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ARTICLES

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"To Promote the General Welfare": Addressing Political Corruption in America[1]

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ABSTRACT

Systemic (but lawful) political corruption reduces well-being and equity in America. The original form of Madisonian democracy is no longer capable of containing such corruption. Proposals currently on the table to stem corruption are unlikely to be effective and tend to undermine basic rights. This Essay describes a new, but still Madisonian, approach—regulating the output of corrupted legislative and administrative processes, rather than the inputs. Providing for substantive ex post review of direct and delegated legislation would be far more protective of the "general welfare" of the People than other reforms, while no more or less difficult to implement. Supporting an "umpire" branch may be a dominant strategy for elites themselves.

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The inference to which we are brought is, that the CAUSES of faction cannot be removed, and that relief is only to be sought in the means of controlling its EFFECTS.

THE FEDERALIST NO. 10 (James Madison)

I. Introduction

Systemic, institutional, or "type 2" lawful political corruption is a serious problem. It misallocates resources, undermines trust in government, and contributes to the growing gap between the rich and the poor. Systemic corruption occurs when political representatives routinely face options that advance their own interests at the expense of the public, and for which there is little or no personal or political risk. Many Americans are contemptuous of politicians because they appear to be for sale. People distrust Congress in particular. Why is this and what can we do about it?

It is difficult to avoid the suspicion that there is something wrong with the structure of government. After all, the constitutional design ratified in 1788 is largely unchanged. The natural inclination of elected officials to serve their own interests at the expense of the public interest probably has changed little over the years. Politicians have always been seen as rascals. The Madisonian system was once widely admired but now seems to be failing us. If corruption is a more serious problem today than in the past, perhaps it is because Madisonian democracy is less effective at containing it.

James Madison and his colleagues were well aware of the problem of corruption. They understood that elected officials face an unavoidable conflict of interest between the public welfare and their own careers. The Framers also had a realistic view of how interest groups affect government policy. It was, and remains, perfectly obvious that if there is an organization that has the power to grant benefits to one group of citizens at the expense of others, members of each group will want to influence that organization's policies. It is not shocking that interest groups matter in policy making. Any form of government, when compared with the alternative of Hobbesian dystopia, requires the support of elite interests to which the Hobbesian alternative appears only somewhat less attractive. Such elites require ongoing favorable treatment by the government.

Madison addressed the problem of "faction" (interest groups) in The Federalist No. 10. He recognized that powerful factions could influence political outcomes in unhealthy ways, including repression of the interests of less powerful or less well organized, but possibly more numerous, citizens. He argued that a strong central government would be better able to control such factions (as compared to individual states) because the number of competing interests would be greater at the national level. Madison also held that the separation of powers, the ability of citizens to discipline

political misbehavior through frequent elections, and the limited scope of government itself would help to suppress corruption.

Successful candidates for congressional seats have some combination of the following characteristics: expertise in campaign strategy and operations, high levels of name recognition, sufficient funding to purchase advertising and other campaign resources, local support groups (e.g., parties or interests) willing to help with canvassing, and positions on high-salience issues that are consistent with those of a majority of voters in the primary and general elections. Equally important, of course, is the failure of rival candidate(s) to have these same characteristics in greater measure. Discussions of the importance of money in politics often seem to assume that money is the only thing that matters. Not true. However, it is useful to assume, for the sake of discussion, that all the candidates do the best they can to run an effective campaign, given the money and related support that they command. In that context, money and the resources it can buy makes all the difference between winning and losing.

Campaign donors (or "independent" supporters) can help a candidate by giving or spending money for the candidate, or by *not* giving or spending money in support of rival candidates. An interest group can influence a candidate or an incumbent seeking reelection without spending a penny in support of that candidate simply by supporting or threatening to support the rival candidate.

Unfortunately, in practice, elections do not effectively discipline systemic corruption. Candidates require several attributes to succeed, but one is indispensable: money. Voters are not inclined to try to assess candidates' contributions to public well-being. The task is beyond the capability of any voter, however well-informed or diligent. Moreover, elections are biased in favor of the same powerful interests that corrupt legislation because these interests also finance campaign advertising.

It is good that elected officials are responsive to interest groups. That is why the First Amendment has its Petition Clause. However, both legislation and the administration of interventions are vulnerable to corruption because important interests are unable to participate in the process; those interests are diffused, difficult to organize, or lack the resources to invest in political action. Further, neither the judiciary nor the President is in the business of blocking corrupted, welfare-reducing legislation. Finally, most corrupted legislation is obscure, hidden in important unrelated bills, and devoid of interest to the media and media audiences. The canonical checks and balances simply do not work in stemming non-salient, welfare-reducing, and redistributive legislation and regulation.

A major purpose of any democratic government is to provide an arena in which interest groups can reach peaceful solutions to conflicts. The constitutional regulation of this struggle in a Madisonian democracy consists in defining and protecting certain minority rights that the government may not sacrifice to majority demands. Madisonian minority protections are general purpose: they protect not only disadvantaged or unpopular interests but also very powerful minorities with ample resources to influence government policy. Because of these protections, we cannot regulate interest groups and their influence on legislation except through elections or pushback from the other

two branches. Regulation that is more direct tends to invade foundational rights that serve important general constitutional purposes.

Systemic political corruption is costlier today than in 1788 because the substantive jurisdiction of the federal government is no longer limited. Washington now regulates nearly every form of human interaction, economic and social. This provides a virtually unlimited menu of opportunities for elite interests and political representatives to design mutually beneficial interventions, the cost of which is borne mostly by the non-elite. Consequently, government often sacrifices the welfare of the poor, the middle class, and perhaps even the elite as a class, to individual elite interests. Not only is the elite share of the pie increased, but also the process shrinks the size of the pie. In the end, *everyone* may be worse off.

The usual suggestions for reform of the system include tinkering with election or lobbying practices. These are not likely to be successful because they do little to redress the imbalance of interests that contributes to corruption. As the epigraphic quotation from Madison's *The Federalist No. 10* suggests, when reform of the *process* is not feasible, we must turn our attention to policing the *effects*.

When the frequent effect of legislation or regulation is to make the people as a whole worse off, or to make each faction of the elite better off at the expense of everyone else, the democratic process has either erred or failed.[3] There is good reason to veto such law and regulation because better alternatives (among them the status quo) always exist. The reality is that the rival branches are unmoved by welfare-reducing legislation or regulation, and elections are ineffective in penalizing lawful corruption. A different institution or branch therefore must provide a remedy in the form of effective checks and balances to protect the general welfare. This Essay proposes a general solution and, for clarity, a concrete illustration of how to do that.

II. Background

Many political philosophers (with such notable exceptions as Plato) have endorsed democracy as a superior method of governance. Winston Churchill rather glibly characterized democracy as a terrible system but better than

[3] See Richard B. Stewart, *Madison's Nightmare*, 5 U. Chi. L. Rev. 335, 340 (1990) ("It is now widely understood that the processes through which national measures are adopted and enforced do not always ensure that assertions of national power serve the general interest. Instead, they can invite the very domination by faction that Madison so desired to prevent.")

the alternatives.[4] A democracy is a society governed by the will of its people. A people's will is slippery, vague, fickle and ephemeral. It may be more realistic to say that democracy is a society governed by whatever voters will put up with. What matters to people, of course, is what has always mattered: well-being and justice, or as the Framers put it, life, liberty, and the capacity to pursue happiness. A democracy can claim to be "best" only to the extent that it delivers on these objectives.

"All political systems are prone to decay over time."[5] Constitutions can be social contracts or peace treaties among contending interests. Nevertheless, if the legitimacy of a constitution rests on the will of the People, and if the People's will is inconstant, it follows that the constitution (or at least its interpretation) must also change. America's Madisonian democracy is no exception. Shortly after the 1787 publication of the proposed new Constitution, Thomas Jefferson expressed the view that the preservation of liberty might require a bloody revolution in each generation and thus a new Constitution.[6] However, violent change has obvious costs and offers no assurance that the well-being of the People will improve. Plenty of revolutions have produced bad outcomes for the people: Russia in 1917 is a good example.

One reason to modify a democratic constitution is to reduce the costs of political corruption. Corrupt law, including administrative rules and procedures, reduces aggregate well-being, or produces regressive redistribution, or both. Political corruption encompasses far more than criminal acts of bribery or extortion.[7] It includes other, *lawful*, behavior that undermines public trust

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4 "Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time …" 444 Parl Deb HC (5th ser.) (1947) col. 206-07.

5 Francis Fukuyama, Political Order and Political Decay 35 (2014).

6 Jefferson at one point apparently favored a revolution and a consequent new constitution for each generation: "The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is its natural manure." Letter from Thomas Jefferson to William Smith (Nov. 13, 1787), *available* at http://www.loc.gov/exhibits/jefferson/105.html. Madison was skeptical of this and other Jeffersonian proposals to rely on "We the People" as a basis for constitutional revisions beyond those governed by Article V. See The Federalist Nos. 47-51 (James Madison) (stating in *The Federalist No. 49* that "a constitutional road to the people ought to be marked out and kept open, for certain great and extraordinary occasions," but that there were "insuperable objections against the proposed recurrence to the people"); Jack N. Rakove, *The Super-Legality of the Constitution, or, a Federalist Critique of Bruce Ackerman's Neo-Federalism*, 108 Yale L.J. 1931, 1954-58 (1999).

7 *See, e.g.*, Lawrence Lessig, *Out-Posting Post*, *in* Robert C. Post, Citizens Divided: Campaign Finance Reform and the Constitution 97, 99-102, 230 n.19 (2014) (describing subtler forms of political corruption beyond quid pro quo bribery or extortion). There is no single generally accepted definition of, or term for, systemic political corruption. Wallis uses the term "systematic corruption." John Joseph Wallis, *The Concept of Systematic Corruption in American History*, *in* Corruption and Reform: Lessons

in government. Peter H. Schuck performed a massive review of the literature reporting cost-benefit analyses of major government programs. He found that most programs fail to achieve their supporters' announced objectives. One possible explanation is that government usually is incompetent. Another is that supporters actually sought altogether different objectives than those announced.[8] In the presence of systemic political corruption, one would ex-

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from America's Economic History 23, 25 (Edward L. Glaeser & Claudia Goldin eds., 2006) ("In polities plagued with systematic corruption, a group of politicians deliberately create rents by limiting entry into valuable economic activities … [T]hese rents bind the interests of the recipients to the politicians who create them. The purpose is to build a coalition that can dominate government. Manipulating the economy for political ends is systematic corruption."). Lessig characterizes lawful corruption (with adverse welfare consequences) as "type 2" corruption. Lawrence Lessig, Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It 228-33 (2011) [hereinafter Lessig, Republic] (characterizing "type 2" corruption as "dependency corruption," meaning that the "independence [of Congress] gets corrupted when a conflicting dependency develops," such that "the pattern of influence operating upon individuals within [Congress] draws them away from the influence intended."). (Type 1 corruption is, by Lessig's definition, unlawful.) *Id.* at 228 ("As I've described, the law regulating type 1 corruption permits Congress to block it (through bribery and illegal influence statutes), and to block contributions that raise a reasonable suspicion of it."). The term "institutional corruption" is common in the field of political philosophy and science. Seumas Miller, *Corruption*, Stan. Encyclopedia Phil., http://plato.stanford.edu/archives/fall2005/entries/corruption (last visited Oct. 19, 2015). The Supreme Court has relied on a narrow definition —quid pro quo bribery—holding that corporate campaign expenditures on behalf of candidates is "not corruption or the appearance of corruption." Citizens United v. FEC, 558 U.S. 310, 357 (2010) ("'The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.'" (quoting Buckley v. Valeo, 424 U.S. 1, 47 (1976))). Wallis notes that political thinkers in the eighteenth century, including the Framers, used the same word, corruption, both for bribery and for systemic or institutional corruption. Wallis, *supra*, at 32-35, 38-43. The Framers may have emulated self-sacrificing patrician statesmen of the Roman Republic. *See* Gordon S. Wood, *The Real Treason of Aaron Burr*, 143 Proc. Amer. Phil. Soc. 280-295 (1999). Fukuyama provides a list of basic works on (mostly type 1) corruption. Fukuyama, *supra* note 5, at 82-83, 555 n.3. Kaiser and Teachout offer other recent perspectives. *See generally* Robert G. Kaiser, So Damn Much Money: The Triumph of Lobbying and the Corrosion of American Government (2009) (documenting the rise of political lobbying in Congress through the story of one particularly successful lobbyist); Zephyr Teachout, Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United (2014) (arguing that the Supreme Court's narrow conception of "corruption" in recent campaign finance decisions contradicts how American political thinkers have understood the term historically).

[8] Peter H. Schuck, Why Government Fails So Often: And How It Can Do Better 4-6, 127-28 (2014).

pect to find elite interests (and the politicians they support) disguising their true intent.

Systemic political corruption is widely acknowledged as a serious problem. Such corruption often impairs efficient production and allocation of goods and services, shrinking the pie. Corruption also often violates consensus principles of equity. Reduced economic efficiency shrinks (or fails to expand) aggregate well-being.[9] Following John Rawls, consensus principles of equity require, at a minimum, avoiding policies that reduce the well-being of the least favored citizens.[10] Corruption of this variety, rather than less common bribery or extortion, is the subject of this Essay. Bluntly, laws and regulations that reduce aggregate well-being or that reduce the well-being of the poor are either honest errors or the results of corrupt influence. In any case, they should be avoided or repealed.

Dominant interests that achieve and preserve advantages through corrupting influence each have narrow objectives involving a single political or policy issue. A particular interest may seek a tax concession, an import duty, a regulation increasing rivals' costs, or a national defense project for which they hope to supply goods and services. Each successful elite interest may affect aggregate well-being only slightly. Nevertheless, the process is ongoing and the aggregate effect is cumulative, and potentially very large.

Even a successful, dominant interest group must protect itself from rivals through continuing expenditures on lobbyists and campaign support. The process is dynamic—a banquet for politicians, lobbyists, and contributors that goes on 24/365, like a free buffet at a Las Vegas casino. In addition, even though each successful interest increases its share of the pie at the expense of other interests, the political process as a whole may result in *every* interest, strong and weak alike, ending up worse off in absolute terms. The resulting distribution of well-being may be one that even the winners find unattractive.[11]

Bribery of public officials is commonplace around the world and not uncommon in America.[12] The cost of such corruption includes criminal theft or waste of tax revenues and other state resources. A greater cost in

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[9] Aggregate well-being as used here corresponds to the conceptions of general welfare and happiness, as used in the Preamble and Declaration, including well-being derived from the satisfaction of preferences for public goods, environmental amenities, and social justice. *See infra* note 109. I use the term "pie" as a metaphor for aggregate well-being.

[10] *See* John Rawls, A Theory of Justice *302 (*1971) ("Social and economic inequalities are to be arranged so that they are … to the greatest benefit of the least advantaged, consistent with the just savings principle …").

[11] *See* Alan Feuer, Opinion, *Billionaires to the Barricades*, N.Y. Times (July 3, 2015), http://www.nytimes.com/2015/07/05/opinion/sunday/billionaires-to-the-barricades.html (discussing billionaires speaking out against growing income inequality).

[12] See U. S. Department of Justice, Report to Congress on the Activities and operations of the Public Integrity Section for 2014, available at http://www.justice.gov/criminal/file/798261/.

many countries is the reduction of private incentives to work, save and invest that stem from expectations of corrupt expropriation. However, many forms of corruption are lawful. Anything that causes a systemic, predictable divergence between the interest of the People and the interests of public officials, who are the agents of the People, gives rise to corruption, lawful though it may be.[13]

Corruption costs also arise from the adverse impact of hundreds of regulatory interventions that impair the efficiency of production and of markets. Many reflect agency compromises among warring elites, reached without regard for the cost imposed on the public. Major costs result from pervasive distortions in the tax system,[14] and legislature-influenced federal procurement decisions.[15]

The more extensive the reach of government regulation of private economic activity, the greater the burden of corruption on the economy as a whole. Madison did not create a structure with this danger in mind. As a result, there is no institution in today's government that effectively restrains impositions on economic efficiency or distributional equity resulting from Congress's and agencies' responsiveness to well-organized interests—and their neglect of adverse effects on ill-organized interests. Within Washington, the process is taken for granted: it is business as usual, the way things are done.

Madison defended the new Constitution in *The Federalist No.10* partly on the basis that a larger and more diverse republic would diffuse the power of interest groups ("factions") that, in a single state or region, might constitute an oppressive majority. The formation of a larger federal government might render such factions harmless by reducing them to minorities. Madison saw this mitigation of the effects of faction as far superior to attempting to regulate faction directly, for example, by restricting freedoms of speech, press, assembly and so on. *The Federalist No. 10* foresees what I am calling systemic political corruption as inevitable, and claims that a strong but limited central government is preferable to individual state gov-

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[13] As discussed below, I treat political representatives as agents of the voters in a standard principal/agent framework. Suzanne Dovi described other and more complex characterizations. Suzanne Dovi, *Political Representation*, Stan. Encyclopedia Phil. (Jan. 2, 2006), http://plato.stanford.edu/entrie/political-representation ("[T]he concept of political representation has multiple and competing dimensions: our common understanding of political representation is one that contains different, and conflicting, conceptions of how political representatives should represent …").

[14] *See* Eric M. Zolt, *Politics and Taxation: An Introduction*, 67 Tax L. Rev. 453, 455 (2014).

[15] Dean Neu, Jeff Everett & Abu Shiraz. Rahaman, *Preventing Corruption Within Government Procurement: Constructing the Disciplined and Ethical Subject*, 28 Critical Persp. on Acct. 49, 49-51 (2015).

ernments because factional competition will be more robust in the larger arena.[16]

It is clear that the increased number and variety of competing factions, which the Federalists insisted would result from a stronger national government, have not forestalled corrupting factionalism.[17] Factions are issue-oriented; only the organized factions directly concerned affect policy on a given issue. They do not face pushback from other elite interests concerned with different issues. Perhaps local or regional factions do face greater difficulties in the federal system than they do in dealing with the states, but they have logrolling as a work-around. Moreover, a strong central government encourages the formation of national factions. In any event, the ratification of the Constitution has not prevented political corruption.

A republican or representative structure is a key feature of Madisonian democracy. This feature relies on an "agency" relationship between elected representatives and the voters.[18] All types of political corruption reflect an agency failure: a government official sacrifices the public welfare to advance a personal or political agenda. In the Madisonian system, representatives are agents of the People acting in the People's interest; we rely on elections to produce trustworthy representatives who seek to advance constitutional objectives.[19]

"Agency" in economics refers to the relationship between a supplier of services and users of those services. Individuals and firms deal with sup-

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[16] By limited government, I mean limited in its jurisdiction or scope, measured, for example, by the percent of all economic and social interactions subject to government regulation.

[17] Jeffrey M. Berry & Clyde Wilcox, The Interest Group Society 3-4, 187-90 (5th ed. 2009).

[18] James E. Alt & David D. Lassen, *Political and Judicial Checks on Corruption: Evidence from American State Governments*, 20 *Econ. & Pol.* 33, 36 (2008); Robert J. Barro, *The Control of Politicians: An Economic Model*, 14 Pub. Choice 19, 19 (1973) (describing a representational model "focus[ed] on the division of interests between the public and its political representatives," which arises "because the public officeholder is assumed to advance his own interests, and these interests do not coincide automatically with those of his constituents"); John Ferejohn, *Incumbent Performance and Electoral Control*, 50 Pub. Choice 5, 7-8 (1986).

[19] This may include protecting the People from their own sometimes welfare-reducing impulses, which is the central point of *representative* democracy. It is beyond the scope of this Essay to consider the implications of the new behavioral economics. *See, e.g.,* Raj Chetty, *Behavioral Economics and Public Policy: A Pragmatic Perspective*, 105 Am. Econ. Rev.: Papers & Proc. 1, 1-3 (2015). But on the public choice incentives of policymakers, voters, and consumers, see Isaiah Berlin, *Two Concepts of Liberty*, in Liberty: Incorporating Four Essays on Liberty 166, 183-85 (Henry Hardy ed., 2002), discussing philosophical objections to certain behavioral interventions, and W. Kip Viscusi & Ted Gayer, *Behavioral Public Choice: The Behavioral Paradox of Government Policy,* 38 Harv. J.L. & Pub. Pol'y 973, 976-77 (2015), pointing out that public officials are subject to the same behavioral lapses as voters and consumers.

pliers of goods and services when it is not efficient to produce their own. Although all suppliers can be thought of as agents, suppliers assume an important agency character when, due to information or skill asymmetry, supplier performance cannot easily be monitored by those who rely on the service. This condition may prevail even when users regularly consume the product or service if, for example, readily comparable alternatives do not exist, or some effects on happiness (or profit, in the case of firms) are delayed, occult, or situational. The production of law has this character.

Agency in this economic sense is fundamental to the division of labor that permits scarce resources to be employed more efficiently than would be the case in a world of autonomous individuals. Absent reliance on specialists, which is avoided when agents are seen as untrustworthy; humans would not have progressed much beyond hunting and gathering in small family groups.[20] Cooperation among individuals, backed by social and cultural institutions, particularly law, is in constant tension with instinctive human self-interest.

In fact, there exists what may be a metaphor, an analogy, or perhaps even a deep biological connection between this agency tension and the tensions among the specialized cells of all multicellular livings things, including humans. Specialized cells sacrifice themselves to the benefit of the organism because doing so provides benefits from the division of labor and economies of scope, more than repaying the sacrifice. This achievement requires multiple dimensions of protection from cells that would cheat or "free ride" on the cooperative behavior of others, damaging the organism in the process. When these protections fail, the organism suffers from cancer.[21] Similarly, when human agents with political power cheat, the social organism to which they belong is corrupted, injuring many or potentially all other members of society.[22]

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[20] The economic growth literature from the time of Adam Smith has laid great emphasis on the roles of economies of scale, the division of labor (specialization), and the sharing of knowledge and expertise amongst a growing population. *See generally* Charles I. Jones & Paul M. Romer, *The New Kaldor Facts: Ideas, Institutions, Population, and Human Capital*, 2 Am. Econ. J.: Macroecon. 224 (2010).

[21] C. Athena Aktipis et al., *Cancer Across the Tree of Life: Cooperation and Cheating in Multicellularity*, 370 Phil. Transactions Royal Soc'y London B: Biological Sci. 1, 1 (2015).

[22] Competition and cooperation each play key roles in our culture. In many contexts, competition contributes to the general welfare, most often by selecting and promoting the fittest individuals or organizations for a particular role. However, competition can also reduce welfare by diverting resources to zero-sum struggles. In other contexts, cooperation is more effective in promoting welfare, often through economies of scale and specialization. Antisocial cooperation can reduce the gains available from competition, as in cartels, cabals, and oligarchies. In contrast to the generally prosocial effects of competition in economic markets, however, competition in other "markets" lack any a priori expectation of superiority over other decision-making methods.

Legislators who advance the interests of those who, even tacitly, are necessary to reelection or career advancement are in essence soliciting and accepting bribes, even though the form of the exchange is lawful. It is an indictment of the system as a whole that modern public officials may have no choice. That is, support from one or more powerful interest usually is necessary to election and reelection. As Senator Robert Byrd explained on the Senate floor, "[I]t is money! Money! Money! Not ideas, nor principles, but money that reigns supreme in American politics."[23]

Although elections are competitions, they would not guarantee the performance of elected representatives even if the campaign finance system did not corrupt the contests. Voters are "rationally ignorant" of most aspects of their political agents' performance, especially non-salient legislation and administrative rule making.[24] For some citizens voting participation stems in large part from impulse and emotion, motivated by a desire for self-validation. Indeed, many citizens who did not vote in recent elections (but share demographic characteristics with those who did) tend to report falsely in survey responses that they voted.[25]

Electioneering and voting are not exercises in public policy analysis. Voting certainly is not based, and these days could not possibly be based, on well-informed voter assessment of the contribution of incumbents either to local or national well-being. Relative advertising expenditures and simple name recognition strongly influence election outcomes, along with the attitudes predominant in each voter's immediate social network. A handful of high-salience policy issues dominate the media and influence debate. Changes in attitudes among political elites precede corresponding changes in the electorate. The process that produces elected officials is in many respects identical to the process that produces legislation—that is, a struggle among interest groups—and both are subject to political corruption by elite interests. The major virtue of elections is the absence of superior alternatives, just as Churchill suggested.

The existing Madisonian separation of powers and checks and balances are not effective safeguards against corruption because both the President and the judiciary are disinclined to oppose welfare-reducing legislation.[26] Lack of line-item veto power and a need to maintain workable

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[23] 143 Cong. Rec. 3998 (1997) (statement of Sen. Byrd).

[24] A great deal of empirical evidence supports the rational ignorance hypothesis presented in Anthony Downs, An Economic Theory of Democracy 258-59 (1957). *See, e.g.,* Fernanda Leite Lopez De Leon & Renata Rizzi, *A Test for the Rational Ignorance Hypothesis: Evidence from a Natural Experiment in Brazil*, 6 Am. Econ. J.: Econ. Pol'y 380, 381-82 (2014).

[25] Stephen Ansolabehere & Eitan Hersh, *Validation: What Big Data Reveal About Survey Misreporting and the Real Electorate*, 20 Pol. Analysis 437, 439-41 (2012).

[26] *See* Alt & Lassen, *supra* note 18, at 37-38. My thesis is not that high salience issues are likely to be decided in a way that increases welfare, but simply that high salience makes their resolution more democratic. In a Madisonian democracy we must grit our teeth and accept, at least temporarily, popular, welfare reducing majoritarian errors.

relationships with legislators limits what the President can do. The courts typically avoid substantive review of welfare consequences of legislation and regulation, legal realism notwithstanding.[27]

Current practice relies on a corrupted institution (elections) and ineffective intramural branch rivalry to discipline a corrupted legislative system. This is rather like relying on the deterrent effect of the criminal law of arson as the sole remedy for house fires. Smoke alarms and firefighters are useful supplements to arson laws. A central theme of this Essay is that mechanisms to reduce the costs of political corruption should focus on examination of the welfare impact of legislation itself rather than on the political, or electoral processes, or motives that led to enactment. In addition to interdicting welfare- or equity-reducing laws directly, interdiction of welfare-reducing law will tend to reduce the incentive for interests and legislators to engage in political corruption.

Corruption is seldom addressed today from a Madisonian perspective. By "Madisonian" I mean the idea of using organizational structure to discipline political action—for example, dividing constitutional responsibilities among rivalrous institutions to achieve a "separation of powers"[28] or recognizing that sometimes controlling effects is better than regulating causative processes.[29] Intramural rivalry among the branches reflects the trope common to the economic competition that disciplines markets, political competition among rival candidates, and sporting events.

We need not accept, however, low-salience outcomes favoring elite interest groups at the expense of the people. Such outcomes should not be accepted because they are not legitimatized by any expression of or appeal to the popular will.

[27] The United States Court of Appeals for the D.C. Circuit, which hears many appeals from administrative agencies, has occasionally moved to discipline substantively corrupt regulatory policies. Such holdings are not routine, and generally rely at least in part on a procedural or other legal error by the agency. The courts are limited further by the Supreme Court's so-called *Chevron* doctrine which grants substantial deference to agencies' interpretations of enabling statutes. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865-66 (1984) ("When a challenge to an agency construction of a statutory provision … really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.").

[28] *See* Charles de Secondat, Baron de Montesquieu, The Spirit of the Laws 157 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748) ("When legislative power is united with executive power in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically. Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to the legislative power, the power over life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor.").

[29] The Federalist No. 10 (James Madison) ("The inference to which we are brought is that the *causes* of faction cannot be removed and that relief is only to be sought in the means of controlling its *effects*.").

There has been a century-long expansion of central government jurisdiction in the United States. Changing political and policy preferences on the demand side and changing technologies, economic conditions, and political incentives on the supply side, may help to explain the expansion. In any event, I take the expansion as given in order to explore from an economic perspective the roots of political corruption and potential remedies for the modern proliferation of corrupt legislation and regulation. The objective is to explore possible Madisonian structural remedies as alternatives to, or at least as ways to postpone, a potentially radical Jeffersonian reboot.

Parts 2-6 of this Essay chiefly summarize existing literature and understanding. Part 3 describes the problem of *lawful* systemic or institutional political corruption in detail, explaining its role in reducing public well-being and distributive justice. My focus is on legislation that is non-salient and hence inaccessible to public scrutiny via the media or otherwise. Part 4 reviews the relevant objectives of government as described by the Framers of the Constitution. This step is antecedent to measuring the performance of Madisonian governance and a predicate to designing remedies for poor performance. Part 5 reviews a variety of commonly discussed remedies for systemic corruption. I conclude that most are ineffective or impracticable.

Part 6 explores the concept of quality control in organizations and specifically the role of "umpires" in sports and politics. I conclude that the addition of a quality-control umpire to the Madisonian branches would improve the performance of government by reducing the impact of lawful corruption both directly and through changed incentives. I also explore historical precedents and practical impediments. Part 7 provides some illustrative details of an umpire function, formulated as an Amendment, and Part 8 comments briefly on feasibility of the proposed approach to stemming welfare-reducing corruption.

III. Lawful corruption

Congress and much of the federal bureaucracy are now thoroughly corrupt in the sense that officials routinely service well-represented elites without regard to adverse effects on the well-being of the People.[30] The vast majority of legislation involves low-salience issues or low-salience riders to high-salience bills. Low-salience legislation is most likely to reflect corrupt influ-

[30] "[P]olitical decay … is evident in the capture of large parts of the U.S. government by well-organized interest groups. The old nineteenth-century problem … [of political patronage] … has been replaced today by a system of legalized gift exchange, in which politicians respond to organized interest groups that are collectively unrepresentative of the public as a whole." Fukuyama, *supra* note 5, at 35-36.

ence and to have adverse welfare or equity effects. Eric Lipton and Kevin Sack describe an illustrative instance of apparent low-salience corruption in the *New York Times*. Here is the lead:

> Just two weeks after pleading guilty in a major federal fraud case, Amgen, the world's largest biotechnology firm, scored a largely unnoticed coup on Capitol Hill: Lawmakers inserted a paragraph into the "fiscal cliff" bill that did not mention the company by name but strongly favored one of its drugs. The language buried in Section 632 of the law delays a set of Medicare price restraints on a class of drugs that includes Sensipar, a lucrative Amgen pill used by kidney dialysis patients.[31]

Similarly, Igan and Mishra trace much of the blame for the 2008 financial collapse on political corruption in Washington.[32] Lessig,[33] Kaiser, [34] and many others, offer numerous examples of such lawful corruption and their political and personal motivations. [35]

Proof that lawful corruption is rife in Washington relies largely on remembered personal experiences of former officials, lobbyists, and lawyers, and often takes the form of anecdotes. However, scholars using modern empirical methods have begun to trace such bad effects of corruption as trade barriers to their sources in corrupting interest group influences.

The most straightforward way to document political corruption is in connection with international trade barriers. Tariffs and quotas imposed on imported goods nearly always reduce welfare; they increase prices and restrict supply, reducing the well-being of both commercial customers and consumers. This is true whether or not foreign governments subsidize the imported goods. The beneficiaries of trade barriers are domestic suppliers of goods that face import competition. To illustrate, consider solar panels, which convert sunshine into clean electricity.

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[31] Eric Lipton & Kevin Sack, *Fiscal Footnote: Big Senate Gift to Drug Maker*, N.Y. Times (Jan.19, 2013), http://www.nytimes.com/2013/01/20/us/medicare-pricing-delay-is-political-win-for-amgen-drug-maker.html.

[32] Deniz Igan & Prachi Mishra, *Wall Street, Capitol Hill and K Street: Political Influence and Financial Regulation*, 57 J.L. & Econ. 1063, 1082 (2014).

[33] Lessig, Republic, *supra* note 7, at 43-86.

[34] Kaiser, *supra* note 7, at 82-97.

[35] Another line of empirical research attempts to use surveys of policy preferences in conjunction with data on incomes and policy outcomes to test various *political* theories of "who governs?" Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 Perspectives on Politics 564-581 (2014) provide one of the most recent and ambitious of these studies. The origins of political outcomes, however, likely depend on the nature of the matter at issue. High salience issues, for example, are more likely to invoke passionate and popular forces than the narrow, low salience issues that attract attention from special business, taxpayer and financial interests.

The price of solar panels helps determine how much we can reduce air pollution emitted by conventional coal-fired power plants. In addition to contributing to the problem of global warming, conventional power plants have serious adverse effects on human health. Lower prices for solar panels means less air pollution, as consumers and businesses adopt solar power for their daytime needs. United States policy has been to encourage use of alternative (non-coal) power sources. The federal government and many states subsidize investments in solar power installations. So why would the federal government impose tariffs on solar panels imported from China, which has the world's largest and most efficient solar panel factories?

Late in 2014, the U.S. government imposed heavy tariffs on Chinese solar panels and their components.[36] The tariffs, equivalent to sales taxes, range from about twenty-five to more than seventy percent, are intended to help domestic manufacturers compete with Chinese makers. The result is to increase prices paid by consumers and the profits made by U.S. manufacturers. U.S. producers are less efficient than suppliers in China and several other Asian countries. Higher prices for the panels make U.S. customers less likely to install solar panels, which reduces jobs related to panel installation and maintenance. Further, the tariffs make the environment unhealthier for U.S. citizens, increasing health care costs and reducing life expectancies. These effects are the same as those that would result from a criminal conspiracy among solar panel producers to fix prices. Executives and companies who did that would face jail time, fines, and expensive lawsuits. Fortunately for them, the U.S. government accomplished the same result, reducing the "general welfare." Consumers were not so lucky.

Trade barriers in general are unambiguous injuries to the general welfare; they result from political corruption. Domestic industries (and their labor unions) seek trade barriers by making campaign donations or independent expenditures to benefit Members of Congress. They also spend money to hire effective lobbyists, often former Members and senior committee staff. Protection of domestic industries is almost literally for sale. So-called "big data" and advanced econometric methods have documented these links.[37] Consumers who pay the price increases and suffer the other

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[36] Diane Cardwell, *U.S. Imposes Steep Tariffs on Chinese Solar Panels*, N.Y. Times (Dec. 16, 2014), http://www.nytimes.com/2014/12/17/business/energy-environment/-us-imposes-steep-tariffs-on-chinese-solar-panels.html.

[37] *See, e.g.,* Stephen Ansolabehere, John M. de Figueiredo & James M. Snyder, Jr., *Why is There So Little Money in US Politics?*, 17 J. Econ. Persp. 105, 126 (2003) (suggesting that the value of PAC contributions may be in buying access to lawmakers rather than in buying votes); Kishore Gawande & Usree Bandyopadhyay, *Is Protection for Sale? Evidence on the Grossman-Helpman Theory of Endogenous Protection*, 82 Rev. Econ. & Stat. 139, 150 (2000) ("The broad picture that emerges about the U.S. pattern of protection is that it *is* influenced by lobbying spending and lobbying competition, and that, hence, protection is 'sold.'"); James Lake, *Revisiting the Link Between PAC Contributions and Lobbying Expenditures*, 37 Eur. J. Pol. Econ. 87, 96 (2015) ("[T]he sum of trade-related contributions and lobbying expenditures by, respectively, business

effects of trade barriers have no effective voice in the political process that results from such systemic corruption.

Corruption has always been a camp follower of political power. Its modern form is imbalanced pluralism. Schattschneider called modern governance "pluralist" because legislative outcomes reflect the interplay of various interest groups.[38] Pluralism involves political effort by such well-represented interests as regulated industries and professions (today, virtually all industries and professions) and passionate factions (the gun lobby, AARP, environmentalists). However, pluralism in practice omits unorganized and ill-represented interests such as citizens in their roles as consumers, nonunion workers, small investors, patients and so on. This lack of balance is corrupting because among the outcomes is a reduction in public welfare, at the expense of everyone, but especially absent interests. "If you are not at the table, you're on the menu."[39]

Politics is useful because it addresses conflicts among contending interests without resort to costly and risky violence. Under benign political leadership, these conflicts can be resolved peacefully and often in a way that increases aggregate welfare. But especially now that the scope of government extends to every aspect of our daily lives, corruption has become a more serious threat to prosperity and political stability. The pluralist competition is imbalanced and so are its outcomes. Unless a Madisonian check or balance intervenes, welfare-reducing outcomes are likely to prevail. This undermines in the most fundamental way not merely the performance but also the legitimacy[40] of representative democracy.

Public choice theory

The "public choice" literature in economics and political science explores the supply and demand for legislative action and related subjects.[41] Like all

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and labor groups reveals a statistically significant relationship between political money and voting on Free Trade Agreements …").

38 *See* E. E. Schattschneider, The Semisovereign People: A Realist's View of Democracy in America 34-35 (1960).

39 Kay Lehman Schlozman, Sidney Verba & Henry E. Brady, The Unheavenly Chorus: Unequal Political Voice and the Broken Promise of American Democracy vi (2012) (citing a Washington truism).

40 "Democratic legitimation occurs when persons believe that the government is potentially responsive to their views … Democratic legitimation therefore depends upon what people actually believe." Robert C. Post, Citizens Divided: Campaign Finance Reform and the Constitution 49 (2014).

41 *See, e.g.,* James M. Buchanan & Gordon Tullock, The Calculus of Consent: Logical Foundations of a Constitutional Democracy 27-30 (1962); Downs, *supra* note 24, at 11-14; Mancur Olson, Jr., The Logic of Collective Action: Public Goods and the Theory of Groups 98-102 (1965); Mancur Olson, The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities 50-53 (1982); James M. Buchanan, *The Constitution of Economic Policy*, 77 Am. Econ. Rev. 243, 243, 246-48 (1987); Dennis C. Mueller, *Public Choice: A Survey*, 14 J. Econ. Literature 395, 395-

economic models—indeed, all *scientific* models, public choice (and its subfield of "constitutional economics") makes simplifying assumptions. The public choice literature typically assumes that voters and officials are "rational actors," and often emphasizes economic efficiency while sometimes neglecting income distribution. Critics decry normative conclusions that rely on such assumptions.[42]

Public choice models predict that Madisonian democracy will be corrupted through the influence of powerful interest groups on the electoral process, just as the Framers feared. Zywicki provides a succinct recent summary of the argument, including several real world examples of such political corruption.[43] Public choice theories are attractive to those inclined to libertarian or objectivist views because the theories appear to suggest that "big government" reduces public welfare. Moreover, the logic of public choice undermines the legitimacy of Madisonian democracy because it traces ultimate political power to prevailing interest groups rather than to the people, given the influence of elites on election outcomes.

A common criticism of public choice theory is its neglect of "irrational" behavior. Attributes of honor, morality, and self-regard seem to contradict, or at least undermine, the narrowly defined concept of rationality that forms the basis for the theory. This criticism is vulnerable to empirical evidence that the political system in fact behaves as if its participants were rational actors in the sense relevant to public choice predictions. Such evidence is rife.

A less common criticism is that public choice theory generally neglects solutions other than reducing the size of government. That the extent of government will grow and continue to grow is a prediction of public choice theory itself, making it unlikely that even a heroic one-time rollback of government programs and regulations would create a permanent solution to the problem. A different and more effective solution is to change the structure of the political process that produces welfare losses as unintended byproducts of successful elite influence. It may not be practical to eliminate the political process in which interests compete for shares of the pie. But not all increases in elite shares necessarily come at the expense of the poor or have the effect of reducing the size of the pie. Public choice theory would serve us better if it focused on reforms that have the effect of restricting the

96 (1976); George J. Stigler, *The Economic Theory of Regulation*, 2 Bell J. Econ. & Mgmt. Sci. 3, 3-4 (1971).

[42] *See, e.g.*, Bruce Ackerman, *Constitutional Economics/Constitutional Politics* 415-16 (Yale Law Sch. Faculty Scholarship Series, Paper No. 124, 1999), *available at* http://digitalcommons.law.yale.edu/fss_papers/124 ("In constitutional economics, the initial distribution of entitlements is treated as if it were sacrosanct … To the contrary, it would be utterly wrong to allow the beneficiaries of injustice to veto any collective effort to stop them from enjoying the fruits of oppression.").

[43] Todd Zywicki, *Rent-Seeking, Crony Capitalism, and the Crony Constitution* 17-25 (George Mason Univ. Legal Studies Res. Paper Series, Paper No. 15-08, 2015), *available at* http://www.law.gmu.edu/assets/files/publications/working_papers/LS1508.pdf.

set of permitted redistributions to those that do not reduce the welfare of the least well off. This Essay offers an example of such a reform.

Progressive expansion

Significant expansion of central government jurisdictions and interventions in America began in the Progressive Era (roughly 1880-1920), partly in response to demands by organized interests and official desire to create and protect continuing streams of political support. The latter seems to have been an awakening of political entrepreneurship and innovation. National elites found it convenient to substitute federal for state-by-state political influence. Expansions also arose from popular—often populist—demands for protection against "unfair" behavior by others or from various perceived risks to well-being. It was in this era that the modern party system emerged in an ultimately futile attempt to increase electoral accountability. The Great Depression later cemented Americans' sense of reliance on big government.

Expansion of the federal jurisdiction produces "interventions"—most often, regulatory regimes. Interventions of course can mitigate market and other imperfections in human interactions and thus increase aggregate well-being. That is the point, for example, of criminal and civil justice systems.

Nevertheless, interventions intended to remedy even undisputed imperfections (air pollution, to take one example) are subject to corrupt design and implementation. Popular interventions often evolve to serve elite interests by distorting markets and behavior, usually at the expense of ill-organized interests. The greater the number and reach of regulatory interventions, the greater the range of continuing opportunities for political corruption, in which one or more elite interest is serviced at the expense of other, less effective interests. Eventually these effects accumulate to slow or stop the improvement in well-being that results from economic growth and technological change.

When progress slows or stops, public discontent is inevitable. Americans have expectations of increasing prosperity. Such expectations may be out of reach in any case, but today widespread discussion of substantial and growing inequality[44] reinforces discontent.

"The dramatic rise in U.S. wage inequality since the 1970s has been well documented."[45] According to Joseph Stiglitz, "[r]eal U.S. wages have stagnated for decades. Adjusted for inflation, average hourly earnings of production and nonsupervisory employees have *decreased* some 30 percent since 1990. More dramatic, … the aggregate share of labor *excluding the top 1% compensation* … has slid from just under 80% to around 60%."[46]

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[44] The connections among actual or perceived inequality, expectations, and political upheaval are complex. For a recent review and discussion, see Vladimir Gimpelson & Daniel Treisman, *Misperceiving Inequality* 2-3 (Nat'l Bureau of Econ. Res., Working Paper No. 21174, 2015), *available at* http://www.nber.org/papers/w21174.

[45] Jae Song et al., *Firming Up Inequality* 2 (Nat'l Bureau of Econ. Res., Working Paper No. 21199, 2015), *available at* http://www.nber.org/papers/w21199.

[46] Joseph E. Stiglitz, *New Theoretical Perspectives on the Distribution of Income and Wealth among Individuals: Part I. The Wealth Residual* 2 n.6 (Nat'l Bureau of Econ.

While there are many explanations of growing inequality, corruption of political institutions is prominent among them.

There can hardly be a tavern in America where one can provoke an argument by claiming that all politicians are crooks.[47] As the burden of corruption grows, those with poorly represented interests find themselves increasingly frustrated, powerless, open to demagoguery, and attracted to the

Res., Working Paper No. 21189, 2015) (emphasis added) (citations omitted), *available at* http://www.nber.org/papers/w21189.pdf.

[47] *See, e.g.,* Fukuyama, *supra* note 5, at 35, 455-548 (discussing "political decay," caused by institutional rigidity—the inability to reform institutions that produce bad outcomes—and repatrimonialization— the capture of large parts of government by interest groups); Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 Stan. L. Rev. 191, 196-97 (2012) (arguing that lax restrictions on lobbying activities not only contribute to corruption but also allow special interests to obtain economically inefficient and welfare-reducing legislation). Opinion polls have long shown that both politicians as a class and most political institutions, especially Congress, are widely disrespected. *See, e.g.,* Post, *supra* note 40, 216 n.103 (citing polls); John R. Hibbing & Elizabeth Theiss-Morse, Congress as Public Enemy: Public Attitudes toward American Political Institutions 1-4 (1995) (discussing the public's disdain for Congress and other political institutions in the 1990s); John Hibbing, *Images of Congress*, in The Legislative Branch 461, 463-69 (Paul J. Quirk & Sarah A. Binder eds., 2005) (charting the vacillations—and general decline—in the public's esteem of government institutions over the last century); *Confidence in Institutions*, Gallup, http://www.gallup.com/poll/1597/confidence-institutions.aspx (last visited Oct. 21, 2015) (reporting that, in June 2015, Americans trusted Congress the least among fourteen other institutions, including the police, banks, and television news); Frank Newport, *Congress Job Approval Drops to All-Time Low for 2013*, Gallup (Dec. 10, 2013), http://www.gallup.com/poll/166196/congress-job-approval-drops-time-low-2013.aspx (reporting an annual average job approval rating for Congress of 14% for 2013, the lowest in Gallup's history); Frank Newport, *Congressional Approval Sinks to Record Low*, Gallup (Nov. 12., 2013), http://www.gallup.com/poll/165809/congressional-approval-sinks-record-low.aspx (reporting Americans' approval of Congress at 9% in November 2013); *Trust in Government*, Gallup, http://www.gallup.com/poll/5392/trust-government.aspx (last visited Oct. 21, 2015) (showing that the public's trust in the federal government has steadily declined since 2001); *Trust in Government Reaches Record Low, But Most Federal Agencies Are Viewed Favorably*, Pew Res. Ctr. (Oct. 18, 2013), http://www.people-press.org/2013/10/18/trust-in-government-nears-record-low-but-most-federal-agencies-are-viewed-favorably (reporting that 30% of Americans described themselves as "angry" with the federal government, while another 55% described themselves as "frustrated"). Quantification of corruption and its costs is challenging for obvious reasons. *But see* Mark Duggan & Steven D. Levitt, *Winning Isn't Everything: Corruption in Sumo Wrestling*, 92 Am. Econ. Rev. 1594, 1595-96 (2002) (conducting empirical study of corruption in sumo matches); Raymond Fisman, *Estimating the Value of Political Connections*, 91 Am. Econ. Rev. 1095, 1095-96 (2001) (developing quantitative index to measure firms' political connectedness in Indonesia, and finding that "a large percentage of a well-connected firm's value may be derived from political connections).

attentions of opportunistic politicians at all extremes. Politicians that are more centrist often jump on the resulting bandwagon. This process tends to produce additional interventions, each of which presents a continuing stream of opportunities for officials to reward elites within programs characterized and even intended as remedial. The process is a negative-sum game that, unchecked, may eventually have an unhappy Jeffersonian ending.[48]

The Framers of the American Constitution were familiar with corruption, which permeated the 18th century British parliament and the monarchy. Partly in response, the Framers designed a small federal government with limited powers, which necessarily operated with the available technologies of 1787. That design is no longer adequate to constrain corruption of public officials or to make their incentives reasonably compatible with the interests of the People. What has changed is not necessarily the inclination of a typical elected official to seek private objectives at the expense of aggregate well-being. Instead, that inclination is now presented with a much wider set of opportunities, often embedded in politically legitimate responses to public needs or demands. Specifically, ongoing regulation of any economic or social activity by an administrative bureaucracy creates a fulcrum of interest group leverage. Leverage is exercised directly on the political appointees that head the agency and on career bureaucrats and is traceable in most cases to members of congressional committees.[49]

Before discussing remedies for these problems we need to agree on the purposes of government and to understand James Madison's constitutional design and its objectives. In considering remedies for systemic corruption our focus must be on the *performance* of constitutional structures in achieving the Framers' (and the People's) key objectives, which remain largely uncontroversial.

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[48] Violent revolution in America may be a long shot, but not for lack of impassioned despair at political corruption from both ends of the political spectrum. *Compare* Chris Hedges, Wages of Rebellion 1 (2015) (arguing that "[w]e live in a revolutionary moment," citing the Arab Spring, the Occupy Wall Street protests, and other protests around the globe in the early 2010s), *with* Charles Murray, By the People: Rebuilding Liberty Without Permission xiii (2015) (arguing that "we are at the end of the American project as the founders intended it," but that "opportunities are opening for preserving the best qualities of the American project in a new incarnation").

[49] The delegation of legislative, judicial and executive power to administrative units established a linkage between individual members of Congress and administrative agencies, creating not only an immense expansion of opportunities for elite interests to influence policy, but also undermining the Madisonian separation of powers. See Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*. 90 N. Y. Univ. L. Rev. No. 5. (2015) 101, at 140-45.

IV. The Framers' objectives

The delegates to the 1787 constitutional convention in Philadelphia shared overlapping views of the proper role of government. The Framers' views were derived largely from John Locke and other Enlightenment philosophers, the delegates' own educations in the Greek and Roman classics, their observations of British institutions, and their experience with colonial governance. Many had participated in drafting new postcolonial constitutions in their home states. Some were practical men who appreciated as constraints the economic and political interests of prospective ratifiers in the several states.[50] We have indications of their intent, in the prevailing Enlightenment climate of opinion, but most clearly and famously in the Declaration of Independence, the *Federalist Papers*, and the Constitution's Preamble.

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.[51]

Jefferson's politically popular and pithy statement of the proper role of government, adopted and published a decade earlier by many of the same men who returned to Philadelphia in 1787, offers another excellent guide to the Founders' intent.

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. —That *to secure these rights, Governments are instituted among Men*, deriving their just powers from the consent of the governed, —That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[52]

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[50] *See generally* Pauline Maier, Ratification: The People Debate the Constitution, 1787-1788 (2010) (describing in some detail the process and the politics of ratification).

[51] U.S. Const. pmbl. The Supreme Court has held that "Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments." Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905).

[52] The Declaration of Independence para. 2 (U.S. 1776) (emphasis added).

Key ideas in the Declaration of Independence and the Preamble still appear in the speeches of modern politicians, but they have become ritualistic. It is clear enough how Madison's Constitution served the ends of life and liberty by creating specific personal rights against the government.[53] More important for present purposes, the Preamble says, in different words, the same thing as the quoted paragraph from the Declaration, that the *general welfare* of the People—their capacity to achieve happiness—should be a primary objective of government, no less fundamental than protection of life and liberty.

The Framers accepted the necessity of government itself as protection from Hobbesian dangers and as provider of essential collective services, such as national defense and justice, and for the peaceful resolution of conflicts. While these functions advance the purposes of government, the Framers also saw two related threats—those of tyranny and of corruption. The larger and more powerful the government, and the broader its scope, the greater the extent or threat of tyranny. Moreover, given the inherent self-interest of public officials—even if only for their own careers—government that is more extensive implies a greater burden of corruption.

The Federalists' Constitution relies on limited government (now abandoned) and on elections to control corruption. The Framers were well aware of the potential shortcomings of voters and elections, but saw no superior alternative. Indeed, it was Federalist doctrine that the People themselves were the only legitimate source of political power. The Constitution produced by the Philadelphia Convention of 1787 relied on ratification by the People for its own legitimacy.[54]

This objective helps explain Madison's creation of a central government structure that permits or even encourages "gridlock."[55] In the absence of near unanimity among the interests supporting the branches, each with

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[53] Much of the Constitution consists of "negative rights." These are limitations on what the government may do to individuals. These rights also create a remedy—a positive right—enabling the individual to call on the judiciary, the legislature, or the People to restrain government abuse of individual rights. Similarly, a traditional liberty can be seen as an entitlement and an entitlement can often be viewed as a liberty. For example, freedom from expropriation of property, a traditional liberty with roots in Magna Carta, entitles citizens to state enforcement of a right. Health care in old age (Medicare) is an entitlement that confers liberty from a particular category of suffering and dependency on others.

[54] Rakove, *supra* note 6, at 1938. Political legitimacy has more than one definition, but it most commonly refers to what people believe. *See* Max Weber, The Theory of Social and Economic Organization 328 (A. M. Henderson trans., Talcott Parsons ed. & trans., 1947) (discussing three types of legitimate authority). For a broader discussion, see Fabienne Peter, *Political Legitimacy*, Stan. Encyclopedia Phil. (Apr. 29, 2010), http://plato.stanford.edu/entries/legitimacy.

[55] Madisonian gridlock results from intramural rivalry among the branches. Modern gridlock is, admittedly, in large part a product of partisan extremism. Another variety of gridlock results from the Senate's tradition permitting a single Senator to hold up a bill

veto power over the others, the federal government would be prevented from acting quickly or easily.[56] The Framers would also have taken as given the technologies of their times, which themselves limited the roles of central government in a vast and growing nation. Madison could hardly have foreseen or imagined the nineteenth century changes that eventually made *unlimited* central government inevitable, among them national markets, mass production, the limited liability corporation, and revolutions in communication and transportation. Most important, by the twentieth century, for many citizens government had become the natural panacea for all social and economic discontents and the favored vehicle for all social aspirations.

Madison designed federal government structure to minimize the potential cost, in corruption and tyranny, of supplying what were in 1787 considered the essential services of government. He also designed the Constitution to appeal to a majority of ratifiers. By the early twentieth century the Madisonian structure had come under enormous strain. The ratifiers of 1788 were no longer representative of the popular will. Agricultural, industrial, labor, and other easily organized supply-side interests began to demand added central government protections and compensations in adjusting to the new age of mass production and mass media. By the time of the New Deal, such demands had been greatly magnified.

Simultaneously, the federal government became freer to respond to demands for political solutions to economic discontents. Big business had pioneered the development of scientific management and large organizational hierarchies. A professional and reformed civil service, freed of patronage appointments by early in the twentieth century, faster and cheaper communication and transportation, and national media enabled Congress to offer solutions to the problems of organized interests who could produce votes, directly or indirectly. Simply put, central government services could now expand to meet the demand. As the Supreme Court has noted, the federal government today, a century after the Progressive movement, "wields vast power and touches almost every aspect of daily life …"[57]

Broadly speaking, the expansion of government that began in the Progressive era has been associated not with provision of more effective or extensive liberties, but with the creation and administration of new entitlements. Both liberties and entitlements require administration, as do taxation and procurement. Administration of each of these functions unavoidably implies policies, rules, regulations, and adjudications that directly or indirectly marshal and reallocate resources within the private economy. Administration, whether assigned to independent or executive branch agen-

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or confirmation without explanation. The House has traditions and rules with similar effect. Single-member holds can facilitate lawful corruption.

[56] The Article III courts did not become a full-fledged Madisonian branch until the Supreme Court made clear that it claimed the right of judicial review of legislation in *Marbury v. Madison,* 5 U.S. 137, 177 (1803).

[57] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010).

cies, entails the exercise of discretion. Both agency officials and members of congressional appropriations and oversight committees must choose among options that create and destroy income and wealth.

Participants in the economy and other interests today therefore have enormous incentives and opportunities to influence government policy. Well-funded interest groups wield much of their leverage by influencing policy options selected. Their objectives, broadly, are to advance their own agendas without regard to the impact on other interests or on the economy as a whole. The public choice term for this is "rent seeking."[58] Rent seeking by elite interests is nearly by definition regressively redistributive and reduces aggregate welfare. The name itself derives from the monopoly rents (profits) gained by Stuart, Tudor, and earlier royal favorites who were granted such concessions as the right to collect customs duties at a British port of entry. Elites succeed today by providing elected officials with financial and other support, by foregoing such aid to rival candidates, hiring appointed officials after they leave office, and providing all officials with substantive resources crucial to the legislative or rule-making process. In consequence, of course, organized interests threatened by rivals are obliged to defend themselves in like fashion. The goals of elite interests often are most effectively pursued by inducing public officials to neglect their obligations to the People as a whole. Public officials, meanwhile, can advance their careers as elective officials or appointed regulators, or later as lobbyists, by servicing these interests.[59] Elected legislators, in fact, may have little choice, even if they hope merely to remain in office, but to promote interests that will support, or at least not oppose, their reelection. In contrast to pre-Depression practice, the Supreme Court no longer resists these expansions of federal jurisdiction and intervention.

The Framers likely perceived the consequences of corruption in a small and limited government as a tolerable cost of doing business. To put it the other way around, limited government meant limited opportunities for corruption. Further, many potentially effective anticorruption measures

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[58] Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 Am. Econ. Rev. 291, 302 (1974); *see also* Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. Econ. J. 224, 228, 231-–-32 (1967) (examining the welfare costs of rent-seeking activities, such as tariffs and monopolies, and the additional costs associated with political lobbying).

[59] According to Professor Reich, "In the 1970s only 3 percent of retiring members of Congress went on to become Washington lobbyists. Now, half of all retiring senators and 42 percent of retiring representatives become lobbyists." Robert Reich, Opinion, *Legal Scandals and "Anticipatory Bribery" Abound*, *SFGate* (June 12, 2015, 3:07 PM), http://www.sfgate.com/opinion/reich/article/Legal-scandals-and-anticipatory-bribery-6320025.php. *See also* Jordi Blanes i Vidal, Mirko Draca & Christian Fons-Rosen, *Revolving Door Lobbyists*, 102 Am. Econ. Rev. 3731, 3731 (2012) (describing the phenomenon of "revolving door lobbyists"); Timothy M LaPira and Herschel F Thomas III, *Revolving Door Lobbyists and Interest Representation*, 3 Interest Groups & Advocacy 4-29 (2014).

conflict with constitutional freedoms; *Citizens United* makes a good example: to reduce corruption in elections we must invade freedom of speech. Nevertheless, what may have seemed a tolerable cost in 1787, relative to aggregate economic activity, has today been greatly inflated by the expanded role of government, and more so as the freedom to petition Congress has become the focus of a large professional class.

It is instructive to consider how an effective constraint on political corruption could fit into the Madisonian structural framework, lacking limited government. The more urgent point is that, if we do not find a less dangerous solution to the corrupt consequences of modern demands for an unlimited administrative state, we may be faced with the messy Jeffersonian default:

> [I]t is the Right of the People to alter or to abolish [government], and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[60]

V. Potential remedies for political corruption

It is useful to begin with proposals to control political corruption that are not especially Madisonian. These are mostly well known and often advocated, but unsatisfactory in various respects.

A. Broaden the reach of criminal law

It is tempting to suggest that authors of welfare-reducing legislation, and perhaps even those who vote for such laws, should face criminal penalties. However, the criminal law would be of little help in controlling currently lawful corruption.[61] The behavior of legislators is often difficult to categorize. At one extreme, it may be unlawful, for example, frank bribery or extortion.[62] At another extreme, it may be unambiguously virtuous—beneficial to constituents or citizens generally and neutral or adverse to the legislator's personal interest. Legislative behavior commonly reflects

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[60] The Declaration of Independence ¶ 2 (U.S. 1776).

[61] *See* Post, *supra* note 40 at 57 ("And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize." (quoting McCutcheon v. FEC, 540 U.S. 93, 153 (2003), *overruled on other grounds by* Citizens United v. FEC, 558 U.S. 310 (2010)).

[62] Alex Stein, *Corrupt Intentions: Bribery, Unlawful Gratuity, and Honest-Services Fraud*, 75 L. & Contemp. Probs. 61, 6162 (2012) (describing elements of bribery and related offenses and reviewing cases).

mixed motives and complex interactions with other legislators as well as imperfect information about the effects of the law itself. For this reason, constraints on legislative behavior intended to deter corruption can easily generate false positive or negative errors and adverse welfare consequences. Classifying currently lawful influences and their consequences as crimes is also inadvisable because of the difficulty of proving intent.

B. Campaign finance reform

There is a widespread appreciation that campaign contributions, in cash or kind, are a way to buy influence with elected officials or, when offered to a candidate's opponent, a way to punish officials who oppose the contributor's aims. Most officials will admit that large contributions buy access—significant contributors typically can easily communicate their views to an elected official, and those views are likely to receive respect. Even legislators not up for reelection benefit from contributions that flow through to party coffers or other candidates because these contributions buy advancement within the party leadership hierarchy. Membership of legislators on relevant appropriation and oversight committees creates channels of influence to executive and agency officials. Access also accompanies the "revolving door" of congressional staff alumni appointed to regulatory commissions and executive agency positions.

This exchange—money for access—is very much like a bribe. Of course, the official generally does not explicitly agree to vote or otherwise act in the donor's interest. The agreement is tacit. If the official would prefer to act in a way that is at odds with the contributor's interests, she will take pains to explain why she cannot support the donor's position. She will strive to find concessions, compromises, or perhaps side payments on unrelated matters. This interaction is very much like explicit bargaining over the price of (continued) political support. However, because the interaction between officials and supporters is a "repeated game," there is no need for explicit agreement. The large special interest contributor, unlike the typical voter, is able to monitor the representative's performance of the tacit agreement. The contributor can punish a reneging official by withdrawing support or by supporting the official's rivals. Threats to do so are highly credible.

Campaign finance is such an obvious source of corruption that many popular reform proposals focus on limiting contributions from special interests. Examples include the reforms associated with Professor Larry Lessig's brief 2015 campaign for the Democratic presidential nomination and the related "Honest Election Seattle" voucher reforms approved by voters on November 3, 2015.[63] In Washington, Congress has enacted a variety of limits and reporting requirements on campaign contributions.

[63] Bob Young, *'Democracy vouchers' win in Seattle; first in country.* Seattle Times, Nov. 3, 2015. http://www.seattletimes.com/news/politicsdemocracy-vouchers/.

Unfortunately, reforms aimed at campaign finance are unlikely to be effective in limiting lawful corruption. First, the reforms enacted so far have been easily evaded by parties, donors and candidates. The most effective work around is the "independent" organizer of campaign support and expenditure. So long as the independent supporter (individual or corporation) does not coordinate directly with the candidate, the First Amendment provides complete protection for unlimited expenditures.

Second, campaign contributions and independent expenditures, while important, are less significant than the relationships between lobbyists and officials. Lobbyists, often alumni of Congress and congressional staffs, are effective because they earn, or have earned, the gratitude and trust of officials. Officials in need of data or arguments in support of their positions often turn to lobbyists for support, including on matters unrelated to a lobbyist's immediate interests.[64] Sometimes committees or Members of Congress hire lobbyists to serve in important staff positions related to the very issues about which they lobbied. Private sector expenditures on lobbying are many times greater than campaign contributions.[65] The relationships between helpful lobbyists and officials generate feelings of gratitude that make officials reluctant to decline support for the lobbyist's clients.[66]

On the other hand, the logic of representative government relies on representatives having accurate information about the problems and preferences of the electorate. Direct communication between citizens, their or-

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[64] Nicholas W. Allard, *Lobbying is an Honorable Profession: The Right to Petition and the Competition to be Right*, 19 Stan. L. & Pol'y Rev. 23, 42 – 44 (2008).

[65] The Center for Responsive Politics compiles data on contributions and lobbying expenditures based on reports mandated by federal laws and Congressional rules. *See* Center for Responsive Politics, www.opensecrets.org (last visited Oct. 23, 2015). There is general agreement that lobbying expenditures greatly exceed expenditures on campaign donations. *See* Mirko Draca, *Institutional Corruption? The Revolving Door in American and British Politics* 8 fig.3 (SMF-CAGE Glob. Perspectives Series, Paper No. 1 2014), *available at* http://www.smf.co.uk/wp-content/uploads/2014/10/Social-Market-FoundationInstitutional-Corruption-the-revolving-door-in-American-and-British-politics.pdf. The data themselves, however, are often of poor quality and almost certainly understate both sorts of expenditures, especially lobbying. Some data include and other data exclude state and local lobbying, but in principle all data exclude legal services provided by the same firms and individuals that lobby. The incentive of reporting firms is to minimize reported lobbying expenditures; legal expenses are not disclosed. *See* Austin C. Clemens, *All Politics is Local, but Lobbying Is Federal and Local: The Validity of LDA Data*, 16 Bus. & Pol. 267, 268 (2014). Many scholars have mined these and related election data. Lake, *supra* note 37, at 88-96 (summarizing recent findings). The current view, according to Lake, is that interest groups make *both* lobbying expenditures and campaign contributions, seeking to influence policy outcomes on specific issues. *Id.* at 96.

[66] Even small favors can generate powerful feelings of gratitude. Ulrike Malmendier & Klaus Schmidt, *You Owe Me* 31-32 (Nat'l Bureau of Econ. Res., Working Paper No.18543, 2012).

ganizations, and representatives is an important means of acquiring such information. Indeed, the Petition Clause of the First Amendment protects such communication. Yet such protected communications, accompanied by support of the candidate for election or re-election, appears to have the same consequence as a cash bribe.

The Supreme Court faced one facet of the problem in *Citizens United*, which focused on "independent" campaign expenditures in support of a candidate, as opposed to contributions made directly to a candidate. The Court had previously upheld most statutory limitations on direct contributions as well as reporting requirements. In *Citizens United,* the Court had to balance the public's interest in clean politics against the First Amendment freedoms to speak and to petition Congress.

The Court's exceedingly narrow definition of corruption as common bribery informed its decision. The Court evaded the real question posed by corporate expenditure in the context of systemic faction-based political corruption.[67] Most constitutional scholars object to the Court's definition of corruption, or at least to the Court's originalist argument for the definition. Nevertheless, it is difficult to fault the Court for its choice to promote free expression at the necessary expense of corruption—corruption that, in any case, would not be much reduced by regulation of political spending.

Notoriously, candidates and contributors have evaded or avoided a succession of attempts to limit direct campaign contributions. There is usually a lawful way around any regulatory constraint, albeit generally at some cost. Given that the very politicians targeted by the regulations draft the regulations, any other result would be surprising.[68]

Campaign finance reform, even if it "succeeded," would not solve the problem posed by political representatives whose incentives are at odds with the interests of the People. Well-organized and well-financed interests would still be able to influence officials. Given the Framers' choice to promote access to legislators and their reliance on elections, combined with the inherent ambiguity of political motivation, campaign finance reform appears futile as a remedy for systemic corruption.

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[67] *See* Post, *supra* note 40, at 58.

[68] In recent developments, the Supreme Court struck down limits on aggregate individual contributions, *McCutcheon v. FEC*, 572 U.S. 1434, 1462 (2014), and Congress passed legislation increasing permissible contribution caps on contributions to parties. *See*, Eliza Newlin Carney, *Parties Poised to Exploit Broad New Rules*, Roll Call (Jan. 6, 2015, 12:00 PM), http://blogs.rollcall.com/beltway-insiders/parties-poised-to-exploit-broad-new-rules; Press release, Fred Werthheimer, Statement on Reid-McConnell "Bipartisan" Deal to Eviscerate Anti-Corruption Campaign Finance Laws (Dec. 10, 2014), *available at* http://www.democracy21.org/legislative-action/press-releases-legislative-action/fred-wertheimer-statement-on-reid-mcconnell-bipartisan-deal-to-eviscerate-anti-corruption-campaign-finance-laws. Presidential candidates were also accused of "skirting" federal election rules. *See* Eliza Newlin Carney, *Presidential Hopefuls Skirt FEC Rules*, Roll Call (Feb. 26, 2015, 3:00 PM), http://blogs.rollcall.com/beltway-insiders/presidential-hopefuls-skirt-fec-rules-rules-of-the-game.

C. Tighten regulation of lobbying

Although statutes require Washington lobbyists to register, identify clients, and report contributions, there is little chance that such regulation has or will reduce corrupted legislation. After all, the First Amendment encourages lobbying. If lobbying were effectively ended, isolated elected officials would have less information about legitimate (welfare-enhancing) legislation and legislative debate would be less well informed. Moreover, restrictions on access by current lobbyists do not address the underlying problem, which is that important unorganized interests lack the means to hire professional lobbyists. In other words, lobbying is not the problem; the problem is *imbalanced* lobbying. It is unclear, however, how to define or achieve "balanced" lobbying. Regulation cannot make lobbying more balanced. Once again, as with campaign finance, it appears futile to rely on reforms aimed at decreasing the effectiveness or imbalances of lobbying as a means to improve legislative outcomes.

D. Congressional reform

Congressional reform could be a path to mitigate corrupt legislation. On several occasions, Congress has found the means to impose discipline upon itself and its members. For example, a legislative branch agency, the Congressional Budget Office (CBO), "scores" proposed legislation with respect to impact on budget deficits. Members of Congress generally accept the result as an authoritative bipartisan constraint on deficit spending. Another reform permits a suspension of normal procedure for trade bills, the so-called "fast-track" for ratification of trade agreements. Similarly, the Base Closing Commission (BCC) reviews proposed retirements of domestic military facilities. The BCC produces a list of recommended closings, and the Congress votes on the package as a whole, rather than on individual closings.

Finally, both houses of Congress have rules restricting non germane amendments to bills on the floor and restrictions on so-called "earmarked" bills proposed by individual legislators. Nevertheless, these rules are not effective. Corrupt bills often become law by riding the coattails of "veto-proof" spending bills in the form of non-germane amendments or line items inserted in committee or in conference.

The problem with many, perhaps all, congressional reforms is that Congress cannot bind itself to follow its own rules next week, much less bind future Congresses. The most recent law on a given matter always trumps preceding laws. Moreover, majority party leaders can decide with impunity to ignore congressional rules simply by suspending them. No branch, court, or police agency can intervene; for example, party leaders are in continuing negotiations with members of their caucuses to gain support for legislation that advances party objectives. A crucial bargaining tool in the negotiations is the leaders' ability to include bills favored by particular members (and the interests supporting that member) in the portfolio of must-pass party legislation. This mechanism is necessary to party discipline and congressional leaders are unlikely to let procedural rules prevent its use.

E. The Westminster system

One of the remarkable features of Madisonian democracy is its competing independent but inter-dependent branches. Most democracies use a parliamentary system. In the Westminster system, the prime minister is both head of government and the leader of the majority party or coalition in the legislature. The prime minister's party controls the legislative agenda and executes the resulting law, directing a permanent professional civil service. Gridlock normally is absent from such a system, or has been since the monarch and the House of Lords have been effectively taken out of the picture.

When it comes to the role of well-organized interests and lobbyists, the situation in Britain and other parliamentary democracies is no different from the United States.[69] Corrupt influences, corrupt practices, and important ill-organized interests exist everywhere. Party leaders still need to negotiate with members of parliament, and both candidates and parties crave financial and career support from interest groups.

The chief relevant difference between Washington and Westminster is that in Britain there is no ambiguity about assigning responsibility for policy and performance to the current majority party, which may give voters a clearer basis for their decisions in the next parliamentary election. While a parliamentary system might alleviate the frustrations associated with Washington "gridlock," it is far from clear that it would significantly reduce corrupt laws or corrupt law enforcement by administrative agencies in non-salient matters. The party in power and sometimes the minority, in general, would retain incentives and numerous opportunities to cater to elite interests without regard to the public welfare. Finally, pursuit of a parliamentary structure in the United States would almost certainly require a massive constitutional amendment or a constitutional convention under Article V, perhaps a dangerous undertaking.[70]

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[69] Draca, *supra* note 65, at 13-14.

[70] Article V offers two methods: congressional legislation ratified by a supermajority of the states, or a constitutional convention, for which the only precedent is the Philadelphia Convention of 1787. Although beyond the scope of this Essay, constitutional reform in the U.S. is thought to be hampered by the grave difficulty of amending the Constitution. *But see* Tom Ginsberg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, (Coase-Sandor Inst. for Law & Econ., Working Paper No. 682, 2014). *available at* http://chicagounbound.uchicago.edu/law_and_economics_wp (conducting empirical analysis and arguing that attitudes about amending constitutions, or "amendment culture," is a better predictor of how easily and often a constitution may be amended than the number and rigidity of formal legal barriers to amendment). As noted above, tacit amendment by the Supreme Court is far more common than the formal routes.

F. The presidential veto and the unitary executive

Why does the President not simply veto corrupt welfare-reducing legislation? Most Presidents have wielded their veto power sparingly. This is not difficult to understand. First, the Supreme Court has denied the President line item veto power.[71] That enables Congress to package corrupt legislation in bills that the President cannot veto without endangering his own agenda or even the Republic.[72] Further, Presidents are in much the same position as congressional party leaders—they are in continuing negotiations, a repeated game with Congress, its leaders, and its members as they seek to advance their own legislative agendas. If they adopted a policy of vetoing corrupt legislation, that might forestall the passage of such legislation but only at the price of depriving themselves of a key negotiating tool. In addition, Presidents are themselves often beholden to the same interest groups that influence Congress. Even Presidents who cannot succeed have loyalties to aides, appointees, and nowadays, family members with political ambitions requiring elite interest support.

A realistic appreciation of the political constraints facing any President also undermines a proposed reform aimed at malfeasance in the federal administrative bureaucracy, which includes cabinet departments as well as independent agencies. Justice Elena Kagan, then a Harvard law professor, discusses the idea in a 2001 law review article.[73]

The premise of the unitary executive (which Kagan calls Presidential Administration) is that most so-called "independent agencies" such as the Federal Communications Commission (FCC) or the Securities and Exchange Commission (SEC) are in thrall to the interests they regulate, producing rules and regulations harmful to public well-being. The Ford and Carter administrations abolished or greatly pared back many regulatory agencies. This was due in part to activism by the Senate Judiciary Commit-

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71 Clinton v. City of New York, 524 U.S. 417, 448 – 49 (1998).

72 The line item veto is politically as well as constitutionally controversial, implicating the separation of powers as well as the legislative process. One point of departure is to note that the governors of most states enjoy line item veto power, in varying forms, and that the Supreme Court has long enjoyed and exercised a line item veto in reviewing the constitutionality of federal legislation. Whatever theoretical changes in the relative powers of the branches or in legislative logrolling may result from line item veto authority, it does not seem to have engendered cataclysmic consequences. *See* John R. Carter & David Schap, *Line-Item Veto: Where Is Thy Sting?*, 4 J. Econ. Persp. 103, 112 (1990) (reviewing empirical studies and finding that they "provide little or no evidence that total spending, budget outcomes, or executive power are substantially affected in general by item-veto authority"); Philip G. Joyce & Robert D. Reischauer, *The Federal Line-Item Veto: What Is It and What Will It Do?*, 57 Pub. Admin. Rev. 95, 95-96 (1997) (casting doubt on whether the Line Item Veto Act, P.L. 104-130, would have the dramatic effects on expanding executive power or reducing the federal deficit as Members of Congress predicted).

73 Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2254 (2001).

tee, then chaired by Senator Ted Kennedy. In almost every case, the result of deregulation was to improve consumer welfare through lower prices, better service or both.[74]

The evidence from this episode is consistent with the premise for abolition of the independent administrative agency system more generally. Kagan's suggestion is for the President simply to assume the duties of the independent agencies under Article II of the Constitution. For this to succeed, the Supreme Court would have to reverse or distinguish its holding in *Humphrey's Executor v. United States*, a Depression Era decision upholding Congress's right under Article I to delegate some of its powers to the agencies without thereby granting supervisory power to the President.[75] Members of Congress would then have reduced influence on policy making by the agencies. Elite interests may face greater resistance within the executive branch than in the legislature. For analysis of the impact of *Humphrey's Executor* on the Madisonian separation of powers see Rao, note 49, *supra*.

However, giving the President responsibility for the work of the independent administrative agencies runs into the same difficulty as relying on the President to veto corrupt legislation. The President has political reasons to permit some corrupt activity that a disinterested monitor would lack. Further, there are many agencies, parts of the executive branch, where congressional influence exercised through oversight and appropriations dominates presidential control.

G. Direct democracy[76]

The golden age of Athenian democracy relied on direct government by the people. All citizens could vote on matters of policy. Functionaries, including military leaders, were either directly elected or selected at random from the citizenry for very brief terms. This system was—and still is—much admired

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[74] Winston surveys studies of the effects of deregulation. *See generally* Clifford Winston, *Economic Deregulation: Days of Reckoning for Microeconomists*, 31 J. Econ. Literature 1263 (1993). The Reagan administration and others later rolled back banking regulation including, unfortunately, financial institution risk-taking and private institutions that are "too big to fail," and thus subsidized with lower capital costs at public expense.

[75] 295 U.S. 602, 628, 631-32 (1935) (finding that Congress could limit the President's ability to remove the Chairman of the Federal Trade Commission to removal "for cause," because the FTC's authority mixed executive, legislative, and judicial functions, and thus "cannot in any proper sense be characterized as an arm or an eye of the executive … and "must be free from executive control").

[76] For surveys of the literature on direct democracy, especially the cognitive challenges associated with voting in complex referenda, *see generally* Shaun Bowler & Todd Donovan, Demanding Choices: Opinion, Voting, and Direct Democracy (1998), and Arthur Lupia & John G. Matsusaka, *Direct Democracy: New Approaches to Old Questions*, 7 Ann. Rev. Pol. Sci. 463 (2004).

by political philosophers. It eliminates or at least reduces to an irreducible minimum the problem of agent corruption. However, the Athenian system was flawed in several ways. It was not inclusive—noncitizen residents, women, and slaves could not participate. The Assembly suffered from the natural defects of "crowd-sourcing"—a weakness for impulsivity and a tendency to be guided by emotion and demagoguery rather than logic and knowledge. A standard example is the Athenian Assembly's disastrous decision, described by Thucydides, to invade Sicily in 415 B.C.[77]

Direct democracy has avid advocates even today. Modern technology offers potential solutions to the problem of voter numerosity. Political scientists such as Fishkin have offered methods (and some evidence from experiments with a "deliberative" decision process) designed to overcome voter ignorance, emotional motivations, and free rider incentives.[78] Of course, any direct process is subject to (and would rely in part upon) persuasive advocacy by well-organized and well-funded interests. Bias in favor of those interests is the likely result.

McCormick, channeling some of Machiavelli's lesser-known work,[79] has suggested reliance on a system of selecting legislative representatives at random from among eligible citizens, excluding those from the elite class.[80] That may preserve the advantages of having full-time representatives while eliminating corrupting incentives related to election and re-election campaigns. However, random selection would not eliminate corrupting influences arising from imbalanced interest group lobbying. Juries may be sequestered, but not legislators. A citizen selected at random for a brief term in Congress, with no chance of serving a second term, would be particularly dependent on interest group sources of information and professional advocacy.

H. Limited government

A traditional conservative or libertarian perspective is that political corruption is an inevitable consequence of big government, with an obvious remedy: less government. However, that does not solve the problem of corruption. This remedy ignores the likelihood that the People simply prefer many or most of the entitlement and regulatory programs that inhabit the expanded sphere of federal jurisdiction. If so, reducing the scope of the federal jurisdiction would likely require devolution of these programs to the

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77 Alan Ryan, On Politics: A History of Political Thought: From Herodotus to the Present 25-28 (2012).

78 James S. Fishkin, When the People Speak: Deliberative Democracy and Public Consultation 21-31, 95-105 (2009).

79 Niccolo Machiavelli, Discourses on the First Ten Books of Titus Livius, *reprinted in* The Prince and the Discourses 99 (Christian E. Detmold trans., Random House, Inc., 1950) (1531).

80 John P. McCormick, Machiavellian Democracy 183-85 (2011).

individual states. State governments face many of the same problems with political corruption as the federal jurisdiction. Pushing the problem down one level does little or nothing to solve it. Nevertheless, effective remedies on a state-by-state level could include those considered here.

I. Watchdogs and whistleblowers

The growth of the Internet has greatly reduced the cost of communicating specialized information to large audiences. One result has been the creation of numerous "watchdog" organizations, both partisan and nonpartisan, publicizing lapses by legislators and agencies. The category overlaps with investigative journalism and with individual government employees ("whistleblowers") who leak and publicize agency misdeeds, especially those that officials attempt to conceal. The most famous recent whistleblower, and certainly the most effective in bringing about change, is Edward J. Snowden, who passed secret U.S. government documents to web sites and newspapers. The documents revealed extensive, and arguably unlawful, government monitoring of private communication of U.S. citizens.[81]

Watchdogs and whistleblowers have a potentially important role, like all media, in making the public aware of dubious government policies and procedures. Several factors, however, reduce their effectiveness in combating welfare-reducing corruption. First, partisan sources or public donations typically fund these organizations; in either case, the nature of the funding source and any watchdog's need for continued funding introduces a source of bias that limits its credibility. Second, watchdog organizations seldom are staffed with the skilled analysts equipped to assess the impact of highly technical legislation and regulatory policies on the welfare of those affected. Third, watchdog groups have no direct power to intercede because they cannot end the harm caused by corrupted legislation and regulation.

VI. Quality control—in business, sports, and politics

The preceding discussion of popular remedies for political corruption focuses on the selection and regulation of elected representatives and factions. None of these remedies have been (or would appear to be) effective or, in some cases, practicable. It is useful to step back at this point and ask how nongovernment organizations mitigate principal-agent corruption

[81] Julia Angwin et al., *AT&T Helped U.S. Spy on Internet on a Vast Scale*, N.Y. Times (Aug. 15, 2015), http://www.nytimes.com/2015/08/16/us/politics/att-helped-nsa-spy-on-an-array-of-internet-traffic.html.

(or equivalently, increase principal-agent incentive compatibility). Leaving aside formal civil and criminal legal remedies, such measures include relational contracts with suppliers and employee compensation designs mostly inappropriate to political representation.[82]

A more general approach in commercial contexts is quality control. Quality control (of products and services) includes the incentive-related measures just mentioned but is grounded on direct measurement and evaluation of outcomes. Firms inspect and test finished products and services for adherence to design specifications and customer satisfaction. A feedback loop adjusts organizational practices and incentive structures.

Law in its various forms is a major "output" of the administrative state. (Increasingly, the federal government outsources or delegates to the states the actual delivery of government services.[83]) The output of law is of poor quality, in part because of corruption, but also due to poor or no quality control.[84] Compared to ordinary practice in the private sector, there is only vestigial or nominal attention to the relationship between output and the well-being of clients. Corrupted elections are a poor substitute for best-practice quality control. Law at the national level is a monopoly of the state; competitive discipline is absent. The rivalry that stems from the separation of powers is seldom about substantive policy; it is chiefly about branch jurisdiction. The rivalry may protect against tyranny but it does little to forestall corruption.

Quality filters such as presidential vetoes and judicial review attend only to a small subset of legislation and seldom address the general welfare objective of the Preamble. The filtering role of the media is confined to issues of high salience that do not correspond systematically to issues that most deeply impugn welfare. The media seek to produce audiences, chiefly by appeal to emotion, especially fear. By reporting on criminal corruption and high-visibility boondoggles (such as the Alaskan "bridge to nowhere"[85]), the media incite contempt for politicians but not attention to the welfare and distributional consequences of lawful corruption.

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[82] For discussions on economic models of intraorganizational incentive structures compatible with improved or optimal organizational performance, see generally, Philippe Aghion & Richard Holden, *Incomplete Contracts and the Theory of the Firm: What Have We Learned over the Past 25 Years?*, 25 J. Econ. Persp. 181 (2011); Robert Gibbons, *Four Formal(izable) Theories of the Firm*, 58 J. Econ. Behav. & Org.200 (2005).

[83] One scholar has noted the trend toward outsourcing or "privatizing" government services, analogizing that trend to the creation of the administrative state in the middle of the last century, and speculating on the implications for, among other constitutional matters, the separation of powers. *See* Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 Colum. L. Rev. 515, 570-72 (2015).

[84] Schuck, *supra* note 8, at 161-97 (examining public policy failures that arise from poor information, rigidity, lack of cooperation, and mismanagement).

[85] Carl Hulse, *Two 'Bridges to Nowhere' Tumble Down in Congress*, N.Y. Times (Nov. 17, 2007), http://www.nytimes.com/2005/11/17/politics/two-bridges-to-nowhere-tumble-down-in-congress.html.

In a Madisonian government the most natural way to interdict corrupted law (and thereby to deter its instigation) in one branch is to assign another branch the responsibility and power to monitor and constrain the *effects* of processes that have been corrupted.[86] (See Madison's argument in *The Federalist No. 10*, which includes the epigraph at the beginning of this Essay.) To accomplish this, we need an "independent" monitor, with the power to assess and veto legislation and agency policy that fails substantively to advance the aims of government set out in the Preamble. Such a function could supply Madisonian intramural discipline focusing on the welfare reductions produced by elite rent seeking.

The American people are familiar with the roles of umpires, referees, and kindred officials in sports contests. In addition, while umpires strive to score pitches and runs accurately, their task is to look at plays, not the recruitment of players. The focus generally is on output or performance, not inputs or form. Partisans do often question the rulings of umpires and refs, and sports officials sometimes accept bribes or bet on the outcome of contests, but for the most part sports officiating is credible. Teams and leagues aim to make profits for their owners, an objective that requires, among other things, credible officiating of games. In a sense, sports teams and leagues are analogous to the People in a democracy in needing to monitor and maintain the credibility of officiating and competition by the players on the field. This is not accomplished by asking baseball fans to elect umpires.

Madisonian democracy recognizes the People themselves as the only legitimate source of political power. However, Madisonian democracy also recognizes that the People are unreliable—even dangerous—as a source of day-to-day legislative action. Instead, the People entrust their power to elected representatives. As noted above, this makes elected officials the agents, in an important sense, of the People.

All agents are unreliable to some degree because of self-interest, particularly if their performance is difficult to monitor or evaluate. Madison relied on competitive elections to control this conflict of interest. We can assume that Madison understood that elections would be biased if the partisan influences on voter choices are biased, but saw no better option. In the modern world, voters are woefully bad judges of the performance of their political agents. Voters generally are incapable of monitoring the performance of legislators, at least on non-salient issues.

Unlike private businesses, legislators are not vulnerable to product liability lawsuits. It would be an improvement to rely on disinterested professional umpires to decide which legislative "plays" are welfare-enhancing and which are not, particularly if the umpires themselves could be insulated from the political processes that lead to corrupt laws and policies.

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[86] *See* The Federalist No. 10 (James Madison). An umpire role is useful not only in mitigating lawful corruption but also in detecting errors and non-corrupt promotion of local constituent interests at the expense of the general welfare.

The judicial branch is the sort of umpire that qualifies as a Madisonian element of government. The courts have many roles, but their umpire role is to protect citizens from infringements of constitutional or other rights by other branches of government. Article III courts, while not immune from human failings, are generally trusted by the public—at least more so than the other Madisonian branches.[87] The courts could be helpful in stemming lawful corruption if they were competent and willing to police not just the infringement of rights, but also infringements of welfare, or else to treat freedom from government interference with the pursuit of happiness as a negative right.

As with the canonical branches of government, no one should expect perfection from a new "officiating" branch. Welfare-oriented umpires will not perfect or "optimize" the output of law, but at least welfare and equity issues will have a place, and an institutional advocate, in the debate. No less important, insulated umpires will reduce the elite bias that infects current lawmaking. As for legitimacy, what matters in the end is whether people trust the government to act in their interests. Despite being thoroughly undemocratic, the judiciary is seen as far more trustworthy than Congress, and an umpiring branch may usefully rely on similar organization features.

This Essay does not explore the technical means by which to assess the welfare and distributional effects of law. Modern benefit-cost-risk-distribution analysis seeks to include assessments of the significant values citizens place on environmental amenities (such as clean air and water), public services, and policy preferences, including preferences for distributional equity. The literature is enormous.[88]

Ultimately, of course, the question is whether a given law or policy increases happiness, compared to the status quo or some counterfactual, and of what relevant categories of the population. Suffice it to say for present purposes that the practice of benefit-cost-risk-distribution analysis applied to legislative impact is no less objective, reliable, or accurate than the constitutional and statutory analysis carried out by the Supreme Court. We accept the Court's decisions not because its reasoning is convincing—obviously it

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87 *Confidence in Institutions*, *supra* note 47; *Trust in Government*, *supra* note 47.

88 *See, e.g.*, Adam Davidson, *The Economy's Missing Metrics*, *N.Y. Times Mag.* (July 5, 2015), http://www.nytimes.com/2015/07/05/magazine/the-economys-missing-metrics.html; Jason J. Fichtner & Patrick A. McLaughlin, *Legislative Impact Accounting: Rethinking How to Account for Policies' Economic Costs in the Federal Budget Process* 3 (George Mason Univ. Mercatus Ctr. Working Paper, 2015), *available at* http://mercatus.org/publication/legislative-impact-accounting-rethinking-how-account- policies-economic-costs-federal; John F. Helliwell et al., *Empirical Linkages between Good Government and National Well-Being* 1-4, 17-18 (Nat'l Bureau of Econ. Res., Working Paper No. 20686, 2014), *available at* http://www.nber.org/papers/20686; Richard Williams & James Broughel, *Principles for Analyzing Distribution in Regulatory Impact Analysis* 1-2 (George Mason Univ. Mercatus Ctr., Mercatus on Policy Working Paper, 2015), *available at* http://mercatus.org/publication/principles-analyzing-distribution-regulatory-impact-analysis.

is not convincing to the dissenters—but because we accept the legitimacy of the rule of law, imperfect as it is, and the necessity for finality.

How could we include umpires in the current Madisonian system? Several possibilities suggest themselves.

A. Substantive review in the Supreme Court

The United States lacks a constitutional court separate from its judicial court of last resort. According to Article III of the Constitution, the Supreme Court was to be a court of last resort for the resolution of disputes. John Marshall, Chief Justice of the Supreme Court from 1801 to 1835, believed that his Court should also be a constitutional court with the power to strike down federal legislation that was inconsistent with the Constitution. In *Marbury v. Madison,* 5 U.S. 137 (1803), the Court awarded itself the right to a line item veto. At a stroke, this made the judiciary a coequal branch of government. Congress might have challenged this usurpation by initiating an Article V amendment process, but did not.[89]

Article III does not require any judge to have legal training, but the Supreme Court has always been made up of lawyers. The Court's appellate role makes the appointment of lawyers natural. Other countries, however, often have separate constitutional courts, to which non-lawyers are appointed. France, for example, has the *Conseil Constitutionnel* (Constitutional Council) on which former presidents of the Republic and other distinguished citizens sit. The *Conseil* rules on constitutional questions referred to it by any legislator, agency, or citizen.

Because it is made up of lawyers, the U.S. Supreme Court approaches constitutional questions much as it approaches appellate review of cases: focusing chiefly on "matters of law" which are either procedural or involve statutory interpretation, giving much emphasis to precedent, and mostly ignoring substantive effects on welfare. Perhaps worse, for present purposes, it is constrained by "legal reasoning," a mode of justification for changes in law in which several factors are alleged to motivate or limit some prior action or doctrine, with respect to which the Court may now assign different subjective weights.

A 2015 Supreme Court decision dealing with Environmental Protection Agency (EPA) regulation of mercury emissions from coal-burning power plants illustrates the problem.[90] The question was whether the EPA should consider costs in deciding to impose regulation. It was undisputed that the costs of compliance would exceed $10 *billion* per year, while the

[89] There is debate whether the power of judicial review of legislation was inherent in the British common law imported to America. *See, e, g.,* Dudley Odell McGovney, *The British Origin of Judicial Review of Legislation*, 93 U. Penn. L. Rev. 1, 1-2 (1944). If it was, there was no "usurpation" by the Marshall Court.

[90] *Michigan v. EPA,* No. 14-46 (U.S. June 29, 2015).

benefits would be well under $100 *million* per year. An assessment of the effect on aggregate well-being, on these facts alone, would lead one to reject the proposed regulation. However, the Court could reach this commonsense result only through a tortuous analysis of the Clean Air Act, the Administrative Procedure Act, canons of statutory interpretation, and other legal materials. In the end, the Court's legal analysis rests in large part on the observation it would be unreasonable for the EPA (or the Congress) to ignore cost. This, despite numerous instances in which Congress has mandated explicitly that costs be ignored in environmental matters, notably in connection with endangered species.[91]

A more catholic constitutional court would consider substantive analysis of effects and treat "facts" as within its competence. What this suggests, unfortunately, is that the U.S. Supreme Court is unlikely to be comfortable asserting a position that would be perfectly natural for the French *Conseil*—for example, that a statute was unenforceable because its substance *or effect* was inconsistent with the general welfare standard in the Preamble to the Constitution, or with its "spirit." Still, the modern Court has "found" all sorts of new rights and entitlements in the Constitution just as the Marshall Court "found" a momentous new right for itself.

Whether the U.S. courts would accept economic well-being and collective action pathology as a new dimension of the nebulous concept of due process may be the key to tacit acceptance of an umpire role. Richard Hasen, advocating such a development, admits that "[d]espite longstanding public and scholarly concern about rent-seeking, I am aware of no court that has ever considered whether national economic welfare could be considered a sufficiently important (even compelling) government interest that could justify [anti-]lobbying (or other) laws."[92] An exception is the forlorn dissent in *Citizens United*:

> When large numbers of citizens have a common stake in a measure that is under consideration, it may be very difficult for them to coordinate resources on behalf of their position. The corporate form, by contrast, "provides a simple way to channel rents to only those who have paid their dues, as it were. If you do not own stock, you do not benefit from the larger dividends or appreciation in the stock price caused by the passage of private interest legislation." … Corporations, that is, are uniquely equipped to seek laws that favor their owners, not simply because they have a lot of money but because of their legal and organizational structure. Remove all restrictions on their electioneering, and the door may be

[91] "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184 (1978) (interpreting the Endangered Species Act of 1973).

[92] Hasen, *supra* note 47, at 235.

> opened to a type of rent seeking that is "far more destructive" than what noncorporations are capable of.[93]

The relatively narrow traditional perspective of the U.S. Supreme Court is unfortunate because the Court represents the least controversial of the possible means to establish a credible umpire function within the existing Madisonian system. As John Marshall demonstrated, no formal amendment is required for the Court to assert such a power, although a modern Court would doubtless move with greater diffidence than did Marshall. One way to begin might be for a President to appoint a distinguished nonlawyer to the Court.[94]

B. *Agencies responsible for policy evaluation: OMB, CBO, GAO*

Other solutions to the problem of creating a legitimate and credible umpire to serve as a substantive filter for legislative and administrative corruption seem to require a constitutional amendment.[95] Any number of existing agencies, including the Office of Management and Budget (OMB), the CBO and the GAO have the necessary expertise to make such judgments, but lack not only the authority to veto legislation or administrative actions but also the political legitimacy to survive resulting push back. Some better method for appointing umpires would be required, such as presidential appointment with supermajority senate confirmation. Those distressed by "gridlock" in Washington today clearly will be even more distressed to consider yet another locus of veto power over legislation.[96] The first response to this is that veto points in the legislative process have proliferated precisely because of systemic corruption; each veto point provides an opportunity to extract payments from elite interests, rather like the highway holdups operated by "rebel" groups in lawless nations. Alternatively, one can argue that from a Madisonian perspective it is not so obvious that gridlock is a bad thing. It is a natural result of the checks and balances established to protect the People from ill-considered laws. Further, if a fourth branch of umpires existed, it would deter expenditures on corrupted legislation likely

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93 *Citizens United v. FEC*, 558 U.S. 310, 471 (Stevens, J., concurring in part and dissenting in part) (quoting Robert H. Sitkoff, Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters, 69 U. Chi. L. Rev. 1103, 1113 (2002)).

94 For a summary (and negative assessment) of proposals to subject regulatory decision making to stricter judicial review, see Fukuyama, *supra* note 5, at 467-476, and Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 Yale L.J. 31, 33-35 (1991).

95 Anything at all can be done, of course, without an amendment if none of the branches opposes it. See Ginsberg & Melton, *supra* note 70, at 1, 22-23, for an argument that amending the Constitution may not be so difficult as is commonly supposed, and Part 8 below for an argument supporting the feasibility of an Umpire Amendment.

96 *See supra* note 55.

to produce an umpire veto. Paraphrasing Oliver Wendell Holmes, Jr., expectations of what umpires will do deter most rule infractions, not official action on every latent player impulse.[97]

C. *The grand jury*

The grand jury is a potential model for an umpiring institution. The most obvious advantage is that the traditional federal grand jury already can be characterized as a fourth branch of government, and one designed to check abuse of government power.

> "[R]ooted in long centuries of Anglo-American history," … the grand jury is mentioned in the Bill of Rights, but not in the body of the Constitution. It has not been textually assigned, therefore, to any of the branches described in the first three Articles. It "is a constitutional fixture in its own right." … In fact the whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people.[98]

The grand jury is, at least in theory, independent of the executive branch, the legislative branch and even the judiciary, though it interacts with each. In centuries past the grand jury has from time to time bravely interceded to resist excesses of the executive,[99] but today it more commonly is accused of being a mere rubber stamp for prosecutors.

With a membership between sixteen and twenty-three citizens subject to the same qualifications as members of a petit jury panel, the federal grand jury is supposed to protect potential criminal defendants from abuse by politically appointed prosecutors. The grand jury votes on the sufficiency of the prosecutor's evidence to justify an indictment, a majority but no fewer than twelve votes being the minimum required to indict. Proceedings are conducted pursuant to Title III, Rule 6 of the *Federal Rules of Criminal Procedure*, which is a product of the legislature. A judge of the local district court has limited supervisory duties and issues subpoenas on behalf of the jury. At the state level, the duties of grand juries sometimes extend to civil matters. One state, California, has a "civil" grand jury in each county con-

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97 "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Oliver Wendell Holmes, *The Path of the Law*, 110 Harv. L. Rev. 991, 994 (1997).

98 United States v. Williams, 504 U.S. 36, 47 (1992).

99 *See, e.g.,* Richard H. Kuh, *The Grand Jury 'Presentment': Foul Blow or Fair Play?*, 55 Colum. L. Rev. 1103, 1108-09 (1955) (noting the acquittal of Peter Zenger on charges of criminal libel against the British Crown by a New York colonial grand jury); Milton Nahum & Louis M. Schatz, *The Grand Jury in Connecticut*, 5 Conn. B.J. 111, 113 (1931) (noting another, similar example from the colonial period).

cerned with investigating and recommending local government efficiency or policy reforms.

The essential elements of the traditional grand jury for present purposes are its common law role of protecting citizens from the power of the state, its status as an agency outside the formal Madisonian framework, its composition of up to twenty-three ordinary citizens chosen at random, and its reliance on a professional staff to coordinate investigations. The work of the grand jury is defined by common law and statute. Arguably, the Congress could create a grand jury tasked with discovering and "indicting" corrupt law, bypassing the need for a constitutional amendment.

There are some obvious problems with relying on repurposed grand juries to serve as umpires. The power of a grand jury lies in denying permission for the state to prosecute an alleged criminal when the prosecutor has insufficient basis to justify a trial. Even "civil" grand juries are limited to making reports and recommendations. Congress would have to give an umpire grand jury the power to veto a law or regulation on the basis that the law reduced the "general welfare." That is a lot of weight for the grand jury institution to bear—a change from protecting individual citizens from abuse of state power to protecting the People as a whole from abuses of state power.

D. Umpires of the past

There are at least two precedents for an umpire role in a republican form of government. One is the "Council of Revision"[100] that existed briefly in New York State under its 1777 postcolonial Constitution, Article III of which stated:

> *And whereas laws inconsistent with the spirit of this constitution, or with the public good, may be hastily and unadvisedly passed*: Be it ordained, that the governor for the time being, the chancellor, and the judges of the supreme court, or any two of them, together with the governor, shall be, and hereby are, constituted a council to revise all bills about to be passed into laws by the legislature; and for that purpose shall assemble themselves from time to time, when the legislature shall be convened; … And that all bills which have passed the senate and assembly shall, before they become laws, be presented to the said council for their revision and consideration; and if, upon such revision and consideration, it should appear improper to the said council, or a majority of them, that the said bill should become a law of this State, that they return the same, together with their objections thereto in writing, to the senate or house of assembly … who shall enter the objection sent down by the council at large in their minutes, and proceed to reconsider the said bill. But if, after

[100] I am indebted to Jack Rakove for pointing me to this episode.

> such reconsideration, two-thirds of the said senate or house of assembly shall, notwithstanding the said objections, agree to pass the same, it shall together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and, if approved by two-thirds of the members present, shall be a law.[101]

The other and more substantial example of an official umpire charged to protect the interests of the People from the self-interest of the legislature and the executive is the "Tribune of the Plebs," an elective office under the Roman Republic (c. 500-27 B.C.). The *Oxford Classical Dictionary* describes the Roman "Tribunate" as follows:

> The *tribuni plebis* (or *plebi*), 'tribunes,' were the officers of the plebs first created … traditionally in 494 B.C … The tribunes were charged with the defense of the persons and property of the plebeians … Elected by the plebeian assembly and exercising their power within … the city, the tribunes could summon the plebs to assembly and elicit resolutions (*plebiscita*). They asserted a right of enforcing the decrees of the plebs and their own rights … They possessed … a right of veto against any act performed by a magistrate … The full acknowledgement of their power came with the recognition of *plebiscita* as laws binding upon the whole *populus* and not just the plebs … Tribunes were first admitted to listen to senatorial debates; at least from the 3rd cent. BC they had the right to convoke the senate; … In the first surviving contemporary discussion of the tribunes, from about the middle of the 2nd cent., Polybius … states that 'they are bound to do what the people resolve and chiefly to focus upon their wishes.' Succeeding years saw the tribunate active in the pursuit of the people's interest and the principles of popular sovereignty and public accountability, as evidenced by the beginning of the practice of addressing the people in the forum directly, the introduction of the secret ballot in assemblies, concern with the corn supply agrarian legislation, … and above all by the legislation and speeches, for which contemporary evidence survives, of Gracchus (123–122 B.C.)… Active tribunes came increasingly to be associated with the particular interests and grievances of the urban plebs …[102]

Briefly, the socioeconomic class called the "plebs" became restive under the tyranny of the aristocratic families that collectively ruled the Roman Re-

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[101] The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 2628-29 (Francis Newton Thorpe ed., 1909) (emphasis added); *see also* Robert L. Jones, *Lessons from a Lost Constitution: The Council of Revision, the Bill of Rights, and the Role of the Judiciary in Democratic Governance*, 27 J.L. & Pol. 459, 464, 485-88 (2012) (discussing the Virginia Plan's proposal for a "Council of Revision," presented at the 1787 constitutional convention).

[102] *Tribuni plebis (or plebi)*, Oxford Classical Dictionary (3d ed. 2002).

public and staged a credible boycott. The aristocracy and the plebs negotiated a lasting settlement that granted substantial political power to the elected representatives of the plebs. The Plebeian Assembly held these Tribunes of the Plebs to nonrenewable one-year terms. The Tribunes do seem to have sought generally to protect the interests of the plebeian class for several hundred years.[103]

Our understanding of the political operation of the early Roman Republic is limited; most surviving materials were created centuries after the fact. Still, what we do know of the Plebeian Tribunate offers a useful model for a modern umpire that might reduce the social cost of political corruption, using the veto power. The relevance of the Tribunes to mitigation of modern systemic corruption is twofold: the Tribunes protected the people (or at least the plebs) from executive and legislative actions adverse to plebian interests, and they did so ex post—after the legislation or action was enacted or ordered.

Of all the remedies discussed above, the establishment of an effective umpire function seems most likely to succeed in mitigating lawful corruption. The major difficulty is not the necessity to find consensus on some very important details (illustrated in Part 7), but rather the barrier of formal constitutional amendment, assuming that hurdle proved unavoidable.

No one thinks that either method of amendment under Article V is easy or riskless. Indeed, the prospect of a convention is positively scary, given the 1787 precedent. As noted above, the Constitution is usually amended tacitly by the Supreme Court in the course of interpretation. Something like that likely will have to precede full realization of an umpire institution willing and able to call strikes on lawful political corruption. For example, perhaps a President could delegate "advisory" veto authority to a new organization within the executive branch, made up of umpires. This in itself would do little if anything to reduce corrupt legislation, but it might evolve into a more effective force, without the need for a formal amendment.

Even a common understanding of "human nature" as given to us by a complicated mixture of nature and civil nurture should leave no one surprised at manifestations of antisocial tendencies in principal-agent relations, including political representation. That is why we have so many

[103] The earliest surviving account of the Tribunate, by Polybius (c. 160 b.c.), likely paints too rosy a picture of the tribunes' effectiveness. *See generally* Polybius, The Histories (Robin Waterfield trans., 2010) (c. 160 B.C.). In addition, it would be a mistake to regard the plebs as "the People" in a modern sense. As in classical Athens, women, slaves, and (perhaps) those who lacked land ownership were excluded, and participation in the Plebeian Assembly was determined by tribal membership. McCormick explores the advantages of reviving the Tribunes of the Plebs as a modern solution to the problem of political corruption. McCormick, *supra* note 80 at 178-88. Posner provides a political economy perspective on the Roman constitution, including the tribunes. Eric A. Posner, *The Constitution of the Roman Republic: A Political Economy Perspective* 17-29 (John M. Olin Law & Econ., Working Paper No. 540, 2010), *available at* http://ssrn.com/abstract=1701981.

mechanisms to contain it: audit trails, supervision, morality, religion, civil, criminal and reputational penalties, conscience, and so on. Political corruption in America is far from costly to its authors—it is a near requirement of holding a congressional seat, and it is boring to voters and media audiences. We need something more effective than dreams of direct democracy, a return to limited government, or easily evaded controls on interest group activity. If we are to retain the bones of Madisonian democracy and still avoid the growing economic and equitable costs of corruption, we must tweak the Madisonian system. That calls for a branch whose only business it is to monitor and edit Washington's massive output of corrupt law.

VII. Illustrative details

For the sake of concreteness, and in emulation of McCormick,[104] I set out below some candidate features of a new or fourth branch of the federal government designed to reduce the impact of legislative and administrative error and corruption on the well-being of the People. In political terms, the illustrative proposal is intended to counter the influence of elite interests in the legislature and the administrative process with a democratic institution representing the principal victims of elite power, the middle class.[105] As with any Madisonian system, the effect of such a new branch would be felt chiefly through changes in the incentives of the remaining branches.

The Constitution and its amendments leave most details up to future implementers. If we are to follow this tradition, only the most important provisions should be included in the "umpire amendment." Which ones are most important? Not necessarily those I have chosen to include in this illustration.

[104] *See* McCormick, *supra* note 80, at 170-188 (conducting a "thought experiment" on institutional reform).

[105] For clarity, although the poor merit special attention and succor, they are not the rational targets of elite corruption; the poor have little worth stealing, and the harm done to them by corruption is the result of systemic efficiency losses. The middle class still has a collective share of half or more of the pie—an amount worth stealing through, for example, corrupted tax, trade, and regulatory policies.

A. The Umpire Amendment[106]

The United States Council of Review[107]

Article 7.1.1.

(a) Promotion of the general welfare of the People being chief among the purposes of government, there is established a Council of Review, which shall not be within the branches established by Articles I, II or III of the Constitution.[108]
(b) The Council may veto any Law or provision thereof judged likely to reduce the well-being of the People or that of the poorest citizens.[109]

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[106] Republican members of the House and Senate introduced a bill in 2015 that bears some procedural and substantive similarities to the umpire proposal described below. *See* SCRUB Act of 2015, S. 1683, 114th Cong. (2015); SCRUB Act of 2015, H.R. 1155, 114th Cong. (2015); H.R. Rep. No. 114-196, pt. 1, at 2-7 (2015).

[107] The anodyne term "Council of Review" may dampen emotional reactions both for and against the proposal.

[108] The Council's jurisdiction is limited to the "general welfare" clause, excluding the remaining enumerated goals in the Preamble, in order to keep its mission focused and its power within bounds. Lawful corruption affects official behavior on many issues, not just those that reduce well-being. Weisman and Confessore describe a recent example in a front-page article in the *New York Times*. Jonathan Weisman & Nicholas Confessore, *Donors Descend on Schumer and Others in Debate on Iran*, N.Y. Times (Aug.12, 2015), http://www.nytimes.com/2015/08/13/us/politics/in-efforts-to-sway-iran-debate-big-money-donors-are-heard.html. The story describes donations made to Senator Chuck Schumer by rival groups supporting or opposing the proposed agreement with Iran restricting its capability to produce nuclear weapons. Senator Schumer is not up for reelection but is understood to need money in aid of his potential candidacy to lead his party in the Senate. (Donations of campaign funds to other politicians, or to party coffers, greatly influences selection for congressional leadership posts. Eliza Newlin Carney, *Money Dominates Committee and Leadership Races: Rules of the Game*, Roll Call (Nov. 19, 2014, 5:00 AM), http://blogs.rollcall.com/beltway-insiders/money-dominates-committee-and-leadership-races-rules-of-the-game/.) The point of the story for present purposes is that it is money from interest groups rather than a calculation of constituent interest that is thought to influence Senator Schumer's position. Senator Schumer's position is a political matter with no clear impact on aggregate well-being or on the distribution of income. Therefore, it is not the sort of matter with which the Council should be concerned.

[109] Such phrases as "general welfare," "well-being," and the like are not well defined. Within the founding documents the term whose meaning best serves as a bridge between the terminologies of 1788 and today is "happiness." Happiness is something that people "pursue;" according to the Declaration it is one of the purposes of government to facilitate that pursuit. Current social science and neuroscience shed a great deal of light on what that means as a practical matter and how to measure it. The science of happiness is not settled in the same way that we think (incorrectly) of physics as "settled" science, but it is certainly no less settled than the application of law to dis-

(c) For purposes of this Amendment, Law shall mean any provision or related provisions[110] of the United States Code, the Code of Federal Regulations, or a Bill enacted during the preceding congressional session.[111]
(d) The Council's action shall take effect when Congress next adjourns, except that a two-thirds majority in each House of Congress may override the Council's action.[112]

Article 7.1.2.

(a) Any citizen of the United States, having voted in six of the last seven federal elections and meeting other standards, established by law, of character, education, and mental fitness may apply to join the Council.[113]
(b) A new Member shall be selected by lot from among qualified applicants within 45 days of a vacancy, for a term to begin no later than 90 days after selection.
(c) Members shall serve a term of 15 years.[114]

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puted matters. Perhaps "the general welfare" should be formally defined in the Umpire Amendment in terms of the average or aggregate happiness of the people, with the possible addition of other characteristics of its distribution, such as variance and skewness. The suggested anti-regressive redistribution clause could be left implicit in the general welfare purpose, because happiness includes components of altruism and policy preferences for living in a just society. But clearly from a moral perspective this component of happiness is particularly important.

[110] This provides for line item vetoes. In dealing with enacted bills, it may be preferable to limit line item veto power to nongermane provisions. See *supra* note 72, discussing line item veto power.

[111] There are many important timing and other issues associated with this broad definition of "Law." Perhaps Statutes at Large (or other codes) should be specified instead of or in addition to the United States Code.

[112] Some enacted bills may require emergency action if the effect on well-being is immediate.

[113] I am grateful to Peter Owen for this suggestion. While it may be helpful to include a cap on applicants' prior year(s) earnings or wealth in order to exclude members of the elite, the restriction on lifetime income makes it very costly for those with high private sector incomes from wealth or employment to serve.

[114] The composition of the Council, method of selection, and number of Members are each critical to issues of political independence, public trust, and competence. Having Members elected invites political corruption. Having Members appointed by, say, the President with Senate confirmation invites partisanship. Having only a few Members provides potential pressure points for influence; having many Members complicates discourse and may unduly potentiate the Council's professional staff.

The particular method described in 7.1.2 produces a Council of fifteen Members, with new appointments each year to fill vacancies. If new appointments were made four times a year the Council would have sixty Members; three appointments per year yields a membership of forty-five, and so on. Sixty or forty-five Members seems unwieldy for en banc discourse and decisions; fifteen may be the lower end of the range needed to discourage corrupting influences, particularly if all decisions to veto are re-

Article 7.1.3.

(a) Members must swear or affirm an oath of office prescribed by law.
(b) For life upon their assumption of office, Members must renounce and divest to the Treasury all income from any source other than as described in this Article.[115]
(c) Members shall receive a salary, not less than twice the salary received by the highest-paid Member of Congress, which Congress may not vary during their term of office.[116]

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quired to be en banc. Perhaps the number and method of selection of grand jurors is a useful precedent.

Choosing Members by lot from a very large panel invokes the legitimacy of modern petit juries as well as Athenian direct democracy. Imposing qualifications requirements (such as education) on the population of the panel tends to undermine legitimacy by suggesting elite bias. One middle ground might be random selection from a panel of middle-income or middle-wealth citizens, perhaps with moderate educational requirements such as at least two years of postsecondary schooling.

The particular suggestion in 7.1.2(a) would likely produce Members relatively well informed about public affairs, engaged, and reasonably well educated, because such people are more likely to vote. Existing studies of voting patterns by age, education, and the like will shed light on these issues. *See, e.g.,* Jan E. Leighley & Jonathan Nagler, Who Votes Now?: Demographics, Issues, Inequality, and Turnout in the United States 58-66, 72-76 (2014) (studying the relationship of education and age with voter turnout); Michael S. Lewis-Beck et al., The American Voter Revisited 92-97 (2008) (reviewing studies and finding positive correlation between eligible voters' interest in public affairs and the likelihood that they will actually vote); *see also* Ansolabehere & Hersh, *supra* note 25, at 456 (noting that people with a bachelor's degree are more likely to vote compared to those without).The details in the illustration imply a minimum age of at least thirty. Perhaps there should be a maximum age as well—do we want a random eighty-year old to be eligible for an office with a fifteen-year term? An alternative procedure combines nomination with random selection: The President, the Vice President, the Chief Justice, the Speaker of the House, the Majority Leader of the Senate, and the Minority Leaders of the Senate and House each nominate ten (10) candidates within forty-five days of a vacancy on the Council; that yields seventy nominations. Each vacancy on the Council is then filled, by lot, from among the nominees, with a two-thirds majority of the Senate required to confirm the candidate thus selected. The requirement of a two-thirds majority tends to discourage highly partisan or otherwise extreme candidates. Members of Congress, their first-degree relatives and senior staff may not be nominated until five years have elapsed since leaving office. (This and most other methods of choosing Members requires a start-up phase with, for example, initially staggered terms.)

[115] Implementers will need to deal with issues involving incomes of other family members, partially vested retirement savings and the like.

[116] Salaries for Members of the Council must be set taking into account the effect of the restriction in clause 7.1.3(b) and the need to attract professional and other citizens away from careers that cannot be rejoined after service. Unlike elected officials, Council Members cannot expect income from post-service employment.

(d) Congress shall by law provide for Members' salaries to be increased or decreased annually after the conclusion of their service in accordance with the increase or decrease in the per capita income of citizens of the United States, after adjustment for inflation.
(e) Members may receive limited and incidental income from appreciation in value of personal and residential real property, gifts unrelated to their office, and interest on loans made to the United States, as Congress may by law provide.
(f) Members may be removed by a two-thirds majority of the Council or by impeachment, and Congress may by law provide for the dissolution of such Members' rights or obligations under this Article.

[Article 7.1.4.][117]

(a) The Council shall publish the reasons for its decisions.
(b) Congress shall by law provide for the Council to compel testimony.
(c) The Council may, if it deems necessary, deliberate in secret.
(d) The Council shall elect, and may remove, its Chair, whose term shall last until the addition of a new Member.
(e) The Council and its Members shall be protected with judicial immunity.
(f) The Council may not override, or nullify a congressional override, of a presidential veto.
(g) The Council may, for purposes of its review, consider what alternative(s) would prevail if the subject matter of the review were vetoed.[118]
(h) The Council may decline to undertake any review requested of it.[119]
(i) A stay pending a decision whether to review a new Law may not exceed 45 days.

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[117] This bracketed article is a placeholder for provisions whose merit or wording is less obvious, or which perhaps belong in implementing legislation rather than in the Amendment. A related issue is the extent to which existing law and procedures, currently affecting other agencies, are applicable to the Council, which is not part of any branch. It may be useful to establish a default status of non-applicability in the absence of congressional action.

[118] This is an important but easily overlooked issue. A law or regulation cannot be evaluated in isolation; its positive and negative effects on well-being must be assessed compared to something else, generally either the status quo ante enactment or some alternative law or regulation. The Council in some cases may have to make a political judgment as to the likely reaction of the government in the event of a veto.

[119] Without control of its own docket, the Council could be overwhelmed with cases requiring review. Moreover, the Council should have the ability to pick and choose cases in a way consistent with guarding its credibility and establishing expectations that it will exercise its "prosecutorial discretion" strategically. For example, arguably the Council should avoid overturning Laws that, even if perhaps welfare-reducing, were enacted accompanied by extensive public awareness and debate, thus invoking Madisonian political legitimacy. See note 26, *supra*.

(j) Any Law in effect upon ratification of this Amendment shall be subject to review by the Council for 10 years and thereafter for one year at 10-year anniversaries of the Law's enactment.[120]
(k) The Council may not veto a Law based solely on any provision of the Constitution except this Amendment,[121] nor treaties except for those provisions concerning international trade and commerce, nor Laws concerning the armed services or national security, including declarations of war, except those provisions dealing with procurement.[122]
(l) The Council may consider the principles of stare decisis in its decisions.[123]
(m) The Council may not stay or veto appointments to federal executive or judicial offices made by the President with the advice and consent of the Senate.[124]
(n) The Chair shall appoint, with the consent of the Council, a Staff Director with a renewable 5-year term.[125]
(o) Professional employees of the Council shall serve "at will" and without tenure. Notwithstanding any provision of law to the contrary, the Council may offer staff compensation commensurate with that in the private sector.
(p) Neither a former Staff Director nor any former professional Council employee may earn income from representing or advising clients with business before the Council before five years after leaving employment.

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[120] Older laws should not be exempt from review, but to make all older laws immediately subject to review may be unduly disruptive. From the point of view of the well-being of the People, the sensible thing would be to target first those Laws, old or new, that most significantly and directly reduce welfare. Of course, vetoing nearly any law requires careful analysis of its connections with a whole network of related laws and institutions. One cannot extract one building block, however flawed, from the base of a tower with considering the effect on the rest of the tower. The Council should be guided by the medical maxim, *primum non nocere*—first, do no harm.

[121] This is perhaps useful to distinguish the jurisdiction of the Council from that of the judiciary.

[122] Trade barriers and corruption in procurement are major sources of reduced well-being. Other areas of foreign and military policy often involve complexities that the Council may be ill suited to consider.

[123] One mechanism by which the Council protects welfare is by changing the incentives of elite interests and legislators. This requires that the actions of the Council be reasonably predictable.

[124] This avoids excessive power in the Council and removes any temptation to speculate on the possible consequences of appointments.

[125] This and the next two items may be useful in protecting the quality, independence, and integrity of the Council's staff. The Council is required to make decisions based on sometimes-complex quantitative analyses and economic reasoning. It is very important that the Council acquire and retain a competent staff of experts, analysts, and communicators, especially given the Members' amateur status.

Article 7.1.5.

Congress shall authorize and appropriate such sums as are necessary to provide the Council with staff support and facilities sufficient to perform its duties, and may otherwise provide by law for the implementation of this Amendment.[126]

VIII. Feasibility

Proposing the creation of a fourth branch of government will produce snickers in any knowledgeable audience and puzzled frowns elsewhere. Many Americans have heard about the branches, checks, and balances from an early age, even if they do not have a very clear idea of the specifics. Even people with no exposure to "civics" are quick to agree that politicians are corrupt—but what they imagine is bribery: trash bags filled with cash, delivered in dark alleys, or vacation condos on exotic islands. Explaining the problem and costs of "lawful corruption," how it arises despite the Madisonian checks and balances, how it ensnares well-meaning elected officials, and why interdiction of its effects is likely more effective than reforms aimed at causation, requires a multidisciplinary educational process. However, economic analysis yields the most convincing argument for the feasibility of reform.

Elites engage in costly efforts to influence policy to advance their own interests and to defend against encroachments from rival elites. The result is an escalating spiral of expenditure by each elite interest and consequent corrupt reductions in the general welfare, affecting not just those without influence but also other, unrelated, elite interests. Elected officials are trapped in this gyre no less than the elites. If government were immune to such influence, fewer of these expenditures would be necessary or worthwhile, and the extent of corrupt influence would decline. It is not possible, or even desirable, to make elected officials immune to elite influence because that could be done only by making them immune to all influences. However, it is possible to reduce the cumulative and escalating adverse impact of this process on everyone, elites and non-elites alike. The key is to rule out elite-favored ends that reduce the size of the pie. This leaves elites

[126] If Congress wished to punish or intimidate the Council, cutting or eliminating its budget might be a temptation. A similar issue could arise with the Supreme Court, although there is little or no indication that it ever has. One way to guard against such a threat is to set a minimum level of appropriation—in effect, an entitlement—that does not have to pass through the usual annual appropriations process. The minimum could be set by linking to the budget of the Congress itself.

free to use government to steal from each other, subject to the constraint that the pie as a whole may not be reduced by the policies they promote. Only shares of the pie, and not the size of the pie, are then at risk. Other elites have resources worth stealing, while the poor have little to steal. The share of the middle class remains vulnerable, through tax policy for example, but it can fight back with its greater numbers and passionate causes.

Given the difficulty faced by elites collectively in containing their potentially destabilizing and pie-shrinking greed, it seems likely that an Umpire Amendment also is in the collective interest of the elite.[127] Both politicians and elites today face a situation in which it is in the collective interest of each to promote reform. Neither group can do this successfully on an individual basis because there is no way any individual elite interest or politician can commit credibly to avoid future welfare-reducing corruption. The Umpire Amendment, unlike any act of Congress, is a very firm commitment.

[127] *See* Feuer, *supra* note 11.

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Strategic and Tactical Totalization in the Totalitarian Epoch

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ABSTRACT

This article examines the totalization of private law by public authorities. It compares and contrasts the fate of private law in totalitarian regimes with the role of private law in contemporary, non-totalitarian liberal democracies. It briefly examines the Socialist jurisprudence of the former Soviet Union and its treatment of private law. It offers an explanation why private law might be inimical to the jurisprudence of the Soviet Union and totalitarian regimes more generally. It next examines the totalization of law accomplished by segregationist regimes in the mid-twentieth century, comparing and contrasting those regimes with totalitarian regimes. Then it turns to examine instances of "tactical totalization" in our own day. Examining totalization of law as a jurisprudential, rather than political, phenomenon reveals how the totalization of legal norms can and does occur in liberal democracies, though with substantially different implications than in totalitarian regimes.

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I. Introduction: Strategic Totalitarianism and Tactical Totalization

My task is to examine the reach of the totalitarian epoch and its implications for the rule of law. To approach this task, I consider totalitarianism not as a political phenomenon but rather in its narrow jurisprudential aspect, as the totalization by a central authority of the power to settle normative questions that would otherwise be settled by plural authorities. Looking at the matter this way reveals how totalization of legal norms can and does occur in contemporary liberal democracies, though with substantially different implications than in totalitarian dictatorships. The reasons for totalitarianism's antipathy toward private law are shared to a limited extent by political authorities that are not violent or comprehensive in their control of society, but instead exhibit characteristics of what Alexis de Tocqueville termed, "soft despotism,"[1] a tyranny that he predicted would be unlike the Roman empire and other ancient tyrannies in that "it would be more widespread and kinder; it would debase men without tormenting them."[2]

Part II of this paper briefly explains why it is important for un-determined and under-determined legal norms to be settled within plural domains, especially domains of private ordering whenever possible (an argument I have made in book length elsewhere[3]). Because basic human goods are incommensurable and affirmative responsibilities are open-ended, most duties of abstention and all affirmative obligations are un- or under-determined by reason. The act of settling and specifying those duties and their correlative liberties and rights is a reflexive act, which has moral value for the groups and communities that perform it, as it forms identity in the order of the will. The liberty to deliberate, choose, and specify norms within domains of private ordering is therefore an indispensable condition of developing one's ability to realize the distinctly human good of practical reasonableness.

This account of norms entails a perfectionist commitment to plural domains of authority (and thus it is not libertarian or individualist), which requires that those domains enjoy liberty (and thus it is not left-liberal or statist). This is a contemporary defense of a classical, common-law sense of liberty. This part also examines the harm caused by totalizing norms of equality and non-discrimination. All law is discrimination, and the plurality of goods and of private ordering requires that discrimination be allowed for valid reasons and forbidden when the reasons are never to be considered in the circumstances. Because norms of equality and non-discrimination

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1 Alexis de Tocqueville, Democracy in America 803-09 (Gerald E. Bevan trans., Penguin 2003) (1835).

2 *Id*. at 804.

3 Adam J. MacLeod, Property and Practical Reason (2015).

are under-determined in the abstract, they can seldom justifiably be used to eliminate norms and judgments of private law.

The clearest case of totalization of norms is of course to be found in a totalitarian regime. Among such regimes, the Soviets are interesting for having developed a jurisprudence to explain their totalizing ambitions. Soviet socialist jurisprudence thus serves as a focal case of the phenomenon examined here. To get a sense of the incompatibility between totalitarian jurisprudence and private law, Part III briefly examines the Socialist jurisprudence that was ascendant within the former Soviet Union and its proxies and allies, particularly its treatment of private law.

The study then generalizes a bit to consider whether totalitarian rule is necessarily hostile to private law and private ordering. Part IV of this article suggests why private law poses a threat to governing regimes that aspire to total control of the political community. It also explores how totalization of law can be viewed in its jurisprudential aspect, apart from the violent barbarities that totalitarian regimes committed in the twentieth century.

A general jurisprudence of totalization enables one to perceive totalization of legal norms in non-totalitarian societies. The latter parts of the paper examine attempts at totalization of law that have arisen within liberal democracies. Part V examines the use of tactical totalization of law within states that aspired in the twentieth century to attain complete segregation of races. Part VI points out some places where tactical totalization appears in liberal democracies and liberalizing societies today.

Part VII briefly considers the prospects for a principled pluralism that might resist totalization and promote human flourishing. Those prospects are not possible under a totalitarian regime but are available in a society that preserves the forms and institutions of liberty despite the tactical totalization of private law norms. Liberal democracies are quite radically different from totalitarian regimes in this sense (among others). This suggests that security for liberty can be regained in liberal democracies by reinvigorating the cultural practices and institutions of private ordering and private law-making.

II. The Need for Perfectionist Pluralism in Law

A. Law as Exclusionary Reasons for Action

Law in its broadest sense consists of authoritative settlements of practical inquiries for the purpose of directing the actions of agents who respond to reasons. Law can direct the choice and action of an individual as a reason for her action as she brings her choices and actions into line with determi-

nate laws, understood as sources of obligation.[4] Law can also act normatively upon the deliberations and actions of groups and associations of individuals. It can direct and coordinate actions among members of a group, association, or community by providing a reason for action that is settled and specified to promote the pursuit of a common good, a good that is common to the members of the group.[5]

These settlements take the form of reasons of a particular kind, which is determinate and does not leave deliberation and choice open. With H. L. A. Hart we might examine these reasons in their form as rules, which supply authoritative, content-independent, and peremptory reasons for action.[6] Or with Blackstone we might note that a rule of action is called a rule "to distinguish it from advice or counsel, which we are at liberty to follow or not, as we see proper, and to judge upon the reasonableness or unreasonableness of the thing advised."[7] We might speak of determinate legal reasons as Grégoire Webber speaks of rights, as absolute or conclusive reasons for action.[8] Or with Joseph Raz we might treat a determinate legal reason as a type of secondary reason for action called an "exclusionary" reason.[9]

The idea common to all those accounts is that legal reasons foreclose further deliberation about the particular practical inquiry at issue. In their focal sense, determinate legal reasons block out of deliberation—forbid further consideration of—other possible reasons. They are, in short, reasons "for excluding normal free deliberation about the merits of" doing or not doing an action.[10]

For present purposes it will be most fruitful to follow Raz's expression of the idea of a binding norm as an exclusionary reason for action. Once settled and specified, the legal reason requires one to exclude from one's future deliberations the first-order reasons that might otherwise have weighed for or against the action that is now required or forbidden. To perform this work, exclusionary reasons must be settled as authoritative by someone. Some require little or even no specification. Insofar as there are exceptionless moral norms,[11] some normative reasons are fully determined, or nearly so, before their settlement and specification in law. Because one can never be reasonably justified in maiming, enslaving, or raping another human being, one has exceptionless duties not to maim, not to enslave, and not to rape anyone.

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4 H. L. A. Hart, The Concept of Law 89-90 (2d ed. 1994).

5 John Finnis, Natural Law and Natural Rights (2d ed. 2011) at ch. VI through X.

6 H. L. A. Hart, Essays on Bentham (1983) at ch. 10.

7 1 William Blackstone, Commentaries on the Laws of England 44 (1769).

8 Grégoire Webber, The Negotiable Constitution: On the Limitation of Rights (2009) at ch. 4.

9 Joseph Raz, The Morality of Freedom (1986) [hereinafter Raz, *Freedom*] at Ch. 7; Joseph Raz, Practical Reason and Norms 35-48, 73-89 (1999) [hereinafter Raz, *Norms*]; Joseph Raz, Practical Reasoning 128-43 (1978).

10 Hart, *supra* note 6, at 255.

11 John Finnis, Moral Absolutes: Tradition, Revision, and Truth (1991).

Those exceptionless duties, being duties owed to all human beings, correlate with and give rise to: the absolute liberties of all human beings not to be maimed, enslaved, and raped; claim-rights against anyone who maims, enslaves, or rapes; immunities from the loss of one's absolute liberties and claims rights; and duties and powers in political communities and their officials to secure and enforce all those rights and duties. Some of those norms require some additional specification. For example, there is not obviously one uniquely-right answer to the question what the criminal punishment should be for maiming. Nevertheless, a duty not to maim, enslave, or rape and the correlative rights are, in common law terms, declared by the lawmaking sovereign, rather than settled and specified by it;[12] they existed as conclusive norms before their declaration and their declaration in human-made law is not the source of their authoritativeness. To the extent that positive law is to be consonant with reason, these fundamental duties and rights cannot be ignored or abrogated.

Yet the vast majority of exclusionary reasons are either undetermined or under-determined unless and until they are specified by some authority. Rights are absolute when they correlate with absolute duties. And a duty can be absolute and exceptionless only if it is a duty of abstention. John Finnis has explained,

> Where these duties are negative duties of respect—duties not to intentionally damage or destroy persons in basic aspects of their flourishing—they can be unconditional and exceptionless: "absolute rights." Where they are affirmative responsibilities to promote well-being, they must inevitably be conditional, relative, defeasible, and prioritized by rational criteria of responsibility such as parenthood, promise, inter-dependence, compensation and restitution, and so forth.[13]

In many instances, moral and pragmatic considerations will not determine an affirmative duty, or not determine it fully, because specification requires an ordering of competing goods—alternative possibilities that possess intrinsic, intelligible value but which cannot all be pursued because of limitations of time, resources, abilities, and other human limitations—and those goods will not be measurable against each other on any common scale of measurement. Basic goods are incommensurable.[14] And therefore the goods chosen and pursued by one individual or group are not always, or even often, commensurable with the goods and plans of other individuals and groups. Responsibilities to pursue or instantiate basic goods are either rationally under-determined or entirely undetermined. It is the choice of one

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[12] 1 Blackstone, *supra* note 7, at 42, 54.

[13] John Finnis, *The Priority of Persons Revisited*, 58 Am. J. Juris. 45, 53 (2013)., MacLeod, *supra* note 3, at Chs. 7 and 8.

[14] *See generally* Raz, *Freedom*, *supra* note 9, at 145-46, 279-84; Finnis, *supra* note 5, at Chs. III, IV, and V.

exclusionary reason over alternative, possible reasons that renders them obligatory and binding.

This is one reason why many (though not all) exclusionary reasons differ from individual to individual, group to group, community to community: many first-order reasons are incommensurable with each other. Different groups and communities of people have their own first-order reasons for action—the health of one's family, the success of one's business partnership, the safety of this neighborhood, the acquisition of knowledge within that school or a particular profession, their assembling together to worship according to their creed (rather than ours), the feeding of the homeless in one's city, the redress of that wrong by this civil jury—that are not shared by the entire political community. The common good of the entire community as a whole does not exhaust the common goods of all of the individuals and communities within its jurisdiction. Groups and communities of people have goods that are common to their members that are incommensurable with—not measurable against or reducible to—the common good of the political community as a whole.

The goods of these groups and communities can reasonably be settled in a wide variety of plans and sub-plans, exclusionary reasons that bind a group's members and coordinate their actions toward realization of the group's common good, as opposed to some other good. And many plans and commitments can be constituted in various reasonable specifications. This is another reason why affirmative rights and duties are left rationally un- or under-determined by considerations of morality, justice, and prudence. Yes, I have a responsibility to educate my children. But is that duty satisfied by sending them to this school, or must I send them to that one? Is it wrong to educate them at home, or to hire a tutor? If a child is not academic in his interests and abilities, can I not reasonably enroll him in a trade school? The duty must be specified in context after consideration of many different facts and goods.

Even some duties of abstention are not absolute. Categorical, exclusionary reasons for action are those that block out of deliberation—foreclose consideration of as possible justifications for action—discrete categories of potential reasons, or all reasons but those in a discrete category or categories. For example, the duty to exclude oneself from others' property is overridden when entry is necessary to save a human life, to execute legal process, or to meet some other strict necessity, but is otherwise absolute.[15] The correlative property right to exclude is therefore categorical but not

[15] 3 Blackstone, *supra* note 7, at 212-13. On categorical-but-not-absolute exclusionary reasons for action, in property law and generally in private law, see MacLeod, *supra* note 3, at Chs. 7, 8. Raz admonishes, "It should be remembered that exclusionary reasons may vary in scope; they may exclude all or only some of the reasons which apply to certain practical problems." Raz, *Norms*, *supra* note 9, at 40. I propose that such exclusionary reasons can be understood as legal reasons (rights and duties), though they are not *fully* exclusionary, when they exclude from deliberation and choice discrete categories of first-order reasons.

absolute. Other duties are absolute and fully-determined but require remedies and sanctions to render them enforceable, which might not always be determined. For example, there is not necessarily one uniquely-correct answer to the question what should be the punishment for human trafficking.

B. *The Harms of Totalizing Equality*

Responsibilities of equality, non-discrimination, and universalizability of concern are among those norms that are undetermined and under-determined in the abstract.[16] Generalizations about equality seldom hold in all, or even most, cases. Discrimination is not an intrinsically good or right action, but nor is it intrinsically bad or wrong. Like all exclusionary reasons for action, laws discriminate. Insofar as many laws and judgments are good and just, much discrimination is good and just; insofar as some laws and judgments are evil or unjust, some discrimination is evil or unjust.

Discrimination is a fact of reasoning. The act of making law—indeed, every act of practical judgment—is discriminatory because choosing and specifying exclusionary reasons for action is a matter of ruling out potential reasons for action as not to be acted upon and privileging and committing oneself to those reasons for which one will act. That discrimination, law-making, and judgment sometimes go wrong does not lessen the need for discrimination, law-making, and judgment. Those actions, when done well, are not only valuable but in many instances strictly necessary.

Law discriminates; reasoned deliberation discriminates; judgment discriminates. The question in each case is whether discrimination is justified on the basis of reasons, and therefore reasonable discrimination, or instead lacking in reasoned justification because motivated solely by fear, prejudice, passion, or other non-rational sources of partiality. It seems non-controversial, for example, that racial discrimination requires some justification, which generally must be compelling and proportionate.[17] It is equally uncontroversial (for now, perhaps) that discrimination on the basis of marital status is reasonable for many purposes, such as enforcing the presumption of paternity and determining eligibility to marry.

And acts of discrimination, law-making, and judgment are not only strictly necessary, they are also valuable. Discrimination cannot be elimi-

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[16] What follows draws heavily upon Hart, *supra* note4, at Ch. VIII; John Finnis, *Equality and Differences*, 56 Am. J. Juris. 17 (2011); and Sherif Girgis, *Equality and Moral Worth in Natural-Law Ethics and Beyond*, 59 Am. J. Juris. 143 (2014).

[17] The Supreme Court of the United States has ruled that racial discrimination is justified on a strict-scrutiny, ends-means analysis when used to reverse the legacy of previous de iure discrimination or to achieve diversity in an elite law school: Grutter v. Bollinger, 539 U.S. 306 (2003). *Cf.* the United Kingdom's Equality Act 2010, allowing proportionate, direct discrimination to remedy various inequalities and requiring direct discrimination where it is necessary to overcome indirect discrimination; "positive action" is justified direct discrimination. *See* Finnis, *supra* note 16, at 31-35.

nated for the sake of pure equality without injuring essential aspects of human well-being, which require practical reason and practically-reasonable judgment to bring them about and to sustain them. To posit equality as an absolute (or even categorical) norm is to eradicate the possibility of reasoning rightly, for the common good. As John Finnis expresses it, to "act without discrimination" is to act "without good judgment, indiscriminately."[18]

Equality cannot justify overriding norms and judgments of difference because it is not a justification in itself—an intrinsic good or a basic moral requirement—for any law or judgment.[19] To put the matter pointedly, the norm requiring equal treatment and the norm against discrimination are nothing like the absolute duties one has not to maim, enslave and rape anyone. They are anything but universal, absolute, fully-conclusive norms.

Human beings are alike in some characteristics and unlike in others; some considerations are so peripheral as to be irrelevant and others are essential. Without an informed and accurate determination which characteristics are relevant, "'Treat like cases alike' must remain an empty form," and Hart has therefore suggested that justice consists of "two parts: a uniform or constant feature, summarized in the precept 'Treat like cases alike' and a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different."[20] The empty form must be filled with reasons—reasons for and against acting on the basis of a distinction, and reasons for discriminating between and evaluating those reasons that weigh for and against differential treatment. The job of practical deliberation is to consider the reasons to determine whether equality or inequality is warranted in each case.

Thus, equality or inequality is a conclusion, not a premise, of practical deliberation and judgment. Until one considers the reasons for and against different treatment one cannot say whether equal or unequal treatment is warranted. In this calculation, as compared with difference, equality is no greater or lesser reason for action. The norm of justice is a norm of equality *and inequality*, that like cases should be treated alike and *different* cases *differently*.

Sherif Girgis has argued that this means there is no moral default in favor of equality as against difference. Instead,

> the true moral default is not equal treatment but *reason-based* treatment, or non-arbitrary treatment-which itself favors neither sameness nor difference of treatment. Our reasons for giving some good to one party are either the same as our reasons for giving it to every other party, or they are different. If the same, then it would be arbitrary to treat the parties unequally: respect requires treating them equally, and dividing the good accordingly. If different, then it would be arbitrary to treat them *equally*: respect requires treating them (i.e., distributing the good) unequally.

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[18] Finnis, *supra* note 16, at 27.

[19] Girgis, *supra* note 16, at 146-49.

[20] Hart, *supra* note 4, at 159.

> There is no more of a presumption of equal than of unequal treatment. Indeed, we might as well have a Principle of Differentiation, to match the principle of equality: there is a presumption of *differential* treatment-except where the reasons bearing on potential beneficiaries of our action happen to be the same, and then we treat them equally.[21]

Girgis concludes, "There is thus no neutral case in which a presumption of moral equality adds a point to break a putative 0-0 tie in favor of equal (as opposed to unequal) treatment of two parties. That would mean no reasons were at stake; yet intentional action is *always* for reasons."[22]

Equality as an absolute norm threatens those reasons. Non-discrimination laws achieve their objectives by eliminating from deliberation, judgment, and choice, possible reasons for action that are deemed not relevant considerations in the context identified. As Finnis explains, the point of laws prohibiting direct discrimination is "to banish protected characteristics from decision-makers' deliberations; the rationale's presupposition is that they are irrelevant, and that decision-makers considering personal characteristics can therefore be rightly required to focus exclusively on such characteristics as are relevant to the task in hand."[23]

The danger here is manifest. If a universal law of general application banishes from deliberation and judgment a consideration that is *not* irrelevant, but is instead an essential aspect of a valuable and reasonable plan of action or life plan, then the law has eliminated from society a valuable and reasonable plan of action or life plan. The more sweeping non-discrimination laws become, the more considerations they banish from deliberation, and the less likely those considerations are to be per se *always* irrelevant, the more likely they are to cause this destruction. Race is quite safely and reasonably banished. But when non-discrimination laws start to prohibit consideration of sometimes-relevant considerations such as language, political party membership, national origin, and so forth, those laws jeopardize the plans or even identities of individuals, families, groups, and associations that are constituted around such characteristics. Consider, for example, a Hispanic Law Students Association.

Even accommodations or exemptions from non-discrimination laws can (perversely) contribute to the problem, even as they are offered as forms of mitigation. For to give reasons of difference a secondary role of deliberation, to treat differences as if they are exceptions to a general rule of sameness, is to obscure the plurality and incommensurability of plans and norms within society and to distort and even suppress important human goods and requirements of justice, such as the unique value of natural mar-

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[21] Girgis, *supra* note 16, at 153 (emphasis in original).

[22] *Id*.

[23] Finnis, *supra* note 16, at 31.

riage, the well-being of children, obedience to conscience, merit and desert, and much else.[24]

Totalization of the norms of difference by a central power inevitably treats cases that are relevantly different as if they were the same. Uniform rules of general application can be neither uniform nor general if they are to take into account every textured feature of practical reason's operation in society. In our egalitarian age norms of equality and non-discrimination seem especially prone toward this danger. Equal treatment is certainly an important consideration and a worthy goal when it is warranted but not when it banishes from deliberation other worthy considerations and goals, such as meritorious treatment, proportionate distribution, integrity with prior judgments, and all of the other aspects of justice, not to mention all of the other human goods that can be pursued in society only if individuals and groups have freedom to pursue them.

Contemporary equality architects seem to be simply unmindful of those considerations, and seem to pay little attention to the instantiation of those distinctions in private law. They would do well to pay better attention. A side effect of the over-pursuit of equality and non-discrimination is, as John Finnis observes, a "negative impact on established constitutional rights such as freedom of association, freedom of religion and conscience… a negative impact which in each case involves also a very substantial shrinking, or invasion, of private life by coercive law."[25] That is a significant loss, as the next section explains.

C. *The Possibility and Value of Plural Exclusionary Reasons*

This broad, perfectionist conception of law as exclusionary reason directing action toward a specific good or goods makes it possible to perceive the law-ness of private law without reducing private law to absolute, individual rights. Private and non-state civic groups need to coordinate their actions in order to achieve their common goods, just as wholesale political communities do. A private group's first-order reasons for acting or refraining from acting—human goods, requirements of practical reasonableness (those requirements that are today called morality and in the common law tradition are often referred to as natural law or the law of nature), conscience, local and general customs—must be specified as authoritative, exclusionary reasons for action if the community is to coordinate the actions of its members. This can be done only in one of two channels, either (1) in unanimity or a close approximation of unanimity, such as custom or agreement, or (2) by some authoritative promulgation.[26] Someone must choose, either the entire group or someone who exercises (not un)lawful authority on the group's behalf.

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[24] Finnis, *supra* note 16, at 40.

[25] Finnis, *supra* note 16, at 36.

[26] Finnis, *supra* note 5, at 231-54.

In instances where the norm was un- or under-determined prior to its specification, the act of settling and specifying the norm is what brings the norm into being. And when an individual or private group or association specifies its norms it constitutes more than merely its rights and duties. It also constitutes itself. It makes itself in what Thomas Aquinas identified as the order one establishes in the operation of the will.[27] A person or group of persons who chooses a plan, a commitment, an obligation, make themselves into the kind of being who privileges and values that plan, commitment, or obligation as against other possibilities.[28]

The act is one of adopting exclusionary reasons that exclude various possible first-order reasons. By excluding from future deliberations those reasons for which the person or group will *not* in the future act (even, or perhaps especially, if others will), the person or group becomes *not* the person or group who acts for those excluded reasons. A university constitutes itself within its domain by not choosing to be a commercial retail outlet or a pharmaceutical manufacturer. A liberal arts university constitutes itself by not choosing to be a trade school or institute of science and engineering.

So, the institution is constituted in part by the first-order reasons it does not choose to pursue. It is constituted even more clearly by the first-order reasons it chooses not to pursue. One university, Vanderbilt, constitutes itself as a university that excludes student groups which insist upon following Christian and Orthodox Jewish ethical commitments.[29] Another educational institution, Gordon College, constitutes itself as a Christian institution whose members must agree not to perform actions that violate Christian ethical norms.[30] The identities of those institutions are constituted in part by the first-order reasons for action they will not allow to be acted upon on their campuses. The act of ruling out first-order reasons that will be excluded focuses one's attention upon and anneals one's commitment to those reasons that are chosen. And by choosing to obligate oneself to act for the reasons for which the person or group *will* act, the person or group constructs a will oriented toward those reasons. This person or group is this person or group, and not some other, because of the exclusionary reasons that constitute the person's or group's identity. Those commitments are laws, nonetheless constitutional laws for being private laws.[31]

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[27] Thomas Aquinas, Commentary on Aristotle's Nicomachean Ethics 1–2 (C. J. Litzinger trans., Dumb Ox 1993). Compare Raz, *Freedom*, *supra* note 9, at Ch. 14; Amartya Sen, Development as Freedom (1999).

[28] John Finnis, Collected Essays of John Finnis, vol. II: Intention & Identity 36–68 (2012).

[29] Michael Stokes Paulsen, *Vanderbilt's Right to Despise Christianity*, Pub. Discourse (Mar. 14, 2012) http://www.thepublicdiscourse.com/2012/03/4930/.

[30] Adam J. MacLeod, *Gordon College and Pluralism in Higher Education*, Pub. Discourse (July 30, 2014) available at http://www.thepublicdiscourse.com/2014/07/13600/.

[31] Adam J. MacLeod, *Universities as Constitutional Lawmakers*, 17 U. Pa. J. Const. L. Online 1 (2014).

III. Socialist Legal Theory

One gets the sense that private law was not a primary concern in Soviet socialist legal theory. Unlike the consolidation of political power, which required the complete instrumentalization of *public* law, collectivization required centralized control of productive resources. It was primarily an economic project focused on control of the resources themselves rather than the norms governing their use and management.[32] Yet the norms of private law are specified as incidents of, and by the authority exercised in, the power to control. Who has dominion has the authority to make law within the domain. And so private law is not excluded from the twin Socialist critiques of law generally, which assert (as Lon Fuller summarized them) that "(1) law and the state are a superstructure reflecting the basic economic organization of society, and (2) in the socialist economy of the future, both law and the state will 'wither away.'"[33] Early Socialist jurisprudence seems to have taken for granted that private law, like all law, would disappear as capitalism disappeared. It would be unnecessary under a regime of centrally-planned production and association.[34]

When it appears in early socialist jurisprudence, private law is portrayed as abstract and artificial. Evgeny Pashukanis, whom Fuller titled "the leading jurist of Russia,"[35] adopted Marx's Hegelian view of property ownership, in which property becomes owned when the owner's will is placed into the thing. On this foundation he built a characterization of private law as formal and abstract. Ownership and the rules and incidents that attach to it are legal forms originating in competitive trade and designed to distinguish subject from object in order to make commercial exchange possible. The rights and duties of property and private law are abstract forms designed to create artificial categories of individual rights and responsibility.[36]

So, early Socialist legal thought treated private law as a servant of capitalism, created by capitalist logic to serve capitalist ends, and therefore an impediment to emancipation. Among capitalism's instruments of repression, the Socialist legal theorist identified property and contract as playing particularly instrumental roles. Private law establishes the foundation for rights and duties borne by individuals, enables contractual exchange in the market, and is therefore required for commerce among independent actors. Private law is unnecessary under a totalizing regime of planned production

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[32] *See* John N. Hazard, *The Soviet Legal Pattern Spreads Abroad in Law* in The Soviet Society 277, 287-92 (Wayne R. LaFave ed, 1965).

[33] Lon Fuller, *A Study in the Development of Marxian Legal Theory*, 47 Mich. L. Rev. 1157, 1159 (1949).

[34] Martin Krygier, *Marxism and the Rule of Law: Reflections After the Collapse of Communism*, 15 Law & Social Inquiry 633, 654-56 (1990).

[35] Fuller, *supra* note 33, at 1159.

[36] Evgeny Pashukanis, The General Theory of Law and Marxism (Barbara Einhorn trans., Transaction 2002).

and association.[37] And its forms are ultimately illusory. As Arthur Ripstein observes, for Pashukanis, private law's forms of agency, responsibility, and formal equality misrepresent the reality that "the choices for which agents are responsible are themselves shaped by the market."[38] The vision was that, when conflicting individual purposes were abolished, private law would be rendered obsolete and wither away.

Yet as long as it remains, private law is inimical to central planning because in the course of enabling capitalism it substitutes for the comprehensive plan so essential to communism's success, it maintains the artificial forms of individualism, and thus it impedes the emancipation that Communism promises to deliver. Private law's presumptions of individual subject, individual and group agency, and private interest are inconsistent with the comprehensive plan of the unified mind[39] with its unitary good and singular means.

The central, unified mind directing the operation of law seems to have played a significant role in later Socialist jurisprudence, as law was accepted and turned toward the Party's ends.[40] Unlike Pashukanis, for whom Socialist law was still law, and therefore fundamentally bourgeois, later Socialist jurisprudents made their peace with the idea of law.[41] In that later Socialist jurisprudence, the whole of Soviet law is a single organic being, comprised of soul and body governed by a single reason and will.[42] Its parts have no minds of their own; they do not deliberate and render judgments. So, for example, in the Soviet model of planned contracts, "the will of an administrative planning agency" substituted for "the will of the contract partners."[43]

The central mind—the Party—was "the brain, the conscience, the mind of the Soviet society." The Party was the one "self-perpetuating organization." Private action poses no threat to the totalitarian project as long as that action is directed by norms specified by the central mind, but it is a threat if directed by the reasoned deliberations and judgments of the independent moral agents. Thus, use of land was assigned to private individuals and groups in Soviet society, and even some personal property rights, but not the authority to specify the rights and duties of property ownership by powers of exclusion, alienation, mortgage, or donation.[44]

For the same reason, there are no rights in Socialist jurisprudence, only concessions of privileges that the sovereign may freely revoke. Indeed, citi-

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37 Krygier, *supra* note 34, at 654-56.

38 Arthur Ripstein, Equality, Responsibility, and Law 253 (1999).

39 Krygier, *supra* note 34, at 635.

40 I am indebted to Michael DeBow for this observation.

41 Fuller, *supra* note 33, at 1163-64; Dietrich A. Loeber, *Plan and Contract Performance in Soviet Law* in Law in the Soviet Society 128, 176-79 (Wayne R. LaFave ed, 1965).

42 Christopher Osakwe, *The Four Images of Soviet Law: A Philosophical Analysis of the Soviet Legal System*, 21 Tex. Int'l. L. J. 1, 2 (1985).

43 Loeber, *supra* note 41, at 129.

44 Osakwe, *supra* note 42, at 15-18 & n.33.

zens are property of the state, and "the dominion of the sovereign over all members of the society is absolute."[45] Dominion entails authority to settle norms—rights and duties—for those within the domain. Plural domains, or even a government whose powers are separated among different branches or federal sovereigns, can specify legal norms that bind both the governed and those who exercise authority. But rights and duties are juristic concepts attaching to legal subjects, which are forms peculiar to capitalism. By contrast, the unitary sovereign, directed by the unified mind, has no need of rights and duties. This unitary sovereign from which all rights emanate as concessions of privilege is not bound by its own law, nor by anyone else's.

IV. Private Law's Threat to the Totalitarian Project

That is merely one totalitarian legal theory, although arguably the world's most influential to date. Perhaps the antipathy of Socialist jurisprudence toward private law is (ironically) historically contingent. Is there a *necessary* incompatibility between private law and totalitarian legal thought?

The argument for the affirmative is straightforward. Private law is inimical to totalitarian rule because and to the extent that it is inimical to central planning, which requires a unity of end(s) and a single, comprehensive plan for its/their attainment. The existence of private law suggests plural ends and means of ordering, and therefore suggests plural instantiations of lawfulness.

On the other hand, this plurality of orders within private law might suggest that private law is not law in fact, and therefore not a rival to the rule of a unitary lawgiver. Private law does not share public law's ambition to provide, as John Finnis has characterized the end of public law, "comprehensive and supreme direction for human behaviour"[46] in the political community as a whole. It does not claim to be the source of validity of other normative arrangements, and it seldom resorts to coercion. It does not often even attempt to supply conclusive reasons for action ex ante.

If private law does not entail universal rules of general application, if many of its doctrines are indeterminate and specified only in particular legal judgments, if it is not publicly promulgated ex ante, and if it is not backed by coercion or threat of coercive sanction, then private law might not partake of the nature of law. In these and other respects, private law does not always, or even often, exhibit those attributes without which, Lon Fuller influentially argued, a law cannot be a law.[47] Private law might lack

[45] Osakwe, *supra* note 42, at 18.

[46] Finnis, *supra* note 5, at 260.

[47] Lon L. Fuller, The Morality of Law (1964).

law's indispensable inner morality. If that is true then the ends and means of public law might exhaust the ends and means of law.

Yet for those who employ private law (i.e. everyone who lives in a jurisdiction in which private law is permitted), these facts about private law are considered strengths, not failings. Thus, there is at least as much reason to interrogate the employment of public law rules as focal instances of law as there is to doubt the law-ness of private law. Benjamin Zipursky points out that Fuller's view understands law as "a system of governance that works by consolidating authority in the state, which issues enforceable rules of conduct and has the power to enforce those rules of conduct by sanctioning those who fail to comply with them."[48] Private law cannot be understood so simply. It functions by responding to the nearly-infinite varieties of acts of private ordering, and therefore must provide many different settlements to various inquiries. A conception of law that takes public law as its defining instance or focal case might not capture the complexities of private, legal ordering.

Zipursky and Ernest Weinrib are among those who have noticed that private law has its own inner logic, which is not reducible to its instrumental utility for attaining collective ends.[49] This suggests that private law is authoritative, but in a different way than public law. Not all of it is concerned with governance. Some private law (e.g. condominium bylaws or university nondiscrimination policies) mimics pubic law. But other areas of private law are concerned with specifying private rights and duties, e.g. property,[50] empowering those harmed by wrongful conduct to obtain redress, e.g. torts[51] and remedies, and other purposes that are not reducible to governance, e.g. contracts, trusts and estates, and commercial law. Thus Hanoch Dagan has argued that "monist theories can hardly account for the vast heterogeneity of our private law doctrines."[52]

To develop a complete account of the domains of private and public law and the boundaries between them is beyond the scope of this article. For present purposes focal cases must suffice. That the norms of private domains *are* specified and treated as authoritative within the domains of private ordering means that private law is possible.[53] That private law *does* act authoritatively within its own domains is a factual matter open to observation. There are hard questions at the boundary between public and private law but there are also focal cases of each. A local custom, a bailment, a church bylaw, and a contract are all private laws. A handgun or

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48 Benjamin C. Zipursky, *The Inner Morality of Private Law*, 58 Am. J. Juris. 27, 36 (2013).

49 Zipursky, *supra* note 48; Ernest Weinrib, The Idea of Private Law (2012).

50 *See* the essays in Philosophical Foundations of Property Law (James Penner & Henry E. Smith eds., 2013), MacLeod, *supra* note 3.

51 Zipursky, *supra* note 48, at 39-40.

52 Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 Colum. L. Rev. 1409, 1411 (2012).

53 *See* Adam J. MacLeod, *Private Rights and Duties*, 6 Faulkner L. Rev. 65 (2014).

marijuana ban, backed by threat of criminal sanction, is a focal example of a public law. Private law often provides for and depends upon reasoned deliberation about what to do within particular communities and specific contexts; in its focal sense, public law does not.

One should hasten to note that, just as it would be a mistake to view private law as defective public law, one could go wrong by viewing public law as merely a security against the failings of private ordering. It is sometimes necessary and justified for a political community to work according to a unitary plan of action for discrete times or discrete ends, as where a central authority is waging a defensive war against an enemy bent on the society's destruction. Nor should all law be private law. There are some absolute and categorical norms without which no society can flourish—as observed above, one must never maim, enslave, or rape. And these norms must in justice be specified not only as private rights and duties—rights of bodily integrity, liberty, exclusion, etc.; duties not to kill, enslave, or take without permission—but also as ex ante prohibitions, promulgated as clear rules and backed by threat of criminal sanction. And sometimes it is necessary for the political community to promulgate malum prohibitum offenses in order to achieve particular goods by discrete plans of action—protection of streams and rivers from pollutants, the timely and safe delivery of the mail, etc. Furthermore, those entrusted with the authority to enforce these rules and mete out the sanctions must themselves be controlled by rules, lest they abuse their power. So, we have constitutions.

Nevertheless, many rights and duties cannot reasonably be specified except within particular contexts, and upon particular judgments of reasonableness. And someone must perform the authoritative specifying. Institutions and authorities of private ordering fill this need. And this is why private law is necessarily at odds with totalitarian rule. For a governing elite to be totalitarian, and not merely thuggish, it must establish a monopoly on judgments of practical reason. It must become the only source of exclusionary reasons for action. To the extent that people look to other sources of authority when deciding what they should and should not do, the central plan is not commanding total obedience.

A measure of a regime's success in establishing totalitarian rule will be how effectively it displaces private law. The existence of private law is an indication that the central authority is not the only domain of deliberation and judgment within the society, and therefore the central plan is not in fact unified and comprehensive. Institutions of private ordering must be deprived of either their freedom or authority (or both) to engage in meaningful practical deliberations.

That is the external conflict between the central plan and private law. There are at least two additional reasons why private law is anathema to totalitarian rule, both related to the reflexive, internal aspects of private ordering. First, totalitarian governments cannot let freethinking citizens and institutions flex their practical-reasoning muscles on questions of civic importance. To defer to the reasoned judgments contained in private law is to *trust* one's fellow citizens to become capable of exercising authority over

their own affairs. So, totalitarian governments must eradicate opportunities for private citizens to reason and to govern their own affairs.

Normative ordering is a self-constituting activity in the sense of being will-ordering, which is habit-forming, and therefore character-forming. The exercise of practical reason, including the specification of authoritative reasons for one's own conduct and the plans and actions of one's groups and associations, is a reflexive (self-constituting, architectonic) exercise.[54] The more one does it, the more accustomed one becomes to doing it, and the better one may become at it. The act of normative ordering makes mature and wise citizens out of puerile and incompetent ones. This exercise brings about liberation, not from nature and material circumstances, but rather from servility and enslavement to the passions. Totalitarianism cannot long last when citizens are free and able to think and choose for themselves.

Second, private ordering is a self-constituting activity in the sense that, by selecting exclusionary reasons from possible alternatives, an individual, group, or community commits itself to those reasons and not other reasons. By deliberating and choosing, individual and group agents make for themselves new obligations and other reasons for action, which may be inconsistent with what the central authorities would choose for them. They commit themselves to ends and means that others might not value or appreciate, and they constitute their identities around those ends and means in the order of the will.[55]

The very idea of private law presupposes that there are domains within which one may exercise practical judgment and free choice in ordering one's affairs, either by oneself or with other moral agents, for common ends. So, the incompatibility of totalitarian legal thought with institutions of private ordering is perhaps no mere coincidence.[56]

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[54] Raz, *Freedom*, *supra* note 9, at 385-90, 407-12; Robert P. George, Making Men Moral: Civil Liberties and Public Morality 173-82 (1993).

[55] *See generally* Aquinas, *supra* note 27, at 1-2; Finnis, *supra* note 5, at 136-38; John Finnis, Collected Essays of John Finnis, vol. I: Reason in Action 237–43 (Oxford 2012); Finnis, *supra* note 28, at 36–39, 83–84.

[56] Thus, nongovernmental organizations were invited to participate in Soviet governance as agents of the central powers. Osakwe, *supra* note 42, at 18. Socialist legal theory took Marxism well beyond Marx, but Krygier persuasively argues that the antipathy of Communist totalitarianism to institutions of private ordering is incipient in Marx's thought.

> In Marx's distaste for separateness, boundaries, distinctness, freedom *of* religion, there is a passion for unmediated social wholeness which, to say the least, has not worn well. In Marx's conception… what was to be liberated in truly human society was the *species*—from alienation, from self-deception, from dependence on nature and on others, from antagonism, from difference. … [N]otions of mediating institutions, zones of protected autonomy and plurality, tolerance and protection of individual life plans, simple restraint in the pursuit of huge ambitions, are simply absent from Marx's utopia and would cut deeply against its grain.

Krygier, *supra* note 34, at 663. In this light, Krygier concludes that the absence of legal securities for mediating institutions in Communist legal thought "was no accident."

The most blunt and direct way to achieve a monopoly on authority is of course to eradicate, co-opt, or de-legitimize all of the institutions of private ordering, and to kill or ruthlessly oppress anyone who does not go along with the master plan of the central mind. Doing so crushes the souls and suppresses the humanity of the governed by depriving them of the domains, groups, and associations within which they reason together in a fully-human way. That was a favorite path to totalitarian rule in the twentieth century,[57] and persists in some of the darker corners of the world today, especially North Korea and the Islamic State in Iraq and al-Sham, known as ISIS.

ISIS represents a new form of totalitarianism with perhaps the purest jurisprudence imaginable. The combination of modern weaponry with a fundamentalist jurisprudence grounded in a text that sanctions violence and oppression has produced a state in which all law emanates from a single source—the Caliphate—and even the slightest departures from its rules are deterred. Punishments for disobedience are specific and inhumane. They include beheading, raping, and enslaving. So it is understandable that many people focus on the actions of ISIS. But motivating the violence and degradation is a coherent, if barbaric, jurisprudence that is totalizing in its ambition and apocalyptic in its eschatology.[58] ISIS does not seek the totalization of legal norms in order to centralize power, it seeks to centralize power in order to purify and totalize all legal norms. It punishes deviations from its rules with the death penalty in order that Islamic law has only one, determinate meaning; "the Quran means exactly one thing, and other levels of meaning or alternate interpretations are ruled out a priori."[59]

In other words, the law promulgated by ISIS consists of fully-conclusive, absolute, exceptionless, exclusionary reasons for action. Interestingly, those fully-exclusionary reasons are binding upon everyone, including the ruling elites within ISIS. Unlike Communist rulers who have often acted arbitrarily, the caliph of ISIS, Abu Bakr al-Baghdadi, understands himself to be obligated to obey a particular interpretation of Sharia law. Totalization of all norms and institutions is not a means to an end, it is the end itself. The reason for ISIS to exist is to impose one law on everyone within ISIS, top to bottom, and everyone who comes under its control.

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[57] *See, e.g.*, Richard Pipes, *Human Nature and the Fall of Communism*, 49 Bulletin of the American Academy of Arts & Sciences 38 (1996); Richard Pipes, Property and Freedom 209–25 (1999).

[58] *See* Graeme Wood, *What ISIS Really Wants*, The Atlantic (Mar. 2015) available at http://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/.

[59] Caner K. Dagli, *The Phony Islam of ISIS*, The Atlantic (Feb. 27, 2015) available at http://www.theatlantic.com/international/archive/2015/02/what-muslims-really-want-isis-atlantic/386156/. *See also* Jeffrey Goldberg, *"Crimes" Jihadists Will Sentence You to Death For*, The Atlantic (Nov. 14, 2015) available at http://www.theatlantic.com/international/archive/2015/11/paris-attacks-isis/415998/.

V. Tactical Totalization

Yet eliminating private law is a useful tactic even when it is not itself a political power's strategic goal. It has proven effective at enabling many projects of social engineering. Governing elites in liberal democracies have ways of eliminating whole categories of private law in broad daylight. These methods leave the forms of institutional autonomy in place but eliminate their authority over important areas of civic life. Two of them have proven popular in recent decades. One, by depriving a community or institution of its sources of authoritative reasons—purpose, conscience, tradition, sacred texts, promises, law—one can deny it the raw materials it needs to order its affairs independently of the collective will. Two, by answering all of a community's practical questions on its behalf, a regime can deprive that community or institution of opportunities to exercise deliberation and judgment.

I will call these practices tactical totalization. Identifying and naming the phenomenon suggests where it might be observed in liberal democracies, and shows how it differs from totalitarian legal ambition. As Martin Krygier observes, no parallel to the "systemic purposefulness" of Communist totalitarianism can be found in liberal democracies.[60] In liberal democracies, particularly where the common law tradition is intact, we take for granted that law limits power, constrains government, and secures liberty. Underlying the rule of law, so foreign to the experience of those who live in totalitarian states, is "a widespread assumption within the society that law *matters* and should matter."[61]

Nevertheless, this assumption is expensive and fragile. As Krygier observes, it has grown in Western societies over centuries. Experience shows that it cannot be decreed, and that it can be destroyed easily. Thus, we should not allow reified distinctions between totalitarianism and liberal democracy to conceal the possibility of totalization. Totalization of legal norms does occur in liberal societies. It might seem to arise democratically because it arises bloodlessly. However, upon closer examination it seems to emanate not from democratic self-governance, but rather from central authorities of public law, albeit in the name of, or on behalf of, democratic notions such as equality.

One might view totalization in liberal societies as a jurisprudential feature of the political pathology that Alexis de Tocqueville predicted would afflict the United States in its later years, what he called "soft despotism," a new tyranny that grows out of the American commitment to radical equality. In the new age of "enlightenment and equality… rulers could more easily manage to gather all public powers into their own hands and to intrude further and more regularly into the realm of private interests than was ever

[60] Krygier, *supra* note 34, at 635.
[61] *Id*. at 646 (emphasis in original).

possible for any ancient sovereign." The "same equality which fosters despotism also tempers it." As fortunes are smaller, imagination is restricted, and pleasures become simpler, the "universal moderation" within democracies would control the ruler's excesses and constrain the "disorderly surges of his desires within certain limits." But the ruler will stand above the masses nonetheless, "an immense and protective power" who seeks not "to prepare men for manhood" but rather "to keep them in perpetual childhood." The governing power is happy to remove from the subjects entirely "the bother of thinking and the troubles of life" and to replace those with "a network of petty, complicated, detailed, and uniform rules."[62]

Tocqueville saw "quite clearly that, in this way, individual intervention in the most important affairs is preserved but it is just as much suppressed in small and private ones."[63] As opportunities for private ordering are eliminated, the citizens are infantilized. The new despotism "reduces daily the value and frequency of the exercise of free choice; it restricts the activity of free will within a narrower range and gradually removes autonomy itself from each citizen" so that all are eventually reduced to "a flock of timid and hardworking animals with the government as shepherd."[64] Soft despotism thus totalizes the community's norms and subdues its people without the executions, famines, and social disruptions associated with Soviet totalitarianism.

On the other hand, soft despotism has some rather hard edges of its own. Segregationists used tactical totalization in liberal societies in the twentieth century. Unlike totalitarians, they did not abolish religion or private property, nor socialize the means of production. The project of racial segregation was not to bring all of society under a single power for all purposes. Rather, it was to force an implausible conception of equality upon everyone, using public law to make segregation a condition of participation in civic life. Segregationists needed to ensure that every question of interaction between the races was resolved by a single answer. They succeeded as long as they eliminated all norms other than the one norm preferred by the state. Indeed, civil disobedience has proven fatal to segregationist regimes

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62 Tocqueville, *supra* note 1, at 803-09.

63 *Id*. at 807.

64 The consequences that Tocqueville anticipated are worth considering at length.

> [T]he ruling power, having taken each citizen one by one into its powerful grasp and having molded him to its own liking, spreads its arms over the whole of society, covering the surface of social life with a network of petty, complicated, detailed, and uniform rules through which even the most original minds and the most energetic of spirits cannot reach the light in order to rise above the crowd. It does not break men's wills but it does soften, bend, and control them; rarely does it force men to act but it constantly opposes what actions they perform; it does not destroy the start of anything but stands in its way; it does not tyrannize but it inhibits, represses, drains, snuffs out, dulls so much effort that finally it reduces each nation to nothing more than a flock of timid and hardworking animals with the government as shepherd.

Tocqueville, *supra* note 1, at 806.

when it has appealed to rights and duties that did not owe their existence to the state.

Though tactical totalizers do not control society as comprehensively as strategic totalitarians, they can afford to leave no domain of life beyond the reach of public law. Private ordering in general, and private laws in particular, often prove resistant to a state-approved project. Private law enables whites to give or to sell their title to blacks, or to vest easements, licenses, bailments, and other private rights in their black neighbors, and vice versa. Therefore, a state that is committed to segregation must either eradicate those powers of the sovereign owner or direct their exercise. Private law enables blacks and whites to worship together, to collaborate in business, to learn in the same classrooms. The rights and duties behind which those interactions are possible pose an existential threat to segregation.

During Jim Crow, public law institutions masked their violence to private ordering by retaining the forms and names of the private rights and duties that they had subverted. So, private law was not often a collaborator in Jim Crow. Rather, it was thrice a victim. First, the reasoned judgments it contained were denied juridical enforcement. Second, its emptied form was filled with public rules of forced segregation. Third, it was blamed for the offenses of the public-law authorities who used its name and authority to achieve their unjust ends.

To take a prominent example, property law has long prohibited racial discrimination in public accommodations where race is irrelevant to the purpose for which the property is held open to the public. An owner of a private residence can exclude anyone for any reason, or no reason. An owner who opens his land to the public, say as a pub or a bakery, may only exclude for valid reasons.[65] And the racial identity of the would-be licensee is not a valid reason. Thus, positive enactments that codify prohibitions against racial discrimination in public accommodations are declaratory of the common law that preceded their enactment.[66]

During Jim Crow, segregationist states produced judicial decisions permitting segregation and enacted statutes *requiring* racial segregation in public accommodations. The resulting rules have been called "property" laws, though they were really posited rules of public law. Apparently, this practice was not unique to the United States. One scholar of South African law has summarized, "In its dynamic mode apartheid law treated land and land rights as instruments for social change--individual rights were subjected to large-scale state interferences for the sake of building the dream, establishing the 'colossal social experiment' that was apartheid."[67] That social experiment required destruction of private law's content, be-

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[65] 3 Blackstone, *supra* note 7, at 212.

[66] Coger v. Northwestern Union Packet Co., 37 Iowa 145 (1873); Ferguson v. Gies, 46 N.W. 718, 719, 720 (Mich. 1890).

[67] A.J. Van Der Walt, *Dancing with Codes--Protecting, Developing and Deconstructing Property Rights in a Constitutional State*, 118 South African L. J. 258, 268 (2001).

cause private rights and duties are settled and specified by agents and institutions beyond the state's control. But it was useful to co-opt the forms of private law in order to co-opt the authority of private institutions.

In the United States the ruse was largely effective. For example, the failure to identify and distinguish private rights and duties has caused confusion about the nature of the dispute in *Shelley v. Kraemer*.[68] Herbert Wechsler and Robert Bork criticized the *Shelley* decision on the ground that it compromises constitutional principles of neutrality.[69] Like other non-neutral constitutional decisions, the argument goes, *Shelley* reduces constitutional adjudication to the preferences of judges concerning which actions are legally unacceptable. If any judicial enforcement of a private choice constitutes state action then any private choice becomes a matter of constitutional concern. But post-*Shelley* constitutional doctrine arbitrarily picks out those private choices that involve racially-discriminatory motives and leaves alone other private choices that would also be constitutional violations if they were state action.

Bork illustrated his concern by imagining a houseguest who "becomes abusive about political matters and is ejected by his host," and then sues his host in state court and loses.[70] Bork worried that, on the authority of *Shelley*, the state court judgment against the rude guest must be construed as state action, requiring the Supreme Court to act as rule-maker for all conduct by private individuals on private property. The only way to avoid that result, Bork thought, would be to import into constitutional law "qualifications and limits that themselves have no foundation in the Constitution or the case."[71] He concluded, "*Shelley* was a political decision. As such, it should have been made by a legislature."[72]

Yet, *Shelley* was decided on the basis of law. As Matthew Franck has observed, the neighbors in the *Shelley* case were asking a court to deprive the Shelleys, the black homebuyers who took possession of the house on Labadie Avenue, of their vested title. By contrast, no one has a right "to make oneself a nuisance to one's hosts."[73] Put in property terms, vested title in fee simple is a fully-specified, in rem right, good against the world. By contrast, a license to visit the home of a neighbor is not a property right at all. It is fully revocable at the pleasure of the host, and in any event does not entail the right to make unreasonable uses.

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[68] 334 U.S. 1 (1948).

[69] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 29 (1959); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1, 15-16 (1971) [hereinafter *Neutral*]; Robert H. Bork, The Tempting of America 151-53 (1990) [hereinafter *Tempting*].

[70] Bork, Tempting, *supra* note 69, at 152.

[71] *Id.* at 153.

[72] *Id.*

[73] Matthew J. Franck, *The Last Justice Without a Theory: Fred M. Vinson* in Sober as a Judge: The Supreme Court and Republican Liberty 121-74, 168 (Richard G. Stevens & Matthew J. Franck eds., 1999).

The Shelleys took lawful title to the contested residence when Fitzgerald, their predecessor-in-title, exercised his power of alienability to deliver to them a warranty deed. Their new neighbors on Labadie Avenue in St. Louis then asked the courts of Missouri to give equitable enforcement to a written agreement, which most, but not all, of the homeowners had signed and recorded, prohibiting for a period of 50 years any possession of the residences by "any person not of the Caucasian race."[74] The case therefore presented as a conflict between a delivered deed, conveying lawful title, and a private contract, unenforceable against the third-party Shelleys. This was a no-brainer. The Shelleys were entitled to prevail on straightforward application of private law doctrines.

Shelley is mistakenly known as a case about the enforceability of private real covenants, instruments by which vested property rights are created. Chief Justice Vinson gave credence to this view with his rather imprecise introduction of the case. His opinion for the court opened,

> These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property.[75]

It is understandable that Vinson's reference to "covenants," the purpose of which is to govern "occupancy of real property," would mislead. But in fact, there was no real covenant to enforce, only a contract. And the Shelleys were neither contracting parties nor third-party beneficiaries of the contract. No vested rights were at stake other than the title of which the Missouri courts intended to divest the Shelleys.

It is true that the Missouri Supreme Court had enforced the restrictive agreement as a real covenant, but that court simply got the law of covenants wrong. The common law doctrine, followed in Missouri, requires some common nexus of title between covenanters, known as horizontal privity, without which the burden of the covenant cannot run with the land.[76] The Missouri courts failed to acknowledge that this agreement failed to run to successors-in-title for lack of horizontal privity. Fitzgerald, who sold to the Shelleys, was not a party to the original agreement, but rather was "a white person who was a straw party,"[77] introduced into the transaction for purposes that are not difficult to infer. Because the parcels had no nexus of title at the time of the original agreement they could not run against successors in title to the burdened residence. Fitzgerald, being a successor-in-title, was free and clear of any legal obligation arising out

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[74] Shelley v. Kraemer, 334 U.S. 1, 4-5 (1948).

[75] *Id.* at 4.

[76] Allen v. Kennedy, 2 S.W. 142, 143 (Mo. 1886); Iowa Loan & Trust Co. v. Fullen, 91 S.W. 58 (Mo. Ct. App. 1905).

[77] Kraemer v. Shelley, 198 S.W.2d 679, 680 (Mo. 1946).

of the agreement. Had he even been a party to the lawsuit, the neighbors would have had no rights against him, much less to the Shelleys, to whom he had already made conveyance.

Kraemer and the other neighbors convinced the Missouri Supreme Court to order the chancellor to enforce the unenforceable covenant with injunctive relief, which would have resulted in the eviction of the Shelleys and their loss of title, and to retain jurisdiction over the case to ensure implementation of the injunction. In doing so, they successfully implicated the Missouri courts in unlawful action in two ways. First, they convinced the Missouri Supreme Court to divest the Shelleys of a vested, legal right by way of equitable relief. Equitable enforcement would clearly have violated equal protection because it would have entailed undoing what law required, and doing so on the ground that the Shelleys were not of the Caucasian race.

Second, the Kraemers implicated the Missouri courts in enforcing a covenant that would not have been enforced as a matter of neutral property doctrine. As a matter of established private law doctrine, the promise did not run with title. There simply was no private right to enforce, apart from the Shelleys' vested dominion over the residence they had purchased from Fitzgerald.

As Franck points out, Chief Justice Vinson, the author of the *Shelley* decision, clarified *Shelley*'s reach in his dissent from a later decision of the Court, *Barrows v. Jackson*.[78] Vinson distinguished *Shelley* from *Barrows* on the ground that "in the *Shelley* case, it was not the covenants which were struck down but judicial enforcement of them against Negro vendees."[79] By contrast, in *Barrows* the "majority identifies no non-Caucasian who has been injured or could be injured if damages are assessed against respondent for breaching the promise which she willingly and voluntarily made to petitioners, a promise which neither the federal law nor the Constitution proscribes."[80] Vinson's dissent clarified the imprecision in his *Shelley* opinion. *Shelley* involved unsettling a vested right by means of a contract that was unenforceable in property law. The claim right and no-right settled by property law both favored the Shelleys. *Shelley* was not a case about state courts vindicating lawful private covenants in violation of the Equal Protection clause of the Fourteenth Amendment, as if what is lawful in common law is unlawful in constitutional law.

In *Barrows*, by contrast, the covenant was enforceable. Horizontal privity was not required because the defendants were the original covenanting parties. So the agreement breached was a straight-forward contract, with a detestable but not criminally-prohibited or otherwise unlawful consideration. No one was deprived of any vested property rights.

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[78] 346 U.S. 249 (1953).

[79] Barrows v. Jackson, 346 U.S. 249, 261 (1953) (Vinson, C.J., dissenting).

[80] *Id.* at 262.

VI. Tactical Totalization Today

The elimination of private law and its plural goods from consideration in deciding important legal questions is an animating impulse of many governing elites today.[81] In contemporary democracies, the totalization of law is not attended by mass slaughter or famine, as it was in twentieth-century Nazi and Communist totalitarian regimes. Tactical totalization of law does not produce such dramatic, immediate carnage. Instead, the consequences unfold more slowly.

A. Totalization There

The shift from strategic totalitarianism to tactical totalization might be perceived in China. China has grown more open in some ways; it recently amended its one-child policy to permit couples to have two children.[82] Yet the government exercises authoritarian control over wide swaths of Chinese society through detailed rules promulgated by centralized authorities. To justify the removal of crosses and other public displays of Christian religious identity, even the demolition of churches, Chinese officials have resorted to land use regulations.[83] Zoning restrictions are used as a means of lowering the civic profile of Christian institutions,[84] whose commitment to natural law and intrinsic human worth are perceived as threats to the totalizing ambitions of government. A New York Times article reports, "Some Chinese Protestants

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[81] A clear articulation of the totalizing impulse is a recent book arguing, without any apparent sense of irony, that a "tolerant-liberal democracy should be reluctant to tolerate religious claims for accommodation" and for "conscientious exemptions from legal norms." Yossi Nehushtan, Intolerant Religion in a Tolerant-Liberal Democracy 1 (2015) Tolerance destroys itself in its quest to eliminate that which it deems intolerant.

[82] Steven Jiang & Susannah Cullinane, *China's One-Child Policy to End*, CNN (Oct. 30, 2015) available at http://www.cnn.com/2015/10/29/asia/china-one-child-policy/index.html.

[83] Michael Forsythe, *Chinese Province Issues Draft Regulation on Church Crosses*, N. Y. Times (May 8, 2015) available at; Congressional-Executive Commission on China, *Zhejiang Government Launches Demolition Campaign, Targets Christian Churches* (June 6, 2014) available at http://www.cecc.gov/publications/commission-analysis/zhejiang-government-launches-demolition-campaign-targets-christian; Rachel Ritchie, *Zhejiang authorities propose regulations prohibiting cross displays on churches' roofs; more than 10 crosses removed*, China Aid (May 7, 2015) available at http://www.chinaaid.org/2015/05/zhejiang-authorities-propose_7.html; Christian Solidarity Worldwide, *Zhejiang Church Demolitions: Timeline of Events*, available at http://www.chinaaid.org/2015/05/zhejiang-authorities-propose_7.html.

[84] Ian Johnson, *Church-State Clash in China Coalesces Around a Toppled Spire*, N. Y. Times (May 29, 2014) available at http://www.nytimes.com/2014/05/30/world/asia/church-state-clash-in-china-coalesces-around-a-toppled-spire.html?_r=1.

argue that rights such as freedom of expression are God-given, and thus cannot be taken away by the state. These beliefs have led many Protestants to take up human rights work. A disproportionate number of lawyers handling prominent political cases, for example, are Protestant [Christians]."[85] Chinese officials thus find it expedient to make Christians less visible, and find land use regulations convenient means of doing so.

In Western Europe one sees the totalizing impulse in the recent effort to criminalize male circumcision,[86] which failed,[87] and in efforts to eradicate home schooling, which have largely succeeded.[88] The German government imposes chilling penalties upon families who attempt to educate their own children without the state's control, ranging from fines to taking away custody of the children.[89] The express motivation for this effort is to eradicate domains of private ordering within which religious communities and families can constitute themselves consistent with their convictions.[90] The German high court declaimed the German government's totalizing motivation outright, stating "that the purpose of the German ban on homeschooling was to "counteract the development of religious and philosophically motivated parallel societies."[91]

China and Germany of course have totalitarian histories. But even societies with long-standing traditions of ordered liberty today are prone to tactical totalization. In the land of Magna Carta, Members of Parliament have recently moved to prohibit some testators from devising and bequeathing their property in accordance with their religious convictions; they promised to open a joint investigation by the Commons Justice and Home Affairs Committees into the use of religious law to undermine equality rights. A headline in the *Telegraph* misleadingly hyperventilated, "Islamic Law is Adopted by British Legal Chiefs," and contained various references to the potential con-

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85 *Id.*

86 Kharunya Paramaguru, *German Court Bans Male Circumcision*, Time (June 29, 2012), available at http://newsfeed.time.com/2012/06/29/german-court-bans-male-circumcision/.

87 John MacDougall, *Circumcision to Remain Legal in Germany*, NBC News (Dec. 12, 2012), available at http://worldnews.nbcnews.com/_news/2012/12/12/15869347-circumcision-to-remain-legal-in-germany.

88 Michael Steininger, *Where Homeschooling is Illegal*, BBC News (Mar. 22, 2010), available at http://news.bbc.co.uk/2/hi/uk_news/education/8576769.stm.

89 *Id.*

90 An American lawyer involved in litigation on behalf of German families explains,

> Germany does permit some people to homeschool, but it is rare and in general Germany does ban homeschooling broadly—although not completely. (Germany allows exemptions from compulsory attendance for Gypsies and those whose jobs require constant travel. Those who want to stay at home and teach their own children are always denied.)

Michael Farris, *German Homeschool Case May Impact U.S. Homeschool Freedom*, Home School Legal Defense Association (Feb. 11, 2013), available at http://www.hslda.org/docs/news/2013/201302110.asp.

91 *Id.*

flicts between Sharia and comprehensive equality laws.[92] The reason for this mobilization of legislative power was that the Law Society had issued a practice note instructing solicitors on how to draw up wills that effectuate their clients wishes, as the common law has long provided.[93]

Many Muslims are bound in conscience to dispose of their assets in obedience to Sharia, which differentiates between Muslim and non-Muslim practices. These dispositions are not unlawful; they do not involve honor killings, forced marriages, or criminal acts. (These Muslims are not ISIS.) The norms governing the dispositions give preference to religious observance over non-observance, marriage over divorce, and traditional distributions of resources between men and women. Women get smaller elective shares, but are entitled to keep their own property separate and to require payment of a marriage gift, while men's property is for the communal use of the family.[94] Thus, inheritance under Sharia is determined by the heir's financial obligations.

To be sure, some radical strains of Islam are totalitarian and oppressive (see ISIS). However, allowing peaceful Muslims to obey their consciences without committing malum in se offenses is not endorsing oppression or even their beliefs. Enforcing the wills of religious testators in court would not entail endorsing the judgments of religious tribunals or arbitration authorities,[95] nor would it entail giving effect to the laws of any other states, [96] or involve British courts in sanctioning criminal or wrongful acts. Instead, Parliament is gearing up to eliminate this domain of private ordering lest devout Muslims in the course of making their testamentary dispositions distinguish between men and women, marriage and non-marriage, Muslim observance and infidelity.

Or consider Canada. Nine years ago, Ontario outlawed religious arbitration. In a perfectly succinct statement of tactical totalization, the Ontario premier insisted that there is only "one law for all Ontarians."[97] More

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[92] John Bingham, *Islamic Law is Adopted by British Legal Chiefs*, Telegraph (Mar. 22, 2014) http://www.telegraph.co.uk/news/religion/10716844/Islamic-law-is-adopted-by-British-legal-chiefs.html

[93] The Law Society, *Sharia Succession Rules* (Mar. 13, 2014), available at http://www.lawsociety.org.uk/advice/practice-notes/sharia-succession-rules/.

[94] *Id.* at §3.6; Omar T. Mohammedi, *Sharia-Compliant Wills: An Overview*, 25 Probate & Property 58, 60-–62 (2011).

[95] Contrast the anti-Sharia laws discussed in John Witte, Jr. & Joel A. Nichols, *Who Governs the Family?: Marriage as a New Test Case of Overlapping Jurisdictions*, 2 Faulkner L. Rev. 321 (2013).

[96] The effort to prohibit enforcement of these wills is an even more straight forward attack on private law and religious exercise than laws which prohibit courts from giving effect to Sharia law or the laws of nations governed by Sharia. Oklahoma's attempt to enact such a law was struck down for its infringement of religious freedom under the Establishment Clause of the First Amendment to the United States Constitution. Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012).

[97] *Sharia Law Move Quashed in Canada*, BBC News (Sept. 12, 2005) http://news.bbc.co.uk/2/hi/americas/4236762.stm.

recently, Trinity Western University in British Columbia proposed to open a law school. Trinity Western is affiliated with the Evangelical Free Church, a Protestant denomination whose teachings "are formed by a firm commitment to the person and work of Jesus Christ as declared in the Bible." Its administrators, faculty, staff, and students voluntarily promise "to live according to biblical precepts," which include honoring in all persons "their God-given worth from conception to death"; "exhibiting honesty, civility, truthfulness, generosity and integrity"; respecting authority and obeying the law; avoiding divorce; and reserving "sexual expressions of intimacy for marriage," defined as the union of a man and a woman.[98]

After performing extensive due diligence and making the necessary proposals and applications, Trinity Western obtained certification from the relevant education ministries and accreditation from the British Columbia Law Society.[99] Then, the law societies of Ontario and Nova Scotia voted to deny to graduates of Trinity Western's law school admission to the bar. For the future offense of promising to live biblically, all hypothetical prospective graduates of Trinity Western's not-yet-existent law school have already been deemed ethically unsound[100] and, therefore, unworthy of entrance into the legal profession. Then, bowing to political pressure, and in spite of a 2001 decision of the Supreme Court of Canada ruling that Trinity Western has the right to operate a school of education,[101] the British Columbia Law Society and Education Minister reversed their earlier decisions to allow Trinity Western's law school to proceed.[102]

Now Trinity Western's law school is fighting for the right to exist.[103] The Attorney General of Canada has opined that the Supreme Court of

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98 Trinity Western University, *Community in Covenant: Our Pledge to One Another*, https://twu.ca/studenthandbook/university-policies/community-covenant-agreement.html

99 *Voting to Accredit: Excerpts from the BC Benchers Meeting*, TWU Law School Blog, available at http://twulawschool.tumblr.com/post/87994320852/voting-to-accredit-excerpts-from-the-bc-bencher.

100 Charlotte Santry, *Ontario Lawyers Weighing in on Trinity Western*, Law Times (Mar. 31, 2014), available at http://www.lawtimesnews.com/201403313881/headline-news/ontario-lawyers-weighing-in-on-trinity-western.

101 Trinity Western Univ. v. B. C. College of Teachers, 1 S.C.R. 772, 2001 SCC 31. (2001)

102 *Trinity Western Law School: B.C. Advanced Education Minister Revokes Approval*, CBC News, (December 11, 2014), available at http://www.cbc.ca/news/canada/british-columbia/trinity-western-law-school-b-c-advanced-education-minister-revokes-approval-1.2870640.

103 The Canadian Press, *Trinity Western law school accreditation denial upheld by Ontario court*, CBC News (July 2, 2015) available at http://www.cbc.ca/m/news/canada/british-columbia/trinity-western-law-school-accreditation-denial-upheld-by-ontario-court-1.3136529; The Canadian Press, *Law society in Nova Scotia appealing ruling in favour of Trinity Western*, CBC News (Mar. 24, 2015) available at http://www.cbc.ca/news/canada/nova-scotia/law-society-in-nova-scotia-appealing-ruling-in-favour-of-trinity-western-1.3006646.

Canada vindicated that right in its 2001 decision,[104] but Trinity Western must litigate again to preserve it. Even accounting for the unwillingness of many to accept the rationality of the Christian distinction between sexual desires and sexual conduct, it is difficult to understand the hostility to Trinity Western as anything other than totalization. Trinity Western welcomes students with same-sex attraction who want to study at a Christian university.[105] Alumni of Trinity Western's undergraduate colleges who made the same promise to live biblically have succeeded in other law schools in Canada[106] and are contributing to the Canadian legal profession, even in Canada's Parliament.[107] The logic of the movement against Trinity Western is not to preserve the competence of the legal profession, but rather to strangle in the crib, an institution whose members voluntarily choose to live according to Christian convictions.

B. Totalization Here

Here in the United States, the prognosis for private law is mixed. The domain of national, public law has expanded enormously. A recent Federalist Society symposium asked, "Is there any area of modern life to which federal government power does not extend?"[108] It appears that the search for that area is ongoing, but that the mission has shifted from its rescue to its recovery stage.

On the other hand, in the last few terms the Supreme Court has strengthened the autonomy of institutions of private ordering. It has upheld the rights of property owners to be protected against regulatory takings,[109] has re-affirmed the autonomy of religious institutions to make their own personnel decisions under the ministerial exception to non-discrimination

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[104] Brief of the Intervenor, The Attorney General of Canada, *Trinity Western University v. Nova Scotia Barrister's Society*, Supreme Court of Nova Scotia No. 427840, available at http://nsbs.org/sites/default/files/ftp/TWU_Submissions/AttorneyGeneralCanada_07-11-2014.PDF.

[105] *Dear Trinity, I'm Gay and I Love You*, TWU Alumni Association, available at http://twualumni.org/column/dear-trinity-im-gay-love/.

[106] Jesse Legaree, *Dear Nova Scotia Human Rights Commission: what's best for me is real freedom*, TWU Law School Blog, available at http://twulawschool.tumblr.com/post/105887907117/dear-nova-scotia-human-rights-commission-whats.

[107] Lorna Dueck, *Trinity Western Affair a Trial of Canadian Civility and Tolerance, The Globe and Mail* (Dec.11, 2014), available at http://www.theglobeandmail.com/globe-debate/trinity-western-affair-a-trial-of-canadian-civility-and-tolerance/article22041303/?cmpid=rss1&utm_source=twitterfeed&utm_medium=twitter.

[108] Title Page, 37 Harv. J. L. & Pub. Policy i (2014).

[109] Arkansas Game & Fish Comm'n v. United States, 133 S. Ct. 511, 184 L. Ed. 2d 417, 75 ERC 1417 (2012); Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013).

laws,[110] and has recognized an implied right of private landowners to have the factual findings of regulatory agencies reviewed by a court of law.[111]

These developments signal the Court's increased sensitivity to (at least some) private rights and duties. But do they matter in light of public law's ambitious expansion project? If there is no jurisprudential question which public law is willing to leave unanswered then to preserve the autonomy of private law makers is to award them a pyrrhic victory. Institutions of private ordering are permitted freedom to deliberate and to exercise judgment… but about what?

Not only the ambitions of the regulatory state, but also those of courts ratifying individual right claims, can jeopardize private law. The invention of novel, uniform, and individualized constitutional rights is just as useful to tactical totalizers as the expansion of the Code of Federal Regulations. Abstract rights which have no foundation in natural law, the common law, private law, custom, or usage, must necessarily deprive institutions of private ordering of their jurisdiction over whole categories of human affairs.

Tactical totalization is a standing temptation for governing powers on both the left and the right.[112] To put it in concrete terms, deference to private law would caution against the individual mandate of the Affordable Care Act,[113] the abortifacient mandate of the Department of Health and Human Services,[114] and the ruling of the Supreme Court in *Snyder v. Phelps*,[115] which began as an action sounding in tort.[116] Phelps and other protestors from the so-called Westboro Baptist Church turned the funeral of Marine Lance Corporal Matthew Snyder into a publicity stunt when they descended upon it with signs reading "Thank God for dead soldiers,"

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[110] Hosanna-Tabor Evangelical Lutheran Ch. & Sch. v. EEOC, 132 S. Ct. 694, 181 L. Ed. 2d 650, 114 FEP Cases 129, 25 AD Cases 1057 (2012).

[111] Sackett v. EPA,, 132 S. Ct. 1367 (2012).

[112] Robert Bolt's play, *A Man For All Seasons*, puts in the mouth of Thomas More an admonition to his son-in-law, William Roper, that would-be totalizers would do well to heed, no matter how righteous the ends they are pursuing.
"ROPER: So now you'd give the Devil benefit of law!
MORE: Yes. What would you do? Cut a great road through the law to get after the Devil?
ROPER: I'd cut down every law in England to do that!
MORE: Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast -man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.."
Robert Bolt, A Man for All Seasons 66 (1960).

[113] 26 U.S.C. § 5000a. *See* National Federation of Independent Business v. Sebelius, 132 S. Ct 2566 (2012).

[114] 78 FR 39869 (2013). *See* Burwell v. Hobby Lobby Stores, Inc*.,* 573 U.S. __ (2014).

[115] 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

[116] Snyder v. Phelps, 533 F.Supp.2d 567 (D. Maryland 2008).

"You're going to Hell," "God hates you," and "Semper Fi Fags."[117] Before the funeral they issued a press release and notified police officials of their intentions in order to attract media attention.[118]

After hearing this evidence, a jury determined that Phelps and his fellow protestors should be held liable for intentional infliction of emotional distress and invasion of privacy, established tort doctrines with specific elements.[119] In setting this verdict aside, the Supreme Court did *not* determine that the evidence was sufficient to support it. Instead, it ruled that the jury must not be allowed to pass judgment upon Phelps' conduct, lest its verdict suppress other, caustic and outrageous expressions that might interest the public.[120] Even within the sacred domain of a funeral, public law will insert itself to ensure "breathing space" for political expressions.[121]

With this novel constitutional right afoot, no domain is sacred from the intrusions of politics. After *Snyder v. Phelps*, if the speaker pronounces on a matter of public interest then the speaker transforms the private domain into one governed by public law, and neutrality requires that the political expression must prevail over the private domain, no matter how vulgar the speech is, and even when it is pronounced at what *would have been* a private funeral but for the speaker's mischief.

This rule of putative neutrality is the Court's own invention. The text of the First Amendment is silent on the question whether wrongful conduct can ever constitute protected speech. And before the Court's 1964 decision in *New York Times v. Sullivan*,[122] the Court had ruled on various occasions that tortious expressions are *not* entitled to First Amendment protection.[123] But, in the three years between the last of those decisions and its decision in *Sullivan*, the Supreme Court lost its attention to the primary role of private law in specifying the rights and duties secured by the First Amendment's speech clause.

In *Sullivan*, a state court judge in Alabama had not-so-subtly directed a jury to make a half-million dollar punitive damages award to a city commissioner against the New York Times for false statements that it had published about Montgomery, Alabama police.[124] This involved a distortion of the common law doctrine of libel per se, which allows a claimant's cause of action to proceed if the defamatory statement concerns his business or

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[117] *Id.* at 569-70.
[118] *Id.* at 571-72.
[119] *Id.* at 573.
[120] Snyder v. Phelps, 131 S. Ct. at 1219.
[121] *Id.*
[122] 376 U.S. 254 (1964).
[123] Konigsberg v. State Bar of California, 366 U.S. 36, 49, and n. 10 (1961); Times Film Corp. v. City of Chicago, 365 U.S. 43, 48 (1961); Roth v. United States, 354 U.S. 476, 486—487 (1957); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); Pennekamp v. Florida, 328 U.S. 331, 348—349 (1946); Chaplinsky v. New Hamphire, 315 U.S. 568, 572 (1942); Near v. Minnesota, 283 U.S. 697, 715 (1931).
[124] *Sullivan*, 376 U.S. at 262-–63.

profession.[125] By invoking this doctrine, the Alabama courts were able to remove the question from the province of the jury with no evidence of actual injury to Sullivan, even though Sullivan was not named in the libelous publication.[126] The trial judge also wrongly excused Sullivan from his burden of showing intent.[127]

In short, tort law did not *support* the segregationists, and we will never know what the jury might have ruled had it not been misdirected. The Alabama courts *distorted* private law to suit their goals. To repair this wound in the law would have required the precision of a scalpel. The Supreme Court of the United States instead addressed the wound with the blunt end of a sledgehammer. The Court invented a new right to publish defamatory material unless the claimant can show actual malice,[128] a nearly impossible burden.

The cultural context in which the Court decided *Sullivan*—the lawlessness of Southern institutions in the 1960s—might obscure from view the Court's contestable, unstated assumption that it must step in and invent a new constitutional right to correct every unjust ruling by a state supreme court which rests upon an unreviewable distortion of state law. That assumption is of course ridiculous. The Court frequently declines to review egregious state court decisions, and when it does grant review, it stops well short of inventing new constitutional rights to remedy their errors.

If the assumption were true then a case at least as worthy of the Court's intervention can be found in *Elane Photography v. Willock*,[129] a decision of the New Mexico Supreme Court which the Supreme Court of the United States decided not to hear.[130] Elane Photography, a small business owned and operated by a Christian couple, the Huguenins, was judged guilty of a human rights offense after declining to photograph a same-sex wedding.[131] The offense was discrimination on the basis of sexual orientation in a public accommodation, which is prohibited by statute.[132] However, the judgment against the Huguenins was contrary to the facts because they did not discriminate on the basis of sexual orientation. Rather, they distinguished between relationships that naturally partake of the nature of marriage and those that do not,[133] a distinction grounded in their religious convictions and public reason,[134] and one that was affirmed by New Mexico state law,

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[125] Restatement (First) of Torts § 569 (1938).

[126] *Sullivan*, 376 U.S. at 256-–63.

[127] *Id.* at 262.

[128] *Id.* at 279-–80.

[129] 309 P.3d 53 (2013).

[130] Elane Photography, LLC v. Willock, 134 S. Ct. 1737 (2014).

[131] Elane Photography, 309 P.3d at 59-–60.

[132] *Id.* at 59.

[133] *Id.* at 59-60, 60-63.

[134] For philosophical articulations and defenses of this distinction, *see* Sherif Girgis, Ryan T. Anderson, & Robert P. George, What is Marriage?: Man and Woman: A Defense (2012); Patrick Lee & Robert P. George, Conjugal Union: What Marriage is and Why

which at the time defined marriage as the union of a man and a woman, and by long-standing precedent of the Supreme Court of the United States.[135]

That distinction is found throughout the rights and duties of private law to this day. Even States that redefined marriage years ago to extend legal recognition to same-sex couples, such as Massachusetts and New York, have retained the distinction between natural marriage and same-sex marriages for many purposes. Massachusetts, for example, retains the presumption of paternity,[136] which makes no sense if two men are "married" in the same way as a man and woman.[137] Recently the high court of New York interpreted New York's incest prohibition in light of its rational basis that incest carries a risk of genetic defects in potential biological offspring.[138] (The other rational basis for the law is the community's moral "abhorrence,"[139] and it is difficult to see how that justification can survive the Supreme Court's ruling in *Lawrence v. Texas*.) [140] That rule, too, makes no sense if two men or two women have exactly the same rights and duties of "marriage" as a man and a woman. Surely a business policy that maintains fidelity to the distinction is a good reason for the purposes of public accommodation laws, even one with such totalizing ambitions as New Mexico's.

The right infringements in *Elane Photography* are manifest. Writing separately in concurrence, one of the justices acknowledged that the Huguenins "now are compelled by law to compromise the very religious beliefs that inspire their lives," but insisted that this is the "price" one must now pay to participate in "civic life" in New Mexico.[141] The loss of the freedom to constitute oneself, one's relations, and one's privately-owned business in ways that do not directly violate one's own conscience and the "very religious beliefs that inspire" one's own life—the freedom to constitute one's most meaningful identity—is quite a heavy price to pay to ensure that other may constitute their own (sexual) identity on whatever privately-owned public accommodation they choose.

IT MATTERS (2014). Of course, there are skeptics of this view. Andrew Koppelman, *Judging the Case Against Same-Sex Marriage*, 2014 U. ILL. L. REV. 431. And there are replies to these skeptics. Sherif Girgis, *Windsor: Lochnerizing on Marriage?*, 64 CASE W. RES. L. REV. 971 (2014).

135 Baker v. Nelson, 409 U.S. 810 (1972)

136 Massachusetts General Laws c. 209C, § 6.

137 *See generally*, Goodridge v. Dept. Public Health, 798 N.E.2d 941, 995-97 (Mass. 2003) (Cordy, J., dissenting).

138 Nguyen v. Holder, 21 N.E.3d 1017, 1021-–22 (N.Y. 2014).

139 *Id.* at 1021.

140 539 U.S. 558 (2003).

141 Elane Photography, 309 P.3d at 79-–80 (Bosson, J., concurring).

C. Totalization and the Loss of Private Ordering

Tactical totalization projects have far-reaching consequences for civic order. The New Mexico Supreme Court's decision in *Elane Photography* managed to disable two domains of private ordering with one shot—the domain of conscience and the domain of free association within public accommodations. The absence from *Elane Photography* of a third important private law institution—the civil jury—was not even noticed. Perhaps the most troubling aspect of the case is the consolidated rule-making, fact-finding, prosecutorial, and adjudicatory authority of the New Mexico Human Rights Commission, which acted in the case as lawmaker, advocate, jury, and judge. The delegation of such authority to unelected commissions has become too common in states and nations which used to entrust important factual questions and moral judgments to juries.

These commissions, which are generally comprised of lawyers and other experts, ignore many of the traditional requirements of due process, such as trial by jury, even as they exercise authority to destroy the lives and fortunes of private citizens. Most importantly, they tend to resolve issues with uniform rules that are impervious to the nuanced demands of practical reasonableness. It takes a rather unprecedented fully exclusionary reason to scrub from deliberations the distinction between marriage and non-marriage and the freedom of conscience to discern between them.Surely it is at least sometimes rational to act on that distinction. But the commissions have not allowed it.

Historically, juries have tended to be better grounded in nuance, local context, and common sense. The disappearing role of the jury in ordering our private and civic affairs is a loss for liberty. When empanelled in a civil action, a jury is an important institution of private ordering and private law. The jury's deliberation and judgment are acts of private citizens resolving specific disputes between other private citizens. The jury's verdict is binding upon the parties, not the public at large, and is generally limited to questions of fact, which are not universal but rather peculiar to the case. And juries can inject proportion and common-sense judgment into legal institutions which are badly in need of both.

Snyder v. Phelps, *New York Times v. Sullivan*, and *Elane Photography v. Willock* can be viewed as victories for liberty only if one believes that citizens should be liberated from the judgments of fellow citizens about what actions are right and wrong. On whole categories of issues jurors, religious observers, and business owners may no longer consider facts or nuance, they may no longer be trusted with the ancient maxims and doctrines of the common law or with conscience, they may not exercise common sense, and under no circumstances may they be allowed to express moral judgment. In short, they may not exercise practical reason to resolve important questions of civic ordering.

VII. The Possibility of Pluralism

A silver lining in this cloud is that, unlike strategic totalitarians, tactical totalization leaves the forms of private law concepts and institutions in place, even as it subverts those concepts and institutions for its own ends. The persistence of the forms can lead curious lawyers to wonder where they came from, and what reasons grounded their intelligibility before law was instrumentalized. If we examine them carefully, we might learn something about liberty, pluralism, and the common good.

It is interesting to note that Tocqueville, who predicted the rise of soft despotism, thought it neither possible nor desirable to re-institute aristocracy as a cure for the despotic tendencies of liberal democracies. Instead, he recommended inter alia that powers removed from corporations and nobility be placed in the hands of "secondary bodies temporarily formed of ordinary citizens."[142] He held up the jury, particularly when adjudicating civil cases, as an Anglo-American institution that empowers citizens and is an enemy to those sovereigns who wish to control society. "Juries, especially civil juries, help to instill into the minds of all the citizens something of the mental habits of judges, which are exactly those that best prepare the people to be free."[143]

Tocqueville also observed that customs, private ownership, and other common-law sources of legal norms contributed to the healthy self-governance of the American people. He generally subscribed to the view that "associations of ordinary citizens may produce very wealthy, influential, strong people who resemble, in a phrase, aristocratic bodies," and could increase freedom without diminishing equality.[144]

Perhaps even more salutary is that, unlike strategic totalitarianism, tactical totalization is generally deployed on behalf of persons, rather than a collective or abstraction. It is sometimes deployed for bad reasons, as to prevent inter-mixing of races, and sometimes for good, as to secure freedom of political expression, but the justification, however flimsy or admirable, ultimately rests in the rights or ostensible well-being of a person or group of persons. As long as this priority of persons[145] is preserved, the excesses of tactical totalization can be corrected by reference to the persons harmed by those excesses.

Universalizability of norms entails that our concern for the rights or well-being of one ought to correspond with and be tempered by our concern for the rights and well-being of others. If the justification for a project of totalization is that it will benefit person or group A then we ought to ask whether one can justify the costs it imposes upon person or group B.

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[142] Tocqueville, *supra* note 1, at 810-–11.

[143] *Id.* at 320.

[144] *Id.* at 811.

[145] On which, *see* Finnis, *supra* note 28, at Ch.1; Finnis, *supra* note 13.

For example, if Vanderbilt University's law school should have the power and liberty to constitute itself by excluding those who do not share its conception of non-discrimination then we might wonder why Trinity Western University's law school should not enjoy the power and liberty to constitute itself by excluding those who would undermine its conception of Christian virtue.

As long as totalization is justified with reference to persons and groups of persons, the justifications offered for projects of tactical totalization contain their own limiting principles. Reinvigorating those principles can promote the common good. Universalizability of norms recommends not a totalizing equality but rather a robust and variegated pluralism. History suggests that where private law flourishes, pluralism flourishes. And there human beings flourish.

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Who Can Be President of the United States?: Candidate Hillary Clinton and the Problem of Statutory Qualifications

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ABSTRACT

Qualifications for public office restrict democratic choice, but such restrictions have a long pedigree in many jurisdictions. For example, the U.S. Constitution sets out qualifications for elected federal officials: i.e., Representative, Senator, President, and Vice President. Qualifications for those positions include provisions relating to age, citizenship, and residence. It has been long debated whether these textual qualifications are exclusive (i.e., floors and ceilings) or whether they are merely floors, which can be supplemented by additional qualifications imposed by Congress or by the States.

Once again, this issue has become topical. Former Secretary of State Hillary Clinton is a prominent candidate in now-ongoing Democratic Party primary elections. These primaries select delegates to a national convention which will choose the Democratic Party's candidate for the 2016 popular presidential election. It has been alleged that, during her term as Secretary of State, Clinton violated a provision of the federal statute mandating government record keeping. 18 U.S.C. § 2071 provides: "Whoever, having the custody of any … record … willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same … shall forfeit his office and be disqualified from holding any office under the United States."

This Article addresses two interesting interpretive challenges posed by Section 2071. First, does Section 2071's "office under the United States" language reach the presidency? Second, if Section 2071's "office under the United States" language encompasses the presidency, is the statute constitutional? In other words, does Congress have the power to create additional qualifications for the presidency?

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I. Introduction: The Key Legal Issues

Constitutions, statutes, and regulations create public offices, and frequently such legal instruments also create qualifications for those offices. When positive law creates qualifications for elected positions, these restrictions limit the scope of democratic choice.[1] Nevertheless, such restrictions on democratic choice have a long pedigree[2] in a variety of jurisdictions.[3] Adjudications relating to qualifications to public office are not uncommon.[4] Likewise, in the United States, the Constitution sets out qualifications for elected federal officials: i.e., Representatives, Senators, President and Vice President. Such qualifications include, among others, provisions relating to age, citizenship, and residence.[5] Courts and commentators have long debated whether the

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1 *See* Josh Chafetz, Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions 170 (2007). Throughout this Article, I treat all constitutional restrictions on a candidate's being elected or holding office as "qualifications." It may be that some of these constitutional provisions are better characterized as "eligibility requirements," as opposed to a true "qualification." A candidate who lacks a qualification for an office is capable of being elected, and the candidate may assume office if she becomes qualified after the election but prior to the start of the term for which she was elected (or, even, if she becomes qualified within a reasonable time after the start of the term). On the other hand, where a candidate lacks an eligibility requirement, the candidate is incapable of being elected, and all votes cast for such a candidate are void. In such a situation, even if the candidate subsequently meets the eligibility requirement prior to the start of the term for which she was "elected," the candidate cannot assume office. *See, e.g.*, State v. Howell, 126 P. 954, 955–56 (Wash. 1912) (Gose, J.) (holding that constitutional restrictions relating to "eligibility" relate to the capability of the candidate to be chosen at the time of election); Luther Stearns Cushing, Elements of the Law and Practice of Legislative Assemblies in the United States of America § 175, at 66 (Boston, Little, Brown and Co. 2d ed. 1866) ("If an election is made of a person, who is ineligible, that is incapable of being elected, the election of such person is absolutely void . . . .").

2 *See* 2 John Hatsell, Precedents of Proceedings in the House of Commons 1–80 (London, Luke Hansard and Sons new ed. 1818) (discussing seventeenth-century and eighteen-century House of Commons qualifications).

3 *E.g.*, Australian Constitution ss 43–45 (qualifications for members of Parliament); India Const. art. 58 (qualifications for President), arts. 84, 102 (qualifications for members of Parliament).

4 *See, e.g.*, Sykes v Cleary (1992) 176 CLR 77 (Austl.) (adjudicating parliamentary candidates' qualifications); *In re* Parliamentary Election for Bristol S.E., [1961] 3 All E.R. 354 (Q.B.) (Gorman & McNair, JJ.) (Eng.) (declaring, after his prevailing in an election, that Anthony Wedgwood Benn, M.P., was disqualified from holding a U.K. House of Commons seat, as a result of his having succeeded to a House of Lords seat which had been held by his late father).

5 *See, e.g.*, U.S. Const. art. II, § 1, cl. 5 ("No Person except a natural born Citizen . . . shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States."); *see also, e.g.*, *id*. at art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); *id*. at art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."); *cf., e.g.*, *id*. at amend. XII ("[N]o person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States."); *id*. at amend. XXII ("No person shall be elected to the office of the President more than twice . . . ."). *Compare, e.g.*, Richard Albert, *The Evolving Vice Presidency*, 78 Temp. L. Rev. 811, 857 (2005) ("[I]t appears that a two-term President may not, as a matter of constitutional law, accept the vice presidential nomination."), *with* Bruce G. Peabody & Scott E. Gant, *The Twice and Future President*, 83 Minn. L. Rev. 565, 620 (1999) ("[I]t therefore cannot be said that the Twelfth Amendment prohibits a

qualifications in the Constitution's text are exclusive (i.e., floors and ceilings) or whether they are merely floors, which can be supplemented by additional qualifications imposed by Congress and/or by the States.

Once again, this issue has become topical. Hillary Clinton, a former Secretary of State and former Senator, is a prominent candidate in the upcoming Democratic Party primary elections. These primaries select delegates to a national convention which will choose the Democratic Party's candidate for the November 2016 popular presidential election. It has been alleged that, during her term of service as Secretary of State, Clinton violated a provision of the federal statute mandating government record keeping.[6] Section 2071 of Title 18 of the United States Code provides:

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twice-elected President from serving as Vice President."). *See generally* Brian C. Kalt, Constitutional Cliffhangers: A Legal Guide for Presidents and Their Enemies 133–57 (2012) (discussing the circumstances, if any, in which a President can hold a third term, and competing views regarding vice presidential qualifications).

It has been suggested from time to time that other constitutional provisions are qualifications or functional qualifications in regard to (some or all) elected federal positions. *See, e.g.*, U.S. Const. art. I, § 3, cl. 7 (Disqualification Clause); *id*. at art. I, § 6, cl. 2 (Incompatibility Clause); *id*. at art. II, § 1, cl. 8 (Presidential Oaths and Affirmations Clause); *id*. at art. IV, § 4 (Guarantee [of a Republican Form of Government] Clause); *id*. at art. VI, cl. 3 (Oaths and Affirmations Clause); *id*. at amend. XIV, § 3 (Insurrection and Rebellion Clause); *see also* The Federalist No. 52, at 286 (James Madison—but authorship is disputed) (J.R. Pole ed., 2005) (affirming that the Incompatibility Clause is a qualification for House, and by implication also Senate, service). *Compare, e.g.*, Jack Maskell, Cong. Research Serv., R41946, Qualifications of Members of Congress CRS-21 & n.112 (2015) (suggesting that Senate-imposed disqualification may bar future membership in Congress), Daniel Hays Lowenstein, *Are Congressional Term Limits Constitutional?*, 18 Harv. J.L. & Pub. Pol'y 1, 8 (1994) ("[The constitutional] provision permitting disqualification from holding federal office, presumably includ[es] congressional office, as a permissible punishment in impeachment cases . . . ."), *and* Buckner F. Melton, Jr., *Let Me Be Blunt: In* Blount*, the Senate Never Said that Senators Aren't Impeachable*, 33 Quinnipiac L. Rev. 33, 35–36 (2014) (suggesting that Senate-imposed disqualification may bar future membership in the Senate), *with* Benjamin Cassady, *"You've Got Your Crook, I've Got Mine": Why the Disqualification Clause Doesn't (Always) Disqualify*, 32 Quinnipiac L. Rev. 209, 287–94 (2014) (Senate-imposed disqualification is a bar against holding the presidency, but not in regard to holding a congressional seat), *and* Josh Chafetz, *Impeachment and Assassination*, 95 Minn. L. Rev. 347, 351 & n.23, 420–21 (2010) (same), *with* Seth Barrett Tillman, *Originalism & The Scope of the Constitution's Disqualification Clause*, 33 Quinnipiac L. Rev. 59 *passim* (2014) (Senate-imposed disqualification extends only to statutory or *appointed* offices, but not to *any* constitutionally-mandated or *elected* positions). Professors Chafetz and Muller have suggested that the Ineligibility Clause is a qualification or a disqualification in regard to holding a congressional seat. *Compare* Chafetz, *supra* note 1, at 168 (quoting the Ineligibility Clause, i.e., Article I, Section 6, Clause 2, in a discussion on *dis*qualifications), *with* Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 Ind. L.J. 559, 564, 567 (2015) (discussing the Ineligibility Clause as a qualification). The clauses of the Constitution controlling elections have also been described as qualifications. *See, e.g.*, Roudebush v. Hartke, 405 U.S. 15, 26 n.23 (1972) (Stewart, J.) ("One of those *qualifications* is that a Senator be *elected* by the people of his State." (emphasis added)). These other constitutional provisions, whether properly characterized as "qualifications" or not, do not directly concern our analysis of Section 2071 or other purported statutory disqualifications. Finally, must the President be a living human being? *See* Muller, *supra* at 563, 567–72 (expounding on qualifications for the presidency and vice presidency, including whether and, by implication, when a purported President must be alive for the purposes of Article II, Section 1, Clause 5); Michael Stokes Paulsen, *Is Bill Clinton Unconstitutional? The Case for President Strom Thurmond*, 13 Const. Comment. 217, 222 (1996) ("Surely the Chief Justice should refuse to swear in President Gus the Dog, even if the lawfully constituted electoral college chose him.").

[6] *E.g.*, Legal Analysis of Former Secretary of State Hillary Clinton's Use of a Private Server to Store Email Records, Cause of Action: Advocates for Government Accountability 1 (Aug. 24, 2015), http://causeofaction.org/assets/uploads/2015/08/Hillary-Clinton-Email-Memo-8.24.15.pdf.

> Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined under this title or imprisoned not more than three years, or both; and shall forfeit his office and be *disqualified from holding any office under the United States*.[7]

Section 2071's language poses two interesting interpretive challenges.

First, what is the scope of the statute? In other words, does Section 2071's generally worded "office under the United States" language extend to the presidency?

Second, if Section 2071's general "office under the United States" language fairly encompasses the presidency, is the statute constitutional? In other words, does Congress have the power to create additional qualifications for the presidency beyond those already expressly stated in the Constitution's text?

II. What is the Scope of the Statute?

In determining the scope of Section 2071's generally worded "office under the United States" language, we cannot rely on clearly established Supreme Court or other federal judicial authority[8] because "the application of [Section 2071] to the Presidency has never been tested."[9] Likewise, the courts have not squarely opined on whether the same or closely similar language in other statutes reaches the presidency.[10] In the absence of good judicial

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7 18 U.S.C. § 2071(b) (1994) (emphasis added).

8 "Office under the State" is a close textual analogue of "office under the United States." However, state case law using "office under the State" is divided. *Compare* State *ex rel.* Ragsdale v. Walker, 33 S.W. 813, 814 (Mo. 1896) (Macfarlane, J.) (explaining that an "office under the state" extends to statutory offices), *with* Willis v. Potts, 377 S.W. 2d 622, 628 (Tex. 1964) (Hamilton, J., dissenting) (explaining that an "office under the state" extends to offices created by state statutes or by the state constitution). *See generally* 63C Am. Jur. 2d *Public Officers and Employees: Persons Subject to Impeachment* § 215 (2015) ("In some jurisdictions, a constitutional provision regarding impeachment of state officers relates only to officers provided for in the *constitution* or *elected* by the people at large, while in other jurisdictions, a person must be an *officer under the state* constitution in order to be impeachable." (footnote omitted)). Foreign courts have occasionally struggled with similar questions, i.e., the scope of general "office" language in a statute or constitutional provision. *See, e.g.*, Williams v Commonwealth (2012) 248 CLR 156, ¶ 110 (Gummow & Bell, JJ.) (Austl.); Sykes v Cleary (1992) 176 CLR 77, 95 (Mason, C.J., Toohey & McHugh, JJ.) (Austl.); Lewis v. Cattle, [1938] 2 All E.R. 368 (K.B.) 371 (Lord Hewart, L.C.J.) (appeal by way of a case stated by justices for the county borough of Stockport) (Eng.) ("There are many offices which are held under His Majesty the holders whereof are not in any proper sense of the words in the service of His Majesty. So also there are many persons in the service of His Majesty who do not in any proper sense of the word hold office under His Majesty."); *cf., e.g.*, Report from the Select Committee on Offices or Places of Profit under the Crown with minutes of evidence, appendices and index viii (London, His Majesty's Stationery Office 1941) (investigating "the precise question" of the scope of "office under the Crown").

9 Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 Md. L. Rev. 1, 9 n.71 (1968). Gordon's claim remains just as true today.

10 In *United States v. Mouat*, 124 U.S. 303 (1888) (Miller, J.), a government employee sought expenses provided by statute. The validity of the employee's claim depended on whether he was an

authority, and for the purpose of expositional clarity, I focus on three approaches for resolving the interpretive issue: the legal populist approach, the historical approach, and the legal presumptions approach.

"officer[] of the Navy." *Id*. at 306. Because the Supreme Court determined that the claimant was not an "officer of the United States," ostensibly a wider category than "officer of the Navy," the Court ruled against the claimant. *Id*. at 307–08. In reaching its decision, the Court held that:

> Unless a person in the service of the government, therefore, holds his place by virtue of an *appointment* by the president, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not strictly speaking, *an officer of the United States*.

Id. at 307 (emphasis added). The *Mouat* Court clearly identified *officer of the United States* with *appointed* positions, not *elected* ones. This would seem to mean that the President is not an "officer of the United States." Moreover, *Mouat* is not an outlier. *See also, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497–98 (2010) (Roberts, C.J.) ("The people do not vote for the 'Officers of the United States.' Art. II, § 2, cl. 2. They instead look to the President to guide the 'assistants or deputies . . . subject to his superintendence.'" (quoting The Federalist No. 72, *supra* note 5, at 386 (Alexander Hamilton))); Motions Sys. Corp. v. Bush, 437 F.3d 1356, 1372 (Fed. Cir. 2006) (Gajarsa, J., concurring in part and concurring in the *en banc* judgment) ("It is plain that the President is not an 'officer of the United States' for Appointments Clause, Commission Clause, or Oath of Office Clause purposes."); Ruth C. Silva, *The Presidential Succession Act of 1947*, 47 Mich. L. Rev. 451, 475 (1949) ("'Officers of the United States' are appointed by the President and the Senate, by the President alone, by the department heads, or by the courts. Officers in the constitutional sense are not elected by the electoral colleges."). Of course, even if the President is not an "officer *of* the United States," he might be an "officer *under* the United States," unless the latter is a subset of the former or unless the two categories are coextensive. Professors Akhil and Vikram Amar have taken the position that the two categories are coextensive. *See* Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 Stan. L. Rev. 113, 114–15 (1995) ("At various points the [Constitution] refers to 'Officers *of* the United States,' to 'civil Officers of the United States,' to 'civil Office under the Authority of the United States,' to 'Office *under* the United States,' and to 'Office of Trust or Profit under the United States.' As a textual matter, each of these five formulations seemingly describes the same stations (apart from the civil/military distinction)—the modifying terms 'of,' 'under,' and 'under the Authority of' are essentially synonymous." (emphasis added) (footnotes omitted)). If the Amars' intuition on this textual issue is correct, if "office *under* the United States" and "officers *of* the United States" are "synonymous," then, per *Mouat* and its progeny, the presidency is neither an officer *of* nor *under* the United States. *But see* Akhil Reed Amar, The Law of the Land: A Grand Tour of our Constitutional Republic 332 n.8 (2015) (discussing the Incompatibility Clause, and noting that "[t]he presidency is an 'office *under* the United States.'" (emphasis added)); *but see also* Akhil Reed Amar, America's Constitution: A Biography 171 (2005) ("The instant such a [legislative leader] became acting president, he would thereby 'hold[]' an 'Office *under* the United States' . . . ." (emphasis added)); *but cf.* Amar & Amar, *supra* at 136 n.143 (arguing that an acting President is an "officer of the United States").

In *Burton v. United States*, 202 U.S. 344 (1906) (Harlan, J.), the Supreme Court adjudicated the scope of a statutory provision in which as a consequence of conviction, a party is precluded from "holding any office of honor, trust, or profit under the government of the United States." *Id.* at 360. The Court reasoned that such a conviction did not bar a person from a Senate seat.

> The seat into which [the defendant-senator] was originally inducted as a Senator from Kansas could only become vacant by his death, or by expiration of his term of office, or by some direct action on the part of the Senate in the exercise of its constitutional powers. This must be so for the further reason that the declaration in [the statutory provision], that anyone convicted under its provisions shall be incapable of holding any office of honor, trust, or profit 'under the government of the United States,' refers only to offices created by, or existing under the direct authority of, the national government, as organized under the Constitution, and not to offices the appointments to which are made by the states, acting separately, albeit proceeding, in respect of such appointments, under the sanction of that instrument. While the Senate, as a branch of the legislative department, owes its existence to the Constitution, and participates in passing laws that concern the entire country, its members are chosen by state legislatures, and cannot properly be said to hold their places 'under the government of the United States.'

Id. at 369–70. How the *Burton* Court's ratio decidendi would apply (if at all) to the presidency is less than pellucidly clear.

A. The Legal Populist

The legal populist approach is the interpretive position of the person on the street. The populist's position is largely an intuition or feeling. As Baron Devlin explained:

> He is not expected to reason about anything and his judgement may be largely a matter of feeling. It is the viewpoint of the man on the street—or to use an archaism familiar to all lawyers—the man in the Clapham omnibus. He might also be called the right-minded man.[11]

I expect our rider on the Clapham omnibus (or to make the analogy more on-point, the American rider on the bus going past the Supreme Court of the United States)—if asked to squarely address Section 2071's meaning—would say:

> In everyday language, the presidency is described as an 'office,' and the president is an 'officer.' Similarly, the presidency is not a state or municipal position; rather, it is a national or federal position whose occupant is responsible to the United States, and its people, as a whole. Therefore the presidency can be characterized as "under the United States." Because the presidency is an "office" and because the President works for "the United States," it would seem to follow that the presidency is an "office under the United States" as that language is used in Section 2071.[12]

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[11] Patrick Devlin, The Enforcement of Morals 15 (1965).

[12] Indeed, our bus rider's intuition would not lack some good authority: the Constitution of the United States describes the presidency as an "office," although nowhere expressly describing the presidency as an "office under the United States." *See* U.S. Const. art. I, § 3, cl. 5 (using the phrase "Office of President of the United States"); *id.* at art. II, § 1, cl. 5 (same); *id.* at art. II, § 1, cl. 8 (same); *see also* Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize, 33 Op. O.L.C., 2009 WL 6365082, at *4 (2009) (Barron, Acting Assistant Att'y Gen.) (announcing that "[t]he President surely 'hold[s] an[] Office of Profit or Trust'" (quoting U.S. Const. art. I, § 9, cl. 8) (latter two alterations in original)); Steven G. Calabresi, Rebuttal, *Does the Incompatibility Clause Apply to the President?*, 157 U. Pa. L. Rev. PENNumbra 134, 141–45 (2008) (arguing that the Incompatibility Clause, which uses "office under the United States" language, reaches the presidency); Steven G. Calabresi, Closing Statement, *A Term of Art or the Artful Reading of Terms?*, 157 U. Pa. L. Rev. PENNumbra 154, 159 (2008) ("The text [of the Incompatibility Clause] forbids members of Congress from holding 'any Office under the United States.' The presidency is plainly such an office."); John F. Manning, Response, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 Stan. L. Rev. 141, 146 (1995) (asserting that "[t]he Presidency is surely an 'Office under the United States'"); Saikrishna Bangalore Prakash, Response, *Why the Incompatibility Clause Applies to the Office of President*, 4 Duke J. Const. L. & Pub. Pol'y 143, 143 (2009) (asserting that "[t]he President occupies an 'Office under the United States'" and denominating that position the "conventional wisdom"); Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341, 366 (2009) ("Foreign corruption of the Executive was a concern as well, as we saw in the Foreign Gifts Clause [which uses 'office . . . under the United States' language]."); *infra* note 14 (collecting multiple statements by former Attorney General Mukasey asserting the legal populist position); *cf.* Saikrishna Bangalore Prakash, Imperial from the Beginning: The Constitution of the Original Executive 48 (2015) (asserting that "a president may not simultaneously sit in Congress"); *Ah, The Old "Everybody Does It" Defense*, Investor's Business Daily, Mar. 19, 2015, at A12 ("Not only is there a possible felony in her violations of the Federal Records Act, but the U.S. Criminal Code (18 U.S. Code Section 2071 B) also says the perpetrator 'shall forfeit his office and be disqualified from holding any office under the United States.' Hillary

For example, Megyn Kelly, a national newscaster stated:

> And I refer the audience to 18 U.S. [C]ode, [S]ection 2071-B, look at it. 'Whoever having the custody of any federal record, willfully and unlawfully conceals removes or destroys the same shall be fined or imprisoned or both' and listen—'and shall be disqualified from holding any office under the United States.' If [Hillary Clinton] willfully concealed these emails, not only did she commit a crime, she cannot be president.[13]

Likewise Sean Hannity, another national newscaster, had an exchange on the scope of Section 2071 with Michael Mukasey. Mukasey is a former Attorney General of the United States and also a former Chief Judge of the United States District Court for the Southern District of New York. Hannity and Mukasey stated:

> Hannity: Let's go to the third law that we're talking about here. And this would be 18 U.S. [C]ode [§] 2071. . . . I would think that [violating

Clinton could not run for president."); Josh Chafetz, *20th Amendment Trivia*, Conlawprof (Nov. 10, 2008, 12:17 PM), http://lists.ucla.edu/cgi-bin/mailman/private/conlawprof/2008-November/033299.html ("I happen to think that the President is an officer under the United States, but some think otherwise."). *But see infra* note 74 (discussing Attorney General Mukasey's subsequent retraction in *The Washington Post–Volokh Conspiracy*).

I have had occasions in the past to express my views in regard to the scope of the Constitution's "office under the United States" language and its variants. *See* Seth Barrett Tillman, *Why Professor Lessig's "Dependence Corruption" Is Not a Founding-Era Concept*, 13 Election L.J. 336 (2014) (peer reviewed) (arguing that "office under the United States" language, and its close variants, used in the (original) Constitution of 1787–1788, and in contemporaneous instruments, does not reach the presidency); Seth Barrett Tillman, *Interpreting Precise Constitutional Text: The Argument for a "New" Interpretation of the Incompatibility Clause, the Removal & Disqualification Clause, and the Religious Test Clause—A Response to Professor Josh Chafetz's* Impeachment & Assassination, 61 Clev. St. L. Rev. 285 (2013) (same); Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause*, 4 Duke J. Const. L. & Pub. Pol'y 107 (2009) (same); Seth Barrett Tillman, Opening Statement, *Why President-Elect Obama May Keep His Senate Seat After Assuming the Presidency*, 157 U. Pa. L. Rev. PENNumbra 134, 135–40 (2008) (same, and Tillman's opening statement); *id*. at 146–53 (same, and Tillman's closing statement); Seth Barrett Tillman, *Member of the House of Representatives and Vice President of the US: Can Paul Ryan Hold Both Positions at the Same Time?*, Jurist–Forum, Aug. 23, 2012, http://jurist.org/forum/2012/08/seth-barrett-tillman-vice-presidency.php (same); *see also* Tillman, *supra* note 5 (discussing the scope of the Constitution's *office*-language in the Disqualification Clause); *cf., e.g.*, Seth Barrett Tillman, Letter to the Editor, *Oath of Officers*, Claremont Review of Books, Summer 2015, at 11 (opining on the temporal scope of the Article VI oath). *Compare, e.g.*, Seth Barrett Tillman, Opening Statement, Citizens United *and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 Nw. U. L. Rev. 399 (2012) (arguing that "office under the United States" language, and its close variants, used in the (original) Constitution of 1787–1788, and in contemporaneous instruments, does not reach the presidency and other elected positions), *and* Seth Barrett Tillman, Closing Statement, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 Nw. U. L. Rev. Colloquy 180 (2013) (same), *with* Zephyr Teachout, Rebuttal, *Gifts, Offices, and Corruption*, 107 Nw. U. L. Rev. Colloquy 30 (2012) (suggesting that the Constitution's office language reaches elected positions), *and* Zephyr Teachout, Closing Statement, *Constitutional Purpose and the Anti-Corruption Principle*, 108 Nw. U. L. Rev. Online 200 (2014) (same).

13 Megyn Kelly & Shannen Coffin, *Did Hillary Clinton knowingly violate the law?*, Fox News Network (Mar. 18, 2015, 9 PM EST), http://www.foxnews.com/transcript/2015/03/18/did-hillary-clinton-knowingly-violate-law/.

> Section 2071] would mean you can't be the [P]resident of the United States . . . .
>
> Mukasey: I would think it would mean precisely that, among other things.[14]

Finally, Professor Akhil Amar has stated, without any equivocation or even any acknowledgment of contrary views, that "[t]he presidency is an 'office under the United States.'"[15] Albeit, Amar was explaining how that phrase is used in the Constitution, not Section 2071.

In each example above, the two national newscasters, the (former) Attorney General, and the academic from Yale Law School—no analysis, no reasoning, and no authority is put forward. This is not surprising because here the basis of the position is a simple text-based intuition.[16] To sum up, if the legal populists' intuitionist approach is correct, if the meaning of "office under the United States" extends to the presidency, then a conviction under Section 2071 imposes a statutory bar against holding the presidency.

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[14] *Trump on Iran: 'They will know I am not playing games,'* Hannity: Fox News (Aug. 12, 2015, 10 PM ET), http://www.foxnews.com/transcript/2015/08/12/trump-on-iran-will-know-am-not-playing-games. Attorney General Mukasey has made similar statements in other fora. *See, e.g.*, John Heilemann & Josh Green, *Fmr. Attorney General Michael Mukasey Intvd on Blmbg TV*, Bloomberg TV (Aug. 24, 2015, 12:00 AM EST) (Mukasey: "[Section 2071] also carries a permanent disqualification from holding any further office, *which is kind of odd*. And that—I mean, since she is obviously running for another office, that would present a certain problem." (emphasis added)); Transcript, *Morning Joe*, MSNBC (Aug. 24, 2015, 6:45:25 AM) ("Mukasey: [I] think the more dangerous part of this from [Hillary Clinton's] standpoint is not so much the placement of the material there [on her server] as wiping the server . . . . [N]umber one, that's a felony, but that statute makes you unqualified—disqualifies you from holding any further office in the United States and she's running for a further office under the [U]nited [S]tates.") (at 6:47:57 AM), http://goo.gl/na0GM4; *see also, e.g.*, *Benghazi, Emails And Family*, Investor's Business Daily, Aug. 25, 2015, at A13 ("The case against Clinton picked up Monday when former Attorney General Mike Mukasey said on MSNBC that Clinton has disqualified herself from holding office because she destroyed federal records when she had the server wiped clean."); *Emails one Hill of a problem for presidency push*, The Daily Telegraph (Austl.), Aug. 26, 2015, at 17 ("Hillary Clinton could find herself disqualified from becoming president if her worst-case legal scenario should come to pass, a former US attorney-general says."); *Hillary on the brink*, Herald Sun (Austl.), Aug. 26, 2015, at 17 (Mukasey: "[T]hat statute disqualifies you from holding any further office in the United States. And she's running for a further office . . . .") (available on Nexis); *cf.* David Martosko, *Former attorney general says classified email scandal 'disqualifies' Hillary Clinton from serving as president—IF she's prosecuted for breaking federal law*, Mail Online (U.K.) (Aug. 24, 2015, 9:14 PM GMT), http://tinyurl.com/qha6enh (quoting Mukasey's statement on *Morning Joe*, MSNBC*, supra*); Jazz Shaw, *Former Attorney General: Clinton may have "disqualified herself for elected office,"* Hot Air (Aug. 24, 2015, 9:21 AM), http://hotair.com/archives/2015/08/24/former-attorney-general-clinton-may-have-disqualified-herself-for-elected-office ("Mukasey went a step further and said that Clinton may have disqualified herself from elected office if the allegations prove to be true."); *supra* note 12 (quoting *Investor's Business Daily* article, a newspaper article, asserting the legal populist position). *But see infra* note 74 (discussing Attorney General Mukasey's subsequent retraction in *The Washington Post–Volokh Conspiracy*).

[15] Amar, The Law of the Land, *supra* note 10, at 332 n.8; *see also* Amar & Amar, *supra* note 10, at 114–15.

[16] The reader should in no way imagine that my exposition here is sarcastic. Interpretations of legal text that veer far from the intuitions of the person in the street—or, from the intuitions of the legal expert who is immersed in the law—risk losing popular legitimacy. *See supra* notes 10 & 15, and accompanying text (quoting Professors Akhil Amar and Vikram Amar); *supra* note 12 (collecting other modern academic authority).

B. The Historical Approach

Some early American materials cast light on the meaning of "office under the United States." Indeed, we can turn to two separate incidents from President George Washington's first administration to understand the meaning of this somewhat opaque phrase.

1. *President George Washington's Gift from the French Ambassador*

The Constitution's Foreign Emoluments Clause provides:

> [N]o Person holding any *Office . . . under the*[] [*United States*], shall, without the Consent of the Congress, *accept* of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.[17]

Does this provision's *office under the United States* language apply to the President?

On December 22, 1791, the French ambassador to the United States, Jean-Baptiste, chevalier de Ternant, sent President George Washington a letter stating: "Permit me to present you with a new print of the king of the [F]rench—I shall feel a very great Satisfaction if you will consider that feeble mark of my lively and respectful attachment for your person, as worthy your kind *acceptance*."[18]

President Washington replied the same day. He wrote:

> Philadelphia, Decr 22nd 1791.
>
> Dear Sir,
>
> I *accept*, with great pleasure, the new and elegant print of the King of the French, which you have been so obliging as to send to me this morning as a mark of your attachment to my person. You will believe me, Sir, when I assure you, that I have a grateful and lively sense of the personal respect and friendship expressed in your favor which accompanied the Print, and that I am, with sentiments of sincere esteem and regard, Dear Sir, your most obedt Servt
>
> Go: Washington.[19]

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[17] U.S. Const. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.").

[18] Letter from Ambassador Ternant to George Washington (Dec. 22, 1791), *in* 9 The Papers of George Washington 306, 306 n.1 (Mark A. Mastromarino & Jack D. Warren, Jr. eds., 2000) (emphasis added).

[19] Letter from George Washington to Ambassador Ternant (Dec. 22, 1791), *in* 9 The Papers of George Washington, *id.* at 306 (emphasis added) (editors' footnote omitted).

Washington *accepted* the ambassador's gift (the print and its frame), he *kept* the gift, and he *never* asked for congressional consent to *accept* or to *keep* the gift. This gift was not one of *de minimis* value,[20] nor was it a gift from a close personal friend or relative of Washington's. It was an official or diplomatic gift from a foreign ambassador to our head of state.[21] This incident suggests that President Washington was not an *Officer . . . under the United States*, and that he did not conceive of his position as one.

Is it possible that President Washington erred in regard to accepting the French ambassador's gift, but failing to ask for congressional consent? Evidence arising in connection with the Washington administration is generally considered superior to that of later administrations.[22] Why? First, Washington's administration was contemporaneous with the Constitution's ratification.[23] Second, the

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[20] *See* William Adair, *George Washington's Frames: A Study in Contrasts*, Picture Framing Mag., June 1992, at 34, 34–35; Wendy Wick Reaves, *The Prints*, Antiques, Feb. 1989, at 502, 502–03; *Louis Seize, Roi de Français, Restaurateur de la Liberté, 1790*, George Washington's Mount Vernon Estate, Museum & Gardens, http://www.mountvernon.org/research-collections/collections-holdings/browse-the-museum-collections/object/w-767a-b/ (last visited Dec. 1, 2015).

[21] *See* William B. Adair, *A Masterpiece of Artisanship*, Picture Framing Mag., Aug. 2010, at 28, 28 (describing the print and frame as "an official diplomatic gift"); *id.* at 32 ("The history of this Royal Palace frame is clear, having been an official gift to Washington."). *But see* Amar, Biography, *supra* note 10, at 182 ("Article I, section 9 barred all federal officers, from the president on down, from accepting any 'present' or 'Emolument' of 'any kind whatever' from a foreign government without special congressional consent."). Interestingly, Professor Amar does not discuss this gift or, indeed, any of the gifts President Washington received from foreign governments. *See Gifts of State*, Nat'l Archives, http://www.archives.gov/exhibits/tokens_and_treasures/gifts_of_state.html (last visited Dec. 1, 2015) ("[I]ndeed, every President since George Washington has received gifts of state.").

[22] *See, e.g.*, Akhil Reed Amar, America's Unwritten Constitution: The Precedents and Principles We Live By 309 (2012) ("Over the centuries, the constitutional understandings that crystallized during the Washington administration have enjoyed special authority on a wide range of issues . . . ."); *cf., e.g.*, Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive: Presidential Power from Washington to Bush 420 (2008) ("The precedent set by Washington [in regard to directing subordinates] was followed by all his successors.").

[23] Nine states were required for ratification. *See* U.S. Const. art. VII ("The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."); Owings v. Speed, 18 U.S. 420, 423 (1820) (Marshall, C.J.) ("It is apparent that the Government did not commence on the Constitution being ratified by the ninth State; for these ratifications were to be reported to [the Articles] Congress, whose continuing existence was recognised by the Convention, and who were requested to continue to exercise their powers for the purpose of bringing the new government into operation. In fact, [the Articles] Congress did continue to act as a government until it dissolved on the first of November, by the successive disappearance of its members. It existed potentially until the 2d of March, the day preceding that on which the members of the new Congress were directed to assemble."). The ninth state—New Hampshire—ratified on June 21, 1788. *See* Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 Notre Dame L. Rev. 1, 1 (2001). Subsequently, two more states—Virginia (on June 25, 1788) and New York (on July 26, 1788)—ratified prior to the first meeting of the First Congress under the Constitution. *See* Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. Rev. 801, 826 (2007). The First Congress was scheduled to meet on March 4, 1789, but it did not have a quorum until April 6, 1789. *See* Seth Barrett Tillman, The Federalist Papers *as Reliable Historical Source Material for Constitutional Interpretation*, 105 W. Va. L. Rev. 601, 604 & n.12 (2003). It was the First Congress which counted the electors' votes and gave notice on April 6, 1789 to Washington and Adams that they had been elected President and Vice President. *See* 1 Annals of Cong. 16–18 (1789) (Joseph Gales ed., 1834). Finally, the last two states of the original thirteen states—North Carolina (on November 21, 1789) and Rhode Island (on May 29, 1790)—ratified during President Washington's first term. *See* Tillman, *supra* at 604 & nn.13 & 14. *See generally* Vasan Kesavan, *When Did the Articles of Con-*

President was a Framer[24] and his cabinet (and administration) contained other prominent Framers[25] and ratifiers.[26] Indeed, between the President and his nine

federation Cease To Be Law?, 78 Notre Dame L. Rev. 35 (2002); Gary Lawson & Guy Seidman, *The First "Establishment" Clause: Article VII and the Post-Constitutional Confederation*, 78 Notre Dame L. Rev. 83 (2002).

[24] George Washington, a Virginia delegate, attended the Philadelphia Convention which drafted the Constitution. *See* Major William Jackson, secretary, *Journal of the Convention*, *in* 1 The Records of the Federal Convention of 1787, at 1–2 (Max Farrand ed., 1911) (indicating that, on May 25, 1787, when a quorum of the States was first formed, Washington was in attendance, and also that Washington was elected to the chair, i.e., President of the Convention).

[25] First, Alexander Hamilton, a New York delegate, attended the Philadelphia Convention. *See* 1 *id*. at 1 (indicating that Hamilton was in attendance on May 25, 1787). Hamilton was President Washington's first Secretary of the Treasury. *See* Susan Low Bloch, *The Early Role of the Attorney General in our Constitutional Scheme: In the Beginning there was Pragmatism*, 1989 Duke L.J. 561, 577 n.54.

Second, Edmund Randolph, a Virginia delegate, attended the Philadelphia Convention. *See* 1 The Records of the Federal Convention, *supra* note 24, at 1 (indicating that Randolph was in attendance on May 25, 1787). Randolph was President Washington's first Attorney General. *See* Bloch, *supra* at 564.

Third, James McHenry, a Maryland delegate, attended the Philadelphia Convention. *See* 1 The Records of the Federal Convention, *supra* note 24, at 7 (indicating that McHenry was in attendance on May 28, 1787). McHenry succeeded Timothy Pickering; thus McHenry became President Washington's third Secretary of War. *See* David F. Forte, *Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace*, 45 Cath. U. L. Rev. 349, 370–71 (1996).

Fourth and finally, Gouverneur Morris, a Pennsylvania delegate, attended the Philadelphia Convention. *See Morris, Gouverneur (1752–1816)*, Biographical Directory of the United States Congress, http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000976 (last visited Feb. 11, 2016). President Washington appointed Morris Minister Plenipotentiary for the United States, at Paris. *See id*. This position, although not in the cabinet, was tied as the second highest paid position in the government: only the President had a higher salary. *See* Alexander Hamilton, *List of Civil Officers of the United States, Except Judges, with their Emoluments, for the Year Ending October 1, 1792* (Feb. 26, 1793), *in* 1 American State Papers: Miscellaneous 57, 57–68 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales and Seaton 1834) (listing compensation of government officials, including the President, who made $25,000 per year, and Morris and Pinckney, who each made $9,000 per year, and also received $9,000 for "outfit"), http://tinyurl.com/z6h9u23. (A reproduction of Hamilton's original document appears in *The Papers of Alexander Hamilton*. *See infra* note 33.) By contrast, the Vice President of the United States made $5,000 per year, and the Chief Justice made $4,000 per year. *Id*.; *History of the Federal Judiciary: Judicial Salaries*, Federal Judicial Center, http://www.fjc.gov/history/home.nsf/page/js_1.html (last visited Feb. 11, 2016).

[26] First, Alexander Hamilton was a ratifier: he attended New York's state convention which ratified the Constitution. *See* 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, at 205–06, 216, 230–39 (Jonathan Elliot ed., Washington, n.p. 2d ed. 1836) (vol. 1, 1st ed. 1827) (indicating that Hamilton had been elected to the New York convention, which convened on June 17, 1788, and that he spoke on June 20, 1788); *supra* note 25 (describing Hamilton's cabinet career).

Second, Edmund Randolph was a ratifier: he attended Virginia's state convention which ratified the Constitution. *See* 3 The Debates in the Several State Conventions (vol. 2, 1st ed. 1828), *supra* at 1 (indicating that Randolph was in attendance on June 2, 1788, when the Virginia convention convened); *supra* note 25 (describing Randolph's cabinet career).

Third, Timothy Pickering was a ratifier: he attended Pennsylvania's state convention which ratified the Constitution. *See* 2 The Debates in the Several State Conventions (vol. 3, 1st ed. 1830), *supra* at 416–17 (indicating that Pickering had been elected to the Pennsylvania convention); 1 *id*. at 319–20 (indicating that Pickering had signed the document recording the Pennsylvania convention's ratification). Pickering succeeded Henry Knox; thus Pickering became President Washington's second Secretary of War. *See* Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 Ind. L.J. 1199, 1207 (2005).

Fourth, Joseph Habersham was a ratifier: he attended Georgia's state convention which ratified the Constitution. *See* 1 The Debates in the Several State Conventions, *supra* at 323–24 (indicat-

cabinet members (over the course of two terms), half of the group were either Framers or ratifiers or both.[27] Third, the President saw himself above party or faction; indeed, active partisan federal electoral politics did not arise until after Washington announced that he would not run for a third term.[28] Fourth, Washington both valued his reputation for probity and acted under the assumption that his conduct was closely monitored by political opponents and opportun-

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ing that Habersham had signed the document recording the Georgia convention's ratification). Habersham succeeded Pickering; thus Habersham became President Washington's third Postmaster General. *See* Noble E. Cunningham, The Process of Government under Jefferson 18 (1978) (noting that "Habersham had been appointed Postmaster General by Washington in 1795"). During Washington's administration and the early Federalist Era, Postmaster General was a senior post, but it was not part of the President's cabinet. *Cf. id.* at 87 (indicating that as late as Jefferson's administration, the Postmaster General was not part of the cabinet).

Fifth and finally, Thomas Pinckney was a ratifier: he attended South Carolina's state convention which ratified the Constitution; indeed, he was president of the state convention. *See Pinckney, Thomas (1750–1828)*, Biographical Directory of the United States Congress, http://bioguide.congress.gov/scripts/biodisplay.pl?index=P000357 (last visited Feb. 11, 2016). President Washington appointed Pinckney Minister Plenipotentiary for the United States, at London. *See id*. This position, although not in the cabinet, was tied as the second highest paid position in the government: only the President had a higher salary. *See* Hamilton, *List of Civil Officers of the United States*, *supra* note 25, at 57–68 (listing compensation of government officials, including the President, who made $25,000 per year, and Pinckney and Morris, who each made $9,000 per year, and also received $9,000 for "outfit"), http://tinyurl.com/z6h9u23; *see supra* note 25 (reporting the Vice President's and Chief Justice's salaries).

[27] *See Cabinet Members*, George Washington's Mount Vernon, http://www.mountvernon.org/digital-encyclopedia/article/cabinet-members/ (last visited Feb. 12, 2016) (listing Jefferson, Randolph, and Pickering as President Washington's Secretaries of the State; listing Hamilton and Wolcott as Washington's Secretaries of the Treasury; listing Knox, Pickering, and McHenry as Washington's Secretaries of War; and listing Randolph, Bradford, and Charles Lee as Washington's Attorneys General). Thus, Washington's nine cabinet members included: (i) Jefferson, (ii) Randolph, (iii) Pickering, (iv) Hamilton, (v) Wolcott, (vi) Knox, (vii) McHenry, (viii) Bradford, and (ix) Charles Lee. Washington was a Framer (from Virginia), and four of his nine cabinet members were Framers or ratifiers or both, including: (i) Hamilton—Framer and ratifier (from New York); (ii) Randolph—Framer and ratifier (from Virginia); (iii) McHenry—Framer (from Maryland); and (iv) Pickering—ratifier (from Pennsylvania). *See supra* notes 24–26. Thus, between Washington and his nine cabinet members, five of ten were either Framers or ratifiers or both. (I am not counting John Jay, who, prior to Jefferson, was Acting Secretary of State, as holdover Secretary of Foreign Affairs from the outgoing Confederation government.)

[28] *See, e.g.*, Stanley Elkins & Eric McKitrick, The Age of Federalism: The Early American Republic, 1788–1800, at 495 (1993) ("[T]he role Washington had marked out for himself—that of a chief magistrate resolutely above all party and faction—was one which by the end of his administration he saw himself less and less able to protect. The unity which he, as the first head of a fragile republic exposed to all the broils of world conflict, had worked so painfully to construct was being threatened by irresponsible partisans in the nation's midst."); *id.* at 496–97 (same); Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 Va. L. Rev. 551, 568–69 (2004) ("Washington's Farewell Address nicely framed the transition to this new [politically partisan] order. On the one hand, it was a great act of nonpartisan statesmanship—in refusing a third term in office, Washington established a precedent against the pernicious tendency toward presidencies-for-life. On the other hand, partisan politics provided a backdrop to Washington's grave farewell. He postponed his announcement until September 17, 1796. This put the Republicans at a serious disadvantage in the presidential election campaign, as Jefferson and his supporters were not prepared to contest Washington's decision to continue in office. Nevertheless, the Republicans almost managed to defeat John Adams, Washington's Vice-President and a man devoted to Washington's non-party ideal, who was now obliged to make his way in the ascendant world of party politics." (footnotes omitted)).

ists.[29] Fifth, Washington understood that his personal and his administration's conduct were precedent-setting in regard not only to significant deeds, but even in regard to what might appear to be minor events and conduct.[30] Indeed, the dominant view is that Washington's conduct deserves special deference in regard to both "foreign affairs"[31] and "presidential etiquette."[32] Both of these latter considerations apply to the facts, circumstances, and legal issues surrounding President Washington's accepting the French ambassador's gift. It follows then that if Washington did not err, then the President is not encompassed by the Foreign Emolument Clause's "office . . . under the United States" language. It would seem to follow that if President Washington was not an "office[r] . . . under the United States" for the purposes of the Foreign Emoluments Clause, then president-elect Clinton (should she be elected) would not be an "office[r] under the United States" under Section 2071.

2. *Secretary Hamilton's List*

There is a second precedent from the Washington administration. In 1792, the Senate ordered Secretary of the Treasury Alexander Hamilton to draft a financial statement listing all persons holding "office . . . under the United States" and their salaries. Hamilton took more than nine months to draft a response. Hamilton's response, in 1793, was some ninety manuscript-sized pages. In it, he included personnel in each of the three branches of the federal government. But Hamilton did not include the President, Vice President, Senators, or Representatives. In other words, Hamilton included only those holding office via appointment, but not anyone holding a constitutionally-mandated or elected federal position.[33] If the presidency was not an "office . . . under the United

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[29] *See, e.g.*, Letter from George Washington to Bushrod Washington (July 27, 1789), *in* 30 The Papers of George Washington 366, 366 (John C. Fitzpatrick ed., 1939) ("You cannot doubt my wishes to see you appointed to any office of honor or emolument in the new government . . . . My political conduct in nominations . . . must be exceedingly circumspect and proof against just criticism, for the Eyes of Argus are upon me, and no slip will pass unnoticed that can be improved into a supposed partiality for friends or relatives.").

[30] *See* Letter from President George Washington to Vice President John Adams (May 17, 1789), *in* 8 The Works of John Adams: Second President of the United States 489, 490 (Charles Francis Adams ed., Boston, Little, Brown and Co. 1853) ("Many things, which appear of little importance in themselves and at the beginning, may have great and durable consequences from their having been established at the commencement of a new general government."); 2 The Life of General Washington: First President of the United States 189, 190–92 (Rev. C. W. Upham ed., London, National Illustrated Library 1861) (reporting that the same basic letter which was sent to Adams, was also sent to Madison on May 12, 1789, and that a similar letter was also sent to Jay and Hamilton); *see also* Letter from George Washington to James Madison (May 5, 1789), *in* 30 The Writings of George Washington from the Original Manuscript Sources 1745–1799, at 310–11 (John C. Fitzpatrick ed., 1939) ("As the first of every thing, *in our situation* will serve to establish a Precedent, it is devoutly wished on my part, that these precedents may be fixed on true principles."). *See generally* Amar, *supra* note 22, at 564 n.2 (same).

[31] *Id.* at 309–10.

[32] *Id*.

[33] *See* Report on the Salaries, Fees, and Emoluments of Persons Holding Civil Office Under the United States (Feb. 26, 1793), *in* 14 The Papers of Alexander Hamilton: February 1793–June 1793, at 157, 157–59 (Harold C. Syrett & Jacob E. Cooke eds., 1969), http://works.bepress.com/seth_barrett_tillman/203/3/download; *supra* note 25 (reporting a nearly identical document in *American*

States" for the purposes of Hamilton's list, it would seem to follow that the presidency is not an "office under the United States" as that phrase is used in other legal documents and instruments, including Section 2071.

3. *Post-Civil War Scholarship*

Later commentators seem to agree. McKnight, a late nineteenth-century commentator, discussing how "office" language was used in the Constitution, stated: "It is obvious that . . . the President is not regarded as 'an officer of, or under, the United States,' but as one branch of 'the Government.'"[34] Likewise, Anne Twomey, a modern commentator, discussing how "office under the Crown" is used in Australian law, stated: "As [the public position at issue] is an elective office, and not generally subject to the direction or supervision of the government, one would assume that it is not an office held 'under the Crown'."[35]

The origins of Section 2071's disqualification-related "office under the United States" language go back to the modern statute's 1853 predecessor.[36] As explained, we have eighteenth-century precedents from President Washington and his administration, late nineteenth-century scholarly authority, and modern scholarly authority, domestic and foreign, indicating that this "office under the United States" language (or closely similar language) does not reach elected positions, such as the presidency. This would seem to indicate that the 1853 statute's "office under the United States" language and its modern successor, Section 2071, do not reach the presidency.

Although this historical approach has a certain attractiveness, it is hardly decisive. Our goal here is not to understand how "office . . . un-

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State Papers); *see also* 1 Journal of the Senate of the United States of America, Being the First Session of the Second Congress: Begun and held at the City of Philadelphia, October 24, 1791, and in the Sixteenth Year of the Independence of the said States 441 (1792) (Washington, Gales & Seaton 1820) (reporting May 7, 1792 Senate order, which stated: "That the Secretary of the Treasury do lay before the Senate, at the next session of Congress, a statement of the salaries, fees, and emoluments, for one year, ending the first day of October next, to be stated quarterly, of every person holding any civil office or employment under the United States . . . ."). It should go without saying that Hamilton's list encompassed no (appointed or elected) state positions.

[34] David A. McKnight, The Electoral System of the United States 346 (Philadelphia, J.B. Lippincott & Co. 1878); *cf.* Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74, 79 (1861) (Bates, A.G.) ("The President is a department of the government; and . . . the only department which consists of a single man . . . .").

[35] Anne Twomey, The Constitution of New South Wales 438 (2004). *See generally* Luke Beck, *When Is an Office or Public Trust 'Under the Commonwealth' for the Purposes of the Religious Tests Clause of the Australian Constitution?*, 41(1) Monash U. L. Rev. 17 (2015) (peer reviewed); Luke Beck, *The Constitutional Prohibition on Religious Tests*, 35 Melbourne U. L. Rev. 323 (2011) (peer reviewed); Luke Beck, Note, Williams v Commonwealth, *School Chaplains and the Religious Tests Clause of the Constitution*, 38(3) Monash U. L. Rev. 271 (2012) (peer reviewed). The Australian Constitution's Religious Test Clause, including its "office" language, is modelled on its predecessor in the United States Constitution. *Compare* Australian Constitution s 116 ("[N]o religious test shall be required as a qualification for any office or public trust under the Commonwealth."), *with* U.S. Const. art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

[36] *See* An Act to Prevent Frauds Upon the Treasury of the United States, 32d Cong., 2d Sess., ch. 81, § 5, 10 Stat. 170, 170–71 (1853) (imposing a disqualification in regard to holding any "office under . . . the United States"); Note, *Historical Writings: The Independent Value of Possession*, 67 Yale L.J. 151, 154 n.19 (1957) (noting the 1853 origins of Section 2071).

der the United States" was used in 1791 (per Washington), in 1793 (per Hamilton), or in 1878 (per McKnight), or thereafter. Nor is our goal to understand how this phrase (or closely similar statutory terminology) was understood in other contexts, domestic and foreign, unrelated to Section 2071. Rather, our goal "is to construe the language [of the statute] so as to give effect to the intent of Congress."[37] Thus, this historical argument is convincing to the extent we can be confident that Congress in 1853 was making use of standard legal jargon, whose meaning was: (i) static since Washington's and Hamilton's day; (ii) singular and undisputed; and (iii) shared widely at the time Congress enacted this provision.

C. *Presumptions of Statutory Interpretation*

Recognizing the ambiguity and difficulty in regard to determining Congress' intent in regard to Section 2071's "office under the United States" language, this approach turns to general presumptions, principles, or canons of statutory interpretation.

1. *General "Office" Language does not Reach the Presidency*

It is an accepted principle of federal statutory construction that general language in a statute, such as "agency," which does not explicitly refer to the presidency amounts to "textual silence."[38] Such "textual silence is not enough to subject the presidency to the provisions of"[39] a statute. This principle of statutory construction is primarily rooted in two policy concerns: "separation of powers and the unique constitutional position of the President."[40]

It is not clear that these concerns are at play here. For example, if in the future former Secretary Clinton were elected to the presidency, and if prior to the start of her four-year term she were convicted under Section 2071, then, arguably, such a conviction would *prevent* Clinton, the president-elect, from becoming President in the first instance, and presumably, someone else (i.e., the vice president elect) would succeed to the presidency. Such a successor, as a formal legal matter, would be free to exercise all the powers and prerogatives of the presidency. However, it is possible (perhaps likely) that a successor in such circumstances would not enjoy the broad democratic mandate of a president-elect: as a practical matter, such a successor might be unable to wield the full powers of office.

On the other hand, the Department of Justice's Office of Legal Counsel has argued that this principle of statutory construction applies where the statute's application impinges on the "President's constitutional

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37 United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542 (1940) (Reed, J.).

38 Franklin v. Massachusetts, 505 U.S. 788, 800 (1992) (O'Connor, J.); *cf.* Nixon v. Fitzgerald, 457 U.S. 731, 748 & n.27 (1982) (Powell, J.).

39 *Franklin*, 505 U.S. at 800–01.

40 *Id.* at 800.

prerogatives."[41] One might suggest that, notwithstanding the availability of a successor, a statute which prevents a president-elect from becoming President, and therefore, which prevents such a person from exercising any presidential powers, is one which impinges on the "president's constitutional prerogatives." If this syllogism is substantially correct, it follows that Section 2071's general "office under the United States" language does not apply to the presidency.

Furthermore, this principle of statutory construction—i.e., that general language in a statute does not cover the presidency—has been understood to apply even where the stated policy concerns are not at play.[42] For example, former President Eisenhower died on March 28, 1969. President Nixon planned to close federal government offices on March 31, 1969 in memory of his dead predecessor. However, 5 United States Code Section 6105 stated: "An Executive department may not be closed as a mark to the memory of a deceased former official of the United States."[43]

The President's staff sought advice from the Office of Legal Counsel. After an examination of the provision's text and legislative history, then-Assistant Attorney General William H. Rehnquist (later Chief Justice of the United States) concluded:

> [S]tatutes which refer to 'officers' or 'officials' of the United States are construed not to include the President unless there is a specific indication that Congress intended to cover the Chief Executive.[44]

I have found no evidence of any such "specific indication" in reported congressional debate on the 1853 statute;[45] indeed, I found no congressional debate in any way addressing the statute's "office under the United States" language. Furthermore, Rehnquist opined that this principle of statutory interpretation is "particularly applicable" where the statute is "obscure."[46] All this is some reason to conclude that Section 2071's general "office under the United States" language does not cover the presidency.

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41 Memorandum for the General Counsels of the Federal Government, 20 Op. O.L.C. 124, 1996 WL 876050, at *34 (1996) (Dellinger, A.G.). Consider a slightly different context. If after she were to win the November 2016 popular general election, Clinton were prosecuted under Section 2071 by the outgoing administration, and afterwards sworn into office in January 2017, and subsequently convicted, then Section 2071's disqualification provision would not keep her from becoming President, but would instead (arguably) remove her from office. Although such a result might not impinge on the "*presidency's* constitutional prerogatives" (as long as a successor were available), such a result does impinge on the disqualified former "*president's* constitutional prerogatives."

42 *See* Neil Kinkopf, *Executive Privilege: The Clinton Administration in the Courts*, 8 Wm. & Mary Bill Rts. J. 631, 644 n.94 (2000).

43 5 U.S.C. § 6105 (1966).

44 Memorandum from William H. Rehnquist, Assistant Attorney General, for the Honorable Egil Krogh, Staff Assistant to the Counsel to the President, Office of Legal Counsel, Re: Closing of Government Offices in Memory of Former President Eisenhower 3 (Apr. 1, 1969), http://works.bepress.com/seth_barrett_tillman/569/1/download.

45 *See* Cong. Globe, 32d Cong., 1st Sess. 387, 391–92 (1853) (reporting Senate debate, second Senate reading, and Senate passage of Frauds on the Treasury Bill on January 25, 1853); *see also id.* Appendix at 64–67 (reporting A. Johnson's speech on the Bill in the House); *id.* Appendix at 67–71 (reporting E.B. Olds' speech on the Bill in the House).

46 Memorandum from William H. Rehnquist, *supra* note 44, at 3.

2. *Interpretations of Statutory Language Restricting the Scope of Democratic Choice are not Favored*

Another well-settled canon of statutory construction—the democracy canon—is that statutory and constitutional language limiting eligibility to office is interpreted narrowly. As *Corpus Juris Secundum*, a leading treatise, explains:

> Statutes limiting the right of a person to hold office are to be given a liberal construction in favor of those seeking to hold office in order that the public may have the benefit of choice from all those who are in fact and in law qualified. Ambiguities should be resolved in favor of eligibility to office, and constitutional and statutory provisions which restrict the right to hold public office should be strictly construed against ineligibility.[47]

Because Section 2071's general "office under the United States" language does not explicitly refer to the presidency but does limit candidate eligibility and, in effect, voter rights, this provision should not be interpreted as applying to the presidency.

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[47] 67 C.J.S. *Officers and Public Employees: Construction and operation of constitutional and statutory provisions, generally* § 23 (2015) (footnotes omitted); *see also* 62 C.J.S. *Municipal Corporations* § 273 (2011) ("[A]n appointed or elected person should not be prevented from taking office unless clearly ineligible."); Richard L. Hasen, *The Democracy Canon*, 62 Stan. L. Rev. 69 (2009) (coining the phrase—the "democracy canon"—and developing the concept); Richard L. Hasen, *Ted Cruz is Fit for Office, At Least Under the Constitution*, Nat. L.J., Jan. 25, 2016, http://tinyurl.com/h57ae5r ("The democracy canon counsels that in ambiguous cases of interpretation, read the questionable provision to give voters a choice and to count their votes. . . . But when in doubt, in cases like Cruz's, liberals should emphatically reject any argument that he is ineligible to run for president. There's a constitutional path to say he is eligible, and a contrary interpretation deprives voters of meaningful choice."); Tillman, *supra* note 5, 108–11 (expounding on the "democracy canon"); Seth Barrett Tillman, *A Different Take on Natural Born*, The Originalism Blog (Jan. 18, 2016, 6:59 AM), http://tinyurl.com/j8d9hqp; *cf.* Thomas Falconer & Edward H. Fitzherbert, Cases of Controverted Elections, Determined in Committees of the House of Commons, in the Second Parliament of the Reign of Queen Victoria 587 (Saunders & Benning 1839) (reproducing committee debate from disputed Galway election of 1838, where Mr. Austin (counsel for the sitting member who prevailed) stated: "In all cases respecting eligibility, eligibility is to be aided, and ineligibility ought to be strictly proved. Severe penalties are imposed by the acts of parliament creating disqualification, and they are not favoured."). *Compare* Richard L. Hasen, *The Benefits of the Democracy Canon and the Virtues of Simplicity: A Reply to Professor Elmendorf*, 95 Cornell L. Rev. 1173, 1173 (2010) ("Though the name 'Democracy Canon' is new, the Canon itself has a long and distinguished pedigree."), *with* Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 Cornell L. Rev. 1051, 1056–63 (2010) (discussing the costs of the democracy canon). *See generally* Edward B. Foley, Implications for Hasen's "Democracy Canon" Thesis, Report to the American Law Institute, Principles of Election Law: Resolution of Election Disputes (Apr. 16, 2012); Chad Flanders, *Election Law Behind a Veil of Ignorance*, 64 Fla. L. Rev. 1369 (2012); Chad Flanders, *More on Veils: Reply to Levitt and Muller*, 64 Fla. L. Rev. F. 76 (2012); Justin Levitt, *You're Gonna need a Thicker Veil*, 64 Fla. L. Rev. F. 59 (2013); Derek T. Muller, *Disfavored Candidates and the Democracy Canon*, 64 Fla. L. Rev. F. 53 (2013).

III. If the Statute Reaches the Presidency, is it Constitutional?

If a court decides that Section 2071 reaches the presidency, it will then turn to the provision's constitutionality. The issue here is one of power: may Congress by statute impose qualifications for the presidency beyond those already in the Constitution's text?

A. Judicial Authority

In 1966, Adam Clayton Powell, Jr. was elected to a twelfth consecutive term in the United States House of Representatives. Because of allegations of corruption, when the new Congress met in 1967, Powell was not sworn in with the other members-elect. Thereafter, a House committee produced a report which stated that Powell had, prior to the first meeting of the new Congress, wrongfully diverted House funds to himself and others. The House voted to exclude Powell and declared his seat vacant. Powell sued both to regain his seat and for lost salary. In *Powell v. McCormack*,[48] decided in 1969, the Supreme Court held that the House's refusal to seat Powell—his exclusion—was unconstitutional.[49] In other words, the House can only exclude a member-elect based on qualifications expressly stated in the Constitution: e.g., age, years of citizenship, and inhabitancy.[50] Allegations of corruption, even if proven, will not do. Thus, notwithstanding the Constitution's textually demonstrable commitment granting the House authority (if not exclusive authority) to judge its members' qualifications,[51] the House's excluding a member-elect for any other reason is unconstitutional. *Powell*'s result was hardly surprising: Alexander Hamilton, prior to ratification of the Constitu-

[48] 395 U.S. 486 (1969) (Warren, C.J.); *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (Stevens, J.) (precluding the States from adding to the qualifications for House and Senate membership).

[49] Powell was only awarded a declaratory judgment because the congressional term for which he had been wrongfully excluded had already ended by the time the Supreme Court reached its decision. *See Powell*, 395 U.S. at 550. The declaratory judgment permitted Powell to seek backpay from the lower courts on remand, but only against non-elected House officers, i.e., the Clerk, Sergeant-at-Arms, and Doorkeeper, and not against the Speaker or any members. Judicial review of single-house action in regard to qualifications and related contexts can rarely be timely, and as *Powell* illustrates, even if available, it is not meaningful. *See* The Federalist No. 53, *supra* note 5, at 293–94 (James Madison—but authorship is disputed) ("[I]n single states where they are large and hold but one legislative session in the year, that spurious elections cannot be investigated [by a legislative chamber] and annulled in time for the decision to have its due effect. . . . Were elections for the federal legislature to be annual, this practice might become a very serious abuse, particularly in the more distant states.").

[50] *See supra* note 5 (collecting constitutional provisions).

[51] *See* U.S. Const. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . .").

tion, took this position in *The Federalist*,[52] as did other prominent early post-ratification commentators, such as Justice Joseph Story.[53]

Powell and its progeny[54] have come to stand for the proposition that the Constitution's express textual qualifications in Article I for membership in the House and Senate are exclusive. Moreover, the rationale of *Powell*—i.e., the primacy of the Constitution's express provisions setting fixed textual qualifications—would equally apply to the eligibility provisions for the presidency in Article II.[55] Indeed, this extension of *Powell* appears uncontroversial. For example, in dicta, Chief Judge Posner explained:

> The democratic presumption is that any adult member of the polity . . . is eligible to run for office. . . . The requirement in the U.S. Constitution that the President be at least 35 years old and Senators at least 30 is unusual and reflects the felt importance of mature judgment to the effective discharge of the duties of these important offices; nor, as the cases we have just cited hold, may Congress or the states supplement these requirements.[56]

Federal district courts, i.e., trial courts, including those outside of Chief Judge Posner's United States Court of Appeals for the Seventh Circuit,[57] and

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[52] *See* The Federalist No. 60, *supra* note 5, at 326 (Alexander Hamilton) ("The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature."); *see also* The Federalist No. 52, *supra* note 5, at 286 (James Madison—but authorship is disputed) (explaining that House qualifications were "regulated" by the "[C]onvention" which framed the Constitution).

[53] *See* 2 Joseph Story, Commentaries on the Constitution of the United States § 624 (Boston, Hilliard, Gray and Company 1833) ("It would seem but fair reasoning upon the plainest principles of interpretation, that when the constitution established certain qualifications, as necessary for office, it meant to exclude all others, as prerequisites."). Albeit, Story was rejecting the power of the States to add qualifications in regard to House and Senate membership.

[54] *See supra* note 48 (citing *U.S. Term Limits, Inc.*).

[55] *See supra* note 5 (collecting the primary qualifications-related constitutional provisions for elected federal positions, including the presidency).

[56] Herman v. Local 1011, United Steelworkers of Am., AFL-CIO, CLC, 207 F.3d 924, 925 (7th Cir. 2000) (Posner, C.J.) (citing *Powell* and *U.S. Term Limits, Inc.*).

[57] These courts include federal district courts in the United States Courts of Appeals for the First, Third, Fifth, and Sixth Circuits. *See, e.g.*, Liberty Legal Found. v. Nat'l Democratic Party of USA, Inc., 868 F. Supp. 2d 734, 741 (W.D. Tenn. 2012) (Anderson, J.) ("Article II of the Constitution . . . is the exclusive source for the qualifications for the Presidency . . . ."); United States v. Caron, 941 F. Supp. 238, 254–55 (D. Mass. 1996) (Young, J.) ("[T]he Constitution is the sole source of eligibility for President of the United States and it does not preclude felons."); *see also* Nat'l Comm. of the U.S. Taxpayers Party v. Garza, 924 F. Supp. 71, 75–76 (W.D. Tex. 1996) (Nowlin, J.) (adjudicating dispute about qualifications and access to the presidential ballot under the rubric of *U.S. Term Limits, Inc.*); Gordon v. Sec'y of State of N.J., 460 F. Supp. 1026, 1027 (D.N.J. 1978) (Biunno, J.) ("As a consequence, whether in jail or not, nothing prevented Gordon from seeking to gain the votes of enough electors to have been elected President of the United States. . . . Eugene V. Debs ran for President four times and was a candidate while in jail. Gordon was free to do the same." (footnote omitted)); *cf., e.g.*, Muller, *supra* note 5, at 571 ("Courts have occasionally treated the holding in *U.S. Term Limits, Inc. v. Thornton*, which found the qualifications for members of Congress enumerated in the Constitution as exclusive, applicable to presidential elections, too." (footnote omitted) (citing federal district court authority)).

state courts[58] have taken a similar stance. So has much persuasive scholarly authority.[59]

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[58] *See, e.g.*, Cathcart v. Meyer, 88 P.3d 1050, 1071 (Wyo. 2004) (Voigt, J.) ("The general rule, and the better-reasoned rule, is that constitutionally prescribed qualifications for holding a constitutional office are exclusive."); Okla. State Election Bd. v. Coats, 610 P.2d 776, 778–79 (Okla. 1980) (Hodges, J.) ("The general rule is that when the constitution establishes specific eligibility requirements for a particular constitutional office, the constitutional criteria are exclusive. The legislature, except where expressly authorized to do so, has no authority to require additional or different qualifications for a constitutional office."); State *ex rel.* Chavez v. Evans, 446 P.2d 445, 448 (N.M. 1968) (per curiam) ("The state may provide such qualifications and restrictions as it may deem proper for offices created by the state; but for offices *created by the United States Constitution*, we must look to the *creating authority for all* qualifications and restrictions." (emphasis added)); Buckingham v. State *ex rel.* Killoran, 35 A.2d 903, 906 (Del. 1944) (Rodney, J.) ("It is the general law that where a constitution creates an office and prescribes the qualifications that the incumbent must possess, that the legislature has no power to add to these qualifications." (citing 1 Justice Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 140 (Walter Carrington ed., 8th ed. 1927); Floyd R. Mechem, A Treatise on the Law of Public Offices and Officers §§ 65, 98, at 22, 39–40 (Chicago, Callaghan and Co. 1890); Montgomery H. Throop, A Treatise on the Law Relating to Public Officers and Sureties in Official Bonds § 73, at 82–83 (N.Y., J.Y. Johnston Co. 1892))); Thomas v. Owens, 4 Md. 189, 1853 WL 2525, at *10 (1853) (Le Grand, C.J.) ("Where a constitution defines the qualification of an officer, it is not within the power of the legislature to change or superadd to it, *unless the power be expressly, or by necessary implication, given to it* . . . ." (emphasis in the original)); *see also, e.g.*, 63C Am. Jur. 2d *Public Officers and Employees: Power of Legislature to Prescribe Qualifications* § 51 (2015) ("The legislature has no power to add to the qualifications, or to require different qualifications, for a constitutional office, unless the constitution, expressly or impliedly, gives the legislature the power to do so." (footnotes omitted)); 67 C.J.S. *Officers and Public Employees: Power to Fix Qualifications and Disqualifications* § 22 (2015) ("[C]onstitutionally prescribed qualifications for holding a constitutional office are exclusive."); *cf., e.g.*, H. B. Chermside, Jr., Annotation, *Construction and Effect of Constitutional or Statutory Provisions Disqualifying one for Public Office Because of Previous Tenure of Office*, 59 A.L.R. 2d 716, § 2[b] (originally published in 1958) ("[I]t has been held that where the qualifications for office are stated by the constitution, the legislature cannot add to them or change them by statute."); C. T. Foster, Annotation, *Legislative Power to Prescribe Qualifications for or Conditions of Eligibility to Constitutional Office*, 34 A.L.R. 2d 155, § 3 (originally published in 1954) ("According to a substantial amount of authority, where a constitution lays down specific eligibility requirements for a particular constitutional office, the constitutional specification in that regard is exclusive and the legislature (except where expressly authorized to do so) has no power to require additional or different qualifications for such constitutional office.").

[59] *See, e.g.*, William Josephson, *Senate Election of the Vice President and House of Representatives Election of the President*, 11 U. Pa. J. Const. L. 597, 660 n.236 (2009) ("[Alexander Hamilton's] view was upheld in *Powell v. McCormack*, 395 U.S. 486, 550 (1969), which held that when 'judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution.' *The same reasoning should apply to the qualifications for President and Vice President.*" (emphasis added)); Sean R. Sullivan, *A Term Limit by any Other Name? The Constitutionality of State-Enacted Ballot Access Restrictions on Incumbent Members of Congress*, 56 U. Pitt. L. Rev. 845, 856–857 (1995) (restating Joseph Story's position in his *Commentaries* as "[s]ince the Constitution created both the offices of President and Representative, the qualifications that the Constitution enumerated for each office were the exclusive qualifications one would need to possess in order to hold office"); Matthew J. Franck, *No, a Statute Can't Keep Hillary From Being President*, National Review: Bench Memos (Mar. 18, 2015, 1:41 PM), http://www.nationalreview.com/bench-memos/415603/no-statute-cant-keep-hillary-being-president-matthew-j-franck ("Last night on her Fox News program, Megyn Kelly was discussing the Hillary Clinton e-mail affair with Shannen Coffin . . . and after partially quoting 18 U.S.C. § 2071, Kelly remarked that if Clinton was [sic] indeed guilty of destruction of documents, she would not only have committed a felony but 'she cannot be president.' . . . [The question] is not so interesting, because *the answer is so obvious*, *is whether this statute has any effect whatsoever on eligibility to be president. It doesn't, because it can't*." (emphasis added)); *see also, e.g.*, Maskell, *supra* note 5, at CRS-1 ("Although there may have been some credible minority argument concerning the ability of Congress or the states individually to set *additional* or different qualifications for federal office from those set out in the Constitution, it is now wellsettled

Furthermore, the case for exclusivity in regard to the Constitution's express textual eligibility requirements for the presidency is stronger than the coordinate issue decided in *Powell*, i.e., the exclusivity of the Constitution's express textual qualifications for House seats. The power to judge members' qualifications is expressly and unambiguously committed to each house of Congress,[60] but no such express power is unambiguously committed to Congress in regard to adjudicating a contest involving a presiden-

that the qualifications established in the U.S. Constitution are the *exclusive* qualifications for federal office . . . and are not merely 'minimum' qualifications . . . ."); *cf. id*. at CRS-24 ("Thus, the fact of a criminal conviction could not be used to keep a candidate for federal office off of the ballot under state law . . . ."); *id.* ("[T]he fact that an individual is in prison is also not necessarily a constitutional bar to or an automatic disqualification from running for and being elected to Congress."); *id.* at CRS-1 ("The constitutional history and case law demonstrate that such constitutional qualifications are fixed and may not be changed, added to, or subtracted from by Congress, nor by the state legislatures (other than by an amendment to the U.S. Constitution)."); Chafetz, *supra* note 1, at 171 (affirming that the Constitution's qualifications in regard to congressional seats are exclusive); Roderick M. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. 97, 101 (1991) ("[T]o the extent that the Qualifications clauses were intended to exclude additions, they were intended to exclude additions by state and federal *legislatures* . . . ." (emphasis in the original)); *id*. at 119 ("A quick glance through *Farrand's Debates* indicates that Madison and other framers believed that no state or federal legislature could add qualifications to those required by the federal constitution." (footnote omitted)); *cf., e.g.*, George W. McCrary, A Treatise on the American Law of Elections § 347, at 264 (Henry L. McCune ed., Chicago, Callaghan & Co. 4th ed. 1897) ("Where the Constitution prescribes the qualifications for an office, the *Legislature cannot add others* not therein prescribed." (emphasis added)); John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. Chi. L. Rev. 775, 785–86 (2001) (suggesting *U.S. Term Limits, Inc.* applies in the context of presidential elections). *Compare, e.g.*, P. Allan Dionisopoulos, *A Commentary on the Constitutional Issues in the* Powell *and Related Cases*, 17 J. Pub. L. 103, 142 n.115 (1968) ("Actually the [A]ct of 1853 also permanently disqualified for any *national office* those public officials, who, having custody of public records, destroyed them." (emphasis added)), *with* Gordon, *supra* note 9, at 9 n.71 (explaining that "the application of these statutes [including Section 2071] to the [p]residency has never been [judicially] tested"). *But see* Chafetz, *supra* note 1, at 178–80 (describing pre-*Powell* decisions by the House and by the Senate to exclude members-elect for reasons unrelated to the Constitution's fixed textual qualifications, e.g., exclusions based on allegations of polygamy by LDS Church members who were elected to Congress); *id*. at 189–91 (discussing exclusion by the House of a member-elect, prior to *Powell*, based, in whole or in part, on his opposition to U.S. participation in World War I); Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 285 (Andrew C. McLaughlin ed., Boston, Little, Brown, and Co. 3d ed. 1898) ("The Constitution *and laws* of the United States determine what shall be the qualifications for Federal offices . . . ." (emphasis added)); Throop, *supra* note 58, at 82 (explaining that the legislature has the power to prescribe qualifications "in addition to those prescribed by the constitution . . . provided that they are reasonable"); Dionisopoulos, *supra* at 108 n.16, 111, 116–21, 142 n.115 (arguing, in a paper published prior to *Powell*, that Congress may add statutory qualifications in regard to congressional membership); *but cf*. Amar, Biography, *supra* note 10, at 427 (suggesting that prior to 1922, a state legislature could "disqualif[y] all female candidates for president"); Amar, *supra* note 22, at 289 ("Before 1920 [when the Women's Suffrage or Nineteenth Amendment was adopted], states could constitutionally keep women from . . . appearing on the ballot as presidential candidates."); Mechem, *supra* note 58, at 22–23 (noting that the legislature may prescribe additional qualifications where the constitutionally mandated qualifications are not "exclusive"); Muller, *supra* note 5, at 571–72. *See generally* John C. Eastman, *Open to Merit of Every Description? An Historical Assessment of the Constitution's Qualifications Clauses*, 73 Denv. U. L. Rev. 89, 124–27 (1995).

60 *See* U.S. Const. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . .").

tial candidate's, president-elect's, or President's eligibility requirements.[61] It would seem to follow that if Congress has no power to add to the standing qualifications of its own members, then it cannot add to the standing eligibility requirements for the other constitutionally-mandated elected federal positions,[62] i.e., the President and Vice President.

For all these reasons, it seems likely that *Powell* is controlling, and that applying Section 2071's "office under the United States" language to the presidency is unconstitutional. Indeed, the more likely that *Powell* is seen as controlling because the constitutional principles at stake are clear, the less likely it is that Congress—whose members are presumed to understand the Constitution's broad structural requirements—intended its "office" language to apply to elected positions, such as the presidency.[63]

Nevertheless, it is possible to make a principled distinction between the facts and law at issue in *Powell* from the consequences of a potential Clinton-related prosecution and conviction under Section 2071. *Powell* involved a legislative investigation and adjudication culminating with a *resolution of a single house* to exclude a member-elect. Such quasi-judicial action by an elected chamber poses due process risks, particularly because the members are both the investigators and decision-makers, because the members are political partisans, and because the members decide by sim-

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[61] *See* Muller, *supra* note 5, at 581 ("As a preliminary matter, the Constitution treats Congress's evaluation of executive and legislative qualifications quite differently. There is a 'textually demonstrable commitment' to Congress to evaluate the qualifications of its own members; there is no such express commitment for its handling of presidential candidates." (quoting *Powell*) (footnote omitted)); *id*. at 584–89 (explaining competing views in regard to congressional control over qualifications disputes involving presidents and presidential candidates); *id*. at 599–608 (explaining competing views in regard to state control over qualifications disputes involving presidents and presidential candidates). *See generally* U.S. Const. art. II; Ackerman & Fontana, *supra* note 28 *passim*.

[62] *See* Franklin v. Massachusetts, 505 U.S. 788, 800 (1992) (O'Connor, J.) ("The new and pending bill recognizes this objection to the extent that the President is substituted for the Secretary of Commerce so that *this function may be served by a constitutional officer*." (quoting from a Senate report) (emphasis added)); *id.* at 809 n.6 (Stevens, J., concurring) ("[I]t were better to name a *constitutional officer rather than a statutory officer*." (quoting Senator Vandenberg's floor statement) (emphasis added)); 63C Am. Jur. 2d *Public Officers and Employees: Constitutional Offices* § 15 (2015) ("A constitutional office is one created by the United States Constitution or by a state constitution, *as distinguished from an office created by statute*." (footnote omitted) (emphasis added)); Chief Justice Harry Lee Anstead et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 510 n.448 (2005) ("[A] constitutional office is one created by the constitution . . . ."). *See generally FAQs*, Compensation Board: The Commonwealth of Virginia, http://www.scb.virginia.gov/faqsmenu.cfm (last visited Apr. 17, 2015) ("In Virginia, the public elects . . . its *constitutional officers, so named because their offices are specifically established by the Constitution of Virginia.*" (emphasis added)).

[63] *See, e.g.*, United States v. Morrison, 529 U.S. 598, 607 (2000) (Rehnquist, C.J.) (referring to a "presumption of constitutionality" in regard to congressional acts); INS v. Chadha, 462 U.S. 919, 944 (1983) (Burger, C.J.) ("We begin, of course, with the presumption that the challenged statute is valid."); United States v. Harris, 106 U.S. 629, 635 (1883) (Woods, J.) ("Proper respect for a coordinate branch of the government requires the courts of the United States to give effect to the presumption that [C]ongress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act in question is clearly demonstrated."). In the *Carolene Products* footnote, the Court stated: "There may be narrower scope for operation of the *presumption of constitutionality* when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth." United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (Stone, J.) (emphasis added).

ple majority voting. By contrast, Section 2071 is a provision of a federal *statute*, part of the supreme law of the land,[64] subject to bicameral passage and presidential veto.[65] Moreover, Section 2071 contemplates the full array of traditional judicial due process rights, including: an independent Article III judge, a right to a grand jury, and a right to an impartial (unanimous) jury.[66] Given the greater respect due a statute (as opposed to a single-house resolution), and the greater procedural protections a defendant has in the context of a Section 2071 criminal prosecution (as opposed to a congressional investigation), a court might distinguish *Powell* and uphold the constitutionality of a federal statutory provision (such as Section 2071) even in cases where the statutory provision has the effect of adding qualifications to elected federal positions,[67] including the presidency.

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64 *See* U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

65 *See* U.S. Const. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.").

66 *See* U.S. Const. art. III (providing for independent judges); *id*. at amend. V (providing for grand jury rights); *id.* at amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."); Apodaca v. Oregon, 406 U.S. 404 (1972) (holding nonunanimous 9-3 or 10-2 verdicts in criminal cases is permissible for state trials, but not for federal trials); Johnson v. Louisiana, 406 U.S. 356 (1972) (same).

67 *See generally* Dionisopoulos, *supra* note 59 *passim*. In opining on a somewhat analogous issue, some commentators have argued that the purported exclusivity of impeachment in regard to removing Article III judges may be supplemented by a federal trial imposing removal—where authorized by statute—as a punishment for a criminal conviction (or even, perhaps, in connection with a civil trial). *See, e.g*., Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. Pa. L. Rev. 209, 230 n.72 (1993) ("Professor Amar interprets the Constitution as implying 'that generally all federal officials are subject to the general criminal laws passed by Congress.' Akhil R. Amar, On Judicial Impeachment and its Alternatives—Remarks Prepared For the National Commission on Judicial Discipline and Removal 3 (Dec. 18, 1992) (unpublished manuscript, on file with author). [Amar] argues that because all federal officials could thus be made subject to a federal statute imposing capital punishment for certain federal crimes, such as murder in the District of Columbia, removal from office should be regarded as simply one of the wide range of lesser penalties embraced by Congress's near-plenary power to prescribe sanctions for federal offenses."); *see also, e.g*., Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 Tex. L. Rev. 1, 81 (1989) ("Thus, the [1790 Anti-Bribery] Act indicates that the First Congress anticipated and accounted for criminal prosecutions preceding impeachments as well as allowed for removal other than by formal impeachment and conviction."); Saikrishna Prakash & Steven D. Smith, *How To Remove a Federal Judge*, 116 Yale L.J. 72, 129–30 (2006) (arguing that Congress may provide for judicial removal in consequence of a criminal conviction); *id*. at 130–31 (arguing that Congress may provide for judicial removal in consequence of a civil action).

B. Constitutional Structure

Frequently, the Constitution is interpreted constructively, through implication,[68] and by inferences about its global structure.[69] Two such structurally related policy concerns merit consideration.

First, the Framers "desire[d] to make the office [of President] as politically independent of Congress as possible."[70] Thus, to allow Congress to manipulate presidential qualifications risks making a candidate or sitting President

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[68] *E.g.*, INS v. Chadha, 462 U.S. 919, 946 (1983) (Burger, C.J.) ("The very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers . . . ."); Collector v. Day, 78 U.S. 113, 124, 127 (1870) (Nelson, J.) (interpreting the Constitution based on "necessary implication[s]" arising from the Constitution's global structure); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (Marshall, C.J.) ("A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. *Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.* That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. . . . In considering this question, then, we must never forget that it is a constitution we are expounding." (emphasis added)). *But see* Amalgamated Soc'y of Eng'rs v Adelaide S.S. Co. (1920) 28 CLR 129, 145 (Knox, C.J., Isaacs, Rich and Starke, JJ.) (Austl.) (rejecting constitutional interpretation via "implication" absent a textual anchor in the constitution).

[69] *See* Printz v. United States, 521 U.S. 898, 905 (1997) (Scalia, J.) ("Because there is no constitutional text speaking to this precise question, the answer to the [petitioners'] challenge must be sought in historical understanding and practice, *in the structure of the Constitution*, and in the jurisprudence of this Court." (emphasis added)); *id*. at 918 (opining on the "structure of the Constitution"); Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934) (Hughes, C.J.) (adjudicating controversy through the prism of the Constitution's "essential postulate[s]"). *See generally* Charles L. Black, Jr., Structure and Relationship in Constitutional Law (1969).

[70] Jack N. Rakove, *Confessions of an Ambivalent Originalist*, 78 N.Y.U. L. Rev. 1346, 1353 (2003). *See, e.g.*, U.S. Const. art. II, § 1, cls. 2–3 (establishing that the President and Vice President are to be elected by means of a system of electors, who may hold neither congressional seats nor appointed positions in the Executive or Judicial Branches); *id.* at art. II, § 1, cl. 7 ("The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected . . . ."); Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 Cornell L. Rev. 1045, 1094 (1994) ("Of course, the [Incompatibility] Clause is not the only constitutional impediment to the development of an American parliamentary regime. Indeed, it is the election of the President independently of Congress, and his ability to retain office even when he does not command the confidence of the legislature, that are commonly cited as defining characteristics of American Presidential government."); Vasan Kesavan, *Is the Electoral Count Act Unconstitutional*, 80 N.C. L. Rev. 1653, 1764–65 (2002) ("We should remember that of all the methods to elect the President considered by the Framers the one most emphatically rejected was election of the President by the legislature. The Framers rejected the parliamentary system for good reason: to create an independent and firm Executive." (footnote omitted)); Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 Geo. L.J. 173, 180 (2011) ("The Framers adopted this system of indirect election so as to provide the President with a degree of independence from Congress. Were the President selected by Congress—the principal alternative to the Electoral College considered by the Framers—the Framers feared that he would be too dependent on Congress and that potential candidates for the office would seek congressional support by making undesirable, if not downright corrupt, promises in return for such support." (citing *Farrand's Records*)); *cf., e.g.*, Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. Miami L. Rev. 475, 487–88 (2010) ("Republican Senator Charles Pinckney, a Framer of the Constitution, gave a strong speech [prior to the 1800 presidential election which] focused on the

dependent on Congress for election or re-election. Second, the Framers envisioned the People[71] choosing the President indirectly through presidential electors.[72] Again, allowing Congress to manipulate presidential qualifications risks Congress' choosing the President, rather than the People of the United States.[73]

To the extent that Section 2071 applies to the presidency, both structural concerns discussed above counsel against upholding its constitutionality. Still, such atextual structural concerns are largely intuition-driven and impressionistic. Such concerns may well have weight with some audiences, including some judges, but not with others.[74]

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idea that the Constitution intended to prevent congressional interference with the presidential election, which might in turn compromise the President's independence.").

However, it should also be noted that in circumstances where the electoral college fails to select a President and Vice President, it is the House which chooses the President, and the Senate which chooses the Vice President. *See* U.S. Const. art. II, § 1, cl. 3, *amended by* U.S. Const. amend. XII; Josephson, *supra* note 59 *passim*.

71 *See, e.g.*, Letter from James Madison to George Hay (Aug. 23, 1823), *in* 3 The Founders' Constitution 556–57 (Philip B. Kurland & Ralph Lerner eds., 1987) ("The district mode [of popular election of the electors] was mostly, if not exclusively in view when the Constitution was framed and adopted . . . ."); Tillman, *supra* note 23, at 613–15 (collecting multiple statements in *The Federalist*, made by Alexander Hamilton and John Jay, which are consistent with Madison's 1823 letter). *But compare* Tillman, *supra* note 23, at 613 ("The Constitution of 1787 committed the selection of Senators to the state legislatures and left the selection of presidential electors to the discretion of the state legislatures: the 'people' played no direct role and played no role as a matter of right."), *with* Vikram Amar & Alan Brownstein, Bush v. Gore *and Article II Pressured Judgment Makes Dubious Law*, 48 Fed. Law. 27, 31 (March/April 2001) ("[A]t the Philadelphia Convention, Madison described the electoral college provisions of the final draft as providing that the President is now to be elected by 'the people.' And at the Virginia ratifying convention, Madison stated that the Constitution provided that the President was to be chosen by 'the people' at large.").

72 *See* U.S. Const. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."); *id*. at art. II, § 1, cl. 3 (providing for the election of the President and Vice President by electors).

73 *See* 5 Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia, in 1787, at 404 (Jonathan Elliot ed., Washington, n.p. Supp. 1845) (James Madison, on Aug. 10, 1787, stating: "The qualifications of electors and elected were fundamental articles in a republican government, and ought to be fixed by the Constitution. If the legislature could regulate those of either, it can by degrees *subvert* the Constitution." (emphasis added)); *see also* Amar & Brownstein, *supra* note 71, at 31.

74 *See* Eugene Volokh, *No, Hillary Clinton wouldn't be legally ineligible for the Presidency even if she had violated government records laws*, The Washington Post–Volokh Conspiracy (Aug. 26, 2015, 12:54 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/26/no-hillary-clinton-wouldnt-be-legally-ineligible-for-the-presidency-even-if-she-had-violated-government-records-laws (quoting Attorney General Mukasey's retraction, apparently based on his considering (or reconsidering) the application of *Powell* and coordinate structural considerations to the issue at hand). *But see supra* note 12 (quoting *Investor's Business Daily* article, a newspaper article, asserting the legal populist position); *supra* note 14 (collecting multiple statements by former Attorney General Mukasey asserting the legal populist position).

IV. Conclusions

Does Section 2071's "office under the United States" language apply to the presidency? I expect the rider on the Clapham omnibus thinks so,[75] as do others from more rarefied academic[76] and judicial circles.[77] But historical materials[78] and established principles of statutory interpretation[79] cut the other way.

As to Section 2071's constitutionality, *Powell* and its progeny,[80] along with structural considerations,[81] lean against upholding the statute if applied to elected federal positions. But we cannot predict with certainty how the courts will decide this question should it come before them. It seems the better view is that if Secretary Clinton prevails in the election, then a Section 2071 conviction would not bar her from the presidency as a formal legal matter. However, such a conviction (or, perhaps, even a mere prosecution) might effectively derail any ongoing presidential campaign.[82] This would be especially true if the prosecution is controlled by a member of her own party, i.e., President Barack H. Obama.

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75 *See supra* Part II[A] (discussing the legal populist's position).

76 *See supra* notes 10 & 15, and accompanying text (discussing Professor Akhil Amar's position); *supra* note 12, and accompanying text (discussing other academic authority); *supra* Part II[B][3] (discussing post-Civil War scholarship, domestic and foreign).

77 *See supra* note 14, and accompanying text (discussing former Chief Judge Mukasey's position). *But see supra* note 74 (noting Mukasey's subsequent retraction).

78 *See supra* Part II[B][1]-[2] (discussing Washington's gift from the French ambassador, and the Hamilton list).

79 *See supra* Part II[C][1] (explaining that general "office" language in a statute does not reach the presidency); *supra* Part II[C][2] (explaining that interpretations of statutory language restricting the scope of democratic choice are not favored).

80 *See supra* Part III[A] (discussing *Powell* and its progeny in federal and state courts).

81 *See supra* Part III[B] (discussing constitutional structure in regard to presidential independence, popular election of the President, and structural limits on congressional power over the process in which electors are chosen and elect the President).

82 If a person were prosecuted under Section 2071 while a candidate or president-elect, and that person were elected and then became President, then continuing the federal prosecution against a sitting President would pose certain practical problems, particularly for unitarists who believe the President has control over all federal law enforcement. *See, e.g.*, Michael Stokes Paulsen, Nixon *Now: The Courts and the Presidency After Twenty-five Years*, 83 Minn. L. Rev. 1337, 1342 (1999) (arguing "contra *United States v. Nixon*[?] [418 U.S. 683 (1974) (Burger, C.J.)], that the President of the United States must have the final say as to all matters concerning the execution of the laws of the United States by officers of the executive branch"); *id*. at 1390–97 (same). Likewise, if a sitting President were convicted under Section 2071, one might very well wonder if the President could pardon herself. *See* U.S. Const. art. II, § 2, cl. 1 (Pardon Clause: "[The President] shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."); Kalt, *supra* note 5, at 39–60; Brian C. Kalt, Note, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 Yale L.J. 779 (1996).

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DE GRUYTER OPEN

Recusant Witnesses and the McCarthyite Congressional Investigations

Ross J. Corbett *

ABSTRACT

This paper charts the Warren Court's handling of those convicted for contempt of Congress at the urging of the House Un-American Activities Committee and the Senate Subcommittee on Internal Security. An examination of the arguments made in the Court's various opinions—and by whom—reveals that the outcomes in these cases cannot be explained solely by the changing membership of the Court. Even when there were the votes to support the vigorous denunciations of the McCarthyite congressional investigations that found expression in dissents inspired by Watkins v. United States, the Warren Court took a more measured tone. That more measured tone was an attempt to avoid a repeat of the fractured Court amidst a public backlash that Warren had provoked with Watkins and marked a return to the Court's pre-Watkins use of formalism to bring about the just result.

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I. Introduction

By the time Chief Justice Earl Warren decided his first case involving contempt of the House Un-American Activities Committee ("HUAC"),[1] the only change to the composition of the Supreme Court since its now-infamous decision in *Dennis v. United States*[2] was that he had replaced Chief Justice Fred Vinson and Justice John Marshall Harlan had replaced Justice Robert Jackson. On only one occasion was the new Chief Justice able to gain a majority of the Court to join in an opinion that denounced the goals of the that committee or its counterpart, the Senate Subcommittee on Internal Security ("SSIS"), rather than just the procedures followed in pursing those goals—*Watkins v. United States*.[3] Throughout his entire sixteen-year tenure as Chief Justice, Warren either dissented from opinions upholding Congress's power to punish people for refusing to testify before (or turn over documents to) HUAC or SSIS,[4] or was able to assemble a majority only for narrow, technical challenges to that power.[5]

These facts lend themselves to an easy narrative: Warren simply could not get enough votes to make his sweeping pronouncements in *Watkins* stick. That narrative, however, does not explain the last two decisions that the Warren Court issued concerning a then-moribund HUAC, *Yellin v. United States*[6] and *Gojack v. United States*.[7] These were also narrow, technical decisions. And by the time these cases were decided, 1963 and 1966, respectively, Warren likely did have five votes in favor of a free-expression attack on the entire system of McCarthyite congressional witch-hunts.

This paper charts the Warren Court's handling of those convicted for contempt of Congress at the urging of HUAC and SSIS. It concludes with a speculation concerning why Warren did not push for a sweeping denunciation of those committees in 1963 or 1966, namely that these cases marked a return to the Court's pre-*Watkins* use of formalism to bring about the just result.

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1 Quinn v. United States, 349 U.S. 155 (1955).

2 Dennis v. United States, 341 U.S. 494 (1951).

3 Watkins v. United States, 354 U.S. 178 (1957).

4 Braden v. United States, 365 U.S. 431 (1961); Wilkinson v. United States, 365 U.S. 399 (1961); McPhaul v. United States, 364 U.S. 372 (1960); Barenblatt v. United States, 360 U.S. 109 (1959).

5 Gojack v. United States, 384 U.S. 702 (1966); Yellin v. United States, 374 U.S. 109 (1963); Grumman v. United States, 370 U.S. 288 (1962) (per curiam); Silber v. United States, 370 U.S. 717 (1962) (per curiam); Russell v. United States, 369 U.S. 749 (1962); Deutch v. United States, 367 U.S. 456 (1961); Flaxer v. United States, 358 U.S. 147 (1958); Sacher v. United States, 356 U.S. 576 (1958); Quinn v. United States, 349 U.S. 155 (1955); Emspak v. United States, 349 U.S. 190 (1955); Bart v. United States, 349 U.S. 219 (1955).

6 Yellin v. United States, 374 U.S. 109 (1963).

7 Gojack v. United States, 384 U.S. 702 (1966).

II. Contempt of Congress Under Vinson

The House Un-American Activities Committee grew out of the anti-fascist Dies Committee, and quickly turned to focus on the tactics of the Communist Party.[8] Its counterpart in the Senate, the Subcommittee on Internal Security, came into being in 1950 to monitor the enforcement of the McCarran Act and related laws.[9] While each was nominally tasked with determining whether current espionage and security statutes were adequate to the subversive threat posed by Communism, they often did so by asking whether a particular citizen was or ever had been a member of the Communist Party.[10] Both committees seemed concerned with ferreting out and exposing Communists for the sake of exposure, i.e., for the sake of punishing the individual rather than gathering information useful to the legislative process.[11] They were not the only committees that engaged in this exposure process.[12]

The McCarthyite congressional committees could not punish Communists directly, for the most part—that task was left to the vigilantism of blacklists and public opprobrium—but they could punish those who did not cooperate in the identification of Communists.[13] Central to that punishment was a nineteenth-century statute by which Congress had augmented its inherent power to punish contempt at the bar of the House or Senate by making that contempt into a crime punishable in the courts.[14]

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully

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8 Morton J. Horwitz, The Warren Court and the Pursuit of Justice 54–55 (1998); Walter Goodman, The Committee: The Extraordinary Career of the House Committee on Un-American Activities 24–58 (1968).

9 Goodman, *supra* note 8, at 295.

10 *See* Lucas A. Powe, Jr., The Warren Court and American Politics 76–78 (2000); Martin H. Redish, The Logic of Persecution: Free Expression and the McCarthy Era, 37–38 (2005).

11 *See* Powe, *supra* note 10, at 76–78.

12 Redish, *supra* note 10, at 37; *cf.* Christoffel v. United States, 338 U.S. 84, 85 (1949) (House Committee on Education and Labor).

13 *See* Horwitz, *supra* note 8, at 61 (contempt charges incentivized compliance with McCarthyite investigative committees); Redish, *supra* note 10, at 37, 44.

14 *See* United States v. Bryan, 339 U.S. 323, 327 (1950) (contempt of Congress statute was enacted to enable contemnors to be jailed past the expiration of Congress's session); *cf.* Anderson v. Dunn, 19 U.S. 204, 230–31 (1821) (as an implied power necessary to effectuate its enumerated powers, Congress's authority to imprison for contempt at its own bar cannot extend past its current session).

> makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor… .[15]

The key phrases in this statute would turn out to be "pertinent," "willfully," and "under inquiry."

At first, it seemed as though the Vinson Court might force McCarthyite congressional committees to respect the formalities of criminal due process, albeit in a case that involved perjury rather than contempt of Congress, *Christoffel v. United States*.[16] Harold Christoffel had been convicted of perjury for telling the House Committee on Education and Labor that he was not a Communist.[17] Yet perjury had to be committed before a "competent tribunal,"[18] while the quorum that was present when roll was called had dissipated by the time Christoffel denied being a Communist.[19] Ignoring a dissent from Justice Jackson that, under the Rules of the House, the Committee had been a competent tribunal because no point of quorum had been raised,[20] Justices Murphy, Minton, Frankfurter, Douglas, and Black voted to reverse the conviction.[21] "We are measuring a conviction of crime by the statute which defined it," they wrote.[22]

The very next year, however, the Court was again faced with the criminal prosecution of a witness, Helen Bryan, who claimed at trial that there had been no quorum at the HUAC hearing at which she refused comply with a subpoena to produce records.[23] Murphy was no longer on the Court, and Minton joined in an opinion written by Chief Justice Vinson in which the Court upheld Bryan's conviction. First, they argued, since the criminal contempt statute did not make any reference to a "competent tribunal," *Christoffel* was irrelevant: that the alleged contempt occurred before a competent tribunal was not an element of the offense.[24] Second, Bryan's failure to object to a lack of quorum at the HUAC hearing both barred her from raising the issue at trial and demonstrated that the lack of a quorum did not materially disadvantage her.[25] Lastly, the statute barring the use

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15 2 U.S.C. § 192, formerly R.S. § 102, originally enacted in the Act of Jan. 24, 1857, c. 19, § 1, 11 Stat. 155.

16 Christoffel v. United States, 338 U.S. 84 (1949).

17 *Id.* at 85.

18 *Id.* at 85 n.2 (quoting 22 D.C. Code § 2501).

19 *Christoffel*, 338 U.S. at 86.

20 *Id.* at 92–93 (Jackson, J., dissenting).

21 *Id.* at 89–90.

22 *Id.* at 89.

23 United States v. Bryan, 339 U.S. 323, 324–27 (1950). Her constitutional objections to the subpoena were not before the Court, having prevailed in the Court of Appeals on the question of whether the competence of the committee was a question of law or fact. *Id.* at 327, 343.

24 *Id.* at 329–30.

25 *Id.* at 333–34.

of congressional testimony in criminal proceedings other than those for perjury should not be read as barring its use in prosecuting contempt of Congress.[26]

Of these three arguments, the second was to reverberate most in the Warren Court.[27] By contrast the first meant in essence that a witness who lied about being a Communist could raise the lack of quorum at trial, but not a witness who refused to answer the question at all.

It is the third argument, however, that is of greatest importance for understanding the fate of witnesses before McCarthyite congressional committees under the Warren Court. Technically, both Justices Black and Frankfurter dissented in *United States v. Bryan* (Justice Douglas did not participate in the case).[28] Frankfurter, however, made it clear that he objected only to the Court's third argument regarding the admissibility of testimony before Congress.[29] Thus Frankfurter was willing to demand that witnesses before a congressional investigative committee raise all objections there, and only a regard for the formalities of the criminal law could save a recalcitrant witness. In his dissent from a companion case, Frankfurter wrote that "regard for [congressional committees' power of testimonial compulsion] does not call for the slightest relaxation of the requirements of our criminal process."[30]

Just as importantly, however, Frankfurter was willing to countenance an awful lot so long as legal forms were adhered to. The idea that one might inadvertently "waive" a defense by failing to raise it in a congressional investigation stands in stark contrast with the nature of a congressional investigation. It suggests that a witness must approach congressional inquiries as a possible prelude to criminal prosecution and thus be wary to preserve arguments for eventual trial and appeal. Yet Congress's authority to punish contempt depends upon its having a proper legislative purpose for its investigation.[31] Congress might like to know, for example, why a debtor to the United States is insolvent, but unless it is contemplating impeaching a federal officer for extending credit to an insolvent debtor, Congress cannot undertake the clearly judicial function of investigating particular wrongs.[32] Where Senators stand accused of insider trading, the

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[26] *Id.* at 335–43.

[27] *E.g.*, McPhaul v. United States, 364 U.S. 372, 379 (1960); United States v. Fleischman, 339 U.S. 349, 352 (1950); *see also* Yellin v. United States, 374 U.S. 109, 135–36 (1963) (White, J., dissenting); Deutch v. United States, 367 U.S. 456, 484–85 (1961) (Whittaker, J., dissenting).

[28] *Bryan*, 339 U.S. at 343, 346.

[29] *Id.* at 343 (Frankfurter, J., dissenting).

[30] United States v. Fleischman, 339 U.S. 349, 380 (1950) (Frankfurter, J., dissenting) (citation omitted).

[31] Sinclair v. United States, 279 U.S. 263, 294 (1929), *overruled on other grounds*, United States v. Gaudin, 515 U.S. 506 (1995); McGrain v. Daugherty, 273 U.S. 135, 173–74 (1927); *see* Kilbourn v. Thompson, 103 U.S. 168, 192–93 (1880).

[32] *Kilbourn*, 103 U.S. at 192–93.

Senate can investigate into whether a particular firm has made trades on behalf of Senators, but it cannot "intru[de] into the affairs of the citizen" or "seek to ascertain any facts as to the conduct, methods, extent, or details of the business of the firm in question."[33] In upholding Congress's power to compel testimony from the Attorney General's brother concerning malfeasance in the Department of Justice, the Court reaffirmed, "neither house is invested with a 'general power' to inquire into private affairs and compel disclosures, but only with such limited power of inquiry" as is necessary to make its enumerated powers effective.[34] The sorts of questions that might be pertinent in contemplating legislation have been expanded, but always in the context of a reiterated prohibition on actual investigation into the affairs of the citizen.[35] The notion that a witness might waive a defense by failing to assert it before Congress, by contrast, treats investigative committees as analogous to trial courts or administrative adjudications. From the beginning, then, Justice Frankfurter seemed amenable to the least defensible aspect of the McCarthyite investigative committees, namely, the exposure and public shaming of individual Communists.

The fact that Frankfurter was willing to give McCarthyism some leeway comes out in a case that did not involve Communists, a case the significance of which was to become a bone of contention under Warren's Chief Justiceship, *United States v. Rumely*.[36] That case involved the Committee for Constitutional Government, which had formed in order to oppose the New Deal and in particular to oppose support for organized labor.[37] In August 1950, the House Select Committee on Lobbying Activities demanded that its secretary, Edward Rumely, produce a list of all the bulk purchasers of his organization's books.[38] The House committee's chairman, Frank Buchanan, claimed that Rumely's organization spent lavishly on lobbying activities but had never disclosed its contributors, so the committee wanted to see whether the Lobbying Act should be amended in case these bulk purchases were actually disguised contributions to lobbyists.[39] Of course, Rep. Buchanan's hearings were described in the conservative press at the time as an "iniquitous New Deal inquisition … set out to intimidate opponents of Trumanism."[40] When Rumely refused to turn over the records, he was convicted of contempt of Congress.[41]

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33 In re Chapman, 166 U.S. 661, 668–69 (1897).

34 McGrain v. Daugherty, 273 U.S. 135, 173–74 (1927).

35 *E.g.*, *Sinclair*, 279 U.S. at 294 (upholding broad inquiry into federal contracts concerning oil reserves as not "related merely to appellant's private or personal affairs").

36 United States v. Rumely, 345 U.S. 41 (1953).

37 Richard Polenberg, *The National Committee to Uphold Constitutional Government, 1937–1941*, 52 J. Am. History 582, 584–85 (1965).

38 *Rumely*, 345 U.S. at 42–43.

39 96 Cong. Rec. 13882 (Aug. 30, 1950) (statement of Rep. Buchanan).

40 *Freedom of the Press on Trial*, Chi. Trib., Aug. 22, 1951, Part 1, at 20, http://archives.chicagotribune.com/1951/08/22/page/20/article/freedom-of-the-press-on-trial.

41 *Rumely*, 345 U.S. at 42.

In this context, where there was no whiff of an international Communist conspiracy, Frankfurter thought that a congressional investigation might offend the First Amendment.[42] He used this suspicion to justify avoiding the constitutional question, however, deciding instead that the House resolution authorizing the Select Committee did not clearly authorize an investigation into all attempts to influence public opinion.[43] The fact that the House as a whole must have thought Buchanan's inquiry relevant to an authorized investigation, considering that it approved his request to prosecute Rumely for contempt, was irrelevant, Frankfurter declared.[44] "Rumely's duty to answer must be judged at the time of his refusal … and cannot be enlarged by subsequent action of Congress."[45] That is, where Communists were not concerned, Frankfurter (and even Vinson, Clark, Jackson, and Reed, who joined his opinion) would read a congressional committee's authorization narrowly if an investigation raised First Amendment concerns.

Justices Douglas and Frankfurter would have overturned Rumely's conviction based on the First Amendment,[46] but the Court that Chief Justice Warren was to inherit was composed largely of justices who had found Communism to be significant enough of a threat to trump First Amendment concerns[47] and who were willing to entertain a First Amendment objection to congressional investigations only where Communists were not involved.[48] At least some procedural defects in a congressional committee's form had to be raised before the committee itself, lest a witness be barred from raising them as a defense to criminal contempt charges.[49] Nonetheless, when Warren took his seat there was precedent that a congressional committee's authorization to ask a question had to be clear in order to sustain a conviction for contempt.[50] A string of cases stating that Congress could not investigate the private affairs of citizens, or at least could inquire into them only pursuant to a valid legislative purpose, were still good law.[51] Crucially, Justice Frankfurter was willing to abandon the *Dennis* majority in the name of strict adherence to the formalities of criminal law, even where Communists were concerned.[52]

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42 *Id.* at 42–44.

43 *Id.* at 45–47.

44 *Id.* at 47–48.

45 *Id.* at 48.

46 *Id.* at 56–58 (Douglas, J., concurring in judgment).

47 *See* Dennis v. United States, 341 U.S. 494, 502–11 (1951); *see also id.* at 546–52 (Frankfurter, J., concurring in judgment).

48 *Cf. Rumely*, 345 U.S. at 45–47.

49 United States v. Bryan, 339 U.S. 323, 329–30 (1950).

50 *Rumely*, 345 U.S. at 46–47.

51 Sinclair v. United States, 279 U.S. 263, 294 (1929), *overruled on other grounds*, United States v. Gaudin, 515 U.S. 506 (1995); McGrain v. Daugherty, 273 U.S. 135, 173–74 (1927); In re Chapman, 166 U.S. 661, 668–69 (1897); Kilbourn v. Thompson, 103 U.S. 168, 192–93 (1880).

52 United States v. Bryan, 339 U.S. 323, 344 (1950) (Frankfurter, J., dissenting); *id.* at 346–48 (Black, J., dissenting); United States v. Fleischman, 339 U.S. 349, 365–77

III. Criminal Procedure: The Opening Salvo

The Warren Court's first push against the power of McCarthyite congressional committees to punish for contempt came in a trio of cases decided in 1955,[53] *Quinn v. United States*,[54] *Emspak v. United States*,[55] and *Bart v. United States*.[56] Where *Bryan* had required that witnesses follow certain formalities in order to preserve their objections to the composition of the committee,[57] these cases compelled Congress to follow certain formalities if it wished to prosecute a person for contempt. Chief Justice Warren's majority opinions in these cases were joined by Justices Douglas and Black, as was to be expected, but also by Justices Frankfurter, Burton, and Clark. In *Quinn*, even Justice Minton joined the majority, while Justice Harlan, who had replaced Justice Jackson some months earlier, concurred in the judgment.

Thomas Quinn was a labor union field representative and had been subpoenaed to appear before a HUAC subcommittee along with two other union officers, Thomas Fitzpatrick and Frank Panzino.[58] Fitzpatrick and Panzino testified first and both refused to answer questions about their membership in the Communist Party, the former mentioning the First and Fifth Amendments, the latter adopting Fitzpatrick's statement and mentioning the Fifth Amendment.[59] The following day, however, Quinn said only that he supported the position advanced by Fitzpatrick and that the defense of constitutional principles forbade him to answer the question.[60]

The House was apparently of the opinion that there was no Fifth Amendment privilege against self-incrimination applicable to its investigations, since it referred all three for criminal prosecution for contempt of Congress.[61] Whatever legal arguments the government put forward in support of that position, it was not seriously considered: both Fitzpatrick and Panzino were acquitted,[62] with the District Court in the former's case saying only,

> [t]here can be no doubt that [the privilege against self-incrimination] extends to a witness testifying before any judicial, congressional or admin-

(1950) (Black, J., dissenting); *id.* at 377–81 (Frankfurter, J., dissenting).

53 The Court had upheld a state's ability to punish a recusant HUAC witness by suspending his medical license the year before, but had not heard his challenge to his contempt conviction. Powe, *supra* note 10, at 78–79.

54 Quinn v. United States, 349 U.S. 155 (1955).

55 Emspak v. United States, 349 U.S. 190 (1955).

56 Bart v. United States, 349 U.S. 219 (1955).

57 *Bryan*, 339 U.S. at 333–34.

58 *Quinn*, 349 U.S. at 157.

59 *Id.* at 157–58.

60 *Id.* at 158 n.8.

61 *Id.* at 159.

62 *Id.*

> istrative body of the United States Government, *although, apparently, there has been misapprehension on the part of some that it does not*."[63]

The Supreme Court's own treatment was brief: one paragraph of platitudes about self-incrimination followed by a three-sentence syllogism that Quinn was entitled to claim the privilege.[64] Only Justice Reed suggested that the privilege against self-incrimination should not apply to congressional investigations, since the extension of that privilege beyond criminal trials was a matter of judicial discretion that could not be authoritative regarding Congress's own policy of compelling testimony before it.[65] But not even Justice Minton joined Reed's dissent.

The significance of *Quinn*, then, is its near-unanimous, if muted, rebuke of the House regarding the reach of the Fifth Amendment. Given the privilege against self-incrimination, and given that the Smith Act exposes Communists to criminal liability,[66] the Court acted as though the only real question was whether Quinn had invoked his privilege, which everyone other than Reed agreed he had.[67]

Warren also articulated an alternate ground for reversing Quinn's conviction, a ground from which only Reed and Harlan dissented.[68] As a criminal statute, contempt of Congress requires criminal intent.[69] The witness must know that an answer is demanded before a refusal to answer can be wrongful, and this requires that the committee expressly overrule any objections to the question.[70] Because the HUAC subcommittee did not overrule Quinn's invocation of Fitzpatrick's objections, he could not be convicted of contempt of Congress.[71]

This aspect of the *Quinn* decision can only be seen as an attack on McCarthyite procedures. After all the objection offered by Fitzpatrick and invoked by Quinn read:

> The Constitution of this country provides certain protection for minorities and gives the privilege for people to speak and think as they feel that they should and want to. It also gives the privilege that people can have opinions or beliefs that may be unpopular. In my opinion, it gives them the right to hold those opinions secret if they so desire. This is a protec-

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63 United States v. Fitzpatrick, 96 F. Supp. 491, 493 (D.D.C. 1951) (emphasis added).

64 *Quinn*, 349 U.S. at 161–62.

65 *Id.* at 184–85 & n.11 (Reed, J., dissenting).

66 *Id.* at 162 n.29 (majority opinion).

67 *Id.* at 162–63; *id.* at 171 (Harlan, J., concurring in part and dissenting in part); *contrast id.* at 174–75 (Reed, J., dissenting).

68 *Id.* at 165–70 (majority opinion); *id.* at 171 (Harlan, J., concurring in part and dissenting in part); *id.* at 185–89 (Reed, J., dissenting).

69 *Id.* at 165 (majority opinion).

70 *Id.* at 165–66.

71 *Id.* at 166.

> tion of the first amendment to the Constitution, supplemented by the fifth amendment.[72]

Quinn, in saying he agreed with this sentiment, phrased it solely as the right to hold unpopular beliefs, that is, as a First Amendment issue.[73] In order for his refusal to be made with the requisite criminal intent, on the Court's reasoning, the HUAC subcommittee would have had to have remembered that Fitzpatrick also made passing reference to the Fifth Amendment and expressly overruled that objection. As Reed's dissent makes clear, the Court was imposing a requirement for formulaic recitations on Congress at the same time as it was declaring that witnesses need not make any formulaic recitation in order to invoke their rights.[74]

The fact that the Court was taking aim at the informality of McCarthyite congressional investigations as a whole, and not just the sloppiness of this particular HUAC subcommittee, is seen plainly in its parallel decision in *Bart*.[75] There, the witness had refused to answer based on both the Fifth Amendment and the fact that the questions were not pertinent.[76] The HUAC subcommittee chairman told the witness's lawyer, "[j]ust advise your client and don't argue with the committee, because we don't rule on objections."[77] Yet the witness was then told the question's pertinence and that he was not being asked to incriminate himself.[78] His conviction was nonetheless overturned.[79] What was at issue, therefore, must have been the informality with which HUAC subcommittees operated, the fact that they "don't rule on objections."

In *Emspak* the witness had seemed to disclaim a reliance on the Fifth Amendment at all, expressly denying that he was concerned that his answer would open him to criminal prosecution.[80] Earlier in his testimony, however, he had stated, "I think it is my duty to endeavor to protect the rights guaranteed under the Constitution, primarily the first amendment, supplemented by the fifth. This committee will corrupt those rights."[81] With this statement as a hook, the Court approached the question as one of whether Emspak had effectively waived his right, not whether he had invoked it, and as his waiver was not explicit, it was not valid.[82]

In finding that Emspak intended to rely on the Fifth Amendment in the first place, however, the Court set the bar very low. When Emspak was

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72 *Id.* at 180–81 (Reed, J., dissenting).
73 *Id.* at 158 n.8 (majority opinion).
74 *Id.* at 187 (Reed, J., dissenting).
75 Bart v. United States, 349 U.S. 219 (1955).
76 *Id.* at 220–21.
77 *Id.* at 223.
78 *Id.* at 224–26 (Reed, J., dissenting).
79 *Id.* at 223 (majority opinion).
80 Emspak v. United States, 349 U.S. 190, 195–96 (1955).
81 *Id.* at 193 n.3.
82 *Id.* at 195–98.

asked whether he knew a specific person, he began to make a statement on the nature of his job as a union representative, the importance of the Constitution, and how HUAC was bad for the labor movement.[83] He affirmed several times that he would answer the question; it was while reaffirming that he would in fact answer the question that he said he was defending the Constitution, primarily those rights protected by the First Amendment, as supplemented by the Fifth.[84] The fact that Warren saw in this an invocation of the privilege against self-incrimination lost him the votes of Minton and Harlan, who had voted with him regarding *Quinn*. The extended quotations from the record that characterize the dissents in *Quinn*, *Emspak*, and *Bart* suggest that Warren stood accused of distorting that record.[85]

What the Court was in effect doing was demanding that congressional investigative committees conduct themselves more like an official tribunal, with formal rulings on objections, except that the objections themselves did not have to be made formally (or even very discernably) at all. On one hand, this demand validated the adversarial and potentially penal nature of the McCarthyite congressional committees, where in theory they could exist solely to solicit information Congress needed in order to legislate intelligently.[86] On the other hand, however, those committees were pursuing individuals under the pretext of a legitimate legislative purpose, and unless the Court was going to put an end to the hearings altogether—a position for which there were neither the votes, the doctrine, nor the means of enforcement—compelling Congress to conduct itself like an adversarial tribunal was certainly an improvement. Yet the Court went beyond even this. In finding that even a passing reference to the Fifth Amendment counted as invoking it, even when the witness denied that answering would be incriminating,[87] as did the bare adoption of another's statement that made passing reference to the Fifth Amendment in the course of defending the freedom to hold unpopular beliefs,[88] Warren signaled to the McCarthyite investigative committees that the Court had between six and eight votes in favor of watching Congress's anti-Communist activities very closely for any procedural impropriety that might implicate criminal due process concerns.

Warren was able to assemble this coalition in 1955 for two main reasons. First, he did not touch the First Amendment claims raised by the defendants, ostensibly because the other grounds sufficed to dispose of the

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[83] Quinn v. United States, 349 U.S. 155, 176–78 (1955) (Reed, J., dissenting). Justice Reed published a single dissent to both *Quinn* and *Emspak*, and so his discussion of the latter occurs in the former.

[84] *Id.* at 178 (Reed, J., dissenting).

[85] *Cf. Quinn*, 349 U.S. at 176–82, 188 (Reed, J., dissenting); *Emspak*, 349 U.S. at 215–18 (Harlan, J., dissenting); *Bart*, 349 U.S. at 224–26 (Reed, J., dissenting); *id.* at 227–31 (Harlan, J., dissenting).

[86] *See* notes 31–35 & accompanying text, *supra*.

[87] *Emspak*, 349 U.S. at 195.

[88] *Quinn*, 349 U.S. at 158.

cases.[89] That ostensive justification is undercut by the fact that Warren offered parallel sufficient arguments in all three cases—each defendant had invoked the Fifth Amendment and evidence of criminal intent was lacking[90]—so his refusal to touch the First Amendment was probably strategic. Second, at issue was not simply Congress's power to conduct investigations or even to jail nonmembers for contempt before its own bar, but its desire to involve the judiciary in punishing contempt. This not only meant that a larger issue was at stake than simply the fate of a few Communists, but it also allowed Warren to take advantage of the momentum of *Rumely*'s formalistic reasoning.

IV. Warren Shows His Hand: Watkins v. United States

Everything that the Chief Justice was careful not to say in *Quinn*, *Emspak*, and *Bart*, he shouted in *Watkins v. United States*.[91] What survived of the case—the propositions for which it was later cited by less amiable majorities—was the narrow, technical ground that Justice Frankfurter cast as its real holding.[92] Contempt of Congress is a crime, meaning that the acts constituting the crime must be clear at the moment the defendant can avoid them.[93] What the statute criminalizes is a refusal to answer "any question pertinent to the question under inquiry."[94] Thus, the scope of a congressional inquiry must be clear both for the witness to know that the question is pertinent and for the courts to judge whether the question the witness intentionally refused to answer was indeed pertinent.[95] That clearly defined scope was lacking in Watkins' case.[96]

John Watkins had freely answered a HUAC subcommittee's questions about his own Communist activities and whether or not he knew specific persons, but he refused to say whether those he knew were members of the Communist Party.[97] While the Court had suggested that acknowledging relationships with Communists might be incriminating,[98] Watkins had already answered questions about whom he knew and in any case expressly refused

89 *Quinn*, 349 U.S. at 170; *Emspak*, 349 U.S. at 202; *Bart*, 349 U.S. at 223.
90 *Quinn*, 349 U.S. at 163–64, 170; *Emspak*, 349 U.S. at 201–2; *Bart*, 349 U.S. at 221–23.
91 Watkins v. United States, 354 U.S. 178 (1957).
92 *See id.* at 216–27 (Frankfurter, J., concurring).
93 *Id.* at 208 (majority opinion).
94 2 U.S.C. § 192; *Watkins*, 354 U.S. at 207–8.
95 *Watkins*, 354 U.S. at 208–9.
96 *Id.* at 209–15.
97 *Id.* at 182–85.
98 Emspak v. United States, 349 U.S. 190, 198–201 (1955).

to plead the Fifth Amendment.[99] He instead insisted that questions about other people were not relevant to the subcommittee's work and that it could have no authority to expose them publicly because of past activities.[100] Watkins in effect challenged the legitimacy of what HUAC was actually doing.

Unlike in *Quinn*, *Emspak*, and *Bart*, Warren's *Watkins* opinion did not avoid the First Amendment issue.[101] What is surprising is not that he touched it—McCarthyism certainly raised First Amendment concerns, even granting what we now know about the extent of Soviet infiltration during the Cold War[102]—but that he did so little with it. He laid out an argument, but he did not draw the conclusion from it.[103] Congress's power to conduct investigations is broad, but not absolute, he said.[104] Not only must an investigation be justified in terms of Congress's functions,[105] but even a justified investigation must comport with the Bill of Rights, including the rights against self-incrimination, unreasonable search and seizure, and abridgement of free speech, belief, or association.[106] These limits may be enforced on judicial review even when Congress punishes contempt at its own bar,[107] and so *a fortiori* when it instead delivers the contemnor to the judicial branch for punishment.[108] Abuse of the investigative process may abridge political freedoms by exposing the adherents of unorthodox beliefs to public censure,[109] and so Congress's need for information can be accommodated only by the courts' discerning "the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness."[110]

These arguments set up any one of several conclusions, but Warren does not draw any of them. He could have concluded that there is no valid legislative purpose in ferreting out individual Communists and that this is what the HUAC subcommittee was doing with Watkins. He could have said that, even though HUAC had a valid legislative purpose in knowing the extent of the Communist threat the nation faced, that purpose would

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99 *Watkins*, 354 U.S. at 185.

100 *Id.*

101 *Id.* at 188, 197–98.

102 *See* Redish, *supra* note 10, at 3–8, 42–43 (Soviet activities as disclosed in Comintern and Verona documents justified anti-espionage and anti-sabotage actions, not the suppression of free speech sanctioned in *Barenblatt* and other decisions upholding McCarthyism).

103 *See* Powe, *supra* note 10, at 96–97; Redish, *supra* note 10, at 40–42.

104 *Watkins*, 354 U.S. at 187.

105 *Id.*

106 *Id.* at 188.

107 *See id.* at 192 (congressional contempt, unlike that of the English Parliament, has always been subject to judicial review).

108 *See id.* at 206–208 (when Congress refers a contemnor for punishment under 2 U.S.C. § 192, the courts must afford every protection of the criminal law).

109 *Id.* at 197–98.

110 *Id.* at 198.

be so little advanced by discovering the political beliefs and associations of particular individuals in a nation of over one-hundred sixty million that the First Amendment forbade such inquiries. But he did not.

Instead, Warren noted that the House or Senate must set the boundaries of their investigative committees and that a vague authorizing resolution makes it more possible for the committee to deviate from the House's or Senate's will.[111] Turning to the resolution authorizing HUAC, in particular ("Rule 11"), Warren remarked, "[i]t would be difficult to imagine a less explicit authorizing resolution."[112] That lack of clarity frustrates the task of judicial review,[113] preventing the courts from "strik[ing] a balance between the public need for a particular interogation and the right of citizens to carry on their affairs free from unnecessary governmental interference."[114] But again Warren did not draw a salient conclusion from this: he did not say that, where Congress's interest in the information is not clear, inquiries into an individual's political beliefs and associations violate the First Amendment.

The reason why Warren did not draw any of these conclusions seems rather clear: an opinion that garners only four votes is not controlling. Minton and Reed were no longer on the Court, but the former's replacement by Justice Brennan was offset by Clark's shift to the dissent in *Watkins*.[115] Formerly, Clark had voted in favor of strict criminal due process protections for those accused of contempt of Congress,[116] but now rejected even Frankfurter's understanding of the *Watkins* decision,[117] having stated at conference that making prosecution in the courts too difficult "would throw these people into the fire" by causing Congress to try them before its own bars, where "the witness has no lawyer and no appeal."[118] While *Watkins* was ultimately decided six to one, Frankfurter made it clear that he joined only regarding criminal due process[119] and at conference suggested that he was

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[111] *Id.* at 201.

[112] *Id.* at 202.

[113] *Id.* at 204–5.

[114] *Id.* at 205–6.

[115] *Watkins*, 354 U.S. at 217 (Clark, J., dissenting).

[116] Quinn v. United States, 349 U.S. 154 (1955); Emspak v. United States, 349 U.S. 190 (1955); Bart v. United States, 349 U.S. 219 (1955); United States v. Rumely, 345 U.S. 41 (1953).

[117] *See Watkins*, 354 U.S. at 225–27 (Clark, J., dissenting) (discussing whether the pertinence of the subcommittee's question was clear enough for a refusal to answer to be proof of the requisite criminal intent).

[118] The Supreme Court in Conference (1940–1985), 299 (Dickson ed. 2001).; *cf.* Marshall v. Gordon, 243 U.S. 521, 545 (1917) (the exercise of Congress's implied power to punish contempt in order to coerce compliance (but not punish past behavior) is not subject to judicial review, except for "an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations.").

[119] *Id.* at 216–17 (Frankfurter, J., concurring).

averse to cabining Congress's investigative power.[120] Harlan's subsequent decision in *Barenblatt v. United States* shows that he thought HUAC's work important enough to overcome most First Amendment challenges.[121]

Yet if Warren could not get the votes for the conclusions flowing from the premises he laid out, then his inclusion of those premises at all becomes perplexing. As a practical matter, the precedential value of his statements depended upon five justices supporting them in a future case, not their presence on the pages of the *United States Reports*. To the extent that members of his majority disagreed with those statements, their likely effect was to antagonize justices upon whose votes he would have to rely. He had said nothing about the First Amendment in conference, instead noting that this was a good case to state the due process limits on Congress's power to punish through the judiciary.[122] Frankfurter's response was that "[w]e should not talk big in this field."[123]

Warren not only talked big in this case, but the manner in which he did so was certain to alienate Frankfurter and Harlan. He cited *Rumely* for the proposition that "the mere semblance of legislative purpose [will] not justify an inquiry in the face of the Bill of Rights,"[124] when Frankfurter had assiduously avoided reaching the constitutional issue.[125] When Warren said that a less explicit resolution than that authorizing HUAC was difficult to imagine, he telegraphed his doubts that there was any such thing as "Un-American" or a "single, solitary 'principle of the form of government as guaranteed by our Constitution.'"[126] Warren was laying the foundation for limiting Congress's investigative power; Frankfurter said that the only case in which Congress was held to have exceeded that power was flawed.[127] Warren not only lost his majority within two years, but so alienated his colleagues that they rejected challenges to McCarthyite investigations even where it was clear that the committees were out of control. A decade later, one commentator on HUAC concluded that "the Chief Justice was merely indulging himself."[128]

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120 Supreme Court in Conference, *supra* note 118, at 298–99.

121 *See* Barenblatt v. United States, 360 U.S. 109, 125–34 (1959).

122 Supreme Court in Conference, *supra* note 118, at 297.

123 *Id.* at 298.

124 *Watkins*, 354 U.S. at 198; *see also id.* at 197 n.31 (*Rumely* permits the First Amendment to be invoked against an overly broad congressional investigation); *id.* at 204–205 (*Rumely* requires a balancing test between Congress's interest in the information and the witness's First Amendment rights).

125 United States v. Rumely, 345 U.S. 41, 43–44 (1953).

126 *Watkins*, 354 U.S. at 202.

127 Supreme Court in Conference, *supra* note 118, at 298–99. The case Frankfurter referred to was Kilbourn v. Thompson, 103 U.S. 168 (1880).

128 Goodman, *supra* note 8, at 360.

V. The Reaction Against Warren

The broad statements in *Watkins* were not reflected in subsequent Supreme Court decisions. The Court decided two cases involving contempt of Congress in between that case and *Barenblatt v. United States* a mere two years later. In *Sacher v. United States*, the *Watkins* majority voted to overturn a conviction for refusing to answer a question that was not pertinent to a SSIS investigation.[129] In *Flaxer v. United States*, a unanimous Court overturned the conviction of a witness who had declared that he would not produce documents for SSIS: because the subcommittee had given him ten days in which to comply, his refusal the day of the hearing did not suffice for the criminal intent to refuse to produce the documents ten days later.[130] Both were technical rulings based on the protections of the criminal law.

One explanation for the Court's renewed incrementalism involves Congress's reaction to what was decried as Red Monday, the day on which *Watkins* and a series of other cases targeting McCarthyism were announced.[131] Senator William Jenner introduced a bill to limit the Supreme Court's appellate jurisdiction over subversive activities,[132] including "any case where there is drawn into question the validity of … any action or proceeding against a witness charged with contempt of Congress."[133] This provision was stripped from the bill by an amendment offered by Senator John Marshall Butler,[134] but the Judiciary Committee replaced it with an amendment to the contempt of Congress statute itself stating that a question would be deemed "pertinent" if (1) no objection was made at the hearing or (2) the question was ruled pertinent by the committee, with the presiding officer's ruling standing as the ruling of the body unless overruled.[135] Although the Jenner-Butler Bill made it out of committee, it was never taken up for a vote.[136]

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[129] Sacher v. United States, 356 U.S. 576, 577–78 (1958) (per curiam).

[130] Flaxer v. United States, 358 U.S. 147, 151 (1958).

[131] Horwitz, *supra* note 8, at 59, 64–65; Powe, *supra* note 10, at 127–34, 141–42.

[132] Ira Mickenberg, *Abusing the Exceptions and Regulations Clause: Legislative Attempts to Divest the Supreme Court of Appellate Jurisdiction*, 32 American U. L. Rev. 497, 503 (1983).

[133] S. 2646, 85th Cong. 1st Sess. (1957), *quoted in* Mickenberg, *supra* note 132, at 503 n.41.

[134] Powe, *supra* note 10, at 31; Mickenberg, *supra* note 132, at 504.

[135] S. Rep. No. 85-1586, at 5 (1958), *available at* http://congressional.proquest.com /congressional/docview/t47.d48.12062_s.rp.1586. The bill was originally going to be taken up by the Judiciary Committee based solely upon SSIS's findings, but the Judiciary Committee's chairman suggested that full hearings be conducted, and Senator Jenner's motion to table that suggestion failed by a single vote. Powe, *supra* note 10, at 102.

[136] Mickenberg, *supra* note 132, at 504–5. The motion to table the bill passed 49-41. Powe, *supra* note 10, at 132.

At any rate, Chief Justice Warren found himself in the dissent in *Barenblatt*.[137] Not much need be said about the majority opinion, other than that it affirmed what Frankfurter and Harlan liked about *Watkins* while emphatically rejecting what they disliked. *Watkins* did not hold that Rule 11 was impermissibly vague, Harlan wrote for the majority, but rather that the pertinence of a question had to be clear in order to sustain a conviction, and the pertinence of a question can be gleaned from sources other than the investigative committee's authorizing resolution.[138] *Watkins* was also distinguishable in that there the witness did not receive a satisfactory answer to his pertinence objection, while Barenblatt's reservation of his right to raise pertinence objections in general did not count as a particular objection to which the subcommittee had to respond at all.[139] Because of the threat posed by Communism, the Court continued, the First Amendment is not offended by compelling witnesses to disclose their political affiliations.[140]

Freed from the imperative to garner a majority, Black's dissent called a spade a spade.[141] HUAC's mandate was too vague, and as the pertinence of a question can come only from that mandate, no prosecution for failing to answer any question asked by any HUAC subcommittee could be sustained.[142] HUAC's activities were designed to curtail speech, and no balancing test could save such an unconstitutional legislative purpose.[143] The threat of Communism did not justify any departure from the First Amendment, since stifling debate is unnecessary to the preservation of the nation.[144] And as the real aim of the McCarthyite activities was to punish

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[137] Barenblatt v. United States, 360 U.S. 109, 134 (1959) (Black, J., dissenting).

[138] *Barenblatt*, 360 U.S. at 116–23 (majority opinion).

[139] *Id.* at 123–24. The Court also held that the questions put to Barenblatt were pertinent as a matter of law. *Id.* at 124–25. At the time, pertinence was a question of law. *See* Sinclair v. United States, 279 U.S. 263, 298–99 (1927). Two years later, however, the Court would treat pertinence as a question of fact that must be proven beyond a reasonable doubt, without expressly overruling *Sinclair*. Deutch v. United States, 367 U.S. 456, 469–71 (1961); *cf.* United States v. Gaudin, 515 U.S. 506, 519–22 (1995) (pertinence is a question of fact, expressly overruling *Sinclair*).

[140] *Barenblatt*, 360 U.S. at 125–34. The Court had made the clear and present danger test into a balance of harm versus freedom (thus eliminating the need for the danger to be imminent) in *Dennis v. United States*. 341 U.S. 494, 510 (1951); *see id.* at 524–26 (Frankfurter, J., concurring); Horwitz, *supra* note 8, at 58. *See also* Watkins v. United States, 354 U.S. 178, 205–6 (1957) (courts must know Congress's interest in order to "strike a balance between the public need for a particular interogation and the right of citizens to carry on their affairs free from unnecessary governmental interference").

[141] *Cf. Barenblatt*, 360 U.S. at 134 (Black, J., dissenting). Curiously, Brennan did not join Black's dissent, instead writing separately to note his agreement with Black that HUAC's aim was solely to punish individuals. *Id.* at 166 (Brennan, J., dissenting).

[142] *Id.* at 137–40 (Black, J., dissenting).

[143] *Id.* at 141–42 (Black, J., dissenting).

[144] *Id.* at 145–46 (Black, J., dissenting).

individuals for their unorthodox beliefs, HUAC impermissibly encroached upon the exclusive preserve of the judiciary.[145]

What is remarkable is not so much the Court's repudiation of where Warren wanted to go in *Watkins*. He had lacked the votes to write something along the lines of Black's dissent from *Barenblatt*, but had tried to lay the legal foundation for it anyway. What is instead remarkable is how far the *Barenblatt* majority was willing to go in subsequent cases in order to avoid acknowledging any merit whatsoever to the concerns expressed in *Watkins*.

Arthur McPhaul had been convicted of contempt of Congress in 1954 for a willful failure to comply with a subpoena to produce the records of the Civil Rights Congress.[146] He refused to say whether those documents were in his possession or control, citing the Fifth Amendment,[147] he presented no evidence at trial,[148] and the only evidence suggesting he had any connection to the Civil Rights Congress was not submitted to the jury.[149] When the Court upheld his conviction in 1960, it inscrutably argued that *Bryan* (a case about accidentally waiving defenses)[150] required that McPhaul answer the subcommittee's questions about whether he was able to comply with its subpoena.[151] The only thing the Court said to McPhaul's claim that he could not answer without incriminating himself was that "there is no merit in Petitioner's argument."[152] His refusal to answer these questions, therefore, provided the prima facie case for willful refusal to comply with a subpoena, thus shifting the burden of proof to him to show that he could not comply.[153]

It was of no avail for Justice Douglas to point out in his dissent that the burden of proof can shift to a defendant only after the government has shown *at trial* some connection between the witness and the subpoenaed documents.[154] His plea that, "when it comes to criminal prosecutions, the Government must turn square corners"[155] echoed the Court's earlier cases protecting the due process rights even of Communists.[156] Douglas's argu-

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145 *Id.* at 154–63 (Black, J., dissenting).

146 McPhaul v. United States, 364 U.S. 372, 373–76 (1960). The events transpired in 1952, but he was not indicted until 1954.

147 *Id.* at 375.

148 *Id.* at 377.

149 *Id.* at 377 n.4.

150 United States v. Bryan, 339 U.S. 323, 333–34 (1946).

151 *McPhaul*, 364 U.S. at 379.

152 *Id.* at 380.

153 *Id.* at 379–80.

154 *McPhaul*, 364 U.S. at 384–87 (Douglas, J., dissenting).

155 *Id.* at 387 (Douglas, J., dissenting).

156 *See* Quinn v. United States, 349 U.S. 155, 165 (1955); Emspak v. United States, 349 U.S. 190, 202 (1955); Bart v. United States, 349 U.S. 219, 223 (1955); Christoffel v. United States, 338 U.S. 84, 89 (1949). One of the questions that Emspak had refused to answer was whether he was a member of the Civil Rights Congress. *Emspak*, 349

ment did not mention, let alone rely on, the First Amendment or the impermissible vagueness of Rule 11. Frankfurter and Harlan nevertheless voted with the rest of the *Barenblatt* majority to uphold the conviction.

Even more shocking was the Court's sustaining the convictions of Frank Wilkinson and Carl Braden the following year.[157] When a HUAC subcommittee was convened in Atlanta in 1958, Wilkinson travelled there to protest its activities.[158] He was immediately subpoenaed and asked if he was a Communist.[159] Braden had forwarded two petitions to Congress, one opposing anti-sedition laws on the grounds that they were being used to target civil rights activists, the other accusing HUAC of targeting liberal and independent thinkers rather than Communists; the HUAC subcommittee summoned him to testify.[160] He was asked if he was a Communist "the instant you affixed your signature to that letter," referring to the first petition.[161] Both men refused to answer, citing the First Amendment, and were convicted of contempt.[162]

Whatever political inclinations both men might have had, it could not have been any clearer that they were targeted for their opposition to McCarthyism, not any activities related to Communist sabotage, espionage, or infiltration of core industries.[163] The Court nevertheless refused to intervene. "These circumstances … *do not necessarily lead to the conclusion* that the subcommittee's intent was personal persecution of the petitioner," it said in *Wilkinson*.[164] If Wilkinson's opposition to HUAC was based on his being a Communist, HUAC was entitled to know that.[165] And given HUAC's mandate, "Are you a Communist?" is always a pertinent question.[166] Of Braden's assertion that he was targeted solely for engaging in protected political advocacy, the Court said only that the subcommittee believed he was

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U.S. at 193. Five months after the Court reversed Emspak's conviction, the Subversive Activities Control Board labeled the Civil Rights Congress a Communist front organization. *See* Patterson v. Subversive Activities Control Bd., 322 F.2d 395, 396 (D.C. Cir. 1963).

157 Wilkinson v. United States, 365 U.S. 399 (1961); Braden v. United States, 365 U.S. 431 (1961).

158 *See Wilkinson*, 365 U.S. at 411.

159 *Id.* at 416 (Black, J., dissenting).

160 *Braden*, 365 U.S. at 439 (Black, J., dissenting).

161 *Id.* at 434 (majority opinion).

162 *Wilkinson*, 365 U.S. at 404–6; *Braden*, 365 U.S. at 432.

163 *Wilkinson*, 365 U.S. at 417–18 (Black, J., dissenting); *id.* at 425 (Douglas, J., dissenting); *id.* at 429–30 (Brennan, J., dissenting); *Braden*, 365 U.S. at 450–51, 455–56 (Douglas, J., dissenting); Powe, *supra* note 10, at 147.

164 *Wilkinson*, 365 U.S. at 411 (majority opinion) (emphasis added).

165 *Id.* at 414. The majority in *Wilkinson* suggested that there was some evidence that the petitioner was a Communist, but the only specifics provided involved HUAC's identification of anyone opposed to its activities as a Communist. *See id.* at 411–13.

166 *Id.* at 413.

a Communist and was investigating appropriately.[167] In effect, a criminal defendant would have to prove HUAC's malicious intent beyond a doubt, and not even just beyond a reasonable doubt, in order to avoid conviction for contempt of Congress.

In these opinions, the Court did not simply refuse to declare McCarthyite investigative committees to be a violation of the First Amendment, as Black had done in his *Barenblatt* dissent and Warren had stopped just short of doing in *Watkins*. It shielded those committees from any First Amendment scrutiny whatsoever. And it did not do so on habeas corpus petitions from those imprisoned following trial at the bar of the House or Senate, but in sustaining criminal convictions before Article III courts. Justices Clark, Frankfurter, Harlan, Whittaker, and Stewart had rejected the relevance of the First Amendment entirely. And as *McPhaul* shows, they had grown impatient with criminal due process, as well.

A fourth case suggests that Justice Stewart, at least, did not vote to uphold those convictions out of fear of McCarthyism (and given Senator Jenner's retirement[168] and the movement's increasing irrelevance,[169] it is unclear how much this fear might have affected Justices Frankfurter and Harlan at that point, either). Bernhard Deutch was a college student who told a HUAC subcommittee investigating Communist infiltration of Albany labor unions about his own Marxist dabblings at Cornell.[170] When he refused to name other Communists at Cornell, however, he was indicted and convicted for contempt of Congress.[171] Like Watkins before him, he had done the "honest" thing, confessing his own acts but refusing to be an informer.[172]

Here, the same Stewart who had authored the contemptuously cynical opinions in *Wilkinson* and *Braden* and joined Whittaker's opinion in *McPhaul* wrote an opinion joined by Warren, Douglas, Black, and Brennan reversing Deutch's conviction on a slender technicality. With nary a word about *Bryan*,[173] Stewart brushed aside the point that Deutch had not raised an objection to the subcommittee's inquiry's pertinence at the hearing.[174] Ignoring (without addressing or overturning) the still-operative rule that

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[167] *Braden*, 365 U.S. at 435.

[168] His final term ended January 3, 1959. *Jenner, William Ezra*, Biographical Dictionary of the United States Congress, http://bioguide.congress.gov/scripts/biodisplay.pl?index=J000093.

[169] *See* Goodman, *supra* note 8, at 399–402.

[170] Deutch v. United States, 367 U.S. 456, 459–61 (1961).

[171] *Id.* at 461.

[172] *Cf.* Supreme Court in Conference, *supra* note 118, at 297 (Warren's description of Watkins).

[173] *Cf. Deutch*, 367 U.S. at 457–58 & n.2 ("we brought the case here because of doubt as to the validity of the conviction in the light of our previous decisions," listing *Bryan* as one of thirteen such decisions).

[174] *Id.* at 469. *Contrast id.* at 484–85 (Whittaker, J., dissenting) (failure to raise objection is decisive under *Bryan*).

pertinence was a question of law,[175] and his own pronouncement on the pertinence of a question as a matter of law in *Wilkinson*,[176] Stewart wrote that, objection or no, the government still had the burden of proving pertinence at trial beyond a reasonable doubt—and to prove not only that the question was pertinent, but that its pertinence had been brought home to the witness such that his refusal to answer evinced criminal intent.[177] As Ithaca is not in the Albany area, he continued, the government failed to prove that a question about Cornell's Marxist faculty and students was pertinent to Albany's labor unions.[178] Justice Stewart, born in Michigan and having practiced law in Ohio,[179] apparently did not accept Justice Harlan's suggestion that "in common usage, at least among New Yorkers, 'Albany area' would be regarded as aptly descriptive of 'upstate' New York."[180] So it cannot be said that the law compelled Justice Stewart to take the position he did in *Deutch*. But that makes *Wilkinson* and *Braden* seem all the more thymotic.

VI. Ending McCarthyite Investigations Through Formalism

Chief Justice Warren did not find himself in the minority on any case concerning McCarthyite congressional investigations after 1961.[181] *Deutch* represented the last case on the issue in which Justices Frankfurter and Whittaker participated. The latter was replaced by Justice Byron White, but the former's successor was Justice Arthur Goldberg. Aside from *Yellin v. United States*,[182] Warren now had the support of Justice Stewart. Indeed, not counting *Yellin*, Stewart was the only justice to vote with the majority on every case involving contempt of Congress between 1958 and 1966,

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[175] Sinclair v. United States, 279 U.S. 263, 298–99 (1929) The Court would later characterize *Deutch* as "contradict[ing the] assumption" on which *Sinclair* was founded, before making it clear that *Sinclair* was no longer good law on this matter. United States v. Gaudin, 515 U.S. 506, 520 (1995).

[176] Wilkinson v. United States, 365 U.S. 399, 413 (1961).

[177] *Deutch*, 367 U.S. at 467–68, 469–70.

[178] *Id.* at 470–71.

[179] *Stewart, Potter*, Biographical Directory of Federal Judges, http://www.fjc.gov/servlet/nGetInfo?jid=2294.

[180] *Id.* at 474 (Harlan, J. dissenting). Justice Harlan's entire legal career had been centered in Manhattan until his elevation to the Court. *Harlan, John Marshall*, Biographical Directory of Federal Judges, http://www.fjc.gov/servlet/nGetInfo?jid=979.

[181] The one contempt of Congress case in which he found himself in the minority, Hutcheson v. United States, 369 U.S. 599 (1962), was unrelated to McCarthyism.

[182] Yellin v. United States, 374 U.S. 109 (1963).

when the last major Warren-era case was decided.[183] The cases in which Stewart voted with Warren focused on criminal procedure, but as demonstrated by *McPhaul* and *Deutch*, Stewart was perfectly willing to force the rules of criminal procedure to bend to his desired result.

The Court next turned to six cases dating back to 1955 involving both HUAC and SSIS. In *Russell v. United States*, the Court reversed all six convictions since the indictments had failed to state "the question under congressional committee inquiry as found by the grand jury," thus preventing the courts from discerning whether the questions the witnesses refused to answer were pertinent and whether the trial jury convicted on the same theory upon which the grand jury had indicted.[184] Never mind that the Court had never required an indictment to include the subject under inquiry in the previous 105 years of the contempt of Congress statute,[185] or that the courts were liberalizing pleading standards in criminal indictments, not enforcing technicalities.[186] Even a defendant who failed to raise the issue of the indictment with the Court of Appeals or make any argument concerning it to the Supreme Court could have his conviction overturned as a matter of plain error.[187] Justice Stewart's majority opinion in *Russell* was joined by Warren, Douglas, Black, and Brennan.[188]

Douglas wrote separately to again fly the flag of free expression and association: "[w]hile I join the opinion of the Court, I think it is desirable to point out that in a majority of the six cases that we dispose of today no indictment, however drawn, could in my view be sustained under the requirements of the First Amendment."[189] The committees had expressly targeted the *New York Times*, and there could be no valid legislative purpose where Congress was powerless to legislate (such as a restriction on the freedom of the press).[190]

What is surprising is that no one took up that flag the following year in *Yellin*.[191] In that case, the Chief Justice did not enjoy Stewart's support (or that of Clark, Harlan, or White). Justice Goldberg, however, provided the crucial fifth vote. Yet the majority opinion, admitting that the Court had granted certiorari precisely because of the importance of the constitutional issues, decided the case on nearly inscrutable technical grounds.[192] Edward Yellin did not want to be publicly embarrassed by his testimony, so he telegraphed HUAC prior to appearing, asking that its subcommittee enter into

183 Gojack v. United States, 384 U.S. 702 (1966).
184 Russell v. United States, 369 U.S. 749, 766, 771–72 (1962).
185 *See id.* at 779 (Clark, J., dissenting).
186 *See id.* at 781–85 (Harlan, J., dissenting).
187 *See* Silber v. United States, 370 U.S. 717, 717–18 (1962) (per curiam).
188 *Cf. Russell*, 369 U.S. at 751 (majority opinion).
189 *Id.* at 773 (Douglas, J., concurring).
190 *Id.* at 775–77 (Douglas, J., concurring).
191 Yellin v. United States, 374 U.S. 109 (1963).
192 *See id.* at 111 & n.1; *see also id.* at 135 n.9 (White, J., dissenting) (describing Yellin's other claims in more detail).

executive session to receive his testimony.[193] HUAC's Rule IV required an executive session if a majority of the committee or subcommittee believed, among other things, that "a public hearing might … unjustly injure [the witness's] reputation."[194] But HUAC's Staff Director—rather than HUAC itself—denied Yellin's request.[195] On this slender reed, Warren built an argument that Rule IV created an individual right to have the committee or subcommittee consider a witness's request for executive session[196] and that the only means of effectuating this right was to refuse to testify when it was violated.[197]

Warren seems to have had in mind the practice of asking to be held in contempt in order to test the validity of a court order. Yellin had not, however, refused to testify on the grounds of not having had his request for executive session considered, or even mentioned the issue of executive session at all.[198]

Given that Warren could get five votes for his tortured logic in *Yellin*, one has to wonder why he could not have gotten five votes for the much more straight-forward propositions that HUAC's nebulous mandate made the crime of failing to answer a "pertinent" question unconstitutionally vague and that inquiries into the political beliefs and associations of private citizens can serve no valid legislative purpose (both as suppressing the exercise of free expression and as an intrusion into the realm of the judiciary, viz. punishment). Warren, Douglas, Black, and Brennan had signed on to both propositions in their dissents from *Barenblatt*.[199] They had reiterated their concerns in their dissents from *Braden*[200] and *Wilkinson*.[201] Goldberg was certainly not afraid to strike down aspects of McCarthyism on First Amendment grounds,[202] and he had told his wife that he intended to be an activist justice.[203]

One possibility for why the Court did not tackle the First Amendment issue in *Yellin* was that one of the questions Yellin had refused to answer involved his residence prior to 1957.[204] Since his sentences were to run concurrently, his refusal to answer a single pertinent question would uphold

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193 *Id.* at 111–12 (majority opinion).

194 *Id.* at 114–15 (quoting HUAC Rule IV).

195 *Id.* at 112.

196 *Id.* at 115–18.

197 *Id.* at 122.

198 *Cf. id.* at 135, 139–40 (White, J., dissenting).

199 Barenblatt v. United States, 360 U.S. 109, 139–40, 141–53 (1959) (Black, J., dissenting); *id.* at 166 (Brennan, J., dissenting).

200 Braden v. United States, 365 U.S. 431, 442–43 (1961) (Black, J., dissenting); *id.* at 449–50 (Douglas, J., dissenting).

201 Wilkinson v. United States, 365 U.S. 399, 426–28 (1961) (Douglas, J., dissenting).

202 *See*, *e.g.*, Aptheker v. Secretary of State, 378 U.S. 500, 514 (1964); Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 557–58 (1963).

203 Powe, *supra* note 10, at 211.

204 *Yellin*, 374 U.S. at 149 (White, J., dissenting).

the conviction,[205] a fact that had condemned witnesses in the past.[206] Attacking the subcommittee's power to ask him any questions at all (because of its failure to follow its own procedures regarding an executive session) would presumably get around this difficulty.

But that explanation cannot suffice regarding the Court's limited holding in *Gojack v. United States*.[207] Gojack was one of the six defendants whose convictions had been reversed in *Russell*, and he had since been re-indicted and re-convicted.[208] The American Civil Liberties Union asked the Court to overrule *Barenblatt*, noting that the threat of Communism had diminished and could no longer be used to justify curtailing free expression.[209] In a unanimous opinion by Justice Abe Fortas, the Court nevertheless expressly refused to revisit *Barenblatt*, instead finding that the HUAC subcommittee's subject of inquiry as stated in Gojack's indictment had not been expressly authorized by HUAC itself, and so Gojack could not be guilty of contempt for refusing to answer questions put to him by that subcommittee.[210] The Court did not touch the question of whether HUAC could have authorized the subcommittee's line of inquiry, except to note that *Rumely* prevented HUAC from doing so retroactively.[211] Black alone wrote separately to say that he would take the opportunity to hold "that the House Un-American Activities Committee's inquiries here amounted to an unconstitutional encroachment on the judicial power for reasons stated in his dissent in *Barenblatt v. United States*."[212]

It is unlikely that Fortas was unwilling as a matter of principle to provide the fifth vote to overrule *Barenblatt* on the basis of that case's dissenting opinions. While in private practice, when Senator McCarthy had not yet been censured, Fortas had written, "the [congressional] hearing has become a weapon of persecution, a useful tool to the demagogue, a device for the glory of the prosecutor and of shame for the accused."[213] He had represented those dragged before the McCarthyite congressional committees.[214] He re-iterated the holding in *Watkins* that "there is no congressional

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[205] *Id.* at 148–49 (majority opinion).

[206] *E.g.*, Barenblatt v. United States, 360 U.S. 109, 115 (1959).

[207] Gojack v. United States, 384 U.S. 702 (1966).

[208] *Id.* at 704–5. Gojack was a union leader rather than associated with the *New York Times*, however. *See* Goodman, *supra* note 8, at 368.

[209] Goodman, *supra* note 8, at 369.

[210] *Gojack*, 384 U.S. at 713–15.

[211] *Id.* at 715 & n.12.

[212] *Id.* at 716 (Black, J., concurring). Walter Goodman is therefore incorrect to characterize *Gojack* as a reprise of *Watkins*: while both were decided on technical grounds, *Gojack* lacked the earlier decision's fiery dicta and made no stand for free expression. *Cf.* Goodman, *supra* note 8 at 369.

[213] Quoted in Goodman, *supra* note 8, at 489.

[214] Goodman, *supra* note 8, at 304; Powe, *supra* note 10, at 81; Laura Kalman, Abe Fortas: A Biography 144 (1990) ("He specialized in congressional committees investigating 'un-American' activities.").

power to investigate merely for the sake of exposure or punishment, particularly in the First Amendment area," albeit in a footnote.[215]

We must look elsewhere to explain the Court's refusal to drive a stake through HUAC's heart. Unfortunately, the Court's conference notes for *Gojack* have not been published (nor those for any case discussed in this paper, save *Watkins*).[216]

Attacking HUAC would not have been beating a dead horse by 1966. True, it had entered what Walter Goodman was to call its "lean years,"[217] but it was still around. The peace movement and the lack of success in Vietnam against which it was directed were being passed off as the work of Communist infiltrators.[218] HUAC could always turn its gaze upon the civil rights movement, just as it had shifted its focus from fascists to Communists.[219] J. Edgar Hoover, HUAC's longtime ally,[220] was still head of the Federal Bureau of Investigations.[221] That is, HUAC might have staged a revival.

Thus, while an outright repudiation of the entire McCarthyite congressional investigatory system would not have come too late, Warren may have held off in order to obtain a unanimous opinion to be used in the future, should the need arise. Regardless of the actual value of unanimous opinions,[222] Warren himself valued them highly.[223] In *Gojack*, Warren had an opinion in which Justices Clark, Harlan, Stewart, and White (plus the liberal wing of the Court) agreed that if HUAC was going ruin lives, it had to gets its own hands dirty. No longer could it dispatch a subcommittee to a hotel conference room in Atlanta or Detroit with an open-ended mandate, at least if it wanted the judiciary to condemn recusants.[224] The Court did not have to reach the question—although it noted its existence—of whether a subcommittee's own wide-ranging statements of its purpose made any prosecutions for contempt of Congress void for vagueness.[225]

If this is the reason why *Gojack* does not read like the *Barenblatt*, *McPhaul*, *Wilkinson*, and *Braden* dissents, it means that *Gojack* represented a real alteration in Warren's strategic thinking about congressional investigative committees, McCarthyite or otherwise. The decision would

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[215] *Gojack*, 384 U.S. at 711 n.9 (majority opinion).

[216] *Cf.* Supreme Court in Conference, *supra* note 118, at 297–300.

[217] *See* Goodman, *supra* note 8 at 435.

[218] *Id.* at 482–83.

[219] *Id.* at 484–86.

[220] *Id.* at 416–17; *see* Horwitz, *supra* note 8, at 65–66.

[221] *Cf. John Edgar Hoover*, Federal Bureau of Investigations, http://www.fbi.gov/about-us/history/directors/hoover (Hoover served until his death in 1972).

[222] *Cf.* Powe, *supra* note 10, at 44–46; Cass R. Sunstein*, Unanimity and Disagreement on the Supreme Court*, 100 Cornell L. Rev. 769 (2015).

[223] *Cf.* Horwitz, *supra* note 8, at 23–25 (discussing Brown v. Bd. of Educ. of Topeka, Kansas, 347 U.S. 483 (1953)).

[224] Gojack v. United States, 384 U.S. 702, 708–9 (1966).

[225] *Id.* at 709 n.7.

mark a return, not to *Watkins* and its grand pronouncements,[226] but to the early days of *Quinn*, *Emspak*, and *Bart*, when the Court demanded that Congress cross every *t* and dot every *i*. It would be a return to the limits that the Vinson Court was willing to enforce against Congress,[227] in one case even regarding Communists.[228] Congress may not investigate in order to right individual wrongs, only to inform itself so that it can exercise its functions intelligently.[229] Each house can use its own bar to coerce recalcitrant witnesses,[230] but if it wants to utilize the judiciary's power to punish, it must play by the judiciary's rigid, formalistic rules.[231] That was the Warren Court's final word on the subject of congressional investigative committees.

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[226] *Contrast* Goodman, *supra* note 8, at 369.

[227] *See* United States v. Rumely, 345 U.S. 41 (1953).

[228] *Compare* Christoffel v. United States, 338 U.S. 84 (1949) *with* United States v. Bryan, 339 U.S. 323 (1950) *and* United States v. Fleischman, 339 U.S. 349 (1950).

[229] Kilbourn v. Thompson, 103 U.S. 168, 192–93 (1880).

[230] Anderson v. Dunn, 19 U.S. 204, 230–31 (1821). Some cases had even suggested that Congress could not punish at all, only use coercion to obtain compliance. *E.g.*, Marshall v. Gordon, 243 U.S. 521, 542–45 (1917); *Anderson*, 19 U.S. at 230–31; *see also* Wilkinson v. United States, 365 U.S. 399, 430 (1961) (Brennan, J., dissenting) (because there was no reasonable prospect that Wilkinson would answer the subcommittee's questions, its purpose in imprisoning him could not have been to facilitate fact-gathering). When one witness burned the records rather than comply with a subpoena, however, the Court said those earlier decisions were dicta and permitted retributive punishment. Jurney v. MacCracken, 294 U.S. 125, 148–49 (1935). That case, however, noted the possibility of judicial review as enervating the policy reason for denying Congress the power to punish. *Jurney*, 294 U.S. at 150.

[231] *See* Gojack v. United States, 384 U.S. 702, 714 (1966); Russell v. United States, 369 U.S. 749, 759–60 (1962); Deutch v. United States, 367 U.S. 456, 471 (1961); Sacher v. United States, 356 U.S. 756, 757 (1958); Watkins v. United States, 354 U.S. 178, 207–8 (1957); *see also* McPhaul v. Unites States, 364 U.S. 372, 387 (1960) (Douglas, J., dissenting); United States v. Fleischman, 339 U.S. 349, 380 (Frankfurter, J., dissenting); *cf. Christoffel*, 338 U.S. at 89.

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The Origins and Development of Judicial Recusal in Texas

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ABSTRACT

In 21st century Texas, a judge's decision to recuse from a case is based on a complex set of norms, codes and procedures intended to promote impartiality. For most of the state's history, however, the sole ground for the removal of a judge from a case was not recusal for bias but disqualification based on rigid conditions set out in the Texas Constitution. This article examines the foundations and emergence of the modern concept of judicial recusal in Texas with the intent to illustrate a shift from rigid constitutional grounds to a more fluid approach based on judicial interpretation of a code of conduct. The author concludes that while Texas disqualification and recusal jurisprudence is conservative and restrained, it remains to be seen whether this restraint can continue unchanged in a post-Caperton era. The Caperton probability of bias standard has become part of the dialogue on recusal and disqualification in Texas, but Caperton-based challenges are unlikely to prevail in the near future because many members of the bench and bar share the belief that the state's judicial campaign contribution restrictions and recusal jurisprudence create a firewall against violations of the Due Process Clause. The risk, however, is that continued resistance to change may further erode public confidence in existing ethical safeguards and fall short of assuaging concerns that wealthy donors continue to exercise disproportionate influence on the judiciary.

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Judicial recusal—a judge's withdrawal from a legal case because of personal bias or prejudice—is a mid-twentieth century development in Texas jurisprudence. In twenty-first century Texas, a judge's decision to recuse from a case is based on a complex set of norms, codes, and procedures intended to promote impartiality. For most of the state's history, however, the sole ground for the removal of a judge from a case was not recusal for bias but disqualification by reference to the conditions set out in the Texas Constitution. Although the two terms "disqualification" and "recusal" are often used interchangeably in Texas, the two concepts are differentiated because the legal authority and grounds for each are fundamentally different. If disqualified from a case on constitutional grounds, a judge does not have jurisdiction in the case and any ruling or decree made has no effect.[1] Recusal from a case, on the other hand, occurs voluntarily if the judge's impartiality might reasonably be questioned. [2] Refusal to recuse results in the transfer of the case to another court or assignment of another judge to the case.[3]This article examines the foundations and the emergence of the modern concept of judicial recusal in Texas. It begins with an historical examination of disqualification rulings of the Texas Supreme Court and lower appellate courts in order to understand early foundational thinking about the circumstances under which a judge should not hear a case, but my primary interest here is the emergence of the body of rules and norms of behavior governing judicial recusal that arose in the late twentieth century. I hope to illustrate a shift from rigid constitutional grounds to a more fluid modern approach based on judicial interpretation of a code of conduct. Of course, the body of case law dealing with disqualification as well as recusal is substantial. A complete treatment is beyond the scope of a single article. The focus here will be on those rulings that have had a major precedential impact on the origins and development of the modern concept of recusal.

I. Constitutional and Common Law Origins

In nineteenth century Texas, the grounds for the removal of a judge from a case were pecuniary interest and consanguinity[4] based on the Texas Constitution and the common law. The 1836 Constitution adopted by the Republic of Texas reflected the old English common law rule that the only basis for disqualification of a judge was direct pecuniary interest—that is,

1 Art. V, § 11, of the Constitution of Texas.
2 Rule 18b of the Tex. R. Civ. P.
3 See http://www.txcourts.gov/rules-forms/rules-standards.aspx.
4 The degree of affinity to parties in a lawsuit.

financial interest in the outcome of the case.[5] There is no evidence that judicial bias as a ground for mandatory or self-disqualification was adopted by any court or governing body at that time. The standard of the time followed Coke's axiom that "no man shall be a judge in his own case,"[6] but rejected the idea that "bias" as a state of mind in contrast to pecuniary interest would disqualify a judge. Also controlling was Blackstone's view that a judge cannot be challenged or disqualified for the possibility of bias, only "interest."[7] The pecuniary interest standard was applied not only where the outcome of a case directly affected the judge's purse but also where a judge might collect a monetary fine that he had the power to impose or might benefit indirectly, for example, as a taxpayer. The problem of course then was that if a judge could potentially be disqualified on the grounds of being a taxpayer, many lawsuits could not be decided especially where there were few (or only one) judges in a sparsely populated area. Judicial disqualification in the Republic of Texas, however, was straightforward: judges were disqualified for financial interest but not for bias.

When Texas became a state in 1845, a new Constitution stated: "No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him by affinity or consanguinity, within such degrees as may be prescribed by law, or where he shall have been counsel in the cause."[8] This language also appeared in the Constitutions of 1861, 1866, and 1869 and is repeated in the present Constitution, which was adopted in 1876. For more than a century, Texas courts held that the state's constitution provided the *only* necessary guidance for removing a judge from a case. The few appellate court opinions from this period show that any attempt to diverge from this rule and thus remove or disqualify a judge for any other reason was generally rejected; the language of the constitution on this matter was interpreted narrowly.

In *Taylor v. Williams*[9] (1863), the Texas Supreme Court rejected efforts to remove a judge solely on the grounds that before becoming a sitting judge, he had been counsel in the case. The case arose when a disputed title to land was litigated before a judge who had appeared as counsel in similar cases dealing with the same title some years earlier. The Court recognized as settled under the common law that the slightest pecuniary interest in a cause would result in the judge's disqualification. However, nothing in the common law prevented a judge from hearing an appeal of a decision made while sitting as a trial judge or even serving as counsel.[10] The judge's "professional connection" with the case, by virtue of the fact that he was "counsel in the cause," would only apply if the judge stood to gain financially. *Taylor v Williams* is important because it rejected the attempt to "creat[e]

5 John P. Frank *Disqualification of Judges,* 56 Yale L. J. 609–10 (1947).

6 *See* Sir Edward Coke, 1 Institutes of the Laws of England, 141a (19th ed. 1832).

7 William Blackstone, 3 Commentaries on the Laws of England 361.

8 Tex. Const. § 19 (1845).

9 Taylor v. Williams, 26 Tex. 583 (1863).

10 *Id*. at 586.

in the mind of the judge a bias, prejudice or partiality" as a ground for disqualification unrelated to that found in the constitution.[11] In a classic statement of judicial restraint, the Texas Supreme Court wrote:

> [W]e cannot undertake to say that his professional connection with a similar cause or one involving the same questions shall have that effect. If we depart from the plain language of the constitution [as grounds for disqualification], we shall be left without a rule for our guidance, and shall countenance a laxity of construction that *may prove both dangerous and inconvenient*." [12]

In *Slaven v. Wheeler* (1882),[13] the Texas Supreme Court ruled that Texas Constitution's provision that no judge shall sit in any case where he has been counsel included instances where the judge, acting as an attorney, gave advice about an issue in a dispute more than 10 years before it ripened into a lawsuit even though, as an attorney, he had not charged his client for the advice. The fact that he had once been consulted professionally as counsel barred him from sitting. The case originated when Elizabeth Slaven sued her husband for selling their property without her knowledge. During the trial, Mrs. Slaven sought to disqualify the presiding judge on the grounds that he had served as her counsel in the case 10 years earlier. On appeal, the Texas Supreme Court held that even though a decade had passed, the attorney–client relationship had continued because Mrs. Slaven had never terminated the relationship. For this reason, the judge was disqualified under the Texas Constitution and the judgment of the lower court was reversed. Justice Watts, writing for the court, ruled that the conclusion in *Slaven* was not at variance with *Taylor v. Williams* because in the latter case, the judge had not been professionally connected as counsel with the parties to the suit.[14]

The Texas Supreme Court even refused to disqualify a judge whose property had been stolen by the defendant tried before him. Ross Davis was indicted in 1875 for stealing 10 fence posts from a Judge Claiborne. The value of the fence posts was 2 dollars and 50 cents. Counsel for the defendant petitioned to disqualify Judge Claiborne from sitting in the case. Both parties agreed and the district attorney selected a local lawyer to be sworn in as a special judge. The trial proceeded and Davis was convicted. Davis appealed on the grounds that the special judge did not have authority to try the case. In *Davis v. State* (1876), [15]the Texas Supreme Court ruled against Davis stating that the Texas Constitution prescribed for the selection of a special judge when a presiding judge was disqualified.[16] However,

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[11] *Id.*
[12] *Id.* at 586-87.
[13] 58 Tex. 23 (1882).
[14] *Id*. at 26.
[15] 44 Tex. 523 (1876).
[16] Tex. Const. art. V § 11 (1869).

the Court concluded that it had not been necessary to disqualify Judge Claiborne. The judge might well have been angry with Davis for stealing his fence posts and have wanted to see him punished but was not constitutionally disqualified. It had not been shown that the judge was "interested" because he was neither a party nor liable to suffer a loss or gain a profit from the outcome.[17] Accordingly, there was no need to appoint a special judge, the judgment against Davis was reversed and the case remanded.[18]

In *Dailey v. State* (1900), the Texas Supreme Court refused to disqualify a judge from hearing a case against a woman for keeping a "disorderly house," or brothel, even though the same judge belonged to an organization of local judges who met regularly to discuss closing down disorderly houses where prostitution and gaming took place.[19]

In 1918, the Court of Criminal Appeals relied on *Davis* when it ruled that evidence of a judge's prejudice against the accused did not constitute grounds for disqualification. In *Berry v. State*,[20] the court rejected an effort to remove a judge because "he … had expressed his prejudice against the appellant" in an appeal from a conviction for the unlawful sale of liquor. The Court argued that the constitution alone set out the circumstances under which a judge should be disqualified. While some states had statutes requiring disqualification on the ground of prejudice, "[o]ur laws appear to proceed on the theory that prejudice against an accused does not disqualify the judge from trying the case…"[21] The logic was that any prejudice that the judge might have had toward the defendant was offset set by the fact that defendant's rights were still fully protected by the constitutional right to trial by an impartial jury and the right to appeal—a view that still influences judicial thinking on recusal to this day. The justices in *Berry* again rejected any considerations or evidence set out in a motion for disqualification beyond those specific and exclusive conditions covered by the constitutional provisions for removal.

That is not to say that early efforts to disqualify a judge were entirely without success. In *Nalle v. City of Austin* (1863), the Supreme Court ruled that a judge who presided in a lawsuit seeking an injunction to block an assessment of property taxes in the City of Austin was properly disqualified because the judge was a taxpayer in Austin and, therefore, had a direct pecuniary interest in the outcome of the case.[22] This ruling deviated from cases where the common law rule of "necessity" required the judge to sit in a case involving a taxpayers suit even though the judge as a taxpayer would stand to benefit financial from the court's ruling.[23] If a taxpayer judge could

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[17] *Davis*, 44 Tex. at 524.

[18] *Id*. at 525.

[19] Dailey v. State, 55 S.W. 821 (Tex. Crim. App. 1900).

[20] Berry v. State, 203 S.W. 901, 902-03 (Tex. Crim. App. 1918).

[21] *Id*. at 903.

[22] Nalle v. City of Austin, 22 S.W. 668 (Tex. 1893).

[23] BLACKSTONE *supra* note 8. *See also* Frederick Pollock, First Book of Jurisprudence for Students of the Common Law 270 (6th ed. 1929).

potentially be disqualified on the grounds of pecuniary interest, then many lawsuits could not be decided. The rule of necessity holds that when no substitute judge is available, the sitting judge should not decline to hear case. This rule was often invoked in rural areas where no substitute judge could be found. Even if the judge wished to be disqualified, appellate courts often ruled that the judge was required to sit in the case even in light of a potential bias or conflict of interest.[24]

The doctrines of consanguinity and affinity[25] as they applied to disqualification refer to the degree of relationship between the judge and a party in a suit. The degree of consanguinity is based on the number of generations by which they are separated. Parents and children are related to each other in the first degree. A grandparent and grandchildren are related in the second degree. A husband and wife are (in most cases) related to each other not by consanguinity but by affinity in the first degree. So, for example, an attorney may not be involved in a case over which a judge is presiding if the attorney is related to the judge by one degree of consanguinity or affinity.[26] In 1943, the Texas Supreme Court relied on cases from early in the state's history to disqualify a judge whose son was an attorney for the plaintiff in a worker's compensation suit over which the judge presided. [27] The Court applied the Texas Constitution and a civil statute to disqualify the judge because the attorney-son met the definition of "party" under both. The court broadly construed the statute, reasoning that the word party was not restricted to litigants but all persons who were interested in the outcome of the case.[28] *Ellis* built upon the 1909 case of *Duncan v. Herder*[29] where the trial judge, the Hon. L.W. Moore, was disqualified by the reason of his relationship by affinity (within the third degree) to one of the parties in a complex probate case. Judge Moore's daughter-in law stood to gain as one of the heirs of the decedent, Mr. Lenert. So even though Mrs. Moore was not named as a party to the suit, she was a party within the meaning of term as used in the Constitution and statute.

In the 1920s and 1930s, no codes or rules were available to address ethical quandaries faced by sitting judges who were actively campaigning for office. Guidance on these matters would not exist until the first codes of judicial conduct were promulgated in the 1970s. In *Love v. Wilcox* (1930), a candidate for governor sought a writ of mandamus from the Texas Supreme Court to compel the State Democratic Committee to put his name on the ballot in the primary election.[30] The party officials refused because the aspiring gubernatorial candidate had once supported Republicans and

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[24] The rule of necessity is said to have originated in England in the fifteenth century. The US Supreme Court recognized the rule in *Evans v. Gore*, 253 U.S. 245, 248 (1920).

[25] Tex. Const. § 19 (1845).

[26] *See* Tex. Gv. Code Ann. §§ 573.023 573.025.

[27] *Postal Mut. Indemnity Co. v. Ellis*,169 S.W.2d 482 (Tex. 1943).

[28] *Id*. at 484-85.

[29] 122 S.W. 904 (Tex. Civ. App. 1909).

[30] Love v. Wilcox, 28 S.W.2d 515 (Tex. 1930).

worked against Democrats. The sitting Chief Justice of the Texas Supreme Court believed that he was disqualified to hear the case on appeal because he was a candidate for the Democratic Party's nomination for Chief Justice that same year. He based his conclusion to self-disqualify not on Texas law but rather on a holding of the Supreme Court of Colorado that addressed the question of whether a judge who was a candidate in a primary election was qualified by his direct interest in the primary to participate in a case related to the primary.[31] Neither Texas case law nor statute provided guidance,[32] but the Supreme Court ruled that under the Texas Constitution the Chief Justice was not only qualified but duty bound to sit in the case.[33]The majority argued that the Colorado decisions had no bearing on the matters of disqualification of a Texas judge because those cases applied statutes governing disqualification. In Texas, only the Constitution specified the grounds for disqualification. The Court held:

> Under the Texas Constitution, it is the duty of the judge to sit save 'in any case wherein he may be interested, or where either of the parties may be connected with him by affinity, or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case.'[34]

For 40 more years, the Texas courts continued to maintain this view. In 1972, rejecting the entire notion of recusal for bias, the Texas Court of Appeals ruled in *Maxey v. Citizens National Bank of Lubbock*[35] that

> [w]hile delicate discretion might indicate a judge's withdrawal from a case in a contentious situation, there is no compulsion to step aside when the judge is not legally disqualified; indeed, unless legally disqualified, it is the duty of the judge to preside. […] […] Because the constitutional and statutory grounds are *inclusive and exclusive,* mere prejudice and bias are excluded as a disabling factor.[36]

Today, it would be hard to imagine a judge admitting that "mere prejudice and bias" are not grounds to consider disqualification.[37]

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31 *Id*. at 517.

32 *Id.* at 518.

33 *Id.*

34 *Id.*

35 489 S.W.2d 697, 702 (Tex. Civ. App. - Amarillo, 1972).

36 *Id.*

37 In 1973, *Williams v. State*, 492 S.W.2d 522 (Tex. Crim. App. 1973), the Court of Criminal Appeals reiterated the century-old rule that "Article V, Section 11, of the Constitution of Texas, provides for the circumstances under which a judge is disqualified … The constitutional grounds of disqualification are exclusive; that is, they specify all the circumstances that forbid a judge to sit."

II. Emergence of Recusal for Bias in Texas

In 1974, the Supreme Court of Texas acted upon the recommendation of the American Bar Association and adopted the ABA Code of Judicial Conduct, Canon 3C (1), promulgated in 1972.[38] The idea of a code of ethics for judges was not a new idea. The "Canons of Judicial Ethics" had been in existence since 1924 when an ABA committee led by the Chief Justice of the United States, William Howard Taft, drafted them as ethical guidance for judges. The Canons were eventually replaced by the 1972 ABA Code. In 1974, shortly before the ABA Code went into effect in Texas, a motion was filed to disqualify a trial judge in a case involving the termination of a parent–child relationship. The trial judge, seeing evidence of child abuse, overruled the district attorney's office and ordered the investigation of the parent for possible criminal prosecution. The judge then went on to discuss the case with the media, making statements to reporters about facts that were not reflected by evidence in the case, including the allegation that the child had been tortured.[39] Numerous newspaper articles reported the judge's allegations, which indicated animus toward the parents. The mother filed to disqualify the judge on two grounds: (1) under Art. V., Section 11 of the Texas Constitution, the judge's statements "put himself in the position of counsel…" and (2) the judge had a personal bias that precluded a fair trial under the 1974 Judicial Code. The trial judge refused to disqualify himself. However, on appeal in *Shapley v. Texas Dep't of Human Resources*, the Court of Appeals ruled that the trial judge acted unethically by ignoring the Code of Judicial Conduct by publicly stating his bias and prejudice to the media during an ongoing trial. Following the judge's public statements, the parties in the case no longer believed that they would be treated fairly and impartially.[40] The Court of Appeals wrote:

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[38] ABA Code of Judicial Conduct, Canon 3C (1) states that: A Judge should disqualify himself in a proceeding in which his or her impartiality might reasonably be questioned, including, but not limited to, instances where
(a) he or she has a personal bias at prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding;
(b) he or she served as a lawyer in the matter of controversy or as a lawyer with whom he or she previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it…
(c) he or she knows that he or she, individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in the subject matter controversy or in a party to title proceeding, or any other interest that could be substantially affected by the outcome of the proceeding…

[39] Shapley v. Texas Dep't of Human Resources, 581 S.W.2d 250 (Tex. Civ. App. – El Paso 1979).

[40] *Id.* at 253.

> Now under the Code, the subject of disqualification has been broadened and the direction has been made that a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. [41]

Shapley represents a shift of great magnitude. For the first time, a Texas appellate court recognized (1) bias as a grounds for judicial disqualification and (2) that the Code expanded the grounds for disqualification beyond the constitutional grounds. Prior to the effective date of the Code, the grounds for disqualification enumerated by the Constitution were held to be both inclusive and exclusive. Prior to *Shapley* mere bias and prejudice were not disabling factors.

The Court of Appeals further explained that the ethical problem did not arise from the comments made by the trial judge in court but those made to the media outside of the courtroom in the course of a trial that was still ongoing. This was contrary to Canon 3 A(6), which provided that a judge should abstain from making public comments about a pending or an impending proceeding.[42] However, under the old "independent grounds" standard, the judge would not have needed to recuse himself after he reacted publicly to the evidence during trial because he developed this bias from information gleaned during the trial.[43] Lastly, the Court of Appeals pointed out that the trial judge in refusing to disqualify himself had ignored Art. 200a, sec. 6, Tex. Rev. Civ. Stat. Ann. (Supp. 1978–1979), which outlined the procedure for the referral of a motion for disqualification to another judge or court.[44] As the mother did not raise this latter point, the Court addressed the merits of her challenge to the district court's parental termination judgment. Prior to Art. 200a, sec. 6, if a judge's impartiality was challenged, he or she made the call. If it was an incorrect decision, then it could be reversed on appeal. Thus, Shapley is a transitional case bridging the old and new standard for disqualification. It was also the first substantive and authoritative interpretation of the new norms for recusal by a Texas court. The concept of recusal for bias had now emerged 143 years after the founding of the Texas Republic.

In 1979—the same year as the *Shapley* ruling—the Texas Supreme Court handed down another landmark opinion on recusal. In *McLeod v.*

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[41] *Id.* The Court of Appeals cites the 1975 case of *Chilicote Land Co. v. Houston Citizens Bank & Trust Co.*, 525 S.W. 2d 941 (Tex. Civ. App. – El Paso 1975), which simply recognizes without amplification that the 1974 adoption of the Code of Judicial Conduct Canon 3.c. broadened the grounds for disqualification beyond that set forth in the Texas Constitution.

[42] Canon 3A(6) states: A judge should abstain from public comment about a pending or an impending proceeding in any court and should require similar abstention on the part of court personnel subject to his or her direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

[43] *Id.* at 253.

[44] *Id*.

Harris,[45] the Court ruled that motions to recuse must be referred to a presiding judge for assignment to another judge for hearing. In a divorce proceeding, Mr. McLeod filed a recusal motion against Judge Harris because of a close personal relationship between Mrs. McLeod and the judge *and* because of political differences between Mr. McLeod and the judge. The Court pointed out that the motion to recuse did not in itself disqualify but required that another judge be assigned to rule on the merits of the motion. The substantive grounds for disqualification, the Court reiterated, were contained in the Texas Constitution.[46] *McLeod* represented another major change in the Supreme Court's recusal jurisprudence. Lower court judges understood that they were bound by the decision but expressed frustration and balked at *McLeod*—arguing that trials would now be encumbered by the ripple effect phenomenon caused by the filing of multiple recusal motions.

In *Robb v. Robb* (1980),[47] the wife in a divorce case filed a recusal motion alleging that the judge was biased in favor of the husband's attorneys because they had made contributions to the judge's campaign. The Court of Appeals observed that *McLeod* had placed no guidelines or limits on the form, time, or contents of motions to recuse. The one-sentence provision (Section 6 of Article 200a) of the statute applied by the Court in *McLeod* was all there was concerning recusal. "Therein lies our problem with this case."[48] The Court of Appeals stated that "we are bound by that decision and follow it … but are not precluded from questioning its soundness, for the constitution cannot be amended by judicial fiat."[49]

In 1981, the Texas Supreme Court adopted Rule 18a, thus giving more specificity to recusal and disqualification rules by adding procedures and time limits.[50] The rule was amended a number of times, first in 1984 clarifying that it applied only to trial judges and not appellate courts of civil jurisdiction. A 1986 amendment to 18a excluded the Texas Court of Criminal Appeals.[51] So three rules now established the terms guiding the disqualification of judges: (1) Rule 18a, (2) Article 200a, and (3) Canon 3C of the Code of Judicial Conduct. The century and a half old axiom that the grounds for disqualification found in the constitution were to be regarded as "inclusive and exclusive" had been augmented by a broad category of grounds for recusal. In 1985, the legislature repealed Article 200a, leaving only Rule 18a and the Code of Judicial Conduct. However, in 1988, the legislature adopted Rule 18b, which provided specific grounds for disqualification and recusal. Judges were now guided by ethical canons, statutory requirements,

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45 582 S.W.2d 772 (Tex. 1979).

46 *Id.* at 775.

47 Robb v. Robb, 605 S.W.2d 390(Tex. Civ. App.— El Paso 1980).

48 *Id*. at 390.

49 *Id.*

50 18a (as a rule of civil procedure) became effective in 1982 and was rewritten in 2011. *See* Tex. R. Civ. P. 18a (Recusal and Disqualification of Judges).

51 *See* Tex.R. App. P. 16 (Disqualification or Recusal of Appellate Judges).

and rules articulated by the courts responding to motions for recusal and disqualification based on "any disability of the judge." Yet many trial as well as appellate judges still fought against the concept of recusal, maintaining that recusal and disqualification are two different concepts and that the only legitimate grounds for disqualification were those found in the Constitution.

One of the most important and frequently cited[52] Supreme Court precedents in recusal jurisprudence is *In Re Union Pacific Resources Co.*[53] handed down in 1998. The case originated when plaintiffs sued the Union Pacific Resources Company for personal injury damages. They moved to recuse the trial judge (Judge Bennett) on the grounds that the attorney for the law firm representing Union Pacific was also currently representing Judge Bennett in an ongoing recusal hearing. Plaintiffs alleged that Judge Bennett's impartiality might reasonably be questioned because of the attorney–client relationship. Judge Bennett refused to recuse himself and pursuant to Texas Rule of Civil Procedure 18a(d) forwarded the motion to recuse to the presiding judge for the administrative district. The presiding judge appointed Judge Blackmon, a district judge, who held a hearing at which Judge Bennett testified. Judge Blackmon granted the recusal motion, but then after Judge Bennett wrote to Judge Blackmon requesting a rehearing on the recusal matter, Judge Blackmon reversed himself. Now frustrated, the plaintiffs suing Union Pacific sought a writ of mandamus from the Court of Appeals to reverse Judge Blackmon.[54]

Union Pacific raised a unique question: is recusal required of a trial judge when an attorney for a party (representing Union Pacific) in the judge's court concurrently represents the same judge in recusal proceedings? Plaintiffs argued that the active participation by a challenged judge in a recusal proceeding must lead to the judge's recusal.[55] The Court of Appeals conditionally issued a writ of mandamus ordering the trial court to vacate its order denying the recusal motion.[56]

In recusal jurisprudence, mandamus is used in extraordinary circumstances to require a trial court to act in a particular way, in this case to compel a judge to recuse. To seek a writ of mandamus is not to seek an appeal but to initiate an original proceeding against a judge or court demonstrating that there is a clear abuse of discretion on the part of the judge for which there is no legal or constitutional remedy.[57]The party must show that

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[52] *Union Pacific* is cited by 3 subsequent Texas Supreme Court opinions, 2 Texas Court Criminal of Appeals opinions, and 118 Court of Appeals opinions (Westlaw and LexisNexis searches, 4/15/15).

[53] 969 S.W.2d 427 (Tex. 1998).

[54] Monroe v. Blackmon, 946 S.W. 2d 533 (Tex. App.—Corpus Christi 1997).

[55] *Id.* at 538.

[56] *Id.*

[57] Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992).

there is real danger of permanently losing substantive rights.[58] Thus, a court will not issue a writ of mandamus absent "compelling circumstances."[59]

On appeal, the Texas Supreme Court reversed the Court of Appeals' decision to issue the writ of mandamus because the plaintiffs had "adequate remedy by appeal" and the appeals court abused its discretion by issuing the writ. Chief Justice Phillips set out the following rule: judges may be removed from a case because they are disqualified under the Constitution[60] or by statute[61] or are recused by rules promulgated by the Texas Supreme Court.[62] The legal grounds for each type removal are fundamentally different, he argued. When a judge refuses to recuse himself or herself contrary to the Constitution, any orders or judgments issued by a judge in that instant are void and without effect. Similarly, any orders or ruling made by a judge who is disqualified under statute are void.[63] In both instances, a writ of mandamus is available to the parties to compel the judges' disqualification without showing that the challenger lacks an adequate remedy by appeal. However, in *Union Pacific*, the erroneous denial of a recusal motion by the presiding judge did not nullify the judge's actions. A judgment rendered in such circumstances may of course be reversed on appeal but not by writ of mandamus. If the appellate court determines that the judge presiding over the recusal hearing abused his or her discretion in denying the motion and the trial judge should have recused, then the appellate court can reverse the trial court's judgment and remand for a new trial with a new judge. In extraordinary instances, where, for example, a judge flagrantly refuses to follow procedural rules governing recusal, then the writ of mandamus is appropriate.[64]

Justice Hecht, concurring in *Union Pacific,* made three very important points: "[j]udges should not inject themselves too far into recusal hearings," "a hearing on a motion to recuse is not a trial of the judge's character and should not be treated as such," and it may be necessary for the judge to testify about the facts contained in the motion to recuse but should not testify on the issue of perceived impartiality or bias.[65] Judge Bennett had called himself as a witness, presented evidence, and given oral argument. [66]Hecht concluded: "The less involved a judge is involved in recusal proceedings, voluntarily or involuntarily, the better." [67]

Thus while in early Texas legal history, courts had resisted the urge to look inside the judge's mind for signs of favoritism or signs of bias toward

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58 Canadian Helicopters, Ltd. v. Wittig, 876 S.W.2d 304, 306 (Tex.1994).
59 Tilton v. Marshall, 925 S.W.2d 672, 681 (Tex.1996).
60 Tex. Const. Art. V, § 11.
61 Tex. Gov't Code §74.053 (d).
62 Tex. R. Civ. P. 18a, 18b.
63 § 74.053 (d)).
64 *In re* Union Pacific Resource Co., 969 S.W.2d 427, 428–29 (Tex. 1998).
65 *Id.* at 428.
66 Monroe v. Blackmon, 946 S.W.2d 533, 544 (Tex. App.—Corpus Christi1997).
67 *Id.* at 429.

litigants or counsel, by the 1980s, the courts were prepared to go there. Would demonstrating favoritism or demonstrating a clear bias toward litigants or counsel be grounds for recusal? According to precedent, behavior that prompts the motion for recusal must be based on an "extrajudicial source."[68] This is a somewhat nebulous concept. Behavior or statements on the part of the judge made outside the courtroom prior to a case or made in another case that shows that the judge is prejudiced or biased against one party in a pendant case *might* be grounds. The motion would need to show that the judge developed an opinion about the case or parties based on information other than that which the judge learned from participation in the case. "[T]o require recusal, a judge's bias must be extrajudicial and not based on in-court rulings…"[69] Rulings or decrees by judges based on the information gleaned during the course of a proceeding are not grounds for removal.[70] This is supported by federal precedent as well. Responding to the question of whether during the course of a proceeding the trial judge's "impatience, disregard for the defense and animosity" are grounds for recusal, the US Supreme Court ruled in *Liteky v. U.S.* that "judicial rulings alone almost never constitute valid basis for a bias or partiality motion …"[71] The *Liteky* rule was adopted by the Texas Court of Appeals in *In Re M.C.M.*,[72] where the Court ruled that recusal is warranted only if it is shown that the bias arises from "an extrajudicial source and not from actions during the pendency of the trial court proceedings, unless these actions during proceedings indicate a high degree of favoritism or antagonism…"[73] This sounds very straightforward but is far from being so. In *Norton v. State*,[74] for instance, a trial judge made a statement in a fit of pique prior to going to trial, proclaiming that regardless of the State's argument or the jury's verdict, he would make his own decision regarding the defendant's punishment for credit card fraud.[75] When the judge was asked if he would accept a plea bargain of deferred adjudication, he replied: "No, and if the jury gives her probation I'll give her jail time."[76] The Court of Appeals reversed the defendant's conviction and ordered a new trial stating that the trial judge's statement was an "arbitrary refusal to consider the entire range of punishment and constituted a denial of due process."[77] Thus, in *Norton*, the court ruled that the judge should have recused not because of extrajudicial information

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68 *See* Grider v. Boston Co., 773 S.W.2d 338 (Tex. App.—Dallas 1989).

69 *Id.* at 346.

70 *Id.*

71 Liteky v. U.S., 510 U.S. 540, 555 (1994).

72 57 S.W.3d 27 (Tex. App.—Houston (1st District 2001)).

73 *Id.*

74 Norton v. State, 755 S.W.2d 522 (Tex. App.—Houston (1st Dist.) 1988) rehearing denied.

75 *Id*. at 523.

76 *Id.*

77 *Id.* at 524.

that caused him to be biased against the defendant but because of the statement he made in anger even before the case went to trial.[78]

Whether a judge should explain the reasoning underlying a decision to recuse or disqualify himself or herself has generated some debate. In *Thomas v. Walker* (1993), the Court of Appeals explained that the "mental processes rule" protects judges from being subjected to explaining their reasoning underlying a recusal decision except in the "most extreme and extraordinary circumstances."[79] "[A]n inquiry into his or her mental processes [however messy] in arriving at his decision would be improper and would threaten the foundation of an honorable and independent judiciary."[80]

III. Disqualification, Recusal, and Judicial Politics

Matters concerning the doctrinal subtleties, states of mind of judges, and norms inherent in recusal jurisprudence have paled in comparison to the issue of whether judges should be recused or disqualified when they have received campaign contributions from law firms, corporations, and political action committees that have a direct stake not merely in the political composition of the court but in the voting patterns of individual judges and justices in a specific policy areas.[81] In August 2002, just prior to the November general election, the Texas Supreme Court amended provisions of the Texas Code of Judicial Conduct that regulate the campaign conduct of state judicial candidates.[82] In doing so, it struck from the Code a provision that prohibited a candidate from making statements of opinion on issues that might come before the court to which the candidate sought election. This change followed *Republican Party of Minnesota v. White*[83] in which the US Supreme Court declared that judicial candidates have a First Amendment right to announce their views on legal disputes or issues that might come before them as a judge. *White* was at first interpreted to mean that every code of conduct

78 *Id.*

79 Thomas v. Walker, 860 S.W.2d 579 (Tex. App.—Waco 1993).

80 Tate v. State, 834 S.W.2d 566, 569. (Tex. App.—Houston (1st Dist.) 1992).

81 Much has been written on the invidious relationship between campaign money and judicial independence. See the ongoing work of Anthony Champagne and Kyle Cheek, specifically Anthony Champagne & Kyle Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 Fordham Urban L. J. 907 (2002) and Kyle Cheek & Anthony Champagne, Judicial Politics in Texas: Partisanship, Money, and Politics in State Courts (2005).

82 Approval of Amendments to the Texas Code of Judicial Conduct, Misc. Docket No. 02-9167 (Tex. Aug. 22, 2002) [hereinafter Texas Amendments] (amending Canons 3, 5 and 6 of the Texas Code).

83 536 U.S. 765 (2002).

regulating judicial speech must be subject to strict scrutiny and that state codes of judicial conduct would have to be rewritten so that they did not limit the political speech of judges. Of course making political statements is not the same as making promises that would lead to the reasonable person doubting the judge's impartiality. So in most instances, campaign statements on "disputed legal issues" by judicial candidates cannot be grounds for disqualification. *White* allows candidates for judicial office to raise as issues in their campaigns matters that may come before them if they are elected. This puts judges in a tough spot if, on one hand, they wish to maintain their impartiality or independence but, on the other, are engaged in a competitive elections. The Texas Supreme Court also narrowed a blanket prohibition on any candidate making pledges or promises during a campaign but included the following language: "a statement made during a campaign for judicial office … may cause a judge's impartiality to be reasonably questioned in the context of a particular case and may result in recusal."[84]

Following *Republican Party v. White*, the Texas appellate courts have handed down only two influential rulings having an impact on motions to recuse or disqualify judges who are engaged in political activity: *Ex Parte Ellis*[85] and *In re Hecht*.[86] *Ex parte Ellis*[87] originated when the State of Texas[88] filed a motion to recuse Court of Appeals (Third District, Austin) Justice Alan Waldrop from an ongoing criminal case. Defendants James Ellis and John Colyandro were charged with election code violations and money laundering. Both men worked for former US House majority Leader Tom DeLay, who ultimately would be convicted for federal conspiracy and money laundering charges. The recusal motion stated that while Waldrop was engaged in private practice before his 2005 appointment[89] to the Court of Appeals, he served as counsel for a Republican organization called Texans for Lawsuit Reform (TLR). TLR's members regularly attended campaign strategy sessions with Colyandro. As counsel, Waldrop filed a number of

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[84] Canon 5 prohibits a judge from engaging in an inappropriate political activity, such as making pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge… It also states that a judge or judicial candidate may attend political events and express his or her views on political matters in accord with this Canon and Canon 3B(10); however "A statement made during a campaign for judicial office, whether or not prohibited by this Canon may cause a judge's impartiality to be reasonably questioned in the context of a particular case and may result in recusal." http://www.scjc.state.tx.us/

[85] 275 S.W.3d 109 (2008).

[86] 213 S.W.3d 547 (2006).

[87] *Ex parte* Ellis; *Ex parte* Colyandro, 275 S.W.2d 109 (2009).

[88] Travis County District Attorney Ronny Earle and Assistant District Attorney Holly Taylor filed the motions.

[89] Justice Waldrop was appointed by Governor Rick Perry in 2005, won election in 2006, and resigned in 2010, two years before his term ended.

pleadings in a civil case on TLR's behalf that involved legal issues similar to those raised in the Ellis/Colyandro criminal appeal that was currently before Justice Waldrop.[90] The State's motion to recuse was based entirely on statements Waldrop made as an attorney in a civil suit and not on anything he said or wrote as a justice on the Court of Appeals.[91] The plaintiffs (Democrats) in this earlier civil suit attempted to serve TLR with a subpoena seeking documents and records of TLR's communications with another group called Texans for a Republican Majority Political Action Committee (TRMPAC). Jim Ellis and John Colyandro were affiliated with TRMPAC.[92] In his successful effort to fight the subpoena Waldrop, then serving as TLR's attorney, signed and filed pleadings on behalf of TLR referring to the case as a "politically motivated lawsuit" without merit and simply a means of harassing a political opponent. The State in its petition for Justice Waldrop's recusal argued that although the plaintiffs in the civil suit are not parties in the current case, Justice Waldrop should recuse from this case because his "politically motivated" comment as a private attorney clearly demonstrated biases about the nature of the charges being challenged before the Court of Appeals.[93] After the State filed the motion to recuse, Justice Waldrop certified the matter to the full Court.

The Court of Appeals ruled 3-2 against the motion to recuse, arguing that when the basis for a recusal motion originates from events occurring from a judge's legal career before appointment to the bench, it must be recognized that when representing clients lawyers are required to express the beliefs of their clients and advocate their clients' interests. Therefore, statements made by a lawyer representing a client, without more, "can only rarely serve as legitimate reasons for excluding a judge from fulfilling his or her sworn duties."[94] Were the rule otherwise, then judges would be recused from all cases that present issues similar to the ones that they confronted in their prior careers as advocates. Paradoxically, such a rule would lead to the view that the more expansive a judge's prior law practice are and experience, the more limited his or her judicial role could be.

Justice Patterson, dissenting in *Ex Parte Ellis*, concluded that Justice Waldrop should have recused himself from further participation in any appeals by Ellis and Colyandro. Waldrop's conduct as a private litigator in related civil proceedings was more than sufficient to cast reasonable doubt on his impartiality in these appeals. He represented a group that worked with, was ideologically aligned with, and had similar goals as the two de-

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90 *Ex parte Ellis*; *Ex parte Colyandro*, 275 S.W.2d 109 (2009) 113.

91 The State cited Tex. R. Civ. P 18b(2)(a), which states that a "judge shall recuse himself in any proceeding in which…his impartiality might reasonably be questioned," and 18b(2)(b), which provides that a "judge shall recuse himself in any proceeding in which … he has a personal bias or prejudice concerning the subject matter…"

92 *Id.*

93 *Id.* at 114.

94 *Id.* at 113.

fendants.[95] The rules and judicial canons not only require judges act with absolute impartiality but that judges also … "*appear to be* impartial, so as to not call into question the fairness or integrity of the court …" Rules of recusal do not require legal proof that a judge engaged in biased or prejudicial conduct but do require the judge to recuse himself if "his impartiality *might* reasonably be questioned."[96]

The second post-*Republican Party v. White* case, *In re Hecht*,[97] did not involve a motion for recusal but a possible violation of the Code of Judicial Conduct. This was a highly visible case that shed light on the extent to which judges are able to campaign for other candidates without needing to worry about disqualification or recusal. The case originated 2005 when the State Commission on Judicial Conduct voted to initiate an investigation of long-serving Texas Supreme Justice Nathan Hecht based on his statements appearing in the *New York Times* and *Texas Lawyer* endorsing his friend Harriet Miers. Ms. Miers was nominated by President George W. Bush in 2005 to replace retiring Associate Justice Sandra Day O'Connor. The Commission informed Hecht of the investigation and requested that he answer a questionnaire about the articles and his actions preceding and during Miers' nomination to the US Supreme Court. Hecht answered the questions and voluntarily appeared at a hearing before eight members of the commission. The commission determined that Justice Hecht violated Canons 2B and 5(2) of the Texas Code of Judicial Conduct and issued a public admonition. Canon 2B states that "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others …," and Canon 5(2) states that "A judge shall not authorize the public use of his or her name endorsing another candidate for any public office …"[98] At the time, Hecht was up for reelection to the Texas Supreme Court. Hecht made clear through his comments about Miers his views on a range of "culture wars" issues that would likely come before the Texas Supreme Court.

Hecht and Miers had known each other for 35 years and had practiced in the same law firm from 1976 to 1981. Miers had served as White House Counsel to President Bush. Hecht was also a longtime friend of Karl Rove, White House Deputy Chief of Staff. Rove asked Hecht to speak to Dr. James Dobson, the founder of Focus on the Family (a conservative religious organization) about Miers' faith, which Rove believed would appeal to an important segment of Bush supporters. Rove also asked Hecht to speak to the media about Miers' qualifications and accomplishments. The Commission believed that Hecht leveraged his reputation to help Miers win confirmation. Hecht, a sitting justice, had acted as a one-man campaign team for Miers,[99] echoing her views on abortion and other social issues. Of course,

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[95] *Id*. at 136-37.
[96] *Id*. citing Gammage J. in *Rogers v. Bradley*, 909 S.W.2d 872. (Tex. 1995).
[97] 213 S.W.3d 547 (2006).
[98] *Id*. at 551-52.
[99] *Id*. at 554-55.

Miers ultimately withdrew her name from consideration after it was clear that she would not make it past the Senate Judiciary Committee.[100]

After the Commission's public admonition, Hecht requested a *de novo* review of the decision.[101] Texas Supreme Court Chief Justice Wallace Jefferson then appointed (by random selection) members of a Special Court of Review[102] to review the commissions' decision. The Special Court conducted an evidentiary hearing calling Justice Hecht as the sole witness. Expert testimony was given by a range of experts, including former Chief Justice Tom Phillips, a well-respected expert on judicial ethics. The Special Court then overturned the commission's ruling.[103]

Writing for the majority, Justice Kerry P. Fitzgerald recognized that contrary to the commission's allegation, there was no evidence that Hecht "authorized" the public use of his name in endorsing Miers. Canon 8A encourages "reasonable and reasoned application of the text," so Justice Fitzgerald decided to construe the language in Canon 5(2) in the same manner—narrowly. Thus, Hecht may have "supported" Miers but he did not "authorize" his name to be used in support of her nomination. In its 1990 amendments, the Texas Supreme Court did not reinstate the 1974 "endorsement" prohibition. It deleted "endorse" and added "authorize."[104] So if Hecht *wasn't* authorizing the use of his name and position to support Miers, what then constitutes an authorization? When does a judge cross the line? In *Public Admonition of Justice of the Peace Torres*, the Commission on Judicial Conduct stated that a judge is in violation of the Canon 5(2) if he or she gives the candidate express permission to include said judge's name on a publicly distributed list of persons endorsing the candidate.[105] Justice Hecht may have anticipated his name being used as the person who gave the interview if the media chose to identify him, but he did not authorize the media to use his name to publicly endorse Miers. In his testimony, Hecht admitted that "of course you're endorsing in the sense that you're supportive, but that's not what the canon means."[106] The intent was to limit the roles that judges would have in lower court elections. The Special Court concluded that Hecht's statements did not constitute an "endorsement" and

[100] https://www.congress.gov/nomination/109th-congress/978.

[101] *Id*.

[102] Tex. Gov't Code Ann. § 33.034(c) (Vernon 2004).

[103] 213 S.W.3d 547, 580.

[104] *Id*. at 562–565.

[105] *Public Admonition of Justice of the Peace Torres, No. 00-0689 – JP (Comm'n Jud. Conduct*, Aug. 16, 2000).

[106] Hecht testified that he was present on the Supreme Court when the canons were amended in 1990: "[T]here was not the slightest thought that it would ever apply to comments made in respect to a nomination to the United States Supreme Court. That was not a concern, it never crossed anybody's mind, and it hasn't since until this case," 213 S.W.3d 547, 560–563.

that judges are permitted to speak out on political matters without fear of disqualification, the need to recuse, or a violation of ethics.[107]

The Commission's second charge alleged that Hecht violated the prestige of his public office to advance the interests of his friend Harriet Miers in violation of Canon 2B, which provides that "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others …"[108] The Special Court disagreed with the commission's position that Miers was pursuing private interests as opposed to public service. A judge campaigning or supporting another candidate is engaged in political speech and is not advancing a private interest even though a judge receives compensation, and in the case of Miers, employment for life.[109]

Justice Ann Crawford McClure, the third member of the special court, believed that Hecht *had* violated both Canon 5(2) and Canon 2B. She believed that the record showed that Hecht gave his endorsement to Miers. He voluntarily participated in rallying support for Miers's nomination and in mounting a "campaign" to convince religious conservatives that she was the real deal. So he endorsed her and voluntarily authorized the public use of his name and office and the prestige of his office to support his friend, both of which amounted to willful and persistent violations of Article V, Section 1-a(6) of the Texas Constitution and Canon 2B of the Texas Code of Judicial Conduct. However, Justice McClure argued that the Canons intrude into a judge's private life and are unconstitutional,[110] contrary to *Republican Party of Minnesota v. White*.[111] In sum, no solid legal grounds for disqualification or motions to recuse exist when a judge or judicial candidate campaigns or makes a statement of support for another candidate even when doing so has the effect of revealing his or her own political philosophy, views of specific issues, or assessments of the motivations of parties who bring a suit. Long-standing precedent extending back to the nineteenth century recognizes that judges are obligated to decide matters before them and not recuse themselves unnecessarily even in cases in which they might prefer not to participate because of embarrassing criticism or mere allegations of bias.[112] The burden is on the movant for recusal to show that the judge has a "high level of antagonism" so deep-seated that it would be impossible for the judge to render fair judgment.[113] The norm that emerged is that need for recusal exists only when a judge displays an attitude or a state of mind that is so closed to fairness that the reasonable person would question the judges' impartiality.[114] Just as *Republican Party v. White* extends First Amendment protection

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[107] *Id*. at 575–576.

[108] Tex. Code Jud. Conduct, 2B.

[109] *In re Hecht,* 213 S.W.3d 547, 575-77.

[110] *Id*. at 580-581.

[111] 536 U.S. 765 (2002).

[112] *Id*. at 115 citing *Rodgers v. Bradley*, 909 S.W.2d 872, 879 (Tex. 1995) (Enoch, J. concurring). See *infra*.

[113] *Id*. at 117.

[114] *Id*.

to judges' political statements, so too does it protect opinions expressed by persons before becoming judges.[115]

Under constitutional disqualification provisions, a judge is disqualified if he or she has a pecuniary interest in a case. The question is whether campaign contributions constitutive a pecuniary interest. A reasonable member of the public might expect a judge to recuse or even be disqualified if an attorney arguing before the judge contributed money to the judge's political campaign. But that expectation does not square with existing case law. In *Rocha v. Ahmad*,[116] two justices on the Court of Appeals (San Antonio) were reported to have received thousands of dollars in campaign contributions from a prominent San Antonio attorney named Pat Maloney about whom a local newspaper made repeated references to his political influence. As a result, a motion was filed to recuse the two justices who received the contributions from one of the litigants represented by Maloney. The Court of Appeals rejected the motion, finding nothing in Canon 2 that applied. The only provision (Canon 3B (2)) that was applicable requires a judge to be "remain unswayed by partisan interests, public clamor, or fear of criticism." Chief Justice Cadena of the Court of Appeals pointed out that in an elected system, judges must "unfortunately" seek contributions.[117] When judicial races are competitive, and voter apathy high, attorneys are the principal source of contributions in judicial elections. Of course *Rocha* was decided in the 1980s, which was a decade of relative sanity before the emergence of million dollar judicial campaigns waged by corporations and Political Actions Committees (PACs) in the 1990s. If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, then judges would have to recuse themselves in a majority of cases in their courts.[118] In *Aguilar v. Anderson*,[119] a motion for recusal was filed against the presiding judge because the judge solicited and accepted a campaign contribution from an attorney representing a party to a suit. The Court of Appeals upheld the decision denying recusal, reiterating what had become axiomatic: a dilemma would be created if judges could not sit in cases involving attorneys who have contributed to a judge's campaign. The court argued that the standard must be whether "a reasonable person on the street—not the judge, the litigant or his attorney—would question the judge's impartiality …" "[I]n states that elect judges the 'reasonable' person must know that judges have to stand for election on a regular basis, that elections cost money … and that in judicial races most contributions are made by practicing

[115] *Id*. at 119.
[116] Rocha v. Ahmad*,* 662 S.W.2d 77 (Tex. App.—San Antonio 1983),
[117] *Id. at* 78–79.
[118] *Id*.
[119] 855 S.W.2d 799, 804-05 (Tex. App. – El Paso 1993).

attorneys."[120] Further, in *Degarmo v. State*,[121] the Court of Appeals rejected as the sole grounds for recusal a campaign contribution of $500 to a trial judge from the parents of a murder victim. In a recusal hearing, the judge admitted that he accepted the campaign contributions (in a first election, he did not win) from the parents of the murder victim's father but never promised or represented to the victim's family how he might act should he preside in the case. In his second (successful) campaign, he did not receive addition contributions from the victim's family. The Court of Appeals ruled that campaign contributions could not serve as independent grounds for recusal.[122]

By the early 1990s, judicial candidates felt increasing pressure to make campaign promises, run negative ads about their opponents, and spend a disproportionate amount of their time and energy raising money.[123] PACs began to exert power in judicial campaigns. In *Rogers, et al. v. Bradley*,[124] the Texas Supreme Court heard a motion to recuse filed by a patient, Rogers, suffering from complications from a liposuction procedure. Rogers and other injured plaintiffs won a $9 million jury award in malpractice suit filed against Dr. Brian Bradley, who performed the procedure. The Court of Appeals reversed the trial court's judgment and the appellants filed a writ of error in the Supreme Court to reverse the Court of Appeals. The appellants also filed a motion to recuse several justices on the Texas Supreme Court including Justices Hightower, Hecht, Cornyn, and Enoch because of a 19-minute video.[125] The origins of the video can be traced back to 1992 when TEX-PAC, supported by the Texas Medical Association, began a concerted effort to counter the influence of trial lawyers on the Texas Supreme Court. TEX-PAC produced "Court Wars III," a parody of *Star Wars*. In the video, Texas trial lawyers were analogized with Darth Vader's evil empire, bringing endless unwarranted medical malpractice suits against honest and caring doctors. The TEX-PAC video supported incumbent Justice Jack Hightower, Fifth Court of Appeals Chief Justice Craig T. Enoch's challenge to incumbent Justice Oscar Mauzy, and incumbent Justice Eugene A. Cook's reelection campaign against 131st District Court Judge Rose Spector. Clips featuring all five of the named favorite candidates appeared in the video. None of the candidates were filmed expressly for the video or authorized

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[120] *Id*. On the matter of the test for impartiality, *see Rosas v. State,* 76 S.W.3d 771 (Tex. App.—Houston (1st Dist.) 2002): "Recusal is appropriate if the movant has provided enough facts to establish that a reasonable person, knowing all the circumstances involved, would harbor doubts as to the impartiality of the judge."

[121] 922 S.W.2d 256 (1996).

[122] *Id*. at 267-68.

[123] For data on campaign spending, see the Texas Ethics Commission web site, http://www.ethics.state.tx.us/guides/JCOH_guide.htm; Texans for Public Justice, http://www.tpj.org; and Frontline: Reform Efforts in Texas and Other States, http://www.pbs.org/wgbh/pages/frontline/shows/justice/howshould/.

[124] 909 S.W.2d 872 (1995).

[125] *Id.* at 873.

TEX-PAC to use their image or words from the various events for the campaign spot. The video also contained brief comments by two incumbents not on the ballot in 1992, Justices Cornyn and Hecht. Dr. Bradley, who was appealing the $9 million medical malpractice verdict, appeared in the video and made an emotional plea for a "fair" court. The campaign video was not merely a plea to voters to support of particular judicial candidate whom TEX-PAC deems friendly to the medical profession but an elaborate and not so thinly veiled plea to sitting justices and judicial candidates to consider Dr. Bradley's unfair jury verdict. While the video spoke of fair and independent justices, the obvious point was that particular justices were allies to the medical profession and that Dr. Bradley's fate was inextricably tied to the presence of particular justices on the court whom TEX-PAC supports.[126]

Responding to the motion for recusal brought by Rogers, Texas Supreme Court Justice Bob Gammage[127] argued for the recusal of all justices, including himself, based on the fact that the video made a direct and express association between support for certain candidates and the probable result in a pending case. At that time, recusal law stated that "…a judge shall recuse himself in any proceeding in which his impartiality might reasonably be questioned." [128] Justice Gammage argued that recusal law—which was silent on the matter of campaign ads run by a third party—*should* be understood as follows: A judge should recuse from participation in a pending or impending case under Rule 18b(2)(a) if a person or entity has sought to engender support, financial or otherwise, for a judicial candidate or group of candidates that would preside in that case and this effort is made through a medium which is intended to be widely circulated and where that effort ties the success of the person's or entity's chosen candidates to the probable result of that case. The recusal law applies not only to judges who have engaged in obvious biased or prejudicial conduct but also to judges whose "impartiality might reasonably be questioned" regardless of the circumstances giving rise to the question of impartiality even though the circumstances "may be beyond the judge's volition or control."[129]

Justice Craig Enoch responded that he saw no basis for Gammage's or any other justice's recusal and he took issue with Gammage's "declaration," as Enoch called it. If Gammage's reasoning were followed, all nine of the current justices would need to recuse solely on the basis of the political speech of a third party, he argued. Recusal would then be required even

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[126] *Id*. at 874-875.

[127] Robert A. "Bob" Gammage served as a justice on Third Court of Appeals from 1982 to 1990 and on the Texas Supreme Court from 1990 to 1995. Along with other advocates of judicial reform, including Chief Justice Thomas R. Phillips, Gammage pushed for the adoption of an appointive method of judicial selection. As a justice, he had a solid record of support for civil rights and liberties. See John C. Domino, *The Jurisprudence of Texas Supreme Court Justice Robert A. "Bob" Gammage: A Legacy of Civil Rights & Liberties*. 55 S. Tex. L. Rev. 27 (2013).

[128] Tex. R. App. P. 15a, Tex. R. Civ. P. 18b.

[129] *Rogers*, 909 S.W.2d at 874.

where there is no questionable conduct on the part of the judge but solely because of a political action committee's endorsement of or opposition to sitting justices on the Court. Gammage reasoned that TEX-PAC was not merely engaged in political speech but it was attempting to use the ongoing case as part of its strategy to elect certain kinds of judges, including the ones currently serving on the Court. However, Enoch argued that nothing in state or federal law required recusal of any justice in this case[130] and inferred that Gammage was attempting to rewrite recusal law. In the end, the full court rejected the motion to recuse,[131] with the exception of Justice Gammage who used the opportunity to set forth a broad recusal philosophy. For him, these kinds of campaigns constituted another form attack on the independence of the judicial branch. Many factors weaken independence, ranging from judicial candidates promising a particular kind of outcome in civil or criminal cases, to large expensive campaigns that send the message to judges that they cannot win office without the support of a powerful group or cartel of professional interests, to third party attack ads of the "Court Wars" variety that erode confidence in the judiciary by either driving home the point that justice is for sale or motivating the wealthy voter to join in and try to buy justice. Justice Gammage argued that judges in certain circumstances should recuse themselves because of the actions of third parties, especially when there were no laws or rules addressing the role of PACs in judicial elections. The year that *Rogers v. Bradley* was decided Gammage retired from the Texas Supreme Court in protest over the million dollar campaigns that began to emerge in the 1990s.[132]

In *Rogers,* Justice Enoch went on record that while he personally deplored the system under which Texas judges are selected,[133] no justice should be expected to recuse because TEX-PAC or any other PAC seeks to

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[130] See TEX R. APP.P. 15a (incorporating by reference Rule 18b, which states "A judge shall recuse himself in any proceeding in which … his impartiality might reasonably be questioned…" TEX R. CIV. P 18b (2) (a)).

[131] When a party files a motion to recuse a justice on the Texas Supreme Court, he or she must either recuse from participation in the case or certify the question to the rest of the court sitting en banc, which then decides the disqualification question by majority vote. TEX. R. APP. P. 16.3. If a justice is disqualified, the chief justice will certify to the governor who can appoint a replacement justice. TEX. GOV'T CODE ANN. SEC. 22.005. http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.22.htm.

[132] In 1999, former Justice Gammage was interviewed by Bill Moyers on a national PBS *Frontline* program called "Justice for Sale," http://www.pbs.org/wgbh/pages/frontline/shows/justice/. Gammage said; "As a candidate, I spent a disproportionate amount off my time on the telephone making calls, going to fund-raising events … The more money you have, the more you're permitted to run positive. The less money you have, the more you have to go on the negative. My ads were almost totally negative. I don't like to do that, but I had no choice [in order to be re-elected]. I had to penetrate the media markets."

[133] See Craig Enoch, *1995 Annual Survey of Texas Law: Foreword*, 48 S.M.U. L. REV. 723 (1995).

raise campaign funds to support or contest the election of justices. Justice Gammage's reasoning would "totally disrupt the efficient administration of justice in Texas" because under his reasoning, only justices who faced no election opposition would be able to carry out their responsibilities without regularly recusing themselves. If the written or electronic statements of a PAC—or clips of justices' speeches used by a PAC—are grounds for recusal because they compromise the perceived impartiality of justices, then few judges would remain on the bench. Enoch concluded that the problem was with the method by which Texas selects judges and called on the legislature to reform the system.[134]

Justice Gammage's recusal philosophy in *Rogers v. Bradley*, which focuses not only on the judge but on those with a disproportionate influence on the outcome on judicial elections, foreshadowed the US Supreme Court's ruling *Caperton v. A.T. Massey Coal Co*.[135] In this case, the Court found that while, traditionally, matters of judicial recusal and disqualification are settled by statutes and codes of conduct and do not normally pose a constitutional question, the millions of dollars in campaign contributions spent by Massey Coal to elect a state supreme court justice supportive of their cause violated the US Constitution's due process guarantee of a fair tribunal.[136]

As in the Texas case *Rogers v. Bradley*, the question in *Caperton* was whether the action of a third party—Blankenship and his PAC—rather than the actions of a judge demands recusal. The Court answered in the affirmative and reversed the ruling of the Supreme Court of Appeal of West Virginia. *Caperton*, similar to *Rogers v. Bradley*, raises an issue not addressed in past precedents or codes of conduct: does the behavior of a wealthy campaign contributor who is instrumental in electing a judge presiding in a case that will benefit said contributor create a constitutionally intolerable probability of actual bias of the judge?[137] The inquiry in *Caperton* was not into Justice Benjamin's "subjective assessment" of his own impartiality—whether he perceived himself to be biased. No one knows what was in Justice Benjamin's mind. There was no evidence of a bribe or statements that indicate bias. He believed that he could remain impartial. However, Justice Kennedy reasoned that the guarantee of due process does not require proof of actual bias but that given an objective "appraisal of psychological tendencies and human weakness," there is a risk of actual bias or prejudgment. Not every campaign contribution by a litigant or an attorney creates a probability of bias that requires recusal but that "objective and reasonable perceptions" show that there is a risk of bias "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the

[134] 909 S.W. 2d 872; 1995 Tex. LEXIS 133.
[135] 556 U.S. 868 (2009).
[136] *Id*. at 876 citing *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948).
[137] Ungar v. Sarafite, 376 U.S. 575 (1964).

judge's election campaign when the case was pending or imminent."[138] Texas law currently maintains that a judge is neither disqualified nor subject to recusal because of campaign contributions. *Caperton* is not understood as stating that every campaign contribution by a litigant or an attorney necessitates recusal unless circumstances produce a violation of due process or an unconstitutional probability of bias amounting to the denial of due process. In sum, campaign contributions cannot serve as independent grounds for recusal. [139]

IV. The Aftermath of *Caperton* in Texas

Post-*Caperton*, the Texas Supreme Court Advisory Committee (SCAC) proposed reforms to recusal standards under Rules 18a and 18b of the Texas Rules of Appellate Procedure.[140] Minor changes were made by the Court but nothing substantive that directly addresses the issues raised in *Caperton* was adopted. Nor has the Texas Supreme Court either cited or discussed *Caperton*[141] in any published opinion. *Caperton* has been cited in appeals from adverse recusal motions heard by the Court of Criminal Appeals in *Gaal v. State* in 2011[142] and four Texas Court of Appeals decisions: *Villareal v. State* in *2011*,[143] *Black v. 7-Eleven Convenience Stores* in 2014,[144] *McIntosh v. Texas State Bd. of Dental Examiners* in 2014,[145] and *Barfield v. Texas* in 2015.[146] In *Gaal,* the Court of Criminal Appeals reversed the decision of the Court of Appeals that denied a motion to recuse a judge in a driving while intoxicated case. *Gaal* simply reiterated the existing grounds for recusal in Texas, but in a single footnote cited *Caperton* as setting out three situations that violate the Due Process Clause of the Fifth Amendment: First, when a judge has a financial interest in the case. Second, when

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138 *Caperton*, 556 U.S. at 884.

139 Rocha v. Ahmad, 662 S.W.2d 77 (Tex. App.—San Antonio 1983); Delgarmo v. State 922 S.W.2d 256 (Tex. App.—Houston (14th District) 1996); River Road Neighborhood Association v. South Texas Sports, Inc., 673 S.W. 2d 952, 953 (Tex. App.—San Antonio 1984); Manges v. Guerra, 673 S.W.2d 180 (Tex. 1984).

140 Texas Supreme Court Advisory Comm., Meeting of the Texas Supreme Court Advisory Comm. 20301, 20314-15, 20320, 20391 (2010), available at http:///www.supreme.courts.state.tx.us/rules/scac/2010/091710-trans.pdf. See also Seana Willing, *Post-Caperton Recusal Reform in Texas. Is it Needed?,*51 S. Tex. L. Rev. 1143 (2010).

141 (Westlaw and LexisNexis searches, 2015).

142 332 S.W.3d 448 (2011).

143 348 S.W.3d 365 (2011).

144 No. 03-12-00014-CV, 2014 Tex. App. LEXIS 2641.

145 No. 07-12-00196-CV, 2014 WL 931260.

146 No. 14-13-00518-CR, 2015 WL 1544790.

the judge acted as a "one-man grand jury" to bring charges in the case he or she is trying. Third, "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." [147] Similarly, in each of the four Court of Appeals cases above, appellants raised due process concerns under *Caperton* along with the recognized grounds for recusal. In *Black*,[148] the court ruled that the trial judge did not abuse his discretion by denying Black's recusal motion because it was not established that the judge's alleged biases arose from an extrajudicial source or that Black was denied due process under the *Caperton* standard.[149] In *Villareal*,[150] the court rejected a recusal motion alleging the trial judge harbored a prejudice against the defendant contrary to a ground for recusal established by *Caperton:* that the "probability of actual bias on the part of the judge… is too high to be constitutionally tolerable."[151] *McIntosh* held that a judge's mere disagreement of party's legal position did not demonstrate a bias or prejudice amounting to a violation of due process and requiring recusal.[152] In *Barfield*, the court ruled that displaying a Mother's Against Drunk Driving (MADD) plaque in the courtroom did not violate the Code of Judicial Conduct, thus casting doubt on the impartiality of the judge amounting to a denial of due process under *Caperton.*[153]

As the above account indicates, Texas disqualification and recusal jurisprudence is conservative and restrained. It continues to be based on a narrow judicial interpretation of state constitutional provisions, statutes, and codes of conduct that are intended to promote impartiality and accountability without creating a net loss to judicial discretion and the stability of the judicial process. At minimum, it ensures that the actions of the judge should not give rise to reasonable grounds to question the neutral and objective character of a judge's rulings or findings. Whether this conservatism and restraint can continue unchanged in a post-*Caperton* era remains to be seen. The *Caperton* probability of bias standard has become part of the dialogue on recusal and disqualification in Texas; however, the actual impact of *Caperton* in the state has been limited by several factors. The fact that recent motions for recusal based on *Caperton* were viewed skeptically and ultimately denied with little or no discussion by appellate courts suggests continued resistance to judicially driven changes in the state's recusal jurisprudence. A presumption exists that the state's code of judicial conduct offers more protection against judicial bias than the *Caperton* standard

147 332 S.W.3d 448, 453 n. 10 (2011).
148 No. 03-12-00014-CV; 2014 Tex. App. LEXIS 2641.
149 *Id.* at 15.
150 348 S.W.3d 365 (2011).
151 *Id.* at 372, 373.
152 No. 07-12-00196-CV, 2014 WL 931260.
153 No. 14-13-00518-CR, 2015 WL 1544790.

requires. This would explain the reluctance of Texas Supreme Court to use its rule-making authority to rewrite recusal guidelines. In addition, in a state that elects its judges, state recusal precedent still adheres to the position that campaign contributions *alone* do not create grounds for recusal nor necessarily are the actions of a powerful PAC or contributor *automatic* grounds for disqualification of a judge presiding in that case unless the circumstances created by the campaign contributions give rise to an unconstitutional probability of bias. Texas' Judicial Campaign Fairness Act of 1995[154] thus tempers the impact of *Caperton* because it imposes a strict $300,000 ceiling as the maximum donation from a political action committee to a candidate for statewide judicial office. This is the highest contribution permitted from any category of donor in Texas—well below the $3 million spent by Don Blankenship and his PAC to elect Brent Benjamin to the West Virginia Court of Appeals in the *Caperton* case.

Caperton challenges are unlikely to prevail in the near future because many members of the bench and bar share the belief that the state's judicial campaign contribution restrictions and recusal jurisprudence create a firewall against violations of the Due Process Clause. However, continued resistance to change may further erode confidence in existing ethical safeguards. Texans hold a deep-seated lack of confidence in the fairness of the judicial system since the days of "Court Wars" and the million-dollar judicial elections in the early 1990s. Concerns that wealthy donors continue to exercise disproportionate influence on the judiciary have not yet been assuaged.

[154] TEX. ELEC. CODE ANN. Section 253.15 (Vernon Supp. 2002). Specific limits are found on the Texas Ethics Commission's Campaign Finance Guide for Judicial Candidates and Officeholders, https://www.ethics.state.tx.us/guides/JCOH_guide.htm.

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Cleaning the Muck of Ages from the Windows Into the Soul of Tax

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ABSTRACT

The aim of this paper is to provide readers with an insight into Marx's methods as a first step to understanding income tax more generally but with specific reference to Australia's income tax system. I do this by introducing readers to the ideas about the totality, that is, capitalism, appearance, and form, and the dialectic in Marx's hands. This will involve looking at income tax as part of the bigger picture of capitalism and understanding that all things are related and changes in one produce changes in all. Appearances can be deceptive, and we need to delve below the surface to understand the reality or essence of income and, hence, of income tax. Dialectics is the study of change. By developing an understanding of the processes of contradiction and change in society, the totality, we can then start to understand income tax and its role in our current society more deeply. To do that, we need to understand the ways of thinking and approaches that Marx and others have used. Only then, armed with the tools that we have uncovered, we can begin the process of cleaning the muck of ages from the windows into the soul of tax and move from the world of appearance to the essence of tax.

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I. Introduction

Drawing on Marx, and those who have followed in his footsteps, this paper introduces readers to a number of related and interrelated approaches and methodologies[1] for understanding tax and tax reform in Australia. It introduces readers to the idea of depth and hidden meaning in tax. The paper considers tax as part of the societal totality that includes capitalism. In doing this, I hope to make a small contribution to the ways that taxpayers, tax teachers, tax administrators, tax practitioners, politicians, economists, commentators, and interested bystanders can—and do—understand tax in both its specific detail and its position and role within capitalism and, at least partially, in understanding capitalism itself. All are interconnected. They are parts of the same coin if you like. The key is in figuring out how they relate to each other and the whole coin.

Indeed, it is arguable that all three sides of the coin[2] are themselves reflective of the coin. That is, they are the coin. The coin and its sides make up the area under examination, which is more than the coin and its sides. They are all linked, related, and in constant interaction with each other and the rest of the totality to produce the coin itself. Thus, major tax reform remakes not only the relations within the tax system but also the capital accumulation process and Australian capitalism itself, remembering that the relations that make up Australian capitalism are themselves part of the global system of capitalism and interact within it in a range of ways.

The paper uses concepts such as totality, appearance, and reality and the dialectic process—totality, contradiction, change, all combining other in constant contradictory motion[3]—to lay the intellectual framework for examining income tax in Australia and to help us get a deeper understanding of the tax system. In doing that, some basic ideas of Marx such as the labor theory of value, surplus value and capital, and the state as a band of hostile brothers can then become tools for a further dialectical examination of the income tax system, taking various areas of that system and, using Marx's

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1 There is much debate in Marxist circles about whether Marx, in fact, had a method or even methods. The term here is used to describe the dialectic—totality, contradiction, change—and its application by Marx and others to subsets of the totality of society, including tax, through processes such as abstraction.

2 Who imagined only two sides? Indeed, could coins not be multisided depending on the view one takes of them and what one determines to be a side? For example, a serrated-edged coin could arguably have many sides. This raises the question of individuation—what is the unit under examination and is that not also a totality? No, because the totality is society, and we, doing what is humanly possible, examine important subsets of that totality such as the mode of production—capitalism today—and subsets of the important subsets, such as tax.

3 John Rees, The Algebra of Revolution: The Dialectic and the Classical Marxist Tradition 5 (Routledge ed. 1998).

concepts, abstracting them to better understand them and the system of which they are a part, capitalism.[4]

The tax system is under constant pressure for reform.[5] It witnesses periodic and cathartic reviews, containing sometimes creatively destructive[6] proposals for tax reform[7] which can, at times, produce actual tax reform.[8] This constant pressure for tax reform and actual tax reform are part of a dialectic of tax that interacts with, and intertwines with, the exploitative system of capitalism that extracts surplus value from workers.[9] At the same time, the tax system and the tax changes embodied within it waiting to be born or lurking outside in the cold, waiting for an invitation to the warmth inside, impact adversely or encouragingly on the extraction of surplus value, depending on the nature of the reform.

The paper starts in Part II with an introduction to methods of deeper thinking and understanding through looking at an iceberg model developed by a very senior Australian tax officer. This sense of depth is, I believe, a gentle nondialectical introduction to a discussion on the need for dialectical thinking in tax and leads neatly to an examination of Marx's method(s) in Part III.

That section abstracts parts of Marx's methods to make them manageable and digestible. This involves a discussion of Marx's standpoint—the working class—and his methods and approaches such as abstraction, cleaning the windows, what the dialectic is in broad terms, and the difference between appearance and reality. The chapter develops key points such as the dialectical understanding of totality and, in situ, the interrelationship between tax and capitalism that underpins, and is a case example of, the intertwining and interconnectedness of things and relationships. Marx's dialectical method and his process of abstraction, "the intellectual practice of breaking [the] whole down into the mental units with which we think about it,"[10] help us do this. The dialectic and the windows of insight it opens into

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4 John Passant, *Some Basic Marxist Concepts To Help Understand Income Tax*, 27 J. Juris. 263 (2015).

5 Fleur Anderson, *Tax Reform Needed to Avert Crisis*, Austl. Fin. Rev., Mar. 12, 2014 *available at* http://www.afr.com/p/national/tax_reform_needed_to_avert_crisis_aToBBTcWP9P2PecK8vdzEK (last visited Jan 7, 2016).

6 Joseph A Schumpeter, Capitalism, Socialism and Democracy 81–86 (George Allen & Unwin 1943).

7 Ken Henry et al., Australia's Future Tax System Report to the Treasurer (2010) [hereinafter 'the Henry Tax Review'].

8 For example, the Goods and Services Tax came into effect on 1 July 2000 as part of the 'A New Tax System' package.

9 Surplus value is the difference between the value a worker creates and the value of their labor power (or much more crudely, but for the purposes of exposition for non-Marxists, the difference between what workers are paid and the price of the goods and services they create). *See* Passant, *supra* note 4, at 269–272.

10 Bertell Ollman, Dance of the Dialectic: Steps in Marx's Method 60 (2003). Ollman says, "In his most explicit statement on the subject, Marx claims that his method

the soul of tax may aid our understanding of the Australian tax system and its positioning within capitalism in Australia. Understanding the methodology and approaches gives us the heavy-duty material to clean the windows of the years of neoliberal and Keynesian muck and allows us a better view or views of the subject under consideration. We still have to take the windows to the cleaners, and that is a task for future work.

Using these tools, the paper moves from the real concrete through the process of abstraction to the thought concrete[11] to argue that understanding tax and tax reform in Australia can only occur fully by understanding capitalism and its processes of change, both within tax but more especially the deeper processes within capitalism that have produced the demands for, and ongoing processes of, tax reform These include the ongoing global economic crises of capitalism, what Andrew Kliman calls the Great Recession,[12] and, by implication, the resistance that neoliberal policies and the ongoing economic crises have provoked across the globe.[13] Understanding the income tax system and its interrelations with the rest of economic, political, and social life requires an understanding of how capitalism works to appreciate how the income tax system in Australia works and how the income tax system then shapes the capitalist system as a whole.

The aim of this paper, then, is to introduce readers to Marx's methodological tools, which enable us to begin that process. The last section of the article looks at tax in general through the various windows Marx has given us to help us get a better understanding of the deep rivers that flow through or underneath the seemingly shallow canal of income tax.

In doing this, I stand on the shoulders of the great, people such as Marx, Engels, Lukács, Ollman, and others. They have done the general theoretical work. The task is then to apply their insights and methodologies to tax in Australia to understand that part of the totality, that is, tax, and the totality itself—in this case, capitalism in Australia or, more appropriately, capitalism as it exists and operates in Australia.

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starts from the 'real concrete' (the world as it presents itself to us) and proceeds through 'abstraction' (the intellectual activity of breaking this whole down into the mental units with which we think about it) to the 'thought concrete' (the reconstituted and now understood whole present in the mind) (Marx, 1904, 293–94). The real concrete is simply the world in which we live, in all its complexity. The thought concrete is Marx's reconstruction of that world in the theories of what has come to be called 'Marxism.' The royal road to understanding is said to pass from the one to the other through the process of abstraction." The reference to Marx 1904 is a reference to Karl Marx, A Contribution to the Critique of Political Economy 293–294 (N. I. Stone trans., Int'l Library Publ'g 1904).

[11] *Id.* at 60.

[12] Andrew Kliman, The Failure of Capitalist Production: Underlying Causes of the Great Recession 1–3 (2011).

[13] Tunisia, Egypt, Syria, Libya, Bahrain, Greece, Spain, Portugal, Italy, Venezuela, Ukraine, Thailand, and Bosnia all come to mind in varying degrees.

Let's start on this journey by looking at a simple model drawn from the work of a very senior member of the Australian Tax Office (ATO) as a way of introducing us to depth and tax simultaneously.

II. Of Icebergs and other Titanic Arguments

As tax teachers, lawyers, and accountants, it can seem that we are forever destined to deal in minutiae. Yet even at a basic level—for example, when we are debating the meaning of words in a tax statute—the Commonwealth Acts Interpretation Act 1901 and judicial approaches exhort us and force us to look at extraneous material to understand the "real" meaning of the words to which Parliament has given its often unknowing and, I would suggest, unknowable imprimatur. The process of "looking behind" the words of the statute involves examining, among other things, second reading speeches, and explanatory memoranda. The process of looking behind, going deeper, is about understanding the policy and context for the particular laws that helps us understand the provisions. However, we do this at a superficial level. We hardly ever allow capitalism—a specific and transitory mode of production[14]—and its reality to be part of that discussion. It doesn't enter our heads. Discussions about "the economy" are framed, at least in the tax field, not in terms of accumulation and exploitation but at the level of policy. They are caught in the often sterile debates about efficiency and equity without ever asking whose interests efficiency serves and why inequality exists and is growing.[15] We reinforce the current relations of production by never questioning them in their totality or their expression within our own particular area of expertise and enquiry, in this case tax. As Harman argued:

> A social group identified with the continuation of the old relations of production and the old institutions of the superstructure necessarily only has a partial view (or a series of partial views) of society as a whole. Its practice is concerned with the perpetuation of what already exists, with 'sanctifying' the accomplished fact. Anything else can only be conceived as a disruption or destruction of a valuable, harmonious arrangement. Therefore, even at times of immense social crisis, its picture of society is one of a

[14] Brian Roper, The History of Democracy: A Marxist Interpretation 10–11 (2013).

[15] Andrew Leigh, Battlers and Billionaires: The Story of Inequality in Australia (2013); Joseph E. Stiglitz, The Price of Inequality: How Today's Divided Society Endangers Our Future (2012).

> natural, eternally recurring harmony somehow under attack from incomprehensible, irrational forces.[16]

We tax teachers, tax administrators, tax policy wonks, and tax practitioners are, as Harman said, concerned with sanctifying the accomplished fact—in this case, the accomplished fact of capitalism and the role of tax within it. As Hegel told us, the owl of Minerva flies only at dusk.[17] For many of us, however, there is no take-off. The very work we do, and its nature, does that because we are concerned with the current relations of production, not understanding how they arose or concerning ourselves with future ones. It also does that because we don't discuss capitalism per se and its relationship to tax. Nor do we discuss tax and its relationship to the totality, that is, society, and an important part of that totality, the mode of production—in our case, capitalism. I see my task as helping others and myself take flight, not just at dusk or even, looking forward, at dawn, but at all times.

We must not only look back, like the owl of Minerva. We must look forward. Indeed, what is in view contains the past, the present, and possible futures. Ollman argued that history for Marx, and this is something that equally applies to tax and tax research, "refers not only to time past but to future time. Whatever something is becoming—whether we know what that will be or not—is in some important respects part of what it is along with what it once was."[18] It is the idea of becoming, of constant change, arising because "existence itself is an uninterrupted process of transformation,"[19] that is, a key Marxist way of looking at and understanding the capitalist world and its components—areas such as tax. It shows both the possibilities of change within the system under examination and the ability to transcend those limits and create a new paradigm from the

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[16] Chris Harman, *Base and Superstructure*, 2 Int'l Socialism 3, 30 (1986) *available at* http://www.marxists.org/archive/harman/1986/xx/base-super.html (last visited Jan 7, 2016).

[17] "When philosophy paints its grey in grey, one form of life has become old, and by means of grey it cannot be rejuvenated, but only known. The owl of Minerva takes its flight only when the shades of night are gathering." G. W. F. Hegel, Philosophy of Right 20 (S. W. Dyde trans., Batoche Books Ltd. 2001). Hegel was arguing that analysis could occur only after the event. However, if the event contains within itself possible futures, then a dialectical materialist approach might enable us to understand the present and the possibilities contained in it, based in part on what the event is now and was before, acknowledging that the "is now" and the "might be" can only be understood through the "was before."

[18] Bertell Ollman, *Putting Dialectics to Work: The Process of Abstraction in Marx's Method*, *in* 3 Rethinking Marxism: A Journal of Economics, culture & Society 26, 32 (1990).

[19] Leon Trotsky, *The ABC of Materialist Dialectics, in* The Age of Permanent Revolution: A Trotsky Anthology 355, 356 (Isaac Deutscher ed., 1964).

contradictory elements within the system itself. [20] This also means understanding capitalism, not just in general but also "a given capitalism at a given stage of development."[21] It also means understanding that the parts of the whole interact with each other and are, thus, constantly changing the totality and themselves.

To do that, let's start off with an analysis of tax complexity not from a Marxist point of view but from that of a senior tax officer, and one of the few who has made any attempt to go beyond platitudes about the purpose and policy of tax laws or proposed laws to try to contextualize tax in Australia. I offer this example because it shows that it can be done and is, I believe, a way of introducing readers to more complex Marxist approaches, in particular the dialectic, to help understand tax.

A. The Tip of the Iceberg

ATO Deputy Commissioner Jim Killaly has sought to understand the depth of tax, including different worldviews which, he argued, drive and interact with the actions of players in the tax system. He is, in my experience, one of the best strategic thinkers in the ATO today.[22] He showed us that we can delve deeper to understand the drivers of change in a tax context, even if not in the Marxist terms that I have outlined earlier. His analysis showed that we can go further in our thinking about tax than just the oft-repeated but never fully understood attempts of many tax teachers and other to teach and understand tax in its "political, social, and economic environment." Such an approach is, or can be, static and uncomprehending of change. Killaly talked in terms of the iceberg model with events or things that happen—the surface appearance—at the top of the iceberg, patterns and trends underneath them, structural drivers below that and world views at the very bottom, all in increasing size.[23] Here is his pictorial representation of the iceberg.

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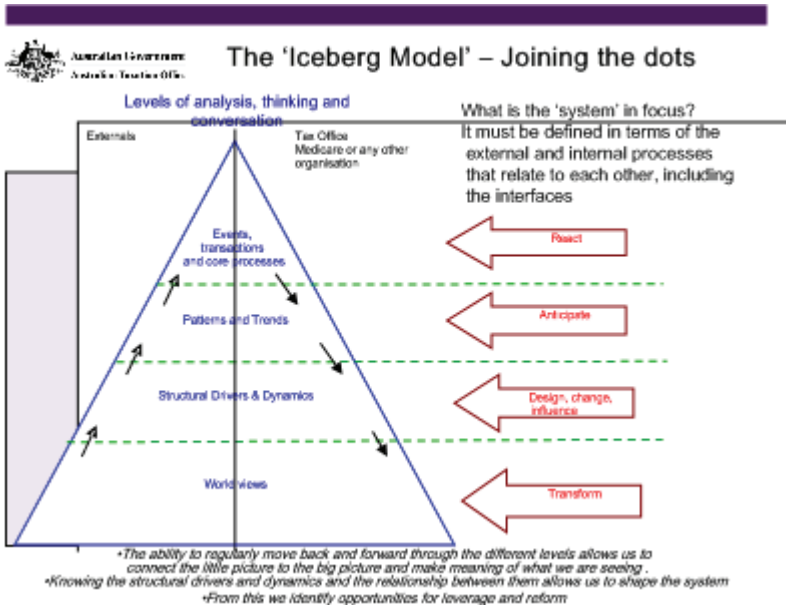
[20] These ideas of totality, change, and contradiction are, as we shall soon see, at the heart of the dialectic. *See* Rees, *supra* note 3, at 5.

[21] Trotsky, *supra* note 19, at 357.

[22] I worked in Large Business and International in the Australian Tax Office when Jim was the Deputy Commissioner in charge. His leadership, and the Strategic Leadership program he set up, gave me hope for the ATO.

[23] Jim Killaly, Deputy Commissioner of Taxation, ATO, Strategic leadership in a technical and policy delivery environment: The Tax Office experience of compliance management in the large business sector, 2009 Medicare Leader Series Comparative Studies In Compliance Management (May 28, 2009), PowerPoint 20 *available at* http://www.slidefinder.net/m/medicare-speech-2805091/33027059 (last visited Jan. 7, 2016). Killaly's diagram is an adaptation of earlier work done by others, including Richard Hames, The Five Literacies OF Global Leadership 287 (Jossey-Bass 2007). His adaptation was done in the course of his role as a Deputy Commissioner in the Australian Taxation Office.



In this, Killaly prefigured, paradoxically after the event, Marx and his search for the essence rather than the appearance of a thing or, more appropriately, the thing as a relation. For example, Marx begins Volume One of *Capital* with a discussion of the commodity as a way of unraveling its essence as a social relation under capitalism. It encompasses, among other things, the concept of use and exchange values, the purchase and sale of labor power, the exploitative relationship of capital over labor that produces the commodity, the surplus value embedded in it, and the profit that flows from its exchange. The concrete is abstracted to reveal the essence, a complex set of interrelationships between human beings in a complicated and interconnected hierarchy of economic, social, and political life and power that can then be used to understand the real concrete through the prism of the abstract.

To emphasize the idea of interconnectedness, here is what Killaly said at the bottom of the slide:

> The ability to regularly move back and forward through the different levels allows us to connect the little picture to the big picture and make meaning of what we are seeing. Knowing the structural drivers and dynamics and the relationship between them allows us to shape the system. From this, we identify opportunities for leverage and reform.[24]

[24] *Id.*

While this shows a dialectical understanding of relationships, it lacks systemic depth and an understanding of class and the relentless drive for profit and the reinvestment of that profit, that is, the Grundnorm of capitalist production or—as Marx put it—"Accumulate, accumulate! That is Moses and the prophets."[25] Killaly also failed to recognize class struggle as the driver of major change within, and potentially beyond, capitalism.[26]

Talk of class struggle conjures up visions of strikes and picket lines. However, both sides of the class divide can, and do, wage class struggles. The past 30 years of neoliberalism and working class quiescence in Australia[27] and much of the developed world can best be described as a one-sided class war by capital against labor.[28] The old mole of sometimes open, often hidden, class struggle[29] does not live on, or in, or even near the iceberg. Perhaps it is too cold or perhaps, like Hardt and Negri,[30] Killaly thinks the old mole is dead, frozen in the icy wastelands of modernity.

When Killaly in his iceberg model posits worldviews as the base, he adopts an idealist approach rather than a materialist one to understanding the world. Ideas come from, and reflect, a material base. As Marx wrote: "It is not the consciousness of men that determines their being, but, on the contrary, their social being that determines their consciousness."[31] However, we need to avoid reading this as some sort of reductionist manifesto from Marx. As Lukács argued, the idea of totality—that society is a totality, and that each part of it interacts on the other parts and the whole—not only

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[25] Karl Marx, Capital Vol. 1: A Critique of Political economy, 558 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., Progress Publishers, 1977) (1867).

[26] As Marx and Engels say: "The history of all hitherto existing society is the history of class struggles." Karl Marx & Friedrich Engels, The Communist Manifesto (Wordsworth Editions Ltd, 2008) (1848).

[27] John Passant, *Neoliberalism in Australia and the Henry Tax Review* 8 J of the Australasian Tax Teachers Ass'n 117, 120–123 (2013).

[28] Sharon Smith, *Marxism, Unions and Class Struggle: The Future in the Present* 78 Int'l Socialist Rev. (2011) *available at* http://www.isreview.org/issues/78/feat-marxism&unions.shtml (last visited Jan. 7, 2016).

[29] Karl Marx, The Eighteenth Brumaire of Louis Bonaparte 107 (Int'l Publishers 1938).

[30] Although arguing against Marx and claiming that his old mole of class struggle was dead, Hardt and Negri say this by way of explanation of Marx's view of the old mole. "Marx tried to understand the continuity of the cycle of proletarian struggles that were emerging in nineteenth-century Europe in terms of a mole and its subterranean tunnels. Marx's mole would surface in times of open class conflict and then retreat underground again—not to hibernate passively, but to burrow its tunnels, moving along with the times, pushing forward with history so that when the time was right, (1830, 1848, 1870) it would spring to the surface again. 'Well grubbed old mole!'" Michael Hardt & Antonio Negri, *Marx's Mole is Dead! Globalisation and Communication*, Eurozine (Feb. 13, 2002), *available at* http://www.eurozine.com/articles/2002-02-13-hardtnegri-en.html (last visited Jan. 7, 2016).

[31] Karl Marx, *Preface to a Contribution to the Critique of Political Economy, available at* https://www.marxists.org/archive/marx/works/1859/critique-pol-economy/preface-abs.htm (last visited Jan. 7, 2016).

negates reductionism but also is the essence of Marxism.[32] Rees, too, argued for similar reasons that totality means there can be no reductionism but adds this is also the case because a dialectical approach "presupposes the parts and the whole are not reducible to each other."[33]

Killaly's iceberg model is useful in pointing out that there are deeper forces at work in tax than just the surface happenings or events or the policy rationalizations or even worldviews. Let's build on that to move into a discussion about totality and change.

B. The Sea of Fluidity and the Totality of Life

The second aspect that Killaly's model doesn't address is the context in which the iceberg finds itself. To continue the analogy, we need to understand not just the iceberg but also the sea in which it floats and is submerged, and the world that sea is in and of which it is a part. Processes such as global warming and the creation and destruction of icebergs would be included in that.

So instead of looking just at the tip of the tax iceberg, tax teachers, administrators, and practitioners need to—indeed must—explore the submerged tax mass. However, they have to go further (and to give him his due, Killaly does do this in other parts of his presentation and slides)[34] and examine the societal, political, and economic sea in which the iceberg floats, the tides, eddies, and currents that move tax icebergs around. They also need to examine the process of creation and destruction of such structures in a rapidly changing environment to understand the tip and the mass beneath and how the iceberg came to be, where it is, its environment, the pressures, and forces moving it and which it moves, and the internal contradictions tearing it apart and rebuilding it. This also means understanding that the tip and the rest of the iceberg are part of that sea, interact with it, and help create and recreate it, in single and multiple effects. In essence, understanding the tip of the iceberg means understanding the iceberg and the sea it is in. This also requires an understanding of the sea as part of a wider system, the planet, and its ecology.[35] This analogy of examining the planet, sea, iceberg, and tip to see how they interact and interrelate is understanding that these exist in the context of and interrelate with the rest of the universe, in short Marx's concept of totality.

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[32] Georg Lukács, History and Class Consciousness 27 (Merlin Press 1967).

[33] Rees, *supra* note 3, at 7.

[34] *See* Killaly, *supra* note 23, slides 5 and 6, where he talks of the interrelatedness of the big perspectives. The perspectives that he identified are social, economic, political, technological (ways of knowing, doing, understanding), environmental, tonal (the pervading ethical issues and perspectives), and tax technical (SEPTETT).

[35] For a brilliant explanation of Marx and the environment, *see* John Bellamy Foster, Marx's Ecology: Materialism and Nature (2000).

III. Marx's Viewpoint and the dialectic

Before we address the question of the dialectic, to understand it, we must first understand the point of view, the window or windows—into society that those thinking in this way adopt.

A. Marx's Viewpoint

Marx sees the world through the eyes of the working class. His view is not, it is true, as a worker but in the context of capitalism and its transitory nature and the role of the working class in becoming the subject of history rather than just its object, or the subject–object of history, as Lukács puts it.[36] Bertell Ollman used the reverse of an old English lyric to explain the basic viewpoint of Marxists as compared to others, especially in academia:

> The law locks up the man or woman
> Who steals a goose from off the common,
> But leaves the greater villain loose
> Who steals the common from under the goose.37

> The commons, of course, was the land owned by everyone in the village. By the late Middle-Ages, feudal lords were claiming this land as their own private property. In universities today, we can discern two opposing kinds of scholarship—that which studies the people who steal a goose from off the commons … and that which studies those who steal the commons from under the goose … If the 'mainstream' in practically every discipline consists almost entirely of the former, Marxism is our leading example of the latter.[38]

Marxists study not just the ruling class but attempt to understand why they are the ruling class. They examine the processes of history that saw them become the lords ruling over the commoners and commons, bosses over workers, and the relations that make them the rulers. They investigate particular areas from the viewpoint of the working class as both the object and the subject of history. They have a materialist approach, and for this reason, the dialectic is sometimes referred to as historical materialism precisely because Marxists look to the way human beings organize production to help understand that society. As Lukács said, "historical materialism alone is in a position to offer objective and correct knowledge of capitalist society. It

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[36] Lukács, *supra* note 32, at 149.

[37] 15th century, English, Anonymous, quoted by Ollman, *supra* note 10, at 155.

[38] Ollman, *supra* note 10, at 155.

does not deliver this knowledge independently from the class standpoint of the proletariat, but rather precisely from this standpoint."[39]

What changes the class from being the object of history to its subject? As Marx and Engels famously put it, "the history of all hitherto existing society is the history of class struggles."[40] This understanding, this historical materialism, can help the working class move toward an alternative vision and practice of society, one already rooted in the present society and bought within view by the contradictions within that society. Of course, working class struggle and its level of intensity define that understanding but practice without theory is as doomed to failure as theory without practice.

For workers, class analysis, class consciousness, and struggle are intimately mixed and this holds true in tax, too. It is no surprise that the dominant capitalist ethos and ideology of neoliberalism has captured tax and tax policy[41] at a time of declining global profit rates and, in Australia, a massive decline in strike days lost (in other words, a big drop in open class struggle).[42]

As to processes and tax analysis and teaching, for example, Ollman said that it is easy to see the thief taking the goose but the theft of the commons is more difficult to see, because it occurs over time as part of a process.[43] We have to grasp the bigger picture—why landlords began to claim that the commons were private property, changes within feudalism, the first stirrings of capitalism, and so on to understand the specifics in more detail. It is much the same with the theft of the tax commons in the realm of real thought through the appropriation by capital of surplus value created by workers, and in the domain of the real concrete through tax cuts for high-income earners and capital and tax expenditures worth tens of billions for the rich and powerful, as well as shifts in tax bases from income to consumption. What we don't see so clearly is the systemic loss of tax from the rich and capital. What we don't see at all is the extraction and appropriation of surplus value by capital from labor and its realization on the market as profit, rent, interest, dividends, and the ongoing purchase of labor through wages, all of which underpin and make viable the tax system.[44] We do not recognize the tax commons because they have already been stolen. That is why arguments for tax equity under capitalism are ultimately a fraud. This doesn't mean that progressive tax changes, if implemented, can't make life better for workers. They can. It just means capital will resist such changes because it may result in less surplus value in concrete form for them. To achieve a better tax system for workers will require class struggle by labor to impose it on capital. Even if that occurs, however, and capitalism remains

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[39] Georg Lukács, A Defence of History and Class Consciousness: Tailism and the Dialectic 80 (Verso 2002).

[40] Marx & Engels, *supra* note 26, at 1.

[41] Passant, *supra* note 27, at 117.

[42] Tom Bramble, Trade Unionism in Australia: A History From Flood to Ebb Tide 7 (2008); Passant, *supra* note 27, at 120-124.

[43] Ollman, *supra* note 10, at 155.

[44] Passant, *supra* note 4, at 277-85.

intact, the fundamental inequity of capitalism, the exploitation of the working class by capital, is not abolished. Tax arises after exploitation and the extraction of surplus value occur. It is built on that exploitation and so cannot fundamentally challenge it.

B. Abstraction

According to Ollman, because capitalism is so big and so all-powerful, few of us see it.[45] As he said, in explaining why abstraction is a part of the thinking process: "our minds can no more swallow the world whole at one sitting than can our stomachs."[46] Another reason for abstraction is to move from the appearance to the reality, from appearance to essence, or real concrete to thought concrete to use different descriptions of the process.

Certainly, when we are thinking about tax, capitalism, its structure, and arrangements are assumed as the eternal background, the natural wellspring of taxable income in the hands of capital and labor. Like the almost automatic process of breathing the air around us, we often only question the process when the air is poisoned. The complex interrelations and the process of change within the system blind us to the reality,[47] that is, the totality and its expression in important areas such as the mode of production—capitalism today—and subsets such as tax and tax reform. As a tool, dialectics can help us understand the totality that exists and the interrelationships between the differing parts that make up the whole, and the feedback loops of interpenetration that exist between the whole and the parts that make it up.

Abstraction is a key process for Marx and Marxists. Marx explained his method of political economy in the following way:

> It seems to be correct to start with the real and concrete, the actual prerequisites, thus in economics, e.g., with population, which is the basis and the subject of the whole social process of production. Yet, on closer consideration, this proves to be wrong. The population is an abstraction if, for instance, I omit the classes of which it is composed. These classes, in turn, remain an empty phrase if I am ignorant of the elements on which they are based, e.g., wage-labor, capital, and so on. These presuppose exchange, division of labor, prices, etc. For example, capital is nothing without wage-labor, without value, money, price, etc. If, therefore, I were to start with population, it would be a chaotic idea of the whole and through more precise determination I would arrive analytically at increasingly simple concepts; from the concrete as imagined to increasingly tenuous abstractions until I reached the most simple determina-

[45] Ollman, *supra* note 10, at 156.
[46] *Id*. at 60.
[47] *Id*.

> tions. From there it would be necessary to take the journey again backwards until I finally arrived at population again, but this time not as a chaotic idea of a whole, but as a rich totality with many determinations and relations.[48]

In other words, as Ollman puts it, we move from the real concrete to the thought concrete through abstraction.[49] Thus, in the tax field, we might move from taxable income to tax profit to accounting profit to surplus value to understand better the taxable income of companies. We might also move from the company as taxpayer taxed on its taxable income to examine the processes by which the wealth that workers create—the surplus value that is embedded in profit—is expropriated by the owners of capital and how it becomes translated into profit, and what happens to that profit in the process of accumulation and repurchase of labor power and capital. The abstraction has already occurred—surplus value is an abstraction, for example—but its existence in thought, together with the circulation process and the sale of goods and services on the market, makes our understanding of profit more complete. We have investigated the appearance and found the essence. It was Marx who said that the appearance of reality was capital producing profit, labor producing wages, and land producing rent, or the Trinity Formula of political economy as he less than generously called it.[50] For him, however, the source of these categories was expressions of a more general essence. They were all drawn from surplus value, essentially the unpaid labor of workers in the production of goods and services for the market. Value is an expression of the socially necessary labor time inhered in a product.

The income tax system reflects that fundamental contradiction ideologically by assuming capitalists earn their profit, interest, rent, and the like rather than it flowing from labor. Indeed, income tax in Australia is theorized and based on three categories of income—income from labor, income from property, and income from business—a combination of both labor and capital.[51] The ghost of Adam Smith haunts tax not just through his four principles but through his Trinity, a mystification of income based on the surface reality.

Income tax also applies after the event—that is, after the process of realization on the market occurs. This produces profit and this can be reinvested as capital to purchase labor power again. The tax system is predicated on the "reality" or the "fact" that workers are paid for their labor rather than their ability to labor or their labor power. It does this by both following the Trin-

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[48] Karl Marx, A Contribution to the Critique of Political Economy 129-130 (General Books 2009).

[49] Ollman, *supra* note 10, at 60.

[50] III Karl Marx, Capital. A Critique of Political Economy 814 (Progress Publishers 1974).

[51] For a more tax-technical discussion of these categories, *see* John Passant et al., *Are Returns Received by Householders from Electricity Generated by Solar Panels Assessable Income*? 43 Austl. Tax Rev. 263, 269 (2014).

ity Formula for income and developing a category called taxpayer to whom is assigned, in the case of business, the responsibility of tax on the value in real form they have expropriated or exploited from workers. In addition, the revenue that government raises will be used for capitalist purposes—for example, infrastructure for capital, tax expenditures on business and the rich, and the social wage to produce educated and healthy workers to exploit.

The contradiction is also fought out politically and economically in terms of the real appearance over which class bears the tax burden. Of course, if tax is an extraction from surplus value, then the answer is that the state becomes a further extractor of surplus value, at the expense—so capital sees it—of a greater share for them. Thus, the introduction and expansion of consumption taxes could be seen, even if it occurs in conjunction with tax cuts for all, including business, as a shift from taxing capital to taxing labor. In part, this will be because inflation over time will increase the average tax rate as workers go into higher tax brackets while for business, the flat rate remains just that—a flat rate.

Obviously, neither capital nor the vast majority of labor see tax as an extraction from surplus value. The tax system reflects the individualization of the distribution of surplus value in money form into particular hands. The particular nature of the distribution that occurs depends on whether one owns the means of production or one only has one's labor power to sell to capital to survive. Despite the fact that there is not a level of understanding of the essence of taxation, the real concrete remains real, but that, too, has consequences. A number of revolutions—for example, the French Revolution and the American Revolution—had, as one of their immediate sparks, taxation. The Henry Tax Review was, in the main, a neoliberal argument for a further shift in tax, at the level of the real concrete, from capital to labor.[52] There also may be conflict within the capitalist class over industry tax burdens and some sectors, for example, primary industry and mining, may receive more favorable taxable treatment than other areas.

C. *Cleaning the Windows*

David Harvey has also given us a very insightful way of looking at Marx's approach. He understood that Marx's relational approach means nothing is fixed and no concept can be understood in isolation.[53] Borrowing from Ollman, he said "… Marx sees each relation as a 'separate' window from which we can look in upon the inner structure of capitalism."[54] If we view capitalism from just one window, it appears "flat and lacks perspective."[55] We move to another window and see things previously hidden so that "[b]

[52] Passant, *supra* note 27.
[53] David Harvey, The Limits to Capital 2 (1982).
[54] *Id.*
[55] *Id.*

y moving from window to window and carefully recording what we see, we come closer and closer to understanding capitalist society and all of its inherent contradictions."[56] Such an approach in tax, for example, might examine and construct an understanding of Australian income tax and capitalism through that examination and abstraction. However, we bring the thinking of the past to this process. We need to clean the windows to see more clearly what is beyond. This paper, I hope, contributes to that window cleaning, recognizing that the heavy-duty cleaning material already exists. All we need to do is to use that material to clean the windows. In other words, the conceptual framework already exists. What is needed is to apply that framework to income tax, in my case using the income tax system I am familiar with, that in Australia. Because the income tax systems of the developed capitalist countries have similar bases—for example, income, taxpayer, resident, source, with variations—the tools outlined in this article for cleaning the muck of ages from the windows of tax are more generally applicable to those income tax systems. They are similar to that of Australia.

We cannot really clean the windows without looking at class and class struggle, or lack of it, the creation of surplus value, the circulation processes in capitalism, the transformation of value into prices, disruptions to the "natural" distribution of surplus value, both the complementary and antagonistic nature of the capitalists who make up the capitalist class, the claims of different sections of capital and the state to a share of surplus value, the tendency of the rate of profit to fall, to name just a few concepts to help us on our long journey to tax enlightenment. We can view tax through these numerous windows, wiping clean the muck of ages[57] for a better view and, in turn, developing a better understanding not just of income tax in Australia but of Australian capitalism and the totality, that is, society.

The dialectic is a way of understanding the process of change, including in tax. What, then, is this dialectic everyone isn't talking about?

D. The Dialectic

Like all good dialecticians, the parts have been partially revealed in our previous discussion. To concretize our thinking, Birchall said: "Dialectics … is the study of how things change."[58] It is also understanding that "things"

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[56] *Id*.

[57] Karl Marx and Friedrich Engels, The German Ideology *available at* https://www.marxists.org/archive/marx/works/1845/german-ideology/ch01d.htm (last visited Jan. 7, 2016). This cleaning away of the muck of ages will occur, according to Marx and Engels, during a workers' revolution. In changing the world, workers change themselves.

[58] Ian Birchall, *What's in a Word: Dialectics: The Whole Truth,* Socialist Review 27-30 (1982-1983) *available at* http://www.marxists.org/history/etol/writers/birchall/1982/12/dialectics.htm (last visited Jan. 7, 2016).

are processes, or—as Engels put it—"the world is not to be comprehended as a complex of ready-made *things*, but as a complex of *processes*."[59] Nothing is final. All is in the process of not only becoming but also ending, or as Engels said:

> Just as the bourgeoisie by large-scale industry, competition, and the world market dissolves in practice all stable time-honoured institutions, so this dialectical philosophy dissolves all conceptions of final, absolute truth, and of absolute states of humanity corresponding to it. For it (dialectical philosophy), nothing is final, absolute, sacred. It reveals the transitory character of everything and in everything. Nothing can endure before it except the uninterrupted process of becoming and passing away, of endless ascendancy from the lower to the higher.[60]

This complex of processes occurs within a totality so a change in one part of the totality produces changes in the rest of the parts because of their interconnectedness and, thus, in the totality. The totality is society.[61] However, even this can be too schematic because there is a constant process of change going on, brought about by contradictions within the totality itself, and interacting back upon each other and the whole, with the whole also interacting upon the parts. It is not just that the whole is great than the sum of its parts. The parts are greater than their own uniqueness by being part of the whole. A single worker is powerless but has the potentiality of power. Thus, together as a class, workers can make a revolution and, in doing that, create a new society. As Birchall said: "So, rather than the whole being a simple sum of its parts, the parts can be understood only in the context of the whole. As Lenin points out, a hand is only really a hand if it is part of a body."[62]

Tax is a very handy part of the body of capitalism. There is a duality to tax in this sense. It is levied by the state and, whatever else may and can be said about the state, and many careers have been built on just this enquiry, the state under capitalism remains a capitalist state. However, tax is levied after the event—that is, after surplus value is created and appropriated. More than that it is levied after the circulation process has seen the capitalists realize profit, or interest or dividends or rent, and the profit is then capital again, to be used among other things to buy labor power (living capital) and machines, buildings, etc. (dead labor). Tax is levied during the process of the distribution of surplus value, which capital regards as its property, its

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[59] 4 Friedrich Engels, Ludwig Feuerbach and the End of Classical German Philosophy (Paul Taylor trans.) *available at* https://www.marxists.org/archive/marx/works/1886/ludwig-feuerbach/ch04.htm (last visited Jan. 7, 2016).

[60] *Id*. at Part 1, *available at* http://www.marxists.org/archive/marx/works/1886/ludwig-feuerbach/ch01.htm (last visited Jan. 7, 2016).

[61] Lukács, *supra* note 32, at 27.

[62] Birchall, *supra* note 58.

worth, its earnings, its income and, as part of the process of realizing surplus value in concrete form, as profit, rent, interest, and so on. Tax upsets the natural order of things from the point of view of the capitalist because it subtracts from their "return on investment", that is, the amount they have invested or reinvested in the means of production and labor power.

Further, tax itself, and tax reform, if implemented, and depending on the nature of the reform, can produce changes in the relationships within capital or sectors of it, between capital or parts of it and the state,[63] between labor and capital, and impact markedly (both positively and negatively and in whole or in part) on the capital accumulation process. Such reforms may change the share of surplus value appropriated by individual capitalists or industries in the process of capitalist production, realization, and distribution and reproduction, the further purchase of labor power and the means of production for the ongoing processes of capitalism to continue. And, of course, static tax laws may become obstacles to the accumulation of capital over time because of shifts in the nature of production, falls in global profit rates, the degree of internationalization of an economy, and the competitive pressures that brings to bear, often with ideologies of cutting taxes, grabbing the imagination of some or most politicians and parts of the population, such as small business in general and that section of big business which is part of global capital and, of course, the final consideration, the combativity, or lack of it of the working class.

Tax will influence, in direct and indirect ways, the production of surplus value and its distribution as profit, interest, rent, dividends, and wages. At a micro level, sections of capital, for example, which see their profit being taken by the state might change their residence or earning location and use 19th century tax treaty concepts to avoid tax in seemingly higher taxing jurisdictions such as Australia (one example of base erosion). Google made between $1 and $2 billion in revenue from Australian sources in a recent income year but paid, on one estimate, only $74,000 in tax here.[64] Apple generated $26 billion worth of revenue from Australia over 10 years to 2013 and yet the company only paid 0.7% of its revenue in tax here.[65] In addition to base erosion, high purchase prices for intellectual property, in other words possible profit shifting, and double Irish Dutch sandwiches—moving profit through Ireland to the Netherlands and back through Ireland, all tax free on the way to a tax haven—reveal complex arrangements whose sole objective is to keep the surplus value rendered as profit in the hands of the company exploiting its workforce or retailing those products to consumers.

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[63] See Passant, *supra* note 27, at 125-26.

[64] John Passant, *Giant Profits, Tiny Tax Bills: Time to Close Loopholes on Corporate Tax Avoidance*, The Conversation Nov. 22, 2012 *available at* http://theconversation.com/giant-profits-tiny-tax-bills-time-to-close-loopholes-on-corporate-tax-avoidance-10874 (last visited Jan. 7, 2016).

[65] Neil Chenoweth, *How Ireland Got Apple's $9bn Profit*, Australian Fin. Rev., 6 Mar. 2014, 1 *available at* http://www.afr.com/p/technology/how_ireland_got_apple_bn_profit_erlmHONvoHJGixwLUpFckN (last visited Jan. 7, 2016).

As Google chairperson Eric Schmidt said, in defending his company's tax avoidance activities around the globe, activities that saw it funnel almost $10 billion into Bermuda, saving $2 billion in taxes:

> I am very proud of the structure that we set up. We did it based on the incentives that the governments offered us to operate. The company isn't about to turn down big savings in taxes. It's called capitalism. We are proudly capitalistic. I'm not confused about this.[66]

In other words, for business, tax laws become part of the structure of capitalism and paying tax is a cost to business. The competitive drive to lower costs and secure more profit for each individual business means that company tax "planning" or avoidance is not a failing of capitalism. It is its logical expression. It is not something that can be legislated away. It is inherent to individual capital in a competitive capitalist society. So, too, arguably are the judiciary's ideas or even world views of community and the individual that underpin differing judicial approaches to the various general anti-avoidance provisions in Australia.[67]

How, then, does the dialectical method[68] help us understand all of this? First, let's examine what is covered by the term the dialectic. Because the audience for this article is those with an interest in tax rather than a deep grounding in Marxism, I will try to keep this discussion as easy to understand as possible. My apologies in advance if sometimes I fall short of that goal.

As Lenin said, "[t]he splitting of a single whole and the cognition of its contradictory parts is the essence (one of the 'essentials,' one of the principal, if not the principal, characteristics or features) of dialectics."[69] Partly, this is done because as I mentioned before "[o]ur minds can no more swal-

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[66] Brian Womack, *Google Chairman Says Android Winning Mobile War With Apple: Tech*, Bloomberg, Dec. 12, 2012 *available at* http://www.bloomberg.com/news/2012-12-12/google-chairman-says-android-winning-mobile-war-with-apple-tech.html (last visited Jan. 7, 2016).

[67] John Passant, *Tax Avoidance in Australia: Results and Prospects*, 22 Fed. L. Rev. 493, 523 (1994).

[68] 'Dialectical materialism' is a term used and abused by the Stalinist regimes to turn creative thought into a crude rubber stamp for state capitalist dictatorship. *See* Birchall, *supra* note 58. The term "The Dialectic" suggests a closed system of truth. It may display a way of thinking that presupposes a magic bullet of understanding and a fixed totality of thought that is in fact antidialectical. *See, for example*, Fredric Jameson, Valences of the Dialectic 5 (2010). Having said that, the term is an adequate descriptor for a journeyman like me trying to understand Marx's method and apply it as a method in concrete circumstances to gain a deeper understanding of the specific under examination and the system of which it is a part.

[69] V I Lenin, *On the Question of Dialectics*, 38 Collected Works 359 (2d ed., Progress Publishers 1965).

low the world whole at one sitting than our stomachs."[70] Partly, it is done to reveal the essence hidden by the appearance.

This general approach emphasizing totality, contradiction, and change, too, is reflected in John Rees' discussion of the dialectic. He said that its general form "… is an internally contradictory totality in a process of constant change."[71] On this view, there are three major elements or principles of the dialectic—totality, change, and contradiction.[72] For Rees, totality expresses interconnectedness, the idea and the fact that what appear to be separate are, in fact, related.[73] Lukács made clear that the idea of totality is, or should be, at the heart of Marxist thought and analysis. As he said, "it is not the primacy of economic motives in historical explanation that constitutes the decisive difference between Marxism and bourgeois thought, but the point of view of totality."[74] That totality is society.[75]

Under capitalism, the producer is separated from the productive process as a whole. Workers are atomized and individuated, divorced from the wider system of which they are an integral part.[76] Most academics and other thinkers silo their field of study—for example, tax law—treating it as a concrete whole divorced from wider forces and separate from the idea that it is an integral part linked and in conflict with other concrete wholes. Despite the division of labor and, with it, of most thinking about particular subjects, there are in fact no separate categories of thought. Lukács again said:

> Marxism, however, simultaneously raises and reduces all specializations to the level of aspects in a dialectical process. This is not to deny that the process of abstraction and, hence, the isolation of the elements and concepts in the special disciplines and whole areas of study is of the very essence of science. But what is decisive is whether this process of isolation is a means towards understanding the whole and whether it is integrated within the context it presupposes and requires, or whether the abstract knowledge of an isolated fragment retains its 'autonomy' and becomes an end in itself. In the last analysis, Marxism does not acknowledge the existence of independent sciences of law, economics or history, etc. There is nothing but a single, unified—dialectical and historical—science of the evolution of society as a totality.[77]

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[70] Ollman, *supra* note 10, at 60.
[71] Rees, *supra* note 3, at 7.
[72] *Id*. at 5.
[73] *Id*.
[74] Lukács, *supra* note 32, at 27.
[75] *Id*. at 28.
[76] *Id*. at 27.
[77] *Id*. at 28.

Alternatively, as Alfredo Saad-Filho said, "the capitalist economy…is integral and whole, and…this organic system of mutually conditioning things is determining with regards to its parts, or moments."[78] This expresses a deeper understanding of society—that it is a totality, not a set of separate isolated units or sectors. Each sector is in creative conflict with the other parts, fighting to reflect their own seeming interests in the context of the totality, that is, the capitalist system. The whole is greater than its parts, parts that contradict and conflict. It is this ongoing conflict that drives change. The major contradiction and conflict (sometimes hidden, sometimes open)[79] is, under capitalism, that between capital and labor. Tax reflects and reinforces that division and, in turn, reflects and reinforces the state of struggle between the two.

So it is with any attempt to understand tax—understanding the tax system and its specifics as part of a whole, but a whole in the process of constant change in which the individual parts conflict and battle each other to produce change. Not only that, it is about abstracting from the specifics to better understand them. Totality, contradiction, and change sums up the process.[80] Tax and tax reform are one part of a wider process of capitalist accumulation, both encouraging and feeding off that process.[81] However, tax is also something more than this. Tax helps mediate the relationship between labor and capital but introduces or, rather, is introduced by a new layer of complexity—the state.

The contradiction at the heart of capitalism is that between capital and labor, or as Engels put it: "The contradiction between socialized production and capitalistic appropriation manifested itself as the antagonism of proletariat and bourgeoisie."[82] I would go further than Engels. The very fact of division between one group who sell their labor power and another who live off that labor is itself the contradiction, of which the reality of socialized production and capitalist appropriation is an expression under capitalism. The antagonism between capital and labor, the class struggle,[83] is the driving force of capitalist history[84]and the key to understanding the future developments within capitalism but also breaking out of it, the synthesis that is socialism. The two classes stand "in constant opposition to each other, [carrying] on an uninterrupted, now hidden, now open fight …"[85] It is this battle that expresses itself in many forms of change. Thus

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78 Alfredo Saad-Filho, The Value of Marx: Political Economy for Contemporary Capitalism 9 (2002).

79 Marx & Engels, *supra* note 26, at 36.

80 Rees, *supra* note 3, at 7.

81 Chris Harman, Zombie Capitalism: The global crisis and the relevance of Marx 113-115 (2009).

82 Friedrich Engels, *Socialism: Utopian and Scientific*, *in* The Marx-Engels Reader 705 (Robert Tucker ed., 3d ed. 1982).

83 Or the lack of it by the working class and, hence, dominance of the ruling class.

84 Marx & Engels, *supra* note 26, at 1.

85 *Id*.

neoliberal policy will produce a set of policy prescriptions to address the tendency of the rate of profit to fall, whether it be a longer working day or improved labor productivity, or reducing real wages and undermining work conditions, or cutting taxes. So the surface expression of this aspect of class struggle might be fought out over attempts to cut the social wage, disproportionate tax cuts for the rich and capital, or the reality or perception of increasing tax burdens on workers.

In Australia, industrial action—the open fight by workers in the battle between capital and labor—has been mainly hidden for many years.[86] This class peace, with strike days per thousand employees lost now standing at only a few percent of the late 1960s and early 1970s, what Bramble calls the ebb tide,[87] has had an adverse impact on the material and political life of the working class and on tax policy. This is now a seemingly unchallenged neoliberal paradise, at least in theory and for the purposes of reviews, but one in which the plans for reform meet the dead hand of the past (the current system) and a deep working class suspicion of tax change that may impact adversely on them. As Marx put it, with just a little bit of tinkering from me: "The tradition of all dead [tax] generations weighs like a nightmare on the brains of the living."[88]

Bernard Keane in *Crikey*[89] had compiled a graph of the decline in strike levels since the first few years of the Accord from Australian Bureau of Statistics (ABS) data. It shows a massive decline in strikes and other open expressions of working class fight-back.

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[86] Tom Bramble & Rick Kuhn, Labor's Conflict: Big Business, Workers and the Politics of Class 170 (2011).

[87] Bramble, *supra* note 41, at 4. For a very good graph highlighting the huge decline in strikes from the flood of the mid-1970s to the ebb tide up to 2007, s*ee* Bramble at 7. Australian Bureau of Statistics (ABS) figures for the period 2008–2013 show a further overall decline, with some slight pick-up in 2012/2013 because of big strikes in the construction industry and among teachers and nurses—but still, in the context of the historic levels of strikes on an average, very very low: http://abs.gov.au/ausstats/abs@.nsf/mf/6321.0.55.001?OpenDocument (last visited Jan. 7, 2016). Figures from 1960 to 2010 show the massive nadir in working class struggle today and for the last few decades, compared with the zenith of the mid-1970s; Australian Bureau of Statistics, Year Book Australia 2012 *available at* http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Workplace%20relations~300 (last visited Jan. 7, 2016). A precipitous decline began with the election of the Hawke Labor Government in 1983 and was a result of the wage restraining Accord between the government and union leaders. Union membership also plummeted accordingly. *Id*, at 313.

[88] Marx, *supra* note 29, at 13.

[89] Bernard Keane, *How the FWA Was a Miserable Failure—at Justifying Business Hysteria*, Crikey, Mar. 14, 2014 *available at* http://www.crikey.com.au/2014/03/14/how-the-fwa-was-a-miserable-failure-at-justifying-business-hysteria (last visited Jan. 7, 2016).

Class antagonisms also play an important, if often indirect, part in the design and ongoing relevance of tax systems and shifting tax bases, tax policy direction. The level of class struggle impacts on the general political climate, and this influences all politicians, including politicians of the reformist left and their approach to tax. All, of course, interact and struggle with each other as part of the bubbling mud pools of tax change. Now, of course, the interplay between capital accumulation, profit rates, and taxes is vital to understanding the role tax change plays in propping up the capitalist system by, for example, reducing the tax burden on the reapers of profit. In other words, it acts as a countervailing action to the tendency of the rate of profit to fall.[90]

We can see the contradiction between capital and labor playing out in the media at the moment with calls for major reform based on the Henry Tax Review recommendations and the head of that group, Ken Henry, warning of a tax crisis in the near future if reform is not pushed more forcefully.[91] The release in 2015 of Re:think, the Federal Government's White Paper on taxation, prompted further agitation from some politicians, interest groups, and commentators for tax reform.[92] Much of the business

[90] Marx, *supra* note 50, at 279 *et seq*.

[91] Anderson, *supra* note 5.

[92] The Australian Government, The Treasury, Re:think – Tax Discussion Paper (2015) *available at* http://bettertax.gov.au/files/2015/03/TWP_combined-online.pdf (last visited Jan. 7, 2016) [hereinafter Re:think]. For other media commentary, sparked in part by the release of the tax white paper, see, for example, Helen Hodgson, *Government calls for tax rethink, but reform answers abound* The Conversation Mar. 30, 2015 *available at* https://theconversation.com/government-calls-for-tax-rethink-but-

reform agenda focuses on expanding the base of Australia's value-added tax, the Goods and Services Tax (GST), to include fresh food and spending on health and education and increasing the rate from 10 to 15 percent and cutting income tax, in particular the company tax rate, although the Labor Opposition has shifted the debate with its proposals to allow negative gearing of rental properties only on new housing and to reduce the capital gains tax concession, while the Government has taken a GST increase off the table in the run up to the election due some time in 2016.[93]

Underlying changes in society can force tax changes. Changes within Australian and global capitalism (recognizing that Australian capitalism is part of global capitalism and becoming more and more integrated into the global system), against a background of an almost complete lack of industrial action by workers, are worthwhile areas for investigation to understand tax reform and the push for tax reforms in Australia.

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reform-answers-abound-39436 (last visited Jan. 6, 2016). Hodgson is critical of the fact Re:think is a series of questions about tax reform, not answers. The Tax Green Paper, after a period of consultation sparked by Re:think, was to provide those answers but the ascension of Malcom Turnbull to the prime ministership in September 2015 appears to have delayed the release of that Tax Green Paper and to have shifted its focus. See Mark Hawthorne*, Malcolm Turnbull halts tax white paper process in major "reset"* Sydney Morning Herald Sept. 23, 2015 *available at* http://www.smh.com.au/business/the-economy/malcolm-turnbull-halts-tax-white-paper-in-major-reset-20150923-gjstsm.html (last visited Jan. 6, 2016).

[93] Roger Brake from the Treasury Revenue Group has listed some of the key issues arising in the discussion of tax reform, including personal and company income tax cuts, reducing the superannuation and capital gains tax concessions, addressing in some way the negative gearing of rental properties, and broadening the Goods and Services Tax (consumption tax) base and/or increasing the rate. See Roger Brake, The Treasury, *An Inside Perspective on the Tax White Paper* (2015) (speech at the VIC 3rd Annual Tax Forum, October 8, 2015), http://www.treasury.gov.au/PublicationsAndMedia/Speeches/2015/An-inside-perspective-on-the-Tax-White-Paper (last visited Jan. 6, 2016). However the Prime Minister Mr Turnbull has since announced that the government will not be taking a GST increase to the 2016 election, in my view for fear of losing a large number of votes or possibly even the election itself. Stephanie Anderson and Eliza Borrello, *GST increase not being taken to election by Malcolm Turnbull* ABC NEWS Feb. 16, 2016, *available at* http://www.abc.net.au/news/2016-02-16/turnbull-rules-out-gst-change-election-policy/7172294 (last visited Mar. 5, 2016).

The Business Council of Australia, recognising the opposition to GST and other changes that might be seen as unfair, has recently put out a discussion paper on tax reform suggesting their proposing be phased in over time, with the company tax cuts first priority and the GST changes pushed back to 2025. *Realising Our Full Potential: Tax Directions for a Transitioning Economy* BCA Mar. 8, 2016, *available at* http://www.bca.com.au/publications/-realising-our-potential-tax-directions-for-a-transitioning-economy (last visited Mar. 13, 2016).

Details of the Labor Party's negative gearing and capital gains tax proposals can be found here. Australian Labor Party, P*ositive plan to help housing affordability*, *available at* http://www.alp.org.au/negativegearing (last visited Mar. 6, 2016).

Dialectical thinking can help us in that understanding. Some readers might have read about the "three laws of the dialectic." These "laws," drawn from Engels, are "the unity of opposites, the transformation of quantity into quality, and the negation of the negation."[94] Essentially, the unity of opposites is one way of describing contradiction. Quantity into quality expresses the idea that a gradual change in the relationship of the contradictory forces can suddenly produce rapid and complete change. The negation of the negation highlights the fact that the old is contained in the new but transformed by the process of rapid change into something completely different.[95] These "laws" are examples of a "way in which dialectical development can take place"[96] but are not the only way this can happen and are not, in fact, laws themselves. While they are useful examples of dialectical change, we should be very wary of applying them like judges at a criminal trial.

While we tax experts may look deeply into the eyes of the policy makers and parliamentarians—invariably not the same people—to discern meaning, or even investigate the underworld of structural drivers, what we generally don't do is posit tax and tax policy debates and discussions in the context of a specific time in history where production is organized (fleetingly as it happens in the grand scheme of human development)[97] to make profit and reinvest that profit in yet more profitable activities, that is, to accumulate.[98] In short, we tend to divorce tax, tax law, tax policy, and tax reform from capitalism, from the accumulation process and the role tax, tax law, policy, administration, and reform play in the capitalist system and the interactions between the parts and the totality, the multilevel interactions, between tax and capitalism. All the dirty windows are waiting to be cleaned and then opened. We just don't yet know how to find the ladders to help us climb to the second floor to clean and peer in. The concepts of appearance and reality are a start.

E. Appearance and Reality

Ollman relays a wonderful story from mythology[99] that Marx used.[100] Cacus, a clever old man-demon, lived in a cave. He came out at night to steal oxen from nearby villages, driving them backwards into his cave so that when the villagers came looking for their stock, all they found were footprints leading

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94 Rees, *supra* note 3, at 8.
95 *Id*, at 9.
96 *Id*, at 8-9.
97 Joseph M Gillman, The Falling Rate of Profit 1 (1957).
98 Marx, *supra* note 25, at 557. As Marx put it, "Accumulate, accumulate! That is Moses and the prophets."
99 Ollman, *supra* note 10, at 12-13.
100 Karl Marx, Theories of Surplus Value Part III 536-537 (Progress Publishers, 1975).

from the cave: thus the oxen apparently disappeared in the middle of a field. Our task is to work back from the footprints of profit and wages and their taxation to the cave of surplus value.

In other words, we need to break through the surface phenomena to understand the deep structures we are dealing with. Whether we acknowledge it or not, we are social scientists in the field of tax. As Hobsbawm put it, drawing on Engels, "[t]he good social scientist [can] only be a person free from the illusions of bourgeois society."[101] Because capitalism is still in business, Marxism is and must be, too.[102] Doing this is not to be doctrinaire and not to demand that readers kneel down before "the truth."[103] It is to "develop new principles for the world out of the world's own principles … We merely show the world what it is fighting for and consciousness is something that it *has* to acquire, even it does not want to."[104]

At one level, most readers—I hope—can accept that to understand tax, you need to understand it in its political, social, and economic contexts. That trite statement contains a real kernel of truth, one that political economists and tax academics like me can build on. As Marx put it: "If the essence and appearance of things directly coincided, all science would be superfluous."[105] This is as true of the social sciences (including tax, tax reform, and tax law) as it is of the natural sciences. Because capitalism is so complex, we can end up accepting its surface appearances as the only reality or we can simplify that complexity to such an extent we lose the truth contained in the complexity.[106] To avoid these pitfalls, we can adopt Marx's method "to abstract from the misleading appearance of things."[107] What Marx seeks to do is "understand the most basic processes in capitalism and then to reconstruct ever more complex aspects of the system in his theory. Once this is done, it becomes clear how the 'basic laws of motion' generate the complicated surface appearances."[108]

That is true, too, of tax. You cannot understand tax and tax reform divorced from the society in which it exists. Society is split into classes. One owns the means of production and the other sells its labor power to survive. Through its labor, one produces surplus value, the other expropriates or obtains that surplus or part of it.[109]

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[101] Eric Hobsbawm, How to Change the World: Tales of Marx and Marxism 95 (2011).

[102] Terry Eagleton, Why Marx was Right 2 (2011).

[103] Karl Marx, *Letter to Arnold Ruge, September 1843* quoted in Kieran Allen, Marx and the Alternative to Capitalism (Pluto Press, 2011) 13 and *available at* http://www.marxists.org/archive/marx/works/1843/letters/43_09.htm (last visited Jan. 7, 2016).

[104] *Id*.

[105] Marx, *supra* note 50, at 817.

[106] Joseph Choonara, Unravelling Capitalism: A Guide to Marxist Political Economy 16 (2009).

[107] *Id*. at 17.

[108] *Id*.

[109] Harman *supra* note 81, at 28-33.

"Objective" truth does not just arise; it is not discovered like gold.[110] Marx said "[t]he question whether objective truth can be attributed to human thinking is not a question of theory but is a practical question. Man must prove the truth, i.e. the reality and the power, the 'this-worldliness' of his thinking in practice."[111] That practice is, as Paul D'Amato argued, class struggle.[112] Thus, we might argue that the objective truth of progressive tax as part of a wider attack on growing inequality[113] can be won through class struggle. In the words of the great trade union philosophers, "If you don't fight, you lose."[114]

However, in understanding the reality of tax and exploitation, tax and the state, tax, and capitalism, it becomes clear that progressive victories may, at best, be temporary and the daily grind of the needs of capital for profit and accumulation undermine or threaten to undermine every ounce of social progress the working class has won. Winding back or destroying the welfare state in Europe is but one current example.[115] So, too, is the extension of the working day in many countries of the developed world, including Australia.[116] Lengthening the working day extracts more surplus value out of workers. It is one response to the reassertion since the late 1960s and early 1970s in most developed capitalist countries of the tendency of the rate of profit to fall. Thus unpaid overtime—a gift to the capitalist class—is now estimated to total about $110 billion a year in Australia,[117] or about 7% of GDP. As one senior trade union official wryly remarked at a May Day celebration a few years ago, maybe the trade union movement needs to begin a campaign for the eight-hour day again.[118] The extension of the working day, much of it unpaid,[119] is an attempt by the ruling class to increase the absolute surplus value it can expropriate from workers.[120]

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[110] Unlike, evidently, the 'correct' case decision, according to rule of law proponents.

[111] Karl Marx, *Theses on Feuerbach, in* Marx, Engels Selected Works 28 (Lawrence & Wishart 1968).

[112] Paul D'Amato, *The Powerlessness of Anti-power: Review of "Change the World Without Taking Power" by John Holloway*, 27 Int'l Socialist Rev. (2003) *available at* http://www.isreview.org/issues/27/holloway.shtml (last visited Jan. 7, 2016). I am indebted to D'Amato, having drawn heavily on his ideas in this paragraph.

[113] Leigh *supra* note 15; Stiglitz, *supra* note 15.

[114] This was, and is, one of the slogans of a militant Australian trade union, the Builders Labourers Federation. *See* Liz Ross, Dare to Struggle, Dare to Win! (2004).

[115] John Passant, *Lessons from the Recent Resource Rent Experience in Australia*, 10 Canberra L. Rev. 159, 178 (2011) *available at* http://www.austlii.edu.au/au/journals/CanLawRw/2011/25.html (last visited Jan. 7, 2016).

[116] Brigid van Wanrooy, *A Desire for 9 to 5: Australians' Preference for a Standard Working Week*, 17 Labour & Industry 71, 73-74 (2007).

[117] David Baker et al., Walking the Tightrope: Have Australians Achieved Work/Life Balance? 1 (2014).

[118] This was a personal observation on her part. She spoke to me at that rally.

[119] van Wanrooy, *supra* note 116, at 74.

[120] Marx, *supra* note 25, at 645.

One final point. The state levies tax. Rather than some neutral body overseeing society, the capitalist state is a creature of the capitalist system.[121] This is not the place to go into the debates about the state other than to adopt the view of "the relative autonomy of the state"[122] in the sense that it can act independently of the interests of particular sections of capital or particular capitalists but that its ultimate existence depends on the continuation of the extraction of surplus value from workers in the productive sector of society.[123] As such, tax cannot unduly interfere with or challenge that exploitative process.[124]

The state is one of the band of hostile brothers of capital, united in exploiting workers but fighting among themselves for a greater share of surplus value.

IV. Tax and the Dialectic

The rise of capitalism in England and its wars with revolutionary France saw income tax introduced as a temporary measure until the wars ended and the tax was repealed in 1816.[125] In this sense, income tax is both a creature and creation of the capitalist state. However (and leaving aside discussion of the fact that the income tax did not at this stage apply to the working class), income tax can only arise in a society in which there is generalized income earning. Such generalized income earning, the first in human history, is one hallmark of capitalism, a system of commodity production and exchange to make profit to reinvest to make more profit through the next round of production and exchange. The possibility of income tax can only arise in the context of the generation of income—in other words, for capital in the process of commodity exchange and for labor through the sale of labor power, itself a form of exchange.

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[121] Chris Harman, *The State and Capitalism Today* 2 International Socialism Journal 3 (Ser. No. 2, 1991) *available at* https://www.marxists.org/archive/harman/1991/xx/statcap.htm (last visited Jan. 7, 2016).

[122] *Id*. *See also* Harman, *supra* note 81, at 111.

[123] This "rule for capital not capitalists" role often fell to Labor or social democratic parties because in the past their social base was the trade union or working class movement, not the corridors of capital. *See* Passant, *supra* note 115, at 174 *et seq*. However, as the experience of the Gillard Labor Government and the Minerals Resource Rent Tax suggests, the changing nature of the ALP from a capitalist workers' party to a CAPITALIST workers' party may mean that role is no longer one it can undertake. *See* Passant, *infra* note 129.

[124] Harman *supra* note 81, at 113–15.

[125] Martin Daunton, Trusting Leviathan: the Politics of Taxation in Britain 1799–1914, 24 (2007).

It is not capital that imposes taxes. It is the state, a state dependent on the capital accumulation process for its existence and survival. This does not make the state a mere instrument of capital. Nor is the modern state in advanced capitalist countries such as Australia just or only "the executive committee for managing the common affairs of the bourgeoisie."[126] The structural dependence of the state on capital[127] limits the choices governments can make. This does not mean that they don't have choices. It does mean that they are neither autonomous nor straitened. Governments are relatively autonomous within the bounds imposed by capital accumulation.[128]

For example, the state can impose solutions on capitalism for the benefit or survival of the system as a whole and at the expense of particular sections of capital if needed. In Australia, this role has traditionally fallen to the Labor Party because of its structural links to the trade union bureaucracy and arm's length distance from capital. Those days appear to be well in the past, as the failure of Labor to impose a Resource Super Profits Tax and only being able to pass a watered down version in the form of the Minerals Resource Rent Tax, a tax designed by the three big multinational mining companies in Australia, shows.[129]

A. The Establishment of Capitalism in Australia and the Imposition of Income Tax

Before Federation in 1901, and after the British invasion in 1788[130] and the ongoing genocide of Aboriginal people,[131] some of the Australian colonies had begun the move from regressive and inequitable taxes to progressive ones on land and income.[132] This change reflected the long, slow process of establishing capitalism in Australia, moving initially from a forced la-

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126 Marx & Engels, *supra* note 26, at 1.

127 Adam Przeworski & Michael Wallerstein, *Structural Dependence of the State on Capital*, 82 Am. Pol. Sci. Rev. 11, 12 *et seq.* (1988).

128 Harman, *supra* note 81.

129 John Passant, *The Minerals Resource Rent Tax: The Australian Labor Party and the Continuity of Change*, 27 Acct. Res. J. 19 (2014).

130 Henry Reynolds, The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia (1981); Colin Tatz, *Confronting Australian genocide,* 25 Aboriginal Hist. 16, 23 (2001).

131 Colin Tatz, *Genocide in Australia*, 1 J. Genocide Res. 31 (1999); Colin Tatz, *supra* note 130, at 16; A. D. Moses, *Genocide and Settler Society in Australian History, in* Genocide and Settler Society (A. D. Moses ed., 2005). For an example of the ongoing nature of the genocide, *see* Human Rights and Equal Opportunity Commission (Australia), Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families 236 (1997).

132 Sam Reinhardt & Lee Steel, A Brief History of Australia's Tax System (2006) *available at* http://archive.treasury.gov.au/documents/1156/HTML/docshell.asp?URL=01_Brief_History.asp (last visited Jan. 7, 2016).

bor economy to a free labor one and with it the ongoing development of agricultural, industrial, retail, and finance capital Australia, or as Hillier and O'Lincoln put it, by 1820, a "state-run prison with capitalist features was transforming itself into a full-blown capitalist society in eastern Australia."[133] One consequence of this was the development of a working class who because of the nature of the capital/labor relationship wanted (and still want) social democratic gains appropriate for their times, often couched in terms of some variant on "fairness." Progressive taxation, especially when the working class is taxed, is one outcome of this systemic social democratic desire. In addition, the state met the needs of capital in an admittedly rudimentary way for an educated workforce, one fit enough to work profitably for the capitalist class, and in more systematic fashion to fund a police force and army to control rowdy workers and engage in imperialist adventures with the mother country from 1885 on in places such as the Sudan, South Africa, and then Europe.

By the time of Federation, many of the States had income taxes, but they were levied on different definitions of taxable income and at different rates.[134] Some applied only to residents and others taxed on a source basis.[135] Funding the First World War drove the Labor Government of Billy Hughes to introduce a Federal income tax in 1916.[136] From then until 1942, there were both federal and state income taxes. The need to fund the war effort in the Second World War, the ongoing centralization of power in the Federal Government, and the inequities inherent in a dual state and Commonwealth income tax saw the Federal Government impose a uniform income tax in 1942. While this, on paper, allowed States to impose income tax, they would lose all Commonwealth grants if they did so. From then on, the income tax effectively became the sole Commonwealth responsibility.[137]

This confirmed the process of centralization of power into the hands of the Federal Government that was occurring within Australia from the time of Federation and which was boosted by the Second World War.[138] This centralization was further reinforced by the demands for and expansion of the welfare state after World War II. So too was the expansion of the income system. While the original Federal Income Tax applied only to high income earners, over time the tax expanded its reach to include the wages of ordinary working class taxpayers. [139]

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[133] Ben Hillier & Tom O'Lincoln, *Five Hundred Lashes and Double Irons: The Origins of Australian Capitalism*, 5 Marxist Left Review (2013) *available at* http://marxistleftreview.org/index.php?option=com_content&view=article&id=89:five-hundred-lashes-and-double-irons-the-origins-of-australian-capitalism&catid=42:number-5-summer-2013&Itemid=81 (last visited Jan. 7, 2016).

[134] Reinhardt & Steel, *supra* note 132.

[135] *Id*.

[136] *Id*.

[137] *Id*.

[138] *Id*.

[139] *Id*.

Wages are the market price for the sale of a worker's labor power, their ability to work. That labor power is itself valued by reference to the socially necessary labor time that goes in to the commodity. In short, it is the amount need to reinvigorate the worker for work the next day and into the future, to allow him or her enough to raise a family as the next generation of workers and to provide for some historically specific expenses such as a few beers or wines on Friday night watching the footy. [140]

Wages will fluctuate around this value level, depending on the level of class struggle. This means that after tax wages, in times of relative economic prosperity will not be below their value. However, it also means that income tax can, at times, cut real wages to below their value. So a fight for a living wage can be a fight to overcome the desire and often reality of capital to pay workers the minimum they can to maximize their profits.

However, it can also be a fight over the ability of the state to tax workers' earnings to avoid their after tax real wage falling below the level of their value. It, too, can be a fight over the amount of tax imposed on capital, although arguably this can be recouped in the market assuming that capital can increase prices to adjust for taxes. This may not always be the case, especially if the products the particular capitalist produces compete in offshore markets where similar taxes or levels of tax do not exist.

More importantly, the bourgeoisie or sections of it may demand cuts in taxes on capital in response to international competition or more fundamentally as one of the number of counteracting tendencies or countervailing methods to address the systemic tendency of profit rates to fall.[141] This could, for example, involve cuts to company taxes to "remain competitive" in line with overseas trends or cuts in government spending on the social wage or a combination of both.

There may be a struggle over the social wage where the state extracts both income tax from workers and redistributes some of that to those workers in the form of public services such as education, health, transport, unemployment benefits, and other social security payments. The provision of such social services may be cost-effective for the State in creating a fit and educated workforce (and, hence, more exploitable workers), but it may rob certain spheres of activity such as public health and education from commodification and, hence, profit making for private capital.[142] It also imposes a burden on the State to fund such spending and on labor and capital, depending on who bears the burden of the taxes imposed, and if the decline in relative surplus value from which to extract tax is systemic,

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[140] Marx, *supra* note 25, at 167-68.

[141] For a discussion of the Law, *see* III Karl Marx, Capital 210 *et seq* (Progress Publishers, 1974); *see also* id. at 222 *et seq.* for a discussion of the counteracting tendencies.

[142] The long slow march—or perhaps zigzag—to private education and health care in Australia has been ongoing since the election of the Hawke Labor Government in 1983. The links Labor had with the union movement enabled it, for example, to introduce a "pay later" scheme for higher education in 1988/1989.

then it creates further pressure for cutting taxes on income that comes out of that pool of surplus value.

B. Class Antagonisms in the Tax System

Clearly, there are class antagonisms in tax systems. Tax issues from 1763 onwards were one of the sparks for the American Revolution and tax lit the bourgeois revolution in France in 1789. Even in Australia, tax (in the form of mining licenses) was at the heart of the Eureka Rebellion in 1854.They are specific examples.

However, it was not tax that prompted the working class revolution in Russia in 1917 or the many outbreaks of revolution across Europe during and after World War I. It was privation, poverty, lack of democracy, and slaughter. It wasn't tax that saw Chinese workers revolt in 1926, nor was it tax that saw Hungarian workers rise up in 1956 against the Stalinist dictatorship. It wasn't tax that fueled the workers rising up during the Iranian revolution of 1978–1979. Tax wasn't at the heart of the working class and other agitations against Stalinism in Poland in 1956, 1970, or1980–1981. It wasn't tax that was at the heart of the overthrow of the Stalinist regimes in Russia and Eastern Europe in 1989–1991. Tax, however, was (and remains) part of the system of exploitation and oppression, including war and privation, which saw workers in these disparate countries, across many generations, revolt.

While tax was a barrier to capitalist development in France in the years preceding 1789,[143] it is not a barrier to the development of a participatory socialist society.[144] The working class exists as an entity with the potentiality to create that new society where production is organized democratically to satisfy human need rather than to make profit to be reinvested again and again in the pursuit of more profit. Income tax can, depending on the specifics of the circumstances of each particular country, be one of the mechanisms for a reduction in working-class living standards. However, paradoxically, cutting taxes on workers may not improve living standards if it is accompanied by cuts to or abolition of the social wage. The increased costs of privatized education or health could outweigh the improved after tax wage as a consequence of tax cuts on wages. The combativity of the working class, or lack of it, and the level of relative surplus value would be

[143] Leonard J. Hochberg, *Reconciling History with Sociology? Strategies of Inquiry in Tocqueville's Democracy in America and The Old Regime and the French Revolution*, 7 J. of Classical Soc. 23, 41 (2007); II Alexis de Tocqueville, The Old Regime and the Revolution, 5 (2001); Keith Baker et al., The Old Regime and the French Revolution (1987).

[144] For a good discussion of the history of democracy, including socialist participatory democracy, *see* Brian Roper, The History of Democracy: A Marxist Interpretation (2013).

important contributors to any struggle and likelihood of success over tax and social services.

There is also a temporal dimension in tax. Bracket creep, when increases in wage move workers into higher marginal tax rates, is an important part of any slow, ongoing increased taxation on workers and possibly, depending on the level of wage increases, decreasing or helping to decrease after tax living standards, too. The introduction of the GST in Australia from 1 July, 2000, is a case in point. It was accompanied by income tax cuts whose value was eroded over time through bracket creep. One estimate is that by 2005/2006, bracket creep had clawed back $3.8 billion of the GST tax cuts,[145] tax cuts themselves at least in part funded by bracket creep in the years before the introduction of the GST. Even a superficial understanding of tax can then show that all is not as it seems. Tax cuts are eroded over time through tax creep. As workers' wages increase, their average tax rate increases. This is so irrespective of whether they actually move into a higher tax bracket because the increased income is taxed in the highest marginal rate, increasing the government's average tax take from each worker. Leaving aside these surface phenomena, a tax system taxing income reflects what is happening on the surface in the realm of exchange. While this surface is a reality and impacts on the real lives and livelihoods and living standards of workers, it hides and obfuscates a deeper reality.

C. *I'm Walking Backwards for Cacus*

Income tax in Australia is imposed on "taxable income": assessable income less allowable deductions. Income, whatever form it takes, is a given. Wages, dividends, interest, rent, and profits, for example, are all specific examples of income that is assessable income and often will also be taxable income. Income is a generic term that captures different forms of income and does not ask from whence this magical item arises. The answer seems self-evident. Wages come from labor. Profits arise from business, or capital and activity. Interest comes from invested money. Rent is the product of land. Dividends flow from shares.

As mentioned previously, this reflects in part what Marx called the Holy Trinity approach of Adam Smith. In short, the income tax system is based on what Marx describes as the (apparent) Trinity Formula of capital-profit, labor-wages, and land-rent. The income tax system is an outgrowth

[145] Thus Hielke Buddelmeyer et al. said, "This $3.8 billion is the dollar amount of bracket creep, expressed in first quarter 2004 dollars, and represents what it would cost to compensate the Australian tax payers for the extra amount of tax they would pay in 2005/06 as a result of inflation as measured by the CPI since 2000/2001." *See* Hielke Buddelmeyer et al., Bracket Creep, Effective Marginal Tax Rates and Alternative Tax Packages *available at* https://www.melbourneinstitute.com/downloads/labour/WebReport.pdf (last visited Jan. 7, 2016).

of an economic system that fetishizes commodities and sees relationships between people as relationships between things. It not only hides the exploitation of workers. It misallocates the creation of profit, interest, rent, and dividends—specific examples of the general category of surplus value—in the hands of capital rather than labor. It views workers as being rewarded for their labor rather than the reality of the reward being for their ability to labor and taxes them accordingly.

What the tax system deals with is the phenomena arising in the distribution of surplus value, not its production. As Paul Mattick puts it, "[t]axes are a part of realized income through market transactions…"[146] While production and circulation "intertwine and intermingle continually and thereby adulterate their typical distinctive features,"[147] profit, a specific and concrete market form of the more general and abstract category of surplus value, appears to the capitalist and indeed to the rest of society, as the real value and to arise in circulation, rather than production. Further, profit appears to arise from total capital invested (i.e., from the cost of machinery, factories, land, as well as labor) rather than from workers, or what Marx calls variable capital. These surface realities, these appearances, find expression in the tax system in the form of the general taxpayer, an abstract individual or concept divorced from his or her role in society as in the main either capitalist or wage laborer. They also find expression in the key concept of assessable income in our income tax system, an abstraction hiding, as it does the reality of the source of that income in the form of profits, interest and the like, and wages. Yet we are walking backwards and the Cacus capitalist is stealing the value workers create. Tax helps steer this backward walk.

The income tax system involves itself with the money that arises from the exchange of commodities and the money value of labor, in other words, the price received for the sale of goods and services in the market place and of labor power in the job market, not recognizing the social relations that these represent. In this way, the income tax system reflects capitalism and reinforces the mystique of capitalism. As Marx said: "The mystification here arises from the fact that a social relation appears in the form of a thing."[148] The "thing" here appears on the one hand as the commodities produced and on the other as the money form of capital or labor, in turn profit, interest, rent, or wages. The social relations are reified in both production and exchange that although viewed as separate are actually a unity or processes that describe capitalism. Marx again stated:

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[146] Paul Mattick, *Monopoly Capital, in* Anti-Bolshevik Capitalism (1978) *available at* https://www.marxists.org/archive/mattick-paul/1966/monopoly-capital.htm (last visited Jan. 7, 2016).

[147] Marx, *supra* note 50, at 44.

[148] Karl Marx, Theories of Surplus Value Part I 313 (Progress Publishers 1975).

> A commodity is therefore a mysterious thing, simply because in it the social character of men's labor appears to them as an objective character stamped upon the product of that labor; because the relation of the producers to the sum total of their own labor is presented to them as a social relation existing not between themselves, but between the products of their labor. This is the reason the products of labor become commodities, social things whose qualities are at the same time perceptible and imperceptible by the senses. It is only a definite social relation between men that assumes, in their eyes, the fantastic form of a relation between things.[149]

Further, it is not just that social relations between humans are viewed as relations between things. As Lukács pointed out, the worker's "own labor becomes something objective and independent of him, something that controls him by virtue of an autonomy alien to man." [150]

A world of commodities that the working class created confronts the working class as alien to them and alienated from them. The ability to perform work itself becomes a commodity in the reality, that is, capitalism, and, hence, in the mind of the worker. As Marx said: "What is characteristic of the capitalist age is that in the eyes of the laborer himself labor-power assumes the form of a commodity belonging to him. On the other hand it is only at this moment that the commodity form of the products of labor becomes general."[151]

It is not just that this process of reification is going on. It is also that in being paid wages, both the worker and capitalist imagine that what is being paid for is the labor of the worker, rather than his or her labor power. This further form of mystification Marx captures when he says:

> We see, further: The value of threes, by which a part only of the working-day – i.e., six hours' labor – is paid for, appears as the value or price of the whole working-day of 12 hours, which thus includes six hours unpaid for. The wage form thus extinguishes every trace of the division of the working-day into necessary labor and surplus-labor, into paid and unpaid labor. All labor appears as paid labor. In the corvée, the labor of the worker for himself, and his compulsory labor for his lord, differ in space and time in the clearest possible way. In slave labor, even that part of the working-day in which the slave is only replacing the value of his own means of existence, in which, therefore, in fact, he works for himself alone, appears as labor for his master. All the slave's labor appears as unpaid labor. In wage labor, on the contrary, even surplus-labor, or unpaid labor, appears as paid.

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[149] Marx, *supra* note 25, at 77.

[150] Lukács, *supra* note 32, at 87.

[151] Marx, *supra* note 25, Chapter 4, Theories of Productive and Unproductive Labour *available at* https://www.marxists.org/archive/marx/works/1863/theories-surplus-value/ch04.htm (last visited Jan. 7, 2016).

> There the property-relation conceals the labor of the slave for himself; here the money-relation conceals the unrequited labor of the wage laborer.
>
> Hence, we may understand the decisive importance of the transformation of value and price of labor-power into the form of wages, or into the value and price of labor itself. This phenomenal form, which makes the actual relation invisible, and, indeed, shows the direct opposite of that relation, forms the basis of all the juridical notions of both laborer and capitalist, of all the mystifications of the capitalistic mode of production, of all its illusions as to liberty, of all the apologetic shifts of the vulgar economists.[152]

In other words, the appearance makes the actual invisible. Yet this doesn't make the appearance less real to those who experience it. As God is the creation of humanity, he or she not only appears to exist, he or she exists. It is precisely because the idea of God or the illusion of wages being paid for labor performed comes from the social relations of society that makes them real. As Marx said in relation to religion: "But man is no abstract being squatting outside the world. Man is the world of man—state, society. This state and this society produce religion, which is an inverted consciousness of the world, because they are an inverted world."[153] So, too, with the capitalist mode of production—our current society—and the relations of production that see workers selling their labor power in the job market to capital. Labor is free in two senses. It is free from any means of subsistence and free to sell itself for subsistence, disguised as a wage seemingly paid for the actual labor performed. This inversion flows through the income tax system, too. The state and society produce income tax. It is both an inverted consciousness of the world and an actuality arising in an inverted world, a world of commodity production and circulation.

Money is the universal equivalent. This means that it becomes the mechanism for exchange by embodying the value that is then reflected in prices. Money performs many roles in capitalism. It is the ultimate reification in one sense, obscuring what is ultimately an abstract, unstable and shifting notion that is the relations of production within enterprises, exchange between enterprises, and the complex of political and state activities that operate to enforce its power as a physical fact. What is behind money is not a thing called money but the whole of the social relations of capitalism, or the complex of actions of real people who (re)produce the power of money as an external force. Money is an ideological proxy for the real power of real capitalists, politicians, and bureaucrats.

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[152] Marx, *supra* note 25, at 505–06.

[153] Karl Marx, *Introduction,* in A Contribution to the Critique of Hegel's Philosophy of Right *available at* https://www.marxists.org/archive/marx/works/1843/critique-hpr/intro.htm (last visited Jan. 7, 2016).

It is money—in exchange, paid for wages, in capital, indeed in all its forms—that the tax system, including the income tax system, is concerned with.

The tax system is about real appearances but buries the essence. Tax mystification is as to the source of surplus value and, hence, of profit, the exploitative relationship between capital and labor and the categories of taxpayers, categories that attribute income earning to different bodies (e.g., businesses earning profit).

What the tax system deals with is the end result of the market exchange process. It hides the reality of the productive process, the process in which surplus value is created and how it is created. That reality, the reality of value, is obscured by the market and exchange. So the appearance is that workers are paid for all their labor and that capital creates profit. The reality is that it is the unpaid labor of workers that creates profit.

The tax system operates in the realm of appearances. It reflects the appearance that itself is a surface reality but obscures the essence of things. Marx called this dealing with appearances, which arises as a consequence of exchange on the market, "the fetishism of commodities" or "commodity fetishism." So, in the tax field, the monetized form of value in exchange disguises the reality of all the human relations. Further, in terms of income tax, the creation and distribution of the money form of that value becomes the basis for taxation by the capitalist state, not in the hands of the producers of the surplus value, or unpaid labor, but in the hands of those who expropriate the unpaid labor and to whom it is distributed in the process of circulation. This nonessence reality of companies earning profit, or banks interest, or landlords' rent is reification, which as Ollman told us is the process of "attributing an independent life to the various forms of value, people succeed in transferring to them certain powers for regulating their own existence."[154]

To paraphrase Marx, the sphere of exchange is the realm of equivalence and equivalents. Buyers and sellers exchange as free agents. They are exchanging "their" property and receiving "their" rewards. They look only to themselves and their private interests.

These principles apply in the tax field too. The free market is the basis for income tax, a tax applying to the profit, interest, and rent that arises in exchange and to wages paid. The result is that this fetishism expresses itself in the income tax field with an attempt to tax "ordinary income" of companies and individuals. It doesn't distinguish between individuals on the basis of their class but on the basis of their income, an incomplete guide to class. It does distinguish between individuals and companies but hides the reality of exploitation and the creation of surplus value. It reifies the relationship by taxing companies as if they had created the surplus value when profit, that is, surface reflection of the surplus value, arises in the course of production and is realized in the process of circulation. It arises from the labor used in

[154] Ollman, *supra* note 10, at 202.

producing commodities for the market. Thus, the real human relationships are doubly hidden—in the labor process in production and in the realization process in circulation. Commodities replace humans and corporations make profit, with the human agency and human interactions hidden, except for the wise Board and CEO and other leaders. Company tax applies to the surplus value expropriated by an artificial entity whose existence is the humanization of the inhuman. It all seems so clear. We work 8, 9, or 10 hours a day and are paid for our labor. Yet this is merely an appearance, an illusion. We are paid for our ability to work, our labor power.

We have already been introduced, briefly, to the labor theory of value and the creation of surplus value in the production process. Marx summarized this well when he says:

> In order to be able to extract value from the consumption of a commodity, our friend, Moneybags, must be so lucky as to find, within the sphere of circulation, in the market, a commodity, whose use-value possesses the peculiar property of being a source of value, whose actual consumption, therefore, is itself an embodiment of labor, and, consequently, a creation of value. The possessor of money does find on the market such a special commodity in capacity for labor or labor-power. [155]

The capitalist buys labor power around its value, "the value of the means of subsistence." As Marx puts it: "The value of labor-power is determined, as in the case of every other commodity, by the labor-time necessary for the production, and consequently the reproduction, of this special article."[156] It is special because although capital purchases labor power, it is in the process of production that this labor power is set to work. It is in putting labor power to work that surplus value is created. What is missing from bourgeois economics and bourgeois law, including tax law and tax teaching, is the idea that it is the labor that creates value and what tax law, for example, does is reflect the illusory appearance of capitalism and reinforce by doing so the system's deeper reality. The classic income tax formula of taxable income being assessable income less allowable deductions disguises the reality of the creation of surplus value in the productive process and its realization on the market and redistribution in the circulation process. It disguises the fact that profit and interest and rent arise from the exploitation of labor and wages from the sale of labor power.

One of Adam Smith's key insights into judging a tax system was equity. The concept of income not only denies the class nature of its production out of the labor of workers but also makes the nature of our activity a generalized equivalent. We are all earning income rather than one class producing the surplus value through its labor. Shares in that value are then distributed to capital through the process of exchange, that is, the market,

[155] Marx, *supra* note 25, at 164.
[156] *Id*.

based on their capital contributions. That "surplus become profit" or other forms of return on capital is then reinvested in labor power in the form of wages and machinery, factories, and the like. Like the villagers wondering what has happened to their cattle, we should march backwards to the essence to understand the reality. There is no Trinity. There is only one source of income and that is labor and the surplus value they create. By accepting the appearance and reinforcing that appearance at the expense of the essence, the income tax system acts both as a revenue raiser and as an ideological tool hammering home the message of the Holy Trinity.

V. Conclusion

Using the concepts and approaches that Marx has left us—concepts such as surplus value, labor power, use value and exchange value, things as processes and relations, totality, contradiction and change, the dialectical process including abstraction, the realization of surplus value on the market, and the tendency of the rate of profit to fall—we can clean the windows into the soul of income tax in Australia and in other developed capitalist countries. Armed with a knowledge and a constant process of deepening our understanding—for example, by looking through Marx's eyes at the process of capitalist production and circulation and the transformation of surplus value into profit, interest, rent, dividends, wages, and the like—we have the opportunity to clean off the centuries of caked-on filth on the windows into the soul of income tax. This wholesale cleaning could include projects not just looking at the system generally through the eyes of Marx but, for example, investigating the neoliberalization of tax policy and tax reform in Australia. It could also examine the role the Australian Labor Party plays, in government, in addressing tax the issues as part of managing capitalism, the question of rent taxes, how Australian tax reform and policy interrelates with, or is part of, wider global trends driven by global changes within capitalism, and why the Australian judiciary undermines or emasculates general anti-avoidance provisions. The foundations of the income tax system—income, source, residence, and the concept of taxpayer—could then be viewed using the tools outlined in this article. Let's use the tools we have discovered. Our journey has just begun.

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To Have, to Hold, and to Vanquish: Property and Inheritance in the History of Marriage and Surnames

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ABSTRACT

Surnames, introduced to England with the Norman Conquest of 1066, became commonly hereditary from parent to child around the fifteenth century. Yet during that time and beyond, women sometimes retained their birth names at marriage, men sometimes adopted the surnames of their wives, and children and grandchildren adopted the surnames of their mothers or grandmothers. Surnames became closely tied to the concept of property, such that the person with the property was the holder and creator of the family name. That person was more often the man, but not always. As women's property ownership became more severely restricted over time, these diverse surname practices eventually disappeared. The connections between the operation of the surname as a socio-legal function and property law and practice will be analyzed in this paper. Important in this analysis is the legal recognition of personhood implicit in the concept of property ownership; "legal personhood" for women was minimal during the period in which surnames became most restrictive for women. Yet prior to that, both the property rights and the surname options for women were more expansive, suggesting that the legal identities of women were more developed in earlier centuries and experienced a significant retrenchment in more modern times. The causes and implications of these historical developments will be analyzed.

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I. Introduction

Surnames have existed in English culture for over a thousand years. But until about 1600 A.D., surname adoption was a highly variable and fluid cultural practice rather than a rigid, legally dictated one, and hereditary assumption of names was the exception rather than the rule during the early centuries. Women often held individualized surnames reflecting specific traits, occupations, status, or parentage (e.g., Cecilia Fairwife, Alice Silkwoman, Agnes Widow, Mary Robertdaughter, respectively). Matronymics—the hereditary passing of a female's name to her descendants—was common. Surnames such as Margretson (son of Margret) and Madison (son of Maddy, nickname for Maud) are just a few of a great many examples of this type of naming. Women's given names also frequently became surnames, without the "son" or "daughter" appellation. Marriott is a Middle English nickname for Mary; Agnes, Elizabeth, Margaret, and Helen are just a few additional examples of female given names that were converted to surnames of various forms. The strongly gendered status quo of contemporary times collectively believed to be "traditional," whereby wives assume the names of their husbands and children the names of their fathers, is a relatively recent phenomenon rather than an ancient English tradition.

Hereditary acquisition of surnames had become the norm around the fourteenth to the fifteenth centuries, though the practice was inconsistently applied from one region to the next.[1] Yet well after this time, when women had become firmly established as legally impotent, they nevertheless sometimes retained their birth names at marriage; men sometimes adopted the surnames of their wives; and children and grandchildren sometimes took the surnames of their mothers or grandmothers. Women had been permitted to own and inherit property through early medieval times, with Saxon landowners willing their lands to their daughters as well as their sons. Later, inheritance for daughters became limited to situations where there were no surviving sons. Surnames as a social and legal convention became closely connected to property, such that the person with the property was the holder and creator of the family name. That person was more often the man, but not always. However, this type of female inheritance too diminished until sometimes even distant male relatives were preferred for succession over immediate family members who were female. As women's property ownership became more severely restricted over time, these variable surname practices also disappeared. The operation and function of property, especially as applied to women, is connected to the operation of surnames as a socio-legal function.

[1] P.H. Reaney & R.M. Wilson, A Dictionary Of English Surnames Xlv-Xlvi, Xlix, Li (3d Ed. 1997).

When it comes to women, the modern state is not the result of a steady linear progression of ever-increasing rights. Rather, evidence demonstrates some significant shifts backwards. Principles of coverture and female legal impotence appear to have become more unyielding and restrictive, rather than less, through many periods in English history, thus reflecting and reinforcing a gender hierarchy that was beginning to take on a more rigidly limiting form.

The legal recognition of personhood implicit in the concept of property ownership becomes critical to the analysis when women are considered specifically. Legal personhood for women was virtually nonexistent during the period in which surnames became most restrictive for them. Yet prior to that, both their property rights and their surname options were more expansive, supporting the view that their legal identities were at one time more developed. The significant simultaneous retrenchment in both areas was not a coincidence. Although it is difficult to determine causality in these events—indeed, other forces were also operating at the time that probably also had simultaneous effects on both women's surnames and their property rights—what is apparent is that women's rights and status were being increasingly restricted in both areas. However, once the new limitations on the inheritance and property rights of women were in place, they conclusively and definitively ended the enduring variation in surname convention and usage under which they had been operating. Thus, surname retrenchment was likely exacerbated by property restrictions. Surnames and property eventually became linked socially and legally, and the implications of this for women are numerous and complex. The modern uses of both conventions have supported the large-scale erasure of women from history: with both their names and their property gone, so went their historical existence.

II. Property Ownership

A. Theories of Property

Theorists for centuries have debated concepts surrounding property as a legal and social construct, such as whether individuals can ever truly own property, whether such ownership is natural or inevitable, how it is accomplished, and the role of the state in creating and enforcing the legal concept. Yet Western theories of property are almost universally based on the assumption that the owner of the property is a legal person and entail the right to pass on one's property to heirs or designees. This is significant given that women's right to own and inherit property was once relatively expansive, and then became increasingly restricted until it was removed entirely, in the case of married women. This suggests that the legal personhood of women similarly disappeared where it had once existed.

B. Women's Historical Inheritance and Property Ownership

1. Pre-Conquest

The situation for women under diverse historical kingdoms and empires was quite variable, and in some cases they enjoyed considerable status and rights. Celtic Britain pre-dates the Anglo-Saxon period, with the first known Celtic settlements dating to the first century A.D. Although Celtic traditions may have influenced Anglo-Saxon England, very little is known about them, and the status of women cannot be determined.[2] Under the Roman Empire, women in Western Europe enjoyed some economic independence and had substantial property rights that expanded over time.[3] They could inherit equally with their brothers,[4] owned and administered property,[5] maintained separately any property they owned before marriage, and had it returned to them in the event of divorce along with the dowry.[6] During that same period, the Salian Franks (early Franks first appearing in records in the third century A.D.) originally prohibited women from owning property, but the law was amended by the Edict of Chilperic in the sixth century to allow daughters to inherit if no surviving sons existed.[7] The Germanic codes vary when it comes to women. Some were quite restrictive, placing women under the guardianship of their husbands and holding that women could not inherit, own, or administer property.[8] Yet that tradition broke down over time and women's rights grew. They became allowed to inherit property if male heirs did not exist.[9] The Visigoths (early nomadic Germans appearing about the same time as the Salian Franks) held that the husband and wife could administer jointly any land possessed before marriage by either of them,[10] and land acquired during the marriage was jointly owned by both.[11] If the husband died, the wife retained control of all of the property, including the inheritance of the minor children.[12]

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2 Sheila Dietrich, *An Introduction to Women in Anglo-Saxon Society* (c. 600-1066), in The Women of England from Anglo-Saxon Times to the Present 32-33 (Barbara Kanner ed., 1979).

3 Frances Gies & Joseph Gies, Women in the Middle Ages 13 (1978).

4 *Id.* at 14.

5 David Herlihy, *Land, Family, and Women in Continental Europe, 701-1200*, in Women in Medieval Society 14 (Susan Mosher Stuard ed., 1976).

6 *Id.*

7 Gies, *supra* note 3, at 18.

8 Herlihy, *supra* note 5, at 14.

9 *Id.*

10 *Id.* at 14-15; Gies, *supra* note 3, at 18.

11 Gies, *supra* note 3, at 18.

12 *Id.*; Herlihy, *supra* note 5, at 14-15.

The Anglo-Saxon period began in the early fifth century A.D. in England. The status of women during this period was considerable.[13] Women were not only allowed, but encouraged to own property individually.[14] The Domesday Book (1086), commissioned by William the Conqueror to survey the landholders and estates of England and Wales, contains a striking number of examples of place names that are themselves derived from the names of female ancestors.[15] The list would have been longer still had the place names recorded in the book been more complete.[16] This speaks to the role women played in the ownership, cultivation, and occupation of lands, as well as their general social status at the time. At a time when surnames did not yet exist, there are nevertheless examples of naming equity between husband and wife: Wulfgifu and her husband Æoelstan named their son Wulfstan, intentionally combining the first part of her name with the second part of his.[17] While the sparsity of the extant records make it more difficult to determine the practical aspects of women's position and involvement in social life, evidence indicates that their social roles were varied, and there were many notable examples of significant women religious figures, administrators, rulers, and warriors.[18] Social views of acceptable behavior for women appear to have been more expansive than they became in later centuries, and women were allowed "the widest liberty of intervention in public affairs."[19]

The position of women under Anglo-Saxon law was likewise relatively expansive. King Æthelbert of Kent recorded a legal code in order to codify existing law and practice[20] in about 602-603 A.D. Several provisions of that code suggest a relatively high status of women by virtue of their property ownership and other rights. If a male ruler died without male heirs, the wife would rule if she was able, and the fact of her authority in public affairs was rather unremarkable and taken for granted by contemporary chroniclers[21] (as were other examples of strong, accomplished, industrious women).[22] Æthelflæd, for example, ruled alone after her husband, a royal

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13 Dietrich, *supra* note 2, at 33.

14 Arianne Chernock, Men and the Making of Modern British Feminism 91 (2010).

15 Lovacott comes from Lufu, and Fladbury comes from "Flæde's burh" (burg/settlement), for example, where Lufu and Flæde were female given names.

16 F.M. Stenton, *Presidential Address: Historical Bearing of Place-Name Studies: The Place of Women in Anglo-Saxon Society, 25 Transactions of the Royal Historical Society* 1, 4-6 (1943).

17 Reaney & Wilson, *supra* note 1, at xxxvii.

18 Barbara Kanner, *Introduction*, in The Women of England from Anglo-Saxon Times to the Present 11 (Barbara Kanner ed., 1979).

19 *Id.* at 1.

20 Bertha Phillpotts, Kindred and Clan in the Middle Ages and After: A Study in the Sociology of the Teutonic Races 205 (1913).

21 Betty Bandel, *The English Chroniclers' Attitude toward Women*, 16 J. Hist. of Ideas 113, 116 (1955).

22 Kanner, *supra* note 18, at 11.

official of Mercia, died in 911. She exerted skillful political and military leadership, successfully retaking areas of land that had been conquered and laying the groundwork for the unification of England. At her death in 918, she left her daughter Ælfwyn to succeed her.[23] Queen Seaxburh likewise reigned after her husband died.[24] "Anglo-Saxon society allowed women the mobility to step directly and without fuss into roles which involved ruling a kingdom or even, on occasion, leading an army."[25] The apparent casual acceptance of such events speaks to common attitudes concerning the place of women in public life.

Other provisions of Æthelbert's Code relating to women lead to similar conclusions. The fine for killing a woman was the same as for a man.[26] Anglo-Saxon practice protected women by adopting the concept of community property within marriage.[27] If a husband died, the wife obtained half of the property if there was a surviving child. If the wife chose to leave the husband, she was entitled to half of the property if she took the children with her, and the same share as a child if she left the children behind.[28] A wife maintained authority over her sphere of the household, and widows were guaranteed maintenance.[29] The morning gift, which was a gift of property from the husband to the wife at marriage intended to protect her in the event of his death, was the wife's to control alone.[30]

Beyond any general provisions dictated by legal codes, much can be inferred from the particularized legal documents of individuals of the period. Women received grants of land just as men did.[31] Land charters, also known as royal charters, created "bookright" or the right to hold property in perpetuity. They were issued by the king or received in inheritance.[32] Women obtained bookright along with men, giving them the right to devise the land as they wished, which provided them with significant legal powers, independence, and enhanced social and political status.[33]

Wills are some of the most common Anglo-Saxon documents to be found, and they suggest much about the status of women. The Anglo-Saxon wife enjoyed autonomy with most of her property,[34] and both spouses were

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23 Dietrich, *supra* note 2, at 34.

24 *Id.*

25 *Id.* at 36.

26 *Laws of Ethelbert,* English Historical Documents 359, (Dorothy Whitelock ed., 1968).

27 Marc Meyer, *Land Charters and the Legal Position of Anglo-Saxon Women*, in The Women of England from Anglo-Saxon Times to the Present 57, 63 (Barbara Kanner ed., 1979).

28 *Id.*

29 Dietrich, *supra* note 2, at 39.

30 Stenton, *supra* note 16, at 3.

31 Dietrich, *supra* note 2, at 40.

32 Meyer, *supra* note 27, at 59.

33 *Id.* at 58-60.

34 Courtney Stanhope Kenny, The History of the Law of England as to the Effects of Marriage on Property and on the Wife's Legal Capacity (Being an Essay which

considered able to manage estates after the death of the other.[35] Many men willed land to women even when male relatives were available. King Alfred (873-888) bequeathed part of his lands to his daughters and wife, stating that he wanted to divide his lands "on the female as well as the male side, whichever I choose."[36] Ælfgar willed lands to his daughters, his daughter's children, and his wife, while other property went to a man.[37] The Will of Ketel indicated that two of his sisters would succeed to different estates if they outlived him; he had a similar agreement with his stepdaughter.[38] Bishop Ælfsige willed lands to his kinswoman and his sister, as well as his kinsman.[39] Ealdorman Ælfheah granted lands to the king's wife independently, as well as to the king, in addition to his own wife and son.[40] Ælfhelm granted some lands to his son, but also left some to his daughter and his wife.

Not only were Anglo-Saxon women able to inherit, but they also possessed the power to bequeath land in wills themselves. A good portion of the wills to be found not only leave property to women, but are actually written by women who chose how to dispose of their property. This power to bequeath land was not limited to their heirs or even their kin, but to all manner of individuals.[41] A woman named Wynflæd in 950 A.D. left property to her daughter as well as her son.[42] Wulfgyth similarly granted land to her daughters as well as her sons.[43] Wulfwaru left her property to her daughters and sons, with one property left jointly to her daughter and son with the stipulation that "they are to share the principal residence between them as evenly as they can, so that each of them shall have a just portion of it."[44] Ælfgifu[45] and Ælfflæd[46] were both women who granted property and estates to various parties, while Leofgifu included both her daughter and her female relative in her list of devisees.[47] It was even possible for a woman to disinherit her son and instead leave all of her property to a female relative. One woman in the eleventh century did just that; when it was challenged in court by her son, the woman stated, "Here sits Leoffled, my kinswoman, to whom after my death I grant … all that I have…. [G]ive my message to the good men in the court, and tell them to whom I have given

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Obtained the Yorke Prize of the University of Cambridge) 10 (1879).

35 Dietrich, *supra* note 2, at 40.

36 *The Will of King Alfred*, English Historical Documents 495 (Dorothy Whitelock ed., 1968).

37 *The Will of Ælfgar*, Anglo-Saxon Wills 7-9 (Dorothy Whitelock ed., 1930).

38 *The Will of Ketel*, *id.* at 91.

39 *The Will of Bishop Ælfsige*, *id.* at 17.

40 *The Will of Ealdorman Ælfheah*, *id.* at 23-25.

41 Stenton, *supra* note 16, at 3.

42 *The Will of Wynflæd*, Anglo-Saxon Wills 11-15 (Dorothy Whitelock ed., 1930).

43 *The Will of Wulfgyth*, *id.* at 85-87.

44 *The Will of Wulfwaru*, *id.* at 63.

45 *The Will of Ælfgifu*, *id.* at 21-22.

46 *The Will of Ælflæd*, *id.* at 39-43.

47 *The Will of Leofgifu*, *id.* at 77.

my land and my property – and to my son, nothing." The son lost the suit, and the woman's desires were recorded in the will as she wished.[48] The right of the woman to devise her lands and property according to her own desires trumped the right of the son to inherit as legal heir.

There are several examples of husbands and wives holding property jointly, sometimes with their daughters inheriting. Bishop Wærferth of Worcester said in a land lease, "And Æthelred and Æthelflæd [husband and wife] shall hold it for all time, … uncontested by anyone as long as they live. And if Ælfwyn [their daughter] survives them, it shall similarly remain uncontested as long she lives…"[49] In another case, King Offa of Mercia (757-796) gave an estate to Osbert and his wife to be held jointly by both; it could not be alienated without the other's consent.[50] One will was created jointly by a husband and wife, where he granted some estates, and she granted others, including an estate she willed to her kinswoman.[51]

Anglo-Saxon women also bought, sold, and exchanged property, and were often litigants in land disputes.[52] Deeds of sale often listed women as seller or purchaser. Æfswith, wife of Ælfphege, for example, purchased an estate in Wiltshire from King Edgar; another woman named Cuthswith purchased land in Warwickshire, Queen Æthelswith sold part of her land to her minister Cuthwulf; and Queen Edith bought an estate in Lincolnshire.[53]

It is clear that many Anglo-Saxon women held land that they had acquired by all of the ordinary means, including gift, purchase, or inheritance, and they were permitted t42o dispose of their land as they chose.[54] As one commentator concludes, given the amount of land and goods given by some widows in wills, these women must have been quite powerful.[55]

It must be acknowledged that the legal codes considered as a whole are not entirely consistent, and there is evidence to suggest legal and social inferiority of women in the period. Furthermore, women's status compared to men may have been quite variable by social class;[56] most of the available documents refer exclusively to higher-class women, making the status of middle and lower class women more difficult to determine. Nevertheless, the conclusion cannot be avoided that Anglo-Saxon women were remarkably independent and influential, with demonstrated importance in legal and political activity. Numerous scholars have attributed to the period a "rough equality" and independence of women and men.[57] "As maidens they were valued and

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48 English Historical Documents 556 (Dorothy Whitelock ed., 1968).

49 *Id.* at 63-64, quoting Anglo-Saxon Charters: An Annotated List and Bibliography 1280 (P. H. Sawyer ed., 1968).

50 Meyer, *supra* note 27, at 64.

51 *Will of Ulf & Madselin*, Anglo-Saxon Wills 95-97 (Dorothy Whitelock ed., 1930).

52 Meyer, *supra* note 27, at 66; Dietrich, *supra* note 2, at 40.

53 Meyer, *supra* note 27, at 67.

54 Stenton, *supra* note 16, at 3.

55 Dietrich, *supra* note 2, at 40.

56 Meyer, *supra* note 27, at 61.

57 Stenton, *supra* note 16, at 13; Dietrich, *supra* note 2, at 41; Meyer, *supra* note 27, at 70.

protected; as wives they appear to have been considered partners, not abject subjects, to their husbands; as widows the laws enabled them to manage their lives with virtually no interference …"[58] Indeed, with respect to women the period appears "almost enlightened," and "a study of Anglo-Saxon history might produce examples of women's influence and freedom of action that would make aspects of even the twentieth century appear 'dark.'"[59]

Everything changed with the Norman invasion. As a whole the Norman influence brought to the region in the eleventh century was extremely damaging to women's rights—especially their right to hold property. In fact, the principle of coverture itself originates in the Norman influence and the subsequent rise of feudalism; thus began a protracted period of decline for women.

2. Post-Conquest and Feudalism

The Norman Conquest of 1066 set in motion a very long and slow process of retraction of women's rights. Where the Anglo-Saxon wife enjoyed autonomy with most of her property,[60] ideas and theories about the place and proper role of women began to shift and harden. The principle of coverture originated in England around the eleventh century, but it developed slowly, beginning to gain a strong hold in the late Middle Ages (1300-1500). In a system of coverture, the husband and wife became one person upon their marriage, but that person was the husband alone, making it less a merger than an annihilation. The wife lost her right to own or use property, and any property she owned prior to the marriage became legally his. Beyond property ownership, the entirety of a woman's rights, obligations, and entire legal existence were subsumed by those of her husband. He became entitled to her company, her labor, and her services, including sexual ones, for the marriage constituted her irrevocable and permanent consent to sexual intercourse at the husband's whim. He was permitted the use of physical force against her for reasons he saw fit. In many respects, the woman herself, not just her property, came to be owned by the husband. The practice of the wife assuming the husband's surname reinforced this legal and social absorption. "Custom said … that man owned what he paid for, and could put his name on everything for which he provided money … [H]is land, his house, his wife and children, his slaves when he had them, and on everything that was his."[61] Given the legal property ownership rights of women before the Conquest, it is evident that the principle of coverture itself originates in the Norman influence brought to the region after the invasion in 1066 and the subsequent

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[58] Dietrich, *supra* note 2, at 39.

[59] *Id.* at 32, 44.

[60] Kenny, *supra* note 34, at 10.

[61] Priscilla Ruth MacDougall, *The Right of Women to Name Their Children*, 3 Law & Ineq. 91, 138 (1985) (quoting Ruth Hale, *But What About the Postman?*, 54 The Bookman 560, 561 (1922)).

rise of feudalism, rather than a traditional "English" practice.[62] The equality with respect to men experienced by Anglo-Saxon women continued in many respects for peasant women during feudalism, but women of upper classes were increasingly restricted to the rule of their husbands[63] and lost the liberty to dispose of their property as they wished.[64]

William Blackstone, the 18th century jurist, legal commentator, and professor of law at Oxford, published his four-volume treatise on the common law, *Commentaries on the Law of England*, in 1765-1769. The work was unprecedented in its design as a complete overview of English law, and it influenced the development of American and other English speaking legal systems. Blackstone explained coverture as follows:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore called in our law – French a feme-covert;…and her condition during her marriage is called her coverture.[65]

The implication that coverture was traditional and therefore incontrovertible English practice was misguided, however. Evidence suggests that a number of elements of coverture – including those related to property ownership – did not become fully implemented or entirely rigid until well into the Middle Ages and even into the early modern period. Blackstone appears to have relied on a mistranslation of a key document by an Anglo-Saxon history scholar to draw some of his conclusions about women's property rights in ancient England that he utilized in his justification of contemporary coverture. He asserted that Saxon women had been entitled to only one third of the husband's personal property on his death, but no share of the land, and that later laws which gave her rights to land were only for her lifetime. However, evidence suggests that the wife actually had rights to a share of both personal and real property, and the right was absolute rather than for her life only; this indicates that her property rights within marriage were considerably more expansive than Blackstone presumed. Blackstone had borrowed much of this work from Sir Martin Wright, who had borrowed it from Nathaniel Bacon, who had himself relied on a mistranslation; he then used this mistranslation as support for his own assertions about the supposed time-honored system of coverture and the justice and foundation of the contemporary treatment of women. [66]

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62 Chernock, *supra* note 14, at 91; Kenny, *supra* note 34, at 11.

63 Dietrich, *supra* note 2, at 41.

64 Stenton, *supra* note 16, at 3.

65 William Blackstone, Commentaries on the Law of England 442 (1768).

66 Although the original mistranslation was later corrected by its author, this appears to have gone unnoticed by Blackstone, who continued to make the same assertions about the history of English law regarding women even while referring readers to the cor-

Courtney Kenny, writing in 1879 about marital property rights in English history, discussed the deterioration of rights for women through the centuries, and similarly attributed it to the Norman influence. That influence resulted in the wife sinking to the state of being a "puppet of her husband's will;" Kenny called this a "revolution in the law of marriage." [67]

Even by the time of the Middle Ages, however, women's lives still exhibited considerable variability; "tradition had yet to solidify into the unyielding patterns which characterize later centuries."[68] When there were no surviving males in a family, women would still inherit the family's estate.[69] Sometimes the beneficiary would be the eldest daughter, while sometimes it would be a younger daughter who was not married. Robert Benyt's widow, for example, died in 1343 with three surviving daughters. The estate went to Emma, who was not the oldest but was the only one left unmarried and residing at the manor.[70] There was an important relationship between land and family bloodline, which took precedence over the preference for male heirs.[71]

The practice of feudalism likely had a significant influence on the restrictions to women's property rights. The practice began in ninth century France, subsequently spread through Europe, and came to England via the Norman Conquest.[72] In a feudal system, the lord grants land to the vassal in return for military service. As a result, a small elite group of soldiers ruled those who worked the land. As a technical matter, the land belonged to the lord and was given to the vassal for his lifetime only,[73] but there was nevertheless a very strong sense of hereditary rights, and rules of inheritance were applied seriously.[74] Such a system, by its dependence upon military service for property ownership, gave a heavy preference to men and excluded women,[75] whose inheritance became more strictly limited to those situations in which there were no male heirs. Between the twelfth and the mid-fourteenth centuries, the principle of primogeniture developed, whereby the eldest male child inherited the land; if there were none, then

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rected translation of the work in question. *See* Kenny, *supra* note 34, at 35-36. It may also be the case that Blackstone's work served as an attempt not simply to describe the principle, but also to reinforce it. This may have obscured later scholarship on the legal status of women, whereby any complexities, exceptions, and even common practices were ignored to the extent that they conflicted with Blackstone's account. *See* Margot Finn, *Women, Consumption and Coverture in England, c. 1760-1860*, Hist. J. 703, 705 (1996).

67 Kenny, *supra* note 34, at 11.

68 Susan Mosher Stuard, *Introduction*, in Women in Medieval Society 4 (Susan Mosher Stuard ed., 1976).

69 Gies, *supra* note 3, at 147.

70 *Id.*

71 *Id.* at 148.

72 Gies, *supra* note 3, at 27.

73 *Id.* at 29.

74 *Id.* at 148-49.

75 *Id.* at 27.

females would inherit jointly.[76] (Counter-examples exist however; in one case in 1189, both the wife and the husband owned separate lands, and the oldest son inherited the father's lands while the youngest son inherited those of the mother.[77]) Even in the absence of a male heir, women began to have difficulty inheriting an estate. In 1319, Alicia Ridel was the sole heir to Galfridus when he died. She attempted to secure his lands as her inheritance, but "her pretentions to the barony of Blaye were doubtful, as it seems to have been confined, like many others, to heirs male only." She nevertheless managed to gain possession of it and sell it to the King, under some uncertainty of outcome.[78] The restriction was connected to specific lands; other property connected to the same family was not similarly restricted, as women inherited freely during the same period when there were no surviving males.[79] Women were moving more clearly into the guardianship of males: first the father (then the father's lord if the father died), and then the husband.[80] After the father's death, the lord received the estate's income until the woman married, and she was required to marry whomever the lord chose or risk losing her inheritance.[81]

Yet even under the much more restrictive rules of feudalism, women's rights were still not restricted to the extent they would later become. Not yet relegated exclusively to the private sphere, women engaged in public life quite extensively, with significant effects on the economy.[82] The expansion of city life and the growth of commerce contributed to the involvement of women in working life.[83] Customs and policies developed in many towns for dealing with married women engaged in trade on their own, in stark contrast to the common law restrictions upon women;[84] many pre-feudal customs persisted, in fact, despite these restrictions. The strong relationship between marriage and property existed before, during and after feudalism.[85] Under feudalism, the husband of an heiress could not sell his wife's property without her consent,[86] nor could he deny her the use of her land.[87]

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[76] Sue Sheridan Walker, *Widow and Ward: The Feudal Law of Child Custody in Medieval England*, in Women in Medieval Society 160 (Susan Mosher Stuard ed., 1976).

[77] Pedigree of Sir James Riddell, of Ardnamurchan, and Sunart, Bart. LL. D., containing an Abstract of the Descents, With the Authorities Annexed vii (1794).

[78] *Id.* at 9.

[79] "[H]e died without issue male, whereupon his property came to be divided between two daughters…" *Id.* at xi.

[80] Gies, *supra* note 3, at 27.

[81] *Id.*

[82] Stuard, *supra* note 69, at 4.

[83] Gies, *supra* note 3, at 29.

[84] Eileen Power, *The Position of Women*, in The Legacy of the Middle Ages 407 (C. G. Crump & E. F. Jacob eds., 1926).

[85] Gies, *supra* note 3, at 31.

[86] *Id.* at 29.

[87] *Id.*

The wife could defend her title to land in court if the husband defaulted.[88] Both married and single women could still own, sell, or give land, and could engage in other legal behaviors such as suing and being sued, making wills, and entering into contracts.[89] This period also saw the creation of equity courts, which were separate from the common law courts and were founded on the idea of equity, or fairness, and these courts grew in the fourteenth and fifteenth centuries.[90] The Lord Chancellor had the power to decide equity cases as he saw fit, and such courts often enforced and supported the property rights of women.[91] The feudal system started crumbling around 1320 and was essentially dead about 1440,[92] although it did not end officially until the Tenures Abolition Act of 1660. But the vestiges of the adversities wrought upon women under the feudal system did not lessen when that system disintegrated; instead, they intensified.

In the mid to late middle Ages, women experienced ever-increasing restrictions on their legal rights and status, including those related to property.[93] While early legal records show women acting as attorneys in court, by the end of the thirteenth century attorneys were almost exclusively male.[94] Daughters did not inherit as they once had; the oldest son inherited alone.[95] A wife could still inherit lands during her marriage if there were no surviving sons, but the husband controlled them. If a child was born alive and the husband survived the wife, he received a lifetime interest in all of her lands; she did not receive the same upon his death. The wife was not allowed to sell or give her lands without the husband's permission, but he could give or sell not only his own lands, but also hers, unilaterally.[96] Any profits generated from her lands were his to keep.[97] The community property practices seen in Anglo-Saxon times were replaced by a common law that did not allow for it, and women also lost the ability to make their own wills. Glanvill's twelfth century legal treatise reasoned that "since legally a woman is completely in the power of her husband, it is not surprising that … all her property is clearly deemed to be at his disposal."[98] A 1311 case in the court

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88 *Id.*

89 *Id.*

90 Ruth Kittel, *Women Under the Law in Medieval England*, in The Women of England 131 (Barbara Kanner ed.,1979).

91 Gies, *supra* note 3, at 30-31.

92 Kathleen Casey, *Women in Norman and Plantagenet England*, in The Women of England 87 (Barbara Kanner ed.,1979).

93 Ann J. Kettle, *My Wife Shall Have It: Marriage and Property in the Wills and Testaments of Later Mediaeval England*, in Marriage and Property 90 (Elizabeth M. Craik ed., 1984).

94 Kittel, *supra* note 91, at 131.

95 *Id.*

96 Kettle, *supra* note 94, at 90.

97 Kittel, *supra* note 91, at 129.

98 *Id.*, quoting Ranulf De. Glanville, Tractatus de Legibus et Consuetudinibus Regni Anglie qui Glanvilla Vocatur: The Treaties on the Laws and Customs of the Realm of England Commonly Called Glanvill vi, 3 (G. D. G. Hall trans. & ed., 1965).

of Common Pleas dealing with wills indicated that "no person can make a testament save he who can claim property in the chattels, but a wife cannot claim property and consequently cannot make a testament."[99] Bracton, a thirteenth century legal scholar, entreated women to "attend to nothing except the care of her house and the rearing and education of her children."[100]

It is worthy of note that the development of the common law, harsh as it was for women, did not necessarily reflect the full realities for women of the Middle Ages. For one thing, other types of law operating concurrently with the common law functioned differently for women. During this period canon law treated women equally with men, in some cases resisting the developments of the common law which was moving to oppress them. [101] Each manor had its own court tasked with enforcing custom, which therefore varied from place to place.[102] These manorial courts generally treated women equally with men; there was more concern with the obligations to the lord being fulfilled than with the sex of the landholder.[103] In some manors, a widow was able to claim the entirety of her deceased husband's land rather than it passing to the eldest son, and sometimes she held it and worked it for long periods, in one case thirty-two years.[104] In the manorial courts women's rights remained consistent over the centuries.[105]

For another thing, theoretical statements of law do not tell the whole story. It would be a mistake to conclude that the legal treatises of the time fully and accurately reflect women's lived experience. There appears to have been much resistance—intentional or otherwise—to the changes wrought by the common law, and many of the older traditions held fast for centuries. Multiple scholars have remarked upon the dissonance between the prominence of medieval women and their common law subordinate status.[106] Medievalist Eileen Power notes that it is actually a blend of theory, law, and practice that constructs the true position of women,[107] while Marc Meyer observes that when it comes to women "legal theory and practice are often diametrically opposed."[108] Legal codes provide the existing normative structure, while other documents provide a fuller understanding of the reality of their lives. For example, married women in this period did in fact

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[99] Kettle, *supra* note 94, at 94, quoting Year Books 5 Edward II, 1311 p. 240-241 (G. J. Turner ed., 1947).

[100] Kittel, *supra* note 91, at 124, quoting Henry de Bracton, De Legibus et Consuetudinibus Angliae f.98 (George E. Woodbine ed., 1915-44).

[101] *See*, e.g., Kettle, *supra* note 94, at 94 (discussing the opposition of the English bishops to the prohibition of women's ability to make a will, holding that married women had the same right as men to do so).

[102] Kittel, *supra* note 91, at 127.

[103] *Id.* at 128.

[104] *Id.* at 127-28.

[105] *Id.* at 128.

[106] *See*, e.g., Casey, *supra* note 93, at 89.

[107] Power, *supra* note 85, at 401.

[108] Meyer, *supra* note 27, at 70.

make wills and distribute property at death, technical prohibitions or no. There are not many examples to glean from, and the beneficiary was often the husband, but examples from 1460 and 1462 demonstrate their existence.[109] Customs often dictated events more than common law; in Gloucester and Lincoln, for instance, the husband's consent was not required at all for the wife to will property, whereas in other counties, wives was not permitted to will property even *with* his consent.[110] Certainly the position of women vis-à-vis men varied by social class, as discussed above. Middle and lower class women experienced a practical equality much longer than did upper class women, since they were engaged in physical labor on the land and there was not a strong sex division of such labor. [111] Upper class women nevertheless still enjoyed more equality in the Middle Ages than they would see by the eighteenth century.[112] Yet, despite the fact that everyday life was different than the dictates of the common law would suggest, available evidence strongly suggests that in both law and practice, the rights and status of women were much more limited during this period than they had been earlier.

The Early Modern period, running from about 1500-1800 A.D., brought about a firming up of the developments begun in the mid to late Middle Ages rather than any substantial changes to them. Married women's property rights were essentially nonexistent,[113] and husbands were thoroughly dominant over their wives. A commentator in 1816 noted that "[m]arried women are, by the law of England, subject, in matters of contract, to a greater disability even than infants …"[114] While women had been able to inherit in the absence of male heirs, even that began to be retracted; a number of examples arose in the sixteenth century of uncles attempting—sometimes successfully—to wrest an estate from a woman who had inherited it from her father.[115] The extreme limits on women's rights were thoroughly entrenched in law and theory. In 1642 the author of *The Law's Resolutions of Women's Rights* claimed it was well-understood that all women could be classified by their status in marriage (which was either married or to-be married), and that even their desires were not their own but were instead "subject to their husband."[116] Nevertheless, even in this period, there are examples which contravene the common law. Women still managed at times to leave property in wills and to handle their own affairs and estates.[117]

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[109] Kettle, *supra* note 94, at 94-95.

[110] *Id.* at 95.

[111] Power, *supra* note 85, at 408; see also Casey, *supra* note 93, at 87-88.

[112] *Id.* at 410.

[113] Pearl Hogrefe, *Legal Rights of Tudor Women and the Circumvention by Men and Women*, 3 The Sixteenth Century J. 97, 100 (1972).

[114] Peregrine Bingham the Younger, Law of Infancy and Coverture 161 (1816).

[115] Hogrefe, *supra* note 114, at 98.

[116] *Id.* at 97-98, quoting T. E., The Lawes Resolutions of Women's Rights 6 (1632).

[117] Rosemary Masek, *Women in an Age of Transition: 1485-1714*, in The Women of England 143 (Barbara Kanner ed., 1979).

They were executors for estates and ran their own businesses.[118] Yet it was this period during which their rights were most severely restricted.

III. Surnames and Property

Despite the concomitant emergence of English surnames with feudalism and the common law after the Conquest in 1066, women's surname usage continued to demonstrate their remarkable visibility and respect for a significant period. Their surnames often reflected individual characteristics rather than the names of their fathers or husbands. When surnames did begin to become more consistently hereditary nearing the end of the thirteenth century,[119] the names passed down were not just those of men; women were represented as well in a striking number of cases. Some of those matronymic names are still in use today.[120] The modern status quo, whereby a woman takes a man's name at marriage and any children born of the union categorically take the father's name, was not the rule during the medieval period.

The fact that medieval women were so commonly represented and acknowledged in the surnames of not only themselves, but also their descendants, means that their status was probably much more complex than is often presumed. They were not systematically and thoroughly denied any legacy or condemned to the total eradication of their identities, as would become the case later; they had names specific to them as women; they were able to retain those names after marriage; they independently inherited and owned property; and they passed both their property and their names down to their daughters, sons, and other descendants. The frequency at which these practices occurred varied depending on the period, the location, the social class, and other circumstances of the individuals involved. But it was the subsequent strict reining in of those rights and that status, and the eventual elimination of any matronymic naming and female property ownership, which created the "traditions" under which modern culture currently operates and makes the earlier system so hard to imagine. Surnames work in tandem with property rights to provide a vantage point from which to evaluate the status of women, and that status saw a very long period of decline beginning around the eleventh century and not reversing again until the women's property acts of the 19th century in both the United States and the United Kingdom.[121] The legal recognition of personhood is implicit in

[118] Hogrefe, *supra* note 114, at 99-100.

[119] Reaney & Wilson, *supra* note 1, at xlviii.

[120] Such as Madison (son of Maddy) and Marriott (diminutive of Mary).

[121] The Married Women's Property Act of 1870 was the first to allow married women in the United Kingdom to inherit and retain property and money (at a capped amount), as

the concept of property ownership. The fact that law and practice regarding female property ownership transformed over time raises considerable implications for not only the legal, but also the social and philosophical position of women as a class through the ages.

When the wife as a legal individual no longer exists independently from the husband, it might seem natural, even necessary, for her to adopt the husband's surname, and for children of the marriage to take his name. Yet that development happened some time after the institution of coverture entered into English law; there exist numerous examples of women retaining their birth names at marriage, passing their names to their children, and even to their husbands, as late as the eighteenth century. Although not the case early on, surnames in particular, and gender more broadly, became closely tied to the concepts of property and inheritance. The surname was both a symbol of and a necessity for the full and proper operation of ownership, but that operation did not always exclude women.

Matronymic naming was common through the Middle Ages, and it took several forms. The mother's birth surname could be passed to her descendants as their surname, or the mother's given name could be incorporated into a surname for her children, either with or without a "son" or "daughter" attached (e.g. Ibbotdaughter or Isabel). Many other surnames existed which were either specific to or related to women but were not necessarily matronymic, such as Rogerdaughter, Fairewif (fair wife), Silkwoman (female silk dealer), Prestsyster (priest's sister), or Mariman (male servant of Mary), but these are beyond the scope of this article.

A few specific examples from the records provide a sense of the larger picture. William Maryson (1298),[122] Richard Elynoreson (1375) [123] (son of Eleanor), and Richard Margretson (1381) [124] are just a few of a great many examples of "son" names referencing the mother. In the twelfth century a man named Robert was alternatively known as Robert de Thweyt (his father was Griffin de Thweyt) and Robert de Curcun (his mother was Cecilia de Curcun), and sometimes even Robert de Curcun de Thweyt.[125] John Organ of Treworian in 1327 is named after his mother Organa.[126] Walter Damealis (son of Lady Alice) and Robert Dame Isabel (son of Lady Isabel), both in 1327, are likewise named for their mothers.[127] Roger Heron de Ford was the son of Mary de Ford and William Heyrun (1327), demonstrating a combination of the surnames of both parents with his mother's appearing last.[128]

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well as to retain her own wage earnings. In the United States, similar laws were passed by individual states, the first being Mississippi in 1839.

[122] *Id.*

[123] *Id.* at 153.

[124] *Id.*

[125] *Id.*

[126] *Id.* at l.

[127] *Id.*

[128] Richard Heron, A genealogical table of the family of the Herons of Newark 5 (c. 1798).

John Dyson de Langeside (1369) adopted his surname from his mother Dionysia de Langside,[129] where the surname reflects the mother's entire name rather than her surname alone, as Dyson means "son of Dy" (a diminutive of Dionysia). In 1408 Geoffrey Reynald and Joan Ryvell had a son known as Richard Ryvelle after his mother.[130][131] Thomas Cromwell, considered to be the first traceable ancestor of Oliver Cromwell, had a daughter who married Morgan Williams. They had a son Richard Williams, but Richard later took his mother's surname Cromwell.[132] In another case from the twelfth century, Matilda Ridel married Richard Basset. Their son Galfridus took the surname Ridel for his mother; their younger son Jordan also assumed the name Ridel.[133] The same practice can be seen as late as the modern period; Susanna Newton married William Eyre in the late seventeenth or early eighteenth century, and one of their four children took the surname Newton after his mother.[134] John Gordon of Pitlurg, born in 1734, added Cuming to his name, which was his mother's birth name. His son also took the dual surname of Gordon Cuming.[135]

Furthermore, it was not uncommon for a couple to give their son a *first* name after the mother's birth surname. For example, in the early seventeenth century Sir Richard Sondes married Susan Montague, and they named their son Mantague Cholmeley.[136] This type of naming is more difficult to locate and trace since the practice is not immediately apparent unless familial relationships are recorded at the same time as the individual's name, and because given names are typically not passed down through generations. In fact, there may be a great many unidentified cases of matronymics where the surname does not specifically identify a woman (such as Robert de Curcun above), given that historical documents typically reference individuals in isolation without familial relationship information to determine the origin of one's name.[137]

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[129] Reaney & Wilson, *supra* note 1, at lii.

[130] He was also called Richard son of Geoffrey Reynald of Edmascote, and Richard son of Joan, daughter of William Ryvell.

[131] *Id.* at xlix.

[132] A Short Genealogical View of the Family of Oliver Cromwell. To Which is Prefixed, a Copious Pedigree 1 (1785).

[133] Pedigree of Sir James Riddell, *supra* note 78, at v.

[134] Isaac Newton, Memoirs of Sir I. Newton sent by Mr. Conduitt to Monsieur Fontenelle. Pedigree of Newton … with His Affidavit Accompanying It.-A Conversation Between Sir I. Newton and Mr. Conduitt 85 (1806), British Library General Reference Collection 455.f.15.

[135] *Table of Pedigree of the Family of Gordon of Pitlurg, Continued from the Eleventh Descent of the Pedigree of the Family of Gordon in Scotland, as stated in table I. now represented by Alexander, Fourth Duke of Gordon*, in Table of pedigree of the family of Gordon in Scotland, from Adam de Gordun, first of the name in Scotland, anno 1057, to Alexander IVth Duke of Gordon, who now (1784) represents the family 12 (1784).

[136] Isaac Newton, *Pedigree of Cholmeley of Easton, descended from the Cholmeleys of Cheshire, and bearing the same arms*, in Newton, *supra* note 135.

[137] Reaney & Wilson, *supra* note 1, at xlviii.

Children would sometimes be given the surnames of their grandmother, rather than either their mother or father, usually to associate themselves with an estate and eventually inherit it themselves, either voluntarily or as a condition of inheritance as indicated in the will,[138] and this is a phenomenon that occurred all the way into the modern era. In the early eighteenth century, for example, Judith Lytton married Nicolas Strode, and their grandson was named Lytton Lytton (alias Strode), taking his grandmother's surname as both his given and last name.[139] Mary Tyssen's grandson took the surname Daniel-Tyssen. When he married Amelia Amhurst, their son was named William Amhurst Tyssen (1835-1909), which was a combination of female surnames on both sides—his mother's and his paternal grandmother's, but not his father's. Gregory Harlaxton married Susanna Williams around 1800. Their grandson was named William Gregory Williams, after his grandmother. Both of his children had the surname Williams as well.[140]

Similarly, there are examples of women who did not assume their husband's name after marriage, even in the late Middle Ages and into the Early Modern period. A widow named Cecilia de Sanford was the daughter of Henry de Sandford, indicating that she went by her father's name rather than her late husband's. Emma Godzer (1290) was the daughter of Walter Godzer and the wife of Robert Pacy. One woman had a seal that read S. Emme. de Litlecote, but her husband was Reginald de Lavynton.[141] In the mid thirteenth century Isabella de Ford retained her family name and was referred to as such despite her marriage.[142] A divorce document from 1499 lists the parties as Peter Mewys and Elizabeth Chapman.[143] Mary Carne is referenced in a lawsuit jointly with her husband, whose name is John Prise (1702).[144] A man from the Gordon family called Alexander Earl of Huntly had a wife referred to as Janet Stewart in 1508.[145] A 1543 royal charter lists

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[138] W. P. W. Phillimore & Edward Alexander Fry, Index to Changes of Name; Under Authority of Act of Parliament or Royal Licence, and Including Irregular Changes from I George III to 64 Victoria, 1760 to 1901 p. ix (1969).

[139] Dame Anne Russell, Widow of Sir Francis Russell Bar. Deceas'd. Appellant. Lytton Lytton alias Strode Esq; and the Rt. Honourable Rebecah Viscountess Dowager Falkland (1708), British Library General Reference Collection 816.m.5.(123).

[140] Isaac Newton, *Pedigree of Gregory of Harlaxton from Thoroton's Nottinghamshire*, in Newton, *supra* note 135, at 455.f.15.

[141] P.H. Reaney, The Origin of English Surnames 84 (1967).

[142] Heron, *supra* note 129, at 5.

[143] Certificate of Divorce of Peter Mewys and Elizabeth Chapman (1499), London National Archives Reference E 135/7/22.

[144] The appellant's case, John Prise, Esq. Eldest Son of Thomas Prise, Esq; by Mary Carne his Wife, Appel. Thomas Button, Esq; Administrator of Diana his late Wife, Respond. Against a Decree in Chancery, made by Default the Twelfth of June, 1702. (1702).

[145] Table of pedigree of the family of Gordon in Scotland, *supra* note 136, at 13.

Janet Ogilvie as the wife of John Gordon of Pitlurg.[146] The practice appears to have been relatively common and unremarkable; it was no foregone conclusion that a married woman must share a surname with her husband.

At times men who married heiresses even assumed the surnames of their wives at marriage—even well into the modern period—in order to attach themselves to the estate and keep the family name connected to the land. [147] Husbands in these cases were considered merely custodians of the property that was held by the woman through her bloodline.[148] In the absence of surviving children, the land would revert to the wife's family rather than the husband's.[149] If there was an heir and the wife died first, the husband would keep the land for his lifetime only, after which the land would go to the wife's heir rather than the husband's in order to keep the land in the wife's family bloodline.[150] The fourteenth century Book of Chertsey Abbey in Surrey alone gives several examples. Hugh atte Clauwe of Thorpe appears as Hugh le Keach after his marriage to Alice le Keach.[151] John atte Hethe of Cobham married Lucy atte Grene, and the record indicated "He is now called atte Grene."[152] In another entry, a woman originally took her husband's name, but after her father's death when she inherited his property, she reverted to her birth name and her husband adopted the name as well.[153] Later cases include that of Henry Gough, who took the name Henry Calthorpe in 1796 when he married Barbara Calthorpe. Their children were surnamed Gogh-Calthorpe.[154] Fysh Coppinger assumed his wife's name of de Burgh in the early nineteenth century, and their children and grandchildren took the surname as well.[155] At times the surname adoptions could become rather comical, as with Richard Temple Nugent Grenville, who in 1822 upon marrying Lady Anna Brydges, adopted the surname Temple-Nugent-Brydges-Chandos-Grenville.[156] There is even a case where a husband, William Eyre, adopted the birth surname of his mother-in-law (his wife had the surname of her father), becoming William Archer. When his wife died and he remarried and subsequently had a son, even that son

146 *Table of Pedigree of the Family of Gordon of Pitlurg*, *supra* note 136, at 6-7.

147 *Id.* at 149.

148 *Id.* at 149-50.

149 *Id.* at 149.

150 *Id.*

151 Reaney, *supra* note 142, at 85, citing Elsie Toms, Court Book of Chertsey Abbey xxxviii.

152 *Id.*

153 *Id.*

154 *Administrative History*, Calthorpe Estate, (1799-1899), London Metropolitan Archives Reference Code E/CAL.

155 *Administrative History*, Burgh, De Family (1637-1937) London Metropolitan Archives Reference Code: ACC/0742.

156 *Administrative History*, Buckingham (1785-1839) London Metropolitan Archives Reference Code ACC/0749.

was given the new surname Archer, despite his having no relationship to the former mother-in-law either by blood or marriage.[157]

Thus, even after women's property ownership had become quite restricted, their surnames had not yet been entirely eliminated. Such flexibility left women with some independent identity, until those options were eventually foreclosed to them as well via imposed legal impotence. This suggests that coverture did not take the full measure of its chokehold as early as we think. It is also likely that the common law and the theory supporting it were inconsistent with actual practice, and that the realities of medieval life were resistant to change. The evidence derived from women's property ownership supports the conclusion that a more gradual implementation and development of coverture and its attendant principles, including a more prolonged reining in of women's rights, took place. Change in general during the period was protracted, and older traditions died hard; in medieval life, "…ideas and information spread only slowly, and against great resistance, from one district to another; custom determined everything, and the type altered little from age to age."[158] While the common law of England was exacting its restrictions on the rights of women, women's representation in surnames eventually followed suit, although this shift began later and took more time.

Where formal law created new restrictions and disabilities for women in medieval England, those restrictions influenced the ways in which surnames were culturally adopted and used, even though no law directly addressed surname use. The common law had nothing directly to say about women's names, as those had always been a cultural rather than a legal practice. But surnames as a social and legal convention became closely connected to property, and the increasingly restrictive rules of coverture which limited property ownership eventually ensured the elimination of any independent women's names. As women's property rights went, so went their names.

The law imbued the husband with a superior legal status as head of household and gave him legal dominion over his wife and children and all marital labor and property. That eventually included the convention of the wife and children adopting the surname of the husband, and it carried with it the right of control and ownership. The functions of property and surnames thus simultaneously operated upon one another in a symbiotic dance of reduced status and increased subordination of women. To be sure, the flexibility of women's surname use and the independence they once enjoyed in their surnames was already diminishing concomitantly with the restriction of other rights they once held. But the eventual connection between naming and ownership changed the relationship of women to their names. Men were given the right to name women, and women's names

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[157] *Pedigree of Archer of Coopersale, & Great Paunton*, in Newton, *supra* note 135.

[158] Charles Homer Haskins, *The Spread of Ideas in the Middle Ages*, 1 Speculum 19, 20 (1926).

changed as they moved from the legal ownership of their father to that of their husband.[159] In this way, the changes in surname usage both enforced and reinforced male rights over the family. The operation and function of property, especially as applied to women, is thus connected to the operation of surnames as a socio-legal function.

Surnames and property are not intrinsic to human nature; both are social and legal constructs. As such, both have been appropriated and manipulated in ways that support patriarchy and confine women. This fact is not surprising; what is more interesting is that it was not always the case. The law's systematic and complete antagonism to women is a relatively recent development. The common law inscribed a new ideology on the collective social consciousness, thereby altering the relationship of the culture with its women. Once complete, the status quo was then viewed as natural, traditional, common sense, and divinely ordained, with preconceived historical fact warped and altered, and then presented as truth. It is not difficult for a culture to look around at the system in which it finds itself and then conclude by its existence that it is the only reasonable course.

IV. Conclusion

Although the concept of a surname as signifying ownership (of wife, children, and property) is no longer overt in English and American culture, it is still undoubtedly present in more subtle ways within our social schema and naming framework. The common conception is that only men have "real" names, and their permanency is one of the rights of being male; women's names are more fleeting and relationship-dependent and they must therefore be less connected to them. That notion managed to insert itself into the American legal system, where the courts have upheld men's naming "rights" with respect to their wives and children; one court held that "a natural father has a protectable right to have his child bear his name,"[160] because women's names are contingent and impermanent, and as one commentator noted, women "merely inhabit names which actually belong to their husbands."[161] Names are important for their own sake, yet they also speak volumes about broader issues

[159] This concept is reinforced by considering the fact that slaves in America were often given no last names at all because, as property themselves, they could not have an independent surname. When they did have last names, they were given the master's surname, and renamed each time they exchanged owners. Lisa Kelly, *Divining the Deep and Inscrutable: Toward a Gender-Neutral, Child-Centered Approach to Child Name Change Proceedings*, 99 W. Va. L. Rev. 1, 12-14 (1996).

[160] Burke v. Hammonds, 586 S.W.2d 307, 309 (Ky. Ct. App. 1979).

[161] Cynthia Blevins Doll, *Harmonizing Filial and Parental Rights in Names: Progress, Pitfalls, and Constitutional Problems*, 35 How. L.J. 227, 235 (1992).

within the dominant culture, including the status of women vis-à-vis their husbands, their children, and their society.

The rigidity in naming we know today is one of the last vestiges of the old system of coverture, yet the issue still receives very little collective analysis or criticism. It is a product not of abiding and ancient tradition, but rather of new strictures instituted most firmly during the modern period, ironically during the "Age of Enlightenment" of the seventeenth and eighteenth centuries. When names stopped signifying individual attributes, they came to signify ownership instead, and women were the ones falling under its regime.

Future research on this topic would expand upon the history in several ways. First, an in-depth analysis of the relationship between culture, tradition, and law, as seen through the lens of surname usage, will shed light on the underlying ways in which patriarchy became more firmly enshrined into cultural and legal systems. Surname usage and adoption was strictly a traditional practice, yet it became so entrenched that it eventually garnered legal backing when it encountered resistance. This was accomplished by virtue of a deceptively appropriated "tradition" that was not, in fact, traditional at all. The mechanisms by which this took place warrant further analysis. Second, a theoretical investigation into the reasons for the constriction discussed herein will be important; if coverture in fact became more restrictive over time, what reasons underlie such a shift? In addition to the emergence (and disappearance) of feudalism and the gradual implementation of common law, these manifestations may be tied to economic and political developments in the Early Modern period. Such factors include capitalism; the development of theoretical concepts of citizenship, rights, and exclusivity; the rise of imperialism and conquest; and the building of the modern nation-state. There is much to be developed on that front.

The status of women in England was at one time strikingly expansive given the era and the natural assumption of society's perpetual forward progress with the passage of time. That assumption, as it turns out, is patently false. Women's legal identities were never static in their limitations, but experienced significant transformation in the form of lengthy retrenchment and then, eventually, expansion. Anglo-Saxon women enjoyed a remarkable status and legal rights that placed them on par with their male counterparts in many ways that would not be seen again for nearly a millennium. Yet the early Middle Ages too exhibited much flexibility for women, as evidenced by their surname autonomy and property ownership and inheritance. Later restrictions in these areas had profoundly negative effects on women, and once in place were then circularly referenced to justify the essentialism of women's gross inferiority. Although today's women for the most part enjoy formal legal equality with men, contemporary surname practices have not only failed to shed the vestiges of the systems under which they were most oppressed, they have failed to even recognize those systems as such. These practices are a product of recent developments in a system of growing patriarchy, ownership, and power. Yet the status quo is justified—to the extent that it is even considered—simply by reference to a "tradition" that is not in fact traditional at all.

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A Historical Perspective on Administrative Jurisdiction in Latin America: Continental European Tradition Versus U.S. Influence

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ABSTRACT

From the perspective of U.S. influence, this text analyses the history of administrative jurisdiction, starting from the 19th Century, in the 19 Latin American countries of Iberian origin (Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Uruguay and Venezuela). The analysis includes the U.S. unified judicial system (generalized courts) and procedural due process of law to decisions by the administrative authorities, the fertile field of primary jurisdiction, which is in conflict with the Continental European tradition firmly established in Latin American administrative law. While setting out the contradictions of administrative jurisdiction in Latin American countries that result from importing rules without putting them in the proper context, the text seeks to identify trends and create perspective to build a model of administrative justice specific to Latin America, drawing on the accumulated experience of the United States and Continental Europe.

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I. Introduction

The boom in public-law conflicts in Brazilian courts[3] has been associated with an identity crisis in its model of administrative justice[4], which bears traces of the U.S. legal system even though it is discordant with the Brazilian culture of administrative law, which is still tied to the French and German models in many respects.[5] On that subject, Rivero warned that "even in those aspects in which Anglo-Saxon influence reaches its high point in Latin-American administrative law, it does not appear to extend to legal technique: the sources, categories and methods of reasoning remain the same as those of Continental European law, with few exceptions".[6]

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[3] "The total number of cases increased from 83.4 million in 2009 to 92.2 million in the year 2012; out of that total, 28.2 million (31%) were new cases and 64 million (69%) had been pending from prior years. Moreover, in 2012, each judge tried an average of 1,450 cases, an increase of 1.4% relative to 2011. Although the judges are trying more cases each year, the total number of judgments (1 million or 4.7%) was lower than the increase in new cases (2.2 million or 8.4%), which means that the number of cases tried was 12% lower than the total number of cases entered in the records. There is no way to determine the exact percentage of cases that involved the public administrative authorities, but such disputes are estimated to account for the majority of them, over 50% of the total number. There are four indications that lead to this conclusion: (i) in 2012, out of the total number of 64 million cases pending from prior years, 39.9% were tax enforcement cases, while, in 2013, 41.4% of the total of 66.7 million pending cases were tax enforcement cases; (ii) over the past 20 years, the public authorities have been a party to 90% of the total number of judicial proceedings tried in the Federal Supreme Court (*Supremo Tribunal Federal* or "STF"), also known as the Constitutional Court; (iii) 498 out of the 693 Supreme Court cases with general repercussions, i.e., 71% of them, concerned public law (administrative law, tax law and social security law); (iv) dos 721 recursos de efeito repetitivo no Superior Tribunal de Justiça / STJ [Superior Court Of Justice], 360 of the 721 precedent-setting Supreme Courts appeals concerned public law, which therefore amounts to 50% of the total." (Conselho Nacional De Justiça, Justiça em números [Justice in Numbers]: 2014 [Reference Year 2013] 32 et seq. (2014), *in* Ricardo Perlingeiro, *O Devido Processo Administrativo e a Tutela Judicial Efetiva: Um NovoOlhar? [Administrative Due Process of Law and Effective Judicial Protection: A New Perspective?],* 239 Revista de Processo*,* 293 (2015)).

[4] It is necessary to point out the scope and context of the terminology used in this text. The expression "contencioso administrativo" [administrative litigation] refers to claims or challenges by an individual against the actions of an administrative authority. The expression "administrative jurisdiction" means the jurisdictional service intended to resolve administrative litigation, and "administrative justice" refers to the state bodies responsible for such jurisdictional action (Universidade Federal Fluminense, Academic Project of the Postgraduate Program in Administrative Justice – PPGJA/UFF (2008) *available at* http://bit.ly/1A1xFy4).

[5] *See* Perlingeiro, *supra* note 3.

[6] Jean Rivero, Curso de direito administrativo [Administrative law course] 221 (J. Cretella Jr. trans., 2004) (Braz.).

In early 19th-Century Europe, many considered administrative jurisdiction to be an attribute of the Executive Branch itself, inherent in its power of "*autotutela*" [power to correct its own decisions and errors]. Later, however, such jurisdiction became divided between the public administrative authorities and autonomous courts, so that a judicial appeal to the courts became the second level of authority of an administrative jurisdiction that originated in the public authorities. Since the late 19th Century, however, Continental Europe has shown a preference for entrusting administrative dispute resolution exclusively to courts that tend to be specialised and have broad powers of review, in order to make up for a system of administrative law in which the authorities lack effective autonomous decision-making power.[7]

In the United States, on the other hand, with the development of its unified traditional judicial system (generalized courts), the tendency is to divide the exercise of the administrative jurisdictional activities between the Executive and the Judiciary, not as in the beginnings of European administrative justice[8] but rather based on a model in which administrative decisions are made by authorities who have a certain degree of independence (*quasi-judicial bodies, administrative tribunals*), in a non-judicial proceeding with guarantees approximating *due process of law;* the – non-specialised – Judiciary can modify such decisions only if they are obviously unreasonable and the authority of the courts to examine the underlying facts of the case is restricted (limited judicial review).[9]

This culture of common law in Latin America, without prior contextualization, creates a risk of driving the model of administrative justice to either of two extremes: on the one hand, duplicate jurisdictions, with public authorities and courts which have similar independence, specialisation and broad powers of review, resulting in higher costs, uncertainty and delays in conflict resolution; on the other, an absence of jurisdiction, since administrative authorities that lack independence and are therefore incapable of ensuring a fair non-judicial administrative proceeding co-exist with non-

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7 See Giulio Napolitano, *Igrandi Sistemi del Dritto Amminstravo [The Main Systems of Administrative Law], in* Diritto amministrativo comparato [Comparative Administrative Law] 45 (2007) (It.).

8 García de Enterría takes the opposite position that the current *judicial review* is a regression to the "arcaico contencioso europeu do século XIX" [archaic European litigation of the 19th Century] (Eduardo García de Enterría, Democracia, Jueces y Control de la Administración [Democracy, Judges and Control of the Administration] 172 (Civitas 1995) (Spain).

9 On the difference between the Ibero-American "judicialist system" and the U.S. model, see Juan Carlos Cassagne, El principio de legalidade y el control judicial de la discricionalidad administrativa [The Rule of Law and Judicial Review of Administrative Discretion] 71 (2009) (Arg.); *see generally* Michael Asimow, *Five Models of Administrative Adjudication*, 63 Am. J. Comp. L. 3, 3-32 (2015), *available at* http://bit.ly/1yp8y4i; on independence and impartiality in administrative tribunals in English law, see Peter Cane, Administrative Law 96 (5th ed. 2011).

specialised courts that choose to defer to the technical expertise and regulatory power of the authorities or else, with the same practical effect of such "administrative deference", opt to decide the case themselves even without the proper expertise to try to subject matter *sub judice*.

In either case, the administrative authorities and courts may weaken themselves as jurisdictional bodies, especially from the standpoint of their reliability vis-à-vis one another and in the eyes of the private claimants.

The Brazilian model tends towards the absence of jurisdiction: with the advent of the Republic, in 1891, under the avowed influence of U.S. constitutionalism an undivided judicial system was set up for both the administrative jurisdiction and ordinary jurisdiction (generalized courts), which still remains in effect today; moreover, the 1988 Constitution raised (non-judicial) administrative due process of law to the category of a fundamental right, making it a prerequisite for administrative decisions restricting individual rights.

Since the public administrative authorities lack prerogatives to settle conflicts with effective independence, however, the Judiciary is being asked to perform increasingly intense judicial review in its supervision of administrative actions. This results in widespread frustration: on the one hand, with courts that defer to the authorities (as is typical of the U.S. model with its *quasi-judicial bodies*), on the other, vis-à-vis courts often criticised by the authorities for going too far with the intensity of supervision (typical of the Continental-European model with its dualist and specialised jurisdiction).

One puzzling example in Brazil is the need for judicial intervention in order to enforce decisions by the tax authorities. There are approximately 25 million tax enforcement claims in progress, representing 40% of the judicial proceedings in progress in the nation.[10] In fact, the Brazilian legal community has the general impression that the public administrative authorities are not empowered to initiate acts of enforcement for their decisions for their own account or even to conduct fair proceedings that result in restrictive decisions, especially in the states and municipalities of inland Brazil where, besides lacking independence, the tax officials do not always have legal expertise.

Paradoxically, however, it is feared that "dejudicialising" tax enforcement claims would increase the number of judicial conflicts, so great is the possibility of administrative errors; it is therefore thought better for the enforcement action to be carried out *ab initio* in the Judiciary, with any judicial resulting errors corrected in court, as well.[11] As shown above, the ad-

[10] In 2012, 25 million tax enforcement cases were pending in Brazilian courts, which amounts to 39.9% of all litigation in process (*See* Conselho Nacional de Justiça, Justiça em números [Justice in Numbers] 293-303 (2013) (Braz.).).

[11] Marcos de Vasconcellos, *Judges of the STJ [Superior Court of Justice] Are Against Tax Enforcement Without a Judge*, Revista Consultor Jurídico, June 8, 2012; *see also* Fernanda Duarte, *A Execução E Uma Questão de Justiça? [Is Enforcement a Question of Justice?]*, 13 Revista da Section Judiciária do Rio de Janeiro 45 (2005). *See also* Maria F. Erdelyi, *Proposta de Execução Fiscal da Fazenda E Alvo de Críticas [Proposal of*

ministrative authorities are practically deprived of any role in tax law, since the power to enforce administrative decisions is relegated to the Judiciary as though it were the *longa manus* of the administrative authorities; thus, even though enforcement is a typical administrative function (attribute of self-enforceability of administrative decisions), the power to resolve tax enforcement conflicts is concentrated in the hands of a non-specialised judge.

In Germany, tax decisions are enforced by the tax authorities themselves.[12] The high degree of credibility of the German public administrative authorities, inherited from Prussian professionalism,[13] gives people a feeling of impartiality even without prerogatives guaranteeing effective independence, so that, in practice, the specialised judges, despite their broad powers, are not often called upon to exercise them. The reality of the German model of administrative justice demonstrates that the Continental-European system is not synonymous with excessive judicial review, which, on the contrary, is a symptom of debilitated public administrative authorities; such weakness might be aggravated if other countries adopted models of administrative justice without making the necessary adjustments to their own specific cultural reality.

This article will try to show that episodic influence of U.S. constitutionalism in Latin American countries in the wake of their republican independence movements in the 19th Century led the majority of the new nations (e.g., Brazil) to a system of unified jurisdiction in the Judiciary (monist system), breaking off from its origins in Continental Europe, which adhered to a dualist judicial model in which the administrative jurisdiction is structured separately from the jurisdiction over private law.

Moreover, in the same way that Brazil can be criticised for ignoring the new version of the French *Conseil d'état* in the late 19th Century *(justice déléguée)*, it is possible that, in the future, no one will be able to understand why Latin-American countries maintained the system of unified jurisdiction without taking into consideration the corresponding evolution of U.S. administrative law.

Against that backdrop, the purpose of this study is explore topics inherent in the basic structure of a model of administrative justice [14] as a basis for analysing the evolution from the 19th to 21st Centuries of administrative justice systems in the Latin American States,[15] comparing their experiences,

Tax Enforcement by the Public Tax Authority is Subject to Criticism], Revista Consultor Jurídico, Nov. 27, 2007.

12 Abgabenordnung [AO] [Tax Code], §§ 249 et seq.

13 Jacques Ziller, Administrations comparées: les systèmes politico-administratifs de l´Europe des Douze [Compared Administrations: the Politico-administrative Systems of the Europe of the Twelve] 381 (1993) (Fr.).

14 Criteria partly inspired by the system developed by Michael Asimow. *See* Asimow, *supra* note 9.

15 There are 19 Latin-American countries of Iberian origin: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Uruguay and Venezuela.

recent changes, oscillations and established tendencies in a search for a new direction: should we reconcile ourselves to the Continental-European model, approximate the evolution in the US model, or else start building the identity of a specific model of our own?[16]

II. Administrative Jurisdiction: Judicial, Non-judicial and Hybrid Model

A. Constitution of Cadiz of 1812. Junta Grande of 1811 (Argentina). Belgian Constitution of 1831. Reglamento para el Arreglo de la Autoridad Ejecutiva Provisoria de Chile (1811). Loi des 16 et 24 août 1790. Ley de Santamaría Paredes. Administrative Court of the Land of Baden of 1863

According to Cassagne, there has been a misinterpretation of the scope of the constitutional sources and their historical bases: he argues that the system of unified jurisdiction in Latin America is mistakenly associated with the U.S. model, whereas in fact the *judicialismo puro* [supervision of administrative decisions exclusively by the Judiciary] of the Latin-American systems of administrative justice originated in the Constitution of Cadiz of 1812, Article 243 of which imposes an absolute limit on the exercise of jurisdictional functions by bodies or tribunals pertaining to the structure of the Executive Branch.[17]

Nevertheless, it is quite likely that the liberal ideas of *La Pepa* originated in the North-American colonies and England, from which the monist judicial system would also be imported later. According to Congleton, the list of functions of the Legislative Branch contained in Article 131 of Cadiz did not correspond to anything in Continental Europe of 1812 but rather to the U.S. Legislature and thus, implicitly, to the English Parliament. [18] The truth is that certain Spanish-American Constitutions had already been approved before 1812, as in the case of Argentina, Chile and Venezuela in 1811.[19]

The *Reglamento Orgánico of 22 October 1811* of the *Junta Grande*, considered the first proto-Argentine Constitution, "organically [adopted]

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[16] According to Rivero, in the current state of the art, it would be rash to conclude that a real Latin-American system administrative law exists (Rivero, *supra* note 6, at 222).

[17] *See* Cassagne, *supra* note 9, at 67, 71.

[18] Roger D. Congleton, Early Spanish Liberalism and Const.al Political Economy: The Cádiz Const. of 1812 18-19 (2010).

[19] *See generally* Albert P. Blaustein, *The U.S. Constitution: America's Most Important Export*, 4 Issues of Democracy 6, (2004).

the tripartite form of government".[20] Article 7 of Section 2 on the Executive Branch reads as follows:

> The Executive Branch shall not hear any judicial cases or attend to any lawsuits, whether pending or closed, nor order any trials to be re-opened, nor change the system of administration of justice, nor hear the cases of higher or lower magistrates or other subordinate judges and civil servants, which cases shall be reserved for the Tribunal de la Real Audiencia or Comisión, which, where appropriate, shall appoint the Junta Conservadora.

It is worth pointing out the origin in the U.S. of the *Junta Grande of 22 October 1811*, as noted by Valadés:

> […] The Secretary of the Government Junta, Mariano Moreno, did a translation of the US Constitution of 1787, to which he made some changes in the numbering and contents. Certain authors consider that study to be a sort of rough draft of the constitution [..] On 18 December 1810, the First Junta interpreted the Reglamento of 25 May and decided that it should also include parliamentary representatives from the inland areas of the Vice-Regency. When the number of its members reached twenty-two in 1811, it changed its name to Conservative Junta (i.and., conserving the rights of Fernando VII), more commonly known as the Second Junta or Junta Grande. [...].[21]

If that thesis is correct, Moreno's work may be considered the first organic constitutional initiative of the Republic of Argentina.[22]

In fact, the above-cited Article 243 of the Constitution of Cadiz (according to which neither the *Cortes* nor the King could exercise under any circumstances judicial functions, rule itself competent to hear pending cases or even order "*juicios fenecidos"* to be reopened) and Article 242 (according which the courts alone have the power to apply the laws in civil and criminal cases) still have correlations with the provisions of the 19th Centu-

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[20] José Rafael López Rosas, Historia constitucional argentina [Const.al History Argentina] 143 (2nd ed. 1970); Francisco Miguel Ávila Ricci, Nueva Constitución nacional: Desde la historiografía institucional argentina [New Const.: From Argentina Historiography] 122 (1997); Luis R. Longhi, *Génesis e Historia del Derecho Constitucional Argentino y Comparado*. Buenos Aires: Bibliográfica Argentina, 1945. t. I. nota 4, p. 258 in Constituiciones iberoamericanas: [Ibero-American Const.s] 6 n.10 (Néstor Pedro Sagüés ed., 2006).

[21] Diego Valadés, *Introducción Histórica: Proceso Constitucional Argentino [Historical Introduction: Argentine Constitutional Process]*, *in* Néstor Pedro Sagüés, Constituiciones iberoamericanas [Ibero-American Consts.]: Argentina 4 (2006).

[22] *Id.* at 5.

ry Latin-American Constitutions of Chile,[23] Ecuador,[24] Argentina,[25] Peru[26] and Bolivia.[27]

However, the use of the expression "civil and criminal courts" in Article 242 makes it clear that the focus of the provisions is not on preventing administrative dispute resolution by the Executive Branch; rather, the Executive was not supposed to interfere with functions of the Judiciary which, at the time, outside of criminal law, were mainly associated with jurisdiction over private-law cases (even if the public administrative authorities were involved in them), rather than constituting an administrative jurisdiction *per se*.

Rivero interprets the expression *civil rights* in Article 92 of the Belgian Constitution of 1831 as follows (in reference to the monist judicial system)[28]: "by 'civil rights', we are to understand all citizens' rights, even those against the State, with the sole exception of interests".[29] In other words, civil rights were the counterpart of political rights, which are identified with legitimate interests (*intérêts légitimes*), which may also be supervised by the judge according to Article 93 of the Belgian Constitution of 1831.

In that respect, the notion of "civil rights and obligations", as expressed in Article 6 of the European Convention on Human Rights, has always been controversial in the European Court of Human Rights. A draft protocol has been proposed, rewording Article 6 to extend its scope to include any public law issues, but no consensus was reached. This restriction, however, it must be said, is not found in the American Convention on Human Rights, Article 8 of which provides that the guarantees of due process of law are applicable to "rights and obligations of a civil, labor, fiscal, or any other nature".[30]

A good deal light is shed on this subject by Article 9 of the *Reglamento para el Arreglo de la Autoridad Ejecutiva Provisoria de Chile*, of 14 August

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[23] Constitución Política de la República de Chile [C.P.] (1828) art. 85.3; Constitución Política de la República de Chile [C.P.] (1833) art. 108.

[24] Const. of Ecuador (1869) art. 73.

[25] Const. of Argentina (1811) art. 7; Const. of Argentina (1813) art. 153; ch. II, art. 1, Const. of Argentina (1815) (Arg.); Const. of Argentina; Const. of Argentina (1816)§ 3, ch. 2, art. 3; Const. of Argentina (1817)§ 3, ch. 2, art. 4,; Const. of Argentina (1856); art. 92,; Const. of Argentina (1860) art. 95.

[26] Const. of Peru (1823) art. 81.3; Const. of Peru (1823) art. 127; Const. of Peru (1828) art. 91; Const. of Peru (1834) art. 86.4; Const. of Peru (1834) art. 136.3; Const. of Peru (1839) art. 88.6; Const. of Peru (1839) art. 141.2; Const. of Peru (1860) art. 43.

[27] Const. of Bolivia (1826) art. 115; Const. of Bolivia (1831) art. 118; Const. of Bolivia(1834) art. 120.

[28] Const. of Belgium (1831) art. 92, (Belg.)*;* art. 93.

[29] Rivero, *supra* note 6, at 169.

[30] See Ireneu Cabral Barreto, A Convenção Europeia dos Direitos do Homem anotada [Annotated European Convention of Human Rights] 150 (4th ed. 2010).

1811, considered the first Chilean Constitution:[31] "The executive authority shall hear no judicial cases between the parties, unless solely concerning matters of the government [acte du gouvernement], *public treasury* and war"; in other words, only *governmental* issues were admitted for hearing by the Executive, issues that were inherent in the executive powers and over which it had exclusive jurisdiction to decide. Worded differently, but with the same practical effect, the Constitution of Paraguay of 1870[32] in the late 19th Century prohibited the Executive from ruling on administrative disputes (*contentieux administratifs* - a rather fluid and restrictive expression at the time). In fact, the Executive was prohibited from ruling on conflicts that did not originate in administrative actions or interests, that is to say, the Judiciary had the sole authority to settle "administrative disputes", which tended to be understood as private-law conflicts involving administrative authorities.

What was considered to be a governmental issue and administrative issue is close to what would now be an *administrative action* and *legitimate interest*. Accordingly to the scholarly writings at the time, from the point of view of *administrative jurisdiction*, the following parallel can be drawn: *interest* versus *right*; *poder gracioso versus poder contencioso*; governmental issues versus judicial issues; matters subjects to judicial review *versus* matters that are not. [33] Otto Mayer, however, in his late 19th Century work never accepted the category of governmental actions [*actes du government*]; according to him, state actions may be legislative, judicial or administrative, never governmental, which would merely serve to justify an immunity.[34]

From that point of view, the Spanish Constitution of 1812 was not contrary to the French Law of 16 and 24 August 1790 (*Loi des 16 et 24 août 1790*), according to which judicial functions are forever separate and distinct from administrative functions so that judges cannot, under penalty of judicial misconduct, interfere with the operations of administrative bodies or summon administrative authorities to appear before them by rea-

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[31] Reglamento para el Arreglo de la Autoridad Ejecutiva Provisoria de Chile [Regulations Under The Temporary Executive Authority Of Chile], Agosto 14, 1811, (Chile).

[32] Const. of Paraguay (1870) art. 114.

[33] Teodosio Lares, Lecciones de derecho administrative [Lessons in Administrative Law] *16, 60, 365* (1852).

[34] Otto Mayer, Derecho administrativo alemán [German Administrative Law] 3-5 (1982)(Arg.). Translated from the French version by Horacio H. Heredia et al. (Otto Mayer, Le Droit Administratif Allemand 1904). On the subject of the disputes about the conflict between the governmental powers and activities of administrative litigation at the time, see Jaun R. Fernández Torres, *La Pugna Entre la Administración y los Tribunales Ordinarios Como Rasgo Sobresaliente del Primer Constitucionalismo Español [The Struggle Between the Administration and the Courts as Regular Feature Highlights of First Spanish Constitutionalism]*, *in* Historia legal de la jurisdicción contencioso-administrativa [Legal History of Administrative Disputes]: 1845-1998 31-79 (2007).

son of their functions. Nor is the Spanish Constitution incompatible with Chapter V, Article 3 of the French Constitution of 1791, according to which the courts must not interfere with administrative functions or summon administrative authorities before them by reason of their functions.

It is true that the Constitution of Cadiz prohibited the performance of judicial functions by the Executive but its most relevant contribution was that it helped create an administrative jurisdiction in Spain in 1888 (*Ley de Santamaría Paredes*), since at the time it was out of the question to submit certain issues of administrative law to the Judiciary; in other words, it was not considered appropriate for judges to rule on governmental questions or other issues exclusively pertaining to the public administrative authorities.[35] This remained an outgrowth of the influence of the great importance of the independence of the administrative jurisdiction established in French law on the basis of the "*justice délleguée*" of the *Conseil d'état*.[36]

In this context, the new jurisdictional functions of the Spanish State, now specialised, and the administrative jurisdiction in the judicial sphere, in general, like that of the *Land* of *Baden* a few years previously, in 1863,[37] had a point in common with the Belgian Constitution of 1831,[38] which was capable of translating the unified judicial model of common law into a "*continentalised*" version, reconciling the Judiciary with an administrative jurisdiction. Until then, such an administration jurisdiction belonged exclusively to the French system of *justice retenue.* All of these new functions tended to create a jurisdiction that was autonomous vis-à-vis the public administrative authorities.

In the opinion of Rivero, who recognises the origin of the system of unified jurisdiction over civil and administrative cases in Anglo-Saxon law, the source of inspiration of the Latin-American countries that have consecrated and maintained judicial unity was the Belgian Constitution of 1831. It is true that the laws and Constitution of Belgium did not escape the attention of the Latin-American authors of the period;[39] but it was really the English and U.S. systems that they often cited, considering them to be more appropriate to liberalism, as a counterpoint to the French model of administrative justice that allowed the public administrative authorities to judge themselves.[40]

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35 Leticia Fontestad Portalés, *La Jurisdicción Contencioso-Administrativa en España [Administrative Jurisdiction in Spain]*, 10 Revista CEJ 62, 62-72 (2006) (Braz.).

36 Loi du 24 mai 1872 portant réorganisation du Conseil d'Etat [Law of 24 May 1872 on the Reorganisation of the State Council] (Fr.); *see* David Capitant, *The Public Ministry vis-à-vis the Administrative Jurisdictions in France,* 34 Revista CEJ 56, 56-61 (2006).

37 Gesetz Betreffend die Organisation der Inneren Verwaltung [Law on the Organisation of Internal Administration], Oct. 5, 1863 (Ger.).

38 Const. of Belgium (1831). art. 92; art. 93.,

39 The Belgian law of the time is featured in the following work: Augusto Olympio Viveiros De Castro, Tratado de sciencia da Administração e direito administrativo [Treatise on the science of administration and administrative law] 655-88 (1914).

40 On the subject of the influence of the liberals on the incorporation of the unified judicial system, see Rivero, *supra* note 6, at 153.

B. Lack of Independence of French Administrative Litigation (Contentieux Administratif) and the Unified Judicial System in Latin America in the 19th Century: La Justice Déléguée of 1872

In fact, in the first half of the 19th Century, in the countries of Hispanic origin and in Brazil, with the advent of its Republic in 1889, the debate that arose in Latin America concerned the lack of independence of French administrative litigation *(contentieux administratif)*.[41] Since, at the time, the Judiciary was conceived of as the only autonomous state structure, it alone was considered responsible for settling administrative disputes; the desire for independence in the administrative jurisdiction was therefore the decisive factor for the spread of the system of unified jurisdiction over civil and administrative cases through Latin America.

Margáin Manautou, for examples, recalls that:

> the historical background of administrative litigation in Mexico dates back to the Law for the Settlement of Administrative Disputes [Ley para el Arreglo de lo contencioso administrativo] of 25 May 1853, which was influenced by contemporary French legislation, especially the notion of a Council of State - and which had caused a great uproar in the Mexican legal community, so that it was soon declared unconstitutional by the Mexican Supreme Court, which held that it violated the doctrine of Separation of Powers.[42]

In the latter half of the 19th Century this debate was becoming obsolete in France and Germany because of the recognition that the administrative jurisdiction could be exercised if it were autonomous from the public administrative authorities even if such jurisdiction is not located in the Judiciary, on the model of the *justice déléguée* of 1872. According to Sommermann, the discussion that persisted in Continental Europe concerned the model of administrative jurisdiction to be adopted: either monist, typical of common law countries, or dualist, of French origin. It is the dualist version that ended up being successful due to the benefits of specialisation and to the elimination of its main drawback: the lack of independence. It was therefore the jurisdiction specialised in administrative law and autonomous from the public administrative authorities that prevailed in Continental Europe.[43]

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41 In Mexico: José María Del Castillo Velasco, Ensayo sobre el derecho administrativo mexicano [Essay on Mexican Administrative Law] V2 275 (1875); Teodosio Lares, Lecciones de derecho administrativo [Lessons on Administrative Law] (1852); In Brazil: Castro, *supra* note 39.; Themístocles Brandão Cavalcanti, Instituições de direito administrativo brasileiro [Institutions of Brazilian administrative law] Vol. 2 748-59 (2d ed. 1938).

42 Emilio Margáin Manautou, De lo contencioso administrativo: de anulación o de ilegitimidad [On Admistrative Disputes: Annulment or Illegality] 67-70 (12th ed. 2004).

43 Karl-Peter Sommermann, *O Desenvolvimento da Jurisdição Administrativa Alemã no Contexto Europeu, [The Development of the German Administrative Jurisdiction in the European Context]*, *in* R. Perlingeiro et al., Código de jurisdição administrativa:

Taking the example of Brazil, the adoption of the unified judicial system by the Republican Constitution of 1891 is associated with a purely political choice in favour of US liberal constitutionalism, in opposition to the monarchic Brazilian institutions of the time, striking examples of which were the Imperial Council of State and administrative litigation under the system of *justice retenue* which, for obvious reasons, did not keep up with the evolution of European administrative law (*justice déléguée*): [44] an autonomous administrative jurisdiction would be contrary to the fundamental principles of the Imperial Constitution of 1824, which remained in force until 1889.[45]

The doctrine of administrative law of the latter half of the 19th Century continued to support the version originating in the French Council of State when they favoured backing the Brazilian Constitution of 1824, considering the Judiciary as a power intended for private law and the Executive as a power intended for public law.[46] The reaction shown by the Republic Constituent Assembly of 1891 in adopting the unified judicial system is therefore understandable.

C. The Unified Judicial System in Latin America in the 19th Century and Questions of Governance

It is true that in the late 19th Century, there were no reasons for Latin America to distance itself from the European model of administrative justice; at the time, it seemed clear that the prohibition of exercise of jurisdiction by the Executive, as enshrined in the Constitution of Cadiz, would not prevent the Latin-American systems from keeping up with the evolution of the French model towards an autonomous administrative jurisdiction. The proof of that is what happened throughout Europe, especially in Spain and Portugal, and above all in Belgium, which abandoned the monist judicial system and where the Council of State exercised administrative jurisdiction without the possibility of appeal.[47]

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o modelo alemão [Code of the administrative jurisdiction: the Germanm model] - Verwaltungsgerichtsordnung (VwGO) 13 (2009).

[44] Castro, *supra* note 39; Cavalcanti, *supra* note 41. The U.S. influence on Brazil at the time may be measured by art. 386 of Decree No. 848 of 1890, which established U.S. law and *common law* precedents as a subsidiary source for Brazilian jurisprudence (Decreto No. 848, de 11 de Octubro de 1890 (Braz.)).

[45] In the opinion of Ribas, clearly opposed to an autonomous administrative jurisdiction, "The creation of judges and courts devoted exclusively to trying such appeals would lead to the same disadvantages unless they could be frely appointed and removed by the government; otherwise, they would be new and costly springs in the already complex and costly administrative mechanism" (Antonio Joaquim Ribas, Direito administrativo brasileiro [Brazilian Administrative Law] 164 (1866).

[46] See Visconde do Uruguai, Ensaios do direito administrativo [Essays on Administrative Law] 29-36 (1862); Ribas, *supra* note 45, at 143-65.

[47] There are currently Councils of State with functions of administrative jurisdiction: France, the Netherlands, Belgium, Italy and Greece; cf. the judicial system of adminis-

It fact, in early 19th Century Latin America, the rise of an essentially judicial jurisdiction became apparent, which, however, gradually become more or less specialised as a sign of reconciliation with its European origin; starting from the early 20th Century, certain Latin-American Constitutions began recognising the dualist judicial model of jurisdiction, with one jurisdiction specialised in administrative law and others with a non-judicial administrative jurisdiction.

The judicial system that prevailed in Latin America during the 19th Century, after the independence movements between 1810 and 1831, was not accompanied by an invasive administrative jurisdiction; it tended to restrict itself to examining to disputes (*contentieux)* – closer to private law – in a judicial model more closely identified with the United States than with Continental Europe.

19th-Century Latin America practically did not recognise any administrative jurisdiction in the judicial sphere, as in Belgian law (1831) and German law (1863); nor did it recognise any administrative jurisdiction in the Executive sphere, like French law (1872) and Spanish law (1874). Out of the 19 Latin-American countries of Iberian origin, only four deviated from the judicial system in the 19th Century, opting instead for autonomous tribunals outside the structure of the Judiciary, although they subsequently back down from their decision: Bolivia (1861-1868, 1871-1878), Panama (1863-1904), Dominican Republic (1874-1880) and Colombia (1886-1914).

The system of unified jurisdiction over civil and administrative cases in Latin America offered no more than the French administrative litigation of the early 19th Century, because the Executive itself settled the constant disputes about which – quite numerous – issues would be reserved exclusively for the public administrative authorities and immune from the Judiciary ("governmental" issues), as may be observed in the Chilean Constitution of 1833 and Ecuadoran Constitution of 1843.[48] It was a judicial system that, in most Latin-American countries, had a restricted field of action, as occurred in Anglo-Saxon law; in that respect the system did not evolve much either in the United States or in the Latin-American countries that still make use of it.

trative jurisdiction with a specific supreme court in the following countries: Germany, Austria, Portugal, Luxemburg, Sweden, Finland, Czech Republic, Poland, Lithuania; there is a judicial system of administrative jurisdiction equipped with a supreme court with common administrative and civil jurisdiction in Spain, Switzerland, Slovenia, Hungary, Romania and Estonia; there is a unified judicial system (monist judicial system) in the United Kingdom, Ireland, Malta and Cyprus; *see* Michel Fromont, Droit administratif des États européens [Administrative Law of the European States] 120 et seq. (2006); also see Jacques Ziller, Administrations comparées: les systèmes politico-administratifs de l´Europe des Douze [Compared Administrations: the Politico-administrative Systems of the Europe of the Twelve] 438-45 (1993) (Fr.).

[48] See Constitución Política de la República de Chile [C.P.] (1833) art. 104.5; Const. of Ecuador (1843) art. 52.11.

D. The Specialization of Jurisdiction in Europe and the Emergence of Administrative Law.

The fact is that the so-called *system of undivided jurisdiction* was a logical corollary of the lack of consolidation of administrative law;[49] the administrative jurisdiction resolving administrative disputes – which had previously been easier to conceal among the "*poderes de autotutela*" [power to correct its own decisions and errors] – was a new activity assigned to supposedly autonomous state bodies, which coincides with what was understood to be administrative law.

Thus, the origin of the system of undivided jurisdiction or, according to Fromont, of the system of *civil* jurisdiction,[50] is usually identified with Anglo-Saxon law: common law did not adopt administrative law until the late 19th Century. Moreover, the 19th Century Latin-American Constitutions reveal a model of judicial supervision of the public administrative authorities of the kind that prevailed in Europe before the French Revolution and, from that perspective, did not differ from the Constitution of Cadiz.

The Continental-European model of single-jurisdiction evolved as administrative law became more firmly established; the Judiciary became increasingly specialised, autonomous non-judicial bodies were created, such as the *Conseil d'État* of 1872, assigned specific powers to rule on cases of public interest; in practice, this helped limit the scope of administrative of actions that were considered at the time immune to the jurisdiction of the courts.

In this context, the regulatory gap left by the monist judicial system, with quasi *jurisdictional immunity* of the public administrative authorities, became more obvious as administrative law developed.[51] That gap was subsequently filled in common law countries, however, by creating "administrative bodies invested with jurisdictional powers", according to Rivero,[52] or "primary jurisdiction".[53]

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[49] According to Rivero, *supra* note 6, at 126-127, "an undivided rule and an undivided judge were, for Dicey, the characteristic elements of the *rule of law*, and the system of administrative law and the principles on which such law is based are undeniably foreign to the spirit and traditions of the British institutions."

[50] Fromont, *supra* note 47, at 135 et seq. (2006).

[51] Rivero warns of the ideology unavowed *Polizeistaat* throughout the 20th Century, in the United Kingdom, in the name of royal prerogatives, in the United States in the name of state sovereignty; and, in France, the theory of acts of government: Rivero, *supra* note 6, at 159-60.

[52] *Id*. at 129. Rivero clearly associates the weakening of the monist judicial system with the emergence of the "primary jurisdiction" within the Executive, which, in the United Kingdom, in 1948, reached the number of 207 types of specialised jurisdictions (*id*. at 136).

[53] See Héctor A Mairal, Control judicial de la Administración Pública [Judicial Revew of Public Administrative Agenices] V2 714 (1984); also see Cassagne, *supra* note 9, at 76 (2009).

E. The Evolution of the Unified Judicial System in the United States: Interstate Commerce Commission (ICC) of 1887.

The creation of the Interstate Commerce Commission (ICC) in 1887 in the United States marked the beginning of the administrative tribunals, a combination of the unified judicial model with adversarial proceedings in the area of public administrative authorities.[54] However, that aspect of the U.S. system, which was not well established until the 20th Century, was never considered by 19th Century Latin America, for obvious reasons.

An irony of history is involved in the evolution of *common law* towards *judicial review* which brought an administrative jurisdiction into the heart of the Executive Branch[55] by creating administrative tribunals whose judges, civil servants of the administrative authorities, have a certain degree of independence to resolve disputes, and their decisions are subject to partial review (cf. the Italian notion of *delibazione*) by the Judiciary.[56] In Continental Europe, administrative law moved in the opposite direction: administrative jurisdiction exercised by the Executive is an exception,[57] in which the elaboration of administrative decisions with the participation of the interested party is more similar to a *procedimento* (procedure) than to a *processo* (proceeding), since it does not clearly provide for guarantees of non-judicial due process.[58]

F. Models of Administrative Jurisdiction in Latin America in the 19th and 20th Centuries

1. Hybrid (Judicial and Non Judicial) Administrative Jurisdiction: Honduras, Brazil

In Latin America, the only case of a hybrid model of administrative jurisdiction, as in common law countries, was provided for by the Constitution of

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54 See Richard J. Pierce et al., Administrative Law and Process 214 (4th ed. 2004); *see also* Mairal, *supra* note 53, at Vol. 2 714.

55 Speaking ironically, Rivero concluded that there is a dualist jurisdiction in the English judicial system (Rivero, *supra* note 6, at 137).

56 See Asimow, *supra* note 9; Mairal, *supra* note 53, at 713.; Julio V. González García, El Alcance del Control Judicial de las Administraciones Públicas en los Estados Unidos de América [The Scope of Judicial Review of Public Administrative Authorities in the USA] 37 (1996).

57 Council of State in France, the Netherlands, Belgium, Italy and Greece) (Fromont, *supra* note 50, at 120 et seq.).

58 Under English law, the authorities were more closely tied to fundamental rights than to statutory law; on the contrary, under French law, the authorities were closely tied to statutory law than to fundamental rights (Maria da Glória Ferreira Pinto Dias Garcia, Da justiça administrativa em Portugal: sua origem e evolução [Administrative Justice in Portugal: its Origin and Evolution] 333-34 (1994); *see also* Asimow, *supra* note 56.

Honduras of 1965,[59] with the specialisation of an administrative chamber in the supreme court,[60] as well as the creation of an Administrative Tribunal, which, pursuant to Article 210, did not form part of the Judiciary: the non-judicial tribunal exercised administrative jurisdiction and was subject to review by a supreme court through cassation.[61]

The Seventh Amendment of 1977 to the Brazilian Constitution of 1969 provided for the possibility of legislators instituting non-judicial administrative litigation which would be subject to judicial supervision, as in contemporary U.S. judicial review, but it never became well established in practice.[62]

2. *Non-Judicial Administrative Jurisdiction: Bolivia, Panama, Dominican Republic, Colombia, Guatemala, Ecuador, Uruguay, Mexico*

In the 19th Century, as mentioned above, Bolivia (1861-1868, 1871-1878), Panama (1863-1904), the Dominican Republic (1874-1880) and Colombia (1886-1914) experimented with an administrative tribunal that was autonomous from the Judiciary, and, in the 20th Century, it was the turn of Guatemala (1927-1945), Ecuador (1929-1979) and, once again, Panama (1945-1956).

Bolivian administrative law recognised a Council of State, conceived of as a body outside the Judiciary, accompanied by Supreme Administrative Court, which exercised administrative jurisdiction (*justice deleguée*), during the brief effective period of the Constitution of 1861,[63] interrupted by the Constitution of 1868, and then immediately returned to the system of the

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[59] Const. of Honduras (1965) art. 210 (c). This Constitution was repealed by the Constitution of 1982, which restored the judicial system of monist jurisdiction that was traditional in Honduran constitutional law (Honduran Constitutions of 1825, 1831, 1839, 1848, 1865, 1873, 1880, 1894, 1904, 1924, 1936 and 1957).

[60] Const. of Honduras (1965) art. 229.

[61] Const. of Honduras (1965) art. 210; Const. of Honduras (1965) art. 229.

[62] See Francisco Mauro Dias, Contencioso Administrativo nos estados para questão de pessoal [Administrative Litigation in the States for Personal Matters], 8th National *Convention of State Prosecutors*, Rio de Janeiro: Government Attorney's Office of the State of Rio de Janeiro, 1979. Anais. Regarding Amendment 7/77, I should make amends by correcting an incorrect note in one of my previous articles (Perlingeiro, *supra* note 3, at 293-331 (2015)) where I said that the Constitutional Amendment 7/77 concerned a dispute challenging the Judiciary; in reality, it concerned just the opposite: a dispute submitted to the Judiciary (Ricardo Perlingeiro, Execução contra a Fazenda Pública [Enforcement Measures against the Public Authorities] 47 (1998)); *See* Ada Pellegrini Grinover, *O Contencioso Administrativo na Emenda 7/77 [Administrative Litigation in Amendment 7/77]*, 10 Revista da Procuradoria Geral do Estado de São Paulo 247 et seq.

[63] Const. of Bolivia (1861) art. 41.6; Const. of Bolivia (1861) art. 42.

period between the Constitutions of 1871 and 1878,[64] until the effective date of the Constitution of 1878, when jurisdiction over administrative disputes was assigned to the Supreme Court.[65]

In Panama, the *Corte de Estado* was established by the Constitution of 1863[66], which was maintained by the Constitutions of 1865[67], 1868[68], 1870[69], 1873[70], and the *Corte Superior de Estado*, with the Constitution of 1875[71], until the advent of the Constitution of 1904. Later on, in 1945, an administrative tribunal autonomous from the Executive and Judiciary was created,[72] which continued to exist until the Constitutional Reform of 1956.

The Dominican Republic formed a non-judicial administrative jurisdiction within the Legislative Branch, during the effective period of the Constitutions of 1874[73], 1878[74] and 1879[75]. The Colombian Constitution of 1886 included among the powers of the Council of State, which at the time was a non-judicial body, jurisdiction to rule on administrative litigation, as an undivided level of authority or on the appellate level, in accordance with the law, and also authorised legislators to create tribunals with jurisdiction over administrative disputes involving questions specific to the *Departamentos*. [76]

Starting from the constitutional reforms in Guatemala of 1927[77] and 1935[78], a distinction was drawn between the cases (conflicts) to which the public administrative authorities are a party, maintaining the authority of the ordinary judges, and *exclusively administrative cases*, which would be

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64 Const. of Bolivia (1871) art. 59.8; Const. of Bolivia (1871) art. 59.9; Const. of Bolivia (1871) art. 79.

65 Const. of Bolivia (1878) art. 111.5.

66 Const. of Panama (1863) art. 71; Const. of Panama (1863) art. 72.

67 Const. of Panama (1865) arts. 83-87.

68 Const. of Panama (1868) arts. 94-99.

69 Const. of Panama (1870) arts. 93-98.

70 Const. of Panama (1873) arts. 97-102.

71 Const. of Panama (1875) arts. 82-87.

72 Art. 8º of Legislative Decree No. 4 of 1945; Arturo Hoyos, El derecho contencioso-administrativo en Panama (1903-2005): una introducción histórica de derecho comparado y jurisprudencial [The Law of Administrative Disputes in Panama (1903-2005): A Historical Introduction from the Perspective of Comparative Law and Case Law] 16 (2005).

73 Const. of Dominican Republic (1874) art. 71.7.

74 Const. of Dominican Republic (1878) art. 22.8.

75 Const. of Dominican Republic (1879) art. 22.8.

76 Const. of Colombia (1886) art. 141.3; Const. of Colombia (1886) art. 164.

77 Guatemalan Constitutional Amendment (1927) art. 41.3, which reworded art. 85 of the amended constitution.

78 Guatemalan Constitutional Amendment (1935) art.6, which reworded art. 17 of the Constitution, and art. 23, which changed the wording of art. 85 of the amended constitution.

under the authority of the Administrative Tribunal– a non-judicial body – with an undivided level of court.

The Ecuadoran Constitution of 1929 established the authority of the Council of State – a non-judicial body – to provide the jurisdiction over administrative disputes on an undivided level of court[79]; the 1945 Constitution provided for the *Tribunal de Garantias Constitutional*, likewise outside the Judiciary, exercising jurisdiction over administrative disputes on an undivided level of court[80]; and, finally, the terminology of the Constitution of 1967 referred to a judicial jurisdiction and the jurisdiction of the fiscal and administrative tribunals headquartered in Quito, conveying the idea of a non-judicial administrative jurisdiction on an undivided level of court. [81]

In modern-day Latin America, there are only two examples of non-judicial administrative jurisdiction: Uruguay, with its *Tribunal de lo Contencioso Administrativo*, since 1934, and Mexico, with its *Tribunal Federal de Justicia Fiscal y Administrativa*, created in 1937, inspired by the *Conseil d'État* of 1872.[82]

The Uruguayan Constitution of 1934[83] established an Administrative Tribunal [*Tribunal do Contencioso Administrativo*] a body that was separate from the Judicial Branch, with the function of exercising administrative jurisdiction on an undivided level of court. It became a tradition of Uruguayan constitutional law, providing rules of procedure for administrative litigation,[84] including the scope of individual claims and the jurisdiction of the ordinary courts over damage claims[85]. That same clause is maintained in the Constitutions of 1942[86], 1952[87] and 1967[88].

According to Article 73 XXIX of current Mexican Constitution of 1917, after subsequently (most recently on 4 December 2006), the Legislative Branch is authorised:

> to issue laws establishing administrative tribunal that are granted full autonomy to render their decisions and that are in charge of settling disputes arising between individuals and the federal administrative authorities, and to impose penalties on public servants for such adminis-

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79 Const. of Ecuador (1929) art. 117.2; Const. of Ecuador (1929) art. 10.

80 Const. of Ecuador (1945) art. 160.8.

81 Const. of Ecuador (1967) art. 28.15 ch. 1-2; Const. of Ecuador (1967) art. 213.

82 Héctor Fix-Zamudo, Tres Instituciones Francesas Revolucionarias y el Derecho Constitucional Mexicano [Three Revolutionary French Institutions and Mexican Const.al Law] 82 (1991).

83 Const. of Uruguay (1934) art. 271; see Augusto Durán Martínez, Contencioso Administrative [Administrative Disputes] 15, 21 et seq. (2007).

84 Const. of Uruguay (1934) arts. 273-75.

85 Const. of Uruguay (1934) art. 275.2.

86 Const. of Uruguay (1942) arts. 268-74.

87 Const. of Uruguay (1952) art. 221; Const. of Uruguay (1952) arts. 307-21.

88 Const. of Uruguay (1967) arts. 307-21.

> trative offences as are prescribed by law, establishing the rules for their organization, operations, procedures and appeals against their decisions.

The Mexican Administrative Tribunal for Tax Matters (*Tribunal Federal Fiscal Administrativo*] was created by the Law of 27 August 1936 and is still in force today. The Constitution of 1917 authorizes the creation of similar tribunals by the Mexican States and the Federal District[89]. Thus, Mexican administrative law has co-existed with autonomous non-judicial administrative tribunals since 1937. Despite their legal nature, the administrative tribunals are outside the structure of the Judiciary and considered to be autonomous bodies under Article 94 of the Constitution of 1917 and the procedure of *amparo* against judicial decisions is provided by Article 107 IV and V b.[90] In fact, the model of undivided jurisdiction has never ceased to exist in Mexico; it is not used, however, whenever the law has established a non-judicial administrative tribunal that is "*autonomous*", to use the terminology of the Constitution.[91]

In 1984, the President of the Federal Republic of Brazil sent a message to the National Congress proposing the creation of an administrative (non-judicial) tribunal for litigation which, in reality, implied solely non-judicial administrative jurisdiction without the possibility of subsequent judicial review. The proposal was not approved however, in light of the severe criticism from the legal community.[92]

3. *Dualist Judicial Jurisdiction: Colombia, Nicaragua, Panama, Ecuador, Guatemala, Dominican Republic*

The dualist system of judicial jurisdiction with a specific supreme court, as is currently found in Germany and Portugal, was incorporated into the territory of Latin America only by Colombia, where it has been in force since 1914. Despite its name of *Consejo de Estado* and the fact that its jurisdictional functions are situated alongside its consultative functions, the Supreme Court of the Colombian administrative jurisdiction is a body of the Judicial Branch.

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89 Arts. 116 V and 122 *Base Quinta* of the Mexican Constitution of 1917.

90 Const. of Mexico (1917) art. 94; Const. of Mexico (1917) art. 107 V; Const. of Mexico (1917) art. 107 V b; On the nature of the *Tribunal Federal Fiscal Administrativo* [Federal Administrative Tax Court], *see* Emilio Margáin Manautou, De lo Contencioso Administrativo: de Anulación o de Ilegitimidad [On Admistrative Disputes: Annulment or Illegality] 2 et seq. (2009).

91 On judicial review of the public administrative authorities in general, see Jorge Fernández Ruiz, *Panorama General del Derecho Administrativo Mexicano [General Overview of Mexican Administrative Law]*, *in* Santiago González-Varas Ibáñez, El derecho administrativo iberoamericano [Ibero-American Administrative Law] 462-63 (2005).

92 Ricardo Perlingeiro, Execução contra a Fazenda Pública [Enforcement Measures against the Public Administrative Authorities] 48 (1998).

The Legislative Act No. 3 (Constitutional Amendment) of 1910 modified Title XV of the Colombian Constitution of 1886, on the administration of justice[93], and established an institution specialising in jurisdiction over administrative disputes. The Reform Act (Constitutional Amendment) of 1914[94] assigned to the Council of State the function of Supreme Court of administrative litigation. Finally, in the Constitution of 1991, the Council of State is maintained as a body of the *Judicial Branch* and its functions included acting as Supreme Court of jurisdiction over administrative disputes.[95]

A dualist system of judicial jurisdiction with an undivided Supreme Court was established constitutionally in the following countries of Latin America: Nicaragua, in the periods from 1939 to 1948, with courts and judges for administrative disputes,[96] and from 1974 to 1979, with the Administrative Court [*Tribunal do Contencioso Administrativo*],[97] which, however, were never implemented by the legislator;[98] Panama, from 1941 to 1945, with the *juicios de lo contencioso-administrativo* [courts to rule on disputes under administrative law];[99] Ecuador, from 1979 to 1992, with the Administrative Court, on an undivided level of court;[100] Guatemala, starting from 1945, with the Administrative Court;[101] and the Dominican Republic, starting from 2010[102].

4. *Monist Judicial Jurisdiction (uninterrupted period): Chile, Argentina, Venezuela, Paraguay, México, Costa Rica, Peru, El Salvador, Cuba, Brazil*

The monist judicial system was the only that all the Latin-American countries had an opportunity to experience at a certain moment of their constitutional history. Some of them did so uninterruptedly from the start of the effective period of their Republican Constitution, as occurred in Chile, Argentina and Venezuela since 1811; in Paraguay since 1813, México, 1818; Costa Rica, 1821; Peru, 1823; El Salvador, 1824; Cuba, 1869; and Brazil, 1891.

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93 Legislative Act 3 (Constitutional Amendment) of 1910, amending Title XV of the Colombian Constitution of 1886 (art. 42).

94 Ato Reformatório (Constitutional Amendment) (1914) art. 6.3 (Colom.).

95 Const. of Colombia (1991) art. 231.

96 Const. of Nicaragua (1939) art. 243.

97 Arts. 280, 290 and 303 Const. of Nicaragua (1974) art. 280; Const. of Nicaragua (1974) art. 290; Const. of Nicaragua (1974) art. 303.

98 See Republica De Nicaragua, Sala de lo Contencioso Administrativo. Antecedentes y Creación de la Sala de lo Contencioso Administrativo [Administrative Law Division of the Courts: History and Creation of Administrative Litigation].

99 Const. of Panama (1941) arts. 190-92.

100 Const. of Ecuador (1979) art. 98 (y).

101 Const. of Guatemala (1945) art. 164; Const. of Guatemala (1956) arts. 193 -94; Const. of Guatemala (1965) art. 255; Const. of Guatemala (1985) art. 221.

102 Const. of the Dominican Republic (2010) arts. 164-65.

The history of the Chilean Judiciary is characterised by a judicial system of monist jurisdiction in the Constitutions of 1811, 1818, 1822, 1823, 1828, 1833, 1925 and 1980.[103] In Argentina, in the absence of an explicit reference to a specialised court in its constitutions, it must be concluded that Argentine law established a monist judicial system, as can be observed in the Constitutions of 1811, 1813, 1815, 1816, 1817, 1819, 1826, 1856, 1860, 1942 and 1994. Venezuelan law adopted a monist judicial system in the Constitutions of 1811, 1819, 1821, 1830, 1858, 1874, 1901, 1909, 1931, 1945, 1947, 1953, 1961 and 1999.[104]

Paraguay adopted the monist judicial system.[105] Although the Charters of 1813 and 1844 do not lay down any rules in that respect, starting from the Constitution of 1870,[106] a jurisdiction for administrative disputes was expressly established as an exclusive attribute of the Judiciary, to the exclusion of the Executive. The same rule was incorporated into the subsequent Constitutions, which also authorised the Congress to legislate on administrative disputes: Constitution of 1940;[107] Constitution of 1967;[108] Constitution of 1992[109].

In Mexico, the judicial system of monist jurisdiction has been the framework up to the present day: it was implicitly established in the Constitutions of 1818, 1824, 1836, 1857 and 1917.[110] In Costa Rican constitutional law, there was not an undivided exception to the judicial system of monist jurisdiction throughout the effective period of its 14 Constitutions: 1821, 1823 (Constitutions of 17 March 1823 and 16 May 1823), 1824, 1825 (with the amendment of 1835), 1844, 1847, 1848, 1859, 1869, 1871, 1917, and 1949.

Peruvian constitutional law anchored the judicial system of monist jurisdiction from its first Constitution, in 1823, and it was maintained by the Constitutions of 1828, 1834, 1837, 1839, 1856, 1860, 1867, 1920, 1933,

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[103] *See* Alejandro Vergara Blanco, *Panorama General del Derecho Administrativo Chileno [General Overview of Chilean Administrative Law]*, in, El derecho administrativo iberoamericano [Ibero-American Administrative Law] 159-61 (Santiago González-Varas Ibáñez ed. 2005).

[104] See Allan R. Brewer-Carrías, Instituiciones políticas y constitucionales [Political and Const.al institutions] vol. 7. La justicia contencioso administrative [Adminstrative justice] 21 et seq. (1997).

[105] See Luis Enrique Chase Plate, *La Justicia Constitucional y la Justicia Administrative [Constitutional Justice and Administrative Justice* in Derecho Administrativo Iberoamericano [Ibero-American Administrative Law] vol.2 1212-13 (Víctor Hernández-Mendible ed. 2007).

[106] Const. of Paraguay (1870) art. 117.

[107] Const. of Paraguay (1940) art. 76.12; Const. of Paraguay (1940) art. 87.

[108] Const. of Paraguay (1967) art. 149; Const. of Paraguay (1967) art. 199.

[109] Const. of Paraguay (1992) art. 248.

[110] See Jorge Fernández Ruiz, *Panorama General del Derecho Administrativo Mexicano [General Overview of Mexican Administrative Law]*, in Santiago González-Varas Ibáñez ed., *supra* note 103, at 462-63.

1979 and 1993; it should be pointed out the Constitution of 1867 called for the creation by law of *Tribunales contencioso-administrativos* [courts for administrative disputes].[111]

The Constitutions of El Salvador of 1824, 1841, 1864, 1871, 1872, 1883 and 1886 ommitted any mention of administrative litigation, which resulted in a judicial system of monist jurisdiction; starting from the Constitution of 1939[112], the constituent assemblies authorised the legislators to organise a jurisdiction linked to the Judiciary that included administrative matters: Constitutions of 1944[113], 1950[114], 1962[115] and 1983[116].

In Cuba, only two of its Constitutions expressly refer to the jurisdiction over administrative disputes as a function of the ordinary courts (Constitutions of 1934[117] and of 1935[118]); the others failed to mention any body as having the authority to rule on such conflicts, so that Cuba, too, is considered to have established the judicial system of monist jurisdiction: Constitutions of 1869, 1878, 1895, 1897, 1901, 1940, 1952, 1959, 1976 (with the amendment of 1992 and 2002). In Brazil, the Constitutions that followed the proclamation of the Republic, those of 1891, 1934, 1937, 1945, 1967, 1969 and 1988, all adopted the judicial system of monist jurisdiction.

5. *Monist Judicial Jurisdiction (Limited Period): Colombia, Guatemala, Dominican Republic*

Colombia (1821-1886), Guatemala (1824-1927) and the Dominican Republic (1854-1874, 1880-2010) experienced the undivided judicial system for a limited period of time.

The Colombian Constitutions of 1821, 1830, 1832, 1843, 1853, 1858 and 1863 do not refer to administrative litigation, which suggests that the Judiciary, in that period, exercised an undivided jurisdiction, including, within its area of authority, jurisdiction over conflicts of public interest involving the administrative authorities. The Constitution of 1830,[119] in particular, established the authority of the High Court of Justice to try any case involving contracts or transactions with the Executive Branch, which confirms the existence of a judicial system of monist jurisdiction that is inclined to settle private law disputes with public administrative authorities, while excluding from judicial evaluation matters of administrative law,

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[111] Ramón A. Huapaya Tapia, Tratado del processo contencioso administrative [Treatise on Administrative Procedure] 335 (2006).
[112] Const. of El Salvador (1939) art. 77.17.
[113] Const. of El Salvador (1944) art. 75.17.
[114] Const. of El Salvador (1950) art. 46.13.
[115] Const. of El Salvador (1962) art. 47.13.
[116] Const. of El Salvador (1983) art. 131.31.
[117] Const. of Cuba (1934) art. 80.
[118] Const. of Cuba (1935) art 86.
[119] Const. of Colombia (1830) art. 110.1.

which are considered to fall exclusively within the scope of the Executive. That rule was maintained with minor alterations in the Constitutions of 1832,[120] 1858[121] and 1863.[122]

In Guatemala, the Constitutions of 1824, 1825, 1879 and 1921 do not establish any specific body with the authority to rule on conflicts involving the administrative authorities; it is therefore presumed to have a system of undivided jurisdiction system; the Constitution of 1839 refers to administrative litigation matters as one of the subject areas under the authority of the courts.[123]

In the Dominican Republic, the monist judicial jurisdiction, generally concentrated in the Supreme Court, predominated through much of its constitutional history (Constitutions of 27 February 1854,[124] 10 December 1854,[125] 1858, 1865,[126] 1866,[127] 1872,[128] 1877, 1880,[129] 1881,[130] 1887,[131] 1884,[132] 1896,[133] 1906,[134] 1908, 1924, 1934, 1942, 1955, 1960, 1961, 1963, 1966, 1994 and 2002); the only exception was in the effective period of the Constitutions of 1874,[135] 1878,[136] and 1879,[137] with a non-judicial administrative jurisdiction, and after the Constitution of 2010,[138] with a dualist judicial jurisdiction.

6. *Monist Judicial Jurisdiction (Intermittent Periods): Nicaragua, Honduras, Ecuador, Panama, Bolivia*

Another group of countries initiated the Republic with the monist judicial system and then searched for a different model of administrative jurisdiction, subsequently returning to the original system: Nicaragua (1884-1939,

[120] Const. of Colombia (1832) art. 131.3.
[121] Const. of Colombia (1858) art. 49.11.
[122] Const. of Colombia (1863) art. 71.8.
[123] Const. of Guatemala (1839) art. 32.1.
[124] Const. of Dominican Republic, February 27 1854, art. 100.6.
[125] Const. of Dominican Republic, December 10 1854, art. 45.6.
[126] Const. of Dominican Republic (1865) art. 87.5.
[127] Const. of Dominican Republic (1866) art. 70.7.
[128] Const. of Dominican Republic (1872) art. 45.6.
[129] Const. of Dominican Republic (1880) art. 67.11.
[130] Const. of Dominican Republic (1881) art. 70.11.
[131] Const. of Dominican Republic (1887) art. 69.10.
[132] Const. of Dominican Republic (1884) art 134.8.
[133] Const. of Dominican Republic (1896) art. 69.10.
[134] Const. of Dominican Republic (1906) art. 66.10.
[135] Const. of Dominican Republic (1874) art. 71.7.
[136] Const. of Dominican Republic (1878) art. 22.8.
[137] Const. of Dominican Republic (1879) art. 22.8.
[138] Const. of Dominican Republic (2010) arts. 164-67.

1948-1974, 1979-), Honduras (1825-1965, 1982-), Ecuador (1830-1929, 1992-), Panama (1841-1863, 1904-) and Bolivia (1826-1861, 1878-).[139]

In Nicaragua, the monist judicial system was in effect in the Constitutions of the years 1884,[140] 1826, 1838, 1842, 1848, 1854, 1858, 1893 (until the advent of the Constitution of 1898), 1905, 1911, 1912, 1913 (until the advent of the Constitution of 1939), 1948, 1950 (until the advent of the Constitution of 1974), 1979, 1987, 1995 (Constitutional Amendment, providing for a specialisation in administrative litigation within the Supreme Court) [141] and 2014 (Constitutional Amendment, granting the Supreme Court jurisdiction over administrative litigation) [142].

The judicial system of monist jurisdiction was in force in the Constitutions of Honduras of 1825, 1831, 1839, 1848, 1865, 1873, 1880, 1894, 1904, 1924, 1936, 1957 and 1982, which were silent about administrative litigation; the only exception was the Constitution of 1965, which instituted a court that was autonomous vis-à-vis the Judiciary.[143]

In Ecuador, the Constitutions of 1830, 1835, 1843, 1851, 1852, 1861, 1869, 1878, 1884, 1897 and 1906 provided general rules about the Judiciary but without any mention of the state bodies responsible for administrative dispute resolution. Such silence was no doubt motivated by the desire of the constituent assembly to set up a judicial system of monist jurisdiction to resolve issues involving administrative authorities a system which remained in effect until the advent of the Constitution of 1929.

The Constitutional Amendment of 1992 established that administrative litigation is to be ruled on by a judicial body to be defined by law and that the Supreme Court will have the authority to deliver a final binding judgement in case of appeals from lower courts, as confirmed by the Constitution of 1998[144]: the monist judicial system was re-established in Ecuador in light of the Constitution. With the same orientation, the Constitution of 2008 stipulated that the acts of public powers could be challenged in

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[139] *See* José Mario Serrate Paz, *Análisis y Evaluación del Proyecto de Ley del Proceso Contencioso Administrativo en Bolivia [Analysis and Evaluation of the Draft Law of Administrative Proceedings in Bolivia]*, *in* Hernández-Mendible, *supra* note 105, at 1233 (2007).

[140] A constitution according to which it was legal to bring proceedings against the Executive (Constitution of Nicaragua (1884) art. 191).

[141] Const. of Nicaragua (1884), art. 163, Const. of Nicaragua (1987) art. 163 as amended by the constitutional amendment of 1995.

[142] Const. of Nicaragua (1884), art. 163, Const. of Nicaragua (1987) art. 163 as amended by the constitutional amendment of 2014.
See, generally, Republica De Nicaragua. Sala de lo Contencioso Administrativo. Antecedentes y Creación de la Sala de lo Contencioso Administrativo [Administrative Law Division of the Courts: History and Creation of Administrative Litigation] available at: < http://bit.ly/15XqPMX>.

[143] Const. of Honduras (1965), art. 210(c).

[144] Const. of Ecuador (1998), art. 196; art. 197.

administrative and judicial fora, and prohibited the Executive and Legislative Branches from exercising jurisdictional functions.[145]

In Panama, the judicial system of monist jurisdiction prevailed in the period from 1841 to 1863 (Constitutions of 1841[146], 1853 and 1855), from 1904 to 1941 (Constitution of 1904, until the advent of the Constitution of 1941); starting from the Constitutional Amendment of 1956,[147] jurisdiction over administrative litigation was indicated as one of the functions of the Supreme Court (Constitution of 1972[148] and the Amendments of 1983[149] and 2004[150].

In Bolivia, administrative jurisdiction was exercised by a unified judicial system throughout most of its constitutional history, during the effective periods of the Constitutions of 1826, 1831, 1834, 1839, 1843, 1851, 1868, 1878, 1880, 1938, 1945, 1947, 1967, 1994, 2004, 2008 and 2009. A system of non-judicial administrative jurisdiction was found only under the Constitutions of 1868 and 1871. In the Constitution of 2004, express reference is made to the judicial unity of the system and the function of resolving administrative litigation and disputes is assigned to the courts, judges and Supreme Court.[151]

7. *Monist Judicial Jurisdiction (Currently in Effect and with Specialised Bodies): Chile, Argentina, Venezuela, Paraguay, Mexico, Costa Rica, Peru, El Salvador, Cuba, Bolivia, Brazil, Panama, Nicaragua, Honduras and Ecuador*

In general, in the countries that maintained the monist judicial system (Chile, Argentina, Venezuela, Paraguay, Mexico, Costa Rica, Peru, El Salvador, Cuba, Bolivia, Brazil, Panama, Nicaragua, Honduras and Ecuador), it developed with a certain level of specialisation, both in the level of court (trial and appellate levels) and a special section within the Supreme Court. Such is the example of Chile, whose Constitution of 1925[152] called for the creation by law of administrative courts in the Judicial Branch, and whose Constitution of 1980[153] directed the courts created by law to evaluate individual claims against the administrative authorities, despite the fact that, in both cases, it was merely an attempt at constitutional norm, which never became a reality.[154]

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145 Const.of Ecuador (2008), art. 188.3; art. 173.

146 Const. of Panamá (1841), art. 109.5.

147 Legislative Act 2 of Oct. 25, 1956. *See* Hoyos, *supra* note 72.

148 Const. of Panamá (1972), art. 188.2.

149 Const. of Panamá (1972), art. 203.2 (with the Constitutional Amendment of 1983).

150 Const. of Panamá (1972), art. 206.2 (with the Constitutional Amendment of 2004).

151 Const of Bolivia (2004), arts. 116.3 & 118.4 & 7.

152 Const. of Chile, (1925), art. 87.

153 Const.of Chile 1925, art. 38.2.

154 *See* Alejandro Vergara Blanco, *Panorama General del Derecho Administrativo Chileno* [General Overview of Chilean Administrative Law], El derecho administrativo iberoamericano [Ibero-American Administrative Law] 2005, at 159-61.

We could also mention Argentina, with the administrative justice of the Province of Buenos Aires, which provides for special sections in courts of the first and second instances[155], and Brazil, currently with the Federal Justice System, with authority to rule on administrative cases of interest to the Federal Government, the state courts of first instance (courts of the State Treasury [*Fazenda Pública*] and Executable Tax Debt [*Dívida Ativa*]) and the specialised public-law divisions of the Supreme Court (*Superior Tribunal de Justiça*). [156]

Other examples include Venezuela, with the Constitutions of 1961 and 1999, granting administrative jurisdiction to the courts defined by law;[157] Nicaragua, in the periods of 1898 to 1905, with the federal courts,[158] from 1948 to 1979, with the courts and judges of the Republic,[159] and the Constitution of 1987, with the Amendments of 1995 and 2014 (Constitutional Amendment establishing a special section for administrative litigation in the Supreme Court),[160] and Costa Rica, with administrative courts, in accordance with the Constitution of 1949.[161]

H. Developmental and Comparative Framework of the Autonomous Administrative Jurisdiction Under the Latin American Constitutions

The evolutionary pattern in Latin America in the 19th and 20th Centuries may be displayed according to the basis of the four models of administrative jurisdiction identified.

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155 *See* Héctor A. Mairal, Control Judicial de la Administración Pública [Judicial Review of Public Administrative Authorities], vol.1, 1984, at 124-26.

156 Const. of Brazil (1988), art. 109 §I; *see also* Internal Regulations of the Superior Court of Justice, at § 1º; Internal Regulations of the Federal Regional Court of the 2d Region, at arts. 2º III, § 4º, & 13 III; Lei de Organização e Divisão Judiciárias [Judicial Division and Organization Act of the State of Rio de Janeiro], State Law 6.956/2015, at arts. 44 and 45 III.

157 Constitución de la República Bolivariana de Venezuela 1979, art. 206; *see also* Constitución de la República Bolivariana de Venezuela 1999, art. 259; Allan R. Brewer-Carrías, Instituciones Políticas y Constitucionales. [Political and Constitutional Institutions] vol.7, 12-14, 19 (1997).

158 Const. of Nicaragua (1898), art. 128; *see also* The Federal Courts of the Constitution of 1898 (which were to reappear later under the name of Courts of the Republic [from 1948 to 1979] do not consist in a specialised jurisdiction but rather in judicial bodies having jurisdiction of cases of federal interest, on the model of what always happened in Brazilian constitutional law from 1891).

159 Const. of Nicaragua (1948), art. 217; *see also* Const. of Nicaragua (1950), art. 233; Const. of Nicaragua (1974), art. 311.

160 Const. of Nicaragua (1987), art. 163; *see also* Const. of Nicaragua (2014), art. 163. (with the Constitutional Amendment of 1995).

161 Const. of Costa Rica (1949), art. 173.2; *see also* Enrique Rojas Franco, Comentarios al Código Procesal Contencioso Administrativo [Comments on the Code of Procedure of Administrative Litigation] 18 (2008).

EVOLUTION OF THE AUTONOMOUS ADMINISTRATIVE JURISDICTION IN THE LATIN-AMERICAN CONSTITUTIONS

1. JUDICIAL JURISDICTION

Monist/unified-jurisdiction (body or court in a non-specialised judicial structure, with a constitutional basis)

1811- : Chile
1811- : Argentina
1811- : Venezuela
1813- : Paraguay
1818- : Mexico*
1821-1886: Colombia
1821- : Costa Rica
1823- : Peru
1824- : El Salvador
1824-1927: Guatemala
1825-1965: Honduras
1826-1861: Bolivia
1830-1929: Ecuador
1830-1934: Uruguay
1841-1863: Panama
1854-1874: Dominican Republic
1868-1871: Bolivia
1869- : Cuba
1878- : Bolivia
1880-2010: Dominican Republic
1884-1939: Nicaragua
1891- : Brazil
1948-1974: Nicaragua
1956- : Panama
1979- : Nicaragua
1982- : Honduras
1992- : Ecuador

Dualist jurisdiction (body or court in a specialised judicial structure with a constitutional basis)

Single Supreme Court (body or court in a specialised structure and subject to a Supreme Court of another structure)

1939-1948: Nicaragua
1941-1945: Panama
1979-1992: Ecuador
1945- : Guatemala
1974-1979: Nicaragua
2010- : Dominican Republic

Administrative Supreme Court (body or court and a Supreme Court in a specialised structure)

1914- : Colombia

2. NON-JUDICIAL JURISDICTION

Autonomous (body or court in a non-judicial structure, with a constitutional basis and autonomous from the challenged authority)

1861-1868: Bolivia
1863-1904: Panama
1871-1878: Bolivia
1874-1880: Dominican Republic
1886-1914: Colombia
1927-1945: Guatemala
1929-1979: Ecuador
1934- : Uruguay
1937- : Mexico*
1945-1956: Panama

Non-autonomous (body or court in a non-judicial structure, with a constitutional basis, and non-autonomous vis-à-vis the challenged authority)

3. HYBRID JURISDICTION (NON-JUDICIAL AND JUDICIAL)

Autonomous (body or court in a non-judicial structure, with a constitutional basis and autonomous from the challenged authority and subject to a judicial body or court)

1965-1982: Honduras

Non-autonomous (body or court in a non-judicial structure, with a constitutional basis, non-autonomous vis-à-vis the challenged authority and subject to a judicial body or court)

III. Administrative Decisions Preceded by Due Process of Law

A. Signs of U.S. Due Process of Law in Latin America: The 5th (1791) and 14th (1868) Amendments of the U.S. Constitution

The predominance of the monist judicial system is not the only sign of U.S. influence to be found in the administrative justice systems of Latin-American countries; the expression *due process of law*, which was first provided for in the United States by the Bill of Rights (1791 Amendment to the U.S. Constitution), started to become incorporated in a number of different Latin-American constitutions and laws in the latter half of the 20th Century. Such is the case with Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guatemala, Mexico, Nicaragua, Peru, the Dominican Republic, Uruguay and Venezuela.

However, due process of law, which has been described in common law countries as procedural guarantees prior to administrative decisions that impose restrictions on individual rights,[162] has taken on a quite different form in Latin America.

The Fifth Amendment of 1791 to the U.S. Constitution reads as follows: [163]

> no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation. [164]

The Fourteenth Amendment of 1868 has a similar orientation in Section 1:

> [...] No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.[165]

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[162] *See,* Murray's Lessee v. Hoboken Land & Inprovement Co., 59 U.S. 272 (1856); Goldberg v. Kelly, 397 U.S. 254 (1970); *see also*, Administrative Procedure Act §2, 5 U.S.C §§ 551-559 (1946)

[163] U.S. Const. amend. VI, §3.

[164] Before the Constitution of 1787, local laws had already provided a similar rule: *Acts of Connecticut* (*Revision of 1784*, p. 198), *of Pennsylvania*, 1782 (2 *Laws of Penn*. 13); *of South Carolina*, 1788 (5 Stats. of S.C. 55); *New York*, 1788 (1 *Jones & Varick's Laws*, 34); *see also* 1 *Henning's Stats. of Virginia*, 319, 343; 12 id. 562; *Laws of Vermont* (1797, 1800), 340 (emphasis added).

[165] U.S. Const. amend. XIV, §2. (emphasis added)

B. Origin of Due Process of Law: Magna Carta of 1215, Liberty of Subject Act (28 Edward 3) of 1354, Observance of Due Process of Law Act (42 Edward 3) of 1368

These laws are rooted in Article 39 of the Magna Carta of 1215, whose main legacy has been the rule that a judgement must precede enforcement of penalties:

> No free man shall be seized or imprisoned, or stripped of *his rights or possessions*, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful *judgment* of his equals or by the law of the land (emphasis added)[166].[167]

The expression *due process of law* is found for the first time in the *Liberty of Subject Act (28 Edward 3)*, de 1354, which reads as follows, *verbatim*: "No man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law". [168] A few years later, in 1368, the term reappears in *Observance of Due Process of Law Act (42 Edward 3)*:

> At the request of the Commons by their petitions put forth in this Parliament, to eschew the mischiefs and damages done to divers of his Commons by false accusers, which often times have made their accusations more for revenge and singular benefit than for the profit of the King, or of his people, which accused persons, some have been taken and caused to come before the King's council by writ, and otherwise upon grievous pain against the law, it is assented and accorded, for the good governance of the Commons, that no man be put to answer without presentment before justices or matter of record or by *due process* and writ original, according to the old law of the land; and if any thing from henceforth be done to the contrary, it shall be void in the law, and holden for error.[169]

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[166] Translation available from the *The British Library Board*. Available at: <http://bit.ly/1zrb39q>. Original text in Latin: "*Nullus liber homo capiatur vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terrae*".

[167] John Lackland, Magna Carta: A Commentary on the Great Charter of King John With an Historical Introduction 377 (William Sharp McKechnie, 2d ed. 1914).

[168] Liberty of Subject Act (28 Edward 3). On this subject, *see* Frederic Jesup Stimson, The Law of the Federal and State Constitutions of the United States: With an Historical Study of Their Principles, a Chronological Table of English Social Legislation, and a Comparative Digest of the Constitutions of the Forty-Six States 32 (1908).

[169] Observance of Due Process of Law (1368).

C. *Right to a Fair Trial on the International Scene: Declaration of the Rights of Man and of the Citizen of 1789 (Déclaration des Droits de l'Homme et du Citoyen), Universal Declaration of Human Rights of 1948, European Human Rights Convention of 1950, International Covenant on Political and Civil Rights of 1966, African Charter on Human and Peoples' Rights of 1981, Charter of Fundamental Rights of the European Union of 2000, American Convention on Human Rights of 1969*

In fact, *due process of law,* from the procedural point of view, in the genuine sense of common law, has never had any exact equivalent in Continental European law or other international and regional legal systems. It is even confused with effective judicial protection or the *right to a fair trial*.[170]

The [French] Declaration of the Rights of Man and of the Citizen of *1789* had a tremendous impact on Continental European public law; although its origins may be associated with the declarations of the North American colonies,[171] the fact is that it did not enshrine due process of law prior to administrative decisions; rather, it merely declares in Article 7 that the Judge's actions are bound by the existing statutes ("No man may be accused, arrested or detained except in the cases determined by the Law, and following the procedure that it has prescribed"),[172] in contrast to Article 12 of the Massachusetts Constitution of 1780, which extends the prohibition to cases of *deprivation of property* without a previous fail trial.[173]

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[170] *See* Osvaldo Alfredo Gozaíni, *El Debido Proceso Constitucional: Reglas Para el Control de los Poderes Desde la Magistratura Constitucional [Constitutional Due Process: Rules for the Control of Powers From Constitutional Court Judges]* 7 Revista Mexicana de Derecho Constitucional (2002). *See also* Gonzalo Garcia Pino & Pablo Contreras Vasquez, *El Derecho a la Tutela Judicial y al Debido Proceso en la Jurisprudencia del Tribunal Constitucional Chileno [The Right to Judicial Protection and Due Process in the Case Law of the Chilean Constitutional Court]* 11(2) Estudios constitucionales [Constitutional studies] 229-82 (2013). *See also*, Luiz Guilherme Marinoni & Daniel Mitidiero, *Direitos Fundamentais Processuais [Fundamental Procedural Rights]* in Curso de Direito Constitucional [Course in Constitutional Law] 615 (Ingo Wolfgang Sarlet et al., 2012).

[171] Georg Jellinek, The Declaration of the Rights of Man and of Citizens: A Contribution to Modern Constitutional History 2-7, 13-21 (1901).

[172] "Nul ne peut être homme accusé, arrêté, ni détenu que dans les cas determinés par la loi et selon les formes qu'elle a prescrites. Ceux sollicitent qui, expediente, exécutent ou font exécuter des ordres arbitraires, doivent être punis; Mais tout citoyen appelé ou saisi en vertu de la loi doit obéir à l'instant; il se rend coupable par sa résistance."

[173] "No subject shall be held to answer for any crimes or no offence until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself; and every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or

Similarly to the French Declaration of 1789, in the [United Nations] Universal Declaration of Human Rights (1948), the previous fair trial as a prerequisite for enforcement of state actions restricting individual rights is limited to *criminal charges*. On other matters, the Declaration of 1948 refers to a fair defence for the *determination of rights and obligations* of individuals, which amounts to declaring the right to judicial protection for conflict-resolution.[174]

And that is the predominant perspective in subsequent international conventions on what, in *common law,* was originally considered *procedural due process of law*. If, according to the letter of the U.S. Constitution, it was considered necessary for the jurisdiction (fair trial) to precede state decisions restricting any kind of individual rights (criminal charges, restriction on property rights, etc.), under the international norms, with a discreet but meaningful change in wording, only criminal charges require a previous fair trial.[175]

The fact that the international norms generally refer to "determination" (recognition) of rights, for the purposes of being submitted to an autonomous and impartial tribunal, does not necessarily require a trial that must be prior to the administrative decisions restricting individual rights.

The European Convention on Human Rights (1950) contains the following passage:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an autonomous and impartial tribunal established by law."[176]

The International Covenant on Civil and Political Rights (1966) provides as follows:

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privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."

[174] Universal Declaration of Human Rights, Art. 10 (1948). (*Everyone is entitled in full equality to a fair and public hearing by an autonomous and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him*).

[175] The principle *audi et alteram partem* is considered to be a *common law* principle of fundamental natural justice in criminal law which was subsequently extended to disciplinary administrative sanctions in Continental Europe, which became known with the Téry Decisions (*Conseil d'État*, 20.6.1913, S. Téry. Available at: <http://bit.ly/1Kw6kWd>), and with the Higher Administrative Court of Saxony (*SächsOVG, Decision of 24 Oct. 1908, Jahrbuch, vol. 13 p. 97*). See Aldo Sandulli, et al. *Il Procedimento* in Corso di Diritto Amministrativo. [Administrative Law Course] vol 4. Diritto Amministrativo Comparator [Comparative Adminstrative Law] 111, 113, 132 (Sabino Cassese ed., 2007).

[176] European Convention on Human rights of 1950. Art. 6.1. (1950).

> In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, autonomous and impartial tribunal established by law.[177]

The African Charter of Human and Peoples' Rights (1981) maintains that "Every individual shall have the right to have his cause heard".

The Charter of Fundamental Rights of the European Union (2000) provides that "everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal", and that:

> everyone is entitled to a fair and public hearing within a reasonable time by a fair and autonomous and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.[178]

Finally, in the American Convention on Human Rights (1969), Article 8 on the Right to a Fair Trial provides as follows:

> Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, autonomous, and impartial tribunal, previously established by law, in the substantiation of any *accusation of a criminal nature* made against him *or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature*[179].

In fact, Article 8.1 of the American Convention follows the international trend and departs from the concept originating in common law to the effect *due process of law* is a set of prior procedural guarantees that must necessarily be prior to any public action restricting individual rights and thus limiting itself to criminal charges.

D. Administrative Due Process of Law in Latin-American Constitutions and Laws

In recent years, various Latin-American constitutional norms have started to make general references to due process of law, which usually conceive of it as inherent not just in judicial actions but also in administrative actions, apparently in keeping with the spirit of the US Constitutional Amendments of 1791 and 1868.

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[177] Art. 14.

[178] EU Charter of Fundamental Rts., art. 47.

[179] Am. Convention on Hum. Rts., art. 8.1.

Article 29 of the Colombian Constitution 1991 establishes that "*due process is applicable to every class of judicial and administrative action";* According to Article 5 of the Brazilian Constitution of 1988, "no one shall be deprived of freedom or of his assets without due process of law" (subsection LIV), and "litigants in judicial or *administrative proceedings* and the accused in general shall be assured adversary proceedings and a full defence, with the associated means and resources" (subsection LV).

According to Article 49 of the Venezuelan Constitution of 1999, "*due process is applicable to all judicial and administrative acts* […]"; in the Dominican Republic, Article 69 of the Constitution of 2010 refers to "effective judicial protection and due process […]" and subsection 10 stipulates that "the rules of due process shall apply *to every type of judicial and administrative acts*".

Article 34 of the Nicaraguan Constitution of 1995 specifies that:

> everyone is a proceeding has the right, under equal conditions, to *due process* and effective judicial protection and, as part of these, the following minimum guarantees … The minimum guarantees established in due process and effective *judicial protection in this trial are applicable to the administrative* and judicial proceedings. (emphasis added)

In Ecuador, Article 23.27 of the Constitution of 1998 provides that "the minimum guarantees established in *due process* and in effective judicial protection in this article *applicable to administrative* and judicial proceedings"; in the Constitution of 2008, Article 169 reads as follows:

> The procedural system is a means of achieving justice. The procedural rules shall establish the principles of simplified, uniform, effective, immediate, speedy and economic trials, and shall apply the guarantees *of due process*. Justice shall not be sacrificed for the mere omission of formalities.

Article 76 of the Constitution of 2008, in turn, establishes that:

> In every proceeding that determines any type of rights and obligations, *the right of due process shall be ensured*, which shall include the following basic guarantees: 1. It is the responsibility of every *administrative or* judicial authority to ensure compliance with the applicable laws and the rights of the parties. (emphasis added)

In the following section, we shall discuss countries that generally provide for due process of law. Mexico, in Article 18 of the Constitution of 1917, requires that "the guarantee of *due process* be observed in all procedures applied to adolescents"; in Bolivia, with the Constitution of 2008, Article 115 II, stipulates that "the State guarantees the right to *due process*, and a universal, speedy, timely, free, and transparent system of justice and defence, without delays"; or Chile, with Article 19 of the Constitution of 1980, provides that:

> every judgement by a body that exercises jurisdiction must be based on a duly processed *prior proceeding*. Legislators are therefore always responsible for establishing guarantees of a rational and fair procedures and investigation.

Article 139 of the Peruvian Constitution of 1993 refers to "observance of *due process* and jurisdictional protection […]"; and, finally, in Guatemala, Article 53 of the Constitution of 1965 includes a general provision according no one may be deprived of property without *due process of law;* and, Article 12 of the current Constitution of 1985 refers to due process of law as follows:

> right to defence: the defence of the individual and of his rights is inviolable. No one maybe convicted or deprived of his rights without having been summoned, heard or convicted in a *legal proceeding* before a predetermined competent tribunal or judge. (emphasis added)

Regarding legislation, Argentina is worth mentioning, with its Law 19.549/72 (*Ley de procedimientos administrativos*), which provides, in Article 1 (f) that individuals involved in administrative procedures have the right to procedural due process; in Uruguay, with its Article 5 of the *Ley de procedimientos administrativos*, according to which individuals involved in administrative procedures enjoy the rights and guarantees inherent in due process.

E. Case Law of the European and Inter-American Courts of Human Rights: Independence and Impartiality in Non-Judicial Administrative Proceedings, and Due Process of Law Prior to Administrative Decisions

In fact, there are many points in common between *procedural due process of law*, in the form in which it evolved in the United States, and the *right to a fair trial* of the European Convention of Human Rights, especially the fact that both of them are applicable to administrative cases, as originally provided for by U.S. constitutional law.

In that respect, despite the controversy surrounding the expression *civil rights and obligations* in Article 6.1 of the Human Rights Convention in relation to administrative law conflicts, the European has interpreted this clause to be binding not only on the courts:

> the Court is not prevented from qualifying a particular domestic body, outside the domestic judiciary, as a "court" for the purpose of the Vilho Eskelinen test. An administrative or parliamentary body may be viewed as a "court" in the substantive sense of the term, thereby rendering Article 6 applicable to civil servants' disputes. The conclusion as to the

> applicability of Article 6 is, however, without prejudice to the question of how procedural guarantees were complied with in such proceedings.[180]

The Inter-American Court of Human Rights follows the same orientation as the European Court: it interprets the expression *"Garantías Judiciales"* or Judicial *guarantees* (translated as "Right to a Fair Trial" in the official English version) contained in the title of Article 8 of the Inter-American Convention does not prevent other state bodies unrelated to the Judiciary from trying the merits of the case and from [being required to] observe the guarantees of due process of law.[181]

When examining a decision of the Uruguayan Administrative Court, the Inter-American Court point out that:

> it was *very specific and precise* in establishing that certain components of the guarantees necessary for ensuring due process are also applicable to in the *non*-judicial sphere in a context in which issues related to personal rights may be under discussion. Thus, the Court has understood in its previous case law that the characteristics of impartiality and independence […] should be mandatory for any body in charge of ruling on the rights and obligations of individuals. With that in mind, […] they should not only correspond to strictly jurisdictional bodies but the provisions of Article 8.1 of the Convention are also applicable to administrative decisions.[182])

There is one characteristic of due process of law, however, conceived in 1792, that is irreconcilable with the right to a fair trial [*processo efetivo]*, as interpreted by the European Court, that is of great importance for understanding the current stage of administrative justice in the Latin America: the prior nature of *procedural due process of law*. It does not form part of the legal tradition of Continental Europe or of Latin-American administrative law: the existence of a proceeding (trial) that is conducted under the responsibility of an autonomous or *quasi-judicial* administrative authority and generally precedes the enforcement of the relevant administrative decision.[183]

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[180] Volkov v. Ukraine, 2010 Eur. Ct. H.R. 1. Along the same lines (as a paradigm). Eskelinen v. Finland. 2007 Eur. Ct. H.R. 1, *See* Rene Chapus, Droit Du Contentieux Administrative [Law Of Administrative Disputes] 136-38 (12th ed. 2006). *See also* Sergio Bartole Et Al., Commentario Breve Alla Convenzione Europea per la Salvaguardia dei Diritti Dell´Umo e Delle Libertà Fondamentali. [Short Commentary on the European Convention for the Protection of Human Rights and Fundamental Freedoms] 176 (2012); Barreto, *supra* note 30.

[181] Constitutional Court v. Peru*,* Judgment of 31 Jan. 2001. 01. Series C No. 142.

[182] Vélez Loor v. Panama, Preliminary Defences, Merits, Damages and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 108 (Nov. 23, 2010) (emphasis added).

[183] *See* Asimow, *supra* note 9.

A debate is therefore necessary, at the current state of Continental-European law, in order to discuss whether due process of law should be considered an integral part of administrative actions restricting individual rights (initial administrative decisions) or should only be considered to form part of the decisions (judicial or non-judicial decisions) that settle conflicts concerning administrative actions that have already restricted an individual's rights or are in the process of doing.

According to the European Court case law, if the national laws provide means of appealing an administrative decision, they should be subject to the rules of Article 6.1 of the Convention; thus, if such means are absent, the Convention is applied only in the appellate phase, which demonstrates that a prior proceeding is not a *sine qua non* for administrative decisions to arise; moreover, if the appeal is made before the Judiciary, the independence of the decision-making administrative authority even becomes dispensable.

In this context, the right to a fair trial implies a means of appeal rather than a constituent element of the administrative decision. The practical difference is substantial: while under the system of a right to a fair trial, the challenged administrative decision only ceased to be effective ab initio in the case of *periculum in mora* and *fumus boni iuris* (for which the claimant bears the burden of proof), in an interim relief measure, under the system of due process of law, the administrative decision does not enter into effect until after the completion of the preliminary proceeding, and inversely, the exception to that rule depends on *periculum in mora* and *fumus boni iuris*, both of which must be proven by the the administrative authority[184].

F. Distinction Between the Judicial Administrative Proceeding (Processo Administrativo Judicial), Non-Judicial Administrative Proceeding (Processo Administrativo não Judicial) and Administrative Procedure (Procedimento Administrativo)

The Latin-American doctrine according to which prior administrative due process (*debido procedimiento administrativo*) is a sine qua non for the elaboration of administrative decisions restricting individual rights is merely rhetorical.[185] That is so because such measures are most never correspond

[184] See *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908).

[185] Regarding the consensus in the Latino-American doctrine on the application of due process. *See* Augustin Gordillo, Tratado de Derecho Administrative [Treatise on Administrative Law] vol. 2, 284 (2004); Allan R. Brewer-Carias, Principios del Procedimiento Administrativo en América Latina [Principles of Administrative Law in Latin America] 262 (2003); Ernesto Jinesta, Debido Proceso en la Sede Administrativa: Derecho Administrativo en el Siglo XXI, [Due Process in the Administrative Sphere] vol. 1, 581-611 (2013); Alan E., Vargas Lima, *Desarrollo Jurisprudencial de la Ley de Procedimiento Administrativo en Bolivi*a *[Jurisprudential Development of the Law of Administrative Procedure in Boliva]* La Razón, (May 13, 2014, 12:00 A.M.), http://bit.ly/150BMf7. The Model Code of Administrative Proceedings – Judi-

to reality, from the use of the expression *administrative procedimiento* (procedure) on to the claim of impartiality without independence from the authorities[186].

Even in the late 19th Century, the administrative jurisdiction was still confused with the administrative authorities' *power of autotutela* [power to correct its own illegal mistakes], that is to say that administrative disputes were tried by the administrative authorities themselves.[187] Thus, the expression *administrative proceeding (processo)* could not be used outside the scope of the Executive; and in some cases not even in the Executive, when it was not capable of establishing autonomous bodies to resolve disputes.

The proceeding is inherent in the jurisdiction, and neither of them can dispense with autonomous management in relation to the parties to the dispute.[188] The judges' concern for maintaining independence from the monarchy dates back to Article 39 of the Magna Carta de 1215; it is inconceivable for a judge to try his own case.

Independence was not only the spark that gave rise to administrative justice in the 19th Century and to the development of specific administrative law, but even today it is considered to be an element inseparable from the jurisdictional function. Independence is expressly incorporated into a number of different national and international norms, such as the European Convention of Human Rights (Article 6.1) and the American Convention on Human Rights (Article 8.1).

It is therefore possible to argue that in the period in which it was inconceivable for administrative jurisdiction to be autonomous from the public administrative authorities, the expression *processo administrativo* (administrative proceeding) was inapplicable. The expression of will of the administrative authorities involving the citizen could be called a *procedimento administrativo* (administrative procedure), although that term would be more appropriate for administrative actions that were *interna corporis* or that could not place the rights or interests of individuals at risk.

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cial and Non-judicial – for Ibero-America lays down principles governing due process of law for judicial proceedings [art. 37] and implicitly for non-judicial proceedings [arts. 6 and 7]; an administrative proceeding is considered to be any proceeding, subject to guarantees of an adversarial hearing and a full defence, that is intended to prepare administrative decisions that may affect the interests or rights of private citizens, as well as any procedure in which a public- or private-law dispute arises between an administrative authority and a citizen, or a dispute between individuals or legal entities that may be resolved by an administrative authority [art. 3]. Grinover et al., *supr*a note 62.

186 *See* S. Ferraz & A. Dallari, *Processo Administrativo [Administrative Proceedings]* 138 (2d ed. 2007) (Regarding the lack of independence and resulting lack of impartiality of the authorities in the punitive proceeding).

187 *See* parts I. B & C.(especially note 45 *supra*).

188 *See* Oskar von Bülow, Die Lehre von den Processeinreden und den Processvoraussetzungen [The Doctrine of Procedural Defences and Prerequisites for Trial] 1-12 (Emil Roth Giesen ed., 1868).

By gaining independence vis-à-vis the administrative authorities, the administrative jurisdiction tended to move away from the Executive, and so did the corresponding (administrative) proceeding. In the case of an administrative jurisdiction before the Judiciary, the *processo administrativo* (administrative proceeding) should be qualified by the term *judicial*: processo administrativo judicial (judicial administrative proceeding).

However, the jurisdiction is not always before the Judiciary, as, for example, in the system of non-judicial administrative jurisdiction (*justice déléguée*), which currently exists in Uruguay and Mexico. According to Monroy, "the dilemma of jurisdiction is not who exercises or personifies it but what it fundamentally means".[189] In fact, in order for a jurisdiction to become autonomous, it need only detach itself from the authority involved in the conflict, and not necessarily from the Executive by means of an administrative agency and its administrative judges as in the United States, where procedural due process of law is sought within the Executive.[190]

At any rate, in this case, the expression *processo administrativo* [administrative proceeding] would be correct in relation to a non-judicial administrative jurisdiction and, to differentiate it from a *processo* directed by the judicial authorities (which would also be a fair trial), it is called a non-judicial administrative proceeding (*processo administrativo não judicial*).

However, not infrequently in certain Latin-America legal systems the *processo administrativo* is associated with situations in which there is no autonomous jurisdiction or, more precisely, where there are no guarantees of due process of law (a *fair trial*); and vice-versa: *procedimento administrativo* [administrative procedure] is used to refer to situations in which there is an autonomous jurisdiction.[191]

In the Brazilian legislation,[192] the expression *processo administrativo* is used to characterise *procedimentos* insofar as the *processo* in Brazil, in practice, are conducted by organisations or administrative authorities

[189] Juan F. Monroy Gálvez, *Teoría General del Proceso* [General Theory of the Trial]; 419 (2009).

[190] This model of "adversarial hearing/combined function/limited judicial review," in which the decision-making administrative authorities belong to the Executive Branch does not have any equivalent in Latin America; Honduras recognised a system of hybrid jurisdiction from 1965 to 1982 but the administrative tribunal was autonomous vis-à-vis both the Judiciary and the Executive. Asimow, *supra* note 9, at 3-32.

[191] According to Manuel María Diez, "algunos autores usan los términos proceso y procedimiento como sinónimos. Esta posición es insostenible, ya que no se pueden identificar ambas instituciones ignorando el problema que presentan" ["certain authors use the terms "proceso" and "procedimiento" as synonyms. That position is untenable since the two insitutions cannot be confused without being aware of the resulting problems]. Pedro Aberastury & Maria Rosa Cilurzo, Curso de Procedimiento Administrative, 17 (1998).

[192] Lei no. 9.784, de 29 de Janeiro de 1999 (Law on federal administrative proceedings).

which lack prerrogatives to act with effective independence;[193] the Latin-American Constitutions and laws that provide for *due process of law* do so by inserting it within a declared administrative *procedimento*.

In Continental Europe, the expression *processo administrativo* (administrative proceeding) is used to refer to the courts or to a proceeding in progress before an autonomous or non-judicial authority: a *procedimento administrativo* is a procedure that is carried out with a body that lacks autonomous jurisdiction.

G. Administrative Due Process Prior to Decisions by Administrative Authorities in Latin America

Administrative law in Latin America is more heavily influenced by the European tradition than by the spirit of the laws of due process. In Latin America, the system of undivided jurisdiction prevails and its courts commonly make up for the absence of prior due process of law by means of broad judicial review in which those same guarantees are provided.[194]In practice, however, the logic of due process of law becomes ineffectual in the administrative sphere.

In addition, the reality of the Latin-American administrative authorities is not compatible with a system of autonomous or quasi-autonomous authorities. The few examples are in the area of access to official information, supported by the *Model Inter-American Law on Access to Public Information,*[195] as in Mexico, with the Federal Institution of Information Access and Data Protection [196] in Chile, with the Transparency

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[193] Regarding certain obstacles in Brazil to creating truly autonomous agencies. *See* Vera Scarpinella Bueno, *Devido Processo Legal e a Administração Pública no Direito Administrativo Norte-Americano: Uma Breve Comparação com o Caso Brasileiro [Due Process of Law and Public Administrative Authorities in U.S. Administrative Law*: *A Concise Comparison with the Case of Brazil*] in Devido Processo Legal na Administração Pública [Due Process of Law in Public Administrative Authorities] 75 (Lucia Valle Figueirido ed., 2001).

[194] See TRF2, AC 2003.51.03.002508-3, Fed. App. Reporting Judge Aluisio Mendes: [...] despite the fact that the judgement and now the decision appealed against acknowledged an irregularity in the administrative act which split [the deceased's] pension to the benefit of the life companion, namely the failure to notify the widow, that irregularity was found to be completely irrelevant when submitted to the scrutiny of the Judiciary, so that there is no obstacle to upholding the above-mentioned act." (Available at: <http://bit.ly/1q7mSOy>).

[195] Organization Of American States (OAS). Plenary Session 4, AG/RES. 2607 (XL-0/10) *Model Inter-American law on access to Public Information.* Washington, June 8, 2010.

[196] Art. 33 of the Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental [Federal Law on Transparency and Access to Public Governmental Information] of 2002. Currently, the Instituto and the Organismos Garantes, contained in arts.

Council;[197] in Honduras, with the Institution of Commissioners *[Instituto de Comissários]*;[198] and in El Salvador, with the Public Information Access Institution *[Instituto de Acesso à Informação Pública]*.[199]

The classic border between administrative functions and jurisdictional functions, according to Monroy,

> is provided by the primary and secondary effect that they produce, respectively, in the area of social relations. The administrative activity is primary insofar as it is designed to be performed immediately and directly vis-à-vis citizens; on the other hand, jurisdictional activity is secondary: i.e., it is only present when laws that are intended to be complied with spontaneously, including administrative laws and the actions of the authorities are rejected by citizens and a mechanism is necessary to ensure their effectiveness or compliance in a voluntary or forced manner.[200]

This explains the reluctance to admit the *primary jurisdiction*, i.e., a jurisdiction prior to the administrative decision and, especially, as an integral part of it.

This situation is not changed by the case law of the Inter-American Court of Human Rights which, following the example of the European Court, requires a fair trial (effective proceeding) by an *autonomous tribunal* for administrative cases within the public administrative authorities.[201] This is so because the jurisdiction to which it refers in its precedents, despite its non-judicial nature, does not necessarily include the contents of the initial administrative decision and is mainly used for any conflicts resulting from such decisions; in other words, the case law of the European and Inter-American Courts relates to non-judicial bodies, such as the French Council of State or Uruguayan Administrative Court – which is not equivalent to a public administrative authority with primary – merely executive or jurisdictional -- functions.[202]

8, III e IV, 30, 37-42 of the Mexican Law of May, 4 2015 (Ley General de Transparencia y Acceso a la Información Pública).

197 Art. 31 of the Law No. 20.285/2008 (Ley sobre el Acceso a la Información Pública [Law on access to public information]).

198 Art. 8 of the Legislative Decree No. 170/2006 (Decreto No. 170/2006, Ley de Transparencia y Acceso a la Información Publica [Law on Transparency and Access to Public Information]).

199 Arts. 51 to 60 Decree nº 534/2011 (Ley de Acceso a la Información Publica [Law on Access to Public Information]),

200 Gálvez, *supra* note 189, at 418.

201 See the precedents in note 180 *supra*.

202 The European Court held that Councils of State situated outside the Judiciary and exercising functions of administrative jurisdiction are compatible with the Convention provided that the advisory functions are not concentrated in the judges to the dispute (Judgement in Procola v. Luxembourg delivered by the Court on 28 September 1995;

In reality, regarding the procedure prior to restrictive administrative decisions, the Inter-American Court decided that:

> the guarantees contemplated in Article 8.1 of the Convention are also applicable to cases in which a certain public authority adopts decisions that rule on such rights[203,] taking into account that although *it cannot be required to provide the guarantees characteristic of a jurisdictional body* it must nonetheless provide the guarantees designed to ensure that the decision will not be arbitrary[204].)

The scholarly writings of Hispanic Latin America have preferred the expression *debido procedimiento legal* to differentiate it from due process of law, which is inherent only in a judicial proceeding (trial) conducted before an autonomous body. However, besides the risk of confusion with *procedural due process of law* (the counterpart of *substantive due process of law*), it fails to answer the essence of the question: Is an (autonomous) jurisdiction inherent in an initial administrative decision or not?

There can be no doubt that autonomous jurisdiction is not an exclusive function of the Judiciary; it can be exercised by the Executive. It would be mere speculation to project the present debate into a past period when the Judiciary supposed to devote itself exclusively to questions of private law and the Executive to public law (ruling on disputes, as well) – at the time, an *autonomous* administrative decision-making body was inconceivable.

It is therefore time to confront the central topic of this article: the prior nature that is required for observance of due process of law in the acts of the public administrative authorities, as expressed in U.S. administrative and constitutional law,[205] and in the Latin-American laws and constitutions, even though no corresponding concept is to be found in the Inter-American Convention of Human Rights and in the European Convention of Human Rights.

Is due process of law, through jurisdiction, a prerequisite for the formation of an administrative decision restricting individual rights under Latin-American law?

Judgement in Kleyn et al v. the Netherlands, delivered by the Court on 6 May 2003, *available at* http://bit.ly/1DVyklu). *See* Bartole, *supra* note 180, at 176.

[203] See Case of the Constitutional Court v. Peru, Judgement of 31 January 2001. 01. Series C No. 71, para. 71, *available at* http://bit.ly/1UwcKLE; Case of Yatama v. Nicaragua, ¶149, *available at* http://bit.ly/1iW2yHU; and the Case of Claude Reyes and others v. Chile, ¶119, *available at* http://bit.ly/1LSjyMB.

[204] See the Case of Claude Reyes and others v. Chile, ¶119, (emphasis added).

[205] See Richard J. Pierce, et al., Administrative Law And Process 231 (4th ed. 2004). Regarding the essentially jurisdictional nature of the preparatory administrative proceedings for administrative decisions in the United States, see Odete Medauar, A Processualidade no Direito Administrativo [The Nature of Proceedings in Administrative Law] 83 (2d ed., 2008).

In reality, according to the letter of most of the laws in force in Latin America, what is required is for the administrative decision to originate from a fair proceeding, in order words, observance of the prior guarantees of due process of law is a condition precedent for the enforcement of administrative decisions. That is the *mens legis*.

In this context, if the State requires but does not provide for prior jurisdiction by means of a non-judicial administrative proceeding offering the guarantees of a *fair trial*, the logical corollary will be for judicial proceeding to perform that function and to serve as a protective instrument prior to the enforcement of an administrative decision restricting an individual's rights; this, in turn, would to undesirable results, as shown in the introduction to this paper: exacerbated judicial review, made even worse by a monist judicial system with non-specialised judges (although there are occasionally specialised bodies in the monist system, the judges have not been organised in a specialised career path).

It is insufficient to argue that compliance with the *due process of law* clause could be ensured even without a prior non-judicial administrative proceeding if a rejected claimant party could have recourse to a judicial means of *challenging the decision*, unless that *judicial means of challenge automatically (unconditionally) suspended the enforceability of the disputed administrative decision and also involved a trial with full powers of review*; that is the only way that would make it equivalent to a judicial (or essentially jurisdictional) proceeding prior to an administrative decision restricting the rights of an individual.[206]

From a different perspective, regarding administrative decisions made at the request of an individual, the question has now been examined whether the petitioner should have the option of [first] exhausting the recourses in the non-judicial administrative channels or else initiate judicial proceedings immediately.[207] In effect, that option does not correspond to suitable organisation of the state: if the non-judicial administrative appeal is non-transferrable, it should be rejected. There are only two possibilities: either the non-judicial administrative appeal is indispensable as a prerequisite for access to a judicial proceeding or it has no function at all and should be discarded (as a prerequisite for access to a judicial action).

On the other hand, from a more rigid perspective, to affirm that the prior administrative appeal as a prerequisite for legal action is necessary on the grounds that the authorities that the authorities have the exclusive right to reverse their decisions[208] amounts to confusing the 19th-Century concept

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[206] Regarding the automatic suspensory effect on the implementation of an administrative decision created by filing a judicial appeal, see Ricardo Perlingeiro & Karl Peter Sommermann, Euro-American Model Code of Administrative Jurisdiction: English, French, German, Italian, Portuguese and Spanish Versions (2014).

[207] See *id.* Article 32.

[208] See Ricardo Perlingeiro et al., *Principes Fondamentaux et Règles Génerales de la Juridiction Administrative* [*Fundamental Principles and General Rules of Administrative Jurisdiction*], 163 Revista de Processo, at 262 (2008).

of the power of *autotutela* [the authority's power to correct its own illegal actions] with the contemporary concept of administrative dispute resolution. The indispensability of the prior proceeding (non-judicial administrative appeal) should be proportional to its effectiveness and, consequently, to the limits of review in any posterior judicial review.[209]

Thus, there are two possibilities: either the proceeding is started at the initiative of petitioner appealing against a decision denying his petition that was issued at the end of a fair proceeding conducted by autonomous authorities, or else such a proceeding becomes merely decorative and should be discarded. However, as in the previous situation (proceeding initiated ex officio), if a non-judicial administrative appeal results in another decision against the petitioner in the appellate phase, then we should rethink the scope– intensity – of appropriate judicial supervision to avoid the risk of creating overlapping jurisdictions.

It would lead to an undesirable duplication of jurisdictions to a adopt a fair and impartial hearing (procedural due process) prior to the [enforcement of the] administrative decision, while at the same time maintaining a judicial system of administrative jurisdiction (monist or dualist) or a non-judicial jurisdiction with broad powers of review (exhaustive review), in both cases, *a posteriori* to the administrative decision.[210] The alternative seems to tend toward the U.S. model of *judicial review*: a hybrid system of administrative jurisdiction.

IV. Closing Considerations

The historical evolution of the administrative jurisdiction in Europe from the 19th Century shows that independence is a vital prerequisite for its existence; the location of that jurisdiction within the structure of the state is of merely secondary importance: whether on the level of the Judiciary, the Executive, or divided between the two, or in entities that are autonomous from both the Judiciary and the Executive.

Administrative jurisdiction is currently conceived of as inherent in a fair trial and must not be confused with the primary actions of public

[209] On the scope of judicial administrative jurisdiction as proportional to the effectiveness of the prior administrative decisions, see, in general, Perlingeiro, *supra* note 3, at 293-331 (2015); Asimow, *supra* note 9, at 3-32.

[210] Asimow, *supra* note 9. Mairal, *supra* note 155, at 714; Julio V. González García, El Alcance del Control Judicial de las Administraciones Públicas en los Estados Unidos de América [The Scope of Judicial Revew of Public Administrative Agenices in the United States of America] 37 (1996).

administrative authorities, understood to be purely executive, sometimes resulting from *procedimentos administrativos* [administrative procedures].

Based on such premises, the combination of the organisation of the administrative jurisdiction within the state (non-judicial, judicial or hybrid; monist or dualist) and the nature of the means of elaboration of administrative decisions that restrict the rights and interests of individuals (whether based on proceedings or procedures) lays the groundwork for the formation of a model of administrative justice.

The scope and intensity of the administrative jurisdiction are proportional to the level of specialisation of the state bodies by which it is exercised; the greater the scope and intensity of the jurisdiction prior to the formation of the administrative decision (prior review), the less important the bodies devoted to *a posteriori* jurisdiction (subsequent review) will be; and vice-versa: both the duplication and the absence of jurisdiction are undesirable.

It is therefore necessary to analyse the optimal point in time for the administrative jurisdiction: review before or review after the formation of the administrative decision?

In the current legal system of Latin-American countries, the fair trial is advocated as inherent in the formation of administrative decisions, and *due process of law* is expressly adopted; besides that, since the 19th Century, the judicial system of monist jurisdiction has predominated in Latin-American.

On the model of the *common law* countries, it would be natural to imagine in Latin America a reinforced non-judicial administrative jurisdiction prior to administrative decisions (*primary jurisdiction)* side by side with a non-specialised judicial jurisdiction that is prone to show deference to administrative decisions.

In practice, however, the opposite situation occurs: there are no administrative proceedings and no jurisdiction that is really prior to the administrative decision; and the Judiciary, which lacks an autonomous administrative jurisdictional structure, occasionally endeavours to form special administrative sections.

The US influence on the Latin-American model of administrative justice seems to be outweighed by the Continental-European Tradition.

In this context, where the current legislation is divorced from reality, we are trying to determine where the Latin-American administrative jurisdiction is heading. How can we interpret the evolutionary historical framework of its administrative justice over the 200 years of its existence and put it in perspective?

Even after the influence of the U.S. Constitution with respect to the unified judicial system, in the early 19th Century, and of administrative and procedural due process of law in the late 20th Century, Ibero-America, naturally oriented by civil law, remains tied to the culture of Continental-European administrative law.

The transformations undergone by administrative law in European countries have not been followed in Latin America, however, resulting in a lacuna in its administrative justice system that can still be felt today.

In the Europe of the first half of the 19th Century, discussions were raised about an administrative jurisdiction separated from the public administrative authorities, even in the hands of a specialised Judiciary; in contrast, in Latin America, the constitutions of the period did not even tackle the subject but contented themselves with creating a Judicial Branch to try "administrative disputes" (*contentieux administratif)* commensurate with the cases that were tried in 18th-Century Europe, that is to say, in practice, restricted to what would now be considered private-law conflicts involving the administrative authorities, since, in that century, the range of governmental actions (*acte du gouvernement)* immune to jurisdiction was defined too broadly.

The evolution of administrative jurisdiction in Europe gradually became noticed in Latin America in various ways; it was not until the end of the 19th Century that timid experiments were begun with a system of specialised jurisdiction which, in certain countries, was tied to the Judiciary and, in others, separated from both the Judiciary and the Executive. This system is currently found in only five different Latin American countries: Guatemala, the Dominican Republic, Colombia, Uruguay and Mexico.

The absolute majority of the Latin-American countries have adopted the unified judicial system, which, however, since it is inherent in *common law*, was not easily assimilated by them and made little progress towards the innovations displayed by US administrative law from the late 19th Century: with administrative authorities capable of conducting a fair trial as a prerequisite for the elaboration of administrative decisions, which tended to be challenged by the Judiciary only when they were [obviously] illegal and unreasonable.

In that respect, the Judiciary's lack of specialisation and constant deference to the administrative authorities in the United States were made up for by the increasing effectiveness of *due process of law* in non-judicial sphere prior to the formation of administrative decisions *(primary jurisdiction)*.

It wasn't until the late 20th Century, when democracy was restored to much of Latin America, that the Judiciary started exercising more intense supervision of administrative actions (including the use of discretionary powers) and began to create certain adjudicating bodies specialising the field of administrative law.

The excessive load on the courts, however, is the most obvious sign that the system has failed.

The occasional specialised bodies – typical of the monist judicial system – are incapable of avoiding the trend of their judges to show favouritism towards administrative actions or (in the exceptional cases in which they act more boldly) of eliminating the mistrust of the jurisdiction aroused by the administrative authorities, who claim that the courts are abusing their authority and that the judicial decisions are of doubtful quality.

Moreover, in Latin America, civil servants in positions of authority do not always have legal expertise and, in most cases, their duties include both investigation and decision-making in the context of administrative procedures that result in decisions restricting the rights of individuals.

Now that it has become firmly established that administrative decisions are subject not only to the applicable statutes but also to the supremacy of constitutional law and international human rights conventions -- a concept which has become ingrained in Latin-American and Continental European legal doctrines and encouraged by the case law by the European and Inter-American Courts of Human Rights - public administrative authorities are required to have a high level of legal expertise, along with a certain degree of independence in decision-making.

It is also extremely important to understand that the effects of administrative decisions on the interests of private citizens, guided by respect for their fundamental rights, must be the result of fair hearing, in which the decision-making authorities must not be confused with the executive authorities.

In this context, it is inevitable to conceive of an administrative jurisdiction that is implemented in two distinct phases, before and after the elaboration of the administrative decision, in order to satisfy both the need for all public institutions to respect the Rule of Law and the guarantee of effective judicial protection, although not necessarily in the hands of the Judiciary.

Without many alternatives, this is currently the road that should be followed by the administrative jurisdiction in Latin America.

The panorama of Latin-American constitutional and statutory law makes it strikingly clear that administrative jurisdiction must be handled by a Judiciary that lacks a specialised structure (except for the five countries mentioned above), while at the same time due process of law must clearly be a constituent element of administrative decisions that restrict the rights of individual.

It has therefore become urgently necessary to advocate a reform of the State by endowing it with a structure capable of conducting prior jurisdictional proceedings through civil servants trained in law and autonomous, impartial and specialised administrative authorities.

As the State becomes structured in such a way as to create a primary jurisdiction for the elaboration of administrative decisions, *a posteriori* jurisdictional supervision will cease to be the only protective mechanism and the interests of the individual will be safeguarded better, because citizens will not have to suffer the consequences of a decision against them until they have first had an opportunity to defend themselves in a fair trial.

If the Continental-European legal system now co-exists with non-judicial procedures prior to administrative decision and a predominantly *a posteriori* administrative jurisdiction it is because its culture enables administrative authorities, despite their lack of independence, to act with reliable degrees of impartiality.

The same cannot be said of Latin America, however, where it would be advisable to split the jurisdiction (corresponding to a proceeding conducted by autonomous judges or authorities) by shifting part of it to a non-judicial phase prior to the formation of the administrative decision.

The Latin-American of model administrative justice tends to rely on European experience but it cannot continue to draw its inspiration from

that source because, paradoxically, it would not provide individuals with sufficient guarantees in today's Latin America.

The Latin-American model is moving towards a transitional phase, in search for the implementation of the administrative *due process of law* that is enshrined in its constitutions and laws and inherent in its unified judicial system that has been in force for 200 years.

Finally, the Latin-American organisational model is tending to move towards the hybrid jurisdictional system of the United States, experienced by Honduras in the 1960s and 80s, but which is not completely similar to it. It is a model that tends to preserve its own identity because the Latin-American experience with non-judicial jurisdiction has moved towards bodies and tribunals that are autonomous from the Executive, as we have seen in Bolivia, Panama, the Dominican Republic, Colombia, Guatemala, Ecuador and Uruguay in the 19th and 20th Centuries.

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