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Marital Cakes and Conscientious Promises

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ABSTRACT

The U.S. Supreme Court has recently been tasked with determining—both metaphorically and literally—whether in matters of marriage equality and religious freedom, those within society can have their cake and eat it too. This came to the fore in Masterpiece Cakeshop (2018). In most of scholarship which has followed, the respective parties' rights in this case are parsed in terms of rights to religious expression and free speech (on the one hand), and a statutory right to non-discrimination (on the other). By approaching this matter through a primarily philosophical (rather than legal) lens, I aim to present a new perspective. Where cases involve same-sex marriage, it is argued that both sides are predicated upon religious or conscientious convictions. This is established through a philosophical argument, which examines the nature of the marital promise to love and seeks to demonstrate how this promise entails a characteristically religious sort of belief.

KEYWORDS

Masterpiece Cakeshop, Religious Freedom, Marital Love Promises, Conscientious Beliefs, Moral Anthropology

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I. Introduction: Masterpiece Cakeshop and the Importance of Religious Freedom

In 2012, Charlie Craig and David Mullins were denied service by Jack Phillips of Masterpiece Cakeshop in Colorado. Mr. Craig and Mr. Mullins sought a cake (without specifying any particularised writing or decoration) in order to celebrate the advent of their lawful marriage in Massachusetts. The issue was heard by the Colorado Civil Rights Commission ("the Commission").[1] The Commission held that in refusing the couple's order, Phillips had violated the Colorado Anti-Discrimination Act of 2014 ("CADA"), which prohibits any "place of business engaged in any sales to the public" from directly or indirectly discriminating against persons because of their sexual orientation. Against this, Phillips argued that having to make a cake to celebrate the same-sex couple's marriage would violate his rights to freedom of expression and religious exercise under the U.S. Constitution's First Amendment. It is along the lines of these contours—the right to non-discrimination, on the one hand, versus the right to freedom of expression and religious exercise, on the other—that scholars have since sought to adjudicate this case.[2]

A. The Discrimination Claim: A Question of Cakes

Although the Court's opinion refrained from balancing the parties' rights in *Masterpiece*,[3] Justice Gorsuch's concurrence offered an assessment. For the purposes of this article, Justice Gorsuch's opinion is particularly interesting in two respects: firstly, because it frames the other rights in terms of what the baked good being offered to the couple is taken to be; secondly, for its insistence that Mr. Phillips' religious beliefs should be determinative in this matter.

To begin with the first of these aspects, Gorsuch notes how the level of specificity attached to the cake impacts the validity of claims being made. He thus accuses the Court of applying "a sort of Goldilocks rule," whereby "describing the cake by its ingredients is too general; understanding it as celebrating a same-sex wedding is too specific; but regarding it as a generic wedding cake is just right."[4] One area in which this exercise in cake calibration impacts the parties' rights and interests most clearly concerns the couples' claim to have been discriminated against on the basis of their sexuality, contrary to CADA. In refusing to sell them a marriage cake, it was alleged that insofar as this baker would have happily sold any betrothed heterosexual couples the same product, he had clearly discriminated against the couple because they were homosexual. Against this claim, Mr. Phillips insisted that he was not discriminating against these specific customers: he would

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1 Craig v. Masterpiece Cakeshop, 370 P.3d 272 (Colo. App. 2015).

2 *See, e.g.*, Anton Sorkin, *A Starch Reality: What Is at Stake in* Masterpiece Cakeshop*?*, 7 Oxf. J. Law Relig. 153, 153-59 (2018); Edward J. Schoen, *Masterpiece Cakeshop: A Case Study Brought to You by the U.S. Supreme Court*, 29 South. Law J. 25 (2019).

3 For a sample of scholarly disappointment this has attracted, see for instance Chad Flanders and Sean Oliveira, *An Incomplete Masterpiece*, 66 UCLA L. Rev. 156–74 (2019); Mark Strasser, *Masterpiece of Misdirection*, 76 Wash. & Lee L. Rev. 963–1012 (2019).

4 Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1738 (2018).

not have sold a "same-sex marriage cake" to *any* person, regardless of his/her sexuality.

The validity of the discrimination claim is thus predicated upon the nature of the cake. If it is conceived as a (generic) "marriage cake," then the baker would have been discriminating against the same-sex couple, as he would not have been denied this product to a heterosexual couple. If, however, the cake in question is a "same-sex marriage cake," as Mr. Phillips appears to have held, then the baker may legitimately claim that he did not discriminate against the couple. As will be discussed further below, for Justice Gorsuch, how the cake should be defined is not simply a matter of perspective, but of (Mr. Phillip's) *religious* perspective.

B. Justice Gorsuch and the Importance of Religious Freedom

The success of the couple's discrimination claim in *Masterpiece* is thus predicated upon the nature of the product. Who or what should decide this question? For Justice Gorsuch, it is the prerogative of the religious person (in this case, Mr. Phillips) to determine upon the item's socio-religious significance or meaning. This, Gorsuch argues, holds irrespective of whether the cake had any distinctive words or symbols. [5] Akin to an "emblem" or a "flag", a same-sex wedding cake is a symbol which conveys agreement with a particular set of beliefs or institutions.[6] Forcing someone to create such a symbol therefore implicates religious faith to just the same extent as written words. "To some, all wedding cakes may appear indistinguishable. But to Mr. Phillips that is not the case—his faith teaches him otherwise."[7] For the Court to suggest that a gay-marriage wedding be regarded by all parties as just a "wedding cake" is akin, Gorsuch suggests, to saying that "sacramental bread is *just* bread or a kippah is *just* a cap."[8] The dictates of Mr. Phillips' faith meant that he viewed the requested baked good as not just a wedding cake but as a *same-sex wedding* cake, endowed with religious significance and therefore violative of his freedom (under the First Amendment's Free Exercise Clause) to produce.[9]

In order to further illuminate Justice Gorsuch's thought concerning the prerogative of religious believers to determine the terms and meaning of debate, it will be instructive to briefly turn to his prior rulings on the Federal Court of Appeal's 10th Circuit. In *Hobby Lobby*, Justice Gorsuch argued that as a result of the right to free exercise of religion being violated, both the company (Hobby Lobby) *and* their owners, the Greens, should be entitled to financial relief. In a highly telling paragraph, Gorsuch states that:

> All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some, religion

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5 *Id.*

6 *Id.* (citing West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 632, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943).).

7 *Id.* at 1739.

8 *Id.* at 1740.

9 *See also* the UK Supreme Court's judgment in *Ashers Bakery* that making the baker in that case produce a cake for a same-sex couple would have been "akin to a Christian printing business being required to print leaflets promoting an atheist message." Lee v Ashers Baking Co. Ltd, [2018] UKSC 49, [2020] AC 413 (Appeal taken from N. Ir.).

> provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability.[10]

Gorsuch here draws upon the previous case of *Thomas v. Review Board of the Indiana Employment Security Division* (1981) in order to illustrate his point that it is a matter for religious believers to determine when a state of affairs is intolerable to their faith. In *Thomas*, the plaintiff, a Jehovah's Witness, was willing to participate in manufacturing sheet steels he knew might be used in armaments, but was unwilling to work on a fabrication line producing tank turrets.[11] Following the plaintiff's success in this case, Gorsuch argues that no one should have to forsake her religious beliefs in order to participate in the public sphere, and it is up to the religious person alone to say where the line is. To briefly reconnect this reasoning back to *Masterpiece*, it will be recalled that the discrimination claim against the baker in this case stands or falls upon whether the cake in question is a "marriage cake" or "same-sex marriage cake". According to Gorsuch's position, this question is one which the party exercising religious beliefs (Mr. Phillips) should decide.

Mr. Phillip's religious position that marriage cakes and same-sex marriage cakes are ontologically and qualitatively distinct, it might be further observed, entails an antecedent judgement that the unions connected with these cakes are also fundamentally different. Same-sex marriage, on this view, is a different kind of thing from heterosexual marriage. The cake to celebrate the former is therefore properly regarded as a "same-sex marriage cake," rather than a "marriage cake" *for* same-sex people.

This raises the question of how the Court has construed the nature of same-sex marriage.

C. Different Cakes, Different Unions? Obergefell Revisited

As Jeremy Waldron points out, marriage may be regarded a social "institution," "practice" or "reality," to which the family law of a country provides "housing."[12] Within the context of the U.S. (and much to Waldron and others' disagreement), this legal housing was provided not by a congressional statute, but instead by the Court's determinations—around three years after the events which culminated in *Masterpiece Cakeshop*—in *Obergefell v. Hodges* (2015).

In *Obergefell*, the Court passed a landmark ruling that same-sex couples had a constitutional right to marriage under the "Due Process" and "Equal Protection" clauses of the Fourteenth Amendment.[13] Drawing upon its previous case law from

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10 Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1152 (10th Cir. 2013). *See also* Gorsuch's 10th Circuit opinion in *Yellowbear v. Lampert*, 741 F. 3d 48 (2014).

11 Thomas v. Review Bd. of the Indiana Emp't Security Div., 450 U.S. 707 (1981).

12 Jeremy Waldron, *What a Dissenting Opinion Should Have Said in* Obergefell v. Hodges, N.Y.U. SCHOOL OF LAW, PUBLIC LAW RESEARCH PAPER NO. 16-44 (2016).

13 Admittedly, this case was not decided at the time of the events surrounding *Masterpiece Cakeshop*, which meant that the Mr. Phillips could claim that a substantial legal difference pertained between same-sex and opposite-sex couples seeking wedding cakes (same-sex marriage was not legal in Colorado at the time). Such an argument, however, would not now be available to him or any other baker in a similar situation in the United States.

Loving v. Virginia (which invalidated bans on interracial unions) and *Turner* v. *Safley* (which held that prisoners could not be denied the right to marry), the Court classed marriage among the "fundamental liberties protected by the Fourteenth Amendment's Due Process Clause," crucially among which are "certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs."[14] Comparing the union of same-sex couples with that of their opposite-sex counterparts, the Court asserts that since "marriage is a keystone of the Nation's social order," it is therefore "demeaning to lock same-sex couples out…for they too may aspire to the transcendent purposes of marriage."[15] The Court did not elaborate much on the "transcendent purposes" of same-sex marriage. However, its subsequent assertions strongly depict marriage in terms of an exclusive relationship between two people, in which a life-long commitment is made, and a joint identity formed, which transcends the sum of its parts. The Court stated that:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were…marriage embodies a love that may endure even past death.[16]

In *Obergefell*, the Court thereby put forward a positive vision for the potentiality of same-sex marriage to be a self-transcending union of two people in a faith-like commitment of love to one another. Within this vision, it may be observed that many same-sex marriages possess a commonality with many opposite-sex marriages, insofar as both centre upon the absolute promise of two people to love one another for the remainder of their lives ("the marital promise"). The remainder of this article will argue that the marital promise to love another should itself be viewed as an exercise of religious or conscientious freedom.

II. The Marital Promise to Love Another as an Exercise of Religious or Moral Belief

In what follows, I will argue that the marital promise to love another should be considered an exercise of religious or moral belief. At first glance, this claim may seem highly questionable. For one, it is not immediately obvious that "beliefs" are a constitutive part of "promises" at all. In order to address this issue—which necessarily precedes any analysis concerning whether it can be characterised as a "religious" belief—the lens of philosophy must be utilised.

Through this lens, the observations which follow in this section are twofold. Firstly, it will be suggested that there is something proto-religious about the practice of making promises itself, and that this proto-religiosity is particularly acute in the case of the marital promise. Promises, *qua* promises, ultimately concern the moral beliefs and normative intentions of the participants, and as such are not reducible

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14 Obergefell v. Hodges, 135 S. Ct. 2071, 2587 (2015). *See also* Loving v. Virginia, 388 U.S. 1 (1967); Turner v. Safley, 482 U.S. 78 (1987).

15 Obergefell v. Hodges, 135 S. Ct. 2071, 2590 (2015).

16 *Id.* at 2608.

to either naturalistic or positivistic accounts. Secondly, it will be argued that when the object of one's promise is perpetual love for another person, the rationality and moral responsibility of this particular promise (*qua* alleged "promise against the evidence") assumes anthropological assumptions and moral commitments on the part of the parties involved.

A. The Promise to Love Another

To begin, it may be argued promises, by their very nature, escape objective and non-moral explanation. Much work has recently been done within philosophy on the nature of promissory obligation. Following David Hume's lead,[17] however, Catholic moral philosopher Elizabeth Anscombe uniquely suggests that a prior and more fundamental problem should first be addressed. What it means to be "making a promise," Anscombe holds, is not itself something which is capable of intelligibility under a naturalistic framework.[18] Promises, Anscombe points out, belong to a particular class of verb. Promises are institutional verbs, in that that their meaning cannot be separated from the beliefs and intentions of those engaged in them. A person is only making a promise if that is what they understand themselves to be doing. In other words, "x is promising" is only the case if x *believes* that he/she is engaged in an exercise of promise-making. A vicious circularity ensues, as Anscombe explains:

> If thinking you are getting married is essential to getting married, then mention of thinking you are getting married belongs in an explanation of what getting married is; but then won't an explanation of what getting married is be required if we are to give the content of thought that one is getting married? Hence it will be impossible to explain what getting married is and impossible to say what is the thought of the man who thinks he is getting married.[19]

This is the paradox of promising. The action of "getting married" (making a marital promise) is explained with reference to expressing the thought that you are getting married, but such a thought requires a prior understanding of what getting married is. The thought of getting married simultaneously constitutes the explanation of what it is make a marital promise—indeed, Anscombe stresses that it is both an "indispensable verifier" and precondition of making this promise—*and* requires one.[20] Anscombe further illustrates this point with a situation wherein all the physical or external conditions are present for making a marital promise, including two parties who say the appropriate promissory words, but one of these parties

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17 *See* David Hume, A Treatise on Human Nature 477-570 (L. A. Selby-Bigge ed., Clarendon Press 1888) (1739).

18 G. E. M. Anscombe, *On Promising and Its Justice, and Whether It Need be Respected in Foro Interno*, 3 Crítica: Revista Hispanoamericana de Filosofía, May, 1969, at 61; G. E. M. Anscombe, *Rules, Rights, and Promises*, 3 Midwest Stud. in Phil. 318 (1978).

19 Anscombe, *On Promising and Its Justice, supra* note 18.

20 *Id.* at 62.

believes that they are participating in a rehearsal, rather than an actual ceremony.[21] In such a case, even though the correct external action is being performed (and the parties involved believe that the action *would* be sufficient, if their intention was present), no promise would actually occur because the belief that a promise was being made was absent.

At first sight, this aspect of promises seems to render the concept intrinsically problematic. Anscombe likens the bringing forth of a promise through the parties' belief about their situation and the significance of their words to "someone's having substantive existence because someone loved him."[22] Such a scenario, however, "seems impossible. Whom did the lover love, if he was not in a state of illusion?"[23] While thought or belief may be the efficient cause of something coming into existence (as in any personal plan), it nevertheless remains the case, for the sake of objective coherence, the thing which thereby comes into existence must be capable of having a description (and thus of being describable) independently from the fact that it has been thought, believed or desired.[24] No such independent descriptive account, however, appears available when it comes to promises.

Once again following Hume's lead, Anscombe argues that the solution to this quandary is in viewing the practice of making a promise as part of a social-linguistic game. In order to "make a move" in this "language game" (in the Wittgensteinian sense of the term), one needs to be acting as a player in the game, in accordance with its rules. This, Anscombe writes, "involves that you are acquainted with the game and have an appropriate background, and also appropriate *expectations* and *calculations* in connection with e.g. moving this piece from point A to point B."[25] This shifts the centre of discussion from what is being explicitly thought and believed about what is being done, to the act and itself and its social context. Consequently, "[i]f someone seriously thought he was only rehearsing, he would not afterwards *act* as if he thought he was married: if he did so, his plea that he 'thought it was only a rehearsal' would not be heard."[26] This marks the beginning of a perspective, which until recently has been almost unchallenged within the philosophy of promises, of regarding the meaning of this concept as the product of social norms, conventions or institutions.

This positivist or conventionalist explanation of promises, however, is not without its own problems.[27] The first objection which has often been raised against the paradigm in recent times is that it cannot explain the particularity which accompanies breaking one's promise to a specific person. When a promise is broken or unfulfilled, it is pointed out, the party with a legitimate grievance is the particular recipient of the promise, and not the larger socio-linguistic community of fellow "promise-game players." To further press the point, this objection would seem to be particularly acute in the case of that most intimate and personal of promise which is the marital promise to love another in perpetuity. When the promise to faithfully

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21 *Id.*
22 *Id.*at 66. *Id.* at 66.
23 *Id.*
24 *Id.*
25 *Id.* at 72 (emphasis original).
26 *Id*.
27 For a prominent example of an alternative account of promises, see Thomas Scanlon, *Promises and Practices*, 19 Phil. Public Aff. 199 (1990).

and loyally love another in marriage is broken, it is not the community at large which has a moral claim against the partner who has strayed; it is the other marital partner.

Another objection raised to this account is that while regarding promises as a social practice or convention may rescue the concept from the conceptual and definitional difficulty which Anscombe identified with naturalistic accounts, it does not necessarily explain how or why promises should be considered as a normative exercise. One may still ask why the game of promises should be considered a good one to abide by. Anscombe's approach to this issue is to posit that the sort of modals which attach to the keeping of promises are the sort of obligations which are commonly entailed by the rules of a game: the player "has to" play in a certain way (which Anscombe terms "stopping modals") and "cannot" act in contravention of the rules ("forcing modals"), as to do otherwise would be contrary to the norms and expectations of others. In response, however, it might be objected that this is not the sort of expectational belief held by those who understand themselves to be making or receiving a promise—perhaps particularly in the case of a commitment to love another in marriage.

As Michael Pratt observes, the sort of expectation and belief held by those who in a promise-making situation is a normative one. The expectation of the promisee is not based on a descriptive prediction that the promisor will do what they have committed to, but on a moral expectation that the promisor regards it as normatively wrong not to fulfil his promises.[28] Moreover, on Pratt's view, a promise can only be said to be made where the speaker communicates an intention to be morally (as opposed to merely socially or legally) bound by the promise); indeed, Pratt observes that this is what separates promises from merely civil and legal contracts.[29] It may therefore be argued that while the conventionalist account of promises evade the objection which Anscombe formulates that the concept of promises, *qua* institutional verb, is naturally unintelligible, it is still subject to a second critique: that no account can be given (either naturalistically or in terms of socio-linguistic agreement) of how the making of a promise can entail a moral obligation. This seems especially pertinent in the case of the marital promise to love another, due to the particular gravity and import of this particular promise. Frequently, the promises which one makes—though still entailing a moral responsibility—are not *existentially* significant. In promising to love another person for the rest of his/her life, a person makes a promise whose consequences and implications (both for him/herself and for the other person involved) arguably exceed those of any other, such as to make the moral obligation involved in the marital promise particularly heavy.

Consequently, the marital promise, *qua* promise, evades either naturalistic or conventionalist explanation: it must instead be considered a form of moral belief. I will now explore how further examination of how the rationality and responsibleness of the marital promise, *qua* promise to *love* another, involves subscription to specific framework of moral, anthropological and metaphysical beliefs.

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28 *See* Michael Pratt, *Promises and Perlocutions*, 5 Critical Rev. Int'l Soc. Pol. Phil. 93 (2010). .

29 *See* Michael Pratt, *Contract: Not Promise*, 35 Fla. St. U. L. Rev. 801, 812 (2008).

B. The Promise to Love Another

The promise of two betrothed parties, *qua* unconditional promise *to love*, has been the subject of many recent philosophical discussions and critiques. As will be seen, these can be divided along broadly the same lines as were visible with promises in general. That is to say, the same problems raised concerning promises in general can be seen to re-emerge with promises to love, albeit in a different form.

For one, it is argued that while actions may be under the control of the will—and thus appropriate things to promise—affections (such as love or happiness) are not. As Elizabeth Brake puts it, "the very concept of love may include uncontrollability, because it involves attitudes of respect or admiration or care or desire, which by their nature, cannot be forced….even by oneself."[30] Insofar as promising something involves making a prediction, one cannot promise something which is by nature unpredictable.

The assertion that promises can only be made concerning things within one's control can be pressed even further. Love would seem dependent upon many of the contingencies which are constitutive of human life. These include one's own character, as well as that of the other person.[31] While a *conditional* promise to love might therefore be appropriate, an unconditional promise should not be made, due to the contingent and transient nature of love's many variables, including personal identity. Related to this is an epistemic objection: one should not promise to carry out x where the conditions which dictate the possibility or impossibility of x's fulfilment cannot be known in advance. One should not promise that one will be alive in 30 years' time, let alone that one will unconditionally continue to be in a relation of love with another. As Iddo Landau puts it, "[t]o promise that one's love will not end is to make a promise one may not be able to keep, about what may well be beyond one's control."[32] In making a promise to love, one cannot rule out the possibility of being fundamentally mistaken about a crucial aspect of one's love, such as the character of the other person. In promising to love another person unconditionally, a person therefore fundamentally errs.

One attempt which seeks to circumvent these problems has been to argue that the marital promise to love another is not a prediction, but rather a statement of intention or desire. As John Wilson observes, in making the marital promise, the bride does not simply want to be assured that the groom believes that it (objectively speaking) is *likely* that he will continue to love her in the immediate future. Rather, "She wants to know whether the bridegroom intends or wants that state of affairs to continue."[33] In 'Marital Faithfulness', political philosopher Susan Mendus further develops this line of thought. The marriage commitment, Mendus argues, is "more like a statement of intention" than a prediction about future actions.[34] To say that "x is unconditionally committed in love to y" is not to make a prediction about their

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30 Elizabeth Brake, *Is Divorce Promise-Breaking*?, 14 Ethical Theory and Moral Practice 31 (2011).

31 *See also* Dan Moller, *The Marriage Commitment—Reply to Landau*, 80 Phil. 279, 281 (2005).

32 Iddo Landau, *An Argument for Marriage*, 79 Phil. 475, 475 (2004). *See also* Dan Moller, *An Argument Against Marriage*, 78 Phil. 79, 85 (2003).

33 John Wilson, *Can One Promise to Love Another*?, 64 Phil. 557, 560 (1989).

34 Susan Mendus, *Marital Faithfulness*, 59 Phil. 243, 247 (1984).

future relationship, but rather to say that in the present moment, x is unconditionally committed (in x's intention) to y. Drawing upon the work of Norman Malcolm, Mendus remarks that it represents a "strong" rather than weak epistemic belief, in that in making this promise, "I cannot now envisage anything happening such as would make me give up that commitment."[35] The marital promise to love one another, on this interpretation, is the assertion that one intends and desires to love another person in perpetuity.

In 'The Promise that Love Will Last', Camilla Kronqvist similarly argues that making marital promises to indefinitely love another is equivalent to neither predicting what one will do, nor predicting what one will feel. Rather, she says, "I am expressing my *trust* in you and my *willingness* that our relationship continues."[36] On this view, the promise to love made in marriage concerns two primary components: belief (in the character of the other person) and intention or desire that the relationship continues to be loving. In making this argument, Kronqvist explicitly draws upon the language of belief, making a distinction between "attempts to control the indeterminacy of life and embracing it with faith in one another."[37] On this view, the central elements of the promise to love are intentionality or desire, and belief or trust. Some conceptual housekeeping may be useful here. While both Kronqvist and Mendus mention intentionality, desire and belief as separate components of the marital promise to love, it is often argued within the field of philosophy of mind that intention implies both desire and belief.[38] In other words, where an intention to indefinitely love another exists, both the desire to do this and belief that it is possible will be present too. It is therefore perhaps sufficient to say that the unconditional promise to love another person in marriage expresses an intention with regard to this love, rather than a prediction as to the circumstances which may befall the happy couple in the future.

Perceiving the marital promise to love another in terms of a volitional intentionality to continue loving,[39] rather than a cognitive prediction concerning the future, substantially changes the framing of philosophical objections to this promise. While a significant degree of objective uncertainty fatally undermines the capacity to make a prediction, the same does not hold for intentions. As such, the arguments of thinkers such as Kronqvist and Mendus greatly helps the coherence of promising to love another. This turn to intentionality does not, however, entirely save the marital promise from its critics. In addition to a psychological state of intentionality, a promise is also a normative state. In making a promise, one imposes an obligation or injunction on oneself to do (or be) as promised. As Brake writes, "promises are not merely statements of intention. Promises create obligations, and…a stated intention to perform something impossible cannot create an obligation."[40] Consideration of the morally-binding nature of a promise

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35 *Id. See* Norman Malcolm, *On Knowledge and Belief*, 14 Analysis 94 (1953).

36 Camilla Kronqvist, *The Promise That Love Will Last*, 54 Inq. 650, 653 (2011).

37 *Id.* at 651.

38 *See, e.g.*, Robert Audi, *Intending*, 70 J. Phil. 387 (1973); Donald Davidson, *Intending*, *in* Philosophy of History & Action 41–60 (Yirmiahu Yovel ed., 1978).

39 For an interesting argument that intention of thought should be conceived as different from intentionality of desire, see P. T. Geach, *Two Kinds of Intentionality?*, 59 The Monist 306-20 (1976).

40 Brake, *supra* note 30, at 35.

resurrects the conceptual objections noted above: there can be "no ought without a can," as Immanuel Kant famously argued. In making a promise, a person imposes an obligation upon oneself, in the form of an injunction not to break the promise. If the obligation concerns something which is by nature beyond the promisor's control—or similarly where he cannot know whether it is possible to fulfil the obligation he has made—then such a promise cannot be rationally made. Seen thus, the promise to unconditionally love another would seem to be the quintessential example of just an irrational undertaking.

Indeed, the marital promise to love another would seem to perfectly exemplify a promise which is "against the evidence." In "Promising to Try," Jason D'Cruz and Justin Kalef argue that such a promise, if made in an unqualified way, is irresponsible. Instead, D'Cruz and Kalef argue that a more conscientious choice to make would be to promise *to try*.[41] Rather than being indicative of "bad faith, faulty reasoning, or dishonesty," the authors note that "[i]t is part of being a human being to have a limited supply of willpower" and "[i]n some cases promising to try just means being honest about this fact."[42] It is not necessarily the case that the promisor in this situation lacks commitment (either to the other person or to their promise), but only that they are conscious of the possibility of failure. Conditions of failure (particularly, one might argue, over the course of one's potential lifespan) are often difficult to precisely enumerate, as a result of which the conscientious and responsible promisor will not, on this view, make an unconditioned or absolute promise, the proverbial equivalent of which is writing a cheque one cannot necessarily cash.

In response to this perspective, Berislav Marušić begins by arguing (in common with Kronqvist, Mendus and others) that promises are not a matter of weighing probabilities. Rather, promises are a matter of practical reason; they are a *decision*, rather than a calculation. "When considering matters that are up to us, we should look to our practical reasons, not to our evidence alone…we should decide what to do, not predict what we will do."[43] Marušić gives the example of two lovers facing imminent physical separation because one of them is departing for military service. For the party who will remain in civilian life, to promise to "try" to be faithful would clearly be an inadequate response.[44] Marušić quips that "[t]o echo Sartre…the lover who promises to *try* to be faithful is a bastard or a coward."[45] As exercises of practical (rather than speculative) reason, the making and execution of promises concerns the moral character of the promisor.

This leaves open the question of whether the promise to love can be sincere or morally responsible. On this point, Marušić makes an interesting case. In apparent agreement with those who argue that the marital promise to love is untenable, Marušić holds that if one *does* believe that there is a "significant chance" that one will not do something, then it is indeed irrational, irresponsible or insincere to promise the contrary.[46] Despite this, Marušić claims that, contrary to the objection

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41 Jason D'Cruz & Justin Kalef, *Promising to Try*, 125 Ethics 797, 799 (2015).
42 *Id.* at 802.
43 Berislav Maruši, *Promising Against the Evidence*, 123 Ethics 292, 294 (2013).
44 *Id*. at 296.
45 Berislav Marušić, *What's Wrong with Promising to Try*?, 98 Pac. Phil. Q. 249, 251 (2017) (emphasis added).
46 Maruši, *supra* note 43, at 304.

noted above, promises to love *can* be sincere and rational. The reason for this, Marušić explains, is that agents may take a different view of their actions from third parties, even where everyone has access to the same evidence. While others may perceive an action which is amoral (at best) or immoral (at worst), therefore, the promisor can nevertheless be morally justified in making her promise to love because it is rational, responsible and sincere on the terms of her own perspective.

To review, the argument here turns on two claims. Firstly, it is claimed that promises (including those to love) are an exercise of practical reason rather than a prediction or calculation *per se*. This provides a response to the accusation that making a promise to love is irrational. Secondly, it is claimed that the coherence of deliberately and intentionally making one's love for another the object of a promissory obligation depends upon the perspective of the promisor. This provides a response to those might allege that making a promise to permanently love another person is either irresponsible or insincere, due to the fact that one cannot (rationally, as well as in good faith) make an obligation where the conditions for fulfilling the obligation are outside one's control.

Marušić's argument opens the question of what, exactly must be believed by the promisor in order for his promise to forever love another to be internally justified; that is to say, for the promise to be responsible and sincere according to the promisor's own point of view. In other words: what must be believed for one's love towards another to not necessarily (or most probably) be contingent and temporary?

Firstly, one has to believe that both oneself and the other to whom he/she is engaged will not necessarily change in a significant way so as to effectively become a different person in a few decades' time. A person's character will, of course, change over the years, but one must believe that it will not change so radically that the identity to whom one is married is no longer the individual to whom one made a promise to perpetually love. Secondly, one must believe that human beings in general (and oneself in particular) are capable under normal conditions of exercising enough freewill over their beliefs, desires and dispositions that the question of whether one will continue to love the other is not wholly outside of one's control. Thirdly and perhaps most significantly, one must believe that human beings are capable of an altruistic concern for another person which transcends one's temporal interests and desires. Moreover, not only must one believe in this moral anthropology; one must also believe that he/she does indeed have such an altruistic and transcendent concern for another human being and that this is the reason why she is making an existentially significant marital commitment.

If one subscribes to these beliefs, then one may be able to affirm (with Marušić) that the promisors' promise to love another (from their perspective) is capable of being sincere, rational and responsible. *Without* these beliefs, however, it is arguably difficult to see how the objections raised concerning absolute promises to love by Landau, D'Cruz and Kalef can be rebutted. In this way, it may be argued that the promise commonly made by two people to unconditionally love another in marriage necessarily implies a commitment to a particular set of non-empirical, normative beliefs which concern the humanity's metaphysical and meta-ethical landscape, as well as its moral anthropology.

C. The Promise to Love Another, Forever: An Intrinsically Religious Promise?

The forgoing argument stipulates that constitutive of the marital promise to love another person are beliefs. As an institutional verb, whose very definition includes that one believes that he/she is doing it, promises cannot be reduced to a naturalistic account (Anscombe). Additionally, because they are believed to impart a moral obligation, promises are also not reducible to a purely conventionalist or socio-linguistic account. With regard to marital promises to *love* specifically, particular moral, metaphysical and anthropological assumptions must be supposed in order for these promises not to be irrational, insincere or morally irresponsible.

The promises which some people make—as part of their marriage ceremony—to love another are both normative and permanent; that is to say, the marital promise entails an obligation on the promisors to love the other for at least the remainder of their lives.[47] It is this normative longevity, it has been noted, which separates these promises from other contractual undertakings, as well as presenting a substantial obstacle to those who wish to recast the essence of the marital promise in terms of prediction, intent or desire. It is also, I submit, where the religiosity of the marital promise is perhaps most readily apparent. In *Promises, Oaths, and Vows*: *On the Psychology of Promising*, Henry J. Schlesinger observes that in its sincerity and intention to bring about a permanent state, "the marriage vow is unique."[48] Whereas "ordinary secular promises change our relationship to someone else (or to the self) temporarily" and "mark a particular intention as serious but also, perhaps implicitly, state the means of releasing us from the obligation undertaken," the promise made by prospective spouses to love one another admits to no such temporal expiration.[49]

As the Court in *Obergefell* opined, it is possible that marriage (of either the opposite-sex or same-sex variety) "embodies a love that may endure even past death."[50] In promising to love someone for the rest of his/her life, a person voluntarily, consciously and intentionally puts him/herself in a permanent ethical and normative relation to one other person—in contradistinction to all others. Insofar as this promise is to an unconditioned and perpetual commitment of love, the moral obligation it entails is also absolute. To borrow the terminology of theologian Paul Tillich,[51] whose conception of God and religion was referenced by the Court in *United States v. Seeger*,[52] to make an absolute promise to love another

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47 Certainly, not all legal marriages involve the making of such promises; many opposite-sex and same-sex couples choose to structure their relationship differently. It remains to be determined whether the argument would be applicable to the couple in *Masterpiece Cakeshop*, or any other case which has so far been heard by the Court. Making a public resolution or pledge to love one another remains, however, a central feature of many marriages.

48 Herbert J. Schlesinger, Promises, Oaths, and Vows: On the Psychology of Promising 19 (2008).

49 *Id.*

50 Obergefell v. Hodges, 135 S. Ct. 2071, 2608 (2015).

51 *See* Paul Tillich, The Shaking of the Foundations (2012).

52 *See* United States v. Seeger, 380 U.S. 163, 180 and 187 (1965). The Court in *Seeger* ruled that a defendant had the right to abstain from compulsory military service because of his deeply held conscientious beliefs against killing human beings. *See also* Torcaso v. Watkins, 367 U.S. 488 (1961) (affirming "Secular Culture" and "Ethical Humanism"

is to engender an obligation such that its fulfillment now functions as an "ultimate concern" for the promisors.[53]

The marital promise is central to the promisor's self-identity, as well as defining their social and moral landscape. Due to the intentional and imperative form of the promise being made, as well as its subject being love, I have argued that marital promises entail normative beliefs which touch upon fundamental questions concerning the human condition. In intentionally placing an obligation on oneself to love someone else, an encounter with the other *qua* other is facilitated. Attention to the promisor's resolution to unconditionally love another *without temporal limit*, I now further argue, strengthens and illuminates the contention that when two people—regardless of their respective genders—seek to make a public and unconditional promise of love to one another, they are exercising a form of (broadly defined) religious freedom. Even if the participants in a marriage ceremony do not subscribe to a conventional or institutional form of religious belonging, their act of getting married may thus be regarded as endowed with religious or conscientious significance.

III. Conclusion

While *Masterpiece Cakeshop* is the place with which this article began, the destination we have ended up at is much broader. The position which has been sketched out may, or may not, be applicable to Charlie Craig and David Mullins.[54] It would, however, have implications for many couples facing a similar situation. To view the marital promise to love another person as an exercise of religious or conscientious belief is to significantly alter the framing of the same-sex marriage debate. According to this perspective, it is not only the objectors to same-sex marriage for whom religious freedom or moral liberty is at stake. One major implication of this argument is that the relative burdens and benefits incurred by the respective parties must be recalibrated. Rather than it only being the aggrieved baker (or any other type of wedding vendor) who might have an interest in protecting his religious freedom, it must be recognised that the couple seeking a cake as part of their endeavour to celebrate making marital vows to one another also have such an interest. This is particularly true in relation to the couple's marriage cake, due to the fact that, as food historian William Woys Weaver notes, "the Great Cake...is a food that has become a veritable institution. A wedding without it would be a wedding without protocol, a rite without confirmation."[55] Put another way,

as forms of religious belief under the U.S. Constitution's First Amendment) and Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979) (in which the Court recognized transcendental meditation as a constitutionally protected religious belief).

53 Space here unfortunately does not permit further exploration of the existential and phenomenological dimensions of the marital promise. For an extensive philosophical and theological meditation on the transcendental dimensions of the marriage "resolution", see Søren Kierkegaard, Stages on Life's Way 87–184 (Edna H. Hong & Howard V. Hong eds & trans., 2013).

54 For this reason, the argument sketched in this article is unlikely to provide a basis for arguing in favour of same-sex marriage *per se*, simply due to the plurality of ways in which people might choose to become married.

55 William Woys Weaver, *Foreword*, *in* Simon R. Charsley, Wedding Cakes and Cultural History vii (1992).

the cultural significance of the marriage cake is such that in many cases it is not seen as accidental to the marital-vow ceremony, but rather as an *essential* to its completion.[56] To be denied a wedding cake would therefore be to incur a burden which is comparable to that of the religious business owner.

As previous cases illustrate,[57] the right to religious expression—which some scholars, owing to its placement in the U.S. Constitution, have dubbed America's "first freedom"—is often weighed by the Court as a highly important interest. In the context of a same-sex couple's pursuit of their (post-*Obergefell*) constitutionally protected legal marriage, as well as the anti-discrimination statutes which prohibit denial of services on the basis of sexuality, the argument here would seem to add substantial weight to the couples' case. Additionally, if Justice Gorsuch's perspective on religious freedom's importance is considered, then it is the prerogative of religious belief-exercisers (which now includes the homosexual couples pursuing marital promises) to define the meaning and significance of the cake being sought for their marriage.[58]

Such a shift in judicial perspective could have significant import for those seeking to champion the rights of betrothed homosexual couples. At the same time however, it may also be claimed that the opposition between the two sides is now even more intractable than it was before. With religious or conscientious beliefs potentially manifesting on both sides of the baking sales counter, it is not at all clear how the two positions can be meaningfully mediated,[59] or neutrally adjudicated. It thus perhaps remains the case that in matters of religious freedom and non-discrimination, we are incapable of having our cake and eating it too.

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[56] The significance of the wedding cake to the marriage ceremony which Weaver here notes arguably provides a basis for differentiating it from other marriage related services (e.g. wedding photography or flowers).

[57] *See, e.g*., Cantwell v. Connecticut, 310 U.S. 296 (1940); Wisconsin v. Yoder, 406 U.S. 205 (1972); Church of the Lukumi Babalu Aye, Inc. v. Hialeah*,* 508 U.S. 520 (1993).

[58] To briefly anticipate the charge that this argument risks being too broad in its implications, it should be noted that nothing here suggests that the freedom to make a marital promise of unconditional love should be indiscriminate or absolute; other considerations may still constitutionally trump the exercise of this freedom.

[59] The philosophical navigation of conflicting rights, such as in this scenario, may arguably hinge upon what, exactly, the *basis* and *rationale* for these rights is conceived to be. Certain rights, it may be suggested, should be afforded greater weight because they are in some sense foundational: that is, they are more intimately connected to the ontology of, and root justification for, constitutional or human rights *per se*. At this theoretical level, much might therefore depend on whether a couple's pursuit of the marital promise to love one another can be said to cohere with the moral underpinnings of rights itself. This question, in turn, hinges upon what the conceptual relationships between love, justice and rights are posited to be. Space here does not allow for sufficient development of this line of inquiry. For one recent proposal which might provide a rewarding conversation-partner, see Michael Perry's defense of what he terms the Other-regarding "agapic sensibility" at the core of human rights in Michael J. Perry, A Global Political Morality 24–41 (2017); Michael J. Perry, *The Morality of Human Rights*, 42 Hum. Rights Q. 434 (2020).

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Rule by the Few in the Federalist Papers: An Examination of the Aristocratic Preference of Publius

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ABSTRACT

The Federalist Papers are a set of eighty-five essays written by Alexander Hamilton, James Madison, and John Jay during the founding era of the United States, with the purpose of persuading the states to adopt the Constitution as the replacement for the Articles of Confederation. The Papers were some of the most impressive political writings of the time, and are still cited frequently today by the United States Supreme Court. The arguments set forth in the Papers attempted to defend the Constitution's aristocratic characteristics against its opponents, the Anti-Federalists, while also attempting to normalize an anti-democratic, representative form of government in the minds of the American people. The clever advocacy and skillful rhetoric employed by Hamilton, Madison, and Jay led to the eventual ratification of the Constitution, and consequently the creation of the most powerful and prosperous nation on the planet. This paper examines the differences between the traditional forms of government, the political philosophies of the Papers' authors, the anti-democratic, aristocratic nature of the government proposed by the Constitution, and the arguments for and against its adoption, as articulated in the Papers and various other writings.

KEYWORDS

Federalist Papers, James Madison, Alexander Hamilton, Aristocracy, Constitution

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I. Introduction

In the post-revolutionary era, good government was of the utmost concern to the people of the newly formed United States. Seeking to prevent the type of tyranny from which the colonies had successfully broken free, the Articles of Confederation were adopted as the country's first form of government. The Articles soon proved to be ineffective, however, which, in the summer of 1787, led to the creation of the Constitution we know today. While the new Constitution seemed like a good solution to some, it also had its opponents. The group known as the Federalists, who favored adopting the new Constitution, were opposed by the Anti-Federalists, who viewed the new Constitution as nothing more than an instrument tailored by and for aristocrats prone to corruption and tyranny. The Anti-Federalists, a group which included the likes of Thomas Jefferson, Patrick Henry, and George Mason, warned of the dangers of the new Constitution, consistently claiming that, if adopted, it would lead to the concentration of power in a few hands, resulting in rule by a small number of elites. The *Federalist Papers,* eighty-five essays written by James Madison, Alexander Hamilton, and John Jay under the pseudonym "Publius" were the Federalists' means of counteracting the Anti-Federalists' claims. These essays were written to discredit the claims of the Anti-Federalists and to persuade the states to ratify the new Constitution. While the *Papers* may have ultimately achieved these goals, an examination of the authors' political philosophy and rhetoric reveals that the Anti-Federalist claims may not have been all that far off. What one finds through such an examination is the preference of Hamilton, Madison, and Jay for an aristocratic form of government, featuring rule by few elites and the suppression of the people's influence. It follows, then, that the implicit aim of the Federalists was to adopt a form of government that resembled a balanced, "middle" state, but that operated as an aristocracy—a form of government in which the masses are ruled by the elite part of society, i.e., "the few," and which concentrates all of the supreme governmental and decision-making power into the hands of those few. This essay will examine these points in greater detail.

II. Classic Conceptions of Government

To understand what is meant by "aristocracy," and the Federalists' preference for it as opposed to other forms of government, a discussion of the fundamental forms of government, as conceived by prominent philosophers, is necessary. First, government will be examined through the lens of the prominent Greek philosopher, Aristotle. Second, the views of the French philosopher Montesquieu, which heavily influenced the Federalists and Anti-Federalists alike, will be discussed.

A. Government as Conceived by Aristotle

Aristotle viewed government as a division of power between men; "true" forms of government were those that were primarily concerned with the common interest, or in other words, the collective good of the people.[1] In contrast, governments

[1] 1 Aristotle, The Politics 144 (Benjamin Jowett, trans. Oxford: Clarendon Press, 1885), https://oll.libertyfund.org/titles/579.

primarily concerned with the private interests of rulers were perversions.[2] According to Aristotle, the classification of a government depends on how its power is distributed: "[t]he supreme power must always be exercised either by one, or by a few, or by many."[3] When a government is chiefly concerned with the collective good ("true" government), the power in the hands of one is called "royalty"; in the hands of a few, "aristocracy"; and in the hands of many, "polity" or "constitutional government."[4] When a government is only concerned with the private interests of a single person or class ("perverted" government), power in the hands of one is called "tyranny"; in the hands of a few, "oligarchy"; and in the hands of many, "democracy."[5] In other words, tyranny, oligarchy, and democracy are the perversions of royalty, aristocracy, and polity, respectively. Governance by the one, the few, or the many becomes perverted when the government begins to administer itself primarily in the interest of one person or class, whether it be the rich or the poor.

As to the question of how the supreme governmental power should ideally be distributed, Aristotle believed that rule by the many was the best solution: "[t] he people, taken collectively, though composed of ordinary individuals, have more virtue and wisdom than any single man among them."[6] Even so, Aristotle recognized that this might not always be practical; indeed, while some individuals are wise, others are nothing more than "brutes," making rule by a public body containing the latter dangerous to good government.[7] Because of this risk, Aristotle did not see "the many" as fit "to hold great offices of state."[8] A solution to this, therefore, was to give "the many" a judicial and deliberative function—such as electing magistrates to state offices and holding them accountable for their official actions—so as to prevent the exclusion of the masses from the administration of government entirely, which would surely give rise to disdain and revolt.[9]

Aristotle's vision, therefore, was to harness the collective wisdom and virtue of the masses by allowing them to select qualified and intelligent men to fill state offices. Those elected would then hold the supreme governmental and decision-making power, eliminating the risk of poor governance and mob rule by the "brutes" to which Aristotle referred. Notwithstanding their lack of governmental power, the masses would still be satisfied by having the ability to hold the elected men accountable for their conduct, giving them some sense of involvement in the government. This type of government ultimately constitutes what Aristotle referred to as "polity," or "constitutional government."[10]

Aristotle viewed a true aristocracy (rule by the few in the interest of the collective good), or, in other words, "the government of the best," as the theoretical "ideal state."[11] If a true aristocracy were practically attainable, it would be the best form

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2 *Id*.
3 *Id*.
4 *Id*.
5 *Id*.
6 *Id*. ¶ 149.
7 *Id*.
8 *Id*. ¶ 150.
9 *Id*.
10 *Id*. ¶ 144.
11 *Id*. ¶188.

of government; however, this form of government would likely be impracticable, requiring of the ruling class "a standard of virtue which is too high."[12] Indeed, it is hard to imagine an elite ruling class that would voluntarily govern in the interest of the masses rather than their own. Thus, for Aristotle, the best that a society could do, in terms of practicality, was to adopt a "middle state," or "polity."[13]

A "polity" is a fusion of democracy (rule by the many in the interest of the masses) and oligarchy (rule by the few in the interest of the elites); it "seeks to unite the freedom of the poor majority with the wealth of the rich minority."[14] Such a form of government "is usually called polity when inclining towards democracy, and aristocracy when approaching more nearly to oligarchy."[15] A polity is attained by borrowing concepts from both an oligarchy and democracy; Aristotle gave the example of public magistrates being elected by vote as in an oligarchy, but without any property qualifications as in a democracy.[16] He also gave the historical example of the Lacedaemonian state, which featured democratic characteristics such as the election of few officials by the masses out of the masses, the common education of all citizens, and common meals and dress. In addition to these democratic characteristics, the Lacedaemonian state also featured the oligarchical characteristic of vesting the power of banishment and inflicting death (law-making and decision-making power) in the hands of the few elected officials.[17]

Both democratic and oligarchic principles should be present in a polity, but neither should be so prevalent as to be ascertainable from the other; the key to a successful polity is the virtue and good will of the citizenry.[18] Aristotle's polity bears the closest resemblance to the United States government (relatively few officials are entrusted with governmental power, but are elected by and out of the masses). Of note in this respect, however, is Aristotle's warning that

> in distinguishing different kinds of government, it must also be remembered that a constitution framed in one spirit may be administered in another, e.g., an oligarchy may be administered in a popular, a democracy in an exclusive spirit. This frequently happens after a revolution; old habits linger although the government is changed. The laws remain, but the victorious party keep the power in their own hands.[19]

Thus, while a polity may be the best form of government to Aristotle, a government instituted as a polity, like that of the United States, can easily be transformed into an oligarchy or aristocracy through its administration.

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12 *Id*. ¶ 198.
13 *Id*.
14 *Id*. ¶ 190.
15 *Id*. ¶ 189.
16 *Id*. ¶ 190.
17 *Id*.
18 *Id*.
19 *Id*. ¶ 187.

B. Government as Conceived by Montesquieu

The governmental philosophy of Montesquieu has similarities to that of Aristotle, but with fewer distinctions as to the different forms of government. Of focus here is Montesquieu's philosophy with respect to rule by the few and rule by the many. Instead of breaking down different schemes into true governments and perverted governments, Montesquieu maintained a simpler approach: "[w]hen the body of the people is possessed of the supreme power, this is called a democracy. When the supreme power is lodged in the hands of a part of the people, it is then an aristocracy."[20] In other words, rule by the many, or the masses, is simply a democracy, and rule by the few is simply referred to as "aristocracy."

Like Aristotle, Montesquieu believed that the collective wisdom of the masses should be utilized to the greatest extent possible in the administration of government. For a democracy to constitute good government, "[t]he people, in whom the supreme power resides, ought to have the management of every thing within their reach."[21] Like Aristotle, however, Montesquieu also recognized that the people are not fit to handle every government matter. For example, the people are not "capable of conducting an intricate affair, [or] of seizing and improving the opportunity and critical moment of action."[22] Therefore, Montesquieu believed, "what exceeds [the people's] abilities must be conducted by their ministers," and it is "a fundamental maxim, in this [type of] government, that the people should choose their ministers; that is, their magistrates."[23] Thus, what Montesquieu views as a well-administered and properly-constituted democracy is essentially the same form of government that Aristotle calls a polity—power vested in the hands of few officials that are chosen by the masses.

In contrast, an aristocracy—according to Montesquieu—is a form of government where "the supreme power is lodged in the hands of a certain number of persons," and these persons "are invested both with the legislative and executive authority."[24] The great remainder of the people, relative to these few, are "the same as the subjects of a monarchy in regard to the sovereign," meaning they have little, if any, power with respect to the administration of the government.[25] Montesquieu notes that "[i]t would be a very happy thing, in an aristocracy, if the people, in some measure, could be raised from their state of annihilation."[26] Indeed, "[t]he more an aristocracy borders on democracy, the nearer it approaches to perfection; and, in proportion as it draws towards monarchy, the more it is imperfect."[27] Thus, some substantial involvement of the people in the administration of government is necessary for an aristocracy to constitute good government.

From the teachings of Aristotle and Montesquieu, it is generally gleaned that "aristocracy" denotes a form of government in which most, if not all, of the

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20 Charles Louis de Secondat, Baron de Montesquieu, The Complete Works of M. de Montesquieu ¶ 453 (trans., London 1st vol. 1777), https://oll.libertyfund.org/titles/837.
21 *Id*. ¶ 458.
22 *Id*. ¶ 461.
23 *Id*. ¶¶ 458-59.
24 *Id*. ¶ 480.
25 *Id*.
26 *Id*. ¶ 483.
27 *Id*. ¶ 489.

governmental and decision-making power is vested into the hands of a few, or a small part of society. These few then administer the government exclusive of the influence of the people. In contrast, a "democracy" denotes a form of government where a substantial portion of the governmental and decision-making power is vested in the people, or the masses. The government is then administered by officials who are chosen by the people, and who are heavily influenced by them. Accordingly, the best form of government appears to be a combination of both aristocracy and democracy, but that leans more toward democracy. The people must be utilized properly for either scheme to work.

III. Views on Government: James Madison and Alexander Hamilton

Keeping in mind that an "aristocracy" generally refers to rule by the few, or, in other words, a form of government in which most, if not all, governmental power is concentrated in the hands of relatively few rulers, the focus will now shift to an examination of the political philosophies of James Madison and Alexander Hamilton. Both men were responsible for authoring the overwhelming majority of the Federalist Papers; therefore, a baseline understanding of their views on government is a prerequisite to fleshing out those views in the text of the Papers themselves. To obtain such an understanding, this section will look to materials outside of the Federalist Papers, authored by both men, during the founding era.

Beginning with Alexander Hamilton, his personal notes from the Philadelphia Convention of 1787 reveal an implicit bias in favor of aristocratic principles, while also displaying a desire to suppress the influence of the masses. To be fair, the notes reference both a democratic and aristocratic arm of the government, which shows that what Hamilton may have been trying to achieve for the United States was a mixture of both, akin to Aristotle's polity and Montesquieu's properly-constituted democracy: "[the government] ought to be in the hands of both [the few and the many]; and they should be separated . . . The democracy must be derived immediately from the people. The aristocracy ought to be *entirely separated*; [and] their power should be *permanent*."[28]

While both Aristotle and Montesquieu believed that the best form of any mixture of aristocracy and democracy would lean more towards a democracy (and therefore allocate more power to the people), Hamilton seems to have departed from this principle, favoring a mixture in which the aristocracy would have the majority of the power. For example, in addition to the above quotation, which reveals Hamilton's desire for the power of the aristocratic arm of the government to be exclusive and permanent, his notes also mention the "unreasonableness of the people" with respect to the "[s]ource of government."[29] Moreover, the notes mention "[p]opular assemblies governed by *a few* individuals," and espouse a preference for "a principle in government capable of *resisting the popular current*."[30]

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[28] 4 Alexander Hamilton, The Papers of Alexander Hamilton 178-187 (Harold C. Syrett ed., Columbia Univ. P. 1962), https://founders.archives.gov/documents/Hamilton/01-04-02-0098-0002 (emphasis added).

[29] *Id*.

[30] *Id*. (emphasis added).

The anti-democratic bias of Hamilton is also displayed in a speech he gave during the New York Ratifying Convention of 1788. In response to an adversary's statement that a pure democracy—a form of government in which all governmental power is vested in the people—is the most perfect form of government, Hamilton asserted that "no position in politics is more false."[31] Hamilton argued that all historical examples of pure democracies, "in which the people themselves deliberated, never possessed one feature of good government."[32] He referred to these democracies as deformed, and as "ungovernable mob[s], not only incapable of deliberation, but prepared for every enormity."[33]

Further, in arguing against a large number of congressional representatives, Hamilton asserted that "[n]o idea is more erroneous" than the premise "that all the interests of all parts of the community must be represented" in the national government.[34] Rather, he argued, only the interests that fall under the purview of the general powers of the federal government needed to be represented, and "these interests come *compleatly* under the observation of *one, or a few men*."[35]

Thus, Hamilton sought to bar the influence of the masses through the imposition of a small number of congressional members who would represent relatively few interests. He believed that one man, or a few men, were much more capable of handling the government's affairs and determining what was in the best interest of the country. In other words, the country would be better served if the influence of the masses was kept at bay and relatively few officials handled all governmental decision making and administration.

James Madison, in a speech given during the 1787 Philadelphia Convention, demonstrated that he held a conception of good government similar to Hamilton's. In this speech, Madison focused on the subject of the Senate, specifically arguing for long senatorial terms in office. He argued that the House of Representatives, the democratic arm of the government most closely tied to the will of the people, would be susceptible to the "passion[s]" and "fickleness" of the masses, despite being a numerous, elected body.[36] This, in turn, would lead to irrational and dangerous legislative decisions by the House. "A necessary [de]fence [against] th[e] danger" of the people's improper passions invading the federal legislature," Madison argued, "would be to select a portion of enlightened citizens, whose limited number, and firmness might seasonably interpose [against] impetuous counsels."[37]

Madison thus envisioned the Senate as an aristocratic body of a few, "enlightened" individuals who would prevent the unreasonable will of the people from exerting too much influence on the federal legislature. While the House's relatively small number of representatives, as Hamilton hoped, would make it difficult for the influence of the masses to invade the federal legislature, there would still be a risk that at least some of the people's influence would push its way

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31 Hamilton, *supra* note 28, 5:36–45.
32 *Id*.
33 *Id*.
34 *Id*.
35 *Id*.
36 James Madison, 10 The Papers of James Madison 76-78 (Robert A. Rutland, et al. eds. Chicago: Univ.. Chi. P., 1977), https://founders.archives.gov/documents/Madison/01-10-02-0044.
37 *Id*.

through. Madison's solution to this problem was the Senate, which would act as a sort of filtering mechanism, and prevent any remaining influence of the people residing in the House from influencing legislation. This construction would ensure that the few, "enlightened" Senate aristocrats would retain control of the federal legislature, undeterred by any remnants of the popular will.

Madison again displayed these sentiments in a 1788 letter to Thomas Jefferson. While the topic of the letter was Jefferson's draft of the Virginia state constitution, the principles Madison evinced are the same. In discussing a Virginia state senate, Madison stated that "[a] Senate is to withstand the occasional impetuosities of the more numerous branch," and "[b]y *correcting the infirmities of popular Government*, [a senate] will prevent that disgust [associated with] that form which may otherwise produce a sudden transition to some very different one."[38] By "that form," Madison meant a "mistaken zeal for too much liberty,"[39] implying that too much liberty, which would be the probable result of a strictly popular (or purely democratic) form of government, was dangerous to good government, and would produce a form of government detrimental to the collective interests of society (in this case, the State of Virginia).

Madison's letter to Jefferson also advocated for stringent property qualifications to determine who could vote for senators: "[a] freehold or equivalent of a certain value may be annexed to the right of [voting] for Senators, & the right left more at large in the election of the other House."[40] This statement represents a desire to further limit the influence of the masses by implementing a substantial property-ownership requirement as a prerequisite to electing the "enlightened," aristocratic senators. In other words, the common folk would not be able to vote for senators; rather, this right would be reserved to wealthier citizens who possessed a substantial amount of property. The rich would elect the rich. Thus, Madison seemingly wanted the great majority of the people to have a very limited influence on not only the federal legislature, but on the Virginia state legislature as well.

A review of the above materials necessitates the conclusion that while both Hamilton and Madison agreed that the United States government should be a mixture of a democracy and an aristocracy, both men also sought a form of government in which the majority, if not all, of the legislative and decision-making power would be in the hands of the aristocrats, or "the few." They viewed the popular will as exceedingly dangerous, and therefore wanted to institute a system in which that will would be suppressed to the greatest extent possible. Stated differently, both men wanted the masses to have little influence on the federal legislature; any substantial portion of governmental power in the hands of the masses would be detrimental. By arguing for a relatively small number of congressional representatives, and an aristocratic senate that would act as a filtering mechanism, they hoped to achieve these goals.

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38 James Madison, *The Papers of James Madison,* ed. Robert A. Rutland and Charles F. Hobson (Charlottesville: University Press of Virginia, 1977), 11: 281–95, https://founders.archives.gov/documents/Madison/01-11-02-0216 (emphasis added).

39 *Id*.282 n.1.

40 Madison, *supra* n.38.

IV. The Federalist Papers: Passages That Point to an Aristocratic Preference in Publius and the Aristocratic Nature of the Constitution

This section will examine specific passages in the *Federalist Papers* themselves that display the aristocratic philosophies of Alexander Hamilton and James Madison. Writing under the pen name "Publius," Hamilton and Madison (and, sparingly, John Jay) hoped to persuade the people of the United States to adopt an aristocratic constitution. While much of the *Papers* focus on the benefits of an aristocratic federal legislature and the detriments of a democratic one, aristocratic principles also make their way into the discussion of the federal judiciary, which Madison and Hamilton envisioned, to an even greater extent, as an aristocratic body. In essence, these two branches of the federal government (the legislature and the judiciary) would institutionalize the concept of an aristocracy—rule by the few—in the United States. An overwhelming majority of governmental power was to be vested in these bodies under the new constitution, which would effectively reduce the influence and power of the people to almost nothing. Publius's explanation and defense of these aristocratic bodies is explored below.

Starting with *Federalist* 10, Publius (here, Madison) addresses the danger of "factions" with respect to government. He defines a "faction" as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common *impulse of passion*, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[41] This statement is consistent with the philosophy of Hamilton and Madison, explored in the previous section, which views the passions of the masses as exceedingly dangerous to the proper governance of society.

Madison suggests that if government were left to strictly democratic means, there would be constant clashing of different factions, motivated by different passions. Factions constituting a majority would triumph in these contests, and inevitably pass laws that would serve their own interests, rather than those of the public as a whole. [42] Indeed, "a pure democracy . . . can admit of no cure for the mischiefs of faction."[43] "[D]emocracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths."[44] Good government and pure democracy were simply not compatible. A democracy would not be able to control the influence of the passions of the people.

Concluding that a democratic form of government would be detrimental to society, Madison offers an aristocratic solution: rule by representatives, or "the few," which he refers to as a "republic." He writes that "[a] republic, by which I mean a government in which the scheme of representation takes place . . . promises the cure for which we are seeking."[45] Stated differently, a defense against the influence of passions and factions on government is an aristocratic form of

41 The Federalist No. 72 (Alexander Hamilton) (emphasis added).
42 *Id*. at 73–75.
43 *Id*. at 76.
44 *Id*.
45 *Id*.

representation. A "republic" would feature "the delegation of the government . . . to a small number of citizens elected by the rest."[46] Such a form of government would "*refine* and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the *true interest* of their country."[47] Here, Madison describes the federal legislature as a mechanism through which the people's influence would be filtered out. He continues: "the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves."[48] In Madison's view, the people could not be trusted with government power and did not know what was best for the country as a whole. Instead, governmental power must be entrusted to a small number of elected representatives, who would ignore the improper passions of the people and rule according to the "true interest" of the country in its entirety. The masses could not hope to accomplish such a feat.

With respect to the issue of disproportionality (i.e., the number of representatives being extremely small when compared to the number of citizens they would be governing), Madison argued that a large republic would be the "most favorable to the election of proper guardians of the public weal."[49] He suggested that in any society only a limited number of persons would be qualified to hold the offices of state, and therefore a large population would create "a greater probability of a fit choice." He gave several reasons.[50] A large constituency would increase the chances that an enlightened individual would be elected by weakening the ability of unfit candidates to capture the public eye. Indeed, it would be hard for any single faction to control such a large constituency and influence the election of an unfit candidate. Additionally, because a large constituency would naturally put forward a greater number of options from which to choose, the constituents would be more drawn to, and more likely to select, meritorious candidates.[51]

In sum, *Federalist* 10 argues that popular democracy is the adversary of civilized society, and an aristocratic form of representation, which Madison calls a "republic," is needed to prevent the passions of the people, through factions, from influencing the administration of the government. Therefore, a small number of enlightened rulers, called "representatives," would be entrusted with the governmental power and govern a large number of citizens. This is the essence of an aristocracy.

In *Federalist* 27, Publius (here, Hamilton), in the midst of a discussion of the federal legislature, briefly touches upon the construction of the Senate. He states that because senators will be chosen by the state legislatures,[52] "there is reason to expect that [the Senate] will generally be composed with peculiar care and judgment."[53] The appointment of senators by the State legislatures "promise[s] greater knowledge and

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46 *Id*.
47 *Id*.
48 *Id*. at 77.
49 *Id.*
50 *Id*.
51 *Id*. at 77–78.
52 The ratification of the Seventeenth Amendment in 1913 changed the method by which federal senators are elected; senators are now directly elected by voters from their states.
53 Federalist No. 27 (Alexander Hamilton), at 171.

more comprehensive information in the national councils."[54] Hamilton's point here is that because the state legislatures would naturally be composed of educated, upper-class individuals, they would in turn select individuals of the same character to hold office in the national Senate. In effect, the people would be totally removed from the selection process; the elites in the state legislatures would select elites to fill the seats of the national Senate. This process, Hamilton argued, would result in the appointment of senators who would "be less apt to be tainted by the spirit of faction, and more out of the reach of those occasional ill humors, or temporary prejudices and propensities, which . . . frequently contaminate the public deliberations."[55] In other words, the unreasonable will of the people will not be able to reach the national Senate, and, on the off chance that it does, the senators will be intelligent enough to ignore it.

A few brief remarks in *Federalist* 49 also show flashes of an aristocratic bias. In this paper, Madison notes that the members of the federal judiciary are few in number and "are too far removed from the people to share much in their prepossessions."[56] He also notes, consistent with his philosophy, that "[t]he passions [of the public] ought to be controlled and regulated by the government."[57] These remarks fall in line with the theme of the new government: to filter out the improper influence of the masses and allow a small number of distant officials to rule. Madison continues this theme in *Federalist* 58, where he again addresses the number of congressional representatives relative to the general population of the country. Here, Madison claims that "the more numerous any [legislative] assembly may be, of whatever characters composed, the greater is known to be the ascendancy of passion over reason."[58] Thus, he defends the disproportionate number of representatives, relative to the number of citizens, by stating that if this number is increased, the passions of the people will be more likely to overcome the House of Representatives. Additionally, he states that a larger number of representatives would pave the way for the election of a greater number of "members of limited information and of weak capacities," or, in other words, uneducated and unqualified individuals.[59] A small number of representatives was key to limiting the dangerous influence of the masses.

Madison takes up the topic of the Senate in Federalist 62, where he begins by defending its more stringent requirements—relative to those of the House —for holding office. These requirements include a more advanced age and a longer period of citizenship. Madison justifies these more stringent requirements by invoking "the nature of the senatorial trust, which, requiring a greater extent of information and stability of character, requires at the same time that the senator should have reached a period of life most likely to supply these advantages."[60] In essence, these requirements were necessary to produce the type of high-class, elite individuals that the Federalists imagined for the institution of the Senate.

Madison also touts the Senate as a necessity for defending against the propensity of the House, the more numerous and democratic assembly of the federal

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54 *Id*.
55 *Id*.
56 Federalist No. 49, (James Madison), at 313.
57 *Id*. at 314.
58 Federalist No. 58, (James Madison), at 358.
59 *Id*.
60 *Id*. at 374.

legislature, "to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions."[61] The Senate would act as the federal legislature's last line of defense against the unreasonable popular will, constituting "a body which is to correct [the House's infirmities]."[62] Thus, while Madison's defense of the small number of representatives in the House included the notion that a larger number would make it easier for the influence of the masses to penetrate the legislature, he also recognizes, as a practical matter, that the House's democratic nature is nonetheless more susceptible to that influence and, consequently, to making irrational or dangerous decisions. Therefore, the Senate would exist as a filtering mechanism to prevent any passions surviving in the House from ultimately affecting legislative decisions.

In sum, the Senate, the consent of which would be needed before all legislative and some executive decisions could take effect, would constitute an exceedingly small number of educated, upper-class, elite officials who would be appointed by individuals of the same character in the state legislatures. This appointment process would entirely remove the influence of the people, to whom the Senate would have no accountability. The Senate, in many ways having the final say over a large number of federal government actions, would act as the legislature's last-resort filtering mechanism and prevent the unreasonable popular will from invading deliberation and affecting final legislation. In effect, this body would constitute almost a textbook example of an aristocracy—rule by a small number of powerful elites, far-removed from the people, over a large population.

Madison builds up the Senate even further in *Federalist* 63, claiming that, in addition to keeping the House in check, this body "may be sometimes necessary as a defense to the people against their own temporary errors and delusions."[63] He continues: "there are particular moments in public affairs, when the people, stimulated by some irregular passion, or some illicit advantage . . . may call for measures which they themselves will afterwards be the most ready to lament and condemn."[64] These statements reveal an anti-democratic bias, and perhaps a superior understanding of human discourse, in Madison: the masses must be ousted from the administration of the federal government, for they are too susceptible to irrational thought and have the ability to cause chaos. Only the elites can be trusted with this duty, and, as such, a "temperate and respectable body of citizens" comprised of these elites—the Senate—is necessary "in order to check the misguided career and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind."[65] The Senate, then, was necessary to defend the people against themselves and their own irrationality, in addition to preventing the unreasonable will of the people from invading the federal legislature. Madison unequivocally wanted the people to stay out of federal government affairs, and he saw only the upper-class elites as fit to rule.

In Federalist 64, John Jay, making one of his only five appearances in the Papers, picks up where Madison left off in discussing the Senate. Jay's commentary, however, focuses on defending the propriety of the senatorial consent that is needed

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61 *Id*. at 377.
62 Federalist No. 62, (James Madison).
63 Federalist No. 63, (James Madison) at 382.
64 *Id*.
65 *Id*. at 382–83.

in many non-legislative areas of the Constitution (e.g., consent for executive and judicial appointments, consent to international treaties, removal of impeached officers, etc.). This senatorial consent would function as a means by which the Senate would retain even more governmental power than simply that of making domestic law, which many viewed as too much power. Jay states that because the State legislatures, who will appoint the senators, "will in general be composed of the most enlightened and respectable citizens, there is reason to presume that their attention and votes will be directed to those men only who have become the most distinguished by their abilities and virtue."[66] Because those appointed to the Senate will be the most enlightened, educated, and virtuous, it is only proper that the Constitution should grant them the aforementioned powers. The senators "will always be of the number of those who best understand [the] national interests," and "who are best able to promote those interests."[67]

Jay also comments on the propriety of six-year senatorial terms, which many viewed as too long, and consequently, a roadmap for tyranny. Jay states that "the duration prescribed is such as will give [senators] an opportunity of greatly extending their political informations, and of rendering their accumulating experience more and more beneficial to their country."[68] Furthermore, "by leaving a considerable [number of veteran senators] in place, uniformity and order, as well as a constant succession of official information, will be preserved."[69] Thus, what many viewed as a concentration of considerable power prone to tyranny, Jay viewed as a necessity. Not only was it necessary for the elites to be far-removed from the people and possess a great amount of governmental power, but it was also necessary for them to remain in their posts for six-year terms. This was a sure-fire way to ensure that the Senate, the aristocratic body of elites, would have the most power and remain in control of the national government.

Considerable discussion of the federal judiciary, which was established as another aristocracy within the federal government, takes place in Federalist 78, which is authored by Hamilton. Much of the commentary in this number centers around the life tenure of judges and their total independence from the people, the latter of which is established through their appointment to office by the executive, as opposed to any popular election. Hamilton states that, like the far-removed Senate, "the independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those *ill humors* which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves."[70] These "ill humors" have the ability to "occasion dangerous innovations in the government," and "serious oppressions" of the community.[71] Here, Hamilton is referring to the same factions and passions discussed in earlier numbers, which, according to those numbers, pose a serious threat to government, and, by extension, to society. Thus, the judiciary was constructed to be another, perhaps even stronger, filtering mechanism to prevent these factious ideas from contaminating American society.

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66 Federalist No. 49 (John Jay), at 389.
67 *Id*.
68 *Id*. at 390.
69 *Id*.
70 Federalist No. 78, (Alexander Hamilton), at 468 (emphasis added).
71 *Id*.

The independence of the judiciary would not only serve the purpose of preventing the spread of those factious, passion-driven ideas, but would also be "of vast importance in mitigating the severity and confining the operation of [unjust and partial] laws" that may have been influenced by those passions despite being run through the Senate.[72] The judiciary would operate as "a check upon the legislative body in passing [unjust and partial laws]."[73] Thus, if a passionate, factious idea was somehow able to bypass both the House and the Senate, and consequently generate the enactment of a law expressing that idea in a legal fashion, the judiciary would act as the final gatekeeper of the federal government, and prevent such a factious law from governing society as a whole by striking it down. The judiciary would constitute the most powerful aristocracy in the national government, and would eliminate any remnants of the unreasonable popular will that may have found their way into legislation.

Because of this important duty, life tenure was necessary to ensure that men "who unite the requisite integrity with the requisite knowledge" would fill the seats of the federal judiciary.[74] "[A] temporary duration in office . . . would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench."[75] Consistent with the theme of rule by the few, the federal judiciary was also to consist of a small number of educated, upper-class elites—especially at the level of the Supreme Court. These were, in Hamilton's view, the only types of persons that could fulfill the important duty of preventing the passionate popular will, which would have already overcome the legislature, from governing society. In the hands of these few elites would rest the ultimate governmental power; the decisions of *six (now nine)* Supreme Court justices could bind the entire population of the United States: an aristocracy in its truest form.

Thus, what is discovered upon a deeper look into many of the passages of the Federalist Papers is the aristocratic bias of their authors—Hamilton, Madison, and to a lesser extent, Jay. These men believed it was necessary to prevent the unreasonable will of the people from penetrating the confines of the federal government. To accomplish this goal, an aristocratic form of government was necessary—one in which the people would have little opportunity to interfere with the administration and decision-making of the national government. Aristocracies would be institutionalized in the federal legislature as well as the federal judiciary. A small number of elite, upper-class men would be chosen to lead these two departments, and in their hands an overwhelming majority of government power would be vested. Through the use of this power, these institutions would rule over an exceedingly large population, consisting mostly of common folk who would, in essence, be barred from exerting any meaningful influence on the national government. Rule by a relatively small number of upper-class elites is indeed what was planned for in the minds of the Federalists, and in the construction of the Constitution.

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72 *Id*. at 469.
73 *Id*.
74 *Id*. at 470.
75 *Id*.

V. Anti-Federalist Writings and Scholarly Articles Exposing the Anti-Democratic, Aristocratic Biases of the Federalists and the Aristocratic Nature of the Constitution

This concluding section examines the writings of several Anti-Federalist authors, the opponents of the Federalists and of the new Constitution. Much of these writings draw attention to the aristocratic construction of the Constitution, and its tendency to give a large amount of power to a small number of government actors, while also keeping the masses at bay. Because of these realities, many of the Anti-Federalists viewed the Constitution as a blueprint for tyranny, and believed that some form of governmental oppression was inevitable. In addition to the writings of Anti-Federalists, two scholarly articles will also be examined. These articles address the anti-democratic rhetoric used by Publius, as well as the aristocratic biases of the men behind the pseudonym.

A. Anti-Federalist Writings

In a letter written in October of 1787, the Anti-Federalist writer known as the "Federal Farmer" discussed how the delegates appointed to the Philadelphia Convention, during which the new Constitution was drafted, had exceeded their authority. The Federal Farmer asserts that the purpose of the Philadelphia Convention was simply to revise the then-existing Articles of Confederation, not to discard the Articles entirely and draft a new Constitution.[76] However, the Farmer claims, most of the delegates present at the Philadelphia Convention were "esteemed [and] aristocratical," and while the Convention's explicit purpose was to revise the Articles of Confederation, "the favourite moment for changing the government was evidently discerned by a few men, who seized it with address."[77] In other words, the upper-class aristocrats selected as delegates for the Philadelphia Convention saw the Convention as an opportunity to totally re-construct the government of the United States, which is why the result of that convention was the drafting of a new constitution rather than a revision of the Articles.

The Farmer explicitly notes that not all of the selected delegates from every state had attended the Philadelphia Convention and implies that these missing delegates were not of the elite, aristocratic rank. He states that "[h]ad [these missing delegates] attended, I am pretty clear, that the result of the convention would not have had the strong tendency to aristocracy now discernable in every part of the plan," the "plan" being the Constitution.[78] He continues: "[t]here would not have been so great an accumulation of powers, especially as to the internal police of the country, in a few hands, as the constitution reported proposes to vest in them."[79] Thus, to the Federal Farmer, what was supposed to be a revised version of the Articles of Confederation ended up being an aristocratic constitution, which gave a large amount of power to only a few individuals. This all occurred, according to the

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[76] The Anti-Federalist Papers and the Constitutional Convention Debates 272 (Ralph Ketcham ed., N.Y.: Signet Classics, 2003),.

[77] *Id*.

[78] *Id*.

[79] *Id*.

Farmer, because of "how disproportionably the democratic and aristocratic parts of the community were represented" at the Philadelphia Convention.[80] If the masses were better represented at the Convention, then "the young visionary men, and the consolidating aristocracy, would have been more restrained than they have been."[81]

Also in October of 1787, the Anti-Federalist writer known as "Brutus" wrote the first of his essays criticizing the new Constitution. In this first essay, Brutus warns that careful examination should be given to the Constitution before recklessly adopting it, noting that "when the people once part with power, they can seldom or never resume it again but by force."[82] Stated differently, because of the immense power the Constitution gives to a small number of government officials, the people should be cautious in adopting it; indeed, these officials may never give up their power.

Brutus then transitions to a discussion of the federal legislature, in which he states that "[i]n every free government, the people must give their assent to the laws by which they are governed. This is the true criterion between a free government and an arbitrary one. The former are ruled by the will of the whole, expressed in any manner they agree upon; the latter by the will of one, or a few."[83] He continues: "if [the representatives of the people] do not know, or are not disposed to speak the sentiments of the people, [then] *the people do not govern, but the sovereignty is in a few*."[84] Brutus predicts that this will be the case in the United States: "in a large extended country, it is impossible to have a representation, possessing the sentiments, and of integrity, to declare the minds of the people."[85] Because so few representatives would be governing an extremely large population, it would be impossible, Brutus argued, for these representatives to govern in the interests of the people; rather, these representatives would govern in their own interests and remain detached from the masses.

Brutus concludes his first essay by stating that "[i]n a republic of such vast extent as the United States, the legislature cannot attend to the various wants and concerns of its different parts."[86] He maintains that "[i]n so extensive a republic, the great officers of government [will] soon become above the control of the people, and abuse their power [for] the purpose of aggrandizing themselves, and oppressing [the people]."[87] In this first essay, Brutus interprets the federal legislature as an aristocratic body that will inevitably become detached from the masses; he believed that its construction would lead the representatives to govern in their own interests rather than those of the people, which would surely result in oppression.

Brutus's sixteenth essay addresses the Senate, which, in his view "represent[s] the aristocracy of the country."[88] While Brutus acknowledged that senatorial terms should be longer than the two-year terms of the representatives, he nonetheless argued that the senators "should not be so long in office as to be likely to forget the

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80 *Id*. at 273.
81 *Id*.
82 *Id*. at 283.
83 *Id*. at 289.
84 *Id*. at 290 (emphasis added).
85 *Id*.
86 *Id*. at 292.
87 *Id*.
88 *Id*. at 355.

hand that formed them, or be insensible of their interests."[89] Brutus believed that a six-year term was too long for any senator to hold office: "[m]en long in office are very apt to feel themselves independent and to form and pursue interests separate from those who appointed them."[90] "This is more likely to be the case," Brutus argued, "with the senate, as they will for the most part of the time be absent from the state they represent, and associate with such company as will possess very little of the feelings of the middl[e] class of people."[91] Because the Senate would already be far removed from the people, a long, six-year term would only be conducive to abuses of power. The longer the senators are away from their states, the more distant the voices of the masses will become and, consequently, the more likely the senators will be to govern in their own interests.

For these reasons, Brutus favored a four-year senatorial term, as well as a mandated rotation of senators, or, in other words, a term limit. The lack of any term limit plus the general construction of the Senate, according to Brutus, would make it "probable that senators once chosen for a state will . . . continue in office for life."[92] Indeed, "the office [of senator] will be honorable if not lucrative. The persons who occupy it will probably wish to continue in it, and therefore use all their influence *and that of their friends* to continue in office."[93] He continues: "[the senators'] friends will be numerous and powerful, for they will have it in their power to confer great favors."[94] What Brutus seems to be predicting here is what, generally, the relationship between senators and private elites has come to be in the present day. Today, a large number of legislators are mostly tied to wealthy campaign donors and special interest groups, and the majority of legislation (and, by extension, oversight of the executive bureaucracy) favors these groups rather than the general public. These "friends" then use their resources and influence to support re-election of the same senators who conferred legislative favors to them.

Another prediction in Brutus's sixteenth essay seems to have been correct as well. Brutus wrote that "it will before long be considered as disgraceful not to be re-elected" to the office of senator.[95] He continues: "[i]t will therefore be considered as a matter of delicacy to the character of the senator not to return him again."[96] "Every body acquainted with public affairs knows how difficult it is to remove from office a person who [has] long been in it. It is seldom done except in cases of gross misconduct. It is rare that want of competent ability procures it."[97] Without any kind of mandated term limit, Brutus claimed, senators would continue to get re-elected, and would entrench themselves in office to the detriment of the masses, but to the benefit of the senators themselves and their powerful "friends." This practice would make it inherently difficult to remove incompetent legislators. Brutus's claims in this respect prove to have some merit in the present day, as many modern senators remain in office for several decades.

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89 *Id*.
90 *Id*.
91 *Id*. at 355–56.
92 *Id*. at 356.
93 *Id*. (emphasis added).
94 *Id*.
95 *Id*.
96 *Id*.
97 *Id*.

With respect to the federal judiciary, Brutus warns in his eleventh essay that the power of this body will become insurmountable. He asserts that the Supreme Court, due to (1) its nature as the court of absolute last resort, and (2) the absence of any "power provided in the constitution to correct [its] errors, or control [its] adjudications," will not "confine [itself] to any fixed or established rules [in its decision-making]," but instead will make decisions based on what its justices believe to be "the reason and spirit of the constitution."[98] Brutus perceived that the concept of "equity" would give the Supreme Court an improper amount of discretion, which would allow its justices to craft their decisions based on what *they thought* was proper in light of the Constitution, rather than any established precedent or other rules. Because any decision of the Supreme Court would operate as binding national law, Brutus viewed this discretion as a pathway to oppression.

Based on this analysis, Brutus concludes that "[t]he [federal] judicial power will operate to effect, in the most certain, but yet silent and imperceptible manner . . . an entire subversion of the legislative, executive, and judicial powers of the individual states."[99] "Every adjudication of the supreme court . . . will affect the limits of . . . state jurisdiction. In proportion as the former enlarge the exercise of their powers, will that of the latter be restricted."[100] In other words, any decision made by the Supreme Court, on whatever topic comes before it, will bind the entire country and will consequently prevent local and state governments (and by extension, the masses) from making decisions for themselves.

It is hard to disagree with Brutus on these points in the present day. Indeed, Supreme Court decisions in cases like *Brown v. Board of Education,*[101] *Roe v. Wade,*[102] and *Obergefell v. Hodges*[103]—irrespective of their merits—completely transformed society while simultaneously taking political decisions away from the state governments and the masses. In effect, these cases weakened the power of the state governments (and by extension, the voice of the people) in areas traditionally regulated by state police powers and legislative decision making. What *nine* justices thought was proper at the time of their deliberation in these cases now governs an entire nation of over 300 million people. Brutus indeed may have been correct in his warnings about the power of the federal judiciary.

Stepping away from Brutus, another Anti-Federalist writer known as "Centinel" published several letters of his own in October of 1787, which, like the other writers, criticized the new Constitution and the form of government it proposed to establish. In his first letter, Centinel claimed that the government proposed by the Constitution "has none of the essential requisites of a free government"; rather, he argued, "it is a most daring attempt to establish a despotic aristocracy among freemen, that the world has ever witnessed."[104] Continuing with his aggressive writing style, Centinel, in agreement with the other Anti-Federalist writers, argued that "[t]he number of the representatives . . . appears to be too few, either to communicate the requisite

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98 *Id*. at 311–12.
99 *Id*. at 312.
100 *Id*.
101 347 U.S. 483 (1954).
102 410 U.S. 113 (1973).
103 576 U.S. 644 (2015).
104 The Complete Anti-Federalist 2:136–43 (Herbert J. Storing, Chicago: Univ. . Chi. P., 1981), https://teachingamericanhistory.org/library/document/centinel-i.

information of the wants, local circumstances and sentiments of so extensive an empire, or to prevent corruption and undue influence, in the exercise of such great powers."[105] As for the Senate, Centinel claimed that it was "constituted on the most unequal principles," and he echoed the arguments of Brutus with respect to it.[106] "The senate, besides its legislative functions, has a very considerable share in the executive; none of the principal appointments of office can be made without its advice and consent."[107] Here, Centinel draws attention to the substantial portion of non-legislative power vested in the Senate by the Constitution, an issue that concerned most of the Anti-Federalists.

With respect to the six-year terms of senators and the absence of term limits, Centinel agreed with Brutus, and argued that "[t]he term and mode of [the senators'] appointment will lead to permanency. The members are chosen for six years . . . and as there is no exclusion by rotation, they may be continued for life, which, from their extensive means of influence, would follow of course."[108] Like Brutus, Centinel predicted that senators would become entrenched in office due to the absence of any term limit and due to "their extensive means of influence," which coincides with the concept of the influential "friends" to which Brutus referred. As discussed above, these predictions seem to have been largely correct in light of modern affairs.

Centinel goes a step further than Brutus, however, and claimed that "[t]he President . . . [will] either become the head of the aristocratic junto in that body, or its minion, besides, [the senators'] influence being the most predominant, could best secure his re-election to office."[109] Centinel believed that the Senate would become so powerful and independent that it would not only become deaf to the voice of the people, but it would also control the president, who would become subordinate to it and do its bidding. There was a very real fear of the Senate amongst the Anti-Federalists, who truly believed that it would become the dominant ruling power—and an oppressive one at that. In line with these themes, Centinel concludes his discussion of the Senate in his first number with the following: "[the Constitution's government is] devoid of all responsibility or accountability to the great body of the people, and that so far from being a regular balanced government, *it would be in practice a permanent aristocracy*."[110] While Centinel's style may have been a bit intense, the merit behind some of his points cannot be ignored. As discussed above, the Senate today has an immense amount of power and influence, and some senators remain in office for several decades. Moreover, the president must be able to secure the loyalty of the Senate to pass critical legislation needed to fulfill his or her campaign promises. In a way, Centinel's prediction about the Senate's power may not have been that far off.

Centinel's second letter puts forward many of the same arguments with respect to the Senate and accordingly merits only a brief mention. In this second letter, Centinel maintains that the Senate will "become a permanent aristocracy, and

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105 *Id*.
106 *Id*.
107 *Id*.
108 *Id*.
109 *Id*.
110 *Id*. (emphasis added).

swallow up the other orders in the government."[111] He repeats his prediction of the relationship that will form between the Senate and the president, asserting that "it will be in [the president's] best interest to coincide with the views of the senate, and thus become the head of the aristocratic junto."[112] Finally, Centinel again warns against the immense power that will be concentrated in the Senate, claiming that the "mixture of the legislative and executive [power] . . . highly tends to corruption."[113] To support this point, he quotes Montesquieu, who wrote that when the legislative and executive powers are united in the same body of officials, there can be no liberty.[114]

Although the various Anti-Federalist writers had different styles in presenting their arguments, much of their substance centered on the same points. These men saw the new government proposed by the Constitution as a means of achieving rule by the rich elites rather than of serving as the guardian of liberty and the rights of the people. The Anti-Federalists predicted, rather accurately, that the federal legislature—especially the Senate—would become a powerful aristocracy. In other words, it would constitute a body comprised of a small number of wealthy, educated, and distant elites who would hold immense governmental power and govern in their own interests, while also suppressing the popular will. The federal judiciary was also to be feared, as the unrestrained power of the Supreme Court could bind the entire country and transform society. To the Anti-Federalists, the system proposed and pushed through by the Federalists was conducive to only one end: the suppression of the masses and the advancement of elite interests at their expense. Modern public affairs and recent history conspire to suggest that the Anti-Federalist camp may have been largely correct in making these predictions.

B. Scholarly Articles

In addition to the Anti-Federalist writers of the founding era, modern scholars have also uncovered aristocratic biases in writings by Hamilton, Madison, and Jay, as well as their desire to establish a government featuring rule by elites. One such scholar is Alan Gibson, who focuses specifically on *Federalist* 10 in his 1991 article "Impartial Representation and the Extended Republic: Towards a Comprehensive and Balanced Reading of the Tenth 'Federalist' Paper." In discussing the scheme of congressional representation laid out by James Madison in *Federalist* 10, Gibson notes that "Madison and his Federalist colleagues sought to secure the election of the members of a *natural aristocracy* through the *procedure* of electing representatives from large electoral districts."[115] "This procedure," Gibson asserts, "served as an alternative to trying to secure the election of elite representatives by writing formal qualifications into the Constitution."[116] A link can be made between

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111 The Complete Anti-Federalist, *supra* note 104, https://teachingamericanhistory.org/library/document/centinel-ii.

112 *Id*.

113 *Id*.

114 *Id*.

115 Alan Gibson, *Impartial Representation and the Extended Republic: Towards a Comprehensive and Balanced Reading of the Tenth "Federalist" Paper,* 12 History of Political Thought 263, 272 (1991).

116 *Id*.

this premise and some of Madison's comments in his letter to Thomas Jefferson, which is discussed in a previous section above. In that letter, Madison suggested implementing substantial property qualifications in order to control who could vote for Virginia's senators, who would naturally be the wealthy, property-owning elites. It appears, based on the premise that Gibson advances, that Madison's scheme of representation was an alternative to imposing similar property requirements on the electorate relative to the *federal* legislature—perhaps done so to give the appearance of propriety to the masses and the opponents of the Constitution, who would have surely been outraged if a substantial portion of the population were to be expressly barred from electing legislators.

In line with this same premise, Gibson also asserts that "Madison and his Federalist colleagues assumed that the nation's elite would be at least somewhat evenly distributed across the sixty-five electoral districts."[117] Moreover, the hope of the Federalists "was that together open access [to the House of Representatives through the imposition of easily-met qualifications] and fewer offices would cause greater competition and consequently the election of better representatives."[118] By utilizing this scheme, "the republican concern for formal equality and openness of opportunity was not sacrificed in order to meet the republican commitment to rule by the natural elite."[119] Put differently, the Federalists disguised their plan for elite rule by proposing a scheme of representation that, at least on its face, would appear proper to the masses and would harmonize with American principles such as equality, liberty, and the rights of the people. In practice, however, this scheme would reach the same result as the express qualification alternative: the wealthy, educated, elite would be in control.

Citing Jack Rakove's "The Madisonian Moment" and language from several *Federalist Papers,* Gibson puts forward the following proposition, which supports the notion that Madison, Hamilton, and other Federalists viewed the masses as unreasonable and unruly and that elite and educated representatives were therefore needed to defend against their influence. "Madison sometimes defended [his scheme] of representation as a means of educating the citizenry about what was in their 'true' or 'permanent' interests. [He] drew upon the set of assumptions about 'the people' that was present in the eighteenth-century understanding of mixed government."[120] One of these "assumptions" to which Gibson refers was the notion that the people were "easily fooled, misled or mistaken about their interests."[121] However, this problem could be eliminated if the "representatives temporarily blocked the passions of the people," in which case "'reason, justice, and truth' would have a chance to 'regain their authority over the public mind' and the reason, the 'cool and deliberate sense' of the people would be heeded."[122] Thus, in effect, this scheme of representation was a way to ensure that the influence of the people was kept to a minimum, in favor of elite control.

As noted previously, Madison recognized that his scheme of representation was not foolproof; the democratic House of Representatives would still be prone

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117 *Id*. at 272, n. 28.
118 *Id*. at 273–74.
119 *Id*. at 274.
120 *Id*. at 281 (citing Jack N. Rakove, *The Madisonian Moment*, 55 *U. Chi. L. Rev.* 55 (1988).
121 *Id*.
122 *Id*.

to invasion by the passions and factions of the masses. Accordingly, Gibson notes that "Madison and his allies viewed the House of Representatives as passionate, powerful and ever encroaching. The qualified executive veto, life tenure for judges, and *especially bicameralism*, were therefore necessary as defensive powers."[123] Here we see Gibson's recognition of the notion that the Senate (implied by the word "bicameralism") was constructed, in part, to be a filtering mechanism to guard against encroachments by the House, which was the body most likely to be overcome by the passions of the people.

A few other points made by Gibson support the themes of this essay. First, Gibson asserts that "Madison and other Federalists fought *against* constitutional reforms which were designed to tie representatives *directly to their constituents*."[124] These reforms included "annual elections, unduly increasing the number of representatives, and binding representatives to the instructions and petitions of their constituents."[125] The fact that Federalists fought against these reforms reinforces the idea that they did not want the national government to be controlled by the people.[126] "Unlike populists," Gibson continues, "Madison and his colleagues sought to minimize rule by popular majorities which, they believed, were most often tyrannical and irrational."[127] Instead of a government controlled by the people, the Federalists desired one in which the people were mostly shut out. Moreover, instead of government officials obliging themselves to the popular will, and responding to the needs and interests of the masses, the Federalists envisioned a government controlled by autonomous elites. "[T]he concept of popular sovereignty, which had been used by the colonists during the Revolution as a justification for opposition to England," became something quite different in the hands of the Federalists.[128] As Gibson notes, "[i]f democracy is defined as the immediate participation of the citizenry in the formation of public policies, then the Federalists were not democratic."[129]

Another modern scholar in agreement with the themes of this essay is Jeremy David Engels, who, in his 2015 article, *The Trouble with "Public Bodies": On the Anti-Democratic Rhetoric of the Federalist*, discusses how Publius used clever language to discredit democracy and to normalize the Constitution's aristocracy. In describing how the Constitution was constructed to suppress the people, Engels suggests that it "was the outcome of a counterrevolution in the middle 1780s determined to curtail popular uprisings in the states and, more generally, to ensure that, while the citizenry still possessed political power in the most abstract terms, nevertheless *the actual control over governance was placed in the hands of educated and impartial representatives* capable of making good decisions."[130] Citing Woody Holton's *Unruly Americans and the Origins of the Constitution*, Engels metaphorically describes the Constitution as an "invisible fence": an instrument

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123 *Id*. at 299 (emphasis added).
124 *Id*. (emphasis added).
125 *Id*.
126 *Id*.
127 *Id*.
128 *Id*.
129 *Id*.
130 Jeremy David Engels, *The Trouble with "Public Bodies": On the Anti-Democratic Rhetoric of the Federalist*, 18 Rhetoric & Public Affairs 505, 506 (2015) (emphasis added).

that "encourage[es] self-government but frustrat[es] its actualization."[131] Thus, the Federalists had the hefty task of defending "an anti-democratic document to an American audience that valued democracy as a means for the majority of poor citizens to check the influence of rich elites."[132] The type of popular, democratic system that most Americans desired, however, is not what the Constitution represented, nor what the Federalists envisioned.

Instead of blatantly arguing that an aristocratic form of government, like that of the Constitution, was superior to a democracy—the form of government that most Americans at the time favored—the Federalists, especially those behind the guise of Publius, instead decided to attack democracy and thereby weaken its popular perception. "Publius found it necessary to discuss democracy not because of the goading of anti-federalists but instead because in the 1780s Americans expressed widespread cultural support for more direct popular control over government and the economy."[133] Engels continues: "[w]hen these post-Revolutionary democratic desires were frustrated, especially by economic policies designed to favor the rich at the expense of the poor, Americans rose up in a series of rebellions that rocked nearly all of the newly independent states, of which Shays' Rebellion in Massachusetts in 1786–87 was the most prominent and terrifying to elites."[134] Because of these uprisings, which resulted from the widespread desire for popular control and the disdain for elite rule, Publius set out to defend "the Constitution by demeaning democracy."[135] Portraying democracy as the enemy of the people was a logical way to persuade the masses to accept a form of government featuring rule by elites.

To effectively persuade the masses to adopt the Constitution, Madison and Hamilton applied the late eighteenth-century understanding of what constituted civilized humanity to the concept of government. "For many Enlightenment writers, the civilizing process involved learning how to resist passionate impulses and to counter such impulses with reason."[136] Accordingly, "[t]o be a fully realized human was to learn to exercise self-government. One of the moral lessons of this particular culture of the self was for people to tame their irrational impulses."[137] Madison and Hamilton took this moral philosophy and applied it to government in the Federalist Papers, urging that a civilized form of government was one in which the irrational impulses—or passions—of man were kept at bay. When the passions of man spread throughout a community, factions were the result, which, in Madison's view, "stood counter to the common good and the permanent, aggregate interests of the community."[138]

To the Federalists, Engels asserts, "factions were the product of 'impulse.'"[139] "In faculty psychology, 'impulse' . . . signified the [influence] of passion directly

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131 *Id*. (citing Woody Holton, Unruly Americans and the Origins of the Constitution (2007)).
132 Engels, *supra* note 130, at 506–7.
133 *Id*. at 508.
134 *Id*. at 509.
135 *Id*.
136 *Id*. at 513.
137 *Id*.
138 *Id*.
139 *Id*.

upon the [human] will outside of the control of reason."[140] It is clear, then, that in the *Federalist Papers,* "'impulse' was shorthand for the irrational part of the human organism overwhelming the rational part."[141] Therefore, "[w]hen Madison discussed factions as the product of a common impulse [in the *Federalist Papers*] he was describing not just a nefarious political entity but also the complete short-circuiting of the type of rational civic judgment th[at] [Publius] demanded of Americans."[142] In other words, factions were to government what irrational impulses were to humans: dangerous, uncivilized, and immoral. Thus, of paramount importance to the Federalists was the implementation of a form of government that could control factions, similar to how human reason controls man's animal instincts. Only by suppressing factions and, by extension, the passions of man, would a civilized society be constructed.

Democracy was not sufficient to control the effects of passions and factions. Indeed, as Engels describes, "[f]or Madison, democracy was destructive of government, for it could not control, but in fact worked to intensify, factions."[143] "Democracy was unable to contain factions because it created the necessary and sufficient condition for their emergence: democracy required people to gather together in public to deliberate, and in such gatherings impulses of passion and interest were communicated from person to person, becoming common."[144] Through democracy, the "disease" of faction was spread among the people, causing the impulses and passions of man, rather than his reason, to control public debate.[145] "A grave danger to the health of the United States, according to Publius, was popular participation in politics."[146]

Taking a rather cynical view, Publius "imagined people to be self-interested animals whose rational faculties were insufficiently developed to protect them from the impulses of passion and interest."[147] Stated differently, the masses were nothing more than unreasonable, uncivilized people dominated by their animal instincts; they could not be expected to reach sensible conclusions. Thus, a government centered on their debate and control was doomed; the masses needed an entity that would play the role of human reason relative to governance and policy-making. As Engels points out, for the Federalists, "[i]t was the job of government to restrain people who responded more readily to passion than to reason."[148]

To Federalists like Madison and Hamilton, the only form of government that could successfully play the role of reason was a system featuring elite rule, where elite officials would ultimately regulate and control passions and factions. As Engels notes, the Federalists longed for "social hierarchy, discipline, and order" akin to that of the old Roman republics, and shared the Greek philosopher Plato's "desire for elite control over government."[149] Thus, the Constitution "had to do more than

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140 *Id*.
141 *Id*.
142 *Id*.
143 *Id*. at 514.
144 *Id*. at 516.
145 *Id*. at 518.
146 *Id*. at 519.
147 *Id*.
148 *Id*.
149 *Id*. at 521.

institute a system of representation; it had to keep the number of representatives relatively small, so that passion could be kept in check."[150] Madison advanced this point in *Federalist* 58, discussed above, by "trumpet[ing] a counterintuitive calculus: as a public body grew more democratic, so too did the danger to the people grow."[151]

Another central theme of American discourse during the late eighteenth century was "the conflicting interests between the rich and the poor."[152] Engels asserts that while classical democracy "was designed to protect the poor from the influence of the rich," Federalists like Hamilton and Madison were interested in increasing the power of the rich.[153] Quoting from a 1787 speech by Hamilton, Engels exposes just how much he and other Federalists supported rich elites ruling the poor masses: "Hamilton [wanted] to balance out the pernicious influence of the poor by increasing the power of the rich, specifically by giving them a 'permanent' interest in government (via an aristocratic senate with long terms in office). He hoped that the new Constitution would place its faith in the rich rather than the people."[154] In the passage of the speech quoted by Engels, Hamilton asserts that, contrary to the common proverb, the voice of the people is not the voice of God; rather, "[t]he people are turbulent and changing; they seldom judge or determine right."[155] The aim of the Federalists, therefore, was to implement an aristocratic Constitution that would materialize their goal of rule by the rich elite.

Despite the Federalists' widespread influence, arguing in favor of the rich at the expense of the poor was not a winning strategy. Indeed, as Engels notes, "[m] any anti-federalists ridiculed the Constitution as an instrument the rich devised to dominate the poor."[156] Aware of the futility of framing their argument in terms of the rich and the poor, Hamilton and Madison, under the guise of Publius, "attempted to shift the terms in which Americans discussed democracy away from economics."[157] "Rather than talking about rich and poor, Madison and Hamilton medicalized political discourse, encouraging Americans to talk about diseases and cures. By doing this they attempted to negate a traditional rallying cry for democratic revolution: that the many must mobilize to protect themselves from the few."[158]

Engels cites several examples of this "diseases and cures" language within the *Federalist Papers*. For example, "Madison began Federalist No. 10 by noting his desire to find 'a proper cure' for popular government's 'propensity to dangerous vice.' While democracy offered no way of healing the 'disease' of faction—and, in fact, only amplified the sickness—a republic like that established by the Constitution 'promises the cure for which we are seeking.'"[159] Through the use of such clever rhetoric, Engels claims, "Madison redescribed government as therapy for civic disease. By shifting registers and troping government in medical terms,

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150 *Id*. at 524.
151 *Id*.
152 *Id*. at 526.
153 *Id*. at 527.
154 *Id*. at 526.
155 *Id*.
156 *Id*. at 527.
157 *Id*.
158 *Id*.
159 *Id*.

Madison was better able to redescribe democracy as illegitimate, destructive, and wicked."[160] As a result of the medical rhetoric used by Publius, a paradigm shift took place in early America. As Engels asserts, "government was [no longer] about protecting the many from the outsized influence of the few; nor was it concerned about achieving equality or about promoting economic justice, as it had been for the ancient Greeks. Now government was about curing civic disease."[161]

Engels thus concludes that "[i]n [the *Federalist Papers*], we see the medicalization of the republican gaze as it viewed the mass of the people as diseased and infectious. The [*Papers*] troped government as a response to diseased bodies: government became about curing disease, about the protection, purification, and immunization of populations, [and] about the management of public bodies."[162] Through the use of medical rhetoric and eighteenth century moral philosophy, Publius was able to demean democracy—the form of government most popular in American thought—by persuading the masses that it was a disease in need of a cure. By discrediting democracy in this way, and by avoiding discussion of the relationship between the rich and the poor that would inevitably materialize in the new system, the Federalists were able to push an aristocratic Constitution—which gave power to rich elites at the expense of the poor masses—through to ratification. Publius successfully persuaded a majority of Americans to adopt a form of government in which the overwhelming majority of governmental power was vested in a relatively small number of rich, educated elites—a concept that was the polar opposite of popular political thought at the time.

VI. Conclusion

While the common perception of the Constitution holds that the document is a democratic instrument, an examination of the *Federalist Papers* and other early writings indicate that the Constitution was intended to be more of an aristocratic instrument than anything else. The aristocratic character of the Constitution was effectively disguised by Publius through the use of rhetoric and clever advocacy, leading to the ratification of an aristocratic form of government that Federalists purported to be "republican." While "republic" derives from the Latin *respublica,* "entity or concern of the people or public," the government that the Constitution created put most governmental power and influence in the hands of the "few"—the goal of Federalists like Alexander Hamilton and James Madison. Through the operation of the House, Senate, and federal judiciary, the influence of the masses is filtered out and suppressed, leaving the supreme decision-making powers of the government in the hands of the educated elite. Indeed, rather than an entity or concern of the people, the Constitution's government is more accurately described as the concern of the few. While the addition of the Bill of Rights and other amendments seemingly increased the power of the people by securing their various rights, the modern operation of the federal government—heavily influenced by private, societal elites—suggests that the aristocracy envisioned by the Federalists has indeed come to fruition. Nevertheless, the scheme of Hamilton, Madison, and

160 *Id*. at 527–28.
161 *Id*. at 528.
162 *Id*.

their Federalist counterparts has produced the most powerful and prosperous nation on the planet, which begs the question: What truly is the best form of government?

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U.S.-UK FTA Negotiations: A Primer on Labor Agenda

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ABSTRACT

With Brexit completed and the UK's conditions of separation from the EU pending, there is some anticipation for a U.S.-UK FTA. But then there is the Pandemic and the unpredictable variables of Donald Trump and Boris Johnson, and the influence of the residual binding obligations of the UK-EU separation agreement and possible UK-EU FTA, which may cause some pause. Identifying the negotiating agenda of the labor issues may flow easily from each country's recent FTAs – USMCA and UK's obligations under CETA. With that likely agenda, a comparison can be made between each country's current labor laws on these issues to identify possible emerging areas needing further attention. Lingering in the background is the potential U.S.-EU FTA (TTIP) which will set standards and obligations for the UK which can be relevant to the UK FTAs with the U.S. and the EU. This is followed with analysis as to likely outcomes on these labor issues and the U.S.-UK FTA. Although the future cannot be predicted, it can be prepared for.

KEYWORDS

U.S.-UK FTA, U.S.-U.K. FTA Agenda for Labor Provisions, Post-Brexit UK FTA with U.S., UK-U.S. FTA Social Dimension Provisions

CONTENTS

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I. Introduction

Anticipation for a successful negotiation of a post-Brexit U.S.-UK FTA is high. Both President Trump and Prime Minister Johnson are eager to finalize the trade deal. But there are certain realities and obstacles to surmount, some of them political, including a third-party, EU, indirectly influencing the negotiations. While UK has a transitional period until December 31, 2020, absent an extension, to reach an exit deal with EU, including an FTA, both sides have significant unresolved issues.[1] That deal is expected by EU to be balanced on UK agreeing to continue its obligations on labor and other issues, such as that the UK commit in writing to stay in the jurisdiction of the European Court of Human Rights,[2] which could affect and influence the UK-U.S. FTA negotiations, especially on labor standards.

As those negotiations progress, the US presidential elections approach, and as much as the Trump Administration may want to finalize a U.S.-UK FTA, the U.S. Congress must approve it. Congress may not want to provide President Trump with a pre-election trade victory and Congress could hold up final approval.[3] Further slowing the negotiations is the coronavirus Pandemic and the uncertainties in the market.[4] Still, it is expected the U.S.-UK FTA negotiations will continue.[5]

The UK also is working to replicate existing EU deals with non-EU countries. The EU has more than 40 trade agreements with around 70 countries. During the transition period, EU trade agreements continue to apply to the UK. As of June

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1 As of July 2, 2020, the negotiations were as follows. "Negotiations between the U.K. and European Union over their future relationship broke up a day early on Thursday amid warnings that big differences still exist between the two sides. Barnier highlighted the UK's "red lines" on the ECJ, fishing and the need to break away from EU law. He said the EU would still insist on a level playing field to ensure fair competition between the two sides, a "sustainable" fishing solution, as well as an effective dispute-resolution mechanism." Ian Wishart, *Brexit Talks End Early as EU, U.K. Say Major Hurdles Remain*, Bloomberg (Jul. 2, 2020), https://www.bloomberg.com/news/articles/2020-07-02/brexit-talks-end-early-as-eu-u-k-say-big-differences-remain. See also, Tom Edgington, *Brexit: All you need to know about the UK leaving the EU*, BBC News (Feb. 17, 2020), https://www.bbc.com/news/uk-politics-32810887. *See* Justin Millar, *Is a Post-Brexit US-UK Free Trade Agreement Realistic?*, Chi. Council on Global Aff., (Nov. 4, 2019), https://www.thechicagocouncil.org/blog/world-cents/lcc/post-brexit-us-uk-free-trade-agreement-realistic. *See Brexit and Outlook for U.S.-UK Free Trade Agreement*, Cong. Res. Serv. (Feb. 12, 2020), https://fas.org/sgp/crs/row/IF11123.pdf.

2 The UK will continue to be committed to the EU Charter until 2021 when it ceases to be binding on the UK. For a general introduction to the Charter, see, *What is the Charter of Fundamental Rights of the European Union?*, Equality & Hum. Rights Commission, https://www.equalityhumanrights.com/en/what-are-human-rights/how-are-your-rights-protected/what-charter-fundamental-rights-european-union (last modified Oct. 3, 2016).

3 *See* Mark Landler & Ana Swanson, *About That Much Vaunted U.S.-U.K. Trade Deal? Maybe Not Now*, N.Y Times (Mar. 2, 2020), https://www.nytimes.com/2020/03/02/world/europe/uk-us-trade-deal.html.

4 Benjamin Laker, *3 Severe Implications of Coronavirus on Global Trade*, Forbes (Apr. 7, 2020, 3:50PM), https://www.forbes.com/sites/benjaminlaker/2020/04/07/3-severe-implications-of-coronavirus-on-global-trade/#573bfd803d11.

5 Justin Millar, *Is a Post-Brexit US-UK Free Trade Agreement Realistic?*, Chi. Council on Global Aff. (Nov. 4, 2019), https://www.thechicagocouncil.org/blog/world-cents/lcc/post-brexit-us-uk-free-trade-agreement-realistic.

2020, the UK had signed continuity deals covering over 8% of total UK trade with close to 50 countries or territories, including Switzerland, Liechtenstein, Chile, Israel, and South Korea. … Also, as part of its "Global Britain" strategy, the UK is taking steps to pursue new trade deals. … Rather than rolling over the EU-Japan FTA, Japan seeks to quickly negotiate new terms with the UK in time for Japan to pass an FTA in autumn. The UK also launched FTA negotiations with Australia and New Zealand and seeks to join the regional Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) …. U.S. Trade Representative (USTR) Robert Lighthizer has committed to pursuing a comprehensive agreement that would be subject to congressional approval and not a limited, 'skinny' deal. He warned, however, that negotiations will take time and likely not be complete in advance of the upcoming presidential election.[6]

The agenda for the labor issues likely will flow from each country's prior FTA obligations; for the U.S. it will be the USMCA and for the UK, it will be the EU's CETA. Both FTAs agree to the ILO core labor obligations, *albeit* with added nuances and obligations, but they have also added new provisions which, in the case of the US, may be ahead of its current law, such as protecting the right to strike.[7] Likewise, the provisions for dispute resolution have differed.[8]

The recent USMCA provides obligations on gender discrimination, including gender identity and LGBTQ+, and pay gap issues; it also deals with migrant workers' rights, a hot issue in each country, as well as family care and paid medical leave, and it recognizes the right to strike. CETA, which included UK as an EU Member at the time of the signing, also has a list of progressive labor obligations. These include labor standards committing the UK to the ILO Decent Work Agenda and the Declaration on Social Justice for a Fair Globalization that are more progressive than those required by the USMCA.[9] Leaders of the major unions of both countries have weighed in with their union's agenda for the new FTA.[10]

The article in Part II identifies the labor obligations agreed to by the Parties in their previous FTAs and sets them up as likely agenda items; Part III compares these agenda items with existing labor legislation in each country and identifies potential trouble spots likely to be put on the negotiating agenda; Part IV provides analysis of the challenges of uncertainty and the likely emerging agenda for negotiation of the labor issues in the U.S.-UK FTA; Part V concludes.

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6 Shayerah I. Akhtar et al., Cong. Research Serv., IF11123, Brexit and Outlook for a U.S.-UK Free Trade Agreement (2020).

7 *See* Agreement between the United States of America, the United Mexican States, and Canada, Art. 23.3, Can.-Mex.-U.S., Nov. 30, 2018 [hereinafter USMCA], https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.

8 USMCA, Art. 31.1-31.22.

9 CETA, Art. 23.3 Multilateral Labour Standards and Agreements, Can.-E.U., Oct. 30, 2016, O.J. (L 11) 23. (a) Health and safety at work, including prevention of occupational injury or illness and compensation in the case of such injury or illness, (b) Establishment of acceptable minimum employment standards for wage earners, including those not covered by a collective agreement; and, (c) Non-discrimination in respect of working conditions, including for migrant workers.

10 *US and UK unions call for trade deal that delivers for workers*, Trades Unions Congress (Mar. 13, 2020), https://www.tuc.org.uk/news/us-and-uk-unions-call-trade-deal-delivers-workers.

II. Non-Legal

A. Post-Brexit Drama: "Three Parties" in Bilateral Negotiations–U.S., UK, and EU and the "Leaked Draft"

UK's trade realignment with the EU following Brexit matters significantly on the level of labor and human rights standards in the US-UK negotiations. Is the UK still bound to EU standards and the European Charter and other EU legal institutions? [11] If so, this can provide a higher bar for worker protections than just UK labor laws. Therefore, American negotiators will pay close attention to the ongoing and possibly concurrent UK-EU negotiations on many matters, including labor.

The UK likewise must evaluate the risk of completing a UK-U.S. FTA before reaching agreement with EU on its future arrangement. The U.S.-UK trade (import, export, and services) is reported for UK to be at about 15 percent of its trade versus UK-EU trade is at about 49 percent. U.S. standards are often lower than that of EU, e.g., on food and health service drugs; and loss of EU trade protections could affect the viability of FDI and supply chains using UK as a base.[12] Assuming the UK would need to make concessions to the U.S., one can predict UK's negotiations and arrangements with EU may certainly be complicated.[13]

The UK's position on a trade deal with EU was first presented by Prime Minister Boris Johnson.[14] Its negotiation goals, particularly on labor issues, were laid out by the UK Government as follows.

"The UK aims for a relationship based on 'friendly cooperation between sovereign equals' with both sides respecting each other's 'legal autonomy'. It will not abide by EU rules and states the UK 'will not negotiate any arrangement in which the UK does not have control of its own laws', will not accept any 'obligations' to be aligned with EU laws, or the 'EU institutions, including the court of justice'. The UK wants a "comprehensive free trade agreement" but in the same paragraph states it wants a Canada-style agreement 'supplemented' by a range of other agreements including 'fisheries law enforcement … judicial cooperation in criminal matters, transport and energy'. [Re]Workers' rights: Here the government is committing to 'reciprocal commitments not to weaken or reduce the level of protection afforded by labor laws and standards.' However, it wants to reserve the right to 'adopt or modify its labor laws.'"[15]

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[11] The UK formally left the EU on 31 January 2020, and there is a transition period which is due to end on 31 December 2020. "During this 11-month period, the UK will continue to follow all of the EU's rules and its trading relationship will remain the same." *Brexit: All you need to know about the UK leaving the EU*, BBC News (Feb. 17, 2020), https://www.bbc.com/news/uk-politics-32810887.

[12] Luke McGee, *The UK will never get the US trade deal it wants*, CNN Bus. (Nov. 6, 2019 5:55AM), https://www.cnn.com/2019/11/06/business/brexit-us-uk-trade-donald-trump-boris-johnson-intl-gbr/index.html.

[13] *Britain to start trade talks with U.S. next week: The Sun,* Reuters (May 1, 2020, 10:17AM), https://www.reuters.com/article/us-britain-usa-trade/britain-to-start-trade-talks-with-us-next-week-the-sun-idUSKBN22D69H.

[14] Rowena Mason, *UK says it will consider walking away from Brexit talks in June*, Guardian (Feb. 27, 2020, 8:05AM), https://www.theguardian.com/politics/2020/feb/27/uk-says-it-will-consider-walking-away-from-brexit-talks-in-june.

[15] Lisa O'Carroll, *Brexit: UK negotiating objectives for trade with EU, in a nutshell*, Guardian (Feb. 27, 2020, 5:35AM), https://www.theguardian.com/politics/2020/feb/27/brexit-uk-negotiating-objectives-for-trade-with-eu-in-a-nutshell.

A leaked draft of the EU's early proposals for the Brexit agreement affecting trade (UK-EU FTA) shows EU proposals would make some actions of future British governments irreversible, such as "social rights" which include labor rights.[16]

The agreement drawn up by the European Commission and seen by The Independent insists that "future levels of protection" brought in by both sides must be maintained as a condition of UK access to European markets. The plan goes further than a simple "non-regression" pledge to maintain existing rules at the point of Brexit, and means any future UK government that brings in new social rights could see its changes become untouchable, as long as they are endorsed and matched by Brussels. The rule is the latest bid by the EU to ensure Britain does not unfairly deregulate itself into "Singapore-on-Thames" after Brexit, to unfairly undercut European businesses with lower standards.[17]

The EU also insists on the requirement that the UK commit in writing to remain in the jurisdiction of the European Court of Human Rights. The document says both parties must have a "continued commitment to respect the European Convention on Human Rights."[18] It is expected that EU's proposals will be resisted by UK negotiators, "who have accused Brussels of trying to hold Britain to conditions that it is not holding other countries with free trade agreements. [19] But EU officials are

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16 "The draft document also includes a demand that the UK notify Brussels in advance of any plans for "major" new regulations, before they are proposed to the UK parliament." Jon Stone, *EU trade deal plan would stop UK governments repealing future workers' rights*, Indep. (Mar. 13, 2020, 4:30PM), https://www.independent.co.uk/news/uk/politics/eu-trade-deal-boris-johnson-brexit-leak-labour-workers-rights-a9400376.html.

17 Article LPFS.2.28 of the draft agreement, headlined "Future levels of protection" states that "where both parties have increased ... the level of labour and social protection above the level referred to in Article LPFS.2.27 [Non-regression of the level of protection], neither party shall weaken or reduce its level of labour or social protection below a level of protection which is at least equivalent to that of the other party's increased level of labour and social protection." It is suggested this means "that if a future UK government brought in new rights and those rights were matched by the EU, they could not be repealed by a later UK government …" – without further mutual arrangements with EU. Stone, *supra* note 16.

18 Stone, *supra* note 16.

19 "The UK plans to publish its own draft for the proposed agreement "shortly", with chief negotiator David Frost having said he will make the text available "before round two next week [in April 2020],"Stone, *supra* note 16. Brexit talks on the future relationship between the UK and the EU "resumed and were expected to provide an urgent 'refocus' before the 30 June deadline for both sides to formally agree to extend the transition period if the UK asks for one. 'A free-trade agreement could still be agreed but it would be hard to implement. Even if we were coming to the end of this pandemic by then, businesses will be not be prepared,' said Lowe, who described himself as optimistic that a free-trade deal could be done by the end of the year, albeit a poor one." Subsequent talks focused on the future relationship with a separate undertaking proceeding on the implementation on the withdrawal agreement. A Joint Committee was formed, and "Michael Gove, the Cabinet Office minister, and Maroš Šefčovič, a European commission vice-president, the committee met for the first time on 30 March and will make decisions on recommendations made by civil servants who will staff six specialized committees. Those committees cover the Northern Ireland protocol; citizens' rights; British sovereign army bases in Cyprus, the divorce bill, Gibraltar and "other separation issues". Who is on the committees, how often they will meet and precisely what they will be exploring has yet to be disclosed?" Lisa O'Carroll, *Brexit talks: who is*

adamant that the UK's proximity to and links with Europe require a strong 'level playing field' of regulations."[20]

B. Agenda Items: Looking Back to the Future (USMCA and CETA)?

It is likely the Parties to the U.S.-UK FTA will draw upon recently negotiated FTAs, which for the U.S. would be USMCA and for the UK would be CETA, negotiated by the EU for its members, which at the time included the UK. The UK would also likely look to keep other EU residual obligations remaining after its withdrawal from the EU is final, perhaps including the Charter of Fundamental Rights of the European Union (EU Charter) and labor standards in a UK-EU FTA, if negotiated.[21]

1. USMCA[22]

The **labor rights** provisions in the USMCA can be organized as follows.

a. Each Party agrees to maintain in its statutes and regulations, and practices thereunder, for the following rights, as stated in the basic ILO core labor standards in the ILO Declaration on Rights at Work, including the freedom of association (and now including the *right to strike*) and the right to collectively bargain, the elimination of forced or compulsory labor, the abolition of child labor, and the elimination of discrimination in respect of employment and occupation.[23] The USMCA now also provides for "acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health."[24]

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involved and what is being covered?, Guardian (Apr. 24, 2020, 1:05AM), https://www.theguardian.com/politics/2020/apr/24/who-and-what-uk-and-eu-resume-interupted-brexit-talks-future-relationship. *See also*, Daniel Boffey, *Post-Brexit trade talks with EU on course to fail, Johnson warned*, Guardian (Apr. 26, 2020, 12:00PM), https://www.theguardian.com/politics/2020/apr/26/post-brexit-trade-talks-with-eu-on-course-to-fail-johnson-warned?CMP=oth_b-aplnews_d-1.

20 "Nathalie Loiseau MEP, former French minister of European affairs and member of the European Parliament's UK Coordination Group told The Independent: No one can ignore now that the times ahead of us are challenging and that they require more cooperation, not less, more solidarity, not less, more coordination, not less. The way we envisage the future EU-UK relationship is based on our understanding that being independent doesn't prevent us from deciding freely to be stronger together. This is why common high standards are so important, for the safety and security of consumers, in order to preserve jobs, to protect businesses which are about to be severely challenged. My message to the British authorities: ideology doesn't save jobs and it doesn't save lives. The time is right for good old British pragmatism and to join forces." Stone, *supra* note 16..

21 Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 2.

22 USMCA, Art.23.1-23.17.

23 USMCA, Art. 23.3(1) a-d.

24 USMCA, Art. 23.3(2). Wages are further defined to include "acceptable conditions of work with respect to minimum wages" include requirements under that Party's labor laws to provide wage-related benefit payments to, or on behalf of, workers, such as those for profit sharing, bonuses, retirement, and healthcare. USMCA, Art. 23.1(e) note 1.

b. **Non-Derogation** and **Enforcement of Labor Laws**: The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in each Party's labor laws.[25] They also agree to fully enforce the labor provisions of the agreement and create processes to mediate and resolve labor conflicts.[26]

c. **Violence, threats, or intimidation against workers** for exercising their labor rights under Article 23.3 in a manner affecting trade or investment between is prohibited.[27]

d. **Migrant Workers** are recognized as vulnerable and in implementing Article 23.3, each Party shall ensure that migrant workers are protected under its labor laws, whether they are nationals or non-nationals of the Party.[28]

e. **Eliminating discrimination in employment and occupation**[29] is recognized and the parties support the goal of promoting equality of women in the workplace and agree to implement policies[30]that it considers appropriate to protect workers against employment discrimination on the basis of sex, including with regard to sexual harassment, pregnancy, sexual orientation, gender identity, and caregiving responsibilities; provide job protected leave for birth or adoption of a child and care of family members; and protect against wage discrimination.

f. **Dispute Settlement:**

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25 USMCA, Art. 23.4.

26 USMCA, Art. 23.5.

27 Footnotes 13 and 14 further clarify this section: 13: "For greater certainty, a failure is "in a manner affecting trade or investment between the Parties" if it involves: (i) a person or industry that produces a good or supplies a service traded between the Parties or has an investment in the territory of the Party that has failed to comply with this obligation; or (ii) a person or industry that produces a good or supplies a service that competes in the territory of a Party with a good or a service of another Party.14: For purposes of dispute settlement, a panel shall presume that a failure is in a manner affecting trade or investment between the Parties, unless the responding Party demonstrates otherwise." USMCA, Art. 23.7.

28 USMCA, Art. 23.8.

29 USMCA, Art. 23.9.

30 While sounding high-minded, the US. added footnote 15 which appears to greatly ameliorate or eliminate its obligations, "The United States' existing federal agency policies regarding the hiring of federal workers are sufficient to fulfill the obligations set forth in this Article. The Article thus requires no additional action on the part of the United States, including any amendments to Title VII of the Civil Rights Act of 1964, in order for the United States to be in compliance with the obligations set forth in this Article." Article 23.9 footnote 15. For insight into the origins of footnote 15, see, Chantal Da Silva, *These 38 GOP Lawmakers Want LGBT Protections Removed From the New NAFTA Deal*, Newsweek (Nov. 19, 2019 9:54AM), https://www.newsweek.com/these-38-gop-lawmakers-want-lgbt-protections-removed-new-nafta-deal-1221751. Shane Croucher, *Trump Uses Footnote to Dodge LGBTQ Rights in New Trade Deal with Mexico and Canada*, Newsweek (Dec. 4, 2018 7:13AM), https://www.newsweek.com/trump-uses-footnote-dodge-lgbtq-rights-new-trade-deal-mexico-and-canada-1242937.

Labor consultations and an enforceable panel report are available upon disagreement whether a labor violation has occurred,[31] procedures are provided, and **a retaliatory remedy** is available under the State-to-State Dispute Settlement mechanism for a breach of the labor provisions.[32] Procedures for Individual-Investor (ISDS) (between only the U.S. and Mexico). There also is a new labor-related dispute resolution applicable only to U.S.-Mexico. The rapid response enforcement mechanism is to hear complaints against facilities for violating the right of freedom of association and collective bargaining.[33] State to State dispute mechanism is provided and allow a choice of international forums including UNCITRAL.[34] A Party may request consultations regarding any matter arising under this Chapter.[35] A third party that considers it has a substantial interest in the matter may participate in the labor consultations,[36] and the requesting Party may request the establishment of a panel.[37] Procedures of good offices, conciliation, and eventually a fact-finding panel are available to determine if there were activities inconsistent with the agreement, and the panel can issue a final report.[38] If no timely resolution is reached over the purported nonconformity pursuant to a panel's final report, the Suspension of Benefits Clause becomes available.[39] Under this provision, suspension must first be sought in the same sector affected by the dispute; that is, benefits conferred under the labor provisions must be considered.[40]

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31 USMCA, Art. 23.17.

32 USMCA, Art. 31, 31.3, 31.16. For a description of the state-to-state dispute settlement system under the USMCA compared with NAFTA, see, J. Anthony VanDuzer, State-to-state Dispute Settlement under the USMCA: Better than NAFTA? (Feb. 27, 2020) (forthcoming) (available at: https://ssrn.com/abstract=3341662).

33 "The North American Free Trade Agreement (NAFTA) put the famous investor–state dispute settlement mechanism (ISDS) on the map. Now its rebirth as the United States–Mexico–Canada Agreement (USMCA) is taking it off again—at least between the United States and Canada." Nathalie Bernasconi-Osterwalder, *USMCA Curbs How Much Investors Can Sue Countries—Sort of*, Int'l Inst. for Sustainable Dev (Oct. 2, 2018), https://www.iisd.org/library/usmca-investors. The provisions for ISDS are between the US and Mexico, only. USMCA, Art. 14.1-14.17. The new Facility Specific Rapid Response Labor Mechanism. USMCA, Art. 31 Annex 31-A concerns the United States and Mexico; and USMCA, Art. 31 Annex 31-B concerns Canada; there is no such Rapid Response Labor Mechanism between the United States and Canada.

34 If a dispute regarding a matter arises under this Agreement and under another international trade agreement to which the disputing Parties are party, including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute. USMCA, Art. 31.1. The Investor-State Dispute Settlement (ISDS), Facility Specific Rapid Response Labor Mechanism, both of which are available only in disputes with Mexico; and the State-to-State disputes resolution mechanisms, are available to all parties.

35 USMCA, Art. 31.4.1.

36 USMCA, Art. 31.14.

37 USMCA, Art. 31.6.

38 USMCA, Art. 31.4–17.5.

39 USMCA, Art. 31.19.

40 In certain situations, the complaining party may suspend benefits in other sectors, unless negated by the USMCA. USMCA, Art. 31.19.2(a). In the case the Facility Specific Rapid Response Labor Mechanism with Mexico is used, there is a review by a three-person arbitration panel that should be issued within thirty days. The complaining party is empowered to impose remedies if the panel finds that there was a violation of worker's rights or free association. This rapid resolution mechanism allows the arbitrators to

In proving violations, the USMCA has added provisions,[41] such as in Article 31.11(2)(b) that explicitly state that "The Rules of Procedure shall include rules of evidence, which shall ensure that: (b) the disputing Parties have the right to submit anonymous testimony and redacted evidence, in appropriate circumstances." [42] Further, Article 23.5 requires the US not to fail to effectively enforce its labor laws through a sustained or recurring course of action *in a manner affecting trade or investment*. The newly revised USMCA provides a rebuttable presumption that a failure to comply *does* affect trade or investment.[43] Providing the necessary evidence in contested cases to overcome presumptions may prove challenging, for example in cases such as under U.S. law, legally permitting the permanent replacements of strikers while granting the right to strike; or sex discrimination.

The Parties also may decide to use alternative methods, such as "arbitration, mediation, online dispute resolution and other procedures for the prevention and resolution of international commercial disputes between private parties in the free trade area.[44]

Another avenue of resolution, permits referrals to judicial or administrative forums:

> If an issue of interpretation or application of this Agreement arises in a domestic judicial or administrative proceeding of a Party that a Party considers would merit its intervention, or if a court or administrative body solicits the views of a Party, that Party shall notify the other Parties and its Section of the Secretariat. The Commission shall endeavor to agree on an appropriate response as expeditiously as possible. 2. The Party in whose territory the

conduct an on-site investigation to verify whether workers' rights have been violated, subject to the other party's consent. Therefore, under the ISDS, dispute resolution can be completed in a few months rather than years. USMCA, Art. 31-A.8.

41 *See generally*, Steve Charnovitz, *The Labor Rights Rationale to Approve the USMCA*, Int'l. Econ. L. & Pol'y. Blog (Dec. 13, 2019), https://ielp.worldtradelaw.net/2019/12/the-labor-rights-rationale-to-approve-the-usmca.html.

42 USMCA, Art. 31.11.2(b). The applicable arbitration rules, whether they were the ICSID Rules, the ICSID or UNCITRAL Rules, will govern the rule of evidence.

43 USMCA Art. 23.3 footnotes 4 and 5 provide further clarification: "4. A failure to comply with an obligation under paragraphs 1 or 2 must be in a manner affecting trade or investment between the Parties. For greater certainty, a failure is "in a manner affecting trade or investment between the Parties" if it involves: (i) a person or industry that produces a good or supplies a service traded between the Parties or has an investment in the territory of the Party that has failed to comply with this obligation; or (ii) a person or industry that produces a good or supplies a service that competes in the territory of a Party with a good or a service of another Party. 5. For purposes of dispute settlement, a panel shall presume that a failure is in a manner affecting trade or investment between the Parties, unless the responding Party demonstrates otherwise." The USMCA did not include the competitive advantage required in earlier U.S. FTAs to prove the case. These and other USMCA improvements were called for in a comprehensive article by Professor Lance Compa. Eric Gottwald & Jeff Vogt, *Wrong Turn for Workers' Rights: The U.S- Guatemala CAFTA Labor Arbitration Ruling – And What To Do About It*, Int'l. Lab. Rts. F., (2018), https://laborrights.org/sites/default/files/publications/Wrong%20Turn%20for%20Workers%20Rights%20-%20March%202018.pdf.

44 USMCA, Art. 31.22.1.

court or administrative body is located shall submit an agreed interpretation of the Commission to the court or administrative body in accordance with the rules of that forum.[45]

2. CETA[46]

a. The Parties affirm their commitment to respect, promote and realize the principles and rights in accordance with the **obligations of the ILO** and its core labor standards relating to freedom of association and the right to collective bargaining, the elimination of forced or compulsory labor, the abolition of child labor; and the elimination of discrimination in respect of employment and occupation.[47]

b. Further, each Party shall ensure that its labor law and practices promote the ILO Decent Work Agenda, and in accordance with the ILO Declaration on Social Justice for a Fair Globalization of 2008,[48] and other international commitments: "(a) health and safety at work, including the prevention of occupational injury or illness and compensation in cases of such injury or illness; (b) establishment of acceptable minimum employment standards for wage earners, including those not covered by a collective agreement; and, (c) non-discrimination in respect of working conditions, including for migrant workers."[49]

c. The Parties have the **right to regulate and establish levels of protection**[50] and they **recognize non-derogation,**[51] providing it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their labor law and standards.

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45 USMCA, Art. 31.20.

46 Comprehensive Economic and Trade Agreement Between Canada of the One Part, and the European Union and its Member States, of the Other Part, Art. 23.1-23.11, Can.-E.U., Oct. 30, 2016 [hereinafter CETA] http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

47 CETA, Art. 23.3.1.

48 CETA, Art. 23.3.2.

49 "Article 23.3.3. Pursuant to subparagraph 2(a), each Party shall ensure that its labour law and practices embody and provide protection for working conditions that respect the health and safety of workers, including by formulating policies that promote basic principles aimed at preventing accidents and injuries that arise out of or in the course of work, and that are aimed at developing a preventative safety and health culture where the principle of prevention is accorded the highest priority. …" CETA, Art. 23.3.2. CETA also adopted ILO standards regarding migrants. CETA, Art. 23.3. And see, Ferdi De Ville, Jan Orbie & Lore Van den Putte, *TTIP and Labour Standards*, Directorate-Gen. for Internal Policies (2016), https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578992/IPOL_STU(2016)578992_EN.pdf.

50 CETA, Art. 23.2.

51 CETA, Art. 23.4.

> **d. Dispute resolution**[52]
> For any labor dispute that arises under this Chapter, the Parties shall only have recourse to the rules and procedures provided in this Chapter on l*abor*.[53] The Parties shall make every attempt to arrive at a mutually satisfactory resolution of a dispute. At any time, the Parties may have recourse to good offices, conciliation, or mediation, and all consultation procedures provided in Article 23.10 to resolve that dispute.

The Parties understand that the obligations included under this Chapter are binding and enforceable through the procedures for the resolution of disputes provided in Article 23.10. Within this context, the Parties shall discuss, through the meetings of the Committee on Trade and Sustainable Development, the effectiveness of the implementation of the Chapter, policy developments in each Party, developments in international agreements, and views presented by stakeholders, as well as possible reviews of the procedures for the resolution of disputes provided for in Article 23.10.[54] In the EU, the legality of investor–state dispute settlement (ISDS), including in the form of an Investment Court System (ICS), in EU trade agreements under EU law (e.g., CETA) was a contentious issue, but in 2018 it was confirmed as legal.[55] Since then, the Parties have renegotiated a clear break from the current ISDS system and are committed to establishing a multilateral investment tribunal for trade issues.[56]

C. International Perspective

1. U.S. and UK Unions' Agendas[57]

U.S. union leader of the AFL-CIO, President Richard Trumka, joined with the British union leader of TUC, General Secretary Frances O'Grady, to announce to the White

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52 CETA, Art. 23.11.

53 CETA, Art. 23.11.2.

54 CETA, Art. 23.11.3. "In the case of disagreement under paragraph 3, a Party may request consultations according to the procedures established in Article 23.9 in order to review the provisions for the resolution of disputes provided for in Article 23.10, with a view to reaching a mutually agreed solution to the matter. Article 23.11.4. Further action may include, "The Committee on Trade and Sustainable Development may recommend to the CETA Joint Committee modifications to relevant provisions of this Chapter, in accordance with the amendment procedures established in Article 30.2 (Amendments). CETA, Art. 23.11.5.

55 See discussion in, Anaëlle Idjeri, The ISDS mechanism provided for under the CETA is compatible with EU law, https://www.soulier-avocats.com/en/the-isds-mechanism-provided-for-under-the-ceta-is-compatible-with-law/#:~:text=In%20this%20context%2C%20there%20was,%2C%20hereinafter%20%E2%80%9C-ISDS%E2%80%9D).

56 CETA: EU and Canada agree on new approach on investment in trade agreement, https://ec.europa.eu/commission/presscorner/detail/lt/IP_16_399.

57 This earlier briefing by TUC specifically targets what it identified as deficiencies in the US labor system. *Submission to the Department for International Trade*, Trades Union Congress (2018), https://www.tuc.org.uk/sites/default/files/TUC%20UK-US%20trade%20consultation%20final%20response.pdf.

House and Downing Street that any UK-U.S. trade deal must put workers' jobs and rights first. U.S. and UK unions demand fair trade and will vigorously oppose any deal that seeks to promote the narrow interests of multinational corporations over those of working people.[58]

> The TUC and AFL-CIO – union federations which together represent over 18 million workers – agree that the UK's first priority should be negotiating a good trade deal with the EU. Their statement outlines a series of needed requirements for any UK-U.S. deal, including:
> Enforceable commitments to protect workers' rights.
> Exclusion of all kinds of special courts which allow foreign investors to sue governments for actions that threaten their profits, such as Investor-State Dispute Settlement (ISDS) or the Investment Court System (ICS).
> Contain enforceable commitments to respect International Labor Organization core conventions on labor rights including the right to take industrial action, to join and form a trade union and the right to collective bargaining, with swift and certain enforcement mechanisms applied to business and governments when labor rights are abused;
> Include a rapid-response labor enforcement mechanism that would provide for facility specific inspections and appropriate sanctions including denial of entry of goods and access to the government procurement market for businesses that violate the agreement's labor standards commitments.
> Before undertaking negotiations on any trade deal involving the UK and US, and throughout any negotiations, our governments must engage with trade unions to ensure the objectives of any deal are to promote good jobs and protect high standards of employment, environment and safety.[59]

2. Post-Brexit UK Reaches for International Trade Connections

As the UK exits from the EU, it also reaches out to other states to form new trade relations. As EU members cannot enter separate FTAs and must be under the umbrella of the EU, the UK will now be free to is move ahead with future individual FTA arrangements with numbers of countries.[60] A compilation of its recent trade activities is shown below.

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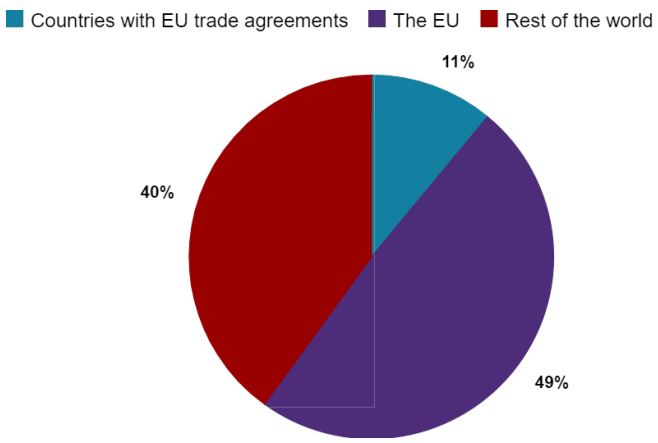
58 Trades Unions Congress, *supra* note 10.

59 *Id.*

60 Matthew Ward, *Geographical pattern of UK trade*, House of Commons Libr. (Nov. 1, 2019), Briefing Paper Number 7593, http://researchbriefings.files.parliament.uk/documents/CBP-7593/CBP-7593.pdf. *See generally*, Ronald C. Brown, *China-EU BIT and FTA: Building a Bridge on the Silk Road Not Detoured by Labor Standard Provisions*, 29 Wash. L. Rev. 61 (2019).

Where does the UK trade?[61]
Percentage of total UK trade in 2018



After Brexit and since March 2020, the UK has made 19 trade deals to be effective following its transition from the EU on December 31, 2020. While it was an EU member, the UK was automatically part of around 40 trade deals the EU had struck with more than 70 countries. The UK has been trying to copy these arrangements. So far, 19 such deals, covering 50 countries or territories, have been rolled over. These deals represent just over 8% of total UK trade. [A number of] deals are expected to take effect at the end of the transition period, according to the Department for International Trade.[62]

The UK will need an agreement with the EU to stop new tariffs and other trade barriers coming into force after the transition period ends on 31 December 2020. If any trade deals are reached, either with the EU or other countries, they will not start until the transition period ends. The UK and the EU currently share the same rules in areas like workers' rights, competition and environmental policy - they're known as level playing field rules.

If negotiators fail to reach a deal, the UK faces the prospect of trading with the EU under the basic rules set by the World Trade Organization (WTO). If the UK had to trade under WTO rules, tariffs would be applied to most goods which UK businesses send to the EU. This would make UK goods more expensive and

[61] Japan and Singapore are included in the "rest of the world" as their EU trade deals had not come into force in 2018. Tom Edgington, *Brexit: What trade deals has the UK done so far?*, BBC News (Mar. 2, 2020), https://www.bbc.com/news/uk-47213842.

[62] Kosovo (£8m of trade in 2018); Jordan (£448m in 2018); Morocco (£2.5bn in 2018); Georgia (£123m in 2018); Southern African nations (£10.2bn in 2018); Tunisia (£542m in 2018); Lebanon (£762m in 2018); South Korea (£14.8bn in 2018); Central America (£1.1bn in 2018); Andean countries (£3.4bn in 2018); Caribbean countries (£3.7bn in 2018); Pacific Islands (£163m in 2018); Liechtenstein (£146m in 2018); Israel (£4.2bn in 2018); Palestinian Authority (£41m in 2018); Switzerland (£32.4bn in 2018); The Faroe Islands (£252m in 2018); Eastern and Southern Africa (£2bn in 2018); Chile (£2bn in 2018). The government says it is still in negotiation with a further 16 countries, including Canada and Mexico. Tom Edgington, *Brexit: What trade deals has the UK done so far?*, BBC News (Mar. 2, 2020), https://www.bbc.com/news/uk-47213842.

harder to sell in Europe. Having WTO terms would also mean full border checks for goods, which could cause traffic bottlenecks at ports. And the UK service industry would lose its guaranteed access. Qualifications would no longer be recognized, and it would be much harder for workers to travel to the EU.[63]

III. Legal

A. Comparative Agenda Issues of U.S. and UK Domestic Labor Laws

Under the USMCA, the labor agenda earlier identified and summarized below, is followed by brief highlights of UK and U.S. relevant labor laws, allowing a comparison to help further identify potential trouble spots in the negotiations.

1. **Labor Rights:** ILO Core Labor Standards and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. The **UK** has ratified all eight core conventions whereas the **U.S.** has ratified only two.[64] The USMCA added the right to strike as part of the freedom of association and "acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health."[65] Both countries have laws regulating wages, hours, and safety,[66] as well as the topics of the ILO core labor standards.[67]

a. **UK's** Trade Union and Labour Relations Act provides for unionization and collective bargaining,[68] the right to strike,[69]

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63 *Id.* Britain also has applied to become a dialogue partner of the Association of Southeast Asian Nations (ASEAN), as it seeks to boost post-Brexit ties in the region. *UK seeks to boost post-Brexit ties with ASEAN partnership*, Reuters (June 5, 2020 11:36AM), https://www.reuters.com/article/us-britain-politics-asean-idUSKBN23C32D.

64 The US has ratified two of the ILO's core labor standards: No. 105 on the Abolition of Forced Labor and No. 182 on the Elimination of the Worst Forms of Child Labor. *Ratifications for United States of America*, Int'l Labour Org., w (last accessed July 1, 2020). The U.S. law prohibiting the Abolition of Forced Labor is 18 U.S.C.A §1589 (Westlaw through Pub. L. No. 116-130). *The US: A Leading role in the ILO*, Int'l Labour Org., https://www.ilo.org/washington/ilo-and-the-united-states/the-usa-leading-role-in-the-ilo/lang--en/index.htm#:~:text=The%20US%20has%20ratified%2014,Worst%20Forms%20of%20Child%20Labor (last accessed July 1, 2020).

65 USMCA Art. 23.3.2.

66 *E.g.*, in the US: Fair Labor Standards Act of 1938, 29 U.S.C.A §§201-219 (2016).

67 National Minimum Wage Act 1998, c. 39 (UK).

68 Trade Union and Labour Relations (Consolidation) Act 1992, c. 52 (UK), §§ 62(5), 178(2). If still applicable the Human Rights Act's Schedule 1, Part 1, Article 11 asserts the United Kingdom's obligation not to restrict its citizens' freedom of assembly and association. This freedom of association includes association with other people as well as the formation or membership with a trade union created in order to protect individual rights and interests. Human Rights Act 1998, c. 42, Art. 11(1), (UK).

69 Trade Union and Labour Relations (Consolidation) Act 1992, c. 52, § 62, (UK) . However, there are cumbersome procedural requirements before a strike can occur and questions whether a permanently replaced striker has the right to return to the job after

and prohibits terms in a collective agreement that restrict employees' right to engage in a strike or industrial action.[70] Employees' termination must be for a "fair reason"[71] and the law protects employees whose business is being transferred to another business.[72] UK laws create a minimum standard of employment rights, located in various Acts, including the National Minimum Wage Act 1998,[73] the Working Time Regulations 1998,[74] the Employment Rights Act 1996,[75] and the Pensions Act 2008.[76] The Modern Slavery Act prohibits any form of compulsory or forced labor.[77]

b. **U.S.** law provides private and federal government employees the freedom of association and private employees the right

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the strike. *See* Trade Union and Labour Relations (Consolidation) Act 1992, c. 52, §§ 62–70 (UK). Also see Employment Rights Act 1996, c. 18 § 14(UK). If EU obligations continue, there is a clear obligation to permit strikes. Article 28 states workers have the right "to take collective action to defend their interests, including strike action." Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 2. The UK Court of Appeals in the Metrobus case in 2009 held delay in informing an employer of the outcome of a ballot for strike action will cause the subsequent strike action to be unlawful, and consequently not protected under the Trade Union and Labor Relations (Consolidation) Act 1992. "For strike action to be lawful and therefore protected, s.231A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C) A) imposes a duty on the union concerned to inform the employer of the outcome of a ballot "as soon as is reasonably practicable" after the holding of the ballot. This requires the identification of the earliest time by which the communication of the information is reasonably achievable. Where the union does not achieve such compliance, the proposed strike action will not be protected, and an employer will be entitled to an injunction restraining the strike action." Metrobus Ltd v Unite the Union [2009] EWCA Civ 829 CA (Eng.).

70 Trade Union and Labour Relations (Consolidation) Act 1992, c.52 §180(1) (UK) .

71 Employment Rights Act 1996, c. 18 §94 (UK).

72 "The Regulations apply: (a) when a business or undertaking, or part of one, is transferred to a new employer; or (b) when a 'service provision change' takes place (for example, where a contractor takes on a contract to provide a service for a client from another contractor).
Dept. for Bus. Innovation & Skills, Employment Rights on the Transfer of an Undertaking (TUPE), 7 (2014), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/275252/bis-14-502-employment-rights-on-the-transfer-of-an-undertaking.pdf.

73 National Minimum Wage Act 1998, c. 39 (UK).

74 Provides the right to 28 days paid holidays, breaks from work, and attempts to limit excessively long working hours. Working Time Regulations 1998, No. 1833 (UK).

75 Provides the right to leave for childcare, and the right to request flexible working patterns. Employment Rights Act 1996, c. 18 (UK).

76 Provides the right to be automatically enrolled in a basic occupational pension, whose funds must be protected according to the Pensions Act. Pensions Act 2008, c. 30 (UK).

77 Modern Slavery Act 2015, c. 30 (UK). If applicable, the Human Rights Act Article 4 also prohibits "slavery or servitude" and "no one shall be required to perform forced or compulsory labour." Human Rights Act 1998, c. 42 , Art. 4(1)–(2) (UK). The Trade Union and Labour Relations Act authorizes collective bargaining. Trade Union and Labour Relations (Consolidation) Act 1992, c. 52, § 70B(1), (UK).

to collective bargain and strike,[78] while federal employees can bargain, but not over wages, with strikes prohibited in the public sector.[79] Employees are employed "at will," except in certain public sector jobs, unless protected by contract or statute.[80] Wages, hours and non-discriminatory pay are also regulated, as is occupational health and safety.[81]

2. **Non-Derogation and Enforcement of Labor Laws:** The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in each Party's labor laws. They also agree to fully enforce the labor provisions of the agreement and create processes to mediate and resolve labor conflicts.

a. **The UK** has accepted this in EU FTAs, and it is of current concern to the EU in its negotiations with the UK that the UK maintain high labor standards and enforcement after Brexit and not become a competitive cheap labor country.

b. **U.S.** FTAs typically include these provisions and the U.S. has a strong record of law enforcement.

3. **Violence, threats, or intimidation against workers** for exercising their labor rights under Article 23.3 in a manner affecting trade or investment between the Parties is prohibited.

a. **UK** employers are obligated to provide workers a general duty of care to protect them from threats and violence at work.[82] The

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78 *See* 29 U.S.C.A. §157 (Westlaw through Pub. L. No. 116-30); 29 U.S.C.A. §163 (Westlaw through Pub. L. No 116-30). Section 29 U.S.C.A. 163 of the NLRA provides that nothing in the chapter was intended to, or in practice will, interfere with or otherwise inhibit employees' right to strike.

79 National Labor Relations Act of 1935, 29 U.S.C.A. §§151-69 (Westlaw through Pub. L. No. 116–30). Equal Employment Opportunity Act of 1972, 29 C.F.R. §§ 1600–1899.

80 *At-Will Employment – Overview*, Nat'l. Conf. of St. Legislatures, https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx (last accessed July 1, 2020).

81 Fair Labor Standards Act of 1938, 29 U.S.C.A §§ 201–19 (2016); Civil Rights Act of 1964, 42 U.S.C.A § 2000e (Westlaw through Pub. L. No. 116–45); Title VII, Civil Rights Act of 1991, 42 U.S.C.A. § 2000e (Westlaw through Pub. L. No. 102–66); Occupational Health and Safety Act of 1970, 29 U.S.C.A. §§ 651–78 (Westlaw through Pub. L. No. 116–45).

82 "There are also five specific health and safety laws that extend to violence at work: laws include the Health and Safety at Work Act 1974 (HASAWA);the Management of Health and Safety at Work Regulations 1999; the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013(RIDDOR); the Safety Representatives and Safety Committees Regulations 1977; and the Health and Safety (Consultation with Employees) Regulations 1996. Employers may also owe you duties under the Protection from Harassment Act 1997. The Act protects you against harassment and victimisation on grounds of sex, sexual orientation, trans-sexuality, marriage, civil partnership, pregnancy, maternity, race, nationality, disability, religion and belief, and age. In Northern Ireland, protection extends to harassment and victimisation on grounds of political opinion." *What laws protect me from threats and violence at work?*, Worksmart, https://worksmart.org.uk/health-advice/illnesses-and-injuries/violence-and-bullying/violence/what-laws-protect-me-threats-and (last accessed July 1, 2020).

Trade Union and Labour Relations Act of 1992 is the primary source of U.K. labor protection relating to unionization, collective bargaining, and the right to strike.[83] Under the Equality Act, "victimization (retaliation) is prohibited as it pertains to protected categories of workers.[84]

b. **U.S.** laws, in addition to criminal laws, provide for government statutory and administrative protection for exercise of labor rights and from retaliation for their exercise.[85]

4. **Migrant Workers** are recognized as vulnerable and each Party shall ensure that migrant workers are protected under its labor laws, whether they are nationals or non-nationals.

a. **UK** migrant workers are granted labor rights, and under the law, "are entitled to receive pay equal to British workers doing the same job and must be paid at least the national minimum wage. They are protected by UK employment laws, have the right to be paid annual leave and statutory sick pay, and must pay tax and national insurance."[86] However, advocates of migrant domestic workers argue the laws are insufficient, and practices sometimes appear to violate forced labor laws.[87]

b. **U.S.** legal migrant workers have the same legal rights as US citizens, although the remedies for illegal aliens are sometimes lower under particular labor laws.[88]

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83 Trade Union and Labour Relations (Consolidation) Act 1992, c. 52 (UK). The right to strike is contained in Trade Union and Labour Relations (Consolidation) Act 1992, c. 52, § 62 (UK).

84 Equality Act 2010, c. 15 , § 27(1) (UK). Article 14 of the Human Rights Act also protects citizens from all forms of discrimination. Human Rights Act 1998, c. 42 , Art. 14 (UK).

85 National Labor Relations Act of 1935, 29 U.S.C.A. § 158 (Westlaw through Pub. L. No. 116–45); Fair Labor Standards Act of 1938, 29 U.S.C.A. § 215 (Westlaw through Pub. L. No. 116–45); Title VII, Civil Rights Act of 1991, 42 U.S.C.A. § 2000e (Westlaw through Pub. L. No. 102–66).

86 *Migrant Workers*, Unison, https://www.unison.org.uk/get-help/knowledge/vulnerable-workers/migrant-workers/ (last accessed July 1, 2020). *See also*, Alan C. Neal, *Migrant Workers and the United Kingdom Labor Market: Some Trends and Implications of Twenty-First Century International Labor Migration Flows*, 31 Comp. Lab. L. & Pol'y J. 91, 116–17 (2009).

87 In June 2011, the UK was one of only nine EU states that did not vote in favor of the ILO's Domestic Workers Convention recognizing domestic workers' rights to the same labor protections as other workers. For a report by UK's largest union, UNISON, with 1.3 million members representing staff who provide public services in the public and private sector on the alleged abuses of migrant domestic labor in UK, see, *Hidden Away: Abuses against Migrant Domestic Workers in the UK*, Hum. Rts. Watch (Mar. 31, 2014), https://www.hrw.org/report/2014/03/30/hidden-away/abuses-against-migrant-domestic-workers-uk. *See also*, "The Coroners and Justice Act of 2009 introduced into the domestic law of the United Kingdom the offense of holding another person in slavery or servitude or requiring them to perform forced or compulsory labor." Coroners and Justice Act 2009, § 71. Siobhán Mullally & Clíodhna Murphy, *Migrant Domestic Workers in the UK: Enacting Exclusions, Exemptions, and Rights*, 36 Hum. Rts. Q. 397 (2014).

88 In the Sure-Tan, Inc. v. N.L.R.B, 476 U.S. 883 (1984), the NLRB held an employee under the law who was an illegal alien, though protected under the law, was not entitled to the usual remedy of reinstatement. Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.

Although agricultural migrant workers have a series of labor protection laws, it is often argued to be inadequate.[89] Agricultural workers, including migrants who often make up a large percentage of that labor force, are excluded from

S. 137, 142-52 (2002) (Federal immigration policy, as expressed by Congress in IRCA, foreclosed the Board from awarding backpay to an undocumented alien who has never been legally authorized to work in the United States for an employer's violation of the worker's rights under the NLRA). *Contra* Patel v. Sumani Corp., 660 F. Supp. 1528 (N.D. Ala. 1987) (right to remedy under FLSA). "The guidance explains that undocumented workers are entitled to the same remedies as any other workers back pay, reinstatement if the employee was unlawfully terminated, hiring if the employee was denied a job due to discrimination, other appropriate injunctive relief, damages and attorneys' fees except in the very narrow situations where an award would directly conflict with the immigration laws. The guidance also emphasizes that unauthorized workers are fully protected by the retaliation principles of the federal anti-discrimination laws." EEOC Issues Guidance on Remedies for Undocumented Workers Under Laws Prohibiting Employment Discrimination, https://www.eeoc.gov/newsroom/eeoc-issues-guidance-remedies-undocumented-workers-under-laws-prohibiting-employmentFor discussion of remedies under anti-discrimination laws. Also see, Keith Cunningham-Parmeter,. *Redefining the Rights of Undocumented Workers*, 58 American U. L. Rev. 1361, 1381-86 (2009).

89 Chandra Bhatnagar, *Human Rights Abuse In Plain Sight: Migrant Workers in the U.S.*, ACLU (Dec. 18, 2009, 11:57AM), https://www.aclu.org/blog/national-security/human-rights-abuse-plain-sight-migrant-workers-us. Alternative federal laws seek to protect these workers. The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) protects migrant and seasonal agricultural workers by establishing employment standards related to wages, housing, transportation, disclosures, and recordkeeping. *Migrant and Seasonal Agricultural Worker Protection Act (MSPA)*, U.S. Dept. of Lab., https://www.dol.gov/agencies/whd/agriculture/mspa (last accessed July 1, 2020). Migrant workers fall into two broad categories in the U.S.: domestic and foreign. Domestic workers are immigrants who move to the U.S. to work in various vocations who are in the process of obtaining citizenship, or who have citizenship. Foreign migrant workers are non-immigrant workers who are in many cases seasonal workers, especially in the agricultural professions. Non-immigrant foreign worke rs typically must apply for a visa, and in the case of agricultural labor, an H-2A visa. For a summary, *see* Claudia G. Catalano, *Construction and Application of the Migrant and Seasonal Agricultural Worker Protection Act (AWPA)—General Provisions Subchapter (29 U.S.C.A. §§ 1851 to 1872)*, 65 A.L.R. Fed. 2d 339 (2012). Lance Compa, *Migrant Workers in the United States: Connecting Domestic Law with International Labor Standards*, 92 Chi.-Kent L. Rev. 211 (2017). Though a federal domestic workers rights bill was introduced in Congress in 2019, there is no federal law protection. Domestic Workers Bill of Rights Act, S. 2112, 116th Cong. (2019–20). As of 2019, "nine states have passed laws extending labor protections to domestic workers: Oregon, California, Connecticut, Illinois, New York, Massachusetts, Hawaii, and Nevada." Alexia Fernández Campbell, *Kamala Harris just introduced a bill to give housekeepers overtime pay and meal breaks*, Vox (Jul. 15, 2019, 4:20PM), https://www.vox.com/2019/7/15/20694610/kamala-harris-domestic-workers-bill-of-rights-act. Likewise, the Occupational Health and Safety Act, which established a worker's right to a safe and healthy work environment, also left out domestic workers and farmworkers. Occupational Health and Safety Act of 1970, 29 U.S.C.A. §§ 651–678 (WestLaw through P.L. 116-145). In the 1970s the FLSA was amended to cover most domestic workers, but not live-in housekeepers and nannies. *Id*. Farmworkers are still excluded from the FLSA. Both domestic workers and farmworkers are also excluded from the National Labor Relations Act, which gave workers the right to form labor unions and organize for better working conditions. 29 U.S.C. 158(3).

federal legislation that provides basic protections like the right to a minimum wage, overtime pay, freedom of association, and health and safety guarantees while at work. Domestic service employees may or may not have the full protections of the labor laws, but are provided some protections, such as minimum wages, depending on a variety of federal and state laws.[90]

5. The USMCA provides for the **elimination of gender-based workplace discrimination** in employment and occupation, promoting equality of women, and implementing policies appropriate to protect workers on the basis of sex, including sexual harassment, pregnancy, sexual orientation, gender identity, and caregiving responsibilities; provide job protected leave for birth or adoption of a child and care of family members; and protect against wage discrimination.

a. **UK** has the Equality Act of 2010 that enumerates characteristics protected from discrimination including age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief; sex, and sexual orientation.[91] The non-discrimination prohibition includes wages,[92] yet the gender pay gap in the UK ranks high compared with EU member states.[93] Sexual harassment is also prohibited[94] as is discrimination based on *LGBTQ+*, including gender reassignment and sexual orientation.[95] Disputes are typically resolved in the Advisory, Conciliation and Arbitration Service (Acas) which is similar in function to the EEOC in the United States and it provides dispute resolution procedures on employment rights and issues between employers and employees and is the step before the Employment Tribunal. [96]

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90 See for example, 29 U.S.C. §206(f) (Westlaw through Pub. L. No. 116-130) (minimum wages except when not compliant with §209(a)(6) of the Social Security Act, or when that employee 1) is employed in multiple households during a given week and 2) is employed for more than eight hours total).

91 Equality Act 2010, c. 15,§ 4,(UK).

92 Equality Act 2010, c. 15, § 71, (UK).

93 *The Guardian view on gender inequality in the UK: time to change the face*, Guardian (Oct. 28, 2014, 3:25PM), https://www.theguardian.com/commentisfree/2014/oct/28/guardian-view-gender-inequality-uk.

94 Equality Act 2010, c. 15, § 26, (UK) . An additional form of prohibited discrimination is "victimization," which is similar to "retaliation" under US law. Equality Act 2010, c. 15, § 27, (UK).

95 Equality Act 2010, c. 15, § 4, (UK). UK laws have adopted protections provided under the European Human Rights Act against discrimination for LGBTQ+ status. Human Rights Act 1998, c. 42 (UK). *But see*, Alex Cooper, *Boris Johnson gets mixed review from LGBTQ Community*, NBC News (Jul. 26, 2019, 11:42AM), https://www.nbcnews.com/feature/nbc-out/boris-johnson-gets-mixed-reviews-u-k-s-lgbtq-community-n1035241. *See also*, Jamie Wareham, *This is How U.K. LGBTQ Rights Change After Brexit*, Forbes (Jan. 26, 2020, 7:10PM), https://www.forbes.com/sites/jamiewareham/2020/01/26/this-is-how-uk-lgbtq-rights-will-change-when-we-brexit/#5f0df054756d.

96 *Acas: What we do*, Advisory, Conciliation & Arb. Serv., https://www.acas.org.uk/what-we-do (last visited June 30, 2020).

Family leave policies exist and generally are paid for certain durations with the right to return to work without discrimination.[97] Maternity protection is provided by the Equality Act of 2010 that also covers the right to equality of pay throughout pregnancy-related maternity leave.[98] Other areas of family care are also provided for under UK law, such as paternity leave.[99]

b. **U.S.** laws include anti-discrimination laws[100] covering gender and wages, though there is a significant wage gap in the U.S.[101] Sex harassment[102] and pregnancy discrimination are prohibited, though maternity benefits are not required by law.[103] Unpaid family leave is provided, though with

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97 *See* Employment Rights Act 1996, c. 18, pt. VIII, (UK). See also, *Holidays, time off, sick leave, maternity and paternity leave*, Gov.UK, https://www.gov.uk/browse/working/time-off (last accessed July 1, 2020); *Employee rights when on leave*, Gov.UK, https://www.gov.uk/employee-rights-when-on-leave (last accessed July 1, 2020).

98 The Statutory Mandatory Pay Act makes all working mothers eligible for up to fifty-two weeks of maternity leaves, with thirty-nine paid weeks, the first six of which are at the rate of 90% of the mother's full pay. Equality Act 2010, c. 15, § 74, (UK).

99 Statutory Paternity Pay and Leave: employer guide, Gov.UK, https://www.gov.uk/employers-paternity-pay-leave.

100 *E.g.*, 42 U.S.C.A 2000e et seq. (Westlaw through Pub. L. No. 116-30). Equal Pay Act, 29 U.S.C.A §206(d)(1) (Westlaw through Pub. L. No. 116-30

101 Analyzing the most recent Census Bureau data from 2018, women of all races earned, on average, just 82 cents for every $1 earned by men of all races. A further breakdown shows the gender wage gap is more significant among women of color: White 79%; Black 62%; Hispanic or Latino 54%; Asian 90%; and American Indian or Alaska Native 57%. Robin Bleiweis, *Quick Facts About the Gender Wage Gap*, Ctr. for Am. Progress (Mar. 24, 2020, 9:01AM), https://www.americanprogress.org/issues/women/reports/2020/03/24/482141/quick-facts-gender-wage-gap/. The Equal Pay Act is a federal law prohibiting wage discrimination on the basis of sex. 29 U.S.C. §206(d).

102 Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). *See* Natalie Dugan, *#Timesup on Individual Litigation Reform: Combatting Sexual Harassment Through Employee-Driven Action and Private Regulation*, 53 Colum. J.L. & Soc. Probs. 247, 265–66 (2020).

103 The U.S. is the only OECD country without a national statutory paid maternity, paternity or parental leave. The Family and Medical Leave Act (FMLA) enables some employees to take up to 12 weeks unpaid maternity leave but only 60% of workers are eligible. Miranda Bryant, *Maternity leave: US policy is worst on list of the world's richest countries*, Guardian (Jan. 27, 2020, 3:00AM), https://www.theguardian.com/us-news/2020/jan/27/maternity-leave-us-policy-worst-worlds-richest-countries. It is also worst on granting paid paternity leave. Miranda Bryant, *Paternity leave: US is least generous of world's richest countries*, Guardian (Jan. 29, 2020, 2:00AM), https://www.theguardian.com/us-news/2020/jan/29/paternity-leave-us-policy. The Federal Employee Paid Leave Act (FEPLA) provides benefits for some federal employees. The new law grants most federal employees up to 12 weeks of paid parental leave for the birth, adoption or foster of a new child. Family and Medical Leave Act of 1993 (29 U.S.C. 2601 et seq.). Nicole Ogrysko, *New federal paid parental leave benefits will be ready without delay, OPM says*, Fed. News Network (Mar. 10, 2020, 9:00AM), https://federalnewsnetwork.com/workforce/2020/03/new-federal-paid-parental-leave-benefits-will-be-ready-without-delay-opm-says/#:~:text=The%20new%20law%20grants%20most,1.

qualifying time eligibility requirements, that allows for time off from work for family health and care needs.[104] The question of whether federal anti-discrimination law includes prohibitions against sexual orientation and gender identity was decided on Monday, June 15, 2020, when the United States Supreme Court ruled that the prohibition against sex-based discrimination in employment set forth in Title VII of the Civil Rights Act of 1964 includes claims of sexual orientation and gender identity-based discrimination.[105]

1. Dispute Settlement:

a. **UK 's** labor dispute resolution takes place first in the Advisory, Conciliation and Arbitration Service (Acas).[106] It emphasizes the importance of attempting to resolve disputes informally before going to the Employment Tribunal[107] and issues guidelines for labor dispute resolution which, though not legally binding, are nevertheless referred to by UK courts.[108]

b. **U.S.** law provides the parties may resolve most individual or collective contract or statutory labor disputes through voluntary non-governmental arbitration whose decisions are deferred to by the courts, assuming certain standards are met.[109] In the U.S., each labor law has an administrative agency to enforce the statutory labor rights under the law; these agencies typically investigate and render a decision, deferred to by the courts if there is substantial evidence supporting it.[110] Where there is no deferral or if the statute permits it, the courts decide the issues.[111]

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104 *FMLA: Applicable Laws and Regulations*, U.S. Dept. of Lab., https://www.dol.gov/agencies/whd/fmla/laws-and-regulations (last accessed July 1, 2020).

105 Bostock v. Clayton Cty., Georgia, No. 17-1618, 2020 WL 3146686 (U.S. June 15, 2020). Nina Totenberg, *Supreme Court Delivers Major Victory to LGBTQ Employees*, Nat'l. Pub. Radio (June 15, 2020, 10:19AM), https://www.npr.org/2020/06/15/863498848/supreme-court-delivers-major-victory-to-lgbtq-employees.

106 *Acas: About Us*, Advisory, Conciliation & Arb. Serv., https://www.acas.org.uk/about-us (last vistied June 30, 2020).

107 *Id*. *Making a claim to an employment tribunal*, Advisory, Conciliation & Arb. Serv., https://www.acas.org.uk/making-a-claim-to-an-employment-tribunal (last accessed June 30, 2020).

108 *Acas: About Us*, Advisory, Conciliation & Arb. Serv., https://www.acas.org.uk/about-us (last accessed June 30, 2020).

109 *See e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

110 *See e.g.*, Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951), where the United States Supreme Court held that a court will defer to a federal agency's findings of fact if supported by "substantial evidence on the record considered as a whole.

111 By statute, the EEOC does not have enforcement powers and therefore does not receive the same judicial deference. "Under Title VII of the Civil Rights Act, EEOC's authority

B. Emerging Agenda: Trouble Spots

Violations "in a Manner Affecting Trade or Investment?"

The most contentious labor issues or the ones with political risks of domestic law not meeting the obligations of the negotiated FTA are emerging as follows. Keep in mind also that to claim violations of obligations under the language of the USMCA, the violation must be shown to be "in a manner affecting trade or investment." So, one can ask: "what evidence demonstrates a claim and what evidence overcomes the presumption under the FTA that it did not affect trade or investment?"

1. Right to Strike

The ILO does not expressly mention the right to strike but the Freedom of Association Committee through ongoing rulings established principles on the right to strike as an essential element of the freedom of association protected by Convention No. 87.[112] Only the International Covenant on Economic, Social and Cultural Rights contains a clause protecting the right to strike; however, like the Social Charter of 1961, the Covenant permits each signatory country to abridge the right to strike. The ILO has also concluded striker replacement, while not in contravention of ILO agreements, carries with it significant risks for abuse and places trade union freedoms in "risk of derogation from the right to strike."[113]

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to issue legislative regulations is limited to procedural, record keeping, and reporting matters. Regulations issued by EEOC without explicit authority from Congress, called "interpretive regulations," do not create any new legal rights or obligations, and are followed by courts only to the extent they find EEOC's positions to be persuasive." *What You Should Know: EEOC Regulations, Subregulatory Guidance and other Resource Documents*, U.S. Equal Emp. Commission, https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-regulations-subregulatory-guidance-and-other-resource (last accessed June 30, 2020). Also, see discussion in, Theodore W. Wern, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second-Class Agency?*, 60 Ohio St. L. J.1533 (1999).

112 For full discussion, see, Jeffrey Vogt, Janice Bellace, Lance Compa, K. D. Ewing, John Hendy QC, Klaus Lörcher, Tonia Novitz, The Right to Strike in International Law, https://www.bloomsburyprofessional.com/uk/the-right-to-strike-in-international-law-9781509933556/.The ILO Committee on Freedom of Association and other ILO bodies have interpreted the core ILO conventions as protecting the right to strike as an essential element of the freedom of association. For example, the ILO has ruled that "the right to strike is an intrinsic corollary of the right of association protected by Convention No. 87." *Compilation of decisions of the Committee on Freedom of Association,* Int'l. Labour Org., at 754, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO::P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3945366,1 (last accessed July 2, 2020). The European Social Charter of 1961 was the first international agreement to expressly protect the right to strike. However, the European Union's Community Charter of the Fundamental Social Rights of Workers permits EU member states to regulate the right to strike. *Strikebreake*r, Wikipedia, https://en.wikipedia.org/wiki/Strikebreaker (last accessed July 2, 2020).

113 The ILO has concluded striker replacement, while not in contravention of ILO agreements, carries with it significant risks for abuse and places trade union freedoms

The EU Charter of Fundamental Rights establishes a right to strike, and the right to associate, in the European Convention on Human Rights, but leaves it to national legislation how it will be administered; therefore, UK law and an applicable FTA are determinative.[114]

United Kingdom

In the UK, workers and employers, or their respective organizations, have, in accordance with the Trade Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action. However, this right is limited.[115]

There is no explicit legal right to strike in the UK, but there is limited protection for individuals from unfair dismissal.[116] The so-called 'right to strike' only exists provided that certain procedures and conditions are met.[117] "Strikes and other forms of industrial action invariably involve a breach of contract. Therefore, it may be lawful for an employer to dismiss employees for it and to refuse pay for a service not provided."[118]

"entails a risk of derogation from the right to strike." *Compilation of decisions of the Committee on Freedom of Association*, Int'l. Labour Org., at 919, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO::P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3945366,1 (last accessed July 2, 2020).

114 Workers and employers, or their respective organizations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action. "The textual note points out "[T]his Article is based on Article 6 of the European Social Charter and on the Community Charter of the Fundamental Social Rights of Workers (points 12 to 14). The right of collective action was recognized by the European Court of Human Rights as one of the elements of trade union rights laid down by Article 11 of the ECHR. … The modalities and *limits for the exercise of collective action, including strike action, come under national laws and practices*, including the question of whether it may be carried out in parallel in several Member States." [emphasis added] Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 2.

115 *See* Marie Brunot et al., *The legality of employee strike action*, Emp. L. Watch (July 21, 2015) https://www.employmentlawwatch.com/2015/07/articles/employment-us/the-legality-of-employee-strike-action/.

116 Trade Union and Labour Relations (Consolidation) Act 1992, c. 52, § 238A (UK).

117 The UK Court of Appeals in the Metrobus case in 2009 held delay in informing an employer of the outcome of a ballot for strike action will cause the subsequent strike action to be unlawful, and consequently not protected under the Trade Union and Labor Relations (Consolidation) Act 1992. Metrobus Ltd v Unite the Union [2009] EWCA Civ 829 CA (UK). *See*, Trade Union and Labour Relations (Consolidation) Act 1992, c. 52, § 62 (UK). "In order to proceed with a strike lawfully, a union must first give a notification of ballot and provide a copy of the voting papers to the employer no later than a week and three days before the ballot takes place. Every member of the union is entitled to vote and has the right to do so secretly where the conditions are met. Employees have some protection against disciplinary action by their employer as a result of both deciding to vote for a strike and participating in a strike or other industrial action." Brunot, *supra* note 115.

118 It is an unfair dismissal to terminate an employee who has taken part in any lawful industrial action within 12 weeks of the action. "The right of an employer to dismiss

> UK's Trade Union Act[119] places tight limits on what constitutes legitimate industrial action; and, in the words of TUC General Secretary Frances O'Grady, "attacks the right to strike – a fundamental British liberty. Workers will still technically have a right to strike, but the Act makes the right much harder to access."[120]

There is protection to strike when: "the dismissal is within 12 weeks of the action starting; it is after 12 weeks but the employee ceased the action within the 12-week period; the employer failed to take reasonable procedural steps to resolve the dispute. It is important to note that an employer can legally dismiss all those who take part in unlawful action."[121] As to strike replacements, it appears after 12 weeks striking employees can be dismissed, so presumably that includes being permanently replaced at that time. The issue of strike replacements during the strike is addressed by the following Regulation.

Regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (SI 2003/3319) precludes the provision of temporary workers to perform the duties normally performed by a worker who is taking part in a strike or other industrial action. [122]

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those taking part in lawful action is restricted. In the case of unofficial action, the employer can dismiss and later pick and choose who it re-employs – with no protection from victimization for those it chooses not to reemploy." *Unison Industrial Action Handbook*, Unison (June 2019), at 9, 14, https://www.unison.org.uk/content/uploads/2019/06/25528.pdf.

119 Trade Union Act 2016, c. 15,§§ 5–9, (UK).

120 *What is happening to the right to strike?*, Worksmart, https://worksmart.org.uk/news/what-happening-right-strike (last accessed July 2, 2020). There are cumbersome procedural requirements before a strike can occur and questions whether a permanently replaced striker has the right to return to the job after the strike. See Trade Union and Labour Relations (Consolidation) Act 1992, c. 52 , §§ 62–70 (UK). Also see, Employment Rights Act 1996, c. 18, § 14, (UK). UK's Trade Union and Labour Relations Act provides for unionization and collective bargaining, the right to strike, and prohibits terms in a collective agreement that restrict employees' right to engage in a strike or industrial action. Trade Union and Labour Relations (Consolidation) Act 1992, c. 52,§§ 62(5), 178(2) (UK). . If it remains applicable after Brexit is complete, the Human Rights Act's Schedule 1, Part 1, Article 11 asserts the United Kingdom's obligation not to restrict its citizens' freedom of assembly and association. This freedom of association includes association with other people as well as the formation or membership with a trade union created in order to protect individual rights and interests. Human Rights Act 1998, c. 42, Art. 11(1) (UK).

121 Unison Industrial Action Handbook, Unison (2019), at 9, 14, https://www.unison.org.uk/content/uploads/2019/06/25528.pdf.

122 The Regulation reads: Restriction on providing work-seekers in industrial disputes 7.—(1) Subject to paragraph (2) an employment business shall not introduce or supply a work-seeker to a hirer to perform—(a) the duties normally performed by a worker who is taking part in a strike or other industrial action ("the first worker"), or (b)the duties normally performed by any other worker employed by the hirer and who is assigned by the hirer to perform the duties normally performed by the first worker, unless in either case the employment business does not know, and has no reasonable grounds for knowing, that the first worker is taking part in a strike or other industrial action.

United States

The U.S. grants the right to strike and at the same time allows the employer to hire striker replacements; and, for economic strikers, but not unfair labor practice strikers,[123] the replacements can be permanent.[124] Advocates argue this basically negates the right to strike in the U.S., removing a union's greatest economic weapon.[125]

> The permanent-replacement doctrine is not used only against workers' exercise of the right to strike. Employers aggressively use the threat of permanent replacement in campaigns against workers' efforts to form and join a union and to bargain collectively. In every organizing drive examined by Human Rights Watch for this report, management raised the prospect of permanent replacement in written materials, in captive-audience meetings, and in one-on-one meetings where supervisors spoke with workers under their authority.

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(2) Paragraph (1) shall not apply if, in relation to the first worker, the strike or other industrial action in question is an unofficial strike or other unofficial industrial action for the purposes of section 237 of the Trade Union and Labour Relations (Consolidation) Act 1992(1). The Conduct of Employment Agencies and Employment Businesses Regulations 2003, No. 3319 (UK), Reg. 7; also, *employees take strike action, can their employer hire temporary staff to cover their work?*, XpertHR, https://www.xperthr.co.uk/faq/where-employees-take-strike-action-can-their-employer-hire-temporary-staff-to-cover-their-work/99324/ (last accessed July 2, 2020).

123 It is argued that in practice, the distinction between an unfair labor practice strike and an economic strike fails to protect workers' right to strike. As the ILO Committee on Freedom of Association noted, "that distinction obfuscates the real issue because workers and employers only find out years after the strike took place, and by then, even with a decision in favor of the workers, the strike is often long broken, and workers scattered to other jobs." *VI. Legal Obstacles to U.S. Workers' Exercise of Freedom of Association*, Hum. Rts. Watch, https://www.hrw.org/reports/2000/uslabor/USLBR008-08.htm (last accessed July 2, 2020).

124 N.L.R.B. v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938), The US Supreme Court held workers who strike remain employees for the purposes of the National Labor Relations. The Court granted the relief sought by the Board, to reinstate the workers. However, the decision in dictum said an employer may hire strikebreakers and is not bound to discharge any of them if or when the strike ends. This applies to economic but not unfair labor practice strikes where workers have the right to immediate reinstatement. "An employer can replace employees who engage in economic strikes and are not required to reinstate strikers after they apply unconditionally to go back to work. If, however, the strikers do not obtain regular and substantially equivalent employment after the strike, they are entitled to be recalled to their jobs when openings occur. Employees who strike in order to protest an unlawful practice of the employer, such as disciplining employees for engaging in union activity, have greater rights to reinstatement. They are entitled to immediate reinstatement even if replacement employees have to be discharged." *VI. Legal Obstacles to U.S. Workers' Exercise of Freedom of Association*, Hum. Rts. Watch, https://www.hrw.org/reports/2000/uslabor/USLBR008-08.htm (last accessed July 2, 2020).

125 *VI. Legal Obstacles to U.S. Workers' Exercise of Freedom of Association, supra* note 123.

> The United States is almost alone in the world in allowing permanent replacement of workers who exercise the right to strike. Some of the United States' key trading partners take a polar opposite approach. In Mexico, for example, federal law requires companies to cease operations during a legal strike.[126] Permanent replacements are also prohibited throughout Canada. In Quebec, even temporary striker replacements are banned, and a company may only maintain operations using management and supervisory personnel. In most European countries the law is silent on the subject because permanent replacements are never used and the very idea of permanent replacement of strikers is considered outlandish.[127]

2. Discrimination in the Workplace

The USMCA prohibits employment discrimination on the basis of sex (including with regard to sexual harassment), pregnancy, sexual orientation, gender identity, and caregiving responsibilities; provide job protected leave for birth or adoption of a child and care of family members; and protect against wage discrimination.[128]

Could violations of these provisions provide an advantage to the employers and the country that utilizes this work, made cheaper by discriminating and avoiding having to pay higher wages and benefits costs?[129] Could it be demonstrated that violations of these obligations are in a manner affecting trade or investment? So, again, one can ask: "what evidence demonstrates a claim and what evidence overcomes the presumption under the Treaty that it did not affect trade or investment?"

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126 Lance A. Compa*, Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards*, Hum. Rts. Watch, at 196 https://www.hrw.org/sites/default/files/reports/uslbr008.pdf (last accessed July 2, 2020). [This was before Mexico was a signatory to the USMCA].

127 *Supra* note 125.

128 USMCA, Art. 23.9.

129 Analyzing the most recent Census Bureau data from 2018, women of all races earned, on average, just 82 cents for every $1 earned by men of all races.3 This calculation is the ratio of median annual earnings for women working full time, year round to those of their male counterparts, and it translates to a gender wage gap of 18 cents. When talking about the wage gap for women, it is important to highlight that there are significant differences by race and ethnicity. The wage gap is larger for most women of color. Robin Bleiweis, *Quick Facts About the Gender Wage Gap*, Ctr. for Am. Progress (Mar. 24, 2020, 9:01AM) https://www.americanprogress.org/issues/women/reports/2020/03/24/482141/quick-facts-gender-wage-gap/. However, some labor cost items of sex discrimination, such as discrimination for sexual identity, may not have the necessary impact on trade or investment and arguably could be rebutted.

United Kingdom

Laws on gender rights and benefits in the UK are comprehensive and of a higher standard than the U.S., bolstered in part by EU standards and the government enforcement mechanisms are regularly used;[130] however, as in many countries, in practice there is a wide wage gap between male and female labor.[131] There has been concern that without continuing legal ties with EU and its standards, the UK could become a "cheap labor" country with a competitive advantage over EU countries and perhaps the U.S.?

Therefore, from the U.S. perspective an argument could be made that if the UK's post-Brexit arrangement with EU does not maintain the EU standards, the UK could allow its gender laws to weaken, providing a less expensive market for U.S. investors. Whether that could manifest itself into violations of an FTA "in a manner affecting trade or investment" is certainly speculative at this point as arguably the US already provides fewer gender-based benefits than the UK.

United States

The answer for the U.S. was provided by footnote 15 of Article 23.9 of the USMC.

> The United States' existing federal agency policies regarding the hiring of federal workers are sufficient to fulfill the obligations set forth in this Article. The Article thus requires no additional action on the part of the United States, including any amendments to Title VII of the Civil Rights Act of 1964, in order for the United States to be in compliance with the obligations set forth in this Article.[132]

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130 The gender pay gap among full-time employees stands at 8.9%, little changed from 2018, and a decline of only 0.6 percentage points since 2012. Many settlements happen long before cases reach court. Bloomberg has analyzed the court database's sex discrimination cases. There are 3,585 judicial cases, of which 2,195 were apparently settled or withdrawn. *Search the Data Behind Britain's Sex Discrimination Cases*, Bloomberg (Sept. 5, 2019), https://www.bloomberg.com/graphics/2019-uk-sexual-discrimination-settlements/tribunals.html.

131 The gender pay gap among all employees fell from 17.8% in 2018 to 17.3% in 2019 and continues to decline. For age groups under 40 years, the gender pay gap for full-time employees is now close to zero. Among 40- to 49-year-olds the gap (currently 11.4%) has decreased substantially over time. Among 50- to 59- year-olds and those over 60 years, the gender pay gap is over 15% and is not declining strongly over time. One of the reasons for differences in the gender pay gap between age groups is that women over 40 years are more likely to work in lower-paid occupations and, compared with younger women, are less likely to work as managers, directors or senior officials. *Gender pay gap in the UK: 2019*, Off. for Nat'l. Stat., https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/genderpaygapintheuk/2019#:~:text=The%20gender%20pay%20gap%20among,2019%2C%20and%20continues%20to%20decline (last accessed July 2, 2020).

132 USMCA, Art. 23.9 at note 5.

So, it would seem if the U.S. were able to use this approach of a footnote agreement to there being no violations, it would not be a trouble spot for the U.S.

3. Migrants

In Article 23.8 of the USMCA, migrant workers are recognized as vulnerable and each Party shall ensure that migrant workers are protected under its labor laws, whether they are nationals or non-nationals.

United Kingdom

The UK policies on migrant labor is now in a bit of a flux, and it has recently proposed policies that would limit foreign workers who often are the ones doing the dirty, dangerous jobs that British citizens do not want to do. In February 2020, Britain announced it is considering a policy to close its borders to unskilled workers and those who can't speak English as part of a fundamental overhaul of immigration laws that will end the era of cheap EU labor in factories, warehouses, hotels and restaurants.[133] Employers from coffee shops to agriculture to factories have raised a huge outcry as to the likely lack of workers for their businesses.[134] The below chart shows the allocation of foreign migrant labor coming into the UK from EU countries.

> Low-skilled factory and construction 21%; Factory and machine operators 17%; Food preparation and other skilled trades 13%; Low-skilled administration and service 12%; Drivers and mobile machine operators 11%; Skilled construction and building trades 9%; STEM professionals 9%; Leisure, travel and related personal service 8%; STEM associate professionals 7%; Culture, media and sports 7%.[135]

While UK laws may provide basic rights and benefits for these workers, the absence of these workers certainly would be a factor affecting labor costs and possibly impact trade and investment. It appears this policy, if implemented, it would not drive UK toward cheap labor, but just the opposite, making the migrant issue a possible plus for US traders who can supply the more UK products which have become more expensive. Thus, if the UK policy stays after it is finally separated from EU, the migrant issue likely would not be a trouble spot in the negotiations.

United States

Generally, in the U.S., migrant workers fall into two main categories: domestic and foreign. Domestic workers are legal immigrants who have moved to the U.S.

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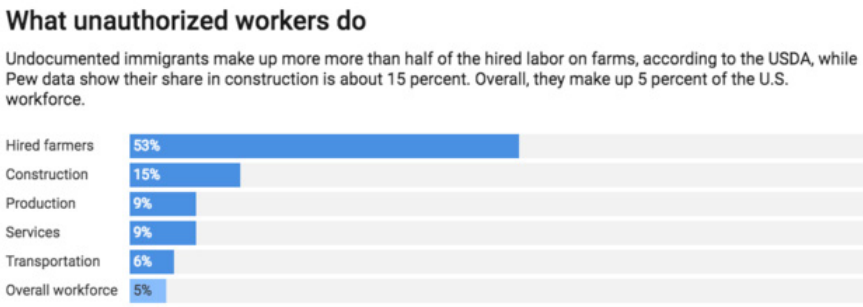
133 *See*, Guardian graphic | Source: The Migration Observatory. Lisa O'Carroll, Peter Walker & Libby Brooks, UK to close door to non-English speakers and unskilled workers, GUARDIAN (Feb 18, 2020, 5:30PM), https://www.theguardian.com/uk-news/2020/feb/18/uk-to-close-door-to-non-english-speakers-and-unskilled-workers.

134 *Id.*

135 *Id.*

to work and who either are in the process of obtaining citizenship, or who have citizenship.[136] Foreign migrant workers are non-immigrant workers who are in many cases seasonal workers, especially in the agricultural professions, as well as in the difficult jobs of meat plant production and construction. Non-immigrant foreign workers typically must apply for a visa, and in the case of agricultural labor, an H-2A visa.[137] It is estimated that about 11.3 million people are currently living in the U.S. without authorization, with many of their job categories listed below.[138]



The Conversation, CC-BY-ND Source: USDA, Pew Research Center

Advocates of migrant workers' rights point out they can be easily exploited and provide the country with a cheap labor supply, especially for the dirty, dangerous jobs that American citizens do not want, that can greatly reduce the cost of labor for employers.[139]

> Our current immigration system isn't working for workers. Instead, it benefits low-road employers who exploit the immigration status of unauthorized immigrants and authorized guest workers through a legal framework that puts downward pressure on wages and leaves migrant workers powerless to enforce their labor rights and hold employers accountable. This hurts both migrants and the U.S. workers—citizens and lawful permanent residents—who work alongside them.[140]

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136 *See,* Claudia G. Catalano, *Construction and Application of the Migrant and Seasonal Agricultural Worker Protection Act (AWPA)—General Provisions Subchapter (29 U.S.C.A. §§ 1851 to 1872)*, 65 A.L.R. Fed. 2d 339 (2012).

137 *H-2A: Temporary Agricultural Employment of Foreign Workers*, U.S. Dep. Labor, https://www.dol.gov/agencies/whd/agriculture/h2a.

138 Mary Jo Dudley, *These U.S. industries can't work without illegal immigrants*, CBS News (Jan. 10, 2019, 3:55PM), https://www.cbsnews.com/news/illegal-immigrants-us-jobs-economy-farm-workers-taxes/.

139 Daniel Costa, *Employers increase their profits and put downward pressure on wages and labor standards by exploiting migrant workers*, Econ. Pol'y. Inst. (Aug. 27, 2019), https://www.epi.org/publication/labor-day-2019-immigration-policy/.

140 *Id.*

Could it be demonstrated that violations of USMCA-style labor obligations relating to migrant labor are occurring and are in a manner affecting trade or investment?

> U.S. total exports of agricultural products to the United Kingdom totaled $2.0 billion in 2018. Leading domestic export categories include wine & beer ($261 million), tree nuts ($197 million), prepared food ($168 million), soybeans ($109 million), and live animals ($90 million).[141]

So, again, one can ask: "what evidence demonstrates a claim and what evidence overcomes the presumption under the Treaty that it did not affect trade or investment?"[142]

4. Related Issues

a. Dispute Resolution Mechanisms: Process and Remedies

United Kingdom

The EU approach to dispute resolution mechanisms in FTAs, to which the UK has been a party, is to provide an exclusive section for trade and a different one for labor. The labor settlement process is a series of consultations and negotiations, but no penalties or real remedies at the end of the process. This contrasts with the U.S. approach of a unified dispute resolution process including both labor and trade issues with a possible penalty in the end versus the EU approach of having a separate path for each with labor issues not having an enforceable remedy for a violation.[143] CETA is going through modifications of its ISDS provisions and breaking from the ISDS system and is establishing a multilateral investment tribunal for trade.[144]

United States

The USMCA presumes that labor violations affect trade and investment, shifting the burden of proof to the party alleged to have violated USMCA labor provisions to prove otherwise. The State to State dispute settlement provisions of Chapter 31 of the USMCA apply "when a Party considers that an actual or proposed measure of another Party is or would be inconsistent with an obligation of this Agreement or that another Party has otherwise failed to carry out an obligation of this Agreement;" [145] Following a possible choice of forum and consultations, mediation and an arbitration panel may be formed and its final report may include

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141 *United Kingdom: Exports*, Off. U.S. Trade Representative, https://ustr.gov/countries-regions/europe-middle-east/europe/united-kingdom#:~:text=U.S.%20total%20exports%20of%20agricultural,live%20animals%20(%2490%20million) (last accessed July 1, 2020).

142 And in this case, one could ask who will lodge the complaint?

143 *See*, Ronald C. Brown, *China-EU BIT and FTA; Building a Bridge on the Silk Road Not Detoured by Labor Standard Provisions*, 29 Was. Int'l L. J. 61, 112 n.227 (2019).

144 CETA, supra note 56.

145 USMCA, Art. 31.2(b).

enforceable, economic remedies.[146] Therefore, it is unknown whether the UK will negotiate a unified or a dual dispute resolution system, but for labor, it is most likely to seek to negotiate the dual path without penalties and the issue will be whether the US will prevail with no ISDS and have a unified system of dispute settlement with penalties?

b. Proof of Violation: Alleging and Disproving "in a Manner Affecting Trade or Investment Between the Parties"

The USMCA is instructive in its "determinative footnotes" that lay out the path for finding violations of the Labor Article. The summary conclusion from the multiple explanatory footnotes in Article 23 is that a violation occurs if it is "in a manner affecting trade or investment between the Parties" and "a panel shall presume that a failure is in a manner affecting trade or investment between the Parties, unless the responding Party demonstrates otherwise."

More specifically, the footnotes of the Labor Article provides the "obligations set out in this Article: i. as they relate to the ILO, refer only to the ILO Declaration on Rights at Work;[147] ii. the definition of trade and investment;[148] iii. the "sustained or recurring course of action or inaction" regarding enforcement of labor laws;"[149] and iv. "presume that a failure is in a manner affecting trade or investment between the Parties, unless the responding Party demonstrates otherwise."[150]

One can predict these footnotes will be used in a future US-UK FTA.

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146 USMCA, Art. 31.6, 31.18.2, 31.19.1. The U.S. approach of combining labor and trade issues for dispute settlement paths contrasts with the EU approach of having a separate path for each.

147 USMCA, Art. 23.3 at note 3. And therefore, not to the more specifically worded obligations of the Conventions.

148 It reads: "A failure to comply with an obligation under paragraphs 1 or 2 must be in a manner affecting trade or investment between the Parties. For greater certainty, a failure is "in a manner affecting trade or investment between the Parties" if it involves: (i) a person or industry that produces a good or supplies a service traded between the Parties or has an investment in the territory of the Party that has failed to comply with this obligation; or (ii) a person or industry that produces a good or supplies a service that competes in the territory of a Party with a good or a service of another Party." USMCA, Art. 23.3 at note 4, 23.4 at note 8, 23.5 at note 11, 23.7 at note 13.

149 It reads: "For greater certainty, a "sustained or recurring course of action or inaction" is "sustained" if the course of action or inaction is consistent or ongoing, and is "recurring" if the course of action or inaction occurs periodically or repeatedly and when the occurrences are related or the same in nature. A course of action or inaction does not include an isolated instance or case." USMCA, Art. 23.5 at note 10.

150 It reads: For purposes of dispute settlement, a panel shall presume that a failure is in a manner affecting trade or investment between the Parties, unless the responding Party demonstrates otherwise. USMCA, Art. 23.3 at note 5, 23.4 at note 9, 23.5 at note 12, 23.7 at note 14.

IV. Analysis

A. Current Status: Uncertainty

1. Pandemic

The impact of the Pandemic on the global economy and the ability of governments and businesses to trade and invest is still unknown as of this date. How this may affect US-UK negotiations for a FTA is uncertain.[151] Even if negotiated, will the Parties and businesses be ready to implement it? On the other hand, might it not be better to have the rules of investment and trade in place when and as the threats of the Pandemic recede and global commerce increases? On May 4, 2020, it was reported the "United States and Britain launched formal negotiations on a free trade agreement …, vowing to work quickly to seal a deal that could counter the massive drag of the coronavirus pandemic on trade flows and the two allies' economies."[152] A recent report from Harvard suggested a "full FTA with the US before the summer of 2020 is impossible given the impacts of Covid-19 and roadblocks and risks involved. A 'mini-deal', however, is a possibility."[153]

2. Role of EU: Residual EU Obligations?

Following Brexit, the European Parliamentary Briefing in 2020, summarized the future EU-UK trade relationship as follows.

> The withdrawal of the United Kingdom (UK) from the European Union (EU) came into effect on 1 February 2020, [and the] transition period began on the same day and is due to run until the end of 2020. During this period, although no longer part of the EU institutions, the UK remains in the customs union and single market, and within the jurisdiction of the Court of Justice of the EU (with some exceptions). Negotiations during the transition period are aimed at reaching agreements that will shape the future EU-UK relationship in a range of domains, and especially that of trade.
>
> In the Political Declaration accompanying the Withdrawal Agreement, the EU and the UK 'agree to develop an ambitious,

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151 "A free-trade agreement could still be agreed but it would be hard to implement. Even if we were coming to the end of this pandemic by then, businesses will not be prepared." Lisa O'Carroll, *Brexit talks: who is involved and what is being covered?*, Guardian (Apr. 24, 2020, 1:05AM), https://www.theguardian.com/politics/2020/apr/24/who-and-what-uk-and-eu-resume-interupted-brexit-talks-future-relationship.

152 David Lawder & Andrea Shala, *U.S., UK launch trade talks, pledge quick deal as virus ravages global economy*, Reuters (May 4, 2020, 7:16PM), https://www.reuters.com/article/us-usa-trade-britain/u-s-uk-launch-trade-talks-pledge-quick-deal-as-virus-ravages-global-economy-idUSKBN22H0E0.

153 Ed Balls, Nyasha Weinberg, Jessica Redmond & Simon Borumand, *Will Prioritizing A UK-US Free Trade Agreement Make or Break Global Britain? Transatlantic Trade and Economic Cooperation through the Pandemic*, Harvard Kennedy Sch. M-RCBG Associate Working Paper Series, No. 136 [May 12, 2020], https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/136_Final_AWP.pdf (last accessed July 1, 2020).

> wide-ranging and balanced economic partnership'. However, some major obstacles have surfaced. The UK insists that it is unwilling to submit to EU Court of Justice jurisdiction, and demands autonomy in its regulatory and trade policies. The UK indicates that it seeks a free trade agreement similar to that agreed between the EU and Canada: comprehensive, but very different to the previous relationship. The EU has taken note of the UK objectives, but emphasizes that the deeper the trade agreement, the more UK regulations and standards must align with those of the EU. To the EU, alignment is essential to preserve a level playing field, on the grounds that the EU and UK are close neighboring economies and strongly interconnected. The European Commission's 3 February 2020 recommendation for a Council decision authorizing the opening of negotiations on the future relationship confirms this approach.
>
> In this context, time is critical. The Withdrawal Agreement allows for an extension to the transition period, but the UK Withdrawal Act explicitly prohibits extension. In addition, to allow for ratification, the trade agreement should be ready well ahead of the end of the transition period…. Time constrained negotiation may give rise to a limited economic and trade agreement that covers only priority areas, rather than the ambitious single comprehensive agreement sought under the Political Declaration and Commission recommendation.[154]

The important question for the U.S.-UK negotiations will be how much, if any, will the UK still be bound by any residual obligations from laws and institutions of EU, especially regarding EU labor standards which are higher than that of UK and U.S. laws. Again, the answer is uncertain at this time.

3. U.S. Politics on Congressional Approval

The reality of U.S. politics is that a Democratically controlled House of Representatives, in its involvement with the text of the FTA, would be very reluctant to give Republican President Trump a 'win" of a new FTA with the UK. It therefore would be reluctant to finalize the text in the treaty before the issue of Senate consent arose, and before the November Presidential election.[155] Additionally, labor advocates will be pushing hard for even better labor standards more like those in the EU than those in the USMCA, which may slow down and politicize the process of passage.[156]

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[154] Issam Hallak, *Future EU-UK trade relationship*, European Parliament Think Tank (Feb. 20, 2020), https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2020)646185.

[155] *See* Mark Landler & Ana Swanson, *About That Much Vaunted U.S.-U.K. Trade Deal? Maybe Not Now*, N.Y. Times, (Mar. 2, 2020), https://www.nytimes.com/2020/03/02/world/europe/uk-us-trade-deal.html.

[156] *See, US and UK unions call for trade deal that delivers for workers*, Trades Unions Congress (Mar. 13, 2020), https://www.tuc.org.uk/news/us-and-uk-unions-call-trade-deal-delivers-workers.

Further, some trade experts hypothesize that while both Johnson and Trump had advertised the trade deal as a top priority, the Johnson administration will likely focus on the domestic economy for the foreseeable future. This and the U.S. politics may force President Trump to focus more on the domestic economy and getting past the economic impacts of the Pandemic.[157]

B. Going Forward

In the ongoing negotiations ahead, with all the attendant uncertainties, many think it prudent to wait for the UK-EU separation and possible UK-EU FTA to be completed. In December, 2019, it was reported that the "U.S. and UK have announced a desire to pursue a free trade agreement as soon as the U.K. completes its exit from the EU."[158] In May 2020, it was announced that the UK and U.S. were to begin negotiations on their FTA. [159] In July 2020, the U.S. stated it would not likely be completed before the November 2020 U.S. presidential elections.[160]

The issue to consider is to whose advantage, if anyone's, is it to complete the U.S.-UK FTA first before knowing the extent of any residual obligations of EU laws and institutions that the UK may retain in its UK-EU trade relationship? This definitely is a debatable point.

V. Conclusion

The background in this paper provides a primer for understanding and identifying the variables of some of the more pressing points on labor and employment issues facing the negotiators in the future U.S.-UK FTA. It also can provide for some reflection on the future contents of labor and dispute settlement provisions in a future U.S.-EU FTA (TTIP). As stated earlier, although the future cannot be predicted, it can be prepared for.[161]

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157 Josh Zumbrun, *New North American Trade Deal Seen as Template for Deals to Come*, Wall Street J. (Dec. 14, 2019, 5:30AM), https://www.wsj.com/articles/new-north-america-trade-deal-seen-as-template-for-deals-to-come-11576319401.

158 *Id.*

159 *Britain to Start Trade Talks with U.S. Next Week: The Sun*, Reuters (May 1, 2020, 10:17AM),
https://www.reuters.com/article/us-britain-usa-trade/britain-to-start-trade-talks-with-us-next-week-the-sun-idUSKBN22D69H. At the same time, adding to the uncertainties of the US-UK negotiations, the U.K. is planning a "shock and awe" information campaign to prepare companies for Brexit, bidding to reduce economic disruption when Britain completes its split from the European Union at year-end. Joe Mayes, *U.K. Plans 'Shock and Awe' Campaign to Prepare Firms for Brexit*, Bloomberg (June 17, 2020 11:26PM) https://www.bloomberg.com/news/articles/2020-06-17/u-k-plans-shock-and-awe-campaign-to-prepare-firms-for-brexit.

160 Shayerah Ilias Akhtar and Rachel F. Fefer, Brexit and Outlook for a U.S.-UK Free Trade Agreement (July 8, 2020), https://fas.org/sgp/crs/row/IF11123.pdf.

161 Nancy Pelosi, the speaker of the House, said that if the UK violates its international agreements [re Northern Ireland], "there will be absolutely no chance of a U.S.-UK trade agreement passing the Congress." UK's post-Brexit plan puts trade deal with the EU — and the U.S. — at risk (Sept. 10, 2020), Sylvia Amaro, https://www.cnbc.com/2020/09/10/brexit-uk-puts-trade-deal-with-the-eu-and-the-us-at-risk.html.

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Prison Ships

Robert M. Jarvis*

ABSTRACT

In 2026, New York City plans to close the VERNON C. BAIN, America's only currently-operating prison ship. Although prison ships have a long history, both in the United States and elsewhere, surprisingly little has been written about them. Accordingly, this article first provides a detailed overview of prison ships. It then surveys the U.S. case law generated by them.

KEYWORDS

Hulks, Prisoners, Prisoners of War, Prisons, Ships

CONTENTS

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I. Introduction

On October 17, 2019, the New York City Council voted to close Rikers Island, one of the world's largest and most brutal penal institutions,[1] and replace it with four new decentralized jails.[2] As part of the plan, which has a December 31, 2026 deadline, the City's Department of Correction ("DOC") intends to close the Vernon C. Bain Correctional Center.[3] Known in everyday parlance as "The Boat," the VERNON C. BAIN is America's only current prison ship.[4]

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[1] Rikers Island is a 415-acre island in the East River, located just off the Queens shore (the location of its only bridge—before it was built in 1966, all travel to the island was by boat). Due to a historical quirk, the island politically is part of the Bronx. It traces its beginnings to 1664, when Governor Peter Stuyvesant granted the then 87-acre island to a local farmer named Abraham Rycken. In 1884, the island was sold back to the City for $180,000. Initially, the City used the island as a landfill (which caused it to expand to its present size). In 1935, the first jail opened on Rikers Island, replacing the City's crumbling one (built 1832) on Blackwell (now Roosevelt) Island. Today, Rikers Island is home to 10 jails that hold, at any given time, 11,000-13,000 inmates. *See* Sharon Seitz & Stuart Miller, The Other Islands of New York City: A History and Guide 200-01, 206 (3d ed. 2011).

By the 1970s, the jails on Rikers Island had become "notoriously overcrowded and explosive." *Id.* at 200. Despite efforts to fix them, they remain cramped, chaotic, and dangerous. *See, e.g.*, Benjamin Weiser, *Violence at Rikers Doubles Despite Efforts to Restrict Use of Force by Guards*, N.Y. Times, Aug. 7, 2020, at A21 ("[A] federal monitor appointed to oversee the troubled jail system has found that little progress has been made curbing the brutality of guards and that violent incidents have risen sharply since 2016. . . ."). *See also* Homer Venters, Life and Death in Rikers Island (2019); Mary E. Buser, Lockdown on Rikers: Shocking Stories of Abuse and Injustice at New York's Notorious Jail (2015). As one would expect, COVID-19 has magnified Rikers' many problems. *See* Sonia Moghe, *Inside New York's Notorious Rikers Island Jails, "The Epicenter of the Epicenter" of the Coronavirus Pandemic*, CNN (May 18, 2020), https://www.cnn.com/2020/05/16/us/rikers-coronavirus/index.html.

[2] *See* The Council of the City of New York, Resolution 1091-2019 (Oct. 17, 2019), https://legistar.council.nyc.gov/Legislation.aspx. *See also* Matthew Haag, *New York City to Close Rikers for Jail Reform*, N.Y. Times, Oct. 18, 2019, at A1 (explaining that once the new jails are built, Rikers Island is expected to be turned into a public park). The Council's decision marked the culmination of a years-long grass roots effort to shut Rikers Island. *See* Janos Marton, *#Closerikers: The Campaign to Transform New York City's Criminal Justice System*, 45 Fordham Urb. L.J. 499 (2018).

[3] *See* The Council of the City of New York, *Report of the Finance Division on the Fiscal 2021 Preliminary Plan and the Fiscal 2020 Preliminary Mayor's Management Report for the Department of Correction* 26 (Mar. 16, 2020), https://council.nyc.gov/budget/wp-content/uploads/sites/54/2020/03/072-DOC.pdf ("[T]he goal is to . . . complete construction of all four new facilities by 2026. After construction is complete, Rikers Island and the Vernon C. Bain Correctional Center will be closed.").

[4] For photographs of the vessel, see its Wikipedia page: https://en.wikipedia.org/wiki/Vernon_C._Bain_Correctional_Center. The DOC's web site describes the VERNON C. BAIN as follows:

> A five-story jail barge built in New Orleans to DOC specifications, the facility houses medium to maximum security detainees. Opened in the Fall of 1992, it is named for a former Warden who died in a car accident. It serves as the Bronx detention facility for intake processing.

There has been relatively little published about prison ships,[5] and to date no one has collected the U.S. case law generated by such ships. This article seeks to fill both gaps.

II. Definitions and Scope

Prison ships are vessels that have been converted by the government into floating jails.[6]

New York City Department of Correction, *Facilities Overview*, *at* https://www1.nyc.gov/site/doc/about/facilities.page. In a series of tweets dated Nov. 1, 2018, a Brooklyn public defender named Scott Hechinger described his first visit to the VERNON C. BAIN. *See* Scott Hechinger (@ScottHech), Twitter (Nov. 1, 2018, 11:31 AM), https://twitter.com/ScottHech/status/1057958412938592256. Like others before him, he found the vessel "massive" and "foreboding." *Id.*

Director Brian De Palma featured the VERNON C. BAIN in his 1993 movie *Carlito's Way*, even though the story is set in 1975. See *Carlito's Way (1993)—Goofs*, IMDb, *at* https://www.imdb.com/title/tt0106519/goofs. The pertinent scene can be viewed at https://www.youtube.com/watch?v=fnluVzLMRBQ. A documentary about the VERNON C. BAIN, titled *The Boat*, currently is in development. For the film's trailer, see The Boat (2020), https://www.theboatmovie.com/. *See also* The Boat – Ivana Hucíková, Ivanahucikova.com (2019), https://ivanahucikova.com/The-Boat (description of the project by the film's producer).

[5] The best work I have found is Allan L. Patenaude, *Prison Ships*, *in* 1 Encyclopedia of Prisons and Correctional Facilities 748-52 (Mary Bosworth ed., 2005). *See also* Mitchel P. Roth, *Convict Hulks, in* Prisons and Prison Systems: A Global Encyclopedia 67-8 (2006); Bryan Finoki, *Floating Prisons, and Other Miniature Prefabricated Islands of Carceral Territoriality*, Subtopia (Jan. 6, 2008), http://subtopia.blogspot.com/2008/01/floating-prisons-and-other-miniature.html.

For a discussion of fictional prison ships, see *Prison Ship*, TV Tropes, https://tvtropes.org/pmwiki/pmwiki.php/Main/PrisonShip (citing examples in comic books, movies, television shows, and video games). *See also* Daisy Dunne, *The Panama Papers Jail*, Daily Mail (Apr. 19, 2017), https://www.dailymail.co.uk/sciencetech/article-4425160/Game-Thrones-ship-designed-Panama-Papers-criminals.html (story about three Paris architects who were inspired by the 2016 Panama Papers financial scandal to design a fanciful prison ship with cells made from paper).

[6] The VERNON C. BAIN, however, was built to be a prison ship. *See supra* note 4. As far as I can tell, no other vessel—past or present—shares this dubious distinction.

My research has not revealed any privately-run prison ships. Nevertheless, numerous sources claim, without attribution, that in 1980 plans were made to turn the ITALIS, an aging ocean liner launched in 1939 as the AMERICA, into such a vessel. *See*, *e.g.*, *The Story of the S.S. America*, Sometimes Interesting (Jun. 27, 2011), https://sometimes-interesting.com/2011/06/27/the-ss-america/ ("The ship was sold to Intercommerce [sic—should be "Inter Commerce"] Corporation in 1980 and renamed the S.S. Noga. Intercommerce planned to convert the ship into a private contractor-operated prison ship. They intended to anchor the ship in Beirut, [Lebanon,] but this would never happen."). The noted marine architect William A. Fox disputes this assertion, explaining that Inter Commerce intended to convert the NOGA into a hotel. *See* William A. Fox, *Passenger Liner Served Gallantly and Deserves to be Remembered*, Daily Press (Newport News, VA), Aug. 31, 1989, at A15 ("She was sold to a Swiss firm and was renamed NOGA in hopes of putting her into service as a stationary hotel, but this never happened."). A different observer, agreeing with Fox, attributes the confusion to a rumor that began circulating shortly before Inter Commerce's purchase:

If this occurs when they no longer are seaworthy, they are known as "prison hulks."[7]

Except in passing, this article does not discuss the following related subjects:

1) "Convict ships," which are vessels that transport banished convicts to their place of exile.[8] From 1717 to 1776, for example, Great Britain used such ships to carry convicts to the United States.[9] When the American Revolutionary War made further transportation impossible, the ships (after a brief interruption) began sailing to Australia (1788-1868).[10]

> By the autumn of 1979 she was, once again, out of service, so [she] went back to her moorings in Perama Bay. [While there, rumors began to fly.] There [were] reports that the America would become a floating hotel in a West African port, then a "floating prison" at Galveston, Texas and even one wildly enthusiastic report that she would return to [the] New York waterfront, but as a restored "luxury hotel"—the Hotel America! In May 1980, she was sold to the Inter Commerce Corporation, a Swiss-backed arm of the Panamanian-flag company Noga d'Importation et d'Exportation. [R]enamed [the] Noga, she remained at her Greek moorings.

Ken Ironside, *History of the America/West Point/Australis/American Star, Pt. 2*, S.S. Australis Homepage, http://www.ssaustralishomepage.co.uk/history1.html.

7 *See Hulk Ships and Its Types: Ships that Didn't Float*, Marine Insight, Dec. 12, 2019, https://www.marineinsight.com/types-of-ships/hulk-ships-and-its-types-ships-that-didnt-float/. As this source explains, the word "hulk" refers to any unseaworthy ship that continues to serve a purpose. In addition to prisons, hulks traditionally have been used as barracks, hospitals, storage depots, and work platforms. *Id.*

8 Historically, the "place of exile" was a remote penal colony. For a look at such institutions, *see* A Global History of Convicts and Penal Colonies (Clare Anderson ed. 2018).

Although the United States has never used convict ships (subject to the next paragraph), the 1927 movie *Captain Salvation*, set in 1840, brings the convict ship PANTHER to the New England town of Maple Harbor, where it embarks a prostitute named Bess Morgan, a shipwreck survivor who has been ostracized by the local citizenry. At the end of the movie, the PANTHER returns to Maple Harbor renamed the BESS MORGAN (the real Bess having died) and is turned into a floating ministry. *See* Keith Withall (writing as "keith1942"), *Captain Salvation, USA 1927*, Early & Silent Film (Nov. 3, 2018), https://cinetext.wordpress.com/2018/11/03/captain-salvation-usa-1927/.

In Flavell's Case, 8 Watts & Serg. 197 (Pa. 1844), the defendant, an Irish national, was found guilty of second-degree murder and sentenced to 12 years imprisonment. Subsequently, however, the governor, persuaded that the defendant had been insane at the time of the crime, pardoned him "on the express condition that he be taken direct from the penitentiary on board the vessel which is to convey him [back to Ireland], there to remain until the vessel put to sea. . . ." *Id.* at 197. For reasons that are unclear, this condition was not carried out and the defendant was ordered to serve his full sentence. *Id*. at 199. In upholding the governor's power to issue conditional pardons, the court wrote: "[C]onditional pardons are by no means strange to the jurisprudence of Pennsylvania, even though the condition [here] amounted to banishment or expatriation." *Id.* at 198.

9 *See, e.g.*, Anthony Vaver, Bound with an Iron Chain: The Untold Story of How the British Transported 50,000 Convicts to Colonial America (2011); Don Jordan & Michael Walsh, White Cargo: The Forgotten History of Britain's White Slaves in America (2007); Peter Wilson Coldham, Emigrants in Chains: A Social History of Forced Emigration to the Americas (1992).

10 It is estimated that 162,000 convicts were transported to Australia. *See, e.g.*, Thomas Keneally, A Commonwealth of Thieves: The Improbable Birth of Australia

Portugal also resorted to transportation, shipping convicts to Brazil (1755-1822) and, when that country ceased being an option, to Africa (1822-1932).[11]

The French likewise used ships to transport convicts to Cayenne, better known as Devil's Island, their penal colony in French Guiana (1854-1946).[12]

2) "Deportation ships," a term that now usually refers to the ships Great Britain used to send back Jews caught trying to illegally enter Palestine (1933-48).[13] In 1947, the deportees on the OCEAN VIGOR managed to get a letter to the United Nations Special Committee on Palestine begging for help. It was signed:

(2006); Robert Hughes, The Fatal Shore: A History of the Transportation of Convicts to Australia, 1787-1868 (1987); Charles Bateson, The Convict Ships 1788-1868 (2d ed. 1969).

11 *See* Tim Coates, *Portuguese Empire: Convicts and Their Labour*, at 6 (Feb. 2017), http://convictvoyages.org/wp-content/uploads/2017/02/Portuguese-Empire.pdf ("From 1755 until Brazil's independence in 1822, . . . 12,000 convicts were sent overseas. In Africa from 1822 to 1881, some 11,000 more convicts were sent, increasingly to Angola. During the period [that Portugal's] two penal institutions were functioning [in Angola and Mozambique] (1881-1932), they received between 16,000 and 20,000 convict laborers."). *See also* Timothy J. Coates, *The Depósito de Degredados in Luanda, Angola: Binding and Building the Portuguese Empire with Convict Labour, 1880s to 1932*, 63 Int'l Rev. Soc. Hist. 151 (Aug. 2018) (Spec. Issue).

In 1929, a group of prisoners being transported to Angola tried to take over their ship:

> The Colonial Office reported today that a serious mutiny among convicts on a Portuguese prison ship bound for the African penitentiary at Loanda, Angola, had been quelled only after desperate hand-to-hand fighting.
>
> The reports said the convict ship Guinea was conveying 126 long-term prisoners when the outbreak came. The ship was within five miles of the coast when the convicts made a wild dash for freedom, savagely attacking the guards and crew.

Portuguese Convicts Mutiny on Prison Ship, N.Y. Times, Dec. 29, 1929, at 20. For another such incident, see *Captives Seize Prison Ship*, N.Y. Times, Aug. 24, 1912, at 5 ("Details have been received of the mutiny of royalist prisoners who were being deported to Africa on board the steamer Malange. . . . The mutineers intended to sail for a South American port, but the Portuguese cruiser Beira happened to be in the vicinity . . . and sent a party of bluejackets aboard the Malange under cover of her guns. The mutineers surrendered after a short resistance.").

12 *See* Alexander Miles, Devil's Island: Colony of the Damned (1988). It is estimated that the French sent 56,000 convicts to Devil's Island, of whom 10% survived their sentences. *See* Benjamin F. Martin, "Devil's Island," *in* 1 France and the Americas: Culture, Politics, and History 372-74 (Bill Marshall ed. 2005). Upon the island's closing, ships were used to bring the last convicts home. *See, e.g.*, *Prison Ship at Casablanca*, N.Y. Times, Apr. 22, 1947, at 16 ("The French cargo ship Boulogne-sur-Seine arrived today at Casablanca, Morocco, from New Orleans, with 523 convicts, mostly North Africans, released in French Guiana. Some had been imprisoned for thirty years.").

13 For a comprehensive look at such ships, *see* Gerald Ziedenberg, Blockade: The Story of Jewish Immigration to Palestine (2011). As another source points out, Jewish commandos regularly tried to sabotage the deportation ships and had a fair amount of success doing so. *See Haapala-Palmach Military Operations*, Palmach, http://palmach.org.il/en/history/database/?itemId=5029.

"The immigrants aboard the prison ship Ocean Vigor."[14]

3) "Slave ships," which from 1440 to 1870 forcibly carried 12 million Africans to the New World.[15]

4) Vessels used to take guards and prisoners to and from offshore prisons.[16] In *Abrahams v. United States*,[17] for example, employees at the United States Penitentiary on McNeil Island in Puget Sound, Washington unsuccessfully sued for extra pay to compensate them for the time they spent riding to and from the island aboard a Federal Bureau of Prisons ("FBOP") boat.[18]

Lastly, the COVID-19 pandemic has resulted in hundreds of ships being detained at sea.[19] Their plight has generated countless news stories with the words "floating prison" in their headlines.[20]

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14 *See Refugees Smuggle Message to UNSCOP Off Prison Ship*, Jewish Telegraphic Agency (Aug. 21, 1947), https://www.jta.org/1947/08/21/archive/refugess-smuggle-message-to-unscop-off-prison-ship.

15 *See* Hugh Thomas, The Slave Trade—The Story of the Atlantic Slave Trade: 1440-1870 (1997). For a further discussion of such ships, *see, e.g.*, Sowande M. Mustakeem, Slavery at Sea: Terror, Sex, and Sickness in the Middle Passage (2016); Marcus Rediker, The Slave Ship: A Human History (2007); Stephanie Smallwood, Saltwater Slavery: A Middle Passage from Africa to American Diaspora (2006).

16 As explained *supra* note 1, in the 19th century New York City's main jail was on Blackwell Island. In 1842, Charles Dickens, the noted English author, visited the City and used part of his time to tour the island, which also housed the City's mental asylum, orphanage, and poor house:

> I was taken to these Institutions by water, in a boat belonging to the Island jail, and rowed by a crew of prisoners, who were dressed in a striped uniform of black and buff, in which they looked like faded tigers. They took me, by the same conveyance, to the jail itself.

Charles Dickens, American Notes for General Circulation 110 (1842). For a further look at Blackwell Island, *see* Stacy Horn, Damnation Island: Poor, Sick, Mad, and Criminal in 19th-Century New York (2018).

17 1 Cl. Ct. 305 (1982).

18 *Id.* at 311-12. For another such case, *see* Giles v. United States, 157 F.2d 588 (9th Cir. 1946), *cert. denied*, 331 U.S. 813 (1947).

19 In a June 8, 2020 press release, the International Labor Organization estimated that 150,000-200,000 seafarers were "trapped on board ships around the world because of measures to contain the COVID-19 virus." *See* https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_747293/lang--en/index.htm.

20 *See*, *e.g.*, Solarina Ho et al., *Floating "Prison" as Countries Bar Canadian Cruise Staff from Getting Home*, CTV News, May 7, 2020, *at* https://www.ctvnews.ca/health/coronavirus/floating-prison-as-countries-bar-canadian-cruise-staff-from-getting-home-1.4928892; *Coronavirus: How a Luxury Cruise Became "A Floating Prison" During Quarantine in Japan*, AP, Feb. 7, 2020, *at* https://www.scmp.com/news/asia/east-asia/article/3049422/coronavirus-how-luxury-cruise-became-floating-prison-during.

In August 2020, crewmembers in Miami sued the Bahamas Paradise Cruise Line, claiming that its delay in repatriating them constituted false imprisonment. *See* Janicijevic v. Classica Cruise Operator, Ltd., Case No. 1:20-cv-23223-BB (S.D. Fla.) (filed Aug. 4, 2020) (paragraph 21 of the complaint reads in pertinent part: "The crew were unnecessarily kept on the ships for months on end, many thousands of miles away from their homes and families. Remarkably, there are still crewmembers effectively

III. History

A. Use During Wartime

1. By Foreign Countries

Prison ships have been used, most famously, to house prisoners of war ("POWs").[21] During the American Revolutionary War (1775-83), for example, the British operated prison ships in Charleston, New York, Norfolk, and Savannah, as well as off the coast of Florida and in Canada.[22] While 6,800 Americans were killed in battle, 11,500 perished on these ships,[23] with most of the deaths occurring in New York.[24] Since 1908, a large memorial, known as the Prison Ship Martyrs' Monument, has occupied a central spot in Brooklyn's Fort Greene Park.[25]

During the War of 1812, the British again used prison ships. In one notable incident, the British seized the MAGNET, an American vessel, and brought her to Halifax, Nova Scotia.[26] In the ensuing prize proceedings,[27] the British government asked that the MAGNET be released, even though she had not yet been adjudged prize, so that she could be used as a POW ship.[28] The government also asked that a cache of small arms and a cargo of wood be released, even though they too had not yet been declared prize, insisting that they also were urgently needed.[29]

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held hostage on the ship. This egregiously delayed repatriation is tantamount to false imprisonment of the crew."). For a copy of the complaint, see 2020 WL 4491952.

21 For a general discussion of POWs, *see* Arnold Krammer, Prisoners of War: A Reference Handbook (2008).

22 *See* Greg Daugherty, *The Appalling Way the British Tried to Recruit Americans Away from Revolt*, History (Jan. 31, 2020), https://www.history.com/news/british-prison-ships-american-revolution-hms-jersey.

23 *See American Revolution Facts*, American Battlefield Trust, https://www.battlefields.org/learn/articles/american-revolution-faqs.

24 *See* Larry Lowenthal, Hell on the East River: British Prison Ships in the American Revolution (2009). The most notorious of these vessels was the JERSEY. *See* Robert P. Watson, The Ghost Ship of Brooklyn: An Untold Story of the American Revolution (2017); Thomas Dring, Recollections of Life on the Prison Ship Jersey (David Swain ed. 2010). For fictional accounts of the JERSEY, see Michael Grisi, Ship of Death (2011); Everett T. Tomlinson, In The Hands of the Red Coats: A Tale of the Jersey Ship and the Jersey Shore in the Days of the Revolution (1900).

25 *See Taft and Hughes at Martyrs' Shaft: President-Elect, Governor, and 20,000 Onlookers Dedicate Monument to Prison Ship Victims*, N.Y. Times, Nov. 15, 1908, at 1. *See also Fort Greene Park: Prison Ship Martyrs Monument*, NYC Parks, https://www.nycgovparks.org/parks/fort-greene-park/monuments/1222 (describing the monument as consisting of a "Doric column 149 feet in height" upon which sits "a bronze urn"). Both the park and the monument are described further in Sierra Club v. Department of Parks and Recreation of the City of New York, 2020 WL 109675, at *2 (N.Y. Sup. Ct. 2020).

26 *See* Maurice N. Davison, *Family Touched by the War of 1812*, 139 Sea History 6 (Summer 2012) (letter to the editor explaining that the MAGNET, which was bringing Irish immigrants to New York, was seized just three days short of her destination).

27 *See* The Curlew, (1812) Stewart's Vice-Adm. Cas. (Nova Scotia) 312.

28 *Id.* at 312-13

29 *Id.*

After observing that the government's requests were highly unusual,[30] the court granted the arms and wood petitions, explaining that the war had created exigent circumstances that permitted it to deviate from its normal procedure.[31] It then turned to the MAGNET and reached the same conclusion:

> A third petition is from Vice-Admiral *Sawyer*, likewise stating "that in consequence of the *United States* having declared war, it has been necessary for His Majesty's service that a prison ship should be provided for the safe keeping of prisoners of war, who [have] now become very numerous, that a ship called the *Magnet*, which is now held in the custody of this Court as a prize taken from the *Americans* is a ship well calculated for a prison ship, and that His Majesty's service requires the said ship to be immediately employed for that purpose, there being no other suitable vessel to be now obtained. He therefore prays that the said ship may be delivered over to such officers as the said vice-admiral shall appoint to take charge of her for his majesty's use, upon the same terms as proposed in the other petition[s]."
>
> This petition depends upon the same principles [as the previous two petitions and therefore is granted].[32]

Closer to home, the British used POW ships in numerous conflicts, including the Napoleonic Wars (1803-15),[33] the Second Boer War (1899-1902),[34] World War

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30 *Id.* at 314-22.

31 *Id.* at 322-24.

32 *Id.* at 324 (italics in original).

33 Many of the French POWs later told lurid stories about their captivity. *See, e.g.*, Louis Garneray, The Floating Prison: The Extraordinary Account of Nine Years Captivity on the British Prison Hulks During the Napoleonic Wars (Richard Rose transl. 2003) (1851). The accuracy of their descriptions has been questioned. *See, e.g.*, W. Branch Johnson, The English Prison Hulks (rev. ed. 1970).

For a case in which an American seaman was held as a POW by the British during the Napoleonic Wars, see Cotteral v. Cummins, 6 Serg. & Rawle 343 (Pa. 1821) (explaining, *id.* at 345, that the plaintiff's imprisonment lasted from March 22 to May 1, 1810). Although the case does not reveal why the plaintiff was released, it is likely that the British let him go once they realized he was an American. (In 1810, the United States officially was neutral by virtue of the Non-Intercourse Act of 1809, Pub. L. 10-24, 2 Stat. 528.)

34 In describing his visit to the prison hulk PENELOPE at Simon's Bay (South Africa), one reporter wrote:

> The majority of the prisoners are sleek, contented, and indifferent. They told me that they thought the war would be a picnic, that they would rush Natal [Province] before the imperial troops arrived, that Great Britain would be involved in foreign complications, and that they would be able to dictate terms from Pietermaritzburg [Natal's capital] and Durban [Natal's principal city]. They [expected] to view the Cape peninsular as conquerors, not from a prison-ship.

Grim Realities of War, N.Y. Times, Dec. 22, 1899, at 3. *See also Treatment of Boer Prisoners: What a Cunard Line Purser Who Was on the Catalonia Says*, N.Y. Times, May 20, 1901, at 7 (explaining that the passenger ship "Catalonia was stationed at

I (1914-18),[35] and World War II (1939-45).[36]

Durban, Simons Town and Capetown at various times. She was utilized as a prison ship, and generally had on board about 600 prisoners of war.").

[35] At the beginning of the war, for example, the British detained thousands of aliens in Portsmouth Harbor:

> By early 1915, following the initial round-up, there were 4,000 men and women on prison ships in Portsmouth Harbour. This was reminiscent of the treatment of French and American prisoners of war in the late eighteenth and early nineteenth centuries, and there was an outcry locally. The protestors were concerned not so much about the welfare of the internees but by the security risk. These people were in custody in the middle of Portsmouth dockyard which was itself at the heart of the Inner Defence Area. Surely this was imperiling the nation's security? In an answer to a question in the House of Commons from local MP, Lord Charles Beresford, the First Lord of the Admiralty, Winston Churchill, admitted that the situation was not ideal but that they were doing their best to find alternative accommodation. He was as good as his word. Within two weeks, the local papers were able to report that prison ships had gone from the harbor and those at Motherbank would be emptied soon and their occupants sent to camps.

Sarah Quail, Portsmouth in the Great War 41-42 (2014).

[36] In July 1940, for example, the press reported:

> The United Kingdom's first "evacuated" prisoners of war stepped to Canadian soil on a sunny summer's day, ending a voyage of tense days and nights climaxed by death on the high seas. One prisoner went to an unknown fate while en route by diving through a porthole. . . .
>
> The exact number of prisoners and interned enemy aliens shifted to Canada from the United Kingdom could not be made known.
>
> The United Kingdom Government requested Canada to receive them because of the danger they might present in the British Isles should the Motherland be invaded.

T.R. Walsh, *First Shipload of German Prisoners of War Arrives from Overseas*, Ottawa Evening Citizen, July 2, 1940, at 13. Like the number of prisoners, the ship's name could not be printed because of censorship restrictions. As a result, the paper could say only that "in pre-war days[, the vessel] was a passenger liner operating between Quebec and Montreal and British ports[.]" *Id.*

One day later, the ARANDORA STAR, another British ship headed to Canada with German POWs, was sunk by the notorious German submarine U-47. *See* Sam Robertson, *Big Prison Liner is Torpedoed: Ship on Way to Canada Sunk by Nazis*, Ottawa Evening J., July 3, 1940, at 1. (In March 1941, U-47 disappeared. To date, an official cause has not been established. For a further discussion, *see* Dougie Martindale, Günther Prien and U-47: The Bull of Scapa Flow (2018).)

By the time the war ended, 34,000 German POWs had been transferred to Canada. For a further discussion, *see Prisoner of War Camps in Canada*, The Canadian Encyclopedia, https://www.thecanadianencyclopedia.ca/en/article/prisoner-of-war-camps-in-canada.

In the Russian Civil War (1918-19), POW ships known as "death barges" were used by both sides.[37] During World War II, POW ships were used by both the Germans[38] and the Japanese.[39] Because they did not display Red Cross-markings,

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[37] *See, e.g.*, Volker R. Berghahn, Europe in the Era of Two World Wars: From Militarism and Genocide to Civil Society, 1900-1950, at 49 (2008) ("In early July 1918 Boris Savinko established a terror regime in the city of Yaroslav during which he herded some 200 hostages on a 'death barge' on the Volga River where they were left to perish.").

Prior to the civil war, the Tsarist government had used prison ships for more standard purposes:

> A prison-ship arrived from Odessa in Vladivostok the day before my departure. It was the *Voronzoff*, a magnificent Clyde-built ship, with airy and roomy quarters. She was the finest-looking ship I saw in the far east, and yet I was assured that she was not an exception, but rather the type of the Russian volunteer fleet.
>
> I went on board of the prison-ship well before she came to anchor. Though in from a voyage of nearly fifty days, and after experiencing severe weather continuously for the past two weeks, I found the vessel and the convict quarters as clean and as sweet as are the steerage compartments on our own Atlantic steamers at the end of a voyage of less than a week. Of course I would have these adjectives to be understood in a relative sense only.
>
> There were no "politicals" on board. There were about 1100 convicts, and, judging from their appearance, the great majority of them were criminals of the lowest and most degraded category. I could not conceal my surprise at the smallness of the guard that stood watch over them, and the absence of fear that seemed to be entertained of the possibility of an outbreak. With the exception of three men, who, as punishment for misconduct during the voyage, were chained to the deck, the convicts were free to move about, it appeared, pretty much as they pleased. The guard of soldiers certainly did not number twenty men, who went about generally unarmed; and the sailors of the ship, who were not armed at all, seemed to be on the best of terms with the convicts, with whom they sat and talked, and even played cards. The convicts, judging from their faces, seemed all to belong to one and the same class of confirmed and hardened criminals, but ethnically it was the most varied assortment of types of the races of the human family that I remember to have seen.

Stephen Bonsal, *Siberian Prisons*, 11 Green Bag 16, 17 (Jan. 1899).

[38] In a famous incident early in the war (Feb. 16-17, 1940), the British destroyer COSSACK intercepted the German freighter ALTMARK, which was carrying 299 British POWs, and forced it to release them. For a further discussion, *see* Willi Frischauer & Robert Jackson, "The Navy's Here!": The Altmark Affair (1955); Martin A. Doherty, *The Attack on the Altmark: A Case Study in Wartime Propaganda*, 38 J. Contemp. Hist. 187 (2003). As these sources report, the incident gave rise to the famous slogan "The Navy's here!" (supposedly said by a member of the COSSACK's boarding party while searching the ALTMARK for POWs).

[39] Conditions aboard Japan's prison ships were so harsh that they became known as "hell ships." *See*, *e.g.*, Living in the Shadow of a Hell Ship: The Survival Story of U.S.

Allied forces often inadvertently bombed these vessels, causing thousands of casualties.[40] In 1949, the Geneva Convention was revised to prohibit POWs from being detained on ships except in emergencies.[41]

2. By the United States

The United States historically has not kept POWs on ships. Exceptions include the War of 1812[42] and the Civil War (1861-65).[43] In both World War I and World War

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Marine George Burlage, a WWII Prisoner-of-War of the Japanese (Georgianne Burlage ed., 2020); Raymond Lamont-Brown, Ships from Hell: Japanese War Crimes on the High Seas (2002); Judith L. Pearson, Belly of the Beast: A POW's Inspiring True Story of Faith, Courage, and Survival Aboard The Infamous WWII Japanese Hell Ship Oryoku Maru (2001).

40 On May 3, 1945 (just five days before the war ended in Europe), for example, British airplanes sank two unmarked German ships carrying concentration camp prisoners: the CAP ARCONA and the THIELBEK. It is estimated that 7,400 prisoners died. *See* Robert P. Watson, The Nazi Titanic: The Incredible Untold Story of a Doomed Ship in World War II (2016).

41 *See, e.g.*, Winston G. McMillan, *Something More than a Three-Hour Tour: Rules for Detention and Treatment of Persons at Sea on U.S. Naval Warships*, Army Law., Feb. 2011, at 31. As McMillan explains, several recent examples exist of POWs being detained at sea:

> During the Falklands War in the early 1980's, the United Kingdom housed Argentine prisoners aboard the British warships based on practical concerns of being able to provide safer and more habitable temporary detention facilities. Likewise, during Operation Enduring Freedom (OEF), the United States placed Taliban and Al-Qaeda detainees on board amphibious assault ships for temporary detention and transit to more permanent land-based internment facilities. Later, during Operation Iraqi Freedom (OIF), due to operational exigencies on the battlefield, the amphibious assault ship USS *Dubuque* served as a temporary detention facility for captured Iraqi [POWs].

Id. at 36 (footnotes omitted).

42 *See* Paul Joseph Springer, *American Prisoner of War Policy and Practice from the Revolutionary War to the War on Terror* 63-64 (unpublished Ph.D. dissertation, Texas A & M University, 2006), https://core.ac.uk/download/pdf/4270747.pdf (explaining that in the War of 1812, "[t]he United States relied primarily upon privately owned vessels for prison ships, leasing the ships on a daily or monthly basis. . . . Conditions on the ships varied: [Michael McClary, the Marshal of New Hampshire, for example,] noted that prisoners under his care had received bedding but not blankets, as he was unsure of his responsibilities for prisoner comforts.").

43 *See*, *e.g.*, Gary Robert Matthews, Basil Wilson Duke, CSA: The Right Man in the Right Place 171-72 (2005) (describing conditions aboard the Union prison ship DRAGOON); *Affairs in the Rebel States*, N.Y. Times, Aug. 10, 1862, at 2 ("On arriving at Philadelphia the crew of [the Confederate schooner] *Catilina* were put on board the prison ship *Princeton*, where they were kept for twelve days. . . ."); Richard H. Holloway, *Riverboat Espionage: How a Confederate Officer Spied from the Decks of a Prison Ship*, HistoryNet, https://www.historynet.com/riverboat-espionage-how-a-confederate-officer-spied-from-the-decks-of-a-prison-ship.htm (recounting a voyage aboard the Union prison ship POLAR STAR); *USS Grand Gulf*, NavSource Online,

II, thousands of POWs were transported by ship to the United States and placed in prison camps located throughout the country.[44] During the War on Terror (2001 to the present), frequent allegations have been made that the United States is using Navy ships to hold and interrogate suspected terrorists.[45]

B. Use During Peacetime

1. By Foreign Countries

In peace time, prison ships have been used when land-based facilities have been full or otherwise unavailable. In 1775, for example, when the British suddenly were unable to transport convicts to the United States because of the American Revolutionary War, the government decided to use ships as a temporary solution:

> The war with America brought an abrupt halt to the steady stream of convict ships that had been heading to its shores. What did not abate, however, was the flow of convicts sentenced to transportation by the courts, and a crisis in prison overcrowding soon began to loom.

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http://www.navsource.org/archives/09/86/86774.htm (noting that the steamer GRAND GULF was used as a prison ship in New Orleans for several months in late 1865).

Shortly after the war ended, Union forces captured Jefferson F. Davis (the president of the Confederacy) in Georgia. Subsequently, he was taken by ship to Fort Monroe in Hampton Roads, Virginia. Years later, Confederate General Joseph Wheeler wrote about his failed attempts to free Davis during the voyage. *See* Joseph Wheeler, *An Effort to Rescue Jefferson Davis*, 34 Century Mag. 85 (May 1898), https://www.victorianvoices.net/ARTICLES/CIVILWAR/C1898B-JeffersonDavis.pdf.

In Clive Cussler's 1992 novel *Sahara*, the scene is repeated but in reverse: near the end of the war, U.S. President Abraham Lincoln, having been betrayed by Secretary of War Edwin M. Stanton, is placed aboard the Confederate warship TEXAS, taken to Africa, and never heard from again. *See id.* at 679-82 (explaining that Stanton then hired John Wilkes Booth to assassinate an actor playing Lincoln).

[44] Very little has been written about the 4,000 World War I POWs. The best source I have found is Leisa Vaughn, *The German Hun in the Georgia Sun: German Prisoners of War in Georgia* (unpublished M.A. dissertation, Georgia Southern University, 2016), https://digitalcommons.georgiasouthern.edu/cgi/viewcontent.cgi?article=2456&context=etd. As Vaughn points out, the majority of World War I POWs were held in camps in Georgia, with a smaller number sent to North Carolina and Utah. *Id.* at 29.

In contrast, numerous books have been published about the 425,000 World War II POWs, who were assigned to some 700 camps scattered across 45 states and the territory of Hawaii. *See* Arnold Krammer, Nazi Prisoners of War in America (1979). For accounts of specific camps, *see, e.g.*, Gregory D. Sumner, Michigan POW Camps in World War II (2018); Dean B. Simmons, Swords into Plowshares: Minnesota's POW Camps during World War Two (2016); Robert D. Billinger, Jr., Hitler's Soldiers in the Sunshine State: German POWs in Florida (2000).

[45] *See, e.g.*, Ronald O'Rourke, Cong. Res. Serv., RS22373, Navy Irregular Warfare and Counterterrorism Operations: Background and Issues for Congress (2019); Marisa Porges, *America's Floating Prisons: The U.S. Navy Has Taken on a Curious New Counterterrorism Role*, Atl. Mag., June 27, 2014, https://www.theatlantic.com/international/archive/2014/06/americas-floating-prisons/373577/; Duncan Campbell & Richard Norton-Taylor, *US Accused of Holding Terror Suspects on Prison Ships*, Guardian (London) (Jun. 1, 2008), https://www.theguardian.com/world/2008/jun/02/usa.humanrights#.

> The immediate, and supposedly short-term, solution was to turn two of the hulks of old battleships berthed on the Thames at Woolwich into floating prisons for 100 inmates. At the same time, two pieces of parliamentary legislation were prepared which proposed longer-term remedies for the problem. The first, the Criminal Law Act of 1776, aimed to extend the use of shipboard prisons. It recommended that transportation be replaced by a period of hard labour lasting between three and ten years. . . . Although the Act made no explicit mention of shipboard prisons, the particular form of hard labour that it proposed—"removing sand, soil, and gravel from, and cleansing the River Thames"—makes it clear that was where its intent lay. Despite some objections, such as the possible nuisance caused to nearby residents, and concerns about the security of the vessels, the bill was passed in May 1776. . . .
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> In August 1776, the contract for supplying and managing the new prison ships, or hulks as they became known, was awarded to Duncan Campbell—one of the merchants who had previously been engaged in transporting convicts to America. Campbell's initial contract was to provide a ship to house 120 prisoners for each of which he was to receive £32 a year. The first vessel he provided, the *Justitia*, was joined the following year by the *Tayloe*, the two then accommodating 240 prisoners. The *Tayloe* was soon replaced by the much larger *Censor*.
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> The ships were moored in the middle of the Thames at Woolwich Warren. . . . During the day, prisoners worked at dredging the river or providing labour for building works. At night they were crammed below decks, originally in beds, and then in pairs on low wooden platforms. . . . An experiment in using hammocks for beds was abandoned after it became apparent how difficult these were to use while wearing chains. . . .
>
> Conditions on the hulks were dire, with ships sometimes housing up to 700 convicts. . . . In the first twenty years of their operation, the hulks received around 8,000 prisoners, of which almost a quarter died on board. As well as diseases, such as goal-fever, tuberculosis, cholera and scurvy, severe depression appears to have been common. . . .
>
> By 1788 [when transportation resumed following the establishment of a new penal colony at Botany Bay in Australia], the [hulks] included the *Stanislaus* at Woolwich, the *Dunkirk* based at Plymouth, the *Lion* at Gosport, and the *Ceres* and *La Fortunee* at Langstone Harbour.[46]

Even with transportation again available, Great Britain continued to use the prison hulks until 1857, when the Parliamentary act authorizing them[47] was not renewed.[48]

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[46] Peter Higginbotham, The Prison Cookbook 43-4 (2010). For a further look at these hulks, *see, e.g.*, Robert Shoemaker, *Convict Hulks*, Digital Panopticon, https://www.digitalpanopticon.org/Convict_Hulks; Anna McKay, *A Day in the Life: Convicts on Board Prison Hulks*, Carceral Archipelago (University of Leicester) (Oct. 10, 2017), https://staffblogs.le.ac.uk/carchipelago/2017/10/10/a-day-in-the-life-convicts-on-board-prison-hulks/.

[47] *See* Hulks Act 1776, 16 Geo. III, c. 43 (Eng.).

[48] *See* Charles Campbell, The Intolerable Hulks: British Shipboard Confinement, 1776-1857 (3d ed. 2001).

Under a different statute passed in 1823,[49] British colonies were permitted to have their own prison hulks, and several availed themselves of this option, including, most notably, Bermuda (1824-63) and Gibraltar (1842-75).[50]

Charles Dickens' 1861 novel *Great Expectations*, set in 1812, opens with a prisoner (Abel Magwitch) escaping from a Thames hulk and swimming to shore.[51] When he is later captured, Philip "Pip" Pirrip (the orphan who is the story's main character) describes Magwitch's forced return to the vessel:

> The something that I had noticed before clicked in the man's throat again, and he turned his back. The boat had returned, and his guard[s] were ready, so we followed him to the landing-place, made of rough stakes and stones, and saw him put into the boat, which was rowed by a crew of convicts like himself. No one appeared glad to see him, or sorry to see him, or spoke a word, except that somebody called as if to dogs, "Give way, you!" which was the signal for the dip of the oars. By the light of the torches we saw the black Hulk lying out a little way from the mud of the shore, like a wicked Noah's ark; cribbed, and barred, and anchored by massive rusty chains, the prison-ship was ironed like the prisoners.

The British maintained detailed rolls of hulk prisoners, and many now are available online. *See* Robert Shoemaker, *Hulks Registers 1801-1879*, Digital Panopticon, https://www.digitalpanopticon.org/Hulks_Registers_1801-1879 (explaining that these lists "were kept by the Treasury to ensure contractors were correctly paid for the number of convicts kept on the hulks, and reimbursed for other expenses.").

49 *See* Male Convicts Act, 4 Geo. IV, c. 47 (Eng.).

50 Prison hulks also were used in Antigua, Australia, Barbados, Canada, Ireland, Malta, and South Africa. *See* Patenaude, *supra* note 5, at 749. *See also* Graham E. Watson, *Royal Navy Hulks Overseas, 1800-1976*, http://www.gwpda.org/naval/rnhulks.htm.

For a look at the Bermuda and Gibraltar prison hulks, *see, e.g.*, Katy Roscoe, *Cosmopolitan Convicts? 19th-Century Convicts in Bermuda and Gibraltar*, Hakluyt Society, Nov. 29, 2019, https://hakluytsociety.wordpress.com/2019/11/29/cosmopolitan-convicts-19th-century-convicts-in-bermuda-and-gibraltar/; Anna McKay, *Conceptualising Islands in History: Considering Bermuda and Gibraltar's Prison Hulks*, Carceral Archipelago (University of Leicester), Mar. 8, 2016, https://staffblogs.le.ac.uk/carchipelago/2016/03/08/conceptualising-islands-in-history-considering-bermuda-and-gibraltars-prison-hulks/. The final years of the Bermuda and Gibraltar hulks is the subject of Chapter 10 (pages 257-81) of Hilary M. Carey's *Empire of Hell: Religion and the Campaign to End Convict Transportation in the British Empire, 1788-1875* (2019). (The chapter is titled: "Floating Hells": Bermuda, Gibraltar and the Hulks, 1850-1875.)

For two pieces focusing just on the Bermuda hulks, *see* Jim Downs, *The Gay Marriages of a Nineteenth-Century Prison Ship*, New Yorker, July 2, 2020, https://www.newyorker.com/culture/culture-desk/the-gay-marriages-of-a-nineteenth-century-prison-ship (describing the six-and-a-half years that George Baxter Grundy, a London lawyer convicted of forgery, spent on a Bermuda prison ship); Clare Anderson, *The Convict Hulks of Bermuda*, Carceral Archipelago (University of Leicester), June 26, 2014, https://staffblogs.le.ac.uk/carchipelago/2014/06/26/the-convict-hulks-of-bermuda/. For a web site dedicated to Bermuda's prison hulks, see http://www.bermudahulks.com/.

51 A pair of wry observers have pointed out the impossibility of Magwitch doing so: "One mystery of the novel is how Magwitch, the convict, manages to swim to shore from the Hulks with a 'great iron' (a shackle) on his leg. The answer may be that Dickens (a good swimmer himself) intended to endow Magwitch with superhuman power." John Sutherland & Jolyon Connell, The Connell Guide to Charles Dickens's Great Expectations 67 (2018).

> We saw the boat go alongside, and we saw him taken up the side and disappear. Then the ends of the torches were flung hissing into the water, and went out, as if it were all over with him.[52]

That the hulks were much feared is made clear by a story recounted in a remembrance of Baron Ellenborough, the Lord Chief Justice of King's Bench (1802-18):

> Some magistrate of Middlesex had sent a young man on board a tender, which lay off the Nore to receive impressed men, for the heinous crimes of sitting in his cart on the high road, and of insolence when summoned before them, the legal penalty for the first offence being a fine of ten shillings. He was kept on board the prison-ship seven days, and brought his action for false imprisonment. Lord Ellenborough summed up strongly in favour of exemplary damages. "This is a case that calls for ample justice. A young man, in driving his cart, commits an offence for which he is fineable, instead of which he is imprisoned without any authority of law, and afterwards put on board a prison-ship; there is nothing a magistrate ought to guard so much against as the playing with the liberty of the subject. There can be no excuse for the conduct of the defendant. The plaintiff is entitled to ample justice from a jury of his country; you will therefore, gentlemen, take the case into consideration and give him those damages that you think will make him ample compensation for the injuries he has sustained." The jury very properly awarded 500*l*.[53]

Prison hulks were not limited to Great Britain. In France, for example, prisoners were used as "galley rowers" ("galley slaves") from the 16th to the 18th centuries.[54] When changes in naval warfare made such ships obsolete, they were turned into prison hulks, primarily at Toulon.[55]

In modern times, Great Britain repeatedly has used ships to detain political prisoners in Northern Ireland: 1920s (ARGENTA),[56] 1940s (AL RAWDAH),[57] and

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[52] Charles Dickens, Great Expectations 60 (Cambridge Edition 1881) (1861).

Fans of the book now regularly seek out the places mentioned in it, including Magwitch's watery cell. *See*, *e.g.*, William Atkins, *A Journey into Pip's World of "Great Expectations,"* N.Y. Times, Nov. 11, 2018, at 7 (Travel) ("[I]t's past 4 p.m. by the time I reach Egypt Bay. I arrive sunburned and windblown, my lips taut and salty. The provenance of the bay's name is unclear. . . . What is known is that this sandy inlet was an ancient landing place, and favored by smugglers in the 19th century. Beyond the mudflats, [my guide] says, is where the prison hulk was from which Magwitch escaped[.]").

[53] *Life of Lord Ellenborough*, 11 Law Mag. Quart. Rev. Juris. 312, 355-56 (1834).

[54] *See* Paul W. Bamford, Fighting Ships and Prisons: The Mediterranean Galleys of France in the Age of Louis XIV (1974).

[55] One of the most famous Toulon prison hulks was the THÉMISTOCLE, which was burned by the British captain William Sidney Smith during the Siege of Toulon (1793) with 260 prisoners aboard. *See* John Gifford, The History of France (1797). As Gifford notes, most of the prisoners managed to escape, but "a few who were in fetters . . . perished in the explosion." *Id*. at 334. For a further recounting of the battle, see Bernard Ireland, Fall of Toulon: The Last Opportunity to Defeat the French Revolution (2005).

[56] *See* Denise Kleinrichert, Republican Internment and the Prison Ship Argenta 1922 (2001).

[57] *See The Al Rawdah Prison Ship, 1940-41*, Treason Felony Blog (Aug. 31, 2019), https://treasonfelony.wordpress.com/2019/08/31/the-al-rawdah-prison-ship-1940-41/.

1970s (MAIDSTONE).[58] Other countries have treated their political prisoners in a similar fashion.

Shortly after becoming Cuba's president in 1925, for example, General Gerardo Machado began using the MÁXIMO GÓMEZ to "disappear" his political enemies.[59] In 1932, Brazil imprisoned the leaders of the failed Constitutionalist Revolution

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[58] On January 17, 1972, seven prisoners escaped from the MAIDSTONE. *See Suspects in Ulster Flee Prison Vessel*, N.Y. Times, Jan. 18, 1972, at 8. One source has described the breakout as follows:

> The *Maidstone* was considered "escape-proof." However, internees on the overcrowded ship saw a seal swimming nearby. If the seal could get in through the security fencing then they could get out. Seven internees covered in boot polish slid down the anchor rope, made their way through the fencing and swam to shore. They hijacked a bus and were spotted driving into the Markets area. The British surrounded the area and claimed everything was under control. The "Magnificent Seven" [as the escapees quickly were dubbed] surfaced [a week later] at . . . [a] press conference.

Robert W. White, Out of the Ashes: An Oral History of the Provisional Irish Republican Movement 87 (2017).

[59] In 1927, Chester M. Wright, one of the officers of the Pan-American Federation of Labor, went to Cuba to investigate the MÁXIMO GÓMEZ. In subsequent reporting, he wrote:

> In Havana harbor, not too near the shore, but well out of the traffic lane and out of sight of tourists, lies the former German ship Maximo Gomez, taken by the Cubans during the World war. It is the prison ship the fear of which spreads throughout Cuba today.
>
> Many Cubans told me of friends who had been snatched away and fed into the Maximo Gomez. Those who have come back are so few that I could learn of but one or two and I could find none. The Maximo Gomez is the first step on the road to exile. Every possible effort was made to find a way in which I might visit this hated ship but that seems to be one of the things that is not being done.

Chester M. Wright, *Grim Prison Ship Inspires Fear Among Cubans: Maximo Gomez is Step to Exile—Counterpart of Old "Success" is Ever-Present Threat to Máchado's Foes*, Pitt. Press, Mar. 4, 1927, at 2.

(Wright's headline needs a bit of an explanation. Built out of teak and launched at Myanmar in 1840, the SUCCESS served as an Australian prison hulk in the 1850s. *See* Rich Norgard, *A History of the Success*, The Sailing Ship Success, http://shipsuccess.blogspot.com/. From 1890 to 1941, she traveled around the world billed as a convict ship, although she had never been used for this purpose. *Id.* In 1946, she was destroyed in a fire while tied up near Port Clinton, Ohio. *Id.*)

It should be noted that not everyone held in the MÁXIMO GÓMEZ was a political prisoner. In 1929, for example, it was reported that "Sydney Hoffman, American citizen, was today placed aboard the Cuban prison ship Maximo Gomez to await deportation on charges of violating the United States-Cuban liquor treaty." *See Cubans Put Miamian on Ship for Deportation*, Miami Herald, Apr. 24, 1929, at 1.

aboard the steamship PEDRO I.[60] Following Spain's July 1936 Military Uprising, many of the coup's participants were held aboard the steamer URUGUAY.[61] During the Cuban Revolution (1959), some Batista sympathizers found themselves locked aboard the SAN PASQUAL, a hulk off the coast of Cayo Las Brujas (Witches Island).[62] Additional examples can be found in Argentina (1959),[63] Uruguay (1968),[64] Cambodia (1970),[65]

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[60] *See Brazilian Revolt Leaders are Jailed: Revolutionary Chief Seized, Placed Aboard Ship with Staff*, Pitt. Press, Oct. 5, 1932, at 7. One month later, the ship set sail to an undisclosed location. *See 75 Rebel Leaders Exiled by Brazil: Floating Prison Ship, Pedro I, Sails for an Unrevealed Destination*, N.Y. Times, Nov. 2, 1932, at 2. A different source reveals what happened next:

> Following the military defeat of the Paulistas early in October 1932, the Pedro I took about one hundred of the rebellion's leaders to Recife and from there another ship took them to exile in Portugal. Together with the military leaders of the rebellion, the ship carried such civilians as Waldemar Ferreira, Francisco Morato, Paulo Nogueira Filho, Paulo Duarte, Júlio de Mesquita Filho, Francisco Mesquita, Prudente de Morais Neto, Joaquim Sampaio Vidal, and Antônio Pereira Lima.

John W.F. Dulles, The São Paulo Law School and the Anti-Vargas Resistance (1938-1945), at 30 (1986).

[61] *See* Pelai Pagès i Blanch, War and Revolution in Catalonia, 1936-1939, at 56 (Patrick L. Gallagher transl. 2013). *See also Fear Haunts Trial on Barcelona Ship*, N.Y. Times, Aug. 28, 1936, at 2 (describing the ship's 500 prisoners as being "in the hold . . . waiting without hope. Some play cards, some dominoes."). A photograph of the URUGUAY, taken shortly after the *Times'* story appeared, can be viewed at https://www.granger.com/results.asp?inline=true&image=0111163&wwwflag=1&itemx=12.

[62] *See Fleet of Stone*, Surveyor, Fall 2004, at 36, 38, https://www.escsi.org/wp-content/uploads/2017/10/4710.095-Fleet-of-Stone.pdf ("SS San Pasqual, an oil tanker launched 1921 in San Diego, traded for a year before becoming a molasses store ship in Havana, Cuba. Run aground close offshore northern Cuba in 1933, she lay forgotten until World War II, when the hull was fitted with machine guns and cannon as a guard post against U-Boat attack. During the Cuban Revolution, it served Che Guevara as a prison for captured partisans."). For photographs of the SAN PASQUAL (often misspelled "PASQUALE"), see *S.S. San Pasqual Shipwreck*, Atlas Obscura, https://www.atlasobscura.com/places/ss-san-pasqual-shipwreck.

[63] *See* Juan de Onis, *Argentines Work as Strikers Yield: All Expected Back Today—Military Pressure Ends Four-Day Shut-Down*, N.Y. Times, Jan. 23, 1959, at 2 ("The meatpackers were striking for the release of their leaders, who are among about 500 labor and political leaders still under arrest. Some of these men are being held on a navy prison ship. . . .").

[64] *See* Malcolm W. Browne, *Uruguay Imposes Emergency Rule*, N.Y. Times, June 25, 1969, at 3 ("Last year, Uruguay sent many detainees, especially striking bank employees, to military detention camps and some to a prison ship.").

[65] *See 2 American Ship Hijackers Want to Quit Cambodia*, N.Y. Times, July 4, 1970, at 4. As this article explains, in March 1970 merchant mariners Alvin L. Glatkowski and Clyde W. McKay, Jr. hijacked the U.S. munitions ship COLUMBIA EAGLE and sailed her to Cambodia, where they expected to be welcomed as heroes. Three days after their arrival, however, a coup replaced the anti-U.S. government with a pro-U.S. government. As a result, the pair were confined, along with other political prisoners, on a rusting World War II landing ship moored in the Mekong River.

Chile (1973-80),[66] and the Philippines (1987-88).[67]

In 1929, Japan turned the former warship MUSASHI into a prison ship for juvenile delinquents.[68] More conventionally, from 1997 to 2005 Great Britain used a ship called the WEARE to relieve prison overcrowding in England.[69] In 2010,

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Glatkowski eventually made his way back to the U.S. and served seven years in prison; McKay escaped and was not heard from again (it is believed he was killed by the Khmer Rouge). For a further discussion, see Richard Linnett & Roberto Loiederman, The Eagle Mutiny (2001).

66 During the military dictatorship of General Augusto Pinochet, Chile was accused of using the Navy training ship ESMERALDA as a floating prison and torture chamber. *See* Leslie Maitland, *Four-Master from Chile is Called "Torture" Ship*, N.Y. Times, June 20, 1976, at 34. In 2004, the Chilean government finally admitted that these allegations were true. *See* Larry Rohter, *Navy Admits Torture on Ship*, N.Y. Times, Dec. 2, 2004, at A24. For a further discussion, see Germán F. Westphal, *The Esmeralda Ship: The Chilean Navy's Torture Chamber* (2003), https://web.archive.org/web/20080224044157/http://www.chile-esmeralda.com/.

67 In 1987, Colonel Gregorio Honasan led an unsuccessful revolt against President Corazon Aquino. Following its conclusion, many of Honasan's followers were briefly held in prison ships. *See Mutineers Ferried to Manila After Weeks on Prison Ships*, Spokesman-Rev. (Spokane), Sept. 8, 1987, at A12 (explaining that the rebels were being brought ashore so that they could be transferred to "re-education camps"). Subsequently, Honasan himself was captured and imprisoned on the ANDRES BONIFACIO, a navy ship converted to a holding facility. In 1988, he escaped after bribing his guards. *See* Seth Mydans, *Leader of a Failed Coup Attempt Escapes Detention in Philippines*, N.Y. Times, Apr. 2, 1988, § 1, at 2. In 1992, Honasan and his supporters were granted amnesty after a new government came to power. *See* Lindsay Murdoch, *Ramos Sworn in [as Filipino President,] Offering Amnesty to Rebels*, Age (Melbourne), July 1, 1992, at 7.

68 Because of its clientele, the ship emphasized rehabilitation over punishment:

> The Juvenile Floating prison, first prison of its kind ever built in Japan[,] was opened near Yokohama with appropriate ceremonies by the [M]inister of Justice and many government officials. The floating juvenile prison is the former Musashi, a scrapped Japanese warship which has been rebuilt.
>
> The floating prison takes young juvenile delinquents and teaches the arts of fishing, navigation and kindred subjects, both practical and theoretical. . . .
>
> Twenty-six boys have been transferred to the ship from prisons ashore and when the crew is completed over 50 boys are expected to be on the prison ship. Half of the boys are to be between the ages of 14 and 18 years and an equal number between the ages of 18 and 23 years.
>
> The floating prison is an experiment in a new treatment of juvenile prisoners, which will give them [the] healthy atmosphere of the sea, plenty of work and at the same time teach them a useful profession.

Old Japanese Ship is Jail for Boys, Tampa Daily Times, Apr. 4, 1929, at 9A.

69 The WEARE was anchored in Portland Harbor in Dorset in southwest England. *See HM Prison Weare*, The Encyclopaedia of Portland His., https://www.portlandhistory.co.uk/hm-prison-weare.html. For a painting of the WEARE, together with a description,

however, when the British government raised the idea of doing so again, the public reacted with a storm of protest.[70]

2. By the United States

In this country, there have been three major peacetime uses of prison ships: in California (1849-54); in California and Maine (1902-16); and in New York City (1987 to present).[71]

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see Simon Ryder, *A Short History of a Pseudonym*, Simon Ryder Investigative Artist (Nov. 6, 2013), https://simonhryder.wordpress.com/2013/11/06/a-short-history-of-a-pseudonym/. The painting is by the British-UAE artist Trever John de Pattenden (https://www.tjdepattenden.com/) (misidentified by Ryder as "Trevor").

As explained *infra* note 95, this was the vessel's second tour as a prison ship, having previously served the same role in New York City (where she was known as the BIBBY RESOLUTION).

70 *See* Andrew Neilson, *Ships Ahoy? What the New Coalition Government Might Do with Penal Policy*, 49 Howard J. Crim. Just. 282 (2010).

71 More isolated episodes also exist. An early judicial decision, for example, mentions that a prison ship operated in New Orleans during the military governorship of General James Wilkinson (1805-07). *See infra* text accompanying note 130.

In 1891, the United Kingdom and the United States agreed to prohibit sealing in the Bering Sea. To publicize the new ban, the two countries sent a squadron of ships to the area. Included in the U.S. force was the prison ship AL-KI. Upon returning to the United States, Captain Henry C. Cochrane wrote a detailed letter to Colonel Charles Heywood describing the mission:

> We went on board the steamer Al-Ki, a chartered vessel belonging to the Pacific Coast Steamship Company, at Mare Island [near San Francisco], on the 21st, and sailed from San Francisco on the 22d of June. Arrived in Bering Sea July 2d, and at Iliuliuk, Ounalaska, Aleutian Islands, the same day, in advance of the other vessels ordered. . . .
>
> While the men-of-war, together with the United States revenue cutters Rush and Corwin, were engaged in cruising and furnishing all sealing, whaling, and fishing vessels with notice of the President's proclamation and the orders of the British Government relative to the fur seal fisheries, the Al-Ki acted as harbor and prison ship at Ounalaska. The crews of vessels seized were promptly transferred to our custody upon being brought into port and were uniformly well treated.
>
> Owing to the determined attitude of the combined governments, and the custom of giving each vessel found a preliminary warning, [just] four seizures were necessary. These were the schooners E.B. Marvin, British, July 6th, the La Ninfa, American, July 14th, the Ethel, American, July 30th, and the Otto, British, August 31st. The total number of prisoners received was 48, including a dozen Nationalities and 7 Nootka Sound Indians, hunters. The crew of the Otto was not transferred to the Al-Ki.
>
> Of these vessels, the first and the last were sent to Victoria for adjudication, and the others were towed to Sitka, 1,200 miles, by the Al-Ki, and turned over to the United States marshal for Alaska.

Following the discovery of gold at Sutter's Mill in 1848, California experienced a sudden influx of 300,000 people hoping to get rich.[72] As a result, local authorities were forced to use prison ships until more permanent jails could be built. In Stockton, for example, a grounded vessel called the SUSANNAH was pressed into service:

> In Mormon channel, near the Center-street bridge, two French-built vessels went aground in 1849. One of these, named the Susannah, was a brig of about 250 tons, built of oak.
>
> "It was used as a prison-ship in '49," said L. Basilio, in answer to the inquiries of a reporter, "as we had no jail in the city then. I was working as a blacksmith's hand in a shop, as the corner of Hunter and Market streets, for $8 a day. One of my duties was to rivet shackles on the legs of prisoners. The stage[coach] brought in the prisoners from the mountains late at night, and my work had, therefore, to be done at about 10 o'clock. An old plank, nailed across with cleats, led up to the deck of the Susannah. The rigging and masts were all gone. The man in charge of the prison was a German, who lived on the flooring just below the deck. The men were kept below on the lower floor, to which a cleated plank descended from a hatch-hole. Every night I went down that plank with my tools

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[Annual] Report of the Secretary of the [United States] Navy 620-21 (1891). *See also Cruising in Bering Sea: War Ships and Cutters in Chase of Sealers*, N.Y. Times, Aug. 14, 1891, at 1 ("The [Al-Ki] is a passenger steamer of the Pacific Coast Steamship Company, which has been chartered by the Treasury Department for $300 per day as a prison ship, where sealers who do not heed the warning to stop sealing are to be kept until turned over to the proper courts. She has on board one line officer of the navy—Lieut. Commander Meade—three marine officers, a [s]urgeon, and forty marines.").

In August 1944, 258 African-American sailors at Mare Island refused to load the U.S. Navy ship SANGAY with mines and other munitions, claiming that the task was too dangerous. Incensed at this show of disobedience, the Navy turned a nearby barge into a makeshift prison. After several days, 208 of the mutineers agreed to accept minor punishments and were reassigned to various overseas units. The remaining 50, who became known as the "Port Chicago 50," were returned to the barge but then sent to Camp Shoemaker to await trial. In October 1944, the men were sentenced to long prison terms, which were reduced after the war. *See* Steve Sheinken, The Port Chicago 50: Disaster, Mutiny, and the Fight for Civil Rights (2014). *See also 50 Get Mutiny Terms: Sentences of Negroes in Navy Range from 8 to 15 Years*, N.Y. Times, Nov. 19, 1944, at 29.

72 *See* J.S. Holliday, The World Rushed In: The California Gold Rush Experience (1981). As has been explained elsewhere:

> In March 1848, there were roughly 157,000 people in the California territory; 150,000 Native Americans, 6,500 of Spanish or Mexican descent known as Californios[,] and fewer than 800 non-native Americans. Just 20 months later, following the massive influx of settlers, the non-native population had soared to more than 100,000. And the people just kept coming. By the mid-1850s there were more than 300,000 new arrivals—and one in every 90 people in the United States was living in California.

Barbara Maranzani, *8 Things You May Not Know About the California Gold Rush*, History (Aug. 31, 2018), https://www.history.com/news/8-things-you-may-not-know-about-the-california-gold-rush.

> and shackles, and the German stood guard at the hole above, armed with pistols and guns enough to kill the entire lot of prisoners if they made a demonstration. I stood the work for a while, shackling the men and chaining them to beams which supported the upper flooring, and then I threw up the job as too dangerous."
>
> The Susannah was used as a prison-ship for only a short time. It afterward became the resort of criminals, who made it a lodging-house and place of refuge. About the year 1854 it was therefore burned to the water's edge.[73]

Similarly, in San Francisco a ship called the EUPHEMIA was turned into a floating prison:

> San Francisco's first jail was an outdated and flimsy log structure built around 1846 at Clay and Stockton streets. . . .
>
> The Town Council of San Francisco[, realizing] how insecure their jail was, . . . began to search for a new jail. A special committee was appointed to either purchase or lease a new building for the jail. A particular dilemma faced the committee; the inflated gold prices of San Francisco had driven up the costs of building, hence rents were also high. A possible solution, and a thrifty one, was the use of an abandoned ship for a building. Gold fever had also stricken the crews of the vessels that had brought the argonauts to California, and hundreds of ships lay empty along the water front. The solution for the special committee's dilemma was at hand; they purchased a ship for use as San Francisco's new jail. . . .
>
> At the October 8, 1849 meeting of the Town Council of San Francisco, the special committee reported "the purchase of the brig *Euphemia* for the purpose of a prison ship, and, on motion, the report of the committee was adopted and the purchase approved." The former owner of the *Euphemia*, incidentally, was Town Council member William Heath Davis. The purchase price: three thousand, five hundred dollars.[74]

In Sacramento, a ship called the LA GRANGE was used for the same purpose:

> [In 1850], the City of Sacramento docked . . . the La Grange, at the foot of I-Street in downtown to house people with criminal convictions and mental illnesses. A grand jury report provided a window into the terrible conditions aboard the La Grange:
>
> [The jail is] considered insecure and, for close confinement, unhealthy. There are at present only 16 cells, each about 4½ by 8 feet in size, divided by board partitions, and occupying a space in the center of the brig of about 25 by 40 feet. . . . Each of these cells contain from two to three prisoners. . . .[75]

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73 *Wrecks of Old Boats: Vessels that Came to Stockton and Stayed*, Stockton Mail, Dec. 17, 1883, at 3.

74 James P. Delgado, *Gold Rush Jail: The Prison Ship Euphemia,* 60 Cal. Hist. 134, 135-36 (1981) (footnotes omitted).

75 Julia A. Mendoza, *Prison Row: A Topographical History of Carcerality in California*, 66 UCLA L. Rev. 1616, 1622 (2019) (footnotes omitted).

The state was no more prepared than its cities for the sudden population boom. As a result, when California opened its first state prison in 1851, it used a ship known as the WABAN.[76] After six months anchored off Angel Island in San Francisco Bay, the WABAN moved to a nearby spit of land called San Quentin:

> The Dec. 20, 1851 edition of the *Daily Alta California* chronicles the ship's first foray as a prison vessel.
>
> "The bark Waban, with about forty state prisoners, was towed over to Angel Island yesterday by the steam tug Firefly, Capt. Grifflin. We learn the prisoners are intended to work in the stone quarry, under the direction and supervision of our efficient Sheriff, Jack Hays," the newspaper reported at the time.
>
> The state [soon] opted for a permanent prison, rather than a ship, and in 1852 . . . purchased 20 acres of land at San Quentin for $10,000. . . .
>
> As folklore has it, the Waban arrived [at San Quentin] on July 14, 1852 (Bastille Day) with 40 to 50 convicts. On Oct. 12, 1852, a "contract was let for the first cell building," according to reports. The building was completed in 1854. Inmates slept on the [Waban] at night and worked to construct the prison during the day.[77]

A book about early California criminals includes the following description of the WABAN's living conditions:

> The officers always called him "Old" Jim Smith, but he was merely "old" in criminal experience. Born in Prussia about 1831, few have heard of James P. Smith (probably Schmidt), although he was as colorful as he was unsuccessful as a bandit. Various nautical tattoos on his body indicated that he had been a seaman and had probably jumped ship at the time of the 1849 California Gold Rush. His first conviction was for grand larceny at Sacramento in September of 1851. He was sentenced to a two-year term in the California State Prison.

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[76] *Id.* at 1622-23. The WABAN became a prison ship after a trip to South America left her unseaworthy:

> The *Waban* was built in Westbrook, Maine, in 1836 and named after a noted, local Indian chief. It sailed from New York with twelve passengers and much cargo on September 1, 1849, destination California. There were numerous stops and delays but it arrived in San Francisco on June 8, 1850. After a voyage to South America, the *Waban* returned in poor shape for further sailing and was purchased as a storage facility, then by the city of San Francisco as a prison ship.

William B. Secrest, California Desperadoes: Stories of Early California Outlaws in Their Own Words 87-8 (2000). It has been reported that no pictures of the WABAN still exist. *See* Pete Brook, *19th Century Museum Prison Ships*, Prison Photography, https://prisonphotography.org/2009/03/18/19th-century-museum-prison-ships/.

[77] Gwen Kubberness, *The History and Corruption of San Quentin Prison*, Criminal Genealogy (Feb. 11, 2019), https://criminalgenealogy.blogspot.com/2019/02/the-history-and-corruption-of-san.html (italics added).

> At this time there was really no prison at all. The twenty-acre site, at Point San Quentin on the bay just north of San Francisco in Marin County, had recently been purchased for $10,000. The old bark *Waban*, anchored offshore, was used to house the prisoners until cell blocks could be constructed on shore. Jim found himself back aboard ship, but under less than ideal circumstances.
>
> Listing himself as a baker by trade, Jim may have been put to work preparing the bread, potatoes, meat and soup that constituted the convicts' main diet. The thirty or forty other prisoners were kept busy quarrying stone on nearby Angel Island, gathering firewood, filling in swampland around the prison site or leveling the ground. Prison life was mostly working out in the open and there were few complaints until they were herded below deck on the *Waban* at night.
>
> The lower deck of the old ship had been divided into a series of eight-foot-square cells with four or five convicts occupying each cell. It was blistering hot in summer and cold and damp in winter. Toilet facilities consisted of a bucket and the smell of the place by morning can well be imagined. Worse, in bad weather the men might be cooped up for days, the stench becoming so unbearable the guards refused to go downstairs until the place had been aired out.[78]

The second significant use of prison ships in the United States during peacetime came in the early 1900s, when the U.S. Navy used five different vessels as prison ships—two on the East Coast and three on the West Coast.[79]

On the East Coast, the collier SOUTHERY began operating as a prison ship in Boston in 1902; moved to Maine in 1903; and was joined there by the gunboat TOPEKA in 1905.[80] Following the opening of the Portsmouth Naval Prison in Maine in 1908, the SOUTHERY and the TOPEKA were kept on and served as overflow prisoner housing until World War I.[81] On the West Coast, the schooner MANILA was converted into a prison ship in 1907 and stationed at Mare Island (near San Francisco).[82] Later, the gunboat NIPSIC (1908-12) and the cruiser PHILADELPHIA (1912-16) replaced her.[83]

In his 1915 report to Secretary of the Navy Josephus Daniels, Captain Ridley McLean, the Navy's Judge Advocate General, after first noting that the SOUTHERY no longer was being used as a prison ship, summed up conditions aboard the PHILADELPHIA and TOPEKA (which were in the process of being phased out):

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78 Secrest, *supra* note 76, at 91-2.

79 In addition to these five ships, other Navy vessels occasionally were assigned prison duty. At the U.S. Naval Academy, for example, the training ship SANTEE regularly doubled as a cadet detention ship. *See*, *e.g.*, *Annapolis Cadets Punished: They Tried to Smuggle in Liquor for a Holiday Celebration*, N.Y. Times, Dec. 30, 1904, at 2; *Naval Court-Martial Closed: Decision in Case of Midshipmen Accused of "Hazing" Expected Next Week*, N.Y. Times, Nov. 6, 1903, at 1; *The Revolt at Annapolis: The Mutinous Cadets Still in the Prison-Ship*, N.Y. Times, Feb. 3, 1883, at 1.

80 *See* Katy Kramer, Portsmouth Naval Prison 25-28 (2016).

81 *Id.* at 60.

82 *See USS Manila*, NavSource, *at* http://www.navsource.org/archives/09/46/46902.htm.

83 *See* Eleanor Boba, *In Sight of Shore: Prison Ships*, Remnants (Nov. 3, 2017), http://remnantsofourpast.blogspot.com/2017/11/in-sight-of-shore-prison-ships.html.

> Reports from the U.S.S. *Topeka* show that while the detention system was in operation on board that ship the general sanitary condition was excellent, the food of good quality and sufficient in quantity; that notwithstanding the great care exercised in advancing detentioners to the higher classes, 29 per cent deserted after being made first-class and allowed liberty.
>
> Reports from the U.S.S. *Philadelphia* show that the sanitary condition of the ship and health of the detentioners were excellent; that the food was sufficient in quantity and excellent in quality; that [religious] services were held weekly; that the detentioners gladly availed themselves of the benefit of the educational system in force in the service, including both the academic and technical instruction; that it was impracticable to hold all the usual military drills, because of the great decrease in the number of detentioners; and that for this reason the instruction and drills were held along naval lines, the idea being to make the men proficient in drills and in the duties of their ratings.[84]

By far, however, the most significant peacetime use of prison ships in the United States has occurred in New York City. Since 1987, it has had five such vessels: BIBBY RESOLUTION, BIBBY VENTURE, HAROLD A. WILDSTEIN, VERNON C. BAIN, and WALTER KEANE.[85] As mentioned at the outset of this article, only the VERNON C. BAIN is still operating.

The impetus for this mini-armada was a crack epidemic that, beginning in 1985, sent the City's inmate population soaring.[86] Desperate for additional jail space, in October 1986 Mayor Ed Koch announced that the City had decided to turn two former Staten Island ferries—the CORNELIUS G. KOLFF and the PRIVATE JOSEPH F. MERRELL—into prison ships.[87]

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84 *Naval Prisons and Disciplinary Barracks*, 7 J. Am. Inst. Crim. L. & Criminology 130, 132-33 (1916).

85 *See* Sneha Dey, *The History of the City's Floating Jail*, CityLimits (May 10, 2018), https://citylimits.org/2018/05/10/urbanerd-the-history-of-the-citys-floating-jail/.

86 To combat the epidemic, in 1984 the City launched "Operation Pressure Point." *See* David W. Dunlap, *Police Moving to Halt Drug Sales on Streets of the Lower East Side*, N.Y. Times, Jan. 20, 1984, at B2. In 1988, a second initiative was added: drug sweeps by specially-trained officers known as "Tactical Narcotics Teams." *See* David E. Pitt, *Ward Says New Drug Units are Not the Whole Answer*, N.Y. Times, Nov. 30, 1988, at B3. By 1989, these policies had resulted in a near-doubling of the City's jail population. *See* Michel Marriott, *After 3 Years, Crack Plague in New York Only Gets Worse*, N.Y. Times, Feb. 20, 1989, at A1 ("In 1985 the city jail population was almost 10,000. Much as a result of crack use and related crimes, the current jail population is almost 18,000[.]").

87 *See* Susan Milligan, *Ferries Eyed as Jail Bailout*, Daily News (NY), Oct. 9, 1986, at 3 ("Koch defended the ferry idea, saying that 'we would consider it one of our better accommodations.' If the inmates get seasick, 'We'll give them Dramamine,' he said."). *See also* Joyce Purnick, *City Studies Plan to Use Two Ferries for Inmates*, N.Y. Times, Oct. 7, 1986, at B1; Joyce Purnick, *City Plans to Add 2,300 Jail Spaces: Would Use Two Upstate Sites and Renovated S.I. Ferry*, N.Y. Times, Oct. 9, 1986, at A1; Robert D. McFadden, *[State] Consent Given for Converting Old Ferryboat into New Jail*, N.Y. Times, Oct. 25, 1986, § 1, at 29.

Both the CORNELIUS G. KOLFF (named for a prominent Staten Island businessman) and the PRIVATE JOSEPH F. MERRELL (named for a Staten Island World War II Medal of Honor recipient) were built in 1951 as part of the City's sixth

Although Koch neglected to mention it—perhaps he did not remember or did not know—in 1965 DOC Commissioner Anna Kross had pushed a similar proposal:

> Special state investigator Herman T. Stichman last night dismissed as "entirely unsound" City Correction Commissioner Anna Kross' suggestion that obsolete aircraft carriers be used as prison ships to relieve overcrowding in the Women's House of Detention and other city jails.
>
> He declared that historically prison ships were "hell holes" and that "we don't want prison ships any more than we want . . . a return to Devil's Island."
>
> "What an absolutely unfortunate image it would give visitors to this country," Stichman exclaimed, "if the first thing they were to see were prison ships tied up in our harbors!"[88]

Following months of conversion work, the PRIVATE JOSEPH F. MERRELL, renamed the VERNON C. BAIN,[89] opened in March 1987, late and over budget.[90]

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class of ferries (the third member of the class was the VERRAZZANO, named for the Italian explorer Giovanni da Verrazzano). *See* Brian J. Cudahy, Over and Back: The History of Ferryboats in New York Harbor 275-80 (1990) (explaining that the three ferries, which were steam-powered and had three, rather than two, passenger decks, represented "a near-total break" from their predecessors).

Initially, the VERRAZZANO also was in the running to be turned into a floating jail. *See NYC Considers Using Old Staten Island Ferries as Jail Boats to Ease Overcrowding*, J.-News (White Plains, NY), Oct. 8, 1986, at B8 ("Mayor Edward I. Koch said Tuesday he hopes to use three retired ferries to ease jail overcrowding by converting them to prison space. . . . The city has three ferries no longer in service, the *Kolff*, the *Verrazano* [sic] and the *Merrill* [sic]. . . ."). Instead, the City decided to auction her off. *See* Jeff Vandam, *Ferries of a Certain Age*, N.Y. Times, Apr. 16, 2006, § 14, at 5. As of 2014, the VERRAZZANO was in a Staten Island scrapyard awaiting demolition. *See Ferry Awaits Final Voyage*, Gordon Donovan (Sept. 24, 2014), http://gordondonovan.com/ferry-awaits-final-voyage/.

88 *Stichman Hits Prison Ship Idea*, Daily News (NY), Mar. 29, 1965, at 5.

89 The new name honored a popular Rikers Island warden who had been killed in a 1985 car accident. *See The Final "Ex" for Ex-Staten Island Ferry, Ex-Rikers Floating Dorm*, New York Correction History Society, http://www.correctionhistory.org/html/museum/gallery/ferries/scrapkeane.html [hereinafter *Final "Ex"*].

90 *See* Bruce Lambert, *City's Prison Boat is Late and Costly*, N.Y. Times, Mar. 24, 1987, at B8 [hereinafter *Late and Costly*] (reporting that the conversion had been expected to take 60 days and cost $4.86 million but ended up taking 150 days and costing $8.2 million). *See also infra* text accompanying notes 201-04 (discussing a lawsuit arising out of the conversion).

Within a month, there was even more red ink:

> New York City's prison ferry, which opened three months late and $3 million over budget, is 60 percent empty because its operation is being changed to prevent $3 million in unexpected staffing costs.
>
> Among the unusual expenses the city has encountered is a Coast Guard requirement that a licensed mate and an engineer be stationed aboard at all times—even though the ferry is permanently docked at its Rikers

The CORNELIUS G. KOLFF, renamed the WALTER KEANE,[91] followed in the fall.[92] Moored at Rikers Island, the two vessels, each with 162 beds, were made part of the Otis Bantum Correctional Center.[93]

Even as it waited for the WALTER KEANE to arrive, the City was busy negotiating with Bibby Line, the venerable Liverpool shipping company, to

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> Island pier and has no engines. . . .
>
> To save money, officials have cut the guard staff in half by converting the ferry for use by work-release inmates, who are gone most of the day for jobs and classes.
>
> But since there are only 65 such inmates, the remaining 97 beds on the ferry are empty. To put them to use, the city is expanding the work-release program. Officials hope to fill the ferry to capacity by the end of the month.
>
> Unresolved, Correction Department officials say, is how the city will address the same staffing problems on a second ferry that has been ordered for arrival in the fall. One possibility is to also use the second ferry for work-release inmates, if the program can be expanded that much. . . .
>
> [Manhattan Councilwoman Ruth W.] Messinger called the ferry problems another example of the city's lack of long-range planning. "The ferry boat prison is not a solution," she said. "It's a gimmick and a costly one at that. It's expensive to create and has an outrageously high operating cost."

Bruce Lambert, *Facing $3 Million Overrun, Jail Ferry Plan is Modified*, N.Y. Times, May 3, 1987, at 40.

91 The new named honored Walter B. Keane, a veteran DOC officer who had been killed in a job-related accident. *See Final "Ex," supra* note 89. My research has not uncovered any additional details regarding Keane's career or his death. I also have not been able to determine why Keane's middle initial was omitted from the ferry's name.

92 *See* Laura Jean Waters, "Rikers Island Jail," *in* Bosworth, *supra* note 5, at 852.

Having learned from the numerous mistakes it had made while converting the PRIVATE JOSEPH F. MERRELL, the City's conversion of the CORNELIUS G. KOLFF proceeded much more smoothly. *See* Linda Borg, *2d Ship of Cells Readied for City*, Daily News (NY), Aug. 2, 1987, at 16.

As Borg explains, the CORNELIUS G. KOLFF was converted by Newport Offshore Ltd. of Rhode Island, which had been awarded the $4.8 million job through competitive bidding. In contrast, the PRIVATE JOSEPH F. MERRELL was converted by First Marine Shipyard of Staten Island, "a company run by the family of Mr. Koch's former Ports and Terminals Commissioner, Susan Frank" that was picked following "a declaration of emergency . . . [that allowed] Correction Commissioner Richard J. Koehler [to] bypass[] strict competitive bidding procedures and Board of Estimate Review." *See Late and Costly*, *supra* note 90.

For a further look at the two companies (neither of which still exist), see, e.g., In re Newport Offshore Ltd., 219 B.R. 341 (D.R.I. Bankr. 1998) (explaining that Newport Offshore filed for bankruptcy in 1985); Anthony Bianco, *The [Franks: The] First Family of Pollution*, Bloomberg News (Oct. 28, 1996), https://www.bloomberg.com/news/articles/1996-10-27/the-first-family-of-pollution (explaining that First Marine Shipyard filed for bankruptcy in 1991).

93 *See* Waters, *supra* note 92, at 852-53.

lease two of its "accommodation barges" (*i.e.*, floating dormitories).[94] Known, respectively, as the BIBBY RESOLUTION and the BIBBY VENTURE, both had housed British troops during the Falkland Islands War (1982).[95]

The negotiations, which consumed nearly 18 months, were followed with intense interest by the media.[96] In the end, the City agreed to pay Bibby Line $20.5

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[94] In 2007, Bibby Line celebrated its 200th birthday. *See* https://bibbylinegroup.co.uk/about/heritage/. Through its Bibby Maritime subsidiary, it continues to lease floating dormitories to parties in need of temporary housing. *See* http://www.bibbymaritime.com (indicating that as of 2020, it has five accommodation barges—three in Europe and two in Asia—that collectively have space for 1,226 residents).

[95] The BIBBY RESOLUTION was built in 1979 in Stockholm at the Götaverken Finnboda shipyard as a floating dormitory for offshore oil-and-gas workers. At her launching, she was known as the BALDER SCAPA. In 1980, she became the FINNBODA 12. In 1982, she served as a British troop barge in the Falkland Islands War. She then was acquired by the Consafe Group of Sweden and renamed the SAFE ESPERIA. When Consafe went bankrupt, she was purchased by Bibby Line and renamed the BIBBY RESOLUTION. Following her time as a New York City prison barge (1989-92), she performed the same role in England under the name WEARE (1997-2005). *See supra* note 69 and accompanying text. Now known as the JASCON 27, she is owned by the Sea Trucks Group of Lagos, Nigeria, and is laid up in Kingstown (Saint Vincent and the Grenadines). *See Jascon 27*, Baltic Shipping, https://www.balticshipping.com/vessel/imo/8636180.

Similarly, the BIBBY VENTURE was built in 1980 in Stockholm at the Götaverken Finnboda shipyard as a floating dormitory for offshore oil-and-gas workers. At her launching, she was known as the FINNBODA 11. In 1982, she served as a British troop barge in the Falkland Islands War. She then was acquired by the Consafe Group of Sweden and renamed the SAFE DOMINIA. When Consafe went bankrupt, she was purchased by Bibby Line and renamed the BIBBY VENTURE. Now known as the VENTURE, she is owned by Intership SVI (London) and is being used in Kingstown (Saint Vincent and the Grenadines). *See Venture*, Baltic Shipping, https://www.balticshipping.com/vessel/imo/8638774.

[96] *See, e.g.*, *NYC Planning to Use Troop Barge as Jailboat*, J.-News (White Plains, NY), Aug. 12, 1987, at B5; Douglas Martin, *Prison Barge Arrives at East River Pier; City to Seek Another*, N.Y. Times, Oct. 27, 1987, at B24; Susan Milligan, *Jail Barge is In, 2d in Works*, Daily News (NY), Oct. 27, 1987, at 25; Celestine Bohlen, *2 More Prison Barges Considered*, N.Y. Times, Oct. 13, 1988, at B9; Celestine Bohlen, *Board Backs Prison Barge Near Pier 40*, N.Y. Times, Oct. 28, 1988, at B1; Celestine Bohlen, *Jail Influx Brings Plan for 2 Barges*, N.Y. Times, Mar. 3, 1989, at B1. *See also Estimate Board Votes a Second Prison Barge*, N.Y. Times, Oct. 15, 1988, at 35 (reporting that the City had hired, for nearly $1 million, an environmental consulting firm to make recommendations as to where the barges should be located).

At the beginning of the negotiations, the City, as an alternative to the BIBBY RESOLUTION and the BIBBY VENTURE, considered buying the much larger British accommodation barge PURSUIVANT. Able to hold 700 inmates, she had been built in 1977 and originally was known as the BARGEMAN. After several years of commercial work, she was leased in 1983 by the British government, renamed the PURSUIVANT, and moved to the Falkland Islands to house the soldiers that had been left there as a deterrence force. With the troops finally relocated to permanent onshore barracks, the PURSUIVANT was available and being offered by a consortium called North Venture Investment (U.K.) Ltd. for $10 million. *See* Joel Benenson, *Celling of a Barge*, Daily News (NY), June 5, 1987, at 2. After the City, along with the states of Florida and Texas, dropped out of the bidding, it appeared that New York State, which was grappling with its own prison overcrowding problem, would become the PURSUIVANT's new owner. However, the deal fell apart after North Venture upped its asking price to $11.2 million.

million for each vessel, with this amount representing five years of lease payments ($17 million) and an additional $3.5 million to cover the cost of various retrofits (such as putting steel mesh over the portholes).[97] The deal also called for the City to have the option of purchasing the vessels at the end of the leases for a "nominal amount."[98]

The BIBBY VENTURE arrived first, pulling into New York City in October 1987.[99] Critics immediately scoffed at the idea of turning her into a jail:

> Officials overseeing New York City jails say the troop barge the city has leased from a British company to cope with inmate overcrowding is dangerous to both prisoners and correction officers.
>
> "Quite simply, it is a labyrinth of spaces that is largely unsupervisable by either sight or sound," wrote Kenneth Schoen, director of the Office of Compliance. Mr. Schoen monitors city jails for the Federal District Court in Manhattan, which has overseen the jails' operation since 1979.
>
> "I don't think the barge is cost-effective space," Mr. Schoen wrote in a letter to Richard J. Koehler, the Commissioner of Correction. He called the Correction Department's plans to erect partitions to better utilize the space a "Rube Goldberg scheme" and said the barge would require more guards than a conventional jail.
>
> Mr. Schoen urged the city to reconsider leasing the $19 million barge and its option to buy the vessel at minimum cost in five years. He also suggested that the city reconsider leasing a larger barge for $21 million. . . .
>
> Other experts who have visited the barge—which arrived two weeks ago and was officially transferred to the city yesterday—voiced similar concerns.
>
> Robert Kasanof, chairman of the Board of Correction, the city's jail oversight agency, pointed out that the barge was designed for well-disciplined British soldiers, not detainees awaiting trial for serious crimes. Mr. Kasanof said the barge's narrow corridors and individual rooms would obstruct guards' views.
>
> "It will require extraordinarily rich, heavy staffing for it to be a secure place," Mr. Kasanof said.

See Paul Browne, *State Prison Boss Sinks Barge Plan*, Daily News (NY), Jan. 13, 1988, at 28. For a further look at the PURSUIVANT, see *Pursuivant*, Baltic Shipping, https://www.balticshipping.com/vessel/imo/7414559.

97 *See* Mireya Navarro, *2 Jail Barges May Be Sold at Shortfall of Millions*, N.Y. Times, July 12, 1994, at B3.

98 *Id.* According to one source, the "nominal amount" was $10. *See* Susan Milligan, *Lower E. Side Berth for Floating City Jail*, Daily News (NY), Sept. 9, 1987, at 5.

99 *See* Jeffrey K. Parker, *Falklands Troop Barge Becomes Big Apple Jailhouse*, UPI (Oct. 26, 1987), https://www.upi.com/Archives/1987/10/26/Falklands-troop-barge-becomes-Big-Apple-jailhouse/5816562222800/.

> Others have criticized the quality of construction, saying inmates could easily hide contraband in ceilings and make weapons from plastic fixtures. They cite exposed smoke-detector wires, buckled floors, and European-style hand-held shower [heads] that are too delicate for jail use, among other failings.
>
> "The whole thing could be taken apart very easily," said Ted Katz, director of the Legal Aid Society's Prisoners Rights Project.[100]

Officially known as "Maritime Facility I" (BIBBY VENTURE) and "Maritime Facility II" (BIBBY RESOLUTION),[101] the two vessels were docked in Lower Manhattan.[102] The 386-bed BIBBY VENTURE opened in March 1988,[103] while the 386-bed BIBBY RESOLUTION opened in May 1989.[104] In his 2002 book

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100 Douglas Martin, *Oversight Groups Assail Prison Barge as a Poorly Constructed and Dangerous Maze*, N.Y. Times, Nov. 10, 1987, at B3.

101 *See* New York State Commission of Correction, *A Report on Corrections in New York State—1989*, at 121 (July 1990), https://www.ncjrs.gov/pdffiles1/Digitization/133454NCJRS.pdf. My research has uncovered very few uses of these designations, which sometimes are rendered using Arabic numbers rather than Roman numerals.

102 Initially, the BIBBY VENTURE was located at Pier 36 in the East River (off South Street on the Lower East Side). Subsequently, she was moved to Pier 40 in the Hudson River (off Houston Street near Greenwich Village). When the BIBBY RESOLUTION arrived in 1989, she was assigned to Pier 36. *See* Raymond W. Gastil, Beyond the Edge: New York's New Waterfront 43 (2002). *See also* Catherine Crocker, *Jail Barge Gets 5-Year Berth*, J.-News (White Plains, NY), June 22, 1989, at B7 (reporting on the move of the BIBBY VENTURE to Pier 40); *New Fight on Jail Barge*, Daily News (NY), May 11, 1989, at 1 (Metro) (detailing the pair's use of Pier 36). For a photograph of the BIBBY VENTURE moving to Pier 40 (after a temporary berthing at Pier 97), see *Prison Barge Moves Down the River*, N.Y. Times, Aug. 10, 1989, at B4.

103 *See* Douglas Martin, *As Crowding in Jails Eases, New York City May Not Need Barge*, N.Y. Times, Apr. 6, 1988, at B1 (reporting that "inmates [had been kept] off the barge until the middle of last month" by a citizens' lawsuit). *See also* Kirk Johnson, *Ruling Allows Immediate Use of Barge as Jail*, N.Y. Times, Feb. 27, 1988, at 35 (explaining that in addition to the lawsuit, the opening had been delayed by a Greek oil tanker, which had run into the BIBBY VENTURE's mooring mechanism and sheared it).

104 *See* Daniel Hays, *A Prison Barges in on East River*, Sunday Daily News (NY), May 21, 1989, at 1 (Metro). In his story, Hays described the barge as follows:

> The city's newest jail barge at Pier 36 near the Manhattan Bridge [is] [b]attleship gray and equipped with razor wire[.] [T]he five-deck, 216-foot craft is named the Bibby Resolution. . . .
>
> Each air-conditioned cell has double bunks, a large window and a bathroom compartment with shower, commode and sink. There's a pharmacy that an official said has "lots of Dramamine," and a gymnasium, weight room, Nautilus machine, law library and medical clinic.
>
> Two swimming pools were not part of the tour reporters were given. "There are no plans to use them," Correction Department spokeswoman Ruby Ryles said.

Id.

about the City's waterfront, urban planner Raymond W. Gastil said the barges, each "stacked with cells of human cargo like a freighter loaded with containers," were at once "both an eyesore and a fascinating curiosity[.]"[105]

When the residents of Lower Manhattan complained about the barges,[106] Koch, famous for his fast quips,[107] had a ready retort:

> When I say every drug pusher should be arrested and put in jail, [people say] that's fine. When I say that means we have to have jails in which to put them, and we dock a jail barge alongside a neighborhood, there are opponents. I say to these groups, "Would you rather have these people walking around in your neighborhood, or be in jail on a barge in your neighborhood?"[108]

Although it already had four floating jails, in March 1989 the City announced that it had awarded a $125 million contract to New Orleans' Avondale Shipyard[109] to build, from scratch, an 800-bed prison barge (officially designated "Maritime Facility III"), with completion expected by June 1990.[110] By the time the new

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105 Gastil, *supra* note 102, at 44.

106 As explained *infra* text accompanying notes 205-10, the residents did more than complain: they took the City to court but lost (twice).

107 *See* Joe Coscarelli, *The Quotable Ed Koch: Wit, Wisdom, and One-Liners*, N.Y. Mag. (Feb. 1, 2013), https://nymag.com/intelligencer/2013/02/ed-koch-quotes-wit-wisdom-one-liners.html.

108 *Koch Speech: Courageous Choices*, N.Y. Times, Aug. 25, 1989, at B4.

Although the City's residents may have disliked the barges, inmates initially had nothing but praise for them. *See* Celestine Bohlen, *For Inmates, the Living is Easier on "Love Boat,"* N.Y. Times, May 30, 1989, at B3 (reporting that inmates aboard the BIBBY VENTURE had dubbed it "the Love Boat" because of its "soft" living conditions); Hays, *supra* note 104 (quoting inmate Teodoro Espada as saying the BIBBY RESOLUTION was "like a hotel . . . it's beautiful").

Conditions on the two vessels subsequently grew much harsher. Thus, in Daniel Nina's novella *Charlie Gorra Strikes Back* (1996), the title character, forced to serve the final six months of his sentence on the BIBBY RESOLUTION, calls for the barge's "liberation" (*i.e.*, closing) after nearly being raped by a fellow inmate. *See id.* at 23, 25, 29. (For a review of the book, which can be difficult to follow because it is written in "Spanglish," *see* "Charlie in New Yol," *in* Gerald Guinness, "The Covers of this Book Are Too Far Apart": Book Reviews for the San Juan Star, 1977-1998, at 147 (1999).)

109 Founded in 1938, Avondale Shipyard closed in 2014 following numerous ownership changes. In 2018, it was announced that the 254-acre site would be turned into a global logistics hub. *See* William Kalec, *Avondale's Second Act*, Biz New Orleans (Feb. 20, 2020), https://www.bizneworleans.com/avondales-second-act/.

110 *See* Celestine Bohlen, *$125 Million Jail Barge is No Mere Ex-Troopship*, N.Y. Times, Mar. 22, 1989, at B3. To ensure that its instructions were carried out, City officials regularly flew to New Orleans to review the project's progress. *See* Selwyn Raab, *New York City's Bayou Digs: Three Rooms, a Prison View*, N.Y. Times, July 23, 1991, at B3.

Various items from the time of the vessel's construction can be viewed at *NYC's DOC "Hard Hat Deputy Warden"—John J. Walker Jr.*, New York Correction History Society (July 30, 2019), http://www.correctionhistory.org/pdf/Saluting-both-DOC-and-NYPD-Johnny-Walkers.pdf (explaining that the items were donated by John J. Walker III in memory of his father, Deputy Warden John J. Walker, Jr., who helped oversee matters). Among the pieces is Walker's "plank owner" certificate, dated Jan. 22,

VERNON C. BAIN arrived in New York in January 1992—18 months late and $36 million over budget[111]—the crack epidemic had eased.[112] As a result, several prison officials admitted that the vessel had been a mistake.[113]

1992, which reads in part: "D/W John Walker was an honored member of the first and the most illustrious crew which distinguished itself forever when it commissioned the Vernon C. Bain—M.T.F. III."

111 *See* Selwyn Raab, *Bronx Jail Barge to Open, Though the Cost is Steep*, N.Y. Times, Jan. 27, 1992, at B3 [hereinafter *Cost is Steep*]. Asked why the jail was late and over budget, John H. Shanahan, an assistant correction commissioner, explained that the City had "never designed this kind of passenger vessel before[.]" *Id.*

Lacking propulsion, the VERNON C. BAIN had to be towed from New Orleans to New York City by tugs, an 1,800-mile trip. *Id.* In a 1999 law review article calling for an overhaul of U.S. tug law, the authors used the long voyage to buttress their argument:

> [The U.S. Supreme Court's] rule against exculpatory clauses in towage contracts [creates] an intolerable result: A tug is responsible in tort for the welfare of its tow, yet the tug is unable to contract freely with that tow as to the duties of the tug. The nature of tows today, huge oil rigs, gambling casinos, generating plants, and floating prisons, among others, makes it imperative that the Court afford relief to tugs so that they may specifically define the parameters of their obligation.

Charles E. Lugenbuhl & David B. Sharpe, *The Law of Towage at the Millennium: What Changes Are Needed?*, 73 Tul. L. Rev. 1811, 1818 (1999) (footnote omitted).

112 The easing had started to become apparent six months earlier. *See Crack May Be Cracking*, N.Y. Times, Aug. 10, 1991, at 18 ("Tantalizing hints have begun to appear that the worst of the crack epidemic is waning. A few unexpected bright spots, for example, now illuminate New York City's social landscape: fewer children are going into foster care; crime reports are going down and so are hospital emergencies").

113 John R. Horan, the vice chairman of the City's Board of Correction, told reporters: "The money was clearly misspent." *Id.* Chairman William H. Booth added: "This should be our last barge. They're too expensive and too uncertain." *Id.*

In more recent times, the VERNON C. BAIN has been criticized for being incompatible with its surroundings:

> In the early 1990s, the Hunts Point neighborhood around the barge was overrun by rampant prostitution, other crime, homelessness and junkyards. At night, the main attraction was strip clubs. Children in the area had some of the country's highest asthma rates. The closest bus stop in Hunts Point, a roughly 900-acre peninsula in the South Bronx, was a 20-minute walk from the jail.
>
> "Hunts Point was a place to put things that no one else wanted," said John Robert, a former president of the local community board.
>
> . . . .
>
> Now, the barge is part of a changing Hunts Point.
>
> The strip clubs have been shut down; violent crime, including homicides and rapes, has plunged by 280 percent from 1990 to 2018, according to the Police Department.

In describing the City's newest jail, the *New York Times* wrote:

> The squat, 47,326-ton barge, named the Vernon C. Bain, is five stories high and resembles a jumble of incongruous blue and gray steel slabs without portholes. . . .
>
> The deck of the new barge is as long as two football fields and 125 feet wide. Lower decks contain dormitories for 700 inmates and cells for 100, a medical clinic, a law library, a chapel and a mess hall. An enclosed exercise pen is on the top deck.[114]

> Down the street from the jail, Amazon opened a warehouse over the summer, where trucks line up throughout the day to pick up packages to be delivered.
>
> The city's Economic Development Corporation, which owns much of the prime waterfront real estate in Hunts Point, has big plans for the area. It recently asked companies to submit ideas for a redesigned Hunts Point Produce Market, one of neighborhood's economic engines.
>
> Roughly 16,000 trucks travel through the area, shuttling goods like produce, meats and beer from warehouses to restaurants and shops throughout New York City. The city, hoping to significantly reduce congestion, has announced plans to develop a marine terminal at Hunts Point.
>
> City officials envision that the marine terminal could anchor a major shift in how goods like produce and lumber enter the New York market, moving them off roads and onto waterways.
>
> Whatever the future holds for Hunts Point, it does not include a city jail taking up precious and valuable waterfront property, [Bronx councilman Rafael Salamanca, Jr.] said.
>
> "We should give this land back and create jobs," he said. "Some could be green space for the community so we can enjoy the view of the East River."

Matthew Haag, *A Temporary Floating Jail is Still Open After 27 Years*, N.Y. Times, Oct. 11, 2019, at A25.

[114] *Cost is Steep*, *supra* note 111. Upon seeing the vessel, Josephine Infante, the director of the Hunts Point Local Economic Development Corporation, was flabbergasted, telling reporters: "[It's] phenomenal-looking. It's incredible. It's so big." Donald Bertrand, *The Bain of Hunts Point*, Daily News (NY), Jan. 26, 1992, at 1 (Bronx-Westchester). Bruce Piel, the general manager of the Hunts Point Produce Market, quickly dubbed the new addition the "Louisiana Purchase." *Id.* The nickname did not stick.

To staff the vessel's medical clinic, Executive Health Group, the City's contractor, ran the following "want ad" flanked by an attractive ship silhouette that looked nothing like a barge:

> **COME ABOARD . . .**
> **AND JOIN THE MEDICAL CREW OF THE VERNON C. BAIN**
> If you'd like to be part of an innovative Medical Service, we have

The Fall 1992 opening of the VERNON C. BAIN at Rikers Island[115] set off several changes:

> 1) The existing VERNON C. BAIN ferry became the HAROLD A. WILDSTEIN.[116]
>
> 2) The BIBBY RESOLUTION and the BIBBY VENTURE were closed[117] and later put up for sale.[118] In July 1994, the pair were auctioned off for $1.8 million to A.L. Burbank, a California shipbroking company.[119] This price represented a return of less than four cents on the dollar.[120]

> outstanding opportunities available for qualified healthcare professionals. EHG National Health Services, Inc., a leading national health service corporation, is seeking healthcare staff for a state-of-the-art maritime correctional facility located on the shores of the Southeast Bronx. . . . We offer full-time, part-time and per diem shifts and are able to accommodate flexible hours and variable sessions. When you **BOARD SHIP**, your car will be safely parked in a free parking lot. . . .

Display Ad, Daily News (NY), Feb. 2, 1992, at 2 (Classified) (bold as in original).

115 *See supra* note 4.

116 The new name honored a Rikers Island psychologist who had been killed during a 1990 robbery. *See There Are Fissures of the Heart That Never Mend*, New York Correction History Society, http://www.correctionhistory.org/pdf/the-harold-a-wildstein-story.pdf.

117 *See* Selwyn Raab, *2 Jail Barges to be Closed and Removed*, N.Y. Times, Feb. 15, 1992, § 1, at 25.

118 *See* Bruce Lambert, *Wanted: Good Home for Barges. Well Maintained. Very Secure*., N.Y. Times, Dec. 5, 1993, at CY6. To help spur interest, the City ran ads that read:

> **BARGES FOR SALE**
> Bids will be received by the City of New York, Department of General Services for the sale of barges, "BIBBY RESOLUTION" and "BIBBY VENTURE" on June 22, 1994 at 11:00 a.m. For additional information, please contact the N.Y.C. Department of Correction. . . .

Display Ad, N.Y. Times, May 18, 1994, at D21 (bold as in original).

When he learned that the vessels were being put up for sale, former Mayor Ed Koch implored the City to keep them, arguing they could be turned into "homeless shelters or AIDS hospices." Navarro, *supra* note 97.

119 *See* Esther B. Fein, *A $1.8 Million Bid Wins 2 Empty Prison Barges*, N.Y. Times, July 29, 1994, at B3. The sale later was challenged, unsuccessfully, by a third party. *See infra* text accompanying notes 214-17.

Ironically, just two years earlier the City had received a $3.2 million offer but had rejected it as being too low. *See* Mark Mooney, *New Woes "Sale" with Jail Ships*, Daily News (NY), Oct. 10, 1994, at 8. As Mooney further explains, within months of the City's sale to A.L. Burbank, a Singaporean company called World Sale Ship Brokering placed the pair (temporarily renamed FLOTEL 750 and FLOTEL 1000) back on the market for $10 million.

120 By the time of the sale, the City's investment totaled $53.5 million: $42 million for acquisition, renovation, and siting; $6.5 million to upgrade Pier 40 so that the BIBBY VENTURE could be moved to it; and $5 million for post-use (*i.e.*, 1992-94) maintenance. *See* Mark Mooney & David L. Lewis, *$5 Million Down Drain in Floating Prisons*,

> 3) The HAROLD A. WILDSTEIN and the WALTER KEANE ferries continued for a time to be used as inmate auxiliary housing but eventually were turned into administrative space.[121] In 2003, the City sold the HAROLD A. WILDSTEIN to a New Jersey scrapyard.[122] In 2004, it sold the WALTER KEANE to a New York financier, who soon sold it to a different scrapyard.[123]

The crack epidemic of the late 1980s and early 1990s was not confined to New York City.[124] As a result, politicians throughout the country argued that ships were a cheap and fast way to relieve prison overcrowding.[125] In the end, however, none of these proposals was greenlighted.[126]

Daily News (NY), July 12, 1994, at 14.

121 *See Final "Ex," supra* note 89 ("As jail population eased in the early 2000s, the ferries' use as reserve dorms declined. Then they were used for DOC offices, inmate programs, and services.").

122 *Id.* ("The Merrell/Wildstein was purchased by a Bayonne company for scrap, brought to the waters of the Kill Van Kull separating Staten Island from New Jersey, and placed alongside a pier about July 2003. The vessel was partially disassembled but sunk into the waters at the foot of 2d Street in Bayonne before salvage was completed. Its removal was the subject of a lawsuit filed by the federal government in November 2004."). The lawsuit, titled United States v. Bayonne Durable Construction Co., No. 04-cv-05784 (D.N.J. filed Nov. 23, 2004), was settled in March 2006. The case file can be accessed on PACER (pacer.login.uscourts.gov).

123 *See Final "Ex," supra* note 89 ("Metal Management Inc. . . . bought the ex-Kolff/ex-Keane for scrap value from a Queens financier who had purchased it from NYC in the Spring of 2004. He said that originally he had hoped to see its survival in NY or elsewhere, possibly as [a] floating casino or health services facility or emergency shelter for the homeless."). *See also Salvaging the Walter Keane Staten Island Ferry*, Olde Good Times (Nov. 14, 2017), https://ogtstore.com/blog/tag/nautical/ (blog post offering for sale various items from the WALTER KEANE, "including salvaged anchors and weights, industrial chain, nautical bells, and marine equipment").

124 *See* David Farber, Crack: Rock Cocaine, Street Capitalism, and the Decade of Greed (2019). As Farber points out, "The crack crisis [was] the dark side of the Reagan-Bush-Clinton years." *Id.* at 6.

125 *See*, *e.g.*, Joe Jackson, *Is Barge Jail in Norfolk's Future?*, Virginian-Pilot (Norfolk), Sept. 16, 1994, at B1; Brian McGrory, *[Massachusetts] Floats Plan for Prison Ships to Ease Crowding*, Boston Globe, Sept. 19, 1991, at 1; Leo C. Wolinsky, *Prison Ship Idea Sails into Sacramento Debate*, L.A. Times, July 7, 1987, pt. II, at 5; *[Texas] Prison Ship Idea Called Unsinkable*, Fort Worth Star Telegram, May 20, 1987, at A22; Alyn Ackermann, *[New Jersey] Studies Conversion of Troop Ship [MAURICE ROSE] into Prison*, Asbury Park Press (NJ), Oct. 29, 1986, at A12. *See also* Joan Barron, *Prison Ships & Sinking Triple Trailers*, Caspar Star-Trib. (WY), Jan. 5, 1992, at A8 ("This approach [of turning ships into prisons] isn't really practical in land-locked Wyoming. It has its attraction though, given the ragged history of the existing state prison near Rawlins.").

In 1986, the City of Philadelphia agreed to a consent decree capping its inmate population. The decree also required it to build a new downtown detention center by December 31, 1990. *See* Harris v. Pernsley, 654 F. Supp. 1042, 1046 (E.D. Pa.), *appeal dismissed*, 820 F.2d 592 (3d Cir.), *cert. denied*, 484 U.S. 947 (1987). In 1989, when the City announced at a court hearing that it was unlikely to meet the deadline, District Judge Norma L. Shapiro suggested that it consider "anchoring a prison ship in the Delaware River." Steve Stecklow, *Inmates Protest Crowding*, Phil. Inquirer, Feb. 20, 1989, at 1B.

126 Even before the crack epidemic, government officials in several states had suggested that prisoners be kept on ships. *See, e.g.*, Dave Hodges, *[Florida] Prison Ship Idea*

In a 2018 interview, Admiral Paul F. Zukunft revealed that the U.S. Coast Guard was considering hiring a private prison ship to hold drug smugglers caught at sea until they could be brought to the United States.[127] According to Zukunft, this would allow the Coast Guard to focus on more urgent tasks.[128]

IV. U.S. Case Law

Prison ship cases can be organized as follows: 1) "mere mention"; 2) "literary effect"; and, 3) "key role." Due to their volume, I have made the modern-day "New York City" cases their own category.

A. Mere Mention Cases

In "mere mention" cases, prison ships are mentioned, but only in passing. In *United States v. Burr*,[129] for example, it was explained that James Knox, one of the government's witnesses, was forced to spend time in a New Orleans prison ship after he refused to cooperate with General James Wilkinson:

> Failing to get from him such a deposition as he desired, it was alleged that General Wilkinson had then caused [Knox] to be arbitrarily and illegally imprisoned. . . . Judge Hall, it was said, must be presumed to have acted under the influence of General Wilkinson, who was exercising a military dictatorship in New Orleans. Knox was taken from the jail to the "prison ship," it was contended, by . . . military force.[130]

Resurrected, Fla. Today (Cocoa), Dec. 18, 1981, at 1B; Kenneth T. Berents, *Prison Ship Idea Privately Pushed by [Maryland] Governor*, Evening Sun (Balt.), Sept. 9, 1976, at C3; Janice Wolf, *A Prison Ship? Idea Won't Float, [Hawaii] Aide Says*, Honolulu Star-Bull & Advertiser, May 30, 1976, at D7; *Prison Ship Idea Studied by Louisiana*, Miami Herald, Sept. 28, 1975, at 8-AW.

Some private citizens also pushed the idea. *See*, *e.g.*, Ed Lattal et al., *Boats Could Solve Prison Overcrowding*, Hartford Courant, July 5, 1984, at E2 ("We are sixth grade students from Clover Street School in Windsor[, Connecticut]. . . . Our alternative plan would be to have boats in the oceans that are actually prisons."); *Floating Prisons?*, North Adams Transcript (MA), Aug. 21, 1981, at 1 ("Vincent F. Zarrilli, . . . a 49-year-old [Boston] kitchenware maker . . . wants officials to study the idea of converting old aircraft carriers into floating prisons."); Editorial, *Prison Compromise*, Green Bay Press-Gazette (WI), Sept. 24, 1979, at A6 ("Debate continues on finding sites for new Wisconsin prisons. There is agreement that the state needs more facilities for a rapidly growing inmate population. . . . But nobody wants prisons built near where they live. Perhaps a prison ship is the solution.").

127 *See* Hope Hodge Seck, *Coast Guard Eyes Leasing Civilian Jail Ship to Hold Detainees*, Military (Jan. 16, 2018), https://www.military.com/dodbuzz/2018/01/16/coast-guard-eyes-leasing-civilian-jail-ship-hold-detainees.html.

128 *Id*. Shortly before the interview, the *New York Times* published a lengthy article reporting that drug smugglers caught by the Coast Guard routinely were spending weeks at sea, chained to outside decks with no protection from the elements, as the vessels continued their missions before finally returning to port. *See* Seth Freed Wessler, *Prisoners at Sea*, N.Y. Times, Nov. 26, 2017, at 39 (Sunday Mag.).

129 25 F. Cas. 41 (C.C.D. Va. 1807) (No. 14,692F).

130 *Id.* at 47. Some background information is needed to make this paragraph intelligible.

In *Patrick v. Commercial Insurance Co.*,[131] a merchant ship lying in the harbor of Cádiz, Spain, ran aground in a storm and later was burned by French soldiers.[132] The ship's owners sought reimbursement from their insurers, who refused to pay based on a clause in the policy that read: "The assurers take no risk in port but sea-risk."[133] To get around this language, the owners argued that the vessel had been lost outside the port:

> The place where the ship was driven ashore was nearly opposite *Fort Puntales*, and immediately adjoining the fortifications of the *French*, on *Trochedera* creek, being a beach (or, as some of the witnesses said, the *Trochedera* islands) on the opposite side of the *Bay of Cadiz*. The master said the place was not considered as part of the port of *Cadiz*, and was then held by a hostile power, and entirely out of the jurisdiction of *Cadiz*. Before the *French* besieged *Cadiz*, merchant ships used to lie along from *Cadiz* to *Puntales*, and the *Spanish* prison-ships used to lie above the latter place; but in consequence of the position taken by the *French*, they were moved nearer *Cadiz*.[134]

At the end of the trial, the jury, deciding that the ship had been lost at sea, found for the owners.[135] On appeal, its verdict was affirmed.[136]

Former Vice President Aaron Burr was on trial for treason, accused of trying to establish his own country in the southwestern part of the United States. One of Burr's key partners was General James Wilkinson, who, with Burr's help, had been named Louisiana's territorial governor in 1805. To avoid being indicted along with Burr, Wilkinson in 1806 sent a false, but highly damaging, letter to President Thomas Jefferson. Although Burr eventually was acquitted, the trial left him financially and politically ruined. Wilkinson, on the other hand, emerged relatively unscathed. Since his death in 1825, however, Wilkinson has come to be regarded as a traitor. For a further discussion, *see, e.g.*, James E. Lewis, Jr., The Burr Conspiracy: Uncovering the Story of an Early American Crisis (2017); David O. Stewart, American Emperor: Aaron Burr's Challenge to Jefferson's America (2011); Peter Charles Hoffer, The Treason Trials of Aaron Burr (2008).

Burr's trial later inspired Edward Everett Hale's famous short story *The Man Without a Country*, 12 Atl. Mon. 665 (Dec. 1863). In it, U.S. Army lieutenant Philip Nolan befriends Burr and later is tried with him. When he is convicted of treason, Nolan tells the judge, "Damn the United States! I wish I may never hear of the United States again!" *Id.* at 667. The judge therefore sentences Nolan to spend the rest of his life imprisoned on U.S. Navy ships, where no one is permitted to tell him anything about what is happening in America. As the years pass, Nolan becomes increasingly desperate for such news. Just before dying, he finally is told how the country has developed. For a further discussion, see Alexander Zaitchik, *No Land's Man: Edward Everett Hale's "The Man Without a Country" Turns 150*, L.A. Rev. Books (Mar. 24, 2013), https://lareviewofbooks.org/article/no-lands-man-edward-everett-hales-the-man-without-a-country-turns-150/.

131 11 Johns. 9 (N.Y. Sup. Ct. 1814).

132 *Id.* at 9.

133 *Id.*

134 *Id.* at 10 (italics in original).

135 *Id.* at 12.

136 *Id.* at 13-14.

In *Wysham v. Rossen*,[137] the PHILIP, a merchant ship travelling from Baltimore to Europe, was captured by a British man-of-war and forced to divert to Jamaica.[138] After being detained there for six months, she was released and returned to Baltimore.[139] Once back in America, Rossen, the ship's second mate, sued for his unpaid wages and was awarded $185.50.[140] On appeal, however, the verdict was overturned.[141]

While in Jamaica, the PHILIP's crew had been forced to live on a prison ship, a fact the court noted but did not find relevant:

> The *Philip* . . . arrived at *Jamaica* the 9th of *October*. The plaintiff, after being on board a month, was compelled, with the rest of the crew, to go on board a prison ship, there being no provisions on board the *Philip*, and was detained on board the prison ship until the 11th of *March*, when he and the rest of the crew were restored to the *Philip*.[142]

In *Succession of Seymour*,[143] various parties put in claims to a woman's estate.[144] Because she had used multiple aliases, there was considerable confusion regarding her true identity.[145] As a result, the trial court was forced to undertake an extensive review of her life. In doing so, it found that in 1851 she had escaped from a California prison ship:

> In the month of June, 1846, a young woman, apparently about nineteen years of age, who stated her name was Fanny Minerva Seymour, shipped from Liverpool, England, for New York. . . . From New York she came to this city [New Orleans], arriving here in the latter part of the summer or early in the fall of 1846. . . . Seymour . . . reached San Francisco in 1850, and lived there a short time in a house of ill fame. In the same year, she went to Sacramento, and became the proprietress of a place called "The Palace," and the mistress of a gambler, Rube Raines, who owned a gambling saloon, the El Dorado. She lived in Sacramento under the name of Fanny M. Smith, until December 20, 1851. On that night, she shot and wounded a man named Albert Putnam, was arrested, carried to the prison ship in the river, from which she escaped, and left California. . . .[146]

In *Cross v. Derwinski*,[147] a World War II veteran who had spent most of the war in Japanese prison camps unsuccessfully sought benefits when, late in life, he developed post-traumatic arthritis and irritable bowel syndrome.[148] In describing the petitioner's service record, the court wrote:

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137 11 Johns. 72 (N.Y. Sup. Ct. 1814).
138 *Id.* at 72.
139 *Id.*
140 *Id.*
141 *Id.* at 73.
142 *Id.* at 72 (italics in original).
143 24 So. 818 (La. 1897).
144 *Id.* at 819.
145 *Id.*
146 *Id.* at 820-21. Although the court does not give the ship's name, it seems likely that it was the LA GRANGE. *See supra* text accompanying note 75.
147 2 Vet. App. 150 (1992).
148 *Id.* at 151.

> Appellant served on active duty with the Armed Forces during World War II from May 21, 1941, to May 28, 1946. R. at 1. . . .
>
> In May 1942, appellant was captured by Japanese forces and was interned in Japanese prison camps until September 1945. R. at 51, 62. During this period, appellant was confined for 21 days in the hold of a prison ship taking him from the Philippines to Japan. R. at 51.[149]

Lastly, in *United States v. Battle*,[150] the court denied a prisoner's habeas corpus motion.[151] In discussing the underlying facts, it referred to

> [t]wo inmates [who] testified by videotaped deposition: Carlos Hill and John McCullough. Hill had been in Cell House C with [Anthony] Battle at [the U.S. Penitentiary in] Atlanta. In part, he testified that Battle thought [the FBOP] was putting "computer chips or things in his brain to find out what he knew. . . ." Tr. 7. In response to habeas counsel's question, "Q: implants?" Hill said "Yeah. Transplants, implants." He related watching a television program with Defendant regarding alternatives to prison. One suggestion was making an aircraft carrier into a floating prison, and implanting devices in the prisoners which would relay their thoughts. At that point, Defendant had said that's what BOP had done to him.[152]

B. Literary Effect Cases

In "literary effect" cases, prison ships are mentioned to emphasize a specific point. In *In re Bonner*,[153] for example, John Bonner was found guilty of stealing four cows on federal land.[154] Because there was no local federal prison, the court ordered Bonner to serve his sentence in the Iowa state penitentiary.[155] Bonner challenged this order, arguing that as a federal prisoner such confinement was illegal.[156] In agreeing with him, Justice Field wrote:

> Counsel for the government admits that [based on previous cases], the petitioner should not have been sentenced to imprisonment in the [state] penitentiary, but he claims that the judgment and sentence are not for that cause void, so as to entitle the petitioner to a writ of habeas corpus for his discharge; and he asks the court to reconsider [the previous precedents]. According to his argument, it would seem that the court does not exceed its jurisdiction when it directs imprisonment in a [state] penitentiary[, or] the guard house of a fort, or the hulks of a prison ship, or in any other place not specified in the law.
>
> We are unable to agree with the learned counsel, but [instead] are of opinion that, in all cases where life or liberty is affected by its proceedings,

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149 *Id.*
150 264 F. Supp. 2d 1088 (N.D. Ga. 2003).
151 *Id.* at 1209.
152 *Id.* at 1153.
153 151 U.S. 242 (1894).
154 *Id.* at 243.
155 *Id.*
156 *Id.* at 243-44.

> the court must keep strictly within the limits of the law authorizing it to take jurisdiction, and to try the case, and to render judgment.[157]

In *Grayson v. Lynch*,[158] the plaintiffs were awarded $5,200 for the loss of their herd, which had become ill with Texas cattle fever ("TCF") after being infected by the defendants' herd.[159] In upholding the judgment, Justice Brown rejected the defendants' argument that it should be set aside because the plaintiffs had described TCF as a "contagious" disease but the trial court had deemed it an "infectious" disease:

> There is, doubtless, a technical distinction between the two in the fact that a contagious disease is communicable by contact, or by bodily exhalation, while an infectious disease presupposes a cause acting by hidden influences, like the miasma of prison ships or marshes, etc., or through the pollution of water or the atmosphere, or from the various dejections from animals. The word "contagious," however, is often used in a similar sense of "pestilential" or "poisonous," and is not strictly confined to influences emanating directly from the body.[160]

In *Mitchell v. Alcoholic Beverage Control Commission*,[161] the plaintiff was denied a liquor license because government officials felt his town already had a sufficient number of bars and carry-out stores.[162] In ordering the state to issue the license,[163] the trial court peppered its opinion with long quotes from historical sources, including one concerning the hatred that the patriots felt for the Tories following the end of the American Revolutionary War:

> An article in the "Massachusetts Chronicle" expressed the common feeling: "As Hannibal swore never to be at peace with the Romans, so let every Whig swear, by his abhorrence of slavery, by liberty and religion, by the shades of departed friends who have fallen in battle, by the ghosts of those of our brethren who have been destroyed on board of prison-ships and in loathsome dungeons, never to be at peace with those fiends the refugees, whose thefts, murders, and treasons have filled the cup of woe."[164]

Lastly, in *United States v. Corozzo*,[165] the government asked that severe restrictions be made part of the defendant's sentence. In rejecting this request,[166] the court provided a long history lesson, beginning with the prison ships used by the British during the American Revolutionary War:

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157 *Id.* at 256.
158 163 U.S. 468 (1896).
159 *Id.* at 469.
160 *Id.* at 477. Justice Brown's "miasma of prison ships" language is quoted with approval in Ex parte Liang Buck Chew, 296 F. 182, 184 (D. Mass. 1923), a case upholding the deportation of a Chinese citizen suffering from clonorchiasis (*i.e.*, fluke worm of the liver).
161 193 A.2d 294 (Del. Super. Ct.), *rev'd and remanded*, 196 A.2d 410 (Del. 1963).
162 *Id.* at 298-99.
163 *Id.* at 385.
164 *Id.* at 325-26.
165 256 F.R.D. 398 (E.D.N.Y. 2009).
166 *Id.* at 403.

> In the sentencing of this sixty-nine year old captain and killer for the [M]afia, the government requests that severe conditions be imposed by the court on his imprisonment and supervised release, limiting his right to interact with: 1) relatives who were or are criminals; and 2) members or associates of organized crime families. Even if modified, the restrictions sought would probably result in long-term solitary confinement, onerous segregation, and alienation from natural family.
>
> The request is considered from chambers high in the new federal courthouse for the Eastern District of New York, with historical memories sunk into its foundations and rising into [the] surrounding atmosphere. On these sanctified grounds, cruelty to American prisoners was first practiced on a mass scale.
>
> The deadliest battle of the Revolutionary War was fought here on August 27, 1776, when Washington's Army was defeated. *See, e.g.*, Barnet Schecter, *The Battle for New York* 141-54 (2002). Thousands of American prisoners captured in that engagement and in those that followed were incarcerated in British prison ships anchored in New York harbor, and in the City's sugar houses. *See* Edwin G. Burroughs, *Forgotten Patriots: The Untold Story of American Prisoners During the Revolutionary War* (2008). There they were packed in one upon another, denied warmth in bitter winter, light, clothing and sanitary facilities, and stifled without ventilation in summer heat. They died by the thousands—Whites and Blacks, sailors and soldiers of the new Republic. For years their bones washed up on the beaches of Brooklyn. Their remains are interred in the Prison Ship Martyrs Monument at Fort Greene, a short walk from [this] courthouse. . . .
>
> So, when the government seeks to impose terms that make life in prison and on supervised release harsher than necessary, the United States District Court for this district cannot ignore history and this country's aspiration to provide justice for all. It must seriously consider whether it would be justified in granting the government's motion to impose cruel prison conditions.[167]

C. Key Role Cases

In "key role" cases, prison ships play a significant factual or legal role.

In *Thompson v. Rowe*,[168] for example, "one Gale" received a warrant (*i.e.*, an IOU), dated Aug. 1, 1850, from the Sacramento County Auditor entitling him (or her) to be paid $1,192.70 for services rendered aboard a prison ship.[169]

By the time of the lawsuit (Dec. 22, 1851), the warrant was owned by Ira D. Thompson.[170] When he sought to cash it in, his request was denied, even though the

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167 *Id.* at 399-400.

168 2 Cal. 68 (1852).

169 *Id.* at 68. The opinion does not provide either Gale's first name or the ship's name. Likewise, it does not describe the nature or duration of Gale's work. It seems likely, however, that the vessel was the LA GRANGE. *See supra* text accompanying note 75.

170 *Thompson*, 2 Cal. at 68. The court does not explain how Thompson came to own the warrant.

county had enough funds on hand to cover it.[171] Thompson therefore filed a petition for mandamus against Cyrus Rowe, the County Treasurer.[172] In response, Rowe cited an intervening court order (Nov. 8, 1851) directing him to pay such warrants at 50% of face value.[173] The court order had been issued pursuant to a state law (Mar. 11, 1851) restricting local government expenditures.[174]

The trial court ordered Rowe to pay Thompson the full value of the warrant, plus interest.[175] On appeal, the California Supreme Court, finding the Legislature's directions to be "clear," reversed in a brief opinion (three paragraphs).[176]

In *Stovel v. United States*,[177] the master (Edwin F. Stovel) and crew of the NANSHAN sought to be awarded a statutory bounty for their actions during the Battle of Manila Bay (May 1, 1898).[178] The court rejected the men's claim, holding that only U.S. Navy ships were eligible for the money.[179]

Until shortly before the battle, the NANSHAN had been a British merchant ship in Hong Kong.[180] On April 6, 1898, Commodore George Dewey (acting under orders from officials in Washington, D.C.) purchased the NANSHAN to serve as a support vessel.[181] After promising the plaintiffs double wages if they would stay on, Dewey outfitted the NANSHAN with two one-pound guns and placed five of his own men (an officer and four sailors) on the ship.[182] These changes, it was argued, made the NANSHAN a U.S. Navy ship.[183]

In deciding that no bounty was due, the Court of Claims distinguished *The Ceylon*,[184] a British case decided during the Napoleonic Wars that had involved a French prison ship:

> On the argument and in the brief of counsel the court's attention is called to the case of the Ceylon . . . in which it is held in substance that the employment of a vessel in the public military service of the enemy, by those who have competent authority so to employ her, "is a sufficient setting forth for war" under the prize act, though the vessel may not be furnished with any formal commission of war. The facts upon which that decision is predicated are briefly as follows:

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171 *Id.*
172 *Id.*
173 *Id.*
174 *Id.*
175 *Id.* at 69.
176 *Id.* at 71.
177 36 Ct. Cl. 392 (1901).
178 *Id.* at 396. The Battle of Manila Bay was the first major engagement of the Spanish-American War. *See, e.g.*, Jose Roca de Togores y Saravia, Blockade and Siege of Manila (Nat'l Hist. Inst. edition 2003) (1909); Robert Conroy, The Battle of Manila Bay: The Spanish-American War in the Philippines (1968); Nathan Sargent, Admiral Dewey and the Manila Campaign (1947).
179 *Stovel*, 36 Ct. Cl. at 402-03.
180 *Id.* at 397.
181 *Id.*
182 *Id.*
183 *Id.* at 399.
184 1 Dod. 105 (High Ct. Adm. 1811).

> [The Ceylon, a British merchant] ship[, was] captured by French frigates. . . . She [later] was . . . dismantled[] and fitted out as a prison ship for English prisoners of war, in which condition she was found at the time of [her recapture by the British Navy]. The question was whether this ship was "sufficiently set forth for war" to come within the prize act, which directs restitution of British ships recaptured from the enemy, unless they shall have been "set forth as ships or vessels of war by the enemy."
>
> The court held in that case, by Sir William Scott, that she came within the phraseology of the statute "set forth as ships or vessels of war."
>
> The question presented and decided in [The Ceylon] is not the question submitted to the consideration of the court in this proceeding. The question is not whether the [NANSHAN] belonged to the United States as a part and parcel of the war equipment, but whether, in the battle of Manila, she was so constituted, equipped, and conditioned as to come within the letter or spirit of the statute entitling vessels to participate in the bounty, upon the theory that they participated in the battle.
>
> The claimant in this case and his crew were not in the military service of the United States. They had not been enlisted or hired to perform and discharge military duty. They were not identified with the naval force, in a military sense, which fought the battle and won the victory at Manila.
>
> It would be an unjust discrimination against the men who were in the service, subject to all the restrictions and requirements of that service, and all the dangers incident to that battle, to allow the demand of the claimant, who did not undertake, by any obligation, to perform the duties and discharge the functions of a soldier.[185]

In *In re Thompson's Will*,[186] the decedent, a U.S. Army lieutenant, was killed on Dec. 15, 1944, when the Japanese hell ship[187] he was on was sunk by a U.S. bomb.[188] Lacking a will, his parents introduced a letter, dated Feb. 19, 1942, he had written to them in which he said that if anything happened to him, he wanted them to collect his $10,000 life insurance policy.[189] The insurance company objected to the introduction of the letter, citing New York's non-recognition of holographic wills.[190] When the parents pointed out that New York law recently had been changed to make an exception for service members,[191] the company claimed that as a POW, the decedent did not qualify for the exception.[192] In rejecting this argument, the court wrote:

> The respondent also contends the proponent's testimony showed that the decedent was a prisoner of war on a prison ship and if killed as claimed

185 *Stovel*, 36 Ct. Cl. at 401-02.
186 76 N.Y.S.2d 742 (Surr. Ct. 1948).
187 Japan's hell ships are discussed *supra* note 39.
188 *Thompson's Will*, 76 N.Y.S.2d at 744.
189 *Id.*
190 *Id.*
191 *Id.* at 746.
192 *Id.* at 749.

> in Subic Bay on such prison ship that he was no more in actual military service than a civilian would be. It is well known that prisoners of war many times escape and return and ofttimes kill or wound the enemy in making such escape and no special ceremony or re-enlistment is necessary on the return of such prisoners to their commands. Section 846 of 10 U.S.C.A. Army, relied on by respondent, does not hold to the contrary, but by providing for payment during captivity even after the expiration of the soldier's term of service indicates the soldier is at all times in actual military service. Such argument must be, therefore, brushed aside, and it is here held that this decedent as such prisoner was at all times from the date of his capture in the actual military service of the United States. Any contrary view would defeat the very purpose of Section 16, Decedent Estate Law, itself.[193]

Lastly, in *Wilson v. Ponce*,[194] a group of inmates at Terminal Island, a federal prison in Los Angeles, filed a habeas corpus petition in which they demanded to be released because of COVID-19.[195] By the time of their lawsuit (May 16, 2020), the disease had ravaged the prison, infecting two-thirds of the inmates and killing nine of them.[196] In rejecting their request, the court explained:

> The nature of the relief[,] coupled with the provisional class certification[,] is simply not what lawyers and judges think of as habeas, even under § 2241, let alone §§ 2254 or 2255. . . . [Moreover,] Petitioners have carefully argued that release is the only remedy; however, relief could be obtained by transferring prisoners, including by such extraordinary measures as recalling the U.S.N.S. Mercy from San Diego to serve as a prison ship.[197]

D. New York City Cases

The "New York City" cases include all decisions that mention, individually or collectively, the BIBBY RESOLUTION, BIBBY VENTURE, HAROLD A. WILDSTEIN, VERNON C. BAIN, and WALTER KEANE.

1. HAROLD A. WILDSTEIN and WALTER KEANE

During its time as the VERNON C. BAIN, the HAROLD A. WILDSTEIN appeared in four opinions. In contrast, no case mentions the WALTER KEANE.[198]

In *Benjamin v. Malcolm*,[199] a prison overcrowding case, the court, in acknowledging that the City was making good-faith efforts to address the problem, referenced the VERNON C. BAIN in a footnote:

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193 *Id.*
194 2020 WL 3053375 (C.D. Cal. 2020).
195 *Id.* at *8.
196 *Id.* at *2.
197 *Id.* at *10. From March 2020 to May 2020, the U.S. hospital ship MERCY was stationed in Los Angeles to help the area fight the COVID-19 pandemic. *See* Andrew Dyer, *Hospital Ship Mercy Departs S.D. to Assist in Los Angeles*, S.D. Union-Trib., Mar. 24, 2020, at A7; Andrew Dyer, *Hospital Ship Mercy Returns to San Diego Today*, S.D. Union-Trib., May 15, 2020, at A1.
198 *But see infra* note 230.
199 659 F. Supp. 1006 (S.D.N.Y. 1987).

> For instance, the New York Times has reported that the conversion of a ferry boat into a "prison boat," a project which was planned to take sixty days and cost 4.86 million dollars, actually took more than twice as long and cost almost twice that much. *See* Lambert, *City's Prison Boat is Late and Costly*, N.Y. Times, Mar. 24, 1987, at B8, col. 1.[200]

In *First Marine Shipyard, Inc. v. Vessel "VERNON C. BAIN,"* the shipyard that converted the PRIVATE JOSEPH F. MERRELL into the VERNON C. BAIN sued both the vessel and New York City for an unpaid balance of $194,999.27, calculated as follows: 1) $115,751.16 for past due invoices; and, 2) $79,248.11 for various change orders.[201]

The ensuing litigation resulted in three opinions. In the first, Judge Charles S. Haight, Jr., *sua sponte*, directed the parties to brief the issue of whether admiralty jurisdiction existed.[202] In the second, Judge Haight, with a nod to Dickens, ruled that such jurisdiction was present:

> The contracts at bar are not for the construction of a new vessel (clearly non-maritime); nor are they for the repair of an existing vessel so that she may return to navigation (clearly maritime). Strictly speaking, the contracts are for the conversion of a vessel. If the purpose of the work was to return the vessel to navigation in a different form for a different purpose, the contracts would clearly be maritime. . . . That cannot be said of the conversion of the ferryboat Private Joseph F. Morell [sic—should be Merrell] into the detention facility Vernon C. Bain: the Department of Corrections [sic] acquired the vessel not to transport inmates over water, but to keep them housed in a floating facility attached to the land. The City argues that the conversion work must be for the purpose of continuing the vessel in navigation. While the question is not free from doubt, I think that the Bain's continued documentation as a vessel, her ongoing voyages under tow for inspection, and her residual utility as a vessel imbue these contracts with the requisite maritime nature. Indeed, the vessel in her present occupation follows in the melancholy tradition of the prison ship, relatively unknown today, but a familiar form of incarceration in the days of Dickens. Regarding the contract for jurisdictional purposes as one of "uncertain intendment," and resolving those reasonable doubts undoubtedly present in favor of the admiralty jurisdiction . . ., I conclude that the contracts at bar are maritime in nature and hence within the Court's admiralty jurisdiction. The case would be different if plaintiff's contracted-for work had at its purpose the reduction of the ferryboat to scrap, or its conversion to use exclusively on land, without residual capacity for navigation.[203]

In his third opinion, Judge Haight, after a lengthy review of the facts, granted summary judgment to the shipyard on the past due invoices and summary judgment to the defendants on the change orders.[204]

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200 *Id.* at 1007 n.2. As explained *supra* note 90, Lambert's story concerned the conversion of the PRIVATE JOSEPH F. MERRELL into the VERNON C. BAIN.

201 *See* 1991 WL 120314, at *4 (S.D.N.Y. 1991).

202 *See* 1990 WL 6593, at *2 (S.D.N.Y. 1990).

203 1990 WL 89343, at *3 (S.D.N.Y. 1990) (footnote omitted).

204 *First Marine*, 1991 WL 120314, at *5-*6.

2. BIBBY RESOLUTION and BIBBY VENTURE

In *Silver v. Koch,*[205] a group of Lower East Side residents sued to keep the BIBBY VENTURE from opening. They scored an early victory in the trial court (Nov. 13, 1987)[206] that quickly was quashed by the appeals court (Feb. 26, 1988):

> Order of the Supreme Court, New York County (Shirley Fingerhood, J.), entered November 13, 1987, which preliminarily enjoined the respondents from transferring any prisoners or staff to Pier 36 or to the barge, the "Bibby Venture," and which set the matter down for an evidentiary hearing as to whether an emergency situation exists and as to whether the use of the pier and barge is and will be of a temporary nature, reversed, on the law and facts, and in the exercise of discretion, and petitioners' motion for preliminary injunctive relief denied, without costs or disbursements.
>
> Respondents selected Pier 36 for the temporary mooring of a prison barge to alleviate overcrowding elsewhere. Petitioners commenced this proceeding to compel respondents to comply with Uniform Land Use Review Procedure ("ULURP"), State Environmental Quality Review [Act] ("SEQRA") and City Environmental Quality Review ("CEQR") procedures and also to preliminarily and permanently enjoin further action with respect to the preparation of the pier for the mooring of the barge.
>
> Since petitioners have failed to show the applicability of ULURP, SEQRA or CEQR to the actions of the respondents, the grant of a preliminary injunction by the [trial] court was an abuse of discretion. Furthermore, petitioners did not establish their likelihood of success on the merits, irreparable harm to them absent the grant of the relief sought, nor a balance of the equities in their favor (*see, W.T. Grant Company v. Srogi*, 52 N.Y.2d 496, 517, 438 N.Y.S.2d 761, 420 N.E.2d 953).[207]

One year later, a different group of residents filed a new lawsuit, raising the same types of claims, when the City announced that it was planning to move the BIBBY VENTURE to Pier 40 in Greenwich Village. Once again, the residents succeeded in obtaining a preliminary injunction from the trial court (Apr. 13, 1989).[208] After reviewing the facts more closely, however, the court dissolved the injunction and dismissed the case (June 7, 1989), explaining:

> Much of petitioners' arguments on this issue fall into the realm of the NIMBY syndrome (not in my backyard) (see, Greenberg v. Veteran, 89 Civ. 0591, WL36290 [SDNY April 17, 1989]; Lewis, *Group Homes, Shelters and Congregate Housing: Deinstitutionalization Policies and the*

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205 525 N.Y.S.2d 186 (App. Div.), *appeal dismissed*, 522 N.E.2d 1069 (N.Y.), *and appeal denied*, 533 N.E.2d 673 (N.Y. 1988).

206 The trial court's opinion is unreported.

207 *Silver*, 525 N.Y.S.2d at 187.

208 *See* Federation to Preserve the Greenwich Village Waterfront and Great Port, Inc. v. Board of Estimate of the City of New York, 1989 WL 1715689 (N.Y. Sup. Ct. 1989) (star pagination unavailable).

> *NIMBY Syndrome*, 21 Real Prop. Prob. T.J. 413; Andreen, *Defusing the "Not in My Backyard" Syndrome*, 63 N.C.L. Rev. 811). While the court understands that no one wants a prison in their neighborhood, NIMBY is not a valid legal argument. The BOE and the responsible agencies were well aware of the community concerns when the BOE voted to approve the prison barge and when the negative declaration was issued. Moreover, community concern and outrage do not render the determination null and void (see, Note, [*Neighborhood Character and SEQRA: Courts Struggle with Homeless Shelters, Prisons and the Environment*, 14 Colm. J. Envt'l L. 231], at 231-243).[209]

In a one-sentence opinion, the appeals court affirmed (May 10, 1990).[210]

During their brief time as New York City jails, the BIBBY RESOLUTION and the BIBBY VENTURE spawned two reported decisions. In both, the firings of guards accused of dereliction of duty were upheld.[211]

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[209] *See* Federation to Preserve the Greenwich Village Waterfront and Great Port, Inc. v. Board of Estimate of the City of New York, 1989 WL 1715688 (N.Y. Sup. Ct. 1989) (star pagination unavailable).

[210] *See* Federation to Preserve the Greenwich Village Waterfront and Great Port, Inc. v. Board of Estimate of the City of New York, 556 N.Y.S.2d 473, 473 (App. Div. 1990). In a brief concurring opinion, Justice Asch wrote:

> I would concur in the affirmance. The underlying questions raised in this Article 78 proceeding, brought with respect to the mooring of the Bibby Venture as a prison barge, as well as the contentions of those interested, already have been considered and passed upon by this court (*In re Application of Sheldon Silver v. Edward I. Koch, etc.*, 137 A.D.2d 467, 525 N.Y.S.2d 186, *appeal denied* 73 N.Y.2d 702, 536 N.Y.S.2d 743, 533 N.E.2d 673).

Id.

[211] *See* Jones v. City of New York, 1989 WL 74942 (S.D.N.Y. 1989); Medina v. Sielaff, 582 N.Y.S.2d 685 (App. Div. 1992).

In *Jones*, a BIBBY VENTURE inmate named Paul Buttafocco, who "was awaiting trial in Brooklyn on a charge of third-degree burglary," "escaped through a hole in the mess hall's wall and jumped into the river." Jeffrey K. Parker, *First Escape from City Jail Barge*, UPI (May 1, 1988), https://www.upi.com/Archives/1988/05/01/First-escape-from-city-jail-barge/9341578462400/. Following the escape, Probationary Guard Angela Jones was fired. Claiming that she had been made a scapegoat for the embarrassing incident, she sued. In rejecting her claim, the court focused on her probationary status and wrote: "Regardless of the quality of Jones' performance, she had no constitutional property interest in her employment at the time of her dismissal. Whether her discharge was erroneous or not, she has not alleged a violation of constitutional due process rights." *Jones*, 1989 WL 74942, at *1.

In *Medina*, a probationary guard named Sherlinda Medina was accused of having a romantic relationship with a BIBBY RESOLUTION inmate named Manuel "Frankie" Cedeno. *See Medina*, 582 N.Y.S.2d at 686. In upholding her firing, the court wrote:

> In the instant matter, petitioner herself admitted that she was off post and went to an unauthorized section of the prison barge in order to visit with an inmate. Thus, regardless of whether or not she was, in fact, engaged in a personal relationship with Cedeno, and even putting aside for purposes

Additionally, in *Palmigiano v. DiPrete*,[212] a Rhode Island prison overcrowding case, the court, in describing the credentials of Dr. Lambert King, one of the plaintiffs' expert witnesses, alluded to both vessels:

> Dr. King is the Medical Director and Vice President for Professional Affairs at the Saint Vincent Hospital and Medical Center of New York City. In addition to his responsibilities for the direction of the medical services within the hospital, he is responsible for the provision of ambulatory medical, dental and mental health services at the Manhattan Detention Center in Manhattan as well as two maritime facilities housing additional inmates. . . .[213]

Lastly, as previously explained,[214] the BIBBY RESOLUTION and the BIBBY VENTURE were sold in 1994 to A.L. Burbank, a California shipbroking company, for $1.8 million. The sale immediately was challenged by a Florida scrap dealer called Impact Shipping:

> This is an action for money damages arising out of the sale of two barges by the City of New York (the "City") to defendant A.L. Burbank Shipbrokers Ltd. ("Burbank") rather than to the plaintiff, Impact Shipping, Inc. The plaintiff sues the City and Joanne Foulke, the Acting Deput[y] Commissioner of the City's Department of General Services, contending that the failure to sell the barges to it deprived it of property without due process in violation of 42 U.S.C. § 1983 (first cause of action), constituted a breach of contract (second cause of action), and violation of the City's own regulations (third cause of action). The plaintiff also sues defendant Burbank on the grounds that Burbank tortiously interfered with the plaintiff's contract (fourth cause of action) and with the plaintiff's prospective economic relations (fifth cause of action).
>
> The City and defendant Foulke now move for summary judgment pursuant to Fed.R.Civ.P. 56 dismissing the plaintiff's first, second, and third causes of action. Defendant Burbank moves for summary judgment dismissing the plaintiff's fourth and fifth causes of action. The plaintiff cross-moves

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> of this analysis the ample corroborative testimony of witnesses, her own concessions were sufficient to support the reasonableness of respondents' actions.

Id. at 688.

(The opinions, it should be noted, do not identify either vessel by name. In *Jones*, however, the court states that the plaintiff was fired for an escape that took place on a "prison barge" on April 30, 1988, see *Jones*, 1989 WL 74942, at *1, and, as explained at the beginning of this footnote, Paul Buttafocco escaped from the BIBBY VENTURE on that date. Similarly, in *Medina*, the court states that the plaintiff was fired for rendezvousing with an inmate on June 25, 1989 on a prison barge located at Pier 36, see *Medina*, 582 N.Y.S.2d at 686, and, as explained *supra* note 104, the BIBBY RESOLUTION began berthing at Pier 36 in May 1989.)

212 737 F. Supp. 1257 (D.R.I. 1990).

213 *Id.* at 1261 n.4. As will be recalled, see *supra* note 101 and accompanying text, during their time in Manhattan the BIBBY RESOLUTION and the BIBBY VENTURE officially were called "maritime facilities."

214 *See supra* text accompanying note 119.

> for partial summary judgment on the issue of liability on its first, second, fourth, and fifth causes of action and for summary judgment on its third cause of action. For the reasons explained below, the defendants' motions are granted, and the plaintiff's motion is denied.[215]

The gravamen of Impact's complaint was that after it had won the barges at auction, the City decided to restart the process and accepted Burbank's bid because it was double Impact's offer:

> In May and June 1994, the City publicly advertised the sale of two prison barges by competitive sealed bid. (Mun. Defs.' 3(g) Statement ¶¶ 1-3; Pl.'s 3(g) Statement ¶ 1.) The bid package contained several documents including an invitation to bid, which specified the bid opening date as June 22, 1994, at 11:00 a.m., and the bid terms and conditions of sale (the "bid terms"). (Hochman Aff. ¶ 24 & Ex. I.) The plaintiff submitted a bid, which included an executed copy of the bid terms, a completed and signed invitation to bid, and an initialed copy of the bid package cover sheet. (Hochman Aff. ¶ 34 & Ex. J.) When the bids were publicly opened and read on June 22, 1994, the plaintiff's bid was the highest at $450,000 per barge, for an aggregate of $900,000. (Mun. Defs.' 3(g) Statement ¶¶ 32-33; Pl.'s 3(g) Statement ¶ 14.). . . .
>
> On June 23, 1994, [the City] received a late bid from defendant Burbank. (Hochman Aff. ¶ 40 & Ex. L.) Defendant Burbank's bid was $900,00 per barge, for an aggregate of $1.8 million. By letter dated July 20, 1994, the City requested that the plaintiff extend its bid. (Hochman Aff. ¶ 46 & Ex. M.) By letter dated July 21, 1994, the plaintiff extended its bid to August 1, 1994, but stated that it considered its bid accepted as of 11:00 a.m. on June 22, 1994. (Hochman Aff. ¶ 47 & Ex. N.). . . . By letter dated July 21, 1994, the City invited both the plaintiff and defendant Burbank to participate in an informal re-bid. (Hochman Aff. ¶ 50 & Exs. P, Q.) The plaintiff received the informal re-bid letter, but did not respond to it. (Kanji Dep. (Hochman Aff. Ex. C) at 155-60.) Defendant Burbank signed and notarized the July 21, 1994 informal re-bid letter and returned it to the City including its bid in the amount of $900,000 per barge, for a total of $1.8 million. (Hochman Aff. ¶ 52 & Ex. R.). . . . The City sent Burbank a written sales order dated July 28, 1994, accepting its bid. (Hochman Aff. ¶ 56 & Ex. T.)[216]

After a detailed review of the facts, the court ruled that the vessels belonged to Burbank:

> The plaintiff never received written acceptance of its bid from the City. (Kanji Dep. (Hochman Aff. Ex. C) at 109, 268; Blustein Dep. (Hochman Aff. Ex. D) at 131, 251.) Therefore, because the plaintiff's bid was never accepted in writing, no contract was ever formed and the City did not breach the terms of the bid.[217]

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215 Impact Shipping, Inc. v. City of New York, 1997 WL 297039, at *1 (S.D.N.Y. 1997).
216 *Id.* at *2-*3.
217 *Id.* at *9.

3. VERNON C. BAIN

Since it opened in 1992, the VERNON C. BAIN has been mentioned in 102 decisions.[218] Many of these cases are prisoner grievance lawsuits.[219] In *Sankara v. City of New York*,[220] for example, the court's opinion begins:

> Plaintiff Ahmadou Sankara brings this action pro se pursuant to 42 U.S.C. § 1983 against Deborah Mateo ("Mateo"), a medical professional at the Vernon C. Bain Center ("VCBC"), and the City of New York (the "City," and together with Mateo, "Defendants"), alleging that Defendants were deliberately indifferent to his medical needs.[221]

According to Sankara, he had been forced to take medicine for two conditions (hepatitis B and tuberculosis) he did not have.[222] Finding that the complaint failed to state a cognizable cause of action, the court dismissed.[223]

In *DeBlasio v. Oliver*,[224] the plaintiff similarly sued for mistreatment:

> Plaintiff, proceeding *pro se*, initiated this action by filing a complaint on July 30, 2018. (Dkt. #2 (the "Complaint")). In the Complaint, Plaintiff alleged that on July 6, 2018, while he was detained at the Vernon C. Bain Correctional Center, a jail barge that is part of the Rikers Island correctional complex, he got into an altercation with two correction officers. (*See id*. at 4). Correction Officer Oliver is alleged to have taken Plaintiff's two Holy Qur'ans, thrown them on the floor, and put Plaintiff in an upper body hold. (*Id*.). Thereafter, Plaintiff alleges, Correction Officer Santiago sprayed Plaintiff in the face with OC-4 (a type of pepper spray). (*Id*.). Plaintiff claims to have suffered mental anguish as a consequence of the altercation, and asked the Court, among other things, to suspend Oliver and Santiago. (*Id*. at 5).[225]

After filing the case, the plaintiff refused to engage in discovery, causing the court to dismiss his complaint with prejudice.[226]

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218 This figure is based on an August 15, 2020 Westlaw search I conducted using the term "Vernon w/2 Bain."

219 In *Inman v. City of New York*, 2011 WL 4344015 (S.D.N.Y. 2011), however, the complainant was a guard who claimed, unsuccessfully, that while working aboard the VERNON C. BAIN she had been treated unfairly because she was African-American.

220 2018 WL 1033236 (S.D.N.Y.), *appeal dismissed*, 745 F. App'x 426 (2d Cir. 2018), *reconsideration denied*, 2019 WL 549018 (S.D.N.Y. 2019), *and reconsideration denied*, 2020 WL WL 1957412 (S.D.N.Y. 2020).

221 *Sankara*, 2018 WL 1033236, at *1.

222 *Id.* at *2.

223 *Id.* at *6 ("Plaintiff's allegations relate to a single incident of being misdiagnosed and prescribed the wrong medication, and the law is clear that a 'single incident of errant behavior is an insufficient basis for finding that a municipal policy caused plaintiff's injury.' *Sarus v. Rotundo*, 831 F.2d 397, 402-03 (2d Cir. 1987).").

224 2020 WL 1673790 (S.D.N.Y. 2020).

225 *Id.* at *1.

226 *Id.* at *6.

More recently, in *Trail v. New York City Department of Corrections*,[227] the court explained:

> Plaintiff, currently detained at the Vernon C. Bain Center in the custody of the New York City Department of Correction (DOC), brings this *pro se* action under 42 U.S.C. § 1983. Plaintiff alleges that housing and testing policies at Rikers Island for handling COVID-19 illness show deliberate indifference to a risk of serious harm to him.[228]

Finding the complaint to be technically deficient, the court dismissed it without prejudice.[229]

In some instances, the court does not give the vessel's name, but the date of the underlying events usually makes it clear that the case involves the VERNON C. BAIN.[230] In *State v. Luna*,[231] for example, Daniel Luna was tried in a New Jersey state court *in absentia* and found guilty of various counts, including, most seriously, armed robbery.[232] In ordering a new trial,[233] the New Jersey Supreme Court held that Luna had had a very good reason for being absent:

> Jury selection proceeded without [Luna] and was completed on Tuesday, August 13, 2002. Later that day, after the jury had been sworn but before the start of testimony, the assistant prosecutor learned that Luna had been arrested in New York the previous Friday and was incarcerated on a prison barge near Riker's Island. The prosecutor reported that news in open court the following morning. Defense counsel then asked for an adjournment in order to arrange for Luna to be brought to court from New York. . . .

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227 2020 WL 2539080 (S.D.N.Y. 2020).

228 *Id.* at *1.

229 *Id.* at *2.

230 Sometimes, however, it is impossible to know which of the City's prison ships are being discussed. In Muhammad v. City of New York Department of Corrections, 904 F. Supp. 161 (S.D.N.Y. 1995), *appeal dismissed*, 126 F.3d 119 (2d Cir. 1997), for example, one finds the following paragraph:

> DOC maintains a procedure that allows inmates to request religious accommodations. (Pl.Ex. 30; Tr. 711.) This procedure was previously utilized by a group of approximately twenty-five inmates of Chinese descent, housed on a DOC prison barge. (Tr. 707-08, 711.) The group requested that a congregate religious service be conducted by a Buddhist monk. Imam Luqman, with the assistance of the DOC Jade Society, an Asian-American fraternal organization of civilian and uniformed staff, located a Buddhist monk to provide a Buddhist service on the prison barge for the group. (Tr. 707-08.)

Id. at 175 (footnote omitted). Because the date of the service is not provided, any one of the City's three prison barges could have been the host.

231 936 A.2d 957 (N.J. 2007).

232 *Id.* at 960.

233 *Id.* at 965.

> The trial court denied the motion for an adjournment [and w]ithout developing a full record, . . . conducted the trial in absentia. After a three-day trial, the jury convicted Luna on all six counts. . . .
>
> [D]efense counsel made a timely motion for an adjournment after jury selection, which was denied. Without a hearing, the trial court lacked a basis to . . . proceed with trial. In light of the complete circumstances presented, the failure to allow defense counsel the opportunity to explore the information just received—that Luna was in jail in another state—rendered the subsequent proceedings defective. Therefore, . . . a new trial is warranted.[234]

In *Basagoitia v. Smith*,[235] three men—Juan Basagoitia, Daniel Machuca, and David Robles—conspired in 2003 to commit a double murder.[236] After their plan went awry, they were arrested and eventually ended up together on a "prison boat."[237] While on the vessel, Basagoitia and Robles got into an angry conversation about the attempted killings, which Machuca later testified about in court, thereby helping to convict Basagoitia.[238]

In *Brown v. City of New York*,[239] an inmate sued, claiming that while he was leaving to go to court in 2005, a corrections officer prematurely shut a door, injuring his arm.[240] In denying the City's motion for summary judgment, the court wrote:

> On the date of the incident, plaintiff was in custody of the NYC Department of Corrections ("NYDOCS") in the process of leaving the prison barge at Riker's Island at 4:00 AM to go to court. Inmates had to walk single-file through a sliding metal gate operated by a corrections officer; its door slides to the right. At deposition, Mr. Brown testified that he was the last person in line; his left hand was handcuffed to the inmate in front of him. Plaintiff alleges that as he passed through the gate, the female corrections officer "must have pushed the button too quick," causing his free right hand to get caught in the door. When the corrections officer failed to respond, the inmates pulled back the gate. . . .
>
> The City's reliance on the doctrine of res ipsa loquitor fails: Having assumed physical custody of plaintiff, the City owes a duty of care to safeguard a handcuffed plaintiff. (*See Sanchez v State of NY*, 99 NY2d 247 [2002].) The Court finds that the movant has failed to meet its burden of proof. A jury must determine whether one hand was free or both hands were cuffed, whether the plaintiff's alleged swinging arm contributed to his injury and whether the corrections officer closed the door gate too abruptly. The defendant's motion to dismiss is accordingly denied.[241]

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234 *Id.* at 959-60, 964.
235 2012 WL 4511358 (E.D.N.Y. 2012).
236 *Id.* at *1.
237 *Id.* at *6.
238 *Id.* at *2, *6.
239 2016 WL 1532365 (N.Y. Sup. Ct. 2016).
240 *Id.* at *1.
241 *Id.* at *1-*2.

Lastly, there are many cases in which the VERNON C. BAIN is merely a bystander, such as *Lurch v. NYSDOCCS*[242]: "Plaintiff, currently incarcerated in the Vernon C. Bain Center, brings this *pro se* action under 42 U.S.C. § 1983, alleging that Defendants violated his rights by arresting him."[243]

V. Conclusion

Prison ships have had a long tenure in the United States, dating back to the American Revolutionary War. It therefore is difficult to understand why so little has been written about them. Additionally, any serious study of America's penal system is incomplete without them.

The VERNON C. BAIN is particularly deserving of attention, given the fact that it is the only vessel ever built to be a prison ship. Moreover, by the time it closes in 2026, it will have held upwards of 500,000 prisoners,[244] making it one of the busiest penal institutions in history.

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[242] 2020 WL 3173020 (S.D.N.Y. 2020).

[243] *Id.* at *1. *See also* Zhang v. City of New York, 2019 WL 4513985 (S.D.N.Y. 2019), in which the court denied as moot a motion to make the VERNON C. BAIN more than a bystander:

> Plaintiffs seek to add the Vernon C. Bain Center ("VCBC")—the Rikers Island facility where Zhang was detained—as a defendant, but note that if Defendants will concede that VCBC is part of Rikers Island Facilities, they will not seek to add VCBC as an additional defendant. (Mem. at 10; ECF No. 178 at 5.) At oral argument, Defendants agreed that VCBC was part of the Rikers Island Facilities. (Oral Arg. Tr. at 3.) Accordingly, Plaintiffs motion to add VCBC as a defendant is denied as moot.

Id. at *6.

[244] The City does not publish records showing how long inmates spend in specific correctional facilities. It does, however, release borough-wide figures. *See* [New York City] Mayor's Office of Criminal Justice, *Biannual Report on Progress Towards Closing Jails on Rikers Island – Local Law 192* (Mar. 5, 2020), https://criminaljustice.cityofnewyork.us/wp-content/uploads/2020/03/LL192-Report-Final.pdf. This report indicates that Bronx inmates are held for a median of 14 days. *Id*. at 2 (under "Chart 4").

Thus, with a capacity of 800 inmates; each inmate being replaced every two weeks; and the ship being in service for 34 years (1992-2026), the math works out to 800 x 26 x 34 = 707,200. Of course, the vessel is not always at 100% capacity. According to the Mayor's report, in 2019 the average daily inmate population of the VERNON C. BAIN was 620. *Id.* at 1 (under "Chart 1"). This still yields a 34-year total of 548,080.

The quick turnover reflects the fact that the facility primarily is used to hold pre-trial suspects who are released once they make bail. For a further discussion, *see, e.g.*, Beth Fertig, *Paying Bail? You May Get Stuck at the Boat*, WNYC News (Mar. 27, 2018), https://www.wnyc.org/story/paying-bail-you-may-get-stuck-at-boat/.

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To Delegate or Redelegate: Is That the Question?

Thomas Halper*

ABSTRACT

Conflicts between those supporting and opposing congressional redelegation to executive agencies go back to the earliest days of the Republic, but given the enormous development of the administrative state, now raise issues of great practical importance. The arguments back and forth implicate abstract notions of democracy, efficiency, and judicial power, though typically partisan and other self interested considerations actually drive the debate. The future is likely to see some retrenchment, but not wholesale rejection of redelegation, as the massive and unpredictable consequences would deter courts from acting.

KEYWORDS

Delegation, Redelegation, Chevron v. Natural Resources Defense Council

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We begin with a maxim. *Delegata potestas non potest delegari*. No delegated power can be further delegated.[1] The reason lies in the problem of principal and agent. When a principal asks an agent to do something, he understands that the agent will have his own interests to advance and protect, but concludes that nonetheless he will complete a sufficient amount of the job to make the arrangement worthwhile. He carries my water in a leaky bucket, but enough arrives to satisfy me.[2] But if the agent then redelegates the task, the connection with the original principal is severed. It is no longer *his* judgment that the agent will be satisfactory, but rather the judgment of the agent that *his* agent will be satisfactory. If the principal wanted the second agent to carry out the task, he would have chosen him. But he did not. The second agent, sloppy, clumsy, and drunk, might well have spilled most of the water. If the Constitution delegates a certain task to Congress, who then redelegates it to an agency, the problem is amplified because neither Congress nor the agency is an *it* with a singular, coherent purpose but rather a *they* with multiple purposes.[3] This is the multiple principal problem.

Yet if we have serious reservations about the wisdom of redelegation, we also know that Congress is incapable of issuing the myriad of regulations that bring statutes to life. Here, we refer not to structural regulations that establish agencies and give them rule making or enforcement powers, but rather the endless substantive regulations that govern conduct, monitor compliance, auction licenses, and the like. Congress redelegates to agencies in the service of *its* multiple interests, but agencies act in the service of *their* own multiple interests.

Yet with the exception of a pair of cases decided some eighty-five years ago,[4] courts have uniformly declined to enforce the ban on redelegation. *Panama Refining Company v. Ryan* (1935) involved the Petroleum Code of the National Industrial Recovery Act (1933),[5] a pillar of the New Deal that created over 700 such codes with the purpose of bringing about economic recovery and reform. Section 9 (c) authorized the President to prohibit the interstate transportation of petroleum products and the removal of these products from storage in excess of the amounts permitted by state production quotas. The President issued executive orders creating a regulatory Petroleum Code and granting the Secretary of the Interior power to enforce it. Panama sued to restrain officials from enforcing these regulations.

Chief Justice Hughes, speaking for an eight vote majority, held that the statute gave "to the President an unlimited authority to determine the policy," in effect unconstitutionally granting him legislative power.[6] (Justice Cardozo, dissenting, thought the law was clear enough and implied that the majority had proceeded with

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1 The doctrine may have originated in a mistranslation of Bracton's *De Legibus* and thence through Coke to Kent and Story. Patrick W. Duff & Horace E. Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 14 Corn. L. Q. 168 (1929).

2 *Cf.* Arthur Okun, Equality and Efficiency: The Big Tradeoff (1975).

3 Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 Int'l Rev. L. & Econ. 239 (1992).

4 Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935).

5 Petroleum Code of the National Industrial Recovery Act, 48 Stat. 195 (1933). In that year, President Roosevelt issued 593 executive orders to implement legislation.

6 *Panama*, *supra* note 4, at 415.

"pedantic rigor."[7]) *Schechter Poultry Corporation v. United States*, concerning the NIRA's Live Poultry Code and decided barely four months later, saw Hughes offer the same argument against redelegation, citing the vagueness of terms like "unfair competition."[8]

With only two cases upholding the principle of nondelegation, it is no wonder that Evan Zoldan called it "less a doctrine than a ghost story."[9] Or that Cass Sunstein remarked, "We might say that the conventional doctrine has had one good year and 211 bad ones (and counting)."[10] The bad ones now total 232. How is this to be explained? What does the future hold?

In surveying the cases and the literature, two views predominate. The Redelegators simply ignore the nonredelegation prohibition as an anachronistic relic of the past or dismiss it as a myth. The Nonredelegators consider this rejection as heresy and would implement the nonredelegation rule in various guises.

I. The Redelegators

Redelegators ordinarily begin with four points. First, administrative rule making, monitoring, and enforcement are all unavoidable corollaries of the executive function derived from legislation itself.[11] There are about 200 federal agencies that issue about 3,000 regulations per year; Congress may enact only about seventy-five laws during that time, but cumulatively the total number of laws also runs into the thousands. These regulations and laws, adopted at different times under different circumstances, often conflict or overlap, requiring administrative discretion to make all kinds of practical choices. Then, too, the ever present scarcity of resources demands priority setting, which also calls for administrative discretion. Furthermore, even if they had the time, experience, expertise, and interest, members of Congress still could not foresee all future factual circumstances, and would need administrators to fashion laws to fit the unforeseen situations.

Moreover, congressional and judicial action is slow, cumbersome, costly, and thus not very responsive to fast moving or unexpected events or developments; Congress and especially courts may also not be very good at fact gathering, being guided by different norms and possibly lacking in useful long term personal relationships.[12] For a bill to become a law, it must be passed in identical form by both houses, after surviving a gauntlet of committee and subcommittee approvals, and be signed by the President; sometimes, this process must be repeated in order to secure appropriations. As for the judiciary, it may also take years for a case to wind its way from trial to the Supreme Court, that is, if it is fortunate enough to be selected among the 1% of certiorari petitions that the Court accepts. Furthermore, though Presidents differ as to

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7 *Id.* at 440.

8 *Schechter supra* note 4, at. 531. The Court also found that the code violated the commerce clause.

9 Evan C. Zoldan, *The Fifth Vote for Non-Delegation*, Jurist (Dec. 14, 2019), https://www.jurist.org/commentary/2019/12/evan-zoldan-the-fifth/.

10 Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 322 (2000).

11 Thomas W. Merrill, *Rethinking Article I Section 1: From Nondelegation to Exclusive Delegation*, 104 Col. L. Rev. 2097, 2101 (2004).

12 Kathryn A. Watts, *Rulemaking as Legislating*, 103 Geo. L. J. 1003, 1005 (2015).

the qualities they look for in their judicial appointees, one factor they nearly always insist on is support for strong presidential authority. Thus, neither Congress nor the courts can be counted on as strong and reliable barriers against redelegation.

Hence, the common observations that implementation "necessarily involves a considerable amount of policymaking,"[13] and that "administrative lawmaking has become a central, defining feature of the modern administrative state."[14] Rule making and legislation, in any case, are functionally indistinguishable; the former fills in the details, completing the latter.[15] Indeed, Justice Sotomayor commented that agency regulations "are often referred to as 'legislative rules' because they have the 'force and effect of law.'"[16] As to the agencies, they "owe significant 'faithfulness' to Congress. Congress breathes them into being and endows them with purpose and authority."[17]

Second, because of this practical necessity, the nonredelegation doctrine is said to have no real history. Keith Whittington and Jason Juliano conclude that "there was never a time in which the courts used the nonredelegation doctrine to limit legislative delegations of power."[18] Matthew Adler reassures us that "the nonredelegation doctrine remains dead."[19] Julian Mortenson and Nicholas Bagley advise, "Forget the debate over whether the nonredelegation doctrine is truly dead. It was never really alive to begin with."[20]

Redelegators prefer, instead, to speak of sleep. Hobbes in *On the Citizen* writes of a sleeping sovereign, whose ministers do not assume his sovereignty as their own, but merely implement the orders he gave before he went to sleep.[21] By analogy, the people, who collectively constitute America's supreme political authority, delegate their powers via the Constitution to Congress, which (also given to sleep) redelegates them to government agencies. In this way, the thread connecting sovereign to regulations remains unbroken.

The most careful historical inquiry, *Creating the Administrative Constitution* (2012) by Jerry Mashaw, confirms this narrative, confounding the conventional view that once upon a time the federal government was run by a Congress that wrote "virtually self-executing laws."[22] As Mashaw tells it, the Articles of Confederation

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13 Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 Mich. L. Rev. 2073, 2094 (2005).

14 Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 Ga. L. Rev. 117, 120 (2011).

15 Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 Yale L. J. 2280, 2282 (2006).

16 Perez v. Mortg. Bankers Ass'n., 135 S. Ct. 1199, 1203 (2015).

17 Robert R.M. Verchick, *Toward Normative Rules for Agency Interpretation: Defining Jurisdiction Under the Clear Water Act*, 55 Ala. L. Rev. 845, 850 (2004).

18 Keith E. Whittington & Jason Juliano, *The Myth of the Nondelegation Doctrine*, 165 U. Pa. L. Rev. 379, 381 (2017).

19 Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. Pa. L. Rev. 759, 839 (1997).

20 Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277, 285 (2021).

21 Thomas Hobbes, On the Citizen 99-100 (Richard Tuck & Michael Silverthorne eds. 1990) (1642).

22 Theodore J. Lowi, The End of Liberalism 94 (1969). *See also, e.g.*, Morton J. Horowitz, The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy 213-46 (1991); Gerald E. Frug, *The Ideology of Bureaucracy in American*

Congress sought to administer government through a multitude of committees, but by the time of the Constitutional Convention, it was clear that a legislative body could not effectively perform executive functions. Thus, when the first post Constitution Congress created the departments of State and War, it said little beyond that they should do as the President instructed and adopt whatever rules he told them to adopt.[23] "From the earliest days of the republic, Congress delegated broad authority to administrators, armed them with extrajudicial powers, created systems of administrative adjudication, and specifically authorized administrative rulemaking."[24]

This embrace of broad redelegation followed not from abstract principle, but from practical necessity, experientially pursued. Even Presidents Jefferson and Jackson, ideologically appalled by the federal bureaucracy, found that they needed agencies operating with considerable discretion to distribute land from the Louisiana Purchase, implement the 1808 trade embargo, regulate navigation, and build hospitals for seamen. Agencies set down detailed rules guiding, incentivizing, and limiting their employees, and it is this "internal administrative law" and not judicial review that Mashaw finds was the chief means of accountability. In other words, agency driven administrative law, often with little congressional or judicial input, governed administration, reflecting the policy preferences of Presidents.[25] Much later, nearly all the civil rights progress prior to the passage of the Civil Rights Act was also due to a series of executive orders that discouraged employment discrimination in the defense industry,[26] desegregated the military,[27] and promoted affirmative action.[28]

Mortenson and Bagley, in almost a book sized article, also conclude that the Framers took redelegation for granted, as long as Congress did not permanently forswear its power to legislate. They believe that the Framers "thought of constitutional powers in nonexclusive and relational terms," so that agencies would "absolutely wield legislative power to the extent they declare binding rules that Congress could have enacted as legislation."[29] In the authors' eyes, the "nondelegation doctrine thus has nothing to do with the Constitution as it was

Law, 97 Harv. L. Rev. 1276 (1984); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1675 (1973).

23 Jerry Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law 290-91 (2012). Tocqueville had pointed to the ubiquity of local administrators. 1 Alexis de Tocqueville, Democracy in America 45, 53 (Henry Reeve trans., 2002) (1835).

24 Mashaw, *supra* note 23, at. 5. This redelegation even predated the "salary revolution," when other means of payment were common. Nicholas R. Parrillo, Against the Profit Motive: The Salary Revolution in American Government 1780-1940 (2013).

25 *Id.* 293.

26 Exec. Order No. 8802 (1941).

27 Exec. Order No. 9981 (1948).

28 Exec. Order No. 10925 (1961).

29 Mortenson & Bagley, *supra* note 20, at 282. The authors also dispute the originalists' contention that the founding generation distinguished between legislation that regulates private conduct and rulemaking that regulates official conduct. They claim that the early Congresses redelegated in both areas.

originally understood."[30] Not until *Marshall Field v. Clark* in 1892 did the Supreme Court so much as mention nonredelegation, and in this case it upheld a law against a nonredelegation challenge.[31]

Blake Emerson carries this further, arguing for the democratic potential of modern administration. In *The Public's Law* (2019), he shows that Progressives, influenced by Hegel's vision of the state as a vehicle for human freedom, believed that "the state must guarantee freedom through regulatory and welfare laws implemented by public-spirited officials."[32] In envisioning agencies and the public interacting, Progressives bypassed Hegel's rejection of democracy and focused on his notion that officials were necessary to offer "the social and economic requisites people need to live their lives freely."[33] Emerson focuses most heavily on the New Deal and the civil rights period of the 1960s (which he calls the Second Reconstruction); both were more successful in involving the public in bureaucratic decision making, through such devices as notice and comment requirements, than in their material results, but had the bureaucracies been even more a "site for political discourse and not merely purely technical or economic reasoning," he thinks these shortfalls might have been ameliorated. Progressives valued apolitical knowledge and expertise, Emerson concedes, because they thought they produced better policies. But they also appreciated the importance of "a professionalism of spirit"[34] and an ethical sense that would constrain officials faced with countless discretionary opportunities.[35] Thus shaped, these agencies could then claim to speak for interests underrepresented in legislatures, and in this sense aggressively advance the democratic purpose.

Emerson would resolve the principal-agency problem through a kind of ethical collusion: If all parties are committed to the common good, the problem would be minimized. What he perhaps does not sufficiently emphasize is that there are a multitude of paths to the common good, many of them also self interested, so that good intentions may not produce much harmony, though it may contribute significantly to the checking function of the separation of powers.

This may be the case, even though redelegation usually occurs far from the general public's view. As another scholar observed, "the central government was most effective when its authority went unnoticed or remained hidden or was quietly obscured."[36] Redelegation seems more common in education, environmental, and public health policy than in tax and fiscal policy,[37] and often the public is quite unaware of what has taken place.

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30 *Id.* at 6.

31 Striking down the law would "produce the utmost confusion in the business of the entire country." Field v. Clark, 143 U.S. 649, 697 (1892).

32 Blake Emerson, The Public's Law: Origins and Architecture of Progressive Democracy 149 (2019).

33 *Id.* at. 65.

34 James M. Landis, The Administrative Process 99 (1938).

35 As Congress consists mostly of millionaires and the bureaucracy is staffed by the middle class, the unelected bureaucracy may seem more representative than the elected Congress.

36 Brian Balogh, A Government Out of Sight: The Mystery of National Authority in Nineteenth Century America 52 (2009).

37 David Epstein & Sharyn O'Halloran, Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers 198-99 (1999).

Third, Redelegators believe that the political process adequately protects against abuse because, sensitive to the threat, Congress will "adequately police itself"[38] through standard political means, chiefly, procedural rules.[39] Congress, for instance, might delegate power to competing agencies, forcing each to monitor the other and involve Congress in the process. Or it might impose high burden of proof standards that would confine the agency's ability to act. Or it might impose limitation riders that prevent agencies from spending for specific purposes.[40] And there is always the formidable power of the purse.

Redelegators admit that widespread redelegation may leave the impression of a joint judicial-congressional abdication of responsibility. But they point to studies of Congress that suggest that congressional oversight of delegation, even under these circumstances, can be effective. Barry Weingast and Mark Moran argue that agencies understand that Congress can punish them if they veer too far from its intent, and believe that even though punishment may be uncommon, the hazard remains potent.[41] J.R. DeShazo and Jody Freeman support this view.[42] Mathew McCubbins, Roger Noll, and Weingast point to the Administrative Procedure Act, which renders regulation easier for members of Congress and others to monitor, evaluate, and influence.[43] From this perspective, the fact that Congress rarely intervenes structurally to reverse redelegation may be construed as evidence that the agencies are acting in accordance with its wishes. The problem is, however, that these studies are dated and rather narrow in focus. From 1973-1997, Presidents issued about a thousand executive orders; Congress tried to reverse thirty-seven of these; it succeeded in three instances.[44] The effectiveness of congressional oversight is not established.

Fourth, Redelegators claim that their approach serves democracy: the President is democratically elected, and can be held accountable for the performance of agencies operating under his direction.[45] This is said to be especially true in the current era of the never ending campaign, for the President will always focus first on political strategy, wanting to avoid driving away his supporters, and this will be reflected in the administrative decisions he and his aides take. The vast proportion of these decisions proceed with little or no public awareness, in a context in which small, well organized groups combat for advantage. Here, though knowledge,

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38 Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2311, 2359 (2006).

39 Mathew McCubbins, Roger Noll, & Barry Weingast, Administrative Procedures as Instruments of Political Control, 3 J. L. Eco 243 (1987); Mathew McCubbins et al., *Structure and Process Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 Va. L. Rev. 431 (1989).

40 Jason A. Macdonald, *Limitation Riders and Congressional Influence over Bureaucracies*, 104 Am. Pol. Sci. Rev. 766 (2010).

41 Barry R. Weingast & Mark J. Moran, *The Myth of Runaway Bureaucracy: The Case of the FTC*, 8 Reg. 33 (1982).

42 J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 Tex. L. Rev. 1443 (2003).

43 McCubbins et al., *Administrative Procedures*, *supra* note 39, at, 253-64.

44 Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J. L., Eco., & Orgs. 132, 165-66 (1999).

45 Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. Econ & Org. 91, 95 (1985).

experience, and skill will be indispensable, they can hardly banish political accountability, which leaders naturally rank as a top priority.

Congress is also democratically elected, and can (at least, in principle) be held accountable for its oversight of agencies. Does the overwhelming odds that incumbents will be reelected suggest that members of Congress pay close attention to issues of redelegation or, instead, that they can afford to ignore them? Can we infer that the silent public approves of the redelegation or merely that it is indifferent or uninformed? In the early twentieth century, Progressives applauded redelegation because their mantra was expertise, not politics,[46] and the Court has sometimes seemed taken with this view.[47] To some extent, the cliché of expert efficiency/politics trade-off is exaggerated. It is true that politicians may pursue politically advantageous goals at the expense of rational policy, politics trumping expertise. But it is also true that politicians may attack bureaucratic inertia and force agencies to move expeditiously, politics supporting expertise. Indeed, efficiency may be good politics, whether in snow removal after a blizzard or in confronting a covid-19 crisis. In any case, it is hard to avoid politics. The alternative to presidential decision making is frequently not administrative expertise but congressional decision making, and the same can be said for congressional decision making. Both kinds of decision making involve democracy essentially to the extent that interest group competition counts as democracy.

Does this, then, disconnect redelegation from democracy? Redelegators think not, for though the public is doubtless ignorant about the literal workings of the massive agencies, they know enough about their programs to form a judgment. They like Social Security and Medicare, for example, and though they may not be fond of large bureaucracies, they understand that these programs require them. To the extent that opposition to the administrative state rests on its practical accountability problems, it must confront the more pressing fact of the approval of these programs.

More broadly, the defenders of redelegation recall the claims for judicial self restraint made by James Bradley Thayer in a renowned 1893 article, when he urged courts to declare acts of lawmakers unconstitutional only when they "have not merely made a mistake, but have made a very clear one – so clear that it is not open to rational question."[48] If the statute did not plainly violate the Constitution, courts should give it the benefit of the doubt, its wisdom, workability or morality being none of their business.[49] Thayer justified this by pointing to the lawmakers' electoral accountability, the risk that judicial activism might undermine the courts' nonpolitical appearance, the slow pace of litigation, and the belief that in the end courts cannot do much good though they might promote irresponsibility among lawmakers and paternalism among the public.

It is but a short step from deferring to Thayer's lawmakers to deferring to their offspring, the agencies.[50] As one of the most prominent advocates of this

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46 Landis, *supra* note 34, at 23.

47 *See, e.g.,* Motor Vehicle Mfr. Ass'n v. State Farm Insurance, 463 U.S. 29 (1983).

48 James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 144 (1893).

49 *Id.* at 143.

50 Henry P. Monaghan wrote that in administrative matters, the judge's task is not to produce "an independent judgment rule; it is in fact quite consistent with a clear-mistake standard." *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 9 (1983).

position declared, in a case involving rate fixing at stockyards, "This is a task of striking a balance and reaching a judgment on factors beset with doubts and difficulties, uncertain and speculative. . . . Congress has put the responsibility on the Secretary [of Agriculture] and the Constitution does not deny the assignment."[51] Similarly, a leading study concluded, "agencies should be able to make policy as they see fit, unless there are very clear reasons indeed for courts to intervene."[52] Administrators, after all, unlike judges, may have to decide under difficult, even stressful circumstances. As for redelegation's opponents, advocates dismiss them as "inebriated by an excessive intake of principle."[53]

Courts, the Redelegators believe, have been solidly in their corner. *Marshall Field v. Clark* (1892) saw the Supreme Court uphold a statute that directed the President to determine whether tariffs on American goods could be deemed "reciprocally unequal and unjust," and if so, to suspend the importation of the commodities "for such time as he may deem just."[54] The Court held that the statute did "not, in any real sense, invest the President with the power of legislation [because] Congress itself prescribed, in advance, the duties to be levied." [55] This holding was reinforced in *Keogh v. Chicago & Northwestern Railway Co.* (1922),[56] where the Supreme Court protected agency set rates and tariffs of service against private consumer lawsuits alleging unreasonable or even unlawful actions. This so-called filed rate doctrine, assigning discretion to agencies and not courts, has had the effect of "keeping regulation to the regulators"[57] in such vast areas as transportation, telecommunications, utilities, and insurance, and is clearly more a legislative than an executive function.

Six years after Keogh, the Court ruled in *J.W. Hampton, Jr. & Co. v. United States* (1928), which involved a company that imported barium oxide and complained, when the collector of customs charged six cents per pound, two cents per pound more than fixed by congressional statute. The statute also gave the President authority to "equalize . . . differences in costs of production in the United States and the principal competing country."[58] Hampton thought this constituted an invalid delegation of the legislative power by Congress to the President, as Article I assigns Congress and not the President "the power to lay and collect taxes, duties, imposts, and excises."[59]

Chief Justice Taft, a former President, acknowledged the nonredelegation rule,[60] but emphasized the practical exigencies involved in implementation.[61] He found that the President was not involved in "the making of law. He was the mere

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51 Frankfurter, J., United States v. Morgan, 298 U.S. 409, 417 (1941).

52 Adrian Vermeule, Law's Abnegation: From Law's Empire to the Administrative State (2016). "If the constitutional institutions, operating as they were set up to operate, have decided that such an arrangement is both valid and wise, then respect for the separation of powers counsels approval for the arrangement."

53 *Id.* at 72.

54 *Supra* note 31, at 691.

55 *Id.* at 692.

56 Keogh v. Chicago & Northwestern Railway Co., 260 U.S. 156 (1922).

57 Kevin M. Decker, *Recent Developments in Minnesota Law: Filed Rare Doctrine: Leaving Regulation to the Regulators*, 34 Wm. Mitchell L. Rev. 1351, 1352 (2008).

58 J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 401 (1928).

59 U.S. Const. art I, § 8.

60 *Supra* note 58, at 405-6.

61 *Id.* at 407.

agent of the law-making department."[62] "If Congress shall lay down by legislative act an intelligible principle . . . such legislative action is not a forbidden delegation of legislative power."[63]

When subsequent courts found intelligible such principles as "public interest, convenience, or necessity,"[64] "fair and equitable" prices,[65] "public interest,"[66] "just and reasonable" natural gas rates,[67] "excess profits,"[68] or "requisite to protect the public health [and] allow an adequate margin of safety,"[69] it seemed that the justices had all but dismissed the "toothless"[70] doctrine with a wink and a grin. Consider, for instance, the Feed and Forage Law,[71] passed after the Civil War to allow soldiers to graze their horses when Congress was not in session, and since used in support of wars in Vietnam, Iraq, and Haiti.[72] As Justice Scalia put it in a case involving indeterminate sentencing, "while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system . . . we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[73]

A half century after Hampton, redelegation was strengthened in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co*. (1983).[74] In the National Traffic and Motor Vehicle Safety Act of 1966,[75] Congress directed the Secretary of Transportation to issue "reasonable, practicable and appropriate" motor vehicle safety standards, the Secretary delegated this power to the National Highway Transportation Safety Administration (NHTSA), and the Court held that it would uphold the redelegation unless it were arbitrary and capricious, a very low standard.[76]

That the case involved a double redelegation – from Congress to the Secretary of Transportation to the NHTSA – seems to the Court to have made no difference. This is significant for two reasons. First, such double redelegations, usually

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62 *Id.* at 411.

63 *Id.* at 409.

64 CBS/NBC v. FCC, 319 U.S. 190, 225-26 (1943).

65 Yakus v. United States, 321 U.S. 414, 427 (1944).

66 N.Y. Central Securities v. United States, 287 U.S. 12, 24 (1932).

67 FPC v. Hope Natural Gas, 320 U.S. 591 (1944).

68 Lichter v. United States, 334 U.S. 742, 783 (1948).

69 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472, 476. It is not obvious that these principles were more intelligible than those of the NIRA struck down in 1935. *See* Pub. L. 73-67, § 3, 48 Stat. 195 (1933).

70 Watts*, supra* note 12, at 1006.

71 Pub. L. 91-379, 84 Stat. § 799 (1868).

72 Louis Fisher, Department of Defense Readiness Preservation Authority 3 (Cong. Res. Serv., Apr. 1995).

73 Scalia, J., dissenting, Mistretta v. United States, 488 U.S. 361, 415-16 (1989). In *Crowell v. Benson*, Chief Justice Hughes held that courts would review administrative questions of law and agencies questions of fact (aside from jurisdictional and constitutional facts). But this distinction broke down because the laws and facts are often deeply intertwined. Vermeule, *supra* note 52, at 28-29.

74 Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983).

75 National Traffic and Motor Vehicle Safety Act, 80 Stat. § 718, as amended, 15 U.S.C. 1381 et seq. (1976 ed. & Supp. V).

76 Justice White concluded that the NHTSA had failed to meet this low standard.

flowing from Congress to the President to an agency, have "become . . . pivotal to presidential leadership and . . . central to an understanding of presidential power."[77] Second, the principal-agent issues behind the opposition to redelegation are plainly amplified, when the process occurs twice. Elena Kagan, in an article that appeared before she joined the Supreme Court, argued for a kind of reverse redelegation, in which "a statutory delegation to an executive agency official . . . usually should be read as allowing the President to assert directive authority."[78] She believed that "the new presidentialization of administration rendered the bureaucratic sphere more transparent and responsive to the public, while also better promoting important kinds of regulatory competence and dynamism."[79]

What is established, by history if not by law, is that the President as chief executive possesses inherent executive powers involving management, covering, for example, agenda setting, staffing, information gathering, and preparing for the future. He is not a passive instrument of Congress, but, on the contrary, is supposed to supply what Hamilton in Federalist 70 called "energy."[80] As public opinion leader, head of his party, possessor of such formal powers as the veto and the executive order, and chief of the bureaucracy, the President can call on vast resources and by any measure is an extraordinarily imposing political figure. He may use these powers not in response to Congress, but as a means of pushing Congress to the sidelines, for example, by issuing executive orders that create a new status quo for Congress to deal with. Congress may regard the President as constitutionally tasked to carry out *its* will, but he likely sees Congress as tasked to carry out *his* will. To the Redelegators, all this underlines the futility of opposing redelegation.

What are courts to do? The redelegators believe that courts have a significant role to play only rarely. Sometimes, they observe, even apparently sensible judicial responses turn counter productive. For example, to address fears of interests capturing agencies, courts began "providing a surrogate political process to ensure the fair representation of a wide range of affected interests."[81] The point was not to exclude politics from administration, which seemed both impossible and undesirable, but to maximize political participation as a token of fairness. It was a Madisonian solution of factions checking factions.[82] However, this approach also exacerbated the difficulties of assembling winning congressional coalitions, making it harder than before for Congress to get beyond mundane, narrow concerns. It also made it harder for agencies to act in its place because the burden of providing materials and responding to opponents plus the risk of alienating supporters discouraged them from innovating or doing anything decisive. Meanwhile, the interests were quite satisfied with the focus on mundane issues because this generally meant that they faced no fundamental challenges or organized opposition.

In short, when courts acted to open the process, the agencies and interests tended to respond to pressure for change with their own effective work-arounds designed to further their own, often narrow interests. As a result, the formal,

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77 Moe & Howell, *supra* note 44, at 133.

78 Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2246, 2251 (2001).

79 *Id.* at 2252.

80 The Federalist No. 70, at 363 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

81 Stewart, *supra* note 22, at 1670.

82 Madison, *supra* note 80, at 42-49.

transparent procedure was often superseded by informal agency-interest contacts preceding the actual proposals, frustrating the purpose of the reforms but permitting small things to get done.

II. The Nonredelegators

The nonredelegators, for their part, also emphasize four points. First, they maintain that the kind of broad redelegation that is commonplace today contravenes the clear intent of the Constitution. Article I, section 1 begins, "All legislative powers herein granted shall be vested in a Congress of the United States."[83] While the text explicitly neither grants nor denies Congress the authority to redelegate these powers to other actors, "no other branch of government is given power to legislate.'"[84] A few lines later, the incompatibility clause in Article I, section 6 reinforces this point by barring members of the executive branch from serving in the legislative branch and vice versa. Further, the Take Care clause in Article II binds the President to take care that the laws are faithfully executed, that is, to ensure that the executive branch honors the purpose and text enacted by Congress. "The essence of the legislative authority," wrote Hamilton in Federalist 75, "is to enact laws, or, in other words, to prescribe rules for the regulation of society."[85] Thus, the Constitution presumes that "only the people can delegate legislative power [and therefore that] the legislature cannot delegate its powers away because legislative power was never fully alienated by the people."[86]

From this perspective, even redelegation's apparent advantage in being far more rapid and less cumbersome than ordinary legislation has a downside; for its very ease of implementation counters the constitutional goal endorsed by bicameralism that law have "broad support" before its enactment.[87] Too, the Administrative Procedure Act states that "the reviewing court shall decide all relevant questions of law,"[88] and the Supreme Court bluntly announced that the "legislative power of Congress cannot be delegated."[89] It is one thing for the branches to conflict over specific policies; it is far more serious when they conflict over their legitimate areas of jurisdiction. "There is now general agreement about the necessity for delegated legislation"?[90] Well, not exactly.

Second, the Nonredelegators often turn to an historical argument, perhaps

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83 U.S. Const., art. I.

84 Martin H. Redish, The Constitution as Political Structure 135 (1995).

85 Hamilton, *supra* note 80, at 387.

86 Joseph Postell, *"The People Surrender Nothing": Social Compact Theory, Republicanism, and the Modern Administrative State*, 81 Mo. L. Rev. 1003, 1013 (2016).

87 Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907, 1909 (2014).

88 5 U.S.C.A. § 706. Congress may have considered agencies almost seamless extensions of the legislature for supplementary legislation. David H. Rosenbloom, Building a Legislative-Centered Public Administration: Congress and the Administrative State, 1946-1999 2 (2000). In this, opponents to redelegation believe, Congress was mistaken.

89 United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932). In this case, the Court upheld the delegation.

90 Stewart, *supra* note 22, at 1669.

citing John Locke: "The legislative cannot transfer the power of making laws to any other hand; for it being but a delegated power from the people, they who have it cannot pass it over to others . . . . [N]or can the people be bound by any laws but such as are enacted by those whom they have chosen and authorized to make laws for them."[91] A century and a half later, Tocqueville expressed fears that an administrative state could impose "a more insufferable despotism . . . than any which now exists in the monarchical states of Europe."[92]

The most influential early writer, however, was undoubtedly the English constitutional scholar, A.V. Dicey, whose *Introduction to the Study of the Constitution* appeared in eight editions from 1885-1915. Dicey believed that the principles of parliamentary sovereignty and the rule of law left no room for the massive delegation to agencies that generates administrative law, displacing the common law. The United States, of course, lacks a principle of parliamentary sovereignty, and Dicey in any event seems to have seriously underestimated the breadth of administrative law in Britain,[93] but what travelled well was his condemnation of the practice as incompatible with the rule of law and liberty. Dicey's view echoes in such statements as this from Gary Lawson: "The modern administrative state, without serious opposition, contravenes the Constitution's design."[94]

This position was given its most thorough historical grounding in Philip Hamburger's polemical *Is Administrative Law Unlawful?* (2014), which aimed even deeper than raising questions of constitutionality. In Hamburger's view, the administrative autonomy of the modern American state is a direct descendant of the British kings' claims to royal omnipotence, claims rejected by Parliament in its Glorious Revolution and by America's Framers in their Constitution. Of course, kings always insisted that they would respect their subjects' rights and spoke of the practical necessity of their unilateral regulations, but Hamburger calls these mere rationalizations for royal power grabs. For him (as for Dicey), the existence of the administrative state threatens nothing less than the principle of "liberty under law."[95] Today, agencies issue rules unmoored to legislation, and courts do nothing about it in an "abandonment of judicial office."[96] He believes that "step-by-step corrections" by courts may reverse the trend, though given their deference to administrators, he is not very optimistic.[97] Hamburger, it would seem, quarrels not only with excessive or abusive delegation, but almost (but not quite) with redelegation itself, for even statutorily authorized regulations he sees as imperiling the rule of law and should be avoided.

The Supreme Court has frequently announced its support for the nonredelegation principle. "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the

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91 John Locke, Two Treatises of Government 141 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

92 Tocqueville, *supra* note 23, at 316.

93 Harry W. Arthurs, "Without the Law": Administrative Justice and Legal Pluralism in Nineteenth Century England chs. 4-6 (1985).

94 Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1231-2 (1994).

95 Philip Hamburger, Is Administrative Law Unlawful? 496 (2014).

96 *Id.* at 316.

97 *Id.* at 491.

system of government ordained by the Constitution."[98] "[T]he lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity."[99] The vesting clause "permits no delegation of those [legislative] powers."[100] These declarations of principle, however, retain their purity only because they have not been put into practice. From 1942-1996, Presidents issued about 4,000 executive orders; eighty-six were challenged in the courts; fourteen of these challenges succeeded.[101]

Third, nonredelegators dispute the contention that the political process keeps redelegation within acceptable bounds. Congress, they admit, has ultimate control over the structure and funding of agencies, and can use hearings and speeches to reward and embarrass. But in practice the incentives for congressional action are ordinarily too sparse to justify these actions. Occasionally, as with Hurricane Katrina, administrative performance will affect large numbers of voters in direct and obvious ways, and frequently, particular interests may motivate members to act on specific regulations, as with the recent relaxation of regulations affecting the production and use of coal.[102]

Regulations involving microeconomic redistribution invariably mean that benefits are concentrated in a fairly small minority, while costs are diffused in a fairly large majority. As it is rational for the minority to work hard to receive substantial benefits, so is it rational for majorities absorbing tiny costs to ignore them. The larger the society and the more complex the regulations, the more the asymmetry is magnified, so that today, it is vastly greater than it was at the Founding. What results is intense, well organized, narrowly targeted minorities that nearly always triumph over unorganized, indifferent majorities. These triumphs tend to be long lasting because the minorities who benefit tend to feel much more intensely than their opponents. Administration, in the sense of addressing special purpose problems, is inherent in governing, but it is inherently biased in favor of the interests it regulates.

Redelegators may believe that it would be "implausible"[103] for Congress to relinquish authority when it could avoid it. One problem with this, according to the nonredelegators, is that members of Congress understand that they *cannot* always avoid it, for obviously they lack the time, energy, knowledge or experience required to assume the indispensable regulative function. Sometimes, redelegation will be actively pursued by the agencies. Perhaps, they have not been given the resources required to carry out Congress' will because of a declining economy or a congressional compromise, consisting of bold legislation and tepid funding, that leaves them feeling forced to follow their own less costly path. Perhaps, the agencies are unable to determine precisely what Congress wants because Congress

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98 Marshall Field, *supra* note 31, at 692.

99 Loving v. United States, 517 U.S. 748, 758 (1996).

100 Whitman*, supra* note 69, at 472.

101 Moe & Howell, *supra* note 44, at 175.

102 Oliver Milman, *Trump Administration Scraps Obama-Era Regulation on Coal Emissions*, Guardian, Aug. 21, 2018, *available at* https://www.theguardian.com/us-news/2018/aug/20/trump-coal-emissions-power-plants-rules-obama.

103 Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 Colum. L. Rev. 2097, 2148 (2004).

itself may not have made its goals known, on account of its own ambivalence.[104] Perhaps, the agencies' personnel differ as to the extent to which they are restrained by Congress[105] or conclude that Congress' instructions conflict with the agency's fundamental mission. The agencies' failure to defer to Congress, in short, cannot routinely be attributed to some nefarious agency intent.

On the other hand, agencies may become so ossified "that informal rulemaking has become so encumbered by procedural and analytic requirements that it is no longer capable of delivering the results expected of it,"[106] and this ossification causes it to go its own way. The most ambitious study of the phenomenon, an analysis of all redelegating statutes concerning the Interior Department from 1947-1987, concluded that "mandatory delegations of regulatory authority more reliably prompt agencies to promulgate at least one regulation in response to the statute than do permissive delegations [but] even in the case of mandatory delegations, agencies routinely fail to promulgate rules."[107] "Congress rarely gives much thought . . . to fine-tuning the amount of discretion afforded to the agency,"[108] often failing even to set deadlines. However, whether the agencies discussed in this study actually exceeded their mandate is not clear, and the data also are quite old. That Congress adequately protects itself against agency redelegation is certainly not well established.

Members of Congress also may have their own reasons for favoring redelegation. For example, they may welcome the opportunity to pass contentious, complex, and potentially costly decisions on to other bodies, "avoid[ing] or at least disguis[ing] their responsibility for the consequences of the decisions"[109] and finding that the exercise of power comes at too high a price.[110]

Also, redelegation may enhance the power of individual members, for redelegations "create administrative discretion, discretion that members of

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104 David B. Spence, *Agency Policy Making and Political; Control: Modeling Away the Delegation Problem*, 7 J. Pub. Admin. Res. & Theory 199 (1997).

105 Joshua D. Clinton, *David E. Lewis & Jennifer L. Selin, Influencing the Bureaucracy: The Irony of Congressional Oversight*, 58 Am. J. Pol. Sci. 387 (2014).

106 Jerry L. Mashaw & David L. Harfst, *From Command and Control to Collaboration and Deference: The Transformation of Auto Safety Regulation*, 34 Yale J. Reg. 167, 170 (2017); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59 (1995).

107 Jason Webb Yackee & Susan Webb Yackee, *From Legislation to Regulation: An Empirical Examination of Agency Responsiveness to Congressional Delegations of Regulatory Authority*, 68 Admin. L. Rev. 395, 437 (2016).

108 *Id.* at 442.

109 Morris P. Fiorina, *Group Concentration and the Delegation of Legislative Authority*, *in* Regulatory Policy and the Social Sciences 175, 187 (Roger G. Noll ed. 1985). *See also* R. Douglas Arnold, The Logic of Congressional Action 101 (1990).

110 Thus, Congress has been castigated for failing to specify the requisite tradeoffs involving the Clean Air Act, dispatching the central issue to the Environmental Protection Agency. David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation 58-81 (1993). On the other hand, members will tend not to delegate redistributive policies, where they might be rewarded with campaign and other contributions. Alberto Alesina & Guido Tabelllini, *Why Do Politicians Delegate?* 12-15 (NBER Working Paper No. 11531, Aug. 2005). However, the authors suggest that trade policy fits this category, though Congress dealt vast discretionary powers in this area to the President in the Trade Expansion Act (1962). Pub. L. 87-794, 76 Stat. 872.

Congress can influence through a variety of formal and informal mechanisms."[111] Redelegation to agencies, in other words, may provide members of Congress with opportunities to intervene and deliver private goods to favored interests, who can help them, bypassing the larger legislative function of providing public goods. Instead of being merely one member of Congress with merely one vote, a member can exert real if limited influence, gaining the gratitude of the interest helped. This intervention will almost certainly occur in secret, further frustrating efforts at democratic accountability while facilitating congressional influence.

There is also the question of how Congress chooses to oversee its delegation. Will it follow the police patrol model, intervening on its own authority to ensure that its intentions are being followed? This type of oversight might be effective, but it will also prove costly in what it demands from members, in time, energy, and rejected alternatives. Or Congress might favor the fire alarm approach, descending on agencies when a serious problem has been brought to its attention. This will be much less costly to the members, but in foreswearing prevention, it may also be much less effective.[112]

When redelegations undermine legislation, they weaken Congress by attacking its credibility; no longer can interests trust Congress to ensure that the compromises and arrangements necessary for legislative enactment will be honored in implementation.[113] Indeed, the undermining is a kind of humiliation, for the political establishment will well understand what Congress has lost. "Delegation allows members to uncouple their personal political effectiveness from the success of Congress as an institution,"[114] and so redelegation tends to diminish if not trivialize the role of Congress, leaving members to focus on specific administrative carve-outs. Perverse incentives reinforce each other. What is good for members is not necessarily good for Congress as an institution. The executive branch is incentivized to redelegate, and members of Congress are incentivized to let them. With the executive involved aggressively in rule making and the legislature intervening in administration, the core of the separation of powers is reversed.

Yet because redelegation emphatically strengthens the executive, the checking function of the separation of powers is undermined. The general rule may be *volenti non fit injuria* (no wrong is done to one who consents), and so if Congress does not complain, why bother? But the question is not whether *Congress* is wronged but whether the *Constitution* is wronged by making it harder to maintain a vigorous separation of powers.

A pair of striking examples underline the lack of confidence in the ordinary political process. In *The Bomb*, Fred Kaplan describes how a low ranking civilian Pentagon aide in the George H.W. Bush administration convinced his superior to find out what targets were specified in the Single Integrated Operational Plan,

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111 Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463 (2015). Of course, the enhanced power of individual members comes at the cost of diminished power for Congress as a collective institution.

112 Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 Am. J. Pol. Sci. 165 (1984).

113 For example, Dodd-Frank, which created the Consumer Financial Protection Bureau, expressly denied it authority over financing by car dealers; the CFPB nonetheless asserted control over auto financing until the Trump administration repealed the regulations.

114 Rao, *supra* note 111, at 1496.

the Defense Department's nuclear war plan. Apparently, no military or civilian bureaucrat nor any President had thought to look into this. What was found was that the Strategic Air Command, which possessed 10,000 nuclear warheads, had simply decided to use all of them, without reference to a national nuclear strategy, and that many of the targets made no sense (for example, Moscow and vicinity was set to get 689 warheads, and an Arctic airbase that was unusable most of the year was to receive seventeen warheads). The inquiry led to modifications of the strategy, but it largely persisted through the Obama administration.[115]

A study of Congress' Safe Drinking Water Act as applied to Flint, Michigan is also harrowing.[116] Congress delegated authority to develop clean water standards to the Environmental Protection Administration (EPA), which, in turn, redelegated it to state and local agencies plus private consultants. The EPA reviewed Michigan's plan only once, and was not officially informed when Flint's water quality degraded, leaving the matter to the state, which failed to ensure compliance with federal standards. The EPA could have insisted on back-up enforcement, but did not, even after it learned of the state's failure. The state and county health department, Flint's city council, and private consultants, indeed, all interested parties, also failed to act. Despite the vast, new found capacity of technology to improve rule making, implementation, and monitoring of environmental law,[117] the result was dangerous levels of lead and other chemicals that polluted Flint's water supply for years and destroyed the government's credibility among the community it served. The lesson is not simply that redelegation from the EPA failed, but that simple and unavoidable delegation from Congress to the EPA also failed.

Fourth, Nonredelegators reject the idea that redelegation is fundamentally democratic. Will presidential or congressional campaigns confer democratic mandates on the victor that extend to administrative issues? This is very doubtful.[118] The President, in any case, ordinarily does not deal with Congress collectively, but with coalitions composed of members, each with his own reelection, partisan base, and institutional influence to secure. Also, the President's heterogeneous national constituency makes him less accountable to the public than are members of Congress, with their much smaller and more compact constituencies.

If we conceive democracy in broader terms, say, at the level of the general public, it would seem obvious that the general public has little meaningful participation in the administrative work of redelegation, and likely is aware of such work only in the vague way that it is aware that food ultimately does not come from the supermarket. It is quite unrealistic, then, to expect that the general public hold administrators accountable through its capacity to elect and defeat Presidents

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115 Fred Kaplan, The Bomb: Presidents, Generals, And The Secret History of Nuclear War ch. 8 (2020).

116 Hannah, J. Wiseman, *Delegation and Dysfunction*, 30 Yale J. Reg. 233, 260-65 (2018).

117 Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. Rev. 115 (2005).

118 The preeminent American political scientist has dismissed presidential mandates as a myth. Robert A. Dahl, *The Myth of the Presidential Mandate*, 105 Pol. Sci. Q. 355 (1990). As for Congress, initially many members may act as if an election were a mandate, but they gradually return to their normal policy positions. David A.M. Peterson, Lawrence J. Grossback, James A. Stimson & Amy Gangl, *Congressional Response to Mandate Elections*, 47 Am. J. Pol. Sci. 411 (2003).

and members of Congress. Unless we are members of a group seeking a tangible benefit, we probably are poorly informed about policies, our thoughts consisting at best of a mélange heavy on personal experiences and misinformation that we do not bother trying to rectify because it simply does not seem worth it. Does this degree of indirect, informationally problematic accountability qualify as democratic? On broad issues that strike us directly, like inflation, most people might well know and care enough to enforce a significant level of accountability. But though administrators' decisions may indirectly affect these issues, they ordinarily will be far too narrow and technical to generate much public interest, even if the public knew about them (which it in all likelihood does not).

Polarization magnifies the problem. Members of Congress may feel that tough party discipline shrinks their role as law makers, leaving intervening with agencies as one of the few remaining tasks that invigorate their sense of accomplishing something. A frontal attack on delegations to agencies may seem quixotic and not worth the substantial investment in energy and political capital, for as party loyalty tends to trump institutional loyalty, members can expect little or no support from opposition colleagues. Thus, the democratic potential of congressional action is sharply reduced.

At the same time, because polarization tends to impede congressional action, it also may incentivize the executive branch aggressively to counter the policy vacuum, moving unilaterally to issue broad regulations. For example, President Obama, faced with a recalcitrant Congress ("We can't wait"[119]), had his Secretary of Homeland Security issue orders granting certain privileges to so-called Deferred Action on Childhood Arrivals (DACA Dreamer) immigrants.[120] As Franklin Roosevelt put it nearly eighty years earlier, "In the event that Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act."[121] Congress members of the President's party routinely applaud these kinds of decisions as bold actions that get things done; members from the opposing party condemn them as autocratic and unlawful.[122] But the power and stature of Congress is eviscerated.

But though members may dispute specific executive actions, rarely do they seek structural changes that would make such actions impossible – possibly, because they understand that their party may soon own the White House and want the discretion that the current executive exercises. Members who intervene over specific regulations may be able to claim credit for something; those who strive to change the system likely will be unable to claim credit for anything.

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119 Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. Times, Apr. 23, 2012, at A1.

120 Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014).

121 Quoted in Joel Fleishman & Arthur Aufses, *Law and Orders: The Problem of Presidential Legislation*, 40 L. & Contemp. Probs. 1 (1976).

122 Mike Lillis, *113 Republicans Back Lawsuit against Obama's Immigration Actions*, The Hill, May 11, 2015.

III. Looking to the future

For a number of years, it was liberals who seemed most appalled by the ever expanding practice of redelegation. Justice Douglas considered public interest "too vague a standard to be left to free-wheeling administrators. They should be more closely confined to specific ends or goals."[123] James O. Freedman saw redelegation as "part of a larger social uneasiness over the impact upon American life of large organizations, within both the public and private sectors" that might eventually threaten the political system's very legitimacy.[124] John Hart Ely considered redelegations to be "undemocratic, in the quite obvious sense that by refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic,"[125] and Martin Redish agreed.[126] The absence of accountability, David Schoenbrod found, allowed "legislators to appear to deliver regulatory benefits without imposing regulatory costs."[127]

Relatedly, the eminent political scientist, Theodore J. Lowi, thought that redelegation enabled government to buy off groups with favors, shutting out the public and forestalling wholesale attacks on such fundamental problems as racism and inequality. So long as this approach prevailed, it would be impossible to rescue the country from the resulting quagmire, which he termed "Policy without law."[128] J. Skelly Wright, a prominent judge on the D.C. Circuit whose business is largely administrative law, declared, "Ultimately, the arguments for broad delegation rest on the illusion that problems are solved by conflict avoidance."[129] But if the political branches cannot solve the problems, he asked, why assume that agencies can? And even if agencies can, this "will have been accomplished at the expense of democratic decisionmaking."[130] These liberal analysts, favoring more aggressive government action, saw redelegation as empowering regulatory bodies, which they believed were routinely captured by conservative interests.

Liberal opposition to redelegation, however, seems today to be very much a thing of the past. Instead, liberals seem more likely to insist that vast administrative discretion and redelegation are essential if society's most significant and pressing problems are to be addressed. If agencies specially equipped for the tasks are not trusted to confront the problems, they reason, who will? There are sufficient controls in place, legal and psychological, they believe, to keep the agencies in line. More controls imposed by courts lacking the requisite knowledge, skills, and experience, would hamstring the agencies, causing hardship greater than the abuses now tolerated as unavoidable costs of doing business.

Now, it is conservatives who voice their opposition. Emmett McGroarty, Jane Robbins, and Erin Tuttle believe that redelegation has been a stealth instrument that

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123 Go East, Young Man: The Early Years 217 (1974).
124 James O. Freedman, Crisis and Legitimacy 262 (1978).
125 John Hart Ely, Jr., Democracy and Distrust 132 (1980).
126 Redish, *supra* note 84, at 142-43.
127 Schoenbrod, *supra* note 110, at 10.
128 Theodore Lowi, The Politics of Disorder xvii-xviii (1974).
129 J. Skelly Wright, *Beyond Discretionary Justice*, 81 Yale L. J. 575, 585 (1972).
130 *Id.* at 586.

has weakened the constitutional role of the states in order to empower the central bureaucracy.[131] John Marini agrees, maintaining that centralization undermines natural rights, limited government, and the separation of powers and faulting Congress for accepting the role of guardian of the administrative state.[132] Steven Hayward thinks that if the process "is not stopped and reversed, it will result in the end of limited constitutional government."[133]

More than this, conservatives blame redelegated administrative discretion for enabling the growth and dominance of big government and the regulatory empire that has emerged to do its work. "The rationale for this virtually complete abandonment of the nonredelegation principle is simple: Congress believes – possibly correctly – that the modern administrative state could not function if Congress were required to make a significant percentage of the fundamental policy decisions."[134] Redelegation might well be necessary for the modern administrative state, but conservatives do not concede that the modern administrative state itself is necessary. In fact, the very indispensability of administrative discretion to the modern state is for them the most powerful argument against it. The alternative, reliance on the market and private initiative, conservatives claim is more efficient and effective, less costly financially and otherwise, and more conducive to preserving liberty and developing strong personal character and independence.

To liberals, this argument gets things precisely backwards. They see a very broad public consensus supporting the programs identified with the administrative state.[135] In addition, as an analysis of every redelegation from 1947-2012 revealed, "increased concentration of implementation authority is associated with greater ideological congruence between pivotal members of the House and Senate."[136] Accordingly, efforts to dismantle the administrative state, particularly, efforts led by unelected judges, strike liberals as profoundly anti-democratic. What gives this special bite is that these efforts, dressed in legal verbiage in court cases practically invisible to laypersons, grant the public no meaningful role and proceed almost entirely without their knowledge. That the conservatives' rationale features paeans to democracy liberals regard simply as a crowning hypocrisy.

If the dispute over delegation were merely a quarrel between abstractions, it might attract the interest only of ideologues and narrow specialists. But it has become perhaps the principal intellectual arena where the legal struggle between liberalism and conservatism is played out, "the legal equivalent of mortal combat."[137] A quarter century ago, the "problem of delegation" was said to occupy "center stage

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131 Emmett Mcgroarty, Jane Robbins, & Erin Tuttle, Deconstructing the Administrative State: The Fight for Liberty (2019); Peter Wallison, Judicial Fortitude: The Last Chance to Rein in the Administrative State (2018).

132 John Marini, Unmasking the Administrative State: The Crisis of American Politics in the Twenty-First Century 43, 59 (Ken Masugi ed., 2019).

133 Steven F. Hayward, *The Threat to Liberty*, *in* 17 Claremont Rev. of Bks. (Winter, 2016-2017).

134 Jamelle C. Sharpe, *Judging Congressional Oversight*, 65 Admin. L. Rev. 184 (2013).

135 Bruce Ackerman, We The People: Foundations 47-50 (1991).

136 Jordan Carr Peterson, *All Their Eggs in One Basket? Ideological Congruence in Congress and the Bicameral Origins of Concentrated Delegation to the Bureaucracy*, 7 Laws 19 (2018).

137 Gillian E. Metzger, *The Roberts Court and Administrative Law*, Sup. Ct Rev. 1 (2018)..

in any account of public law today."[138] Years have only validated this observation and awarded it an exclamation point.

Recently, the Supreme Court has indicated that it may, at long last, revisit the redelegation issue. *Gundy v. United States* (2019), concerned Herman Gundy, who was convicted of giving cocaine to a minor girl and raping her. Congress' Sex Offender Registration and Notification Act of 2006 (SORNA) required all sex offenders convicted or serving prison time after its enactment to join a nationwide registry for sex offenders, but left it to the attorney general to determine whether and how the law applies to offenders convicted *before* its enactment.[139] The attorney general decided that the registration requirement applied retroactively on an interim (2007) and then a permanent (2010) basis. Gundy failed to register, was prosecuted and convicted, and sued, charging that Congress had delegated excessive authority to the attorney general.

Speaking for a liberal plurality, Justice Kagan found that SORNA had adequately limited the attorney general's discretion by requiring him, by implication, to implement the law "as soon as he thought it feasible to do so."[140] As the law defined sex offender as "an individual who was convicted,"[141] that is, in terms of a past conviction, it seemed reasonable for the attorney general to apply the law retroactively, and the statute's legislative history indicated that this "was front and center in Congress' thinking."[142] The redelegation was a "stopgap [addressing] practical problems . . . and nothing more,"[143] which Kagan characterized as a "transitional"[144] issue. With this "intelligible principle," which "the Court has made clear [is] not [a] demanding" standard, the law "easily passes constitutional muster."[145] Seeing *Gundy* as a possible proxy for redelegation generally, Kagan wrote, "If SORNA's delegation is unconstitutional, then most of government is unconstitutional – dependent as Congress is on the need to give discretion to executive officials to implement its programs."[146] Justice Alito concurred separately, noting that he would have been "willing to reconsider" redelegation but acknowledging that he could not say that "the statute lacks a discernible standard that is adequate under the approach this Court has taken for many years."[147]

In a dissent longer than the majority opinion, Justice Gorsuch, long a foe of redelegation, argued that redelegation "undercuts" accountability, dismissing the intelligibility principle as having "no basis in the original meaning of the Constitution, its history, or even the decision from which it was plucked."[148] He asserted that redelegations must be "sufficiently definite and precise to enable Congress, the courts, and the public to ascertain whether Congress' guidance has been followed,"[149]

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138 Harold J. Krent, *Delegation and Its Discontents*, 94 Colum. L. Rev. 710 (1994).
139 34 U.S.C. § 20911-13 (2006).
140 Gundy v. United States, 139 S. Ct. 2116, 2125 (2019).
141 *Id.* at 2123.
142 *Id.* at 2127.
143 *Id.* at 2125.
144 *Id.* at 2129.
145 *Id.*
146 *Id.* at 2130.
147 *Id.* at 2131.
148 *Id.* at 2139.
149 *Id.* at 2142.

Gundy failed to change redelegation doctrine, yet it may well be the harbinger of changes to come. The very fact that the Court agreed to hear the case – the first delegation case in nearly two decades – when there was no conflict among the circuit courts indicates a readiness, perhaps an eagerness, to reconsider the issue. Moreover, the addition of Justice Kavanaugh, known for his reservations about delegation, may mean that there is now a majority supporting that position. In *Paul v. United States* (2019), a redelegation case the Supreme Court declined to hear, Kavanaugh, sitting as a D.C. circuit judge, declared that Gorsuch's "thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases."[150] Justice Thomas has also pointed out that "the Constitution does not speak of 'intelligible principles [but instead] vests all legislative powers" with Congress;[151] Article I "require[s] that the federal government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process."[152] Justice Alito, too, has dismissed defenses of redelegation as a "mere fig leaf of constitutional justification,"[153] and Chief Justice Roberts, known for his caution, has observed that "the danger [of tyranny] posed by the administrative state cannot be dismissed."[154] A majority, deeply suspicious of redelegation, may already exist.

Does "this turn against congressional delegations signif[y] a profound transformation in our political and intellectual life"?[155] It depends. One option would be simply to dismantle the administrative state, on the theory that, whatever its virtues, redelegation is prohibited by the Constitution. However, this seems so radical a proposal – even a critic of redelegation admitted it would be "unlikely [and] highly disruptive"[156] -- that no President or Congress has ever seriously considered it. Regardless as to whether the administrative state is in fact necessary for the well being of the public, clearly there is a durable and entrenched public consensus that thinks so. This option is plainly a nonstarter.

A second option would be to continue the status quo, pretending that there is really no constitutional problem. The Constitution bans redelegation, Justices might admit, but what Congress has done is not redelegation, but merely rule making. Nearly everyone recognizes that this verbal sleight-of-hand does not solve the problem, but rather only denies that a problem exists. This option possesses the enormous advantage of continuing things as they are, and plainly appeals to the Court's liberal faction. But it also offers nothing to its opponents, who seem unlikely to quietly surrender.

Justice Gorsuch, in his *Gundy* dissent, pointed to intermediate options. Highlighting the importance of the criminal nature of the regulation, he noted that

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150 Paul v. United States, 140 S. Ct. 342 (2019).

151 Whitman, *supra* note 69, at 487 (Thomas, J., concurring).

152 Dep't of Transp. v. Ass'n of Am. R.R., 135 U.S. 1225, 1246 (2015) (Thomas, J., concurring).

153 Whitman*, supra* note 69, at 475 (Alito, J., concurring).

154 City of Arlington v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

155 J. Benton Heath, *From the Spirit of the Federalist Papers to the End of Legitimacy: Reflections on* Gundy v. United States, 114 Nw. U. L. Rev. 1723, 1727-28 (2020).

156 Justin Walker, *The Kavanaugh Court and the* Schechter-*to*-Chevron *Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 Ind. L. J. 923, 943 (2020).

the crime of which Gundy was convicted literally would not have existed, save for the attorney general's action. Redelegation meant that "a single executive branch official [could] write laws restricting . . . liberty," notwithstanding that the Framers considered the "federal government's most dangerous power was the power to enact laws restricting the people's liberty."[157] If criminal redelegation was counted as the worst kind, why not start the carve-out here? Also, while Gorsuch did not mention it, excising criminal regulations would not affect the commercial interests that have made their peace with redelegation, and thus would entail a much lower level of political conflict.

Underpinning Gorsuch's argument was a pair of distinctions he drew: privileges versus rights and fact finding versus policy making. If privileges and fact finding were involved, he clearly would be much more likely to uphold redelegation than if rights and policy making were involved. In *Gundy*, he believed that rights and policy making were involved. Rejecting the intelligible principle standard as useless, he would return to "fill up the details," a test set down in a 1911 case involving grazing rights.[158]

Another option might be to confine redelegation to minor matters or incidental powers. As a prominent originalist put it, "Some powers are so great, so important, or so substantive, that we should not assume that they were granted by implication, even if they might help effectuate an enumerated power."[159] Following this line of reasoning, Chief Justice Roberts, in considering whether the Affordable Care Act could compel people to buy health insurance, held that forcing people to purchase something altered "the relation between the citizen and the federal government" so substantially that it constituted "a great substantive and independent" change that could only be authorized by an express provision of the Constitution.[160] This rehearsed James Madison's familiar argument in the House against Hamilton's proposed Bank of the United States. Creating a bank was such a great power that it could not be implied from the Constitution, Madison said, but required explicit authorization. Congress was obliged to weigh not merely "the degree of incidentiality to an express power [but also the] degree of its importance."[161] The Constitution must "condemn the exercise of any power, particularly a great and important power, which is not evidently and expressly involved in an express power."[162]

If I hire someone to manage my restaurant, she does not need to ask me if she has the authority to buy tomatoes. That power is incidental to her function as

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157 *Gundy*, *supra* note 140, at 2131, 2133 (2019).

158 United States v. Grimaud, 220 U.S. 506, 517 (1911).

159 William Baude, *Rethinking the Federal Eminent Domain Power*, 122 Yale L. J. 1738, 1749 (2013).

160 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2589, 2591, 2593 (2012). But *cf.* Ginsburg, J., concurring and dissenting, at 2627.

161 2 Annals of Cong. 1896 (1791).

162 *Id.* at 1899. Hamilton's supporters strongly disagreed (*see, e.g.*, pp. 1904, 1929-30). Concerning a bill providing for federal aid to a New Jersey copper mine, Jefferson retorted, "Congress are authorized to defend the nation. Ships are necessary for defense; mines, necessary for copper; a company necessary to work the mines; and who can doubt this reasoning who has ever played 'This is the House that Jack Built.' Under such a process of filiation the sweeping clause makes clean work." Thomas Jefferson letter to Edward Livingston (Apr. 30, 1800) (on file with the Library of Congress).

manager. But if she wants to double the size of the restaurant or change the menu from Italian to Welsh or hire her son as chef, I might want to insist on a right of approval. Where on the spectrum between buying tomatoes and doubling the size of the restaurant does the decision cease to be incidental? If she wants to repaint the dining room, does she need to talk to me? Would it depend on whether she chose a different shade of its current white or instead a chartreuse to match the color of her daughter's hair? It is hard always to be certain where to draw the line, and as the two of us each have our own interests and perspectives, we can hardly pretend to objectivity. So it is with delineating the boundaries of incidental powers for the purpose of resolving redelegation controversies.

In *FDA v. Brown & Williamson* (2000), the Supreme Court considered an effort by the Food and Drug Administration to regulate children's access to tobacco products. The Court highlighted a provision of the United States Code that "marketing tobacco constitutes one of the greatest basic industries of the United States," and concluded that Congress did not intend to delegate such a major decision to the FDA.[163] Similarly, in *King v. Burwell*, the Court held that as the Affordable Care Act "involved billions of dollars [and] affect[ed] the price of health insurance for millions of people,"[164] the Court could not assume that Congress intended to delegate the rules requiring purchase of coverage to an agency. Political accountability required that Congress make the decisions.

Justice Kavanaugh has emerged as the chief proponent of the major question exception.[165] When sitting on the D.C. Circuit, he dissented in a case involving an FCC rule on net neutrality, and held that given its importance, "clear congressional authorization" was required for redelegation.[166] Absent this authorization, redelegation would violate the separation of powers. The very fact that redelegation would facilitate rapid policy change seems to Kavanaugh another reason to proceed cautiously, for the legislative process established in the Constitution is intended to slow passage as a means of ensuring "broad support."[167] Justice Kavanaugh's answer to the puzzle would eliminate contentious line drawing: require Congress explicitly to authorize redelegation.[168] Certainly, this would clarify matters, although even here unanticipated circumstances may present silences and ambiguities that would remain unresolved.

From 2009-2017, as a political gesture congressional Republicans proposed the REINS Act (Regulations from the Executive in Need of Scrutiny) that would have necessitated that all major rules be approved via a joint resolution, making it much harder for agencies to generate regulations, but it never was adopted.[169]

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163 529 U.S. 120, 137.

164 135 S. Ct. 2480, 2483, 2489 (2015).

165 Jonathan H. Adler, *Will Kavanaugh Curb Sloppy White House Deregulation?*, N.Y. Times (July 16, 2018), *available at https://www.nytimes.com/2018/07/16/opinion/brett-kavanaugh-supreme-court-administrative-state.html*.

166 U.S. Telecom *supra* note 162, at 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

167 Kavanaugh, *supra* note 87, at 1910.

168 United States Telecom Ass'n v. FCC, 855 F. 3d 381 (D.C. Cir. 2016) (dissenting); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118 (2016).

169 An interesting question is whether President Trump's travel bans could survive such a major exception test. In *Trump v. Hawaii*, he claimed that 8 U.S.C. §. 1182 (f) authorized the President to prevent the entry of foreign nationals he considers "detrimental to the interests of the United States . . . for such period as he shall deem necessary . . . or impose

An obvious problem with the major question approach is the absence of objective criteria for distinguishing major from minor questions. Was creating a national bank a major question? Madison and Jefferson thought so. Hamilton and Marshall thought not. Absent these objective criteria, the result of REINS might well be even more judicial subjectivity, confusion, and unpredictability.

The judicial combat over redelegation is most immediately focused on *Chevron v. Natural Resources Defense Council* (NRDC), decided in 1984, universally described as "the most famous doctrine in all of administrative law."[170] Before the case, it was assumed that courts had the power to determine what an ambiguous or silent regulation meant, on the theory that Congress had an intention to fit every situation and it was up to the courts to determine what the intent was. One analysis of mandamus cases decided before 1940 found that "the Court's interpretive role was essentially [nondeferential] de novo,"[171] while another denied that "there is one elegant allocation of power between court and agency."[172] Sometimes, courts were deferential, and sometimes they were not.

The *Chevron* case arose out of the Clean Air Act of 1977,[173] which empowered the EPA to issue regulations governing "major stationary sources of pollution." The EPA's regulations allowed states to treat all pollution emitting devices within a single factory as if they were encased in a single bubble; the NRDC considered the bubble approach inconsistent with congressional intent, insisting that each piece of equipment be treated as a pollution source that had to meet the pollution standard. Congress had not defined "stationary source" in a way that would have resolved the dispute, and the legislative history was inconclusive.

Justice Stevens, writing for a unanimous Court, acknowledged that if Congress' statutory intent were clear, agencies and courts had to follow it; "that is the end of the matter."[174] But what if the statute is silent or ambiguous? In these cases, Stevens said, "judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do."[175] Judges lack policy expertise and are not accountable to the people; agencies possess expertise and are indirectly

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on the entry of aliens any restrictions he may deem to be appropriate." The provision did not define "interest" nor did it require the President to present evidence that the ban was a reasonable means to that end, but it did allow the President on his own to criminalize conduct that had not been criminal. Targeting a major policy, the provision would seem to lack an intelligible principle. Additionally, that it might imply a power to override congressionally authorized visa categories might also pose separation of power issues. Chief Justice Roberts ruled that as the provision "exudes deference to the President in every clause . . .the proclamation falls well within this comprehensive delegation." 138 S. Ct. 2392, 2408 (2018). It is precisely the exuding of deference that raises redelegation concerns.

170 Adrian Vermeule, Judging Under Uncertainty: An Institutional Theory Of Legal Interpretation 201 (2006); Joshua Matz, *The Imminent Demise of Chevron Deference?*, Take Care Blog (June 21, 2018), *available at* https://takecareblog.com/blog/the-imminent-demise-of-chevron-deference

171 Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L. J. 908, 958 (2017).

172 Ann Woolhandler, *Judicial Deference to Administrative Action – A Revisionist History*, 43 Admin. L. Rev. 197, 245 (1991).

173 Pub. L. 95-95, 91 Stat. 685.

174 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc. 467 U.S. 837, 842 (1984).

175 *Id.* at 866.

accountable through the President; "it is entirely appropriate for the political branch of the government to make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve or intentionally left to be resolved by the agency."[176] Courts should not impose their own interpretation of the statute, but should defer to the agency, provided only that the agency's interpretation is not arbitrary, capricious, or manifestly contrary to the statute. As a kind of default judgment, Stevens assumes that Congress has implicitly delegated authority to agencies to fill in the gaps.

Initially, conservatives lauded *Chevron*, perhaps because the agencies that were empowered were part of the Reagan administration. The Pacific Legal Foundation and the Mid-America Legal Foundation, both conservative think tanks, submitted amici briefs in support of deference, Justice Scalia, an expert in administrative law, defended the decision as implementing congressional intent,[177] and Kenneth Starr, then with the D.C. Circuit, observed, "Unelected judges should leave the executive branch free to pursue . . . what it perceives to be the will of the people."[178] By the Obama years, however, the perils of redelegation seemed clearer[179]

Critics have attacked *Chevron* and its progeny as instances of judicial abdication[180] that encourage Congress and the courts to pass difficult or politically controversial policies on to the agencies, thus expanding their role as enunciators of constitutional law and empowering them at the expense of the political branches. Justice Kennedy, for instance, thought *Chevron* encouraged "cursory analysis" and "reflexive deference;"[181] Chief Justice Roberts pointed to the "thousands of pages of regulations [and] hundreds of federal agencies poking into every nook and cranny of daily life";[182] Gorsuch, when on the Tenth Circuit, said that *Chevron* permits "executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution;"[183] and Justice Thomas declared that *Chevron* "wrests from courts the ultimate interpretive authority to 'say what the law is' and hands it over to the executive"[184] citing John Marshall in *Marbury v. Madison*.[185] By this time, the composition of the federal judiciary had become much

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176 *Id.* at 865-66.

177 Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L. J. 511, 517. On the Court, he also favored Chevron deference, as in Whitman, *supra* note 69, at 473-75 ; Gonzales v. Oregon, 546 U.S. 243, 301 (2006); City of Arlington, *supra* note 154, at 299.

178 Kenneth W. Starr, *Judicial Review in the Post*-Chevron *Era*, 3 Yale J. On Reg. 283, 309 (1986). *See also*, Douglas W. Kmiec, *Judicial deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 Admin. L. J. 269 (1988); Lawrence H. Silberman, Chevron—*The Intersection of Law and Policy,* 58 Geo. Wash. L. Rev. 821 (1990).

179 *See, e.g.*, Joseph Postell, How to Limit Government in the Age Of Obama, Heritage Foundation (June 25, 2013); *Founders Betrayed? New Threats to US Democracy and the Rule of Law*, Am. Enterprise Inst. (Nov. 30, 2012).

180 Gorsuch, J., Gutierrez-Brizuela v. Lynch, 834. 3d 1142 (10th Cir. 2016).

181 Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018).

182 Arlington, *supra* note 154, at 315.

183 Gutierrez-Brizuela, *supra* note 180, at 1149.

184 Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015).

185 5 U.S.(1 Cr.) 137, 177 (1803). On the other hand, if courts defer to agencies, they are saying that the agencies' interpretations of statutes *are* the law.

more heavily weighted toward Republicans, perhaps explaining why conservative judges and pundits now perceived more defects in Chevron than they had noticed a few years earlier.

If the charge of judicial abdication suggests no specific remedy, more focused critiques have called for particular responses. For example, in *Auer v. Robbins* (1997), the Court decided that courts should defer to an agency's interpretation of its *own* regulations,[186] and in *National Cable & Telecommunications Association v. Brand X Services* (2005), the Court held that the agency's interpretation should prevail, even when it conflicted with a judicial precedent.[187] A future Court might rule that these cases approve a conflict of interest that allows agencies to judge their own causes, placing them both in obvious jeopardy. In this, *Chevron* poses the same problem that faces redelegation generally. Is the statute sufficiently silent or ambiguous to satisfy *Chevron*? A dissatisfied consensus has proven difficult to translate into a satisfied consensus on a replacement. As my father used to remind me, "You can't beat something with nothing."

Prophecy is always treacherous, but it seems clear that redelegation will neither remain intact nor be entirely struck down. Hence, much of the overblown rhetoric the controversy has inspired seems beside the point, especially the back-and-forth on democracy. No one expects Congress to vastly broaden its legislative mandate nor the agencies to relinquish their administrative responsibilities. Democracy, we recognize, is more about choosing leaders than controlling their policies. We may imagine that the political branches are the great compromisers. But, as we shall see, courts compromise, too.

To delegate or redelegate? The weak-kneed reply (surprisingly) received classic expression from John Marshall: "" It will not be contended that Congress can delegate to the courts, or to any tribunal, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."[188] Will presidential and congressional initiatives provoke the other to greater activity?[189] Is there a shared interest in effective governance? The influence of the administrative state is felt everywhere, and so though cases on same sex marriage and abortion may win the headlines, administrative law has a far greater impact on the Constitution and the every day life of Americans.

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186 519 U.S. 452, 461.

187 545 U.S. 967, 1003 (Thomas, J.). A few years later, Thomas announced that he had changed his mind. "It is never too late to surrender former views to a better considered position." South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2100 (concurring) (2018).

188 Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42-43 (1825).

189 On the other hand, a President or an agency, after following notice rules, may simply issue regulations essentially on their own authority. Thus, even ideal legislators would need to delegate considerable authority to administrators to apply laws to a complicated, changing world. For example, the Reagan administration's aggressive assertion of administrative discretion was met by Congress less willing to delegate authority to the executive. Epstein & O'Halloran, *supra* note, at 115.

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