersey, and a "model constitution" produced by the National Municipal League.

This choice of constitutions was clearly gerrymandered. None of the documents selected derived from states adjacent to Montana, within the Rocky Mountain region, or, with the possible exception of Alaska, particularly comparable to Montana.[120] Yet the selection included one constitution from a jurisdiction that was not a state (Puerto Rico) and another—the National Municipal League model—that had never been adopted at all. The Convention Commission chairman's explanation was that the documents included were "more recent" or "better."[121]

The inclusion of the National Municipal League model in a set of constitutions from which all states surrounding Montana were excluded illustrates the extent of League material included in the information provided to the delegates. The

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114 Olive Rice, *Delegates Conclude Their Roles; Burden Falls on People Now*, Gallatin County Tribune, Mar. 30, 1972, p.1.

115 Occasional Paper No. 6, *supra* note 1, at iii, *available at* https://i2i.org/wp-content/uploads/occasionalpapers6.pdf.

116 Occasional Paper No. 7, *supra* note 1, at iii, *available at* https://i2i.org/wp-content/uploads/occasionalpapers7.pdf.

117 Occasional Papers No. 6, *available at* https://i2i.org/wp-content/uploads/occasionalpapers6.pdf. & 7, *supra* note 1.

118 *E.g.*, Occasional Paper No. 5, *supra* note 1, *available at* https://i2i.org/wp-content/uploads/Occasionalpapers5.pdf (unpaginated) (criticizing limits on mining taxes); Occasional Paper No. 7, *supra* note 2 at 144, *available at https://i2i.org/wp-content/uploads/occasionalpapers7.pdf* (recommending replacement of most fiscal limits).

119 Occasional Paper No. 5, *supra* note 1, *available at* https://i2i.org/wp-content/uploads/Occasionalpapers5.pdf.

120 *Id*. at iii.

121 Alexander Blewett, *Preface*, Occasional Paper No. 5, *supra* note at 2, at iii, *available at* https://i2i.org/wp-content/uploads/Occasionalpapers5.pdf:

> Some of these constitutions were chosen based upon the general opinion of authorities that they represent the better state constitutions, others because they are comparatively new documents. The Model State Constitution was used because this is the only document of its kind known to exist.

Of course, the fact that a document is "comparatively new" is not a criterion of political wisdom. The acclaimed U.S. Constitution was far older than any of those included. And while the Model State Constitution might be "the only document of its kind known to exist," it might have been more instructive to select a document that actually had been adopted somewhere.

Constitutional Convention Commission provided the delegates with a bibliography of constitutional readings: of the 24 sources listed, 17 were League sponsored.[122] The Convention Commission also provided delegates with a pamphlet containing reports of subcommittees of its predecessor Constitution Revision Commission; that pamphlet repeatedly relied on League materials.[123] Furthermore, during the convention the leadership granted the League's executive director, William N. Cassella, Jr., extraordinary and repeated access to the delegates.[124]

The National Municipal League is not, of course, an unbiased source. It is a lobbying group that advocates for local government officials and promotes an agenda seen as favorable to its constituency. Its influence over the proceedings did not go unnoticed. As one journalist sympathetic to the convention observed, "[A] preponderance of research material furnished to the delegates seemed to come from one source (the National Municipal League and related groups) … ."[125]

Unfortunately the press did little to counterbalance the skewed ideological environment in which the convention worked. Lee Enterprises, the owner of four Montana daily newspapers, composed and published a newspaper supplement with headlines echoing the prevailing ideological line: "Money straitjacket: can cords be cut?" the supplement asked. "The constitutional convention offers an opportunity to cut the cords of the financial straitjacket in which the 1889 framers clothed the legislature".[126] The supplement further declared that "Rigid constitutional taxation provisions prevent the state from responding to rapidly changing social and economic needs by denying needed flexibility " and that "The weight of modern constitutional thought is that a special tax situation has no place in a document of fundamental principles".[127] "[C]onstitutional scholars emphasize," the supplement added, "that the best constitutions are brief, simple statements of the fundamental,

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122 Montana Constitutional Convention Commission, Selected Bibliography 3-5 (1972), *available at* https://i2i.org/wp-content/uploads/Selected-Bibliography.pdf. The Commission's predecessor also relied heavily on League publications, *e.g*., Montana Constitutional Revision Commission, Montana Constitutional Revision 40 (Cooperative Extension Service, MSU Bozeman, 1972), *available at* https://i2i.org/wp-content/uploads/Constitutional-Revision-Const.Rev_.Commn-MSU.pdf (citing the model constitution); *id.* at 46-47 (additional references).

123 *E.g.,* Occasional Paper No. 7, *supra* note 1, *available at* https://i2i.org/wp-content/uploads/occasionalpapers7.pdfat 5. 8, 23, 141 & 164. For other examples of reliance on League publications by the Revision Commission, see, *e.g*., Montana Constitutional Revision Commission, Montana Constitutional Revision 40 (Cooperative Extension Service, MSU Bozeman, 1972), *available at* https://i2i.org/wp-content/uploads/Constitutional-Revision-Const.Rev_.Commn-MSU.pdf (citing the model constitution); *id.* at 46-47 (additional references).

124 Olive Rice, *Common Cause Leader to Address Convention*, Gallatin County Tribune, Mar. 9, 1972, p.8 (referring to the address to the convention of the League executive director, William N. Cassella, Jr.); 3 1972 Convention, *supra* note 1, at 267 (quoting the convention president as announcing that Cassella would have multiple meetings with committees, committee chairmen, and executive officers); *see also id*. at 277; 7 *id*. at 2513, 2558.

125 Olive Rice, *Delegates Conclude Their Roles; Burden Falls on People Now*, Gallatin County Tribune, Mar. 30, 1972, at 1.

126 Lee Enterprises, *Constitutional Convention* (Newspaper Supplement), Jan. 16, 1972, at 14.

127 *Id*. at 15.

enduring principles of government".[128] I have looked in vain through contemporary newspapers for any serious effort to investigate or balance these debatable claims.[129]

Under such circumstances, even conservative-leaning convention delegates might well assume that the limits the 1889 constitution placed on state and local government were atypical or senseless.

C. The Character of the New Constitution

The document produced by the convention has been described as "populist."[130] Some of its provisions were of this cast, most notably its provisions for citizen initiatives.[131] But if populist government means directly responsive to the people, then in important respects the document was a less populist than its predecessor. Rather than dispersing power, the delegates generally adopted what was called a "short ballot" policy—that is lodging more power in fewer hands.[132] The new charter reduced the number of directly-elected executive officers,[133] and cut the size of both legislative chambers.[134] It also abolished referenda on nearly all fiscal decisions,[135] and expanded the authority of the executive branch at the expense of the legislature.[136] It increased the power of the judiciary at the expense of the

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128 *Id*. at 16.

129 For other examples of this media approach see Robert E. Miller, *New Constitution Provides for Flexible Government*, Gallatin County Tribune, Apr. 13, 1972, at 3B (praising new constitution's lack of specific rules pertaining to local government); Associated Press, *ConCon shortens document*, Billings Gazette, Mar. 24, 1972 (repeating an unrebutted claim that exclusion of detail from the draft constitution is "encouraging").

130 *Eck, Constitution, supra* note 1.

131 Mont. Const. art. III, § 4 (laws); *id*., art. XIV, § 9 (constitutional amendment). At the time, the citizen initiative was seen as useful mostly to liberal interests. Widespread use of the citizen initiative by conservative groups was still several years in the future. It began with California's Proposition 13 in 1978. *See* https://www.californiataxdata.com/pdf/Prop13.pdf. On the so-called "tax revolt," *see* Robert G. Natelson, *The Colorado Taxpayer's Bill of Rights* 7 (Independence Institute 2016).
Also of a populist nature was the constitution's "right to know," subject, however, to judicial balancing. Mont. Const. art. II, § 9 ("No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.").

132 This was a persistent theme in the convention. *See* Olive Rice, *Common Cause Leader to Address Convention*, Gallatin County Tribune, Mar. 9, 1972, at 8; Olive Rice, *Delegates Conclude Their Roles; Buren Falls on People Now*, Gallatin County Tribune, Mar. 30, 1972, at 1; Associated Press, *Convention Receives Short Ballot Proposal,* Missoulian, Feb. 3, 1972, at 10.

133 The state treasurer was no longer elected.

134 Formerly, there had been 55 senators and 104 representatives. Atlas, *supra* note 1, at 251. The 1972 constitution limited the number to 50 and 100. Mont. Const. art. v, § 2.

135 *Supra* notes 71-79 and accompanying text.

136 Ted Schwinden, *Face-Off*, Montana Eagle, Mar. 17, 1982, at 11 (outlining the increased authority of the governor under the 1972 constitution). The constitution also made it more difficult for the house of representatives to impeach executive and judicial officers. *Compare* Mont. Const. art. iv, § 16 (1889) (majority to impeach) *with* Mont. Const. art. v, § 13(3) (two thirds to impeach).

legislature by including language that, because vague and untethered to historical content, enabled judges to make key policy decisions.[137] One influential delegate suggested the convention feared the people rather than trusted them.[138]

The new constitution deleted most of the old constitution's anti-corruption provisions,[139] extended state authority over the environment and natural resources,[140] deleted the two-year limit on legislative appropriations, abolished caps on state taxation, and left local caps to legislative decision.[141] It also permitted two thirds of state lawmakers to authorize an unlimited amount of state debt without a referendum.[142] Several provisions apparently created new constitutional rights, but some of these actually were, at least in part, transfers of entitlements from some citizens to others, with judiciary to oversee the transfers.[143] The delegates abandoned their goals of brevity, generality, and flexibility for the sake of retaining several provisions that buttressed government authority or exclusivity.[144]

Liberal or *progressive*, in the colloquial sense of augmenting government power for good or ill, are thus more accurate descriptions of the result than "populist".[145]

D. Structuring the Election to Ensure Victory

The 1889 constitution gave the convention power to "appoint[…]" an election for the vote on "such revisions, alteration, or amendments to the constitution as may be

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137 *E.g.* Mont. Const. art. II, § 3 & art. IX, § 1 ("clean and healthful environment"); art. II, § 4 ("individual dignity"); art. II, §9 ("right to know" subject to a judicial balancing test), § 10 (right to privacy, overridden on showing of a judicially-determined "compelling state interest"). The state supreme court has not been shy about building policy around such phrases. *See, e.g.*, Montana Environmental Information Center v. Montana Dep't of Environmental Quality, 988 P.2d 1236 (Mont. 1999) (construing environmental rights); Gryczan v. State, 942 P.2d 112 (Mont. 1997) (construing private right to invalidate anti-sodomy law). At the time the constitution was written some people were aware of the potential implications of such broad language. *E.g.,* Gerald J. Neely, *Con Con Newsletter*, Mar. 10, 1972, at 3-5 (discussing interpretative problems).

138 *Missoula Delegate Claims Convention Fears Public*, Gallatin County Tribune, Mar. 9, 1972, p.1.

139 *Supra* note 71.

140 Mont. Const., art. IX..

141 *See generally,* Mont. Const., art. VIII.

142 Mont. Const., art. VIII, § 8.

143 *E.g., id*., art. II, § 4 (creating "right of individual dignity" enforceable against private parties); art. IX, § 1 (creating an environmental right enforceable against private parties).

144 E.g., Mont. Const. art. V, § 11(5) (forbidding appropriations to entities not under state control); art. VIII, § (inalienability of the taxing power); art. X, § 6 (banning aid to "sectarian" schools, in part to protect public school system from competition); art. X, § 10 (keeping educational funds "sacred").

145 Ten years after the constitution was adopted, the convention president acknowledged the effect. Leo Graybill, Jr., *Opinion*, Montana Eagle, Mar. 17, 1982, at 11 ("The Constitution's detractors have generally opposed its radical changes ... have disliked centralization, and been uncomfortable with the new enlarged bureaucracy in Helena which some parts of the new Constitution fostered."). *Fresh Chance Gulch*, Time Magazine, Apr. 10, 1972 (stating that the constitution's bill of rights "rings with progressive principles" and praising its abandonment of property tax limits).

deemed necessary".[146] The convention used that power to structure the election to the new constitution's advantage.

A significant obstacle to ratification was the 1889 constitution's requirement that convention proposals garner a "majority of electors voting in the election" rather than merely a majority of those voting on the question. The distinction was well understood: The convention enabling act repeated the constitutional language[147] and the Constitutional Convention Commission specifically addressed the challenge in its study of the enabling act:

> "Since 25 per cent of the voters at general elections commonly do not vote on constitutional questions, convention proposals placed on the general election ballot almost certainly would not receive the vote of a majority of the persons voting at the election, as is required by the Constitution.[148]

The Commission offered a solution: "This problem can be avoided by conducting a special election on the same day as the general election but not as part of the general election."[149]

Just in case this was not clear to the delegates, during the convention Marshall Murray, an attorney and chairman of the convention rules committee, described the issue in a memorandum to all convention officers, rules committee members, and committee chairmen. Murray wrote:

> Another compelling reason for the calling of a special election is the statistic that nearly twenty-five percent (25%) of all electors voting in an election in which there is a special issue, failed to vote on the question of the special issue. Since a majority of electors voting in the election is required, it is probable, if not likely, that adoption could be defeated by "failure to vote" rather than by a negative vote."[150]

Although Murray's memorandum was not addressed to all delegates, on February 5, 1972, all were provided with a copy of it.

Pursuant to his recommendation, Murray rose on the floor to move Resolution Number 10, providing for a special election on June 6.[151] He again explained the "majority of electors voting at the election" requirement and the plan to hold a special election so as to eliminate primary election voters from those "voting at the

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146 Mont. Const. of 1889, art. XIX, § 8 (providing that the convention's recommendations "shall be submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose").

147 Montana Constitutional Convention Commission, Constitutional Convention Enabling Act 27 (1972), *partially available at* https://i2i.org/wp-content/uploads/Enabling-act-partial.pdf (quoting § 17(9): "If a majority of the electors voting at the special election shall vote for the proposals of the convention the governor shall by his proclamation declare the proposals to have been adopted by the people of Montana.").

148 *Id.* at 28.

149 *Id.*

150 Memorandum, Marshall Murray to Leo Graybill, Jr., et al. (undated), *id.* at 2, *available at* http:/www.umt.edu/media/law/library/MontanaConstitution/MHS%20Ratif/Murray%20to%20Graybill.pdf.

151 3 1972 Convention, *supra* note 1, at 330.

election."[152] He further explained that separate ballots, poll books, and tally books would be used to segregate the constitutional referenda from the primaries.[153]

Later in the convention, delegate John M. Schiltz introduced the proposed ballot and adoption schedule. He described the "majority of electors voting at the election" rule, employing a blackboard for illustrations. Schiltz emphasized that all six lawyers on the Style and Drafting Committee agreed on the required standard.[154] In the ensuing days, the convention discussed the topic several more times, always with the same understanding.[155]

Meanwhile the delegates were considering how they might otherwise structure the election to increase the constitution's chances of ratification. First, they opted for an early date. They did so to capitalize on convention publicity and curb the ability of opponents to organize.[156] They selected June 6, 1972, the day of the party primaries.

Next, the convention segregated into separate ballot questions two constitutional provisions most delegates favored, but thought would impair the instrument's chances of ratification if inserted directly. One was a provision for a unicameral legislature[157] and the other was abolition of the death penalty. In addition, they decided to add a separate question on whether to abandon the state's constitutional ban on gambling.[158]

The convention segregated the constitutional issues from the party primaries by designating those issues collectively as a "special election." This would eliminate citizens from the decisional denominator who voted only in the primaries, thus raising the chances that the "yes" votes on the constitution would comprise a majority of "electors voting at the election."

Following recommendations of its committee on style, the convention next structured the special election ballot to further promote the constitution's chances. The convention decided to employ paper ballots rather than the then-customary voting machines. The convention's ballot form violated traditional rules of ballot neutrality by stating "You Should Vote 4 Times"[159]—a legend later changed to "Please vote on all four issues."[160]

As Professor Ellis L. Waldron observed, "Many delegates believed that to make legalization [of gambling] depend on the ratification of the constitution would gain

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152 *Id*.
153 *Id*. at 334 & 336.
154 7 *Id*. at 2864.
155 *Id*. at 2895, 2905 & 2972.
156 Associated Press, *Delegates Set June 6 for Constitution Vote*, Great Falls Tribune, Feb. 6, 1972, p.1; 3 1972 Convention, *supra note* 1, at 331 (remarks by Delegate Murray). *See also id*. at 331, 333 & 337 (reporting delegates' comments on retaining media "momentum").
157 Two thirds of the delegates favored unicameralism, Males, *supra note* 1, at 5, but the Roeder newspaper supplement discussed *infra* notes 185 - 189 and accompanying text, explained that the unicameral option was a separate proposition because "the convention thought that citizens would be more likely to vote for the constitution if it contained a bicameral rather than a unicameral legislature." Supplement, at 11.
158 Mont. Const. of 1889, art. III, § 9.
159 Convention Committee on Style, Drafting, Transition and Submission, *Final Report* 21 (Mar. 22, 1972).
160 *Cashmore*, 500 P.2d at 923 (reproducing ballot).

votes for ratification by determined advocates of gambling."[161] Accordingly, the ballot informed electors that "If the proposed constitution fails to receive a majority of the votes cast, alternative issues also fail."[162] Thus, the ballot communicated that only if the constitution was adopted would legalized gambling be possible.

The convention also sought to piggyback the constitution on the popular issue of the death penalty. Montana already employed the death penalty, so normally one would expect a "yes" vote to favor a change from the status quo—that is, for abolition. However, the convention drafted the ballot to phrase the question the opposite way, so the elector had to vote "yes" to *continue* the death penalty. Because of the ballot legend stating that if the constitution failed alternative issues would also fail, some may have been misled some into believing the only way to save the death penalty was to vote for the constitution.

Hence, the administration of the referendum as a separate election, the timing of the election, and the structure of the official ballot form all were carefully designed to inflate the constitution's share of the popular vote.

E. The Ratification Campaign

During the ratification campaign, liberal and pro-government groups strongly promoted the new document.[163] Of course they did not emphasize that their proposal would restrict popular referenda on taxes and debt or reduce the number of elected offices. Instead they focused on the new constitution's flexibility, its relative brevity, and the benefits of relying more on legislative decision making.[164]

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161 Atlas, *supra* note 1, at 261. The measure was directed specifically at voters in Silver Bow County (Butte), who were known to favor gambling. Oral Conversation with Charles S. Johnson, Helena, Aug. 24, 1972. Although Silver Bow County rejected the constitution, the margin was probably less than it otherwise would have been.

162 *Cashmore*, 500 P.2d at 923 (reproducing ballot).

163 *E.g.*, Dan K. Mizner, Executive Director of the Montana League of Cities and Towns, to Fred Martin, Mar. 23, 1972, *available at* http://www.umt.edu/media/law/library/MontanaConstitution/MHS%20Ratif/LeagueCitiesTowns.pdf (praising the new constitution for lifting the debt limit and otherwise conceding more power to local governments); Bryant & Robin Hatch, Co-Chairmen, Montana Common Cause, to Dorothy Eck, Apr. 14, 1972, *available at* http://www.umt.edu/media/law/library/MontanaConstitution/MHS%20Ratif/CommonCause.pdf (endorsing the constitution; Common Cause was and is a liberal lobbying group); AFL-CIO flyer, "Vote for the New State Constitution", *available at* http://www.umt.edu/media/law/library/MontanaConstitution/MHS%20Ratif/AFL-CIO%20flyer.pdf; Roy Warner, *Montana Common Cause to Propagate Constitution,* Gallatin County Tribune, Apr. 20, 1972, at 1.
See also Males, supra note 1, at 19 (stating that "The AFL-CIO, League of Women Voters, Common Cause, and other progressive groups supported ratification); *see also* Gallatin Citizens Corps Flyer, *Would a New State Constitution Mean Better Government? You know it would!, available a*t http://www.umt.edu/media/law/library/MontanaConstitution/MHS%20Ratif/GallatinCitizensCorps.pdf (listing 19 organizations in support including the foregoing groups and various public education, environmental, and government interests).

164 *E.g.*, Richard Roeder, *Proposed 1972 Constitution for the State of Montana*, Newspaper Insert (1972), *available at* http://www.umt.edu/media/law/library%5CmontanaConstitution%5Ccampbell/1972MTConstNewspaperSupp.pdf ("The 1972 Constitution also offers flexibility. It achieves this by leaving many matters to future legislative

At times during the campaign the new constitution's advocates felt beleaguered,[165] but overall they enjoyed enormous advantages over their opponents. Two daily newspapers endorsed the constitution, while none opposed it.[166] News coverage was consistently favorable. As one sympathetic observer noted, "the press … started campaigning for the constitution with non-stop headlines … . The small but vocal campaign by convention delegates urging ratification was rarely balanced by coverage of opposition arguments."[167] Advocates, by reason of the convention and several years of preparation, already were organized, but the scattered distribution of Montana's population rendered it difficult for opponents to marshal their forces within the available time.[168] Numerous civic associations supported the "pro" campaign,[169] but only a few, such as the Montana Farm Bureau[170] and the Montana Contractors Association,[171] actively opposed ratification. The voices of others who might have opposed the constitution were muted.[172] The state Chamber of Commerce—often considered a center-right organization—took no position.[173] In fact, one Chamber chapter endorsed the document.[174] The Montana Taxpayers

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determination … . [S]uch reliance is both necessary and democratic."). *See also* Gallatin Citizens Corp flyer, *available at* http://www.umt.edu/media/law/library/MontanaConstitution/MHS%20Ratif/GallatinCitizensCorps.pdf (claiming the 1889 constitution "lacks flexibility to meet present and future needs").

165 *E.g.*, J.C. Garlington, *Analysis of the "Comparison of the Existing and Proposed Montana Constitutions"* (May 12, 1972), *available at* http://www.umt.edu/media/law/library/MontanaConstitution/MHS%20Ratif/Garlington%20response.pdf (claiming an opposition flier "contains serious errors and unfair criticisms"). *See also* John Kuglin, *28,500 Budget Earmarked for Defeat of Proposed Constitution*, Great Falls Tribune, Jun. 1, 1972, at 1.

166 Atlas, *supra* note 1, at 250.

167 *Males, supra* note 1, at 19. Press representatives sometimes forgot their duty of objectivity during the convention, and advised delegates on tactics, *e.g.*, 3 1972 Convention, *supra note* 1, at (remarks by Delegate Martin announcing the tactical advice to him by a reporter).

168 Associated Press, *Delegates Set June 6 for Constitution Vote*, Great Falls Tribune, Feb. 6, 1972, at 1.

169 Atlas, *supra* note 1, at 259 ("Numerous organizations of labor, women, educators, environmentalists, public employees and some business-oriented groups endorsed ratification of the proposed constitution.").

170 Montana Farm Bureau, *The Big Decision "On Our Constitution"*, *available at* http://www.umt.edu/media/law/library/MontanaConstitution/MHS%20Ratif/Farm%20Bureau/Farm%20Bureau%20Pamphlet.pdf.

171 Atlas, *supra* note 1, at 259.

172 *Cf. Billings Attorney Seeks Debate on Constitution,* Gallatin County Tribune, Apr. 20, 1972, p. 2 (noting lack of discussion of constitution's weaknesses).

173 *See* Montana Chamber of Commerce, *Con Con News, Constitutional Election Issues*, Jun. 6, *available at* http://www.umt.edu/media/law/library/MontanaConstitution/MHS%20Ratif/Cham%20Comm%20Newsletter%20ocr.pdf; *See also* Gerald J. Neely, Montana's New Constitution: A Critical Look, *available at* http://www.umt.edu/media/law/library%5CmontanaConstitution%5Ccampbell/NeelyPamphlet.pdf (a pamphlet written by a proponent, but limited mostly to a neutral survey).

174 Gallatin Citizens Corps Flyer, *Would a New State Constitution Mean Better Government? You Know It Would!, available at* http://www.umt.edu/media/law/library/MontanaConstitution/MHS%20Ratif/GallatinCitizensCorps.pdf (listing the Great Falls Chamber in support).

Association published critical information, but principally urged its members to "Study the Constitutional Issues."[175]

F. The Understood Margin Required for Ratification

During the proceedings in the *Cashmore* case, the constitution's opponents claimed the voting public was led to believe that ratification would require the affirmative vote of all participating in the election, and that failure to vote on an issue was effectively a "no."[176] This was true. Indeed, it was so true that the opponents can be charged with significant understatement.

First, the standard was fully aired and explained in the Montana press. When Marshall Murray, who chaired the convention rules committee, issued his memorandum on the standard, the Associated Press reported its content.[177] Shortly thereafter, a *Great Falls Tribune* article elucidated the issue for the general public:

> This means that more than half of the persons voting at the election must vote on each proposition for it to pass … . In other words, if 100,000 Montanans voted in the election, yet cast less than 50,001 votes for or against any one proposition, that proposition would fail.[178]

On March 24, the day the convention adjourned, the Billings Gazette ran *two* articles explaining the "majority of electors voting" standard.[179] Many similar articles appeared in newspapers throughout the state explicating the rule as it pertained to some or all ballot issues.[180]

Second, when using government resources to campaign for constitution, advocates repeatedly explained the "majority of electors voting" standard. During

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175 14 Montana Taxpayer, No. 12, at 1 (Apr. 1972); John Kuglin, *28,500 Budget Earmarked for Defeat of Proposed Constitution*, Great Falls Tribune, Jun. 1, 1972, at 1 (stating that the organization had been critical of certain aspects but had not taken an official position).

176 *E.g.*, Brief of Intervenors Manning et al., at 11-13, *available at* https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

177 Associated Press, *Delegates Set June 6 for Constitution Vote*, Great Falls Tribune, Feb. 6, 1972, at 1 (explaining Murray's advice).

178 John Kuglin, *Style Committee Most Crucial*, Great Falls Tribune, Feb. 27, 1972, at 21.

179 Dennis E. Curran, *Unicameralism Favored, Expected to Lose,* Billings Gazette, Mar. 24, 1972, p.7; Associated Press, *New Constitution Finally on Paper,* Billings Gazette, Mar. 24, 1972, at 13.

180 *E.g.,* Editorial, *New Constitution Deserves Support*, Montana Standard (Butte), May 21, 1972, at 6; Associated Press, *New Constitution Gains Approval*, Missoulian, Mar. 23, 1972, at 1; Charles S. Johnson, *New Constitution Easy to Amend*, Missoulian, Apr. 4, 1972, at 11; Charles S. Johnson, *New Constitution Has Easier Method to Amend*, Montana Standard, Apr. 11, 1972, at 10; Associated Press, *Con-Con Can't Decide About Unicameral Idea*, Montana Standard, Mar. 22, 1972, at 1; Dennis E. Curran, *Unicameralism Takes Delegate Vote*, Missoulian, Mar. 24, 1972, at 12; Dennis E. Curran, *Ballot Quick May Doom Unicameral Legislature Preferred by Delegates*, Montana Standard, Mar. 24, 1972, at 1; *Billings Attorney Seeks Debate on Constitution,* Gallatin County Tribune, Apr. 20, 1972, at 2; Associated Press, *Delegates Make Side Issue of Unicameral,* Daily Inter Lake (Kalispell), Mar. 22, 1972, at 9; Editorial, *Options Important Too,* Daily Inter Lake, Jun. 4, 1972, at 4.

the convention, its leadership had applied for a federal grant for "public education," and the convention set aside $11,000 for a film on the convention.[181] The Montana Supreme Court foiled efforts to employ convention funds this way,[182] but advocates found other public sources. They seem to have used some to contribute to a pamphlet that, while billed as a "Critical View" of the constitution, still concluded that its "good points do outweigh the bad points."[183] This publication explained that a ballot issue needed a majority of those participating in the election, not merely a majority of the yes/no vote.[184]

Similarly, employees of Montana State University used state and federal resources to produce, print, and distribute a newspaper supplement promoting ratification.[185] The authors were MSU Professors Pierce C. Mullen and Richard Roeder, the latter of whom had served on the Constitutional Revision Commission[186] and as a convention delegate. Their supplement was twelve pages long and elaborately illustrated with drawings of an engaging young cowboy. It was inserted in all Montana daily newspapers. The supplement masqueraded as objective, even featuring a statement that it had been "reviewed for … objectivity by Mrs. Margaret S. Warden, Mrs. Thomas Payne and Mr. Fred Martin." In fact, the text was strongly

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181 Olive Rice, *Constitutional Convention Promises Excitement and Vigorous Debate*, Gallatin County Tribune, Jan. 27, 1972, at 1 (reporting on application for government grant). The film was never made.

182 State of Montana *ex rel.* Kvaalen v. Graybill, 496 P.2d 1127 (Mont. 1972) (ruling that the convention enabling act did not grant power to promote public education). According to the court, the amount consisted of approximately $15,000 in unexpended state funds and $30,000 in federal funds. *Id*. at 1129; *see also* Atlas, *supra* note 1, at 259 (citing the $45,000 figure). *But see* John Toole, *Administration Committee*, in 100 Delegates, *supra* note 1, at 17 (stating that the convention had reserved a $80,000 surplus for "voter education" but "the Supreme Court took it away from us."). When Leo Graybill, Jr., a lawyer, criticized the court for this decision, the court threatened disciplinary action against him. Atlas, *supra* note 1, at 259; *In re* Graybill, 497 P.2d 690 (Mont. 1972).
The convention also applied unsuccessfully for a $50,000 federal grant for "public education." Olive Rice, *Constitutional Convention Promises Excitement and Vigorous Debate*, Gallatin County Tribune, Jan. 27, 1972, at 1.

183 Gerald J. Neely, Montana's New Constitution: A Critical Look 1 (1972), available at http://www.umt.edu/media/law/library%5CmontanaConstitution%5Ccampbell/NeelyPamphlet.pdf. Neely stated this position in other forums as well. David T. Earley, *Explanation Needed 'to Sell' Constitution*, Billings Gazette, Mar. 31, 1972, at 11.

184 Neely, Critical Look, *supra* note 183 (unpaginated; at sheets 4-5).

185 Margaret Warden, *Public Information Committee*, in 100 Delegates, *supra* note 1, at 19. (The supplement, *Proposed 1972 Constitution for the State of Montana* (1972), is available at http://www.umt.edu/media/law/library%5CmontanaConstitution%5Ccampbell/1972MTConstNewspaperSupp.pdf); Burger v. Judge, 364 F. Supp. 504, 509 fn. 13 (D. Mont.), *affirmed*, 414 U.S. 1058 (1973) ("It was partially financed by Community Services Program, Title I of the Higher Education Act of 1965, with the state providing office expense and state employees furnishing services; and supplementary funding was provided by Concerned Citizens for Constitutional Improvement (a private group of Montana citizens)").

186 Montana Constitutional Revision Commission, Montana Constitutional Revision 1 (Cooperative Extension Service, MSU Bozeman, 1972), *available at* https://i2i.org/wp-content/uploads/Constitutional-Revision-Const.Rev_.Commn-MSU.pdf (listing Roeder as a member).

pro-constitution,[187] and failed to disclose that Warden, Payne, and Martin—those purportedly assuring "objectivity"—all had served as convention delegates and strongly supported the constitution.

This supplement fully explained the "majority of electors voting" standard, noting that each measure required a majority of the total vote on all measures to pass.[188] It warned of the consequences of abstaining: "If you fail to vote on any item, you will aid in its defeat".[189] Each issue would need more than a majority of the yes/no vote; it would need a majority of everyone who cast a vote on any of the four issues.

Furthermore, the same assumption guided Montana's election officers and influenced their communications with the public. In the official voter information pamphlet distributed to all electors before Election Day[190] was a sample ballot structured with the "majority of electors voting at the election" rule in mind. It admonished electors to vote on all issues and warned them that if the constitution did not pass, all other issues would fail.[191] The secretary of state sent instructions to county election officers emphasizing the importance of entering "the total number of electors who are listed on the poll books for the separate election on the proposed constitution."[192] Accompanying the instructions was a form entitled "Election Returns," which identified the special election as the "Ratification or rejection of the proposals of the Constitutional Convention".[193]

In sum, the required majority by which the constitutional issues would pass or fail was communicated to every Montanan paying attention.

G. The Referendum Results

The election returns showed the voters were clear about some issues. The proposal to continue the death penalty garnered 65 percent of the yes/no vote. Large majorities

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187 For example, in treating the 1889 constitution, the supplement stated "While these same details [in the 1889 constitution] have not always achieved their intended purposes, they have sometimes had the unintended effect of hamstringing effective state government." *Id.* at 2.

188 Richard Roeder, *Proposed 1972 Constitution for the State of Montana*, Newspaper Insert 10-12 (1972), available at http://www.umt.edu/media/law/library%5CmontanaConstitution%5Ccampbell/1972MTConstNewspaperSupp.pdf:

> Article XIX, Section 8 of the 1889 Constitution requires that any item the convention submits to the people can be adopted only by a majority of the electors voting at the election. We know that as they go down the ballot voters fail to vote in increasing numbers on each subsequent item. Consequently, the likelihood of a proposition failing for the lack of a majority of those voting in the election increases with the addition of each item on the ballot. … If you fail to vote on any item, you will aid in its defeat.

189 *Id*. at 12.

190 Montana Constitutional Convention, Proposed 1972 Constitution for the State of Montana, Official Text With Explanation 2, *available at* http://www.umt.edu/media/law/library/MontanaConstitution/Miscellaneous%20Documents/Const%20VIP.pdf.

191 *Cashmore*, 500 P.2d at 923 (reproducing ballot).

192 *Id.*, 500 P.2d at 939 (dissenting opinion) (reproducing instructions).

193 *Id.*, 500 P.2d at 940 (dissenting opinion) (reproducing form).

opposed a unicameral legislature (56 percent) and wanted to permit the state to authorize gambling (61 percent). But despite all its campaign advantages, the constitution fell short of the required majority. It won slightly under 50.6 percent of the yes/no tally, but garnered less than 49 percent of the total special election vote as reported by the secretary of state. About a third of those issued ballots failed to vote on the constitution,[194] perhaps from understanding that abstention meant "no." Thus, the constitution fell 2386 votes short. In 44 of Montana's 56 counties it failed to garner even a majority of even the yes/no vote.[195]

IV. The Proclamation, the Lawsuit, and the Decision

Before the election, the convention leaders had shared the common understanding that "a majority of the electors voting at the election" meant a majority of all voters participating.[196] Once they saw the election results, however, they turned on a dime. They now claimed that "a majority of the electors voting at the election" meant only that the "yes" vote had to be greater than the "no" vote.[197] The lawyer-delegates, who during the convention had been unanimous in affirming the former meaning promptly began to argue for the latter.[198]

Overruling the scruples of Frank Murray, the Democratic Secretary of State,[199] Governor Forrest Anderson, also a Democrat, signed a proclamation of ratification on June 20, 1972.[200] A fierce argument ensued between Murray and Anderson,[201] but the governor remained fixed. When Murray objected that the governor had

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194 Associated Press, *Constitution OK Still in Question*, Great Falls Tribune, Jun. 13, 1972, at 1.

195 Atlas, *supra* note 1, at 259.

196 *Supra* notes 150-55 and accompanying text.

197 *E.g.,* Associated Press, *Constitution OK Still in Question*, Great Falls Tribune, Jun. 13, 1972, at 1 (stating that "Convention President Leo Graybill, Jr. … and Vice President John H. Toole … said Monday they were confident the constitution had passed legally. In a letter to other delegates, they said they believed MT legal proceedings would uphold the principle that a majority voting for or against the main issue—the constitution—approved it.").

198 Charles S. Johnson, *Canvass Confirms Doubts of Constitution Vote*, Great Falls Tribune, Jun. 15, 1972, at 1 (reporting that lawyer delegates claimed that only a majority of the yes/no vote was required).

199 Atlas, *supra* note 1, at 259.

200 *A Proclamation by the Governor of the State of Montana*, Jun. 20, 1972, *available at* https://i2i.org/wp-content/uploads/Anderson-proclam.pdf.

201 J.D. Holmes, *Constitution Proclaimed*, Great Falls Tribune, Jun. 21, 1972, at 1 ("Because Anderson and Murray had just finished arguing about an interpretation of the June 6 primary vote on the proposed constitution, tempers were still short."). Murray protested, "I didn't see you sign it," to which Anderson rejoined "I'll put my signature on it again while you're sitting there*." Id.*
According to my sources, one of which was Professor William Crowley, who in 1972 served as Anderson's chief of staff, the actual exchange was saltier, with Anderson exclaiming, "Then I'll sign it again, you son of a bitch." According to Judge Charles C. Lovell, who argued the *Cashmore* case for the court, Crowley was the author of the ratification proclamation. Oral Conversation with Judge Charles C. Lovell, Helena, Aug. 24, 2018.

not signed the document in his presence, Anderson scrawled his signature on the document a second time.[202] The proclamation shows one signature superimposed on an earlier one.[203]

U.S. District Judge Charles C. Lovell, who as a young lawyer argued *Cashmore* for the state attorney general's office, says he was never quite sure of Anderson's motives in signing—whether he believed the constitutional majority standard didn't mean what everyone said it did, or whether he was putting on a political show.[204] The grandiose language of the news release accompanying the proclamation is consistent with the latter: "Government must be free to act," Anderson declared, "and I proclaim the passage of this Constitution, declaring it to be a major step in that direction."[205]

Contemporaneously with the signing, lawyers for William C. Cashmore, a Helena physician, and Stanley C. Burger, executive director of the Farm Bureau,[206] appeared before the Montana Supreme Court. In separate but substantively identical applications the two of them—styled "relators" in the pleadings—asked the court to assume original jurisdiction, emphasizing the importance of the case and claiming there were no factual disputes. For relief they requested an order directing the governor to appear and show cause why the new constitution should not be declared invalid. They further asked for an injunction or, alternatively, a writ of prohibition preventing the governor from proclaiming ratification.[207] But the governor had signed a just few minutes earlier, rendering their requests for an injunction or writ of prohibition moot.[208] Accordingly, the court, in an order issued two days later, treated their applications as requests for a declaratory judgment. The order recited an earlier, presumably oral, order consolidating the two cases. It further recited the absence of factual issues, fixed a schedule for response, and invited other interested parties to intervene or file briefs as amici curiae.[209]

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202 Atlas, *supra* note 1, at 259.

203 *A Proclamation by the Governor of the State of Montana*, Jun. 20, 1972, *available at* https://i2i.org/wp-content/uploads/Anderson-proclam.pdf.

204 Oral Conversation with U.S. District Judge Charles C. Lovell, Helena, Aug. 24, 2018.

205 Statement by Governor Forrest H. Anderson, Helena, June 20, 1972, *available at* http://www.umt.edu/media/law/library/MontanaConstitution/MHS%20Ratif/Anderson.pdf. *See also* Brief of Respondent Anderson at 7, *available at* https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/ ("I proclaimed the new Constitution effective, and I stand on that decision").

206 Dr. Cashmore had served as a Republican in the state senate from 1961 to 1963 and in the house in 1969 and again in 1971. Ellis Waldron, Montana Legislators, 1864-1979: Profiles and Biographical Directory (Bureau of Gov't Research, University of Montana, 1980). Dr. Cashmore ran unsuccessfully for constitutional convention delegate in 1971. Atlas, *supra* note 1, at 257. Burger was a long-time conservative activist who founded the Montana Farm Bureau as a more conservative alternative to the liberal Farmers Union. Telephone Conversation with Tom Rolfe of Helena, Montana, Aug. 6, 2018.

207 Application of Burger, available at https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/; Application of Cashmore, *available at id*.

208 J.D. Holmes, *Constitution Proclaimed, Passed, Protested*, Great Falls Tribune, Jun. 21, 1972, p. 1. A conspiratorial right wing group also commenced a suit, Associated Press, *Citizens' Group Protests Passage of Constitution*, Great Falls Tribune, Jun. 22, 1972, p.3, but it was soon dismissed.

209 Per curiam order, Jun. 22, 1972, *available at* https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

On June 28, the governor filed his answer and a supporting brief.[210] He did so pro se, although the documents likely were drafted by his chief of staff, William Crowley, a University of Montana law professor and civil procedure expert.[211] The governor admitted there was no factual dispute, but contested the relators' interpretation of the law. On June 20, at Lovell's recommendation, the Republican attorney general requested permission to intervene to support the Democratic governor, and the court immediately granted this request.[212] On July 11, the court scheduled oral argument for July 17.[213] On July 11 also Burger filed his principal brief, and Cashmore did so the following day.[214]

As in the referendum campaign, the constitution's opponents found themselves outgunned. Intervening to support the governor and the attorney general were the City of Billings, Montana's largest municipality; Robert L. Kelleher, a lawyer who had served as a convention delegate; and a group of former delegates led by Leo Graybill, Jr., the convention president. Submitting amicus curiae briefs on the same side were five organizations, including Common Cause and the League of Women Voters.[215] No organization or governmental unit supported the relators. They were backed by four amici, all individuals, and a single group of six individuals.[216] Among the pro-relator amicus briefs, only that of Billings lawyer Gerald J. Neely represented a respectable effort.[217]

The relators soon faced a more serious disadvantage. The court had assumed original jurisdiction on the premise, accepted by all, that there was no factual dispute. The relators, their supporting intervenors, and their allied amici had prepared their briefs on that supposition. Then, on July 12—a scant five days before oral argument and more than three weeks after receiving permission to intervene—the attorney

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210 Answer and brief *available a*t https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

211 I served on the same faculty as Professor Crowley for many years. I have personal knowledge of the fact that he customarily taught courses in Civil Procedure, focusing almost exclusively on the procedure of Montana.

212 The Attorney General's Application for Leave to Intervene and the court's order are available at https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.
The Montana attorney general usually represents state officers, of course, which argues for his supporting the governor. On the other hand, the attorney general also defends the results of ballot issues, and under existing rules the voters had rejected the constitution. However, Judge Lovell says there was no debate over which side to take. Oral Conversation with U.S. District Judge Charles C. Lovell, Helena, Aug. 24, 2018.

213 Oral Argument Schedule, *available at* https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

214 Burger's brief and Cashmore's memorandum of law (brief) are available at https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

215 Register of Action in the Supreme Court of the State of Montana, Case No. 12309, *available at* https://i2i.org/wp-content/uploads/Cashmore-Register-of-Action.pdf; *see also* Associated Press, *17 Attorneys to Air Views on Constitution,* Great Falls Tribune, Jul. 7, 1972, p.17.
All briefs filed in the case are available at https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

216 *Id.*

217 Brief of Amicus Gerald J. Neely, *available at* https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

general filed his formal answer.[218] This document challenged for the first time the consensus that there was no factual dispute.

The attorney general's answer, backed by a brief filed two days later,[219] contended that the number certified by the secretary of state as the total voting was an overstatement. According to the attorney general, the secretary of state's figure included all ballots issued to electors at the polls, including those that were blank, mutilated, discarded, or otherwise not properly voted. "[T]he total number of individual electors voting at such election," the attorney general stated, "is some number less than, and perhaps markedly less than, 237,600."[220]

Apparently several intervenors and amici allied with the governor knew in advance that the attorney general had this surprise planned, because within two days the Graybill intervenors, the League of Women Voters, and Common Cause all had filed briefs focusing on the new factual dispute.[221]

Under these circumstances, the court could have pursued any of three defensible courses. The best would have been to remit the case to a trial judge for a hearing on the factual question—and, preferably, for development of the legal issues as well. The second best would have been to employ a special master to resolve the factual question. A barely-defensible option would have been to postpone oral argument and afford the relators time to investigate and respond. But the court adopted none of these courses. Instead, it retained original jurisdiction and proceeded with oral arguments as scheduled.

Those arguments were held on July 17, with numerous convention delegates peering from the courtroom galleries.[222] Judge Lovell says that he focused his argument on dicta from a 1902 case because the dicta had been composed by Montana's longest serving Chief Justice, Theodore M. Brantley.[223] Lawyers speculated that Justices Frank I. Haswell and Gene B. Daly probably would vote for the new constitution because they were more liberal, while Chief Justice James T. Harrison and Justice Wesley Castles, who were relatively conservative, would oppose it. The swing justice was said to be Justice John C. Harrison.[224]

On the face of it, those predictions seem to have been confirmed.[225] On August 18, 1972, the court ruled 3-2 in favor of the governor and for ratification, holding

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218 Answer of Attorney General, *available at* https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

219 Brief of Attorney General, *available at* https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

220 Answer of Attorney General, *available at https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/*.

221 Briefs *available at* https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

222 J.D. Holmes, *237,000 Key Figure in Constitution's Fate*, Great Falls Tribune, Jul. 18, 1972, p.1; *see also* Frank Adams, *Constitution Backers Lean to Optimism,* Great Falls Tribune, Jul. 18, 1972, at 1 (reporting that at least 30 delegates were in the galleries).

223 Oral Conversation with Judge Charles C. Lovell, Helena, Aug. 24, 1972. Judge Lovell's account is confirmed by a newspaper report. J.D. Holmes, *237,000 Key Figure in Constitution's Fate*, Great Falls Tribune, Jul. 18, 1972, at 1. The case was *Tinkel v. Griffin*, 68 P. 859 (Mont. 1902), discussed *infra.*

224 Frank Adams, *Constitution Backers Lean to Optimism,* Great Falls Tribune, Jul. 18, 1972, at 1.

225 Frank Adams (column), Great Falls Tribune, Aug. 27, 1972, at 25. *But see infra* notes 303-08 and accompanying text (proposing the alternative hypothesis that Justice Haswell was the swing vote).

that a majority of the vote on the issue was sufficient. Justice Haswell wrote on behalf of a majority that included Gene B. Daly and John C. Harrison. James T. Harrison penned the dissent for himself and Castles.

V. *Cashmore*'s Majority Opinion

In view of the importance of the case and its departure from previous authority, it would be gratifying to report that Justice Haswell's opinion was rigorously researched, carefully written, and powerfully argued. Unfortunately, such a report cannot be made. Indeed, the opinion's organizational defects are such that reorganization is necessary before analysis can be attempted. When reorganized, Justice Haswell's opinion coalesces into six fundamental propositions:

A. The framers did not clearly require an "extraordinary majority" because "a majority of electors voting at the election" is ambiguous.
B. The precedents from other states are in hopeless conflict.
C. The Montana precedents favor a simple majority.
D. "Natural right" favors a simple majority rather than an extraordinary majority.
E. The constitution's variation in language is explainable on grounds other than variation of meaning.
F. The constitution was adopted even under the relators' understanding of the rule.

We consider each point, in turn.

A. The Court's Claim that the Constitutional Language was Ambiguous

After noting that rules of statutory construction apply to interpreting the constitution,[226] Justice Haswell conceded that "a literal construction would seem to support relators"[227]—that is, "electors voting at the election" seems to mean everyone who voted on any issue. He then proceeded:

> The quoted language speaks of approval 'by a majority of the electors voting at the election'. But voting on what? The constitutional language does not expressly answer this. However, the substance of the language of the entire provision indicates that it refers to voting on approval or rejection of the proposed constitution, and it is to that question that the quoted language is directed. *There is absolutely nothing to indicate that the framers had in mind a multiple issue ballot* wherein contingent alternative issues would be submitted to the electors in addition to the primary question of approval or rejection of the proposed constitution itself … . The best that can be said for relators is that the quoted language is ambiguous when read in connection with the entire constitutional

[226] *Cashmore*, 500 P.2d at 926.
[227] *Id.*, 500 P.2d at 927.

> provision relating to submission of the proposed constitution to the electors.[228]

One problem with this passage is that the constitutional language clearly *did* contemplate a multiple issue election. It authorized the convention to refer to the voters "such revisions, alteration, or amendments" as may be deemed necessary."[229] The legislature providing for the convention referendum interpreted it that way, as had the Constitutional Convention Commission.[230] As the dissent pointed out,[231] in a case decided just the previous year Justice Haswell himself had noted with apparent approval the referendum's provision for multiple issues.[232]

A more fundamental weakness is that Justice Haswell's rhetorical question, "But voting on what?" is irrelevant to the constitutional denominator. That denominator is based on the number of electors voting in the election, not the issues on which they vote. In other words, the court found ambiguity not in the constitution's actual language, but in hypothetical language different from what the document actually said.

Later in the opinion, Justice Haswell cited several constitutional provisions requiring super-majorities—that is, heightened decisional numerators.[233] He then returned to the issue of ambiguity:

> Finally, if the framers of our Constitution had intended to require an extraordinary majority for approval of a proposed constitution submitted by an elected constitutional convention, they could easily have said so. Our Constitution contains several provisions requiring extraordinary majorities, but wherever such requirement is imposed the language is loud, clear and unambiguous. … Here, we are simply not satisfied that the framers of our Constitution intended to require more than a simple majority vote on approval of the proposed constitution.[234]

Of course, the provision at issue required only a simple majority, not an "extraordinary majority." The change from the default rule was not in the numerator but in the denominator. Just as critically, the framers did indeed "sa[y] so." As explained in

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228 *Id.,* 500 P.2d at 927. (Italics added.).

229 Mont. Const. of 1889, art. XIX.

230 Montana Constitutional Convention Commission, Constitutional Convention Enabling Act 28 (1972):

> The convention may submit proposals for ratification in any of the following forms: (1) as a unit in the form of a new constitution, (2) as a unit with the exception of separate proposals to be voted upon individually, or (3) in the form of a series of separate amendments.

231 *Cashmore*, 500 P.2d at 931.

232 Forty-Second Legislative Assembly v. Lennon, 481 P.2d 330, 338 (Mont. 1971):

> [S]ince the referendum uses the language "revise, alter, or amend the constitution" it must have been contemplated that the work of the convention might be partial or total and that the individual parts might be submitted to the people. Therefore each Article might be separately submitted.

233 *Cashmore*, 500 P. at 928.

234 *Id.*, 500 P.2d at 929.

Part II, at the time they inserted the heightened denominator language into the 1889 constitution, that denominator's meaning was universally understood.

B. The Court's Claim that Precedents from Other States Were in Hopeless Conflict

On this subject, Justice Haswell wrote for the court:

> We recognize that there are two distinct and opposing lines of authority in other jurisdictions having the same or similar constitutional language. … These cases are cited merely to indicate the two conflicting lines of authority but are not relied upon or determinative of our decision in the instant case. We prefer to look to Montana statutes and cases for guidance in interpreting the meaning of our own constitutional provisions.[235]

In fact, there were not "two distinct and opposing lines of authority." Those cases equating "a majority of electors voting at the election" with "a majority voting on the question" arose from single issue special elections. In other words, they differed only in the scope of the election, not in the meaning of "a majority of electors voting."[236] As the *Cashmore* dissenters pointed out, the alleged split of authority was more apparent than real.[237]

This passage seems to have served the rhetorical purposes of dismissing all authority but two Montana cases on which the court's majority wished to rely.

C. The Court's Claim that the Montana Precedents Favored a Simple Majority

Having disposed of other authority, Justice Haswell opined that "we must consider the policy and philosophy of government contained in our Constitution as enunciated in numerous [Montana] cases … . "[238] Those "numerous" cases turned out to be two: *Tinkel v. Griffin*[239] and *Morse v. Granite County*.[240]

Tinkel involved a one-issue special election, so the number of votes in the election was identical to the number of votes on the issue.[241] In addition, the constitutional provision at issue in *Tinkel* was worded differently from the governing provision in *Cashmore*. The clause relevant to *Tinkel* required that for a county bond issue to pass, approval was necessary by "a majority of the electors

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235 *Id.,* 500 P.2d at 926.

236 *Supra* note 59 and accompanying text.

237 *Cashmore*, 500 P.2d at 933 ("[A]t first blush, the authorities may seem to be split, but there is something we feel reconciles any apparent variance in the cases."). The dissent was, correctly, referring to the fact that the 1972 referendum was a special election, but it failed to follow through with a sufficient explanation of why that was significant. *Cf.* Rice v. Palmer, 96 S.W. 396, 400 (Ark. 1906) (calling the purported split "more apparent than real").

238 500 P.2d at 928.

239 68 P. 859 (Mont. 1902).

240 119 P. 286 (Mont. 1911).

241 68 P. at 860.

thereof, voting at an election".[242] Thus, the provision relevant to *Tinkel*, unlike that relevant to *Cashmore*, featured a comma before the word "voting." This signals, of course, that the ensuing phrase is not restrictive—that is, the ensuring phrase does not define or limit the meaning of "electors." (This use of the comma as a non-restrictive signal was paralleled elsewhere in the 1889 constitution.[243]) A county bond issue, in other words, needed approval by a majority of *all* electors. The statute implementing Article V, Section 13 interpreted the comma as non-restrictive as well, for it required approval by "a majority of the electors of the county."[244]

As noted earlier,[245] some cases interpret "a majority of electors" to mean either (1) the majority of electors voting or (2) a majority voting on the question. One can classify *Tinkel* among the second group. But that was not relevant to the interpretation of the clause at issue in *Cashmore*.[246]

Morse v. Granite County[247] was in all relevant respects identical to *Tinkel*. In *Morse* the court stated that the single issue referendum had been offered at a general election, but closer examination of the court's opinion shows that the referendum actually was a single-issue special election held concurrently with the general election: It was a one-county affair characterized by a separate call, separate notice, and separate ballots.[248] Moreover, it was a county bonding referendum, subject to the same constitutional and statutory provisions that governed *Tinkel*.[249]

Justice Haswell must have understood that neither *Tinkel* nor *Morse* dictated the answer in *Cashmore*.[250] This explains why he glossed over the law and facts governing those cases in favor of dicta in *Tinkel*, which he cited primarily as evidence of "policy and philosophy."[251]

D. The Court's Claim that the 1889 Constitution's Variation in Language was Explainable on Grounds Other than Variation of Meaning

There is a presumption that when a legal document employs different phrases the phrases carry different meanings.[252] However, in writing for the court Justice Haswell stated that the "differences in the language employed by the framers of our

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242 Mont. Const. of 1889, art. V, § 13.

243 *Id.*, art. XVI, §2 ("a majority of the qualified electors of the county, at a general election").

244 The statute, Mont. Rev. Code § 2933, is quoted in *Morse*, 119 P.2d at 291.

245 *Supra* note 244 and accompanying text.

246 Justice Haswell emphasized *Tinkel's* status as a Montana case; however, the opinion in *Tinkel* was based heavily on a Kentucky decision, *Montgomery County Fiscal Court v. Trimble*, 47 S.W. 773 (Ky. 1898), from which the *Tinkel* opinion borrowed a 247 word extract. 68 P. at 861.

247 119 P. 286 (Mont. 1911).

248 119 P. at 288.

249 119 P. at 291.

250 Certainly this was pointed out in several briefs. *E.g.,* Brief of Petitioner, The State of Montana *ex rel.* v. Burger (Cashmore), *available at* https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/, at 15-17 (discussing *Tinkel* and *Morse*); Amicus Curiae Brief of Gerald J. Neely, *available at id.* at 21 (discussing *Tinkel*).

251 500 P.2d at 929 ("Additionally, we must consider the policy and philosophy of government contained in our Constitution as enunciated in numerous cases including *Tinkel v. Griffin*").

252 *E.g*. Henson v. Santander Consumer USA, Inc., 137 S.Ct. 1718, 1723 (2017).

Constitution in the different election provisions … are no evidence of a differing intent on the part of the framers, but are the result of inherent constitutional differences in the elections themselves, which in turn requires different language."[253] He explained:

> The first part of Section 8 relating to calling a constitutional convention requires a referendum vote by "a majority of those voting on the question"; Section 9 dealing with submission of individual constitutional amendments by the legislature requires referendum to the qualified electors and approval "by a majority of those voting thereon". That part of Section 8 we are called upon to construe requires . . . approval by 'a majority of the electors voting at the election".
>
> The reason for the difference in language between these three provisions is readily apparent. The referendum to the voters on the calling of a constitutional convention is normally held at a general election as was done here; consequently, the phrase requiring "a majority of those voting on the question" was employed to distinguish the constitutional referendum question from other general election issues.
>
> The language of Section 9 relating to submission to the electors of individual constitutional amendments proposed by the legislature must be at a general election where up to three such amendments can be submitted at the same election, thus the language "approved by a majority of those voting thereon" is used.
>
> The language of Section 8, that we must construe.—"a majority of the electors voting at the election" was used because a separate election is required for approval or rejection of a constitution proposed by a constitutional convention and there is no need to differentiate between approval or rejection of a proposed constitution at such separate election and issues at some other election held at the same time.[254]

Yet this passage adds text to the 1889 constitution that was not present. It states, "The referendum to the voters on the calling of a constitutional convention is normally held at a general election as was done here," but nothing in the constitution so required. It required only that the legislature "submit [the proposal for a convention] to the electors of the state."[255] Nor was there any evidence that including the referendum in a general election, as in 1970, was any more "normal" than holding a special election for the purpose. The claim that "a separate election is required for approval or rejection of a constitution proposed by a constitutional convention" was similarly without textual basis. The constitution required only that the convention designate an election for the referendum; there was no requirement that the election be general or special.[256]

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253 500 P.2d at 927.
254 *Id.*
255 Mont. Const. of 1889, art. xix, § 8.
256 *Id.*

Thus, Justice Haswell's opinion created distinctions between elections that did not exist. And without them, no reason remained for disregarding the presumption that different language signifies different meaning.

E. The Court's Claim that "Natural Right" Favors a Simple Majority Rather than an Extraordinary Majority

"We are mindful of the principle," Justice Haswell wrote,

> that when a statute is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted. Section 93-401-23, R.C. M. 1947. Majority rule is a natural right and fundamental tenet of government in a democracy, and only the strongest evidence that something more than a majority, i.e., an extraordinary majority, is required in a given situation will suffice. Here no such evidence exists.

Of course the differences between the parties arose not from differences about majority rule but about the group from which a majority is determined. The dispute was over decisional denominators rather than numerators. More importantly, perhaps, Justice Haswell cited no authority for the proposition that majority rule is a matter of natural right. On the contrary, one reason super-majority requirements appear in constitutions is to better protect the "natural rights" of individuals and minorities.[257]

F. The Court's Claim that the Constitution Was Adopted Even Under the Traditional Rule

Near the end of his majority opinion, Justice Haswell alluded to the factual issue raised by the attorney general: The secretary of state reported 237,600 electors as voting, but that figure may have included all those receiving ballots rather those who cast them properly.[258] Justice Haswell therefore determined that "the figure of 237,600 labeled 'total number of electors voting at the election' on the Secretary of State's certificate is demonstrably incorrect, and the disputable statutory presumption of correctness of such figure … must yield to the facts."

Certainly the court should have yielded to the facts, but it neither ordered a recanvassing nor appointed a fact-finder to determine what those facts were. Instead, the majority opinion insisted that

> We can make that determination on the materials before us. If we take the total number of electors who cast ballots that were counted on the issue receiving the largest total vote, this should approximate the total number of electors voting in the election.[259]

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257 *E.g.*, John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 Tex. L. Rev. 703, 722 (2002) ("Both the large republic and supermajority rule founded government on popular consent yet reduced the power of particular factions to oppress the rights of minority opponents.").

258 *Cashmore*, 500 P.2d at 930.

259 500 P.2d at 930.

Accordingly, the majority added together the number of votes on the most-voted for issue in each county—that is, the gambling question in 18 counties and the constitution in the remaining 38. This yielded a total of 230,588 voters. The constitution, wrote Justice Haswell, was ratified under the traditional rule because the affirmative vote of 116,415 represented a majority of 230,588.[260]

Unfortunately, these calculations demonstrated a lack of numerical understanding. In absence of specific legal authorization, one cannot employ the most-voted-on question as a proxy for total votes cast because some electors opt to vote only on issues *other* than the most-voted-on question. Consider the hypothetical five-voter election posited above:[261]

> *Elector 1 votes for governor and on Proposition A.
> *Elector 2 votes for governor, senator and on Propositions A and B.
> *Elector 3 votes for governor, senator, and on Proposition B.
> *Elector 4 votes for senator and on Proposition A.
> *Elector 5 votes on Proposition A only.

The most voted-on candidate or issue is Proposition A—four votes. But that was not the number of electors who voted (five), because Elector 3 voted for the candidates and on Proposition B, but not on Proposition A.

Nor was this a merely theoretical concern in the actual referendum:

- Advocates of the constitution, the press, and presumably election officials repeatedly told the electors that an abstention on any proposition was effectively a vote against it.[262] The death penalty was, as it is now, a subject of passionate views. Those who went to the polls to vote for the death penalty, particularly social conservatives, had reason not to bother voting on the other (more liberal) proposals. The court's count omitted all of those voters.
- Gambling was also contentious. No doubt there were single-issue voters who went to the polls to cast their ballot on gambling and nothing else. The court's count omitted electors who chose only to vote on gambling in counties where the constitution was the most-voted-on issue.
- Some people in the eighteen counties where gambling was the most-voted-on issue may have chosen only to vote on the constitution, on unicameralism, and/or on the death penalty. The court's count omitted them as well.

In other words, *the court's estimate omitted every elector in 36 counties who cast a ballot but decided not to vote on the constitution and every elector in the other eighteen counties who cast a ballot but decided not to vote on gambling*. The number omitted may have been very significant—but even an undercount of less than one percent would have raised the denominator sufficiently to depress the constitution's percentage below the necessary majority.[263]

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260 *Id*.

261 *Supra* note 48 and accompanying text.

262 *Supra* Part III.E.

263 If the number of "electors who vote[d] at the election" was higher than 232,831, the constitution would not have had the necessary majority. The 2243 figure is 232,831 *minus* 230,588, the number of voters conceded by the court's opinion.

VI. Chief Justice Harrison's Dissent

Chief Justice James T. Harrison's dissenting opinion[264] was structured in a peculiar manner. It revealed signs of piecemeal drafting, with different parts written at different times and perhaps by different authors.

As finally issued, the dissenting opinion began with a preface of about 660 words. This preface was haunted by a spirit of exasperation. It recited earlier proceedings and complained that the majority was not acting in a consistent manner. It specifically criticized Justice Haswell for contradicting his own statement in an earlier case.[265]

After the preface came the core exegesis. It was composed in the indicative mood.[266] It consisted of about 6300 words, of which more than half—a recital of authorities—was cribbed nearly verbatim from Dr. Cashmore's principal brief.[267] The core exegesis also borrowed from an exhaustive amicus brief by Billings lawyer Gerald J. Neely.[268] Near the end of the core was a 150-word insert written in the subjunctive mood,[269] after which the opinion returned to the indicative.[270] The last three paragraphs were written in the subjunctive and served as a conclusion.[271] Like the preface, this conclusion is testy in tone.[272]

From the overall structure it appears that the core exegesis was to be the majority opinion, but when it became clear the writer or writers did not command the majority, he (or they) interlineated the 150-word passage, added the frustrated preface, and appended the testy conclusion.

Supporting the hypothesis of piecework composition are some other oddities. One passage was incoherent and another bore no relation to the remainder of the text. The incoherent passage appeared in the portion of the opinion that agreed with the holding in *Tinkel*:

> We have no argument with that philosophy. The same argument is applicable to the case at bar because the total number of votes for the proposed constitution may have been less than a majority of those who voted on that separate issue.[273]

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264 *Cashmore,* 500 P.2d at 930-45.

265 *Id*., 500 P.2d at 931.

266 The indicative mood is a grammatical term used to indicate the meaning of verbs. As illustrated by the text *infra*, it is to be distinguished from the subjunctive mood. The indicative mood is used, inter alia, for statements of fact, e.g., "I *see* a giraffe." The subjunctive is used, inter alia, for statements contrary to fact, e.g., "I see only an elephant; if I *saw* a giraffe I *would tell* you."

267 *See* Memorandum [*i.e*., brief] in Support of Application for Declaratory Judgment, *available at* https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

268 Amicus Curiae Brief of Gerald J. Neely, State of Montana *ex rel.* Cashmore v. Anderson (1972), *available at* https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

269 *Id*. at 943 (beginning, "The foregoing should pose a dilemma for the court … .

270 *Id*. (beginning, "A canvassing board cannot evade its duties …. .").

271 *Id*. at 945 (beginning "We would order … ").

272 *Id*. at 945 ("In filing the foregoing dissent, we recognize the futility of it. By a three to two vote this Court is declaring a new constitution to have been adopted. We believe the majority opinion to be wrong … .").

273 *Id*., at 938.

Perhaps the writer intended to say he agreed with *Tinkel* insofar as it limited the decisional denominator to those who voted in the special election, but that *Tinkel* was *inapplicable* because the proposed constitution may have received less than a majority of those who voted in the special election.

The passage without relation to anything else in the opinion was as follows:

> We would find then that 'positive assent' is the same as 'a majority of the electors voting at the election'. This positive assent is referred to by many writers and courts as an extraordinary majority.[274]

This passage appears to have been dropped into the opinion by mistake. There is no other reference to "positive assent" in either the majority or dissenting opinions. The passage derives from the part of Neely's brief that explained the "majority of electors voting at the election" requirement as one that ensured that ratifiers approve by positive assent rather than by silence.[275]

The coherent portions of the dissent's core exegesis cited and reproduced extracts from constitutional provisions and from eight decided cases defining "a majority of electors voting at the election." It then distinguished *Tinkel* and *Morse*, and finally discussed the factual question of how many voted in the special election.[276] It argued that the number of electors who voted was "the critical, controlling fact figure,"[277] and that the court should order a "recanvass" [*sic*] to resolve it. Apparently, this process would involve only requiring each county election officer to clarify whether the number of voters he or she submitted to the secretary of state consisted of *all* ballots issued or only of ballots *legally voted*.

Despite its length, the dissent suffered from several lost opportunities. First, its author(s) should have contended that original jurisdiction had been improvidently granted or, once granted, should have been revoked after the factual issue surfaced. The factual issue—and, indeed, the complex and important legal issues—justified careful consideration at the district court level, or at least by a special master.

Second, the dissent should have noted the unfairness of the proceedings: Five days before the hearing—after all parties had agreed that there was no factual dispute and after the briefs of the relators and their allies had been prepared—the attorney general and his allies produced a factual dispute. Under the circumstances, the court should have postponed the hearing, asked the relators for briefs on the factual issue, or otherwise permitted an opportunity for response.

Third, the dissent strung together a list of relevant cases, but failed to draw two necessary conclusions: One was that the phrase "a majority of electors voting at the election" had a clear, accepted meaning, not a disputed or debatable one. The other was that *this was also the meaning when the voters ratified the 1889 constitution*. It was this understanding that should have governed the case, not the "philosophy" of the *Tinkel* dicta issued thirteen years later.

Fourth, the dissent failed to show how that meaning, and the public message that an abstention meant "no," invited those who opposed the constitution to abstain.

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274 *Id*., at 939.
275 Amicus Brief of Gerald J. Neely, *supra*, at 3 & 40.
276 *Cashmore*, 500 P. at 939-43.
277 *Id.*, 500 P.2d at 943 (dissenting opinion).

Fifth, the dissent failed to mention how the manipulated structure of the paper ballot could have affected the election results. For example, contrary to the standard practice (followed for the other three propositions) that a "yes" vote is a vote to alter the status quo, the ballot provided that a "yes" vote continued the death penalty. It also advised voters that "If the proposed constitution fails to receive a majority of the votes cast, alternative issues also fail."[278] Hence electors who contributed to the landslide majority in favor of the death penalty might well have voted for the constitution only because they were misled into believing that without the new constitution Montana could no longer inflict the death penalty.

Finally, the dissent failed to challenge the majority's erroneous claim that the number of electors casting ballots on the most voted-upon issue was equivalent to the total number of electors voting.

VII. The Motion for a Rehearing

On September 5, Burger filed a petition for rehearing. The petition included extensive argument. Much of it represented a futile effort to persuade the court to reconsider its legal conclusions, but it also included the first written rebuttal of the attorney general's claim of factual dispute. The petition pointed out that county election officials copied the voter numbers they sent to the secretary of state from their "poll books," and that under state law a poll book recorded only those who actually cast valid ballots, not everyone who was issued a ballot. Attached to the petition were affidavits from two county clerks affirming that the numbers they transmitted represented only those who had properly voted.[279]

The Burger petition also featured elaborate statistical examples showing that the number of votes on the most-voted-upon issue was not the same as the total number of electors participating in the election.

The following day, Dr. Cashmore also filed a petition for rehearing. Cashmore's petition noted that the constitutional referendum was part of a multi-issue special election, and discussed cases arising in such elections. It also urged a "recount" of the vote.[280]

The attorney general's response accused the relators of trying to re-litigate issues the court already had decided.[281] After the filing of some additional papers—among them two very short amicus briefs in support of the relators but not really on point[282]—the court denied re-hearing without explanation. The vote for denial was the same 3-2 tally that resulted in the initial decision.[283]

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278 *Id.,* 500 P.2d at 923 (reproducing ballot form).

279 Petition for Rehearing, *available at* https://i2i.org/wp-content/uploads/1972-0905-Rehg-Petition-Burger.pdf.

280 Petition for Rehearing of the Relator, William F. Cashmore, M.D., *available at* https://i2i.org/wp-content/uploads/1972-0906-Rehg-Petition-Cashmore.pdf.

281 Objections to Petitions for Rehearing, *available at* https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/; Memorandum in Support of Objections to Petitions, *available at id*.

282 These materials are available at https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

283 Associated Press, *High court rejects constitution test,* Great Falls Tribune, Sept. 26, 1972, at 1.

The denial was, in retrospect, probably inevitable. The petitions contained little more on the legal issues than that already offered by the parties, intervenors, or amici in the earlier proceedings. The Burger petition, it is true, demonstrated clearly the error in equating the vote on the most-voted-on issues with "electors voting at the election." Additionally, it cast doubt on the conclusion that there were fewer than 237,600 actual voters. But the statistical portion of the court's opinion had been dicta anyway.

VIII. The Aftermath

After the Montana Supreme Court issued its decision on rehearing, Dr. Cashmore surrendered, as he earlier had announced he would.[284] Burger appealed to the U.S. Supreme Court, which denied certiorari.[285] He next sued in federal district court, claiming that, in violation of the Fourteenth Amendment to the U.S Constitution, the state had misled voters by informing them that an abstention on the constitution was a "no" vote.[286] He was joined by another voter, who alleged that he

> was one of the 7,302 electors who did not vote on the constitution ... . He testified in his deposition that he voted for a bicameral legislature, gambling, and the death penalty, and that he understood that if the proposed constitution failed "the alternate issues also fail." He failed to vote on the proposed constitution for two reasons: first, because he did not know enough "about the issues involved", and second, because he felt that if he did not vote, "it was a vote against it." He had read the ballot and the newspaper supplement. [His] wife voted as he did.[287]

However the district court found no Fourteenth Amendment violation:

> There is no suggestion that any publication or statement, either official or unofficial, was intended to misrepresent any facts or deceive or mislead the voters. The official ballot and publication followed the language of the existing constitution. The other statements at most contained an erroneous interpretation of an ambiguous provision in the Montana Constitution—an interpretation deemed correct by two of the five justices of the Montana Supreme Court.
>
> In no document was there any advice or suggestion that the electors should not vote on the proposed constitution. On the contrary, the unofficial as well as the official publications urged a vote on all four issues.[288]

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284 Tribune Capitol Bureau, *Document Ruling Seen Acceptable*, Great Falls Tribune, Jun. 24, 1972, at 7 ("But, says Cashmore, 'we should settle things in Montana without going to Washington. Certainly a matter of this kind should be settled here.'"); Associated Press, *Challenger of Constitution Accepts Court Ruling Despite Disappointment,* Great Falls Tribune, Aug. 19, 1972, pat 3.

285 410 U.S. 931 (1973).

286 Burger v. Judge, 364 F.Supp. 504 (D. Mont.), *cert. denied*, 414 U.S. 1058 (1973).

287 *Id.* at 509.

288 *Id*. at 511.

The court added that the newspaper supplement was an "unofficial" document and that if "any electors were in fact misled, they were simply mistaken as to the effect of their abstention from voting and not deprived of any right or opportunity to vote … ."[289]

Although most election errors do not constitute Fourteenth Amendment violations, this decision is somewhat disquieting. Surely the Montana public was entitled to assume the constitutional language would be interpreted as represented by all concerned, with abstentions being counted as "no" votes. Perhaps Montana officials can be accused of changing settled election rules after the election was over—which surely is a Fourteenth Amendment violation.[290]

IX. What Happened?

When the court granted original jurisdiction it did so upon the representation by all parties that there were no unresolved issues of fact. Once it became clear this was not true, a prudent tribunal would have remitted the case to a trial judge or at least to a special master. If the trier of fact found that a critical number of ballots issued were not validly cast, the constitution would have been ratified under the traditional rule, and there would have been no need to spend court time on exhaustive treatment of the law. Even in the absence of a factual dispute, the case could have benefited from lower court review because of the extensive amount of case law interpreting the phrase "a majority of the electors voting at the election."

Why did the court retain original jurisdiction in such circumstances? *Cashmore* is not the only case in which the Montana Supreme Court's exercise of original jurisdiction amounted to judicial malpractice,[291] but it was certainly the most important. And another question is "Why, having retained jurisdiction, did the justices decide to abandon a settled rule of law on which all parties, no matter what their views on the new constitution, had relied?"

The answer to the latter question may be simply because Charles C. Lovell from the attorney general's office, funneling his appeal through the words of Montana's longest-serving chief justice, out-argued the constitution's opponents. Otherwise, the two questions may have some common answers. First, there is a substantial body of research showing that the decisions of judges, in particular elected judges, are influenced by personal incentives and judicial self-interest.[292]

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289 *Id.* at 512

290 *Cf.* Bush v. Gore, 531 U.S. 98 (2000) (voting, once recognized by the state, is a fundamental right, and voters must be treated equally; shifting rules after the election is inconsistent with the Equal Protection Clause); Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978) (finding due process violation where ballots cast in accordance with existing practice were invalidated after the election by retroactive application of new rule).

291 *See* Marshall v. State of Montana, 975 P.2d 325 (Mont. 1999), in which the court took original jurisdiction of challenge to voter-passed constitutional initiative without inquiring into the standing of the plaintiffs, and invalidated the initiative by altering a ballot rule after the election was held.

292 Joanna Shepherd, *Measuring Maximizing Judges: Empirical Legal Studies, Public Choice Theory, and Judicial Behavior,* 2011 Ill. L. Rev. 1753 (2011) (summarizing recent findings, including the influence of such factors as length of tenure, judicial elections, whether the elections are partisan or non-partisan, fear of reversal, and campaign contributions).

It is not disrespectful to the Montana Supreme Court to observe that the justices had powerful incentives to short-circuit the judicial process and uphold the 1972 constitution. The new constitution's omission of fiscal limitations could be expected to increase funding for the judiciary. The greater scope for legislation and some of the new constitution's open-ended language promised more judicial business and more scope for judicial efforts to "do good." The new constitution also extended the justices' terms of office from six years to eight.[293]

Additional influences on the justices may have arisen from their daily associations: They were, after all, public employees and human beings. They were in the hub of a county that awarded the new constitution the second highest percentage of any county in the state.[294] The information flow in Helena at the time was such that they would have been inundated with claims that the new constitution was good for Montana. It was unlikely they had encountered any coherent, intelligent arguments to the contrary.[295] They worked in the same building as the governor, and the fact that they already had issued one decision against the movement for a new constitution[296] may have discouraged them from issuing another.[297]

The justices may have been subtly affected also by the foreseeable consequences of alternative outcomes. It seems all but certain that the constitution's advocates would have "punished" an adverse decision, perhaps with continued litigation and perhaps through mass media favorable to the new constitution. A decision against the constitution, on the other hand, entailed fewer costs. The constitution's opponents had demonstrated their media ineptitude during the ratification campaign, and Dr. Cashmore had made a tactically unwise public statement ruling out in advance any federal court proceedings.[298] It was not then known that Burger was determined enough to proceed without him.

In such circumstances it is not remarkable that three justices voted to short-circuit the process, disregard precedent, and rule the constitution ratified. It is perhaps more remarkable that two justices did not.

Why, then, having decided to retain original jurisdiction and abandon the traditional rule, did they not take more time and care in organizing and composing their opinions?"

Part of the answer to this question may lie in the proceedings within the court's chambers. Some insiders claim the initial vote among the justices was 2-3 *against* the constitution, that each side prepared an opinion on that basis, that one justice switched sides, and that both opinions had to be re-written.[299] This claim is corroborated by the structure of the dissent. As noted earlier, its core exegesis shows signs of having been composed as the opinion of the majority. Its preface

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293 *Compare* Mont. Const. of 1889, art. vii, § 7 (six years) with Mont. Const. art. vii, § 7 (eight years).

294 Atlas, *supra* note 1, at 262 (showing that Lewis and Clark County awarded the new constitution over 59 percent of the vote, second only to Cascade County (Great Falls)).

295 *Supra* Part III.A & III.B (discussing the public information flow).

296 Montana *ex rel.* Kvaalen v. Graybill, 496 P.2d 1127 (Mont. 1972) (holding that the convention, once adjourned, had no authority to spend government funds for "public education").

297 *Shepherd, supra* note 292, at 1761 ("Judges who consistently vote against the interests of the other branches of government may hurt their chances for reappointment).

298 *Supra* note 284 and accompanying text.

299 Telephone Conversation with Robert Campbell, Aug. 13, 2018.

and conclusion display a sense of exasperation the core exegesis does not show, and may have been tacked on later.[300] Moreover, the court's decision was unaccountably delayed, and work continued feverishly right up to the very day Associate Justice John C. Harrison was to leave on a European vacation.[301]

If the initial vote was 2-3, then who switched? The person usually identified is the affable John C. Harrison,[302] the same justice whom experienced attorneys identified early as the likely swing vote.[303] To be sure, there is some evidence Justice Harrison did not switch. First, he subsequently denied changing his position.[304] Second, even before the case was heard Harrison had acknowledged that in the referendum he had voted *for* the constitution.[305] Of course, a judge is not supposed to take his or her political preferences into account in deciding the law, but in practice this can be a difficult abstraction to apply, and it can be particularly difficult for a judge with circumscribed legal abilities—which Harrison certainly was.[306] Finally, the target of the dissent's exasperation was Justice Haswell, not Harrison.[307]

But several reports nevertheless identify John C. Harrison as the justice who changed his vote. According to a prominent constitutional convention delegate, someone leaked the story of the 2-3 preliminary tally (with Harrison voting against) to U.S. Senator Lee Metcalf, a strong advocate of the new constitution. Accordingly, Metcalf confronted Harrison in Helena and threatened to run him out of the state Democratic Party if he voted to (in his words) "kill the constitution."[308] This tale of political pressure has been corroborated in part by Charles S. Johnson, former chief of the Lee Enterprises Helena Capitol Bureau and widely considered the dean of the Helena press corps. Johnson says he was present at the 1997 celebration of the constitution's 25th anniversary, when former convention president Leo Graybill openly announced in a banquet speech to attendees that he had personally contacted

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300 *Supra* notes 273-75 and accompanying text.

301 Associated Press, *Constitution Vote Ruling Could Be Today*, Great Falls Tribune, Aug. 18, 1972, at 1.

302 Telephone Conversation with Robert Campbell, Jul. 30, 2018; Telephone Conversation with Robert Campbell, Aug. 13, 2018. Campbell remains active in post-convention memorial events.

303 Frank Adams, *Constitution Backers Lean to Optimism,* Great Falls Tribune, Jul. 18, 1972, p.1.

304 Telephone Conversation with reporter Frank Adams of Helena, Aug. 8, 2018; Telephone Conversation with constitutional convention delegate Robert Campbell, Jul. 30, 2018; Telephone Conversation with reporter Charles S. Johnson of Helena, Aug. 2, 2018; Oral Conversation with reporter Charles S. Johnson, Aug. 24, 2018.

305 *Supra* note 304 and accompanying text.

306 Harrison apparently was in academic trouble at the University of Montana law school ("I needed a few grade points") when he demanded a grade change from his Water Law professor. When the professor refused, Harrison cursed at him, and was expelled. Harrison next enrolled at George Washington University law school, where he graduated in the bottom 36 percentile, despite having the advantage of prior law school experience. After graduation he failed the Montana bar exam twice before passing it.
This information is based on an interview with Harrison himself. *See* Frank Adams, *Expelled UM Law Student Rises to State Supreme Court*, Great Falls Tribune, Sept. 10, 1978, at 11.

307 *Supra* notes 265 - 272 and accompanying text.

308 Telephone Conversation with Robert Campbell, Jul. 30, 2018; Telephone Conversation with Robert Campbell, Aug. 13, 2018.

Metcalf and asked the Senator to induce Harrison to change his vote.[309] Researcher Ann Koopman of Bozeman has recovered the official program for the event, and it confirms that Johnson participated and that Graybill was one of two banquet speakers.[310]

If tampering did occur, then it further explains why the justices did not draft their opinions with more care. There is not much incentive one to take pride in one's written product when that product is not really your own.

X. Conclusion

There is, of course, no chance the Montana Supreme Court will reverse the result in *Cashmore*. In fact, the court is highly protective of the 1972 constitution.[311] Several reforms can, however, reduce the chances of similar results in the future, both in Montana and in other states.

One such reform would be to adopt rules that prevent state supreme courts from assuming original jurisdiction except in the most dire emergencies. Even in emergencies a case with unresolved factual issues is never appropriate for original jurisdiction without a mechanism for reliable fact-finding. After all, we have lower courts for a reason: They resolve factual issues in hearings specially designed to do so, and they clarify legal issues for higher tribunals. There was no real emergency in the *Cashmore* case, no reason it should not have been examined first by a trial court, and every reason to believe it should have been.

When appeals courts do exercise original jurisdiction, they should apply the usual standards for late-breaking evidence—that is, exclude it or provide the opposing party with a fair opportunity to respond. This would seem to be a basic requirement of due process.

More fundamentally, legal reformers should examine seriously the effects of incentives on judges and how to address them so as to better preserve judicial impartiality. For example, jurists who live in a capital city are as likely as anyone else to be caught up in the thinking that prevails in that capital city. When justices of a state's highest court are reviewing the validity of a measure from which they, and the institution they work for, will benefit or suffer, they face a conflict of interest.

This Article does not focus on judicial reform, and I do not, therefore, offer comprehensive solutions. At the least, however, we might abandon the dogma that the state's highest court must be located in the same place as the governor, legislature, and central bureaucracy. The Montana Supreme Court might be better located in Billings or Great Falls, or perhaps rotate between the two, rather than in the small-town political hot-house that is Helena.

Existing mechanisms for temporarily replacing judges who face conflicts of interest can be more broadly applied. Replacement could come from the ranks of district judges. Alternatively, or in addition, Montana could team with other low

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309 Telephone Conversation with Charles S. Johnson, Aug. 2, 2018.

310 Program for constitutional symposium, Jun. 27-28, 1997, *available at* https://i2i.org/wp-content/uploads/MT-Const-25th-Anniv-program.pdf.

311 *E.g.*, Marshall v. State of Montana, 975 P.2d 325 (Mont. 1999); Montana Ass'n of Counties v. Montana, 404 P.3d 733 (Mont. 2017) (together rendering significant amendments almost impossible).

population states to form an interstate pool consisting of judges of unusually high quality. Montana could draw from the pool for impartial judges from other states in cases in which state supreme court justices face conflicts and the matter for determination does not require detailed knowledge of Montana law.[312] This is not as radical as it sounds: Many other low-population jurisdictions utilize common judges,[313] and Montana already teams with other states to provide certain other services.[314]

More important than any specific suggestion, however, is the lesson that the rule of law is a fragile thing, and easily shattered when those in power find the reasons for shattering it sufficiently appealing.

[312] I am indebted to Andrew P. Morriss, Professor of Law and Dean of the School of Innovation at Texas A&M University, for this suggestion.

[313] *E.g., Caricom, The Caribbean Court of Justice*, https://caricom.org/the-caribbean-court-of-justice. Many present and former British dependencies—Jamaica among them—continue to rely on the Judicial Committee of the British Privy Council. *Judicial Committee of the Privy Council*, https://www.jcpc.uk/about/did-you-know.html ("Today, a total of 27 Commonwealth countries, UK overseas territories and crown dependencies use the JCPC as their final court of appeal.").

[314] *E.g.*, Montana's participation in the WWAMI Medical School program with Washington, Wyoming, Alaska, and Idaho, http://www.montana.edu/wwami/.

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Posner's Folly: The End of Legal Pragmatism and Coercion's Clarity

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ABSTRACT

Highly influential legal scholar and judge Richard Posner, newly retired from the bench, believes that law is irrelevant to most of his judicial decisions as well as to most constitutional decisions of the U.S. Supreme Court. His recent high-profile repudiation of the rule of law, made in statements for the general public, was consistent with what he and others have been saying to legal audiences for decades. Legal pragmatism has reached its end in abandoning all the restraints of law. Posner-endorsed "epistemological democracy" obscures a discretion that is much worse than the rule of law promoted by epistemological authoritarianism. I argue that a focus on conceptual essentialism and on the recognition of coercive intent as essential to the concept of law, both currently unpopular among legal theorists and many jurists, can clarify legal understandings and serve as starting points for the restoration of the rule of law. A much more precise, scientific approach to legal concepts is required in order to best ensure the rational and moral legitimacy of law and to combat eroding public confidence in political and legal institutions, especially in an increasingly diverse society. The rational regulation by some (lawmakers) of the real-world actions of others (ordinary citizens) requires that core or central instances of concepts have essential elements rather than be "democratic." Although legal pragmatism has failed just as liberal theory generally has failed, the pragmatic value of different conceptual approaches is, in fact, the best measure of their worth. Without essentialism in concept formation and an emphasis on coercion, the abilities to understand and communicate effectively about the practical legal world are impaired. Non-essentialism grants too much unwarranted discretion to judges and other legal authorities, and thus undermines the rule of law. Non-essentialist or anti-essentialist conceptual approaches allow legal concepts to take on characteristics appropriate to religious and literary concepts, which leads to vague and self-contradictory legal concepts that incoherently and deceptively absorb disparate elements that are best kept independent in order to maximize law's rationality and moral legitimacy. When made essentialist, the concept of political positive law shrinks, clarifies, and reveals its true features, including the physically-coercive nature of all laws and the valuable method of tracing the content of law by following its coercive intents and effects.

KEYWORDS

Legal Philosophy, Legal Theory, Jurisprudence, Concepts, Essentialism, Coercion

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Introduction

The candor in retirement of Richard Posner, the ex-libertarian former judge, displays an admirable lack of limits. In an interview published on September 11, 2017, he explained for a general audience just how small a role the law played in his decisions while he served on the U.S. Court of Appeals for the Seventh Circuit:

> "I pay very little attention to legal rules, statutes, constitutional provisions," Judge Posner said. "A case is just a dispute. The first thing you do is ask yourself—forget about the law—what is a sensible resolution of this dispute?" The next thing, he said, was to see if a recent Supreme Court precedent or some other legal obstacle stood in the way of ruling in favor of that sensible resolution. "And the answer is that's actually rarely the case," he said. "When you have a Supreme Court case or something similar, they're often extremely easy to get around."[1]

Posner is both one of the most influential legal scholars as well as one of the most influential judges of the past few decades, and is by some measures the most-cited legal scholar of the 20th Century.[2] That such statements from such a prominent jurist could be made without attracting much controversy says a great deal about the ascendency, in our time, of the rule of men over the rule of law. It did prompt the authors of one U.S. Supreme Court filing to complain, "Upon leaving the bench, Judge Posner even more clearly revealed his personal contempt for any constraint on his exercise of federal judicial power."[3] In truth, Posner said no more than he and other legal pragmatists, legal realists, critical theorists, disgruntled originalists and textualists, and others have been saying for decades. It was simply unusual to hear it so baldly from a prominent judge in a prominent forum for the non-legal public. Judges typically prefer to profess reverence for the Constitution and law's constraints, particularly in front of laymen.

Posner's statement described the logical end of legal pragmatism as commonly understood and practiced in America: *An end to the rule of law itself and the substitution of the discretion of political and legal authorities so far as politically and socially tolerable.* And in truth, there are always good reasons to erode the rule of law. Legal rules and precedents often get in the way not only of what particular authorities believe are sensible resolutions of disputes, but of what almost anyone would consider sensible resolutions of some disputes, and even Aristotle acknowledged that the rule of just men could be superior to the rule of just laws because of the inability of rules to properly fit every set of facts—or could be superior if just men were not so rare.[4]

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1 Adam Liptak, *An Exit Interview With Richard Posner, Judicial Provocateur*, N.Y. Times, (Sept. 11, 2017), https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html.

2 Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. Legal Stud. 409, 424 (2000).

3 Brief of Public Advocate of the United States et al. as Amici Curiae Supporting Petitioners at 26, Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. et al. v. Whitaker, 138 S. Ct. 1260 (2018) (No. 17-301) 2017 WL 4404962 (U.S.).

4 *Cf.* Aristotle, Politics, Gutenberg, bk. III, ch. XV (1912), http://www.gutenberg.org/files/6762/6762-h/6762-h.htm#link2HCH0031 ("Now the first thing which presents

Many are content to ignore the erosion of the rule of law when they trust political and legal authorities, but when those authorities change, as they have been with more-than-typical drama recently, those previously content suddenly rediscover the value of strong, clearly rule-oriented, and honored laws that restrain authorities' discretion—but they rediscover this too late. Perhaps the willingness to tolerate suboptimal results in particular cases in order to preserve the strength and stability of rules is the chief hallmark of distinctively legal reasoning,[5] and the erosion of the rule of law reflects the erosion of exactly this sort of reasoning—perhaps along with reasoning as a whole. Thus is lost the appreciation of one of the pragmatic values of tolerating suboptimal results: Such powerful respect for rules may have the unfortunate effect of such results, but also tends to prevent even worse consequences flowing from the abuses by political and legal authorities of their own discretion.

I share the increasingly common if not clichéd view that we have reached yet another new low in the crisis of confidence in American institutions—perhaps it is not overwrought to say in the institutions of Western Civilization generally—and that our politics, law, and education are suffering as a result, and that this suffering is very likely to worsen. Unfortunately, the institutions themselves have done much to lose citizens' confidence. The denouncements of the federal judiciary by prominent politicians, however destabilizing, seem justified. Judges and their defenders advocate the need for an independent judiciary, but judging from Posner's statements, the judiciary has declared itself independent of the law.

Much has been written decrying the decline of the rule of law and what to do about it, and I will not bore the reader by rehashing those previously-made arguments here. Others have long offered broader critiques of legal pragmatism.[6] Instead, from a corner of legal theory, I will sketch an approach to broadly reconceptualizing law beginning with its *essentially physically-coercive nature*. From a naturalistic and fundamentally Aristotelian point of view that reasons first from the characteristic effects of experienced realities upon the typical conscious human mind, the essential elements of the concept of law—those elements needed to distinguish political positive law from other phenomena—can be discerned to necessarily include a *socially-recognizable coercive intent* on the part of a lawmaker toward her legal subjects, i.e. those bound in duty to obey her laws. That

itself to our consideration is this, whether it is best to be governed by a good man, or by good laws? Those who prefer a kingly government think that laws can only speak a general language, but cannot adapt themselves to particular circumstances; for which reason it is absurd in any science to follow written rule. . . .").

5 *Cf.* Frederick Schauer, Thinking Like a Lawyer: A New Introduction to Legal Reasoning 7 (2009), "[E]very one of the dominant characteristics of legal reasoning and legal argument can be seen as a route toward reaching a decision *other than* the best all-things-considered decision for the matter at hand."

6 *See, e.g.,* Smith, *The Pursuit of Pragmatism*, 100 Yale L. J. 409 (1990); Ronald M. Dworkin, Law's Empire (1986); Brian Z. Tamanaha, Law As A Means To An End: Threat To The Rule Of Law (2006); Richard H. Weisberg, *It's a Positivist, It's a Pragmatist, It's a Codifier! Reflections on Nietzsche and Stendhal*, 18 Cardozo L. Rev. 85 (1996); Sotirios A. Barber, *Stanley Fish and the Future of Pragmatism in Legal Theory*, 58 U. Chi. L. Rev. 1033 (1991); and John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 31 Harv. J. L. & Pub. Pol'y 917 (2008).

coercive intent ultimately must be backed by physical coercion or the threat of it,[7] and *every law must have this coercive intent behind it to be a political positive law at all*. Even statutes containing, say, only definitions of terms or other superficially non-coercive elements must relate in some way to the legally-sanctioned coercion of subjects in order to be part of law.

Socially-recognizable coercive intent is not the only essential element of the concept of law—authority, social legitimacy, and a rule-like nature are among the others—but in my view, this intent is certainly essential even though almost all contemporary legal theorists take the opposite view. Seeing laws and legal systems consistently as the coercive structures that they are—rather than conceptualizing them in deceptive ways such as by emphasizing their empowering, rights-conferring, expressive, voluntary planning, "soft," or moral aspects—can help to limit law and the discretion of legal authorities to their proper spheres. Legal pragmatism and other approaches have not.

I recently offered a long argument in favor of a return to a form of the Jeremy Bentham-John Austin coercive command theory of law.[8] Instead of repeating that argument, here I focus on refracting Posner's views and legal pragmatism's repudiation of the rule of law through the lenses of *conceptual essentialism* and law's essentially coercive nature in the hope of outlining a path back to law and confidence therein. The argument in favor of conceptual essentialism and law's coercion is certainly not the most important part of the effort to restore the rule of law and confidence in political and legal institutions, yet is overlooked and can play a valuable role in understanding and rectifying our current predicament, and indeed in understanding law in all times and places.

In sum: I contend that to best justify law and any legal system as a legitimate enterprise, as both rationally and morally acceptable when engaged in coercing citizens, legal concepts must be essentialist—thus rendering law an exercise in essentialism.[9] Conceptual non-essentialism of the sort famously described by Wittgenstein, whom Posner mentions regularly in his scholarly work, allows legal concepts to take on the vague, equivocal, and contradictory characteristics appropriate to religious and literary concepts. Wittgenstein himself said, "I am not a religious man but I cannot help seeing every problem from a religious point of view,"[10] and Posner wrote, "I think the literary analysis of [judicial] opinions is highly promising"—and these are exactly the problems.[11] Unsurprisingly, influential anti-

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7 From now on, I will use "physical coercion" and "physical force" to include the threat of physical force unless indicated otherwise.

8 *See generally* Joseph D'Agostino, *Law's Necessary Violence*, 22 Tex. L. Rev. & Pol. 121 (Fall 2017).

9 I refer here to political positive law, that is, rules and commands laid down by socially-legitimated authorities given responsibility for the ultimate earthly ordering of a human society.

10 Rush Rhees, Discussions of Wittgenstein 94 (1970). By the end of his life, Wittgenstein had abandoned the view, often attributed to him, of considering religious language meaningless. ("The early Wittgenstein still regards religion as non-scientific, meaningless and nonsensical, whereas the later Wittgenstein only maintains the first idea." Joost Hengstmengel, '*Philosophy to the Glory of God': Wittgenstein on God, Religion and Theology'* (2010), https://hengstmengel.wordpress.com/2010/02/22/philosophy-to-the-glory-of-god-wittgenstein-on-god-religion-and-theology/.

11 Richard A. Posner, Law and Literature: A Misunderstood Relation 269 (1988).

foundationalist legal scholar and literary theorist Stanley Fish[12] wrote some time ago, "Posner puts the cap on his anti-essentialist, anti-foundational, anti-rational (in the strong sense), anti-metaphysical, and deeply pragmatist view of the law, and it is perhaps superfluous for me to say that I agree with him on almost every point."[13]

Instead, I believe that *legal concepts should be patterned after scientific ones* rather than religious or literary ones, not because religious and literary concepts are not highly valuable within their spheres, but because they are detrimental within the strictly legal sphere even though all of these spheres inevitably—and productively—interact with one another. Legal concepts need a worldly, everyday epistemological foundation to be something more than intellectual games with coercive effects, and the foundationalism I favor is the empirically-based, realist one that begins with sensory observation and experience. Epistemological anti-foundationalism that refers all inferences to other inferences, and nothing else, is too arbitrary for real-world exercises of *social practical reason* such as law. However, I do not insist on metaphysical foundationalism here—a foundationalism based upon social convention will do for my argument in this article. In other words, the agreed-upon bedrock upon which to base our inferences need not be considered to be the absolute metaphysically true one, but only one treated as such, i.e. accepted as socially objective and universal for the purposes of legal reasoning. Thus, my argument is compatible both with foundationalism and some forms of anti-foundationalism.[14]

Legal concepts must refer to socially-objective realities, understandable in the same general way by all concerned, as well as objective physical realities in order to justify their involvement in any rational scheme of regulating the behavior of a society's members. Different subjective perspectives must be harmonized when one person, or a small group of persons, commands others to conform to certain concepts, rules, and commands—whenever a legal authority or legal subject can have a substantially different understanding of a legal concept, rule, or command even while remaining reasonable and diligent, the law has failed to be its best rational self. If disagreement were substantial and widespread enough, the content of the law would not exist as a truly social phenomenon at all, but only as a collection of subjective and contradictory personal understandings. The alternative to essentialism means that different legal subjects and even different legal authorities, while remaining reasonable, too easily can have fundamentally different understandings of laws and legal obligations, and this tends to defeat the

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12 For Fish's literary theory of interpretation, *see generally* Stanley Fish, Is There a Text in This Class? The Authority of Interpretive Communities (1982). On defending his own version of anti-foundationalism, see, e.g., *id.* at 368–70. He has said elsewhere, "[T] he thesis of anti-foundationalism is not that there are no foundations, but that whatever is taken to be foundational has to be established in the course of argument and debate and does not exist to the side of argument and debate." (Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 Yale L.J. 1773–1800, 1796 (1989)).

13 Stanley Fish, *Almost Pragmatism: Richard Posner's Jurisprudence*, 57 U. Chi. L. Rev. 1447, 1456 (1990) (referring to statements in Posner's book The Problems of Jurisprudence (1990)).

14 For an introduction to foundationalism and bibliography of modern topical works, *see* Ali Hasan & Richard Fumerton, Foundationalist Theories of Epistemic Justification, Stanford Encyclopedia of Philosophy (2016), https://plato.stanford.edu/archives/win2016/entries/justep-foundational/.

concept of law as a rational and presumably morally legitimate way of regulating subjects' behavior.

Maximizing the pragmatic value of law thus mandates essentialism, and if Posner's opposition of essentialism and pragmatic value includes conceptual approaches, as it appears to do, it is counter-productive. In explaining legal pragmatism, Posner writes, "I mean, to begin with, an approach that is practical and instrumental rather than essentialist—interested in what works and what is useful rather than in what 'really' is."[15] I believe that legal concepts can and should be based upon the really useful.

Although metaphysical and conceptual essentialism may both be unfashionable in many quarters, at least the latter is imperative for law, which depends upon the artificial classification of phenomena in ways that must be objectively recognizable to the subjective perceptions of a public. Although large numbers of legal concepts, such as those associated with "law," "crime," "negligence," "liability," and "due process" are not formed directly from our shared sensory experience of the natural world, a universally-intelligible social understanding of these concepts still must be constructed.[16] Further, this understanding must be clear enough to justify using those legal concepts in the *application of coercion* against ordinary legal subjects—that is, against citizens who must obey the law but who had no hand in the formulation of those concepts.[17]

In other words, conceptual essentialism is necessary to "doing law" properly, and makes it harder for legal authorities to "forget about the law" while treating the legal rulings of higher authorities as things "to get around."

After essentialism is established as the proper path to maximizing law's rationality and moral legitimacy, tracing the legal system's essential coercive intent and effect reveals more of law's content than any other method. This emphasis on law's coercion of citizens may also encourage a more libertarian, or at least more precise and restrained, use of law in the future than otherwise may be the case, and greater precision and restraint should contribute to the regrowth of confidence in political and legal institutions. I believe that Posner's prodigious writings, so valuable in some areas, have hurt far more than helped here.

In Part I, I outline the problems caused by non-essentialist thinking in legal concepts. In Part II, I discuss Posner's views and the desirability of employing scientific-style concepts in law. Part III briefly explains that essentialism is required in social practical reasoning and that non-essentialist concepts can and should be made into essentialist ones. I also give a summary of the steps of my argument. Part IV advocates for understanding law as the humanity that should use scientific concepts. In Part V, I very briefly and partially situate my argument in the contemporary flow of legal philosophy with a continued eye toward Posner's thought and the clarifying value of essentialism and coercive intent.

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15 Richard A. Posner, Overcoming Law 4 (1995).

16 By "universally intelligible," I mean that those who are meant to obey laws are able to understand the laws that they are meant to obey. I do not mean to include young children or the mentally disabled, nor do I mean to say that society's members must actually understand the law, only that they could if they tried at least insofar as it applied to their own behavior.

17 By "legal subject," I mean anyone upon whom the law places a binding requirement to act in a certain way. I consider a requirement to "not act" in a certain way to be a kind of requirement to "act."

I. The Problem of Legal Non-Essentialism

A. The Expansion of Government Power

Legal concepts such as substantive due process, equal protection, privacy, freedom of speech, establishment of religion, free exercise, the right to bear arms, the personhood of corporations, and negligence have justified the expansion of the power of the courts, and sometimes of other branches of government, in dramatic ways.[18] It is difficult to say how much non-essentialist thinking has facilitated this expansion since judges, regulators, and legislators typically do not indicate their conceptual approaches—and though I expect few consciously consider the question of essentialism versus non-essentialism, they may employ non-essentialism without saying or without realizing so.[19]

So, in examining the work of most judges and other legal authorities, the problem posed by non-essentialism is twofold. First, there is the effect, perhaps mostly psychological, of the popularity of non-essentialism in legal scholarship and elsewhere, and this may be one of the factors rendering religious- and literary-style conceptual imprecision more and more acceptable in law either explicitly or implicitly. The imperialistic expansion and long-burgeoning Gnostic vagueness of so many legal concepts over time may draw some of their energy and justification from this source, even though legislators and judges rarely delve openly into the philosophy of concepts, or of anything else, in the way Posner so intelligently does in many areas—yet the unconsidered philosophies behind their work determine the outcomes of that work to a great extent, especially in difficult cases. Second, in the future, judges and others may come to adopt explicitly the non-essentialism already adopted by many theorists within and without the legal academy. Regardless, judges and other legal authorities have a notorious habit of imprecise use of concepts, and a conscious adoption of stricter approaches to conceptual definitions would yield considerable benefits to puzzled subjects, as well as puzzled legal authorities and legal practitioners, who try to make sense of and obey the law.

B. Diversity and the Need for Limits

This is all the more important in our time of increasing diversity and disagreement, as shared norms splinter and the unity of a Christian-ish, Anglo cultural and legal tradition gives way to a clashing collection of differing traditions and newly-minted doctrines. The law and legal authorities *can no longer rely so strongly on socially hegemonic ideas and attitudes to underlie and shape ill-defined concepts*

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[18] *See, e.g.,* Michael S. Greve, The Upside-Down Constitution (2012); Randy E. Barnett, Restoring the Lost Constitution (2004); and Akhil Reed Amar, America's Unwritten Constitution (2012).

[19] *Cf., e.g.,* this from an Australian scholar: "A person, purpose or activity falls within the meaning of the term if, and only if, it possesses all of the 'essential features' or essential characteristics' that define that term. I shall argue that the semantic model that judges actually use frequently differs from this simple proposition. In particular, they often employ definitions that do not consist of 'essential features.'" Simon Evans, *The Meaning of Constitutional Terms: Essential Features, Family Resemblance and Theory-Based Approaches*, 29 U.N.S.W.L.J. 207, 207–08 (2006).

and their application, not to mention rely on them to buttress confidence in their authority, but rather must make themselves unmistakable to a much greater variety of not-easily-compatible perspectives. "Due process," "privacy," and "freedom of speech" mean more differing things to more different groups of Americans today than they did 50, 30, 20, or even ten years ago, and methods of approaching legal questions continue to diversify—how long before what remains of the *traditional Anglo-American legal tradition must give way* to other elements on many major points? All this argues for greater need of clarity and essentialism in law, which cannot legitimately straddle questions of what to require of its subjects but rather must give those subjects pragmatically precise instructions—and, further, when unenforceable traditional norms and manners decline in political culture or society generally, they must be replaced by coercive norms to maintain order. Those new coercive norms should be clearly formulated.

And so, as these coercive norms expand and social diversity grows, delimitation is needed all the more, though it is typically desirable in law in all times and places. Perhaps one day, comments such as those of Posner and the following from Ronald Dworkin's *Law's Empire* will ring false instead of too true: "We are subjects of law's empire, liegemen to its methods and ideals, bound in spirit while we debate what we must therefore do. What sense does this make? How can the law command when the law books are silent or unclear or ambiguous?"[20] *Silent or unclear or ambiguous*—how can ordinary citizens obey, or respect, a system that requires them to conform to the silent and unclear and ambiguous, especially when they no longer conform or wish to conform to residual WASP norms?

It is not that law is impossible with Wittgenstein-style non-essentialist concepts, but that such understandings needlessly render law less comprehensible and less stable. Although some law will always be vague, ambiguous, or even self-contradictory, subjects must as a general rule be able to understand the law and the concepts it uses so that they can obey it[21]—in particular, they must be able to recognize the coercive intent of legal authorities and what that intent signals concerning the behavior demanded of them[22]—or else law loses its legitimacy as an exercise in reason and justice.

Beyond this, lawmakers and other legal authorities should strive to make laws and legal concepts *not just minimally clear, but as clear as reasonably possible*—part of the evaluation of a lawmaker, as good or poor at her function, is her capacity for the *right level of precision*. The more unclear the law is, the more its legitimacy

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20 Dworkin, *supra* note 6, at VII (1988).

21 "It is a presupposition of thought itself that some kind of objective 'rightness' exists." Hilary Putnam, Reason, Truth, and History 124 (1981). (Whether this is true in an absolute metaphysical sense, it must be true in some sense in order to fix the meaning of law well enough for subjects to obey it, and further true enough to declare coercive legal rules and commands morally "right"—or at least not morally wrong—if law is to be legitimate in a way that the rules of organized crime syndicates cannot be.).

22 This formulation emphasizes the internal points of view of, first, the legal subject and, second, the lawmaker while recognizing that external signs form the only communications between internal points of view. Like an approach outlined by Dan Priel, this "could thus maintain the concern with the 'internal point of view' by examining the role law plays in people's lives and the way these issues touch on questions of legitimacy but adopt an 'external' methodology for answering this question." Dan Priel, *Jurisprudence Between Science and the Humanities*, 4 Wash. U. Jur. Rev. 269, 322 (2012).

rightly erodes. Law is a matter of practical reason, not theoretical reason, and should conform to the requirements for guides to reliable decision-making about courses of action—ultimately, law is meant to tell both legal authorities and legal subjects *what to do* rather than *what to think*. Not only is law an exercise in practical reason, but it is an exercise in social practical reason—the reasoning must be understood not only by those doing the reasoning, but by a number of distant others. The imprecision unavoidable and sometime fruitful in the realm of pure theory, or even in the realm of religious and moral thought meant to guide behavior, must be resolved into precision when commanding others to "do" or "do not."

Many theorists, conspicuously since the publication of Wittgenstein's *Philosophical Investigations*,[23] have variously denied that concepts have, should have, should always have, or even *can* have essentially-defined content, and this certainly has included legal theorists regarding legal concepts.[24] They assert that many or all concepts, either as ordinarily used or as in any way useable, do not have any essential elements to their understandings but are rather collections of disparate elements with no commonality or set of commonalities.[25] The most famous example used by Wittgenstein is "game," which he claimed had no feature common to all the different core or central—and not just marginal—uses of the concept.[26] Instead, he claimed, strands of similarity ran through different core instances of games as through a rope but that no one strand, no one property, ran through all of them. This is like a family, he said, whose members often share certain traits such as eye color or temperament, but no one trait must be shared by all family members for those members to still make up a family or even to appear to be a family.[27] Anti-essentialist or non-essentialist concepts are often called family resemblances, cluster concepts, prototypes, or generics, and each term has an associated theory that approaches the question somewhat differently, although I will tend to treat them together.[28]

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23 Ludwig Wittgenstein, Philosophical Investigations (G.E.M. Anscombe trans., 1967).

24 *See, e.g.,* Torben Spaak, *Schauer's Anti-Essentialism*, 29 Ratio Juris 182–214 (2016); James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. Pa. L. Rev. 685 (1985); David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 Cal. L. Rev.1069 (2014); Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 Buff. Crim. L. Rev. 1, 29 (2004); Andrew Koppelman, *The Troublesome Religious Roots of Religious Neutrality*, 84 Notre Dame L. Rev. 865, 880-81 (2009); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 Cal. L. Rev. 753, 763-64 (1984); Jeremy Waldron, *The Right to Private Property* 49-50 (1988); and Daniel J. Solove, *Conceptualizing Privacy*, 90 Cal. L. Rev.1087 (2002).

25 *See* H.L.A. Hart, the great exponent of legal positivism, who "was likely not averse to basic Wittgensteinian ideas." Frederick Schauer, *(Re)Taking Hart*, 119 Harv. L. Rev. 852, 861 (2006). Not all agree that Hart had no such aversion.

26 Wittgenstein, *supra* note 23, at 3ff.

27 *Id.* at 32ff.

28 The classic treatment of family resemblance theory is Wittgenstein, *supra* note 23. For a sample of arguments in favor of newer theories of concept-formation and semantic meaning, see on cluster concepts, John R. Searle, Speech Acts: An Essay in the Philosophy of Language (1970); on prototype theories, Eleanor Rosch, *Principles of Categorization*, in Cognition and Categorization 27–48 (Eleanor Rosch & Barbara B. Lloyds eds., 1978); and on generics, Mark Johnston & Sarah-Jane Leslie, *Concepts, Analysis, Generics and the Canberra Plan*, 26 Philos. Perspect. 113–71 (2012).

I believe that the infection of legal theory and law itself with this sort of non-essentialist thinking has caused a great deal of confusion and contributed to the current failure of contemporary theorists to recognize even as much as the necessary features to define law, such as its inherent coercion.[29] A focus on law's characteristic effects upon real-world subjects—who generally are first concerned with what legal authorities can do to them, and second concerned with what they can get legal authorities to do to others—can help to rescue legal theory from the charge of having modest relevance to anything outside of itself.[30] This neglect of law's coercive nature has contributed to the gradually totalitarian expansion of both legal concepts and the legal system, and government generally, into more and more territory, often with the justification that law empowers subjects—which it never does except at the expense of others. If Posner is right, today law typically authorizes legal authorities to do whatever they think is sensible after forgetting about the law entirely.

II. Posner's View and the Desirable Shift to Scientific-Style Concepts

A. Posner the Non-Scientific Juridical Scientist

Law and legal concepts should become more scientific, by which I mean first, that all legal concepts should have non-contradictory cores defined by essential properties, and second, that real-world effects—particularly coercive ones—should be the foundational raw material of legal concepts rather than justice, rights, duties, fault, or the like considered abstractly in the way that jurists love so much. This latter requirement may be only a matter of emphasis, but a change in emphasis has often produced real legal change affecting real subjects. There are bounds to a scientific approach to legal concepts: Law is a humanity, not a science—with all the inevitable limits to precision that human things demand—and unlike science, religion, philosophy, and literature, law must employ force in order to fulfill its function, and even to be distinguishable as law at all rather than exhortation, guideline, rhetoric, or something else such as a mere source for voluntary rules of personal conduct.

In a book aptly titled *Overcoming Law*, Posner rightly says, and this can be said of the prophet, philosopher, and scholar as well, that "[t]he scientist is the inquirer who [is] disdainful of enlisting the power of the state to enforce agreement with his views."[31] *This cannot be the attitude toward the actions of others of the legal authority, who whenever acting as a legal authority, never engages in acts of*

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[29] *But cf., e.g.,* ("For all its appeal—apparent simplicity, stability and roots in classical philosophy—the 'essential features' element of the standard model is unworkable.") Evans, *supra* note 19, at 208.

[30] *See, e.g.,* "Many law students have complained that there seems to be little or no connection between legal philosophy and other subjects in the curriculum. Similarly, many legal scholars complain that they find little illumination for their particular studies from such theorizing." William Twining, *General Jurisprudence*, 15 U. Miami Int'l & Comp. L. Rev. 1, 23–4 (2007).

[31] Posner, *supra* note 15, at 450.

pure abstract inquiry or persuasion, but rather seeks to make practical judgments relevant to the enforcement of behavioral conformity to the law's specifications.

Just as the scientist and the philosopher always should seek to use definitions as definite as realistically possible in contrast to the prophet and the poet, so too should the legal authority, and here I agree with Posner's hope when he says that he wishes "to nudge the judicial game a little closer to the science game."[32] Yet I am put on my guard when he says that "[t]he idea that law stands or falls by its proximity to mathematics is the fallacy shared by Langdellians and many crits."[33] In using legal concepts and issuing legal rules—which are themselves legal concepts containing somewhat specific imperatives to obey, derived from an idea of authority, rather than descriptions and predictions alone—legal authorities should seek to distill broad concepts into easily-obeyable ones. As the humanity that should use scientific-style concepts, law for the ordinary subject should be an area of exact inquiry just as much as science should be, though again insofar as reasonably possible—for example, legal authorities often need substantial discretion in many circumstances just as scientists do. Legal inquiry can be only so exact.

"In areas of exact inquiry, Orwell's stated goal of writing prose as clear as a windowpane seems, if properly understood, an attainable ideal. . .," says Posner. "Newton will survive as long as Homer, but the essential Newton—the Newton that will survive—is not the language in which he described his theories and findings but the theories and findings themselves, while the essential Homer cannot be detached from the language in which he wrote or chanted."[34] Although mathematical precision is unachievable in much of science as well as in most of law, judges and others write too much like Homer and not enough like Newton. Broad and vague moral concepts, social goals, and rhetorical language cannot be, and should not be, prevented from influencing the formulation and enforcement of law—they cannot any more than social attitudes toward, say, dogs and other animals can, or should, be prevented from influencing scientists' attitudes toward animals. I suspect the choice of rats for so much scientific experimentation is not a purely scientific one. But when they impair the precision needed, these influences necessarily become negative in both spheres, the legal and the scientific.

Unfortunately, judges do not rigidly distinguish between the simple application of the law and the making of it, including when they *de facto* make law by interpreting it discretionarily, and "[m]ost judges blend the two inquiries, the legalist and the legislative, rather than addressing them in sequence"[35]—and thus the judges themselves may not know when they are being influenced by imprecise extra-legal concepts and attitudes, much less be clearly and explicitly translating those concepts and attitudes into clear-cut legal ones. The sad fact is, says Posner, "Judges are not a moral vanguard, and the highfalutin words they use tend to be labels for convictions based on hunch and emotion. Rhetorical inflation, like sheer loquacity and impenetrable jargon, is one of the occupational hazards of adjudication, as of law generally."[36] Here is all the more reason to use essentialism and a tight focus on law's coercive effects in order to deflate the rhetorical bubble, at least a bit.

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32 *Id.* at 8.
33 *Id.* at 3–4.
34 Posner, *supra* note 11, at 273.
35 Richard A. Posner, How Judges Think 84 (2010).
36 Richard A. Posner, Law, Pragmatism, and Democracy 67 (2003).

Many of the unfortunate realities that Posner describes are, I think, indisputably well-established, such as the Supreme Court's frequently political nature in what is supposed to be a republic characterized by the separation of powers. The political branches headed by the elected representatives of the people may be no more political in their decision-making than the Court when it interprets the Constitution, suggests Posner. "I shall argue that, viewed realistically," he says, "the Supreme Court, at least most of the time, when it is deciding constitutional cases is a political organ."[37] This flows partly from the nature of the Constitution itself. "[C]onstitutional provisions tend to be both old and vague. . .," Posner notes. "The older and vaguer the provision at issue, the harder it is for judges to decide the case by a process reasonably described as interpretation rather than legislation."[38] Another part of the problem is the Court's need to maintain some sort of vague uniformity of governance as this one small group of jurists has gone from overseeing a small federal government, set over four million people, to reviewing vast federal and state apparatuses micro-regulating over 300 million residents. In such circumstances, perhaps no court with nine—or 90—members could possibly fulfill its standardizing role while remaining a court, but must transform into a legislature as Posner suggests it has done—and a legislature that can give only general guidance to inferior authorities, who must be left free to adapt that guidance to a wide range of situations. "[L]et me . . . note the extraordinary growth in the ratio of lower court to Supreme Court decisions," he writes. "That ratio has reached a point at which it is no longer feasible for the Court to control the lower courts by means of narrow, case-by-case determinations—the patient, incremental method of the common law. Instead, it must perforce act legislatively."[39] Here is one of the ways the Anglo common law is dying.

In fact, Posner candidly calls the Supreme Court a "lawless judicial institution,"[40] but repudiates the implicit condemnation such a description implies. "I use 'lawless' in a nonjudgmental though unavoidably provocative sense," he says. "I mean the word simply to denote an absence of tight constraints, an ocean of discretion. . . . From a practical standpoint, constitutional adjudication by the Supreme Court is also the exercise of discretion—and that is about all it is."[41] Not only are the Supreme Court's constitutional decisions mostly exercises in lawless discretion, they are exercises in arbitrary lawless discretion—and it would be good if the Court's members admitted as much, at least within the privacy of their own minds, says Posner. "If the Justices acknowledged to themselves the essentially personal, subjective, and indeed arbitrary character of most of their constitutional decisions, then—deprived of 'the law made me do it' rationalization for the assertion of power—they probably would be less aggressive upsetters of political and policy applecarts than they are," he says. "That, in my opinion, would be all to the good."[42]

But although the Court is lawless, its decisions are lawlike, Posner says. "[E]ven if legislative in a sense," they are "so much more constrained, disciplined, impersonal, reasoned, nonpartisan—as to be 'lawlike'" when compared to "the

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37 Richard A. Posner, *Foreword: A Political Court*, 119 Harv. L. Rev. 31, 34 (2005).
38 *Id.* at 40.
39 *Id.* at 35.
40 *Id.* at 41.
41 *Id.* at 41.
42 *Id.* at 56.

characteristic product of the official legislatures."[43] And so, in fact, perhaps the Court's arbitrary lawless discretion "is really rather narrowly penned" after discretionary decisions are made.[44]

This sets up an interesting conundrum for those who see the courts, and particularly the Supreme Court, as systematically overstepping their proper bounds in unjust, anti-legal ways and undermining public confidence in our institutions in doing so, but also often taking very vague constitutional and statutory provisions and refining them into something closer, although rarely as close as might be, to the clear and specific regulations that the coercive rule of law ideally mandates. Not that specific regulations must be carved in stone—in fact, rationality requires they be subject to revision when circumstances warrant.[45] Is it too revolutionary to join those who suggest that legislatures should legislate better, including by revising statutes when needed, rather than allow courts and administrative agencies to engage in such revision as a routine matter while claiming to merely interpret? Yet essentialism should always be used by all lawmakers, whether legislative, administrative, or nominally judicial.

B. Posner the Nihilist

Posner's rhetorical candor fails in the acknowledgement of his nihilism. Like so many other moderns and postmoderns, he must dress nihilism in the language of liberalism, pragmatism, diversity, and the like, but ultimately believes that nothing is good nor evil but thinking makes it so. He says that pragmatism's "core is merely a disposition to base action on facts and consequences rather than on conceptualisms, generalities, pieties, and slogans."[46] If he means that abstractions should not be allowed to obscure the results of applying them to real-world situations, and that those results should weigh heavily in the balance, then all is well. Yet how can anyone determine what facts are relevant and the value to attach to any consequences without prior conceptualisms and generalities? Representative of Posner's nihilism is the below passage expounding pragmatic philosopher Richard Rorty's views, which Posner endorses. Speaking of a variety of moral, political, legal, scientific, and aesthetic beliefs such as those concerning the defects of National Socialism, Posner writes:

> These are all things that most of us believe, and we would like to think that we believe them because they correspond to the way things are…. Rorty disagrees. He thinks we believe a thing because the belief fits our other beliefs. Two hundred years ago Negro slavery, though already controversial, nestled comfortably in a system of beliefs…. We have other beliefs about these things today, with which slavery doesn't fit, and it has become anathema. Not because slavery "really" is wrong; there is no really about the matter if "really" is taken to point to something more "objective" than public opinion…. [T]he liberal state is neutral

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43 *Id.* at 75.

44 *Id.*

45 *Cf.* The common law "treats all generalizations as contingent and perfectible." Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life 178 (1993).

46 Posner, *supra* note 36, at 3.

> about substantive values. It insists only on the procedural values, such as the protection of privacy and of freedom of belief and speech and of occupation, that are necessary to secure diversity of belief, expression, and ways of life. These values and their institutional safeguards constitute "epistemological democracy"…. All this seems to me basically sound. It is the generalization to the sphere of politics of the "fallibilist" vein in the philosophy of science.[47]

This way of thinking has nothing convincing to say to potentially change the minds of those who do not share the beliefs relevant to slavery and National Socialism that Posner says that "we" do, or any way to object if public opinion changes to favor those things once again, as it well might.

Nor can the distinction between substantive and procedural values withstand scrutiny. Does the protection of privacy require a legal right to abortion? Some say yes, others no, and the question cannot be resolved without substantive values about the rights of women and of unborn children, and of what legal "privacy" covers substantively—how is it obvious that paying an abortionist to terminate a pregnancy is a private matter that must be almost entirely free from government control, whereas one's private correspondence can be discovered through legal compulsion by an opposing party in litigation before any wrongdoing has been found? Or that adults' sexual matters are private, but the hiring, pay, and promotion decisions of private businesses are subject to reams of public regulation? Do the procedural values necessary to secure diversity of "ways of life" protect those who wish to return to the plantation system complete with "Negro slavery," or descendants of Aztecs who wish to resurrect the ceremonies of human sacrifice suppressed by the conquering Spanish Catholics? Does freedom of speech or expression protect those who delight in posting to the internet the photos, names, and addresses of private citizens together with unproven accusations that they are cop-killers? If such speech should be illegal because it can lead to harm, should we also outlaw speech critical of Christianity, Islam, or Judaism, as some countries do in order to forestall hate crimes? No procedural values can resolve these questions, only substantive values that privilege—or so much as acknowledge—some rights and ways of life rather than others.

"Epistemological democracy" seems to be a term for "affirming nothing so long as social disagreement exists." Since law involves the coercive regulation of some by others, such a stance by any legal authority is just a hypocritical pose. In all real political states, some or perhaps nearly all subjects do not agree with the entirety of the law's requirements or conform to them. Regardless of their personal beliefs about truth or what they may say, lawmakers and the legal authorities who enforce the law must act as if they know what the law is and are justified in inflicting upon subjects the law's consequences, including financial penalties, disbarment from occupations, incarceration, and occasionally death. Lawmakers, including judges when behaving as *de facto* lawmakers, must act as if they know what the law should be, and what it should prescribe in order to punish those who act illegally—and saying to a defendant convicted of a crime and sentenced to a decade in prison that "I am unsure that this is the right thing, but I am doing it to you anyway" is unlikely to amount to much consolation.

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[47] Posner, *supra* note 15, at 448–50.

"Epistemological democracy" may contribute to the ongoing slow-motion exposure, in the view of many, of the façade of our political and legal systems as corrupt frauds, and we may see the public bankruptcy of what Posner, to borrow his description of façade as an expansive concept, might label "[a]n intricate complex of interrelated laws, judge-made and statutory, [that] protects this interest that has no name, the interest I am calling 'the face we present to the world.'"[48] In my analogy, the intricate complex protects the reputation of the legal system in crucial part because citizens have confidence that the complex of laws *is truly of laws rather than of something else, such as the largely lawless discretion of the men and women in power.*

III The Duty of Essentialism

Whatever else they may do, epistemological democracy and related thinking require concepts that are anti-essentialist or non-essentialist *when it comes to the regulation of behavior by law*. The supposedly procedural values of liberalism paper over substantive disagreements that need not be resolved when those values remain abstract, but must be resolved when the law is coercively enforced in the real world. Assuming we accept non-essentialist concepts as valid, the concept of privacy at the procedural level, as Posner appears to mean it, can include the irreconcilable elements of "private persons can legally keep private correspondence private from others, including those who sue them" and its negation. It can include "decisions about abortion are private" and also its absence. But not when coercive legal decisions about discovering private correspondence or punishing abortion must be made, and whenever an appropriate case arises, the question of whether the law should extend respect for diversity of ways of life to include racial discrimination or slavery must be answered.

Legal coercion should be defined broadly to include the awarding of benefits that are legally obtainable only by meeting certain conditions, so long as coercion is used to keep those benefits away from those who do not meet the conditions, as well as coercion applied to government officials—who, rather than or in addition to ordinary legal subjects, are the subjects of some laws. Ultimately, the coercion in question must be physical, for financial and other such penalties cannot be *legally enforced* except by *physical force*. Demands for the payment of a fine that go no further than sending the fined subject unpleasant letters hold little terror, nor are they distinguishable from non-legal social pressure generated by political and legal authorities—who often exhort and lecture citizens about their duties in non-coercive, non-legally-formal ways. I have written a much longer argument in favor of this understanding elsewhere.[49]

Posner cites Wittgenstein in many of his writings, and Wittgenstein is famous for his formulation of non-essentialist family resemblance concept theory. Posner rejects essentialism as alien to pragmatism,[50] though he never quite endorses Wittgenstein-style conceptual non-essentialism as far I have found. Yet many of

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48 *Id.* at 531.

49 *See* D'Agostino, *supra* note 8, at 145–70.

50 ("Emphasis on consequences makes pragmatism anti-essentialist"). Posner, *supra* note 36, at 6.

his approaches and assertions implicitly require conceptual non-essentialism, as do most forms of legal pragmatism, since they require judges to reinterpret legal concepts, in ways contradictory to previous interpretations, in order to produce the desired results on a case-by-case basis while claiming not to legislate, but rather claiming to use the same law and same legal concepts each time. If the judges are not changing the law each time that they use or interpret principles in ways that contradict prior uses, then the legal concepts must already contain within themselves contradictory elements from which judges choose in accordance with their wishes in any given case.

Instead, judges should work with essentialist concepts and when they change the law, *they should state explicitly that they are doing so* and how they are doing so, in an open and above-board way. This approach not only better informs subjects of what legal changes have taken place and what to expect from legal authorities in the future, but may promote stability and predictability in law by discouraging judges from making changes in the law—changes which are no longer disguised. And if judges make more pragmatically poor rulings in order to adhere to precedent and avoid legal changes, they can put greater onus for legal change onto legislatures where it belongs. Even more, what endlessly second-guessing judges, in their folly, consider pragmatically poor rulings may turn out not so, or at least to be consistent with the intentions of the officially political branches of government.

Instead of arguing for the complete abandonment of modern non-essentialist approaches in the formulation of legal concepts, elsewhere I have argued in favor of the superiority of an *essentialist understanding of supposedly non-essentialist family resemblance concepts, cluster concepts, and other such concept forms, at least when engaged in social practical reasoning with legal concepts.*[51] This includes lawmakers' decisions about what laws to promulgate in affecting the actions of those subject to those laws—their legal subjects—and the decision-making of those subjects concerning whether and how to obey the law. Purely theoretical concepts entirely unrelated to behavioral regulation by legal authorities are not my concern.[52] An essentialist understanding of non-essentialist concept forms allows them to be used to shape law without unnecessarily impairing the law's rationality and legitimacy, and thus I do not argue that a return to the exclusive use of older and more straightforward notions of legal concepts is required. Family resemblance and related theories are good ways to understand many legal concepts when such theories are reconfigured as essentialist.[53]

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51 *See generally* Joseph D'Agostino, *Against Imperialism in Legal Concepts*, 17 U.N.H. L. Rev. 67 (2018).

52 Similar distinctions now have a long history and continue to be made by contemporary legal theorists, such as this one in Poland: "It seems to be quite obvious that in practical deliberation, we cannot generally avoid concept analysis [but] [f]rom the vast set of concepts, we can simply cut off ones that do not bear any practical, observable effects." Adam Michał Dyrda, *Pragmatism, Holism, and the Concept of Law*, 8 Erasmus L. Rev. 2, 9 (2015).

53 Do not fear that I claim to offer something fundamentally new. I offer only a new argument in favor of old ways and am not "a legal philosopher [who] proposes to offer a new classification scheme; he assures that great things will follow (the achievement of conceptual clarity is almost always involved); then after much arduous reading and repeated encounters with ethereal abstractions, nothing happens." Pierre Schlag, *How To Do Things with Hohfeld*, 78 Law & Contemp. Probs. 185-86 (2015).

Those who consider family resemblance and similar theories to be *essentially non-essentialist* can view my argument as one in favor of normatively excluding such theories entirely from understanding legal concepts.

This approach combats the expansionist tendencies of contemporary legal theorists, whose abandonment of coercion as an essential element of every political positive law has helped to enable them to fit more and more phenomena under the umbrella of law as conceptual alchemy transforms non-legal phenomena into legal ones—and some legal phenomena have become anti-legal exercises of unfettered discretion. Non-essentialist legal concepts by nature are systemically vaguer than essentialist legal concepts and invade the provinces of other categories of concepts where such vagueness is a valuable asset—in law, it is a liability. In my view, at least when substantial enough to be used by some to regulate the actions of others who are meant to understand the rules and commands used to regulate them well enough to obey, any non-essentialist concept is unproductively equivocal or in insufficient conformity to experienced reality. Conformity to our experience of worldly reality is a crucial test of a practical concept's usefulness, and when it comes to legal practical reasoning, non-essentialist concepts perform more poorly on this test than do essentialist ones.[54]

If we believe that legal authorities have a duty to use law and legal concepts as clearly as reasonably possible when regulating subjects' actions, then we should believe that they have a *duty to employ conceptual essentialism*.[55] Of course, even essentialism employed as effectively as possible would not mean that difficult legal questions could always be resolved with clear right answers—clarity can, at best, be approached only parabolically.[56] Posner's endorsement of epistemological democracy grants judges an abusive franchise, allowing them enormous discretionary power while leaving citizens in the dark concerning what those judges will do with that power.

My argument against non-essentialism, whether explicit like that of Wittgenstein or implicit like that of Posner and many other legal pragmatists, can be divided into the following four steps:

1. Any real-world system of political positive law seeks to coerce its subjects using rationally-comprehensible rules and commands. I believe that my argument fits with any reasonable definition of "political," but I mean it to refer to the structures, concepts, and authorities ultimately responsible for the socially-legitimated governance of temporal human societies. The *ends* of political positive law, i.e. law promulgated by legal authorities designated as such by a polity, necessarily involve the regulation of subjects' actions through the *means* of coercive rules and

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54 *Contra* "…I shall argue that departures from the standard model [of essentialism] are often inevitable and appropriate [in judicial reasoning]." Evans, *supra* note 19, at 208.

55 "What is law? Pontius Pilate had little time for a similar question about truth, and it is unlikely that busy attorneys will find much time for philosophical disquisitions concerning the nature of law." Hans Oberdiek, *The Nature of Law by Alan Watson*, 130 U. Pa. Rev. 229, 229 (1981). Yet the unexamined professional life unfolds within an irrational framework. "[T]hose who ignore such questions do so to their own detriment, for one's conception of law will certainly affect one's understanding of what one is doing, whether it is worth doing, and what one is becoming in the process." *Id.* at 229.

56 *Contra* Ronald Dworkin, *Is There Really No Right Answer in Hard Cases?*, in A Matter of Principle, 119 (1985).

commands meant to affect subjects' practical decision-making. The regulatory end remains necessary even if understood to be a means to a further end, such as justice or social stability. Even if some political positive law is thought—erroneously in my view—to be non-coercive, every political legal system systematically employs coercion.[57] Note that the objectively-manifested *coercive intent* of legal authorities, not coercion simpliciter, is an essential element of any political positive law, although there are other essential elements as well such as social legitimacy and authority. The remainder of my argument applies to legal concepts employed, directly or indirectly, in the coercive regulation of behavior. I believe this includes all truly legal concepts.

2. To justify political positive law as a *rational enterprise*, lawmakers and other legal authorities must strive to make their coercive demands of subjects as clear and comprehensible as reasonably possible so that those subjects may use their own rational minds to understand and obey the law, and so that legal authorities not involved in the making of any particular law can understand that law well. This applies just as much when subjects turn to legal practitioners and others they trust to explain the law to them; those who do the explaining must be able to understand the law's requirements first. "Reasonably possible" leaves room for vagueness and ambiguity in law when the advantages of such vagueness and ambiguity outweigh the disadvantages, such as when granting necessary discretion to judges and regulators, and *essentialism can circumscribe more clearly the bounds of vagueness and ambiguity* than can non-essentialism. Of course, perfection is not achievable here any more than in other areas of human life, but the failure to commit to this principle of rationality as a goal *renders law unfit to be classed as an exercise of reason*, even though law is *never solely* an exercise of reason in any case—legal authorities cannot rely solely on the rational force of argument in order to persuade subjects to obey. The requirements concerning clarity may apply to non-coercive advice just as much as to coercive rules, but I do not focus on this possibility here.

3. Separately, in order to justify political positive law as *morally legitimate*, lawmakers and other legal authorities must strive to make their coercive demands of subjects as clear and comprehensible as reasonably possible. Anything else would be unjust and unfair, and indeed law is often unjust when it is unclear and subjects are subsequently penalized for non-compliance with its unclear demands. I take these heavily moral assertions for granted rather than argue for them. I recognize that those whose moral system requires no justification for the coercion of some by others, or whose moral system requires no goal of clarity in coercive requirements, or who have no moral system at all may find this part of my argument unconvincing.

4. When promulgating legal rules and commands meant to be intelligible to a range of subjects who must then reason practically based upon those rules

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[57] Hart himself writes that some positive law must be coercive due to a form of natural requirements. (" … [W]e do need to distinguish the place that sanctions must have within a municipal system, if it is to serve the minimum purposes of beings constituted as men are. We can say, given the setting of natural facts and aims, which make sanctions both possible and necessary in a municipal system, that this is a *natural necessity*…") H.L.A. Hart, The Concept of Law (3d ed. 2012), at 199. He says that "the minimum forms of protection for person, property, and promises which are similarly indispensable features of municipal law" are natural necessities as well. *Id.* at 199. But he views the system of international law differently and, mistakenly in my opinion, denies that "every legal system *must* provide for sanctions." *Id.*

and commands, the use of scientific-style essentialist understandings of concepts is systematically clearer and more precise than the use of non-essentialist understandings of concepts. The use of non-essentialist approaches does not offer any outweighing advantages. And further, from the perspective of practical reason, all non-essentialist concepts can transform into clearer and more consistent essentialist ones. This remains true even when the elements of essentialist concepts are fixed not by objective, pre-existing social or other realities, but by chosen social conventions—as long as those conventions do not contradict social or other realities. The purpose of concepts is to classify human experience, not necessarily in any absolute sense, but sufficiently well to *distinguish phenomena from one another*, such as law from non-law and legal requirements from the legally unrequired. I believe that the fundamentals of the first three major steps of my argument are more or less common sense, or close enough to it, and thus that this step is the one of major contention.

IV. Law as the Humanity That Must Use Scientific Concepts

A. Law as the Most Scientific Humanity

Law is the one humanity that, to be its best self, must exclusively use a scientific approach when formulating its own distinct concepts, and so law must translate the religious, moral, and literary concepts that it uses as source materials into scientific-style concepts for itself. Religious and moral rules and commands as well as the concepts on which they depend—and I believe that morality is a subspecies of religion—can at times be their best and perhaps only selves when non-essentialist and self-contradictory from a worldly perspective; whether they are self-contradictory in an ultimate analysis is another question. I say this not about mysteries of faith such as the Trinity and its associated doctrines, although it may be true of them, but about rules and commands that believers are meant to obey. Some religious rules and commands are straightforward but others, such as the difficult "So whatever you wish that men would do to you, do so to them,"[58] the apparently impossible "You, therefore, must be perfect, as your heavenly Father is perfect,"[59] and the obscure "[B]e wise as serpents and innocent as doves,"[60] have natures that would make them hard for any legal system to enforce in a rational and just manner if left at their high levels of generality—fortunately, they are not meant to be enforced by secular authorities using their methods.

When a typical believer seeks to follow them with consistency in her actions, she must translate them into clearer and more concrete concepts from which she can derive clear rules to follow. For example, she may decide that "cunning yet innocent" includes the evasion of questions in certain circumstances, which she must further define, but never includes outright lying even though "cunning yet

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58 Matt. 7:12, National Council of the Churches of Christ, Revised Standard Version Catholic Edition (RSVCE), Biblegateway.com, https://www.biblegateway.com/versions/Revised-Standard-Version-Catholic-Edition-RSVCE-Bible/ (last visited Feb 2, 2018).

59 Matt. 5:48, *Id.*

60 Matt. 10:16, *Id.*

innocent" by itself is not specific enough to require any such distinction. After she makes the distinction, the believer can then formulate a rule against lying, and Wittgenstein himself said that religious believers show their beliefs by "regulating" their actions rather than in some more amorphous way.[61]

Many legal authorities enjoy issuing their own religious-style pronouncements, with the U.S. Supreme Court being particularly fond of them. A classic example of a regulatorily near-useless revelation is this from the Court:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education…. These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.[62]

This airy edict thinly disguised as constitutional law does little to indicate what actions the Supreme Court would allow the government to regulate and what actions it would not. Certainly, marriage, many family relationships, child rearing, and education are heavily regulated by a bewildering array of federal and state statutes, common law, and administrative rules, while acts of procreation and contraception are less so. "Personal dignity and autonomy" are very much in the eye of the beholder. The last sentence has no legally relevant meaning at all—somehow it buttresses a right to abortion but not, say, to a right to polygamy, to a single-sex work environment, or to sell one's own internal organs.

These, as well as somewhat more recognizably *legal* concepts such as "negligence," "equal protection," the "right to privacy," "due process," and the "personhood of corporations," must be translated into rules and commands that subjects can rationally understand and obey if law is to aspire to rationality and justice. The imperative for such translation is greater in law than in religion and morality, for many religious and moral concepts can vary substantially from thinker to thinker and still be themselves—they can be more purely individual mental kinds—and, further, religious and moral concepts are not necessarily used by some to regulate the actions of others. Legal concepts are necessarily social and must be substantially shared by a variety of subjects, and are used to coerce.

It is not that the law should dispense with the use of concepts of high generality any more than it should dispense with religious concepts as sources—"do unto others as you would have them do unto you" clearly plays a prominent role in the thinking underlying a wide range of law, as do "dignity and autonomy." Instead, before law is made, they should be translated into specific legal concepts that indicate more clearly to subjects what they must and must not do, and which can serve as more precise and stable sources for rules and commands than either openly or *de facto* non-essentialist procedures.

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61 A religious belief of a believer "will show, not by reasoning or by appeal to ordinary ground for belief but rather by regulating for it in all his life." L. Wittgenstein, Lectures & Conversations on Aesthetics, Psychology and Religious Belief 53–4 (Cyril Barrett ed., 1967).

62 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992).

For instance, giving to courts the power to penalize subjects for uncontoured "negligence" would give them a quasi-religious power to interpret, often unpredictably, the concept in different ways at different times that then would lead to different outcomes for subjects however diligently those subjects attempted to be law-abiding. Unlike God, courts neither merit this power nor can be relied upon to exercise it properly. This is why legislators, judges, and regulators translate negligence, constitutional rights, and other general concepts into more specific ones, if not explicitly then at least implicitly when they produce concrete rules and commands. Insofar as this process does not produce precise essentialist concepts, it is faulty.

Again, sometimes legal concept formulation must leave room for considerable discretion for legal authorities, but that discretion should be delineated as precisely as reasonably possible. Essentialism can contribute to this. And again, it is not that essentialism alone can cure law of harmful vagueness, rationally-irresolvable ambiguity, and arbitrary discretion—far from it—but essentialism is a necessary step along the right path. Like many essentialist concepts, all non-essentialist concepts should be, at most, sources for law rather than used as legal concepts, that is to say, used to regulate subjects' actions by means of the legal system.

B. Refining the General into the Regulatory

"Negligence," as a general American legal concept, includes violations of behavior expected of the reasonable man of ordinary prudence, and also includes higher standards such as "utmost care" that demand more than ordinary prudence, as in the case of common carriers. At times, those different standards dictate different results in a given tort lawsuit because the two standards are partially contradictory and at times irreconcilable, even though the general concept of negligence encompasses them both. Allowing judges and jurors to use the negligence concept containing the contradictory standards, without including in the concept specifications of the circumstances in which each standard should be used, gives them a *non-essentialist concept* that renders the application of the law unpredictable for some litigants and potential litigants. They cannot know when a court will choose which standard. The non-essentialist concept allows courts to choose out of it what the court wants, when the court wants, while leaving the contradictory elements behind. This is irrational and unjust. The same goes for such vague doctrines as "dignity and autonomy," the "right to privacy," and whatever can be deduced for law from "the right to define one's own concept of existence" as well as more mundane examples such as "disorderly conduct."

These must be refined into regulatory concepts and rules that come closer to the ideal of informing subjects of exactly what behavior will expose them to legal liability, or allow them to obtain legally-specified benefits, and what will not. The concepts should contain properties that both do not contradict one another and are also specific enough to cover as many future contingencies as possible. Due to the vagaries of facts, thought, and language, this ideal is often unreachable, but it *should be an ideal at which the law aims.* Marginal cases especially will present evergreen challenges, but by having cores to them, legal concepts can more clearly signal which cases are marginal and which are central. "Negligence," the "right to privacy," and so on are often refined into essentialist concepts for certain purposes—but often are not, and often are altered unexpectedly without the salutary candor and precision that more rigorous conceptual thinking would provide.

More examples of translations: moral principles such as "avoid harm to others" have been translated into tort law in various ways, but have not been used to create a general duty to rescue strangers in distress even when the cost to the potential rescuer is negligible. The conjectured constitutional "right to privacy" has been refined to cover the commercial purchase of contraceptives but not items inside discarded residential garbage.[63] And so on.

In other words, *Posner's epistemological democracy should become epistemological authoritarianism*. Keeping legal concepts "democratic" empowers the discretion of legal authorities at the expense of legal stability and predictability for legal subjects and citizens. Although legal authorities' discretion can be employed to benefit legal subjects and advance justice when following clearer legal rules would not, authoritarianism produces better results overall for the same reasons that the rule of law is superior to the rule of men—allowing the powerful to do as they think best comes at too great a cost, even though law sometimes prevents the powerful from doing the best thing. In law, epistemological democracy is most often democracy restricted to rulers, and epistemological authoritarianism is freeing for the ruled.

Many legal authorities' discretion is too great—Posner seems to think it close to legally unconstrained, though perhaps constrained by what society will accept—and non-essentialist concepts always leave it greater in sub-optimal ways when compared to the advantages of essentialism. More generally, contemporary non-essentialism helps to justify pre-existing tendencies toward slipshod thinking, certainly a long-standing feature of human life.

C. Tracing Law via Coercion

Beyond the conscious use of essentialism *per se*, using it to clarify the high-level concept of law, such as the recognition of coercive intent as an essential element, is a precondition for clarifying many downstream legal concepts.[64] This may be most important when a judicial opinion or statute overturns or simply ignores previous law than with an opinion or statute that falls within long-established and hopefully long-understood precedents.[65] A substantial change in the law highlights

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[63] ("[T]he issue here is whether the Fourth Amendment prohibits the warrantless search and seizure of garbage left for collection outside the curtilage of a home. We conclude, in accordance with the vast majority of lower courts that have addressed the issue, that it does not." (quoting California v. Greenwood, 486 U.S. 35, 37 (1988))). The Supreme Court of Canada came to the same conclusion. ("[T]he police did not breach P's right to be free from unreasonable search and seizure. When P's conduct is assessed objectively, he abandoned his privacy interest when he placed his garbage for collection at the rear of his property where it was accessible to any passing member of the public" (quoting R. v. Patrick, 17 SCC 579, 580 (2009))).

[64] *Contra* "[Essentialism] cannot provide answers to many of the questions of categorization that arise in constitutional law. Judges should, therefore, abandon the search for 'essential features.'" Evans, *supra* note 19, at 208.

[65] Failure to recognize this duty is part and parcel with a failure to recognize the significance of the rule of law, both in principle and in the eyes of those ruled. *Cf.* "Rejection of a strong commitment to the normative importance of received doctrine would probably generate serious legitimacy concerns among the general public. A more free-wheeling approach to legal practice, in which lawyers placed heavy and explicit weight on

the benefits of an emphasis on legal concepts' effects upon ordinary legal subjects, and a paramount focus on any shift in direction of the stream of law's coercive force—rather than on its rights-conferring effects or its advancement of justice or "dignity and autonomy"—could lead to a more judicious and restrained attitude in forming new concepts and rules.[66]

For example, in shifting a certain class of cases from the ordinary prudence standard to the utmost care standard of negligence, the direct real-world effect is not to increase the safety of those newly due utmost care. That may or may not occur. The direct effect, or at least directly-intended effect, is to make liable, or at least potentially liable, a new group of potential defendants to an increased risk of lawsuits, and the associated expenses and other disadvantages, and an increased risk of paying judgments, which may also have a higher average cost. The direct effect is the coercive force of the law applied more strictly against a certain group of subjects. When this is recognized, the coerced subjects' interests come into sharper relief, and the more distantly-intended effects can be more easily seen to be subject to greater uncertainty. Perhaps the more risk-adverse members of the industry in question will get out of the business, thus rendering the industry's customers, whom the legal authorities had intended to make safer, in reality less safe.

Similarly, when the Supreme Court decided that citizens do not have a privacy interest in discarded garbage, it did not decide to directly empower the police to search garbage without a warrant, but rather took away the potential legal power of citizens to coerce police and prosecutors away from such searches by having any evidence thus obtained rendered useless, or by granting monetary compensation at the government's expense, or by some other method. A will does not empower a testator to inform others of the desired disposition of his property—this could be done by a legally-informal document—but rather, as a specifically *legal* document, a will directs the coercive power of the state against those who might take the testator's property against his wishes after his death.[67] These shifts in emphasis can lead judges and others to rule differently in close cases.

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non-doctrinal considerations, would offend our political culture's commitment to the distinction between the rule of law and the rule of persons." David Millon, *Objectivity and Democracy*, 67 N.Y.L. Sch. L. Rev. 1, 64 (1992). Insofar as law and legal concepts are unclear, the door is opened to the rule of men over the rule of law.

66 Non-essentialism can join with other types of deconstruction to weaken, rather than strengthen, our understanding of and commitment to law. "[I]t has often been liberals and leftists who have championed the possibilities of Hohfeldian decomposition. . . . [O]nce we see that legal concepts can be unbundled into constituent jural relations that can be reallocated, the classic *cri de coeur* of the laissez-faire or free market champion against redistribution—'but it's my property!'—loses much of its presumptive force." Schlag, *supra* note 53, at 221. This is because, perhaps, "property" does not mean much of anything at all. "Indeed, the possibility of decomposition challenges the notion that there is some sort of already established natural or neutral baseline conception of what constitutes 'property' or indeed any jural composite." *Id.* at 221. As Schlag recognized, the so-called political right has taken advantage of this approach as well. "Decomposition is politically indiscriminate: one can decompose in the service of the Right as well as the Left. As the United States has turned sharply right during the last three decades, decomposition has been vigorously exploited in various legislative and executive precincts." *Id.*

67 On wills and other "law-constituted" forms, see D'Agostino, *supra* note 8, at 194–203.

This approach also reveals what is directly at stake in an ongoing class of free speech and religious liberty cases. For example, when a baker refuses to bake a cake for a same-sex wedding in certain jurisdictions,[68] the first thought should not be that an anti-discrimination law would prevent discrimination or empower the couple to buy a cake at the store of their choice. Rather, where such a law is in effect, the law coerces the baker to do something against his conscience, or empowers the couple to use the force of the law to coerce the baker into doing something against his conscience. The direct operation of the law is to force someone—the baker—to do something, not to do anything for the couple—who also are not forced to do anything. Without the anti-discrimination law, the couple would have to obtain voluntary, rather than forced, service from a willing provider, bake a cake themselves, or go without an inessential service while suffering the inconvenience and potentially distressing feelings that may accompany these alternatives—yet it would not be the law that imposed these consequences, but rather the voluntary choice of the private baker.

Such anti-discrimination cases are about forcing private citizens to do things they do not wish to do by using the legal system—which may or may not be justified in these cases, but of course often is. Obscuring the operation of the law by focusing first or solely on preventing discrimination or the like is deceptive, although it can be useful *after first identifying the coercive effects of the law*. In any case, Posner's nihilistic procedural values of liberalism and epistemological democracy are of no use.

V. Legal Philosophy and the Clarifying Roles of Essentialism and Coercion

A. Law, Knowledge, and Coercion

The relationship among law, knowledge, and coercion is highly relevant to conceptual essentialism since that relationship determines the need for essentialism, the value of which is contingent upon the ends and means in question.[69] Legal philosophers should have a consensus regarding the value of essentialism for legal concepts and coercion as essential to the concept of law. Unfortunately, like Posner, other legal theorists entertain non-essentialist conceptual understandings,[70] and some argue that while legal theorists should pay more attention to coercion in formulating their theories, they continue to reject coercion as essential to the concept

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[68] *See, e.g.,* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

[69] Tracing the flow of coercion is a useful way to frame the metaphors that I believe we inevitably use to understand law. "[L]egal concepts are analyzed as if they were spatialized objects existing in two- or three-dimensional space. Hence it is that legal thinkers, even today, will speak un-self-consciously about legal concepts as 'covering certain areas' or as having certain 'boundaries' that must be established through 'line-drawing' exercises…" Schlag, *supra* note 53, at 194. Schlag is much more skeptical of the value of spatial metaphors than I.

[70] On essentialism, *see, e.g.,* Frederick Schauer, The Force of Law 35ff (2015).

of law.[71] I believe that the essential nature of law's coercion flows from a focus on law's effects on subjects, and the work of Brian Leiter, particularly his advocacy of a naturalistic jurisprudence,[72] has helped to orient me in my argument, which of course is rooted in older views of concepts and law from Plato and Aristotle to St. Augustine and St. Thomas to Jeremy Bentham and John Austin.[73]

Posner has long favored paying close attention to science in judicial decision-making, and I agree with those who say that legal philosophers would do well to examine more closely actual experience, including data from empirical disciplines such as sociology and psychology.[74] This is consonant with a focus on law's real-world effects. A rigid separation between philosophy and scientific disciplines[75] is counter-productive since the data of the latter must inform the former, including informing our discovery of what is essential to law and the understanding of legal concepts—discovery of essences is an empirical exercise rather than purely *a priori*.[76] Further, non-essential features of law and many other phenomena are

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71 *See,* Schauer, *id*. at 3 ("It thus appears that noncoercive law both can and does exist"). Schauer is among those prominent contemporary legal theorists who come closest to acknowledging coercion as an essential element of law. So is Kenneth Einar Himma, who writes, "I argue that the authorization of coercive enforcement mechanisms is a conceptually necessary feature of law." Kenneth Einar Himma, *The Authorization of Coercive Enforcement Mechanisms as a Conceptually Necessary Feature of Law*, SSRN, 1 (2015), http ://ssrn.com/abstract=2660468 (last visited Sept. 26, 2016). Neither argues that coercive intent, or coercion in another form, is an essential element of every political positive law.

72 Brian Leiter, Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy (2007).

73 *See, e.g.,* Aristotle, The Complete Works of Aristotle (J. Barnes ed., 1984); Augustine, Against the Academicians and the Teacher (P. King trans., 1995); Jeremy Bentham, An Introduction to the Principles of Morals and Legislation (1996); and John Austin, The Province of Jurisprudence Determined (W. Rumble ed., 1995).

74 "[W]e ought not let the contingent and contested contemporary demarcations of the academic disciplines circumscribe the inquiry. . . . Some of what follows will be sociological, in the broadest sense, and more than some will draw on experimental psychological research." Schauer, *supra* note 70, at 4. He says that "we should not too quickly accept that the domain of inquiry designated as 'philosophical' should be limited to the search for essential properties" and also relies upon "empirical and analytical conclusions from economics and political science." *Id.* at 4.

75 *Contra* "Legal philosophy has to be content with those few features which all legal systems necessarily possess." Joseph Raz, The Authority of Law: Essays on Law and Morality 104–5 (2009). Instead, "we may usefully think of law as shaped by three relatively distinctive yet intersecting elements—ideas, interests, and institutions—and that each of these elements has formed the principal object of particular traditions in legal theory." Nicola Lacey, *Jurisprudence, History, and the Institutional Quality of Law*, 101 Va. L. Rev. 919, 926–7 (2015). If that is accepted, we can see that "[a] theoretical understanding of law—in the sense of an explanation of not only what it is but its social role and effects, and its development—requires an analysis informed by . . . a jurisprudence that opens itself to both historical and comparative analysis." *Id.* at 927.

76 "Aristotelian jurisprudence also challenges the split in legal studies between normative and empirical research. . . . Aristotle's own legal thought powerfully combines a deep normative orientation toward human flourishing with an empirical study of over one hundred and fifty Greek constitutions and myriad Greek legislation." Aristotle and Modern Law, XX (Richard O. Brooks & James Bernard Murphy eds., 2003).

crucial for understanding those phenomena and, at times, for the best understanding of their essential features.

I disagree with those who suggest that the concept of law and other legal concepts can be more fruitfully understood from a non-essentialist standpoint than from an essentialist one, and even with those who simply leave the door to non-essentialism open. One writes:

> And thus a running subtext of this book is a challenge to a prevalent mode of jurisprudential inquiry. For most contemporary practitioners of jurisprudence, the principal or even exclusive task of their enterprise is to identify the essential properties of law, the properties without which it would not be law, and the properties that define law in all possible legal systems in all possible worlds. But that understanding of the jurisprudential enterprise rests on what is at least a highly contested and quite possibly a mistaken view of the nature of our concepts and categories, and of the nature of many of the phenomena—including law—to which those concepts and categories are connected.[77]

It is this "quite possibly mistaken view of the nature of our concepts"—essentialism[78]—that I wish to defend within legal theory *while retaining the useful elements of Wittgenstein-style family resemblance and similar theories* and while, also, relying upon the empirical data of the actual world rather than imaginable but unrealistic "possible worlds."[79] And I certainly believe that one of the principal duties of jurisprudence or legal philosophy is "to identify the essential properties of law," which is a project that Posner also rejects. He wrote, "Law itself is best approached in behaviorist terms. It cannot accurately or usefully be described as a set of concepts. . . . It is better . . . described as the activity of . . . judges, the scope of their license being limited only by the diffuse outer bounds of professional propriety and moral consensus."[80] To that, I say that concepts describe and shape the behavior, and indeed we cannot identify what behavior counts as law-related without a clear concept of law.

Posner says of judges' work that "[i]ts raw materials are the ugly realities of life, but the judicial game transmutes them into intellectual disputes over rights and duties, claims and proofs, presumptions and rebuttals, jurisdiction and competences."[81] That transmutation must be into the practically comprehensible and empirically obeyable, not alchemically into a game of abstract mental gymnastics made all the more facile by non-essentialism.[82] I have concentrated on the necessity

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77 Schauer, *supra* note 70, at x–xi.

78 *See id.* at 37–8. ("Cognitive scientists who study concept formation have almost universally concluded that people do not use concepts in the way that the 'essential feature' view of concepts supposes. . . . [P]eople think of concepts and categories in terms of properties . . . that may not hold even for all the central cases of the category").

79 I could say that "I advocate a common sense jurisprudence toward law and its practical applications." Jean R. Sternlight, *Symbiotic Legal Theory and Legal Practice: Advocating a Common Sense Jurisprudence of Law and Practical Applications*, 50 U. Miami. L. Rev. 707, 713 (1996).

80 Richard A. Posner, The Problems of Jurisprudence 456–57 (1990).

81 Posner, *supra* note 15 at 134.

82 Essentialist thinking is necessary elsewhere as well. I expect that the same cognitive scientists whom Schauer references seek to use terms precisely, and without internal

of essentialism from a *pragmatic standpoint in legal philosophy*—by which I mean a focus on what works best in promoting the ends or goals of law.[83] My approach could be called functionalist.[84]

Family resemblances, cluster concepts, and the like can and should be reinterpreted with a firm anchor in some form of essentialism that employs necessary and sufficient properties, even if the question of inclusion of additional properties is objectively irresolvable.[85] Upon inspection when used practically, *such non-essentialist concepts either dissolve in equivocation and non-conformity to reality or can be made essentialist after all*. To see this, readers must accept the minimum of beliefs about concepts, terms, and their uses that can make a workable legal system and legal philosophy,[86] i.e. they must accept that we can understand subjectively and communicate objectively about concepts sufficiently well to support political positive law as an exercise in practical reason necessarily dependent upon some (lawmakers and other legal authorities) relaying to others (legal subjects) instructions meant to guide the latter's behavior in human societies with the aid of rules or norms.[87] Theoretical systems that do not allow for the

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contradictions, in their work rather than think like ordinary people. "Moreover, people think of concepts and categories in terms of properties—like flying for birds and grapes for wine—that may not hold even for all of the central cases of the category. And although cognitive scientists debate about many things, this is not one of them, for it is widely recognized that a picture of concept formation that stresses necessary (and sufficient) conditions or properties is an inaccurate picture of how people actually think." Schauer, *supra* note 70, at 37–8.

83 Thus, my use of "pragmatism" does not encompass any anti-essentialist essence that it may be thought to have. *See* "I said earlier that once pragmatism becomes a program it turns into the essentialism it challenges; as an *account* of contingency and of agreements that are conversationally not ontologically based, it cannot without contradiction offer itself as a new and better basis for doing business." Fish, *supra* note 13, at 1464.

84 "[F]unctionalism represents an assault upon all dogmas and devices that cannot be translated into terms of actual experience." Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809, 822 (1935).

85 "It is worth repeating that the most important versions of anti-essentialism are not merely about peripheral cases. . . . Rather, the question is whether even the core or standard or central cases can be understood in terms of necessary features." Schauer, *supra* note 70, at 39.

86 Thus I am not a legal realist if the following is essential to legal realism: "[W]e see that the basic realist gesture is a double, and perhaps contradictory, one: first dismiss the myth of objectivity as it is embodied in high sounding but empty legal concepts (the rule of law, the neutrality of due process) and then replace it with the myth of the 'actual facts' or 'exact discourse' or 'actual experience' or a 'rational scientific account.'" Fish, *supra* note 13, at 1459. Legal realists "go from one essentialism, identified with natural law or conceptual logic, to another, identified with the strong empiricism of the social sciences." *Id.* at 1459. I believe in both forms of essentialism, with the first (legal concepts) built upon the second (actual experience). *Contra* "Cohen and Frank are full of scorn for the theological thinking and for the operation of faith, but as [Roscoe] Pound sees, they are no less the captives of a faith, and of the illusion—if that is the word—that attends it." *Id.* at 1459 (then explaining in the next paragraph that "illusion" was not the best word since it implies the existence of another, objective perspective). Yet Frank eventually became a Catholic Thomist.

87 *Cf.* "Let us accept that what we are really studying is the nature of institutions of the type designated by the concept of law." Joseph Raz, Between Authority and

project of law cannot be useful to legal philosophy, but rather rule legal philosophy out of existence.[88] I do not here assert that every legal norm must be laid down by a lawmaker or that legal norms alone constitute legal systems, only that some such relaying of instructions is a necessary and important part of any political legal system.[89] Whether non-essentialist concepts are useful in other philosophical contexts is not one of my primary concerns here.[90]

B. Post-Modern Epistemological Democracy versus Law

Therefore, even those who favor the highly dubious epistemologies of post-modernism must believe, if they believe in law, that valid and socially-objective conclusions[91] can be made within the system of law, even if those conclusions may have no ultimate metaphysical truth behind them, and that there must be ways for different reasoners to distinguish better reasoning from worse with reasonable consistency with one another.[92] If truth is not objective but rather depends upon

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Interpretation: On the Theory of Law and Practical Reason 32 (2009). Any law necessarily involves or shapes in some way a claim on the decision-making process of those toward whom the law is directed, i.e. the concept of law involves an acceptance of some form of the practical difference thesis. *Cf., e.g.,* "[T]he most plausible construction of the Practical Difference Thesis asserts that every legal norm must be capable of making a practical difference in the deliberations *of those persons who are addressed and hence obligated to conform to that norm.*" Kenneth Einar Himma, *H.L.A. Hart and the Practical Difference Thesis*, 6 Leg. Theory 1–43, 38 (2000).

88 *See* "Indeed, if you take the anti-foundationalism of pragmatism seriously (as Posner in his empiricism finally cannot), you will see that there is absolutely nothing you can do with it." Fish, *supra* note 13 at 1464. This renders pragmatism a useless, thoroughly un-pragmatic-in-a-higher-sense method. Fish disclaims the label of advocate for pragmatism. *Id.* at 1465.

89 "Norms, we were told, are imperatives. They are laid down by an individual or groups of individuals with the intention of guiding human behaviour. This is the imperative theory of norms." Joseph Raz, Practical Reason and Norms 51 (1999). Raz rejects the imperative theory as a comprehensive description, but surely some legal norms must be imperative or at least have an imperative effect. Although I do believe in a form of the imperative theory of norms for all legal norms, I do not believe it is necessary for my argument here.

90 Keep in mind that conceptual essentialism and metaphysical realism do not necessarily go together, and the results of the explicit adoption of one may not have the same results as adoption of the other. "[I]t might still be the case that adopting the metaphysical realist program would not substantially change the results courts reach." Brian Bix, *Michael Moore's Realist Approach to Law*, 140 U. Pa. L. Rev. 1293–1331, 1319 (1992). This may be because courts are implicitly realist even though not all philosophers are.

91 For any workable legal system, this must include conclusions based upon imperfect knowledge. *See, e.g.,* "Despite the limited evidence, judges rightly affirm propositions such as 'the contract is valid,' and deny their negation, in cases in which there is offer, acceptance, consideration, and no available defense." Michael S. Moore, *The Plain Truth About Legal Truth*, 26 Harv. J.L. Pub. Pol. 23, 34–5 (2003).

92 Postmodernists believe in "no neutral, objective standpoint to which we can retire in order to determine the truth value of any assertion. We can, however, evaluate the truth of a proposition from within our own knowledge system; that is to say, there are generally accepted criteria within a particular discourse, reference group, or community for determining whether something is true." Peter C. Schanck, *Understanding*

the perspective of each evaluator, those within the same legal system must be able to share perspectives similar enough for them to share the same laws, which means there must exist something objective in the sense of being accessible—and comprehensible—to all reasonable evaluators that allows them to draw the same conclusions, or at least conclusions similar enough to one another to be able to obey the law and be viewed by others as obeying the law, at least the great majority of the time.[93] Posner's epistemological democracy rules out this necessary consensus beyond an extremely narrow and wholly inadequate set of procedural ideas that, as argued above, cannot answer fundamental questions that must, practically speaking, have answers.

Further, there are features and goals that may not be strictly essential to law, but are essential to maintaining respect for it and, thus, perhaps for maintaining the rule of law in the long run. Situating the question as a relation of the means necessary to achieve socially-desired ends, Fish wrote of Posner's *The Problems of Jurisprudence*:

> Law emerges because people desire predictability, stability, equal protection, the reign of justice, etc., and because they want to believe that it is possible to secure these things by instituting a set of impartial procedures. This incomplete list of the desires behind the emergence of law is more or less identical with the list of things Posner debunks in his book, beginning with objectivity…. Repeatedly he speaks of himself as "demystifying" these concepts in the service of "the struggle against metaphysical entities in law"…. But the result of success in this struggle, should Posner or anyone else achieve it, would not be a cleaned-up conceptual universe, but a universe deprived of the props that must be in place if the law is to be possessed of a persuasive rationale. In short, the law will only work—not in the realist or economic sense but in the sense answerable to the desires that impel its establishment—if the metaphysical entities Posner would remove are retained….[94]

I have gone beyond Fish in one sense and denied that law can exist at all without a socially-objective conceptual universe that includes these "metaphysical entities." A collection of willful commands, untethered from socially-recognizable rules of at least substantial predictability that are administered with at least substantial impartiality, is not the rule of law, but the rule of men—and not only is formulating a legal rule

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Postmodern Thought and Its Implications for Statutory Interpretation, 65 S. Cal. L. Rev 2505, 2517 (1992). I argue that these criteria ideally should include essentialist concepts and thus essentialism should become generally accepted. Postmodernist epistemology "constitutes a set of assumptions, sometimes unrecognized, behind much current legal theory." *Id.* at 2517.

93 Some argue that those who take a purely pragmatic or relativist theoretical position cannot offer anything to those who must act, especially when they act to judge what others should do or what should be done to others. "Thus the idea that we cannot overcome our positioned perspective and make legitimate, impartial judgments is theoretical only: The practices of both judgment and justice are deeply rooted in the belief that we can." Eric Blumenson, *Mapping the Limits of Skepticism in Law and Morals*, 74 Tex. L. Rev. 523, 561 (1996).

94 Fish, *supra* note 13, at 1462.

without using legal concepts impossible, but a legal rule *is* a legal concept.[95] If the distinction between the rule of law and the rule of men is one without a difference, then Aristotle has had us waste a great deal of our time—and legal philosophy must be indistinguishable from a philosophy of non-legal power relations pure and simple.

C. Descriptive versus Prescriptive Values of Non-Essentialist Understandings

I do not criticize those linguists who assert that non-essentialist theories may be valuable ways to describe how speakers use many terms and concepts in various contexts, and that is often what legal theorists such as Posner appear to be doing.[96] If such theories are restricted to semantics and the common usages of concepts, and to religious and artistic uses, they certainly have descriptive and perhaps prescriptive value, and can be more useful than essentialist concepts.[97]

Imprecision, vague association, and outright incoherence characterize, to greater or lesser degrees, much of our thinking and speech both in everyday life and in certain professional areas, especially those in which these qualities are often actively sought such as politics, propaganda (often euphemistically called journalism), and legal argument.[98] Some incoherence is often acceptable for everyday and even specialist purposes and, indeed, the stereotype of the annoying amateur logician who needlessly corrects the imprecise—but clear enough—speech of others exists for a reason. Yet at other times, this incoherence yields confusion and even hides dishonesty.

In addition, and contrary to the beliefs of some, there is considerable scientific evidence that the human mind naturally tends toward conceptual essentialism.[99]

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[95] Here, we can usefully employ the term *a priori*. Even something as simple as "Do not exceed 55MPH" involves multiple prior legal concepts such as "a rule," "meant to guide subjects' behavior," "a measurement of physical speed meant to be employed in determining the legal speed limit," "enforceability," and the "penalty" for the rule's violation. It almost certainly involves other legal concepts such as the "exceptions to the rule," explicit or implicit, including whatever the law classifies as "emergency vehicles" under a "duty to travel as quickly as reasonably possible" in "appropriate circumstances."

[96] But Schauer never adopts non-essentialism and writes, "That our language and our concepts, especially those that do *not* describe natural kinds such as gold and water, are best characterized in terms of prototypes, central cases, generic properties, clusters, and family resemblances is contested terrain." Schauer, *supra* note 70, at 39.

[97] Concerning empirical research into how people use concepts, *see, e.g.,* "The present study is an empirical confirmation of Wittgenstein's (1953) argument that formal criteria are neither a logical nor psychological necessity; the categorical relationship in categories which do not appear to possess criterial attributes, such as those used in the present study, can be understood in terms of the principle of family resemblance." Eleanor Rosch & Carolyn B. Mervis, *Family Resemblances: Studies in the Internal Structure of Categories*, 7 Cognit. Psychol. 573–605, 603 (1975).

[98] "More importantly, the nonessentialist view is consistent with a great deal of research in contemporary and not-so-contemporary cognitive science. People simply do not think and use concepts in terms of essences or necessary and sufficient conditions." Frederick Schauer, *The Best Laid Plans*, 120 Yale L. J. 586–621, 617 (2010).

[99] *See, e.g.,* Woo-kyoung Ahn et al., *Why Essences Are Essential in the Psychology of Concepts*, 82 Cognition 59–69 (2001). They discuss the theory of psychological essentialism. "Essentialist theories have recourse to the notion of naturalness of a causal

Structured cause and effect reasoning is a human habit as well as a required property for the interpretation of any intelligible world.[100] Thus, when I advocate for effects-based concepts, I most certainly do not mean to exclude causal inferences from the content of concepts, only to assert that the effects are the first—and essential—materials for such inferences.[101]

Regardless of the accuracy of the theory of psychological essentialism and setting aside the preferences of the human mind—rationality and not preference should be our ultimate guide—problems arise when non-essentialist family resemblances or other non-essentialist forms become considered acceptable, or even unavoidable, *when terms and concepts need to be used prescriptively for coercive social action*. I criticize the refusal to recognize that any family resemblance or similar concept must involve an essential core or else be a mishmash of more lucid categories and a sign of muddled thinking, even if that muddled thinking has no substantial cost or has advantages in many contexts.

Family resemblance can be employed valuably and positively not only in describing the thinking of real people in the real world, but also in non-linear explorations of reality such as much literature, other forms of art, and religion, in all of which incoherent thinking can be a stepping-stone to insight and thus a more profound understanding of reality. *Law does not qualify and cannot valuably be extended to include such categories.* Although even in philosophy the quest for precision can go beyond what is useful or possible, it is the duty of theorists, scholars, and jurists to clarify language and use concepts with the optimal levels of precision and limitation rather than accept the common sloppiness of thought and speech, or even the truth-revealing obscurity of art and religion, and it is the duty of legal scholars to clarify legal argument.[102] Such precision is an essential quality of truly philosophical discourse as opposed to other forms of communication.[103]

D. Posner and the Essential as the Pragmatic

Unlike the concept of epistemological democracy, Posner's general concept of pragmatism does not, initially, produce any incompatibility with an essentialist

relation. It is precisely in distinguishing natural from non-natural relations or properties that the content of essentialist beliefs is crucial." *Id.* at 62.

100 *Cf.* "Psychological essentialism was initially proposed in reaction to the common assumption that concepts are equivalent to undifferentiated clusters of readily accessible properties." Ahn et al., *supra* note 99, at 90.

101 And, in fact, the human mind may ultimately prefer to classify by cause rather than effect. "[P]revious studies show that when causes underlying the surface features are revealed, people group objects based on the common underlying cause rather than surface features." *Id.* at 63. My approach of using effects to infer coercive intent in order to identify law fits this model.

102 "It thus appears that an important feature of human cognition and human communication is the use of probalistically but not universally true characterizations as a vital part of our cognitive and communicative existence." Schauer, *supra* note 70, at 39. The imprecision of everyday language becomes unacceptable when indulged by philosophers, and thus I reject the influence of ordinary language philosophy if and when its claims lead philosophers to accept in their own work the counter-productive imprecision of the ordinary use of language.

103 *Cf.* D'Agostino, *supra* note 8, at 211–21.

approach that does not require *metaphysical* essentialism. By pragmatism, he says, "I mean, to begin with, an approach that is practical and instrumental rather than essentialist—interested in what works and what is useful rather than in what 'really' is."[104] Certainly, I see law as beginning with the practical and instrumental, and as an initial matter I agree with the pragmatist's view that it is as "odd to suppose that a judge has an obligation to maintain a 'fit' between what he does and what his predecessors did as to suppose that a modern scientist has an obligation to maintain a fit between what he does and what Archimedes and Aristotle did."[105] Instead, he says, "There are practical reasons of both an epistemological and political character why judges should usually follow precedent . . . but no question of *obligation* is involved. . . ."[106]

But I would add that a specific obligation to follow precedent does arise after the practical reasons are identified, precisely because there is a general obligation to serve those practical reasons, and I would add also that this specific obligation is subject to exceptions—and certainly the specific obligation does not arise from some purely *a priori* or Kantian-style notion of duty. The specific obligation to follow precedent is highly valuable in realizing law's overarching goals, which require considerable stability and predictability. After all, Posner says that if formalism works best in the long run, then "[a] pragmatic philosopher might without inconsistency think that judges should be formalists rather than pragmatists. . . ."[107] Posner also repudiates overall utilitarianism and consequentialism, saying, "If a consequentialist is someone who believes that an act, such as a judicial decision, should be judged by whether it produces the best overall consequences, pragmatic adjudication is not consequentialist, at least not consistently so. . . . Judicial decisionmaking is likewise a truncated form of consequentialism."[108] This truncation makes Posner's views somewhat more compatible with the essentialist view expressed here—we need not consider the cosmic effects of the essentialist approach as a consistent consequentialist or utilitarian must seek to somehow do.

Posner's work cannot give us the answer, nor even the tools for a good answer, for restoring or preserving the rule of law, perhaps because this does not seem to be one of his priorities.[109] And the most important reason for this lack may be *his approach to concepts and epistemology*. Writes Edward Cantu, "Posner's vacillations between fact and value . . . appear to be practical manifestations of the *conceptual* contradiction created by Posner's simultaneous embracing of greater empiricism and rejection of foundationalism."[110]

It is not that conceptual approaches can never change, or that we should not always be open to revision in our thinking, but that some things are so unlikely to

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104 Posner, *supra* note 15, at 4.

105 *Id.* at 11.

106 *Id.* at 11.

107 *Id.* at 12.

108 Posner, *supra* note 36, at 65.

109 *See, e.g.,* "As so often in *The Problems of Jurisprudence,* Posner then walks away, leaving his readers with an unresolved clash of arguments. Throughout the book, one constantly has the sense of strolling into Maxim's and being handed a trout, a pan, and a place by the stove." Eric Rakowski, *Posner's Pragmatism (Review of The Problems of Jurisprudence)*, 104 Harv. L. Rev. 1681, 1691 (1991). I deny that Posner provides a trout.

110 Edward Cantu, *Posner's Pragmatism and the Turn toward Fidelity*, 16 Lewis & Clark L. Rev. 69, 107 n.171 (2012).

change that we need not concern ourselves with the possibility.[111] In biology, we can continue to include the concept of mammal as an essential part of the concept of dog even though we can imagine that dogs without mammary glands would remain easily recognizable and classifiable as dogs from a common-sense perspective and perhaps even from a strictly biological one—reworking our classifications based upon detached speculation about what is extremely unlikely to be, but which still could conceivably be, would render almost all of our categories uselessly vague or ambiguous. We can imagine that one day, human bodies could exist that do not require the consumption of protein to be healthy—should that mean we should conclude that protein is not essential to a healthy diet?[112] What about vitamin B12?[113] So the question of what is essential is a practical, even pragmatic one: What is always necessary to best serve our instant purpose, in the world as it actually is and is overwhelmingly likely to remain?

Posner sometimes seems to use this conceptually essentialist approach *because it is pragmatic*, but while denying that he does so: "[T]he question arises whether pragmatism has any common core, and, if not, what use the term is. To speak in nonpragmatic terms, pragmatism has three 'essential' elements. (To speak in pragmatic, nonessentialist terms, there is nothing practical to be gained from attaching the pragmatist label to any philosophy that does not have all three elements.)"[114] That is just the point to conceptual essentialism as it should be used in legal theory and law itself: Essential to a concept is what it should always include in order to optimize understanding and communication in pursuit of the relevant ends.

A way of restating the above: Modern law has a great number of imperialist tendencies and gradually has conquered more areas of life and regulates each one with greater and greater effect. Despite law's many benefits—including some benefits of expanded regulation—its overcriminalization, overregulation, vagueness, and ambiguity[115] degrade both the quality of life and the confidence in legal institutions

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111 *Cf.* "Practical reason avoids the trap of ensconcing a conceptual scheme, or a theoretical, rule-governed picture of the world, into which new incidents must either fit or exist as anomalies. Its nature is to exist beyond grammars currently extant, moving on to better ones when it can picture them and holding fast to the best existing ones when it cannot." James Penner, *The Rules of Law: Wittgenstein, Davidson, and Weinrib's Formalism*, 46 U. Toronto Fac. L. Rev. 488, 506 (1988).

112 "Protein malnutrition leads to the condition known as kwashiorkor. Lack of protein can cause growth failure, loss of muscle mass, decreased immunity, weakening of the heart and respiratory system, and death." Protein, The Nutrition Source, Harvard School of Public Health, https://www.hsph.harvard.edu/nutritionsource/what-should-you-eat/protein/ (last visited Feb 14, 2018).

113 "Symptoms of B12 deficiency include memory loss, disorientation, hallucinations, and tingling in the arms and legs. Some people diagnosed with dementia or Alzheimer's disease are actually suffering from the more reversible vitamin B12 deficiency." Vitamin B12 Deficiency: Causes and Symptoms, The Nutrition Source, Harvard School of Public Health, https://www.hsph.harvard.edu/nutritionsource/b-12-deficiency/ (last visited Feb 14, 2018).

114 Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 Cal. L. Rev. 1653, 1660 (1990).

115 *See, e.g.,* Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 Vand. L. Rev. 1191, 1223-24 (2015) ("Overcriminalization not only causes unnecessary criminal violations through increased and unjustified enforcement and adjudication, but it also

of those subjects who live under them.[116] Some such as Posner openly acknowledge the irrelevance of law in most judicial decision-making, at least at the appellate level where law is most often judicially shaped and precedents set.[117] Conscious or unconscious non-essentialist conceptual imperialism is one contributor to this phenomenon, and pragmatic conceptual clarity versus non-essentialism is the piece of the puzzle that I address.[118]

Statements such as this from Posner are common among dedicated legal pragmatists: "There is no algorithm for striking the right balance between rule-of-law and case-specific consequences, continuity and creativity, long-term and short-term, systemic and particular, rule and standard. In fact, there isn't too much more to say to the would-be pragmatic judge than make the most reasonable decision you can, all things considered."[119] Again, this is a license to rule without law and to look only to one's own judgment concerning consequences—either that, or it is a statement of useless generality, for if understood broadly, who opposes making "the most reasonable decision you can, all things considered"?

A strict formalist's answer would be, "Apply the law as written regardless of the perceived consequences. All things considered, that is what reasonable judges do."

Conclusion

American legal pragmatism has reached its *reductio* in Posner's open and public repudiation of the rule of law. This state of affairs is not only irrational and unjust as a substantive matter, but contributes to the ongoing undermining of faith in American political and legal institutions.

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causes criminal behavior itself"); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 506-7 (2001) ("Anyone who reads criminal codes in search of a picture of what conduct leads to a prison term, or who reads sentencing rules in order to discover how severely different sorts of crimes are punished, will be seriously misled. The reason is that American criminal law, federal and state, is very broad; it covers far more conduct than any jurisdiction could possibly punish"); and Richard A. Epstein, How Progressives Rewrote the Constitution 2 (2006) ("The New Deal Court thus vindicated both expansive federal powers and limited protection of individual rights of liberty and property…That transformation represents the defining moment in modern American constitutional law: the Court's shift toward the big government model that continues to dominate today").

116 For the erosion of confidence in major U.S. institutions, including the U.S. Supreme Court, see, e.g., Gallup, Americans' Confidence in Institutions Stays Low, Gallup.com (2016), http://news.gallup.com/poll/192581/americans-confidence-institutions-stays-low.aspx (last visited Jan 31, 2018) and Gallup, Supreme Court | Gallup Historical Trends, http://news.gallup.com/poll/4732/supreme-court.aspx (last visited Jan. 31, 2018).

117 Perhaps pragmatists and critical theorists have more in common than many suppose. On critical theory, s*ee, e.g.,* Costas Douzinas & Colin Perrin, Critical Legal Theory (2011).

118 This is far from just an American phenomenon. For an example, see a treatment of an unacknowledged move away from an essentialist understanding of "tax" in Australian law. Evans, *supra* note 19 at 223–7. For an openly non-essentialist understanding of "judicial power" in Australian law, see *id.* at 227–30.

119 Posner, *supra* note 36, at 64.

One aspect of the restoration of the rule of law should be a shift to the conscious, consistent, and precise use of conceptual essentialism and, then, a focus on coercive intent's role as an essential element of every law. By beginning with legal phenomena's effects upon the decision-making processes of typical legal subjects, jurists and theorists can better understand and direct law, and hopefully in a more careful and disciplined fashion. Unlike other approaches that focus on the political nature of the courts or the questionable constitutionality and broad powers of the administrative state, this philosophical critique attacks the problem from a very different angle and can complement those other efforts. Rather than seeing essentialism and pragmatic values in opposition, I have argued that pragmatic values require essentialism, and that legal pragmatism is unpragmatic.

The power of my argument depends on the value ascribed to the rule of law. Those who consider broad discretion granted to judges to be a virtue, not a vice—and especially if they wish the contours of that discretion to remain obscured—may favor conceptual non-essentialism over essentialism. Those who imagine the rule of just authorities to be a superior and lasting state of affairs may not favor the reinvigoration of law, which is often an obstacle to the implementation of their own best judgments.[120] This is not necessarily a dispute over the principle only, but additionally over the empirical value of the supremacy of law. But as society continues to diversify, the empirical need for clear and stable laws less prone to unexpected—and unrespected—reinterpretations is likely to grow.

Says Plato's Athenian in the *Laws*:

> We insist that the highest office in the service of the gods must be allocated to the man who is best at obeying the established laws…. Such people are usually referred to as "rulers," and if I have called them "servants of the laws" [it is] because I believe that the success or failure of a state hinges on this point more than on anything else. Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.[121]

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[120] *Cf.* "In a society governed by the wise and the good, legal reasoning is likely simply to get in the way. And in such a society, were such a society ever to exist, the Rule of Law would be at least superfluous, and quite possibly pernicious." Schauer, *supra* note 5, at 11.

[121] Plato, *Laws*, *in* Plato: Complete Works 1318–1616, 1402 (John M. Cooper & D. S. Hutchinson eds., Trevor J. Saunders trans., 1997).

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Lying and the First Amendment

Thomas Halper*

ABSTRACT

The first amendment does not protect all speech. Should it protect lies? Some argue that the state should intervene to prevent and punish lying because the people are insufficiently rational (they are too emotional, and, therefore vulnerable) or excessively rational (they find it too costly to investigate claims and are, therefore, vulnerable). Others retort that state officials are not neutral or objective, but have their own interests to advance and protect, and, therefore, cannot be trusted. Though certain kinds of lying, like fraud and perjury, are clearly not protected speech, courts have recently seemed sympathetic to the view that the proper response to lying is not government action, but the workings of the marketplace of ideas. The distinguished economist, Ronald Coase, has taken this argument much farther, applying it to commercial speech, but thus far his views have not prevailed.

KEYWORDS

First Amendment, Lying, Supreme Court

CONTENTS

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I. Lying and the First Amendment

The first amendment to the United States' Constitution may sweepingly proclaim that "Congress shall make no law . . . abridging the freedom of speech, or of the press,"[1] but it has never been read by the Supreme Court to ban all restrictions on all speech, and the argument has been made, pointing at perjury,[2] fraud,[3] and false advertising,[4] that it does not protect lying. Lies, that is deliberate falsehoods spoken with the purpose to deceive, are said to be inherently bad (morally disrespectful to the listener and dehumanizing to the liar), as well as bad in their consequences (poisonous to discourse and human relationships).[5] Almost no one defends lying as a good thing. Thus, even when the Supreme Court all but obliterated a public official's chances of winning a libel suit, it was careful to exclude assertions made with "a knowledge that they were false"[6] from protection.

And yet courts, wary both of encouraging self censorship and of approving content based restrictions, have sometimes been reluctant to exclude lies from constitutional protection. A complicating factor is that lies, especially effective lies, are often mixed with truths; indeed, it is the element of truth that may render the lie credible. This paper will explore the issue of lying and the first amendment in the context of national and state statutes plus an argument presented by Ronald Coase, a Nobel Laureate in economics. [7]

There is nothing new about lying, as the serpent's tale to Eve about the consequences of sampling fruit from the tree of knowledge of good and evil well illustrates.[8] But today the topic blooms like a ravenous noxious weed, with the *Oxford Dictionary* naming the 2016 word of the year "post-truth,"[9] and "alternative facts"[10] and "fake news"[11] becoming *les sujets du jour*. The most bizarre allegations, for example, linking Hillary Clinton to a pedophile ring operating out of a pizza parlor, strike millions of citizens as perfectly plausible,[12] and European officials complain that state sponsored fake news is generated at such a torrential pace that

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1 U.S. Const., amend. I.

2 E.g., 18 U.S.C.A. § 1621.

3 E.g., 18 U.S.C.A. § 341.

4 E.g., 15 U.S.C.A. § 1125.

5 Lying may also take the form of generating doubt where none is justified. The tobacco industry, for instance, "defended its primary product – tobacco – by manufacturing something else: doubt about its harm." Naomi Oreskes & Erik M. Conway, Merchants of Doubt 34 (2010).

6 N.Y. Times v. Sullivan, 376 U.S. 254, 279 (1964).

7 This paper addresses only lying. It does not address falsehoods honestly made, misleading truths, or mere opinions, which resist true/false designations.

8 Genesis 3:4.

9 Amy B. Wang, *"Post-Truth" Named 2016 Word of the Year by Oxford Dictionaries*, Wash. Post, Nov. 16, 2016.

10 Eric Bradner, *Conway: Trump White House Offered "Alternative Facts" on Crowd Size,* CNN.com, Jan. 23 2017.

11 Angie Drobnic Holan, *2016 Lie of the Year: Fake News*, PolitiFact.com, Dec. 13, 2016.

12 Public Policy Polling.com, Dec. 9, 2016. Fourteen percent of Trump supporters believed the accusation, and thirty-two percent were not sure.

it quite overwhelms any efforts to counter it.[13] A *Time* magazine cover asked, "Is Truth Dead?"[14] And that governments and politicians lie are likely truths as ancient as governments and politicians themselves.[15]

United States v. Alvarez (2012) concerned a minor official who falsely claimed at a public meeting that he had been awarded the Congressional Medal of Honor, the nation's highest medal for combat bravery, in violation of a national law that made such lies criminal offenses. *Susan B. Anthony List v. Driehaus* (2016) dealt with a suit brought under state law banning campaign lies. *National Institute of Family and Life Advocates v. Becerra* addressed a state law compelling speech as a cure for deceptive silence. "Advertising and Free Speech" by Ronald H. Coase maintains that commercial speech should be treated constitutionally like any other speech and enjoy the full protection of the first amendment, including whatever protection is granted to lying. The material I discuss will illustrate how a contemporary society, "post-truth" and awash in fake news, addresses the problem.

II. The Marketplace of Ideas

Perhaps the most common rationale for freedom of speech in the aggressively individualistic United States is the marketplace. As Milton famously wrote in *Areopagitica* (long before there was a United States), "Let [truth] and falsehood grapple; who ever knew truth put the worse in a free and open encounter?"[16] The view that truth will win in the end, however, is open to serious and numerous reservations. How are we to know that what we believe is true is actually the truth that has won out? Perhaps it is a falsehood that has triumphed, for we naturally always think that whatever we believe is true, even if it is not. Also, since, as Keynes observed, "In the long run, we are all dead,"[17] how comforted should we be by the promise of eventual victory? Before it was accepted that the earth revolves around the sun, dozens of generations lived and died, confident in believing the opposite. Also, Milton posits "free and open" encounters, but how common are they, given the advantages typically enjoyed by the status quo? Do we really choose beliefs in the marketplace of ideas in the same way we choose, say, deodorant or beer, in the marketplace of products? For we overvalue our pre-existing beliefs as a way of saving us from having to admit mistakes; we perceive (or misperceive) information to reinforce these beliefs; we are reluctant to view events from another person's perspective; we tend to prefer things the way they are over an uncertain,

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13 Mark Scott & Melissa Eddy, *Europe Combats New Enemy of Political Unity: Fake News,* N.Y. Times, Feb. 21, 2017.

14 Time, April 3, 2017. A half century earlier during the Vietnam War, pundits complained of a "credibility gap." Josh Zeitz, *How Americans Lost Faith in Government*, Wash. Post, Jan. 30, 2018.

15 The insistent call for social media to police their content by banning sites that lie raises many of the problems inherent in government's performing the same function. Indeed, the absence of electoral accountability might render the social media's position even weaker.

16 John Milton, Areopagitica 58 (Richard C. Jebb, ed. Cambridge Univ. Press, 1918) (1644).

17 J.M. Keynes, A Tract on Monetary Reform 80 (Macmillan, 1924).

different form they might take in the future; we are generally more worried about potential losses than cheered by potential gains; and we may well be governed by socialization that inculcates beliefs at an early age, leaving us content to search for information that merely confirms what we learned years before we were able to think for ourselves. Lies, as Hannah Arendt observed, "are often much more plausible, more appealing to reason, than reality, since the liar has the great advantage of knowing beforehand what the audience wishes or expects to hear. He has prepared his story for public consumption with a careful eye to making it credible, whereas reality has the disconcerting habit of confronting us with the unexpected for which we were not prepared."[18] Our innate psychological tendencies, in short, leave us open to manipulation by those seeking to use them for their own purposes. Indeed, efforts to counter misinformation may actually do more harm than good.[19]

Technology, moreover, has seriously amplified the problem. Deep fakes, involving impersonation by digital manipulation, are making it possible to present people saying and doing things they never did – and the typical audience is entirely unaware of the deception.[20] The potential for reputational damage, blackmail, electoral abuse, national security errors, and undermining public and interpersonal trust is so enormous that it seems fatuous to offer the marketplace as a corrective. The bromide that seeing is believing turns out to be an invitation to be conned.

All of which suggests that correction cannot reliably be purchased simply by providing more and better information.[21] In fact, the standard method of presenting both sides of an issue is apt to strengthen attachment to prevailing views,[22] and even retracting a false assertion may by repeating it harden the belief.[23] That we

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18 Hannah Arendt, *Lying in Politics: Reflections on the Pentagon Papers*, N.Y. Rev. of Bks., Nov. 18, 1971.

19 Edward Glaeser & Cass Sunstein, *Does More Speech Correct Falsehoods?* 43 J. Leg. Stud. 65, 73-90 (2014).

20 Robert Chesney & Danielle Citron, *Deep Fakes: A Looming Crisis for National Security, Democracy and Privacy?* (2018) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3213954. The authors suggest that firms may arise to provide protection by tracking our acts, but concede that this would threaten privacy, grant the firms tremendous power, and tempt government to use the data for its own purposes. Another commentator speaks of tort suits using defamation or right of publicity, but these remedies might not be widely available and, in any case, could be activated only after the lies had been spread. Jesse Lempel, Combatting Deep Fakes through the Right of Publicity, Lawfare, Mar. 30, 2018. Other commentators, regarding fake news as political advertising, argue that the answer is greater transparency in the form of mandated disclosures, but in addition to obvious enforcement problems, it appears doubtful that the disclosures would prove effective. Abby K. Wood, Ann M. Ravel & Irina Dykhne, *Fool Me Once: Regulating "Fake News" and Other Online Advertising*, 91 So. Cal. L. Rev. 6 (2018).

21 Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 Pol. Behav. 303, 304 (2010).

22 Charles S. Taber & Milton Lodge, *Motivated Skepticism in the Evaluation of Political Beliefs*, 50 Am. J. Pol. Sci. 755 (2006).

23 B. Swire, U.K.H. Ecker & S. Lewandowsky, *The Role of Familiarity in Correcting Inaccurate Information*, 43 J. of Experimental Psych.: Learning, Memory, and Cognition 1948 (2017).

are normally quite unaware of these biases indicates that it will never occur to us to challenge them.[24] No wonder a study of 126,000 stories tweeted by more than three million people more than 4.5 million times concluded that falsehoods spread faster and reached more people than truths.[25]

But if the marketplace rationale is radically imperfect, still the standard American view is Holmes' classic statement: "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[26] Not the *perfect* or *infallible* test, for elsewhere he admitted that the "beliefs expressed in proletarian dictatorship"[27] may win out, certainly beliefs he personally abhorred. Instead, he avers that the marketplace, mindless and purposeless, was merely the *best* test available. And it is taken to be the best test because Americans, long suspicious of state power, are wary of officials making the determination of truth for them. We understand, as Weber said, that the state "claims the monopoly of the legitimate use of physical force,"[28] and we understand that the state is neither neutral nor benevolent, but is guided by persons with their own interests and beliefs to advance and protect. This may not always be obvious. In the West, leaders do not gain power like Machiavelli's Prince, violently eliminating his rivals, and in governing, our leaders are typically sensitive to the nooks and crannies of public opinion, flattering the people like a lothario in a silent movie. But in imposing their will, via the bureaucracy, the police, or the military, leaders (to switch the metaphor) urge the hidden wolf from its lair, and force is exposed.

Yet it may be unrealistic to assume that ordinary people have the knowledge, experience, or skills required to make these truth determinations, for acquiring all these resources is costly in terms of time, effort, lost opportunities, and money. We do not know what pharmaceuticals are safe and effective and so we rely on the Food and Drug Administration to tell us what they believe is the truth. Thus, in effect we deputize others, in government and out, to act as investigative truth squads on our behalf. Formerly, this might have meant heavy reliance on conventional print media. Today, it would include all kinds of social media, which may operate quite outside traditional journalistic norms and practices and direct their messages toward narrow, niche audiences seeking only reinforcement of preexisting views. The results, sad to say, are not always encouraging: thirty-six percent of Americans believe Obama was definitely or probably born in Kenya, and forty-two percent definitely or probably believe a handful of Wall Street bankers secretly planned the 2008 financial crash.[29] To some, the proliferation of misinformation suggests a greater need for the state to intervene on behalf of the people. To others, the intervention of the state would merely supplant a present evil with a worse one. Meanwhile, pundits ruminate darkly about the metastatic proliferation of falsehoods, while postmodernists seem uncertain that truth is even a useful concept.

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24 William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. Risk & Uncertainty 7, 9 (1988).

25 Soroush Vosoughi, Deb Roy & Sinan Aral, *The Spread of True and False News Online*, 359 Science 1146 (2018).

26 Abrams v. United States, 250 U.S. 616, 624, 630 (1919).

27 Gitlow v. New York, 268 U.S. 652, 672, 673 (1925).

28 Max Weber, *Politics as a Vocation*, *in* From Max Weber, 78 (H.H. Gerth & C. Wright Mills eds. & trans. N.Y.: Oxford Univ. Press, 1946).

29 Economist/YouGov Poll, Dec. 17-20, 2016.

The first amendment, it would seem, is silent on the subject. It instructs Congress (and by extension via the fourteenth amendment, all levels of government[30]) not to abridge the freedom of speech, but does not pause to indicate what this vague term "freedom of speech" means. It is obvious that it cannot simply mean "speech," because if it did, the words "freedom of" would be superfluous. But if "freedom of speech" does not equal "speech," what does it mean? One answer is that freedom of speech is broader than literal speech, in the sense of covering such nonverbal expression as wearing a black armband to signify opposition to a war[31] or raising a red flag to signal solidarity with a political movement.[32] At the same time, freedom of speech is also narrower, as it does not include libel, obscenity, true threats, or fighting words. Consider the iconic legal venue, the courtroom trial, which is enmeshed in detailed restrictions as to whom may speak, what they may speak, even the order in which they are allowed to speak, and thus is far removed from any ideal, free wheeling marketplace that Holmes might have imagined. The contours of freedom of speech are hardly self evident.

III. A Right to Lie?

It is not surprising, then, that the question as to whether the first amendment protects the right to lie offers only complex and vexing answers. This is especially true, when lies are not of a personal nature, but instead concern information about which the audience has no direct knowledge; it will be easier to deceive me with information about a war in another continent than with a slur against my family. Of course, it would be absurd for a witness in a trial to lie, and then justify it by claiming freedom of speech.[33] And it would be absurd to expect the protection of the first amendment for a salesperson to tout an off-label use of a drug through false marketing[34] or for a patron falsely to shout fire in a crowded theatre and cause a panic[35] or for a driver stopped for a violation to misrepresent himself as a policeman.[36] Are systematic lies – for example, the traditional practice of doctors keeping bad news from patients "for their own good" – worse than individualistic lies – I tell my wife I was working late at the office, when I was actually engaged in a liaison with a mistress? It depends on the circumstances.

More than this, if we conceive speech as a principal means of connecting with other persons, combatting isolation and loneliness, sharing information and ideas, and cooperating for common purposes, lying emerges as a toxic corruptor, undermining trust and driving persons apart. For the purpose of lying is deception. Or to put it differently, the essence of lying is not falsity but belief and intention: If I say something I believe is false and present it as true I am lying, even if it develops that I was mistaken and inadvertently spoke the truth, so long as my purpose was to deceive. In this sense, lying entails treating the audience as unworthy to hear

30 *Supra* note 27.
31 Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).
32 Stromberg v. California, 283 U.S. 359 (1931).
33 Gates v. Dallas, 729 F. 2d 343 (1984).
34 United States *ex rel*. Polansky v. Pfizer, Inc., 822 F.3d 613 (2d Cir. 2016).
35 Schenck v. United States, 249 U.S. 47, 52 (1919).
36 United States v. Chappell, 691 U.S. F.3d 388 (4th Cir. 2012).

the truth, in short, with moral disrespect. Kant thought lying was always wrong because it denies the moral worth of the liar, who "annihilates his dignity as a human being,"[37] and impedes the rationality of the audience; both are used only as means, and not as ends. When you deceive me and deny me the opportunity to make a free rational choice, I become merely a means to some end you have selected, and the end itself is robbed of its goodness because it was not rationally pursued.

From a societal perspective, too, lying may contaminate the discussions that drive democratic accountability. If, for example, you believe that definitely or probably the 9/11 attacks were planned by the United States – as a quarter of Americans do[38] – then accountability means something quite different from believing that Al-Qaeda was to blame. Imagine, for example, a world in which lying was the default position. No statement could be trusted; every assertion would require personal verification, which in the aggregate would become so expensive no one could afford to perform it; handing down information from one generation to the next would be impossible, and so there could be no accumulation of knowledge and no material progress. With a cynical gullibility, the public would either believe nothing or, as Arendt put it, believe anything, "no matter how absurd, and [would] not particularly object to being deceived because it held every statement to be a lie anyhow."[39]

Borges makes a related point in his story, "Tlön, Uqbar, and Orbis Tertius," where a secret society produces multivolume tomes on imaginary alien places; these fantasies gradually displace reality in the minds of the people, as they study and discuss the fantasies; in the end, "The world will be Tlön."[40] Similarly, Dick wrote of implanting memories, so that the protagonist, having learned that the "extra-factual" are convincing, concedes that the "actual memory is second best."[41] In a variation on Gresham's law, lies drive out the truth. And, of course, *1984* featured a memory hole, where documents describing the past were incinerated, and replaced by the party's newer version of history, in which the party is always right.[42] No wonder Kant believed that a lie "harms . . . humanity generally," for "it vitiates the source of justice."[43]

On the other hand, if truth telling is the default position, the pervasive distrust and susceptibility to fantasy that hinder progress and accountability are removed,

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37 Immanuel Kant, *The Metaphysics of Morals* (Mary J. Gregor trans.) *in* Practical Philosophy 552-53 (Mary J. Gregor & Allen W. Wood trans. & eds. Cambridge: Cambridge Univ. Press, 1996) (1797).

38 *Supra* note 29.

39 Hannah Arendt, The Origins of Totalitarianism 382 (1951).

40 Jorge Luis Borges, Labyrinths: Selected Stories and Other Writings 43 (Donald A. Yates & James E. Irby eds., (1970/1940).

41 Philip K. Dick, *We Can Remember It for You Wholesale*, 30 Fantasy and Science Fiction 4 (April, 1966). Bertrand Russell famously observed, "It is not logically necessary to the existence of a memory-belief that the event remembered should have occurred or even that the past should have existed at all. There is no logical impossibility in the hypothesis that the world sprang into being five minutes ago, exactly as it then was, with a population that 'remembered' a wholly unreal past." The Analysis of Mind 159 (1921).

42 George Orwell, 1984 (Boston: Houghton Mifflin, 1949).

43 Immanuel Kant, Critique of Practical Reason 433 (Thomas Kingsmill Abbott trans. , London: Longman's, Green & Co., 1879).

and if you recognize that you benefit from veracity, you may decide that fairness requires that you reciprocate and foreswear lying yourself.[44]

Lying may also be conceived as an abuse of power. If I lie to you, I may be exploiting your need for me; you rely upon me for information, and I repay the reliance with deliberate falsehoods. It may also be a way of showing my disdain for you; a lie of sufficient brazenness implies that the audience is either too stupid to see the lie or too weak or passive to do anything about it. Such lies may entail contempt not only for the audience, but for truth itself, which like an obnoxious relative at a party, is best dealt with by ignoring that it is there. Or I may compel my subordinates to lie, undermining their relationships with others and leaving them more dependent upon me. By forcing them to lie, I test their loyalty to me, exposing them to possible embarrassment and humiliation; lying, in this context, becomes a kind of ritualistic humbling that undercuts the liar's self esteem and sense of personal worth. The ways in which lying is bad, in practice and in principle, are both numerous and well known. It is an easy step from all this to the conclusion that "there is no constitutional value in false statements of fact" [45] or that "neither lies nor false communications serve the ends of the First Amendment."[46]

But this is not the end of the story. If the Bible instructs, "Thou shalt not lie to one another,"[47] it also tells us to "[b]e kind and compassionate to one another,"[48] and it is obvious that these obligations may sometimes conflict, perhaps generating anxiety[49] or the avoidance of the stressful conversation.[50] Honesty, after all, may risk social rejection, a potent deterrent, or create embarrassment. In Genesis, for example, angels tells Abraham, aged ninety-nine, that his wife, Sarah, aged eighty-eight and long post-menopausal, will become pregnant and have his son; Sarah overheard the prediction and laughs, saying, "Now that I am withered, am I to have enjoyment with my husband so old?" But to spare his feelings and keep peace in the home, God quotes her as saying, "Shall I in truth bear a child, old as I am?" omitting her reference to Abraham's presumed impotence.[51] Thus, we may avoid painful honesty not only because it seems inherently wrong, but also because it may bring hurtful consequences in its wake. Elsewhere, Samuel, fearful that King Saul will kill him if he learns he is traveling to select a king to replace him, asks God for advice; the answer is to claim that he is merely bringing a heifer to sacrifice, in other words, to lie.[52] Further evidence of God's willingness to countenance lies may be found in nature, where deception is ubiquitous, for example, in a possum's playing dead to foil a predator.

For nearly everyone acknowledges that lying is permissible under certain circumstances, for instance, when a murderer asks where a potential victim

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44 Cf., Sissela Bok, Lying: Moral Choice in Private and Public Life (1978).

45 Gertz v. Robert Welch, Inc., 418 U.S. 322, 339-40 (1974).

46 St. Amant v. Thompson, 390 U.S. 727, 732 (1968).

47 Leviticus 19:11.

48 Ephesians 4:32.

49 Andrew L. Molinsky & Joshua D. Margolis, *Necessary Evils and Interpersonal Sensitivity in Organizations*, 30 Acad. of Mgemt. Rev. 245 (2005).

50 Sidney Rosen & Abraham Tesser, *On Reluctance to Communicate Undesirable Information: The MUM Effect*, 33 Sociometry 253 (1970).

51 Genesis 18: 9-15.

52 I Samuel 16:2.

is hiding.[53] Here, a life is at stake and the rarity of the situation indicates that it will have little precedential impact. Lying may also seem to be justified if it "is designed to benefit the person deceived,"[54] as when a dentist persuades an elderly demented woman to wear her dentures by telling her "that I was marrying her son, and she needed to put that partial in before she could go to the synagogue"[55] or when you respond to an unwanted dinner invitation with, "Oh, I'm so sorry, I have plans with my family"[56] or when you assure someone in great pain that everything will be alright. There is an element of paternalism here that some will find objectionable, but probably most people will conclude that in these situations, lying does not undermine relationships but in its consequences instead helps to sustain them. Lying may also be an accepted response to bigotry. For instance, a divorced Afghan woman admitted that she had to tell her landlord that her husband was away because he would not rent to a divorcee.[57] For truth is seen as trumped by the need to preserve a life, avoid hurt feelings, offer a dollop of hope that will make suffering bearable, or lease a place to live. Lying, which in the abstract may seem inherently wrong, may sometimes produce better consequences than truth.

Can lying be harmful? Of course. But other speech that is deliberately harmful, like hate speech, is protected by the first amendment, and so the corrosive harm of lies, by itself, the argument goes, should not disqualify them from coverage. Mill, who dismissed the marketplace defense as "one of those pleasant falsehoods,"[58] argued that errors should not be suppressed -- presumably, this would also apply to lies -- because examining them gives people a "clearer perception and livelier impression of truth, produced by its collision with error,"[59] thus aiding in the development of a critical, inquiring mind.

Lies, or at least "investigative deceptions,"[60] also, paradoxically, may be a means to truth, as when journalists lie to sources in order to induce them to say what they know. Similarly, a leading text on criminal interrogations advises police to pose as friends of the suspects, to suggest that confessions will make the suspects feel better or restore their sense of honor or result in lenient punishment, or even to fabricate claims of evidence.[61] The effort to prevent or punish lies may also

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53 Benjamin Constant, *On Political Reactions*, reprinted in Ecrits et Discours Politiques (O. Pozzo di Borgo ed., 1964) (1797). But cf., Immanuel Kant, 8 Practical Philosophy 427 (Mary Gregor ed. & trans. Cambridge Univ. Press, 1996).

54 Henry Sidgwick, The Methods of Ethics 316 (7th ed. 1981/1907).

55 Trey Popp, *House Dentist*, 115 Penn. Gazette 34, 37-38 (May/June, 2017).

56 Valeriya Safronova, *Two Etiquette Experts Take on New York*, N.Y. Times, Style sec., May 28, 2017.

57 Zahra Nader & Mujib Mashal, *In Afghanistan, Women Struggle After a Divorce*, N.Y. Times, April 18, 2017.

58 John Stuart Mill, On Liberty 89 (Gertrude Himmelfarb ed., Harmondsworth: Penguin, 1974) (1859).

59 *Id*. at 76.

60 Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 69 Vand. L. Rev. 1435, 1438 (2015).

61 Fred E. Inbau, John Reid, Joseph P. Buckley, & Bryan C. Jayne, Criminal Interrogation and Confessions (5th ed. 2011). But cf., Miriam Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 Fordham Urb. L. J. 791, 793 (2006); Patrick McMullen, *Questioning the Questions: The*

discourage people from speaking on controversial topics from a fear of possible prosecution, and thus impede the discovery of truth. By the same token, a parody consisting of deliberate falsehoods does not generate tort liability, as this might bring about a chilling effect that might hinder the pursuit of truth.[62]

Thus, if a rationale for denying speech the protection of the first amendment is that it be "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality,"[63] then some lies will win favor and others will not. "A good man does not lie," wrote a prominent legal philosopher, and yet "many lies do little if any harm, and some lies do real good."[64] The assumption that lies necessarily lack the social value that would warrant first amendment protection, in sum, is simplistic and misplaced.

What, then, makes an honest person? Is it simply someone who does not lie? Since nearly everyone lies at least occasionally, this would seem to make the honest person a kind of moral unicorn, who exists only in the imagination. Most people, who excuse lying under a number of circumstances, would likely find this too harsh. For them, an honest person might perhaps be one who does not lie with malicious intent. (There might, of course, be degrees of honesty, reflecting how often or how seriously, one violates the norm.) But some would insist that honesty is incompatible with lying, whatever its purpose. In this sense, the virtue of honesty in real life might sometimes seem too harmful to be virtuous. The alternative, however, would be to confuse honesty with something else, perhaps compassion.

A few words on liars. Why do they lie? The standard answer is that they believe the anticipated benefits exceed the anticipated costs.[65] But what are the benefits? If I make a false claim about the Yugo I am trying to sell you, the benefit is obvious: the money I acquire from your buying my defective old car. But lies may also call on less tangible motives; the presentation of self is often misleading in order to manage the impressions we give to others, enhancing other people's opinion of us and avoiding social awkwardness and embarrassment.[66] Incentives to lie are seemingly everywhere.

Impermissibility of Police Deception in Interrogations of Juveniles, 99 Nw. Rev. L. Rev. 971, 975 (2005).

62 Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52-55 (1988).

63 Chaplinsky v. New Hampshire, 315 U.S. 568, at 572 (1942). The Supreme Court examined the harmless lie in oral arguments preceding its decision in *Maslenjak v. United States*. The government sought to revoke the citizenship of a naturalized citizen for making an immaterial statement in her naturalization application, which requires applicants to note any criminal offense, regardless of how trivial and regardless of whether they were arrested; Chief Justice Roberts asked if he could be deported for not revealing that he had once driven five miles an hour over the speed limit, Justice Sotomayor would have refused to disclose an embarrassing childhood nickname, and Justice Kagan wondered whether she could have been expelled for lying about her weight; to derisive laughter, the government's assistant solicitor general answered, Yes. Matt Ford, *Will the Supreme Court Defend Naturalized Citizenship*? The Atlantic, May 2, 2017.

64 Charles Fried, Right and Wrong 54 (1978).

65 Gordon Tullock, Toward a Mathematics of Politics (1967); Michael L. Davis & Michael Ferrantino, *Toward a Positive Theory of Political Rhetoric: Why Do Politicians Lie*? 88 Public Choice 1 (1996).

66 Erving Goffman, The Presentation of Self in Everyday Life (1956).

IV. United States v. Alvarez

Xavier Alvarez, a minor official on a local water board, announced at a public meeting, "I'm a retired Marine of twenty-five years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy."[67] All of these statements were lies. Alvarez was charged with violating the *Stolen Valor Act*, which made it a crime to lie about receiving military medals.[68] He pleaded guilty, reserving the right to challenge the law's constitutionality, and was ordered to pay a $5,000 fine. He appealed, charging that his right to free speech under the first amendment was abridged.

The Court of Appeals for the Ninth Circuit upheld his claim. Judge Milan D. Smith, speaking for the court, feared that if the law were sustained, "there would be no constitutional bar to criminalizing lying about one's height, weight, age, or financial status on Match.com or Facebook, or falsely representing to one's mother that one does not smoke, drink alcoholic beverages, is a virgin, or has not exceeded the speed limit while driving on the freeway."[69] Thus would government have "license to interfere significantly with our private and public conversations."[70] Judge Smith conceded that Alvarez's lie did not promote the marketplace of ideas, but added that this could be said about most lies, with the result that government prosecution would be intrusive and "inconsistent with the maintenance of a robust and uninhibited marketplace of ideas."[71] For "the right to speak and write whatever one chooses – including, to some degree . . . demonstrable untruths – without cowering in fear of a powerful; government is . . . an essential component of the protection afforded by the First Amendment."[72] Later, Smith invoked the famous clear and present danger test, concluding that the law failed the test.[73] Nor was he persuaded that the law was the "best and only way to ensure the integrity of [military] medals,"[74] speculating that the damage from lying would fall on the liars rather than the awards system. In the end, Smith was skeptical of permitting "the government to police the line between truth and falsity."[75] Judge J. S. Bybee, dissenting, believed that precedents had established that lies are not protected unless "protection is necessary 'to protect speech that matters,'"[76] a condition that clearly did not apply here.

The government appealed the ruling to the Supreme Court, but the result was the same. Justice Anthony Kennedy, writing for a plurality, acknowledged that

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67 United States v. Alvarez, 132 S. Ct. 2537, 2542. Alvarez might profitably have studied the life of Enric Marco, who became famous in Spain as spokesman for the Spanish survivors of Nazi concentration camps, producing endless books, articles, and speeches, in effect transforming himself into a suffering hero celebrated by generations. Javier Cercas, The Imposter: A True Story (Frank Wynne trans., 2018).

68 18 U.S.C. sec. 704 (2005).

69 617 F. 3d 1198, 1200 (2010).

70 *Id*. at 1204.

71 *Id*.

72 *Id*. at 1205.

73 *Id.*at 1215.

74 *Id.*at 1217.

75 *Id.*at 1218.

76 *Id.*at 1231.

honoring military heroism was a legitimate governmental purpose, but considered the law a content based restriction, which meant that it must be examined with strict scrutiny, that is, it must serve a compelling government interest and it must be narrowly tailored.[77] There may be a compelling interest in preserving the integrity of the medals, but the law's language, Kennedy found, was so sweeping that it endorsed the principle that government could punish any false statements, and this would have a chilling, self censoring effect on speech.[78] Nor did the government show a direct link between the goal of the law and its operation;[79] there was no evidence presented that lies undermined public trust in the awards or that counter speech, perhaps facilitated by a government created data base,[80] would not be adequate to combat lies.[81] "The remedy for speech that is false is speech that is true,"[82] Kennedy wrote, not Orwell's Ministry of Truth.[83] The law, in sum, was clearly insufficiently narrow. That the lies were of no apparent social value and, in fact, were alleged to have caused harm did not disqualify them from protection.

Justice Stephen Breyer, concurring, thought Alvarez's lies did not call for the high level of scrutiny that Kennedy demanded, for the lies did not advance valuable ideas and were easily verifiable.[84] Still, he was troubled by the sweeping character of the law that could invite prosecutorial abuse[85] and by the failure of the government to explain why a more narrowly tailored approach would not work. [86] He favored an intermediate level of protection, something between the tough strict scrutiny and the soft rational basis tests.[87]

Justice Samuel Alito, dissenting, concluded that the law was sufficiently narrow, as it covered only factual lies within the speaker's personal knowledge, and because the lies had no value, prosecuting them would not chill valuable speech.[88] He chided the majority for acting counter to many precedents and other laws that punish lies that serve no legitimate interest. Instead, he compared the law to trademarking, where it is understood that the proliferation of cheap imitations of luxury goods dilutes the brand; he thought it was reasonable for Congress to conclude that the same result would occur with military honors.[89] For if Alvarez's type of lie, Alito showed, were common, a steady stream of exposés would feed public skepticism about the awards system. A comprehensive database would be of little help, he explained, because records went back only to 2001[90].

Although the justices each exude a potent confidence, it is clear that they had not entirely subdued the congeries of slippery problems. Kennedy, for example,

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77 *Supra* note 25, at 2548.
78 *Id.*at 2547.
79 *Id.*at 2549.
80 *Id.*at 2551.
81 *Id.*at 2550.
82 *Id.*at 2550.
83 *Id.*at 2547.
84 *Id.*at 2552.
85 *Id.*at 2555.
86 *Id.*at 2556.
87 *Id.*at 2552.
88 *Id.*at 2556-57.
89 *Id.*at 2559.
90 *Id*.

differentiates between harm causing and non-harm causing lies. But what kind or magnitude of harm would satisfy him? The government's concern about the devaluation of military awards seemed sufficiently harmful to Congress, but did not convince him. Is this the kind of question that requires a judicial answer or should it be left to the judgment of the legislature? And is it really plausible that lawmakers would extend the principle to criminalize *all* lies or is this the kind of hobgoblin Emerson saw fluttering around petty consistencies?[91] Certainly, it is hard to see how punishing lying about winning a combat medal could justify punishing lying about one's virginity, where a legitimate government interest is nearly impossible to discern. Breyer, for his part, seems to be suggesting that some lies are valuable – perhaps lies from investigative reporters that might help in the pursuit of truths – and others – perhaps like Alvarez's – are not. Again, the perennial problem of line drawing presents itself.

Of course, it is obvious that we lie everyday for a variety of purposes, good and bad, and that whole industries (for example, cosmetics, plastic surgery, veneer paneling, food dyes, toupees) exist to deceive. Punishing lying *per se* would revolutionize human relations, denying the social functions that lying plainly performs; it has not become ubiquitous by random chance. Alito insists that the issue is not punishing *all* lying, but simply lying about military medals. But is his rationale self limiting? And who would draw the limits, the elected and democratically accountable Congress or the appointed and independent courts? Where Kennedy emphasizes the value of individual expression and believes tolerating lies demonstrates the strength of society, Alito sees a societal value in celebrating military heroism and worries that tolerating lies will invite disrespect. The marketplace that Kennedy would trust to solve the problem seems to Alito sadly inadequate.

Alvarez also speaks to the relation of truth to authenticity. In common speech, the terms are sometimes treated interchangeably, but the case suggests that they overlap and nothing more. For if authenticity means be-who-you-are, Alvarez was, quite simply, a pathological liar. His lies in this case, as Judge Smith observed, "were only the latest in a long string of fabrications. Apparently, Alvarez makes a hobby of lying about himself," including tales about a second Medal of Honor won for rescuing the American ambassador to Iran during the hostage crisis, playing hockey for a professional team, working as a policeman, and secretly marrying a Mexican movie starlet. Perhaps Alvarez imagines that his pursuit of happiness entitles him to construct his own fantasy persona, but this entirely ignores its effect on other people.

V. Susan B. Anthony List v. Driehaus

In political campaigns (as in war), truth is often the first casualty. Yet even in this age of fake news, it is obvious that beyond a certain point, campaign lies generate toxic effects: they undermine voter efforts to hold officials accountable; they generate cynicism and its progeny, alienation and apathy; they lower the tone of campaigning, discouraging high minded persons from participating; and they

[91] Ralph Waldo Emerson, *Self-Reliance, in* Essays and English Traits, 63,70 (C.W. Eliot ed. 1909).

encourage unethical persons to run for office, increasing the likelihood of official malfeasance and corruption. Efforts to punish campaign lies, in sum, are not short of justifications. Yet though no one defends such lies, the issue, again, is not simple. *Susan B. Anthony List v. Driehaus* (2016) involved an Ohio law that prohibited lying in campaign materials during campaigns in order to promote the election, nomination, or defeat of a candidate.[92] Susan B. Anthony List, a pro-life organization, had tried to purchase a billboard sign reading, "Shame on [Congressman] Steve Driehaus! Driehaus voted FOR taxpayer funded abortion." In fact, Driehaus had voted for the law in question only after receiving assurances from the President that taxpayer funding would *not* fund abortions. Driehaus warned the advertising company involved in purchasing the billboard sign about a possible suit, and it refused the ad, but he nonetheless filed a complaint with the state board of elections, claiming that Susan B. Anthony List had knowingly and falsely accused him of voting for taxpayer funded abortions. After he lost the election, he withdrew his complaint, but Susan B. Anthony List maintained that as long as the law remained, the organization would be subject to a chilling effect from fear of possible future suits. At the time, at least eighteen states had similar laws.[93]

A federal district court handed down a permanent injunction that prevented Ohio from enforcing the law, and Susan B. Anthony List took the case to the Court of Appeals for the Sixth Circuit. There, Chief Judge R. Guy Cole announced that it was bound by *Alvarez*, and must apply the strict scrutiny standard.[94] Ohio had a compelling interest in preserving the integrity of its elections, he acknowledged, but because the law was content based and targeted political speech, which lies at the core of first amendment protections, it also had to be narrowly tailored. In this, the law failed. Complaints were often useless because they were not concluded before the election or in time for a candidate to recover from the false charges; the complaint process could be abused to tar an opponent or divert resources; there was no procedure for eliminating frivolous complaints.[95] Behind his arguments, Judge Cole seemed to be pointing to the commonplace that lies and falsehoods are not exactly unknown in campaigns, that the system has always relied on the marketplace to make final judgments, and that, consequently, the first amendment denies government a determining role. Though he did not address it, there was also the matter of the advertising company being deterred from accepting the ad from the same lawsuit threat. Unaddressed (because it was not germane to the facts of the case) was false speech designed to reduce voter turnout, for example, by providing inaccurate information on the place and time of voting or eligibility rules.[96]

The commonplace that campaigns often feature lies suggests that lying might best be evaluated by examining prevailing norms in particular contexts. Machiavelli[97] and

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92 Ohio Rev. Code Ann. Sec. 3517.21 (B) (2013).

93 Margaret Zhang, Susan B. Anthony List v. Driehaus *and the (Bleak) Future of Statutes that Ban False Statements in Political Campaigns*, 164 U. Pa. L. Rev. 19 (2015).

94 Susan B. Anthony List v. Driehaus, 814 F. 3d 466, 472 (2016).

95 *Id.*at 474-76.

96 Staci Lieffring*, Note, First Amendment and the Right to Lie; Regulating Knowingly False Campaign Speech After* United States v. Alvarez, 97 Minn. L. Rev. 1047, 1078 (2013).

97 Niccolo Machiavelli, The Prince (1950). He famously advised leaders to learn "how not to be good" (p. 57).

Weber[98] maintained, for example, that leaders' social responsibilities exempted them from the claims of ordinary ethical responsibilities as they performed their public duties. Thus, in safeguarding the polity, Machiavelli's prince might be called upon to lie and deceive.[99] Similarly, firms may engage in puffery (so long as they adhere to the law) in their pursuit of profits; [100] lawyers may try to mislead juries in the hope of seeking an acquittal of a client they believe to be guilty; would-be buyers and sellers may pretend that certain dollar figures represent their final offers; and card players may bluff as to the cards they hold. Within reasonable limits, these lies may be tolerated as following established norms,[101] in the sense that audiences should expect them; if we suspect that we will be deceived, we will greet the lies suspiciously, and so it will be harder for us to be taken in. Put differently, if we try to excuse our lying by pointing out that everyone lies, we also undermine our credibility. Susan B. Anthony List could offer this defense; Alvarez could not. Still, the lesson from *Alvarez* and *Susan B. Anthony List* would seem to be that the first amendment may in certain circumstances protect lies, both trivial and significant, leaving them to the marketplace to sort out.

VI. National Institute of Family and Life Advocates v. Becerra

The *National Institute of Family and Life Advocates* (*NIFLA*) case focuses not on outright lies, but instead on arguably deceptive omissions. NIFLA operates hundreds of non-profit crisis pregnancy centers (CPCs), which offer services to pregnant women and try to persuade them not to have abortions.[102] California's *Reproductive FACT Act* required CPCs to post the following notice: "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women." The notice also informed clients as to whether the CPCs were licensed as medical facilities.[103] If they were not licensed, they were banned from performing medical procedures. Failure to comply risked a fine of $500 for the first offense and $1000 for subsequent offenses. NIFLA, which operates 111 CPCs in California, sought a preliminary injunction on the ground that the statute abridged its first amendment rights to free speech and the free exercise of religion. The district court denied the motion,[104] concluding that NIFLA had not demonstrated that it would likely prevail on the merits, a necessary precondition for such an injunction.[105] NIFLA appealed to the Ninth Circuit.

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98 Max Weber, *Politics as a Vocation*, in From Max Weber 77-128. (Hans H. Gerth & C. Wright Mills trans. & ed. New York: Oxford Univ. Pr., 1946)

99 *Supra* note 97, ch. 18. *See* Michael Walzer, *The Problem of Dirty Hands*, 2 Phil. & Pub. Affs. 160 (1973).

100 Albert Z. Carr, *Is Business Bluffing Ethical?* 46 Harv. Bus. Rev. 143 (1968).

101 That is, "shared understandings about actions that are obligatory, permitted, or forbidden." Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. Eco. Perspectives 137, 143-44 (2000).

102 Nationwide, there are between 2,000-4,000 CPCs, substantially more than the number of abortion providers.

103 Cal. Health & Safety Code, secs. 123472(a)(2)(A)-(C) and (a)(10-(2).

104 Civil No. 15c2277 JAH(DHB) (Sept. 29, 2017).

105 Winter v. Natural Resources Defense Council, 555 U.S. 7, 22 (2008).

After conceding that the case was sufficiently ripe and that NIFLA had standing to sue, the court addressed the merits of the case. In a detailed forty page opinion, Judge Dorothy W. Nelson methodically dealt with NIFLA's complaints. The act is content based, she admitted, and this ordinarily triggers strict scrutiny. But this test is unwarranted in this case for two reasons: first, because courts have recognized "a state's right to regulate physician's speech concerning abortion" [106] and to regulate the medical profession generally;[107] and second, because the act does not discriminate on the basis of viewpoint, in the sense that it targets a particular opinion, point of view or ideology.[108]

Nor, she held, did the licensing notice requirement require strict scrutiny because regulating speech between a professional and a client calls to mind "speech in the context of medical treatment, counseling or advertising," and professional speech merits only intermediate scrutiny.[109] Can California show that the act directly advances a substantial governmental interest and is drawn to meet that interest? Yes, because "California has a substantial interest in the health of its citizens,"[110] and the notice "is closely drawn [in] fully informing Californians of the existence of publicly-funded medical services."[111] Nor was there a problem with the unlicensed notice, for the act simply requires a one sentence statement informing women that the facility had not met state licensing standards; the state has a compelling interest, and the law is narrowly tailored.[112] Nor did the act unconstitutionally interfere with the free exercise of religion because it was neutral with general application.[113] Thus, NIFLA had not met the burden of demonstrating a likelihood to succeed on the merits. The district court's decision was upheld.[114]

Though Judge Nelson alluded to "the Legislature's findings regarding the existence of CPCs, which often present misleading information to women about reproductive medical services,"[115] she delicately danced around the state's central

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106 National Institute of Family and Life Advocates v. Harris, D.C. No. 3:15-cv-02277-JAH-DHB, 22. Kamala Harris had replaced Xavier Becerra as attorney general of California.

107 *Id.* at 23.

108 *Id.* at 19-20.

109 *Id* at.30.

110 *Id.* at 32.

111 *Id.* at 33.

112 *Id.* at 33-35.

113 *Id.* at 38.

114 In *Greater Baltimore Center for Pregnancy Concerns & St. Brigid's Roman Catholic Congregation v. Baltimore*, the Fourth Circuit decided a similar case differently. A Baltimore ordinance required CPCs to post signs in their waiting rooms that they did not offer or refer patients for abortions; the Greater Baltimore Center refused to do so, though it included this message in a pamphlet available in their waiting room. The court denied that the ordinance covered commercial or professional speech, viewing the ordinance as compelling the CPC to "portray abortion as one among a menu of morally equivalent choices. . . . [a] message . . . antithetical to the very moral, religious, and ideological reasons the Center exists." No. 16-2325, 15 (2018). As Baltimore over seven years could not identify a single woman who was misled and as the ordinance did not require abortion centers to post a pro-life message, it amounted to "[w]eaponizing the means of government against ideological foes" (p. 20), which violates the first amendment.

115 *Supra* note 106, at 35.

complaint: that CPCs employ "intentionally deceptive advertising and counseling practices [that] often confuse and intimidate women from making fully-informed, time-sensitive decisions about critical health care."[116] More aggressively, a congressional investigation had reached the same conclusion a decade earlier; twenty-three federally funded CPCs were contacted, and twenty of them provided false or misleading information on the health consequences of abortion.[117] The staff may wear lab coats like doctors but not be doctors; the clinics may be named so as to imply that they perform abortions, but their purpose is to discourage women from having abortions, sometimes by offering misinformation.[118]

Some deceptions, of course, are harmless or even beneficial, but the court found it hard to imagine that NIFLA's deception fell into these categories, for plainly some women who might otherwise have chosen abortion will claim to have been harmed by NIFLA's deception that turned them away from this option (just as some who ignored NIFLA's deception will say they were harmed by abortions). But even if*, arguendo*, NIFLA harmed no one, there is still the Kantian matter as to whether the deceptive means are justified by the end.

The Ninth Circuit did not persuade the Supreme Court. Justice Clarence Thomas, speaking for a five member majority, found the law defective. Content based regulations of speech must pass the strict scrutiny test, he observed, but forcing NIFLA to inform women about abortions "plainly 'alters the content' of petitioners speech."[119] Yet the lower circuit did not apply the test, tagging the notice as professional speech that is subject to regulation. But Thomas denied that the Court had previously recognized such a category, though "precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information."[120] Abortion, however, is "anything but an 'uncontroversial' topic."[121] He conceded that an earlier Court had upheld a law requiring a state to provide certain information to a woman as a condition of obtaining her consent to an abortion, but justified this as facilitating "informed consent to a medical procedure"; in the NIFLA case, however, "it is not tied to a [medical] procedure at all."[122] Regulation of so-called professional speech, moreover, would interfere with the operation of the marketplace of ideas.

Thomas also found the law to be "wildly underinclusive,"[123] in the sense that it applied only to a minority of community clinics, chiefly affecting the speech of pro-life clinics disagreeing with the state. This implied that the purpose of the law was less to inform women than to disfavor the pro-life point of view. In any event, there exist many means to inform women of their abortion rights without forcing these clinics to do so. California, he wrote, "imposes a government-scripted,

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116 Hearing on A.B. 75 before Senate Committee on Health, 2015-2016 session 6 (Cal. 2015), ECF No. 11-6, 6.

117 House of Representatives, Committee on Government Reform, False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers (July 2006).

118 Of course, evidence of an effort to deceive does not establish that deception took place.

119 138 S.Ct. 2361, 585 U.S. _ (2018).

120 *Id*.

121 *Id.*

122 *Id*.

123 *Id*.

speaker-based disclosure requirement that is wholly disconnected from the state's informational interest."[124] Thomas was dubious that pregnant women needed to be informed as to "when they are getting medical care from licensed professionals,"[125] for California had offered no empirical evidence in support of this proposition. At one point, Thomas implicitly compared the California statute to policies pursued by Nazi Germany, Mao's Cultural Revolution, and Ceausescu's Romania.[126]

In a brief concurrence, Justice Kennedy addressed the first amendment issue more directly. He saw the law as "a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression."[127] Where California had lauded the statute as "part of California's legacy of 'forward thinking,'" Kennedy retorted that it "is forward thinking to begin by reading the First Amendment as ratified in 1791."[128] As a lawyer defending the center put it, "the government loses its power to force pro-life pregnancy centers to provide free advertising for abortion."[129]

Justice Breyer, writing for the four dissenters, took a characteristically practical approach. "Virtually every disclosure law could be considered 'content based,'" he said, "for virtually every disclosure law requires individuals to speak a particular message. . . . [T]he majority's approach at the least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation."[130] The reference to the marketplace of ideas he also found far fetched. If a state may "insist that medical providers tell women about the possibility of adoption [it] should also allow states similarly to insist that medical providers tell women about the possibility of abortion."[131] And "carrying a child to term and giving birth," he wrote, is no less a medical procedure than abortion.[132] As to the complaint that California had not demonstrated that women need to be informed as to whether they are receiving care from licensed practitioners, he thought it was "self-evident."[133]

Clearly, it was California's transparent lack of neutrality that drove NIFLA's arguments. NIFLA observed that the statute was admittedly aimed at pro-life pregnancy centers, forcing them to supply information on obtaining abortions. It did not compel abortion clinics to post signs informing women about the pro-life alternative. Accordingly, NIFLA argued, the law came up against the maxim: "freedom of speech prohibits the government from telling people what to say."[134] The right to speak, from this perspective, implies a right not to speak that should be applied even handedly: if pro-choice clinics are not required to provide anti-

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124 *Id*.
125 *Id*.
126 *Id*.
127 *Id*.
128 *Id*.
129 Michael P. Farris of the Alliance Defending Freedom, qtd. in Adam Liptak, *Anti-Abortion Health Clinics Win First Amendment Ruling*, N.Y. Times, June 27, 2018.
130 *Supra* note 119.
131 *Id.*
132 *Id*.
133 *Id*.
134 Agency for International Development v. Alliance for Open Society International, 133 S.Ct. 2321, 2327 (2013). This point was most famously made by Justice Jackson in *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 633-34 (1943).

abortion information, pro-life clinics should not be required to provide abortion information. The state cannot avoid its responsibility to be neutral by pretending that the required statement is merely informational, for it is information that supports a particular policy position.

But the problem, according to California, was that NIFLA was not simply a pro-life clinic. It was a pro-life clinic masquerading as a clinic with no ideology. Requiring NIFLA to post the abortion information notice would not unmask them as liars, but it might make their deception harder to pull off. In this sense, the case resembles a decision upholding a congressional requirement that campaign donors disclose their names.[135] Admittedly, as Mill argued, there is value in confronting truth with falsehoods as a means of saving truth from degenerating into "dead dogma, not a living truth."[136] Yet Thomas' reference to the marketplace of ideas notwithstanding, the point of NIFLA's refusal to post the abortion clinic information was to *avoid* confrontation and impede the discovery of truth. In the course of doing so, it contravened the general principle that health providers inform patients of treatment options, so they can make informed decisions. Where the majority was speaker-centric, the minority was listener-centric.[137] The clinic objects to being forced to advance a practice it finds abhorrent; the women are denied important information from a fear that they will choose the wrong lawful option.

Must a state, in any event, be neutral as to abortion? California plainly was not neutral. It was clearly in the pro-life camp. At oral argument, Justice Alito asked, "Isn't it possible to infer intentional discrimination?"[138] California replied that the law also affected a "significant" body of pro-choice clinics, as well, but, perhaps fearful of provoking further controversy, claimed that the law was intended merely to inform pregnant women, not to prevent them from being deceived. The result, however, was to provoke Justice Gorsuch to demand to know why it was the task of the "limited number of clinics . . . to provide that information." He was clearly troubled that California was attempting "to force a private speaker to do that for you under the First Amendment."[139]

On the other hand, some states are plainly in the pro-life camp. For example, eighteen states require that abortion providers inform women that abortion increases the risk of breast cancer or mental illness or suicide or that pre-viable fetuses feel pain, though none of these claims are accurate.[140] And in the important *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), the Supreme Court upheld a pro-life statute that mandated physicians to provide "printed materials" to women "describing the fetus and providing information about medical assistance for childbirth," plus "information about child support from the father" and "a list of agencies which provide adoption and other services as alternatives to abortion.[141]

What this illustrates is that states take policy positions all the time, preferring one goal to another or one means to another. Indeed, that is what governing is. One

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135 Buckley v. Valeo, 421 U.S. 1 (1976).

136 *Supra* note 58, 97.

137 Martin H. Redish & Peter B. Siegel, *Constitutional Adjudication, Free Expression, and the Fashionable Art of Corporation Bashing*, 91 Tex. L. Rev. 1425, 1469 (2013).

138 Supreme Court Oral Argument, Nat'l Institute of Family & Life Assocs. v. Becerra (Heritage Reptg., Mar. 20, 2018) at 38.

139 *Id*. at 42.

140 *Id*. at 46.

141 505 U.S. 833.

is reminded of Holmes' famous dissent in *Lochner*, when he scolded the majority for claiming that that in labor-management questions, the state must be hands-off neutral. The Constitution, he said, did not "enact Mr. Herbert Spencer's Social Statics."[142] It did not, that is, require laissez faire policies but on the contrary was "made for people of fundamentally different views."[143] The majority, acting as if the law were a series of abstract propositions that could decide cases by deduction, misunderstood the very nature of law, which represents the political forces within societies and was always in flux, favoring first one side and then another.

But that California may take a pro-choice position in *NIFLA* still leaves open the question as to whether it can force private parties to do the same. California maintained that the act did not require clinics to endorse abortion or recommend it to their clients or say anything it does not believe. Yet the obvious purpose of the informational statement on abortion availability was to facilitate abortions. It was not merely a stray bit of information, like the capitol of Paraguay, that one might find in an almanac, but a borderline advertisement for the practice. However, if government can require that McDonald's post the calories in its Big Macs and Marlboros the dangers of smoking, it is odd that NIFLA escaped. The Court has held that legislative restrictions on commercial speech bear a "heavy burden" in advancing a state interest.[144] But the majority was not convinced. In this sense, the case reflects the Court's troubles in dealing with compelled speech. In one case where fundraisers were required to disclose the percentage of contributions that actually went to the charity, the Court saw this as content based and struck down the law.[145] In another case, however, the Court upheld a requirement that universities be compelled to circulate information on military recruiters, even where the universities did not want the military on their campuses.[146]

Can the government, then, "promote any message it deems desirable"?[147] The obvious answer is: no. The government, for example, cannot reinstate "white" and "colored" rest room signs, as this would violate the equal protection clause. But short of such constitutional issues, the government is, indeed, free to promote any message, with the understanding that a free political process involving public opinion, parties, the media, interest groups, and so on, will operate to challenge it. When writers raise the hypothetical that "there is no binding practical restraint that prevents the Postal Service"[148] from printing Adolf Hitler's face on postage stamps, they ignore the potent popular opposition that render such a decision unthinkable. Indeed, government speech may contribute to the democratic process by provoking such controversies.[149] As Justice Alito put it in a different case, "the

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142 Lochner v. New York, 198 U.S. 45, 75 (1905).

143 *Id.*at 76.

144 Sorrell v. IMS Health, 564 U.S. 552 (2011); 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996).

145 Riley v. Nat'l Fed. of the Blind, 487 U.S. 781 (1988).

146 Rumsfeld v. FAIR, 547 U.S. 47 (2006).

147 Ilya Shapiro, Trevor Burrus, & Meggan Dewitt, *Not Everything Professionals Say Is "Professional Speech,"* Cato at Liberty, Dec. 26, 2017, 01.58 PM, https://www.cato.org/blog/not-everything-professionals-say-professional-speech.

148 Daniel J. Hemel & Lisa Larrimore Ouellette, *Public Perceptions of Government Speech* 2018 Sup. Ct. Rev. 33, 54. (2018).

149 Keller v. State Bar of California, 496 U.S. 1, 10-11 (1990).

government is not required to maintain viewpoint neutrality in its own speech."[150] Should government anti-littering signs require government pro-littering signs?[151] On the other hand, nothing in the statute forbade the centers from adding signs that sought to refute the message in the required signs. For example, next to the abortion notification might be placed a photograph of an aborted fetus.

On the other hand, if the public does not understand that the message comes from the government – perhaps, it utilizes private doctors to carry its message[152] -- it may not be able to hold officials accountable, and the fact that some government directives raise no problems, does not mean that *no* such directives raise problems.[153] There is a consensus that smoking is dangerous and Hitler was evil, but as Thomas noted, there is hardly a consensus on the morality of abortion.[154] A consensus, moreover may change as new facts become known – it was long falsely believed that stomach ulcers were caused by stress – and a past consensus – like the white population's belief in the inferiority of non-whites – may crumble as social values evolve. Truth and morality cannot finally be determined by majority rule.

Requiring a statement on licensing, however, appears easy to justify. If the act required an unlicensed person performing ultrasounds to say that he or she was unlicensed, why object? Isn't the purpose similar to deterring firms from committing fraud with deceptive or misleading advertising? Does the reasonableness of protecting the consumer/client disappear merely because no financial profit is sought? A barber must display his license. Is it too much to ask a clinic to inform its clients as to its license? When NIFLA prevailed and CPC licensing requirements were disregarded, Breyer wondered whether any licensing law could be enforced.[155]

VII. Ronald H. Coase, "Advertising and Free Speech"

Years earlier, Ronald Coase, later a Nobel laureate in economics, argued for extending first amendment protection to advertising. If consumers can choose freely in the marketplace of political and social ideas, he asked, why not in the marketplace of ideas about goods and services? If government "is regarded as

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150 Matal v. Tam, 137 S. Ct. 1744, 1747 (2017).

151 Because NIFLA so obviously concerns government speech, it is unnecessary here to inquire as to the nature and limits of non-governmental speech. *See, e.g*., Pleasant Grove v. Summum, 55 U.S. 460 (2009) (privately donated religious monument in a public park); Walker v. Texas Division, Sons of Confederate Veterans, 135 S. Ct. 2239 (2015) (privately designed automobile license plate). These cases also highlight the difficulty the public may have in distinguishing public from private speech.

152 Rust v. Sullivan, 500 U.S. 173 (1991).

153 For instance, North Carolina offered pro-life but not pro-choice license plates, and a court held that license plates "amount to government speech and that North Carolina is free to reject license plate designs that convey messages with which it disagrees." 815 F.3d 183 (4th Cir. 2016).

154 Jonathan Kelley, M.D.R. Evans & Bruce Headey, *Moral Reasoning and the Politics of Conflict: The Abortion Controversy*, 44 Br. J. Socio. 589 (1993); Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 Cal. L. Rev. 539 (1989).

155 138 S.Ct. 2361, 2380 (2018) (Breyer, J., dissenting).

incompetent and untrustworthy in the one market," why consider it "efficient and reliable in the other?"[156] It will not do to claim that political and social ideas are more important and deserve more protection because "the great mass of people"[157] would disagree; the poet may inveigh against "getting and spending,"[158] but most of us give them a higher priority than public policy issues, and if we truly believe in the democratic sovereignty of the people, we can hardly ignore their preference for the mundane simply because we find it inconvenient or banal.

But even if we agreed that political and social ideas were in some cosmic sense more important, it would be irrelevant, for a first amendment that protects nude dancing[159] and videos of dog fights[160] is obviously not confined to major things. Some might argue, in fact, that the greater importance of political and social ideas itself justifies heavier regulation; if we falsely are persuaded that a shampoo will make our hair prettier, we can soon test the claim and at worst may have to put up with a few bad hair days. But if we are falsely persuaded that certain groups are inherently evil and in some important sense not fully human, the result might be the Holocaust.

Advertising, in any event, Coase believes is "clearly part of the market for ideas," as it "may provide information or may change people's tastes."[161] Even if the advertising itself contains no information, if it induces people to consume a product, the act of consumption conveys information. Intellectuals are in the ideas business, and so they naturally value the marketplace of political and social ideas more than goods; they write books and articles, and naturally value their work product higher than the work product of advertisers and have tried to convert the larger society to this point of view. But is an academic essay, say, on Felix Frankfurter,[162] more socially impactful than an advertisement for beer? The answer is not obvious, and the self importance of intellectuals does not close the case. Indeed, a closer look reveals that publishers, writers, and public speakers are themselves also commercial actors, profiting from their words; only the hermit or the saint does not seek some gain from what he says. Which raises the question of how to distinguish advertising from other speech. The conventional definition of commercial speech is "speech that proposes a commercial transaction,"[163] but taken seriously, this capacious definition is hungry for expansion. If a lawyer gives a speech with the thought that it may raise his profile and gain him clients, is this advertising? If an academic presents a paper at a conference in the hope that it might help him get a better position elsewhere, is this advertising? If a salesman befriends a guest at a cocktail party, imagining him a future customer, is this advertising? Moreover, nearly every product conceivably is related to the marketplace of ideas. Advertising for potato chips raises the question as to what we should eat; advertising for video games alerts us as to how we should spend our time.

To regulate or not to regulate? Regulations, whether of ideas or goods, Coase

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156 Ronald H. Coase, *Advertising and Free Speech*, 6 J. Leg. St. 1, 2 (1977).
157 *Id.* at 4.
158 William Wordsworth, *The World Is Too Much With Us*.
159 Barnes v. Glen Theatre, 501 U.S. 560 (1991).
160 United States v. Stevens, 559 U.S. 460 (2010).
161 *Supra* note 156, at 8, 9.
162 Thomas Halper, *Felix Frankfurter and the Law*, 7 Br. J. Am. Leg. Studies 115 (2018).
163 Bd. of Trustees, SUNY v. Fox, 492 U.S. 469, 482 (1989).

reminds us, are designed to benefit those who advance them, typically by narrowing competition. Thus, whether particular regulations are justified can be determined only by examining individual cases. In general, though, for Coase the marketplace, not government, would be relied upon to counter lies and reduce their influence. Yet if courts have become more sensitive to the claims of commercial speech, they show no signs of granting it the level of protection Coase envisions. [164]

VIII. Conclusions

In the last analysis, we must choose from imperfect, maybe unsatisfactory alternatives. We cannot rely always on markets because we are flawed. We are insufficiently rational and respond emotionally to claims, perhaps because of childhood experiences, rendering us vulnerable to manipulation. Or we are excessively rational and refuse to make the investment necessary to inform ourselves because we recognize that it is simply not worth it. Moreover, faith in the market is not evidence. "Certitude," as Holmes said, "is not the test of certainty."[165] On the other hand, it would be naïve to trust the state to identify truth for us, for institutionally and individually in terms of persons acting on its behalf, it has its own interests to protect and advance, and cannot pretend to objectivity or neutrality. Holmes thought the Framers of the first amendment chose the market, and believed that courts should follow this grand experiment. Perhaps it, like Churchill's democracy, can only earn the back handed defense that it is the worst system, except for every other that has been tried from time to time.[166]

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[164] Coase, *supra* note 1.

[165] Oliver W. Holmes, *Natural Law,* 32 Harv. L. Rev. 40, 41 (1918).

[166] Cf., House of Commons speech, Nov. 11, 1947; 444 Parl, Deb. HC (5th ser.)(1947), col. 203 (UKL).

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Adventures in Higher Education, Happiness, And Mindfulness

Peter H. Huang*

ABSTRACT

This Article recounts my unique adventures in higher education, including being a Princeton University freshman mathematics major at age 14, Harvard University applied mathematics graduate student at age 17, economics and finance faculty at multiple schools, first-year law student at the University of Chicago, second- and third-year law student at Stanford University, and law faculty at multiple schools. This Article also candidly discusses my experiences as student and professor and openly shares how I achieved sustainable happiness by practicing mindfulness to reduce fears, rumination, and worry in facing adversity, disappointment, and setbacks. This Article analyzes why law schools should teach law students about happiness and mindfulness. This Article discusses how to teach law students about happiness and mindfulness. Finally, this Article provides brief concluding thoughts about how law students can sustain happiness and mindfulness once they graduate from law school.

KEYWORDS

Happiness, Mindfulness, Wellness, Higher Education, Legal Education

CONTENTS

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* Professor and DeMuth Chair of Business Law, University of Colorado Law School. Visiting Scholar, Loyola Los Angeles Law School. J.D., Stanford Law School; Ph.D., Harvard University; A.B., Princeton University. I dedicate this Article to my beloved Aunt Margaret Soong Meow Lee, a bilingual educator who exemplified happiness through mindfulness, and who passed away way too soon. Thanks for helpful conversations, discussions, insights, and suggestions to Jim Anaya, Debra S. Austin, Anne M. Brafford, Jim Chen, Rebecca Huss, Martha Knudson, Kate Mayer Mangan, and Len Riskin, students I have taught, the audience of a session at the 2017 University of Colorado law school faculty scholarship retreat *Making a Difference: Impactful Legal Scholarship*, participants from the University of Colorado law school summer 2017 conference *Positive Lawyering, Mindfulness, and Humane Games*, the audience of the panel *Ethical Curricula* at the 24th International Learner conference, the audience of a Southwestern law school visiting speaker series presentation, especially those at a fun lunch afterwards, and those from the 2020 class of the University of Colorado law school who shared feedback and thoughts about my presentation about mindfulness at their orientation.

Introduction

My life-long curiosity, interest, and passion about education, higher education, learning, and teaching started at a young age when my tiger mom[1] purchased for me a set of Ivy League book covers when I was six years old in the first grade at Public School (P.S.) 183 and explained that there are eight schools in the Ivy League: Harvard, Yale, Princeton, and five other places.[2] Five years later, when I was in sixth grade at P.S. 183, my mom called to ask about the admissions process to Brearley,[3] an independent school on the upper east side of Manhattan. When a Brearley admissions office employee told my mom that her son could not go to Brearley, my mom asked why not and was it because her son is an American born Chinese? The Brearley admissions office employee replied that it was because Brearley was and still is an all girl's K-12 school.

Two years later, while attending Horace Mann,[4] an independent country day college preparatory school in Riverdale, a neighborhood of the Bronx, New York, I developed a crush on my eighth-grade algebra teacher, a recent graduate of Columbia University Teacher's College. I would write her love poems in German (because I was taking German) and signed my quizzes "Mit Liebe," ("With Love"). For Valentine's day, I gave her an equation in polar coordinates that depicts a rotated cardiod, namely $r(q) = 1 - \sin(q)$.[5]

Because my mom was worried that her number one son would be distracted from studying by my harmless crush, my mom took me to see the chair of the New York University (NYU) mathematics department at the Courant Institute of Mathematical Sciences. We convinced him to let me audit pre-calculus and calculus I in between my eighth and ninth grades, during the six-week first session of NYU summer school. I sat front and center in the first row every day, did all the assigned and extra credit homework, and took the in-class final examinations in both courses. Both professors wrote letters to whom it may concern stating that I would have earned a course grade of A had I been enrolled in the courses. I was allowed that July and August to enroll for credit at NYU in calculus II during the six-week second session of summer school and earned a course grade of A. I returned to start ninth grade at Horace Mann without any further mathematics to take (mission accomplished mom). I believed the Chinese concept qi (chi) of a life force was similar to gravity, electricity, and magnetism in the sense there are (differential) equations that describe how and why acupuncture works. I found it fun and helpful to apply calculus in understanding practically every aspect of life,[6]

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1 Peter H. Huang, *Tiger Cub Strikes Back: Memoirs of an Ex-Child Prodigy About Legal Education and Parenting*, 1 Brit. J. Am. Legal Stud. 297, 297, 300 (2012).

2 Peter H. Huang, *Meta-Mindfulness: A New Hope*, 19 Richmond J.L. & Pub. Int. 303, 308 (2016).

3 Brearley Website, https://www.brearley.org/page.

4 Horace Mann School, http://www.horacemann.org/.

5 *See, e.g.*, Wolfram MathWorld, *Heart Curve*, http://mathworld.wolfram.com/HeartCurve.html.

6 Oscar E. Fernandez, Everyday Calculus: Discovering the Hidden Math All Around Us (2017).

including biology, economics, and social interaction.[7] I delighted in learning how to apply calculus to solve problems in physics. For some reason, I took eleventh grade physics (non-AP, which meant no calculus in the course) instead of ninth grade biology and skipped tenth grade chemistry.

I applied at the age of 13 during the fall of ninth grade to attend these colleges the following academic year: Harvard, Yale, Princeton, Columbia, and NYU.[8] I did not graduate from Horace Mann because New York state law requires taking health and sex education to graduate and one had to be at least age 16 to take health and sex. I thus left Horace Mann without a high school diploma. Because I never took a General Educational Development (GED) test,[9] I am a high school dropout without any high school equivalency credential. This means that, unlike the character *Maverick* Tom Cruise played in *Top Gun*,[10] I cannot attend truck driving school, which requires a high school diploma or its equivalent.

I have always been fascinated by how and why some people learn the same material or skill better, easier, and quicker than others. People's heterogeneity in learning costs, effectiveness, efficiency, and speed presumably result in part from differences in ability, attention, discipline, effort, environment, genetics, identity, mindset, motivation, resilience, and time. Education professor Jin Li analyzes fundamental differences in the cultural orientations that exist between European-American and East Asian attitudes towards learning, despite both cultures having similar educational content in their K-12 systems and valuing the goal of learning.[11] In a European-American model of learning stemming from a Western intellectual tradition of Socrates, the goal of education is to cultivate the mind to expand the depth of knowledge about our world. European-American learning focuses on developing these four essential pursuits: active engagement, critical thinking, exploration, and self-expression. In an East Asian model of learning arising from an Eastern intellectual tradition of Confucius, education focuses on developing ethical character and personal excellence. East Asian learning centers on five key virtues aimed at perfecting the moral self: concentration, diligence, endurance, perseverance, and sincerity.

These different models of learning inform the mindsets of students and teachers. These different views about learning also influence and permeate different associated cultural notions of education and parenting. There are cost and benefits to any (education and) parenting style, including tiger parenting.[12] I have written elsewhere at some length about how American legal education and tiger parenting share much in common.[13] A law professor recently wrote about how helicopter

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7 Oscar E. Fernandez, The Calculus of Happiness: How a Mathematical Approach to Life Adds up to Health, Wealth, and Love (2017).

8 In case the reader is curious, I was accepted by Princeton, Columbia, and NYU, rejected by Yale, and asked by Harvard to withdraw my application and reapply in three years. I would have been able to finish college in two years at NYU with 100% faculty dependent tuition remission. I would have been able to live at home attending Columbia. Princeton was the choice because it was the highest ranked of the accepted set and known for its world class mathematics department.

9 GED Testing Service, https://www.gedtestingservice.com/educators/home.

10 Top Gun (Paramount Pictures 1986).

11 Jin Li, Cultural Foundations of Learning: East and West (2012).

12 Huang, *supra* note 1, at 309.

13 Huang, *supra* note 1, at 297, 300-01.

(law) professors may, like helicopter parents, end up harming pedagogically and professionally their (law) students.[14]

Evaluating different ways of teaching (and parenting) presupposes a normative criterion or criteria by which to measure flourishing, progress, or success.[15] Happiness or subjective well-being provides one such natural metric.[16] Martin Seligman, a founder of the field of positive psychology,[17] suggested these five components of happiness and well-being summarized by the mnemonic acronym PERMA: Positive emotion, Engagement, Relationships, Meaning, and Accomplishment. [18] How do law students and lawyers fare in terms of PERMA? The good news is that a majority of law students and lawyers do not have a mental health or substance use disorder.[19] The bad news is that this does not mean the majority of law students and lawyers are flourishing. Many law students and lawyers report experiencing anxiety,[20] depression,[21] and chronic stress.[22] Unfortunately, many law students also report engaging in high levels of substance abuse to cope with anxiety and depression,[23] while few sought help for mental health issues or alcohol and drug

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14 Emily Grant, *Helicopter Professors*, Jan. 23, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2904752. *See also* Paul Caron, *Helicopter Professors Are Hurting Their Students,* Tax Prof Blog, Jan. 30, 2017, http://taxprof.typepad.com/taxprof_blog/2017/01/helicopter-law-professors-are-hurting-their-students.html; Steven Cohn, *The Rise of the Helicopter Teacher*, The Conversation, The Chronicle of Higher Education, Aug.5, 2014, http://www.chronicle.com/blogs/conversation/2014/08/05/the-rise-of-the-helicopter-teacher/; Berlin Fang, *How to Avoid Being a Helicopter Professor,* Faculty Focus, June 8, 2015, https://www.facultyfocus.com/articles/teaching-careers/how-to-avoid-being-a-helicopter-professor/. *But see* Barry Thomas, *Helicopter Professor and Proud!*, The Evollution, Aug. 2, 2016, https://evollution.com/programming/teaching-and-learning/helicopter-professor-and-proud/.

15 Huang, *supra* note 1, at 303.

16 *Id*. at 303-04.

17 *See generally* Martin E.P. Seligman, Authentic Happiness: Using the New Positive Psychology to Realize Your Potential for Lasting Fulfillment (2004).

18 *See generally* Martin E.P. Seligman, Flourish: A Visionary New Understanding of Happiness and Well-being (2012).

19 National Task Force on Lawyer Well-Being, The Path to Lawyer Well-Being: Practical Recommendations for Positive Change, Aug. 14, 2017, https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportFINAL.pdf.

20 Jeena Cho, *Talking About the Elephant in the Room – Social Anxiety*, ABA J., Aug. 9, 2017, 8:30 am, CDT, http://www.abajournal.com/news/article/talking_about_the_elephant_in_the_room_social_anxiety; Jeena Cho & Karen Gilford, The Anxious Lawyer: An 8-Week Guide to a Joyful and Satisfying Law Practice Through Mindfulness and Meditation (2016); Annie Little, *Anxiety, Law + Me (It's Not Just You)*, JD Nation, http://www.thejdnation.com/anxiety-law-me-its-not-just-you/.

21 Joe Patrice, *If You're In Law School, You're Probably Depressed*, Jan. 15, 2015 at 2:57 PM, Above the Law, http://abovethelaw.com/2015/01/if-youre-in-law-school-youre-probably-depressed/.

22 Barbara Glesner Fines, *Law School and Stress*, LawLifeline, http://www.lawlifeline.org/articles/458-law-school-and-stress.

23 Jerome M. Organ, David B. Jaffee, & Katherine M. Bender, *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. Legal Educ. Autumn 2016, at 116, 127-38.

abuse, with many expressing concern over seeking help being a potential threat to bar admission or employment.[24] Unhappy, unhealthy law students graduate to become zombie lawyers.[25] Many lawyers report a "profound ambivalence" over the work they do to make a living.[26]

Patrick Krill, an attorney, board certified alcohol and drug counselor, expert on lawyers' addiction and mental health issues, and lead author of the first and only national study of lawyer mental health problems and substance abuse,[27] recently wrote in the preface to an autobiography about an addicted lawyer:[28]

> In addition to the eye-popping rates of problem drinking and depression, the research demonstrated that the problems are widespread and systemic, affecting all practice settings, all age groups, all experience levels, and all work environments, from the most rural to the most urban . . . very high rates of alcohol use disorders, depression, anxiety, and stress are plaguing attorneys across the country, in all stages of their careers, and in every practice setting. Younger lawyers newer to the profession are the ones experiencing the highest rates of problem drinking and other mental health concerns.[29]

I and many people I know struggled with anxiety, depression, and chronic stress in law school and law practice. It is natural that all of us will feel down, lost, and overwhelmed at various points in our personal and professional lives. Law students and lawyers often are overly critical of others and themselves. Practicing mindfulness provides a helpful sense of perspective, compassion, and self-compassion. I still vividly remember feeling anxious, depressed, and chronically stressed at various times as a child, adolescent, 1L, and law professor.

A large and still growing body of neuroscience and psychology research empirically shows that practicing mindfulness can help manage anxiety, depression, and chronic stress.[30] Law professor Katrina Lee proposed that law schools link mindfulness with legal technology courses to reduce law student stress, increase creativity, and decrease bias.[31] My maternal grandmother introduced me as a child to practicing mindfulness,[32] through her example of a

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24 *Id*. at 140-42.

25 Peter H. Huang & Corie Rosen Felder, *The Zombie Lawyer Apocalypse*, 42 Pepp. L. Rev. 727 (2015).

26 David L. Chambers, *Overstating the Satisfaction of Lawyers*, 39 Law & Soc. Inquiry 1 (2014).

27 Patrick Krill, Ryan Johnson, & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. Addiction Med. 46 (2016).

28 Brian Cuban, The Addicted Lawyer: Tales of the Bar, Booze, Blow, and Redemption (2017).

29 *Id*. at viii-ix.

30 *See, e.g*., *Mindfulness Goes Mainstream* (PBS broadcast Aug. 2017), http://pressroom.pbs.org/Programs/m/Mindfulness-Goes-Mainstream.

31 Katrina Lee, *A Call for Law Schools to Link the Curricular Trends of Legal Tech and Mindfulness*, 48 Toledo L. Rev. 55 (2016).

32 Huang, *supra* note 2, at 315.

daily meditative practice with a set of mala beads.[33] Developing and sustaining a mindfulness practice has helped me cope with and manage anxiety, depression, and chronic stress. It is not even a slight exaggeration to say that mindfulness has saved my life and helped me to achieve and sustain calmness, confidence, happiness, meaning, and peace.

Some law professors and law students believe the anxiety, stress, suffering, and unhappiness that many law students experience in law school forges them into tougher individuals and will make them become more effective future advocates. Some law professors and law students believe the negative aspects of law school experience are similar to fraternity or military hazing in being able to build character and resilience. Unfortunately, the belief "that depression among lawyers is inevitable or even desirable is not only incorrect, it also encourages the legal academy to do nothing to mitigate the psychological trouble that many law students experience."[34]

Other law professors and law students are enamored with the myths of lawyer, law student, and law school essentialism and exceptionalism. A cynical or University of Chicago economically-minded person may argue that for lawyers and law students to stay in law practice and law school with that much anxiety, depression, and chronic stress, there has to be compensating benefits, such as higher than competitive (at least expected) salaries, perks, and returns. There are several responses, including there is a mass exodus from law practice, especially of women and minorities,[35] people are heterogeneous in their threshold for pain and suffering, and the power of inertia.

Additionally, some law students and lawyers become addicted to the drama, stress, and pain of law school and law practice in the same way that some people become addicted to the drama, stress, and pain of a dysfunctional personal relationship.[36] Even an existing familiar unpleasant status quo can be comforting and preferable in comparison with an unknown future that possibly entails much worse outcomes. Many people remain in dysfunctional personal and professional situations due to fear and aversion to risk or aversion to ambiguity.

The rest of this Article is organized as follows. Part I recounts my unique adventures in higher education as student and professor because "[w]e do not see things as they are, we see them as we are."[37] Part II analyzes why law schools should teach law students about happiness and mindfulness. This Article advocates that law professors teach law students about happiness to equip them with mindsets, skills, and techniques to craft, develop, and sustain fulfilling, meaningful, and satisfying careers and professional identities. This Article advocates that law professors teach law students about mindfulness to improve their professional and personal

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33 Nathalie Martin, *Mindful Lawyering*, *in* The Best Lawyer You Can Be: A Guide to Physical, Mental, Emotional, and Spiritual Wellness 27 (Stewart Levine ed., 2018).

34 Corie Rosen Felder, *The Accidental Optimist*, 21 Va. J. Soc. Pol'y & L. 63, 68 (2014).

35 *See, e.g.*, Kate Mayer Mangan, *How the New Science of Self-Compassion Could Patch the Leaky Pipeline*, 101 Women Lawyer's J., No. 2, 2016, at 12.

36 *See, e.g.*, Louis Tomlinson and Bebe Rexha with Digital Farm Animals performing the song *Back to You* on *The Tonight Show Starring Jimmy Fallon*, NBC television broadcast, Aug. 4, 2017, https://www.youtube.com/watch?v=yIe5KBLnjMY.

37 Anais Nin, Seduction of the Minotaur 124 (1961, 6th printing 1972).

decision-making, ethics, and leadership.[38] Part III examines how to teach law students happiness and mindfulness. Finally, this Article offers brief conclusions about how law students can sustain happiness and mindfulness once they graduate from law school.

I. My Unique Adventures in Higher Education

I discuss a few of my unique adventures in higher education in the spirit of sharing idiosyncratic, personal, and specific memories to provide background, context, and as a precursor for a more abstract, general, and universal discussion of legal education. Our path dependent history shapes us in our present and our multiple possible futures. As best-selling authors Stanford business school professor Chip Heath and his brother, Duke center for the advancement of social entrepreneurship senior fellow, Dan Heath explain in their book,[39] all of us have certain memorable positive moments in our lives that change us thorough connection, elevation, insight, and pride.

I have been fortunate to be a student (in chronological order) at these schools: New York University, Princeton University, Harvard University, the University of Chicago, and Stanford University; teach economics or finance (in chronological order) at Cañada Community College, the University of Iowa, Southern Methodist University, Tulane University, the University of California, Berkeley, the University of California Los Angeles, the University of Southern California, and Stanford University; and teach law (in chronological order) at the University of Pennsylvania, the University of Southern California, the University of Chicago, the University of Virginia, the University of Minnesota, Temple University, Yale University, and the University of Colorado, Boulder.

A. Princeton University Freshman at the Age of 14

I was a freshman at Princeton University at the age of 14. My first mathematics class at Princeton was a section of honors calculus that mathematics majors usually take in the spring of their sophomore year. The course provided a theoretical introduction to multivariable analysis.[40] A prerequisite for this course was a rigorous linear algebra course that focused on writing proofs and bridged the gap between single variable calculus and more advanced mathematics courses.[41] One day, my honors calculus professor announced our class would not get back a homework assignment

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38 Peter H. Huang, *Can Practicing Mindfulness Improve Lawyer Decision-Making, Ethics, and Leadership?* 55 Houston L. Rev. 63-154 (2017); Peter H. Huang, *Boost: Improving Mindfulness, Thinking, and Diversity*, 10 Wm. & Mary Bus. L. Rev. (forthcoming 2018).

39 Chip Heath & Dean Heath, The Power of Moments: Why Certain Experiences Have Extraordinary Impact (2017).

40 The course covered metric and topological spaces, continuous and differential mappings between n-dimensional real vector spaces, the inverse mapping theorem, the implicit function theorem, measure and content zero, Fubini's theorem, partitions of unity, change of variable, exterior derivatives, differential forms, pullbacks, tangent spaces, tensor calculus, and the generalized modern Stokes' theorem on manifolds-with-boundaries.

41 A prerequisite course would cover linear transformations, matrices, determinants, eigenvalues, vector spaces, inner product spaces, dual spaces, and quadratic forms.

because the course's grader had committed suicide! It was rumored that every four years, a Princeton mathematics graduate student or undergraduate mathematics major jumped off the mathematics building, Fine Hall, to commit suicide due to depression, anxiety, and chronic stress from the pressure to excel academically and/or live up to their or others' perfectionist expectations.

At the risk of sounding trite, happy people do not commit suicide; unhappy people do. Recently, researchers developed a mindfulness-to-meaning theory proposing that practicing mindfulness, through the promotion of positive reappraisal, fosters eudaimonic well-being, flourishing, a greater sense of purpose, and meaningful engagement with life.[42] Additional recent social genomics research found that people with eudaimonic well-being in terms of being meaningfully engaged with life, having a sense of purpose, and who were flourishing, were more likely to exhibit decreased inflammation and increased antiviral response, which is the opposite gene profile of those who suffer from social isolation.[43] It is crucial to emphasize this research finds a correlation, and not a causal link, between thriving and favorable gene expression.[44] Also, older adults who practice mindfulness are less lonely and have less pro-inflammatory gene expression.[45] Additionally, practicing mindfulness provides individuals with an awareness and the perspective that nothing is permanent, including pain, suffering, and negative emotions. Mindfulness mitigates ruminations and can transform vicious cycles of thought, feelings, and bodily sensations into virtuous cycles of thought, feelings, and bodily sensations.[46] The practice of mindfulness reduces stress and increases resilience to stressors.[47]

I had not thought about suicide before learning of that suicide. I came to think about suicide at various times during the next three years, as do many teenagers. According to the United States Center for Disease Control and Prevention, teen suicide is the number two cause of death for youths ages 15 to 24, and is only

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42 Eric L. Garland et al., *Mindfulness Broadens Awareness and Builds Eudaimonic Meaning: A Process Model of Mindful Positive Emotion Regulation*, 26 Psychol. Inquiry 293 (2015).

43 Barbara Fredrickson et al., *A Functional Genomic Perspective on Human Well-Being*, 110 Proc. Nat'l Acad. Sci. 13684 (2013) (presenting this research); Barbara Fredrickson et al., *Psychological Well-Being and the Human Conserved Transcriptional Response to Adversity*, 10 PLoS One e0121839 (2015) (confirming and following up on this research); Barbara Fredrickson et al., *Correction: Psychological Well-Being and the Human Conserved Transcriptional Response to Adversity*, 11 PLoS One e0157116 (2016) (presenting a corrected version of the follow-up research). *See also* Will Storr, *A Better Kind of Happiness*, The New Yorker, July 7, 2016 (reporting on this research). *See also* Will Storr, *A Better Kind of Happiness*, The New Yorker, July 7, 2016.

44 Dan Pouliot, *Mind Over Genetics, and Inaccuracy in Journalism*, Sept. 28, 2013, available at http://danpouliot.com/blog/2013/09/mind-over-genetics-and-innaccuracy-in-journalism/.

45 J. David Creswell et al., *Mindfulness-Based Stress Reduction Training Reduces Loneliness and Pro-Inflammatory Gene Expression in Older Adults: A Small Randomized Controlled Trial*, 26 Brain, Behav. & Immunity 1095, 1099 (2012).

46 Garland et al., *supra* note 42, at 293, 299, fig. 1.

47 Nick Petrie, *Wake Up! The Surprising Truth about What Drives Stress and How Leaders Build Resilience*, 15, Center for Creative Leadership White Paper (2013), http://www.nicholaspetrie.com/wp-content/uploads/2013/08/Wake-Up-The-Surprising-Truth-About-What-Drives-Stress-and-How-Leaders-Build-Resilience.pdf.

surpassed by accidents.[48] Sadly, Gunn High School and Palo Alto High School, two high schools located near Stanford University, had a ten-year suicide rate in in December 2015 between four and five times the national average.[49] Although suicide, teen suicide, and suicide clusters (defined to be multiple suicides that happen in close proximity and succession) know of no geographical or social boundaries, constant pressures to be all that you can be academically often exacerbate teen suicides. Palo Alto High School, affectionately known as "Paly," is just across the street known as El Camino Real (The King's Road) from Stanford, while Gunn is only two miles from Stanford and was in 2014 one of America's top five STEM high schools according to *U.S. News & World Report*.

There are many causes of suicide "--biological, environmental, psychological and situational"[50] with correspondingly many contributing factors, some of which are controllable and preventable. Dr. Adam Strassberg, a psychiatrist and parent whose teenagers attended school in the Palo Alto Unified School District, eloquently wrote:

> Why does it need to take a suicide, or worse yet this cluster of suicides, to justify and invigorate public conversation over improving the mental health, happiness and quality of life for our teens?! More sleep, more free unscheduled time to play and to grow, less homework, more balance, better stress tolerance -- these are inherent goods and worthy continual goals for our school district and community. These goals should be active and ongoing and not be predicated upon any "crisis" in student mental health, "perceived" or "actual."[51]

An analogous paragraph to the above paragraph applies to law students and lawyers in the sense that improving the happiness, mental health, and quality of life for law students and lawyers can and should be priorities for them, their clients, and our society-at-large. Happy and healthy law students learn how to be happy and healthy lawyers who can more effectively serve their clients. Learning to live with a growth mindset, more balance, better and more sleep, more resilience, and stress management are perspectives and skills that law professors can teach and law students can learn. Happy and healthy lawyers can realize their potential to accomplish much social good. Unhappy and unhealthy lawyers can realize their potential to cause much social harm.

Suicidologists (those who study suicide behavior and prevention[52]) disagree over whether suicide is an irrational or a rational choice. Suicide hotlines are based

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48 American Psychological Association, *Teen Suicide is Preventable*, Research in Action, Psychological Science, http://www.apa.org/research/action/suicide.aspx.

49 Hanna Rosin, *The Silicon Valley Suicides: Why Are So Many Kids with Bright Prospects Killing Themselves in Palo Alto?* The Atlantic, Dec. 2015, https://www.theatlantic.com/magazine/archive/2015/12/the-silicon-valley-suicides/413140/.

50 Adam Strassberg, *Guest Opinion: Keep Calm and Carry On*, Palo Alto Online, Mar. 16, 2015, 2:51 p.m., https://paloaltoonline.com/news/2015/03/16/guest-opinion-keep-calm-and-parent-on#sthash.UpnboeKF.dpuf.

51 *Id*.

52 American Association of Suicidology Website, http://www.suicidology.org/.

on the underlying idea that attempting suicide is due to experiencing relatively short periods of mental illness and intense psychological pain leading to temporary and treatable irrational thoughts and lapses in reason. The title of American hip-hop artist Logic's popular music hit song with vocals from Canadian and American singer-songwriters Alessia Cara and Khalid, 1-800-273-8255,[53] is the phone number of the confidential, free, 24/7 National Suicide Prevention Lifeline: 1-800-273-TALK.[54] On April 28, 2017, the song's release date, the National Suicide Prevention Lifeline experienced its second-highest call volume, with calls up approximately 33% from a year ago.[55]

A large body of research links perfectionism to suicide ideation and attempts.[56] A recent meta-analysis of forty-five studies involving eleven thousand seven hundred and forty-seven individuals consisting of undergraduates, medical students, community adults, and psychiatric patients finds:

> perfectionistic concerns (socially prescribed perfectionism, concern over mistakes, doubts about actions, discrepancy, perfectionistic attitudes), perfectionistic strivings (self-oriented perfectionism, personal standards), parental criticism, and parental expectations displayed small-to-moderate positive associations with suicide ideation. Socially prescribed perfectionism also predicted longitudinal increases in suicide ideation. And perfectionistic concerns, parental criticism, and parental expectations displayed small, positive associations with suicide attempts.[57]

The study's authors conclude their findings "lend credence to theoretical accounts suggesting self-generated and socially based pressures to be perfect are part of the premorbid personality of people prone to suicide ideation and attempts. Perfectionistic strivings' association with suicide ideation also draws into question the notion that such strivings are healthy, adaptive, or advisable."[58]

A basic economic model of suicide assumes that a rational individual chooses to commit suicide when the net present discounted value of that person's remaining expected lifetime happiness becomes negative or less than some benchmark level.[59] A financial economic model of suicide adds the real option value of staying alive.[60] A revised economic model of suicide assumes there is a nontrivial probability of surviving a suicide attempt and that an unsuccessful suicide attempt may affect a

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53 Logic, *1-800-273-8255*, *on* Everybody (Visionary 2017).

54 National Suicide Prevention Lifeline Website, https://suicidepreventionlifeline.org/.

55 Ben Tinker, *The Life-Saving Message in Logic's Hit Song*, CNN, Updated 11:59 ET, Aug. 27, 2017, http://www.cnn.com/2017/08/25/health/logic-suicide-hotline-vma-18002738255/index.html.

56 See, e.g., Sidney J. Blatt, *The Destructiveness of Perfectionism: Implications for the Treatment of Depression*, 50 Am. Psychol. 1003 (1995).

57 Martin M, Smith et al., *The Perniciousness of Perfectionism: A Meta-Analytic Review of the Perfectionism-Suicide Relationship*, J. Personality (forthcoming).

58 *Id*.

59 Daniel S. Hamermesh & Neal M. Soss, *An Economic Theory of Suicide*, 82 J. Pol. Econ. 83 (1974).

60 Avinash K. Dixit & Robert E. Pindyck, Investment Under Uncertainty 24-25, 41 n.9 (1994).

person's happiness, positively or negatively.[61] An evolutionary economic model in which people are motivated to increase the likelihood of elation and reduce the likelihood of depression reconsiders the idea that depression and suicide are ways individuals can improve their kin's welfare.[62]

After my first year, I successfully applied to graduate in three years and became a junior in my second year. I also successfully applied to and became a university scholar as part of a program "designed for students with exceptional talent in an academic or creative area that cannot be pursued within the confines of the regular curriculum."[63] In my third year as a senior, I took only graduate courses and reading courses in mathematics, economics, mathematical economics, and politics. I earned an A.B. in mathematics from Princeton at the age of 17.

My junior independent work advisor was professor Charles Louis Fefferman, a child prodigy who was a freshman at the University of Maryland at the age of 14. Fefferman earned his B.S. with the highest distinction in mathematics and physics at the age of 17. Fefferman earned his mathematics Ph.D. from Princeton at the age of 20. Fefferman became a full professor at the University of Chicago at the age of 22. Fefferman was the youngest person ever appointed as a full professor in the United States. In 1973, Fefferman returned to Princeton University as a full professor at the age of 24. Fefferman was the first person to whom the National Science Foundation presented the Alan T. Waterman Award.[64] Fefferman also received the Fields medal,[65] which is often considered to be the highest honor a mathematician can receive and is commonly known as the mathematician's Nobel prize.[66]

In my second year at Princeton, I sat in on Professor Fefferman teaching the course on advanced multivariable calculus that I took in the fall of my first year. Professor Fefferman's conversational teaching style was congenial, easy-going, and fun.[67] His classroom presentations and interactions with students were effortless and natural. It was a very different version of the course than the one I took just one year earlier. There was no hypercompetitive, Darwinian evolutionary survival-of-the-fittest, sink or swim attitude in the course. Instead, it was clear

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61 Dave E. Marcotte, *The Economics of Suicide, Revised*, 69 Southern Econ. J. 628 (2003).

62 Donald Wittman, *Darwinian Depression*, 168 J. Affective Disorders 142, 143, 145-46 (2014).

63 Office of the Dean of the College, *University Scholar Program*, Princeton University, https://odoc.princeton.edu/curriculum/special-academic-programs/university-scholar-program.

64 This is the highest honorary award in the United States given to scientists not older than thirty-five.

65 The Fields Medal is awarded to mathematicians under 40 years of age, once every four years, at the International Congress of the International Mathematical Union.

66 More precisely, the mathematician's Nobel prize is often thought of as the Fields medal, in conjunction with the Abel prize, which the Norwegian government started in 2003 to award annually and has no age restriction.

67 For each of the main theorems about the geometry of differentiable mappings between n-dimensional real vector spaces, professor Fefferman presented alternate versions of the proofs, emphasizing the algebraic, differential, or topological aspects of the results. He also related each theorem to its lower-dimensional versions in the plane or space as well as their applications to and interpretations from classical and modern physics.

that Professor Fefferman cared about his teaching and engaging students as and where they were.

I have vivid memories of a wide-ranging one-and-one-half hour conversation, on a bus ride between Port Authority in New York City and Princeton's Nassau Street, with Professor Fefferman about his research, teaching, and taking out the garbage before proving theorems in his then new role of husband to his wife Julie Anne Albert, who herself was a child prodigy in music who studied violin at the famed Juilliard School at the age of 9. He discussed the wide range of mathematical problems on which he worked.[68] He observed that instead of him choosing problems to work on, problems effectively chose him to be worked upon in the sense that he could not stop thinking about certain problems once he learned of them by reading, serendipity, talking with colleagues, or simply following his own thinking. He observed that he could solve only some of the problems he worked on, even ones he worked for quite long periods of time.

He described how much he would enjoy lying on his couch and thinking deeply for hours at a time about change, relationships, shapes, and not so much about numbers per se. After he mentally investigated and cast off many of his ideas, he would eventually come upon a hopeful idea and be ready to pursue it further on paper. He emphasized how important optimism and perseverance are to working on difficult research problems. He said that solving an easier version of a complicated problem was his first step in making progress. He said that he would often go down many dead ends for quite some time before realizing that. He cautioned research can be highly nonlinear in its progress and often involves doubling back upon realizing having earlier made a mistake.

I was fascinated listening to Fefferman and learning about how he did his mathematics research! While his example was inspirational, I realized I had neither his rare mathematical talent nor the desire to become a pure mathematician because of a nascent interest about and attraction to mathematical economics. I earned in the spring of that year at Princeton a grade of A+ in the course *Economic Dynamics*,[69] taught by a new assistant professor Martin Hellwig.[70] Taking that course (and earning that course grade) provided the impetus and motivating force for me to focus on studying mathematical economics. The mathematics that course utilized to model the dynamics of economic systems was difference equations. My familiarity with the stability analysis of a dynamical system described by difference equations helped to convince me much later in life to participate in couples counseling. I

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68 Professor Fefferman is known for his path-breaking research in modern mathematical analysis, mathematical physics and geometry, partial differential equations, several complex variables, and Fourier analysis, which is the study of how complicated vibrations can be decomposed, represented, or approximated by sums of simpler trigonometric functions. He offered an example of what Fourier analysis is about by explaining how the complicated motion of a violin string consists of a fundamental note, a first overtone, a second overtone, and so forth.

69 This course covered difference equations, cobweb models, business cycle models, the Hansen-Samuelson multiplier-accelerator model, and Solow's growth model.

70 Martin Hellwig, Max Planck Institute for Research on Collective Goods, https://www.coll.mpg.de/team/page/martin_hellwig.

was fascinated to learn from an article[71] and related book[72] about how to utilize the mathematics of dynamical systems to analyze the impacts on the happiness, unhappiness, or dissolution of a relationship of these psychological factors: emotional inertia, how each member of a couple influences the other, personality, and relationship history.

My interests in applying mathematics to economics by becoming a mathematical economic theorist developed further upon taking a pair of graduate mathematical economics courses *Linear and Convex Systems*[73] and *Advanced Theory*.[74] Both courses opened my eyes to a field that possesses the abstraction, beauty, elegance, logic, precision, rigor, and sophistication of pure mathematics applied to analyze important economic and societal issues. Being able to apply mathematics to understand how to solve real-world economic problems and social challenges seemed like a wondrous way to spend a life. I knew then, or thought I knew, I would be happy being a mathematical economic theorist for a lifetime. Life of course unfolded somewhat differently.

My senior thesis title was *Applications of Catastrophe Theory to Economics*. A French mathematician, René Thom, invented catastrophe theory,[75] which studies how dynamical systems can bifurcate. Catastrophe theory qualitatively models how underlying forces that change continuously, gradually, and slowly can nonetheless cause discontinuous, large, and sudden changes. Erik Christopher Zeeman popularized catastrophe theory and its applications to biology, economics, and sociology.[76] Zeeman's catastrophe theory model of stock market bubbles and crashes was published 1974 in the inaugural issue of the *Journal of Mathematical Economics*.[77] My senior thesis analyzed that model and other applications of catastrophe theory to economics.

I have remained ever since then interested in applications of catastrophe theory to study the stability of general economic equilibria,[78] asset market fluctuations,[79]

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71 John Gottman, Catherine Swanson, & James Murray, *The Mathematics of Marital Conflict: Dynamic Mathematical Nonlinear Modeling of Newlywed Marital Interaction*, 13 J. Fam. Psychol. 13 (1999).

72 John M. Gottman, James D. Murray, Catherine C. Swanson, Rebecca Tyson, & Kristen R. Swanson, The Mathematics of Marriage: Dynamic Nonlinear Models (2005).

73 This course covered convex analysis, fixed point theorems, separating hyperplane theorems, general equilibrium theory, the fundamental theorems of welfare economics, and algorithms for computing fixed points and general equilibria of competitive economies.

74 This course covered dynamic programming, optimal control theory, Euler equations, Pontryagin's maximum principle, calculus of variations, von Neumann's growth model, Ramsey's growth model, transversality conditions, and turnpike theorems.

75 René Thom, Structural Stability and Morphogenesis: An Outline of A General Theory of Models (1972).

76 E. C. Zeeman, *Catastrophe Theory*, Sci. Am., Apr., at 65 (1976); E. C. Zeeman, Catastrophe Theory: Selected Papers, 1972-1977 (1977).

77 E. C. Zeeman, *On the Unstable Behaviour of Stock Exchanges*, 1 J. Mathematical Econ. 39 (1974).

78 *See, e.g.*, Yves Balasko, *Economic Equilibrium and Catastrophe Theory: An Introduction*, 46 Econometrica 557 (1978).

79 *See, e.g.*, Jozef Barunik & Miloslav Vosvrda, *Can A Stochastic Cusp Catastrophe Model Explain Stock Market Crashes?* 33 J. Econ. Dynamics & Control 1824 (2009) (estimating a cusp catastrophe based upon real-world financial data); Thorsten

and aggregate business cycles.[80] I also was fascinated and intrigued much later in life to learn about applications of catastrophe theory to mathematically analyze dating and mating,[81] in addition to how and why a marriage can breakdown suddenly.[82] I have always been more comfortable with communicating in the language of mathematics than in the various languages of love.[83]

My senior thesis advisor was Harold W. Kuhn, well-known for the Karash-Kuhn-Tucker (KKT) theorem and the associated KKT conditions.[84] The KKT conditions provide a standard mathematical way to analyze the optimal choices of economic actors. For example, economists apply the KKT conditions to study three canonical problems. First, consumers maximizing utilities subject to budget constraints. Second, firms maximizing profits subject to production technology constraints, or firms maximizing sales revenues subject to profit constraints. Third, investors minimizing total portfolio risk subject to budget and expected return constraints. Harry Markowitz received the 1990 Nobel memorial prize in economic sciences in part for analyzing how to build optimal asset portfolios.[85] The KKT theorem and KKT conditions also are ubiquitous in operations research, industrial engineering, and management planning to characterize solutions to such pervasive nonlinear optimization problems as designing quality or safety inspections, managing and controlling inventories, optimizing the packing and shipping of boxes, planning factory production schedules, scheduling power plants, and routing airlines crews, flights, itineraries, and planes.

I took professor Kuhn's undergraduate *Mathematical Programming* course[86] in the fall of my junior year and his two-semester sequence of graduate mathematical

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Rheinlaender & Marcus Steinkamp, *A Stochastic Version of Zeeman's Market Model*, 8 Stud. Nonlinear Dynamics & Econometrics Art. 4 (2004) (analyzing a randomized version of Zeeman's model involving fundamental and momentum traders); J. Barkley Rosser Jr., *The Rise and Fall of Catastrophe Theory Applications in Economics: Was the Baby Thrown Out with the Bathwater?* 31 J. 3255, 3270-72 (concluding that many criticisms of Zeeman's stock market model are fallacious (2007).

80 Hal R. Varian, *Catastrophe Theory and the Business Cycle*, 17 Econ. Inquiry 14 (1979).

81 Abraham Tesser & John Achee, *Aggression, Love, Conformity, and Other Social Psychological Catastrophes*, *in* Dynamical Systems in Social Psychology 95 (Robin R. Vallacher & Andrzej Nowak eds., 1994).

82 Gottman et al., *supra* note 72, at 81-98, 141-43.

83 Gary Chapman, The 5 Love Languages: The Secret to Love that Lasts (2015).

84 William Karash, *Minima of Functions of Several Variables with Inequalities as Side Constraints*, M. Sci. dissertation, Mathematics, Univ. of Chicago (1939); Harold W. Kuhn & Albert H. Tucker, *Nonlinear Programming*, Proc. 2nd Berkeley Symposium 481 (1951). The KKT theorem and KKT conditions are iconic in mathematical optimization as the first order necessary conditions for a solution of a nonlinear programming problem to be optimal (assuming that a regularity condition known as the constraint qualification is met). The KKT theorem and KKT conditions generalize the classic method of Lagrange multipliers, which apply only to the optimization of a function subject to equality constraints, to also permit inequality constraints.

85 Harry M. Markowitz, *Foundations of Portfolio Theory*, 46 J. Fin. 469 (1991) (Nobel lecture); Harry M. Markowitz, *Portfolio Selection*, 7 J. Fin. 77 (1952); Harry M. Markowitz, Portfolio Selection: Efficient Diversification of Investments (2d. ed., 1991).

86 This course covered linear programming, tableau algebra, duality theorems, Dantzig's simplex method, matrix games, assignment problems, matching problems, transportation problems, network flow problems, the Hungarian method, quadratic programming, and nonlinear programming.

economics courses in my senior year. In each of those classes, Kuhn was impeccably organized and thoroughly prepared. Kuhn was a masterful expositor and Kuhn's lectures were just a joy to behold because they were simply exemplary in their clarity and precision, while his neat blackboard writing provided camera-ready notes. Kuhn was amazing in distilling the key insights underlying complex theoretical results. Kuhn also provided insightful low-dimensional examples, intuition, pictures, and stories to illustrate and motivate our truly understanding the central essence and important features of highly abstract, formal, and general versions of key theorems. Kuhn told us engaging anecdotes and personal stories about iconic figures in the field of mathematical economics during the frenzy and heyday of cold war research into activity analysis, decision theory, game theory, mathematical programming, and welfare economics.

Although professors Fefferman and Kuhn had very different mathematical research interests, teaching styles and classroom presentation methods, both clearly had a passion for advancing the frontiers of research by creating knowledge and sharing their enthusiasm for learning by inspirationally communicating core concepts, organizing ideas, and multiple perspectives. I view both of them as exemplars and role models for professors who excel at research and teaching. Professors who are both excellent researchers and teachers are rare.

B. Harvard University Graduate Student at the Age of 17

I enrolled at Harvard University in what is now known as the Harvard John A. Paulson School of Engineering and Applied Sciences to pursue a Ph.D. in applied mathematics at the age of 17. My Ph.D. dissertation was titled *Asymptotic and Structural Stability of Signalling Equilibria*. My principal thesis advisor was Kenneth J. Arrow, a recipient of the 1972 Nobel memorial prize in economic sciences at the age of 51, and who remains the youngest person ever to receive the Nobel memorial prize in economic sciences.[87] Another of Arrow's former economics graduate students, Michael Spence, is a 2001 economics Nobel memorial prize in economic sciences recipient for his path-breaking research in the economics of (asymmetric) information about what he called market signaling.[88] Spence defined job market signals to be alterable, observable characteristics that may or may not affect an individual's unobservable individual marginal productivity, which depends on unalterable, unobservable personal characteristics.[89] The prototypical example of a job market signal is years of higher education.

By assuming that higher education may or may not affect productivity, Spence was agnostic about education being a form of human capital. Spence focused instead on the sorting aspect of higher education signals. Two other recipients of the Nobel memorial

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87 Kenneth J. Arrow, *General Economic Equilibrium: Purpose, Analytic Techniques, Collective Choice*, 64 Am. Econ. Rev. 253 (1974) (Nobel lecture).

88 Michael Spence, *Signaling in Retrospect and the Informational Structure of Markets*, 92 Am. Econ. Rev. 434 (2002) (Nobel lecture); Michael Spence, *Job Market Signaling*, 87 Q J. Econ. 355 (1973).

89 Michael Spence, Market Signaling: The Informational Structure of Job Markets and Related Phenomena 119 (1972).

prize in economic sciences, Kenneth Arrow[90] and Joseph Stiglitz[91] also wrote about higher education serving as a filter, screen, or label.[92] The traditional human capital theory view is that higher education increases productivity through acquiring cognitive skills and/or becoming socialized about such soft skills as emotional intelligence and punctuality.[93] Arrow stated that he personally did not believe that higher education only serves to screen people.[94] Arrow also stated that obviously professional schools transmit concrete skills that potential employers value.[95] Data suggests that higher education is both a form of human capital and job market signal.[96]

Spence's thesis analyzed the existence, economic inefficiency, and some other properties of job market signaling equilibria, which are defined as employers' probability beliefs over productivity conditional on higher education that do not generate any disconfirming market data. There is now a vast economics literature about market signaling.[97] My thesis examined the asymptotic stability and structural stability of market signaling equilibria.[98] Asymptotic stability refers to convergence of conditional probability beliefs revised under a dynamic adjustment process, such as updating prior beliefs via Bayesian inference to form posterior beliefs. Mathematical tools of asymptotic stability analysis include probability theory and martingale convergence theorems.[99] Structural stability refers to robustness of market signaling equilibria under perturbations of the underlying parameters that define a signaling economy, such as individuals' marginal productivity functions and signaling cost functions. Gerard Debreu, 1983 economics Nobel memorial prize in economic sciences recipient,[100] pioneered the structural stability analysis of general economic equilibria.[101] Debreu introduced to economic analysis the mathematical tools of degree theory, differential topology, genericity analysis, global analysis, Sard's theorem, and transversality theory.[102]

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90 Arrow, *supra* note 87.

91 Joseph E. Stiglitz, *Information and the Change in the Paradigm of Economics*, 92 Am. Econ. Rev. 460 (2002) (Nobel lecture).

92 Kenneth J. Arrow, *Higher Education as a Filter*, 2 J. Pub. Econ. 193 (1972); Joseph Stiglitz, *The Theory of 'Screening', Education, and the Distribution of Income*, 65 Am. Econ. Rev. 283 (1975).

93 Arrow, *supra* note 92, at 193-94.

94 *Id*. at 194.

95 *Id*. at 194.

96 John G. Riley, *Testing the Educational Screening Hypothesis*, 87 J. Pol. Econ. S 227 (1979).

97 Spence, *supra* note 89.

98 Peter H. Huang, *Asymptotic Stability of Bayesian Updating for Spencian Examples*, 17 Econ. Letters 47 (1985); Peter H. Huang, *The Robustness of Multidimensional Signaling Equilibria*, 25 Econ. Letters 217 (1987); Peter H. Huang, *Upper Semi-Continuity of the Separating Equilibrium Correspondence*, 47 J. Econ. Theory 406 (1989); Peter H. Huang, *Structural Stability of Financial and Accounting Signaling Equilibria*, 9 Res. Fin. 37 (1991).

99 *See, e.g.*, Margaret Bray & David M. Kreps, *Rational Learning and Rational Expectations*, *in* Arrow and the Ascent of Modern Economic Theory 597 (George R. Feiwel ed., 1987); Margaret Bray, *Learning, Estimation, and the Stability of Rational Expectations*, 26 J. Econ. Theory 318 (1982).

100 Gerard Debreu, *Economic Theory in the Mathematical Mode*, 74 Am. Econ. Rev. 267 (1984) (Nobel lecture).

101 Gerard Debreu, *Regular Differentiable Economies*, 66 Am. Econ. Rev. 280 (1976).

102 *See, e.g.*, Yves Balasko, Foundations of the Theory of General Equilibrium (2d

I remember asking Arrow why Spence did not study the asymptotic stability and structural stability of market signaling equilibria. Arrow replied that both were difficult and challenging problems in mathematical economics. I took Arrow's answer to be a call to action. Before that moment, I, as is true of many students who finished the course requirements of their Ph.D. program, was finding it challenging to decide on an interesting, manageable, and suitable dissertation topic. In my first year of graduate school, I took the comprehensive microeconomic theory course,[103] that is designed for non-economics Ph.D. students in other parts of the university. Economics assistant professor Steven Shavell, who would later become a professor at Harvard law school and a leader in the field of law and economics,[104] taught the course. It was my introduction to formal economic models of risk behavior, insurance, and efficient risk allocation. In my second year of graduate school, I took the core microeconomics sequence, limited to students in the economics and business economics Ph.D. programs. It was co-taught by professor Jerry Green and Spence. In my third year of graduate school, I sat in on a graduate industrial organization course, also co-taught by Spence.

I took in the spring of my first year of graduate school Arrow's course *Information, Communication, and Organization*.[105] This was a fascinating course about how to analytically model the communication of dispersed information in organizations, such as couples, firms, societies, teams, and the military. Arrow sometimes presented a stream of consciousness that he just thought of while walking through Harvard yard on his way to class. Arrow's brilliance made it difficult for him once in a while to determine the knowledge of the audience. A fellow applied mathematics graduate student sat in on a lecture during which Arrow wrote: x''' where the first prime denoted the transpose of the vector x, the second its derivative, and the third to distinguish x''' from x' and x''. Arrow noted that the order of the primes did not matter, which is classic Arrow! In that class, Arrow asked if students knew the sigma summation symbol, $\sum$, from high school algebra, and later if students knew how to apply Itô's lemma to derive the stochastic partial differential equation whose solution is the famous Black-Scholes-Merton options pricing formula,[106] for which Myron Scholes and Robert Merton jointly received the 1997 Nobel memorial prize in economic sciences (Fisher Black had passed away and the Nobel memorial prize in economic sciences is not awarded posthumously).[107]

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ed., 2016); Yves Balasko, The Equilibrium Manifold: Postmodern Developments in the Theory of General Economic Equilibrium (2009); Andreu Mas-Colell, The Theory of General Economic Equilibrium: A Differentiable Approach (1990).

103 This course rigorously covered modern economic theories of consumption, production, behavior under risk, and general equilibrium theory.

104 Harvard Law School, Steven Shavell faculty page, http://hls.harvard.edu/faculty/directory/10793/Shavell.

105 This course covered the general resource allocation problem, market allocation, uncertainty, demand for and value of information, transactions costs, bosses, authority, communication, team theory, budget planning, moral hazard, principal agent theory, hierarchical supervision, formal organization of decision making, expedience, and incentives.

106 Fisher Black & Myron Scholes, *The Pricing of Options and Corporate Liabilities*, 81 J. Pol. Econ. 637 (1973); Robert C. Merton, *Theory of Rational Option Pricing*, 4 Bell J. Econ. & Mgmt. Sci. 141 (1973). *See also* Robert A. Jarrow, *In Honor of the Nobel Laureates Robert C. Merton and Myron S. Scholes: A Partial Differential Equation That Changed the World*, 13 J. Econ. Lit. 229 (1999).

107 Robert C. Merton, *Applications of Options Pricing Theory Twenty-Five Years Later*, 88

I also took in the spring semester of my first year of graduate school another fascinating course, *A Mathematical Approach to General Equilibrium*.[108] Graciela Chichilnisky, who has two Ph.D. degrees, one in mathematics from M.I.T. and one in economics from the University of California Berkeley,[109] taught the course. It was a particularly exciting and fun time to take her course because Chichilnisky was just starting to apply differential topology methods to analyze social choice problems.[110] In that course we learned about diverse, novel applications of differential topology, such as how the Poincaré–Hopf index theorem applies to studying nonlinear dynamics in ecological and chemical networks.[111]

It was and still is rare to have a woman professor teach a graduate course in mathematical economics. I have been struck by how few women there are at conferences for economics professors and how many more women there are at conferences for psychology and/or marketing professors, even though all three disciplines require quantitative and statistical coursework and proficiency. Gender discrimination and inequality in economics and academia are unfortunate for women and society. University of Michigan professor of complex systems, political science, and economics Scott Page wrote a book rigorously analyzing and providing evidence for how important diversity of viewpoints is to solving individual and collective problems.[112]

Chichilnisky wrote a candid, fascinating chapter about two lessons that she learned from having to deal with a glass ceiling and gender inequity at Columbia University:[113] one way to thrive, succeed, and be happy is to turn negative responses directed at you into positive resources for you, and the genuine source of happiness is the feeling of being useful to others.[114] Computer science and technology entrepreneurs, start-up employees, and even as early as college majors have

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Am. Econ. Rev. 323 (1998) (Nobel lecture); Myron Scholes, *Derivatives in a Dynamic Environment*, 88 Am. Econ. Rev. 350 (1998) (Nobel lecture).

108 This course covered the mathematics of combinatorial topology, differentiable topology, and algebraic topology. It also covered economic applications to general equilibrium theory and social choice theory, in addition to applications to biology, chemistry, and physics.

109 http://chichilnisky.com/graciela-chichilnisky/.

110 *See, e.g.,* Graciela Chichilnisky, *On Fixed Point Theorems and Social Choice Paradoxes*, 3 Econ. Letters 347 (1979); Graciela Chichilnisky, *Social Choice and the Topology of Spaces of Preferences*, 37 Adv. Mathematics 165 (1980); Graciela Chichilnisky, *Continuous Representation of Preferences* 47 Rev. Econ. Stud. 959 (1980); Graciela Chichilnisky, *Social Aggregation Rules and Continuity*, 97 Q.J. Econ. 337 (1982); Graciela Chichilnisky, *Structural Instability of Decisive Majority Rules*, 9 J. Mathematical Econ. 207 (1982); Graciela Chichilnisky, *Topological Equivalence of the Pareto Condition and the Existence of a Dictator*, 9 J. Mathematical Econ. 223 (1982); Graciela Chichilnisky, *Social Choice and the Closed Convergence Topology*, 8 Soc. Choice & Welfare 307 (1991); Graciela Chichilnisky, *Social Diversity, Arbitrage, and Gains from Trade: A Unified Perspective*, 84 Am. Econ. Rev. 427 (1994).

111 Leon Glass, *A Topological Theorem for Nonlinear Dynamics in Chemical and Ecological Networks*, 72 Proc. Nat'l. Acad. Sci. 2856 (1975).

112 Scott E. Page, The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies (new ed. 2008).

113 *See, e.g.*, Valerie Strauss, *Taking on the Economics of Gender Inequity*, Wash. Post, Dec. 3, 2007.

114 Graciela Chichilnisky, *Sex and the Ivy League*, *in* Reflections of Eminent Economists 108 (Michael Szenberg & Lall Ramrattan eds., 2004).

recently been reporting facing micro-aggressions, sexism, and sexual harassment.[115] Professor Iris Bohnet, who is a behavioral economist, director of the women and public policy program, and co-chair of the behavioral insights group at the Kennedy school of government, wrote a book about how to de-bias organizations instead of individuals through behavioral design.[116]

In his path-breaking Ph.D. thesis, Arrow proved there is no voting procedure that satisfies all of these desirable axioms: consensus, decisiveness, independence of irrelevant alternatives, and non-dictatorship.[117] Arrow single-handedly created the modern fields of mathematical social choice theory[118] and mathematical politics.[119] Robert J. Aumann, a 2005 Nobel memorial prize in economic sciences recipient,[120] believes Arrow's impossibility theorem "fundamentally altered economic and political theory and practice."[121] Eric Maskin, who is one of Arrow's former applied mathematics graduate students and a 2007 Nobel memorial prize in economic sciences recipient,[122] and Amartya Sen, a 1998 Nobel memorial prize in economic sciences recipient,[123] each presented an invited lecture at Columbia University about Arrow's famed impossibility theorem.[124] Arrow applied a discrete, finite, and set-theoretic framework to prove his impossibility theorem. Chichilnisky's novel approach to social choice problems was continuous and applied topological methods, which generated some controversy in terms how to appropriately express formally some central claims in social choice theory.[125]

Law professor Leo Katz argues that many legal foundational conundrums, puzzles, and perversities arise from a constellation of related logical difficulties associated with legal doctrines involving multi-criterial decision-making.[126] Katz explains how many legal paradoxes are legal counterparts of the well-known voting paradoxes described in Arrow's impossibility theorem, Sen's libertarian

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115 Nashwa Bawab, *College Women in Tech: We're Encountering Sexism Already*, USA Today, Aug. 1, 2017, 10:12 pm EDT, http://college.usatoday.com/2017/08/01/college-women-in-tech-were-encountering-sexism-already/.

116 Iris Bohnet, What Works: Gender Equity by Design (2016).

117 Kenneth J. Arrow, Social Choice and Individual Values (2012 reprint of 1951 ed.).

118 *See, e.g.*, Donald G. Saari, Basic Geometry of Voting (2013), Donald G. Saari, Disposing Dictators, Demystifying Voting Paradoxes: Social Choice Analysis (2007); Donald G. Saari, Chaotic Elections! A Mathematician Looks at Voting (2001); Donald G. Saari, Decisions and Elections: Explaining the Unexpected (2001).

119 Alan D. Taylor & Allison M. Pacelli, Mathematics and Politics: Strategy, Voting, Power, and Proof (2d ed., 2008).

120 Robert J. Aumann, *War and Peace*, 103 Proc. Nat'l. Acad. Sci. 17075 (2006).

121 Associated Press, *Nobel-Winning Economist Kenneth J. Arrow Dies at 95*, Feb. 23, 2017, https://phys.org/news/2017-02-nobel-winning-economist-kenneth-arrow-dies.html.

122 Eric S. Maskin*, Mechanism Design: How to Implement Social Goals*, 98 Am. Econ. Rev. 567 (2008).

123 Amartya Sen, *The Possibility of Social Choice*, 89 98 Am. Econ. Rev. 349 (1999).

124 Eric Maskin & Amartya Sen, The Arrow Impossibility Theorem (2014).

125 Nick Baigent & Peter Huang, *Topological Social Choice: A Reply to Le Breton and Uriate*, 7 Soc. Choice & Welfare 141 (1990).

126 Leo Katz, Why the Law is So Perverse (2011). *See also* Leo Katz & Alvaro Sandroni, *The Inevitability and Ubiquity of Cycling in All Feasible Legal Regimes: A Formal Proof*, 46 J. Legal Stud. 237 (2017).

paradox,[127] Chichilniky's theorem, and the Gibbard-Satterthwaite theorem.[128] I critically analyze Katz's view that logical unavoidability of legal loopholes implies exploiting loopholes is ethically acceptable.[129]

In the summer between my second and third years of graduate school, I followed Arrow to Stanford, where he went annually to participate in a series of seminars and workshops at the Institute for Mathematical Studies in the Social Sciences (I.M.S.S.S.) and later its successor, the Stanford Institute for Theoretical Economics (S.I.T.E.). Talks occurred weekly on Tuesdays and Thursdays. Presenters distributed their unpublished working papers beforehand. There were lively debates, discussions, and exchanges before, during, and after each talk. All the papers concerned some novel aspect of mathematical economics. Sometimes there were additional talks about game theory on Wednesdays. Presenters ranged from past and future Nobel memorial prize in economic sciences recipients, including the famed game theorist Aumann; Roger Myerson, another of Arrow's former applied mathematics graduate students and a 2007 Nobel memorial prize in economic sciences recipient;[130] and Jean Tirole, a 2014 Nobel memorial prize in economic sciences recipient.[131] It was exhilarating to converse with and learn from some amazing intellectual giants in mathematical economics. I also immediately fell in love with the climate, collegiality, camaraderie, community, and culture at Stanford's I.M.S.S.S. and later S.I.T.E. Among economists in academia, there is a well-established traditional hierarchy of social status under which mathematical economists are the most-respected among and revered of economists primarily because of their rare mathematical prowess.[132] Most economists do empirical research because of the rare level of mathematics required to do economic theory, let alone mathematical economics.

I vividly remember many thought-provoking and stimulating lunches, while sitting outside Stanford's coffee house or Tressider Memorial Union. One was with Arrow and D. John Roberts, a Stanford graduate school of business (GSB) management professor. We discussed professors who published just one very well-received article and subsequently only published less well-received articles or never published anything else. These folks are the scholarly equivalent of music performers who are known as one-hit wonders. We mused over whether they were better off than others who never published any very well-received articles.

We also spoke about how Redwood City, California, approximately five miles northwest of Stanford University, has a motto: "*Climate Best by Government Test*," which refers to it being a location the United States and German governments determined through climate surveys and meteorological data to have one of the

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127 Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. Pol. Econ. 152 (1970).

128 Allan Gibbard, *Manipulation of Voting Schemes: A General Result*, 41 Econometrica 587 (1973); Mark Allen Satterthwaite, *Strategy-Proofness and Arrow's Conditions: Existence and Correspondence Theorems for Voting Procedures and Social Welfare Functions*, 10 J. Econ. Theory 187 (1975).

129 Peter H. Huang, *Book Review of Leo Katz Why the Law is So Perverse*, 63 J. Legal Educ. 131, 134, 137-48 (2013).

130 Roger Myerson, *Perspectives on Mechanism Design in Economic Theory*, 98 Am. Econ. Rev. 586 (2008).

131 Jean Tirole, *Market Failures and Public Policy*, 105 Am. Econ. Rev. 1665 (2015).

132 Axel Leijonhufvud, *Life Among the Econ*, 11 West. Econ. J. 327, 333-34 (1973).

world's three best climates, with the other two being the Canary Islands and the Mediterranean Coast of North Africa.[133] The motto best climate raises the question of what best means in the context of climate. People have diverse preferences about climate or weather, which consists of multiple dimensions, such as humidity, precipitation, and temperature. Temperature is a random variable and temperature over time is a stochastic process. Some people prefer to experience distinct seasons, meaning they prefer positive variance in precipitation and temperatures. Others prefer a high mean and low variance in temperatures.

In a fun lunch with Aumann, we spoke at length about many topics, including his article about whether two people can agree to disagree,[134] his chapter about what game is trying to accomplish,[135] conditions for the convergence of players' probability beliefs over others' strategy choices in normal form games, and viewing dating as attempting to solve for an equilibrium in an asymmetric information two-person extensive form game! I enjoyed many delightful, humorous, and spontaneous conversations with Aumann about his path-breaking research in repeated game theory,[136] correlated equilibria,[137] and common knowledge.[138] Aumann had a smile and laughter that were irresistibly contagious.

In addition to lunches, there were many engaging and fun conversations about academia and mathematical economics in corridors, elevators, offices, and outdoors. I remember having numerous conversations with Paul Milgrom,[139] well-known for his research in designing optimal auctions for multiple unique but related items,[140] and with Bob Wilson,[141] designing the initial auction for sales of radio spectrum licenses in the United States. We spoke about classic film noirs, his article about how to formally represent favorable and unfavorable news in analytical models of information economics,[142] and the wide readership of the I.M.S.S.S. technical report series.

During my third year of graduate school, Arrow decided to leave Harvard and return to Stanford. I followed Arrow to Stanford with the official designations of traveling scholar at Harvard and visiting scholar at Stanford. I underwent a delayed adolescence at Stanford, while being a teaching assistant for a section of intermediate microeconomics. I learned to ride a bicycle, drive a car, play organized 6-person volleyball (unfortunately on asphalt courts instead of sand or even grass),

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133 Quora, *What does the "climate best by government test" sign at the Redwood City Caltrain station mean?* https://www.quora.com/What-does-the-climate-best-by-government-test-sign-at-the-Redwood-City-Caltrain-station-mean.

134 Robert J. Aumann, *Agreeing to Disagree*, 4 Ann. Stat. 1236 (1976).

135 Robert J. Aumann, *What is Game Theory Trying to Accomplish? in* Frontiers of Economics 28 (Kenneth J. Arrow & Seppo Honkapohja eds., 1985).

136 Robert J. Aumann, Michael Maschler, & Richard Stearns, Repeated Games with Incomplete Information (1985).

137 Robert J. Aumann, *Subjectivity and Correlation in Randomized Strategies*, 1 J. Mathematical Econ. 67 (1974).

138 Aumann, *supra* note 134.

139 Paul Milgrom Personal Website, http://www.milgrom.net/.

140 Paul Milgrom, Discovering Prices: Auction Design in Markets with Complex Constraints (2017).

141 Robert Wilson, Stanford Graduate School of Business, https://faculty-gsb.stanford.edu/wilson/index.html.

142 Paul R. Milgrom, *Good News and Bad News: Representation Theorems and Applications*, 12 Bell J. Econ. 380 (1981).

date Stanford co-eds, and understand the pros and cons of running different plays and sets in a 6-2 versus 5-1 offensive system in intercollegiate women's volleyball.

I attended every home and away match the Stanford women's volleyball team played one season. A setter/outside hitter on that team, Jody Freeman, would often do one-handed push-ups on the sidelines during warm-ups before matches to intimidate and psych out opposing teams. Jody today is the Archibald Cox professor at Harvard law school, the founding director of its environmental law and policy program, a leading environmental law and administrative law and regulation scholar, and independent outside director at ConocoPhillips, serving on its public policy and compensation committees.[143] Jody co-edited an accessible, scholarly treatise about American law and climate change,[144] in which she also co-authored a chapter about possible innovative U.S. legal policies to help mitigate the damages from global climate change.[145]

I sat in on and was a grader for the year-long graduate industrial organization course Bill Rogerson,[146] a then new Stanford economics assistant professor with a Ph.D. from Cal Tech, taught. We also shared meals and hung out together socially. Rogerson is now the Harold and Virginia Anderson professor of economics at Northwestern University and currently serves as economics department chair, co-director of the center for the study of industrial organization, director of the program in mathematical methods in the social sciences, and research director of the program on competition, antitrust and regulation at the Searle center on law, regulation and economic growth.[147]

I also sat in on several graduate courses at Stanford GSB about game theory, multi-person decision theory, information economics, public finance and taxation, and topics in game theory. A new assistant professor of decision sciences, Anat Admati,[148] taught one such course. Admati has become a refreshing strong advocate of reforming bank capital regulation and recently published a skeptical view of financialized corporate governance.[149] Admati and Hellwig[150] coauthored the book, *The Bankers' New Clothes: What's Wrong with Banking and What to Do about It*.[151] I was a grader for two sections of the first-year core M.B.A. microeconomics course, one taught by Margaret Bray,[152] and another taught by William F. Sharpe,

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143 Harvard Law School Faculty Profiles, *Jody Freeman*, http://hls.harvard.edu/faculty/directory/10285/Freeman; Harvard Law School Faculty, *Professor Jody Freeman*, http://www.law.harvard.edu/faculty/freeman/.

144 Global Climate Change and U.S. Law (Michael Gerrard & Jody Freeman eds., 2d ed. 2015).

145 *Id.* at 735.

146 William Rogerson Northwestern University Economics Department Home Page, http://faculty.wcas.northwestern.edu/~wpr603/.

147 http://faculty.wcas.northwestern.edu/~wpr603/bio.pdf.

148 Anat R. Admati, Stanford Graduate School of Business, https://www.gsb.stanford.edu/faculty-research/faculty/anat-r-admati.

149 Anat R. Admati, A *Skeptical View of Financialized Corporate Governance*, J. Econ. Perspectives, Summer 2017, at 131.

150 Hellwig, *supra* note 70.

151 Anat R. Admati & Martin Hellwig, The Bankers' New Clothes: What's Wrong with Banking and What to Do about It (2013); http://bankersnewclothes.com/.

152 London School of Economics, *Dr. Margaret Bray Faculty Page*, http://www.lse.ac.uk/economics/people/facultyPages/MargaretBray.aspx.

famous for his role in developing the canonical financial capital asset pricing model, and a 1990 recipient of the Nobel memorial prize in economic sciences.[153]

C. Economics or Finance Faculty at Multiple Schools

I was an economics instructor at Cañada Community College, assistant professor at Tulane University, and visiting assistant professor at the University of Iowa, Southern Methodist University, the University of California, Berkeley, the University of California, Los Angeles, the University of Southern California, and Stanford University. I have taught a diverse range of undergraduate and graduate economics courses: microeconomics principles, macroeconomics principles, intermediate microeconomics, industrial organization, public finance, mathematical economics, microeconomic theory, advanced microeconomic theory; law and economics, modern welfare economics, economics of the firm, organization economics, speculative markets, game theory and economic applications, and optimization and economic analysis. I have also taught these two courses in the finance department of the A.B. Freeman business school at Tulane University: investments, a standard required undergraduate business course,[154] and options and futures markets, a standard elective second year M.B.A. course.[155]

At the start of my second semester at Tulane, on the first day of class, I was going over my section of the principles of microeconomics course syllabus in class when a student raised her hand and asked if I knew what Mardi Gras was. I replied I was familiar with the concept. She said Mardi Gras is not a concept, it's a way of life. I said everything is a concept and asked if she would care to elaborate about Mardi Gras because she seemed to be very familiar with the Mardi Gras concept. She said that Mardi Gras is an opportunity to go out, drink alcohol, party, and have a fun time. I thought and did not say how does that differ from many other evenings in her undergraduate experience. I decided to ask why she asked if I was familiar with Mardi Gras. She answered because on the course syllabus, there is a reading assignment for Mardi Gras and a related homework assignment due on the next day. She asked if this was my initial year of teaching at Tulane. I stated yes and she as a freshman said that I would come to learn to have more realistic expectations about what students do on Mardi Gras and how many students attend classes the day after Mardi Gras. She was quite right. I learned that year to never again assign any reading for Mardi Gras nor have homework due on the day after Mardi Gras. Both would be quite unrealistic for most students.

During the course review session for a section of microeconomics principles I taught at Tulane, a student asked if a particular topic we were discussing was important. I thought and did not say sarcastically the topic was unimportant and I was just wasting their time and mine. I instead asked that student what she meant by important, for her soul, the final examination, or life? She replied of course for

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153 William F. Sharpe, *Capital Asset Prices with and without Negative Holdings*, 46 J. Fin. 489 (1991) (Nobel lecture).

154 This course covered modern portfolio theory, capital asset pricing model, arbitrage pricing theory, bonds, stocks, mutual funds, and collectibles.

155 This course covered the markets, pricing, and valuation of derivative securities and contingent claims.

the purposes of passing the final examination and the course. I replied there are more important things than any one final examination grade and any one course grade. She said while that was true in the grand scheme of things, her immediate focus had to be on the final examination grade. I tried to convince her that learning to appreciate the benefits and costs of seeing the world from a microeconomics point of view likely would have a longer-term impact on her life than her final examination grade. I am not sure if she was convinced. As Sean Covey wrote in *The 7 Habits of Highly Effective Teens*, "grades are important, *learning* is more important, so make sure you don't forget why you're in school to begin with."[156]

After teaching three years at Tulane, I passed a mid-tenure review and received an academic year-long sabbatical, during the fall of which I was a visiting scholar at Stanford law school and a visiting assistant professor in economics at the University of California, Berkeley. I taught a section of intermediate microeconomics with about ninety students. One of the students asked me whether I thought it was a good idea to apply to law school. I asked her if she wanted to attend law school. She answered that her dad wanted her to attend law school. I asked her again if she wanted to attend law school. She answered that her boyfriend wanted her to attend law school. I asked her once more if she wanted to attend law school. She answered that she was not sure that she wanted to attend law school. I told her that she did very well on the midterm and could apply to attend business school, public policy school, or graduate school in economics. She ended up applying to law school and choosing between attending law at Stanford and the University of California, Berkeley's Boalt law school.

Terrance Odean was another student in that course. Terry always sat in the front row of class. It was only last May during the 2016 Boulder summer conference on consumer financial decision-making[157] that I learned Terry sat in the front row because Terry felt I spoke too fast and Terry wanted to catch what I was saying. Terry was a senior pursuing a bachelor of arts degree in statistics. Terry was a bit older than me and had returned to college at the University of California, Berkeley at the age of 37. Terry asked me to write a recommendation letter in support of his application to pursue a Ph.D. in finance at only the University of California, Berkeley. I suggested Terry also apply to Stanford, Harvard, etc. in the spirit of portfolio diversification. Terry said that for personal family reasons, he was only applying to the University of California, Berkeley. Another of Terry's recommendation letter writers was Daniel Kahneman, a 2002 economics Nobel laureate.[158] Terry was accepted by the finance Ph.D. program at the University of California, Berkeley.

Terry is now a well-known behavioral financial economist at the Rudd Family Foundation Professor and Chair of the Finance Group at the Haas School of Business, University of California, Berkeley.[159] Terry was a former director of UC Berkeley's Xlab, an experimental social science laboratory. Terry also co-authored a clever and famous article utilizing account data for over 35,000 households

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156 Sean Covey, The 7 Habits of Highly Effective Teens 220 (2014).

157 http://www.colorado.edu/business/sites/default/files/attached-files/boulder_summer_conference_program_2016_corrected_proof.pdf.

158 Daniel Kahneman, *Maps of Bounded Rationality*, 93 Am. Econ. Rev. 1449 (2003) (Nobel lecture).

159 Terrance Odean Personal Homepage, http://faculty.haas.berkeley.edu/odean/.

from a large discount brokerage to analyze the common stock investments of men and women from February 1991 through January 1997 and found men trading 45 percent more than women and earning annual risk-adjusted net returns 1.4 percent less than women earn; the differences are more pronounced between single men and single women with single men trading 67 percent more than single women and earning annual risk-adjusted net returns that are 2.3 percent less than single women earn.[160] Terry's current research empirically shows that: (1) women Chartered Financial Analyst (CFA) members are less conformity and tradition-oriented and more achievement-oriented than both men CFA members and women in the population at large,[161] (2) the mathematics gender gap predicts the percentage of women investment professionals across countries and across states,[162] and (3) among CFA Institute members, women are more likely to have a STEM parent (particularly a STEM mother) than men; STEM mothers increase the rate that daughters become CFA Institute members by 48% more than sons; and STEM fathers increase the rate that daughters become CFA Institute members by 29% more than sons.[163]

Terry also created a series of user-friendly instructional personal finance videos on YouTube.[164] I have assigned his terrific videos to law students in these two courses: (1) economic analysis of law, and (2) legal ethics and professionalism: business law issues. In the course on law and economics, I explain to students that finance is economics over time and under risk. I also teach students that having some financial literacy is desirable. In the course on legal ethics and professionalism, I explain to students that lacking financial literacy can lead to unethical and/or unprofessional behavior. In both courses, I teach students to understand the nonlinearity of compound interest and the importance of living frugally. Appreciating how compound interest works helps convince students to save as much as they can as soon as they can.[165] I explain that lawyers have to be ready to be fired or quit instead of engage in unethical or unprofessional behavior. I then explain the way to be prepared to resign or be terminated is to live well below your means. I remind students of the difference between want and need. Law students come to appreciate why and understand how practicing financial mindfulness and retirement planning enables them be able to say no thank you to becoming entangled in unethical career-ending professional disasters. Discussing how mindfulness and financial decision-making are interdependent provides a pragmatic example of how mental health and financial health can affect each

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160 Brad M. Barber & Terrance Odean, *Boys will be Boys: Gender, Overconfidence, and Common Stock Investment*, 116 Quart. J. Econ. 261 (2001).

161 Renée B. Adams, Brad M. Barber & Terrance Odean, *Family, Values, and Women in Finance*, Mar. 8, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2827952.

162 Renée B. Adams, Brad M. Barber & Terrance Odean, *The Math Gender Gap and Women's Career Outcomes*, Mar. 16, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2933241.

163 Renée B. Adams, Brad M. Barber & Terrance Odean, *STEM Parents and Women in Finance*, July 18, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2975898.

164 https://www.youtube.com/user/PR67895/playlists.

165 Peter H. Huang, *Achieving American Retirement Prosperity by Changing Americans' Thinking About Retirement*, 22 Stan. J.L., Bus. & Fin. 189-259 (2017).

other.[166] I also recommend Terry's videos to family and friends as ways to learn important financial ideas and concepts in an engaging and fun way.

D. Stanford University 2L-3L and University of Chicago 1L

I earned a J.D. from Stanford law school (SLS) upon transferring after being a 1L at the University of Chicago (U of C) law school. I have already written at some length elsewhere about being an anxious, stressed fish-out-of-water 1L at the U of C,[167] being a calmer, happier more-at-home 2L and 3L at SLS,[168] being on both sides of the entry level law faculty market,[169] and teaching in several vastly different law school cultures, ranging from quite collegial at the University of Southern California to southern at the University of Virginia to dysfunctional at several other places.[170]

Some colleagues have asked me whether and how being a 2L and 3L at SLS differed from being a 1L at U of C law school. The answer is the difference is like that between temperate, cheerful, blue-sky, and sunny Palo Alto, California versus cold, gloomy, gray, and overcast Hyde Park, Illinois. The student cultures at SLS and U of C are genuinely like day and night respectively. At the U of C law school, most students humble-bragged they studied weekends, even if they did not. At SLS, most students humble-bragged they did not study weekends, even if they did. At the U of C law school, most professors called students Mr. or Ms. and the student's last name. At SLS, most professors called students by the student's first name. At the U of C law school, most professors used the cold-calling inquisitorial Socratic method, some effectively and some not. At SLS, professors used various teaching methods, including a gentler and kinder form of Socratic dialogue without cold calling and with students on assigned panels, voluntary discussion, and/or lecture. At the U of C law school, most professors dressed in suits as their teaching costumes, even women. At SLS, most professors dressed in what the SLS registrar called the faculty's casual gardening clothes (because they were fertilizing their students' minds). At the U of C law school, many students and faculty would habitually and routinely apply elementary microeconomics to analyze law, even if they did it often simplistically and sometimes incorrectly. At SLS, many students and faculty criticized applying elementary microeconomics to analyze legal rules and institutions, even if they did it often simplistically and sometimes incorrectly.

I took many seminars at SLS and for each one, wrote an independent research paper, some of which formed the foundation of a law review article published after law school. For example, I learned basic human biology and genetics in a seminar course titled *Advanced Health Law*, covering the ethical, legal, and social implications arising from advances in our knowledge of human genetics.[171] My

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166 Peter Dunn, *Pete the Planner: How Mental Health Impacts Financial Health?* 10 USA Today (Aug. 26, 2017, 7:00 AM), https://usat.ly/2xBs6qx.

167 Huang, *supra* note 1, at 328-31.

168 *Id*. at 332-33.

169 *Id*. at 334-35.

170 *Id*. at 335-45.

171 This course covered such topics as consequences of genetics for human reproduction, ethics of genomic biobanks for research, forensic uses of genetics, genetic enhancement,

independent research paper, *Herd Behavior in Designer Genes*, was invited to be published in a symposium issue of the *Wake Forest Law Review*.[172] My law and economics seminar course paper, *A New Options Theory for Risk Multipliers of Attorneys' Fees in Federal Civil Rights Litigation*, became my academic job market paper and was published in the *New York University Law Review*.[173] My senior thesis, *The Unexpected Value of Litigation: A Real Options Perspective*, was published nine years later in the *Stanford Law Review*.[174]

I took a course titled *Decision Analysis*[175] in conjunction with applying and becoming a Stanford Center on Conflict and Negotiation (S.C.C.N.) fellow in the spring of 1996.[176] A team of professors taught the course. That team included Amos Tversky, a cognitive psychologist whose joint research with another psychologist Daniel Kahneman formed the foundations of behavioral law and economics.[177] Michael Lewis, the author of *Moneyball*, wrote a book about the unique collaboration between Tversky and Kahneman.[178] Kahneman was a recipient of the 2002 Nobel memorial prize in economic sciences[179] "for having integrated insights from psychological research into economic science, especially concerning human judgment and decision-making under uncertainty."[180] A central insight of Tversky and Kahneman's research is that people often make different choices when mathematically equivalent choices are presented differently.[181] An example of this preference inconsistency is when people have different emotional responses to and make different choices about alternatives depending on if those options are presented a negative frame such as mortality rates or a positive frame such as survival rates. By definition, the mortality rate of any alternative is one minus the survival rate of that same alternative. A perhaps apocryphal story is that when Amos Tversky learned about his diagnosis of metastatic melanoma, Amos Tversky asked the physician to speak in terms of survival rates to Barbara Tversky, Amos' wife and colleague in the Stanford psychology department. The physician agreed to do so and then spoke to Barbara Tversky in terms of mortality rates.

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genetic testing, genome editing, genome synthesis, and widespread whole genome sequencing.

172 Peter H. Huang, *Herd Behavior in Designer Genes*, 34 Wake Forest L. Rev. 639 (1999).

173 Peter H. Huang, *A New Options Theory for Risk Multipliers of Attorneys' Fees in Federal Civil Rights Litigation*, 73 N.Y.U. L. Rev. 1943 (1998).

174 Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 Stan. L. Rev. 1267 (2006).

175 This one-credit pass fail course was cross-listed in several other departments and required students to attend weekly presentations about decision-making by professors from other law schools, economics departments, and psychology departments.

176 S.C.C.N. fellows met with the speakers and shared conversation over dinner.

177 Paul Brest, *Amos Tversky's Contributions to Legal Scholarship: Remarks at the BDRM Session in Honor of Amos Tversky, June 16, 2006*, 1 Judgment & Decision Making 174 (2006).

178 Michael Lewis, The Undoing Project: A Friendship That Changed Our Minds (2016).

179 Kahneman, *supra* note 158.

180 *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2002*, The Official Web Site of the Nobel Prize, http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2002/kahneman-facts.html.

181 Daniel Kahneman & Amos Tversky, *Prospect Theory*, 47 Econometrica 263 (1979).

E. Law Faculty at Multiple Schools

After the first law school class I taught, a University of Pennsylvania law student came up and asked if this was the first time I was teaching securities regulation. I answered yes and he replied that he preferred to take a course from a professor who was not teaching it for the first time. I said that I understood and respected how he felt. I thought and did not say that I preferred to teach students who were not taking a course for the first time. My point in recounting this interaction is to draw attention to how students in any course are heterogeneous in their background, motivation, preparation, and tenacity. Students have the options to be more or less hard-working, motivated, and prepared. Teachers must accept a reality in which not all students will be hard-working, motivated, and prepared to learn. Teachers can and should engage students by making clear why the course is relevant for students and how the course can make a positive difference in their lives.

Karl Schellscheidt was a student in my section of securities regulation in his and my second year at the University of Pennsylvania law school. We shared a meal and/or ice cream together every now and then in the food court near the law school in the semesters after Karl took the course. His eldest daughter was born right before he started law school, his second was born right after his second year first semester exams, and his third was born right after he took the bar exam. Karl was a corporate lawyer for Dechert LLP for a couple of years.

Five years after Karl graduated, I saw Karl again in McCaffrey's Food Market in Princeton shopping center when I was a member of the Institute for Advanced Study School of Social Science during the 2005-2006 academic year, its psychology and economics themed year. We resumed our friendship and spoke about utilizing technology to democratize the delivery of education. Based on his over twenty-five years of teaching and private tutoring experience, Karl co-founded ePrep, Inc., a unique video-based online test prep study program that provides the benefits of expert private tutoring to its clients at an affordable cost.[182] Karl is ePrep's president and chief executive officer. Before law school, Karl graduated from Princeton University with a bachelor's degree in civil engineering and from Seton Hall University with a master's degree in secondary education. Karl was an environmental science instructor for the office of continuing education at Rutgers University. Karl also taught, coached, and served as a dorm parent at the Hun School of Princeton.

I taught in the spring of my first year of teaching law school a first-year perspectives elective in law and economics. I had taught versions of an undergraduate course in law and economics in the economics departments at Tulane University and the University of Southern California. Many of those students were pre-law majors in economics or political economy and all of the students had taken intermediate microeconomics. We covered a brief introductory paperback about law and economics[183] and a more comprehensive textbook about law and economics that surveyed from an economic viewpoint the core first-year law subjects of property, torts, contracts, civil procedure, and criminal law.[184] Law

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182 ePrep, https://www.eprep.com/.

183 A. Mitchell Polinsky, An Introduction to Law and Economics (4th ed. 2011).

184 Robert Cooter & Thomas Ulen, Law & Economics (6th ed. 2011).

students taking a law and economics course form a bimodal distribution in their knowledge of microeconomics. We covered elements of price theory, behavioral economics, and game theory.

Two law students in that course received a grade of A+ and made the University of Pennsylvania law review because of that. Both of those students took securities regulation from me in the fall of their and my second year at the University of Pennsylvania law school. One of them became a summer associate practicing securities in the New York City office of a so-called "white shoe" law firm. She jokingly asked me if I would be able to get her out of the University of Pennsylvania law school public interest requirement. I replied that I did not have the power and even if I did, she should do some public interest. She chose to teach law to local high school students and found it exhilarating. I asked if that experience changed her career plans. She replied that she had accepted an offer to be an associate in the New York City office of a so-called "white shoe" law firm to be focusing on securities, mergers and acquisitions, and private equity. She mentioned that she was tired of eating Kraft brand or even sometimes generic brands of macaroni and cheese. A couple of years later, when I attended the American law and economics association meetings held at NYU law school, we met for dinner. She ordered as her main course an entree of macaroni and cheese that cost forty-five dollars. She mentioned that if she is at work after six-o-clock, she can order dinner compliments of her law firm and if she is at work past nine-o-clock, she can order a limousine ride home compliments of her law firm. If she was a rational economic actor who learned law and economics well, then she would probably leave work after 9 p.m.

I have taught a diverse range of elective and required courses in law schools at the University of Pennsylvania, the University of Southern California, the University of Chicago, the University of Virginia, the University of Minnesota, and Yale University. I have taught these courses: business associations; business basics for lawyers; corporate finance; derivative securities and their regulation; economic analysis of law; financial decision-making; law and economics; law and human behavior; law, happiness, and neuroscience; law, happiness, and subjective well-being; law and popular culture; legal ethics and professionalism: business law issues; media, law and popular culture; neuroscience and law; securities regulation; securities litigation and enforcement; and torts. I was the inaugural Harold E. Kohn Chair professor at Temple University law school. I am currently a law professor and the inaugural DeMuth Chair of business law at the University of Colorado, Boulder.

When I was a member in the School of Social Science at the Institute for Advanced Study, some other members were surprised by my being a lawyer and former mathematical economist. An economic theorist stated that my introducing myself to him as a business law professor was misleading as it belied how much general equilibrium theory I knew and that I co-authored an article in the *Journal of Mathematical Economics* about existence of general equilibrium for a system of incomplete asset markets.[185] Other members would sometimes ask me to provide free financial or legal advice. I declined after reminding them that price can be a signal of quality.

[185] Peter H. Huang & Ho-Mou Wu, *Competitive Equilibrium of Incomplete Markets for Securities with Smooth Payoffs*, 23 J. Mathematical Econ. 219 (1994).

Two women behavioral law and economics scholars who each hold a J.D. and an economics Ph.D. asked me while I was a 1L whether I found being a law student or undergraduate mathematics major or graduate student in applied mathematics taking graduate economics courses to be more challenging or difficult. I told both of them such a comparison is like that between apples and oranges. That being said, I also told them that law school was often pedantic and unintellectual, while economics and mathematics were fun. Additionally, there is an about one order of magnitude difference between the couple of hundred first-year students in an entering class of a top law school program compared to about thirty first-year students in an entering class of a top economics graduate program. That difference reflects both applicant preferences and program selectivity. That difference also is associated with differences in student competition and culture. Graduate economics courses have Ph.D. teaching assistants running weekly sections and grading written homework assignments and midterms. Law school courses provide no such teaching support nor regular feedback to students.

I offered the above personal higher educational history to provide some background and context about my unique perspectives towards, and interests in, improving legal education. I learned many lessons from my unique experiences in higher education. For example, while a 1L, I paid close attention to how my law professors taught in addition to what they taught. There was very high variance across law professors in pedagogical efficiency and proficiency of Socratic dialogue. When I was an entry-level law faculty candidate, a senior non-business law professor asked me during an office interview if I would teach securities regulation using the tried and true method of Socratic instruction. I answered I would teach securities regulation the same way that it was taught to me by former S.E.C. Commissioner Joe Grundfest, namely using a lecture format. The senior non-business law professor leading the interview disagreed vehemently with not using the Socratic method and said Socratic dialogue is the only way to teach law students how to think for themselves. I chose not to ask this professor if he had any empirical data or evidence to support his assertion. I did not get an offer to join the faculty of that professor's law school.

I have learned as a teacher to meet students as they are and where they are. Teachers may prefer their students to be different people or to know less or more than they do. I also learned that it helps most students to not "hide the ball" in teaching. Most students appreciate having the course learning objectives and the method(s) of learning assessment explicitly stated (and emphasized) on their course syllabus. The method(s) of learning assessment should measure the student achievement of the course learning objectives. If there is a mismatch, then one or both must change to result in a match. The course assessment method(s) will dictate what students choose to spend their attention and time learning. The final examination or whatever is the course assessment method usually is the proverbial tail that wags the dog. Teachers are role models and sources of emotional contagion. If a teacher is curious, kind, and passionate, students are more likely to also be curious, kind, and passionate. Finally, I learned that a law school's leadership can matter a great deal, both positively and negatively. A law school dean can demoralize, dishearten, and undermine a law school's faculty, students, and staff by running a law school with a lack of ethics, lack of leadership, lack of accountability, secrecy, and top-down micro-management. A law school dean can instead encourage, hearten, and inspire a law school's faculty, students, and staff by running a law school with accountability, confident leadership, ethical leadership, participatory

decision-making, and transparency. Leadership can make a big difference in the daily lived experiences of a law school's faculty, students, and staff. I co-authored an article applying psychological game theory to demonstrate the importance of organizational leaders being ethical leaders and role models to avoid corrupt cultures from developing and taking over an organization.[186]

II. Why Teach Law Students About Happiness and Mindfulness?

Law schools do not operate in vacuums. Law schools operate in markets or more accurately, quasi-markets, that is market-like settings. The J.D. degree has complements (joint degrees and L.L.M. degrees) and substitutes (M.L.S. degrees). There has always been and is now more than ever intense competition among law schools for applicants, attention, students, professors, deans, donations, prestige, and media coverage. There are sub-quasi-markets indexed by geographical regions, legal specialty areas, and *U.S. News & World Report* ranking cohorts. Many law school stakeholders believe their law school deserves to be ranked higher than it is and has as its real peers higher-ranked law schools. Such inaccurate and self-serving beliefs are often delusional, inspirational, or wishful thinking. The law school quasi-market has barriers to entry, informational asymmetries, and reputational stickiness. Yale has been and is likely to be stuck as the *U.S. News & World Report* number one ranked law school, even if wanted to have the ranking of zero or a negative number!

There is deliberate and innate opaqueness about law school quality, imperfect self-regulation, and conflicted self-governance. Law school stakeholders are heterogeneous and may even have conflicting objectives based on differences in beliefs, philosophies, preferences, risk attitudes, time horizons, and values. Law schools operate in quasi-markets likely to have industrial organizational structures that are problematic from the viewpoints of distributional equity and economic efficiency.

There are long-standing differences among law school admits, applicants, students, faculties, and deans in attitudes towards lack of diversity by ethnicity, gender, and socio-economic class. Policies about increasing diversity are often contested and contentious among faculty. Based on interviews between 2009 and 2011 at two law schools of one hundred and six law students, non-participant observations of panethnic student groups, and analysis of email list correspondence, sociology professor Yung-Yi Diana Pan analyzes how systemic inequalities are generated and sustained in law schools, racialization happens with professional socialization, panethnic students navigate their gender, identities, and race in an institutional context, how lived experiences of panethnic students influence their student organization association choices and career paths, and race operates in law schools for students of color and in white students' minds.[187]

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[186] Peter H. Huang & Ho-Mou Wu, *More Order Without More Law: A Theory of Social Norms and Organizational Cultures*, 10 J.L. Econ. & Org. 390 (1994).

[187] *See, e.g.*, Yung-Yi Diana Pan, Incidental Racialization: Performative Assimilation in Law School (2017).

A law school can seek many objectives, include maximizing one of these variables: the law school's annual ranking according to *U.S. News & World Report*, alumni engagement and involvement, applications, assessments by and reputation among lawyers and judges, bar passage rate of first-time test takers, number of law school graduates employed at graduation, number of law school graduates employed after ten months, enrollment, faculty's research reputation, peer assessment, selectivity, public perceptions and profile, students' L.S.A.T. scores (25th-75th percentile), and students' undergraduate G.P.A.s (25th-75th percentile). Some aspirations that many law schools do not seem to pursue are to become places and spaces that are happier, more diverse, more inclusive, more quantitative, and more welcoming.

Part II of this Article analyzes why teaching law students about happiness and mindfulness is a worthy goal. First, this part of the Article discusses law student discontent. Second, this part of the Article discusses what motivates law school applicants, students, alumni, and faculty. Third, this part of the Article discusses what motivates clients of law school graduates. Fourth, this part of the Article discusses how unhappy law students become unhappy lawyers. Fifth, this part of the Article discusses what motivates law professors.

A. Law Student Discontent, Unhappiness, and Suffering

A 2014 cross-sectional survey of law students at fifteen law schools found that about "one-quarter to one-third of respondents reported frequent binge drinking or misuse of drugs, and/or reported mental health challenges. Moreover, the results indicated that significant majorities of those law students most in need of help are reluctant to seek it."[188] At Yale, 70% of the law students surveyed (206 students in a sample of 296 students) admitted suffering from some type of mental health issues.[189]
Although many other professionals also face stress, as Yvette Hourigan, director of the Kentucky Lawyer Assistance Program, cogently pointed out:

> Being a physician has stress. However, when the surgeon goes into the surgical suite to perform his surgery, they don't send another physician in to try to kill the patient. You know, they're all on the same team trying to do one job. In the legal profession, adversity is the nature of our game.[190]

Lawyers are often financially rewarded for being hostile. Some clients will seek and hire the most aggressive, antagonistic, argumentative, intimidating, unpleasant, and unsympathetic jerk of a gladiator they can find to be their divorce or torts lawyer. Adversarial rules of civil and criminal procedure incentivize, normalize, and reward a zero-sum, hypercompetitive, no-holds-barred, take-no-prisoners, winner-take-all mentality and mindset. An economically-minded

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188 Organ, Jaffee, & Bender, *supra* note 23, at 116.

189 Yale Law School Mental Health Alliance, *Falling Through the Cracks: A Report on Mental Health at Yale Law School*, Dec. 2014, https://law.yale.edu/system/files/falling_through_the_cracks_120614.pdf.

190 Rosa Flores & Rose Marie Arce, *Why Are Lawyers Killing Themselves?* Jan. 20, 2014, updated 2:42 pm ET, http://www.cnn.com/2014/01/19/us/lawyer-suicides/index.html

observer might simply characterize the unhealthiness of law practice and law school as just additional costs of being a lawyer and law student, albeit emotional health, mental health and physical health costs that are hard to perhaps measure, observe, quantify, and verify.

Legal education often implicitly and even sometimes explicitly trains and socializes law students to be amoral, if not immoral.[191] It is by now quite well-known that many law students come into law schools bright-eyed and bushy-tailed with intrinsic values to do good, help the vulnerable and underprivileged in our society, and make our world a better place.[192] Yet, too many law students end up obsessing in law schools about extrinsic values of comparative worth, such as their class rank, grades, honors, and salary offers.[193] Law school often alters law students in many truly fundamental ways, some that are very undesirable personally and societally.[194] The displacement of intrinsic values by extrinsic values that happens to many law students reduces their subjective well-being, deep sense of meaning or purpose, and self-concordance.[195] It should be unsurprising that emotionally impaired and mentally unhealthy law students graduate to become emotionally impaired and mentally unhealthy lawyers.[196] Scott Fruehwald, a law professor, posted a blog titled *Why Professional Identity Training is So Important*, focusing on how the years in law school can be formative and transformative in helping law students develop healthy and sustainable professional identities.[197] Part of the raison d'être of law school is to help law students grow into and become flourishing lawyers. John Tomer, an economist who was a founder and past president of the society for the advancement of behavioral economics, recently wrote about how neoclassical economics and behavioral economics are both missing the same ingredient, namely:

> the conception of a human being as an individual who develops in many different ways along a sequence of stages, a maturational path. As wise thinkers through the ages have recognized, humans are capable of attaining a very high level of development, involving a full flourishing of

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191 Peter H. Huang, *How Improving Decision-Making and Mindfulness Can Improve Legal Ethics and Professionalism*, 21 J.L. Bus. & Ethics 35 (2015).

192 Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. Legal Educ. 112 (2012).

193 Lawrence S. Krieger & Kennon M. Sheldon, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Values, Motivation and Well Being*, 22 Behav. Sci. & L. 261 (2004).

194 Lawrence S. Krieger, *Psychological Insights: Why Our Students and Graduates Suffer, and What We Might Do About It*, 8 J. Assn. L. Writing Directors 259 (2002).

195 Kennon M. Sheldon & Lawrence S. Krieger, *Walking the Talk: Value Importance, Value Enactment, and Well-Being*, 38 Motivation & Emotion 609 (2014).

196 Lawrence S. Krieger, *Service Job Lawyers Are Happier than Money Job Lawyers, Despite their Lower Income,* 9 J. Pos. Psychol. 52 (2014).

197 Scott Fruehwald, *Why Professional Identity Training Is So Important*, Legal Skills Prof Blog, July 18, 2017, http://lawprofessors.typepad.com/legal_skills/2017/07/why-professional-identity-training-is-so-important.html. *See also* Scott Fruehwald, Developing Your Professional Identity: Creating Your Inner Lawyer (2015).

> all their human capabilities in the broadest and highest sense over their life cycle.[198]

Supreme Court Justice William Rehnquist wrote an opinion about private securities fraud litigation in which he stated: "we deal with a judicial oak which has grown from little more than a legislative acorn."[199] This memorable phrase offers a compelling picture of change over time. Sometimes, such change is a positive growth as is the case of a little acorn growing into a huge oak tree. Other times, the change is a negative descent as is all too often the case with idealistic, compassionate, curious, empathetic, and socially concerned law students becoming arrogant, anxious, depressed, hostile, and jaded lawyers.

Empirical evidence finds that law schools do not select unhappy students.[200] Yet within the first semester of law school, many students report feeling adrift, anxious, apathetic, cynical, dejected, disaffected, disheartened, disillusioned, dispirited, frustrated, irritable, isolated, jaded, lost, overwhelmed, overworked, stressed, unhappy, and withdrawn. Hopefully, this negative affect is neither desired nor intended by most law professors. As law professors, we should first and foremost heed the maxim to do no harm![201] We can and must do better affectively by our students than emotionally harming them.[202]

Perhaps due to path dependence and serendipity, more legal clinical faculty, legal writing faculty, and law school administrators than legal doctrinal faculty have teaching and research interests about law student and lawyer happiness. This is unfortunate because legal doctrinal faculty have the most power and status at law schools in comparison with legal clinical faculty, legal writing faculty, and non-decanal law school administrators. This neglect of law student and lawyer well-being is yet another of the many inequities, issues, and problems with the traditional, institutional, and illegitimate status hierarchy among American law school faculties.[203]

Psychology professor Kennon Sheldon and law professor Lawrence Krieger conducted longitudinal studies at two law schools and found that law students at both schools experienced significant and substantial erosion of well-being and psychological need satisfaction within the first year of law school. They summarize the state of research findings as of 2007 in the first paragraph of their article:

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198 John F. Tomer, *Smart Persons and Human Development: The Missing Ingredient in Behavioral Economics*, *in* Handbook of Behavioural Economics and Smart Decision-Making: Rational Decision-Making with the Bounds of Reason 137-38 (Morris Altman ed., 2017).

199 *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1974).

200 Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success*, 83 Geo. Wash. L. Rev. 554 (2015).

201 For a detailed analysis of the origins and usage of the so-called Hippocratic injunction to do harm, *see* Cedric M. Smith, *Origin and Uses of Primum Non Nocere--Above All, Do No Harm*! 45 J. Clin. Pharmacology 371 (2005).

202 Peter H. Huang, *First Blog Post of the Law School Wellness Project*, Stanford Law School Blogs, Aug. 8, 2016, https://law.stanford.edu/2016/08/08/1st-blog-post-of-the-law-school-wellness-project/.

203 Kathryn M. Stanchi, *Who Next the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. Rev. 469 (2004).

> The popular notion that law school is an exceptionally stressful experience for many students has been substantiated by longitudinal studies. Indeed, the emotional distress of law students appears to significantly exceed that of medical students and at times to approach that of psychiatric populations. These findings have substantial human and social significance, given that the level of adjustment of graduating law students is likely to carry over into professional practice and may set the stage for the unparalleled frequency of psychological distress and other problems seen broadly among lawyers today.[204]

There have since then been precipitously sharp declines in the demand for legal services[205] and relatedly, also the demand for professional legal education.[206] These twin decreases have led to many proposed reforms in the legal profession[207] and legal education.[208] A commentator observed law schools that are not in the top tier are "hunkering down just long enough until it thins down at the bottom."[209] Law students who are graduating from the top three law schools, namely Yale, Stanford and Harvard, "will nearly always find security and top-paying work, those attending non-rated or poorly rated schools will struggle as their profession contracts. Even students at moderately rated schools could see their prospects shrink, statistics suggest."[210]

James Daily, attorney, Washington law school lecturer, and creator and author of a blog about superheroes, supervillains, and the law,[211] advocates that "American law schools–at least those associated with universities–should return to offering the LL.B., now as a four-year undergraduate degree, while making the J.D. the research-focused graduate degree it always should have been."[212] Daily argues that offering the professional law degree to undergraduates, as is the case in most non-U.S. countries has many economic and other benefits coupled with some negligible financial costs to law schools and law students.[213]

The AccessLex Institute, a nonprofit organization "underpinned by nearly 200 American Bar Association-approved nonprofit and state-affiliated law schools,"[214] complied a 2017 Legal Education Data Deck,[215] depicting certain data and trends

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204 Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self- Determination Theory*, 33 Personality & Soc. Psychol. Bull. 883, 883 (2007).

205 *See, e.g*., James E. Daily, *Embracing New (and Old) Ideas*, 53 Wash. U.J. L. & Pol'y 157, 161-63 (2017).

206 *Id*. at 159-61.

207 *See, e.g*., Bruce MacEwen, Growth is Dead: Now What? (2013).

208 *See, e.g*., Steven J. Harper, The Lawyer Bubble: A Profession in Crisis (2013); Richard Susskind, Tomorrow's Lawyers: An Introduction to Your Future (2013); Brian Z. Tamanaha, Failing Law Schools (2012).

209 Greg Toppo, *Why You Might Want to Think Twice Before Going to Law School,* USA Today, June 28, 2017 https://usat.ly/2tnE3Ch.

210 *Id*.

211 Law and the Multiverse, http://lawandthemultiverse.com/.

212 Daily, *supra* note 205, at 166.

213 *Id*. at 166-68.

214 About AccessLex Institute, https://www.accesslex.org/about-us.

215 Legal Education Data Deck, https://www.accesslex.org/legal-education-data-deck.

about access, affordability, and the value of U.S. legal education. This is a living document in the sense that it will be periodically updated. Based on publicly available data, "J.D. degrees awarded per year increased overall between 2003 and 2013, then began to decline in 2014. In 2016, about 37,000 J.D. degrees were awarded."[216] Additionally, "the median salary of recent J.D. graduates is less in 2015 than it was in 2007."[217] Among 1992-1993 bachelor's degree recipients, more than "80 percent of law-related degree recipients felt their education was worth the money."[218] In comparison, only "52 percent of 2007-2008 bachelor's degree recipients who had since earned a graduate degree in legal professions and studies felt their education was worth the cost."[219]

B. What Motivates Law School Applicants, Students, and Alumni?

People apply to and attend law school for many reasons. Because law school is a graduate professional school, most college graduates who apply to law school want to practice law, at least for a while. While there are many things that a person can do as a law school alum, most become lawyers. People desire to become attorneys for many personal and professional reasons, including doing good, fighting for justice, getting rich, having social status, helping people, and making a difference. The rest of this section considers motivations people have in attending law schools.

It has become commonplace to say that students are consumers who buy the commodity of education. A problem with this metaphor is that students are by definition less than fully informed consumers about what it is they are consuming. If they were fully informed, they already would know the information they seek through education. Education is more than information transmission, which takes attention, effort and time, by students and teachers alike. Education entails a set of in-class and related out-of-class experiences, which may have positive or negative affect. Such experiences, though ephemeral, can have lasting impacts in terms of biological consequences and memories. Whether people and society should care more about people's experiences or their memories are intriguing questions.[220] Law school can produce memories, possibly fond, of times, possibly good. Law school can also produce memories, possibly unpleasant, of times, possibly stressful.

It has also become commonplace to say that law students are investors in human capital by acquiring the skills of legal analysis. More generally, pursuing any professional degree is a form of investment under uncertainty. Many variables are unknown and likely unknowable, such as future market returns of a professional degree. The past is never a guarantee of the future. The market for attorney services is under intense flux and pressure due to increasing automation, domestic and foreign competition from non-lawyers, and technological changes in the delivery of legal services.[221]

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216 *Id*. at 14.
217 *Id*. at 30.
218 *Id*. at 31.
219 *Id*. at 32.
220 Peter H. Huang, *Torn Between Two Selves: Should Law Care More About Experiencing Selves or Remembering Selves?* 17 S.M.U. Sci. & Tech. L. Rev. 263 (2014).
221 *See, e.g.*, Benjamin H. Barton & Stephanos Bibas, Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law (2017); Mark A. Cohen, *When*

For example, *Do Not Pay* is a completely free lawyer chatbot that democratizes legal assistance, including disputing parking tickets, assisting with landlord disputes, getting compensation from airlines for losing luggage or cancelling flights, disputing credit card charges, disputing credit report items, filing and disputing insurance claims, filing for or extending maternity and paternity leaves, filing complaints with the United States EEOC (Equal Employment Opportunity Commission), and getting consumer product refunds or replacements.[222] JustFix.nyc is an AI-enhanced website that offers the free service of helping New York City tenants fill out forms to get Housing Court assistance.[223]

The financial costs of attending law school include tuition, living expenses, and opportunity costs. There are also likely emotional costs, such as chronic stress, feeling overwhelmed, and negative impacts on personal relationships. There are even possible mental, physical, and psychological health costs, such as being constantly tired, insomnia, lack of physical exercise, loss of autonomy, substance abuse, and unhealthy eating habits. The benefits of investing in a law school education include financial opportunities that come from being able to practice law, psychological advantages of higher self-esteem and improved social status, and cognitive value of having been exposed to legal analysis. Just what legal analysis is or includes is up to debate. Many law students would say that legal analysis entails analogical reasoning, statutory interpretation, and persuasive legal writing.

Recently, there have been interesting analyses of the value of a J.D. in relation to law student debt and over the course of the business cycle. Law professor and former University of Louisville law school dean Jim Chen utilized mortgage lending guidelines that the Federal Home Administration and private lenders developed to calculate how much of an annual salary a law school graduate has to earn in relation to annual law school tuition to achieve marginal, adequate, and good ratios of income to debt.[224] Economics professor Frank McIntyre and law professor Michael Simkovic analyze the size and predictability of cohort effects in the premium in earnings from earning a law degree.[225]

Good is Good Enough: Finding The Appropriate Legal Delivery Resources, Forbes, Aug. 3, 2017, 5:54 a.m., https://www.forbes.com/sites/markcohen1/2017/08/03/when-good-is-good-enough-finding-the-appropriate-legal-delivery-resources/2/#160f26f96827; Glenn Harlan Reynolds, *Legal Automation Spells Relief for Lower-income Americans, Hard Times for Lawyers*, USA Today, updated 3:55 p.m. ET, Aug. 7, 2017, https://www.usatoday.com/story/opinion/2017/08/07/legal-automation-spells-relief-lower-income-americans-hard-times-lawyers/543542001/.

222 Joshua Browder, *The World's First Robot Lawyer – Now in 1,000 Legal Areas*, You Tube, July 10, 2017, https://www.youtube.com/watch?v=-rabJDCBUbY; John Mannes, *DoNotPay Launches 1,000 New Bots to Help You with Your Legal Problems*, TechCrunch, July 12, 2017, https://techcrunch.com/2017/07/12/donotpay-launches-1000-new-bots-to-help-you-with-your-legal-problems/.

223 Technology for Housing Justice, JustFix.nyc, https://www.justfix.nyc/our-mission.

224 Jim Chen, *A Degree of Practical Wisdom: The Ratio of Educational Debt to Income as a Basic Measurement of Law School Graduates' Economic Viability*, 38 Wm. Mitchell L. Rev. 1185 (2012). *See also* Jim Chen, *ARM-Twisting "A Degree of Practical Wisdom": A One-Year Readjustment of Legal Education's Debt-Based Stress Test*, MoneyLaw Blog, Oct. 20, 2102, http://money-law.blogspot.com/2012/10/arm-twisting-degree-of-practical-wisdom.html (revising his analysis).

225 Frank McIntyre & Michael Simkovic, *Timing Law School*, 14 J. Empirical Legal Stud. 258 (2017).

The market for legal services, like most job markets, involves asymmetric or private information in the sense that people know more about themselves than do potential employers. This informational gap is ameliorated somewhat by employers screening potential employees using such market signals as the *U.S. News & World Report* ranking of the law school attended, class ranking, law school G.P.A., and law review membership. So-called white shoe law firms are still hiring and offering high salaries to graduates of top law schools. Students used to joke at SLS that the hardest part about SLS was getting admitted to SLS. Some SLS students did not attend classes, preferring to use commercial study aids and classmates' notes to prepare for their finals.

Although market signals are imperfect proxies for some of the unobservable variables that legal employers care about, they are somewhat informative and free to potential employers. At Yale law school (YLS), where there are only two possible course grades: honors and high honors, some law students work very hard to differentiate themselves from their accomplished colleagues. Because the grades at YLS are noisy and uninformative signals, the many students planning to eventually go into legal academia or seek those prestigious federal judicial clerkships that are known as feeder clerkships for Supreme Court clerkships look for other ways to signal their legal ability, discipline, or work ethic, such as authoring a student note or being a faculty research assistant.

Law school certainly transmits legal information in the form of so-called "black letter" law to law students. More generally and importantly, law schools also transmit what is often called "thinking like a lawyer" or so-called critical thinking skills.[226] The phrase critical thinking means different things to different people. Many law students would likely say that critical thinking entails a form of learned pessimism, in terms of always thinking about what could possibly go wrong, and being able to criticize arguments by others and oneself, looking for logical fallacies, sloppy reasoning, and unfounded conclusions. People in other parts of a university would include as part of critical thinking quantitative reasoning skills, such as drawing and reading graphs, elementary probabilistic reasoning, and statistical literacy. Very few law students or even law professors would include any quantitative reasoning skills as part of critical thinking because of legal innumeracy.[227] Former First Lady Michelle Obama, while speaking at the National Science Foundation, described why she chose law to be her career by saying: "I know for me, I'm a lawyer because I was bad at [science and math]. All lawyers in the room, you know it's true. We can't add and subtract, so we argue."[228] Lack of risk literacy is a serious problem for some law students because the legal profession is becoming more quantitative, technical, and technological.

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226 *See, e.g.*, Thomas D. Morgan, The Vanishing American Lawyer 179-81 (2010).

227 James Ming Chen, *Legal Quanta: A Mathematical Romance of Many Dimensions*, 2016 Mich. St. L.J. 313 (2016); Edward K. Cheng, *Fighting Legal Innumeracy*, 17 Green Bag 2d 271 (2014): Lisa Milot, *Illuminating Innumeracy*, 63 Case Western L. Rev. 769 (2013); Arden Rowell & Jessica Bregant, *Numeracy and Legal Decision Making*, 46 Ariz. St. L.J. 191 (2014).

228 Michelle Obama, Remarks by the First Lady at the National Science Foundation Family-Friendly Policy Rollout (Sept. 26, 2011).

Law students undergo a transformation during law school, in many ways for which students are not always prepared.[229] This transformative process is an important part of most law students' development of a professional identity. This transformation starts early in law school and can also be uncomfortable, unexpected, and unsettling for some. Law school is not just about information transfer. Law school also is about becoming socialized to the dominant cultures, norms, and mindsets of the legal profession. Such socialization can be more or less foreign. Changes in law students' emotional, mental, and psychological attitudes can be large and painful or small and comforting. At its best, law school benignly transforms law students into lawyers. As the well-known fictional character from the movie *Paper Chase*, Harvard law school contracts law professor Charles W. Kingsfield Jr. famously said: "You teach yourselves the law, but I train your minds. You come in here with a skull full of mush; you leave thinking like a lawyer."[230] Some cynics might joke there is no difference between thinking like a lawyer and having mush in your skull because most lawyers lack quantitative analytical skills.[231]

Law schools teach law students to think like a lawyer, whatever that means exactly. It is helpful to students for professors to be transparent and explicitly state that law school teaches a certain style or way of thinking.[232] Different law professors usually mean (sometimes very) different sets of things by the phrase, thinking like a lawyer. What it means to think like a lawyer may differ across cultures, ethnicity, gender, generations, law school, practice areas, and regions. Economist Miles Kimball writes about cognitive economics, which he defines as the economics of what is inside people's minds.[233] Kimball explains that people hire and pay lawyers due to the finiteness of human cognition:

> As for lawyers, even if one considers talking in a courtroom a special skill that is not just a matter of intelligence, people pay a lot of money to lawyers who merely read law books and extract the relevant information. If everyone had infinite intelligence, it would be easy to understand the law books on one's own, and paying someone else to do it would only make sense if one's wage rate was higher than the lawyer's wage rate, or if one was a slow reader for physiological reasons. If everyone had infinite intelligence, even finite reading speeds would not give trained lawyers enough of an edge for them to charge the fees they do.[234]

Naturally, law schools teach law students how to read and extract legally relevant information from judicial opinions, regulations, and statutes. Law schools do more than

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229 Nelson P. Miller, Going to Law School: Preparing for a Transformative Experience (2016).

230 The Paper Chase (Twentieth Century Fox Film Corp. 1973).

231 *But see* Howell E. Jackson, Louis Kaplow, Steven Shavell, W. Kip Viscusi, & David Cope, Analytical Methods for Lawyers (3rd ed. 2017).

232 Ron Ritchhart, Mark Church, & Karin Morrison, Making Thinking Visible: How to Promote Engagement, Understanding, and Independence for All Learners (2011).

233 Miles Kimball, *Cognitive Economics*, 66 Japanese Econ. Rev. 167, 167 (2015).

234 *Id.* at 173.

just merely transmit information though. Law schools also teach law students "how to think like lawyers," a cognitive set of skills that include specific habits of thought. Those habits of thought that may be helpful professionally may not be helpful personally. Cross-examining significant others or one's children is likely to be a bad idea.

Law school alumni vary greatly in their engagement and involvement with their law school. Law school alumni can feel adoration, apathy, connection, contempt, hatred, and indifference towards their law school. Some law school alumni derive a positive sense of identity from being a graduate of their law school. Most people have fond memories of their college days when they became adults. Many people made life-long friends in college. Some people met their spouse or significant other in college. It was and still is commonplace for many students to go to law school directly after graduating from college. Thus, there are law school alumni who also have fond memories of their law school days, made life-long friends in law school, and met their spouse or significant other in law school.

The anxiety, chronic stress depression, and overall unhappiness that many law students have self-reported also means that many law school alumni have quite negative affective memories of their law school days. It also means that some law school alumni want no reminders of their law school days. Traditional five-year reunions offer alumni opportunities to reconnect with their friends (and possibly faculty), reminisce on their law school days, and revisit anew their law school. Those who attend their law school reunions form a proper, self-selected, and possibly unrepresentative subset of their law school alumni.

Overall, law school alumni are motivated to feel good about being a graduate of their law school. This motivation explains why many law school alumni are happy when the ranking of their law school alma matter goes up in the annual *U.S. News & World Report* ranking and are unhappy if not upset when the ranking of their law school alma matter falls in the annual *U.S. News & World Report* ranking. Happy law school alumni are likely to make supporting their law school alma mater a philanthropic priority, while unhappy law school alumni are not. Fundraising entails building connections and sustaining relationships with potential donors. Potential alumni donors differ in their motives, needs, and expectations. There are seven types of major donors, namely altruist, communitarian, devout, dynast, investor, repayer, and socialite.[235] Law schools that are successful in fund-raising develop and sustain a positive law school culture among students, alumni, staff, the greater community, and faculty. It is important for a law school's dean to collaboratively craft and successfully communicate to that law school's stakeholders a clear and compelling vision of that law school's core mission(s). The leadership of a successful law school is able to translate that vision into the languages of a law school's diverse constituents in such a way that students, alumni, staff, the greater community, and faculty all feel engaged and part of a positive, organizational culture that helps them flourish and thrive.

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[235] Russ Alan Prince & Karen Maru File, The Seven Faces of Philanthropy: A New Approach to Cultivating Major Donors (2001).

C. What Motivates Clients of Law School Graduates?

Clients hire lawyers to help solve legal problems. In litigation, clients hire lawyers to initiate or defend lawsuits. Clients hire lawyers for their legal expertise, practice experience, and problem-solving skills. Litigators also negotiate settlements of lawsuits. In transactional practice, clients hire lawyers to take companies public, defend against hostile takeovers, defend against Department of Justice prosecutions or Securities Exchange Commission (S.E.C.) enforcement actions, perform S.E.C. compliance, draft agreements for corporations, limited liability companies, or limited partnerships, make tender offers, or negotiate mergers or acquisitions. In alternative dispute resolution and mediation, clients hire lawyers to be advocates or neutrals.

Clients often hire lawyers at very emotional and stressful times for the clients. Most clients are not familiar with legalese, legal procedure, and the legal system. Human, as opposed to organizational, clients often despise and fear lawyers, including their own. The American legal system is not user-friendly, except for the knowledgeable and rich. As past Harvard University President and former Harvard law school dean Derek Bok wrote: "There is far too much law for those who can afford it and far too little for those who cannot."[236] Wealthy individuals and corporations have the financial resources to hire "dream" teams of the best lawyers that money can buy. Poor and even middle-class people often cannot afford to vindicate their most basic human rights and legal rights. There is no shortage of lawyers for corporate America or high net worth individuals. There is vast excess demand for lawyers to represent many even middle-income, let alone low-income, people.

Many lawyers' clients and law firms view lawyers today more as fungible commodities than people. Law once was a noble profession. Law now is a highly competitive business. Medicine and higher education also were once noble professions and now highly competitive businesses. Commodification of law, medicine, and higher education means that employers and customers in law, medicine, and higher education view lawyers, physicians, and professors as being highly interchangeable and replaceable. Such commodification is the result of such inexorable forces as automation, technological progress, and online competition. This commodification is related to a business, economic, and financial perspective to social transactions and market interactions. Conversations about law, medicine, and higher education now routinely utilize the language of benefits, competition, costs, efficiencies, externalities, markets, and tradeoffs. It is contested how individually and socially harmful are economics rhetoric, commodification discourse, and market metaphors.[237]

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[236] Derek Bok, *A Flawed System*, Harvard Magazine, May-June 1983, at 38.

[237] Margaret J. Radin, Contested Commodities (2001); Kenneth J. Arrow, *Invaluable Goods* 35 Am. Econ. Rev. 757 (1997) (reviewing Radin's book); Peter H. Huang, *Dangers of Monetary Commensurability: A Psychological Game Model of Contagion*, 146 U. Pa. L. Rev. 1701 (1998); Peter H. Huang, *Emotional Reactions to Law and Economics, Market Metaphors, and Rationality Rhetoric*, *in* Theoretical Foundations of Law and Economics 163 (Mark D. White ed., 2009).

In the last thirty-five years, approximately thirty client-based and attorney-based empirical studies[238] about lawyering skills establish that so-called soft skills,[239] such as communication, problem-solving, and resilience determine attorney professional achievement more than legal area expertise.[240] A meta-synthesis of these surveys found eight of the ten most important skills, as ranked by attorneys, are soft skills, namely, ability to assess deals and proposed solutions; ability to assess and mitigate risk; honoring commitments; delegation to and management of support staff; integrity and trustworthiness; keeping information confidential; punctuality; and treating others with courtesy and respect.[241] That meta-synthesis also revealed nine of the ten most important lawyering skills, as ranked by clients, are soft skills, namely, accurately estimating and clearly explaining attorney fees; communicating with clients; empathy; listening skills, responsiveness to clients; respectfulness; strategic problem solving; trust; and understanding of client needs.[242]

D. Unhappy Law Students Become Unhappy Lawyers

An open empirical question is whether legal education must have deleterious effects on law student happiness and well-being. What is empirically resolved is that current legal education does have deleterious effects on the self-reported happiness and subjective well-being of many law students.[243] It is also even at least partially clear exactly how and why this happens.[244] This section analyzes what happens when unhappy law students become unhappy lawyers. Unhappy law students become used to being unhappy and/or learn to develop bad habits and coping strategies to deal with their unhappiness, such as self-medication through substance abuse. The substances abused include alcohol, drugs, and unhealthy food.

Alcohol (over)consumption is accepted in the student culture of many law schools. Many law school events and functions routinely serve alcohol. Many law students get together to drink alcohol during a weekly informal "bar review" night, often Thursday before additional drinking at weekends parties and/or tailgating before football games. The lawyer well-being report issued recently by the National Task Force on Lawyer Well-Being explicitly and expressly recommends that law schools deemphasize alcohol at social events and discourage alcohol-centered social events.[245]

The danger of drug abuse is vividly illustrated by the story of Peter, who was a chemist before becoming a high-powered, successful patent lawyer.[246] Peter had made partner in the IP practice of Wilson Sonsini Goodrich & Rosati, a Silicon

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238 Randal Kiser, Soft Skills for the Effective Lawyer 25-26, *n*.5, 26-33, 292-302 (2017).
239 *Id*. at 4, 6, tbl. 1.1.
240 *Id*. at 32-33.
241 *Id*. at 34-35, tbl. 2.1.
242 *Id*. at 34-35, tbl. 2.1.
243 Krieger & Sheldon, *supra* note 193.
244 Krieger, *supra* note 194; Sheldon & Krieger, *supra* note 204.
245 National Task Force on Lawyer Well-Being, *supra* note 19, at 4, 5, 11, 19, 33, 40, n.159.
246 Eilene Zimmernan, *The Lawyer, the Addict*, N.Y. Times, July 16, 2017, at BU1.

Valley law firm that describes itself on its company website as "the premier legal advisor to technology, life sciences, and other growth enterprises worldwide."[247] Peter died alone a drug addict in his home July 2015 from a systemic bacterial infection due to intravenous drug usage. Eilene, his ex-wife, found in Peter's house a cornucopia of drugs including Adderall, cocaine, crystal meth, Tramadol, and Vicodin. Eilene observed that "drug abuse among America's lawyers is on the rise and deeply hidden."[248]

Eileen told Peter's heart-breaking story, including a sad, haunting fact that the last call Peter made on his cell phone was a conference call into work.[249] Peter is unfortunately only one of all too many lawyers who deal privately and silently with a highly stressful professional work life and self-medicate through substance abuse.[250] There are well-known disturbing, sobering, and tragic statistics about the percentage of lawyers suffering from anxiety, depression, and problem drinking, or self-medicating with cocaine, crack, hash, marijuana, opioids, sedatives and stimulants.[251] Compounding problems of alcohol and prescription drug abuse are some law firm cultures of avoidance and conspiracies of silence that fail to acknowledge that addiction is a disease.[252]

The fictional AMC television series *Better Call Saul* viscerally showed the possible tragic consequences that can result from lawyers who are suffering chronic stress and mental illness.[253] In the penultimate episode of the third season of the series,[254] Kim Wexler, law partner of the titular character, became fatigued and worn down mentally and physically from overwork and self-induced stress. Kim fell asleep driving, crashed her car into a boulder, and broke her arm. In the next and final episode of the season,[255] Chuck McGill, brother of the titular character, was forced out of a law firm that bore his name (Hamlin, Hamlin & McGill) and became obsessed with disabling every electronic device in his home to such an extent that he tore open walls to remove wiring. Chuck finally broke down and knocked over a gas lantern on purpose to set fire to his house, while still inside

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247 Wilson Sonsini Goodrich248 & Rosati Website, *About Us*, https://www.wsgr.com/WSGR/Display.aspx?SectionName=about.

248 *Id*. *See also* Eilene Zimmernan, *The Lawyer, the Addict*, N.Y. Times, Business Day, July 15, 2017, https://www.nytimes.com/2017/07/15/business/lawyers-addiction-mental-health.html (online version).

249 *See also* Debra Cassens Weiss, *BigLaw Partner Managed to Dial in to Work Conference Call Before His Drug-Related Death*, A.B.A. J., Work-Life Balance, July 19, 2017, 7:00 a.m. C.D.T., http://www.abajournal.com/news/article/drug_addicted_biglaw_partner_managed_to_dial_in_to_work_conference_call_bef/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.

250 *See, e.g*., Debra S. Austin, *Drink Like a Lawyer: The Neuroscience of Substance Use and Its Impact on Cognitive Wellness*, 15 Nev. L.J. 826 (2015). *See also* Brian Cuban, *Staying 'Well' in Law School*, Above the Law, Aug. 9, 2017, 2:47 pm, http://abovethelaw.com/2017/08/staying-well-in-law-school/?rf=1; Cuban, *supra* note 28.

251 *See, e.g*., Krill, Johnson, & Albert, *supra* note 27; Dave Nee Foundation, *Lawyers & Depression*, http://www.daveneefoundation.org/scholarship/lawyers-and-depression/.

252 Zimmerman, *supra* note 246.

253 Adam Banner, *'Better Call Saul' Highlights Stress and Mental Illness in the Legal Profession*, ABA J., July 31, 2017, 8:30 am CDT, http://www.abajournal.com/news/article/better_call_saul_highlights_stress_and_mental_illness_in_the_legal_professi.

254 *Better Call Saul: Fall* (AMC television broadcast June 12, 2017).

255 *Better Call Saul: Lantern* (AMC television broadcast June 19, 2017).

the house. The Centers for Disease Control and Prevention reported in 2014 that lawyers ranked fourth in the proportion of suicides in the profession, behind only dentists, pharmacists and physicians.[256]

Eilene remembers Peter working over sixty hours every week for twenty years ever since he started law school. Peter was a law review editor who graduated number one is his law school class and spoke at his commencement.[257] Law school can often be boring, exhausting, painful, stressful, and tedious. Some law students develop bad habits in law school about how to manage their stress. Many law students suffer from anxiety, depression, despair, hostility, learned pessimism, and unhappiness.[258] Lawyers often learn in law school to become highly, perhaps overly critical, detailed, and focused thinkers who approach legal problems in exclusively analytical, deliberative, and logical terms, eschewing all emotions.[259]

E. What Motivates Law Professors?

Law professors engage in teaching, scholarship, and service. Motivations of law professors for teaching, scholarship, and service are as varied as law professors. Some law professors only enjoy and/or are capable of doing well one of teaching, scholarship, and service. Other law professors enjoy and/or are capable of doing well all three of teaching, scholarship, and service.

In introductory economics courses, students learn the principle of comparative advantage in discussing the gains from international trade. British economist David Ricardo published in chapter seven of his political economy treatise,[260] his classical theory of comparative advantage to explain why trade among two or more countries can be mutually beneficial, even if one country's labor force is more efficient at producing every single commodity than laborers in other countries. Applying the concept of comparative advantage to people and tasks implies that it would be most economically efficient for people to specialize in doing tasks in which they have a comparative advantage.

Considerations of equity, fairness, or tradition prevent having professors specializing in only doing one of teaching, scholarship, and service. There are de facto exceptions in the form of reduced teaching loads for professors who excel at research or service. In the natural and social sciences, it is common for professors to apply for and be granted external research funds that explicitly include buying time off from some or all of a professor's teaching to do research. Some professors are able to effectively teach little if at all as long as they are able to secure highly competitive research grants and their renewals. This is especially true at higher-ranked research universities. There are no Nobel laureates in teaching excellence. In medical schools, professors often pay for laboratory space and part of their

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256 Flores & Arce, *supra* note 190.

257 Zimmernan, *supra* note 248.

258 Todd Peterson & Elizabeth Waters Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 Yale J. Health Pol'y, L., & Ethics 357 (2009).

259 Elizabeth Mertz, The Language of Law School: Learning to "Think Like a Lawyer" (2007).

260 David Ricardo, On the Principles of Political Economy and Taxation 77-93 (1817, 2004 ed.).

salaries from external research funding sources. Most grants also pay for overhead and often summer salaries. In law schools, professors do not have a tradition of having to apply for and secure external research funds.

Teaching and service can be fulfilling, though often labor-intensive and time-consuming. Both teaching and service also usually entail developing what economists would call firm-specific human capital. In other words, teaching and service are less observable and transferable than research. Publications are public information and proof of the ability to do research. Most professors have a research agenda or plan in the sense of multiple publications. Some professors believe in the concept of publishing only the least publishable unit of work product. Other professors publish the same idea multiple times in slightly different publications. Law reviews exacerbate these problems because law reviews are not peer-refereed, permit multiple, simultaneous submissions, and expedite manuscript reviews based on the signal of acceptance by lower-ranked law reviews. A recent law review article cleverly parodies and satirizes law review articles in general.[261]

My law school's current dean presented this top five list of reasons that law professors do research and write articles.[262] The number five reason that law professors write articles is for their family and themselves to be proud of what they do. The number four reason that law professors write articles is for promotion, tenure, and post-tenure review. The number three reason that law professors write articles is to experience the collegiality and camaraderie when making presentations at colloquia, conferences, meetings, seminars, and workshops. The number two reason that law professors write articles is to have or make an impact, be that among law professors, law and public policy makers, judges, the public, or society-at-large. The number one reason that law professors write articles is to achieve or sustain happiness or joy in terms of finding and having meaning and purpose.

Law professors can and should teach law students to become life-long learners who embrace curiosity,[263] asking their own questions,[264] and exceling at deep inquiry and imaginative questioning.[265] Law professors can and should create a culture of thinking in law school classrooms by utilizing these eight cultural forces: expectations, language, time, modeling, opportunities, routines, interactions, and environment.[266] A thinking culture

> is not about just adhering to a particular set of practices or a general expectation that people should be involved in thinking. A culture of thinking produces the feelings, energy, and even joy that can propel

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261 Pierre Schlag, *The Law Review Article*, 88 U. Colo. L. Rev. 1043 (2017).

262 S. James Anaya, Presentation at the University of Colorado Law School faculty scholarship retreat, *Making a Difference: Impactful Legal Scholarship*, May 20, 2017, Stanley Hotel, Estes Park, CO.

263 Brian Grazer, A Curious Mind: The Secret to a Bigger Life (2015).

264 Dan Rothstein & Luz Santana, Make Just One Change: Teach Students to Ask Their Own Questions (2011).

265 Warren Berger, A More Beautiful Question: The Power of Inquiry to Spark Breakthrough Ideas (2016).

266 Ron Ritchhart, Creating Cultures of Thinking: The 8 Forces We Must Master to Truly Transform Our Schools (2015).

learning forward and motivate us to do what at times can be hard and challenging mental work.[267]

III. Ways to Teach Law Students About Happiness and Mindfulness

Law professors can and should teach law students about empirically validated well-being mindsets, skills, strategies, techniques, and tools proven to mitigate the likelihood, duration, and severity of anxiety, depression, and chronic stress. Part III of the Article offers many possible resources to help law professors do this. First, this part of the Article discusses approaches that law professors, lawyers, and others have developed or suggested to teach law students about happiness and mindfulness. Second, this part of the Article discusses my experiences teaching law students about happiness and mindfulness. This discussion will be brief because I have already written elsewhere extensively about my experiences teaching about happiness and mindfulness to law students in torts, legal ethics and professionalism, economic analysis of law, neuroscience and law, media, law, and popular culture.[268]

A. Resources to Teach Law Students About Happiness and Mindfulness

Law professors Nancy Levit and Douglas Linder co-authored a wonderful book about happiness for law students and lawyers,[269] for which they also created a webpage of resource materials.[270] They also wrote another terrific book about how to be a better and more fulfilled lawyer,[271] accompanied by another webpage of resource materials.[272] Two law professors recently wrote books about the business of being a lawyer that contain sections about well-being.[273] A chapter in a handbook about well-being surveys applications to law, including legal education and the practice of law.[274]

A recent meta-analysis of twenty-nine studies, involving a total of 3319 participants, found training interventions can increase optimism and various factors increasing significantly effect size, such as utilizing a visualizing the best possible

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267 *Id*. at 5.

268 Huang, *supra* note 1; Huang, *supra* note 2.

269 Nancy Levit & Douglas O. Linder, The Happy Lawyer: Making a Good Life in the Law (2010).

270 The Happy Lawyer: Making a Good Life in the Law, http://law2.umkc.edu/faculty/projects/ftrials/happylawyers/thehappylawyer.html.

271 Douglas O. Linder & Nancy Levit, The Good Lawyer: Seeking Quality in the Practice of Law (2014).

272 The Good Lawyer: Seeking Quality in the Practice of Law, http://law2.umkc.edu/faculty/projects/ftrials/GoodLawyer/aboutgoodlawyer.html.

273 Katrina Lee, The Legal Career: Knowing the Business, Thriving in Practice 231-54 (2017); Pamela Bucy Pierson, The Business of Being a Lawyer (2014).

274 Peter H. Huang, *Subjective Well-Being and the Law*, *in* Handbook on Well-Being (Ed Diener, Shige Oishi, & Louis Tay eds., 2018), https://www.nobascholar.com/chapters/56.

self exercise and providing the intervention in-person.[275] Law professors can and should create optimistic classrooms.[276] The Association of American Law Schools Section on Balance in Legal Education,[277] which "seeks to investigate, discover, and inspire those practices that support the well-being of law students, lawyers, and judges," [278] maintains a bibliography of scholarship "related to Humanizing/ Balance in Legal Education"[279] organized by topic.

There are many books about happiness that law professors can learn from and assign (parts of) as required or optional reading to law students, including these: a handbook that is the positive psychology analogue of the current and fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V),[280] a positive psychology handbook,[281] a trade book providing an easy-to-read interdisciplinary overview and review about happiness by a psychologist,[282] an undergraduate positive psychology paperback textbook,[283] a trade book about positive psychology,[284] a book that won the 2008 professional and scholarly publishing division of the association of American publishers prose award for excellence in psychology by a co-founder of positive psychology,[285] a trade book by a popular teacher of positive psychology at Harvard,[286] a book about being in the "zone" by another co-founder of positive psychology,[287] a user-friendly trade book about positive psychology,[288] a tour of different philosophies about happiness,[289] another excellent undergraduate positive psychology paperback textbook,[290] a trade book about happiness by a psychotherapist,[291] a trade book about how to achieve and sustain happiness by a

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275 John M. Malouff & Nicola S. Schutte, *Can Psychological Interventions Increase Optimism? A Meta-Analysis*, 12 J. Positive Psychology 594 (2017).

276 Corie Rosen, *Creating the Optimistic Classroom: What Law Schools Can Learn from Attribution Style Effects*, 42 McGeorge L. Rev. 319 (2011).

277 AALS Section on Balance in Legal Education, http://www.balanceinlegaleducation.org/.

278 http://www.law.du.edu/index.php/aals-balance-in-legal-education-bib.

279 http://www.balanceinlegaleducation.org/resources/resources/bibliography.html.

280 Character Strengths and Virtues: A Handbook and Classification (Christopher Peterson & Martin E.P. Seligman eds., 2012).

281 Shane J. Lopez, Jennifer Teramoto Pedrotti, & Charles Richard Synder, Positive Psychology: The Scientific and Practical Exploration of Human Strengths (3d ed., 2014).

282 Daniel Nettle, Happiness: The Science behind Your Smile (2006).

283 Martin Bolt & Dana S. Dunn, Pursuing Human Strengths: A Positive Psychology Guide (2d ed., 2015).

284 Jonathan Haidt, The Happiness Hypothesis: Finding Modern Truth in Ancient Wisdom (2006).

285 Ed Diener & Robert Biswas-Diener, Happiness: Unlocking the Mysteries of Psychological Wealth (2008).

286 Tal Ben-Shahar, Happier: Learn the Secrets to Daily Joy and Lasting Fulfillment (2007).

287 Mihaly Csikszentmihalyi, Flow: The Psychology of Optimal Experience (2008).

288 Bridget Grenville-Cleave, Positive Psychology: A Practical Guide (2012).

289 Will Buckingham, Happiness: A Practical Guide (2012).

290 William C. Compton, Positive Psychology: The Science of Happiness and Flourishing (2d ed., 2012).

291 Richard Carlson, You Can Be Happy No Matter What (15th anniversary ed. 2006).

positive psychologist,[292] that is based partly on a related research article,[293] and a trade book by an authority on positive psychology about strategies for leading a less stressful and more joyful, meaningful, and mindful life.[294]

An entertaining video introduction to research about happiness and positive psychology is a documentary *Happy*,[295] which features visually compelling vignettes interviewing happy and unhappy people in different countries interspersed with brief segments that showcase various leading positive psychologists and neuroscientists who study happiness.[296] A recent special issue of *Time* magazine includes sixteen general interest articles discussing the practical implications of recent scientific research about happiness.[297] An excellent master's in applied positive psychology capstone project by attorney Anne Brafford*, Building the Positive Law Firm: The Legal Profession at Its Best*[298] develops a blueprint for how to utilize insights from positive psychology and positive organizational scholarship to design a law firm in which attorneys, clients, and communities thrive. Another excellent master's in applied positive psychology capstone project by attorney Martha Knudson, *Building Attorney Resources: Helping New Lawyers Succeed Through Psychological Capital* details how psychological capital[299] in the form of confidence, hope, optimism, and resilience helps lawyers and law students develop a competitive edge.[300] A chapter in a handbook about positive psychology discusses how to create positive law schools and positive law firms.[301] Appendix E of the

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292 Sonja Lyubomirsky, The How of Happiness: A New Approach to Getting the Life You Want (2008).

293 Sonja Lyubomirsky, Kennon M. Sheldon, & David Schkade, *Pursuing Happiness: The Architecture of Sustainable Change,* 9 Rev. Gen. Psychol. 111 (2005).

294 Beth Cabrera, Beyond Happy: Women, Work, and Well-Being (2015).

295 Happy (Wadi Rum Productions 2011).

296 There are appearances by Greg Berns, Mihaly Csikszentmihalyi, Richard Davidson, Ed Diener, Daniel Gilbert, Sonja Lyubomirsky, Tim Kasser, Nic Marks and Read Montague.

297 *The Science of Happiness: New Discoveries for A More Joyful Life*, Time, (Siobhan O'Connor ed., updated reissue of special ed. 2016, 2017).

298 Anne M. Brafford, *Building the Positive Law Firm: The Legal Profession at Its Best*, Master of Applied Positive Psychology Capstone Projects 62, University of Pennsylvania Scholarly Commons, Aug. 1, 2014, http://repository.upenn.edu/cgi/viewcontent.cgi?article=1063&context=mapp_capstone. *See also* Anne M. Brafford, Positive Professionals: Creating High-Performing Profitable Firms Through the Science of Engagement (2017); Anne M. Brafford, *Transform Lawyer Well-Being into a Team Sport, in* The Best Lawyer You Can Be: A Guide to Physical, Mental, Emotional, and Spiritual Wellness 41 (Stewart Levine ed., 2018)

299 Fred Luthans, Carolyn M. Youssef, & Bruce J. Avolio, Psychological Capital: Developing the Human Competitive Edge (2007).

300 Martha Knudson, *Building Attorney Resources: Helping New Lawyers Succeed Through Psychological Capital*, Master of Applied Positive Psychology Capstone Projects 83, University of Pennsylvania Scholarly Commons, Aug. 1, 2015, http://repository.upenn.edu/cgi/viewcontent.cgi?article=1084&context=mapp_capstone. *See also* Martha Knudson, *Psychological Capital and Lawyer Success*, in The Best Lawyer You Can Be: A Guide to Physical, Mental, Emotional, and Spiritual Wellness 151 (Stewart Levine ed., 2018).

301 Peter H. Huang, Anne M. Brafford, Debra S. Austin, & Martha Knudson, P*ositive Institutions: Organizations, Laws, and Policies*, in The Oxford Handbook of Positive Psychology (C.R. Snyder, Shane J. Lopez, Lisa M. Edwards, & Susana C. Marques eds., 2018). *See also* Peter H. Huang, *Happiness 101 for Legal Scholars: Applying Happiness*

National Task Force on Lawyer Well-being report, *The Path to Lawyer Well-being: Practical Recommendations for Positive Change*,[302] offers additional readings, resources, and topics for "creating a well-being course and lecture series for law students."[303] Appendix B of the report provides "Example Educational Topics for Lawyer Well-Being,"[304] including mindfulness meditation.[305]

A straightforward and pragmatic definition of mindfulness is as "the ability to know what's happening in your head at any given moment without getting carried away by it."[306] A commercial real estate attorney provides a very brief (one and one-quarter page) pragmatic, terrific introduction to why and how lawyers should practice mindfulness (including two short, simple, sample mini-exercises in practicing mindfulness).[307] There is a YouTube video of Andy Puddicombe, founder of the meditation app *Headspace* with approximately eighteen million users, leading a two-minute guided mediation on the Tonight Show Starring Jimmy Fallon.[308] A podcast of an American Bar Association webinar titled, *Mindfulness: A Pathway to Success, Happiness, and Conflict Resolution*[309] includes the slides from a PowerPoint presentation about how mindfulness can benefit law students and lawyers. An introduction to mindfulness designed for law students and young lawyers is an American Bar Association law student division webinar presentation by Cory Muscara, an attorney who also holds a master's degree in applied positive psychology, about how to manage stress and shift from just surviving to flourishing and thriving.[310]

A number of law professors, bar associations, and law schools offer law students courses and programs about mindfulness. Northwestern University law school Harris H. Agnew Visiting Professor of Dispute Resolution Leonard L. Riskin[311]

Research to Legal Policy, Ethics, Mindfulness, Negotiations, Legal Education, and Legal Practice, in Research Handbook on Behavioral Law and Economics 271, 286-88 (Joshua C. Teitelbaum & Kathryn Zeiler eds., 2018) (providing a primer for law professors about happiness in legal education and legal practice).

302 National Task Force on Lawyer Well-Being, *supra* note 19, at 61-62.

303 *Id*. at 61.

304 *Id*. at 50-57.

305 *Id*. at 52-53.

306 Happify, *Why Mindfulness Is a Superpower: An Animation*, Dec. 7, 2015 (available at https://www.youtube.com/watch?v=w6T02g5hnT4).

307 Gisela M. Munoz, *Meant to Be*, Dade County Bar Ass'n Bull., Mar. 2017, at 4-5.

308 The Tonight Show Starring Jimmy Fallon, *Andy Puddicombe Guides Jimmy Through a Two-Minute Headspace Meditation*, Aug. 4, 2017, https://www.youtube.com/watch?v=kP_EY7pdTJY.

309 American Bar Association Section of Science & Technology Law, Behavioral and Neuroscience Law Committee, and Membership and Diversity Committee, *Mindfulness: A Pathway to Success, Happiness, and Conflict Resolution*, Mar. 24, 2016, http://www.americanbar.org/content/dam/aba/events/science_technology/2016/2016mindfulness.authcheckdam.pdf.

310 American Bar Association Law Student Division and Young Lawyer Division, *Mindfulness Meditation: Managing Stress and Shifting from Surviving to Thriving*, Mar. 31, 2016 (available at https://www.youtube.com/watch?v=_so1P482XGc).

311 Leonard L. Riskin, Faculty Page, Northwestern Law School, http://www.law.northwestern.edu/faculty/profiles/LeonardRiskin/.

pioneered the introduction of mindfulness in law schools,[312] dispute resolution,[313] conflict resolution,[314] and negotiation.[315] University of Miami law professors Jan Jacobowitz, director of the Professional Responsibility and Ethics Program,[316] and Scott Rogers, founder and director of the Mindfulness in Law Program,[317] co-teach an innovative version of the required professional responsibility course that is organized around mindfulness and social media/technology, called *Mindful Ethics: Professional Responsibility for Lawyers in the Digital Age*.[318] University of Miami law professor William Blatt[319] teaches a course titled *Emotional Intelligence*,[320] which is related to mindfulness as emotional intelligence is mindfulness about emotions. Principal Analyst at DecisionSet® in Palo Alto, California, Randall Kiser wrote a unique multi-disciplinary, practice-based book that introduces these important soft skills to law students: self-awareness, self-development, social proficiency, wisdom, leadership, and professionalism,[321] and includes masterful coverage of mindfulness, equanimity, and well-being.[322]

University of New Mexico law professor Nathalie Martin co-authored a book about yoga for lawyers,[323] advocates that law schools incorporate mindfulness, professional identity, and emotional intelligence into the first year curriculum,[324] and wrote a wonderful text for law students about how to craft professional

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312 Leonard L. Riskin, *Awareness and the Legal Profession: An Introduction to the Mindful Lawyer Symposium*, 61 J. Legal Educ. 634 (2012); Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients*, 7 Harv. Negot. L. Rev. 1 (2002).

313 Leonard L. Riskin, *Awareness and Ethics in Dispute Resolution and Law: Why Mindfulness Tends to Foster Ethical Behavior*, 50 S. Tex. L. Rev. 493 (2009).

314 Leonard L. Riskin & Rachel Wohl, *Mindfulness in the Heat of Conflict: Taking STOCK*, 20 Harv. Negot. L. Rev. 121 (2015); Leonard L. Riskin, *Managing Inner and Outer Conflict: Selves, Subpersonalities, and Internal Family Systems*, 18 Harv. Negot. L. Rev. 1 (2013).

315 Leonard L. Riskin, *Negotiation, Outside-In and Inside-Out: On the Level or Thereabout*, 43 Ohio N.U. L. Rev. 399 (2017); Leonard L. Riskin, *Beginning with Yes: A Review Essay on Michael Wheeler's the Art of Negotiation: How to Improvise Agreement in a Chaotic World*, 16 Cardozo J. Conflict Resol. 605 (2015); Leonard L. Riskin, *Annual Saltman Lecture: Further Beyond Reason: Emotions, the Core Concerns, and Mindfulness in Negotiation* 10 Nev. L.J. 289 (2010).

316 Jan L. Jacobowitz, Faculty Page, University of Miami Law School, http://www.law.miami.edu/faculty/jan-l-jacobowitz.

317 Scott L. Rogers, Faculty Page, University of Miami Law School, http://www.law.miami.edu/faculty/scott-l-rogers.

318 Mindful Ethics: Professional Responsibility for Lawyers in the Digital Age, Course Page, University of Miami Law School, https://lawapps2.law.miami.edu/clink/course.aspx?cof_id=1472.

319 William Blatt Faculty Page, http://www.law.miami.edu/faculty/william-s-blatt.

320 https://lawapps2.law.miami.edu/clink/course.aspx?cof_id=2479.

321 Kiser, *supra* note 238.

322 *Id*. at 129-35.

323 *See e.g*., Hallie Neuman Love & Nathalie Martin, Yoga for Lawyers: Mind-Body Techniques to Feel Better All the Time (2015). *See also* Nathalie Martin, *The Lawyer in the Lotus, in* The Best Lawyer You Can Be: A Guide to Physical, Mental, Emotional, and Spiritual Wellness 69 (Stewart Levine ed., 2018).

324 Nathalie Martin, *Think Like a (Mindful) Lawyer: Incorporating Mindfulness, Professional Identity, and Emotional Intelligence into the First Year Law Curriculum*, 36 U. Ark. Little Rock L. Rev 413 (2014).

identity through practicing mindfulness and emotional intelligence.[325] University of San Francisco law professor Rhonda Magee,[326] has written about how and why to teach lawyers to meditate,[327] how mindfulness can help educate lawyers about how to confront racism,[328] and the role of mindfulness practices in enhancing understanding of race and its pervasive influence in our lives and in the law.[329] Brooklyn University director of legal writing and law professor Heidi K. Brown has written about mindful legal writing[330] and the importance of active listening, empathy, contemplative analysis, and impactful writing.[331] A case study about housing development in west Oakland, California demonstrates how practicing mindfulness can help lawyers best advocate for economic justice on behalf of disenfranchised and subordinated communities.[332]

Southwestern law professor Rebecca Ann Simon,[333] co-directs an innovative, science-based, and voluntary IL "Peak Performance Program" to help new law students de-stress, focus, and perform well in law school.[334] Professor Simon also is executive director of the national Mindfulness in Law Society (MILS), a national community of lawyers, law students, faculty, judges, and others in the legal profession who seek to improve and promote the mental health and well-being of law students and those in the legal profession through mindfulness practices.[335] The MILS website includes a set of mindfulness resources.[336]

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325 Nathalie Martin, Lawyering from the Inside Out: Learning Professional Development through Mindfulness and Emotional Intelligence (2018).

326 Rhonda Magee Faculty Page, University of San Francisco School of Law, https://www.usfca.edu/law/faculty/rhonda-magee.

327 Rhonda V. Magee, *Educating Lawyers to Meditate*? *From Exercises to Epistemology to Ethics: The Contemplative Practice and Law Movement as Legal Education Reform*, 79 UMKC. L. Rev. 535 (2011).

328 Rhonda V. Magee, *Reacting to Racism: Mindfulness Has a Role in Educating Lawyers to Address Ongoing Issues.*, ABA J., Aug. 2016, at 26.

329 Rhonda V. Magee, *The Way of ColorInsight: Understanding Race and Law Effectively Through Mindfulness-Based ColorInsight Practices*, 8 Geo. J.L. & Critical Race Persp. 251 (2016).

330 Heidi K. Brown, The Mindful Legal Writer: Mastering Predictive and Persuasive Writing (2016); Heidi K. Brown, The Mindful Legal Writer: Mastering Persuasive Writing (2016); Heidi K. Brown, The Mindful Legal Writer: Mastering Predictive Writing (2015).

331 Heidi K. Brown, The Introverted Lawyer: A Seven Step Journey Toward Authentically Empowered Advocacy (2017).

332 Angela Harris, Margaretta Lin & Jeff Selbin, *From the Art of War to Being Peace: Mindfulness and Community Lawyering in a Neoliberal Age*, 95 Cal. L. Rev. 2073 (2007).

333 Rebecca Ann Simon Faculty Page, Southwestern Law School, http://www.swlaw.edu/faculty/full-time/rebecca-simon.

334 Southwestern Law School Los Angeles, *Mindfulness, Peak Performance, and Wellness Programs*, http://www.swlaw.edu/student-life/support-network/mindfulness-peak-performance-and-wellness-programs; *Mindfulness, Stress Management, and Peak Performance Program Brochure*, http://www.swlaw.edu/sites/default/files/2017-05/SLS_7x7booklet_EMAIL.pdf; Peak Performance Program Sessions, http://www.swlaw.edu/sites/default/files/2017-08/Peak%20Performance%20Sessions%202017.pdf.

335 Mindfulness in Law Society Website, http://mindfulnessinlawsociety.com/.

336 Mindfulness in Law Society Resources, http://mindfulnessinlawsociety.com/resources/.

Law professors can also learn from and assign several brief articles from the *Harvard Business Review* about mindfulness, including a discussion of business implications of neuroscience research about mindfulness,[337] an interview with psychologist Ellen Langer discussing her pioneering research about mindfulness,[338] empirical evidence the benefits of mindfulness require practice,[339] possible pitfalls from practicing mindfulness,[340] an explanation of how practicing just ten minutes of mindfulness daily subtly changes reactions to everything and improves decision-making,[341] recommendations for how to successfully design a mindfulness program for corporate leadership,[342] and research finding that practicing mindfulness improves leadership through improving emotional intelligence competencies.[343]

Law professors can learn from and assign (parts of) as required or optional reading to law students many books about mindfulness, including these: a trade book by an Ohio Congressman about how mindfulness can help reinvigorate the American Dream;[344] any of many trade books by a renowned Vietnamese Zen master, poet, and peace activist,[345] a trade book by a clinical psychologist, co-founder of the Insight Meditation Society and the Spirit Rock Center,[346] any of many trade books by, any of many trade books by the founder of Mindfulness-Based Stress Reduction (MBSR),[347] two trade books by a former software engineer and Google employee

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337 Christina Congleton et al., *Mindfulness Can Literally Change Your Brain*, Harv. Bus. Rev., Jan. 8, 2015, https://hbr.org/2015/01/mindfulness-can-literally-change-your-brain.

338 Ellen Langer & Allison Beard, *Mindfulness in the Age of Complexity*, Harv. Bus. Rev., Mar. 2014, at 68, 70–72.

339 Megan Reitz & Michael Chaskalson, *Mindfulness Works but Only If You Work at It*, Harv. Bus. Rev., Nov. 4, 2016, https://hbr.org/2016/11/mindfulness-works-but-only-if-you-work-at-it.

340 David Brendel, *There Are Risks to Mindfulness at Work*, Harv. Bus. Rev. Feb. 11, 2015, https://hbr.org/2015/02/there-are-risks-to-mindfulness-at-work.

341 Rasmus Hougaard, Jacqueline Carter, & Gitte Dybkjaer, *Spending 10 Minutes a Day on Mindfulness Subtly Changes the Way You React to Everything*, Harv. Bus. Rev., Jan. 18, 2017, https://hbr.org/2017/01/spending-10-minutes-a-day-on-mindfulness-subtly-changes-the-way-you-react-to-everything.

342 Megan Reitz & Michael Chaskalson, *How to Bring Mindfulness to Your Company's Leadership*, Harv. Bus. Rev., Dec. 1, 2016.

343 Daniel Goleman & Matthew Lippincott, *Without Emotional Intelligence, Mindfulness Doesn't Work*, Harv. Bus. Rev., Sept. 8, 2017, https://hbr.org/2017/09/sgc-what-really-makes-mindfulness-work.

344 Tim Ryan, A Mindful Nation: How a Simple Practice Can Help Us Reduce Stress, Improve Performance, and Recapture the American Spirit (2013).

345 *See, e.g.*, Thich Nhat Hanh, The Art of Living: Peace and Freedom in the Here and Now (2017); How to Relax (2015); Thich Nhat Hanh, You Are Here: Discovering the Magic of the Present Moment (2010); Thich Nhat Hanh, Peace Is Every Step: The Path of Mindfulness in Everyday Life (1992); Thich Nhat Hanh, The Miracle of Mindfulness: An Introduction to the Practice of Meditation (1999).

346 Jack Kornfield, Meditation for Beginners (2008).

347 *See, e.g.*, John Kabat-Zinn, Mindfulness for Beginners: Reclaiming the Present Moment and Your Life (2016); John Kabat-Zinn, Full Catastrophe Living (Revised Edition): Using the Wisdom of Your Body and Mind to Face Stress, Pain, and Illness (rev'd. updated ed. 2013); John Kabat-Zinn, Letting Everything Become Your Teacher: 100 Lessons in Mindfulness (2009); John Kabat-Zinn, Arriving at Your Own Door: 108 Lessons in Mindfulness (2007); John Kabat-Zinn, Coming to Our Senses: Healing Ourselves and the World Through Mindfulness (2006);

number 107 with the job title of Jolly Good Fellow,[348] a trade book by the director of the stress reduction clinic at the University of Massachusetts Medical Center about mindfulness for patients and physicians,[349] a trade book by a neuroscientist about how practicing mindfulness can help overcome addictions,[350] a trade book co-authored by neuroscientist/psychologist Richard Davidson and science journalist Daniel Goleman about how meditation produces enduring, long-term changes in human brains leading to happier, more compassionate and meaningful lives,[351] and a trade book by Robert Wright, author of *The Moral Animal*,[352] co-founder and editor-in-chief of Bloggingheads.tv,[353] and editor-in-chief of MeaningOfLife.tv,[354] about how modern evolutionary psychology and cognitive neuroscience provide scientific validation that practicing mindfulness meditation can lead to seeing reality clearer and achieving a deep, morally valid happiness.[355]

Many teachers have introduced mindfulness in their classes to improve the attention and emotional regulation of their students.[356] There is evidence that practicing mindfulness benefits students, teachers, and parents.[357] A free 45-minute film, *Healthy Habits of Mind*, features neuroscientist and mindfulness researcher Richard Davidson,[358] provides information about the neurobiology and research underpinning mindfulness, and showcases the value of mindfulness in educating children.[359]A 55-minute PBS documentary, *Room to Breathe*, follows Megan Cowan for several months as she teaches mindfulness to youths in a San Francisco public middle school with the most disciplinary suspensions in its district.[360] A recent book by Thich Nhat Hanh, a Vietnamese monk, poet, scholar, and human rights activist, and Katherine Weare, an expert on social and emotional learning

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John Kabat-Zinn, Wherever You Go, There You Are: Mindfulness Meditation in Everyday Life (2005).

348 Chade Meng-Tan, Search Inside Yourself: The Unexpected Path to Achieving Success, Happiness (and World Peace) (2014); Chade Meng-Tan, Joy on Demand: The Art of Discovering the Happiness Within (2017).

349 Saki Santorelli, Heal Thy Self: Lessons on Mindfulness in Medicine (2000).

350 Judson Brewer, The Craving Mind: From Cigarettes to Smartphones to Love — Why We Get Hooked and How We Can Break Bad Habits (2017).

351 Daniel Goleman & Richard J. Davidson, Altered Traits: Science Reveals How Meditation Changes Your Mind, Brain, and Body (2017).

352 Robert Wright, The Moral Animal: Why We Are, the Way We Are: The New Science of Evolutionary Psychology (1995).

353 Bloggingheads.tv, https://bloggingheads.tv/.

354 MeaningOfLife.tv, http://meaningoflife.tv/.

355 Robert Wright, Why Buddhism is True: The Science and Philosophy of Meditation and Enlightenment (2017). *See also* Robert Wright, *Buddhism and Modern Psychology*, Coursera, https://www.coursera.org/learn/science-of-meditation.

356 Lauren Cassani Davis, *When Mindfulness Meets the Classroom*, the Atlantic, Aug. 31, 2015, https://www.theatlantic.com/education/archive/2015/08/mindfulness-education-schools-meditation/402469/,

357 Mindful Schools, *Why Mindfulness is Needed in Education*, http://www.mindfulschools.org/about-mindfulness/mindfulness-in-education/.

358 Richard J. Davidson Webpage, http://richardjdavidson.com/.

359 Mindful Schools, *Healthy Habits of Mind*, http://www.mindfulschools.org/resources/healthy-habits-of-mind/.

360 Mindful Schools, Multimedia, http://www.mindfulschools.org/resources/explore-mindful-resources/#just-breathe/.

and mental health in schools, provides evidence-based guidance, practices, and techniques for teachers, administrators, counselors, and others to teach themselves and their students about mindfulness.[361]

A white paper by a senior faculty member of the center for creative leadership explains how practicing mindfulness helps develop enduring resilience by eliminating stress and its root cause, namely rumination.[362] An engaging video introduction to practicing mindfulness is the PBS documentary, *Mindfulness Goes Mainstream*, which features singer and songwriter Jewel, psychologists and neuroscientists who have conducted research about mindfulness, and several authors of trade books about mindfulness.[363] This general interest program consists of sections that explain how practicing mindfulness has been empirically found to have beneficial impacts on: (1) anxiety, stress, and depression; (2) pain and craving; and (3) focus and performance.

Law professor Debra Austin proposes the new field of positive legal education, that draws on the fields of positive psychology, neuroscience, and positive education.[364] Austin "explains neuroscience research on habit learning, knowledge acquisition, and the impact of stress on cognition,"[365] "illustrates how law student knowledge-base, legal skill acquisition, and professional identity development can be enhanced with discipline-specific growth mindset and self-efficacy training,"[366] and "covers four practices lawyers can undertake to deal with the harmful effects of stress."[367] Austin also has written articles that discuss how and why to engage in such restorative practices as gratitude, meditation, mindfulness, and yoga;[368] the impact of such substances as Adderall, alcohol, caffeine, cocaine, marijuana, nicotine, opiates, and Ritalin on cognitive function;[369] the connection between cognitive well-being and good nutrition;[370] and mindfulness meditation, which is an empirically-supported strategy for emotional regulation, which is an essential skill of emotional intelligence.[371]

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361 Thich Nhat Hanh & Katherine Weare, Happy Teachers Change the World: A Guide for Cultivating Mindfulness in Education (2017).

362 Nick Petrie, *Wake Up! The Surprising Truth about What Drives Stress and How Leaders Build Resilience*, Aug. 2013, http://www.nicholaspetrie.com/wp-content/uploads/2013/08/Wake-Up-The-Surprising-Truth-About-What-Drives-Stress-and-How-Leaders-Build-Resilience.pdf. *See also generally* Derek Roger & Nick Petrie, Work without Stress: Building a Resilient Mindset for Lasting Success (2016).

363 *Mindfulness Goes Mainstream* (PBS broadcast Aug. 2017), http://pressroom.pbs.org/Programs/m/Mindfulness-Goes-Mainstream.

364 Debra S. Austin, *Positive Legal Education: Flourishing Law Students and Thriving Law Schools*, 77 Md. L. Rev. 649 (2018).

365 *Id*. at section III.

366 *Id*. at section VI.

367 *Id*. at section VIII.

368 Debra S. Austin, *Killing Them Softly: Neuroscience Reveals How Brain Cells Die from Law School Stress and How Neural Self-Hacking Can Optimize Cognitive Performance*, 59 Loy. L. Rev. 791 (2013).

369 Debra S. Austin, *Drink Like a Lawyer: The Neuroscience of Substance Use and Its Impact on Cognitive Wellness*, 15 Nev. L.J. 826 (2015).

370 Debra S. Austin, *Food for Thought: The Neuroscience of Nutrition to Fuel Cognitive Performance*, 95 Or. L. Rev. 425 (2017).

371 Debra S. Austin & Rob Durr, *Emotion Regulation for Lawyers: A Mind is a Challenging Thing to Tame*, 16 Wyo. L. Rev. 387 (2016).

Stanford law professor and clinical psychologist Joe Bankman posted an unpublished paper,[372] that describes in detail a two-hour course he, Barbara Fried, and Ian Ayres developed and taught first-year law students at Stanford and Yale.[373] Any law professor or law school administrator can utilize the empirically validated cognitive reframing techniques in Bankman's paper to teach their law students about how to reduce anxiety, depression, and stress. The basis of Bankman's approach is Cognitive Behavioral Therapy (CBT) and what he calls The Cognitive Model, which

> posits that emotions, physical sensations, and behaviors are influenced by automatic thoughts, assumptions, interpretations, and beliefs about self, others, and the world. The Cognitive Model assumes that people can learn to: 1) notice and identify negative automatic thoughts; 2) question automatic thoughts for accuracy or utility; 3) identify inaccuracy, exaggeration, or error (also referred to as cognitive distortions or unhelpful thoughts); and 4) challenge cognitive distortions and reframe automatic thoughts to interrupt the cycle and change emotions, physical sensations, and behaviors.[374]

Bankman also posted a one-page handout providing examples of unhelpful thinking styles or cognitive distortions, such as all-or-nothing thinking, catastrophizing, disqualifying the positive, jumping to conclusions, labelling, personalization, and overgeneralizing.[375]

Curious readers may wonder if mindfulness or CBT is more effective in managing anxiety, chromic stress, and depression. Robert Meikyo Rosenbaum, a neuropsychologist and psychotherapist, cogently discusses how neuroscience and psychology research about the efficacy of practicing mindfulness compared to alternatives (such as cognitive behavioral therapy, medication, and relaxation) distracts us and misses far more crucial issues (such as motivation to practice mindfulness, socioeconomic status, and the relationship between a mindfulness student and a mindfulness teacher).[376] Popular media coverage often reports on brain imaging studies by "cognitive paparazzi" depicting colorful photographs of human brains during meditation in an fMRI machine. In fact, anything that humans do changes their brains, such as closing their eyes, practicing the piano, laying bricks,[377] or being exposed for a single twenty-minute session in a tanning salon to ultraviolet rays.[378]

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372 Joseph Bankman, *Pyschoeducation about Anxiety – for You and Your Students*, https://www.colorado.edu/law/sites/default/files/Bankman%20-%20Materials%20for%20Anxiety%20Psychoeducation%20Course.pdf.

373 Randee Fenner, *Stanford Law Professor Creates New Way to Help Students Deal with the Stress of It All*, Stanford News, Apr. 7, 2015, http://news.stanford.edu/2015/04/07/bankman-law-anxiety-040715/.

374 *Id*. at 6.

375 *Unhelpful Thinking Styles*, http://www.icctc.org/August2013/PMM%20Handouts/Unhelpful_Thinking_Styles.pdf.

376 Robert Rosenbaum, *Mindfulness Myths: Fantasies and Facts*, *in* What's Wrong with Mindfulness (and What Isn't): Zen Perspectives 53, 63-68 (Barry Magid & Robert Rosenbaum eds., 2016).

377 *Id.* at 376, at 55-56.

378 *Id*., at 59 n.6. *See also* Cynthia R. Harrington et al., *Activation of the Mesotriatal Reward Pathway with Exposure to Ultraviolet Radiation (UVR) vs. Sham UVR in Frequent Tanners: A Pilot Study*, 17 Addiction Biology 680 (2012).

The website, *Lawyers with Depression*, helps law students, lawyers, and judges cope with and heal from depression.[379] The thirty-minute documentary, *A Terrible Melancholy: Depression in the Legal Profession*, features four lawyers and a former judge discussing personal experiences with depression, and several national experts about depression.[380] The documentary's title is based on a book about Abraham Lincoln's life-long suffering from depression.[381] A free book about depression and anxiety among law students and lawyers outlines the causes of anxiety, burnout, depression, and stress among law students and lawyers.[382] The book also offers a guide to books about anxiety, depression, stress, and lawyer wellness in addition to related and online resources.[383] A recent intriguing study[384] "found visual cues within Instagram posts can help determine whether a user is suffering from depression."[385] Recent research suggests that major depressive disorder, which is the world's leading source of disability, may be an evolved response to adversity instead of a discrete, specific, and unitary disease.[386]

B. My Experiences in Teaching Happiness and Mindfulness to Law Students

I have taught law students about happiness and mindfulness in these courses (in alphabetical order): economic analysis of law; financial decision-making; law and human behavior; law, happiness, and neuroscience; law, happiness, and subjective well-being; legal ethics and professionalism: business law issues; media, law, and popular culture; neuroscience and law, and torts. In many of these courses, I have assigned as required readings: an eight-page article about whether lawyers can learn to be happy, written by Ted David, who is a tax law professor, tax practitioner, former Internal Revenue Service (IRS) agent, and IRS District Counsel attorney;[387] a seven-page follow-up article about generators of happiness by the same author;[388] a brief article from *The Atlantic* about meaning versus happiness;[389] a twenty-

379 Lawyers with Depression, http://www.lawyerswithdepression.com/.

380 Bar Association of Erie County, *A Terrible Melancholy: Depression in the Legal Profession*, Vimeo, https://vimeo.com/14303016.

381 Joshua Wolf Shenk, Lincoln's Melancholy: How Depression Challenged a President and Fueled His Greatness (2006).

382 Daniel T. Lukasik, Overcoming Stress, Burnout, Anxiety, and Depression in the Legal Profession: How a Lawyer Life Coach Can Help 3-28 (2017).

383 *Id*. at 35-41.

384 Andrew G. Reece & Christopher M. Danforth, *Instagram Photos Reveal Predictive Markers of Depression*, 6 EPJ Data Sci. (2017).

385 Brett Molina, *Can Your Instagram Photos Reveal If You're Depressed?* USA Today, Aug. 10, 2017, 11:26 a.m. ET, https://www.usatoday.com/story/tech/talkingtech/2017/08/10/can-your-instagram-photos-reveal-if-youre-depressed/555210001/.

386 Vladimir Maletic & Charles Raison, The New Mind-Body Science of Depression (2017).

387 Ted David, *Can Lawyers Learn to be Happy?* The Practical Lawyer, Aug. 2011, at 29.

388 Ted David, *The Happiness Generators*, The Practical Lawyer, June 2016, at 46.

389 Emily Esfahani Smith, *There's More to Life Than Being Happy*, The Atlantic, Jan. 9, 2013, https://www.theatlantic.com/health/archive/2013/01/theres-more-to-life-than-being-happy/266805/.

page set of materials about boosting wellness,[390] which includes many related books, TED talks, and web resources; and a nineteen-page trade book chapter about popular culture conceptions of happiness and unhappiness,[391] that discusses key characters from *House*,[392] a critically acclaimed, dramatic, fictional, popular medical television series whose titular character is a quirky, misanthropic genius addicted to pain medication and leader of a diagnostic team at Princeton–Plainsboro Teaching Hospital in New Jersey. I also have assigned a trade book,[393] by Caroline Webb, who is a former McKinsey partner, that applies insights from behavioral economics, (positive) psychology, and neuroscience to provide readers step-by-step guidance about handling everyday work routines and tasks.[394] The book explains how to set better priorities, make time go further, make the most of interactions, be the smartest, wisest, and most creative self, maximize personal impact, be resilient to annoyance and setbacks, and boost energy, enjoyment, and enthusiasm.[395]

I have learned many lessons from teaching law students about happiness and mindfulness, including these. First, it is important to explain that while one component of happiness is positive affect or emotion in the sense of feeling yippy-skippy, there are many other dimensions of happiness including the more cognitive notions of life satisfaction, meaning, and purpose. Second, regardless of the conception of happiness or subjective well-being being utilized, different people and societies may disagree over whether and how to trade off happiness with other desired goals. Third, empirical findings about the causes, correlates, and consequences of happiness and unhappiness usually arise from large cross-sectional studies, meaning that your mileage may vary. Fourth, correlation is not causation. Fifth, longitudinal studies are rarer than cross-sectional studies because of the much higher costs in time and money involved to conduct multi-year studies. Sixth, mindfulness is a concept with which students are familiar with in the sense that they have to have been mindful to have gotten to where they are now. Seventh, the concept of mindfulness is not binary, zero or one; mindfulness has degrees along a continuum or spectrum. Eighth, students find it hard to believe that psychological and neuroscience research demonstrates that multi-tasking is an illusion and is really serial single-tasking with high switching costs. Ninth, there are people who believe the benefits that unhappiness and mindlessness always outweigh their costs. Tenth, being mindlessly mindful is still a form of mindlessness. Eleventh, people who learn about and study happiness and mindfulness can still be at times unhappy and mindless. Twelfth, happiness and mindfulness are skills that can be taught, learned, and improved through continual and regular practice. Thirteenth, happiness and mindfulness are habits and mindsets that can be acquired and maintained. Fourteenth, annoyances and frustrations offer opportunities to practice

390 Anne Brafford, Sandra Adkins, & Jill Sanford, Wellness Booster Kit (2014).

391 Nancy L. Sim, Katherine M. Jacobs, & Sonja Lyubomirsky, *House and Happiness A Differential Diagnosis*, *in* House and Psychology: Humanity Is Overrated 77-94 (Ted Cascio & Leonard L. Martin eds., 2011).

392 *House* (Fox television broadcast 2004-12).

393 Caroline Webb, How to Have a Good Day: Harness the Power of Behavioral Science to Transform Your Working Life (2016).

394 Caroline Webb, How to Have a Good Day Website, http://carolinewebb.co/books/how-to-have-a-good-day/.

395 *Id*.

happiness and mindfulness. Finally, it is important for law students, law professors, and lawyers to experience mindfulness directly, first-hand, and for themselves, preferably in-class, as soon as possible in discussing mindfulness through such three-minute guided meditations as these: the Body Scan Meditation[396] and the Body and Sound Meditation.[397] All of these are from a free set of guided meditations,[398] the UCLA Mindfulness Awareness Research Center offers on its website.[399]

I candidly and openly share with law students about how practicing mindfulness has helped me overcome professional and personal fears, setbacks, and struggles. I disclose to law students how I and many people I know experienced anxiety, depression, and chronic stress in law school and law practice. I make these disclosures to reassure law students that having feelings of anxiousness, sadness, and being overwhelmed are okay. I remind them how as law students and lawyers, we can be overly critical of ourselves and engage in unhelpful rumination. I tell them that a blind date once told me that I think too much. I asked her how much should I think and agreed that overthinking is an occupational hazard about which I have to be mindful.

IV. Conclusions

This Article discussed my adventures in higher education, happiness, and mindfulness. Although my unique adventures in higher education are atypical, hopefully they are still valuable for others to hear about because they may make you laugh and they involve situations that everyone can identify with and from which learn something. If nothing else, my unique experiences show how being so-called academically gifted or precocious is no guarantee to achieving happiness or practicing mindfulness.

After making a presentation at a conference, I accidentally dropped a laptop and its trackpad stopped working. I made an appointment at the nearest Apple store, where a technician fixed the laptop trackpad free of charge. Feeling in a good mood, I decided to visit a Tesla store in the same mall as the Apple store and ended up test driving a Tesla model S and model X on a nearby freeway. During one test drive, a Tesla employee engaged the enhanced autopilot feature, which combines cameras, GPS, radar, onboard computer, real-time information processing, and ultrasound sensors. I sat in the driver seat and watched in awe and amazement as the car steered itself, matched its speed to varying traffic conditions, stayed within a lane as that lane curved, and even changed lanes automatically, all without any driver input required.[400] I excitedly told someone afterwards that I had just witnessed and experienced the future. She very wisely and gently reminded me that while that might be, we still live in the present. She reminded me that in the present, the

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396 UCLA Health Website, *UCLA Mindful Awareness Research Center*, *Body Scan Meditation*, http://marc.ucla.edu/mpeg/Body-Scan-Meditation.mp3.

397 UCLA Health Website, *UCLA Mindful Awareness Research Center*, *Body and Sound Meditation,* http://marc.ucla.edu/mpeg/Body-Sound-Meditation.mp3.

398 UCLA Health Website, *UCLA Mindful Awareness Research Center*, *Free Guided Meditations*, http://marc.ucla.edu/body.cfm?id=22.

399 UCLA Health Website, *UCLA Mindful Awareness Research Center*, http://marc.ucla.edu/.

400 Tesla, *Autopilot*, https://www.tesla.com/autopilot.

infrastructure of rapid charging stations is not yet well developed as it most likely will be in the future. I was able to benefit from her mindfulness because it helped me to not buy a Tesla by outlasting my temporary fevered excitement from test driving a new technology.

A well-known behavioral legal scholar once told me that he thought it was ironic that while he was a Ph.D. student in psychology, he went out with someone who is now a leader in positive psychology and that person was quite unhappy then. My reaction was that many people choose to or end up studying happiness because they were quite unhappy in some period of their lives. Similarly, many people choose to or end up studying mindfulness because they were quite mindless in some period of their lives. If happiness and/or mindfulness came more naturally to these people, they would probably be less likely to choose to or end up studying happiness and/or mindfulness. That is certainly the case with me.

My niece K once asked me to play with her and I told her that I would in a few minutes after I finished up a train of thought I was working on in a paper I was writing. She incredulously and suspiciously asked why did I as a teacher still have to be writing papers instead of grading my students' papers? I told her that I was happy to write this paper. She asked me why. I told her because it was about happiness and writing it gave me the opportunity to study and learn about happiness. She then said "Uncle Peter, shouldn't everyone be studying and learning about happiness?" I said yes, everyone should and it is a shame and sad that is not already the case because a lot of people are unhappy and are not sure how to be happy. In the penultimate scene of the movie, *Ingrid Goes West*, the titular character is desperately unhappy and films a video of herself confessing her being at wit's end about how to change and be happy before overdosing on prescription medication.[401] Everyone also can and should be studying and learning about mindfulness because a lot of people are mindless and are not sure how to be mindful.

I believe that teaching law students about happiness and mindfulness can help them professionally and personally. My belief is based on seeing this happen, student feedback in person, on teaching evaluations, in heartfelt "thank you" cards, and grateful emails from former law students, sometimes years after they graduated. If law students acquire a taste for learning about happiness and mindfulness, then they may continue to learn about and practice happiness and mindfulness for the rest of their lives. Happy and mindful law professors can teach and inspire law students to be happy and mindful, who in turn grow into and become happy and mindful lawyers, who may help their clients be happy and mindful, who in turn may help their communities and societies be happy and mindful. What a wonderful world that would be to help create and in which to live, flourish, and thrive.

[401] Ingrid Goes West (Neon 2017).

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