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Nonmarriage: The Double Bind

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ABSTRACT

Nonmarital families constitute a large and growing slice of the population in the United States and around the world. Scholars and policymakers are increasingly grappling with how the law does and should regulate these relationships. Many other countries have responded to this demographic shift by adopting a “status-based approach.” Under this approach, if the relationship meets various criteria, the couple is subject to family law rules. States in the United States, however, continue to resist this trend. The United States, it is said, applies a “contract-based approach” to nonmarriage. This Article offers new insights on this critically important debate.

By meticulously rereading the case law through the prism of market doctrines, this Article reveals that the law of nonmarriage in the United States follows neither approach. Instead, it places nonmarital partners in an untenable double bind: nonmarital partners are at once nonfamilies and families. Nonmarital partners are denied protection under the law of the family because they are not family. Simultaneously, they are denied protection under private law doctrines when the underlying transactions are too family-like.

The content of this double bind is also peculiar. Nonmarital partners are denied relief for their family-like bargains because the law subjects these claims—and only these claims—to heightened formality requirements, beyond those imposed on sophisticated business players. The practical result of these features is that the critical work of forming and running nonmarital families remains outside of the law’s grasp. This Article concludes by employing the theoretical lens of the double bind to challenge the normative defenses of nonmarriage as autonomy and family respecting.

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INTRODUCTION

Nonmarital families constitute a large and growing slice of the U.S. population.¹ In 1960, there were fewer than 500,000 nonmarital cohabiting couples.² By 2017, that number had increased to over nine million.³ How the law regulates this ever-increasing segment of the population in the United States, and indeed around the world,⁴ is of increasing interest to scholars⁵ and policymakers alike.⁶ Many other

¹ JULIANA HOROWITZ, NIKKI GRAF & GRETCHEN LIVINGSTON, PEW RSCH. CTR., MARRIAGE AND COHABITATION IN THE U.S. 15 (2019), <https://www.pewresearch.org/social-trends/2019/11/06/the-landscape-of-marriage-and-cohabitation-in-the-u-s/> [<https://perma.cc/6NZF-SLJ5>] (“[C]ohabitation rates have increased across all age groups since 1995, though this growth has slowed in the past decade.”); see also Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 915 (2019) (noting that “[b]etween 2000 and 2010, the unmarried cohabiting partner population grew by over 40 percent”).

² *Historical Living Arrangements of Adults*, U.S. CENSUS BUREAU (Nov. 2021), <https://www.census.gov/data/tables/time-series/demo/families/adults.html> [<https://perma.cc/447W-F4XQ>] (select link to download “Table UC-1. Unmarried Couples of the Opposite-Sex: 1960 to Present”).

³ See Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1016 (2018).

⁴ Anna Stepien-Sporek & Margaret Ryznar, *The Consequences of Cohabitation*, 50 U.S.F. L. REV. 75, 89–90 (2016) (describing different approaches to cohabitation in Europe).

⁵ See generally Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67 (2021) [hereinafter Antognini, *Nonmarital Contracts*]; Kaiponanea T. Matsumura, *Breaking Down Status*, 98 WASH. U. L. REV. 671 (2021); Katharine K. Baker, *What Is Nonmarriage?*, 73 SMU L. REV. 201 (2020); Joslin, *supra* note 1; Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139 (2019) [hereinafter Antognini, *Nonmarital Coverture*]; Michael J. Higdon, *While They Waited: Pre-Obergefell Lives and the Law of Nonmarriage*, 129 YALE L.J.F. 1 (2019); Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983 (2018); Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425 (2017) [hereinafter Joslin, *Gay Rights Canon*]; Matsumura, *supra* note 3; June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55 (2016); William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881 (2012); Marsha Garri-

countries—including Canada and Australia—have responded to this demographic shift by adopting a “status-based” approach.⁷ Under this approach, if the relationship meets various criteria, the couple is subject to family-based rules.⁸ States in the United States, however, continue to resist this trend.⁹ Instead, the conventional narrative suggests, the United States applies a “contract-based” approach to nonmarriage.¹⁰

This Article offers new insights on this critically important debate about the legal treatment of nonmarriage.¹¹ By meticulously rereading the law of nonmarriage through the prism of market doctrines, this Article reveals that the law of nonmarriage in the United States follows neither approach. Instead, the law places nonmarital partners in a curious “double bind.”¹² Nonmarital partners are at once nonfamilies and families. They are nonfamilies for the purposes of family law and families for the purposes of market law. In both instances, their family status (or lack thereof) is invoked for the purpose of denying them protection of the law.

The content of nonmarriage’s double bind is also peculiar. Nonmarital partners are denied relief for their family-like bargains because the law subjects these claims to heightened requirements.¹³ Although sophisticated business players can seek relief in the absence of compliance with formalities, nonmarital partners typically cannot do

son, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815 (2005).

⁶ The Uniform Law Commission recently promulgated a uniform act governing the economic rights and obligations of unmarried cohabitants. See UNIF. COHABITANTS’ ECON. REMEDIES ACT (UNIF. L. COMM’N, Draft July 15, 2021). I served as an observer on this project.

⁷ See, e.g., Helen Alvaré, *U.S. Cohabitation Law: Still Separate and Unequal*, INST. FOR FAM. STUD. (June 25, 2019), <https://ifstudies.org/blog/us-cohabitation-law-still-separate-and-unequal> [<https://perma.cc/PRW9-CT83>] (“More than a few nations and countries have granted marital-like rights to cohabiting couples—if their relationship meets several criteria. These include Australia, New Zealand, Canada, Ireland, the Scandinavian countries, and Scotland.”).

⁸ *Id.*

⁹ See *infra* Section I.B.

¹⁰ See *infra* Section I.B.

¹¹ See, e.g., *Developments in the Law—Unjust Enrichment* (ch. 3), 133 HARV. L. REV. 2124, 2127 (2020) [hereinafter *Developments in the Law*] (“For decades, scholars have argued over the economic rights of partners at the end of a cohabiting relationship. Some advocate a contract-based approach, others a status-based approach.” (footnotes omitted)).

¹² See Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1748 (1993) (“In everyday language, you are in a double bind when you cannot win because your victorious opponent is willing to be a hypocrite and to ‘damn you if you do and damn you if you don’t.’”).

¹³ See *infra* Section II.B.

so, at least for bargains related to quotidian details of forming and running a family.

The conventional understanding of the law of nonmarriage is as follows. Nonmarital partners are not family members. As such, former nonmarital partners are precluded from invoking family law's property division and spousal support rules.¹⁴ This is true regardless of how long they have lived together, or whether they have children in common.¹⁵ Nonmarital partners can, however, pursue relief under the law of the market, including contract law and business law doctrines like partnership.¹⁶ As the California Supreme Court famously put it in its 1976 *Marvin v. Marvin*¹⁷ decision, "adults who voluntarily live together and engage in sexual relations *are nonetheless as competent as any other persons* to contract respecting their earnings and property rights."¹⁸ Or, as the Tennessee Supreme Court explained, "ordinary laws pertaining to partnership, not the laws of domestic relations, apply."¹⁹

This Article reveals, however, that this understanding is inaccurate, or at least incomplete. Although nonmarital partners generally are entitled to invoke a variety of private law doctrines, including claims sounding in contract, equity, and partnership, these doctrines are incompletely applied to them. More specifically, courts decline to

¹⁴ See *infra* Part I.

¹⁵ See, e.g., Joslin, *supra* note 1, at 917–18; see also Antognini, *Nonmarital Contracts*, *supra* note 5, at 72 ("[U]nmarried couples have no status-based rights.").

¹⁶ See, e.g., *Developments in the Law*, *supra* note 11, at 2128–29. ("Contractual approaches start from the position that cohabitants, like all legal strangers, derive no baseline, default protections from their relationship but are nevertheless free to alter that default arrangement by contract."); IRA MARK ELLMAN, PAUL M. KURTZ, LOIS A. WEITHORN, BRIAN H. BIX, KAREN CZAPANSKIY & MAXINE EICHNER, *FAMILY LAW: CASES, TEXT, PROBLEMS* 935 (5th ed. 2010) ("The majority of states will recognize some contracts claims between unmarried cohabitants, as well as claims grounded in equity."); Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J.L. & FAM. STUD. 135, 159 (2005) ("In the decades since the *Marvin* case was decided, the courts and legislatures in almost all states have adopted some version of this contract doctrine."); PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03 cmt. b (AM. L. INST. 2002) ("In the United States, courts generally rely upon contract law when they conclude that cohabiting parties may acquire financial obligations to one another that survive their relationship. The great majority of jurisdictions recognize express contracts, and only a handful of them require that the contract be written rather than oral.").

¹⁷ 557 P.2d 106 (Cal. 1976).

¹⁸ *Id.* at 116 (emphasis added); see also Joslin, *supra* note 1, at 920 ("[I]n theory, *Marvin* treats former nonmarital partners like other legal strangers."); *Salzman v. Bachrach*, 996 P.2d 1263, 1269 (Colo. 2000) ("[T]he court should determine—as with any other parties—whether general contract laws and equitable rules apply." (emphasis added)).

¹⁹ *Martin v. Coleman*, 19 S.W.3d 757, 761 (Tenn. 2000).

apply private law principles to ventures or exchanges that are *too family-like*.²⁰ In other words, nonmarital partners are denied protection under the law of the family because they are not family,²¹ and, simultaneously, they are denied protection under the law governing market transactions with respect to critical bargains relating to the creation and running of their relationship.²²

Consider *Martin v. Coleman*.²³ The case involved Robert and Delores Coleman.²⁴ Two years after Delores gave birth to their daughter, the parties married.²⁵ After ten years of marriage, the parties divorced.²⁶ Shortly after divorcing, however, the parties resumed living together as a couple, which they did for the next sixteen years.²⁷ Throughout this period of nonmarital cohabitation, the parties “held themselves out to the public as husband and wife,” and “conducted their affairs as though they were married.”²⁸ Throughout the entirety of their twenty-eight-year relationship, Delores never had outside paid employment;²⁹ instead, she “provid[ed] all of those amenities and benefits customarily provided by a wife.”³⁰ Upon the conclusion of their relationship, litigation ensued to unwind their assets.³¹ In the litigation, Delores sought a division of the assets accumulated during their sixteen-year nonmarital relationship.³²

If the parties had been married during that sixteen-year period, a court likely would have awarded Delores an equitable share of all of the assets accumulated during that time.³³ The court held, however, that for purposes of that period, Delores was not a family member.³⁴ Delores was therefore not entitled to a family law-based remedy: “In Tennessee, marriage is controlled by statute, and common-law marriages are not recognized.”³⁵ It was uncontroverted that the parties

²⁰ See *infra* Part II.

²¹ See *infra* Section I.B.

²² See *infra* Section II.B.

²³ 19 S.W.3d 757 (Tenn. 2000).

²⁴ *Id.* at 759.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 761 (quoting the trial court order).

³¹ *Id.* at 759.

³² *Id.*

³³ See TENN. CODE ANN. § 36-4-121(a)(2).

³⁴ See *Martin*, 19 S.W.3d at 761–62.

³⁵ *Id.* at 760; see also *Carney v. Hansell*, 831 A.2d 128, 138 (N.J. Super. Ct. Ch. Div. 2003) (“Being unmarried, plaintiff of course has no right to alimony or equitable distribution.”).

were not married.³⁶ Accordingly, Delores was not a family partner; she was a legal stranger.

Part I begins by confirming that this conclusion in Delores's case—that nonmarital partners are not family members for purposes of family law—reflects the current state of the law around the country.³⁷ Thus, as the California Supreme Court declared in the seminal *Marvin v. Marvin* decision, “No language in the Family Law Act addresses the property rights of nonmarital partners”³⁸ Or, to use the blunter words of the Colorado Supreme Court, “cohabitation does not trigger any marital rights.”³⁹ Hence, the first half of the conventional understanding of the law of nonmarriage is accurate.

Part II moves from the law of family law to that of the market to test the second half of the conventional understanding—that Delores *can* seek relief under other market law doctrines and can do so to the same extent as any other legal stranger.⁴⁰ Part II first surveys the range of claims that can be asserted by legal strangers. Legal strangers can, for example, invoke principles of partnership or joint venture to protect their contributions to joint endeavors.⁴¹ To establish a partnership, the law simply requires the party to demonstrate an “intent to do the things which constitute a partnership.”⁴² It does not matter whether the parties had “an understanding of the legal effect of their acts.”⁴³ Indeed, even if the parties wished to avoid the formation of a partnership, a court nonetheless can find that the parties created a partnership if they intended to do “the things” together.⁴⁴ Moreover, and importantly, the parties' failure to memorialize their intent does not preclude the court from finding the existence of a partnership.⁴⁵ In this way, even as between sophisticated parties, courts can look past the lack of formalities to find that the parties intended to and did indeed form a partnership.

Consider, again, Delores's situation. If Delores and Robert had been treated as true legal strangers, the court could have found that

³⁶ *Martin*, 19 S.W.3d at 760.

³⁷ See Joslin, *supra* note 1, at 920.

³⁸ 557 P.2d 106, 120 (Cal. 1976).

³⁹ *Salzman v. Bachrach*, 996 P.2d 1263, 1269 (Colo. 2000).

⁴⁰ See, e.g., *Developments in the Law*, *supra* note 11, at 2128–29.

⁴¹ See *infra* Section II.A.2.

⁴² *Via v. Oehlert*, 347 S.W.3d 224, 229 (Tenn. Ct. App. 2010).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See *infra* Section II.A.

they were in a joint venture or an implied partnership together.⁴⁶ The “thing” they intended to do together was to create and run a family. As is true of many more traditional “commercial” ventures, the parties joined their skills and contributions in hopes of mutual success, and they did join their skills and contributions for sixteen years. As such, each person should both be entitled to seek a share in the success of that joint venture. Had Delores and Robert not been intimate partners, the court could have awarded such relief even in the absence of a formal partnership agreement, and even if they had not understood that their joint efforts would have that legal effect.

But Part II reveals that courts—including the court in Delores’s case—refuse to apply these concepts to the venture of creating and running a nonmarital family.⁴⁷ That is, when parties seek protection under the law of the market *for their family-like behavior and bargains*, courts invoke the family-like nature of these relationships to deny application of otherwise available market doctrines.⁴⁸ As one court recently put it, “to hold that the parties entered into a joint venture . . . solely because they lived together and jointly contributed to the appreciation of real property would pull the theory of implied partnership/joint venture too far from its moorings.”⁴⁹ Thus, although the law authorizes recognition of informal business partnerships, the same is not true of informal family partnerships.

To be sure, the law does not preclude any and all relief to nonmarital partners. Nonmarital partners cannot seek relief for the entirety of their joint venture to create and run an informal family.⁵⁰ They can, however, seek relief based on individual transactions between the parties.⁵¹ But a closer look reveals this, too, is only partially true. Across jurisdictions and across approaches, nonmarital partners can recover under market law principles for only some of their contributions.⁵²

Courts apply and allow recovery under market law doctrines for exchanges that are commercial in nature.⁵³ Thus, for example, if the

⁴⁶ See *infra* Section II.A.

⁴⁷ See *Martin v. Coleman*, 19 S.W.3d 757, 761–62 (Tenn. 2000) (“To hold that these retirement benefits are available as partnership assets would require this Court to expand the concept of implied partnership beyond the business relationship We decline to do so.”).

⁴⁸ See *infra* Section II.B.1.

⁴⁹ *Via*, 347 S.W.3d at 230.

⁵⁰ See *infra* Section II.B.2.

⁵¹ See *Matsumura*, *supra* note 3.

⁵² See *infra* Section II.B.2.

⁵³ See *Bass v. Bass*, 814 S.W.2d 38, 43 (Tenn. 1991) (“The obvious implication to be drawn

parties started a video game machine enterprise together, the court will recognize and compensate their contributions to that venture.⁵⁴ With regard to these commercial transactions, courts can further the parties' intentions and expectations by allowing for the possibility of relief even in the absence of a written agreement, or other compliance with formalities.

Here again, courts generally alter the rules and, importantly, demand more with regard to exchanges that are too family-like.⁵⁵ For these family-like exchanges, courts apply a rule that is the opposite of that which is applied to legal strangers. As between strangers, the law presumes that services provided were done so with an expectation of compensation.⁵⁶ But the reverse presumption applies to the exchange of domestic caretaking for support as between people who are family members.⁵⁷ These services—unlike all other services—are presumed to have been provided gratuitously.⁵⁸ Thus, with regard to these family-like bargains and exchanges, compensation typically is available only where the parties formalized the agreement to provide compen-

from the *Johnson* and *Thornton* decisions is that an individual should not be denied the opportunity to establish the existence of a *business* partnership into which they, like any other competent individual, may enter into, whether or not cohabitation exists.”).

⁵⁴ *Id.* (“There is no question that the Plaintiff and William Bass carried on as co-owners of a business for profit.”).

⁵⁵ *See infra* Section II.B.

⁵⁶ *See, e.g., In re Estate of Marks*, 187 S.W.3d 21, 29 (Tenn. Ct. App. 2005) (“Persons who provide valuable services to another without an agreement regarding compensation are entitled to recover the reasonable value of their services (1) when the circumstances indicate that the parties to the transaction should have understood that the person providing the services expected to be compensated and (2) when it would be unjust to permit the recipient of the services to benefit from them without payment.”).

⁵⁷ *McLane v. Musick*, 792 So. 2d 702, 705 (Fla. Dist. Ct. App. 2001) (“When a person provides services to another without a written agreement regarding compensation, a promise to pay for those services will generally be implied. However, this general rule is not applicable if the services are rendered by and for members of the same family or relatives who live together.” (footnote omitted)).

⁵⁸ *See, e.g., In re Estate of Steffes*, 290 N.W.2d 697, 703 (Wis. 1980) (“The basis for applying the presumption of gratuitous service to persons cohabiting but not related by marriage is that in the ordinary course of life persons living together in a close relationship perform services for each other without expectation of payment in the usual sense because the parties mutually care for each other’s needs and perform services for each other out of a feeling of affection or a sense of obligation.”); *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980) (“The major difficulty with implying a contract from the rendition of services for one another by persons living together is that it is not reasonable to infer an agreement to pay for the services rendered when the relationship of the parties makes it natural that the services were rendered gratuitously.”). *Cf. Developments in the Law, supra* note 11, at 2130 (“[C]ourts have been less willing to embrace *Marvin*’s vision of restitutionary claims for former unmarried cohabitants who provided domestic labor in the relationship.”).

sation.⁵⁹ Supporters contend that this rule—again, the flip of the usual rule—best respects the parties’ autonomy and intentions.

Consider again Delores’s situation. If Delores had been a true legal stranger, she could have sought compensation for her years of service in the home.⁶⁰ She could have argued, for example, that the parties had an implied contract to pay her for her services. Typically, when services are rendered and accepted, a right of compensation is implied.⁶¹ Alternatively, Delores could have argued that she should be entitled to reasonable compensation for her services under equitable principles, including quantum meruit.⁶² But because courts consider people like Delores to be family members for purposes of these claims, they lose.⁶³ Courts require something more of them than would be required of true third-party business bargainers.⁶⁴

This Article offers critical new contributions to the contemporary conversation about nonmarriage. First, this Article reveals several curious features of the law of nonmarriage. The law of nonmarriage places partners in a double bind. Nonmarital partners are, at once, denied protection of the law of the family because they are nonfamilies, and, simultaneously denied protection of market law for transactions that are too family-like.⁶⁵

The content of nonmarriage’s double bind is also peculiar. Nonmarital partners are denied relief for their family-like bargains because the law subjects *these claims and only these claims* to heightened formality requirements, beyond those imposed on sophisticated busi-

⁵⁹ See, e.g., *Brooks v. Allen*, 137 A.3d 404, 410 (N.H. 2016) (“In *Tapley v. Tapley*, we declined to allow recovery for ‘domestic services’ under an implied contract or in quantum meruit, adopting the view of other jurisdictions that have concluded that until their legislatures determine otherwise, they will not recognize a contract which is implied from the rendition of ‘housewifely services.’” (citation omitted) (quoting *Tapley v. Tapley*, 449 A.2d 1218, 1219 (N.H. 1982))).

⁶⁰ See, e.g., *Moors v. Hall*, 532 N.Y.S.2d 412, 415 (App. Div. 1988).

⁶¹ See, e.g., *Estate of Marks*, 187 S.W.3d at 29.

⁶² See, e.g., *Developments in the Law*, *supra* note 11, at 2130.

⁶³ See, e.g., *Brooks*, 137 A.3d at 410; *Morone*, 413 N.E.2d at 1157–58.

⁶⁴ Indeed, Albertina Antognini demonstrates that even where the parties do formalize the agreement in a writing, courts often refuse to enforce such contracts when they relate to the provision of domestic services. Antognini, *Nonmarital Contracts*, *supra* note 5, at 78.

⁶⁵ In recent years, a few scholars have identified the reluctance of courts to award relief for claims arising out of the traditional family bargain. See, e.g., Antognini, *Nonmarital Coverture*, *supra* note 5, at 2145 (“[S]ervices that take on the form of homemaking or childrearing—duties undertaken by the wife under coverture—do not lead to any attendant property rights.”); *Developments in the Law*, *supra* note 11, at 2130 (“[C]ourts have been less willing to embrace *Marvin*’s vision of restitutionary claims for former unmarried cohabitants who provided domestic labor in the relationship.”). This Article presses these important insights further by rereading these cases through the lens of market law.

ness players.⁶⁶ To put it more concretely, if the parties bought and ran a video store together, that joint endeavor can be recognized and enforced even if the parties did not memorialize their agreement, and even if they did not understand that their joint efforts could result in mutual rights and obligations.⁶⁷ But for their family-like exchanges, a distinctly different set of rules applies. For these exchanges—even as between the same two people—formalities typically are required.⁶⁸ Indeed, even compliance with the formalities may not be enough to secure relief.⁶⁹ The practical result of these features of the law of nonmarriage is that the critical work of forming and running nonmarital families remains outside of the law's grasp.

After uncovering these novel insights, Part III then uses this new theoretical lens of the double bind to challenge normative defenses of the law of nonmarriage as autonomy and family respecting. A number of scholars argue that the contemporary law respects and reflects the preferences of nonmarital partners.⁷⁰ On this account, the law of nonmarriage “recognizes and honors the individual choices that cohabitants and married couples have made. Married couples have chosen obligation; cohabitants have chosen independence. The law recognizes and honors both choices.”⁷¹

Part III reveals, however, that this descriptive assertion of nonmarriage as autonomy protecting fails to account for the way in which the law of nonmarriage applies varied rules to different types of ventures and bargains. With respect to their “commercial” ventures, the law respects party autonomy by authorizing courts to recognize their bargains even in the absence of proof formalities.⁷² The rules regarding business ventures excuse the lack of formalities, it is said, to honor the intent and expectations of the parties. But the law of nonmarriage applies a distinctly different rule to a subset of exchanges as between nonmarital partners—namely, domestic ventures and exchanges—allegedly to further the same end. Here, courts will not recognize and

⁶⁶ See *infra* Section II.B.

⁶⁷ See, e.g., *Bass v. Bass*, 814 S.W.2d 38, 43–44 (Tenn. 1991).

⁶⁸ See, e.g., Antognini, *Nonmarital Contracts*, *supra* note 5, at 102–03 (noting that some jurisdictions allow for only express contracts in nonmarital relationships).

⁶⁹ *Id.*; see also, e.g., *Bass*, 814 S.W.2d at 43.

⁷⁰ See, e.g., Joslin, *supra* note 1, at 941–42 (“Among scholars, the leading defense of *Marvin* sounds in the register of autonomy.”).

⁷¹ Garrison, *supra* note 5, at 896; see also Carbone & Cahn, *supra* note 5, at 63–64, 121.

⁷² See *infra* Section II.A.

give effect to the mutual decision to form a family or bargains necessary to run that family in the absence of formalities, if at all.⁷³

To the extent the disparate treatment of family-like exchanges is acknowledged, courts and scholars posit that this legal disjunction appropriately respects the unique importance of these contributions. On this view, presuming that family-like contributions—unlike all others—are provided gratuitously is a “crucial means by which the law . . . preserves the specialness and dignity of intimate relations.”⁷⁴ The work of running a family is performed “not as a servant, with a view to pay, but from higher and holier motives.”⁷⁵ Treating the provision of domestic caretaking just like other business contributions would “impoverish” these hallowed contributions.⁷⁶ To avoid doing so, the law presumes that these domestic services are provided as “gifts” or gratuities.⁷⁷

Part III offers historical context to facilitate a more accurate evaluation of the applicability of this so-called “presumption of gratuity” to nonmarriage. This chronicle reveals useful insights. The contemporary rule finds its “roots . . . in a status discourse that gave the head of a household property rights in the ‘services’ of its members (that is, wife, children, servants).”⁷⁸ In other words, the providers of these household services were not entitled to compensation because the law of the family already required the bestowal of the services in exchange for the provision of support. Applied to nonmarital families, however, the rule’s logic falters. As Part I teaches, no legal rights or obligations flow by virtue of a nonmarital relationship.⁷⁹ Nonmarital partners are

⁷³ See, e.g., *McLane v. Musick*, 792 So. 2d 702, 704–05 (Fla. Dist. Ct. App. 2001).

⁷⁴ Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 499 (2005).

⁷⁵ *Cropsey v. Sweeney*, 27 Barb. 310, 315 (N.Y. Gen. Term 1858).

⁷⁶ See Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CALIF. L. REV. 821, 847 (1997) (“[T]he world of contract is a market world, largely driven by relatively impersonal considerations and focused on commodities and prices. The impersonal organs of the state are an appropriate means to enforce promises made in such a world. In contrast, much of the world of gift is driven by affective considerations like love, affection, friendship, gratitude, and comradeship. That world would be impoverished if it were to be collapsed into the world of contract.”); see also Hila Keren, *Considering Affective Consideration*, 40 GOLDEN GATE U. L. REV. 165, 226–27 (2010) (“This fear is described by Eisenberg as the fear of impoverishing the non-legal world of gifts as a result of contaminating it with legal and market-born ideas.”).

⁷⁷ See, e.g., *Trimmer v. Van Bomel*, 434 N.Y.S.2d 82, 85 (Sup. Ct. 1980) (describing domestic services as ones that “would ordinarily be exchanged without expectation of pay”).

⁷⁸ Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127, 2206 (1994).

⁷⁹ See, e.g., Kaiponanea T. Matsumura, *Beyond Property: The Other Legal Consequences of Informal Relationships*, 51 ARIZ. ST. L.J. 1325, 1330 (2019).

excluded from a vast array of default protections extended to legally recognized family members, and the law imposes no reciprocal duties upon them.⁸⁰ Hence, to the extent the rule retains any contemporary validity, it is inapt as applied to nonmarital partners.

I. PARTNERS BUT NOT FAMILY PARTNERS

A. *The Law of the Family*

At common law, the property rights of married spouses were largely defined by the doctrine of coverture. Under coverture, “[t]he husband gained his wife’s property and earning power because he was legally responsible to provide for her.”⁸¹ The doctrine thus “prevented wives from holding or acquiring separate property during marriage.”⁸² At divorce, the spouses were awarded the property for which their respective names were on the title.⁸³ Given the rules governing ownership during marriage, this generally resulted in awards granting “most or all of the property to the husband.”⁸⁴

Over time, courts came to appreciate that this system often produced unjust results. As the Mississippi Supreme Court explained, this was true “especially involving cases of a traditional family where most property was titled in the husband, leaving a traditional housewife and mother with nothing but a claim for alimony, which often proved unenforceable.”⁸⁵ Even in families in which “both spouses worked,” it was often the case that “the husband’s resources were devoted to investments while the wife’s earnings were devoted to paying the family expenses or vice versa.”⁸⁶ In such cases, “the same unfair results ensued.”⁸⁷ Moreover, the court continued, the system “is also unable to take account of a spouse’s non-financial contribution.”⁸⁸

⁸⁰ *See id.*

⁸¹ NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 12 (2000); *see also* HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 115 (2000) (“Coverture meant that, in exchange for gaining full ownership of all of his wife’s personal property and absolute control for life over her real estate, a husband was bound to support her . . .”).

⁸² JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 193 (2011).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Ferguson v. Ferguson*, 639 So. 2d 921, 926 (Miss. 1994).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* (quoting Stephen J. Brake, *Equitable Distribution vs. Fixed Rules: Marital Property Reform and the Uniform Marital Property Act*, 23 B.C. L. REV. 761, 765 (1982)).

Eventually all states—including Mississippi⁸⁹—jettisoned a title-based approach for distributing marital property. Today, “all fifty states divide the available” estate either “equally or equitably upon divorce.”⁹⁰ As a result, “regardless of the governing system, judges [generally] presume that marital property will be split more or less evenly but have some power to deviate based on equitable factors.”⁹¹

These property division rules reflect the understanding, or at least the ideal, that the parties both contribute in important ways to the success of the marital venture and thus should both share in their collective successes.⁹² “Marital partnership theory recognizes that spouses jointly contribute their labor as well as a wide range of financial and non-financial resources for the good of the marital relationship as a whole.”⁹³ Accordingly, “the collective benefits produced by mutual efforts during marriage are conceptualized as jointly acquired and jointly owned.”⁹⁴ This theoretical understanding is embraced at least to some degree in all states.⁹⁵

This law of family dissolution allows courts to “soften the often harsh economic [gendered] consequences of divorce.”⁹⁶ “Marriage gives men the opportunity, support, and time to invest in their own careers.”⁹⁷ In this way, “marriage . . . builds and enhances the husband’s earning capacity.”⁹⁸ By contrast, marriage erodes women’s earning potential.⁹⁹ Despite advancements, this gendered impact per-

⁸⁹ *Id.* at 927.

⁹⁰ Joslin, *Gay Rights Canon*, *supra* note 5, at 481; see Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1230 (“[E]very state’s default approach is now designed to effectuate an equal or equitable division of all property accumulated from wages during marriage, regardless of the title of that property.” (footnotes omitted)).

⁹¹ GROSSMAN & FRIEDMAN, *supra* note 82, at 200.

⁹² See Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN’S L.J. 141, 143 (2004) (expressing that “[t]he marital partnership model is centrally about recognizing a community of interests created by the individuals who have joined their lives”).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 696 (1990) (“Nearly every state currently embraces the community-property concept of marriage as a partnership.”).

⁹⁶ *Id.*

⁹⁷ LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 342 (1985).

⁹⁸ *Id.*

⁹⁹ Joan Williams, *Is Coverture Dead? Beyond A New Theory of Alimony*, 82 GEO. L.J. 2227, 2245 (1994) (“Statistics also dramatize the way marriage enhances men’s market potential, while eroding women’s: married men make more than single men, whereas married women earn less than single women.”).

sists.¹⁰⁰ Women, including married women, continue to perform more of the domestic tasks related to the running of families.¹⁰¹ To perform these tasks critical to the functioning of a family, the individuals performing them often “cut back on or disrupt entirely their careers.”¹⁰² “Because [the wife] has invested her human capital in the home rather than the labor market, . . . she will . . . be less well positioned [at divorce] . . . compared to her partner, who will have invested his human capital in advancing his career and improving his salary.”¹⁰³ This pattern of task division in marital households often leaves the wife “significantly disadvantaged.”¹⁰⁴ Marital dissolution principles acknowledge and seek to lessen the impact of this continued reality. One of the ways existing family law doctrine does so is by allowing spouses, including spouses who contributed primarily through domestic services, to be awarded an equal or equitable share of all property accumulated during the relationship.¹⁰⁵

All fifty states also allow such spouses to seek spousal support.¹⁰⁶ Contemporary spousal support statutes generally authorize judges “to make ‘just’ or ‘equitable’ awards, sometimes guided by a list of relevant factors.”¹⁰⁷ To be sure, current divorce rules remain insufficient to protect women from the negative financial consequences of divorce. Nonetheless, at least in theory, they seek to recognize the concept that both spouses are contributing to the success of the whole. Because the parties are recognized as partners in this joint endeavor, the law declares that they are entitled to share in the successes of the community, regardless of their type of contribution.

¹⁰⁰ Jennifer Bennett Shinall, *Settling in the Shadow of Sex: Gender Bias in Marital Asset Division*, 40 CARDOZO L. REV. 1857, 1861 (2019) (“[W]omen as a whole continue to see their finances decline after divorce.”).

¹⁰¹ See *American Time Use Survey, Charts by Topic: Household Activities*, U.S. BUREAU LAB. STAT. (Dec. 20, 2016), <https://www.bls.gov/tus/charts/household.htm> [<https://perma.cc/AD3K-K9K9>]; see also Alicia Brokars Kelly, *Navigating Gender in Modern Intimate Partnership Law*, 14 J.L. & FAM. STUD. 1, 10 (2012) (explaining that, “[d]espite . . . shifts,” “[w]omen still do more unpaid care work than men, and men still provide more market work and income than women”); Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 20 (2005) (“[R]esearchers consistently find that women spend significantly more time than men engaged in caregiving activities for children and the disabled elderly.” (footnote omitted)).

¹⁰² Courtney G. Joslin, *Family Choices*, 51 ARIZ. ST. L.J. 1285, 1310 (2019).

¹⁰³ Maxine Eichner, *Marriage and the Elephant: The Liberal Democratic State’s Regulation of Intimate Relationships Between Adults*, 30 HARV. J.L. & GENDER 25, 49 (2007).

¹⁰⁴ *Id.*

¹⁰⁵ See *supra* note 90 and accompanying text.

¹⁰⁶ See GROSSMAN & FRIEDMAN, *supra* note 82, at 195 (“Historically, courts in all states could award alimony to wives, in a divorce or legal separation.”).

¹⁰⁷ *Id.* at 204 (citing *Mills v. Atl. City Dep’t of Vital Stat.*, 372 A.2d 646 (N.J. 1977)).

B. Nonmarital Partners and Family Law

The law of the family does not apply to nonmarital partners. Historically, courts refused to award any relief upon the dissolution of nonmarital relationships.¹⁰⁸ Until the 1970s, most states criminalized nonmarital cohabitation and sex outside of marriage.¹⁰⁹ “Given that they were not only partners in life but also partners in crime,” some reasoned that awarding any form of relief for claims arising out of their relationship “would violate [state] public policy.”¹¹⁰ Thus, as one early decision put it, even the enforcement of an express agreement based on “future illicit cohabitation between the parties is void.”¹¹¹ Today, nonmarital cohabitation is no longer a crime.¹¹² States, however, still refuse to treat these partners as family members.¹¹³ As a result, no mutual rights or obligations flow by virtue of the existence of a nonmarital relationship.¹¹⁴ To use the words of the Colorado Supreme Court, “cohabitation does not trigger any marital rights.”¹¹⁵

Consider the Illinois Supreme Court case *Hewitt v. Hewitt*.¹¹⁶ The case involved nonmarital partners—Victoria and Robert—who separated after a fifteen-year relationship.¹¹⁷ The parties began living together in 1960, around the time that Victoria became pregnant.¹¹⁸ At the time, Robert told Victoria “that they were husband and wife and

¹⁰⁸ See Joslin, *supra* note 1, at 919 (“Until the 1970s, many courts refused to permit former nonmarital partners to pursue any claims for recovery upon dissolution.”).

¹⁰⁹ See, e.g., CYNTHIA GRANT BOWMAN, *UNMARRIED COUPLES, LAW, AND PUBLIC POLICY* 13–20 (2010); Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 579 (2013).

¹¹⁰ Joslin, *supra* note 1, at 919.

¹¹¹ *Wallace v. Rappleye*, 103 Ill. 229, 249 (1882); see also Case Comment, *Property Rights upon Termination of Unmarried Cohabitation: Marvin v. Marvin*, 90 HARV. L. REV. 1708, 1713 (1977) (“The doctrine of illegality has been invoked to render an agreement unenforceable as against public policy if the parties contemplated nonmarital sexual intercourse as any part of the consideration.”).

¹¹² See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (striking down statute criminalizing nonmarital sex); *Martin v. Zihlerl*, 607 S.E.2d 367, 371 (Va. 2005) (striking down Virginia’s law criminalizing fornication); see also Joslin, *Gay Rights Canon*, *supra* note 5, at 479.

¹¹³ See, e.g., Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 16 (2017) (noting that only two states—Washington and Nevada—“apply the rules regulating property distribution at divorce to the end of a nonmarital relationship”). In many states, a party is entitled to some family-law protections under the putative spouse doctrine if they had a good faith belief they were in a valid marriage. See, e.g., *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1210 (Ill. 1979). The vast majority of nonmarital partners, however, are well aware they are not married.

¹¹⁴ See, e.g., *Sands v. Menard*, 904 N.W.2d 789, 801 (Wis. 2017) (noting that while “cohabitation between unmarried romantic partners is not a bar to an otherwise valid claim of unjust enrichment[,] . . . the romantic relationship [itself does not] create[] [a] claim for relief”).

¹¹⁵ *Salzman v. Bachrach*, 996 P.2d 1263, 1268–69 (Colo. 2000).

¹¹⁶ 394 N.E.2d 1204 (Ill. 1979).

¹¹⁷ *Id.* at 1205.

¹¹⁸ *Id.*

would live as such, no formal ceremony being necessary.”¹¹⁹ Robert also promised Victoria that he would “share his life, his future, his earnings and his property.”¹²⁰ Thereafter, the parties “held themselves out” to others, including their own families, as a married couple.¹²¹ Like many married couples, Victoria and Robert pooled their efforts for the joint benefit of the family.¹²² For example, “in reliance on [Robert’s] promises [Victoria] devoted her efforts to his professional education and his establishment in the practice of pedodontia.”¹²³ Victoria also “obtain[ed] financial assistance from her parents” to support Robert’s professional pursuits.¹²⁴ After Robert established his dental practice, Victoria assisted in the office.¹²⁵ Had they married, Victoria would have been entitled to an equitable share of the assets accumulated during their relationship.¹²⁶ She also would have been entitled to seek spousal support.¹²⁷

But because they did not formalize their relationship through marriage, those rules did not and could not be applied to Victoria.¹²⁸ Even though they had lived like a married couple, and even though Victoria had contributed finances and her services to further Robert’s assets and his earning capacity, Victoria was not entitled to an equitable share of the parties’ jointly accumulated assets, or to request an award of spousal support under the state’s domestic relations laws.¹²⁹ To entitle her to do so, the court concluded, would violate the legislature’s intent and state public policy.¹³⁰

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *See id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *See In re Marriage of Hamilton*, 128 N.E.3d 1237, 1249 (Ill. App. Ct. 2019) (“The distribution of assets must be equitable in nature.”).

¹²⁷ As noted above, all fifty states allow spouses to seek spousal support. *See, e.g.*, GROSSMAN & FRIEDMAN, *supra* note 82, at 195 (“Historically, courts in all states could award alimony to wives, in a divorce or legal separation.”). Given the length of their relationship, the very unequal earning capacities of the parties, and because Victoria helped develop Robert’s earning capacity, a court very well may have awarded Victoria spousal support had they been married. *See, e.g.*, J. Thomas Oldham, *Changes in the Economic Consequences of Divorces, 1958–2008*, 42 FAM. L.Q. 419, 432 (2008) (noting that courts are more willing “to award indefinite term alimony when parties are divorcing after a marriage of long duration, the parties’ incomes are quite different, and the recipients cannot realistically be retrained”).

¹²⁸ *See Hewitt*, 394 N.E.2d at 1210.

¹²⁹ *See id.*

¹³⁰ *Id.* at 1211 (“We accordingly hold that plaintiff’s claims are unenforceable for the rea-

Like Illinois, other states refuse to apply the law of the family to nonmarital partners.¹³¹ The law declares that these parties are legal strangers, not family members. As such, they fall outside the scope and protection of the doctrine of family law. In this way, the U.S. approach is distinctly different from the trends seen in other countries around the world. A growing number of other countries apply family law rules to nonmarital couples upon dissolution or death.¹³²

But while nonmarital partners are precluded from invoking the law of the family, almost all states have since abandoned *Hewitt*'s purported "no recovery" model.¹³³ Instead, it is said, nonmarital partners can now invoke other private law doctrines that regulate relationships between legal strangers.¹³⁴ These doctrines include contract law, equitable principles, and business law principles like partnership and joint venture.¹³⁵ The California Supreme Court led this shift in its famous 1976 *Marvin v. Marvin* decision.¹³⁶ *Marvin* affirmed the principle that nonmarital partners could *not* pursue family law remedies.¹³⁷ The court, however, simultaneously declared that former nonmarital partners were not without any remedy. *Marvin* established that nonmarital partners should be entitled to seek the remedies available to other legal strangers.¹³⁸ As the *Marvin* court put it, "adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights."¹³⁹ Or, to use the words of the Wisconsin Supreme Court, "neither public policy nor the abolition of common-

son that they contravene the public policy . . . disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants.").

¹³¹ "[O]ne or two states extend married-like rights and protections based on proof of a sufficiently committed, interdependent nonmarital relationship." Joslin, *supra* note 1, at 930; *see also* Antognini, *supra* note 113, at 16 (identifying two states).

¹³² *See, e.g.,* Stepien-Sporek & Ryznar, *supra* note 4, at 89–90.

¹³³ *See* Joslin, *supra* note 1, at 919–20; *see also* *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) ("[O]ur courts should by no means apply the doctrine of the unlawfulness . . . to the instant case.").

¹³⁴ *See, e.g.,* Joslin, *supra* note 1, at 920–21.

¹³⁵ *See* Stepien-Sporek & Ryznar, *supra* note 4, at 92.

¹³⁶ 557 P.2d 106 (Cal. 1976).

¹³⁷ *Id.* at 110 ("We conclude: (1) The provisions of the Family Law Act do not govern the distribution of property acquired during a nonmarital relationship; such a relationship remains subject solely to judicial decision."); *see also* *Salzman v. Bachrach*, 996 P.2d 1263, 1268–69 (Colo. 2000) ("[C]ohabitation does not trigger any marital rights.").

¹³⁸ *See Marvin*, 557 P.2d at 116.

¹³⁹ *Id.*; *see also* *Salzman*, 996 P.2d at 1268–69 ("[T]he court should determine—as with any other parties—whether general contract laws and equitable rules apply.").

law marriage prohibited an unmarried cohabitant from asserting a contractual or quasi-contractual claim against another cohabitant.”¹⁴⁰

II. PARTNERS BUT NOT BUSINESS PARTNERS

A. *The Law of the Market*

The *Marvin* court’s rule represents the conventional understanding of the law of nonmarriage: nonmarital partners are not partners for purposes of family law, but they may be partners for purposes of private law remedies, including those sounding in contract law, equity, or business law principles.¹⁴¹ As the *Marvin* court explained, they are “as competent as any other persons to contract respecting their earnings and property rights.”¹⁴²

Numerous commentators critique this approach to nonmarriage. Critics argue that this body of law is not well suited to the regulation of nonmarital relationships. A core defect with this approach, it is said, is that “couples do not in fact think of their relationship in contract terms.”¹⁴³ Others note that this approach fails adequately to account for unequal bargaining power that is often at play in intimate relationships.¹⁴⁴ Elsewhere, I also argue that “the current regime does a poor job of recognizing and protecting individual’s decisions or choices to form a family.”¹⁴⁵

This Part approaches the law of nonmarriage from a different perspective. Specifically, this Part tests whether and under what circumstances the law indeed treats nonmarital partners as being as “competent as any other persons” to pursue relief under market doctrines.¹⁴⁶ Ultimately, this Part finds that the problem runs much deeper than critiques noted above that focused on the inapt fit be-

¹⁴⁰ *Sands v. Menard*, 904 N.W.2d 789, 798 (Wis. 2017).

¹⁴¹ *See, e.g.*, Matsumura, *supra* note 79, at 1329.

¹⁴² *Marvin*, 557 P.2d at 116.

¹⁴³ Ira Mark Ellman, “*Contract Thinking*” Was *Marvin*’s *Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1367 (2001) [hereinafter Ellman, *Contract Thinking*]; *see also* Matsumura, *supra* note 3, at 1040 (“[A]s critics of *Marvin* have pointed out, ‘[p]eople don’t generally make formal contracts about either the conduct of their relationship or the consequences that ought to flow in the event they end it.’ They might be uninterested in arms-length bargaining or incapable of achieving that self-interested distance.” (alteration in original) (footnote omitted) (quoting Ira Mark Ellman, *Inventing Family Law*, 32 U.C. DAVIS L. REV. 855, 874 (1999))).

¹⁴⁴ *See, e.g.*, Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1163 (1981) (“[T]he cohabitants’ unequal bargaining power leads to unjust results under contract theory.”).

¹⁴⁵ Joslin, *supra* note 1, at 915.

¹⁴⁶ *See Marvin*, 557 P.2d at 116.

tween nonmarital partners and contract principles.¹⁴⁷ This Part shows that these partners are subjected to formalities and requirements beyond those imposed on true third-party bargainers. For true third-party bargainers, courts are authorized to look beyond a lack of formalities to give effect to the contributions that have in fact been exchanged. But as between nonmarital partners, more is required, at least for their family-like exchanges.

But, first, a review of those market doctrines is necessary.

1. *Exchanges*

One body of private law frequently invoked in the context of nonmarital relationships is the law of contracts.¹⁴⁸ This body of law has long been viewed as “the core of the private law system.”¹⁴⁹ Contract law, and a variety of equitable doctrines that serve as gap-filling functions, facilitate the provision of compensation in exchange for the provision of valuable services. Under basic contract doctrine, where parties expressly mutually assent—that is agree—to enter into a bargain to which they each contribute consideration, a contract has been formed.¹⁵⁰

Moreover, even where this agreement was not in writing, a court can find an implied agreement if the parties’ conduct reveals this is indeed what the parties intended; the fact that the parties failed to express their intent in writing or orally does not preclude the court from finding that intent.¹⁵¹ As the Wisconsin Supreme Court put it in 1911,

The general rule is that if a person performs valuable services for another at that other’s request, the law implies, as matter of fact, the making of a promise by the latter and ac-

¹⁴⁷ See, e.g., Ellman, *Contract Thinking*, *supra* note 143, at 1367.

¹⁴⁸ See, e.g., PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03 cmt. b (AM. L. INST. 2002) (“In the United States, courts generally rely upon contract law when they conclude that cohabiting parties may acquire financial obligations to one another that survive their relationship.”).

¹⁴⁹ Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 175, 185 (2009).

¹⁵⁰ *Id.* at 200 (noting that “[m]utual assent and consideration are still all that are needed to form a valid, traditional contract”); see also RESTATEMENT (SECOND) OF CONTS. § 17(1) (AM. L. INST. 1981) (“[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.”).

¹⁵¹ 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 1:5 (4th ed. 2004) (“Just as assent may be manifested by words, so intention to make a promise may be manifested in language or by implication from other circumstances, including the parties’ course of dealing or course of performance, or a usage of trade.”).

ceptance thereof by the former to pay the one performing the service the reasonable value thereof. . . . [T]he burden of proof is upon the recipient of the service to rebut such presumption if he would escape from rendering such equivalent.¹⁵²

In this way, the law allows courts to find consent based on the parties' conduct, even in the absence of compliance with formalities.¹⁵³

Historically, though, when there was no meeting of the minds, persons seeking relief were often "without a remedy" under common law.¹⁵⁴ Eventually, this situation was viewed as creating "inequitable" results.¹⁵⁵ "To correct this inequitable situation the remedy of implied in law contract came into being"¹⁵⁶ Under this doctrine, "the courts invent[] the fiction that the two had entered into a contract, even though the beneficiary never expected to reimburse the plaintiff and indeed even where he deliberately intended the contrary."¹⁵⁷ The doctrine has its "foundation in natural justice" and is understood to be necessary in order to prevent "the unjust enrichment of one party at the expense of another."¹⁵⁸

Today, courts use a variety of phrases to refer to this basic principle: quasi-contract, implied in law contract, constructive contract, and quantum meruit.¹⁵⁹ While the words may vary, "[t]hey are all legal fictions created by courts of law to provide remedies which prevent unjust enrichment and thereby promote justice and equity. Their purpose is to provide the injured party with the fair value of the work and services rendered and thus prevent unjust enrichment to another."¹⁶⁰ Hence, even without an agreement, a person is entitled to recover the "reasonable value of their services (1) when the circumstances indicate that the parties to the transaction should have understood that

¹⁵² *Wojahn v. Nat'l Union Bank*, 129 N.W. 1068, 1077 (Wis. 1911) (citations omitted).

¹⁵³ See, e.g., Orit Gan, *The Many Faces of Contractual Consent*, 65 *DRAKE L. REV.* 615, 622–23 (2017) ("This objective manifestation test . . . relies exclusively on the outward manifestations of intent, as measured objectively from the point of view of the other contracting party, and with what is known as the 'reasonable person' standard." (footnote omitted)).

¹⁵⁴ Comment, *Quasi-Contracts—Relationships Raising Presumption of Gratuities*, 6 *FORDHAM L. REV.* 417, 417 (1937) [hereinafter *Quasi-Contracts*].

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 418 (footnote omitted); see also 1 *LORD*, *supra* note 151, § 1:6 ("[A] quasi or constructive [contract] . . . does not require mutual assent but is imposed by a fiction of the law, to enable justice to be accomplished, even when no contract was intended by the parties.").

¹⁵⁸ *Quasi-Contracts*, *supra* note 154, at 417–18.

¹⁵⁹ See, e.g., *Wright v. Pennamped*, 657 N.E.2d 1223, 1229 (Ind. Ct. App. 1995), *decision clarified on denial of reh'g*, 664 N.E.2d 394 (Ind. Ct. App. 1996).

¹⁶⁰ *Id.* (citation omitted).

the person providing the services expected to be compensated and (2) when it would be unjust to permit the recipient of the services to benefit from them without payment.”¹⁶¹

Indeed, “[b]ecause a contract implied in law is not really a contract at all, it may even be imposed in the face of a clearly expressed contrary intent if justice so requires.”¹⁶²

To fairly compensate parties for the provisions of valuable services rendered and accepted, courts can award recovery even in the absence of express agreements. This principle applies even if the provider of the services was a sophisticated party familiar with the law of contracts.¹⁶³

2. Joint Endeavors

Contract law and equitable theories allow parties to recover compensation for services that they provided from those who accepted and benefitted from those services. Other private law doctrines allow parties not only to recover the value of the services provided, but also to share in the success of the parties’ combined efforts. Like with the contract- and equity-based doctrines described above, these doctrines allow for the recognition of the joint efforts, and an award of recovery based on evidence of the joint endeavor itself, even when the parties failed to formalize their agreement.¹⁶⁴

One such doctrine is the law of business partnership. If parties expressly agree to form a partnership, that agreement will be recognized and enforced, subject to certain limitations set forth in law.¹⁶⁵

¹⁶¹ *In re Estate of Marks*, 187 S.W.3d 21, 29 (Tenn. Ct. App. 2005).

¹⁶² 1 LORD, *supra* note 151, § 1:6; *see also* DCB Constr. Co. v. Cent. City Dev. Co., 965 P.2d 115, 119 (Colo. 1998) (“[T]he [unjust enrichment] claim arises, ‘not from consent of the parties, as in the case of contracts, express or implied in fact, but from the law of natural immutable justice and equity.’” (quoting DCB Constr. Co. v. Cent. City Dev. Co., 940 P.2d 958, 962 (Colo. App. 1996))).

¹⁶³ *See* Cablevision of Breckenridge, Inc. v. Tannhauser Condo. Ass’n, 649 P.2d 1093, 1097 (Colo. 1982) (holding that a cable company was entitled to payment for services in the absence of an express agreement because “it would be inequitable to allow its use without payment for its value”).

¹⁶⁴ Other scholars explore whether family law doctrine should import the standards that apply to business partnership. *See, e.g.*, Jane Rutheford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539 (1990); Jennifer A. Droback & Antony Page, *A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law*, 41 GA. L. REV. 349 (2007); Larry E. Ribstein, *Incorporating the Hendrickses*, 35 WASH. U. J.L. & POL’Y 273 (2011).

¹⁶⁵ *See, e.g.*, UNIF. P’SHP ACT § 105(a) (1997) (UNIF. L. COMM’N, amended 2013) (“Except as otherwise provided in subsections (c) and (d), the partnership agreement governs: (1) relations among the partners as partners and between the partners and the partnership; (2) the

Moreover, a business partnership can arise out of the parties' conduct, *even in the absence of a formal agreement* and even if the parties do not realize that their conduct might result in the creation of a legally recognized joint endeavor.

These principles are well established. Almost all fifty states follow the Uniform Partnership Act ("the UPA" or "the Act")—either the original 1914 version, or the 1997 revision.¹⁶⁶ The UPA sets forth default rules that apply to a business partnership in the absence of an agreement. Under the Act, a business partnership can be established without any formal action.¹⁶⁷ Moreover, the partnership can arise without the knowledge or realization of the partners.¹⁶⁸ As the comment to section 202 of the Act explains: "a partnership is created by the association of persons whose intent is to carry on as co-owners a business for profit, regardless of their subjective intention to be 'partners.' Indeed, they may inadvertently create a partnership despite their expressed subjective intention not to do so."¹⁶⁹ In other words, "subjective intent and subjective awareness are probative but not dispositive."¹⁷⁰ The critical question is whether the *mutual endeavor* itself was "voluntary and consensual."¹⁷¹ Or, as courts have put it, "[i]t is the intent *to do the things* which constitute a partnership that determines whether individuals are partners, regardless [of whether] it is their purpose to create or avoid the relationship."¹⁷² Again, the critical intent is the intent to do the project together. This can create the implied business partnership regardless of whether the parties had any clear intentions about how to split the profits or whether they had any conversations about or understandings of the legal implication of that joint project.

business of the partnership and the conduct of that business; and (3) the means and conditions for amending the partnership agreement.").

¹⁶⁶ Drobac & Page, *supra* note 164, at 386 & n.173 (stating that nearly all fifty states apply the UPA); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 120 (1993) (stating that "[t]he UPA codifies the law of partnership in forty-nine states").

¹⁶⁷ See Drobac & Page, *supra* note 164, at 389.

¹⁶⁸ See *id.*

¹⁶⁹ UNIF. P'SHIP ACT § 202, cmt.; see also Barry E. Adler, *The Accidental Agent*, 2005 U. ILL. L. REV. 65, 65 ("When parties agree to share profits and control of a business venture, they are deemed under law to have formed a partnership even if the parties have never expressly provided for such a result.").

¹⁷⁰ Drobac & Page, *supra* note 164, at 389–90.

¹⁷¹ See *id.*

¹⁷² *Via v. Oehlert*, 347 S.W.3d 224, 229 (Tenn. Ct. App. 2010) (emphasis added).

If the endeavor is treated as a business partnership, then the law of partnership provides the applicable rules. The basic default “[p]artnership doctrine incorporates the ideal that partners are equal, enjoying equal rights to share in the profits and to control and manage partnership property.”¹⁷³

Moreover, while the parties retain the right to alter or opt out of some of these default rules by agreement, there are limits on their ability to avoid their fiduciary obligations to other partners.¹⁷⁴ In sum, under this doctrine, the law imposes mutual legal rights and obligations on parties to a joint business endeavor even if they did not intend to take those on and even if they did not understand that their actions might cause that result. Again, this concept is well established and indeed applies in almost all fifty states.¹⁷⁵

Consider *Wyatt v. Brown*.¹⁷⁶ The case involved a lawsuit against two people—Dearing and Brown—alleging that they had breached a contract with the plaintiff to dig a well which would provide potable water.¹⁷⁷ The question was whether Dearing and Brown had a partnership and were, therefore, both liable for the breach of the contract.¹⁷⁸ The trial court held both parties liable, but the suit against one of them—Brown—was dismissed by the intermediate appellate court.¹⁷⁹

On appeal to the Tennessee Court of Appeals, Brown argued that the finding that there was no partnership should be affirmed on the ground that “there was no intent to form a partnership and that no partnership can result without such intent.”¹⁸⁰ While there was indeed some evidence of such an intent in the case, the court took pains to clarify that “[i]t is not essential that the parties actually intend to become partners.”¹⁸¹ “[N]or,” the court continued, “is it essential that the parties have knowledge of the legal effect of their acts.”¹⁸² Instead, the critical inquiry is whether they intended “to do a thing”—the joint

¹⁷³ Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 104 (2001); see also Rutheford, *supra* note 164, at 555 (“[P]artnership law expressly favors sharing and equality. For example, the UPA provides for partners to share profits and losses equally, share the management of the business equally, and share partnership property equally.” (footnotes omitted)).

¹⁷⁴ Drobac & Page, *supra* note 164, at 387.

¹⁷⁵ See *id.* at 386 & n.173.

¹⁷⁶ 281 S.W.2d 64 (Tenn. Ct. App. 1955).

¹⁷⁷ *Id.* at 66.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 67.

¹⁸¹ *Id.* (internal citations omitted).

¹⁸² *Id.* (internal citations omitted).

project—that constitutes the partnership.¹⁸³ And that intent to do the thing together governs, even if they did not want to take on the rights and obligations that flow from the joint venture. In determining whether the parties indeed intended to do the thing—the joint venture—courts emphasize the importance of joint contributions, the sharing of decision making, and joint benefits from the endeavor.¹⁸⁴

A closely related concept is that of joint venture or joint adventure. While some courts use the phrase “joint venture” interchangeably with business partnerships, in other jurisdictions, the concept is used to refer to a narrower undertaking.¹⁸⁵ In any event, this common law concept is now widely recognized. Like partnerships, a joint venture or adventures is “[a]n undertaking on the part of two or more persons to combine their property or labor in the conduct of a particular line or general business, for joint profit.”¹⁸⁶ Where this is found, the conduct of the parties “creates the status of a partnership.”¹⁸⁷ Whether or not there are some distinctions between the entities, “[p]artnership law *generally* applies to joint ventures.”¹⁸⁸ As Sarath

¹⁸³ *Id.* (internal citations omitted).

¹⁸⁴ See *In re Thornton's Estate*, 499 P.2d 864, 868 (Wash. 1972) (“[The parties] jointly contributed their labor to the cattle and farming enterprise; . . . they shared in the decision making concerning the enterprise; and . . . they benefited jointly from the profits thereof.”); see also *Bass v. Bass*, 814 S.W.2d 38, 43 (Tenn. 1991) (“The parties pooled their money to purchase ‘food and things,’ to pay bills and, most importantly, to lease the restaurant. . . . When asked about who kept up with the financial aspect of the businesses, Linda Bass stated that ‘mostly, we took care of it together.’”).

¹⁸⁵ See, e.g., *O.K. Boiler & Welding Co. v. Minnetonka Lumber Co.*, 229 P. 1045, 1047 (Okla. 1924) (“The principal distinction between a partnership and a joint adventure is that the latter may relate to a single transaction.”); see also Sarath Sanga, *A Theory of Corporate Joint Ventures*, 106 CALIF. L. REV. 1437, 1449 (2018) (“A few states admit idiosyncratic differences between partnership and joint venture law.”).

Some scholars contend this position that the entities are “distinct legal form[s]” is legally incorrect. Robert Flannigan, *The Joint Venture Fable*, 50 AM. J. LEGAL HIST. 200, 200 (2008–2010) (“It recurrently is assumed that a joint venture is a distinct legal form. That is not a valid assumption. The joint venture claim materialised [sic] only aberrantly in the nineteenth century. A remedial distinction within partnership law led to, or was the springboard for, the assertion that the ‘joint venture’ had a legal identity different from every other form of commercial association.”).

¹⁸⁶ *O.K. Boiler & Welding Co.*, 229 P. at 1047.

¹⁸⁷ *Id.*

¹⁸⁸ Sanga, *supra* note 185, at 1448 (footnote omitted); see also *id.* at 1450–51 (“Thus, . . . in Texas and Maryland, joint venture and partnership are legally equivalent; in all other states, case law has approximately equated the two.”); *Goss v. Lanin*, 152 N.W. 43, 45 (Iowa 1915) (“[A]lthough courts in modern times do not treat a joint venture as identical with a partnership, it is so similar in its nature and in the contractual relationships created by such adventure that the rights as between themselves are governed practically by the same rules that govern partnerships.”).

Sanga explains, “The reasoning behind this typically revolves around a simple inference: joint ventures are, by legal definition, similar to partnerships; therefore, partnership law should apply.”¹⁸⁹

The basis for finding a joint venture is similar to the requirements for an implied business partnership:

To constitute a joint adventure the parties may combine their property, money, efforts, skill or knowledge in some common undertaking, and their contribution in this respect need not be equal or of the same character, but there must be some contribution by each joint adventurer of something promotive of the enterprise.¹⁹⁰

Joint venture can be found even in the absence of an express agreement; it can “be implied, in whole or in part, from the conduct of the parties.”¹⁹¹ A joint venture can be found even if “one adventurer owns all the property used in the joint adventure.”¹⁹² And “while a provision for sharing losses is important in construing an agreement for a joint enterprise, it is not essential, and neither an agreement to share profits nor losses is conclusive in the construction of the contract.”¹⁹³ Ultimately what matters is “the intention of the parties.”¹⁹⁴

These widely accepted principles—recognizing and compensating valuable exchanges in the absence of express agreements or compliance with formalities—are regularly applied even when the parties are relatively sophisticated business players. Take the recent case of *Houle v. Casillas*.¹⁹⁵ The lawsuit “stemmed from difficulties that arose from a real estate investment and renovation project that failed to pan out as planned.”¹⁹⁶ This was intended to be a for-profit business project. The men had some sophistication regarding business projects and concepts. For example, the men decided to “form a limited liability corporation (LLC) [for the purpose of] purchas[ing] the Pershing Property.”¹⁹⁷ But despite their business acumen and their knowledge

¹⁸⁹ Sanga, *supra* note 185, at 1448.

¹⁹⁰ *Rhodes v. Sunshine Mining Co.*, 742 P.2d 417, 421 (Idaho 1987); *see also* *Pittman v. Weber Energy Corp.*, 790 So. 2d 823, 827 (Miss. 2001).

¹⁹¹ *Rhodes*, 742 P.2d at 421; *see also* *Lane v. Nat’l Ins. Agency*, 37 P.2d 365, 368 (Or. 1934) (“The rule of law that a contract of joint adventure may be implied from the conduct of the parties, permits and requires a consideration not only of the testimony directly indicating that there was such a contract, but also of the evidence which shows the course of dealing . . .”).

¹⁹² *Rhodes*, 742 P.2d at 421.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ 594 S.W.3d 524 (Tex. App. 2019).

¹⁹⁶ *Id.* at 532.

¹⁹⁷ *Id.* at 533.

about compliance with formalities, they left other aspects of their business arrangement unmemorialized.¹⁹⁸

When the business venture began to flounder, one of the men—Houle—sued the other and the LLC. Among other things, Houle argued the parties had formed an implied business partnership and that Casillas had violated the implied duty of “good faith and fair dealing.”¹⁹⁹ In response, “Casillas argued that a partnership was not formed, primarily because the parties did not sign a written agreement to that effect.”²⁰⁰ Applying the well-settled rules of business partnership, the court rejected this argument: “The fact that a written agreement was not signed, however, is not dispositive of the question of whether a partnership was actually formed”²⁰¹ Moreover, the facts that the parties could have memorialized *and* knew how to memorialize their joint business venture but failed to do so, did not bar a finding of an implied partnership. As the court put it, “The fact that the parties agreed to form an LLC to effectuate their agreement does not preclude the possibility that the parties already had a pre-existing—and continuing—partnership.”²⁰²

Indeed, courts have even found implied partnerships among people who really should know how to memorialize their agreements—lawyers. *Beckman v. Farmer*²⁰³ involved two lawyers who practiced together, but who “never executed a contract defining the nature of their association and respective rights and duties.”²⁰⁴ When a third lawyer later joined the group, he too never executed a “formal agreement defining his status.”²⁰⁵ The group eventually sought to disentangle their relationships. One of the men, Farmer, sued alleging that the other two had breached their fiduciary duties to him—duties that arose, he argued, by virtue of an implied partnership between the parties.²⁰⁶ Here too, the court said that the key issue is whether the parties intended “to do *the acts* that in law constitute partnership.”²⁰⁷ Ultimately, the court concluded that the parties may have entered into

¹⁹⁸ *Id.* at 547.

¹⁹⁹ *Id.* at 543.

²⁰⁰ *Id.* at 547.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ 579 A.2d 618 (D.C. 1990).

²⁰⁴ *Id.* at 623.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 625–26.

²⁰⁷ *Id.* at 627 (emphasis added) (quoting ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 2.05(c) (1988)).

an implied partnership, even though they failed to formalize such an intent.²⁰⁸

B. Nonmarital Partners and Market Law

The conventional narrative recognizes that nonmarital partners are excluded from the law of the family. The narrative suggests, however, that nonmarital partners are entitled to market law protections. This Section shows that this description is inaccurate or at least incomplete. It is true that most states allow the parties, at least in theory, to assert a range of claims that are available to other legal strangers, including claims arising in contract or equitable theories, as well as various business concepts.²⁰⁹ A closer examination of the law of nonmarriage, however, reveals that courts do not uniformly apply the law of the market to these families. Instead, at the same time the law denies the very existence of these families, it also invokes their familial nature to deny consistent application of well-established market doctrines to some ventures and exchanges between them. The result is that their family-like ventures and bargains are subjected to *more stringent formality requirements* than those that are imposed on sophisticated business partners.

As between true legal strangers, the law authorizes courts to recognize joint business partnerships or ventures that exist in fact, even in the absence of formalities, express agreements, or even an understanding of the consequences of the parties' conduct. But courts refuse to apply these principles equally to recognize and give effect to the joint endeavor of starting and running a family. Instead, for this venture alone, formalities are required.²¹⁰

²⁰⁸ *Id.* at 628–29.

²⁰⁹ *See supra* Section II.A.

²¹⁰ *See, e.g.,* Sands v. Menard, 904 N.W.2d 789, 801 (Wis. 2017) (“Watts [v. Watts] simply provided that cohabitation between unmarried romantic partners is not a bar to an otherwise valid claim of unjust enrichment. It did not provide that the romantic relationship created the claim for relief.” (citing Watts v. Watts, 405 N.W.2d 303 (Wis. 1987))); Salzman v. Bachrach, 996 P.2d 1263, 1268–69 (Colo. 2000) (“We find these authorities persuasive and agree that cohabitation and sexual relations alone do not suspend contract and equity principles. We do caution, however, that mere cohabitation does not trigger any marital rights.”).

In this way, the law of nonmarriage is another example of family law exceptionalism. I explore other types of family law exceptionalism elsewhere. *See, e.g.,* Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. 787, 794 (2015); Courtney G. Joslin, *The Perils of Family Law Localism*, 48 U.C. DAVIS L. REV. 623, 627 (2014); Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1673 (2011).

1. *Business Endeavors but Not Family Endeavors*

This Section considers how business law concepts are—or are not—applied to the joint venture *to create and run a family and to exchanges that allow that joint venture to function*. Recall the basic theory of partnership:²¹¹ the partnership is recognized when the parties combined their “money, assets, labor, or skill . . . with the understanding that” the successes of the partnership “will be shared between them.”²¹² This basic idea aptly describes what happens in many nonmarital families; the parties mutually decide to pool their resources, their labor, and their skills for the purpose of forming a joint venture—a family—with the expectation that they will both benefit from and share the fruits of this collaboration.

Indeed, courts in a few states recognize this core similarity. In Washington State, for example, courts are authorized to distribute property that was acquired by unmarried partners as a result of their joint efforts.²¹³ The rule recognizes that nonmarital families typically involve a pooling of resources and skills for the collective benefit.²¹⁴ As is true in the context of joint business ventures, the law acknowledges that the refusal to divide the property that was acquired as a result of those joint efforts in furtherance of the common venture would result in unfairness.²¹⁵

As is true in the context of joint commercial ventures, not all intimate endeavors are indeed family partnerships. Accordingly, in deciding whether to impose a sharing obligation on the parties, Washington courts are directed to consider a number of factors: “continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties.”²¹⁶ These factors are similar to the factors that are relevant to determining the existence of an implied business partnership or joint venture.²¹⁷ Recall that to determine whether an implied business partnership exists, courts are directed to assess whether “it appears that the individuals involved have entered into a business relationship for profit, combining their property, labor, skill, experience, or

²¹¹ See *supra* Section II.A.

²¹² Bass v. Bass, 814 S.W.2d 38, 41 (Tenn. 1991).

²¹³ See, e.g., Connell v. Francisco, 898 P.2d 831, 834–35 (Wash. 1995).

²¹⁴ See, e.g., *id.* at 834.

²¹⁵ See, e.g., *id.* at 836 (“[T]he property acquired during the relationship should be before the trial court so that one party is not unjustly enriched at the end of such a relationship.”).

²¹⁶ *Id.* at 834.

²¹⁷ See *supra* Section II.A.

money.”²¹⁸ Then, as is true with regard to implied business partnerships, if the court determines the parties did indeed form a family relationship, the court is directed to “make[] a just and equitable distribution of [the partnership’s] property.”²¹⁹

A small minority of other jurisdictions follow a similar approach. For example, in *Beal v. Beal*,²²⁰ the Oregon Supreme Court announced a rule that allows the court to distribute the assets accumulated by the joint family venture if the parties either expressly or, importantly, *impliedly* “intended to pool their resources for their common benefit during the time they lived together.”²²¹ The *Beal* court concluded the parties intended to pool their resources for their common benefit.²²² The court reached this conclusion by looking to facts common of many relationships: “Neither party,” the court explained, “made any effort to keep separate accounts or to total their respective contributions for reimbursement purposes, and, although they had separate checking accounts, they had a joint savings account. Finally, the living arrangement itself is evidence that the parties intended to share their resources.”²²³ Where this type of joint living and pooling of resources is evident, Oregon courts are authorized to treat the endeavor as a partnership and to distribute the partnership’s property consistent with the “express or implied intent of those parties.”²²⁴

A more recent case involved a couple who lived together for twenty-one years, during which time they raised three children together.²²⁵ As the court explained, during their twenty-one years together, they pooled their labor and resources together for the benefit of the joint endeavor—the running of their family:

Petitioner[, Ronald Joling,] worked outside the home as a general contractor. Respondent[, Jackie Joling,] maintained the parties’ home, raised the children, and, for a time, homeschooled them. Respondent testified that her work at home included cooking, cleaning, laundry, shopping, gardening, and helping to build the family home. She did “everything” when it came to household chores.²²⁶

²¹⁸ *Bass v. Bass*, 814 S.W.2d 38, 41 (Tenn. 1991).

²¹⁹ *In re Marriage of Pennington*, 14 P.3d 764, 770 (Wash. 2000).

²²⁰ 577 P.2d 507 (Or. 1978).

²²¹ *Id.* at 510.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ See *In re Domestic P’ship of Joling*, 443 P.3d 724, 726 (Or. Ct. App. 2019).

²²⁶ *Id.*

Ronald filed an action seeking a dissolution and for child custody.²²⁷ Jackie counterclaimed, alleging “breach of a claimed contract of marriage.”²²⁸ Ultimately, the court applied the *Beal* rule to the parties’ relationship. To determine whether Jackie was entitled to relief under the rule, the court said the critical question was whether the parties’ intended to pool and share their common resources.²²⁹ In assessing this issue, the court identified a number of relevant factors, including:

[T]heir pooling of their resources for their common benefit; their financial arrangements that indicated a sharing of resources, which included a joint saving account; and their combined living arrangements. We also consider as relevant to the parties’ implicit intent, “among other things, whether the parties held themselves out to the community as married, how title to the property was held, and the parties’ respective financial and nonfinancial contributions to their assets.”²³⁰

Like the concept of joint venture or implied business partnership, if the parties intended to do the thing together—here, the creation and running of a family—that intent creates the joint relationship. Once found, the court can distribute the assets accumulated by virtue of the joint venture. As with joint “business” ventures, the distribution of the “domestic” partnership’s assets need not be an equal distribution; it is based on the parties’ intentions and their respective contributions.

Nevada courts follow a similar approach. The seminal Nevada case involves a couple who were first married for about seven years.²³¹ “Almost immediately after their divorce,” however, “they resumed cohabitation and continued to live together” for another twenty-four years.²³² During the course of their life together, the couple had three children.²³³ After their separation, the woman, Virginia, brought an action seeking a distribution of the property acquired during the course of their nonmarital relationship. “Her complaint alleged that during the course of their relationship, she and respondent had been holding themselves out as husband and wife and had ‘pooled all monies earned . . . as if they were a marital community or a general part-

²²⁷ *Id.* at 727.

²²⁸ *Id.*

²²⁹ *Id.* at 729.

²³⁰ *Id.* (citations omitted) (quoting *In re Domestic P’ship of Staveland & Fisher*, 433 P.3d 749, 754 (Or. Ct. App. 2018)).

²³¹ *Hay v. Hay*, 678 P.2d 672, 673 (Nev. 1984).

²³² *Id.*

²³³ *Id.*

nership.’”²³⁴ The court held that Virginia’s allegations were “sufficient to state a cause of action.”²³⁵

These decisions apply a rule that is similar to the rule of implied business partnerships. Like with implied business partnerships, the question is whether they intended to do the thing—here that “thing” being the pooling their assets, skills, and resources to create and run a family for their mutual benefit. As is true with regard to implied business partnerships, in the rules described above, courts can “ascertain” that intent by looking to “the acts of the parties.”²³⁶ Like with implied business partnerships, it is not “necessary that the parties have an understanding of the legal effect of their acts.”²³⁷ Where they intend to do that thing, the court can treat the parties as being partners and, accordingly, divide the assets of the partnership.²³⁸ And, as with joint business ventures, in these jurisdictions, courts can recognize the decision to pool resources, skills, and assets for the purpose of forming and running a domestic partnership, even in the absence of a formal agreement.

But, critically, the approach described above represents a *distinct minority approach* in the United States. The total number of jurisdictions that follow this approach can be counted on one hand.²³⁹ Instead, courts in the overwhelming majority of jurisdictions categorically refuse to apply rules that would authorize them to recognize and protect the mutual joint endeavor of pooling resources, skills, and labor to create and run a family in the absence of formalities.²⁴⁰

²³⁴ *Id.*

²³⁵ *Id.* at 674.

²³⁶ *Montgomery v. Montgomery*, 181 S.W.3d 720, 726 (Tenn. Ct. App. 2005) (discussing the standards for finding an implied business partnership with regard to for-profit ventures).

²³⁷ *Id.* at 727 (citing *Roberts v. Lebanon Appliance Serv. Co.*, 779 S.W.2d 793, 795–96 (Tenn. 1989)).

²³⁸ Under the rules governing implied business partnerships, a finding that the partnership exists does not necessarily mandate a fifty-fifty split. *See, e.g., id.* at 729 (“We certainly agree with Defendant that the contributions of the partners may be important when determining how much of an interest each partner has in an implied partnership.”).

²³⁹ These jurisdictions include Oregon, Nevada, and Washington. *See supra* notes 213–235. Some scholars include some but not all of these states in this category. *See, e.g., Antognini, supra* note 113, at 16 & n.69 (“A limited number of states—two[, Washington and Nevada]—apply the rules regulating property distribution at divorce to the end of a nonmarital relationship.”).

²⁴⁰ *See, e.g., Kozlowski v. Kozlowski*, 403 A.2d 902, 905 (N.J. 1979) (“The contract between the parties . . . was not a partnership or a joint venture entitling plaintiff to a share of defendant’s accumulated assets.”); *Martin v. Coleman*, 19 S.W.3d 757, 761–62 (Tenn. 2000) (“To hold that these retirement benefits are available as partnership assets would require this Court to expand the concept of implied partnership beyond the business relationship now conceded by the parties. In essence, we would be required to hold that unmarried couples may create an implied partnership simply by their continued cohabitation. We decline to do so.”).

An illustrative case is one encountered earlier—*Martin v. Coleman*.²⁴¹ As described earlier, the case concerned Robert and Delores Coleman. The parties divorced after ten years of marriage.²⁴² Thereafter, however, the parties continued to cohabit together, with their child in common, for another sixteen years.²⁴³ Throughout their relationship, “Delores Coleman did not work outside the home.”²⁴⁴ Instead, she “indirectly contributed . . . by providing all of those amenities and benefits customarily provided by a wife.”²⁴⁵ Robert’s contributions to the family venture were to serve as “the family’s sole provider.”²⁴⁶ The parties’ conduct indicated that they intended to form a family, and that they, at least implicitly, decided to pool their efforts to support the running of that unitary family for the benefit of both of them. Delores’ work in the home allowed Robert to focus on his work outside the home. In turn, Robert’s income not only supported the family but allowed the family to accumulate assets.

At the conclusion of their cohabitation, Robert filed a lawsuit seeking “to have the couple’s jointly-held accounts and home conveyed to him in his name.”²⁴⁷ In response, Delores argued that the parties’ relationship constituted an implied partnership and, accordingly, sought a fifty percent division of all of the assets of the partnership.²⁴⁸ Despite the fact that the parties clearly combined their labor and skills to run a family together, the Supreme Court of Tennessee rejected this argument. “In essence,” the court explained, “we would be required to hold that unmarried couples may create an implied partnership simply by their continued cohabitation.”²⁴⁹ This, the court continued, “[w]e decline to do.”²⁵⁰

Under private law doctrines, courts can recognize the reality of joint endeavors. Nonetheless, even though the law formally declares nonmarital partners to be legal strangers, courts and legislatures in the United States almost uniformly refuse to allow for the possibility that the creation and running of a nonmarital family could constitute a

²⁴¹ 19 S.W.3d at 757.

²⁴² *Id.* at 759.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 760 (quoting trial court decision).

²⁴⁶ *Id.* at 759.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 759–60.

²⁴⁹ *Id.* at 761–62.

²⁵⁰ *Id.* at 762; see also *Kozlowski v. Kozlowski*, 403 A.2d 902, 905 (N.J. 1979) (“The contract between the parties . . . was not a partnership or a joint venture entitling plaintiff to a share of defendant’s accumulated assets.”).

joint venture entitling the contributors to share in the venture's success. Those business principles, courts declare, cannot be applied to the joint endeavor of creating and running a nonmarital family. As a Tennessee court put it in *Via v. Oehlert*,²⁵¹ "to hold that the parties entered into a joint venture . . . solely because they lived together and jointly contributed to the appreciation of real property would pull the theory of implied partnership/joint venture too far from its moorings."²⁵²

If two business partners had engaged in the similar conduct for the purpose of making money—if, for example, they started and ran a bed and breakfast and divided the tasks in similar ways, with one performing primarily "domestic" aspects of the venture and the other performing the more "business-like" parts—the joint venture could be recognized. It could be recognized even if the parties failed to memorialize the joint nature of the venture and even if the parties did not understand their actions would have that legal effect. Where the venture is viewed as a commercial one between business partners, courts are authorized to find and give effect to a joint venture that exists in fact. But because the conduct was engaged in for the purpose of creating and running their own family, these rules did not and could not be applied.

2. *Business Exchanges but Not Family Exchanges*

Although the law declines to recognize the joint nature of the family creation project itself in the absence of formalization, the parties are permitted to assert and, if proven, to recover based on *individual transactions* that occur during the course of that overall joint endeavor.²⁵³ Here too, however, relief is incomplete. And here too the law applies a different rule to family-like transactions. Courts are generally open to applying the usual market rules to exchanges that are not family-like in nature. For example, if one partner worked in the other partner's business without pay, they may be able to recover for their unpaid market labor even where no express agreement was exe-

²⁵¹ 347 S.W.3d 224 (Tenn. Ct. App. 2010).

²⁵² *Id.* at 230; see also *Martin*, 19 S.W.3d at 761–62 ("To hold that these retirement benefits are available as partnership assets would require this Court to expand the concept of implied partnership beyond the business relationship We decline to do so.").

²⁵³ See, e.g., *Developments in the Law*, *supra* note 11, at 2134–35 ("Instead, courts have traditionally focused on *identifiable* and *substantial* contributions to the acquisition, preservation, or enhancement of a specific asset owned by the defendant (categories that exclude domestic labor)."). For scholarship arguing in favor of rules that allow courts to parse and enforce distinct agreements between nonmarital partners, see Matsumura, *supra* note 3, at 1025.

cuted.²⁵⁴ The same, however, cannot be said for suits to recover for “domestic” services.²⁵⁵

Consider *Story v. Lanier*.²⁵⁶ The case involved claims between unmarried partners—Mary Story and Malcolm Lanier—who lived together for thirty years.²⁵⁷ Ms. Story alleged that “during the course of their thirty year relationship, she and Mr. Lanier purchased both real and personal property together, and that through her contributions to the relationship Mr. Lanier was able to amass substantial funds in his bank accounts.”²⁵⁸ The property in dispute included a fifty-eight-acre farm that was originally owned by Ms. Story that she later transferred to Mr. Lanier;²⁵⁹ a restaurant owned by Mr. Lanier in which Ms. Story worked “without compensation”;²⁶⁰ and a bank account titled only in Mr. Lanier’s name, into which was deposited income from the farm and the restaurant.²⁶¹

With respect to the individual exchanges that occurred between the parties, the court awarded Ms. Story relief with respect to her “business” contributions but refused to grant recovery for her domestic contributions. Specifically, the trial court found “that the parties engaged in an implied business partnership when they purchased the restaurant.”²⁶² This finding was challenged on appeal. The appellate court affirmed, applying the usual rules of implied business partnerships.²⁶³ The court thus explained that the lack of a written agreement was not dispositive. Instead, the court clarified that an implied busi-

²⁵⁴ See, e.g., *Carney v. Hansell*, 831 A.2d 128, 136 (N.J. Super. Ct. Ch. Div. 2003) (awarding woman “quantum meruit recovery” for “some fifteen” years of labor in the towing business developed during their relationship).

²⁵⁵ See, e.g., *Joslin*, *supra* note 1, at 934 (“Finally, under whatever theory, implied contract or equitable doctrines, the law almost uniformly undervalues or denies value altogether to ‘domestic’ or ‘wifely’ contributions.”); see also *Developments in the Law*, *supra* note 11, at 2134 (“Former unmarried cohabitants are able to bring claims in restitution in many states, but courts almost invariably deny recovery based on the value of domestic labor . . .” (footnote omitted)); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 28 cmt. d (AM. L. INST. 2011) (“Claims to restitution based purely on domestic services are less likely to succeed, because services of this character tend to be classified among the reciprocal contributions normally exchanged between cohabitants whether married or not.”).

²⁵⁶ 166 S.W.3d 167 (Tenn. Ct. App. 2004).

²⁵⁷ *Id.* at 170.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 171–72.

²⁶⁰ *Id.* at 172.

²⁶¹ See *id.* at 172–73 (stating that “[t]he profits from the restaurant went solely into Mr. Lanier’s bank account” and that “the accountant for the farming business . . . paid Mr. Lanier directly”).

²⁶² *Id.* at 175.

²⁶³ *Id.* at 178.

ness partnership can be established in the absence of a written agreement.²⁶⁴ Where there is no written agreement,

no one fact or circumstance may be pointed to as a conclusive test. . . . If the parties' business brings them within the scope of a joint business undertaking for mutual profit—that is to say if they place their money, assets, labor, or skill in commerce with the understanding that profits will be shared between them—the result is a partnership whether or not the parties understood that it would be so.²⁶⁵

The court affirmed the holding that the parties had an implied business partnership with respect to the restaurant specifically because Ms. Story's contributions were of a business rather than a purely "domestic" nature: "We disagree with Mr. Lanier's assertion that the only possible justification for the trial court finding an implied partnership in the restaurant was the parties' cohabitation."²⁶⁶ Instead, Ms. Story presented evidence "that she worked for free [in the restaurant]" and that she "was responsible for keeping the books for the restaurant."²⁶⁷

The same court, however, affirmed the holding that the parties did not have an implied business partnership with respect to the farm or Mr. Lanier's bank account.²⁶⁸ On these issues, the court explained:

While we are mindful of Ms. Story's contributions to the relationship following [the transfer of the ownership of the farm from Ms. Story to Mr. Lanier], we are directed to focus our attention upon the facts as they relate to the parties' decision to enter this particular transaction, not the facts as they relate to domestic matters.²⁶⁹

That is, the usual rules applied to any commercial bargains between the parties, but not to bargains involving domestic contributions. Indeed, in an earlier case, the Tennessee Supreme Court was even clearer. With respect to business transactions between former nonmarital partners, "ordinary laws pertaining to partnership, not the

²⁶⁴ *Id.* at 176.

²⁶⁵ *Id.* (quoting *Bass v. Bass*, 814 S.W.2d 38, 41 (Tenn. 1991)).

²⁶⁶ *Id.* at 178.

²⁶⁷ *Id.*; see also *Bass*, 814 S.W.2d at 44 ("[T]he ordinary laws pertaining to partnership, not the laws of domestic relations, apply in a situation such as this where a *business* partnership can be implied from the facts and circumstances, a meretricious relationship notwithstanding. The fact that the parties may be involved socially should not, and does not, slam shut the courthouse doors to a claimant such as Linda Bass who invests time, money, labor, and energy into establishing a profit producing enterprise.").

²⁶⁸ *Story*, 166 S.W.3d at 178–79.

²⁶⁹ *Id.* (citing *Martin v. Coleman*, 19 S.W.3d 757, 761–62 (Tenn. 2000)).

laws of domestic relations, apply.”²⁷⁰ But while the rights and obligations of parties are generally governed by these “ordinary laws” of the market, market law cannot be applied to “domestic matters” that are transacted between the parties.²⁷¹

Thus, at the very same time that the law denies that the partners are family members, the law also refuses to apply private law doctrines equally to the “family”-based or family-like exchanges that occur in these relationships. Instead, additional requirements or burdens are imposed on these bargains and these alone. These heightened formality requirements are imposed most obviously and directly in those states that purport to shut the door entirely on claims between former nonmarital cohabitants. Three states—Minnesota,²⁷² New Jersey,²⁷³ and Texas²⁷⁴—have statutory provisions that expressly impose requirements not imposed on true third parties. The statutes purport to deny any recovery to former cohabitants *in the absence of a written contract*.²⁷⁵ As the Senate sponsor of the Texas legislation explained, the statute was intended to “do away with palimony lawsuits.”²⁷⁶

Despite these apparently sweeping bars to relief, courts in these states *do* award relief for business-like contributions between the former cohabitants and will do so consistent with the usual rules. Hence for these business-like contributions, courts will award relief for such

²⁷⁰ *Martin*, 19 S.W.3d at 761.

²⁷¹ *See id.* at 761–62.

²⁷² MINN. STAT. § 513.075 (2021); *see also id.* § 513.076 (“Unless the individuals have executed a contract complying with the provisions of section 513.075, the courts of this state are without jurisdiction to hear and shall dismiss as contrary to public policy any claim by an individual to the earnings or property of another individual if the claim is based on the fact that the individuals lived together in contemplation of sexual relations and out of wedlock within or without this state.”).

²⁷³ N.J. STAT. ANN. § 25:1-5(h) (West 2010) (providing that “[a] promise by one party to a non-marital personal relationship to provide support or other consideration for the other party, either during the course of such relationship or after its termination” is not enforceable “unless the agreement or promise, upon which such action shall be brought or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized,” and, further, that “no such written promise is binding unless it was made with the independent advice of counsel for both parties”).

²⁷⁴ TEX. BUS. & COM. CODE ANN. § 26.01 (West 2021) (providing that “[a] promise or agreement” made on “consideration of nonmarital conjugal cohabitation” is “not enforceable unless . . . it, is (1) in writing; and (2) signed by the person to be charged with the promise or agreement”).

²⁷⁵ Thus, while other legal strangers can assert claims arising in implied contract or based on equitable theories, the statute purports to provide that such claims between cohabitants are barred.

²⁷⁶ *Zaremba v. Cliburn*, 949 S.W.2d 822, 826 (Tex. App. 1997) (quoting from the Second and Third Floor Readings of S.B. 281 on the Floor of the Senate, 70th Leg., Reg. Sess., (Tex. 1987)).

contributions *even in the absence of a written contract*. But, for family-like contributions, as the statute directs, a “writing”²⁷⁷ or a written “contract”²⁷⁸ is required. Take the recent Minnesota case of *Tiedke v. Tiedke*.²⁷⁹ As noted above, Minnesota is one of the three states that, by statute, purports to bar relief between former cohabitants in the absence of a written agreement. The parties—Kathleen Marie Freitag and Alex Lee Tiedke—cohabited for two years prior to their marriage.²⁸⁰ During that two-year premarital cohabitation period, they “collaborated in various ways in the acquisition, renovation, and renting of four residential properties.”²⁸¹ “They also acquired, renovated, and rented two additional residential properties during their marriage.”²⁸² Importantly, “[t]he parties generally did not enter into written agreements to govern their enterprise, did not attempt to identify and maintain their respective interests in the properties, and did not consistently maintain accounting records for the properties.”²⁸³ In the divorce proceeding, the parties disputed their respective interests in their properties, including the ones purchased during the parties’ cohabitation.²⁸⁴ The trial court held that Freitag had an interest in the four properties acquired during their cohabitation.²⁸⁵

On appeal, Tiedke argued that no relief was permissible because the parties had not entered into a written agreement regarding the properties, as required by the anti-palimony statute.²⁸⁶ That statute provides that

a contract between a man and a woman who are living together in this state out of wedlock . . . is enforceable as to terms concerning the property and financial relations of the parties only if . . . the contract is written and signed by the parties ²⁸⁷

²⁷⁷ TEX. BUS. & COM. CODE ANN. § 26.01 (providing that “an agreement made . . . on consideration of nonmarital conjugal cohabitation” is “not enforceable unless . . . it, is (1) in writing; and (2) signed by the person to be charged with the . . . agreement”).

²⁷⁸ MINN. STAT. § 513.075 (2021).

²⁷⁹ No. A18-1492, 2019 WL 3545816 (Minn. Ct. App. Aug. 5, 2019) (unpublished opinion).

²⁸⁰ *Id.* at *1.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.* at *1–2.

²⁸⁵ *Id.* at *3.

²⁸⁶ *Id.* at *4 (“On appeal, Tiedke contends that, because the parties did not have a written agreement concerning the four properties, Freitag’s claims to property interests in the four properties should be barred by the so-called anti-palimony statutes.”).

²⁸⁷ MINN. STAT. § 513.075 (2021); *see also id.* § 513.076 (“Unless the individuals have executed a contract complying with the provisions of section 513.075, the courts of this state are

The court, however, rejected Tiedke's argument and held that the written contract requirement did not bar Freitag's request for recovery regarding the premarital properties.²⁸⁸ The court agreed, instead, with Freitag who argued that the statute did not bar claims based "on the existence of an implied agreement *arising from a business partnership between the parties*."²⁸⁹ Thus, even in states with apparently sweeping statutes, courts treat market and family bargains differently. For business transactions, the usual rules apply, and courts can grant relief even in the absence of formalities, like a written contract.²⁹⁰ The atypical absolute requirement of a written contract applies only to claims that arise out of the quotidian exchanges of running a family.

This result is not anomalous. As previously stated, New Jersey also has a statute requiring any agreements between cohabitants to be in writing.²⁹¹ New Jersey takes this position even a step farther by requiring the written agreement to have been entered into *with the advice of counsel for both parties*.²⁹² Here too, however, it turns out that despite the unqualified language in the statute, this extraordinarily stringent set of requirements only applies with regard to the provision of domestic services in exchange for something else. To the extent the parties participated in a "business" transaction, the usual rules apply; bargains can be enforced in the absence of such formalities.

An illustrative case is *C.N. v. S.R.*²⁹³ "[T]he parties resided together for a substantial period and had a child in common."²⁹⁴ During the course of their relationship, "[t]he parties comported their behavior in a manner akin to that of a married couple—cohabitating; sharing household expenses and responsibilities; and co-parenting."²⁹⁵

without jurisdiction to hear and shall dismiss as contrary to public policy any claim by an individual to the earnings or property of another individual if the claim is based on the fact that the individuals lived together in contemplation of sexual relations and out of wedlock within or without this state.").

²⁸⁸ *Tiedke*, 2019 WL 3545816, at *4.

²⁸⁹ *Id.* (emphasis added); *see also id.* at *5 ("Thus, the district court did not err by ruling that the so-called anti-palimony statutes do not bar Freitag from asserting a claim to property interests in the four residential rental properties that the parties acquired before their marriage.").

²⁹⁰ *See id.* at *4; *see also In re Estate of Eriksen*, 337 N.W.2d 671, 674 (Minn. 1983) ("Potvin's claim is similar to the claim made by a joint venturer or partner, as the probate court noted in its memorandum. Sections 513.075 and 513.076 and the cases dealing with division of property between an unmarried cohabiting man and woman are not apropos.").

²⁹¹ N.J. STAT. ANN. § 25:1-5(h) (West 2010).

²⁹² *Id.*

²⁹³ 230 A.3d 1003 (N.J. Super. Ct. Ch. Div. 2020).

²⁹⁴ *Id.* at 1008.

²⁹⁵ *Id.*

One of the assets in dispute was a home in which they all lived.²⁹⁶ Despite the fact that both parties contributed financial funds, skills, and other resources to the property, the home was titled in only S.R.'s name.²⁹⁷

The court found that the man's claim to an interest in the house was not barred by New Jersey's anti-palimony statute. Despite the statute, the court held that the home constituted a "joint venture," and, thus, under the usual rules such a claim could be recognized and an award could be granted even though the joint venture was "not memorialized in writing."²⁹⁸ With respect to this "business" transaction, the question was simply whether the parties "create[d] an interest in the singular venture."²⁹⁹ Such an intent could be "inferred by the parties' conduct" even though they failed to formalize that intent in writing.³⁰⁰ "Accordingly," the court concluded that "*even in the absence of a writing*, C.N. is entitled to partition of the shared residence as this equitable remedy survived the enactment of Subsection (h), for unmarried, cohabitating intimates engaged in a joint venture."³⁰¹

Despite its seemingly all-encompassing language, it is thus only when the person who has been laboring in the home seeks compensation that this unusual rule requiring extremely heightened formality requirements—a signed written contract entered into with the advice of counsel—applies. For all other transactions between the parties—exchanges that involve more traditional "business" ventures—the usual rules of the market apply.

Although this approach—imposing heightened formalities on family-like bargains between nonmarital cohabitants—is not expressed in codified law, a similar pattern emerges in states that purport to bar all claims between cohabitants as a matter of case law, including Illinois. Illinois's rule was first declared by the Illinois Supreme Court in 1979.³⁰² In that famous or infamous case—*Hewitt v. Hewitt*—the court declared: "We accordingly hold that plaintiff's

²⁹⁶ *Id.* at 1005.

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 1008.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.* (emphasis added); *see also* *Maeker v. Ross*, 62 A.3d 310, 320–21 (N.J. Super. Ct. App. Div. 2013) (holding that whether or not a claim between unmarried cohabitants is governed by the anti-palimony statute depends on whether the claim is "for services rendered to [the] defendant on account of the business" or for "the provision of homemaking services and companionship" (quoting *Carney v. Hansell*, 831 A.2d 128, 135 (N.J. Super. Ct. Ch. Div. 2003))), *rev'd on other grounds*, 99 A.3d 795 (N.J. 2014).

³⁰² *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1211 (Ill. 1979).

claims are unenforceable for the reason that they contravene the public policy, implicit in the statutory scheme of the Illinois Marriage and Dissolution of Marriage Act, disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants.”³⁰³ And lest one think that this decision has become anachronistic and no longer applicable, the Illinois Supreme Court reaffirmed the rule in the 2016 case of *Blumenthal v. Brewer*.³⁰⁴ “When considering the property rights of unmarried cohabitants,” the court explained, “our view of *Hewitt*’s holding has not changed.”³⁰⁵ As explained by the court, under the *Hewitt* rule “individuals can enter into an intimate relationship, but *the relationship itself* cannot form the basis to bring common-law claims.”³⁰⁶

Importantly, however, the rule does not bar cohabiting parties from “mak[ing] express *or implied* contracts with one another . . . if they are not based on a relationship indistinguishable from marriage.”³⁰⁷ Lest one miss the import of this language, the case law makes it clear. To the extent that a cohabitant is seeking compensation for *labor in the home*—like Eileen Brewer and Victoria Hewitt were—the usual rules do not apply; instead, the claim is barred.³⁰⁸ If, however, the party is seeking recovery for a transaction not involving a traditional family-like bargain of domestic labor or future support, the opposite is true, even in states like Illinois that purport to bar all claims between cohabitants.³⁰⁹ For example, in *Spafford v. Coats*,³¹⁰ the court held that the plaintiff was entitled to equitable relief with respect to a number of vehicles she paid for during her relationship but which were titled solely in her partner’s name.³¹¹ The court distinguished the claim from the one asserted in *Hewitt*:

³⁰³ *Id.*

³⁰⁴ 69 N.E.3d 834 (Ill. 2016).

³⁰⁵ *Id.* at 853.

³⁰⁶ *Id.* at 859 (emphasis added).

³⁰⁷ *Id.* at 860 (emphasis added).

³⁰⁸ *See id.* at 852 (“In rejecting Victoria’s public policy arguments, this court recognized that cohabitation by the unmarried parties may not prevent them from forming valid contracts about independent matters, for which sexual relations do not form part of the consideration and do not closely resemble those arising from conventional marriages. However, that was not the type of claim Victoria brought; thus, her claim failed.” (citation omitted)).

³⁰⁹ *See, e.g., Spafford v. Coats*, 455 N.E.2d 241, 244–45 (Ill. App. Ct. 1983) (“[P]laintiff asserts that since the claim to property is not founded simply upon proof of cohabitation or the plaintiff’s performance of domestic services, appropriate restitutionary remedies may be used to prevent unjust enrichment in property disputes between the cohabitants.”).

³¹⁰ 455 N.E.2d 241 (Ill. App. Ct. 1983).

³¹¹ *Id.* at 245–46. As the *Blumenthal* court explained: “Spafford had actually paid for the motor vehicles herself. Because Spafford’s claims had an economic basis independent of the

The plaintiff's claims in *Hewitt* for one-half of defendant's property were *based primarily upon her services as housekeeper and homemaker* However, where the claims do not arise from the relationship between the parties and are not rights closely resembling those arising from conventional marriages, we conclude that the public policy expressed in *Hewitt* does not bar judicial recognition of such claims.³¹²

Moreover, for these commercial-like bargains, not only are they not barred, but the usual private law rules apply. Relief is therefore available even in the absence of an express agreement.³¹³

A similar pattern emerges in states that follow the *Marvin* rule. Again, to restate the usual market rules recounted earlier, “[o]rdinarily and without more, where one person renders services for another which are known to and accepted by him, the law implies a promise on his part to pay therefor.”³¹⁴ This usual rule is applied to market transactions between nonmarital partners. But where the service provided is of a domestic nature, the usual rules do not apply. Instead, a heightened standard applies, and the person seeking relief must overcome the presumption that these services were provided gratuitously.³¹⁵

Consider New Jersey. Today, New Jersey has a statutory provision regulating agreements between nonmarital partners.³¹⁶ But before this statute was enacted in 2010, New Jersey followed a variation of the *Marvin* decision. An illustrative case is *Carney v. Hansell*.³¹⁷ The case involved a different-sex couple—Joann Carney and Christopher Hansell—who lived together as a nonmarital family for over sixteen years.³¹⁸ Joann “maintained the house, did the laundry, food shopping, cooking and was responsible for the primary care of their son.”³¹⁹ Although Christopher “paid for most expenses connected with the home, [Joann] spent her disability check each month

nonmarital, cohabiting relationship, she was permitted to recover those independent contributions.” *Blumenthal*, 69 N.E.3d at 854 (citation omitted).

³¹² *Spafford*, 455 N.E.2d at 245 (emphasis added).

³¹³ See *Blumenthal*, 69 N.E.3d at 860 (holding that the *Hewitt* rule does not bar cohabiting parties from “mak[ing] express or implied contracts with one another . . . if they are not based on a relationship indistinguishable from marriage” (emphasis added)).

³¹⁴ *Scully v. Scully's Ex'r*, 28 Iowa 548, 550–51 (1870).

³¹⁵ *Id.* at 551.

³¹⁶ N.J. STAT. ANN. § 25:1-5(h) (West 2010).

³¹⁷ 831 A.2d 128 (N.J. Super. Ct. Ch. Div. 2003).

³¹⁸ *Id.* at 130.

³¹⁹ *Id.* at 131.

for groceries, toiletries and clothes for their son.”³²⁰ In addition to this traditional domestic exchange, “the parties [also] began to build [a] towing business” during their relationship.³²¹ Along with Joann’s disability check, this towing business was a primary source of income for the family.³²² “The business was built from the ground up and both parties contributed substantially to its success.”³²³ Joann handled many of the administrative tasks associated with the business. She “handled much of the paperwork,” she “wrote and paid many of the business bills,” “[s]he went to court to prosecute bad checks, she picked up parts from auto parts dealers, and she prepared monthly invoices.”³²⁴ As a result of their joint efforts, this key source of income for the family “prospered.”³²⁵

When their over sixteen-year relationship came to an end, all the assets accumulated during their relationship were titled in Christopher’s name.³²⁶ Joann then filed a lawsuit seeking a share of these jointly accumulated assets based on all of her contributions to the relationship—those in and out of the home. But, again, the market/home distinction appears. Her “business” services could be recognized and compensated under existing market doctrines.³²⁷ The court also concluded these services were not provided gratuitously; instead, the court found she provided them with the expectations that she would be able to share in the fruits of those efforts.³²⁸ As the court put it, “plaintiff did not gratuitously donate her work, time, effort, enthusiasm and zeal for this business enterprise for some 15 years for nothing. She felt the business and her relationship with defendant represented her future financial security. She clearly expected to be compensated for her efforts.”³²⁹

This assumption (or presumption) that business contributions were not provided gratuitously is consistent with the usual rules of the market. In sharp contrast, however, the court flatly refused to provide Joann any relief for her almost twenty years of domestic contributions. That claim, the court said, “must fail.”³³⁰ Although the court con-

³²⁰ *Id.*

³²¹ *Id.*

³²² *See id.* at 131–32.

³²³ *Id.* at 131.

³²⁴ *Id.* at 131–32.

³²⁵ *See id.* at 132.

³²⁶ *See id.* at 132–33.

³²⁷ *See id.* at 135.

³²⁸ *See id.*

³²⁹ *Id.*

³³⁰ *Id.*

cluded that Joann had not already received the benefit of her bargain with respect to her business contributions, the same court, with regard to the very same parties and the very same relationship, concluded that she had already “received the benefit of the bargain” with regard to her domestic contributions.³³¹

The law in other *Marvin* jurisdictions is similar.³³² Commercial exchanges are governed by the usual rules. By contrast, claims “based entirely upon the provision of homemaking services and companionship” are “barred.”³³³ Moreover, as these cases illustrate, inconsistent rules are applied even as to claims between the very same people, arising out of the same relationship. Indeed, courts in some states, like New Hampshire, have adopted a blackletter rule to this effect. New Hampshire allows nonmarital parties to pursue claims under the law of the market.³³⁴ Thus, “upon the dissolution of a non-marital living arrangement, either party may seek a judicial determination of the equitable rights of the parties in particular property.”³³⁵ This rule allows the parties to seek relief under implied contracts, various partnership and joint venture doctrines, and equitable theories. At the same time, New Hampshire courts have repeatedly and expressly declined “to extend the holding of that case . . . to include recovery for domestic services” absent an express contract.³³⁶

This Section reveals a curious feature of nonmarriage. With respect to endeavors or exchanges of a commercial nature, courts do indeed apply private law doctrines. This is true across jurisdictions and across jurisdictional approaches. Even jurisdictions that are described as denying all relief for nonmarital partners generally allow relief for business-like services.³³⁷ These traditional business-like endeavors and

³³¹ *Id.*; see also *Maeker v. Ross*, 62 A.3d 310, 320 (N.J. Super. Ct. App. Div. 2013) (concluding that commercial exchanges were “an entirely different matter” from those in which a person is seeking relief for domestic contributions (quoting *Carney*, 831 A.2d at 135)), *rev’d on other grounds*, 99 A.3d 795 (N.J. 2014).

³³² See *Schwegmann v. Schwegmann*, 441 So. 2d 316, 325 (La. Ct. App. 1983) (“Our jurisprudence appears settled to the effect that predicated upon equitable principles, the claims of a paramour and concubine will be recognized and enforced with respect to joint or mutual commercial ventures, provided such enterprises arose independently of the illicit relationship.” (quoting *Guerin v. Bonaventure*, 212 So. 2d 459, 461 (La. Ct. App. 1968))).

³³³ *Maeker*, 62 A.3d at 320–21.

³³⁴ See *Tapley v. Tapley*, 449 A.2d 1218, 1219 (N.H. 1982).

³³⁵ *Id.*

³³⁶ *Id.*; see also *Brooks v. Allen*, 137 A.3d 404, 410 (N.H. 2016) (noting that the New Hampshire Supreme Court has refused “to allow recovery for ‘domestic services’” (quoting *Tapley*, 449 A.2d at 1219)).

³³⁷ *Tyranski v. Piggins*, 205 N.W.2d 595, 596 (Mich. Ct. App. 1973) (“While the parties illicitly cohabited over a period of years, that does not render all agreements between them

exchanges will be recognized and protected even when the parties failed to comply with formalities. As the West Virginia Supreme Court explained, with respect to traditional business-like exchanges between the parties, courts “scrutinize such cases carefully and to enforce legitimate business expectations whenever the business part of a contract between cohabiting or romantically attached partners can be separated from the personal part.”³³⁸

But across jurisdictions and approaches, courts apply different, more onerous rules to exchanges involving the provision of “family” services. Although formalities are not required with respect to commercial transactions, they are where the person is seeking compensation for family-like services.

III. CHALLENGING NONMARRIAGE’S DOUBLE BIND

Part II identifies two curious features of the law of nonmarriage. The conventional narrative posits that although nonmarital relationships are outside the ambit of family law, they are entitled to market-based protections. A comprehensive account of the case law, however, reveals this is only partially true. Market law applies to commercial ventures and bargains, but not to family-like ones. The second peculiarity is the content of the law that applies to these two different types of exchanges. To the extent nonmarital partners contribute business-like services, the usual rules of the market apply.³³⁹ But to the extent the services were related to the creation of and day-to-day running of a family, the usual rules are jettisoned. Here, the law presumes that these services have been provided gratuitously; because the provider simply finds these tasks to be a “rewarding thing to do.”³⁴⁰ To be compensated for *these services*, formalities are required.

This Part uses this uncovered disjunction to evaluate two primary defenses of the current law of nonmarriage: autonomy in the family and respect for the family.

illegal. Professor Corbin and the drafters of the Restatement of Contracts both write that while bargains in whole or in part in consideration of an illicit relationship are unenforceable, agreements between parties to such a relationship *with respect to money or property* will be enforced if the agreement is independent of the illicit relationships.” (emphasis added)).

³³⁸ Thomas v. LaRosa, 400 S.E.2d 809, 813 (W. Va. 1990).

³³⁹ See Scully v. Scully’s Ex’r, 28 Iowa 548, 550–51 (1870).

³⁴⁰ Tapley, 449 A.2d at 1219–20 (quoting Morone v. Morone, 413 N.E.2d 1154, 1157 (N.Y. 1980)).

A. *Autonomy Protecting(?)*

A primary defense of the contemporary law of nonmarriage “sounds in the register of autonomy.”³⁴¹ On this account, the current doctrine respects the deliberate choices of the parties.³⁴² As Marsha Garrison puts it, *Marvin* “recognizes and honors the individual choices that cohabitants and married couples have made. Married couples have chosen obligation; cohabitants have chosen independence. The law recognizes and honors both choices.”³⁴³ This theoretical claim, however, fails to account for the fact that the law subjects different exchanges to different rules.

Dichotomous rules apply even though these ventures and bargains share a number of key features. As is true of commercial joint ventures, nonmarital partners have chosen to combine their skills, resources, and assets in the hopes that the collaboration will result in mutual benefits. Although financial gain may not be the sole or primary reason for forming nonmarital family unions,³⁴⁴ financial considerations are not absent altogether.³⁴⁵ Moving in and consolidating households can mean that the parties may save money—that is, they may “profit.” Moreover, by consolidating households, they can also combine their efforts and their skills for the benefits of the collective union.³⁴⁶ Indeed, anthropologists have found that such exchanges “involve[] at least implicit bargaining and self-interest in addition to altruism.”³⁴⁷ With respect to nonmarital unions specifically, many people cite *financial issues* as relevant to their family formation decisions.³⁴⁸ Not only are family-related choices shaped by financial con-

³⁴¹ Joslin, *supra* note 1, at 941.

³⁴² Carbone & Cahn, *supra* note 5, at 78 (arguing that the *Marvin* rule “respects the parties’ autonomy”).

³⁴³ Garrison, *supra* note 5, at 896.

³⁴⁴ For example, “love is cited more than any other reason for why [respondents] decided to get married or to move in with their partner: 90% of those who are married and 73% of those living with a partner say love was a major factor in their decision.” HOROWITZ ET AL., *supra* note 1, at 31.

³⁴⁵ *E.g., id.* at 31–32 (“About four-in-ten cohabiting adults say moving in with their partner made sense financially (38% say this was a major reason why they decided to move in together) or that it was convenient (37%).”).

³⁴⁶ Erez Aloni, *The Marital Wealth Gap*, 93 WASH. L. REV. 1, 24 (2018) (noting that “[u]nmarried couples who live together, as well as nonconjugal partners who cohabit and are economically and emotionally interdependent, all enjoy, to different degrees, such advantages [of economies of scale]”).

³⁴⁷ Hasday, *supra* note 74, at 497.

³⁴⁸ *See, e.g.,* HOROWITZ ET AL., *supra* note 1, at 7 (reporting that “about four-in-ten cohabiters also say finances and convenience were important factors in their decision [to move in together]”).

siderations, they also have financial consequences. As Erez Aloni explains, “Wealth ownership and family structure are highly correlated.”³⁴⁹

On the flip side, although financial considerations often motivate commercial ventures and bargains, other considerations may be at play there as well.³⁵⁰ The parties may decide to work together because they enjoy working together. But there, the fact that the parties considered factors in addition to profit does not prevent the court from applying the relevant doctrines to their collaborative commercial efforts.

These bargains—bargains which share important qualities—are treated differently under the law of nonmarriage. Courts are authorized to recognize unformalized commercial ventures between nonmarital cohabitants.³⁵¹ They are willing to do so even though the facts may be muddy and messy, and the parties may dispute whether there was an agreement or a joint intent to do the “thing.” Courts can and do sort through and resolve such claims. But the same is not true with respect to unformalized family-related endeavors.³⁵² Instead, with regard to these bargains, even as between the same two people, different, heightened requirements are imposed, allegedly in the name of protecting party autonomy.

This is curious, however, since a key goal of the market doctrines that courts are reluctant to apply to these family-like exchanges are themselves about furthering party choice. Indeed, a “central aim[] of contract law” is “to enforce the reasonable expectations of parties to a contract.”³⁵³ With regard to commercial bargains, the law furthers this goal by enforcing the bargains even when they are not memorialized, and even where they lack definiteness.³⁵⁴ Indeed, in this context, the

³⁴⁹ Aloni, *supra* note 346, at 16.

³⁵⁰ Cf. Allison Anna Tait, *Corporate Family Law*, 112 Nw. U. L. REV. 1 (2017) (exploring family businesses).

³⁵¹ See *Bass v. Bass*, 814 S.W.2d 38, 43 (Tenn. 1991) (“[A]n individual should not be denied the opportunity to establish the existence of a *business* partnership into which they, like any other competent individual, may enter into, whether or not cohabitation exists.”).

³⁵² Indeed, Albertina Antognini shows that courts frequently refuse to enforce agreements even when they are express. Antognini, *Nonmarital Contracts*, *supra* note 5, at 78.

³⁵³ Paul M. Altman & Srinivas M. Raju, *Delaware Alternative Entities and the Implied Contractual Covenant of Good Faith and Fair Dealing Under Delaware Law*, 60 BUS. LAW. 1469, 1476 (2005); see also E. Allan Farnsworth, *Disputes over Omission in Contracts*, 68 COLUM. L. REV. 860, 860 (1968) (“It is a commonplace that, absent some overriding public policy, courts are to enforce contracts in accordance with the ‘expectations of the parties.’”).

³⁵⁴ Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 557 (1999) (“[C]ourts have become increasingly willing to enforce indefinite agreements in the commercial context.”); see also *id.* at 555 n.11 (noting that scholars

law has “move[d] toward enforcing all commercial promises, even those that appear gratuitous.”³⁵⁵ These principles are illustrated by *Wyatt*,³⁵⁶ *Houle*,³⁵⁷ and *Beckman*.³⁵⁸ The fact that true third-party business partners did not enter into a formal agreement does not preclude courts from recognizing and compensating the parties for their valuable contributions. On the flip side, the lack of sophistication of the parties is also not a bar to recognizing and giving effect to their intentional conduct. For example, a court can recognize the existence of an implied business partnership even where the parties did not “understand[] . . . the legal effect of their acts.”³⁵⁹

Again, courts are willing to apply these principles to nonmarital partners—but only so long as the endeavor is of a business nature. Hence, the “commercial” venture between Linda and William Bass,³⁶⁰ first to start a restaurant and then to start a video game business, could be recognized and enforced even though it was not formalized.³⁶¹ As the court explained, it was “of little or no consequence that” they “did not formally regard themselves as ‘partners.’”³⁶² The partnership, the court continued, may be implied from circumstances that show the parties entered into a relationship by “combining their property, labor, skill, experience, or money.”³⁶³ That, the court said, was “precisely what the parties involved in this case did.”³⁶⁴

The law allows for recognition of commercial bargains unmarked by formalities even though the very types of ventures involved—for profit business ventures—are ones that typically result from “rationality, clarity, hard-headed bargaining from self-interest.”³⁶⁵ In other words, these are the very types of transactions in which we might be more inclined to require the parties to follow the rules rigidly to protect their own interests. The parties are more likely to have back-

“Daniel Farber and John Matheson argue that, even absent reliance, courts enforce gratuitous promises made in business contexts”).

³⁵⁵ Eisenberg, *supra* note 76, at 833.

³⁵⁶ 281 S.W.2d 64 (Tenn. Ct. App. 1955).

³⁵⁷ 594 S.W.3d 524 (Tex. App. 2019).

³⁵⁸ 579 A.2d 618 (D.C. 1990).

³⁵⁹ *Montgomery v. Montgomery*, 181 S.W.3d 720, 727 (Tenn. Ct. App. 2005).

³⁶⁰ Although Linda and William briefly married, most of their relationship was nonmarital. See *Bass v. Bass*, 814 S.W.2d 38, 40 (Tenn. 1991).

³⁶¹ *Id.* at 44.

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ Terry A. O'Neill, Response, *Reasonable Expectations in Families, Businesses, and Family Businesses: A Comment on Rollock*, 73 IND. L.J. 589, 590 (1998).

ground knowledge about business transactions, and they are more likely to have engaged in arm's length transactions under which it is more reasonable to expect that the parties know they need to look out for their own interests. Yet, although the law does allow them to negotiate the terms of their relationship, it does not leave them without protection in the event they fail to do so.

But although "courts are typically willing to forego formalistic rules of contracting to enforce contracts in the commercial context,"³⁶⁶ the same is not true of bargains of a family-like nature. Instead, the law of nonmarriage imposes heightened requirements on bargains of a family-like nature.

This is true even though decades of experience reveals that few nonmarital partners comply with formalities with respect to their exchanges with regard to the forming and running of their family.³⁶⁷ "[F]ew couples (married or unmarried) . . . make express contracts at all, much less comprehensive contracts intended to capture what their relationship is all about."³⁶⁸ There are a host of reasons why family members are unlikely to enter into express contracts about their mutual rights and obligations.³⁶⁹ As compared to parties engaged in primarily for-profit ventures together, family members are less likely to be familiar and comfortable with formal legal documents, like contracts or other legal instruments that might clarify and protect their nonprofit joint venture. More fundamentally, even when family members are knowledgeable about contracts, they are unlikely to enter into contracts regarding their family relationships. Some do not understand it is necessary; they think the law protects them in the absence of a written agreement.³⁷⁰ Some do not want to think about, much less plan for, the possibility that the relationship might come to an end. Some assume that in the—unlikely, they hope—event the relationship ends, they will treat each other fairly.³⁷¹ Some may have

³⁶⁶ Deborah Zalesne, *The Contractual Family: The Role of the Market in Shaping Family Formations and Rights*, 36 CARDOZO L. REV. 1027, 1062 (2015).

³⁶⁷ Almost twenty years ago, Ira Mark Ellman explained that requiring contracts in this area is the wrong approach. See Ellman, *Contract Thinking*, *supra* note 143, at 1367.

³⁶⁸ *Id.*

³⁶⁹ See Matsumura, *supra* note 3, at 1018 (noting that "[w]ritten agreements between nonmarital partners also appear to be rare").

³⁷⁰ See, e.g., SHARON SASSLER & AMANDA JAYNE MILLER, *COHABITATION NATION: GENDER, CLASS, AND THE REMAKING OF RELATIONSHIPS* 153 (2017) (stating that some of the respondents who rejected marriage "noted that getting married wouldn't add anything to their relationships").

³⁷¹ See Barbara A. Atwood & Brian H. Bix, *A New Uniform Law for Premarital and Marital Agreements*, 46 FAM. L.Q. 313, 320 (2012) ("Most people are poor at thinking clearly about

concerns about the possible results at the time of dissolution but are uncomfortable raising the issue.³⁷² For these and many other reasons, as compared to partners in a for-profit venture—where it may be more reasonable to expect that each side will understand that they need to proceed with caution—this expectation is much less reasonable in a family setting.³⁷³

B. *Family Respecting(?)*

This Section interrogates the other justification offered in this realm: family respect. The family respect theory *does* account for the disjunction between commercial and family bargains. This legal dichotomy makes sense, it is said, because these bargains are different in kind. The tasks of forming and caring for families are performed “not as a servant, with a view to pay, but from higher and holier motives.”³⁷⁴ That being the case, it is reasonable to presume that these services—unlike all others—are performed primarily out of love and altruism;³⁷⁵ they are “gifts” not work.³⁷⁶ Indeed, the argument continues, treating domestic caretaking services just like other services would “impoverish” these hallowed contributions.³⁷⁷

This line of reasoning appears in many nonmarriage cases.³⁷⁸ The idea of singling out domestic tasks and excluding them from the rules

events in the distant future, especially if it involves contingencies contrary to our idealist assumptions.”).

³⁷² See SASSLER & MILLER, *supra* note 370.

³⁷³ See, e.g., Judith T. Younger, *Perspectives on Antenuptial Agreements*, 40 RUTGERS L. REV. 1059, 1061 (1988).

³⁷⁴ *Cropsey v. Sweeney*, 27 Barb. 310, 315 (N.Y. Gen. Term. 1858).

³⁷⁵ See, e.g., *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980) (“[I]t is not reasonable to infer an agreement to pay for the services rendered when the relationship of the parties makes it natural that the services were rendered gratuitously.”).

³⁷⁶ See, e.g., *Trimmer v. Van Bomel*, 434 N.Y.S.2d 82, 85 (Sup. Ct. 1980) (describing domestic services as ones that “would ordinarily be exchanged without expectation of pay”).

³⁷⁷ Eisenberg, *supra* note 76, at 847 (“[T]he world of contract is a market world, largely driven by relatively impersonal considerations and focused on commodities and prices. . . . In contrast, much of the world of gift is driven by affective considerations like love, affection, friendship, gratitude, and comradeship. That world would be impoverished if it were to be collapsed into the world of contract.”); see also Keren, *supra* note 76, at 226–27 (“This fear is described by Eisenberg as the fear of impoverishing the non-legal world of gifts as a result of contaminating it with legal and market-born ideas.”); Hasday, *supra* note 74, at 499 (noting that some argue that the presumption of gratuity is a “crucial means by which the law . . . preserves the specialness and dignity of intimate relations”); Viviana A. Zelizer, *The Purchase of Intimacy*, 25 LAW & SOC. INQUIRY 817, 823–24 (2000) (noting that “[o]n the one hand, [some] see money as the means for self-interested rational economic transactions [and] [o]n the other, they see erotic relations as the means for mutuality and emotional fulfillment”).

³⁷⁸ See, e.g., *Morone*, 413 N.E.2d at 1157.

that apply to all others, however, has a much longer and deeper genealogy. This Section traces that lineage. To the extent the singling out of family-like exchanges from the usual rules of the market today seems “natural” and appropriate, it is important to understand that “[t]he law has shaped the very expectations and understandings of family life that it claims to reflect.”³⁷⁹

As Reva Siegel,³⁸⁰ Albertina Antognini,³⁸¹ and others have identified, the rule presuming that domestic services are provided gratuitously finds its roots in the deeply gendered doctrine of coverture.³⁸² Wives, courts reasoned, could not enter into enforceable agreements with their husbands to be paid for their domestic service, because that service was owed to and owned by their husbands.³⁸³ Hence, any such agreement was without consideration. Of course, the legal relationship between husbands and wives has been altered over time. Women are no longer under the “cover” of their husbands. But rather than resulting in an abandonment of the rule, this legal change resulted in an evolved justification for it. To treat the provision of domestic services like other types of commercial exchanges would denigrate their sacred nature.³⁸⁴ Or, to put it another way, these domestic services and exchanges are treated differently not because they “are less important than bargain promises, but because they are more important.”³⁸⁵ This evolution is an example of what Siegel refers to as “preservation-through-transformation.”³⁸⁶ “[W]hen an existing legal regime is successfully challenged so that its rules and reasons no longer seem persuasive or legitimate, defenders may adopt new rules and reasons that

³⁷⁹ Siegel, *supra* note 78, at 2207.

³⁸⁰ *Id.*

³⁸¹ Antognini, *Nonmarital Coverture*, *supra* note 5.

³⁸² 1 WILLIAM BLACKSTONE, COMMENTARIES *442 (“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 . . .”).

³⁸³ *Id.*

³⁸⁴ Hasday, *supra* note 74, at 500 (“[Courts] stress that they are upholding the separation between marriage and the market to respect and safeguard the specialness of the marital relation.”) *See also* Eisenberg, *supra* note 76, at 847 (“To begin with, the world of contract is a market world, largely driven by relatively impersonal considerations and focused on commodities and prices. The impersonal organs of the state are an appropriate means to enforce promises made in such a world. In contrast, much of the world of gift is driven by affective considerations like love, affection, friendship, gratitude, and comradeship. That world would be impoverished if it were to be collapsed into the world of contract.”).

³⁸⁵ *See* Eisenberg, *supra* note 76, at 849.

³⁸⁶ *See* Reva B. Siegel, “The Rule of Love”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178–87 (1996).

preserve elements of the challenged regime.”³⁸⁷ Recovering this hidden history, however, raises questions about whether this concept—even accepting its continued applicability in some contexts—is aptly applied to nonmarital partners.

Under the common law doctrine of coverture, wives were legally obligated to serve their husbands.³⁸⁸ Not only were wives’ services required under the law,³⁸⁹ but their services were not their own; husbands owned their wives’ labor.³⁹⁰ In the mid-1800s, states began the slow process of chipping away at the doctrine of coverture. One area of change related to women’s rights to their own earned income. At the same time that states enacted laws to achieve this end, however, courts and legislatures simultaneously strove mightily to insulate a subset of wives’ labor from change: the labor wives performed *for their husbands*. As Siegel explains, “courts proceeded cautiously in recognizing wives’ rights to earnings under the reform statutes, lest they unduly encroach upon a husband’s continuing property rights in his wife’s services.”³⁹¹

Some early Married Women’s Property Acts expressly protected husbands’ rights to their wives’ service to them. Illinois’s 1869 statute is one such example. The act declared that “a married woman shall be entitled to receive, use and possess her own earnings.”³⁹² The very same statute, however, clarified that “this act shall not be construed to give to the wife any right to compensation *for any labor performed for her minor children or husband*.”³⁹³ Other Married Women’s Property

³⁸⁷ Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2553 (2015).

³⁸⁸ COTT, *supra* note 81, at 54 (“Coverture expressed the legal essence of marriage as reciprocal: a husband was bound to support his wife, and in exchange she gave over her property and labor.”).

³⁸⁹ G.A. ENDLICH & LOUIS RICHARDS, *THE RIGHTS AND LIABILITIES OF MARRIED WOMEN, CONCERNING PROPERTY, CONTRACTS AND TORTS, UNDER THE COMMON AND STATUTE LAW OF PENNSYLVANIA*, § 17, at 19 (1889) (“Her services and the comfort of her society are deemed an equivalent for the obligations the law imposes upon the husband because of the marital relation, and her obligation to render family services is held to be co-extensive with that of the husband to support her in the family.”).

³⁹⁰ Siegel, *supra* note 78, at 2127 (“For centuries the common law of coverture gave husbands rights in their wives’ . . . earnings . . .”).

³⁹¹ *Id.* at 2168.

³⁹² Act of Mar. 24, 1869, § 1, 1869 Ill. Laws 255.

³⁹³ *Id.* (emphasis added); *see also* Act of Apr. 17, 1857, ch. 59, 1857 Me. Laws 49 (“Any married woman may demand and receive the wages of her personal labor, *performed other than for her own family*, and may hold the same in her own right against her husband or any other person, and may maintain an action therefor in her own name.” (emphasis added)); Minn. Stat., ch. 69, § 6 (1866) (“The wages of any married woman, earned after or before marriage by her

Acts were drafted more broadly. For example, the 1860 New York law declared, without qualification, that “[a] married woman may . . . perform any labor or services on her sole and separate account, and the earnings of any married woman, from her trade, business, labor or services, shall be her sole and separate property.”³⁹⁴

Where legislatures failed to expressly protect a husband’s right to his wife’s labor for him, courts stepped in to do so. Thus, for example, the New York high court considered the scope of the 1860 law in *Brooks v. Schwerin*.³⁹⁵ In the case, the court explained that although the statute did alter women’s rights over their earnings arising out of labor *for others*, it did nothing to abrogate the wife’s common law obligation to provide “services . . . in the household in the discharge of her domestic duties.”³⁹⁶ Such duties, the court declared, “still belong to the husband.”³⁹⁷

In this way, newly enacted laws allowing women to maintain ownership and control over their market labor did not alter the essential, defining bargain of marriage. A treatise written during this period explained:

It does not seem open to doubt that the Act of 1887 [allowing women ownership and control over their wages], far from destroying the duties devolving upon the wife as an incident of the marriage and family relations, leaves her, in this respect, where it found her, i.e., owing her time and services, in the first instance, to the family, subject to the direction of the husband, as its head and representative.³⁹⁸

Over time, husbands’ right to their wives’ earnings and services *for them* was curbed to some degree. Eventually, wives gained control over all of their labor *outside the home*, whether it was on behalf of their husbands or not.³⁹⁹ Under this new legal regime, courts recognized that a wife’s labor outside the home “was a fungible market commodity that a wife or any other person might supply.”⁴⁰⁰ Having gained ownership rights in her outside market labor, courts recog-

personal labor *performed for any other person than her husband*, shall be paid and held to her sole and separate use” (emphasis added)).

³⁹⁴ Act of Mar. 20, 1860, ch. 90, 1860 N.Y. Laws 157.

³⁹⁵ 54 N.Y. 343, 348–49 (1873).

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ ENDLICH & RICHARDS, *supra* note 389, § 105, at 131.

³⁹⁹ See Siegel, *supra* note 78, at 2178 (“Wives’ claims for earnings in family business enterprise did, however, begin to find legitimacy in the courts—on grounds the federal court plainly foresaw.”).

⁴⁰⁰ *Id.* at 2180.

nized that she could “validly contract with [her] husband for services *outside the purely domestic ones*.”⁴⁰¹

This critical principle—that a *wife’s labor in the home was not hers*—was reinforced in a number of ways. Poignantly, if a woman was unable to perform this household labor as a result of an injury, any tort claim arising out of the injury belonged not to her but to her husband.⁴⁰² The lost labor was labor owed to the husband’s property. Hence, any right to sue belonged to him. Relying on similar logic, courts refused to enforce agreements by a husband to pay his wife for those domestic services.⁴⁰³ The labor was his to begin with; the wife had a preexisting legal obligation to provide her labor to her husband in exchange for his support for her. A bargain to pay her wages for that labor—labor that was already owed to him—was therefore void for lack of consideration. She had offered nothing in the bargain; the labor, even though done by her, was not hers to give.⁴⁰⁴

For wives, that remains the law today. Married women are entitled to enter into enforceable agreements providing compensation *for their market labor*.⁴⁰⁵ But, to this day, wives cannot enter into enforceable contracts with their husbands to receive compensation *for their domestic services*.⁴⁰⁶ This absolute ban on agreements to pay for domestic services applies only to spouses. But the idea of exempting do-

⁴⁰¹ Recent Case, 10 TEX. L. REV. 241, 241 (1932) (emphasis added).

⁴⁰² See, e.g., *Blair v. Seitner Dry Goods Co.*, 151 N.W. 724, 727 (Mich. 1915) (“[D]espite changes in the law, the legislature] has not, however, put her domestic duties and labor, performed in and about her home for her family upon a pecuniary basis, nor meant to classify such duties as services, nor to permit her to recover damages for loss of ability to perform them.”).

⁴⁰³ See, e.g., *Church v. Church*, 630 P.2d 1243, 1250 (N.M. Ct. App. 1981).

⁴⁰⁴ *Id.* (“[A] wife has a duty to provide household services to her husband and the husband has a duty to support his wife. . . . Having a duty to provide the services of a wife, those services are not a basis for relief for fraud, or breach of contract, or for an equitable award based on unjust enrichment.”).

⁴⁰⁵ See Hasday, *supra* note 74, at 500.

⁴⁰⁶ See, e.g., *id.* (“[I]nterspousal contracts for domestic services [remain] unenforceable.”); see also *Mays v. Wadel*, 236 N.E.2d 180, 183 (Ind. App. 1968) (“It is the law of this State that between husband and wife, while they are living together as such in a common household, that there can be no express or implied contract for compensation or payment for any services or acts performed or rendered in and about the home by either of them in the common support of that household.”); *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16, 20 (Ct. App. 1993) (“Personal performance of a personal duty created by the contract of marriage does not constitute a new consideration supporting the indebtedness alleged in this case.”); *Church*, 630 P.2d at 1250 (“It is the duty of the wife to reverence her husband, and to serve him. These duties grow out of the mere act of marriage. The husband may not present a bill against his wife for board and clothing, nor the wife present to her husband a bill for presiding over the household. The law will not imply a contract to pay such bills.” (quoting *Keister’s Adm’r v. Keister’s Ex’rs*, 96 S.E. 315, 322 (Va. 1918) (J. Burks, concurring))).

mestic services from usual market doctrines seeped beyond the boundaries of the spousal relationship. Hence, as is true with husbands and wives, “commercial” transactions between other family members are evaluated under traditional market rules. But their exchanges with respect to the provision of domestic services are treated differently. Unlike other services, these services are presumed to have been given freely, out of love and affection. To overcome this presumption, the law requires proof of compliance with formalities. Importantly, though, coverture provided the frame even in these cases involving other family members.

Many early cases involving exchanges between family members other than husbands and wives involved married women who cared for other family members in their home. Often these wives were caring for their mothers-in-law. When these married women sued, seeking compensation for their services, they often lost. Here too, the legal obligations of husbands and wives offered the logic to the analysis. Consider *Coleman v. Burr*.⁴⁰⁷ A husband agreed to pay his wife \$5.00 per week to care for his mother who was paralyzed.⁴⁰⁸ Thereafter, the wife cared for her mother-in-law for eight years.⁴⁰⁹ Later, a judgment creditor sought to set aside a conveyance, “the only consideration [for which] being the amount due [to the wife] under said agreement.”⁴¹⁰ The New York high court held that the agreement between the husband and the wife to pay her for her domestic services to others in the home was invalid.⁴¹¹ She could not enter into a valid agreement to be paid for those services because “in rendering them she simply discharged a marital duty which she owed to him[, her husband].”⁴¹²

In contrast to these cases involving daughters-in-law, *husbands* who provided care for their mothers-in-law often were awarded compensation. The disparate results could be explained by the different inherent legal obligations of husbands and wives. When a wife was providing services for her in-law, “[t]he services she rendered were for her husband, and were in the line of household duties.”⁴¹³ As re-

⁴⁰⁷ 93 N.Y. 17 (1883).

⁴⁰⁸ *Id.* at 18.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.* at 29.

⁴¹² *Id.*; see also *Reynolds v. Robinson*, 64 N.Y. 589, 593 (1876) (“[The wife] was engaged in no business or service on her own account. She was in charge of his household, and, as part of her household duties, rendered the services to a person in her husband’s house[, specifically, her adopted father] . . . She was then working for her husband, and not for herself, or on her own separate account.”).

⁴¹³ *Hensley v. Tuttle*, 46 N.E. 594, 595 (Ind. App. 1897).

counted above, these household duties were ones that she was already obligated to provide to her husband. In contrast to their wives, labor of husbands was and always had been their own. Husbands did not owe any duties to care for their mothers-in-law. Accordingly, husbands were entitled to be paid for their valuable labor.⁴¹⁴ “[T]he law,” the court explained, “implies a promise to pay [the son-in-law] the reasonable value of his services.”⁴¹⁵

In early cases like *Coleman*, some courts concluded that wives were *absolutely* barred from entering into enforceable agreements to be paid for services in the home, including services provided to people other than her husband.⁴¹⁶ It was understood that *all* of those services were services due to her husband. Because they were duties already owed, the provision of them could not constitute consideration to support a valid agreement.

The absolute bar on compensation continues to apply to services provided *to the husband*. Over time, however, the law evolved with respect to domestic services provided by a wife to people *other than their husband*. Here, as the law evolved to recognize wives’ ownership and control rights over their labor, the absolute bar against compensation was removed when the wife was performing domestic tasks in the home for people other than her husband. Take *Farmers Loan & Trust Co. v. Mock*.⁴¹⁷ In affirming an award to a married woman who sought compensation for her care and labor on behalf of her father-in-law, the court noted two important legal principles. First, the court noted that “[t]he law did not cast upon appellee any family or legal duty to render decedent services by reason of the fact that she was his daughter-in-law.”⁴¹⁸ Second, the court explained that by virtue of the state’s Married Women’s Property Act, “the earnings and profits of a married woman accruing to her for service and labor, other than labor for her husband or family, are her sole and separate property.”⁴¹⁹

But while wives were no longer barred absolutely from receiving payment for domestic services provided in the home to people other than their husbands, these services were still singled out for different legal treatment. Although the law generally presumes that services provided and accepted were extended with an expectation of pay-

⁴¹⁴ See, e.g., *id.*

⁴¹⁵ *Id.*

⁴¹⁶ See *Coleman*, 93 N.Y. at 20.

⁴¹⁷ 2 N.E.2d 235 (Ind. App. 1936).

⁴¹⁸ *Id.* at 236.

⁴¹⁹ *Id.* at 237.

ment,⁴²⁰ when the wife was performing services in the home for someone other than her husband, the law presumed that the services were provided on behalf of her husband. This presumption could be rebutted, however, with evidence to the contrary.

*Morgan v. Bolles*⁴²¹ is a useful illustration. In the case, the wife lived with and cared for her husband's mother.⁴²² At the time, Connecticut law provided that the wife's separate earnings were her separate property.⁴²³ Nonetheless, the court held that in the absence of evidence to the contrary, the wife was presumed to have cared for her mother-in-law *on behalf of her husband*.⁴²⁴ As the court explained, the wife "*may be the equitable owner of any indebtedness accruing for such personal services.*"⁴²⁵ "Still," the court continued, "*the service of the wife presumptively belongs to the husband, and [hence] . . . service rendered to [his] mother would ordinarily be presumed to be rendered in behalf of the husband.*"⁴²⁶

Over time, this "presumption" of no compensation was extended beyond the husband-wife relationship. But here too, the law carried over coverture's basic family-market divide. When a family member provides *nondomestic* services, the usual rule applies. Accordingly, a New Jersey court explained in 1926 that the presumption of gratuity had "no application" in a case in which a son worked on his father's farm for six years.⁴²⁷ A Kentucky court stated the rule more broadly: "It is well settled in this state that for services rendered that are not

⁴²⁰ See, e.g., *Cropsey v. Sweeney*, 27 Barb. 310, 315 (N.Y. Sup. Ct. 1858) ("True, the law will not presume that work or labor performed as a servant or laborer, was voluntary, and performed without any view to compensation; but the law cannot presume that the domestic and household work and services of a wife for a husband are performed with the view to pay as a servant or laborer. The law . . . compels us to infer and hold, that these services were performed not as a servant, with a view to pay, but from higher and holier motives . . .").

⁴²¹ 36 Conn. 175 (1869).

⁴²² *Id.* at 175.

⁴²³ *Id.* at 176.

⁴²⁴ *Id.*

⁴²⁵ *Id.* (emphasis added).

⁴²⁶ *Id.* (emphasis added).

⁴²⁷ *Waker v. Bergen*, 132 A. 669, 670 (N.J. 1926) ("We think that this rule is limited to household services, and has no application to the present case. The services which plaintiff sought to be compensated for were not such as are ordinarily and usually rendered by one member of a family or household to another."); see also *In re Estate of White*, 303 N.E.2d 569, 571-72 (Ill. App. Ct. 1973) (explaining that the presumption of gratuity does not apply to "[e]xtraordinary services certainly not incident to any normal domestic relationship"); J.E. Keefe, Jr., Annotation, *Recovery for Services Rendered by Member of Household or Family Other than Spouse Without Express Agreement for Compensation*, 7 A.L.R. 2d 8, § 10 (1949) ("It has been held that the rule that there is no implication of a promise to pay for services rendered between members of a household is limited in application to household services.").

personal, an implied contract will arise to pay for them even in favor of one occupying family and domestic relationship.”⁴²⁸ Accordingly, courts can and regularly do award compensation for nondomestic services rendered between family members, even in the absence of an express agreement to that effect.⁴²⁹ But, if the services are of a domestic nature, the opposite presumption applies. The services are presumed to have been provided gratuitously, and additional proof is necessary to overcome the presumption.⁴³⁰

Eventually, this anomalous rule was extended to nonmarital partners as well. As Albertina Antognini explains, “To this day, cases addressing nonmarital couples rely on the abiding presumption that [domestic] contributions made in the context of an intimate relationship are gratuitous.”⁴³¹ As a result, relief typically will be denied where the requested relief is for “housewifely services” such as “housekeeping chores, including preparation of meals, laundering, care and cleaning of the home, keeping the financial books, payment of bills, banking, shopping, showing their rental properly, and caring for the defendant’s infant child on weekends.”⁴³²

In recent years, some scholars have argued that rules singling out domestic exchanges for differential legal treatment are anachronistic and harmful. As such, the general rule ought to be abandoned.⁴³³ For

⁴²⁸ Cheatham’s Ex’r v. Parr, 214 S.W.2d 95, 98 (Ky. 1948).

⁴²⁹ Kellum v. Browning’s Adm’r, 21 S.W.2d 459, 466 (Ky. 1929) (“It is also held that a recovery may be had by a near relative on a contract implied in law where the services were not personal to the decedent, such as washing or mending or making clothes, and other similar non-personal services, exclusive of board and nursing.”); *see also* Durr v. Durr, 82 S.W. 581, 582 (Ky. 1904) (“[W]e do not think that such extraordinary and menial services as were performed by the appellee Mary Durr during the last year of the life of the intestate ought to be regarded as household work appertaining to the domestic duties of the wife, and which she is bound to perform for her husband to another without compensation, and we are therefore of opinion that for the last year’s services rendered the intestate she ought to receive just compensation.”); *Garner v. McKay*, 15 S.W.2d 908, 909 (Mo. Ct. App. 1929) (“As to money furnished for the purpose of building upon or improving the property, the presumption of voluntary service which would ordinarily follow furnishing board and lodging, does not prevail.”); *Gayheart’s Adm’r v. Gayheart*, 155 S.W.2d 1, 3 (Ky. 1941) (“[W]here the services are of an extraordinary and menial character and extend over a long period, there is no presumption they were rendered gratuitously and the law will imply a contract to pay therefor.”).

⁴³⁰ *See* Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 183 (2008).

⁴³¹ Antognini, *Nonmarital Coverture*, *supra* note 5, at 2175.

⁴³² Tapley v. Tapley, 449 A.2d 1218, 1219 (N.H. 1982).

⁴³³ *See generally* Hasday, *supra* note 74; Jonathan S. Henes, Note, *Compensating Caregiving Relatives: Abandoning the Family Member Rule in Contracts*, 17 CARDOZO L. REV. 705 (1996); *see also* Tate, *supra* note 430, at 184 (“In recent years, commentators have argued that the presumption of gratuitousness in the context of eldercare is outdated and needs to be reformed or rejected entirely.”).

example, Katharine Silbaugh argues that “by treating housework as indistinguishable from other private family matters while treating paid labor as relevant to legal doctrine, law participates in the process of devaluing housework as work.”⁴³⁴ These rules, as Silbaugh puts it, “turn[] [domestic] labor into love.”⁴³⁵ The people who disproportionately feel the impact of this mandate are women.⁴³⁶

Although I share these concerns,⁴³⁷ my point here is different: this is another example of the double bind the law imposes on nonmarital partners. As detailed in Part I, the law declares that these parties are legal strangers to each other. This is true for purposes of marital property division and spousal support. It is also true for purposes of hundreds of other rights and protections.⁴³⁸ The law, however, simultaneously applies family-based doctrines—here the presumption of gratuity—for the purpose of denying relief to which they would otherwise be entitled.

There is a tendency to naturalize expectations about the provision of domestic services. Unlike other types of services and contributions, family members who provide services in the home are presumed to provide these services out of love and affection and to have no expectation of compensation. But as demonstrated above, these contemporary intuitions are shaped by the law. The rule finds its roots in legal doctrines which imposed preexisting reciprocal legal obligations on certain family members. Hence, the rule that wives are not entitled to payment for their domestic services in their own home grows out of

⁴³⁴ See, e.g., Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 26 (1996) [hereinafter Silbaugh, *Labor into Love*]; see also Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 100 (1998) (“Legal rules tend to ignore the productive nature of household labor altogether, excusing the labor from entitlement based on its intimate context, on the assumption that the emotional context of home labor cannot be sustained if that labor is understood to lead to the kinds of entitlements associated with wage labor.”).

⁴³⁵ Silbaugh, *Labor into Love*, *supra* note 434, at 32–33.

⁴³⁶ Janet Halley, *What Is Family Law?: A Genealogy Part II*, 23 YALE J.L. & HUMANS. 189, 265–66 (2011).

⁴³⁷ Others, of course, disagree. See, e.g., Eisenberg, *supra* note 76, at 823 (“In this Article, I will show that . . . the world of gift would be impoverished if simple donative promises were placed into the world of contract”); Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 799 (1941) (arguing that the bases favoring enforceability of contracts do not support the enforcement of donative promises); Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 1–2 (1979); Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 416–17 (1977).

⁴³⁸ See, e.g., Courtney G. Joslin, *Family Support and Supporting Families*, 68 VAND. L. REV. EN BANC 153, 166–67 (2015) (discussing some such benefits).

their preexisting legal obligation to provide those services for their husbands.

The rules applicable to other family combinations find a similar history. Thus, in cases where the family members in question did not owe each other reciprocal legal duties, courts were less likely to apply the presumption of gratuity.⁴³⁹ Take *Sargent v. Foland*.⁴⁴⁰ In the case, a stepson brought suit seeking compensation for services he provided on his stepfather's farm.⁴⁴¹ After leaving home, the stepfather—who had become blind—wrote to the stepson asking him to return home to care for him.⁴⁴² “The relation of parent and child of itself creates reciprocal rights and duties,” the court explained.⁴⁴³ In contrast, “the relation of stepfather and stepchild does not of itself impose any duty upon one to the other or create any right assertable by one against the other.”⁴⁴⁴

If, however, a stepfather receives a stepchild into his family and treats the child as a member of his family he places himself in loco parentis, and the reciprocal rights and duties of parent and child are thus created and will continue to exist as long as the stepfather continues to stand in that position.⁴⁴⁵

In such cases—where there are reciprocal legal duties between the parties—the presumption of gratuity applies:

If the stepson lives with the stepfather as a member of his family and by reason of that fact the stepfather stands in loco parentis to the stepchild, then it necessarily follows that in such circumstances the stepchild is required to allege and prove an express contract, or its equivalent, for the same reason that a child is required to allege and prove such a contract.⁴⁴⁶

⁴³⁹ To be sure, one certainly can find cases in which courts rather blindly restate and apply the presumption of gratuity to a range of family members, including family members who did not owe each other reciprocal duties. See, e.g., *Farris v. Faris' Estate*, 212 S.W.2d 71, 75 (Mo. Ct. App. 1948) (applying presumption in case involving care provided by “a cousin of the deceased's husband”).

⁴⁴⁰ 207 P. 349 (Or. 1922).

⁴⁴¹ *Id.* at 350.

⁴⁴² *Id.*

⁴⁴³ *Id.* at 352.

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*; see also *Morris v. Retz*, 413 S.W.2d 544, 549 (Mo. Ct. App. 1967) (explaining that “[t]he term ‘family’” for purposes of the presumption of gratuity refers to those “persons under one head and one domestic government, ‘who have reciprocal, natural, or moral duties to support and care for each other’” (quoting *Offord v. Jenner's Estate*, 189 S.W.2d 173, 176 (Mo. Ct. App. 1945))).

But where the person is not a family member with reciprocal rights and obligations, the usual rules apply: acceptance of services provided “imply[s] a contract to pay,” and the burden lies on the person who received the services “to prove that the services were rendered gratuitously.”⁴⁴⁷ Thus, even as applied to other combinations of family members, the rule singling out domestic exchanges for differential treatment was rooted in the preexisting mutual rights and obligations imposed by law on the parties.

This brings us back to where we began: unlike legally recognized family members, nonmarital partners have no mutual rights or obligations to each other by virtue of their relationships. They are not family members at all.⁴⁴⁸ This basic principle is reflected in hundreds of other laws and policies.⁴⁴⁹ Nonmarital partners, for example, have no default rights to share property acquired during their relationships.⁴⁵⁰ They are not entitled to intestate succession.⁴⁵¹ They are not entitled to protections upon the death or disability of the other based on the existence of their relationship.⁴⁵² They are not responsible for the other’s debt, nor can they be required to provide for the necessary care of the other. Yet, here again, courts rhetorically invoke their family-like nature to squeeze the double bind.⁴⁵³ They are at once not family members, but family members, their family-like status—or lack thereof—being invoked to deny them the protection of the law.

CONCLUSION

The legal treatment of nonmarital families is an increasingly important question. Nonmarital families constitute a large and growing slice of the population here in the United States and around the world.⁴⁵⁴ Many other countries have responded to this demographic shift by shifting to a status-based approach.⁴⁵⁵ Under this approach, if the relationship meets various criteria, the couple is treated like a

⁴⁴⁷ *Morris*, 413 S.W.2d at 550.

⁴⁴⁸ *See infra* Section I.B.

⁴⁴⁹ *See, e.g., Joslin, supra* note 438.

⁴⁵⁰ *See, e.g., Joslin, supra* note 1, at 920 (surveying state approaches).

⁴⁵¹ *See Matsumura, supra* note 79, at 1330.

⁴⁵² *See id.*

⁴⁵³ Halley, *supra* note 12, at 1748.

⁴⁵⁴ *See supra* note 1; *see also* Margaret Rynar & Anna Stepien-Sporek, *Cohabitation Worldwide Today*, 35 GA. ST. U. L. REV. 299, 299 (2019) (noting an “increase in cohabitation around the world”).

⁴⁵⁵ *See, e.g., Alvaré, supra* note 7 (“More than a few nations and countries have granted marital-like rights to cohabiting couples—if their relationship meets several criteria. These include Australia, New Zealand, Canada, Ireland, the Scandinavian countries, and Scotland.”).

married couple.⁴⁵⁶ For example, in Canada and Australia, nonmarital couples are treated like married spouses. States in the United States continue to resist this trend.⁴⁵⁷

This Article offers new insights on this critically important debate between the status-based and market-based approaches to nonmarriage.⁴⁵⁸ This Article reveals that the law of nonmarriage in the United States follows neither approach. Instead, it places nonmarital partners in an untenable double bind. Nonmarital partners are denied protection under the law of the family because they are not family. Simultaneously, they are denied protection under market law when their underlying transactions are too family like. This Article also reveals the curious content of this double bind. Nonmarital partners are denied relief for their family-like bargains because the law subjects these claims and only these claims to *heightened formality requirements*, beyond those imposed on sophisticated business players.

This Article concludes by employing the theoretical lens of the double bind to challenge the normative defenses of the current U.S. approach to nonmarriage as autonomy and family respecting. In so doing, this Article offers critical new insights that can aid scholars, policymakers, and courts as they grapple with the question of how the law can best value, respect, and protect these relationships and the critical work that occurs within them. Elsewhere, I argue in favor of treating these families as families. At the very least, however, the law ought not to leave them in a lose-lose situation.

⁴⁵⁶ *Id.*

⁴⁵⁷ See *supra* note 16 and accompanying text.

⁴⁵⁸ See, e.g., *Developments in the Law*, *supra* note 11, at 2127 (“For decades, scholars have argued over the economic rights of partners at the end of a cohabiting relationship. Some advocate a contract-based approach, others a status-based approach.” (footnotes omitted)).

The Constitutional Right to “Establish a Home”

John G. Sprankling*

ABSTRACT

Everyone needs a home. But exclusionary zoning ordinances in many communities prevent low-income and moderate-income families from securing affordable homes, disproportionately harming people of color. Because these ordinances satisfy the rational basis test, they have been immune from substantive due process attack. This Article provides a new method to challenge the constitutionality of exclusionary zoning.

For decades, the Supreme Court has recognized that the Due Process Clause of the Fourteenth Amendment protects the right to “establish a home.” The Clause was adopted, in part, as a response to the “Black Codes” enacted by southern states in the post-Civil War era that prohibited Black Americans from buying or leasing homes. The Court has frequently mentioned the right in dicta but has never squarely relied on it to reach a decision. Perhaps for this reason, it has been overlooked by scholars.

This Article is the first piece of legal scholarship to explore the right to establish a home. This is a negative right: it bars the government from unduly interfering with a person’s ability to rent or buy a home. The Article demonstrates that this right is a fundamental right for the purpose of substantive due process analysis, like the right to marry or the right to raise children. Accordingly, a law that infringes the right must be evaluated under either the strict scrutiny or intermediate scrutiny tests. Under either test, exclusionary zoning is probably unconstitutional.

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INTRODUCTION

*Meyer v. Nebraska*¹ is a landmark in constitutional law—the first time the Supreme Court used the Due Process Clause of the Fourteenth Amendment to protect personal liberty.² It remains a cornerstone of modern substantive due process jurisprudence today. As Professor Peter Nicolas explains, *Meyer* is “consistently presented by the Court in support of the contemporary approach to recognizing and enforcing substantive fundamental rights under the Due Process Clause.”³ Many of the Court’s most far-reaching decisions—ranging from *Griswold v. Connecticut*⁴ to *Obergefell v. Hodges*⁵—have relied on *Meyer*.

In a famous passage, *Meyer* defined the components of “liberty” guaranteed by the Due Process Clause:

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, *establish a home* and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.⁶

Over time, all the rights enunciated in *Meyer* have been the subject of extensive litigation and intensive scholarly analysis, except for one—the right to “establish a home.”⁷ The Court has often referred to this right but has never formally used it in reaching a decision.⁸ Lower courts have utilized the right infrequently, and scholars have ignored it.⁹ As a result, the nature and scope of the right to establish a home remain uncharted.

This Article is the first academic work to analyze the right to establish a home. This is a negative right: it bars the state from unduly interfering with a person’s ability to rent or buy a home. Although the

¹ 262 U.S. 390 (1923).

² *See id.* at 401.

³ Peter Nicolas, *Reconstruction*, 10 U.C. IRVINE L. REV. 937, 958 (2020).

⁴ *See* 381 U.S. 479, 481–83, 485 (1965) (recognizing right to use contraceptives).

⁵ *See* 576 U.S. 644, 664–65, 667–68 (2015) (recognizing right to marry).

⁶ *Meyer*, 262 U.S. at 399 (emphasis added).

⁷ Although the *Meyer* phrasing might imply that the right to establish a home is a component of a larger right that also encompasses the right to marry and the right to bring up children, later developments made it clear that these are separate rights. *See infra* note 238 and accompanying text.

⁸ *See infra* text accompanying notes 246–78, 282–91.

⁹ *See infra* notes 279–81, 290.

right has a number of potential applications, it is particularly important as a tool for challenging exclusionary zoning ordinances. Many cities have adopted ordinances that prohibit apartments, condominiums, and other multifamily housing; require large minimum lot sizes for single-family residences; or bar manufactured homes.¹⁰ Indeed, some cities permit only a particularly expensive form of housing: detached single-family homes on large lots. These ordinances harm the public by curtailing the types of homes that are available. A person who is financially able to buy a detached home on a large lot, for example, might strongly prefer to live in an apartment or condominium. Additionally, exclusionary zoning ordinances effectively prevent low-income and moderate-income families from securing affordable homes and disproportionately exclude minority groups.¹¹

No court has decided whether exclusionary zoning violates the right to establish a home. Notably, however, the Supreme Court has already held that the right to marry and the right to bring up children—the neighboring rights identified in *Meyer*—are fundamental rights for purposes of substantive due process analysis, which invokes intensive judicial scrutiny.¹² Therefore, although the courts have yet to use the right to establish a home to invalidate exclusionary zoning, this Article demonstrates how the right could be used for this purpose.

Part I of this Article examines the traditional veneration of the home in American legal culture. It develops four themes: (1) the home as a necessity for survival; (2) the home as a sanctuary from other people and the state; (3) the home as the locus of personal liberty; and (4) the home as the center of family life.

Part II traces the origins of the right to establish a home in American law. In its early stages, the right can be traced from William Blackstone’s natural law “right of habitation,” through the Declaration of Independence, and to the home-centric Bill of Rights.¹³ The right is reflected in a catalogue of nineteenth-century policies ranging from land bounties for veterans to the Homestead Act of 1862.¹⁴ And concern that southern states would bar emancipated slaves from ob-

¹⁰ See *infra* notes 406, 408–09.

¹¹ See *infra* note 407 and accompanying text.

¹² See *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (“[T]he right to marry is a fundamental right”); *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (“[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”).

¹³ See *infra* text accompanying notes 55–107.

¹⁴ Homestead Act of 1862, Pub. L. No. 37-64, 12 Stat. 392; see *infra* text accompanying notes 108–26.

taining homes helped to spur adoption of the Civil Rights Act of 1866¹⁵ and the Fourteenth Amendment, leading to express recognition of the right in *Meyer*.¹⁶

Part III analyzes the right to establish a home, as enunciated in *Meyer* and its subsequent evolution. In context, recognition of the right should be viewed as a libertarian response to early zoning ordinances that imperiled the traditional freedom to obtain a home. This Part explores later Supreme Court cases and lower court decisions that have referenced the right and further explained its meaning. Most recently in *Obergefell*, which held that the right to marry is a fundamental right, the Court proclaimed that “[t]he right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.”¹⁷ Over 400 federal and state decisions have referred to the right to establish a home, many of which occurred in the last decade.¹⁸

Part IV demonstrates that the right to establish a home is a fundamental right. Under the *Obergefell* approach to identifying fundamental rights—the technique the Court has used most recently—a compelling argument can be made that the right to establish a home is fundamental. Under the older *Washington v. Glucksberg*¹⁹ approach, a persuasive case can also be made for this result.²⁰ A law that impairs a fundamental right is ordinarily subject to strict scrutiny. Alternatively, such a law might be analyzed under intermediate scrutiny, a less demanding standard.

Finally, Part V evaluates the constitutionality of three common exclusionary zoning techniques: (1) prohibition of multifamily housing; (2) large lot size requirements; and (3) prohibition of manufactured homes. It concludes that these laws are probably unconstitutional infringements of the fundamental right to establish a home under both the strict scrutiny and intermediate scrutiny tests.

I. THE HOME IN AMERICAN LAW

American law venerates the home. As the Supreme Court observed in *Payton v. New York*,²¹ “overriding respect for the sanctity of

¹⁵ Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1983).

¹⁶ See *infra* text accompanying notes 127–51.

¹⁷ *Obergefell*, 576 U.S. at 668 (quoting *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)).

¹⁸ See *infra* note 232.

¹⁹ 521 U.S. 702 (1997), *superseded by* *Obergefell*, 576 U.S. 644.

²⁰ See *infra* text accompanying notes 380–96.

²¹ 445 U.S. 573 (1980).

the home . . . has been embedded in our traditions since the origins of the Republic.”²² Similarly, Justice Brennan explained in *United States v. Verdugo-Urquidez*²³: “For over 200 years, our country has considered itself the world’s foremost protector of liberties. The privacy and sanctity of the home have been primary tenets of our moral, philosophical, and judicial beliefs.”²⁴ Indeed, the Court’s interpretation of the First, Second, Third, Fourth, and Fifth Amendments embodies a “home-centric jurisprudence.”²⁵

In the most basic sense, a home is a house, apartment, or other physical structure used as a long-term residence. Yet scholars agree that the concept of home involves far more than a building; it also connotes the experiences, relationships, and values that are associated with living in a home.²⁶ For example, Professor Margaret Radin posits that “[t]he home is a moral nexus between liberty, privacy, and freedom of association.”²⁷ Professor Gerald Dickinson concludes that “Americans’ admiration ‘for the sanctity of the home’ is linked to the individual, the family, and the fabric of society.”²⁸ Professor John Campbell stresses that “a family’s home is important to a person’s physical, emotional, and financial well-being” and thus is “central to American culture and identity.”²⁹ And Dean Benjamin Barros notes that “[h]ome’ evokes thoughts of, among many other things, family,

²² *Id.* at 601.

²³ 494 U.S. 259 (1990).

²⁴ *Id.* at 285–86 (Brennan, J., dissenting).

²⁵ See, e.g., Gerald S. Dickinson, *The Puzzle of the Constitutional Home*, 80 OHIO ST. L.J. 1099, 1103, 1109–16 (2019); see also AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 129–30 (2012) (discussing “house-protective” doctrines developed by the Supreme Court); John Campbell, *Where Kafka Reigns: A Call for Metamorphosis in Unlawful Detainer Law*, 49 U. MICH. J.L. REFORM 557, 564 (2016) (“With very few exceptions, American law . . . embraces home exceptionalism or ‘home-centric’ ideals.”).

²⁶ As philosopher Michael Allen Fox comments:

There is a strong tendency to identify house and home, and even to use the words interchangeably. . . . A home is always a house plus many other ingredients; a house is a home minus many elements. . . . [W]hen we focus too much on the house (or any dwelling structure) as the essence of home, we neglect the most important components: the interactions among people who live together (relationships) and their behaviour regarding the objects (possessions, mementos, artifacts, goods, commodities, and so forth) which fit out their home space.

MICHAEL ALLEN FOX, HOME: A VERY SHORT INTRODUCTION 65–66 (2016); see also JOHN S. ALLEN, HOME: HOW HABITAT MADE US HUMAN 13–54 (2015) (discussing attributes of a home); JUDITH FLANDERS, THE MAKING OF HOME 166–68 (2014) (discussing the evolving association of “home” with terms like “comfort” and “relaxing”).

²⁷ Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 991 (1982).

²⁸ Dickinson, *supra* note 25, at 1100 (quoting Radin, *supra* note 27, at 1013).

²⁹ Campbell, *supra* note 25, at 564–65.

safety, privacy, and community,” which has led to “an ideology of home where the protection of home and all it stands for is an American virtue.”³⁰ As these comments reflect, four themes explain the centrality of the home in American law.

First, shelter is necessary for human existence.³¹ As the Court acknowledged in *New State Ice Co. v. Liebmann*,³² “the shelter of a home” is a “prime necessity.”³³ American law adopted a laissez-faire approach to the quality of housing until the twentieth century.³⁴ During this era, people could live in hovels, shanties, or virtually anywhere. With rapid urbanization, however, living conditions in many cities became abysmal; crime, disease, fire, and overcrowding were constant dangers.³⁵ Spurred on by the Progressive movement, cities³⁶ eventually began to regulate the nature and quality of housing through health and safety standards, building codes, and zoning ordinances.³⁷ The unintended consequence of this regulatory expansion was that some people were unable to obtain homes in communities where they wanted to live, while others have been forced out of the housing market altogether.³⁸

Second, the home is a sanctuary against both other people and the state.³⁹ As an English court phrased the doctrine in 1604, “the house of every one is to him as his . . . castle and fortress.”⁴⁰ Eventually this doctrine expanded to restrict interference by the state, as embodied by William Pitt’s 1763 speech to the House of Commons: “The poorest man may in his cottage bid defiance to all the force of the

³⁰ D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 255 (2006).

³¹ See *infra* text accompanying notes 320–33.

³² 285 U.S. 262 (1932).

³³ *Id.* at 277.

³⁴ See SEYMOUR I. TOLL, *ZONED AMERICAN* 16–18 (1969).

³⁵ See, e.g., JACOB A. RIIS, *HOW THE OTHER HALF LIVES: STUDIES AMONG THE TENEMENTS OF NEW YORK* 1–3, 10 (1890) (discussing living conditions in New York City tenements); TOLL, *supra* note 34, at 21–26, 88 (same).

³⁶ Various types of local governments adopt zoning ordinances, including cities, counties, towns, and villages. For simplicity, this Article refers to a local government as a “city.”

³⁷ See TOLL, *supra* note 34, at 18, 26.

³⁸ See, e.g., Jacquelyn Kerubo, *What Gentrification Means for Black Homeowners*, N.Y. TIMES (Aug. 18, 2021), <https://www.nytimes.com/2021/08/17/realestate/black-homeowners-gentrification.html> [https://perma.cc/GR5J-MS6M] (focusing on how Black Americans have been priced out of homeownership in New York).

³⁹ See *infra* text accompanying notes 334–48; see also Barros, *supra* note 30, at 259–69 (discussing security in the home); Dickinson, *supra* note 25, at 1113–16 (discussing Fourth Amendment protections).

⁴⁰ *Semayne’s Case* (1604) 77 Eng. Rep. 194, 195; 5 Co. Rep. 91 a, 91 b.

Crown.”⁴¹ American law has long embraced the castle doctrine, which allows a man to defend his home against criminal intrusion.⁴² As the Court explained in *Wilson v. Layne*,⁴³ “[t]he Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home.”⁴⁴ It noted that “[p]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.”⁴⁵

Third, the home is essential for protection of personal liberty.⁴⁶ The Court has consistently viewed the home as a place where constitutional rights receive enhanced protection.⁴⁷ For example, in *Stanley v. Georgia*,⁴⁸ it held that a person has a First Amendment right to possess obscene material “to satisfy his intellectual and emotional needs in the privacy of his own home.”⁴⁹ And in *Griswold v. Connecticut*, the Court identified a “zone of privacy” in the home arising from “several fundamental constitutional guarantees”—including the Third and Fourth Amendments.⁵⁰ In the process, it posed a rhetorical question: “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?”⁵¹

Finally, the home is the center of family life. The Court noted in *Moore v. City of East Cleveland*⁵² that “the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”⁵³ The Court explained that “[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”⁵⁴ This goal can be realized only in a home.

⁴¹ *Frank v. Maryland*, 359 U.S. 360, 378–79 (1959) (Douglas, J., dissenting) (quoting William Pitt, Speech on the Excise Bill to the House of Commons (Mar. 1763)).

⁴² See, e.g., *People v. Tomlins*, 107 N.E. 496, 497 (N.Y. 1914) (“It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground and resist the attack.”).

⁴³ 526 U.S. 603 (1999).

⁴⁴ *Id.* at 610.

⁴⁵ *Id.* (quoting *United States v. U.S. Dist. Ct. (Keith)*, 407 U.S. 297, 313 (1972)).

⁴⁶ See *infra* text accompanying notes 349–65; see also *Barros, supra* note 30, at 269–75 (discussing privacy in the home).

⁴⁷ See *Dickinson, supra* note 25, at 1107–17.

⁴⁸ 394 U.S. 557 (1969).

⁴⁹ *Id.* at 565.

⁵⁰ 381 U.S. 479, 484–86 (1965) (upholding the right to obtain contraceptives).

⁵¹ *Id.* at 485.

⁵² 431 U.S. 494 (1977).

⁵³ *Id.* at 503.

⁵⁴ *Id.* at 503–04.

II. ORIGINS OF THE RIGHT TO ESTABLISH A HOME

A. *A Traditional Right*

For millennia, people were free to establish homes without governmental interference. William Blackstone posited that the right to a home evolved in a “state of nature”:

As human life . . . grew more and more refined, [an] abundance of conveniences were devised to render it more easy, commodious, and agreeable; as, habitations for shelter and safety, and raiment for warmth and decency. . . . In the case of habitations in particular, it was natural to observe, that even the brute creation, to whom every thing else was in common, maintained a kind of permanent property in their dwellings . . . the birds of the air had nests, and the beasts of the field had caverns Hence a property was soon established in every man’s house and home-stall.⁵⁵

Over three centuries—from the founding of the first European colonies in North America until the widespread adoption of zoning ordinances in the early twentieth century—a white male American was generally⁵⁶ free to rent or buy a home wherever he wished.⁵⁷ This decision was viewed as a private matter, not a public concern. Indeed, virtually everyone had a home of some sort, however humble.⁵⁸ Looking back at this era, the Supreme Court proclaimed in *Meyer v. Nebraska* in 1923 that the right to “establish a home” was one of the rights “long recognized at common law as essential to the orderly pursuit of happiness by free men.”⁵⁹

This right evolved from two foundational themes in American law: the right to acquire property and the importance of the home. Under the republican ideology that dominated the founding era, a central purpose of government was to safeguard property rights. As

⁵⁵ 2 WILLIAM BLACKSTONE, COMMENTARIES *4.

⁵⁶ Traditional American property law was pervaded by gender and racial bias. Married women were legally incapable of acquiring property until the widespread adoption of the Married Women’s Property Acts in the nineteenth century. JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 154–58 (4th ed. 2017). Black Americans and other minority groups did not hold equal rights to obtain property until *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), clarified the scope of the Civil Rights Act of 1866. All references to the scope of the right to acquire property as a general matter, and the right to establish a home in particular, are subject to these caveats.

⁵⁷ See *infra* text accompanying notes 85–86, 114, 162.

⁵⁸ As the 1823 song *Home, Sweet Home* proclaimed: “Be it ever so humble, there’s no place like home.” JOHN BARTLETT, FAMILIAR QUOTATIONS 405 (Justin Kaplan ed., 16th ed. 1992).

⁵⁹ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

James Madison declared, “[g]overnment is instituted to protect property of every sort.”⁶⁰ This necessarily required that government safeguard the right to acquire property in the first instance. Yet the special status of the home did not stem simply from its role as a form of property. As discussed above, the home was necessary for survival, provided security against other people and the state, was vital for personal liberty, and served as the center of family life.⁶¹

B. Colonial America

English law traditionally afforded special protection to the home. For example, a 1615 decision stressed “[t]he pre-eminence and privilege which the law gives to houses which are for men’s habitation.”⁶² As Sir Edward Coke explained in 1644 in his influential *Institutes of the Laws of England*, “a man’s house is his castle, & domus sua cuique est tutissimum refugium [and each man’s home is his safest refuge]; for where shall a man be safe, if it be not in his house?”⁶³ Colonial America inherited this tradition.

Perhaps the biggest difference between colonial America and England was the availability of land. In England, real property was the source of economic power, political influence, and social status.⁶⁴ But land was usually held in fee tail so that it could be passed down to successive generations in the same family.⁶⁵ As a result, most people could not hope to own freehold estates.⁶⁶ But when Europeans discovered North America, almost the entire continent was an unowned wilderness.⁶⁷ In colonial America, almost any white male could obtain a fee simple estate, and many emigrated to the colonies to obtain land.⁶⁸ Thus, as historian James Ely observed, “[a] widely shared desire to

⁶⁰ JAMES MADISON, PROPERTY, PAPERS 14:266–68 (Mar. 29, 1792), reprinted in 1 THE FOUNDERS’ CONSTITUTION 598, 598 (Philip B. Kurland & Ralph Lerner eds., 1987).

⁶¹ See *supra* Part I; *infra* Section IV.B.3.

⁶² Lewis Bowles’s Case (1615) 77 Eng. Rep. 1252, 1257; 11 Co. Rep. 79 b, 82 a.

⁶³ 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 162 (1644); see also 4 WILLIAM BLACKSTONE, COMMENTARIES *223 (“[T]he law of England has so particular and tender a regard to the immunity of a man’s house, that it styles it his castle and will never suffer it to be violated with impunity . . .”).

⁶⁴ SPRANKLING, *supra* note 56, at 118.

⁶⁵ *Id.*

⁶⁶ JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 11–12 (3d ed. 2008).

⁶⁷ RODERICK NASH, WILDERNESS AND THE AMERICAN MIND 7 (3d ed. 1982). At least Europeans perceived it in this manner. *Id.*

⁶⁸ PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 66 (1997) (“[F]or the first time in human history, cheap, good land was available to the multitude.”).

acquire and enjoy property has long been one of the most distinctive features of American society.”⁶⁹

During the colonial era, the right to acquire land and establish a home, either by purchase or lease, was unquestioned. John Locke’s postulate that ownership of property was a natural right strongly influenced colonial thought. “For the preservation of Property being the end of Government, and that for which Men enter into Society,” he wrote, “it necessarily supposes and requires, that the People should *have Property*.”⁷⁰ Blackstone—who was considered “the preeminent authority on English law” at the time⁷¹—provided more specific guidance. The “principal aim of society,” he reasoned, is to protect the “absolute rights” of individuals that would arise in a state of nature, including the “right of private property” and the “right of personal liberty.”⁷² The entire second volume of his treatise examined “those rights which a man may acquire in . . . property.”⁷³

For Blackstone, property was “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”⁷⁴ This absolutist approach naturally extended to establishing a home. He explained that “personal liberty consists in the power of loco-motion, of changing situation, or removing one’s person to whatsoever place one’s own inclination may direct.”⁷⁵ He referred to this as “that right of habitation, which every individual might acquire even in a state of nature.”⁷⁶

Rather than restrict the right to establish a home, government policy during the colonial era helped to fulfill the right by promoting frontier settlement. Under the headright system used early in the era, unappropriated land was freely granted to anyone willing to “settle upon it, subdue it, and establish a home upon it.”⁷⁷ Eventually, the Crown began selling land to settlers for a “nominal fee” and granted land freely in return for military service.⁷⁸ Finally, squatters who “es-

⁶⁹ ELY, *supra* note 66, at xi.

⁷⁰ JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 138, *reprinted in* TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 1988) (1690).

⁷¹ Alden v. Maine, 527 U.S. 706, 715 (1999).

⁷² 1 WILLIAM BLACKSTONE, COMMENTARIES *124, *129.

⁷³ 2 BLACKSTONE, *supra* note 55, at *1.

⁷⁴ *Id.* at *2.

⁷⁵ 1 BLACKSTONE, *supra* note 72, at *134.

⁷⁶ 4 BLACKSTONE, *supra* note 63, at *223.

⁷⁷ MARSHALL HARRIS, ORIGIN OF THE LAND TENURE SYSTEM IN THE UNITED STATES 401–02 (1953).

⁷⁸ *See id.* at 399–400.

established possessory rights by the construction of houses, barns, fences, and other improvements . . . and by clearing and cultivating it” usually obtained formal ownership “without significant cost.”⁷⁹

Colonial law placed virtually no limits on the right to acquire property and establish a home.⁸⁰ The vast majority of people lived and worked on farms,⁸¹ where the settler who acquired land typically built his own house and supported his family by raising crops.⁸² Thus, for most colonists there was not a sharp distinction between homes and other types of property. The implicit right to acquire property naturally encompassed both. Certainly, piecemeal restrictions affecting homes were occasionally adopted in cities. Official maps might lay out the planned locations for lots.⁸³ And some cities required that homes be constructed of brick or stone to minimize the risk of fire, or mandated that nuisance-like uses, such as slaughterhouses and distilleries, be restricted to certain areas.⁸⁴ But beyond this point, government simply did not regulate land use.

In sum, as the Supreme Court observed in *United States v. Wheeler*,⁸⁵ “[i]n all the States from the beginning down to the adoption of the Articles of Confederation the citizens thereof possessed the fundamental right . . . peacefully to dwell within the limits of their respective States.”⁸⁶ The right to acquire property and the unique status of the home were central themes in the newly independent United States. Reflecting on this era, the Court later explained in the *Slaughter-House Cases*⁸⁷ that “the right to acquire . . . property of every

⁷⁹ *Id.* at 401.

⁸⁰ As Morton Horwitz summarized: “In the eighteenth century, the right to property had been the right to absolute dominion over land . . . a static agrarian conception entitling an owner to undisturbed enjoyment” MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 31 (1977).

⁸¹ See SONIA A. HIRT, *ZONED IN THE USA* 113 (2014). As late as 1776, 98% of the population lived outside of cities. *Id.*

⁸² By 1750, “the vast majority of white adult males in the colonies owned land,” which usually included a home. BERNARD H. SIEGAN, *PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT* 54 (2001); see also ELY, *supra* note 66, at 27–28 (“Easy availability of land had long characterized colonial society, and by the time of the revolutionary crisis the ownership of land was widespread.”).

⁸³ For example, William Penn’s 1682 renowned plan for Philadelphia was one of the first examples of American city planning; other notable plans included Savannah, Georgia and Washington, D.C. See HIRT, *supra* note 81, at 112.

⁸⁴ See *id.* at 111–12.

⁸⁵ 254 U.S. 281 (1920).

⁸⁶ *Id.* at 293.

⁸⁷ 83 U.S. (16 Wall.) 36 (1872).

kind” was one of the “fundamental principles” that had existed since the nation became “free, independent, and sovereign.”⁸⁸

C. *Independence*

The Declaration of Independence indirectly recognized the right to establish a home as a matter of natural law. It proclaimed that “all men are created equal, that they are endowed by their Creator with certain unalienable Rights, [and] that among these are Life, Liberty and the pursuit of Happiness.”⁸⁹ Thomas Jefferson based this phrase on Virginia’s draft Declaration of Rights, written by George Mason.⁹⁰ The first paragraph of Mason’s Declaration provided:

[A]ll men are born equally free and independant [sic], and have certain inherent natural rights, of which they cannot, by any compact, deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.⁹¹

Historian Pauline Maier explains that Jefferson shortened the final phrase to “life, liberty, & the pursuit of happiness” during the drafting process.⁹² She suggests that Jefferson used the words “pursuit of happiness” because “he meant to say more economically and movingly what Mason stated with some awkwardness and at considerably greater length.”⁹³ Maier concludes that “[t]he inherent right to pursue happiness probably also included ‘the means of acquiring and possessing property.’”⁹⁴ Indeed, Jefferson envisioned an agrarian nation where farmers who owned their own lands—and necessarily their homes—would provide the “virtue and judgment” necessary for republican government.⁹⁵

⁸⁸ *Id.* at 76.

⁸⁹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁹⁰ See PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 125–27 (1998).

⁹¹ *Id.* at 126–27.

⁹² *Id.* at 134.

⁹³ *Id.*

⁹⁴ *Id.*; see also ELY, *supra* note 66, at 29 (“The right to obtain and possess property was at the heart of the pursuit of happiness. Still, Jefferson’s formulation was significant because it stressed the importance of acquiring property rather than just the protection of existing property arrangements.”).

⁹⁵ Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467, 475 (1976). Katz stresses that “the right to property was an unquestioned assumption of the American revolutionaries.” *Id.* at 469–70. As Thomas Jefferson explained, “[w]henver there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right.” Letter from Thomas

The Supreme Court has suggested that the phrase “pursuit of happiness” includes the right to establish a home. In *Board of Regents of State Colleges v. Roth*,⁹⁶ it defined the “liberty” protected by the Due Process Clause to include a list of specific rights—including the “right . . . [to] establish a home . . . and generally . . . those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.”⁹⁷ In context, the right to establish a home and the other listed rights are specific examples of the liberties that are essential to the “pursuit of happiness.”

Scholars describe the Constitution as home-centric because it extends special protections to homes—particularly as developed in the Court’s jurisprudence over the last century.⁹⁸ For example, the Third Amendment guarantees that soldiers cannot be quartered in any “house” without the consent of the owner,⁹⁹ and the Fourth Amendment protects against unreasonable searches of “houses,”¹⁰⁰ reflecting the importance that the Framers placed on the home. As Professor Akhil Amar notes:

[N]othing in the written Constitution explicitly demands special protection of “houses” . . . but surely the document invites judges (and other interpreters) to attend to this explicit word . . . in pondering which unenumerated rights are properly claimed by the people. . . .
 . . . [T]he Justices have in fact developed a case law of both enumerated rights and unenumerated rights that recognizes the special significance of houses and what happens inside them.¹⁰¹

These amendments indicate that the Framers assumed the existence of an underlying right to establish a home.¹⁰²

In context, the amendments that the states requested were largely the product of history—both the turmoil in seventeenth-century En-

Jefferson to James Madison (Oct. 28, 1785), in 8 THE PAPERS OF THOMAS JEFFERSON 681, 682 (Julian P. Boyd ed., 1953).

⁹⁶ 408 U.S. 564 (1972).

⁹⁷ *Id.* at 572 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

⁹⁸ See Dickinson, *supra* note 25, at 1109–16.

⁹⁹ U.S. CONST. amend. III.

¹⁰⁰ *Id.* amend. IV.

¹⁰¹ Akhil Reed Amar, *America’s Lived Constitution*, 120 YALE L.J. 1734, 1773 (2011).

¹⁰² Cf. *United States v. Guest*, 383 U.S. 745, 758 (1966) (holding that the right to travel is a fundamental right even though it does not appear in the text of the Constitution). As one scholar interprets the decision, “[t]he Court explained that the right to travel was absent from the text of the Constitution because as a right so basic, it was simply assumed to exist.” ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 881 (4th ed. 2011).

gland that led to the 1689 Declaration of Rights and the perceived British abuses of the colonies before independence.¹⁰³ Adoption of the Bill of Rights was driven by anti-Federalist anxiety that the new government might engage in similar conduct.¹⁰⁴ But because the Crown had never interfered with the traditional right to establish a home, there was no need to list it as a specific right.

More broadly, James Ely observes that “the right to acquire and own property was undoubtedly a paramount value for the framers of the Constitution.”¹⁰⁵ For example, James Madison stated that “[t]he personal right to acquire property, which is a natural right, gives to property, when acquired, a right to protection, as a social right.”¹⁰⁶ Indeed, the Takings Clause and the property component of the Due Process Clause in the Fifth Amendment would be meaningless unless there was an underlying right to acquire property.¹⁰⁷

D. *Antebellum Era*

American courts firmly endorsed the right to acquire property in the antebellum era.¹⁰⁸ The federal circuit court in *Vanhome's Lessee v. Dorrance*,¹⁰⁹ for example, held that a state law which terminated the plaintiff's title to a home and farm was unconstitutional.¹¹⁰ Sitting as a circuit justice, Supreme Court Justice William Paterson observed that “the right of acquiring and possessing property, and having it pro-

¹⁰³ See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (noting that the Cruel and Unusual Punishments Clause of the Eighth Amendment was derived from the Declaration of Rights).

¹⁰⁴ As historian Leonard Levy notes, the Bill of Rights “was a bill of restraints on the United States.” LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 11–12 (1999).

¹⁰⁵ ELY, *supra* note 66, at 43.

¹⁰⁶ James Madison, Speech in the Virginia Constitutional Convention (Dec. 2, 1829), in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 402, 402–03 (Marvin Meyers ed., Univ. Press of New Eng. rev. ed. 1981).

¹⁰⁷ See U.S. CONST. amend. V, cl. 3–4.

¹⁰⁸ Leading scholars of the era echoed this view. Melding the approaches taken by Blackstone and Jefferson, James Kent declared that one of the “absolute rights of individuals” was “the right to acquire and enjoy property.” 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 1 (1827). He noted that this right had been “justly considered, and frequently declared, by the people of this country, to be natural, inherent, and unalienable.” *Id.* In turn, Theodore Sedgwick quoted *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230), to explain that the Privileges and Immunities Clause encompassed “the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety.” THEODORE SEDGWICK, *A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW* 601–02 (1857) (quoting *Corfield*, 6 F. Cas. at 551–52).

¹⁰⁹ 2 U.S. (2 Dall.) 304, 28 F. Cas. 1012 (C.C.D. Pa. 1795) (No. 16857).

¹¹⁰ See *id.*

tected, is one of the natural, inherent, and unalienable rights of man.”¹¹¹

In turn, Justice Bushrod Washington provided the first influential interpretation of the Privileges and Immunities Clause in *Corfield v. Coryell*¹¹² by identifying the “fundamental” rights “which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.”¹¹³ Echoing the Declaration of Independence, two of the rights he listed were the “enjoyment of life and liberty, with the right to acquire and possess property of every kind” and “[t]he right . . . to reside in any other state.”¹¹⁴ In combination, the right to acquire property and the right to reside reflected an early recognition of the right to establish a home.

The land policies of the federal government during this period were designed to encourage the settlement of western lands, consistent with Jefferson’s vision of a nation populated by independent farmers.¹¹⁵ As the Supreme Court explained in *Van Ness v. Pacard*,¹¹⁶ “[t]he country was a wilderness, and the universal policy was to procure its cultivation and improvement.”¹¹⁷

Rather than restrict the right to establish a home, the government facilitated it. Under the Land Ordinance of 1785,¹¹⁸ the government began selling public lands at a “sale price [that] was not too high for the settler.”¹¹⁹ Military bounties allowed veterans of the Revolutionary War, the War of 1812, and the Mexican War to obtain land without payment.¹²⁰ Squatting was widespread; and under the Preemption Act of 1841, the government eventually allowed the squatter who had “inhabited and improved the land, [and] erected a dwelling on it”¹²¹ to purchase it for a low price.¹²² Finally, under the Homestead Act of

¹¹¹ *Id.* at 310.

¹¹² 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

¹¹³ *Id.* at 551.

¹¹⁴ *Id.* at 551–52.

¹¹⁵ See Katz, *supra* note 95 and accompanying text.

¹¹⁶ 27 U.S. (2 Pet.) 137 (1829).

¹¹⁷ *Id.* at 145.

¹¹⁸ 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 375 (John C. Fitzpatrick ed., 1933).

¹¹⁹ HARRIS, *supra* note 77, at 400.

¹²⁰ See PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 251–54, 262–63, 270–73 (1968).

¹²¹ *Id.* at 238.

¹²² See HARRIS, *supra* note 77, at 401; see also GATES, *supra* note 120, at 238–39 (discussing preemption).

1862,¹²³ a settler could obtain 160 acres of land “for the purpose of actual settlement” for ten dollars, as long as he resided on and cultivated the land for five years.¹²⁴ As the Court observed in *Buchser v. Buchser*,¹²⁵ “the policy of the [homestead] statute . . . is to enable the settler and his family to secure a home.”¹²⁶

E. Post-Civil War Era

Congress adopted the Fourteenth Amendment in 1866, and it took effect upon ratification in 1868. Section 1 contains its Due Process Clause, which provides, “[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”¹²⁷ Section 1 was motivated in part by concern that southern states would prevent emancipated slaves from obtaining homes and other property—thus interfering with the right to establish a home.

The legislative history of Section 1 is scant.¹²⁸ It was primarily intended to constitutionalize the protections set forth in the Civil Rights Act of 1866.¹²⁹ Accordingly, the provisions of the Act help to interpret the scope of the Due Process Clause.¹³⁰ As Justice Brennan explained in *Goodman v. Lukens Steel Co.*,¹³¹ “[t]he main targets of the [Act] were the ‘Black Codes,’ enacted in Southern States after the Thirteenth Amendment was passed”—laws that were “poorly disguised substitutes for slavery.”¹³² Notably, the Act protected the right to “inherit, purchase, lease, sell, hold, and convey real and personal property”—which included the right to establish a home.¹³³

¹²³ Homestead Act of 1862, Pub. L. No. 37-64, § 2, 12 Stat. 392.

¹²⁴ *Id.* at 392; GATES, *supra* note 120, at 395. Ultimately, over 1,400,000 homesteads were successfully established. HIRT, *supra* note 81, at 116.

¹²⁵ 231 U.S. 157 (1913).

¹²⁶ *Id.* at 162.

¹²⁷ U.S. CONST. amend. XIV, § 1, cl. 3. All references hereinafter to the “Due Process Clause” refer to the Due Process Clause of the Fourteenth Amendment.

¹²⁸ See SIEGAN, *supra* note 82, at 237 (noting that debate on Section 1 in the Senate and House of Representatives was “not very extensive”).

¹²⁹ *Id.* at 226 (“While opinion was divergent as to the full meaning of Section 1 of the proposed Fourteenth Amendment, commentators generally agreed that it was intended to authorize passage of and constitutionalize the principles of the Civil Rights Act of 1866 . . .”).

¹³⁰ See Kurt T. Lash, *Enforcing the Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 GEO. L.J. 1389, 1391 (2018) (“Scholars have long looked to the 1866 Civil Rights Act for clues to the original meaning of the Fourteenth Amendment.”).

¹³¹ 482 U.S. 656 (1987).

¹³² *Id.* at 672 (Brennan, J., concurring in part and dissenting in part).

¹³³ See Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1982); see also Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal*

The congressional debates preceding adoption of the Act indicate that its property protections encompassed this right. For instance, Congressman William Windom complained that “[t]he State laws of Georgia and South Carolina prohibit any negro from buying or leasing a home.”¹³⁴ Other legislators noted that similar laws existed in Mississippi¹³⁵ and Louisiana.¹³⁶ Windom rhetorically asked: “Do you call him a freeman who is denied that most sacred of all possessions, a home?”¹³⁷

In the same vein, Senator Jacob Howard argued that opponents of the bill would permit the former Confederate states to declare that:

[N]o negro who has once been a slave shall ever . . . have the right or privilege of earning and purchasing property; of having a home under which to shelter him and his family . . . thus leaving it in the power of these interested States to expatriate him at any moment and drive him beyond their limits [and] to deprive him of a home ¹³⁸

Howard asked: “Is a freeman to be deprived of the right of acquiring property, of the right of having a family, a wife, children, home?”¹³⁹ In turn, Congressman Martin Thayer challenged the right of southern states to adopt “laws which prevent the enjoyment of the fundamental rights of citizenship; laws which declare, for example, that [former slaves] shall not have the privilege of purchasing a home for themselves and their families.”¹⁴⁰

Senator Lyman Trumbull, who introduced the bill in the Senate, and Congressman James Wilson, who sponsored it in the House of Representatives, both asserted that the rights it guaranteed were already protected by the Constitution.¹⁴¹ After quoting at length from

Entitlements, 13 HARV. J.L. & PUB. POL’Y 37, 39 (1990) (suggesting that the Thirteenth Amendment should be viewed as creating a positive “right to sustenance and shelter” for freed slaves).

¹³⁴ CONG. GLOBE, 39th Cong., 1st Sess. 1160 (1866).

¹³⁵ Mississippi law prohibited “the holding, leasing, or renting of real estate by freedmen.” *Id.*

¹³⁶ An ordinance in one Louisiana town provided that “[n]o negro or freeman shall be permitted to rent or keep a house within the limits of the town *under any circumstances*” and similar ordinances were adopted by other towns in the state. Report of Carl Schurz, S. EXEC. DOC. NO. 2, 39th Cong., 1st Sess. 23 (1865).

¹³⁷ CONG. GLOBE, 39th Cong., 1st Sess. 1160 (1866).

¹³⁸ *Id.* at 504.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1151; *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 428 (1968) (“[O]ne of the most comprehensive studies . . . before Congress [when the Civil Rights Act of 1866 was adopted] . . . noted the existence of laws virtually prohibiting Negroes from owning or renting property in certain towns . . .”).

¹⁴¹ *See* CONG. GLOBE, 39th Cong., 1st Sess. 475–76, 1117 (1866).

Justice Washington's decision in *Corfield v. Coryell*, Trumbull described "the right to acquire property" and other rights specified in the bill as "fundamental rights belonging to every man as a free man, and which under the Constitution as it now exists we have a right to protect every man in."¹⁴² Wilson agreed that the object of the bill was "to protect and enforce those [rights] which already belong to every citizen."¹⁴³ Quoting James Kent's *Commentaries on American Law*, he stated that the "right to acquire and enjoy property" and other rights in the bill were "natural, inherent, and inalienable."¹⁴⁴

Ultimately, the rights guaranteed by the Civil Rights Act of 1866 resembled the *Corfield* formulation, including the rights to purchase and lease property.¹⁴⁵ Reflecting on the Act in the *Civil Rights Cases*,¹⁴⁶ the Supreme Court observed that it protected "those fundamental rights which appertain to the essence of citizenship."¹⁴⁷ As historian Eric Foner summarizes, the Act was "the first statutory definition of the rights of American citizenship."¹⁴⁸

Four years after ratification of the Fourteenth Amendment, the Court recognized that it was intended, in part, to protect the right to obtain a home. In the *Slaughter-House Cases*, it noted that the former Confederate states adopted "laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value."¹⁴⁹ The Court continued: "They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it."¹⁵⁰ Thus, emancipated slaves were unable to own the homes where they lived or the farms where they labored. In order to deal with this concern and other problems, the Court explained, legislators "accordingly passed through Congress the proposition for the Fourteenth Amendment."¹⁵¹

¹⁴² *Id.* at 475–76.

¹⁴³ *Id.* at 1117.

¹⁴⁴ *Id.* at 1118 (quoting 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1 (1827)).

¹⁴⁵ See Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1983).

¹⁴⁶ 109 U.S. 3 (1883).

¹⁴⁷ *Id.* at 22.

¹⁴⁸ ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 244 (1988).

¹⁴⁹ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70 (1872).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

F. *Lochner Era*

The rapid industrialization and urbanization that characterized the late nineteenth century produced a fundamental change in the Supreme Court’s attitude toward property.¹⁵² Business enterprises argued that the Due Process Clause insulated them from unreasonable state legislation that interfered with property rights.¹⁵³ Over time, the Court developed a series of doctrines that limited the scope of state regulation by broadly protecting economic liberty, initially through reliance on the Contract Clause but eventually by developing the concept of substantive due process.¹⁵⁴ The symbolic triumph of economic liberty was *Lochner v. New York*,¹⁵⁵ where the Court held that a statute limiting the working hours for bakery workers violated the Fourteenth Amendment.¹⁵⁶

A series of Court decisions from this era endorsed the right to acquire property—usually in the context of shielding business entities from state regulation. For instance, in the 1888 decision of *Powell v. Pennsylvania*,¹⁵⁷ the Court stated that the “privilege . . . of acquiring, holding, and selling property” was protected by the Due Process Clause.¹⁵⁸ Ten years later, in *Holden v. Hardy*,¹⁵⁹ it struck the same theme by observing that the “phrase ‘due process of law’” protected that right:

As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a state law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provision.¹⁶⁰

The Court also acknowledged the right to reside in a place of one’s choice—which indirectly recognized the right to establish a home. Writing for the majority in *Allgeyer v. Louisiana*,¹⁶¹ Justice Peckham addressed the meaning of “liberty” as used in the Due Pro-

¹⁵² See ELY, *supra* note 66, at 8.

¹⁵³ See, e.g., *Powell v. Pennsylvania*, 127 U.S. 678, 686 (1888).

¹⁵⁴ See ELY, *supra* note 66, at 7.

¹⁵⁵ 198 U.S. 45 (1905).

¹⁵⁶ *Id.* at 45.

¹⁵⁷ 127 U.S. 678 (1888).

¹⁵⁸ *Id.* at 684. This holding was foreshadowed by *Barbier v. Connolly*, 113 U.S. 27 (1885), where the Court commented that the Fourteenth Amendment was “undoubtedly intended” to assure “that all persons should be equally entitled to pursue their happiness and acquire and enjoy property.” *Id.* at 31.

¹⁵⁹ 169 U.S. 366 (1898).

¹⁶⁰ *Id.* at 390–91.

¹⁶¹ 165 U.S. 578 (1897).

cess Clause of the Fourteenth Amendment for the first time, identifying specific rights encompassed by the clause:

The “liberty” mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, *to live and work where he will*, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.¹⁶²

During this era, the concept of the home began to evolve, influenced by the same currents that reshaped the Court’s property jurisprudence. In preindustrial society, the home was often both a residence and a workplace.¹⁶³ But as the century progressed, work increasingly occurred outside the home on premises owned by an employer.¹⁶⁴ In this changing environment, the home took on new meaning as the center of family life, a private retreat from the outside world, and a symbol of autonomy.¹⁶⁵ By the early twentieth century, “[e]stablishment of a separate household by a newly formed family, as well as the maintenance of household headship in the later years of life, were sacred values and markers of autonomy in American society.”¹⁶⁶

At the same time, however, inspired either by the Progressive movement or by racial animus, some cities began to adopt ordinances that restricted land use—and thereby began to imperil the right to establish a home.¹⁶⁷ For example, the 1912 case of *Eubank v. City of Richmond*¹⁶⁸ marked the first time that the Court struck down a land use ordinance—and it involved a home. The Court reasoned that the

¹⁶² *Id.* at 589 (emphasis added); *see also* *United States v. Wheeler*, 254 U.S. 281, 293 (1920) (affirming that citizens held the “fundamental right . . . peacefully to dwell within the limits of their respective States”).

¹⁶³ *See* FLANDERS, *supra* note 26, at 49 (discussing the impact of industrialization on the nature of the home). For example, “in New York City, in 1800, less than 5 per cent of men had a workplace outside the house . . . and by 1840 it was 70 per cent.” *Id.*

¹⁶⁴ *See id.*

¹⁶⁵ Tamara K. Hareven, *The Home and the Family in Historical Perspective*, 58 SOC. RSCH. 253, 256–60, 274 (1991), *reprinted in* HOME: A PLACE IN THE WORLD 227, 230–34, 248 (Arien Mack ed., 1993).

¹⁶⁶ *Id.* at 256.

¹⁶⁷ *See infra* text accompanying notes 202–03, 239–40.

¹⁶⁸ 226 U.S. 137 (1912).

ordinance, which allowed neighbors to establish a building setback line between the street and the houses on a particular block, violated the Due Process Clause.¹⁶⁹ The equities favored the plaintiff, who had obtained a building permit and purchased the needed materials before his neighbors decided to create a setback line; and, even then, the planned home conformed to the line, aside from a minor window protrusion.¹⁷⁰ The decision signaled the Court’s concern that land use regulation might go too far.

The Court’s 1917 decision in *Buchanan v. Warley*¹⁷¹ foreshadowed the right to establish a home that it later enunciated in *Meyer v. Nebraska*.¹⁷² The ordinance at issue in *Buchanan* made it “unlawful for any colored person to move into and occupy as a residence . . . any house upon any block upon which a greater number of houses are occupied as residences . . . by white people.”¹⁷³ In order to test the ordinance, Warley, a Black man, entered into a contract to purchase a residential lot from Buchanan “for the purpose of having erected thereon a house which I propose to make my residence.”¹⁷⁴ Warley then refused to perform the contract because the ordinance barred him from living on the property, and Buchanan sued for specific performance.¹⁷⁵ Citing *Holden v. Hardy*, the Court explained: “Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property.”¹⁷⁶ It relied on the Due Process Clause in striking down the ordinance:

We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth

¹⁶⁹ See *id.* at 140, 143–44.

¹⁷⁰ See *id.* at 141–42; see also Joseph Gordon Hylton, *Prelude to Euclid: The United States Supreme Court and the Constitutionality of Land Use Regulation, 1900–1920*, 3 WASH. U. J.L. & POL’Y 1, 34 (2000) (noting that during this era the Court “routinely upheld the legitimacy of local land use controls” in cases involving commercial properties).

¹⁷¹ 245 U.S. 60 (1917). For helpful analysis of *Buchanan*, see James W. Ely, Jr., *Buchanan and the Right to Acquire Property*, 48 CUMB. L. REV. 423 (2018); and James W. Ely, Jr., *Reflections on Buchanan v. Warley, Property Rights, and Race*, 51 VAND. L. REV. 953 (1998).

¹⁷² 262 U.S. 390, 399 (1923).

¹⁷³ *Buchanan*, 245 U.S. at 70–71.

¹⁷⁴ *Id.* at 69, 73.

¹⁷⁵ This was a collusive lawsuit brought to challenge the constitutionality of the ordinance. See Richard A. Epstein, *Lest We Forget: Buchanan v. Warley and Constitutional Jurisprudence of the “Progressive Era,”* 51 VAND. L. REV. 787, 788 (1998) (noting that the case “was a staged litigation challenge”).

¹⁷⁶ *Buchanan*, 245 U.S. at 74.

Amendment of the Constitution preventing state interference with property rights except by due process of law.¹⁷⁷

III. THE CONSTITUTIONAL RIGHT TO ESTABLISH A HOME

A. *Meyer v. Nebraska*

The Supreme Court expressly recognized the right to establish a home in the 1923 decision of *Meyer v. Nebraska*.¹⁷⁸ Yet long before *Meyer*, this right was seen as “essential to the orderly pursuit of happiness by free men,”¹⁷⁹ as discussed in Part II. From the colonial period through the *Lochner* era, the American legal system protected the right through a variety of doctrines, just as federal government policy facilitated fulfillment of the right. As the Court acknowledged two years before it decided *Meyer*, “[h]ouses are a necessary of life.”¹⁸⁰

Meyer is an enigma. Scholars celebrate it as the cornerstone of contemporary substantive due process jurisprudence—“the first modern civil rights case,”¹⁸¹ “the seminal decision for non-economic substantive due process,”¹⁸² and a “liberal icon[.]”¹⁸³ Together with *Pierce v. Society of Sisters*,¹⁸⁴ *Meyer* served as the foundation for the Court’s expansion of individual rights in areas such as abortion, birth control, family relations, and marriage.¹⁸⁵ Yet the decision was rendered in the middle of the *Lochner* era by a staunchly conservative Court.¹⁸⁶

Technically, the *Meyer* holding is narrow. The Court merely held that a state law that prohibited teaching a foreign language to students who had not passed the eighth grade violated the Due Process Clause.¹⁸⁷ The decision is notable in part because it represents the Court’s first use of substantive due process to protect personal liber-

¹⁷⁷ *Id.* at 82.

¹⁷⁸ 262 U.S. 390 (1923).

¹⁷⁹ *See id.* at 399.

¹⁸⁰ *Block v. Hirsh*, 256 U.S. 135, 161 (1921).

¹⁸¹ Louise Weinberg, *The McReynolds Mystery Solved*, 89 DENV. U. L. REV. 133, 133 (2011).

¹⁸² William G. Ross, *A Judicial Janus: Meyer v. Nebraska in Historical Perspective*, 57 U. CIN. L. REV. 125, 126 (1988).

¹⁸³ Barbara Bennett Woodhouse, “Who Owns the Child?”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 996 (1992).

¹⁸⁴ 268 U.S. 510 (1925).

¹⁸⁵ *See infra* text accompanying notes 282–91.

¹⁸⁶ Exploring the Court’s reinterpretation of *Meyer* and *Pierce* over time, Professor Peter Nicolas concludes that these decisions “hold the record for the number of times a decision has been judicially reconstructed.” Nicolas, *supra* note 3, at 956.

¹⁸⁷ *See Meyer v. Nebraska*, 262 U.S. 390, 400, 402–03 (1923).

ties—in this case the defendant teacher’s “right . . . to teach and the right of parents to engage him so to instruct their children.”¹⁸⁸

But the decision is best known for its catalogue of individual rights. Writing for the Court, Justice McReynolds stressed that “the individual has certain fundamental rights which must be respected.”¹⁸⁹ He proclaimed in dicta that the “liberty” guaranteed by the clause encompassed a broad range of rights:

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, *establish a home* and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.¹⁹⁰

He explained that a state could not interfere with these rights by legislation that was “arbitrary or without reasonable relation to some purpose within the competency of the State to effect.”¹⁹¹ Today the *Meyer* list is still the accepted standard for defining the liberty protected by the Due Process Clause.¹⁹²

Although McReynolds cited thirteen prior Court decisions as authority for his catalogue, none of these precedents involved individual liberties. Rather, they all dealt with challenges to laws that burdened economic rights.¹⁹³ The *Meyer* catalogue was apparently based on Justice Peckham’s pioneering list of mainly economic liberties in *Allgeyer v. Louisiana*, decided twenty-six years earlier.¹⁹⁴ But McReynolds reformulated the list by shifting its focus from economic rights to personal rights—in an echo of the Declaration of Independence.¹⁹⁵

¹⁸⁸ *Id.* at 400.

¹⁸⁹ *Id.* at 401.

¹⁹⁰ *Id.* at 399 (emphasis added).

¹⁹¹ *Id.* at 400.

¹⁹² See CHEMERINSKY, *supra* note 102, at 577–78 (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972)); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 679 (2d ed. 1988) (quoting *Meyer*). As Tribe notes, *Meyer* has “remained [a] durable and fertile source[] of constitutional doctrine concerning the nature of liberty.” *Id.* at 1318.

¹⁹³ See, e.g., *Butchers’ Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Livestock Landing & Slaughter-House Co.*, 111 U.S. 746 (1884) (right to contract); *Truax v. Raich*, 239 U.S. 33 (1915) (right to earn a livelihood); *Adams v. Tanner*, 244 U.S. 590 (1917) (right to engage in lawful business).

¹⁹⁴ See *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

¹⁹⁵ See *supra* notes 89–97 and accompanying text.

In context, the *Meyer* formulation was a libertarian response to the Progressive movement. Professor Robert Post posits that McReynolds and his fellow Justices were concerned that the rising tide of Progressive legislation, coupled with the expansion of federal regulatory power during World War I, threatened personal rights that individuals had traditionally enjoyed.¹⁹⁶ He notes that—particularly in *Meyer*—the Court “extended constitutional protections to remarkably diffuse and undifferentiated aspects of ordinary experience, far exceeding merely economic transactions.”¹⁹⁷ Its goal, he argues, was to “safeguard that realm from unjustifiable interference” by the state.¹⁹⁸ As such, “*Meyer* can be read as extending ‘fundamental rights’ to the kinds of cultural practices deemed necessary to sustain the individuality presupposed by democracy.”¹⁹⁹

In a similar vein, Professor Barbara Bennett Woodhouse observes that contemporary commentators “viewed the decision[] . . . as, above all, championing the individual’s right to control his own [children]—free from government interference.”²⁰⁰ More ominously, Professor Steven Macias suggests that the motivation for the decision “was not a charitable concern for the preservation of a pluralistic society, but rather an anti-progressive philosophy grounded in social Darwinian ideology.”²⁰¹

Neither *Meyer* nor any of the precedents that McReynolds cited involved a home.²⁰² It is probable the inclusion of the right to establish a home was a reaction to the rapid spread of zoning ordinances, a core theme of the Progressive movement.²⁰³ New York City adopted the

¹⁹⁶ See Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1494–95, 1530–31 (1998).

¹⁹⁷ *Id.* at 1530.

¹⁹⁸ *Id.* at 1532.

¹⁹⁹ *Id.* at 1534 (footnote omitted).

²⁰⁰ Woodhouse, *supra* note 183, at 1090. She interprets the recognition of the right “to . . . bring up children” as a reaction to the fact that “the family citadel was crumbling under assaults from common schooling, child welfare, juvenile justice, child labor laws, and a host of government assumptions of paternal prerogatives designed to standardize child-rearing and make it responsive to community values.” *Id.* at 1087 n.506, 1090.

²⁰¹ Steven J. Macias, *The Huck Finn Syndrome in History and Theory: The Origins of Family Privacy*, 12 J.L. & FAM. STUD. 87, 89 (2010). He notes that McReynolds had a “nasty, racist, anti-Semitic temperament.” *Id.* at 101.

²⁰² Lofty opening definitions of liberty . . . notwithstanding, there is simply no right to marry, establish a home, or bear children at stake in the *Meyer* case. . . . [T]he problem in *Meyer* is not state interference in the intimacies of home and family Susan E. Lawrence, *Substantive Due Process and Parental Rights: From Meyer v. Nebraska to Troxel v. Granville*, 8 J.L. & FAM. STUD. 71, 77 (2006).

²⁰³ MICHAEL ALLAN WOLF, *THE ZONING OF AMERICA: Euclid v. Ambler* 30 (2008) (“Zon-

first comprehensive ordinance in 1916, and other cities soon followed its example.²⁰⁴ These early ordinances were modest in scope; each city was divided into geographic zones where different uses were permitted, with limits on the size and location of buildings, including homes.

The widespread adoption of zoning ordinances signaled a shift away from the American tradition that allowed individuals to establish homes as they wished, with minimal governmental interference. As the Supreme Court later explained in *Village of Euclid v. Ambler Realty Co.*,²⁰⁵ “[r]egulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.”²⁰⁶

B. Meaning of “Establish a Home”

The phrase “establish a home” was not a legal term of art when *Meyer* was decided. However, a number of factors indicate that the Court intended the phrase to refer to a person’s right to lease or purchase a house, apartment, or other dwelling as a long-term residence and to begin living in that dwelling.²⁰⁷

The Court used the phrase as part of a sequence: “to marry, establish a home and bring up children.”²⁰⁸ This suggests a temporal relationship: people marry, then they establish a home, and finally they raise children.²⁰⁹ In this context, “home” connotes a long-term residence for a family to inhabit, rather than a temporary accommodation such as a room in a hotel or boarding house. Further, the term “establish” indicates the holder of the right will both obtain a home and begin living there.

This interpretation is consistent with dictionary definitions from the era. The leading American dictionary, Webster’s Revised Unabridged Dictionary, defined “home” as “[o]ne’s own dwelling place; the house in which one lives; esp., the house in which one lives with

ing as an American legal institution is readily identified with the Progressive Era. . . . In many ways, zoning is a quintessential Progressive concept.”).

²⁰⁴ See *id.* at 27.

²⁰⁵ 272 U.S. 365 (1926).

²⁰⁶ *Id.* at 387.

²⁰⁷ In a broad sense, of course, a “home” is more than a house or structure—because the term connotes the manner in which people use the property. See *supra* text accompanying notes 26–30. But at a minimum, a “home” connotes a house or other dwelling unit used as a long-term residence, and that is the sense in which the *Meyer* Court used it.

²⁰⁸ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

²⁰⁹ Later developments make it clear that the right to establish a home is not limited to married couples. See *infra* note 238.

his family; the habitual abode of one's family."²¹⁰ In turn, it defined "establish" as "[t]o originate and secure the permanent existence of; to found; . . . to create and regulate."²¹¹ Combined, these terms connote securing and occupying a long-term dwelling.²¹²

The phrase occasionally appeared in judicial decisions before *Meyer* was decided, though not as a term of art. One line of cases involved charitable gifts. For instance, in *Peek v. Woman's Home Missionary Society*,²¹³ the Illinois Supreme Court referred to a bequest that was intended to "establish a home" for orphans.²¹⁴ *Board of Commissioners v. Dinwiddie*²¹⁵ involved a devise of land "to establish a home for the benefit of worthy persons who have no home."²¹⁶ Another example is *Chase v. Stockett*,²¹⁷ where the decedent created a trust to "establish a home for 'destitute, aged, and infirm women.'"²¹⁸ As used in these decisions, the phrase "establish a home" connoted acquiring a physical dwelling and operating it as a long-term residence.

A second line of cases concerned homestead claims. In the same year that *Meyer* was decided, the Eighth Circuit observed in *United States v. Bennett*²¹⁹ that the law required a claimant to "prove that he had a habitable home upon the land and had actually resided upon and cultivated the same for the term of five . . . years";²²⁰ it noted that "there must be good faith on the part of the homesteader to establish a home for himself and family upon the land."²²¹ Similarly, in *Tustin v. Adams*,²²² the court explained that the homestead laws required the

²¹⁰ *Home*, WEBSTER'S REVISED UNABRIDGED DICTIONARY (1913), <https://www.websters1913.com/words/Home> [<https://perma.cc/2ZJE-8BRF>]. Earlier editions reflect the same meaning. See, e.g., *Home*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining "home" as "[a] dwelling house; the house or place in which one resides").

²¹¹ *Establish*, WEBSTER'S REVISED UNABRIDGED DICTIONARY (1913), <https://www.websters1913.com/words/Establish> [<https://perma.cc/7MN3-JSYN>].

²¹² *Homestead*, BLACK'S LAW DICTIONARY (1st ed. 1891) is also helpful. It defines "homestead" as "the home, the house and the adjoining land, where the head of the family dwells; the home farm. The fixed residence of the head of a family, with the land and buildings surrounding the main house." *Id.* (citation omitted).

²¹³ 136 N.E. 772 (Ill. 1922).

²¹⁴ *Id.* at 775.

²¹⁵ 37 N.E. 795 (Ind. 1894).

²¹⁶ *Id.* at 796.

²¹⁷ 19 A. 761 (Md. 1890).

²¹⁸ *Id.* at 762.

²¹⁹ 296 F. 409 (8th Cir. 1923).

²²⁰ *Id.* at 411.

²²¹ *Id.* at 413.

²²² 87 F. 377 (D. Wash 1898).

claimant to enter vacant public land and “establish a home thereon, by either erecting a dwelling house, or purchasing from the owner a house suitable for habitation.”²²³ In both instances, the phrase meant acquiring a house or similar structure and using it as a long-term residence.

Finally, two later Supreme Court uses of the phrase support this interpretation.²²⁴ In *Shelley v. Kraemer*,²²⁵ the Court described a segregation-era zoning ordinance at issue in a prior case; it explained that the law “forbade any Negro to establish a home on any property in a white community.”²²⁶ In addition, concurring in *City of Cleburne v. Cleburne Living Center, Inc.*,²²⁷ Justice Marshall observed that for adults with intellectual disabilities, the “right to ‘establish a home’ . . . means living together in group homes, for . . . group homes have become the primary means by which [they] can enter life in the community.”²²⁸ Again, in these cases, “home” connotes a physical structure that is acquired and used as a long-term residence.

In sum, as the First Circuit explained in *González-Fuentes v. Molina*,²²⁹ the “constitutionally protected prerogative to ‘establish a home’” encompasses the right “to reside in a dwelling of [one’s] own choosing.”²³⁰ This right logically covers both leasing and purchasing a home. When *Meyer* was decided, about 45% of Americans owned their homes, while the remainder were renters.²³¹ It was therefore common for people to “establish” homes in both contexts, and nothing in the opinion suggests that the right was limited to one method of acquisition.

²²³ *Id.* at 378.

²²⁴ A number of decisions by lower courts have also used the phrase in this manner. *See infra* notes 279–81.

²²⁵ 334 U.S. 1 (1948).

²²⁶ *Id.* at 12.

²²⁷ 473 U.S. 432 (1985).

²²⁸ *Id.* at 461.

²²⁹ 607 F.3d 864 (1st Cir. 2010).

²³⁰ *Id.* at 890 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)) (commenting that while an electronic supervision program confined prisoners to their homes, it allowed them to “live with their loved ones, form relationships with neighbors, lay down roots in their community, and reside in a dwelling of their own choosing . . . rather than in a cell designated by the government” and that what it “afforded the appellees was included in the constitutionally protected prerogative ‘to establish a home’”).

²³¹ *See Housing 1929–1941*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/education/news-and-education-magazines/housing-1929-1941> [<https://perma.cc/5WHS-M3JA>] (indicating 45.6% of Americans owned their homes when the 1920 census was taken).

C. *Evolution of the Right after Meyer*

Over 440 federal and state decisions have quoted the *Meyer* phrase “right . . . to . . . establish a home” since the case was decided.²³² More than 120 opinions have quoted this language in the last decade.²³³ The right occasionally appears alone²³⁴ but is usually grouped with other *Meyer* rights, sometimes as part of the full list.²³⁵ It is frequently seen in the original cluster “right to ‘marry, establish a home and bring up children’”²³⁶ and often combined with the right to raise children.²³⁷ Despite this clustering, it is clear that these are three separate rights.²³⁸

Three years after *Meyer*, a divided Supreme Court upheld the constitutionality of comprehensive zoning in *Village of Euclid v. Ambler Realty Co.* under the rational basis test.²³⁹ Although the decision shocked observers who assumed that the Court would reject comprehensive land use regulation as an attack on property rights, scholars

²³² *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Cases were identified by searching the “Cases” database in Westlaw on February 21, 2021 using the following search terms: “establish a home” /50 meyer. This search identified 443 federal and state decisions.

²³³ *Id.* The same search indicated that 127 of these decisions were rendered after February 21, 2011.

²³⁴ *See, e.g., González-Fuentes*, 607 F.3d at 890.

²³⁵ *See, e.g., Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972) (quoting the entire *Meyer* list with approval); *Perrier-Bilbo v. United States*, 954 F.3d 413, 434 (1st Cir. 2020) (defining the scope of protected “liberty” under the Due Process Clause by quoting from the *Roth* Court’s quotation of the *Meyer* list).

²³⁶ *See, e.g., Obergefell v. Hodges*, 576 U.S. 644, 668 (2015).

²³⁷ *See, e.g., In re B.F.*, 976 N.E.2d 65, 67 (Ind. Ct. App. 2012).

²³⁸ For example, in *Obergefell*, the Court made it clear that the right to marry is not tied to having children: “[I]t cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate.” *Obergefell*, 576 U.S. at 669. Similarly, unmarried individuals have the right to bring up their children. *See Stanley v. Illinois*, 405 U.S. 645, 649 (1972). Finally, in *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), Justice Marshall recognized that the right to establish a home was not tied to marriage or children, but rather could be exercised by single adults; he noted that “[f]or [adults with intellectual disabilities], this right means living together in group homes.” *Id.* at 461 (Marshall, J., concurring in the judgment in part and dissenting in part); *see also Cabrol v. Town of Youngsville*, 106 F.3d 101, 107 (5th Cir. 1997) (referring to Due Process Clause protection for “an individual’s freedom . . . to establish a home”).

²³⁹ *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395–97 (1926).

suggest that it was largely motivated by racial and ethnic bias.²⁴⁰ Notably, the decision did not mention the right to establish a home.²⁴¹

Two factors explain this omission. First, because the plaintiff was attacking Euclid’s decision to zone a portion of its land for residential use rather than industrial use, it had no incentive to invoke the right.²⁴² Second, the ordinance had only a minor impact on the right. For example, it permitted multifamily housing in five of the six use districts,²⁴³ and the minimum lot sizes for single-family homes ranged from 700 to 5,000 square feet—small by modern standards.²⁴⁴ Significantly, the *Euclid* Court anticipated that future cases might involve ordinances that were more restrictive; it indicated that a higher standard of review could be appropriate “where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.”²⁴⁵

In the decades after *Euclid*, the Court generally refused to review cases that challenged zoning ordinances.²⁴⁶ But it did issue three well-known decisions that touch on the right to establish a home in the zoning context: *Village of Belle Terre v. Boraas* (1974),²⁴⁷ *Moore v. City of East Cleveland* (1977),²⁴⁸ and *City of Cleburne v. Cleburne Living Center, Inc.* (1985).²⁴⁹ In two of these cases, the parties failed to raise the issue, so it was not directly before the Court.

The *Belle Terre* ordinance permitted only one type of residential use, “one-family dwellings”; it defined “family” as “one or more per-

²⁴⁰ See WOLF, *supra* note 203, at 138–42; see also Richard H. Chused, *Euclid’s Historical Imagery*, 51 CASE W. RES. L. REV. 597, 604–15 (2001). For example, duplexes and apartment buildings were barred from the U-1 district, which consisted only of detached single-family houses, resulting in economic segregation. See, e.g., *Euclid*, 272 U.S. at 380. The Court’s infamous characterization of an apartment house as “a mere parasite” reflects this animus. See *id.* at 394. As the trial judge remarked: “In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life.” *Ambler Realty Co. v. Village of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924).

²⁴¹ *Euclid*, 272 U.S. 365. Justice McReynolds dissented, without explaining why. *Id.* at 397.

²⁴² See *id.* at 382 (explaining that part of the Ambler Realty land “falls in class U-2” where the main permitted uses were detached single-family homes and duplexes).

²⁴³ *Id.* at 380–81.

²⁴⁴ *Id.* at 381–82.

²⁴⁵ *Id.* at 390.

²⁴⁶ But see *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 117, 121, 123 (1928) (citing *Meyer* in a zoning dispute about a proposed “philanthropic home for aged poor,” but finding it unnecessary to decide whether “it is within the power of the State or municipality by a general zoning law to exclude the proposed new home from a district”).

²⁴⁷ 416 U.S. 1 (1974).

²⁴⁸ 431 U.S. 494 (1977).

²⁴⁹ 473 U.S. 432 (1985).

sons related by blood, adoption, or marriage.”²⁵⁰ The case arose when a couple leased their house to a university student, and five more students later moved in as well.²⁵¹ In response to the village’s lawsuit, the owners and tenants asserted that the ordinance was unconstitutional.²⁵² The defendants might have challenged the ordinance as a violation of the right to establish a home because it prohibited the tenants from living together in the village.²⁵³ Instead, they argued that the ordinance violated the Equal Protection Clause based on a variety of arguments, including the right to privacy, the right to travel, and the claim that the tenants’ marital status should be irrelevant.²⁵⁴ The majority characterized the case as a garden-variety zoning dispute that did not involve a fundamental right²⁵⁵ and upheld the ordinance under the rational basis test.²⁵⁶ In his dissent, Justice Marshall reasoned that the ordinance violated the Equal Protection Clause by unduly burdening the tenants’ rights of association and privacy.²⁵⁷ He buttressed this argument by citing *Meyer* for the proposition that “[t]he right to ‘establish a home’ is an essential part of the liberty guaranteed by the Fourteenth Amendment.”²⁵⁸

Yet three years later, in *Moore v. City of East Cleveland*, the Court held that a parallel ordinance violated the Due Process Clause.²⁵⁹ The ordinance restricted occupancy of a dwelling to one family, yet defined “family” more narrowly than the *Belle Terre* law.²⁶⁰ As a result, the homeowner, her son, and one of her grandsons could live in the home, but a second grandson could not.²⁶¹ The majority distinguished *Belle Terre* on the basis that it only involved unrelated

²⁵⁰ *Belle Terre*, 416 U.S. at 1–2. The ordinance also classified two unrelated persons as a “family.” *Id.*

²⁵¹ *See id.* at 2–3.

²⁵² *See id.*

²⁵³ The brief filed on behalf of the tenants and owners did not raise the right to establish a home. Brief for Appellees, *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (No. 73-191), 1974 WL 187429.

²⁵⁴ *Belle Terre*, 416 U.S. at 7.

²⁵⁵ *See id.*

²⁵⁶ *See id.* at 3, 10.

²⁵⁷ *Id.* at 15 (Marshall, J., dissenting). Marshall seemed to view the ordinance as a form of exclusionary zoning. He observed that some lower federal courts had “acted to insure that land-use controls are not used as means of confining minorities and the poor to the ghettos of our central cities.” *Id.* at 14. His dissent cited two early articles on exclusionary zoning. *See id.* at 14 n.3.

²⁵⁸ *Id.* at 15.

²⁵⁹ *Moore v. City of E. Cleveland*, 431 U.S. 494, 506 (1977).

²⁶⁰ *See id.* at 531–33.

²⁶¹ The property at issue was a “frame house” owned by Moore that contained two “dwelling units.” Moore and her family occupied one of the units. *Id.* at 533.

individuals, while the *Moore* ordinance “slic[ed] deeply into the family itself” by regulating which relatives could live in a home.²⁶² The Court explained that “[a] host of cases, tracing their lineage to *Meyer v. Nebraska* and *Pierce v. Society of Sisters* have consistently acknowledged a ‘private realm of family life which the state cannot enter.’”²⁶³ Reasoning that the rational basis test was inappropriate “when the government intrudes on choices concerning family living arrangements,” the Court used a higher level of scrutiny by examining “the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.”²⁶⁴ Although it noted that the city’s justifications for the ordinance—concern for overcrowding, traffic, parking, and school financing—were “legitimate,” the Court concluded that the ordinance served them “marginally, at best.”²⁶⁵

The *Moore* plurality did not expressly rely on the right to establish a home, even though Moore raised the issue.²⁶⁶ But the opinion was permeated with references to the importance of the family home: the traditions that “uncles, aunts, cousins, and especially grandparents [share] a household along with parents and children”;²⁶⁷ “close relatives . . . draw together and participate in the duties and the satisfactions of a common home”;²⁶⁸ and “the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life.”²⁶⁹

In sum, *Moore* recognized the right of a family to live together in a home—an amalgam of the *Meyer* rights to establish a home and to raise children. The Court touched on this theme by quoting from a famous dissent by Justice Harlan:

[H]ere we have not an intrusion into the home so much as on the life which characteristically has its place in the

²⁶² *Id.* at 498.

²⁶³ *Id.* at 499 (citations omitted).

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 499–500.

²⁶⁶ See Brief for Appellant at 31, *Moore*, 431 U.S. 494 (No. 75-6289), 1976 WL 178722. Moore’s brief relied, in part, on the right to establish a home: “By arbitrarily ruling out certain groupings of blood-related family members, the City of East Cleveland has substantially interfered with the right of the Appellant and her children and grandchildren to, as enunciated in *Meyer v. Nebraska*, 262 U.S. 390 (1923), ‘establish a home and bring up children.’” *Id.*

²⁶⁷ *Moore*, 431 U.S. at 504.

²⁶⁸ *Id.* at 505.

²⁶⁹ *Id.* In his dissent, Justice White quoted the *Meyer* list of due process liberties, including the “right . . . [to] establish a home,” and noted that “*Meyer* has not been overruled nor its definition of liberty rejected.” *Id.* at 545 (White, J., dissenting).

home. . . . The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.²⁷⁰

Eight years later in *City of Cleburne v. Cleburne Living Center, Inc.*, the Court reviewed the city's denial of an application for a special use permit to operate a group home for people with intellectual disabilities.²⁷¹ The applicant might have relied on the right to establish a home but failed to raise this claim.²⁷² Instead it argued that intellectual disability was a quasi-suspect classification and, accordingly, that the ordinance violated the Equal Protection Clause.²⁷³ The majority rejected the argument that intellectual disability constituted a quasi-suspect classification.²⁷⁴ However, the Court concluded that the ordinance was invalid as applied under the rational basis test because it would subject residents to "closely supervised and highly regulated conditions."²⁷⁵ Yet scholars suggest that the Court actually utilized a form of heightened scrutiny.²⁷⁶

Concurring with the result, Justice Marshall and two colleagues focused on the right to establish a home. They explained that "the interest . . . in establishing group homes is substantial" because "[t]he right to 'establish a home' has long been cherished as one of the fundamental liberties embraced by the Due Process Clause."²⁷⁷ As such, they reasoned that heightened scrutiny was appropriate "[w]ith respect to a liberty so valued as the right to establish a home in the community, and so likely to be denied on the basis of irrational fears and outright hostility."²⁷⁸

²⁷⁰ *Id.* at 504 n.12 (quoting *Poe v. Ullman*, 367 U.S. 497, 551–52 (1961) (Harlan, J., dissenting)).

²⁷¹ See 473 U.S. 432 (1985).

²⁷² The brief filed on behalf of the applicant did not mention the right to establish a home. See Brief for Respondents, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (No. 84-468), 1985 WL 669785. A footnote asserted that shelter was a "basic societal benefit[]," but cited no authority for this proposition. See *id.* at 42 n.17.

²⁷³ See *id.* at 25–36.

²⁷⁴ See *Cleburne*, 473 U.S. at 445–46.

²⁷⁵ See *id.* at 450.

²⁷⁶ See, e.g., John M. Payne, *From the Courts: A New Constitutional Look in Zoning Ordinances*, 14 REAL EST. L.J. 260, 263 (1986) (noting that the majority's analysis used "heightened scrutiny in some degree").

²⁷⁷ *Cleburne*, 473 U.S. at 461 (Marshall, J., concurring in the judgment in part and dissenting in part).

²⁷⁸ *Id.* at 473.

Lower courts have also discussed the right to establish a home in contexts related to land use. For example, in *Vasquez v. Foxx*,²⁷⁹ the Seventh Circuit held that the right was not infringed by a state statute that barred sex offenders from living within 500 feet of a child-related use because they were free to live elsewhere in the state.²⁸⁰ And the First Circuit relied on the right in *González-Fuentes v. Molina*, in part, to reject a due process challenge to the procedures governing a program by which prisoners were released from custody and allowed to live at home, subject to electronic monitoring—because it protected the “prerogative to ‘establish a home.’”²⁸¹

Outside of the land use context, the Court has cited the right to establish a home—along with the rights to marry and to raise children—in a series of major decisions involving family life. The common theme in these decisions is the existence of a “private realm of family life which the state cannot enter.”²⁸² In this setting, the right to establish a home plays a supplemental role, but it helps to demarcate the extent to which the state may intrude into the family, as it did in *Moore*. For example, as Justice Goldberg observed in *Griswold v. Connecticut*, which invalidated laws forbidding the use of contraceptives:

The Connecticut statutes here involved deal with a particularly important and sensitive area of privacy—that of the marital relation and the marital home. This Court recognized in *Meyer v. Nebraska* . . . that the right “to marry, establish a home and bring up children” was an essential part of the liberty guaranteed by the Fourteenth Amendment.²⁸³

The right to establish a home was also mentioned in either the Court’s opinion or a concurrence in the following cases: *Roe v. Wade*²⁸⁴ (right

²⁷⁹ 895 F.3d 515 (7th Cir. 2018).

²⁸⁰ *Id.* at 525; *see also* *Belt v. State*, 127 S.W.3d 277, 284 (Tex. App. 2004) (finding a probation condition requiring a sex offender to reside more than 1,000 feet away from schools and other child-related uses did not violate his right to establish a home).

²⁸¹ 607 F.3d 864, 890 (1st Cir. 2010) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). It observed that the program allowed prisoners to “live with their loved ones . . . and reside in a dwelling of their own choosing,” which were “included in the constitutionally protected prerogative ‘to establish a home.’” *Id.* (quoting *Meyer*, 262 U.S. at 399); *see also* *Deraffele v. City of Williamsport*, No. 4:14-CV-01849, 2015 WL 5781409, at * 13, *16 (M.D. Pa. Aug. 19, 2015) (finding ordinance requiring that the tenant’s family members be listed on the lease did not violate the “fundamental right to establish a home” because it only imposed a “slight burden”).

²⁸² *See* *Hodgson v. Minnesota*, 497 U.S. 417, 447, 452 (1990) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

²⁸³ 381 U.S. 479, 495 (1965) (Goldberg, J., concurring) (quoting *Meyer*, 262 U.S. at 399).

²⁸⁴ 410 U.S. 113, 214 (1973) (Douglas, J., concurring).

to abortion), *Runyon v. McCrary*²⁸⁵ (right to education), *Zablocki v. Redhail*²⁸⁶ (right to marry), *Thornburgh v. American College of Obstetricians & Gynecologists*²⁸⁷ (right to abortion), *Hodgson v. Minnesota*²⁸⁸ (right to abortion), and *Troxel v. Granville*²⁸⁹ (right to raise children).²⁹⁰ Most recently, in *Obergefell v. Hodges*, the Court characterized the “right to ‘marry, establish a home and bring up children’” as “a central part of the liberty protected by the Due Process Clause.”²⁹¹

IV. CONTOURS OF THE RIGHT TO ESTABLISH A HOME

A. A Fundamental Right

As a general rule, a law that infringes a fundamental right will survive a substantive due process challenge only if it satisfies the strict scrutiny test.²⁹² The Supreme Court has designated a number of liberties as fundamental rights, including the rights to marry, raise children, travel, and vote.²⁹³ This Part demonstrates that the right to establish a home should also be recognized as a fundamental right.

The Supreme Court has never squarely decided whether this right is fundamental.²⁹⁴ Although *Meyer v. Nebraska* referred to its cata-

²⁸⁵ 427 U.S. 160, 176–79 (1976).

²⁸⁶ 434 U.S. 374, 384, 386–87 (1978).

²⁸⁷ 476 U.S. 747, 773, 775–76 (1986) (Stevens, J., concurring), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

²⁸⁸ 497 U.S. 417, 435 (1990).

²⁸⁹ 530 U.S. 57, 65–67 (2000).

²⁹⁰ Although courts often mention the right to establish a home, scholars have overlooked it. A few articles briefly refer to the right, but none analyzes its history, nature, or scope. *See, e.g.,* Meris Bergquist, *No Exit for Patients Confined at the Vermont State Hospital*, 32 VT. BAR J. 34, 34 (2006) (two sentences); Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111, 136 (1987) (one sentence); Inez Smith Reid, *Law, Politics and the Homeless*, 89 W. VA. L. REV. 115, 144 (1986) (two paragraphs).

²⁹¹ *Obergefell*, 576 U.S. 644, 668 (quoting *Zablocki*, 434 U.S. at 384).

²⁹² *See* CHEMERINSKY, *supra* note 102, at 814 (presenting a framework for determining whether a fundamental right exists and thus will need to meet strict scrutiny); *see also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1292–96 (2007) (discussing the Court’s “evolving approach” to protecting fundamental rights from government intrusion by applying strict scrutiny); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 862–66 (2006) (“Overall, the strict scrutiny survival rate in fundamental rights cases is 24 percent, with 11 of 46 applications upholding the challenged laws.”).

²⁹³ *See Obergefell*, 576 U.S. 644 (right to marry); *Troxel*, 530 U.S. 57 (right to raise children); *United States v. Guest*, 383 U.S. 745 (1966) (right to travel); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969) (right to vote).

²⁹⁴ In *Lindsey v. Normet*, 405 U.S. 56 (1972), the Court held that the Constitution does not create a *positive* right to housing—that is, the state is not obligated to provide housing to those in

logue of liberties—including the right to establish a home—as “fundamental rights which must be respected,”²⁹⁵ this usage predates the Court’s modern jurisprudence.²⁹⁶ A number of contemporary federal and state decisions have characterized the right as “fundamental,”²⁹⁷ but this is an overbroad reading of *Meyer*. However, the Court did recognize an analogous fundamental right in *Moore v. City of East Cleveland*—the right of a family to live together in a home.²⁹⁸

The Court’s approach to identifying fundamental rights has varied over time.²⁹⁹ In *Washington v. Glucksberg*, it utilized a rigid two-part framework.³⁰⁰ More recently, in *Obergefell v. Hodges*, the Court adopted a flexible standard, strongly suggesting that the *Glucksberg* test was no longer appropriate.³⁰¹ The analysis below evaluates the right to establish a home under both approaches and then discusses the appropriate standard of review.

need. *Id.* at 73–74. It rejected claims that the “need for decent shelter” and the “right to retain peaceful possession of one’s home” were “fundamental interests,” commenting that “the Constitution does not provide judicial remedies for every social and economic ill.” *Id.* The right to establish a home, in contrast, is a *negative* right.

²⁹⁵ *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923).

²⁹⁶ However, Justice Kennedy expressed the view that “[t]he broad formulation of fundamental rights announced in *Meyer* is one of the richest in all of our case law.” FRANK J. COLUCCI, JUSTICE KENNEDY’S JURISPRUDENCE 22 (2009) (quoting Anthony M. Kennedy, Unenumerated Rights and the Dictates of Judicial Restraint, Address at the Canadian Institute for Advanced Legal Studies (July 24–Aug. 1, 1986)).

²⁹⁷ See, e.g., *Sebesta v. Davis*, 878 F.3d 226, 232 (7th Cir. 2017) (“fundamental liberty interest[]”); *Henderson v. Adams*, 209 F. Supp. 3d 1059, 1077 (S.D. Ind. 2016) (same); *In re Visitation of A.A.L.*, 927 N.W.2d 486, 492 (Wis. 2019) (“fundamental liberty”); N.J. Div. of Child Prot. & Permanency v. A.B., 175 A.3d 942, 948 (N.J. 2017) (“fundamental right”).

²⁹⁸ In *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997), the Court described the source of its “established method of substantive-due-process analysis” by quoting from *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion). It stated: “[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition.’” *Glucksberg*, 521 U.S. at 720–21 (quoting *Moore*, 431 U.S. at 503). The implication is that the right recognized in *Moore* is deeply rooted in the nation’s history and tradition, and hence a fundamental right. See also CHEMERINSKY, *supra* note 102, at 826 (concluding that *Moore* recognized a fundamental right “to keep the family together”).

²⁹⁹ See generally Robert C. Farrell, *An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 ST. LOUIS U. PUB. L. REV. 203, 216–48 (2007) (discussing different approaches).

³⁰⁰ *Glucksberg*, 521 U.S. at 720–21.

³⁰¹ See *Obergefell v. Hodges*, 576 U.S. 644, 663–71 (2015).

B. Obergefell Approach

1. Overview

Obergefell established the Court's modern standard for identifying fundamental rights.³⁰² Writing for the majority, Justice Kennedy observed that the process is not governed by "any formula" but rather requires courts to "exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect."³⁰³ He explained:

That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present.³⁰⁴

Kennedy began his analysis by stressing that "the Court has long held the right to marry is protected by the Constitution."³⁰⁵ He cited a number of Supreme Court precedents for the proposition that "the right to marry is fundamental under the Due Process Clause"³⁰⁶—including *Meyer*—though none of those decisions expressly characterize it as a "fundamental right"; rather, they broadly discuss the importance of marriage.

Kennedy then identified "four principles and traditions [that] . . . demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples"³⁰⁷ as follows: (1) "the right to personal choice regarding marriage is inherent in the concept of individual autonomy";³⁰⁸ (2) "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals";³⁰⁹ (3) "the right to

³⁰² See *id.* As the Court noted, the *Obergefell* approach is rooted in Justice Harlan's famous dissent in *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). *Obergefell*, 576 U.S. at 663–64.

³⁰³ *Obergefell*, 576 U.S. at 664.

³⁰⁴ *Id.* (citation omitted).

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 664–65. Kennedy included *Meyer* in this list, citing to the page that contains the standard list of due process liberties, including the rights "to marry, establish a home and bring up children." *Id.* (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). If taken literally, this reference suggests the Court has already found the right to establish a home to be fundamental.

³⁰⁷ *Id.* at 665.

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 666.

marry . . . safeguards children and families”;³¹⁰ and (4) “marriage is a keystone of our social order.”³¹¹ In parallel fashion, the analysis below demonstrates that the right to establish a home is a fundamental right under the *Obergefell* standard.³¹²

2. Constitutional Protection of the Right to Establish a Home

Like the right to marry, the Court has long held that the right to establish a home is protected by the Constitution.³¹³ Kennedy’s citation to *Meyer* as the temporal foundation of the right to marry applies equally to the right to establish a home because both appear in the *Meyer* catalogue of liberties.

The Court has recognized the importance of the right to establish a home—though less frequently than the right to marry. For example, *Meyer* classified the right as one of the “privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”³¹⁴ In *City of Cleburne v. Cleburne Living Center, Inc.*, Justice Marshall observed that the right “has long been cherished as one of the fundamental liberties” protected by the Due Process Clause.³¹⁵ And in *Obergefell*, the Court quoted *Zablocki v. Redhail* in describing the right—together with the right to marry and the right to bring up children—as a “central part of the liberty protected by the Due Process Clause.”³¹⁶ Notably, both the right to marry and the right to raise children are already recognized as fundamental rights.³¹⁷

³¹⁰ *Id.* at 667.

³¹¹ *Id.* at 669.

³¹² Before *Obergefell*, the Court only recognized negative fundamental rights. As Justice Thomas’s dissent commented: “In the American legal tradition, liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement.” *Id.* at 726 (Thomas, J., dissenting). But *Obergefell* held that government must recognize marriages of same-sex couples, indicating that the fundamental right to marry was a positive right. *Id.* at 675–76 (majority opinion). An argument could be made that the right to establish a home should be a positive right—obligating the government to provide housing for those in need. But this would require far more affirmative government action than recognition of marriage, and thus it is not clear that the argument would succeed. Accordingly, this Article argues for recognition of the right to establish a home as a negative fundamental right.

³¹³ See *supra* Part III.

³¹⁴ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

³¹⁵ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 461 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).

³¹⁶ See *Obergefell*, 576 U.S. at 668 (quoting *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)).

³¹⁷ See *Obergefell*, 576 U.S. at 675 (right to marry); *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (right to raise children).

3. “Principles and Traditions” Supporting the Right

American law has long recognized the right to establish a home, as discussed in Parts II and III. As Justice Kennedy acknowledged, this history is important in identifying a fundamental right, though not determinative.³¹⁸ Using the *Obergefell* framework, the analysis below discusses four principles and traditions that explain why the right to establish a home is fundamental: (1) the home is a necessity for existence; (2) the home provides security against the state and the outside world; (3) the home protects individual liberty; and (4) the home is the center of family life.³¹⁹

a. Home as a Necessity

Shelter is a necessity for human existence—like food or water.³²⁰ Without shelter, a person exposed to the ravages of inclement weather and other hazards cannot survive.³²¹ Thus, humans have utilized shelter for at least 350,000 years.³²² As Professor Jerry Moore observes, “[w]e have been building homes longer than we have been *Homo sapiens*.”³²³ Blackstone invoked this ancient history when he posited that even in the state of nature before governments existed, each person enjoyed a “right of habitation.”³²⁴

The Supreme Court has acknowledged the importance of shelter in a number of decisions. For example, in *Shapiro v. Thompson*,³²⁵ it described “the very means to subsist” as “food, shelter, and other necessities of life.”³²⁶ In other decisions, the Court has referred to “shel-

³¹⁸ *Obergefell*, 576 U.S. at 664.

³¹⁹ These principles and traditions differ somewhat from those considered in *Obergefell* because the nature of the right is different. The *Obergefell* Court emphasized that the process for identifying fundamental rights “has not been reduced to any formula.” *Id.* at 663–64 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)). Nothing in the decision indicates that the identification of all fundamental rights must be based on the principles and traditions relevant to the right to marry.

³²⁰ See FOX, *supra* note 26, at 7.

³²¹ The most basic function of a home is “providing shelter from natural elements.” JERRY D. MOORE, *THE PREHISTORY OF HOME* 3 (2012). In particular, the shelter of a home allows humans to minimize the loss of heat, which is crucial for survival in many climates. See *id.* at 45; see also MARY GORDON, *HOME: WHAT IT MEANS AND WHY IT MATTERS* 38 (2010) (“We are, as a species, terrifyingly fragile, ill-equipped for what nature provides in the way of dangers: cold, heat, storm, predatory beasts . . .”).

³²² See MOORE, *supra* note 321, at 93 (“[T]he oldest dwelling currently known is about 450,000–350,000 years old.”).

³²³ *Id.* at 5.

³²⁴ 4 BLACKSTONE, *supra* note 63, at *223.

³²⁵ 394 U.S. 618 (1969), *overruled in part by* *Edelman v. Jordan*, 415 U.S. 651 (1974).

³²⁶ *Id.* at 627.

ter, fuel, and other basic necessities”³²⁷ and “housing and the other necessities of life.”³²⁸ Given modern health and safety regulations and building codes, the only legally acceptable form of permanent shelter is a house, apartment, or other permanent dwelling—in short, a home.

The plight of the homeless helps to demonstrate the necessity for shelter. One study revealed that unsheltered homeless adults in Boston were almost three times more likely to die than those sleeping in shelters.³²⁹ Although the mortality rate for the unsheltered is certainly affected by factors that contribute to homelessness in the first place,³³⁰ it is also increased by conditions that they experience. As another study explained, certain mortality factors arise from “homelessness itself, such as . . . exposure to communicable diseases, [and] harsh living environments.”³³¹ For example, the rates of hepatitis and tuberculosis for homeless people are far higher than for the general population.³³² Similarly, hypothermia caused by exposure to cold disproportionately affects the homeless, leading to an increased risk of death.³³³

b. Home as a Sanctuary

For centuries, the Anglo-American legal tradition has valued the home as a sanctuary from other people and from the state.³³⁴ Indeed,

³²⁷ *Hagans v. Lavine*, 415 U.S. 528, 531 n.2 (1974).

³²⁸ *Lombard v. Louisiana*, 373 U.S. 267, 279 (1963) (Douglas, J., concurring).

³²⁹ See Jill S. Roncarati, Travis P. Baggett, James J. O’Connell, Stephen W. Hwang, E. Francis Cook, Nancy Krieger & Glorian Sorensen, *Mortality Among Unsheltered Homeless Adults in Boston, Massachusetts, 2000–2009*, 178 JAMA INTERNAL MED. 1242 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6142967/> [<https://perma.cc/99WR-FXNC>]; see also Jonathan R. Hibbs, Lawrence Benner, Lawrence Klugman, Robert Spencer, Irene Macchia, Anne K. Mellinger & Daniel Fife, *Mortality in a Cohort of Homeless Adults in Philadelphia*, 331 NEW ENG. J. MED. 304, 304 (1994) (“The age-adjusted mortality rate among the homeless was 3.5 times that of Philadelphia’s general population . . .”).

³³⁰ Mental health and substance abuse problems, for example, contribute both to the risk of homelessness and the higher mortality rate. See Seena Fazel, John R. Geddes & Margot Kushel, *The Health of Homeless People in High-Income Countries: Descriptive Epidemiology, Health Consequences, and Clinical and Policy Recommendations*, 384 LANCET 1529 (2014).

³³¹ *Id.* at 1532 (footnotes omitted); see also *Housing and Homelessness as a Public Health Issue*, AM. PUB. HEALTH ASS’N (Nov. 7, 2017), <https://apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2018/01/18/housing-and-homelessness-as-a-public-health-issue> [<https://perma.cc/MRH7-2XLC>] (discussing public health impacts of homelessness).

³³² Fazel et al., *supra* note 330, at 1532–33.

³³³ See Jerzy Romaszko, Iwona Cymes, Ewa Draganska, Robert Kuchta & Katarzyna Glin-ska-Lewczuk, *Mortality Among the Homeless: Causes and Meteorological Relationships*, PLoS ONE (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5739436/> [<https://perma.cc/535L-HHJV>] (“Deaths due to hypothermia were thirteen-fold more frequent among the homeless as compared to the general population.”).

³³⁴ See *supra* text accompanying notes 39–45; see also Barros, *supra* note 30, at 260–69

for millennia cultures around the world have used the home to provide security against outside intrusions.³³⁵

At the most basic level, a home protects its inhabitants against physical attack. For example, one analysis concluded that homeless women are between two and four times more likely to experience sexual assault and other violent attacks than women in general.³³⁶ It concluded that the “best ‘defense’ against the risks of victimization that result from being homeless is—to not be homeless!”³³⁷ When a criminal intrusion into the home does occur, the castle doctrine traditionally allows the resident to defend herself with force.³³⁸

The home also serves as a haven from the outside world in a more general sense. In *Carey v. Brown*,³³⁹ Justice Black acknowledged the importance of this function:

Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value. Our decisions reflect no lack of solicitude for the right of an individual “to be let alone” in the privacy of the home, “sometimes the last citadel of the tired, the weary, and the sick.”³⁴⁰

Anthropologist John Allen similarly views the home as “the place where our minds and bodies recover from the challenges we face in the outside world.”³⁴¹ He explains that the “human need to feel at home has its roots in our evolutionary biology and is reinforced today

(discussing security in the home); Dickinson, *supra* note 25, at 1113–16 (discussing Fourth Amendment protection).

³³⁵ See, e.g., BILL BRYSON, *AT HOME: A SHORT HISTORY OF PRIVATE LIFE* 29–30 (2010) (noting that 5,000 years ago the houses in Skara Brae, a small village, “had locking doors”).

³³⁶ JANA L. JASINSKI, JENNIFER K. WESELY, ELIZABETH MUSTAINE & JAMES D. WRIGHT, *THE EXPERIENCE OF VIOLENCE IN THE LIVES OF HOMELESS WOMEN: A RESEARCH REPORT 2* (2005), <https://www.ncjrs.gov/pdffiles1/nij/grants/211976.pdf> [<https://perma.cc/2256-NE4Q>]. The most common types of injuries beyond the category of sexual assaults were “bruises, black eyes, and broken bones.” *Id.* at 83. The location where homeless women sleep at night plays a major role in their safety. See *id.* at 53; see also Fazel et al., *supra* note 330, at 1535 (“[S]tudies show that between 27% and 52% of homeless individuals were physically or sexually assaulted in the previous year.”).

³³⁷ JASINSKI ET AL., *supra* note 336, at 53.

³³⁸ See, e.g., *People v. Tomlins*, 107 N.E. 496, 497 (N.Y. 1914).

³³⁹ 447 U.S. 455 (1980).

³⁴⁰ *Id.* at 471 (quoting *Gregory v. City of Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring)).

³⁴¹ ALLEN, *supra* note 26, at 30.

by our cognitive psychology.”³⁴² As such, Allen concludes that a home is “necessary to maintain equilibrium in our lives.”³⁴³

Finally, the home provides security against action by the state. The Fourth Amendment commands that “[t]he right of the people to be secure in their . . . houses . . . shall not be violated.”³⁴⁴ In *Silverman v. United States*,³⁴⁵ the Supreme Court explained that “[a]t the very core [of the amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”³⁴⁶ As Justice Kennedy later noted in *Minnesota v. Carter*,³⁴⁷ “[t]he axiom that a man’s home is his castle . . . has acquired over time a power and an independent significance justifying a more general assurance of personal security in one’s home, an assurance which has become part of our constitutional tradition.”³⁴⁸

c. *Home as the Locus of Liberty*

One of the principles and traditions that Justice Kennedy relied on in *Obergefell* was “the right to personal choice regarding marriage [which] is inherent in the concept of individual autonomy.”³⁴⁹ He stressed the “abiding connection between marriage and liberty.”³⁵⁰ Similarly, our American tradition recognizes that the home is closely linked to liberty.³⁵¹

As the Supreme Court summarized in *City of Ladue v. Gilleo*,³⁵² “[a] special respect for individual liberty in the home has long been part of our culture and our law.”³⁵³ The Court has consistently held that the exercise of constitutional rights inside the privacy of one’s home is entitled to greater protection than outside the home.³⁵⁴ Judicial interpretation of the First, Second, Third, Fourth, and Fifth

³⁴² *Id.* at 9.

³⁴³ *Id.* at 30.

³⁴⁴ U.S. CONST. amend. IV, cl. 1.

³⁴⁵ 365 U.S. 505 (1961).

³⁴⁶ *Id.* at 511.

³⁴⁷ 525 U.S. 83 (1998).

³⁴⁸ *Id.* at 100 (Kennedy, J., concurring).

³⁴⁹ See *Obergefell v. Hodges*, 576 U.S. 644, 665 (2015).

³⁵⁰ *Id.*

³⁵¹ See *supra* text accompanying notes 46–51; see also Barros, *supra* note 30, at 269–75 (discussing privacy in the home); John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 786–87 (2006) (discussing standards in federal constitutional law that center on the privacy of the home).

³⁵² 512 U.S. 43 (1994).

³⁵³ *Id.* at 58.

³⁵⁴ See *supra* text accompanying notes 47, 98–102.

Amendments has created “home-centric jurisprudence.”³⁵⁵ Thus, having a home is necessary for a person to enjoy the full extent of the liberty guaranteed by the Constitution.

For example, in *Stanley v. Georgia*, the Court invalidated a statute that criminalized the possession of obscene material “in the privacy of a person’s own home,” stressing the “fundamental” nature of “the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.”³⁵⁶ It commented: “If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.”³⁵⁷ In *District of Columbia v. Heller*,³⁵⁸ it expanded the scope of the Second Amendment to allow possession of firearms in the home; it stressed that “the home [is] where the need for defense of self, family, and property is most acute.”³⁵⁹ Similarly, in *Lawrence v. Texas*,³⁶⁰ the Court reasoned that the liberty guaranteed by the Due Process Clause allowed adults to engage in “homosexual conduct” in “the confines of their homes.”³⁶¹ Writing for the Court, Justice Kennedy opined: “In our tradition the State is not omnipresent in the home.”³⁶²

More broadly, in *Carey v. Brown*, the Court explained that “[t]he State’s interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.”³⁶³ And in *United States Department of Defense v. Federal Labor Relations Authority*,³⁶⁴ it stated that “the privacy of the home . . . is accorded special consideration in our Constitution, laws, and traditions.”³⁶⁵

d. Home as the Center of Family Life

American law has traditionally viewed the home as the center of family life—a “sacred retreat to which families repair for their privacy

³⁵⁵ See Dickinson, *supra* note 25, at 1109–16.

³⁵⁶ *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

³⁵⁷ *Id.* at 565.

³⁵⁸ 554 U.S. 570 (2008).

³⁵⁹ See *id.* at 628.

³⁶⁰ 539 U.S. 558 (2003).

³⁶¹ See *id.* at 567–68.

³⁶² *Id.* at 562.

³⁶³ *Carey v. Brown*, 447 U.S. 455, 471 (1980).

³⁶⁴ 510 U.S. 487 (1994).

³⁶⁵ *Id.* at 501.

and their daily way of living.”³⁶⁶ Indeed, the home has been the center of family life since prehistoric times, long before governments arose.³⁶⁷

In *Obergefell*, Justice Kennedy explained that one basis for protecting the right to marry was that it “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”³⁶⁸ He observed: “The Court has recognized these connections by describing the varied rights as a unified whole: ‘[T]he right to “marry, establish a home and bring up children” is a central part of the liberty protected by the Due Process Clause.’”³⁶⁹ Thus, the right to establish a home is closely linked to the rights to marry and to bring up children. The family life that *Obergefell* celebrates can only occur in a home, as the Court acknowledged by stressing the importance of “loving and nurturing homes” for children.³⁷⁰

Obergefell also recognized that “permanency and stability” are important to “children’s best interests.”³⁷¹ The secure family relationships that are “so critical to a child’s cognitive, emotional, social, and psychological development”³⁷² are developed and maintained in a home.³⁷³ Housing insecurity “has devastating effects on children,” which can include delayed speech and language development, hyperactivity, and psychiatric, behavioral, and academic problems.³⁷⁴

In *Roberts v. United States Jaycees*,³⁷⁵ the Court addressed another key aspect of the family home: “Family relationships, by their

³⁶⁶ *Gregory v. City of Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring). Sociologists suggest “the link between home and family is so strong that the terms are almost interchangeable.” Shelley Mallett, *Understanding Home: A Critical Review of the Literature*, 52 SOCIO. REV. 62, 73 (2004); see also Hareven, *supra* note 165, at 228 (noting that “[t]he close identification of home with family” can be “traced to the late eighteenth or early nineteenth century”).

³⁶⁷ Anthropologist John Allen observes that although “[f]amilies leave little evidence in the archaeological record . . . [t]he study of family dynamics across species makes clear that the origins of home are likely tied to family.” ALLEN, *supra* note 26, at 108. Some scholars argue that the importance of the home for early humans “originates from two biological imperatives: reproductive success and the extended dependency of human offspring.” See MOORE, *supra* note 321, at 22. Under this view, “it is to the reproductive advantage of both parents to have their offspring in a relatively safe location to which resources are transported.” *Id.*

³⁶⁸ *Obergefell v. Hodges*, 576 U.S. 644, 667 (2015).

³⁶⁹ *Id.* at 668 (quoting *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)).

³⁷⁰ See *id.* at 668.

³⁷¹ *Id.*

³⁷² See Joseph S. Jackson & Lauren G. Fasig, *The Parentless Child’s Right to a Permanent Family*, 46 WAKE FOREST L. REV. 1, 28 (2011).

³⁷³ See Lindsay T. Graham, Samuel D. Gosling & Christopher K. Travis, *The Psychology of Home Environments: A Call for Research on Residential Space*, 10 PERSPS. ON PSYCH. SCI. 346, 347–48 (2015) (discussing the role of the home in early social and cognitive development).

³⁷⁴ See ALLEN, *supra* note 26, at 191–92.

³⁷⁵ 468 U.S. 609 (1984).

nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."³⁷⁶ The home is also the place where the ideals and beliefs of children are formed. As the Court noted in *Moore v. City of East Cleveland*, "[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."³⁷⁷

Finally, as the Court summarized in *Hodgson v. Minnesota*: "The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right."³⁷⁸

4. Conclusion

In sum, within the *Obergefell* framework, the right to a home is such a "fundamental" interest that "the State must accord . . . [it] . . . respect."³⁷⁹ It is arguably more fundamental, for example, than the right to marry or the right to travel, which are already recognized as fundamental rights.

C. Glucksberg Approach

1. Overview

Before *Obergefell* was decided, the generally accepted test for identifying fundamental rights was the approach developed in *Washington v. Glucksberg*.³⁸⁰ There the Court employed a two-part inquiry in refusing to find that the right to a physician's assistance in committing suicide was a fundamental right:

First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of or-

³⁷⁶ *Id.* at 619–20; see also *Moore v. City of E. Cleveland*, 431 U.S. 494, 505 (1977) (noting the tradition that close relatives often "draw together and participate in the duties and the satisfactions of a common home" and "maintain or rebuild a secure home life").

³⁷⁷ *Moore*, 431 U.S. at 503–04; see also *Roberts*, 468 U.S. at 618–19 (observing that "highly personal relationships" such as family ties "foster diversity and act as critical buffers between the individual and the power of the State").

³⁷⁸ *Hodgson v. Minnesota*, 497 U.S. 417, 448 n.33 (1990) (quoting *Poe v. Ullman*, 367 U.S. 497, 551–52 (1961) (Harlan, J., dissenting)).

³⁷⁹ See *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015).

³⁸⁰ *Washington v. Glucksberg*, 521 U.S. 702 (1997), superseded by *Obergefell*, 576 U.S. 644.

dered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.” Second, we have required in substantive-due-process cases a “careful description” of the asserted fundamental liberty interest.³⁸¹

In utilizing a different standard, the *Obergefell* Court explained that although the *Glucksberg* approach “may have been appropriate for the asserted right there involved . . . it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.”³⁸²

The relationship between the *Obergefell* and *Glucksberg* approaches remains unclear, although in context the *Obergefell* Court’s seeming dismissal of the *Glucksberg* test suggests that it is obsolete. Dissenting in *Obergefell*, Chief Justice Roberts complained that the majority had “effectively overrule[d]” *Glucksberg*,³⁸³ and scholars, such as Laurence Tribe, express the same view.³⁸⁴ Yet a number of lower courts continue to follow the *Glucksberg* approach in the post-*Obergefell* era, suggesting that it may survive.³⁸⁵ Moreover, given changes in the Court’s composition since *Obergefell* was decided, it is possible that it might revive the *Glucksberg* standard in a future decision. Accordingly, this Section analyzes the right to establish a home under the *Glucksberg* standard.

2. History, Tradition, and Ordered Liberty

The right to establish a home is deeply rooted in our history and tradition, as discussed in Parts II and III. The comparison with the asserted right of physician-assisted suicide at issue in *Glucksberg* is instructive. There the Court explained in detail how “for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide.”³⁸⁶ By contrast, the right to establish a home is a central part of our Anglo-American legal heritage, from Blackstone’s ancient “right of habita-

³⁸¹ *Id.* at 720–21 (citations omitted) (first quoting *Moore*, 431 U.S. at 503; then quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937); and then quoting *Reno v. Flores*, 507 U.S. 292, 301–02 (1993)).

³⁸² See *Obergefell*, 576 U.S. at 671.

³⁸³ *Id.* at 702 (Roberts, C.J., dissenting).

³⁸⁴ See Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 16 (2015).

³⁸⁵ See Ronald Turner, *W(h)ither Glucksberg?*, 15 DUKE J. CONST. L. & PUB. POL’Y 183, 210–15 (2020) (discussing these decisions).

³⁸⁶ *Glucksberg*, 521 U.S. at 711.

tion” through the repeated recognition of the right in *Obergefell* and other modern Supreme Court decisions.³⁸⁷

Two foundational concepts in American law reflect the right to establish a home: the right to acquire property and the importance of the home. The right is implicit in the “pursuit of happiness” provision of the Declaration of Independence and the home-centric Bill of Rights.³⁸⁸ After ratification of the Constitution, the federal government took practical steps to fulfill the right by adopting land policies that allowed settlers to easily obtain land for homes and farms.³⁸⁹ And when southern states imperiled the right in the post-Civil War era, Congress adopted both the Civil Rights Act of 1866 and the Fourteenth Amendment, in part, in order to safeguard it.³⁹⁰ Thus, the Framers of the Fourteenth Amendment intended to protect the right to establish a home and understood it to be fundamental to ordered liberty.³⁹¹ Ultimately, in *Meyer* the Court transformed this basic right from one that was assumed to exist—like the right to eat or breathe—into an express right protected by the Constitution.

Moreover, the Court has repeatedly stressed the fundamental nature of the right, describing it as one of the “privileges long recognized at common law as essential to the orderly pursuit of happiness by free men”;³⁹² “an essential part of the liberty guaranteed by the Fourteenth Amendment”;³⁹³ and “a central part of the liberty protected by the Due Process Clause.”³⁹⁴

3. *Defining the Right*

As defined earlier, the right to establish a home means the right to purchase or lease a house, apartment, or other dwelling as a long-term residence and begin living in that dwelling.³⁹⁵

³⁸⁷ See discussion *supra* Part II, Section III.A, Section III.B.

³⁸⁸ See *supra* text accompanying notes 89–104.

³⁸⁹ See *supra* text accompanying notes 115–26.

³⁹⁰ See *supra* text accompanying notes 127–48.

³⁹¹ This paragraph tracks the historical analysis that the Court in used *McDonald v. City of Chicago*, 561 U.S. 742, 767–78 (2010), to explain why the right to bear arms is a fundamental right under the *Glucksberg* test.

³⁹² *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

³⁹³ *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring).

³⁹⁴ *Obergefell v. Hodges*, 576 U.S. 644, 668 (2015) (quoting *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)).

³⁹⁵ See *supra* Section III.B.

4. Conclusion

The right to establish a home is a fundamental right under the *Glucksberg* approach. Indeed, the core requirement of that approach—that the right be “deeply rooted in this Nation’s history and tradition”—is a quotation from *Moore v. City of East Cleveland*, which recognized the right of a family to live together in a home.³⁹⁶

D. Standard of Review

As noted above, the traditional test for determining whether a law that infringes a fundamental right survives substantive due process review is strict scrutiny.³⁹⁷ Under this test, the state has the burden of establishing that the law serves a compelling governmental interest and is narrowly drawn to attain that objective.³⁹⁸ Accordingly, courts will probably use strict scrutiny to evaluate infringement of the right to establish a home.

In the alternative, courts might utilize a version of intermediate scrutiny. The use of this test is well established in equal protection jurisprudence, and requires that a law “serve important governmental objectives and . . . be substantially related to achievement of those objectives.”³⁹⁹ In such cases, “[t]he burden of justification is demanding and it rests entirely on the State.”⁴⁰⁰ Although the Court has never explicitly stated that intermediate scrutiny applies to substantive due process cases involving fundamental rights, it has seemingly used this standard in certain cases.⁴⁰¹

The most analogous decision is *Moore v. City of East Cleveland*, where Moore argued that the ordinance “substantially interfered” with her right to “establish a home and bring up children.”⁴⁰² Rather than use strict scrutiny, the Court stated that the appropriate test re-

³⁹⁶ See *supra* note 298 and accompanying text.

³⁹⁷ See *supra* note 292.

³⁹⁸ See, e.g., *Carey v. Population Servs. Int’l*, 431 U.S. 678, 688 (1977) (right to use contraceptives); *Roe v. Wade*, 410 U.S. 113, 155 (1973) (right to abortion); *Dunn v. Blumstein*, 405 U.S. 330, 342–43 (1972) (right to travel).

³⁹⁹ See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

⁴⁰⁰ *United States v. Virginia*, 518 U.S. 515, 533 (1996).

⁴⁰¹ The Court has occasionally used intermediate scrutiny in substantive due process cases involving fundamental rights. See Stephen G. Gilles, *Parental (and Grandparental) Rights After Troxel v. Granville*, 9 SUP. CT. ECON. REV. 69, 126 (2001); David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 536–37 (2000); see also Cody Stoddard, Benjamin Steiner, Jacqueline Rohrbach, Craig Hemmens & Katherine Bennett, *All the Way Home: Assessing the Constitutionality of Juvenile Curfew Laws*, 42 AM. J. CRIM. L. 177, 196–98 (2015) (discussing use of intermediate scrutiny by lower courts in substantive due process cases).

⁴⁰² Brief for Appellant, *supra* note 266, at 31; see also CHEMERINSKY, *supra* note 102, at 826

quired it to “examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation”—a formulation that echoes the equal protection approach.⁴⁰³ Similarly, the Court appeared to use a lower standard of review in striking down other laws that infringed on fundamental rights, as in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (right to abortion) and *Troxel v. Granville* (right to bring up children).⁴⁰⁴ Although it is difficult to distill a precise standard from these cases, in general they seem to consider both the importance of the government interest and its relationship to the law at issue.

Professor David Meyer attributes the Court’s implicit use of intermediate scrutiny in family privacy cases to the fact that protecting this right may produce adverse consequences for both the community and other people, when compared with other fundamental rights whose exercise have no external impacts, such as the right to vote.⁴⁰⁵ A similar argument might apply to the right to establish a home because its exercise could have external effects.

V. ENFORCING THE RIGHT TO ESTABLISH A HOME: COMBATING EXCLUSIONARY ZONING

A. *Exclusionary Zoning in Context*

Imagine a city where the zoning ordinance prohibits all residential uses except for traditional, detached, single-family homes on one-acre lots.⁴⁰⁶ B, C, and D are all searching for housing. B, who can only afford to live in an apartment, cannot reside there. C, who intends to purchase a detached single-family home, but cannot afford to buy one on such a large lot, is similarly barred. And D, who plans to place a manufactured home on a residential lot, cannot move to the city ei-

(noting that *Moore* involved “a fundamental right to keep the family together that includes an extended family”).

⁴⁰³ *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977); see also Meyer, *supra* note 401, at 543 (observing that the *Moore* Court used a standard midway between the strict scrutiny and rational basis tests).

⁴⁰⁴ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (finding regulation that imposes an “undue burden” on the right to an abortion unconstitutional); *Troxel v. Granville*, 530 U.S. 57, 68–73 (2000); see also Gilles, *supra* note 401, at 126 (“Intermediate scrutiny is . . . the most convincing interpretation of the plurality’s overall approach.”).

⁴⁰⁵ See Meyer, *supra* note 401, at 549–51.

⁴⁰⁶ Belle Terre, New York, is an example of this approach. The entire village is zoned as “A Residence District.” BELLE TERRE, N.Y., CODE § 170-2. In this district, the only permitted residential use is a “[o]ne-family dwelling[]” on a lot that is “at least one acre” in size. *Id.* §§ 170-5A(1), 170-7.

ther. These hypothetical situations all present the same question: is exclusionary zoning an unconstitutional infringement of the right to establish a home? This Article demonstrates that it is.

Zoning is exclusionary when an ordinance effectively prevents or substantially impairs the construction of affordable housing for low-income and moderate-income families.⁴⁰⁷ Although such zoning can take many forms, three common techniques are: (1) prohibiting multifamily housing such as apartments, condominiums, and townhouses,⁴⁰⁸ (2) mandating large lot sizes for detached single-family homes,⁴⁰⁹ and (3) barring manufactured homes.⁴¹⁰ Less draconian restrictions may also be exclusionary. For example, a city that zones 95% of its residential land for detached single-family homes has engaged in exclusionary zoning.⁴¹¹ In practice, exclusionary zoning techniques tend to disproportionately prevent racial and ethnic minorities from moving to a

⁴⁰⁷ See 3 AM. L. ZONING § 22:1, Westlaw (database updated Nov. 2021); 2 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, *AMERICAN LAND PLANNING LAW* § 66:1 (rev. ed. 2003); see also Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.-C.L. L. REV. 289, 309 (2002) (“Each type of exclusionary zoning has the effect, and often the purpose, of increasing housing costs, which inevitably reduces the number of affordable units for low-income persons.”).

⁴⁰⁸ See, e.g., BELLE TERRE, N.Y., CODE § 170-5A(1) (only permitted form of housing in village is detached single-family homes). As one study sponsored by the Department of Housing and Urban Development stated: “[L]imiting multifamily housing through exclusionary zoning . . . is one of the most common and most pervasive barriers to affordable housing in America.” GERRIT KNAAP, STUART MECK, TERRY MOORE & ROBERT PARKER, AM. PLAN. ASS’N, *ZONING AS A BARRIER TO MULTIFAMILY HOUSING DEVELOPMENT*, at v (2007), https://www.huduser.gov/portal/Publications/pdf/zoning_MultifmlyDev.pdf [<https://perma.cc/P8HD-LYXB>]; see also Richard F. Babcock & Fred P. Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040, 1059–73 (1963) (discussing suburban hostility to apartment projects).

⁴⁰⁹ See, e.g., BELLE TERRE, N.Y., CODE § 170-7 (one-acre minimum lot size). One study showed that 14 of the 187 cities and towns in eastern Massachusetts require minimum lot sizes of more than 70,000 square feet or 1.625 acres. EDWARD L. GLAESER, JENNY SCHUETZ & BRYCE WARD, PIONEER INST. FOR PUB. POL’Y RSCH., *REGULATION AND THE RISE OF HOUSING PRICES IN GREATER BOSTON: A STUDY BASED ON NEW DATA FROM 187 COMMUNITIES IN EASTERN MASSACHUSETTS*, at ii (2006), <https://www.hks.harvard.edu/centers/rappaport/research-and-publications/major-reports/regulations-and-the-rise-in-housing-prices-in-greater-boston> [<https://perma.cc/389J-2AL6>]. It concluded that each increase in lot size decreased the percentage of affordable homes. See *id.* at 34; see also Paul Boudreaux, *Lotting Large: The Phenomenon of Minimum Lot Size Laws*, 68 ME. L. REV. 1, 9 (2016) (observing that large lot zoning “inflates the cost of housing”); Jeffrey Zabel & Maurice Dalton, *The Impact of Minimum Lot Size Regulations on House Prices in Eastern Massachusetts*, 41 REG’L SCI. & URB. ECON. 571 (2011) (discussing impact of large lot zoning on prices).

⁴¹⁰ See 3 AM. L. ZONING, *supra* note 407, § 22:2; see also Daniel R. Mandelker, *Zoning Barriers to Manufactured Housing*, 48 URB. LAW. 233, 234 (2016) (commenting that “manufactured housing . . . has significant affordability advantages over site-built traditional housing”).

⁴¹¹ See 3 AM. L. ZONING, *supra* note 407, § 22:2.

city.⁴¹² Moreover, they deprive everyone of the freedom to choose the type of home they wish to live in.

Under the standard *Euclid* framework, the validity of a zoning ordinance is governed by the rational basis test.⁴¹³ An ordinance is presumed to be constitutional, and the party challenging its validity must prove that it is “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”⁴¹⁴ In *Village of Belle Terre v. Boraas*, the Court described the standard more succinctly, explaining that such a law will be upheld if it is “reasonable, not arbitrary” and bears “a rational relationship to a [permissible] state objective.”⁴¹⁵ Under this deferential test, it is extraordinarily difficult to invalidate a zoning ordinance.⁴¹⁶

Federal courts and most state courts utilize the rational basis test to evaluate the constitutionality of exclusionary zoning ordinances,⁴¹⁷

⁴¹² See NOAH KAZIS, N.Y.U. FURMAN CTR., *ENDING EXCLUSIONARY ZONING IN NEW YORK CITY'S SUBURBS* 7 (2020), https://furmancenter.org/files/Ending_Exclusionary_Zoning_in_New_York_City's_Suburbs.pdf [<https://perma.cc/V2M3-9VXB>]; see also Elliott Anne Rigby, *Understanding Exclusionary Zoning and Its Impact on Concentrated Poverty*, CENTURY FOUND. (June 23, 2016), <https://tcf.org/content/facts/understanding-exclusionary-zoning-impact-concentrated-poverty> [<https://perma.cc/C8YR-AR8V>].

⁴¹³ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391 (1926). *Euclid* was premised on the Court's respect for separation of powers; it deferred to the judgment of the village council which “presumably representing a majority of its inhabitants and voicing their will” had adopted the ordinance. *Id.* at 389. In other words, the ballot box is the method to challenge unwise laws. However, an ordinance that bars people from moving into a community also prevents them from voting for candidates committed to repealing such laws. Thus, the logic underlying *Euclid*'s deferential standard of review does not readily apply to exclusionary zoning. *Cf.* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (“When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.” (citations omitted)).

⁴¹⁴ *Euclid*, 272 U.S. at 395.

⁴¹⁵ *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) (alteration in original) (first quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); and then quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971)).

⁴¹⁶ See, e.g., Robert J. Hopperton, *The Presumption of Validity in American Land-Use Law: A Substitute for Analysis, a Source of Significant Confusion*, 23 B.C. ENV'T AFFS. L. REV. 301, 308 (1996).

⁴¹⁷ See, e.g., *Ybarra v. Town of Los Altos Hills*, 503 F.2d 250, 254 (9th Cir. 1974) (“[T]he town need only show that the [one-acre minimum lot size] ordinance bears a rational relationship to a legitimate governmental interest. Here the ordinance is rationally related to preserving the town's rural environment.” (citation omitted)); *Jaylin Invs., Inc. v. Village of Moreland Hills*, 839 N.E.2d 903, 906 (Ohio 2006). As one authority summarizes current law: “Since neither a classification based on wealth nor the necessity of housing triggers ‘strict scrutiny’ review of exclusionary zoning ordinances, a municipality need only show a minimal rational basis in support of the ordinance.” ARDEN H. RATHKOPF, DAREN A. RATHKOPF & EDWARD H. ZIEGLER, JR., *RATHKOPF'S THE LAW OF ZONING AND PLANNING* § 22.3 (4th ed. 2021).

though a handful of states employ more rigorous standards.⁴¹⁸ As a result, courts have generally upheld such ordinances against substantive due process attack.⁴¹⁹ But the Supreme Court has never decided whether exclusionary zoning violates the Due Process Clause.⁴²⁰ The fundamental right to establish a home is a powerful tool for challenging such zoning because it invokes a more searching standard of review—either strict scrutiny or intermediate scrutiny.

This Part first examines when exclusionary zoning techniques infringe the right to establish a home. It then evaluates the justifications for using these techniques. To avoid duplication, it discusses intermediate scrutiny before strict scrutiny. The analysis below illustrates how this right can be used to challenge exclusionary zoning as a general matter.

B. *Infringement of the Right*

Clearly, a city may regulate the right to establish a home to some extent. As the Supreme Court noted in *Zablocki v. Redhail*, “reasonable regulations that do not significantly interfere” with a fundamental right “may legitimately be imposed.”⁴²¹ It explained that the existence

⁴¹⁸ See, e.g., *Surrick v. Zoning Hearing Bd.*, 382 A.2d 105, 111 (Pa. 1977) (“Where the amount of land zoned as being available for multi-family dwellings is disproportionately small in relation to [various] factors, the ordinance will be held to be exclusionary.”); *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 724 (N.J. 1975) (“We conclude that every . . . municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing.”).

⁴¹⁹ Exclusionary zoning can also be challenged under the Fair Housing Act, 42 U.S.C. §§ 3601–3619, where it is proven to have a disparate impact on a racial minority or other group protected by the Act. See *id.* §§ 3604–3606. If such a showing is made, the burden shifts to the defendant city to show that the zoning is “necessary to achieve a valid interest”; and, if so, the plaintiff can still prevail by showing that the interest could be adequately served by different policy with a less discriminatory effect. See *Tex. Dep’t. of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 527, 541 (2015). The approach presented in this Article is a better method for attacking exclusionary zoning because (1) there is no need to prove disparate impact and (2) the standard of review is more rigorous.

⁴²⁰ In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Court rejected a claim that the village’s failure to rezone land for multifamily housing violated the Equal Protection Clause, even though the decision disproportionately affected African Americans. See *id.* at 269–71. It held that “[p]roof of racially discriminatory intent or purpose is required” to show a violation of the Clause. *Id.* at 265. This decision significantly impeded the use of federal litigation to challenge exclusionary zoning under the Equal Protection Clause. See 3 AM. L. ZONING, *supra* note 407, § 22:4.

⁴²¹ *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978). Similarly, in *Planned Parenthood v. Casey*, the Court observed that “not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873 (1992).

of a violation depends on “[t]he directness and substantiality of the interference.”⁴²²

The statute in *Zablocki* mandated that a noncustodial parent obligated to pay child support obtain permission from a court in order to marry; this necessitated proof that the required payments had been made. The Court invalidated the statute because it imposed a serious financial burden on the exercise of the fundamental right to marry. It noted that some parents “will never be able to obtain the necessary court order, because they . . . lack the financial means to meet their support obligations.”⁴²³ And even those “able in theory to satisfy the statute’s requirements[] will be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry.”⁴²⁴ Under the *Zablocki* logic, the fundamental right to establish a home is infringed when the law imposes a serious financial burden on the exercise of the right.

The national standard for assessing housing affordability was developed by the Department of Housing and Urban Development. Under this approach, housing is deemed to be affordable if a household spends less than 30% of its income on housing.⁴²⁵ A household that spends more than this amount is classified as “cost burdened,” while one that spends more than 50% is considered to be “severely cost burdened.”⁴²⁶ According to the most recent data, 46.3% of tenants in the United States are cost burdened and 23.9% are severely cost burdened, while 21.2% of homeowners are cost burdened, and 9% are severely cost burdened.⁴²⁷

Household incomes and housing costs are affected by a variety of factors. But, at a minimum, where an exclusionary zoning technique

⁴²² *Zablocki*, 434 U.S. at 387 n.12; see also *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (the statutory definition of “household” for purposes of food stamp eligibility did not “‘directly and substantially’ interfere with family living arrangements and thereby burden a fundamental right” because “in the overwhelming majority of cases” it would have no effect on whether close relatives chose to live together (quoting *Zablocki*, 434 U.S. at 387)).

⁴²³ *Zablocki*, 434 U.S. at 387.

⁴²⁴ *Id.*

⁴²⁵ J. David Hulchanski, *The Concept of Housing Affordability: Six Contemporary Uses of the Housing Expenditure-to-Income Ratio*, 10 HOUS. STUD. 471, 475–86 (1995) (discussing standard); see also CHAS: Background, U.S. DEP’T OF HOUS. & URB. DEV.: OFF. OF POL’Y DEV. & RSCH., https://www.huduser.gov/portal/datasets/cp/CHAS/bg_chas.html [<https://perma.cc/M5FV-W29D>] (discussing standards used in the Comprehensive Housing Affordability Strategy).

⁴²⁶ HARVARD UNIV. JOINT CTR. FOR HOUS. STUD., THE STATE OF THE NATION’S HOUSING 2020, at 1 (2020), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_The_State_of_the_Nations_Housing_2020_Report_Revised_120720.pdf [<https://perma.cc/M6NM-AJMV>].

⁴²⁷ *Id.* at 34.

increases the cost of housing to the point where a household is severely cost burdened—paying more than 50% of its income—an infringement of the right to establish a home should be found.

For example, consider a hypothetical family with income of \$36,000 per year that wants to live in a city which bars multifamily housing. It could afford to pay up to \$1,499 in rent each month without being severely cost burdened; and apartments charging this level of rent could be profitably built in the city. But the minimum cost to rent a detached home in the city—the only type of housing available because of exclusionary zoning—is \$2,400 per month; such a rental would consume 80% of the family’s annual income. In a situation like this, the excess cost caused by exclusionary zoning severely burdens the right to establish a home.⁴²⁸ Under the *Zablocki* framework, the added cost is so high that the family is “coerced into forgoing” the right.⁴²⁹

More broadly, exclusionary zoning ordinances infringe the right to obtain a home in a different sense—by depriving people of the freedom to live in the type of home they prefer. For instance, consider a city where the only permitted residential use is a conventional detached single-family house on a large lot. In this situation, the city has prohibited almost all the housing alternatives that most cities allow, including apartments, townhouses, condominiums, detached homes on smaller lots, and manufactured homes. An individual, couple, or family who can afford to live in a single-family home on a large lot might strongly prefer to live in a different type of home, such as an apartment or single-family home on a small lot. Under the *Zablocki* standard,⁴³⁰ ordinances that drastically curtail the range of available housing choices directly and substantially interfere with the right to establish a home.

⁴²⁸ The same approach applies to the purchase of a home. For example, one study of housing costs in Washington, D.C. showed that a lot occupied by a traditional single-family home could instead accommodate six condominium units. See JENNY SCHUETZ, BROOKINGS INST., TO IMPROVE HOUSING AFFORDABILITY, WE NEED BETTER ALIGNMENT OF ZONING, TAXES, AND SUBSIDIES 2–4 (2020), https://www.brookings.edu/wp-content/uploads/2019/12/Schuetz_Policy2020_BigIdea_Improving-Housing-Afforability.pdf [<https://perma.cc/KP7N-MDLM>]. In order to purchase the traditional home, a buyer would have to pay \$1,000,000. *Id.* But a developer could profitably acquire that home, demolish it, build condominium units, and sell each unit for \$579,472—which would substantially expand the number of people who could afford to buy a home. *Id.*

⁴²⁹ See *Zablocki*, 434 U.S. at 387.

⁴³⁰ *Id.*

C. *Standard of Review: Intermediate Scrutiny*

1. *Overview*

The Supreme Court has not clearly delineated the intermediate scrutiny test sometimes used in substantive due process cases, as discussed above.⁴³¹ The analysis below uses the test set forth in *Moore v. City of East Cleveland*—the case that comes closest to applying the fundamental right to establish a home.⁴³² In *Moore*, the Court held that “when the government intrudes on choices concerning family living arrangements” a court must “examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.”⁴³³

The question is not whether a city may establish zones where the only uses are detached single-family houses on large lots. Such zoning is certainly permissible. A city that zones most of its residential land for such houses but also permits duplexes and other multifamily dwellings, houses on smaller lots, and manufactured homes in at least some areas has not engaged in exclusionary zoning. Rather, the question is whether total or near exclusion of all residential uses other than detached homes on large lots is constitutional.

Under the intermediate scrutiny test, the challenged law is not presumed to be constitutional. For instance, in *Moore* the Court placed the burden of justifying the ordinance on the city.⁴³⁴ This approach is consistent with the Court’s equal protection jurisprudence, which requires that the government bear the “demanding” burden of establishing that the law is constitutional.⁴³⁵ Thus, a city cannot rely on speculation or surmise, but instead must present proof that the ordinance serves “important” interests.⁴³⁶

2. *Prohibition of Multifamily Housing*

Ordinances banning multifamily housing may be defended on the basis that such housing increases density—and consequently produces traffic, noise, and similar impacts.⁴³⁷ Although the Supreme Court held in *Village of Euclid v. Ambler Realty Co.* that density concerns provided a rational basis for excluding apartment buildings from sin-

⁴³¹ See *supra* Section IV.D.

⁴³² *Moore v. City of E. Cleveland*, 431 U.S. 494, 499–500 (1977).

⁴³³ *Id.* at 499.

⁴³⁴ See *id.* at 499–500.

⁴³⁵ See *United States v. Virginia*, 518 U.S. 515, 533 (1996).

⁴³⁶ See *id.*

⁴³⁷ See 3 AM. L. ZONING, *supra* note 407, § 22:13.

gle-family zones, it also acknowledged that “in a different environment [apartments] would be not only entirely unobjectionable but highly desirable.”⁴³⁸ Thus, *Euclid* suggests that entirely excluding multifamily housing from a city would not even meet the rational basis test.

In any event, all forms of development—commercial, industrial, recreational, and otherwise—produce density impacts. A city can hardly have a strong interest in avoiding density impacts if it permits them for other types of uses, especially when compared with the importance of the right to a home. Indeed, the vast majority of zoning ordinances expressly permit duplexes, apartments, and other forms of multifamily housing,⁴³⁹ indicating that density concerns are not significant.⁴⁴⁰

Even assuming that avoiding density impacts is an important government interest, a ban on all forms of multifamily housing does not closely serve that interest. To paraphrase the Court’s analysis in *Moore*, an exclusionary zoning ordinance could allow a family consisting of a “husband, wife, and unmarried children to live together [in a detached single-family home], even if the family contain[ed] a half dozen licensed drivers, each with his or her own car.”⁴⁴¹ Yet, as the Court observed, such an ordinance could ban the construction of a duplex shared by an adult brother and sister, each “faithfully us[ing] public transportation.”⁴⁴² Such an ordinance serves density-related goals “marginally, at best.”⁴⁴³

Cities sometimes assert fiscal concerns to justify such bans. They argue, incorrectly, that multifamily housing does not generate enough tax revenue to pay for the city services that the inhabitants need.⁴⁴⁴ As a Harvard University study concluded: “[R]ather than imposing a

⁴³⁸ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

⁴³⁹ See NAT’L MULTIFAMILY HOUS. COUNCIL, THE HOUSING AFFORDABILITY TOOLKIT 37 (2021) (noting that 15% of the housing stock in the United States is multifamily rental housing).

⁴⁴⁰ The *Moore* Court noted that limiting density impacts was a “legitimate” goal but did not evaluate its relative importance. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 499–500 (1977).

⁴⁴¹ *Id.* at 500.

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ See Pat Dugan, *But What About Multiple Family Housing: Does it Pay for Itself?*, MUN. RSCH. & SERVS. CTR. OF WASH. (Mar. 1, 2012), <https://mrsc.org/Home/Stay-Informed/MRSC-Insight/Archives/But-What-About-Multiple-Family-Housing-Does-it-Pay.aspx> [https://perma.cc/X8R5-2W3D] (“It is commonly perceived that single family dwellings generate more tax revenue per unit . . . than multiple family developments generate. This is not a very accurate perception.”). The *Moore* Court commented that “avoiding an undue financial burden” was a “legitimate” goal but did not assess its relative importance. *Moore*, 431 U.S. at 500.

greater burden on local governments, higher density developments like apartments are actually more fiscally prudent than traditional suburban sprawl.”⁴⁴⁵ Moreover, a city can readily raise taxes to fund these services if needed.⁴⁴⁶ Local governments have financed their operations through taxation for centuries. Most cities across the nation have successfully surmounted any arguable fiscal challenges that these developments might pose. Even assuming that allowing duplexes or other types of multifamily housing might strain local finances, this concern is far less important than the right to a home.

For example, in *Southern Burlington County NAACP v. Township of Mount Laurel*,⁴⁴⁷ the New Jersey Supreme Court utilized a heightened standard of review—based on state law—to invalidate an ordinance that prohibited all multifamily housing, despite the township’s financial concerns.⁴⁴⁸ It explained: “We have no hesitancy in now saying . . . that, considering the basic importance of the opportunity for appropriate housing for all classes of our citizenry, no municipality may exclude or limit categories of housing for that reason or purpose.”⁴⁴⁹

Further, a ban on all forms of multifamily housing has only a “tenuous relation” to fiscal concerns.⁴⁵⁰ For example, five adult family members could reside in a traditional single-family house, while only two people might live in a duplex, one per unit. Thus, the duplex adds only two people consuming government services, while the house adds five—a 250% increase.

A third potential claim is that multifamily housing will lower property values.⁴⁵¹ However, as scholars have observed, “[l]and values in most existing apartment areas are very high . . . [and] there is little evidence that an apartment per se will detract from the value of sur-

⁴⁴⁵ MARK OBRINSKY & DEBRA STEIN, HARVARD UNIV. JOINT CTR. FOR HOUS. STUD., *OVERCOMING OPPOSITION TO MULTIFAMILY RENTAL HOUSING* 8 (2007), https://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/rr07-14_obrinsky_stein.pdf [<https://perma.cc/Z8M9-EZWX>]; see also Babcock & Bosselman, *supra* note 408, at 1062 (“[I]t is clear that multiple-family housing *per se* does not have any particular effect on municipal finance.”).

⁴⁴⁶ See *Nat’l Land & Inv. Co. v. Kohn*, 215 A.2d 597, 610 (Pa. 1965) (“Zoning provisions may not be used . . . to avoid the . . . economic burdens which time and natural growth invariably bring.”).

⁴⁴⁷ 336 A.2d 713 (N.J. 1975).

⁴⁴⁸ See *id.* at 724–25.

⁴⁴⁹ *Id.* at 731.

⁴⁵⁰ See *Moore v. City of E. Cleveland*, 431 U.S. 494, 500 (1977) (noting that the ordinance had only a “tenuous relation” to the city’s interests).

⁴⁵¹ See 3 AM. L. ZONING, *supra* note 407, § 22:14.

rounding land.”⁴⁵² Of course, in theory any new development might affect the value of nearby properties to some extent. For example, a new shopping center or factory might slightly lower the value of adjacent single-family homes; yet cities routinely approve developments like these, even if they are far more likely to reduce property values than, for example, a duplex. More broadly, property values fluctuate over time for many reasons. Concern that multiunit housing lowers these values is often mere speculation, based on fear rather than facts, and cannot outweigh the importance of the right to a home.

Finally, even if this were a strong state interest, any impact on the value of nearby houses can be mitigated by standard planning techniques, such as creating buffer zones between uses, installing landscaping and other visual screening, and requiring building designs that harmonize with single-family uses.⁴⁵³ Accordingly, a complete ban on all multifamily dwellings serves this goal only marginally.

3. *Large Lot Size Requirements*

In *Euclid*, the Court observed that there was “no serious difference of opinion” about the validity of certain aspects of the ordinance—including the lot size requirements for single-family houses.⁴⁵⁴ Because the ordinance only mandated minimum lot sizes between 700 and 5,000 square feet, it was reasonable to view them as measures to address density concerns.⁴⁵⁵ By contrast, some modern ordinances demand a minimum size of one acre—more than eight times bigger than the largest *Euclid* lot—while others require two acres or more. As one authority concludes, these requirements do not even have a rational relationship to density concerns because they exceed “even the arguable needs of health, safety, and morals.”⁴⁵⁶ By definition, such density arguments cannot satisfy the more searching intermediate scrutiny test.

⁴⁵² Babcock & Bosselman, *supra* note 408, at 1067; *see also* OBRINSKY & STEIN, *supra* note 445, at 12 (“[M]ultifamily housing rental developments do not generally lower property values in surrounding areas.”).

⁴⁵³ *See, e.g.*, Appeal of Girsh, 263 A.2d 395, 399 (Pa. 1970) (“Certainly [a city] can protect its attractive character by requiring apartments to be built in accordance with (reasonable) setback, open space, height, and other light-and-air requirements”); *cf.* Pinecrest Lakes, Inc. v. Shidel, 795 So. 2d 191, 193 (Fla. Dist. Ct. App. 2001) (involving requirement that portions of multifamily housing project use “compatible structure types” on land adjacent to single-family homes).

⁴⁵⁴ Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

⁴⁵⁵ *See id.* at 381–82.

⁴⁵⁶ 1 AM. L. ZONING, *supra* note 407, § 7:20.

More commonly, large lot zoning is defended on the rather elusive basis that it preserves the “rural character” of the area. For example, in *Ybarra v. Town of Los Altos Hills*,⁴⁵⁷ the Ninth Circuit held that requiring a one-acre lot met the rational basis test because it preserved “the town’s rural environment.”⁴⁵⁸ But using a more demanding standard of review, the Pennsylvania Supreme Court invalidated a similar requirement in *National Land & Investment Co. v. Kohn*.⁴⁵⁹ It explained:

There is no doubt that many of the residents of this area are highly desirous of keeping it the way it is, preferring, quite naturally, to look out upon land in its natural state rather than on other homes. . . . [But] [t]his is purely a matter of private desire which zoning regulations may not be employed to effectuate.

. . . .

The . . . argument . . . is that the rural character of the area must be preserved. If the township were developed on the basis of this zoning, however, it could not be seriously contended that the land would retain its rural character—it would simply be dotted with larger homes on larger lots.⁴⁶⁰

Similarly, under intermediate scrutiny, the governmental interest in using large lot zoning to maintain rural character is weak at best, particularly when compared with the important interest underlying the right to a home.

Further, large lot zoning has only a tenuous connection with the goal of maintaining the rural character of a region. This goal is better served by allowing cluster zoning, by which housing units are grouped together as condominiums, townhouses, or homes on small lots—thus allowing rural areas to remain devoted to agricultural and other non-residential uses.

⁴⁵⁷ 503 F.2d 250 (9th Cir. 1974).

⁴⁵⁸ *Id.* at 254.

⁴⁵⁹ 215 A.2d 597 (Pa. 1965).

⁴⁶⁰ *Id.* at 611–12; *see also* C & M Devs., Inc. v. Bedminster Twp. Zoning Hearing Bd., 820 A.2d 143, 158 (Pa. 2002) (ordinance that mandated one-acre minimum lot size in rural area was not “attempting to preserve agriculture, but rather . . . improperly attempting to exclude people”); *Hock v. Bd. of Supervisors*, 622 A.2d 431, 435 (Pa. Commw. Ct. 1993) (“[M]aintaining the rural character of the township does not constitute a sufficient justification for the minimum lot requirement.”).

4. *Prohibition of Manufactured Homes*

The modern successor to the mobile home is the “manufactured home.” Under federal law, a manufactured home is a dwelling unit that is constructed in a factory—including electrical, heating, and plumbing systems—and then transported to a site where it is installed.⁴⁶¹ Congress has recognized that manufactured homes are a “significant resource for affordable homeownership and rental housing accessible to all Americans.”⁴⁶² However, zoning ordinances in some cities prohibit the use of manufactured homes.⁴⁶³

Cities may argue that they have an interest in excluding manufactured homes due to aesthetics. Aesthetic concern is generally recognized as a rational basis for zoning regulation. But today “[w]ell-designed double-wide manufactured homes with conventional siding, roofing materials, and acceptable roof pitch are almost indistinguishable from traditional site-built homes of the same price and quality.”⁴⁶⁴ Moreover, ordinances often restrict manufactured homes to special zones where only those types of homes are permitted so that they are visually shielded from the public;⁴⁶⁵ in this situation, aesthetic issues are irrelevant. Finally, any lingering aesthetic concerns can be addressed by regulating the appearance of these homes.⁴⁶⁶

Another possible claim is that manufactured housing will lower property values.⁴⁶⁷ But the analysis above concerning the supposed

⁴⁶¹ See 42 U.S.C. § 5402(6) for a more detailed definition.

⁴⁶² 42 U.S.C. § 5401(a)(2). Manufactured housing provides over 6% of the national housing stock. Mandelker, *supra* note 410, at 235.

⁴⁶³ See Mandelker, *supra* note 410, at 237; see also CASEY J. DAWKINS, C. THEODORE KOEBEL, MARILYN CAVELL, STEVE HULLIBARGER, DAVID B. HATTIS & HOWARD WEISSMAN, CTR. FOR HOUS. RSCH., REGULATORY BARRIERS TO MANUFACTURED HOUSING PLACEMENT IN URBAN COMMUNITIES 19 (2011) (noting that 8% of survey respondents indicated that their jurisdictions excluded manufactured homes). In addition, some cities permit manufactured homes in special zones but bar them from single-family home zones; the analysis in this section applies equally to such ordinances.

⁴⁶⁴ Mandelker, *supra* note 410, at 239.

⁴⁶⁵ See, e.g., OCALA, FLA., CODE § 122-287.

⁴⁶⁶ See, e.g., *Ga. Manufactured Hous. Ass’n v. Spalding Cnty.*, 148 F.3d 1304, 1307 (11th Cir. 1998) (citing *Haves v. City of Miami*, 52 F.3d 918, 923–24 (11th Cir. 1995)) (upholding zoning regulation requiring manufactured homes to be built with 4:12 roof pitch under rational basis test).

⁴⁶⁷ For example, in *Texas Manufacturers Housing Ass’n v. City of La Porte*, 974 F. Supp. 602 (S.D. Tex. 1996), the court used the rational basis test to reject a challenge to an ordinance barring manufactured homes from zones for single-family detached houses. See *id.* It noted the defendant’s argument that such housing “may lead to a decrease in property values,” even though there was no evidence supporting this conclusion. See *id.* at 606. It concluded, “Plaintiff has not satisfied its burden of negating every conceivable rational basis for the Ordinance’s exclusion.” *Id.* at 607.

impact of multifamily housing on values applies equally here.⁴⁶⁸ Research tends to show that manufactured homes do not negatively affect the value of nearby properties.⁴⁶⁹ As one scholar concludes “[w]ell-designed and well-maintained manufactured housing built to national standards should not have a negative effect on the value of neighboring property.”⁴⁷⁰

Finally, one traditional objection to mobile homes and other early forms of manufactured housing was safety. For example, conventional homes are less likely to be affected by fire or tornadoes.⁴⁷¹ However, federal law has established the safety standards for manufactured homes in recent decades, thereby preempting local ordinances.⁴⁷² As a result, a city may not exclude manufactured homes based on safety concerns if they meet federal code requirements.⁴⁷³

D. *Standard of Review: Strict Scrutiny*

1. *Overview*

Under the strict scrutiny test, the government has the burden to prove that the law serves a compelling state interest and is narrowly tailored to obtain that objective.⁴⁷⁴ The Supreme Court has never provided criteria for determining when a compelling state interest exists.⁴⁷⁵ Its decisions certainly suggest that there must be a “truly vital interest.”⁴⁷⁶ For example, the Court has indicated that safeguarding human health,⁴⁷⁷ maintaining medical standards,⁴⁷⁸ ensuring proper care for children,⁴⁷⁹ and winning a war⁴⁸⁰ all qualify as compelling state interests. In order to show that the law is narrowly tailored, a city has

⁴⁶⁸ See *supra* notes 451–52 and accompanying text.

⁴⁶⁹ See Mandelker, *supra* note 410, at 237–38 (summarizing research studies). For instance, in *Anstine v. Zoning Bd. of Adjustment of York Twp.*, 190 A.2d 712, 717 (Pa. 1963), the Pennsylvania Supreme Court noted that the record showed that locating a mobile home in the zone at issue “will enhance the value of the surrounding property.”

⁴⁷⁰ Mandelker, *supra* note 410, at 238–39.

⁴⁷¹ See, e.g., Torie Bosch, *How to Tornado-Proof Your Mobile Home*, SLATE (Nov. 8, 2005, 3:59 PM), <https://slate.com/news-and-politics/2005/11/tornado-proofing-your-mobile-home.html> [<https://perma.cc/55EQ-ECNU>] (discussing the risks of remaining in a manufactured home during a tornado).

⁴⁷² See 42 U.S.C. § 5403(d).

⁴⁷³ See, e.g., *Scurlock v. City of Lynn Haven*, 858 F.2d 1521, 1525 (11th Cir. 1988).

⁴⁷⁴ See *supra* text accompanying notes 397–98.

⁴⁷⁵ See Fallon, *supra* note 292, at 1321–22.

⁴⁷⁶ See CHEMERINSKY, *supra* note 102, at 817.

⁴⁷⁷ See, e.g., *Roe v. Wade*, 410 U.S. 113, 154 (1973).

⁴⁷⁸ *Id.*

⁴⁷⁹ See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

⁴⁸⁰ See, e.g., *Korematsu v. United States*, 323 U.S. 214, 219–20 (1944).

the burden of proving that there is no “alternative, less intrusive” method that could be used to satisfy the government interest.⁴⁸¹

2. *Prohibition of Multifamily Housing*

The justifications offered for prohibiting multifamily housing—density, finances, and property value—cannot satisfy the intermediate scrutiny test, as discussed above. By definition, they also cannot meet the more demanding strict scrutiny test. Although these are all rational bases for regulation, it cannot be seriously argued that they are compelling state interests such as protecting human health, providing proper care for children, or winning a war.⁴⁸²

Moreover, these interests can be satisfied by less intrusive methods. Density concerns, for example, can be addressed by regulating the number of people who may live in each unit, rather than the types of housing units that are allowed.⁴⁸³ City finance issues can easily be avoided by raising money through taxation. And basic planning techniques such as buffer zones, visual screening, and architectural design measures can ensure that multifamily housing projects do not impact property values.

3. *Large Lot Size Requirements*

Large lot size requirements are invalid under the intermediate scrutiny test, as discussed above, despite arguments based on density⁴⁸⁴ and rural character.⁴⁸⁵ Again, by definition, these interests are far less compelling than, for example, winning a war, and thus would not meet the strict scrutiny test.

In addition, less intrusive techniques can be used to preserve the rural character of a region. The local government could condemn development rights in the region,⁴⁸⁶ rezone the area exclusively for agricultural use, or allow cluster zoning. All three approaches would be more effective than authorizing large homes on large lots.

⁴⁸¹ See CHEMERINSKY, *supra* note 102, at 817.

⁴⁸² See, e.g., *Evans v. Romer*, 882 P.2d 1335, 1345 (Colo. 1994) (preservation of fiscal resources is not a compelling state interest).

⁴⁸³ Cf. *Moore v. City of E. Cleveland*, 431 U.S. 494, 500–01 (1977) (explaining why ordinance was overbroad, based on number of household residents).

⁴⁸⁴ See *supra* notes 437–43, 456 and accompanying text.

⁴⁸⁵ See *supra* notes 457–60 and accompanying text.

⁴⁸⁶ See *Nat’l Land & Inv. Co. v. Kohn*, 215 A.2d 597, 611 (Pa. 1965) (suggesting condemnation and cluster zoning approaches).

4. *Prohibition of Manufactured Homes*

Just as the interests advanced to defend bans on manufactured homes do not satisfy the intermediate scrutiny standard, they are also insufficient under the strict scrutiny standard. Concern for aesthetics and property values do not constitute compelling state interests.⁴⁸⁷

Again, these concerns can be adequately addressed through alternative methods. A city can deal with aesthetic concerns by regulating the appearance, location, and landscaping for manufactured homes so that they easily blend in with traditional, single-family homes and other uses. The same techniques will address any possible impact on property values.

E. *Summary*

In sum, the exclusionary zoning techniques discussed above—prohibition of multifamily housing, large lot size requirements, and prohibition of manufactured homes—probably violate the fundamental right to establish a home.

Although the government interests typically advanced to justify these techniques admittedly meet the deferential rational basis test, they cannot satisfy the intermediate scrutiny test when weighed against the vital importance of the right to establish a home, particularly because the city has the burden of persuasion. Moreover, assuming *arguendo* that such an interest is strong, it is not closely served by the technique.

Nor can any of these techniques satisfy the strict scrutiny standard. Interests such as density, aesthetics, finances, rural character, and property value are simply not compelling state interests. And these techniques are not narrowly tailored to serve such interests.

CONCLUSION

For almost a century, the Supreme Court has acknowledged that the Due Process Clause encompasses the right to establish a home. But the right has rarely been used and remains underdeveloped, thereby contributing to the shortage of affordable housing. History, tradition, and logic compel the conclusion that the right to establish a home should be recognized as a fundamental right.

It is time to reassess the twentieth-century approach to residential zoning. The broad language of *Village of Euclid v. Ambler Realty Co.*

⁴⁸⁷ See, e.g., *Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728, 737–38 (8th Cir. 2011) (aesthetic protection is not a compelling state interest).

was pressed into service to legitimize cities where only the wealthy can reside.⁴⁸⁸ However, as Justice Stanley Mosk once declared, “total exclusion of people from a community is both immoral and illegal.”⁴⁸⁹ Exclusionary zoning unduly burdens the fundamental right to establish a home, and accordingly should be declared unconstitutional.

⁴⁸⁸ See *supra* notes 239–46, 406–12 and accompanying text.

⁴⁸⁹ *Associated Homebuilders of the Greater Eastbay, Inc. v. City of Livermore*, 557 P.2d 473, 497 (Cal. 1976) (Mosk, J., dissenting).

The Private Role in Public Safety

Farhang Heydari*

ABSTRACT

Amid a national debate over the scope of the criminal system and calls to defund police, a growing number of jurisdictions are turning to private actors to mitigate the system's harms. Communities across the country are purchasing body cameras, contracting for implicit bias trainings, and turning to community-based alternatives to police responses.

There is irony in these calls essentially to privatize aspects of public safety. Many proponents of these reforms sharply criticize privatization in related contexts, from prisons to policing. This contrast between demands to privatize in some instances, and to curtail privatization in others, underscores the twin theses of this Article. First, private influences on the criminal system are far more pervasive than the literature recognizes. By canvassing the roles of non-state actors, this Article demonstrates that private influence is inevitable. Second, private influences are neither intrinsically harmful nor beneficial. Although privatization raises serious governance concerns, public aspects of the system suffer many of the same problems, including distorted financial incentives, lack of transparency, and limited accountability. In fact, reliance on private rather than public actors sometimes mitigates these concerns.

In short, the oft-discussed line between public and private is a poor proxy for harm in the criminal system. Instead, policymakers should accept that the public and private spheres will always be intertwined and should regulate them in ways that avoid accountability gaps. The approach detailed in this Article offers important lessons for everything from relying on community-based antiviolence groups to law enforcement's access to the private data market.

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INTRODUCTION

In response to high-profile police killings, many communities are grappling with fundamental questions about the role of law enforcement in achieving public safety. An expanding coalition of Americans agrees that the criminal system incarcerates too many, and that law enforcement responses to social problems—homelessness, substance abuse, and mental illness, to name a few—often result in more harm than good.¹ Calls to “reimagine,” “defund,” or “abolish” aspects of

¹ See, e.g., *American Voters Share Cross-Partisan Consensus on Wide Range of Federal Policies, Polling Shows*, APPEAL (Jan. 8, 2021), <https://theappeal.org/the-lab/polling-memos/american-voters-share-cross-partisan-consensus-federal-policies-polling/> [<https://perma.cc/TS9A-UMJX>] (“66% of likely voters . . . support a proposed federal grant program to provide \$100 million per year in funding for community-based, non-law enforcement emergency and non-emergency response.”); *Widespread Desire for Policing and Criminal Justice Reform*, ASSOCIATED PRESS, <https://apnorc.org/projects/widespread-desire-for-policing-and-criminal-justice-reform/> [<https://perma.cc/7F4R-VHZ6>] (new national polling data); Maggie Astor, *Left and Right*

the criminal system have attracted considerable attention.² These movements seek to deemphasize and direct resources away from police, prosecutors, and prisons, in favor of social service responses to public safety problems.³ Although there is no single blueprint for achieving this kind of transformation, advocates and policymakers are calling for communities to play a bigger role in developing and implementing true public safety.⁴

Agree on Criminal Justice: They Were Both Wrong Before, N.Y. TIMES (May 16, 2019), <https://www.nytimes.com/2019/05/16/us/politics/criminal-justice-system.html> [https://perma.cc/XFF9-42G2] (“There is a new bipartisan consensus on criminal justice, and it is that the old consensus was wrong.”). *But see* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 265-74 (2018) (complicating the apparent “consensus” about how to address mass incarceration).

This Article uses the term “criminal system” to refer to the institutions and individual conduct that relate to the promulgation and enforcement of criminal laws, while acknowledging these forces are not a unified “system.” *See, e.g.*, Benjamin Levin, *Rethinking the Boundaries of “Criminal Justice,”* 15 OHIO STATE J. CRIM. L. 619, 619 (2018). This definition does not reach the full scope of the carceral state. *See, e.g.*, Sharon Dolovich & Alexandra Natapoff, Introduction: Mapping the New Criminal Justice Thinking (including all “public policies that generate the crime/poverty nexus” (emphasis omitted)), in THE NEW CRIMINAL JUSTICE THINKING 1, 4 (Sharon Dolovich & Alexandra Natapoff eds., 2017); Vesla M. Weaver & Amy E. Lerman, *Political Consequences of the Carceral State*, 104 AM. POL. SCI. REV. 817, 818 (2010) (defining carceral state as totality of “spatially concentrated, more punitive, surveillance-and punishment-oriented system of governance”).

² On police defunding, see generally *The Time Has Come to Defund the Police*, MOVEMENT 4 BLACK LIVES, <https://m4bl.org/defund-the-police/> [https://perma.cc/5XET-RED4]; *see also* Sarah Holder, Fola Akinnibi & Christopher Cannon, *We Have Not Defunded Anything: Big Cities Boost Police Budgets*, BLOOMBERG CITYLAB (Sept. 22, 2020), <https://www.bloomberg.com/graphics/2020-city-budget-police-defunding/> [https://perma.cc/YE43-9DUG] (“While a few major cities like New York and Los Angeles have made large, high profile cuts, more than half actually increased spending or kept it unchanged.”).

On police abolition, see generally Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1617 (2019); Amna A. Akbar, *Toward A Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 462 (2018); ALEX S. VITALE, *THE END OF POLICING* (2017).

³ *See, e.g.*, Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [https://perma.cc/WCH7-BJQC]; *see also* Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1782 (2020) (arguing that we must “take seriously an abolitionist horizon for reform projects”).

⁴ *See, e.g.*, Press Release, White House Briefing Room, Readout of First Meeting of White House Community Violence Intervention Collaborative (July 16, 2001), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/16/readout-of-first-meeting-of-white-house-community-violence-intervention-collaborative/> [https://perma.cc/MU7D-TJ8E] [hereinafter White House Community Violence Intervention Press Release]; Editorial, *Reducing Crime in Chicago: Instead of Jail and a Record, a Second Chance*, CHI. TRIB. (Nov. 13, 2020, 5:25 PM), <https://www.chicagotribune.com/opinion/editorials/ct-editorial-restorative-justice-court-north-lawndale-second-chance-20201113-r74ushfv6re6rfgo2oklslvai-story.html> [https://perma.cc/C336-A5CW]; *see also* Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925, 926 (2021) (suggesting that communities “reimagine public safety from the ground up”); Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1367

In addition to redirecting resources away from law enforcement, this community-centric vision of public safety elevates the role of privately operated (nongovernmental) alternatives to police. Examples are too numerous to count but include supporting private entities that engage in violence prevention efforts, combat domestic violence, protect vulnerable individuals, and offer community-based alternatives to calling 911.⁵ In championing these programs, advocates often seek a greater role for private, community-based organizations (“CBOs”) and a reduced role for public actors.⁶

There is some irony in these calls—coming largely, though not entirely, from progressive advocates—essentially to privatize aspects of the criminal system. In other contexts, privatization long has been subject to consistent attack. Privately operated prisons and the larger “prison industrial complex” are the most frequent target, but privatization’s critics also discuss private police, private prosecutors, and private surveillance companies.⁷ Critiques vary but often focus on the

(2017) (arguing that “the primary solution is to make criminal justice more community focused and responsive to lay influences”).

⁵ On violence prevention efforts, see *infra* note 56 and accompanying text (discussing violence interrupters); see also Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1217 (2015) (“[A]n abolitionist ethic creates space within which community members may organize themselves to empower vulnerable individuals and to address crime prevention by other means.”).

On domestic violence interventions, see, e.g., McLeod, *supra*, at 1217–18 (discussing “Sistas Liberated Ground” in Bushwick, Brooklyn); API CHAYA, <https://www.apichaya.org/> [<https://perma.cc/V2ZH-T74A>].

There are also groups focusing on youth safety and the LGBTQ community. See, e.g., ABOUT, COLLECTIVE ACTION FOR SAFE SPACES, <https://www.collectiveactiondc.org/about/> [<https://perma.cc/TWW6-RH3U>]; *Youth Development*, MAN UP! INC., <https://manupinc.org/youth-development/> [<https://perma.cc/88EP-3XGA>]; YOUTH JUST. COAL., <https://www.youthjusticela.org> [<https://perma.cc/F9ZV-MF36>]; see also Ejeris Dixon, *Building Community Safety: Practical Steps Toward Liberatory Transformation*, in WHO DO YOU SERVE, WHO DO YOU PROTECT? 161, 163–65 (Maya Schenwar et al. eds., 2016) (discussing Safe OUTside the System Collective).

On community-based alternatives and co-response models, particularly for individuals in mental health crisis, see *infra* notes 62–66 and accompanying text.

⁶ See, e.g., CORRECT CRISIS INTERVENTION TODAY-N.Y.C. (CCIT-NYC), PILOTING A PEER-DRIVEN MENTAL HEALTH CRISIS RESPONSE PROGRAM 2, https://f4dce468-6f07-4865-b2e5-1c7341acad2.filesusr.com/ugd/d972a6_890402b83b3247219fbf212550cc2ff6.pdf [<https://perma.cc/ELK6-54EX>] (calling for the New York City Department of Health and Mental Hygiene (DOHMH) to “contract with non-governmental agencies which will deploy the mental health crisis response teams”); cf. Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 913 (2007) (“The public criminal justice system is failing. . . . And as we have seen in other industries, from education to postal services to resolving civil law disputes, a failure of the public system will inevitably lead to the development of a private alternative.”).

⁷ See *infra* notes 110–13, 136 (discussing various aspects of the prison industrial complex); *infra* notes 48–49 and accompanying text (private police); *infra* notes 67, 96–99 and accompany-

difficulties that arise in attempting to govern and hold these private entities accountable.⁸

This contrast between calls to privatize in some contexts and to curtail privatization in others underscores the thesis of this Article: that private actors can play both beneficial and harmful roles in the criminal system. A close look at the criminal system reveals that even public actors suffer from many of the concerns associated with privatization. Moreover, private influences sometimes improve the public system. Rather than seeking to root out or embrace privatization wholesale, each instance must be considered on its merits.

Another key theme of this Article is that private influence on the criminal system is far more pervasive than the literature recognizes. For example, police rely on private individuals to report crimes, a process that neighborhood watch associations and private surveillance tools have made much more systematic.⁹ Investigations and prosecutions depend on a wide range of privately sourced data—from eyewitnesses to massive databases of location data harvested from cell phones.¹⁰ Some neighborhoods bolster police services by hiring private security; others pursue social service-based alternatives to policing.¹¹

These mechanisms are rarely (if ever) thought of as “privatization.” Part of this gap is definitional: traditional privatization, sometimes referred to as “contracting out” or “outsourcing,” refers to arrangements where government finances the private sector to provide specific goods and services.¹² Although some private influences on the criminal system fit this definition, many do not. Government-directed philanthropy, for example, allows the government to bring private sector resources to bear in filling budget shortfalls, buying new surveillance equipment, and implementing new programs with minimal public oversight.¹³

ing text (private prosecutors); *infra* notes 32–35 and accompanying text (surveillance companies).

⁸ See *infra* Part II (discussing governance critiques of privatization).

⁹ See *infra* notes 41–44 and accompanying text.

¹⁰ See *infra* notes 59–77.

¹¹ See *infra* notes 42–58.

¹² See *infra* Section I.A (comparing privatization with private influence); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1230 (2003) (“Although the term ‘privatization’ covers a variety of different activities, a useful definition encompasses the range of efforts by governments to move public functions into private hands and to use market-style competition.”).

¹³ See *infra* notes 29–31 and accompanying text. Reliance on private surveillance technology is another example of what this Article calls “government appropriation.” See *id.*

Rather than supporting a particular policy agenda, this Article advocates for a practical policymaking approach to private influence. It is both unrealistic and undesirable to avoid private influences on the criminal system. A better approach is to understand the full breadth of private influence and then to regulate in ways that maximize benefits while minimizing harms.¹⁴

This Article proceeds in three parts.

Part I demonstrates the *extent* to which private individuals and entities pervade the criminal system. Section A provides a taxonomy of private influence. Section B then demonstrates the breadth of private influence at different stages of the criminal process.

Part II then turns to *impact* and makes the case that private influence is intrinsically neither harmful nor beneficial. This discussion begins by identifying four common governance-focused critiques of privatization: (A) lack of democratic accountability, (B) lack of transparency, (C) lack of legal accountability, and (D) misaligned incentives. It then demonstrates not only that these critiques frequently apply to public actors, but that when properly designed, some private influences are preferable to their public alternatives. In short, Part II argues that the “public” or “private” label is not a useful proxy for concern.

Part III turns to regulatory implications. It argues that rather than focusing on “private” or “public” influences, those seeking social change should evaluate benefits and harms, including the governance critiques discussed in Part II. By focusing on outcomes rather than actors, policymakers should be willing to embrace roles for private entities where valuable, while also regulating in ways that avoid the legal and regulatory loopholes that have plagued privatization. Part III concludes with two specific applications of this guidance: community-based antiviolenence groups and police reliance on private surveillance.

I. THE PERVASIVENESS OF PRIVATE INFLUENCE

Many commentators decry privatization across the criminal system. Their critiques range from moral objections,¹⁵ to the practical difficulties of governing private actors.¹⁶ Advocates and scholars have

¹⁴ See generally AM. L. INST., PRINCIPLES OF THE LAW: POLICING (forthcoming) (on file with author) (discussing the role of private actors in promoting sound policing, and citing this Article).

¹⁵ See *infra* note 136 (discussing moral arguments against private prisons).

¹⁶ See *infra* Part II (discussing governance critiques).

sustained focus on private prisons and the broader prison industrial complex, including the privatization of bail, probation, immigration detention, and more.¹⁷ More recently, these criticisms have spread beyond the corrections context to the privatization of policing and prosecutorial services,¹⁸ and the role of private technology companies.¹⁹

But the influence of private actors is far broader than most credit. Seeing the full scope of private influence matters, because only after doing so can one level a candid appraisal of impact.²⁰ This Part focuses on the extent of private influence; Part II turns to impact.

A. Dimensions of Private Influence

When most people refer to “privatization,” they have a specific meaning: government contracting with a for-profit corporation to provide goods and services.²¹ This type of formal privatization is ubiqui-

¹⁷ See *infra* notes 110–117 and accompanying text (discussing various aspects of the “prison-industrial complex,” from private prisons and immigrant detention, to privatized supervised release).

¹⁸ See *infra* notes 48–49 and accompanying text (discussing private police); *infra* notes 67, 96–99 and accompanying text (discussing private prosecutors). See generally Benjamin Levin, *Criminal Employment Law*, 39 CARDOZO L. REV. 2265, 2314 (2018) (“Outside of the collateral consequences frame, privatization and the role of private actors in the criminal system increasingly have garnered academic attention over the last few decades. In their treatments of criminal law’s private dimensions, scholars have focused primarily on private prisons, with a lesser emphasis on private policing.” (footnote omitted)).

¹⁹ See, e.g., Elizabeth E. Joh & Thomas Wuil Joo, *The Harms of Police Surveillance Technology Monopolies*, DENV. L. REV. F. (forthcoming), <https://ssrn.com/abstract=3834777> [<https://perma.cc/3WGD-8NMK>]; Elizabeth E. Joh, *The Undue Influence of Surveillance Technology Companies on Policing*, 92 N.Y.U. L. REV. ONLINE 19, 21 (2017) [Hereinafter Joh, *Undue Influence*].

²⁰ See Dolovich & Natapoff, *supra* note 1, at 4 (“Conceptualizing the criminal system in this multifaceted way is a deliberately expansive move. It is an argument that, in order to understand, judge, and ultimately refashion our system of criminal justice, we need to acknowledge multiple dimensions Omit one of these elements, and you will have missed a vital piece of the puzzle.”); Seth W. Stoughton, *The Blurred Blue Line: Reform in an Era of Public & Private Policing*, 44 AM. J. CRIM. L. 117, 150–51 (2017) (“A similar observation may apply in the context of public and private policing: an incomplete understanding of policing can lead to regulation that is focused exclusively on policing as it is conducted by public officials *not* because the regulatory decision was driven by informed consideration of the options but instead because the blurred blue line was not considered at all.”).

²¹ See Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1508 (2001); Ronald A. Cass, *Privatization: Politics, Law and Theory*, 71 MARQ. L. REV. 449, 450 (1988); see also Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 998 (2005) (“[W]ith much federal governmental action—and most DOD initiatives—privatization simply becomes reliance on nongovernmental actors who are paid under publicly-funded con-

tous across American government,²² but it is hardly the only way that private actors influence the criminal system. To capture the broader scope of “private influence,” this Section offers a rough taxonomy.

1. Outsourced Goods & Services

Government outsourcing, or “contracting out,” is a deliberate decision to formally contract with the private sector for production of a good or provision of a service.²³

The umbrella of formal privatization encompasses a wide range of activities. Public actors outsource production of simple goods—e.g., office supplies, Kevlar vests, and firearms—but also incredibly complicated ones—e.g., facial recognition and predictive policing algorithms.²⁴ The more complicated the good, the more discretion

tracts or vouchers.”). See generally Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1377–79 (2003) (discussing various forms of privatization).

²² See generally LAUREN-BROOKE EISEN, *INSIDE PRIVATE PRISONS: AN AMERICAN DILEMMA IN THE AGE OF MASS INCARCERATION* 36 (2018) (“The U.S. Government has contracted out or sold its services to private business for more than two centuries.”) (capitalization omitted).

Privatization reaches everything from the administration of social welfare and education programs to military operations and other aspects of what many consider “core” government work. See, e.g., JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC* 3 (2017) (“Private contractors now number in the millions. These contractors have taken leading roles in fighting our wars in Afghanistan and Iraq; running prisons and immigration detention facilities; facilitating domestic surveillance and counterterrorism operations; drafting major rules; shaping energy, transportation, health care, and environmental policy; rendering public benefits decisions; collecting taxes; and monitoring and enforcing regulatory compliance across the vast administrative expanse.”); Metzger, *supra* note 21, at 1369 (“Privatization is now virtually a national obsession. Hardly any domestic policy issue remains untouched by disputes over the scope of private participation in government.”); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547 (2000) (“Virtually any example of service provision or regulation reveals a deep interdependence among public and private actors in accomplishing the business of governance.”). These days, no institution seems beyond privatization’s grasp. See, e.g., Chris Edwards, *Restructuring the U.S. Postal Service*, 39 CATO J. 667, 667 (2019); *Trump Administration Mulls Privatizing National Park Campgrounds*, AXIOS (Nov. 4, 2019), <https://www.axios.com/trump-administration-privatizing-national-park-campgrounds-a9642a77-46f0-4ac7-8eac-e2b14d63a2cf.html> [<https://perma.cc/ZYS9-YQEB>].

²³ Although traditional privatization relies on contracting, less traditional methods of privatization include tax breaks, voucher programs, and social impact bonds. See, e.g., Carol M. Rose, *Privatization—The Road to Democracy?*, 50 ST. LOUIS U. L.J. 691, 694 (2006); Jon D. Michaels, *Privatization’s Progeny*, 101 GEO. L.J. 1023, 1027 (2013) (calling these arrangement “government by bounty”); E.S. Savas, *Privatization and Prisons*, 40 VAND. L. REV. 889, 889–90 (1987) (“In the United States . . . state and local governments are implementing privatization primarily through contracting and, to a lesser degree, vouchers, franchises, free-market arrangements, and voluntary efforts. Contracting, however, is the primary method governments use to privatize prisons.” (footnote omitted)).

²⁴ See, e.g., Viens Brian, *Privatizing Facial Recognition Systems*, RUTGERS: CIV. LIBERTIES.

government cedes to the private sector.²⁵ When policing agencies purchase facial recognition software, for example, they have little understanding of how the algorithms perform under real-world conditions, whether the algorithm exhibits racial or gender disparities, or how to tailor the algorithm to minimize those disparities.²⁶ They rely almost entirely on the private vendor.²⁷

Service contracts operate much the same way. Governments contract out for everything from janitorial and IT services to wholesale operations of prisons and police patrols.²⁸ The more discretionary the service—like the day-to-day operations of a prison—the more control government cedes to the private sector.

2. Government Appropriation

When contracting out, government spends to acquire a good or service. But there are forms of private influence where government relies on private funding to expand its footprint. I call this “government appropriation,” though it is often done with the knowledge and consent of the private parties.

Government-directed philanthropy is a prime example of government appropriation. Private philanthropic foundations have helped policing agencies purchase a variety of surveillance and investigative tools: persistent aerial surveillance technology in Baltimore, cellphone cracking technology in San Diego, and networked cameras in Atlanta, to name a few.²⁹ Private donations have funded the acquisition of po-

IN TIMES OF EMERGENCY (May 2, 2018), <https://civil-liberties-ite.blogs.rutgers.edu/2018/05/privatizing-facial-recognition-systems/> [<https://perma.cc/S44M-V9CF>].

²⁵ See, e.g., Jon Schuppe, *How Facial Recognition Technology Became a Routine Policing Tool in America*, NBC NEWS (May 11, 2019, 4:19 AM), <https://www.nbcnews.com/news/us-news/how-facial-recognition-became-routine-policing-tool-america-n1004251> [<https://perma.cc/LZ4X-X7W6>].

²⁶ See *id.*

²⁷ See *id.*

²⁸ See *infra* notes 109–14 (discussing various aspects of the “prison-industrial complex,” from prisons to halfway houses and supervised release); *infra* note 61 and accompanying text (discussing private police); *infra* notes 67, 96–99 (discussing private prosecutors).

²⁹ See, e.g., Joseph Cox, *A Police Charity Bought an iPhone Hacking Tool and Gave It to Cops*, VICE (Sept. 28, 2020, 9:00 AM), <https://www.vice.com/en/article/qj4qyp/police-foundation-iphone-graykey-san-diego> [<https://perma.cc/ZP5H-K7RC>]; Emily Opilo, *Privately Funded Surveillance Planes to Begin Patrolling Baltimore Skies*, WASH. POST (Apr. 2, 2020), https://www.washingtonpost.com/local/legal-issues/privately-funded-surveillance-planes-to-begin-patrolling-baltimore-skies/2020/04/02/92cd0daa-752c-11ea-a9bd-9f8b593300d0_story.html [<https://perma.cc/PYY9-L6VD>]; Marcus K. Garner, *12K Cameras to Give Atlanta Police Broader Window to City*, ATLANTA J.-CONST. (Feb. 27, 2014), <https://www.ajc.com/news/12k-cameras-give-atlanta-police-broader-window-city/P9aPd6ApEP4vezte0ZiTcO/> [<https://perma.cc/N7RD->

lice dogs, covered the costs of mental health services for police, and much more.³⁰ At the same time, they have also funded alternatives to police enforcement.³¹

Appropriation is not limited to private funds. Law enforcement routinely expands its surveillance capabilities by relying on private surveillance equipment. When private people and businesses purchase surveillance—cameras, license plate readers, etc.—they often provide police with direct (real-time) access.³² Even short of direct access, new technologies also allow police to obtain information from private devices en masse, rather than installing publicly owned equipment.³³

Law enforcement can also expand its reach by accessing privately held data. Billions of smart devices gather data on every aspect of our lives. Realizing this, law enforcement is increasingly opportunistic, snatching data from smart home devices, smart cars, exercise

DTX8]. See generally Margaret H. Lemos & Guy-Uriel Charles, *Patriotic Philanthropy? Financing the State with Gifts to Government*, 106 CALIF. L. REV. 1129, 1160 (2018).

³⁰ E.g., *About the Spirit of Blue*, SPIRIT OF BLUE, <https://www.spiritofblue.org/about-the-foundation> [<https://perma.cc/CSF7-4W9Z>] (“Through our fundraising, the foundation is able to provide grants in partnership with law enforcement safety equipment manufacturers ranging from illumination to ballistic protection to firearms.”); *State K9 LEAP Grant Program*, K9 WORKING DOGS INT’L, LLC, <http://k9wdi.com/law-enforcement-k9-police-dogs/police-k9-grants-k9-leap-grant.html> [<https://perma.cc/9BTC-WNM9>]; *Programs*, NAT’L 9-99 POLICE & SHERIFF FOUND., <https://999foundation.org/programs> [<https://perma.cc/F4WM-X3MB>].

³¹ Liz Navratil, *Minneapolis Council Agrees on Alternative Public Safety Approach, but Cuts to Police Undecided*, STAR TRIB. (Dec. 4, 2020, 5:03 AM), <https://www.startribune.com/mps-council-agrees-on-alternative-public-safety-approach-cuts-to-police-undecided/573278561/> [<https://perma.cc/KJ6A-6K5Y>].

³² E.g., John J. Miller, Deputy Comm’r of Intel. and Counterterrorism, N.Y.C. Police Dep’t, Testimony Before the New York City Council Committees on Public Safety and Fire and Criminal Justice Services (Nov. 12, 2014), http://www.nyc.gov/html/nypd/downloads/pdf/pr/terrorism_preparedness_testimony_11122014.pdf [<https://perma.cc/UG67-B8MU>]; *Project Green Light Detroit*, CITY OF DETROIT, <https://detroitmi.gov/departments/police-department/project-green-light-detroit> [<https://perma.cc/64NN-HUTY>]; *SafeCam NOLA*, NEW ORLEANS POLICE & JUST. FOUND., <https://nopjf.org/project/215/> [<https://perma.cc/W6LS-UYT4>]; FLOCK SAFETY, <https://www.flocksafety.com/flock-for-neighborhood-security/> [<https://perma.cc/BR3E-SCT6>].

Video surveillance equipment—a multi-billion-dollar industry—is mounted on private businesses, on private homes, and even atop skyscrapers. See NIAL JENKINS, INFO. HANDLING SERVS., VIDEO SURVEILLANCE: NEW INSTALLED BASE METHODOLOGY YIELDS REVEALING RESULTS, [https://ihsmarkit.com/pdf/IHS-Video-surveillance-installed-base\(2\)_227038110913052132.pdf](https://ihsmarkit.com/pdf/IHS-Video-surveillance-installed-base(2)_227038110913052132.pdf) [<https://perma.cc/D3G4-P66P>].

³³ See, e.g., POLICING PROJECT, RING NEIGHBORS & NEIGHBORS PUBLIC SAFETY SERVICE: A CIVIL RIGHTS & CIVIL LIBERTIES AUDIT 41, <https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/61baab9fcc4c282092bbf7c3/1639623584675/Policing+Project+Ring+Civil+Rights+Audit+%28Full%29.pdf> [<https://perma.cc/ET35-JTNU>] (discussing growth of lateral surveillance). For a discussion of the interaction between new technologies, the police, and civil society, see generally JOSHUA REEVES, CITIZEN SPIES: THE LONG RISE OF AMERICA’S SURVEILLANCE SOCIETY (2017); see also *infra* note 52.

monitors, and a variety of other sources.³⁴ Relying on privately collected data gives law enforcement otherwise unattainable capabilities, and at minimal cost.³⁵

3. *Private Volunteerism*

In the preceding categories, public actors initiate or acquiesce to private influences. Government can operate its prisons, decline private donations, and limit its reliance on private surveillance. These decisions might be costly, impractical, or unlikely, but at least public actors largely retain the initiative and authority.

But there is a third category of private influence in which public actors are largely responsive to private actors. In this category, which I call “private volunteerism,” private individuals and entities set priorities and effectively make important decisions on behalf of government.

Consider, for example, a private person’s decision to call the police. Although many call when they genuinely need help, recent years have seen viral episodes of individuals reporting people of color who are going about their daily lives—walking their dogs, shopping in a deli, barbecuing in the park, watching their child play soccer, and generally existing in public spaces.³⁶ The consequences in any individual case can be profound—emotional trauma, arrest, or even death.³⁷

This type of private influence is far removed from formal privatization, but it is a mistake to ignore its effect. We tend to focus on high-profile incidents, but tens of thousands of police interactions occur every day as a result of calls to police.³⁸ At such scale, the impact can be profound. Rather than setting their own agenda, police spend a

³⁴ For a discussion of the ways technology will change the nature of law enforcement surveillance, and resulting privacy issues, see generally Andrew Guthrie Ferguson, *The “Smart” Fourth Amendment*, 102 CORNELL L. REV. 547 (2017) [hereinafter Ferguson, *The “Smart” Fourth Amendment*]; Andrew Guthrie Ferguson, *The Internet of Things and the Fourth Amendment of Effects*, 104 CALIF. L. REV. 805 (2016) [hereinafter Ferguson, *The Internet of Things*].

³⁵ See Ferguson, *The “Smart” Fourth Amendment*, *supra* note 34; Ferguson, *The Internet of Things*, *supra* note 34.

³⁶ See Chan Tov McNamara, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 335, 337–41 (2019) (collecting examples).

³⁷ See, *id.* at 341–42.

³⁸ In 2018, for example, of the nearly 61.5 million people who had contact with police, more than 35 million initiated that contact. ERIKA HARRELL & ELIZABETH DAVIS, U.S. DEP’T OF JUST., NCJ 255730, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2018 – STATISTICAL TABLES 3 tbl.1 (2020), <https://bjs.ojp.gov/content/pub/pdf/cbpp18st.pdf> [<https://perma.cc/B9AB-VH4U>].

substantial amount of time answering private calls.³⁹ Private companies like Walmart generate a volume of calls to police that make officers look like private security.⁴⁰ Calls to police in gentrifying neighborhoods generate arrests for offenses like loitering and disorderly conduct and lead to proactive policing for drug and alcohol offenses.⁴¹ This type of enforcement can make longtime residents feel unwelcome, inflame tensions, and exacerbate gentrification.⁴²

Private volunteerism goes well beyond a decision to call 911. The criminal system has many points at which individuals define priorities and choices for public actors. Additional examples, discussed in more detail below, include whether victims and witnesses come forward to the police, whether they cooperate with the prosecution, and whether they embrace a restorative justice-style approach.⁴³

And in many cases, private volunteerism is not just an *individual* decision—private entities and new technologies play key roles. Community bail funds pool private resources to override the decisions of judges and prosecutors.⁴⁴ Some neighborhoods come together to cre-

³⁹ See Jeff Asher & Ben Horwitz, *How Do the Police Actually Spend Their Time?*, N.Y. TIMES (Nov. 8, 2021), <https://www.nytimes.com/2020/06/19/upshot/unrest-police-time-violent-crime.html> [<https://perma.cc/H6NR-FMNS>] (providing data demonstrating that police spend about one-third of their time answering non-criminal calls for service).

⁴⁰ Stoughton, *supra* note 20, at 139 (“According to a review of Walmart stores in the Tampa area, for example, local police agencies ‘logged . . . ‘two calls an hour, every hour, every day.’ One officer described the situation this way: ‘We are, as a department, at the mercy of what they [Walmart] want to do.’” (alteration in original) (footnote omitted) (quoting Zachary T. Sampson, Laura C. Morel & Eli Murray, *Walmart, Thousands of Police Calls. You Paid the Bill*, TAMPA BAY TIMES (May 11, 2016), <https://projects.tampabay.com/projects/2016/public-safety/walmart-police/> [<https://perma.cc/2HS5-SXHD>])).

⁴¹ See, e.g., Brenden Beck, *Policing Gentrification: Stops and Low-Level Arrests During Demographic Change and Real Estate Reinvestment*, 19 CITY & CMTY. 245, 249 (2020); see also Olatunde C.A. Johnson, *Unjust Cities? Gentrification, Integration, and the Fair Housing Act*, 53 U. RICH. L. REV. 835, 846 (2019) (“There is some research that has begun to support the accounts of increased 911 calls in gentrifying neighborhoods and the expansion of punitive policing strategies.”); McNamara, *supra* note 36, at 360 (“[I]n New York City, the highest rate of quality-of-life police reports occurred in communities of color with the largest influx of White residents. Further, such reports were significantly more likely to end in the issuance of a summons or an arrest in communities of color that experienced the highest influx of White new arrivals.” (footnote omitted)).

⁴² See Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1495 (2016) (“The private can mobilize broken windows policing on demand, and the government can proactively supply it at will. This public/private mobilization of broken windows policing makes blacks out of place in, and facilitates their displacement from, areas on route to becoming new white communities.”).

⁴³ See *infra* notes 57, 72, 88 and accompanying text.

⁴⁴ See *infra* notes 92–93 and accompanying text.

ate support networks to avoiding calling the police,⁴⁵ while others form watch associations with a focus on enforcement.⁴⁶

B. *The Breadth of Private Influence*

With this taxonomy in mind, one now can assess the breadth of private influence across the stages of the criminal process. This section makes clear that private influence is pervasive, including in many ways that have escaped notice in the literature on privatization in the criminal system.

1. *Crime Prevention & Emergency Response*

Preventing and responding to crime are seen as core police duties. But in truth, crime prevention and response rest largely in private hands.

We expect and permit private individuals to provide for their own security. People protect their property using a variety of technologies, from vehicle antitheft devices and burglar alarms to cameras and smart doorbells with motion detection, night vision, and other capabilities.⁴⁷ Private entities bolster these efforts—security guards far outnumber public police;⁴⁸ wealthy neighborhoods pay police departments to have officers patrol during their off hours;⁴⁹ neighbor-

⁴⁵ See *infra* notes 63–66 and accompanying text (discussing community-based alternative responder models); see also Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 587 (“Much private policing arises from the private sector to meet private demands. Government agencies are sometimes purchasers of private policing services, but private police often operate wholly outside of direct public management.”).

⁴⁶ See *infra* notes 54–56 and accompanying text.

⁴⁷ See, e.g., TJ McCue, *Home Security Cameras Market to Surpass \$9.7 Billion by 2023*, FORBES (Jan. 31, 2019, 3:33 AM), <https://www.forbes.com/sites/tjmccue/2019/01/31/home-security-cameras-market-to-surpass-9-7-billion-by-2023/> [<https://perma.cc/88R7-X9MQ>].

⁴⁸ Niall McCarthy, *Private Security Outnumbers the Police in Most Countries Worldwide [Infographic]*, FORBES (Aug. 31, 2017, 9:05 AM), <https://www.forbes.com/sites/niallmccarthy/2017/08/31/private-security-outnumbers-the-police-in-most-countries-worldwide-infographic/> [<https://perma.cc/TMV3-G96U>]; see also BRUCE L. BENSON, TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE 76–78 (1998); Stoughton, *supra* note 20, at 128–29.

⁴⁹ See, e.g., Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 724 (2020) (discussing “Extended Neighborhood Patrol” (ENP) public-private partnership in Dallas, where “neighborhood associations . . . pay the Dallas Police Department large fees to procure specialized community policing” in the form of “sworn Dallas officers who are off duty spend[ing] overtime hours in specific neighborhoods that pay for the privilege of greater protection and for a relationship with their assigned officer”); Joh, *supra* note 45, at 584 (discussing privately funded patrols); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1177–78 (1999) (“[M]ore commonly, groups of residents or business owners in particular areas have received permission to tax themselves (and their dissenting neighbors) to pay for private patrols.”).

hood watch associations act as the “eyes and ears” of law enforcement,⁵⁰ bringing with them the potential for vigilantism and racial profiling.⁵¹ These efforts have been amplified by modern technology—Nextdoor and Ring, for example, have created digital neighborhood watch associations that include tens of millions of members.⁵² As with a private individual’s decision to call police, these private entities and associations can define what policing looks like in a jurisdiction.⁵³

There are also many examples of private influences that avoid police involvement. Some communities use private sanctions—social pressure and exclusion—to enforce social norms.⁵⁴ Neighbors work together to prevent truancy and confront individuals disturbing the peace without resorting to police.⁵⁵ Community-based antiviolence

⁵⁰ See, e.g., *About Neighborhood Watch*, NAT’L NEIGHBORHOOD WATCH, <https://www.nnw.org/about-neighborhood-watch> [<https://perma.cc/BKC4-2NZP>].

⁵¹ For criticisms of watch associations, see, e.g., Adeoye Johnson, *Neighborhood Watch: Invading the Community, Evading Constitutional Limits*, 18 U. PA. J.L. & SOC. CHANGE 459, 471–79 (2016); Sharon Finegan, *Watching the Watchers: The Growing Privatization of Criminal Law Enforcement and the Need for Limits on Neighborhood Watch Associations*, 8 U. MASS. L. REV. 88, 105–06 (2013).

⁵² See, e.g., POLICING PROJECT, *supra* note 33; *Neighbors by Ring*, Ring, <https://shop.ring.com/pages/neighbors> [<https://perma.cc/6VVP-APC8>]; Christopher Smith, *Neighborhood Watch Goes Rogue: The Trouble with Nextdoor and Citizen*, PCMAG (July 8, 2021), <https://www.pcmag.com/news/neighborhood-watch-goes-rogue-the-trouble-with-nextdoor-and-citizen> [<https://perma.cc/7JE3-VSE6>].

Some platforms like Ring Neighbors and Axon Citizen make it easier to share video with police. See, e.g., POLICING PROJECT, *supra* note 33; *Axon Citizen*, AXON, <https://www.axon.com/products/axon-citizen> [<https://perma.cc/C22P-ECPY>].

⁵³ See, e.g., Johnson, *supra* note 51. Private influences can, for example, heavily influence where police patrol. Most patrol allocation decisions are based on private demands—emergency and non-emergency calls to protect private individuals and private property. There are also a growing number of police using AI-powered proprietary algorithms to determine where to send their officers. See, e.g., Will Douglas Heaven, *Predictive Policing Algorithms Are Racist. They Need to Be Dismantled.*, MIT TECH. REV. (July 17, 2020), <https://www.technologyreview.com/2020/07/17/1005396/predictive-policing-algorithms-racist-dismantled-machine-learning-bias-criminal-justice/> [<https://perma.cc/29MV-T38M>]. For examples of companies that supply police with such technologies, see, e.g., *Overview*, PREDPOL, <https://www.predpol.com/about> [<https://perma.cc/5LYM-4EAM>]; *Community First Patrol Management Software Improves Crime Deterrence*, SHOTSPOTTER, <https://www.shotspotter.com/law-enforcement/patrol-management> [<https://perma.cc/4LBV-6WQ6>]; see also ANDREW GUTHRIE FERGUSON, *THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT* 67 (2017) (“Today, several dozen cities are using some form of predictive policing technology.”).

⁵⁴ See, e.g., BENSON, *supra* note 48, at 52 (“[T]he availability of alternative private sanctions can reduce the incentives to report crimes to the public sector, if the victim or the witness perceives greater net benefits from private pursuit of justice.”); Dan M. Kahan, *Privatizing Criminal Law: Strategies for Private Norm Enforcement in the Inner City*, 46 UCLA L. REV. 1859, 1862, 1866 (1999) (discussing how “the Black church” and “juveniles” are “well positioned to contribute to the control of crime” in inner cities).

⁵⁵ See, e.g., Christopher R. Browning, Seth Feinberg & Robert D. Dietz, *The Paradox of*

groups, such as Cure Violence, attempt to diffuse violence before it occurs.⁵⁶ Many of these groups apply restorative justice principles—bringing offenders and victims together in conversation to look for

Social Organization: Networks, Collective Efficacy, and Violent Crime in Urban Neighborhoods, 83 SOC. FORCES 503, 506–07 (2004); Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCI. 918, 918 (1997).

⁵⁶ CURE VIOLENCE GLOBAL, <https://cvg.org> [<https://perma.cc/H22Z-9N2A>]; see also JOHN JAY COLL. RSCH. ADVISORY GRP. ON PREVENTING AND REDUCING CMTY. VIOLENCE, REDUCING VIOLENCE WITHOUT POLICE: A REVIEW OF RESEARCH EVIDENCE 9 (2020) (discussing benefits of anti-violence programs, including Cure Violence, and calling the evidence base for interrupters “promising but mixed”); V. Noah Gimbel & Craig Muhammad, *Are Police Obsolete? Breaking Cycles of Violence Through Abolition Democracy*, 40 CARDOZO L. REV. 1453, 1509–11 (2019) (discussing the work of Cure Violence and violence interrupters and noting their “mobilizations of community members” in response to acts of violence).

Cure Violence and other violence interrupter programs have proliferated across the country. See, e.g., ADVANCE PEACE, <https://www.advancepeace.org> [<https://perma.cc/G8GA-857D>]; *Our Programs: Safe Streets, Living Classrooms*, <https://livingclassrooms.org/programs/safe-streets/> [<https://perma.cc/5YNF-BQ7V>]; *Street Outreach* (Nov. 9, 2021), <https://www.chicagocred.org/street-outreach> [<https://perma.cc/X93L-A6U8>]; Deena Zaru, *Lessons from a ‘Violence Interrupter’ as Shootings Continue to Ravage Chicago*, ABC NEWS, <https://abcnews.go.com/Politics/lessons-violence-interrupter-shootings-continue-ravage-chicago/story?id=80462349> [<https://perma.cc/6MD9-25W4>] (describing the violence prevention work of UCAN Chicago); *Communities Partnering 4 Peace*, METRO. FAM. SERVS., <https://www.metrofamily.org/cp4p/cp4p-info/> [<https://perma.cc/JZ7S-482L>]; Maya Rao, *Next Step Goes to the Front Lines of Gun Violence in Minneapolis, Starting with the Shooting Victims*, STAR TRIB. (JAN. 30, 2021, 3:42 PM), <https://www.startribune.com/next-step-goes-to-the-front-lines-of-gun-violence-in-minneapolis-starting-with-the-shooting-victims/600017039/> [<https://perma.cc/8XV5-FCFX>] (discussing work of Next Step in Minneapolis); S. CAL. CROSSROADS, <https://www.socalcrossroads.org> [<https://perma.cc/8558-LJFH>]; Mayor’s Initiative to Reduce Gun Violence, Cure Violence Announcement, CITY OF TOLEDO (Aug. 26, 2021), <https://toledo.oh.gov/news/2021/08/26/mayors-initiative-to-reduce-gun-violence-cure-violence-announcement> [<https://perma.cc/Z83W-ZRSB>] (discussing launch of Toledo’s Cure Violence program); *Urban Peace Academy*, URB. PEACE INST., <https://www.urbanpeaceinstitute.org/our-work-urban-peace-academy> [<https://perma.cc/PP2A-E6XH>]; MIKE McLIVELY & BRITTANY NIETO, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, A CASE STUDY IN HOPE: LESSONS FROM OAKLAND’S REMARKABLE REDUCTION IN GUN VIOLENCE (Apr. 2019); see also *Meeting Bulletin #4: Community Based Responses to Violence*, COUNCIL ON CRIM. JUST. (Oct. 7, 2021), <https://counciloncj.org/meeting-bulletin-4-community-based-responses/> [<https://perma.cc/5FEH-5F6G>] (discussing community-based responses to violent crime).

noncriminal resolutions to disputes.⁵⁷ There is growing evidence of how effective these interventions can be.⁵⁸

When deterrence and prevention fail, next comes crime reporting and response.⁵⁹ Private entities offer specialized ways to contact the police. In addition to the digital watch associations discussed above, security systems and burglar alarms provide an increasing number of direct lines to police.⁶⁰ And when it comes to police response, many places outsource patrols and certain calls to private police.⁶¹

In some cities there are also private entities that offer nonpunitive alternatives to crime reporting and police response.⁶² Los Ange-

⁵⁷ See, e.g., *Our Work*, COMMON JUST., https://www.commonjustice.org/our_work/#common-justice-model [<https://perma.cc/M3AC-X7ZF>] (discussing Common Justice's programs in Brooklyn and the Bronx); M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation*, 46 N.M. L. REV. 123, 140 (2016) (“[R]estorative justice programs usually bear the following hallmarks: a focus on harm rather than on violation of law, consideration of the interests and needs of both victim and offender, support for the offender to meet achievable obligations, and facilitation of dialogue that involves the community affected by the harm.”); Simmons, *supra* note 6; OFF. FOR VICTIMS OF CRIME, U.S. DEP'T OF JUST., NCJ 176350, NATIONAL SURVEY OF VICTIM-OFFENDER MEDIATION PROGRAMS IN THE UNITED STATES 5–6, 13, 15 (2000) (cataloging hundreds of victim-offender mediation programs across the country, 67% run through private organizations and 33% run through public agencies); BENSON, *supra* note 48, at 117 (discussing a number of “community dispute resolution projects” and “victim-offender mediation”).

⁵⁸ See PATRICK SHARKEY, *UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE, AND THE NEXT WAR ON VIOLENCE* (2018) (describing impact of community-based groups on combatting violence).

⁵⁹ 911 services, the core of crime reporting, can be outsourced. See Stoughton, *supra* note 20, at 144 (“Private police support services—such as private companies that provide call-taking and dispatch services . . . —are common.”); Karena Rahall, *The Siren Is Calling: Economic and Ideological Trends Toward Privatization of Public Police Forces*, 68 U. MIAMI L. REV. 633, 648 (2014) (discussing the privatization of “emergency response or 911 dispatching”); see also About, SAFERWATCH, <https://www.saferwatchapp.com> [<https://perma.cc/FR2A-QJPY>] (offering an app that provides a connection to 911 and first responders).

⁶⁰ See Rahall, *supra* note 59; SAFERWATCH, *supra* note 59.

⁶¹ See, e.g., Sklansky, *supra* note 49, at 1177 (“Increasingly, though, government agencies are hiring private security personnel to guard and patrol government buildings, housing projects, and public parks and facilities A few municipalities have hired private security companies to provide general patrol services.” (footnote omitted)).

For differing assessments of the role of private police, compare Heidi Boghosian, *Applying Restraints to Private Police*, 70 MO. L. REV. 177 (2005) (warning of the dangers of the virtually unregulated private security industry), with Joh, *supra* note 45, at 596 (arguing that “traditional legal scholarship has demonstrated too shallow an understanding of private policing in action. By assuming that private policing is a monolithic entity, critical responses often take the form of sweeping denigration.”).

⁶² See, e.g., CMTY. ACTION TEAMS, <https://cat-911.org> [<https://perma.cc/8CVJ-8MPK>] (Los Angeles); *Our Work: Mobile Crisis Team*, BALT. CRISIS RESPONSE INC., <https://bcresponse.org/our-work/mobile-crisis-team.html> [<https://perma.cc/PA7R-SYZK>] (Baltimore); *What We Do: PAD 311 Community Referral Services*, POLICING ALTERNATIVES & DIVERSION INITIATIVE, <https://www.atlantapad.org/311-community-referrals> [<https://perma.cc/9HFR-TEL8>] (Atlanta);

les-based Community Action Teams (“CAT”) 911, for example, is a nonprofit that gives community members an alternative to calling 911 and offers to dispatch private trained responders to assist community members.⁶³ Other programs do not field direct calls from community members but aim to provide holistic care services to address the root causes of low-level criminal behavior.⁶⁴

Other jurisdictions are experimenting with public-private partnerships that create alternative responders operating within the existing public system.⁶⁵ Perhaps the best known of these programs is Crisis Assistances Helping Out on the Streets (“CAHOOTS”) in Eugene, Oregon. A partnership between the local police department and a local nonprofit, CAHOOTS responders bring a social service focused approach to over ten thousand calls a year with little police assistance.⁶⁶

M.H. First Community First Response, ANTI POLICE-TERROR PROJECT, <https://www.antipoliceterrorproject.org/mental-health-first> [<https://perma.cc/YFD8-BB3L>] (Oakland and Sacramento).

⁶³ CMTY. ACTION TEAMS, <https://cat-911.org> [<https://perma.cc/8CVJ-8MPK>].

⁶⁴ See, e.g., *JustCARE*, CoLEAD, <https://coleadteam.org/justcare> [<https://perma.cc/7TXW-VHQQ>] (providing a variety of services to unhoused individuals in Seattle’s downtown).

⁶⁵ Many cities have public programs that rely on private entities or contractors to provide a non-enforcement response. See *Support Team Assisted Response (STAR)*, MENTAL HEALTH CTR. OF DENVER, <https://mhcd.org/star-program> [<https://perma.cc/JK7S-QXMX>] (Denver); BALT. CRISIS RESPONSE INC., *supra* note 62 (Baltimore); S.F. DEP’T PUB. HEALTH, STREET CRISIS RESPONSE TEAM ISSUE BRIEF (2021), https://www.sfdph.org/dph/files/IWG/SCRT_IWG_Issue_Brief_FINAL.pdf [<https://perma.cc/VQR6-NUKQ>] (San Francisco); *Transforming Police Responses to Mental Health Emergencies: Rapid Integrated Group Healthcare Team (RIGHT Care)*, MEADOWS MENTAL HEALTH POL’Y INST., <https://mmhpi.org/project/right-care> [<https://perma.cc/N4W5-VCCK>] (Dallas); *Mobile Crisis Team (MCT)*, HOPEWORKS, <https://www.hopeworksnm.org/mct-2-0> [<https://perma.cc/6AFQ-9VM3>] (Albuquerque); *Crisis Intervention Services*, CITY OF ROCHESTER, <https://www.cityofrochester.gov/crisisintervention> [<https://perma.cc/4G7K-3JEB>] (Rochester); see also Leila Miller, *Reformers Want Police to Step Back from Mental Health Calls. The LAPD Says It’s Been Trying*, L.A. TIMES (June 24, 2020, 6:00 AM), <https://www.latimes.com/california/story/2020-06-24/protests-spur-bid-for-lapd-to-move-back-from-mental-health-calls> [<https://perma.cc/KTY3-78PS>] (describing LAPD plan to divert some 911 suicide calls to a phone line run by Didi Hirsch Mental Health Services, a county-contracted provider). See generally, Katherine Beckett, Forrest Stuart & Monica Bell, *From Crisis to Care*, INQUEST (Sept. 2, 2021), <https://inquest.org/from-crisis-to-care> [<https://perma.cc/ZGM7-FQ5C>] (discussing a variety of alternative responder programs, many operating via private entities or contractors). New York City, for example, has a network of more than two dozen programs called the Crisis Management System. *Interventions*, NYC OFF. TO PREVENT GUN VIOLENCE, <https://www1.nyc.gov/site/peacenyc/interventions/crisis-management.page> [<https://perma.cc/TBS8-EA2J>].

⁶⁶ See Rowan Moore Gerety, *An Alternative to Police that Police Can Get Behind*, ATLANTIC (Dec. 28, 2020), <https://www.theatlantic.com/politics/archive/2020/12/cahoots-program-may-reduce-likelihood-of-police-violence/617477/> [<https://perma.cc/L87V-N4LP>].

In response to recent demand, CAHOOTS has begun offering virtual trainings (for a fee). See Tatiana Parafiniuk-Talesnick, *CAHOOTS Launches Mobile Crisis Response 101 Course as*

2. Criminal Investigations & Arrests

Private actors play key roles in criminal investigations. Some jurisdictions formally outsource investigations to private contractors,⁶⁷ but more commonly, police are left to respond to investigations conducted by private businesses.⁶⁸ In Chicago, Norfolk Southern Railroad security filled an unmarked tractor trailer with Nike shoes, parked it in multiple spots in a predominantly black and low-income Chicago neighborhood, and then had the Chicago Police Department arrest people caught in the act.⁶⁹ According to the company, the operation was to combat “unacceptable thefts” from freight containers.⁷⁰ From shoplifting to eBay scams to insurance fraud, private investigators conduct a range of investigations, turning over their results to law enforcement.⁷¹

Cities Across the Country Look to Start Similar Programs, KGW8 (Dec. 15, 2021, 4:11 PM), <https://www.kgw.com/article/news/local/cahoots-mobile-crisis-response-101-course/283-5b6564be-2037-4969-94e0-fd8dd882918b> [<https://perma.cc/ZWL9-PUTM>].

⁶⁷ A few jurisdictions contract out general investigative responsibilities, while others contract out specific types of investigations. See Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution?: The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL F. 265, 275.

⁶⁸ See, e.g., Peter Waldman & Lauren Etter, *Target’s Cozy Police Legacy Leaves Black Americans Wary*, BLOOMBERG L. (Aug. 25, 2021, 5:00 AM), <https://www.bloomberglaw.com/bloomberglawnews/esg/XCNR00JK000000> [<https://perma.cc/9XA2-G37B>] (“Target collected video evidence of shoplifters in the act, interviewed them on tape, and delivered the evidence to law enforcement. ‘What they were doing was essentially the police work that the police didn’t have the time or incentive to do’”).

Rather than turning to the police, some businesses impose private sanctions by, for example, dealing with an employee’s wrongdoing via dismissal, suspension, or other internal sanctions. See BENSON, *supra* note 48, at 124–25 (“Some observers suggest that within business organizations, ‘private justice may exert far greater control on citizens than the criminal justice system itself.’” (quoting WILLIAM CLAY CUNNINGHAM & TODD H. TAYLOR, *THE HALLCREST REPORT: PRIVATE SECURITY AND POLICE IN AMERICA* 12 (1985))).

More recently, some larger retailers have started engaging for-profit corporations to extract payments from (primarily shoplifting) offenders rather than turning the offender over to police. Under this “retail justice” model, “[t]he retailer pays nothing; in fact, in some cases, it reaps a portion of each suspect’s payment.” John Rappaport, *Criminal Justice, Inc.*, 118 COLUM. L. REV. 2251, 2252–53 (2018) (discussing for-profit retail justice corporations like the Corrective Education Company).

⁶⁹ Nadra Nittle, *Video: Railroad Company That Put Nike “Bait Truck” in Chicago Neighborhood Apologizes*, VOX (Aug. 9, 2018, 1:56 PM), <https://www.vox.com/2018/8/7/17661240/video-chicago-police-bait-truck-nike-norfolk-southern-apology-englewood-black-neighborhood> [<https://perma.cc/AT6E-VGJ8>].

⁷⁰ *Id.*

⁷¹ See, e.g., Sean James Beaton, *Counterparts in Modern Policing: The Influence of Corporate Investigators on the Public Police and a Call for the Broadening of the State Action Doctrine*, 26 Touro L. REV. 593, 599–601 (2010) (discussing eBay’s Global Law Enforcement Operations and North America Fraud Investigation teams); *About NICB*, NAT’L INS. CRIME BUREAU, <https://www.nicb.org/about-nicb> [<https://perma.cc/9WMK-YFLD>] (“[T]he nation’s premier not-for-profit organization dedicated exclusively to fighting insurance fraud and crime.”).

Short of an outsourced investigation, there are many other ways that law enforcement relies on private information to power its investigations.

At the simplest level, private actors provide key information to investigators. Many investigations rise and fall on the willingness of private individuals—victims, eyewitnesses, informants, and whistleblowers—to cooperate.⁷² Private entities can play similar roles—Amazon tags packages with GPS devices for use in police operations against package theft,⁷³ the taxi industry helps uncover unli-

Pulling in a different direction, some argue that Amazon has played a role in abetting certain crimes. See, e.g., Rebecca Ballhaus & Shalini Ramachandran, *Ben Dugan Works for CVS. His Job Is Battling a \$45 Billion Crime Spree.*, WALL ST. J. (Sept. 1, 2021, 10:31 AM), <https://www.wsj.com/articles/cvs-home-depot-theft-organized-crime-11630505851> [<https://perma.cc/ATB9-JV46>] (quoting a Colorado police sergeant calling Amazon the “largest unregulated pawnshop on the face of the planet”).

⁷² See, e.g., ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* 25–27 (2011) (describing how “snitching is sprinkled throughout the system like salt, flavoring every kind of case from burglary to corporate fraud and political corruption”); BENSON, *supra* note 48, at 4 (“Very few arrests for property or violent crimes result from police-initiated investigations or actions. . . . [W]ithout the . . . cooperation by victims or witnesses in providing testimony, a very substantial portion of the violent and property criminals that are arrested would never be successfully prosecuted.”); see also James F. Barger, Jr., *Life, Death, and Medicare Fraud: The Corruption of Hospice and What the Private Public Partnership Under the Federal False Claims Act Is Doing About It*, 53 AM. CRIM. L. REV. 1, 33 (2016) (“Every such case—whether civil or criminal—was initiated by a whistleblower under the public-private partnership of the False Claims Act.”).

If there was any doubt the extent to which law enforcement relies on private individuals coming forward, take a look at the rates at which crimes go unsolved in communities where distrust of the police runs high. See C.R. DIV., U.S. DEP’T OF JUST., *INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT* 139 (2016) (“BPD’s persistent failure to hold officers accountable for misconduct contributes to an erosion of the community trust that is central to effective law enforcement.”); C.R. DIV., U.S. DEP’T OF JUST., *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* 80 (2015) [hereinafter *THE FERGUSON REPORT*] (“[L]oss of legitimacy makes individuals more likely to resist enforcement efforts and less likely to cooperate with law enforcement efforts to prevent and investigate crime.”); Statement of Interest of the United States at 10, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 1:08-cv-01034) (“Officers can only police safely and effectively if they maintain the trust and cooperation of the communities within which they work.”); see also Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2058–59 (2017) (explaining that “[m]any scholars and policymakers have settled on a ‘legitimacy deficit’ as the core diagnosis of the frayed relationship between police forces and the communities they serve”); TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* 7 (2002) (“There is considerable evidence that when people regard the particular agents of the legal system whom they personally encounter as acting in a way they perceive to be fair and guided by motives that they infer to be trustworthy, they are more willing to defer to their directives and decisions.”).

⁷³ See, e.g., Jordan Pearson, *Amazon Is Helping Police Trap Package Thieves in Canada, Too*, VICE (Dec. 16, 2019, 7:49 PM), https://www.vice.com/en_us/article/bvggw5/amazon-is-helping-police-trap-package-thieves-in-canada-too [<https://perma.cc/C947-HEP6>] (detailing Am-

censed taxis,⁷⁴ and large corporations operate forensic labs.⁷⁵ Private entities can also bolster investigative efforts by encouraging witnesses to come forward. Crime Stoppers, for example, offers cash rewards for information leading to arrests and claims to have contributed to over 800,000 arrests.⁷⁶ The Crime Stoppers model, which “encourages people to call the cops early and often,” has been criticized for encouraging overincarceration and unnecessary fines.⁷⁷

Then there are the range of investigative tools created by the private sector: body cameras, surveillance planes, and drones capture video evidence while AI-powered algorithms analyze the videos.⁷⁸ When police lack video, they rely on fingerprints, DNA, and other forensic tools.⁷⁹ But many of these tools are so complex that govern-

amazon and Ring’s partnership with Royal Canadian Mounted Police to conduct sting and noting “package stings conducted by police in several U.S. cities including Jersey City, NJ, Hayward, CA, Aurora, CO, and more. In places such as Hayward, GPS-bugged packages from Amazon did the trick. In others, such as Aurora, police got Ring cameras as well.”).

⁷⁴ See Stoughton, *supra* note 20, at 139.

⁷⁵ See Kaveh Waddell, *CSI: Walmart*, ATLANTIC (Apr. 3, 2017), <https://www.theatlantic.com/technology/archive/2017/04/csi-walmart/521565/> [https://perma.cc/6LQW-X34E].

⁷⁶ See CRIME STOPPERS USA, <https://www.crimestoppersusa.org> [https://perma.cc/9WRC-E2YZ]. Crime Stoppers claims that information provided through their networks have contributed to over 800,000 arrests, including 14,000 homicides, resulting in over \$117 million in rewards to private individuals. *Id.* Motorola’s TipSubmit serves the same purpose. See *TipSubmit*, MOTOROLA SOLS., https://www.motorolasolutions.com/en_us/products/command-center-software/community-engagement/tipsubmit.html [https://perma.cc/US9G-UPVC].

⁷⁷ Tana Ganeva, *How Crime Stoppers Hotlines Encourage Sketchy Tips and Hurt Poor Defendants*, NEW REPUBLIC (Oct. 29, 2021), <https://newrepublic.com/article/164156/crime-stoppers-fees-police-reform> [https://perma.cc/NJ4Z-RJKQ].

⁷⁸ See JAY STANLEY, AM. C.L. UNION, *THE DAWN OF ROBOT SURVEILLANCE: AI, VIDEO ANALYTICS, AND PRIVACY* 24–25 (2019).

⁷⁹ See Meghan J. Ryan, *Secret Conviction Programs*, 77 WASH. & LEE L. REV. 269, 294 (2020) (“Similarly, when a forensic scientist tries to use an [Automated Fingerprinting Identification System (“AFIS”)] to match a latent print found at a crime scene to a known print in a law enforcement database, she employs a computer program generally developed by an independent company.”).

On probabilistic genotyping, see *Parabon Snapshot Advanced DNA Analysis*, PARABON NANO LABS, <https://snapshot.parabon-nanolabs.com> [https://perma.cc/E9HL-VHUR]; Ryan, *supra*, at 296–97 (“[Private] researchers have developed computer programs to run statistical analyses on these types of low-level and mixed samples so that analysts can determine the probability that any particular individual was a contributor to the DNA sample at issue.”). See generally Michael D. Coble & Jo-Anne Bright, *Probabilistic Genotyping Software: An Overview*, 38 FORENSIC SCI. INT’L: GENETICS 219, 221 (2019).

On cell-site simulators, see, e.g., Joh, *Undue Influence*, *supra* note 19 (discussing law enforcement use of Stingrays and the Harris Corporation); Stephanie K. Pell & Christopher Soghoian, *A Lot More Than a Pen Register, and Less Than a Wiretap: What the StingRay Teaches Us About How Congress Should Approach the Reform of Law Enforcement Surveillance Authorities*, 16 YALE J.L. & TECH. 134, 142 (2013).

ment actors are beholden to the design choices made by private developers, such as how well a face recognition algorithm performs across races and genders.⁸⁰

Police also rely on access to huge reservoirs of privately generated data. As discussed above, private actors share access to privately owned surveillance devices.⁸¹ But police can also purchase data on the private market. Detailed dossiers, geo-tagged license plate readers,⁸² iris scans,⁸³ facial images,⁸⁴ and much more⁸⁵ are available at little cost. If all else fails, police can obtain deeply personal data—our location history, our communications, and our internet search histories—

⁸⁰ See PATRICK GROTH, MEI NGAN & KAYEE HANAOKA, U.S. DEP'T OF COM., NISTIR 8280, FACE RECOGNITION VENDOR TEST (FRVT) PART 3: DEMOGRAPHIC EFFECTS (2019), <https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8280.pdf> [<https://perma.cc/T2UW-J3X4>]. See generally Andrew Guthrie Ferguson, *Illuminating Black Data Policing*, 15 OHIO ST. J. CRIM. L. 503, 510 (2018) (“Most police administrators and officers are not computer scientists and must remain largely dependent on private companies to provide technical guidance. In practice, this means that police purchase big data technologies without the ability to interrogate them or even understand them.” (footnote omitted)).

⁸¹ See *supra* note 32 (citing New York’s Domain Awareness program, Detroit’s Project Greenlight, Flock Safety’s Automatic License Plate Readers (“ALPRs”), and others).

⁸² Stephen Rushin, *The Regulation of Private Police*, 115 W. VA. L. REV. 159, 180, 182–83 (2012) (“Data aggregators like the [National Vehicle Location Service (“NVLS”)] then amass this type of micro-surveillance from private police all around the country. The result is a thorough, national database of public movements. . . . Aggregative surveillance companies like the NVLS represent the expansion of *private policing into an arena previously occupied exclusively by public police: widespread community surveillance*.” (emphasis added)).

⁸³ BF TECHS., <https://bi2technologies.com> [<https://perma.cc/Z5JG-92KH>].

⁸⁴ See *Thornley v. Clearview AI, Inc.*, 984 F.3d 1241, 1243 (7th Cir. 2021).

⁸⁵ For example, DNA Solves, created by the private DNA lab Othram, collects genetic profiles. See DNASOLVES.COM, <https://www.dnasolves.com> [<https://perma.cc/D5FJ-RLTT>]. A number of companies sell bulk location data. See Jon Keegan & Alfred Ng, *There’s a Multibillion-Dollar Market for Your Phone’s Location Data*, THE MARKUP (Sept. 30, 2021), <https://themarkup.org/privacy/2021/09/30/theres-a-multibillion-dollar-market-for-your-phones-location-data> [<https://perma.cc/HMK6-4A2E>]. Data brokers develop detailed profiles that include our “addresses, drivers license information, vehicle information . . . telephone numbers, corporations, business affiliations, aircraft, boats, assets, professional licenses, concealed weapons permits, liens, judgments, lawsuits, marriages,” and more. Chris Jay Hoofnagle, *Big Brother’s Little Helpers: How ChoicePoint and Other Commercial Data Brokers Collect and Package Your Data for Law Enforcement*, 29 N.C. J. INT’L L. & COM. REGUL. 595, 596 (2004) (quoting SOLE SOURCE JUSTIFICATION FOR AUTOTRACK (DATABASE TECHNOLOGIES), <https://epic.org/wp-content/uploads/privacy/choicepoint/cpusms7.30.02j.pdf> [<https://perma.cc/NX6D-8CHB>])). All of this data can be mined and analyzed by a variety of privately developed tools. See, e.g., Ferguson, *supra* note 80, at 503 (“[P]olice administrators have been seeking out new partnerships with sophisticated private data companies and experimenting with new surveillance technologies.”); Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. CHI. L. REV. 317, 322–23 (2008); Christopher Slobogin, *Transaction Surveillance by the Government*, 75 MISS. L.J. 139, 167–82 (2005).

through a legal request, leaving it to tech companies to decide whether and when to object to overbroad demands.⁸⁶

3. Prosecution & Defense

After an arrest comes a series of key determinations—whether to divert the individual away from prosecution, whether to hold them on bail, and whether to impose conditions on release (such as electronic monitoring). Each decision, although made by a public actor (usually a prosecutor or judge), is privately influenced in substantial ways.

For example, police may want to divert a person from prosecution, but the options available are constrained by the programs that exist. In many places, diversion programs—be it youth development programs or driving-under-the-influence schools—are operated by private entities.⁸⁷ Where these entities are plentiful, they can divert many away from prosecution and into restorative justice programs that bring victims and offenders together to avoid incarceration.⁸⁸

Similar dynamics exist around bail.⁸⁹ In many places, private companies offer electronic monitoring as an alternative to incarceration—a business that has boomed in response to the COVID-19 pandemic and bail reform.⁹⁰ There also are a growing number of nonprofits that

⁸⁶ See Alan Z. Rozenshtein, *Surveillance Intermediaries*, 70 STAN. L. REV. 99, 102 (2018). For information on data insourcing, see generally Kimberly N. Brown, *Outsourcing, Data Insourcing, and the Irrelevant Constitution*, 49 GA. L. REV. 607, 616–17 (2015); see also Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 MISS. L.J. 1309, 1311 (2012); Jon D. Michaels, *All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CALIF. L. REV. 901, 902 (2008); Daniel J. Solove & Chris Jay Hoofnagle, *A Model Regime of Privacy Protection*, 2006 U. ILL. L. REV. 357, 359.

⁸⁷ See, e.g., Sammi Nachtigal, *The Potholes of Offender-Funded Driving Diversion: How Minnesota's Driving Diversion Program Fails the People It Is Supposed to Help*, 37 L. & INEQ. 443, 454 (2019) (discussing Diversion Solutions, LLC); see also Shaila Dewan & Andrew W. Lehren, *After a Crime, the Price of a Second Chance*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/us/crime-criminal-justice-reform-diversion.html> [<https://perma.cc/R8PZ-DDK6>]; Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 U. PA. J.L. & SOC. CHANGE 125, 154 (2017); Dan M. Kahan, *supra* note 54, at 1868 (1999).

⁸⁸ E.g., *Restorative Justice Partnership*, YOLO COUNTY DISTRICT ATTORNEY, <https://yoloda.org/progressive-programs/restorative-justice-partnership/> [<https://perma.cc/W7SL-BNWW>]; *Manhattan Justice Opportunities*, CTR. FOR CT. INNOVATION, <https://www.courtinnovation.org/programs/manhattan-justice-opportunities> [<https://perma.cc/5CXF-H892>].

⁸⁹ Although judges make final bail determinations, their decisions often mirror the recommendations of privately developed “risk assessment” algorithms. See, e.g., Hannah Bloch-Wehba, *Access to Algorithms*, 88 FORDHAM L. REV. 1265, 1284–86 (2020) (discussing pre-trial risk assessment tools acquired from foundations and the private sector).

⁹⁰ Cyrus Farivar, *Other than Prison, Electronic Monitoring Is ‘the Most Restrictive Form’ of Control, Research Finds*, NBC NEWS (Sept. 23, 2021, 6:03 AM), <https://www.nbcnews.com/tech/tech-news/other-prison-electronic-monitoring-most-restrictive-form-control-research-finds->

supervise individuals on release, giving judges the option to grant release when they otherwise could not. The Center for Court Innovation's Supervised Release Program, for example, has enabled the release of individuals without bail in more than 12,000 cases.⁹¹ Closely related, there are many community bail funds, i.e., nonprofits that use pooled private funds to secure an individual's release.⁹² In a relatively short time, these funds have freed thousands.⁹³ Given the documented impact of pre-trial detention on an individual's ability to mount a defense, likelihood to take a plea, and mental and physical health, one cannot overstate the impact these private entities have on people's lives.⁹⁴ (Of course, there are for-profit entities in the bail business, as well.⁹⁵)

The mechanics of prosecution and defense are also significantly privatized. Although most prosecutors are public actors, some places outsource the role.⁹⁶ There are even jurisdictions that accept private

n1279894 [https://perma.cc/3L7B-Y55Z] ("In the past 18 months, as the judicial system has increasingly used electronic monitoring instead of prisons to monitor inmates through the coronavirus pandemic, newly released data confirm what activists and advocates have long argued: [a]nkle monitors are onerous, and they often subject wearers to vague rules The ankle monitoring business, the research found, is also dominated by four profit-seeking companies, and it ultimately could drive more people back to prison."); April Glaser, *Incarcerated at Home: The Rise of Ankle Monitors and House Arrest During the Pandemic*, NBC NEWS (July 5, 2021, 11:30 AM), <https://www.nbcnews.com/tech/tech-news/incarcerated-home-rise-ankle-monitors-house-arrest-during-pandemic-n1273008> [https://perma.cc/X8UY-YWLZ].

⁹¹ *Supervised Release Program*, CTR. FOR CT. INNOVATION, <https://www.courtinnovation.org/programs/supervised-release> [https://perma.cc/PU8E-LEAK].

⁹² See Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 587–88 (2017) ("In recent years, community groups in jurisdictions across the United States have increasingly begun to use bail funds to post bail on behalf of strangers, using a revolving pool of money. . . . Each time a community bail fund pays bail for a stranger, the people in control of the fund reject a judge's determination that a certain amount of the defendant's personal money was necessary for the defendant's release.").

⁹³ See Mary Hooks & Jocelyn Simonson, Opinion, *The Power of Community Bail Funds*, N.Y. TIMES (Aug. 23, 2020), <https://www.nytimes.com/2020/08/23/opinion/bail-funds.html> [https://perma.cc/CQ87-THY6] ("At least 10,000 protesters and ordinary people have been freed from jail and immigrant detention facilities after months of uprisings in which millions of dollars have been donated to nearly 80 community bail funds nationwide.").

⁹⁴ See Andrea Estes, *Flush with Donations, Massachusetts Bail Fund Pays to Free Defendants Across the State—Many Facing Serious Charges*, BOS. GLOBE (July 19, 2020, 6:49 PM), <https://www.bostonglobe.com/2020/07/19/metro/flush-with-donations-massachusetts-bail-fund-pays-free-defendants-across-state-many-facing-serious-charges/> [https://perma.cc/G8QJ-5X33].

⁹⁵ See generally Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 Hous. L. REV. 731, 764 (1996) (discussing the historical and contemporary roles and rights of bail bondsmen and bounty hunters).

⁹⁶ On outsourcing the role of the chief prosecutor, see generally Maybell Romero, *Profit-Driven Prosecution and the Competitive Bidding Process*, 107 J. CRIM. L. & CRIMINOLOGY 161,

financing to support certain types of prosecutions, including for rape kit testing,⁹⁷ workers' compensation fraud,⁹⁸ quality of life issues,⁹⁹ and a host of minor crimes.¹⁰⁰ On the defense side, the accused is permitted to hire private counsel. For people who cannot afford one, counsel is appointed—often a private attorney operating under contract.¹⁰¹ Both the prosecution and the defense can bring additional private resources to the table—investigators, jury consultants, testifying experts, and more.¹⁰²

165–66 (2017) (“For [smaller jurisdictions], hiring a full-time prosecutor or district attorney is often cost-prohibitive Candidates for such outsourced prosecution positions are often required to go through a competitive bidding process in which cost-savings, fine generation, and outbidding competitors are prioritized over other evaluative concerns” (footnote omitted)); Fairfax, *supra* note 67; Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 435 (2009).

Historically, prosecutions were brought by private individuals. See I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1586–87 (2020); Barry Friedman, *What Is Public Safety*, 102 B.U. L. REV. (forthcoming Apr. 2022) (noting relatively recent origins of public prosecutions).

⁹⁷ See, e.g., *The Enough Said Project: A Partnership for Justice*, ENOUGH SAID, <http://enoughsaiddetroit.org/about.html> [<https://perma.cc/W4YX-7T57>]; Ruth McCambridge, *400,000 Untested Rape Kits – Nonprofits Take the Issue On*, NONPROFIT Q. (May 7, 2013), <https://non-profitquarterly.org/400-000-untested-rape-kits-nonprofits-take-the-issue-on/> [<https://perma.cc/UW3H-2GHY>].

⁹⁸ Joseph E. Kennedy, *Private Financing of Criminal Prosecutions and the Differing Protections of Liberty and Equality in the Criminal Justice System*, 24 HASTINGS CONST. L.Q. 665, 668 (1997).

⁹⁹ Jordan C. Harris, Note, *Justice for Sale: The Cost of Private Financing of Prosecution, When Is It Worth It?*, 31 GEO. J. LEGAL ETHICS 635, 635–36, 635 (2018) (listing examples).

¹⁰⁰ See, e.g., Brett Kelman, *They Confessed to Minor Crimes. Then City Hall Billed Them \$122K in ‘Prosecution Fees.’* DESERT SUN (Nov. 15, 3:53 PM), https://www.desertsun.com/story/news/crime_courts/2017/11/15/he-confessed-minor-crime-then-city-hall-billed-him-31-k-his-own-prosecution/846850001/ [<https://perma.cc/A6Q3-CSUX>]; Brett Kelman, *Three New Plaintiffs Join Lawsuit Accusing Indio and Coachella of Prosecuting for Profit*, DESERT SUN (Apr. 26, 2018, 5:29 PM) https://www.desertsun.com/story/news/crime_courts/2018/04/26/new-plaintiffs-accuse-indio-and-coachella-prosecuting-profit/537832002/ [<https://perma.cc/6LB8-J7EX>].

¹⁰¹ See, e.g., N.Y. COUNTY LAW § 722 (McKinney 2019). See generally Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 76 (1993) (“Rather than stressing efforts to strengthen the formal independence—and monopoly position—of established Public Defender agencies, we seek, in a word, to ‘privatize’ the delivery of indigent defense services.”).

¹⁰² On evidence gathering techniques, see, e.g., Bloch-Wehba, *supra* note 89, at 1286 (discussing breathalyzers and DNA testing); Ryan, *supra* note 79, at 270 (discussing breathalyzers, fingerprint analysis, and probabilistic genotyping).

On expert witnesses, see, e.g., *Rape Kit Backlogs: Failing the Test of Providing Justice to Sexual Assault Survivors: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 75 (2010) (statement of Dr. Christian Hassell, Assistant Director, Laboratory Division, FBI); David Armstrong, *The Child-Abuse Contrarian*, NEW YORKER (Sept. 26, 2018), <https://www.newyorker.com/news/news-desk/the->

4. Sentencing & Punishment

Sentencing is at the core of the state's responsibility. Legislatures define a range of possible punishments, commissions set guidelines, and judges have discretion to determine the sentence.¹⁰³ But even sentencing determinations have seen creeping private influence. Most states use risk assessment tools to assist in sentencing decisions; some do so in every case.¹⁰⁴ The private entities that develop these tools determine which factors to include—from prior convictions, incarceration, and drug use to a person's high school grades and socioeconomic factors.¹⁰⁵ It is difficult to know the precise impact of these algorithms, but there is growing evidence of profound racial disparities.¹⁰⁶

Private individuals also play formative roles at sentencing. As a result of the victims' rights movement, many states now afford victims the option to speak at sentencing and parole hearings.¹⁰⁷ On the flip side, the participatory defense movement calls on community groups to join “with families, friends, neighbors, and allies of defendants” and “present biographical videos to prosecutors and judges, and pack courtrooms in support of defendants.”¹⁰⁸ (Of course, court-packing

child-abuse-contrarian [<https://perma.cc/27PV-XQWJ>] (“Michael Holick, a renowned scientist turned expert witness, relies on his own controversial theory to help alleged abusers avoid prison and regain custody of the babies they were accused of harming.”).

¹⁰³ See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 717 (2005) (“For the past three decades, the federal government and roughly one-third of the states have turned to expert commissions to overhaul their criminal sentencing regimes.”).

¹⁰⁴ Maneka Sinha, *Junk Science at Sentencing*, 89 GEO. WASH. L. REV. 52, 70 (2021); Andrew Guthrie Ferguson, *Policing Predictive Policing*, 94 WASH. U. L. REV. 1109, 1121 (2017).

¹⁰⁵ For a discussion of how risk assessments are created, see generally Matt Henry, *Risk Assessment: Explained*, APPEAL (Dec. 14, 2019), <https://theappeal.org/the-lab/explainers/risk-assessment-explained/> [<https://perma.cc/43MK-QSBF>].

¹⁰⁶ See Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 824, 838 (2014); see also Jessica M. Eaglin, *Technologically Distorted Conceptions of Punishment*, 97 WASH. U. L. REV. 483, 492 (2019) (“Public and private coalitions began endorsing the use of publicly and privately developed actuarial risk tools in the states as part of a comprehensive agenda to reduce recidivism while saving states correctional costs.”); Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 69 (2017) (“Private companies have developed some of the leading tools used in several jurisdictions.”); Andrea Nishi, Note, *Privatizing Sentencing: A Delegation Framework for Recidivism Risk Assessment*, 119 COLUM. L. REV. 1671, 1673 (2019) (discussing the “largely unexamined role that private actors—risk assessment developers—have come to play in individual sentencing determinations”);.

¹⁰⁷ For background on how these this came to be, see generally OFF. FOR VICTIMS OF CRIME, U.S. DEP'T OF JUST., NCJ 170600, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY (1997).

¹⁰⁸ Jocelyn Simonson, Essay, *The Place of “the People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 268 (2019); see also Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281,

techniques also can be used against the accused, and are frequent tactics of police when officers are criminally charged.¹⁰⁹)

Once a person is sentenced, the terms of their sentence are often in private hands. Scholars have written extensively about private prisons, which operate across institutions in at least thirty states and the federal system.¹¹⁰ Privately operated jails and immigrant detention facilities also span the country.¹¹¹ But more widespread are private influences on the 4.5 million Americans living under some form of supervised release, probation, or parole.¹¹² Many halfway houses and drug treatment facilities are outsourced.¹¹³ Other entities administer probation programs—some are nonprofits, but others charge significant fees.¹¹⁴ Private apps promise to lower the cost of parole monitor-

1285–86 (2015) (describing participatory defense movement); *Participatory Defense*, GRASSROOTS LEADERSHIP, <https://grassrootsleadership.org/programs/participatory-defense> [<https://perma.cc/B4R6-XXKK>].

109 Expert testimony at sentencing can also come on either side of the ledger—a defendant presenting mitigation evidence or a prosecutor arguing likelihood to re-offend. *See, e.g.*, Sinha, *supra* note 104, at 74.

110 *See, e.g.*, *Private Prisons in the United States*, SENT’G PROJECT (Mar. 3, 2021), <https://www.sentencingproject.org/publications/private-prisons-united-states/> [<https://perma.cc/39HW-G73X>]. Regarding private prisons and the prison industrial complex, *see generally* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 84–85 (2003); Patrice A. Fulcher, *Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex*, 51 WASHBURN L.J. 589, 599 (2012); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 449 (2005); Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 144 (2001); Chris Weaver & Will Purcell, Comment, *The Prison Industrial Complex: A Modern Justification for African Enslavement?*, 41 HOW. L.J. 349, 353 (1998).

111 *See, e.g.*, SENT’G PROJECT, *supra* note 110. Regarding immigrant detention, *see generally* Mariela Olivares, *Intersectionality at the Intersection of Profiteering and Immigration Detention*, 94 NEB. L. REV. 963, 976–91 (2016); César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1507–11 (2015).

112 PEW CHARITABLE TRS., TO SAFELY CUT INCARCERATION, STATES RETHINK RESPONSES TO SUPERVISION VIOLATIONS 1 (2019), https://www.pewtrusts.org/-/media/assets/2019/07/pspp_states_target_technical_violations_v1.pdf [<https://perma.cc/M3Q7-FD7R>].

113 *See* Liliana Segura, *How the Coronavirus Became a Death Sentence at a Geo Group Halfway House*, INTERCEPT (July 3, 2020, 7:00 AM), <https://theintercept.com/2020/07/03/halfway-house-pandemic-coronavirus-geo-group> [<https://perma.cc/8CKN-X5ZU>] (discussing coronavirus deaths at federal halfway houses, including those privately run by GEO Group); BENSON, *supra* note 48, at 6.

114 *See* EISEN, *supra* note 22, at 45 (“An increasing number of governments have signed contracts with private, for-profit companies that offer misdemeanor probation services at no cost to the government in exchange for the right to collect fees from the probationers they supervise.”); Andrew Ross, *Probation Profiteering Is the New Debtors’ Prison*, BOS. REV. (Nov. 9, 2021), <https://bostonreview.net/articles/probation-profiteering-is-the-new-debtors-prison/> [<https://perma.cc/HQD9-L6KR>]; Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1496–98, 1507–09 (2016); Vicki L. Gilliam, *The Role of the Defense Attorney in Mitigating the Nonviolent Youthful Offender and Locating the Appropriate Alternative Sentence*, 19 MISS. COLL. L. REV. 361, 372 (1999) (discuss-

ing by tracking and monitoring parolees via remote check-ins, but in so doing make profound choices about the extent to which they invade one's privacy.¹¹⁵

And of course, there are the collateral consequences that come with a criminal conviction. Although some collateral consequences are state imposed—disenfranchisement and loss of access to public housing and public benefits—many are privately imposed. Employer and landlord sanctions are two of the most common.¹¹⁶ The ability of private parties to impose these collateral sanctions is fueled by a private market that aggregates criminal records, performs background checks, and even charges fees to correct erroneous records.¹¹⁷ At the same time, there are also private actors working to minimize collateral consequences—CBOs focus on reentry assistance, and private employers can prioritize hiring people with criminal convictions. Government can incentivize this work through grants or tax credits, but it ultimately relies on private actors.¹¹⁸

5. Systemic Influences

Private influences also operate at a systemic, policymaking level.

The legislative process is an obvious place to start. We expect criminal laws to reflect public will—in some places this means decriminalizing marijuana,¹¹⁹ in others it means stiffening penalties for

ing nonprofit that offers probation, non-adjudication, and house arrest services for a fee); see also HUM. RTS. WATCH, “SET UP TO FAIL”: THE IMPACT OF OFFENDER-FUNDED PRIVATE PROBATION ON THE POOR 55 (2018).

There are also private initiatives working to purchase and forgive probation debt. *E.g.*, Associated Press, *Groups Erase Some Probation Debt in Mississippi, Florida*, U.S. NEWS (Oct. 30, 2021, 8:47 AM), <https://www.usnews.com/news/best-states/florida/articles/2021-10-30/groups-erase-some-probation-debt-in-mississippi-florida> [<https://perma.cc/3UB9-CRLX>] (erasing nearly \$3.3 million in private probation debt in Mississippi and Florida).

¹¹⁵ See, e.g., Molly Osberg & Dhruv Mehrotra, *When Your Freedom Depends on an App*, GIZMODO (Apr. 27, 2020, 1:29 PM), <https://gizmodo.com/when-your-freedom-depends-on-an-app-1843109198> [<https://perma.cc/EVX3-ZRSY>]; Press Release, SCRAM Systems, One in 55 U.S. Adults is Under Community Supervision, (Mar. 11, 2019), <https://www.scramsystems.com/media-room/software-solution-aims-improve-outcomes-adults-community-supervision/> [<https://perma.cc/UD7S-ULAS>]; Jordannah Elizabeth, *JAY-Z Continues to Fight Mass Incarceration with New Investment*, AMSTERDAM NEWS (Apr. 5, 2018), <http://amsterdamnews.com/news/2018/apr/05/jay-z-continues-fight-mass-incarceration-new-inves/> [<https://perma.cc/V5RK-54RY>].

¹¹⁶ See, e.g., Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1411–17 (2018).

¹¹⁷ *Id.*

¹¹⁸ See MARGARET COLGATE LOVE, JENNY ROBERTS & WAYNE A. LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY, AND PRACTICE § 6:14 (2016), Westlaw (database updated Nov. 2021); Michaels, *supra* note 23, at 1052.

¹¹⁹ Daniel Kreps, *Virginia Lawmakers Pass Marijuana Legalization Bills*, ROLLING STONE

package theft.¹²⁰ Private groups have tremendous influence on this process; interest groups lobby, testify, publish research, mobilize supporters, and contribute to campaigns.¹²¹ Business interests, law enforcement associations, and civil liberties groups are the best known, but they are hardly alone in influencing criminal policy.¹²² For decades, tough-on-crime groups have had the upper hand—supporting passage of three strikes laws and mandatory minimums, for example—but the winds have begun to shift of late.¹²³

(Feb. 6, 2021, 1:04 PM), <https://www.rollingstone.com/culture/culture-news/virginia-legalize-marijuana-1124749/> [<https://perma.cc/6PN4-NANM>]. Such efforts can have a substantial effect on reducing over-policing. See Lindsey Kennett, *Marijuana-Related Possession Arrests Drop 90% Across Virginia*, WLSL (Sep. 15, 2021, 3:30 PM), <https://www.wsls.com/news/local/2021/09/14/marijuana-related-possession-arrests-drop-90-across-virginia/> [<https://perma.cc/R73P-E3SY>].

¹²⁰ Recent estimates suggest that 1.7 million packages are stolen or lost every day. Katie Schoolov, *With Package Theft at an All-Time High, Amazon and Others Are Fighting Back*, CNBC (Jan. 11, 2020, 9:01 AM), <https://www.cnbc.com/2020/01/10/package-theft-how-amazon-google-others-are-fighting-porch-pirates.html> [<https://perma.cc/W84S-2BUL>]. Some legislatures are addressing this issue with criminal laws: Michigan enacted a new state law making a second such offense a felony. MICH. COMP. LAWS §§ 445.31–33 (2019). Texas has stiffened its package theft law. TEX. PENAL CODE ANN. § 31.20 (West 2019). Other states are considering similar measures. See, e.g., Benjamin Yount, *Wisconsin Lawmaker Looks to Get Tougher on Porch Pirates*, CTR. SQUARE (Dec. 27, 2019), https://www.thecentersquare.com/wisconsin/wisconsin-lawmaker-looks-to-get-tougher-on-porch-pirates/article_60bbf166-280e-11ea-aae7-f32175936a04.html [<https://perma.cc/5DBU-RSHK>]; H. 3071, 123rd Gen. Assemb. (S.C. 2019); Rachel Nunes, *Proposed RI Law Would Crack Down on Porch Pirates*, PATCH (Dec. 20, 2019, 3:01 PM), <https://patch.com/rhode-island/cranston/proposed-ri-law-would-crack-down-porch-pirates> [<https://perma.cc/672N-GA4E>].

¹²¹ See, e.g., PROSECUTORS & POL. PROJECT, UNIV. N.C. SCH. L., STUDY OF CAMPAIGN CONTRIBUTIONS IN PROSECUTORIAL ELECTIONS (2019); *FSA and the Legislative Process*, FLA. SHERIFFS ASS'N, <https://www.flsheriffs.org/law-enforcement-programs/legislative> [<https://perma.cc/U7TA-7C7Y>] (describing lobbying efforts “to support and monitor legislation that ensures public safety in Florida”).

¹²² See, e.g., U.S. CHAMBER OF COM., THE BUSINESS CASE FOR CRIMINAL JUSTICE REFORM: SECOND CHANCE HIRING 1 (2021), https://www.uschamber.com/assets/documents/uscc_business_case_for_cj-second_chance_hiring_report_aug2021.pdf [<https://perma.cc/979G-PX7R>]; Emily Birnbaum, *Tech's Favorite Lobbyists Want to End Qualified Immunity for Cops*, PROTOCOL (June 17, 2020), <https://www.protocol.com/big-tech-police-reform> [<https://perma.cc/Q63D-GZZ7>]; *Criminal Justice Reform News*, AMS. FOR PROSPERITY, <https://americansforprosperity.org/issue/criminal-justice-reform/> [<https://perma.cc/F3VN-6456>]; *About*, INNOCENCE PROJECT, <https://innocenceproject.org/about/> [<https://perma.cc/69VC-GDL8>]; *Criminal Justice*, ARNOLD VENTURES, <https://www.arnoldventures.org/work/criminal-justice/> [<https://perma.cc/Q3HQ-BVR2>].

¹²³ Compare Barbara Ann Stolz, *The Criminal Justice Policy-Making Arena and Privatization: Subgovernment in Flux?*, in PRIVATIZATION IN CRIMINAL JUSTICE: PAST, PRESENT, AND FUTURE (David Shichor & Michael J. Gilbert eds., 2001), and Barkow, *supra* note 103, at 726 (“Groups like Families Against Mandatory Minimums, the Western Prison Project, and the Justice Policy Institute aggressively advocate for sentencing reform and alternatives to incarceration, but they do not come close to the lobbying power of traditional targets of regulation.”), with Sarah Figgatt, *Progressive Criminal Justice Ballot Initiatives Won Big in the 2020 Election*,

Systemic private influence is less visible outside of the legislative process. Private companies like Lexipol write policies for police that are designed to be legally adequate but do little to advance meaningful reform.¹²⁴ Some places turn to consultants and think tanks to conduct audits and aid in reform efforts on a range of topics.¹²⁵ There are also private accreditation bodies that, for a fee, will review an agency to ensure it meets certain (proprietary) standards.¹²⁶

The private sector also influences how public actors are trained. Private entities offer police specialized trainings on use of force, social media investigations, warrantless searches, and interrogations.¹²⁷ Some of these trainings are incredibly harmful—the Reid method of interrogation, for example, has contributed to countless coerced statements, false confessions, and wrongful convictions.¹²⁸ But others miti-

CTR. FOR AM. PROGRESS (Nov. 19, 2020, 9:01 AM), <https://www.americanprogress.org/issues/criminal-justice/news/2020/11/19/493026/progressive-criminal-justice-ballot-initiatives-won-big-2020-election/> [<https://perma.cc/D5H2-W2WH>].

¹²⁴ See, e.g., Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol: The Privatization of Police Policymaking*, 96 TEX. L. REV. 891, 892–93, 895–96 (2018); see also *id.* at 894 n.10 (listing other private entities including OSS Law Enforcement Advisors; Daigle Law Group, LLC; the Public Safety Specialist’s Group; Legal and Liability Risk Management Institute; the Thomas and Means Law Firm; and Hillard Heintze).

¹²⁵ Some of these organizations include Policing Project, Justice Collaboratory, Center for Policing Equity, Vera Institute for Justice, National Police Foundation, Police Executive Research Forum, and 21CP Solutions (performing auditing and strategic planning for cities and communities seeking to reform their police system). See, e.g., *Five Days After Two 911 Calls, Her Body Found*, 25 NAT’L BULL. ON DOMESTIC VIOLENCE PREVENTION NO. 11 (2019) (“The Meriden police has a history of botched 911 calls. As a result of prior revelations, a private firm was hired in 2016 to review the police dispatch system. The Mayor at the time promised that improvements were being implemented.”); see also PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* 43 (2007) (“The hidden hand metaphor can also be used to describe how consultants work. They operate under vaguely worded contracts to provide advice and analysis. And many government officials, not just the president, rely on consultants for policy advice and counseling on critical issues.”).

¹²⁶ On accreditation, see *About the Commission*, COMM’N ON ACCREDITATION FOR L. ENF’T AGENCIES, <https://www.calea.org/about-commission> [<https://perma.cc/MF6P-X9CP>]; *About Services*, INT’L ASS’N OF DIRS. OF L. ENF’T STANDARDS & TRAINING, <https://www.iadlest.org/our-services/about> [<https://perma.cc/5A2M-ML3P>].

¹²⁷ See, e.g., Pub. Agency Training Council, Seminar Agenda: Investigative Techniques Using Social Networking Sites (Nov. 28–30 2017), <http://www.patc.com/training/brochures/2017/15097.pdf> [<https://perma.cc/2XXS-NZH3>]; BLUE TO GOLD, <https://www.bluetogold.com/> [<https://perma.cc/J8L6-WCHL>] (marketing themselves as “the Nation’s Best Instructors” and offering classes such as “Warrantless Home Entries”); *Training Programs*, JOHN E. REID & ASSOCS., INC., http://archive.reid.com/training_programs/r_training.html [<https://perma.cc/X9KU-K7FR>] (“The Reid Technique(R) is now the most widely used approach to question subjects in the world.”); *About IPTM*, INST. OF POLICE TECH. & MGMT., <https://iptm.unf.edu/About/> [<https://perma.cc/L7SH-UFLK>].

¹²⁸ See Alan Hirsch, *Going to the Source: The “New” Reid Method and False Confessions*,

gate harm, such as trainings on de-escalation techniques, crisis intervention, procedural justice, and implicit bias.¹²⁹

When there are allegations of official misconduct, the private sector again is involved. Law firms defend suits against individuals and municipalities, creating financial incentives to elevate contentiousness over just outcomes.¹³⁰ Many jurisdictions have insurance policies to cover claims, giving insurers substantial authority either to encourage obstinate litigation or to improve policies and fire problematic employees.¹³¹

11 OHIO ST. J. CRIM. L. 803, 805–06 (2014); see also Gene Maddaus, *Netflix and Ava DuVernay Win Dismissal of Defamation Suit*, VARIETY (Mar. 23, 2020, 5:29 PM), <https://variety.com/2020/tv/news/netflix-duvernay-john-reid-assocaites-defamation-1203542947/> [https://perma.cc/LM9T-E2GL].

¹²⁹ The leading de-escalation principles were developed by the Police Executive Research Forum. See POLICE EXEC. RSCH. F., GUIDING PRINCIPLES ON USE OF FORCE 33, 121 (2016), <https://www.policeforum.org/assets/30%20guiding%20principles.pdf> [https://perma.cc/EHV4-XU9D]. Other companies, building on technology originally developed for the military, offer simulator technology for officers to practice these techniques. See VIRTRA, <https://www.virtra.com/> [https://perma.cc/E23C-DTQS]; Caren Chesler, *How Role-Playing Helps Police Do Their Job Without Firing Their Guns*, WASH. POST (Dec. 12, 2021, 8:00 AM), <https://www.washingtonpost.com/national-security/2021/12/12/role-play-police-shootings/> [https://perma.cc/A7FC-3BDV] (discussing virtual de-escalation training); Danny Wicentowski, *Searching for the Real Inside a Police Training Simulator*, RIVERFRONT TIMES (Jan. 15, 2020), <https://www.riverfronttimes.com/stlouis/searching-for-the-real-inside-a-police-training-simulator/Content?oid=32911702&showFullText=true&utm> [https://perma.cc/9CFM-LBG4]; see also *Firearms Training Systems (FATS®)*, INVERIS TRAINING, <https://www.inveristraining.com/firearms-training-systems-history> [https://perma.cc/2J2N-T87W].

On crisis intervention training, see *CIT Is More Than Just Training . . . It's a Community Program*, CIT INT'L, <https://www.citinternational.org/What-is-CIT> [https://perma.cc/J5A4-LHZH]. On implicit bias training, see FAIR & IMPARTIAL POLICING, <https://fipolicing.com> [https://perma.cc/P2P6-6B7W]; see also Robert J. Smith, *Reducing Racially Disparate Policing Outcomes: Is Implicit Bias Training the Answer?*, 37 U. HAW. L. REV. 295, 296 (2015) (“This Article situates implicit bias training as one small step towards racial equality in law enforcement. But it cautions against overselling implicit bias training.”).

¹³⁰ See Dan Hinkel, *A Hidden Cost of Chicago Police Misconduct: \$213 Million to Private Lawyers Since 2004*, CHI. TRIB. (Sept. 12, 2019, 5:00 AM), <https://www.chicagotribune.com/investigations/ct-met-chicago-legal-spending-20190912-sky5euto4jbcdenjfi4datpnki-story.html> [https://perma.cc/XN9F-MVX4].

¹³¹ John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1543, 1574, 1585 (2017); see also Kit Ramgopal & Brenda Breslauer, *The Hidden Hand that Uses Money to Reform Troubled Police Departments*, NBC NEWS (July 19, 2020, 6:15 AM), <https://www.nbcnews.com/news/us-news/hidden-hand-uses-money-reform-troubled-police-departments-n1233495> [https://perma.cc/E4D3-WEBZ] (“[T]he insurer gave her a choice: remove the officers or lose coverage. And just like that, although criminal and civil cases against them were dismissed, two-thirds of Niota’s police force had to be replaced.”).

II. THE LIMITED VALUE OF THE PUBLIC/PRIVATE DIVIDE

What should one make of a system so permeated by private influence? Champions of privatization extol its many virtues.¹³² Proponents argue that the private sector improves efficiency and lowers costs,¹³³ results in improved research and technological capabilities, and yields greater flexibility and agility.¹³⁴ But critics of privatization offer strident criticism including moral objections and serious concerns about our ability to govern private actors.¹³⁵ In few contexts is this criticism more sustained and nearly ubiquitous than around the criminal system.

This Part argues that it is a mistake to label all privatization or private influence as “beneficial” or “harmful.” It does so by focusing on the four chief governance critiques of privatization in the criminal system: (A) lack of democratic accountability, (B) lack of transparency, (C) lack of legal accountability, and (D) perverse financial incentives.¹³⁶ With a broader understanding of what private influence

¹³² See Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1291–92 (2003) (“In the last two decades, privatization has been championed by conservative policymakers, academics, and public intellectuals as instrumental to reducing the size of government and broadly restructuring society in line with a conservative agenda.” (footnotes omitted)).

¹³³ See, e.g., Steven J. Kelman, *Achieving Contracting Goals and Recognizing Public Law Concerns: A Contracting Management Perspective* (“The sum of all the rules in the traditional procurement system slowed the system down enormously, so that buying products or services took far longer than in the private sector . . .”), in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 153, 165 (Jody Freeman & Martha Minow eds., 2009); VERKUIL, *supra* note 125, at 4; see also Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 98 (2016) (“When the prison privatization movement began in the 1980s, supporters heralded the private sector as capable of demonstrating efficiency that public bureaucracies lacked.”); Freeman, *supra* note 132, at 1287–88 (characterizing claims made by proponents of privatization that performance-based pay in the private sector may improve quality of services provided); Developments in the Law—The Law of Prisons, *A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 HARV. L. REV. 1868, 1870 (2002) (“[P]rivate prisons have substantially greater market accountability because they are concerned with winning new contracts and renewing old ones, and with avoiding both adverse publicity and drops in stock price.”).

¹³⁴ See, e.g., Stan Soloway & Alan Chvotkin, *Federal Contracting in Context: What Drives It, How to Improve It* (arguing private entities often are better resourced and have superior research capacity compared to government entities), in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY*, *supra* note 133 at 192, 221–22; Savas, *supra* note 23, at 896 (“Interest in prison privatization stems from the perception that private prisons are more cost effective and efficient, constructed more quickly, and operated under more flexible and innovative management.”).

¹³⁵ See, e.g., Stoughton, *supra* note 20.

¹³⁶ Although this Article focuses on the governance critiques of privatization, see *infra* Part II.A–II.D, there are many critiques of privatization unrelated to institutional governance and operation. For example, some argue that transferring aspects of the criminal system into private

entails, this Part argues that on each of these four dimensions, public provision of the criminal system can be as problematic as, or worse than, private influence. And, at times private influence can mitigate the harms of the public system. The four critiques are valid and important, but they do not divide cleanly across the public/private line.

A. *Lack of Democratic Accountability*

A central critique of privatization relates to democratic governance and accountability (or lack thereof).

hands undermines basic moral tenets of a democratic society. *See, e.g.*, Malcolm M. Feeley, *The Unconvincing Case Against Private Prisons*, 89 IND. L.J. 1401, 1406 (2014). Most often this argument arises in the context of private prisons, with many arguing that punishment meted out by a private, for-profit actor entails an addition injury: the affront to person dignity the comes with the commodification of incarcerated individuals. *See, e.g.*, Avihay Dorfman & Alon Harel, *The Case Against Privatization*, 41 PHIL. & PUB. AFFS. 67, 91, 95 (2013); Dolovich, *supra* note 110, at 542; John J. DiIulio, Jr., *What's Wrong with Private Prisons*, 92 PUB. INT. 66, 83 (1988); *see also* HCJ 2605/05 Acad. Ctr. of L. & Bus., Hum. Rts. Div. v. Minister of Fin., IsrSC, 27, 73 (2009) (Isr.) (decision of Israeli Supreme Court holding private prisons per se unconstitutional).

A second strain of moral critique—one that reaches both private prisons and private police—begins with the proposition that government maintains a monopoly on all legitimate use of force. *See, e.g.*, Joh, *supra* note 45, at 593; Sklansky, *supra* note 49, at 1188. Absent exigent circumstances, private use of force is illegitimate because it lacks the authority of the state. *See, e.g.*, Jennifer M. Chacón, *Privatized Immigration Enforcement*, 52 HARV. C.R.-C.L. REV. 1, 33 (2017); Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 881 (2004); John J. DiIulio, Jr., *The Duty to Govern: A Critical Perspective on the Private Management of Prisons and Jails*, in PRIVATE PRISONS AND THE PUBLIC INTEREST 155, 173, 175–76 (Douglas C. McDonald ed., 1990).

Although a philosophical debate is beyond the scope of this Article, there are pragmatic reasons not to let these concerns, on their own, drive policy. First, public prisons often involve the same commodification of persons as private prisons. This includes prison gerrymandering, which incentivizes public officials to build and fill prisons to increase their tax base; labor from public prisoners, which is a billion-dollar industry that pays little to no wages; and income from public prisoners and their families who are forced to pay high fees for everyday necessities. *See* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR-BLINDNESS* 230–249 (2010). Second, the moral distinction between private and public employees is even more tenuous. Contractors and public employees both work to make a living—they show up each day, draw a wage, and do not share in the profits or windfalls of their employers. And both contractors and employees perform well—or engage in misconduct—for personal reasons. *See, e.g.*, Dolovich, *supra* note 110, at 545–46; Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 U.C. DAVIS L. REV. 133, 150 (2012). If the true concern is that private entities will make tradeoffs that public entities would not, then the objection is not a moral one, but an empirical one. It can be studied and addressed through regulation that prioritizes quality over low cost, detailed guidance that reigns in private discretion, and systems that identify and correct contractor misconduct.

Democratic norms are fundamental to governance.¹³⁷ Key public actors—legislators, sheriffs, and district attorneys—are elected.¹³⁸ When the public sector acts through administrative agencies—like police agencies or bureaus of prisons—the public maintains a degree of indirect control by electing local officials (e.g., mayors) who appoint the agency head and exercise general oversight over the agency.¹³⁹ Although the public’s control over these agencies is indirect, given the visibility of crime and public safety issues, elected officials tend to pay close attention.¹⁴⁰

Private influence is a different matter. Privatization interrupts lines of accountability by insulating decisionmakers from the public’s democratic check.¹⁴¹ Corporations answer to their shareholders and

¹³⁷ Democratic accountability is linked to institutional legitimacy. By limiting democratic control, privatization might undermine public faith in the institutions of the criminal system. *See, e.g.,* Scott M. Sullivan, *Private Force / Public Goods*, 42 CONN. L. REV. 853, 877 (2010) (“Democratic accountability is inextricably tied to legitimacy because its purpose is to keep policy decisions by political officials roughly in line with and responsive to the policy preferences of the public.” (citing Delmer D. Dunn, *Accountability, Democratic Theory, and Higher Education*, 17 EDUC. POL’Y 60, 61 (2003))). This, in turn, might reduce voluntary compliance with the law and engagement with the system generally. *See* PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT 1 (2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [<https://perma.cc/DKH8-2CCT>] (“Decades of research and practice support the premise that people are more likely to obey the law when they believe that those who are enforcing it have authority that is perceived as legitimate by those subject to the authority.”). Without discounting this, it is worth noting that public governance is so broken that certain communities are experiencing “legal cynicism” and “LEGAL ESTRANGEMENT” FROM THE CRIMINAL SYSTEM AND GOVERNMENT GENERALLY. *See* Bell, *supra* note 72, at 2066.

¹³⁸ *See, e.g.,* Cheryl Corley, *Election Results Show Voters Nationwide Ready for Criminal Justice Reform*, NAT’L PUB. RADIO (Nov. 24, 2020, 3:57 PM), <https://www.npr.org/2020/11/24/938593052/election-results-show-voters-nationwide-ready-for-criminal-justice-reform> [<https://perma.cc/67Z8-3ABR>]; Aaron Morrison, *Criminal Justice Reformers Cheer Multiple Election Victories*, ASSOCIATED PRESS (Nov. 21, 2020), <https://apnews.com/article/election-2020-race-and-ethnicity-new-york-voting-rights-elections-1e57c8fb7e737b9aeb6b444019ac98ec> [<https://perma.cc/5PN3-GBWL>]; *see also* Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 119–20 (2005).

¹³⁹ *See* Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813, 818–19 (2000) (“Like agencies, private actors are unelected. Unlike agencies, however, they are not generally expected to serve the public interest. . . . To the extent that they increasingly perform traditionally public functions unfettered by the scrutiny that normally accompanies the exercise of public power, private actors may indeed raise accountability concerns that dwarf the problem of unchecked agency discretion.”).

¹⁴⁰ *See* Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1864 (2015) (“There are few labels in American politics more damning than ‘soft on crime.’”).

¹⁴¹ *See, e.g.,* Fairfax, *supra* note 67, at 283 (“When private actors are contracted to perform the prosecution function, they exercise this power without the democratic check that theoretically applies to public prosecutors.”); *see also* Minow, *supra* note 12, at 1260 (“Self-government

board of directors, not voters.¹⁴² By splintering decisionmaking among public officials and private actors, privatization also can make it difficult for the public to know who to fault when things go wrong.¹⁴³ In the private prison context, for example, public officials can shift the blame of a scandal onto the private entity administering the program, drawing attention away from the underlying public policy issues.¹⁴⁴

Ironically, contracting out may be the most democratically accountable of the private influences.¹⁴⁵ Whereas government maintains some control of private actors through the contracting process, other forms of private influence operate further beyond democratic reach. Government appropriation is a prime example. When police departments use private foundation funding rather than their own funds, they erode a key “lever for democratic control”—budget oversight.¹⁴⁶

But before skewering private influence on the sword of unaccountability, an honest assessment of the accountability of public ac-

will not retain meaning if major decisions about public resources and the shape of collective experiences occur without the knowledge or participation of the nation’s citizens.”).

¹⁴² CoreCivic, the largest private prison corporation in the country, is just one example. See *Board of Directors*, CORECIVIC, <https://www.corecivic.com/investors/board-of-directors> [<https://perma.cc/44GH-2NA5>].

¹⁴³ See Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1210 (2000) (“When problems arise, government officials and private contractors can point fingers at each other, leaving the public with little means of knowing who is really at fault.”).

¹⁴⁴ See White, *supra* note 110, at 140; Stephen Rahe, *The Business of Punishing: Impediments to Accountability in the Private Corrections Industry*, 13 RICH. J.L. & PUB. INT. 209, 229 (2010).

¹⁴⁵ At the level of individual employees, the way agencies control their employees looks similar to how they control contractors. Bureaucratic controls like setting policy, political appointments, and employee removal, look similar to setting contract terms, monitoring performance, and sanctioning those who do not follow through. See, e.g., Fairfax, *supra* note 67, at 284. Contractor oversight is challenging, but public officials also have encountered tremendous difficulty controlling and removing problematic police, prosecutors, and corrections officers. See, e.g., Zolan Kanno-Youngs & Michael D. Shear, *Trump Loyalists Across Homeland Security Could Vex Biden’s Immigration Policies*, N.Y. TIMES (Feb. 18, 2021), <https://www.nytimes.com/2021/02/03/us/politics/biden-trump-immigration.html> [<https://perma.cc/HGD7-MU8Z>]; Tom Perkins, *‘It Makes it Very Difficult to Fire Them’: Police Union Contracts Protect Bad Officers, Critics Warn*, GUARDIAN (June 30, 2020, 6:00 AM), <https://www.theguardian.com/us-news/2020/jun/30/police-union-contracts-collective-bargaining-officers> [<https://perma.cc/3PEN-5PWP>]; Matthew Ormseth, *Union Representing Deputy District Attorneys Sues Gascón over Enhancements Policy*, L.A. TIMES (Dec. 30, 2020, 4:05 PM), <https://www.latimes.com/california/story/2020-12-30/union-deputy-district-attorneys-sues-gascon-enhancements-policy> [<https://perma.cc/9ZU3-8WCK>].

¹⁴⁶ See Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515, 570 (2016). Over time, privatization may erode support for public law enforcement expenditures, not only skewing resources toward those with means, but also undermining legislative checks. See David Alan Sklansky, *Private Police and Democracy*, 43 AM. CRIM. L. REV. 89, 91, 104 (2006).

tors is in order. Most prosecutors and sheriffs run unopposed and without term limits, remaining in power for a generation.¹⁴⁷ Their elections hardly function as a check against abuse of power, particularly for the politically powerless.¹⁴⁸ In fact, the electoral process can give outsized influence to the wealthy and powerful.¹⁴⁹

The criminal system also distorts the electoral process in ways that undermine public accountability.¹⁵⁰ Racially disparate law enforcement removes (and incarcerates) voters from communities of color, and felon disenfranchisement strips them of their vote.¹⁵¹ Prison gerrymandering—the practice of counting imprisoned individuals where they are incarcerated, not where they reside—then redistributes that voting power to more conservative (and whiter) communi-

¹⁴⁷ Janet C. Hoeffel & Stephen I. Singer, *Elections, Power, and Local Control: Reining in Chief Prosecutors and Sheriffs*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 319, 319 (2015) (“This toxic combination of narrow focus and disproportionate power skews our political system in the direction that secures and increases the power of chief prosecutors and sheriffs.”).

¹⁴⁸ See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 163–66 (2007); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 583 (2009); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 963 (1997); James Tomberlin, Note, “Don’t Elect Me”: *Sheriffs and the Need for Reform in County Law Enforcement*, 104 VA. L. REV. 113 (2018) (“This Note argues that elections are not functioning as an effective accountability mechanism and that county government must be given power to act as a check on county law enforcement.”).

¹⁴⁹ See, e.g., PROSECUTORS & POL. PROJECT, *supra* note 121, at 30; Radley Balko, Opinion, “Woke” Corporations Are Funding Groups Working to Undermine Criminal Justice Reform, WASH. POST (Sept. 8, 2021, 4:19 PM), <https://www.washingtonpost.com/opinions/2021/09/08/woke-corporations-are-funding-groups-working-undermine-criminal-justice-reform/> [https://perma.cc/37NL-5KNF].

¹⁵⁰ See, e.g., Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1611 (2017) (“Relying on deliberation and consensus ignores the ways in which our current criminal justice system relegates African-Americans and other marginalized populations to non-democratic subjects . . .”); STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 130 (2012) (“American criminal justice is much too far out of alignment with outsiders’ needs and views to derive robust legitimacy from the consent of the governed.”).

¹⁵¹ *Criminal Disenfranchisement Laws Across the United States*, BRENNAN CTR. FOR JUST., (Jan. 1, 2022), <https://www.brennancenter.org/our-work/research-reports/criminal-disenfranchisement-laws-across-united-states> [https://perma.cc/273P-U98L]; CHRISTOPHER UGGEN, RYAN LARSON & SARAH SHANNON, SENT’G PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016, (2016), <https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf> [https://perma.cc/J8AE-FR8W]; see also Matt Vasilogambros, *Many in Jail Can Vote, but Exercising that Right Isn’t Easy*, PEW CHARITABLE TRS. (July 16, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/07/16/many-in-jail-can-vote-but-exercising-that-right-isnt-easy> [https://perma.cc/WX4R-2YVB] (describing difficulties of voting from prison).

ties.¹⁵² It is no surprise then, that some see elected officials as the main impediment to criminal reform.¹⁵³

Just as public and private actors can undermine democratic accountability, it is important to remember that private influences can enhance democratic accountability.¹⁵⁴ They do so in two primary ways.

First, as discussed in the next section, private influences can force greater transparency from public actors. Second, decentralizing control of the criminal system from purely government hands into private hands allows for more localized control over criminal justice priorities.¹⁵⁵ For example, rather than ceding all prosecutorial discretion to public prosecutors, community-based restorative justice programs empower crime victims to find nonpunitive solutions. Bail funds allow communities to reassert control over incarceration.¹⁵⁶ Local anti-violence programs can reach at-risk community members on a personal level that police likely never will.¹⁵⁷ All of this creates greater public accountability, not at the municipal or county level, but at the community or neighborhood level. This type of democratic accountability prioritizes localized values and lived experience. It gives a voice to disenfranchised communities most impacted by the criminal system.

¹⁵² See John F. Pfaff, *The Complicated Economics of Prison Reform*, 114 MICH. L. REV. 951, 957 n.23, 978 (2016) (“In all but four states—California (as of 2020), Delaware (as of 2020), Maryland, and New York—inmates are treated as residing in the area where they are housed, not where they come from, for the purposes of redistricting. Since offenders disproportionately come from urban areas, and prisons are disproportionately in nonurban areas, this counting effectively transfers legislative power from cities to more rural areas.” (citation omitted)); see also Natasha Haverty, *By Counting Prisoners Where They’re Incarcerated, Wisconsin Shifts Voter Clout from Cities to Small Towns*, MILWAUKEE J. SENTINEL (Oct. 15, 2021, 5:28 PM), <https://www.jsonline.com/in-depth/news/2021/10/15/when-new-political-districts-drawn-power-skewed-areas-prisons-through-prison-gerrymandering/5950103001/> [https://perma.cc/M98J-8D7G].

¹⁵³ See RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 110–11 (2019).

¹⁵⁴ See Freeman, *supra* note 132, at 1290.

¹⁵⁵ See Joshua Kleinfeld et al., White Paper of Democratic Criminal Justice, 111 NW. U. L. REV. 1693, 1696 (2017); Kleinfeld, *supra* note 4, at 1403.

¹⁵⁶ See Alexis Okeowo, *How to Defund the Police*, NEW YORKER (June 26, 2020), <https://www.newyorker.com/news/news-desk/how-the-police-could-be-defunded> [https://perma.cc/C7DP-ZEMC] (“In the past three years, [community anti-violence organizations have] contributed to a fifteen-per-cent decline in shootings in the seventeen precincts with the highest levels of violence in [New York City] . . . Today, more than fifty nonprofits . . . work in twenty-two neighborhoods across New York. Funded by the city, their total budget is \$37.4 million, and they employ a hundred and fifty full-time employees and two hundred seasonal ones.”); see also Hooks & Simonson, *supra* note 93.

¹⁵⁷ See Okeowo, *supra* note 156.

B. Lack of Transparency

Closely related to lack of democratic accountability is another common critique—that privatization breeds lack of transparency.

Improved transparency is a central tenet of criminal system reform.¹⁵⁸ It is a bulwark against corruption and the foundation of public accountability.¹⁵⁹ Many even argue that transparency can foster trust and legitimacy in the eyes of those most impacted by the system.¹⁶⁰ To that end, the list of transparency-focused reforms is extensive.¹⁶¹

Privatization can undermine transparency. Traditional mechanisms of government transparency—open records laws,¹⁶² administra-

¹⁵⁸ See Hannah Bloch-Wehba, *Visible Policing: Technology, Transparency, and Democratic Control*, 109 CALIF. L. REV. 917, 929–30 (2021); Friedman & Ponomarenko, *supra* note 140, at 1848–49; see also David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 115 (2018).

¹⁵⁹ See Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839, 851 (2019) (“Policing scholars and reform advocates have taken Louis Brandeis’s famous adage that ‘[s]unlight is said to be the best of disinfectants’ as gospel when it comes to police reform.” (quoting Louis D. Brandeis, *What Publicity Can Do*, HARPER’S WKLY., (Dec. 20, 1913))); Mary D. Fan, *Panopticism for Police: Structural Reform Bargaining and Police Regulation by Data-Driven Surveillance*, 87 WASH. L. REV. 93, 129 (2012) (“When police are subject to the watchful gaze of courts, the public, and self-surveillance, they behave in better conformity with expectations.”); Bell, *supra* note 72, at 2144–45 (“Transparency measures, including data collection and ‘hot ticket’ reforms such as police officer body cameras, can also contribute to the overall democratization of policing in a way that could begin to root out legal estrangement.”).

¹⁶⁰ See, e.g., Barack Obama, *Commentary, The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 850 (2017).

¹⁶¹ For example, the California Racial & Identity Profiling Act establishes a board composed of various stakeholders to review civilian complaints and to amend police training accordingly. CAL. GOV’T CODE § 12525.5 (West 2015); AB 953: *The Racial and Identity Profiling Act of 2015*, ST. OF CAL. DEP’T OF JUST. OFF. OF ATT’Y GEN., <https://oag.ca.gov/ab953> [<https://perma.cc/ZYD3-WHTF>]. For other transparency efforts, see CTR. FOR POLICING EQUITY & POLICING PROJECT AT N.Y. UNIV. SCH. OF L., *COLLECTING, ANALYZING, AND RESPONDING TO STOP DATA: A GUIDEBOOK FOR LAW ENFORCEMENT AGENCIES, GOVERNMENT, AND COMMUNITIES* (2020), https://policingequity.org/images/pdfs-doc/COPS-Guidebook_Final_Release_Version_2-compressed.pdf [<https://perma.cc/67KH-NHKE>] (promoting among other things, access to body camera footage); Editorial, *Justice and Open Files*, N.Y. TIMES, Feb. 27, 2012, at A18 (advocating for open records on law suit settlements).

¹⁶² See, e.g., VERKUIL, *supra* note 125, at 90 (“[T]his provision applying as it does to government records (or to records held by government) does not reach documents in the hands of private contractors who are doing the work of government. By analogy to the state action requirement, the FOIA ‘agency’ requirement has an exempting force that makes it harder for the public to learn what its private agents are doing.”); David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1461–62 (2010) (“As private corporations, they are typically not subject to open meeting and freedom of information laws that apply to state and local departments of corrections.”); Minow, *supra* note 21, at 999 (“Private companies are free from the disclosure obligations placed on the government by the FOIA, the federal law intended to make democracy work by ensuring access to all of the government’s information compatible with security.”); Beermann, *supra* note 21, at 1554; Nicole B. Cáñez, *Furthering the Accounta-*

tive procedure requirements like notice-and-comment procedures,¹⁶³ and even criminal discovery rules¹⁶⁴—do not apply to private actors in the same ways as public actors. There are also many examples of private entities taking affirmative steps to obscure their operations from public view. Some entities selling DNA testing tools assert trade secret privileges to block access to information about their technology, even when used in criminal prosecutions.¹⁶⁵ Other companies require that government agencies sign nondisclosure agreements, preventing officials from disclosing the existence of the technologies, let alone any details.¹⁶⁶ Contracting out is not the only type of private influence that can create transparency problems. Government-directed philanthropy, for example, often allows agencies to skirt budgetary and procurement processes designed to make government decisionmaking more open to the public.¹⁶⁷

But public actors are hardly immune from transparency concerns. Consider open records requirements. Police routinely invoke a range

bility Principle in *Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J.L. REFORM 249, 264–68 (1995); Craig D. Feiser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law*, 52 FED. COMM'NS L.J. 21, 31 (1999).

¹⁶³ 5 U.S.C. § 553.

¹⁶⁴ See Ryan, *supra* note 79, at 307–08; Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. 1343, 1346–48 (2018).

¹⁶⁵ See, e.g., Bloch-Wehba, *supra* note 89, at 1272; Ryan, *supra* note 79, at 319; Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. REV. 54, 118–19 (2019); Wexler, *supra* note 164; Joh, *Undue Influence*, *supra* note 19; see also Martha Minow, *supra* note 21, at 999 (“There is some authority that private companies enjoy the ability to enjoin the government from disclosing information they have shared with the government in the course of doing business together.”).

¹⁶⁶ See, e.g., *supra* note 79 (discussing police use of Stingrays); see also Elizabeth E. Joh, *The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing*, 10 HARV. L. & POL'Y REV. 15, 38–39 (2016) (discussing “a number of recent instances [in which] private companies providing surveillance technology have required agreements from police departments that prevent disclosure of information about the technology itself.”); Olivia Solon, *iPhone Spyware Lets Police Log Suspects' Passcodes When Cracking Doesn't Work*, NBC NEWS (May 18, 2020, 3:34 PM), <https://www.nbcnews.com/tech/security/iphone-spyware-lets-cops-log-suspects-passcodes-when-cracking-doesn-n1209296> [<https://perma.cc/EHY3-6UZD>] (discussing NDAs required by Grayshift cell phone cracking malware).

¹⁶⁷ See, e.g., Ali Winston, *Palantir Has Secretly Been Using New Orleans to Test Its Predictive Policing Technology*, VERGE (Feb. 27, 2018, 3:25 PM), <https://www.theverge.com/2018/2/27/17054740/palantir-predictive-policing-tool-new-orleans-nopdf> [<https://perma.cc/2MXK-XR2K>]; Laura Nahmias, *Police Foundation Remains a Blind Spot in NYPD Contracting Process*, CRITICS SAY, POLITICO (July 13, 2017, 5:10 AM), <https://www.politico.com/states/new-york/city-hall/story/2017/07/13/police-foundation-remains-a-blind-spot-in-nypd-contracting-process-critics-say-113361> [<https://perma.cc/4HJK-L378>]; Ali Winston & Darwin Bond Graham, *Private Donors Supply Spy Gear to Cops*, PROPUBLICA (Oct. 13, 2014, 8:00 AM), <https://www.propublica.org/article/private-donors-supply-spy-gear-to-cops> [<https://perma.cc/JT6H-H7DZ>].

of statutory protections to avoid disclosing officer disciplinary records.¹⁶⁸ In too many police killings, body camera footage and other critical evidence is withheld.¹⁶⁹ Prosecutors hide behind grand jury secrecy to avoid explaining why they decline to indict officers who use force.¹⁷⁰ Some agencies have begun filing “reverse FOIA” suits, forcing members of the public to go to court to defend their right to access the records sought.¹⁷¹

Because open-records laws only apply to preexisting documents, public actors can frustrate transparency through poor data collection practices.¹⁷² This is why it is pointless in certain jurisdictions to request comprehensive use of force or stop data—it simply is not collected. A similar dynamic exists with discovery into a police officer’s witness interviews—if there are no notes, there’s nothing to disclose.

¹⁶⁸ See, e.g., *Something Extra Publ’g, Inc. v. Mack*, No. 1190106, 2021 WL 4344346, at *15 (Ala. Sept. 24, 2021) (Parker, C.J., dissenting) (“With one sweeping stroke, today’s decision spells the end of public access to law-enforcement records that are connected in any way to an investigation. Hidden now from the public eye are body-cam videos, dash-cam videos, 9-1-1 recordings, and anything else that is remotely connected to a crime or even potential crime. After today, as to law-enforcement agencies at least, the statute might as well be titled the Closed Records Act.”); Kenny Jacoby & Ryan Gabrielson, *How Cops Who Use Force and Even Kill Can Hide Their Names from the Public*, PROPUBLICA (Oct. 29, 2020, 6:00 AM), <https://www.propublica.org/article/how-cops-who-use-force-and-even-kill-can-hide-their-names-from-the-public> [https://perma.cc/4M6S-MR42] (“Marsy’s Law ensures crime victims the right to privacy. But police departments across Florida and the Dakotas have repeatedly used it to hide the names of officers who use force on the job.”); Colleen Slevin, *Transparency Push to Release Police Disciplinary Records*, CHRISTIAN SCI. MONITOR (MAY 2, 2021), <https://www.csmonitor.com/USA/Justice/2021/0502/Transparency-push-to-release-police-disciplinary-records> [https://perma.cc/T4ZP-8A8N] (“Lawmakers in more than 20 states have considered bills this year to make the disciplinary records of police officers public or to share them with other agencies About 20 states still largely prohibit their release, however.”).

¹⁶⁹ See, e.g., Jessica Glenza, *Chicago Officials Delayed Release of Laquan McDonald Shooting Video*, GUARDIAN (Jan. 1, 2016, 1:35 PM), <https://www.theguardian.com/us-news/2016/jan/01/chicago-officials-delayed-release-laquan-mcdonald-shooting-video> [https://perma.cc/R298-YUZE]; Ryan J. Foley, *Public Regularly Denied Access to Police Officer Videos*, AP NEWS (Mar. 13, 2019), <https://apnews.com/article/wv-state-wire-iowa-city-nd-state-wire-iowa-us-news-67f22d5857f14413a4a9b34642c49ae3> [https://perma.cc/H9EF-VNDT].

¹⁷⁰ See, e.g., Bill Hutchinson, *Breonna Taylor Case Sparks Renewed Scrutiny of Grand Juries in Police Misconduct Cases*, ABC NEWS (Oct. 9, 2020, 6:09 AM), <https://abcnews.go.com/US/breonna-taylor-case-sparks-renewed-scrutiny-grand-juries/story?id=73438566> [https://perma.cc/2YXM-R2U7].

¹⁷¹ E.g., C.J. Ciaramella, *I Asked for Public Records on a Fatal Police Shooting. Then a Washington Sheriff’s Office Sued Me.*, REASON (Dec. 17, 2020, 10:51 AM), <https://reason.com/2020/12/17/i-asked-for-public-records-on-a-fatal-police-shooting-then-a-washington-sheriffs-office-sued-me/> [https://perma.cc/H7U7-WU9Z].

¹⁷² See generally Barry Friedman & Elizabeth G. Jánosky, *Policing’s Information Problem*, 99 TEX. L. REV. 1 (2020).

Public actors also take affirmative steps to conceal information from the public. When police and prosecutors obtain evidence from sources—technologies or informants—that they prefer not to acknowledge publicly, they engage in “parallel construction,” manufacturing an alternative source for the information and hiding the true original source.¹⁷³ There are reports of government officials using encrypted messaging apps so that their communications are not preserved.¹⁷⁴

In contrast, the private sector can, in some cases, help improve government transparency. Take public reporting of crime data. Today, one would be hard pressed to find a police department that does not report crime data. But this became routine only after the federal government called for investment and partnerships with the private sector to make the technology widely available.¹⁷⁵ Body cameras are following a similar course, with initial strong federal support from the Obama Administration.¹⁷⁶ It is hard to imagine these tools being developed or widely adopted without private industry. Some companies also build transparency features into their products, such as public dashboards that document how police use the technology or built-in audit trails that log every time information is accessed.¹⁷⁷

Moreover, the very presence of nonstate actors can bring transparency to government conduct. The filming of George Floyd’s murder, and the resulting national upheaval and criminal prosecution, demonstrates this potential.¹⁷⁸ This type of transparency can be epi-

¹⁷³ On the use of parallel construction by police and prosecutors and secrecy around methods of execution, see Ryan, *supra* note 79, at 324–26. On non-disclosure agreements, see Joh, *Undue Influence*, *supra* note 19, at 23–26. On how federal funding can thwart local control and oversight, see Catherine Crump, *Surveillance Policy Making by Procurement*, 91 WASH. L. REV. 1595, 1601–04 (2016).

¹⁷⁴ Paul Egan, *Top Michigan State Police Officials Using Encryption Messaging Apps that Can Evade FOIA*, DETROIT FREE PRESS (Jan. 23, 2021, 6:00 PM), <https://www.freep.com/story/news/local/michigan/2021/01/22/state-police-phone-apps-keep-text-messages-secret/4236305001/> [<https://perma.cc/G7AL-XEYV>].

¹⁷⁵ See Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1164–65, 1170–71 (2000) (discussing crime mapping technology and transparent policing).

¹⁷⁶ Carrie Dann & Andrew Rafferty, *Obama Requests \$263 Million for Police Body Cameras, Training*, NBC NEWS (Dec. 1, 2014, 7:15 PM), <https://www.nbcnews.com/politics/first-read/obama-requests-263-million-police-body-cameras-training-n259161> [<https://perma.cc/3DD4-XACG>].

¹⁷⁷ See, e.g., Holly Beilin, *Flock Safety and Piedmont Police Launch First-Ever ALPR Transparency Portal*, FLOCK SAFETY (June 10, 2021), <https://www.flocksafety.com/blog/transparency-portal/> [<https://perma.cc/LWZ4-PR6B>]; *Taser 7 Device Logs*, MY AXON, https://my.axon.com/s/article/TASER-7-Logs?language=EN_US [<https://perma.cc/M39Z-ENLM>].

¹⁷⁸ Michelle Garcia, *The Monumental Impact of George Floyd’s Death on Black America*,

sodic but can also spark national movements. There are also examples of private groups organizing court-watching or cop-watching efforts to bring greater visibility to how the system operates.¹⁷⁹

If transparency is the goal, one should not assume that the public or private sector is the answer, but rather look to regulatory structures that take the best of both.

C. Lack of Legal Accountability

Another pervasive critique of privatization is that private actors operate above the law, beyond the legal rules constraining their public counterparts.¹⁸⁰

The core of this critique hinges on the inapplicability of constitutional protections.¹⁸¹ Courts have developed state action tests to draw a line between conduct that is sufficiently public—and thus subject to constitutional constraints—and conduct that is private—and not subject to constitutional rules.¹⁸² These tests frequently exempt private actors across the criminal system. Private police are a prime example.¹⁸³ Private police typically are not required to demonstrate legal

NBC NEWS (May 25, 2021, 8:52 AM), <https://www.nbcnews.com/news/nbcblk/monumental-impact-george-floyds-death-black-america-rcna1021> [<https://perma.cc/G5HR-GMCQ>].

¹⁷⁹ See Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 393 (2016) (defining “organized copwatching” as “groups of local residents who wear uniforms, carry visible recording devices, patrol neighborhoods, and film police-citizen interactions in an effort to hold police departments accountable”); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2177–200 (2014) (discussing courtroom audience’s role in keeping judges and prosecutors accountable).

¹⁸⁰ See, e.g., VERKUIL, *supra* note 125, at 84–90; Jody Freeman & Martha Minow, *Introduction: Reframing the Outsourcing Debates*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY, *supra* note 133, at 1, 4–5; Dolovich, *supra* note 110, at 480–500.

¹⁸¹ The Fourth Amendment, for example, requires an “invasion[] on the part of the government.” *Boyd v. United States*, 116 U.S. 616, 630 (1886).

¹⁸² The state action doctrine has yielded a body of law that is notoriously confused and confusing, “leaving a dizzying array of outcomes with few common threads.” Kimberly N. Brown, *Outsourcing, Data Insourcing, and the Irrelevant Constitution*, 49 GA. L. REV. 607, 651–52 (2015); see also Martha Minow, *Alternatives to the State Action Doctrine in the Era of Privatization, Mandatory Arbitration, and the Internet: Directing Law to Serve Human Needs*, 52 HARV. C.R.-C.L. L. REV. 145, 145 (2017) (“In U.S. constitutional law, the state action doctrine—attaching the protections of individual rights to government action—is notoriously confusing, if not incoherent.”); Ohm, *supra* note 86, at 1339 (“In the future, the police request alone will satisfy state action. . . . [T]he ‘action’ of the state will seem thin compared to the cases we think about today.”).

¹⁸³ Stoughton, *supra* note 20, at 127–30 (citing Sklansky, *supra* note 49, at 1270–75); Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 91 (2004) (“The law that regulates the public police, however, is largely inapplicable to the private police. An unyielding legal distinction divides the two groups.”); see also *United States v. Day*, 591 F.3d 679, 689 (4th Cir. 2010); Brian R. Johnson & Ruth S. Stevens, *The Regulation and Control of Bail*

cause to perform a stop or search, are not required to administer *Miranda* warnings, and need not provide legal counsel upon request.¹⁸⁴ These constitutional gaps, in turn, can allow *public* police to evade their legal limits by using evidence provided by private police, even if obtained by methods that otherwise would have been unconstitutional.¹⁸⁵

A similar dynamic exists around statutory limits. Because many statutes governing the criminal system do not apply to private parties, law enforcement can rely on private actors to evade statutory restrictions. Examples include data privacy laws and open records laws.¹⁸⁶

But this analysis does not tell the whole story. First, not all constitutional and statutory protections exempt private actors. Under state action tests, for example, private prison employees typically are subject to constitutional restrictions.¹⁸⁷ There also has been statutory movement in this direction, particularly around emerging technologies.¹⁸⁸

Second, the arguments about the legal unaccountability of private actors often do not account for how profoundly unaccountable public actors can be, despite being subject to constitutional restrictions.¹⁸⁹

Recovery Agents: An Exploratory Study, 38 CRIM. JUST. REV. 190, 192 (2013) (stating, in the context of bounty hunters, that private actors “have unique powers that far surpass those of the police in America”).

¹⁸⁴ See Stoughton, *supra* note 20, at 133 (“Because they are private actors, ‘[p]rivate police have been held exempt from the Fourth Amendment and the *Miranda* rules—as well as from restrictions on entrapment and statutory disclosure requirements.’” (quoting Slansky, *supra* note 49, at 1240)); Rushin, *supra* note 82, at 180 (“[T]he law facilitates private police interrogations. While traditional police must read criminal suspects *Miranda* warnings before beginning interrogation, private police have no comparable regulation.” (footnote omitted)); Simmons, *supra* note 6, at 929.

¹⁸⁵ See, e.g., Joh, *supra* note 183, at 114–17 (discussing the “reemergence of the silver platter doctrine,” under which “private police may obtain evidence in ways forbidden to the public police, and then they may turn over contraband, statements, and other kinds of evidence for use at trial”).

¹⁸⁶ See, e.g., Jon D. Michaels, *Privatization’s Pretensions*, 77 U. CHI. L. REV. 717, 719–22 (2010) (Because they are not subject to federal privacy laws, private data brokers “acquire the information more liberally on their own and submit raw data or synthesized intelligence to the government. DHS thus gets the benefit of more sweeping, intrusive searches than would otherwise be permitted of government officials, short of their first obtaining warrants or securing legislative change.” (footnote omitted)); *supra* note 162 (discussing open records laws).

¹⁸⁷ See STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS § 2:15 (2021) (“Most lower courts have viewed the private operation of prisons under contract with state and local governments as subject[] . . . to § 1983 suits.”).

¹⁸⁸ See *infra* notes 293–97 (discussing Utah ALPR legislation and other statutes that reach privately collected data).

¹⁸⁹ See, e.g., Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 763 (2012) (noting that constitutional law cannot fully address problems of police regulation).

Take, for example, the Constitution's failure to address racially disparate law enforcement. Racial disparities permeate every level of the criminal system.¹⁹⁰ The constitutional provisions that one might expect to address these disparities have been imbued with impossibly high legal standards. The Equal Protection Clause, for example, has been interpreted to require discriminatory intent of the officers involved, leaving most widespread racial disparities beyond reach.¹⁹¹ Other constitutional requirements have been interpreted to provide law enforcement with expansive discretion, creating ripe conditions for discrimination. For example, police effectively are given carte blanche to perform pretextual stops and then seek "consent" to search.¹⁹² The results are huge racial disparities with minimal constitutional intervention.¹⁹³

These constitutional failures are compounded by the judiciary's persistent reluctance to provide meaningful redress when it does find constitutional violations.¹⁹⁴ Courts decline to exclude evidence in the face of illegal searches.¹⁹⁵ When civil rights plaintiffs overcome the bevy of court-erected procedural hurdles, officers frequently are protected by qualified immunity, leaving people who experience egregious misconduct with no recourse.¹⁹⁶ In one recent example, a court

¹⁹⁰ See Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 854–59 (2011) (citing evidence of racial profiling in policing). Indeed, although this Article focuses primarily on the critiques (and harms) of privatization, when discussing harms of the criminal system, the place to begin is with racial harms. For more background, see generally PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017); ALEXANDER, *supra* note 136; Bell, *supra* note 49; Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599, 1609, 1619 (2012).

¹⁹¹ See, e.g., *McClesky v. Kemp*, 481 U.S. 279, 292 (1987) (proving that an equal protection violation requires "proving 'the existence of purposeful discrimination.' . . . [plaintiffs] must prove that the decisionmakers in [their] case acted with discriminatory purpose." (footnote omitted) (citations omitted) (quoting *Whitus v. Georgia*, 385 U.S. 545, 550 (1967))); *Brown v. City of Oneonta*, 195 F.3d 111, 118–19 (2d Cir. 1999).

¹⁹² See, e.g., *Whren v. United States*, 517 U.S. 806, 811–16 (1996).

¹⁹³ See Harcourt & Meares, *supra* note 190, at 854–59 (citing evidence of racial profiling in policing).

¹⁹⁴ See, e.g., Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477, 1500–19 (2018) (discussing the narrowing availability of judicial remedies, focusing on policing); Friedman & Ponomarenko, *supra* note 140, at 1865 ("[J]udicial review is completely inadequate for [the regulation of policing].").

¹⁹⁵ Friedman & Ponomarenko, *supra* note 140, at 1866–67.

¹⁹⁶ *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–09 (1983) makes it nearly impossible to obtain injunctive relief, while *Clapper v. Amnesty International USA*, 568 U.S. 398, 408–09 (2013) does the same for aggregate litigation. For a discussion of the barriers on standing, see generally Vicki C. Jackson, Symposium: Standing in the Roberts Court, *Standing and the Role of Federal Courts: Triple Error Decisions in Clapper v. Amnesty International USA and City of Los Angeles v. Lyons*, 23 WM. & MARY BILL RTS. J. 127, 149–75 (2014). In addition to the

granted immunity to officers who tased a man soaked in gasoline knowing that it would light him on fire.¹⁹⁷ And when individuals manage to secure damages awards, they have little practical impact.¹⁹⁸

Extraconstitutional mechanisms are similarly ineffective in holding public actors accountable. Consider the ways we punish police and prosecutor misconduct. Policing agencies are notorious for their inability and unwillingness to punish their own officers, even those with long histories of misbehavior.¹⁹⁹ Disciplining officers can be challenging in part because of public sector employee protections—union contracts, law enforcement officer bills of rights (“LEOBRs”), civil service boards, and arbitrators all make it exceedingly difficult to punish and remove misbehaving officers.²⁰⁰ Many cities have created civilian review boards, but these boards rarely have authority to make meaningful change.²⁰¹ And when officers are disciplined by one department, they often simply transfer to another.²⁰² Prosecutor discipline is not much better.²⁰³

dubious legal protection of qualified immunity, see Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1798 (2018); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 47 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 17 (2017), municipalities cannot be sued unless one meets the elaborate requirements of *Monell v. Department of Social Services*, 436 U.S. 658, 690–95 (1978), and its progeny.

¹⁹⁷ See *Ramirez v. Guadarrama*, 844 F.App’x 710, 712 (5th Cir. 2021).

¹⁹⁸ See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (finding that police officers found liable are “virtually always indemnified”); Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1633 (2012) (noting that money damages are often ineffective in deterring constitutional violations).

¹⁹⁹ See DARREL W. STEPHENS, U.S. DEP’T OF JUST., NCJ 234052, *POLICE DISCIPLINE: A CASE FOR CHANGE*, 1 (2011) (“Police disciplinary procedures have long been a source of frustration for nearly everyone involved . . .”).

²⁰⁰ See, e.g., Benjamin Levin, *What’s Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1340 (2020) (summarizing dominant critiques of police unions, including that “they operate as impediment to reform by opposing specific policies and shielding officer misconduct”); cf. Ovetta Wiggins & Erin Cox, *Maryland Enacts Landmark Police Overhaul, First State to Repeal Police Bill of Rights*, WASH. POST (April 10, 2021, 10:00 PM), https://www.washingtonpost.com/local/md-politics/hogan-vetoes-police-accountability/2021/04/09/c0ac4096-9967-11eb-962b-78c1d8228819_story.html [<https://perma.cc/EKQ7-CVT4>] (noting that Maryland, the first state to implement a Law Enforcement Bill of Rights (“LEOBR”), repealed the law as part of the State’s efforts to promote justice in policing).

²⁰¹ See Sharon R. Fairley, *Survey Says?: U.S. Cities Double Down on Civilian Oversight of Police Despite Challenges and Controversy*, 2020 CARDOZO L. REV. DE NOVO 1, 32–50.

²⁰² See, e.g., Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L.J. 1676 (2020); AM. L. INST., *supra* note 14 at § 14.13. There have been a range of legislative efforts attempting to address this problem. See, e.g., S. 6489, 2021 S. Assemb. B., Reg. Sess. (N.Y. 2021) <https://www.nysenate.gov/legislation/bills/2021/a7284> [<https://perma.cc/Q973-M67Q>]; Roger L. Goldman, *A Model Decertification Law*, 32 ST. LOUIS U. PUB. L. REV. 147, 149 (2012).

²⁰³ See, e.g., KATHLEEN M. RIDOLFI & MAURICE POSSLEY, *PREVENTABLE ERROR: A RE-*

In light of all this, there are ways in which it can be easier to hold private actors accountable.²⁰⁴ Private sector actors are at-will employees, meaning many public sector hurdles to discipline—like LEOBRs and union contracts—do not apply.²⁰⁵ At a policy level, because the private sector is subject to market pressures, private entities can show greater responsiveness to potential for civil liability and even media scrutiny.²⁰⁶ Compound this with the fact that private sector actors do not enjoy the same immunity protections.²⁰⁷ This is likely why there are examples of private industry implementing their own accountability mechanisms, such as ethics boards, codes of conduct, impact statements, and whistleblowing.²⁰⁸ These mechanisms are particularly prominent around emerging technologies, where government regulation struggles to keep pace.²⁰⁹

PORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009 2, 18–38 (2010) (finding that across 707 misconduct cases, 548 cases were upheld, but the misconduct was found harmful in only 157 cases); see also Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. CRIM. L. & CRIMINOLOGY 881, 887–88 (2015) (describing examples of ineffective prosecutor discipline). But see Edward R. Montgomery, *The Facts and Fictions of Prosecutorial Misconduct*, 33 UTAH B.J. 14 (2020).

The same can be said about public corruption more broadly. See, e.g., Lise Olsen, *In Texas, Corrupt Politicians Face Little Accountability*, TEX. OBSERVER (Sept. 20, 2021, 9:00 AM), <https://www.texasobserver.org/corrupt-texas-politicians-face-little-accountability/> [https://perma.cc/Z9J9-LMAE].

²⁰⁴ See, e.g., EISEN, *supra* note 22, at 177 (“There are abuses in both public and private correctional facilities, and there is not enough data to say one is better (or worse) than the other.”). Cf. Rappaport, *supra* note 68, at 2257 (“[W]hile retail justice may not be ideal, it may still be preferable to criminal justice. Private justice, in fact, is the predictable result of, and a potential palliative for, aggressive policing and harsh criminal penalties.”).

²⁰⁵ At-will employment is the default position in every state but Montana. *At-Will Employment – Overview*, NAT’L CONF. OF STATE LEGISLATURES (Apr. 15, 2008) <https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx> [https://perma.cc/8YCY-JUDF].

²⁰⁶ See Freeman, *supra* note 139, at 819 (“Although these forms of accountability may not satisfy the traditional administrative law demand for accountability to an elected body and vulnerability to judicial review, they nonetheless may play an important role in legitimizing, or rendering acceptable, a particular regulatory regime.”); see also Volokh, *supra* note 136, at 150 (“One can have significant de facto control over one’s contractor just by having known reasons for failing to renew the contract . . .”).

²⁰⁷ See, e.g., *Richardson v. McKnight*, 521 U.S. 399, 412–13 (1997).

²⁰⁸ See Katyal, *supra* note 165, at 108 (noting these mechanisms in the context of algorithmic accountability).

²⁰⁹ E.g., *Axon AI Ethics Board*, AXON, <https://www.axon.com/company/ai-and-policing-technology-ethics> [https://perma.cc/S5R4-SVQ3].

D. Perverse Financial Incentives

The most pervasive critique of privatization focuses on the distorting effects of profit motives.²¹⁰ Private actors make decisions to increase revenue, maximize profit, and ensure continuity of their contracts; public actors, the argument goes, act with purer motives, such as the pursuit of justice.²¹¹ With regard to private prisons, for example, scholars argue that corporations maximize efficiency and cost-effectiveness by sacrificing quality of services and living conditions.²¹² Prison companies may also take policy positions that ensure there remain large numbers of people to incarcerate—ignoring rehabilitation programs, imposing discipline to lengthen sentences, and lobbying for stricter sentencing laws.²¹³ Private police are similarly criticized—that

²¹⁰ This critique is closely tied to another: that the perception of financial conflicts can undermine institutional legitimacy. Even absent evidence that profit motives distort behavior, some commentators argue that any role for private entities “may jeopardize the legitimacy of government action because the public may suspect that private profit-making—rather than public purposes—is being served.” Minow, *supra* note 12, at 1234; *see also* Volokh, *supra* note 136, at 189 (discussing Israeli Supreme Court decision striking down private prisons, noting “the absence of actual violations is irrelevant; perceptions of private purposes are enough to ban the practice.”). Loss of legitimacy, in turn, can threaten public safety. *See* Joh, *supra* note 183, at 59 (discussing deficit in trust in police-community relationships, and the resulting impact on police work).

²¹¹ *See* Levin, *supra* note 18, at 2315 (“[T]o the extent that criminal law is meant to embody some sort of collective consciousness or shared moral opprobrium, a system that employs private actors or that implicates private motives may fail to advance the public interest.” (footnote omitted)).

²¹² *See, e.g.*, EISEN, *supra* note 22, at 181 (“[P]rivate prisons have every incentive to cover [their financial data] up. A public prison—no matter how horrible the scandal—will never lose a contract; a private prison will.”); Sharon Dolovich, *How Privatization Thinks: The Case of Prisons* (arguing that operators of private prisons will promote efficiency over other important interests), in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY*, *supra* note 133, at 128, 134; Robert Craig & André Douglas Pond Cummings, *Abolishing Private Prisons: A Constitutional and Moral Imperative*, 49 U. OF BALT. L. REV. 261, 278 (2020); Lucas Anderson, *Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts*, 39 PUB. CONT. L.J. 113, 116 (2009) (“[P]rivate prison companies are primarily profit-seeking entities, working to reduce costs wherever possible. Cost-cutting measures promote inferior contract performance, undue safety risks, and poor delivery of inmate services.”); Dolovich, *supra* note 110, at 460–61 (“[A]necdotal evidence suggests that contractors have prioritized economy above all else, with disturbing results for the inmates themselves,” including increased violence).

²¹³ *See* EISEN, *supra* note 22, at 186 (“[P]rivate prison corporations have created a web of perverse incentives around a common financial interest—the steady growth of mass incarceration.”); Geiza Vargas-Vargas, *The Investment Opportunity in Mass Incarceration: A Black (Corrections) or Brown (Immigration) Play?*, 48 CAL. W. L. REV. 351, 360–65 (2012) (discussing how the private prison industry helped draft bills that would expose large number of people to incarceration); Anderson, *supra* note 212, at 116 (“The profit motive also encourages private prison companies to disregard the principles of inmate rehabilitation and criminal deterrence; if advanced, these principles would undermine profits and reduce the demand for these companies’

they act to protect private property at the public's expense.²¹⁴ Scholars also question the incentives of private prosecutors²¹⁵ and technology companies.²¹⁶

Although these critiques are well taken, the picture is incomplete. Public sector policymaking is not immune from distorted financial incentives.²¹⁷

Government addiction to fines, fees, and forfeitures is a clear example. Millions of low-income Americans owe tens of billions of dollars in criminal fines and fees.²¹⁸ These fees stem from everything from traffic violations and court-mandated programs to fees for taking a case to trial.²¹⁹ In some places, fines and fees account for most of the local budget.²²⁰ These windfalls allow lawmakers to plug shortfalls and

services.”) Dolovich, *supra* note 110, at 523, 529 (discussing the dangers of profit motives as they relate to sentencing policies, discipline, and parole). *But see* Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 STAN. L. REV. 1197, 1197 (2008) (“In this Article, I evaluate . . . the argument against prison privatization based on the possibility that the private prison industry will distort the criminal law by advocating for incarceration. I conclude that there is at present no particular reason to credit this argument.”).

²¹⁴ *E.g.*, Rushin, *supra* note 82, at 174–75.

²¹⁵ *E.g.*, Romero, *supra* note 96, at 199; Fairfax, *supra* note 67, at 296–97.

²¹⁶ *E.g.*, Joh, *Undue Influence*, *supra* note 19, at 20.

²¹⁷ *See* Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL’Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html> [<https://perma.cc/8Z5P-GADR>].

²¹⁸ *See* BRIANA HAMMONS, FINES & FEES JUST. CTR., TIP OF THE ICEBERG: HOW MUCH CRIMINAL JUSTICE DEBT DOES THE U.S. REALLY HAVE? 6–9 (2021), https://finesandfeesjusticecenter.org/content/uploads/2021/04/Tip-of-the-Iceberg_Criminal_Justice_Debt_BH1.pdf [<https://perma.cc/Z4VH-9K2M>]; KARIN D. MARTIN, SANDRA SUSAN SMITH & WENDY STILL, U.S. DEP’T OF JUST., NCJ 249976, SHACKLED TO DEBT: CRIMINAL JUSTICE FINANCIAL OBLIGATIONS AND THE BARRIERS TO RE-ENTRY THEY CREATE 1, 5 (2017), <https://www.ncjrs.gov/pdffiles1/nij/249976.pdf> [<https://perma.cc/NT4H-D5U2>].

Jurisdictions impose fines as punishment for everything from traffic violations to serious misdemeanors, whereas fees are designed to offset costs. *See* MATTHEW MENENDEZ, MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN & NOAH ATCHISON, BRENNAN CTR. FOR JUST., THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES: A FISCAL ANALYSIS OF THREE STATES AND TEN COUNTIES (2019); *see also* John D. King, *Privatizing Criminal Procedure*, 107 GEO. L.J. 561, 562, 571 (2019) (fees for indigent defense); Leah A. Plunkett, *Captive Markets*, 65 HASTINGS L.J. 57, 57 (2013) (“pay-to-stay” fines). For background on the debt incurred by individuals passing through the criminal justice system, *see generally* Neil L. Sobol, *Charging the Poor: Criminal Justice Debt and Modern-Day Debtors’ Prisons*, 75 MD. L. REV. 486 (2016); Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1193.

²¹⁹ *See, e.g.*, Editorial Board, Opinion, *Train the Police to Keep the Peace, Not Turn a Profit*, N.Y. TIMES (Nov. 20, 2021), <https://www.nytimes.com/2021/11/20/opinion/police-traffic-stops-deaths.html> [<https://perma.cc/WJ9D-RTNE>] (“Some police departments across the country have embraced the corrupting and unjust practice of raising revenue for their municipalities by pushing officers to write as many traffic tickets as possible.”).

²²⁰ *See* Mike Maciag, *Addicted to Fines: Small Towns in Much of the Country Are Danger-*

avoid tough budgeting questions.²²¹ Forfeiture laws have allowed law enforcement to seize and retain billions of dollars from people suspected of criminal activity, even without bringing formal charges.²²² Because forfeiture funds are generally spent outside of the budgeting process, they can be used to fund a variety of off-the-books initiatives and splurges.²²³ As a result, fines, fees, and forfeiture opportunities can dictate enforcement priorities.²²⁴ They also create a two-tiered system of justice in which individuals with means can reap a range of benefits—avoiding arrest or incarceration through diversion programs

ously *Dependent on Punitive Fines and Fees*, GOVERNING (Aug. 19, 2019), <https://www.governing.com/archive/gov-addicted-to-fines.html> [<https://perma.cc/XG8C-64U3>].

²²¹ See King, *supra* note 218, at 562 (“As states continue to deal with ever-increasing budget pressures, many have begun to look for nontraditional ways to pay for criminal prosecutions and to shift the costs of the system onto those charged with crimes.”); Brief for the American Civil Liberties Union et al. as Amici Curiae Supporting Petitioners at 7, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (No. 17-1091) (“Perhaps because they are politically easier to impose than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue.”).

²²² See DICK M. CARPENTER II, LISA KNEPPER, ANGELA C. ERICKSON & GENNIFER McDONALD, *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* (2d ed. 2015) (highlighting how local law enforcement uses the federal Equitable Sharing Program to avoid restrictive forfeiture laws); see also *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari) (“This system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses.”); *Wayside Church v. Van Buren Cnty.*, 847 F.3d 812, 823 (6th Cir. 2017) (Kethledge, J., dissenting) (“Van Buren County took property worth \$206,000 to satisfy a \$16,750 debt, and then refused to refund any of the difference. In some legal precincts that sort of behavior is called theft.”).

²²³ See CARPENTER II ET AL., *supra* note 222, at 7, 39–41; MARIAN R. WILLIAMS, JEFFERSON E. HOLCOMB, TOMISLAV V. KOVANDZIC & SCOTT BULLOCK, *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 15–20 (1st ed. 2010); see also Shannon Dooling & Christine Willmsen, *Boston Police Bought Spy Tech with a Pot of Money Hidden from the Public*, WBUR (Dec. 17, 2021), <https://www.wbur.org/news/2021/12/17/massachusetts-cell-site-simulator-civil-forfeitures> [<https://perma.cc/K29M-C5UP>]; Tom Schuba & Frank Main, *CPD Launched Secret Drone Program with off-the-Books Cash*, CHI. SUN TIMES (May 12, 2021, 11:02 AM), <https://chicago.suntimes.com/city-hall/2021/5/11/22425299/cpd-chicago-police-drone-secret-emails-hack-lori-lightfoot-dodsecrets-city-hall> [<https://perma.cc/X3PR-UYLN>]; Hannah Morse & Alexandra Clough, *Florida Sheriff Funds \$35,000-a-Month Luxury Office with ‘the Money We Take from the Bad Guys,’* USA TODAY (Aug. 14, 2020, 12:50 PM), <https://www.usatoday.com/story/news/nation/2020/08/13/palm-beach-county-sheriff-ric-bradshaw-rents-luxury-office-space/3366088001/> [<https://perma.cc/VQ5W-CVHQ>].

²²⁴ See David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L.J. 1, 31 (2012); see also THE FERGUSON REPORT, *supra* note 72, at 4–5; ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* 113–48 (2018).

or community service²²⁵—and those who cannot pay face a spiral of increasing penalties.²²⁶

Even beyond fines and fees, financial incentives permeate the criminal system in countless ways. Cities seeking to revitalize certain neighborhoods (and their tax bases) often turn to aggressive enforcement to remove “undesirable” elements.²²⁷ Candidates and legislators seek the endorsement of labor organizations and business interests and promise political support in return.²²⁸ Rural communities vie for prisons, and with them the potential for jobs, tax revenue, and local spending.²²⁹ In short, financial motives permeate the public sector much like the private.

Again, there are ways that private influences can guard against these financial motives. The growing role of nonprofit CBOs is one example. By empowering community-focused entities—such as local

²²⁵ See, e.g., Dave Maass, “No Cost” License Plate Readers Are Turning Texas Police into Mobile Debt Collectors and Data Miners, ELEC. FRONTIER FOUND. (Jan. 26, 2016), https://www.eff.org/deeplinks/2016/01/no-cost-license-plate-readers-are-turning-texas-police-mobile-debt-collectors-and#footnoteref1_83a8ezn [<https://perma.cc/KLT5-DD8B>]; Radley Balko, Opinion, *A Louisiana DA Will Let You out of Your Community Service Obligation—If You Donate to His Nonprofit*, WASH. POST (Nov. 1, 2019), <https://www.washingtonpost.com/opinions/2019/11/01/louisiana-da-will-let-you-out-your-community-service-obligation-if-you-donate-his-nonprofit/> [<https://perma.cc/Z6V9-TBG8>]; Dewan & Lehren, *supra* note 87.

²²⁶ See ALEXES HARRIS, BETH HUEBNER, KARIN MARTIN, MARY PATTILLO, BECKY PETTIT, SARAH SHANNON, BRYAN SYKES, CHRIS UGGEN & APRIL FERNANDES, *MONETARY SANCTIONS IN THE CRIMINAL JUSTICE SYSTEM* 14 (2017) (discussing “collection charges, interest, non-payment charges, per-payment charges, payment plan set-up charges,” driver’s license suspension, and eventually rearrest); see also MARIO SALAS & ANGELA CIOLFI, *LEGAL AID JUST. CTR., DRIVEN BY DOLLARS: A STATE BY-STATE ANALYSIS OF DRIVER’S LICENSE SUSPENSION LAWS FOR FAILURE TO PAY COURT DEBT* 1 (2017); THE FERGUSON REPORT, *supra* note 72, at 42–43; King, *supra* note 218, at 598–99; Sobol, *supra* note 218, at 492–93.

²²⁷ See, e.g., Brenden Beck, *The Role of Police in Gentrification*, APPEAL (Aug. 4, 2020), <https://theappeal.org/the-role-of-police-igentrification-breonna-taylor/> [<https://perma.cc/52GT-3Q8W>]; see also *supra* notes 41–42 and accompanying text.

²²⁸ See Joan Petersilia, *California’s Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST. 207, 224 (2008) (discussing California Correctional Peace Officers Association and its lobbying and political clout); Volokh, *supra* note 213, at 1203 (noting that correctional unions have “contributed massively in support of tough-on-crime positions on voter initiatives and [have] given money to crime victims’ groups, and public corrections officers unions in other states have endorsed candidates for their tough-on-crime positions”).

²²⁹ See Barkow, *supra* note 103, at 729 (“Those with an economic stake in prison growth—such as rural communities, corrections officer unions, and private prison companies—are strong advocates for longer sentences.”); Beatrix Lockwood & Nicole Lewis, *The Hidden Cost of Incarceration*, MARSHALL PROJECT (Dec. 17, 2019, 5:00 AM), <https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration> [<https://perma.cc/K6Y9-2DWM>] (“[F]amilies spend \$2.9 billion a year on commissary accounts and phone calls. Families are also often responsible for paying court fees, restitution and fines when a member goes to prison. . . . [T]he average family paid roughly \$13,000 in fines and fees.”).

violence interrupters or social service groups—policymakers can help ensure that resources are directed toward the communities that are most harmed by the criminal system.²³⁰

If one’s goal is to remove the influence of financial incentives on decisionmakers, one should not assume that the public or private sector is necessarily preferable, but instead focus on guardrails and regulation that curb these influences.

* * * * *

The explosive growth of privatization over the last few decades has brought with it a rich body of scholarship on privatization in the criminal system. Focusing on some of the most conspicuous manifestations of privatization—private prisons in particular—this scholarship has raised a number of valid governance concerns.²³¹ But this Part makes clear that these concerns are not limited to privatization because the public sector is vulnerable to these faults as well. At the same time, private influences sometimes mitigate these harms.

Simply put, the “public” or “private” label is a poor proxy for harm in the criminal system, and undue focus on these labels may cause policymakers to miss opportunities to mitigate harm.²³²

III. POLICYMAKING ACROSS THE PUBLIC/PRIVATE DIVIDE: TOWARD PARITY IN GOVERNANCE

Part I described a criminal system thoroughly riddled with private influences, stretching well beyond the bounds of formal contracting out.

Part II presented a paradox: Yes, private influence can be corrupting and harmful, but public management of the criminal system is hardly rosy, and ironically private influence on occasion can help address some of the worst dysfunction of public actors.

²³⁰ See, e.g., Laura McCrystal & Marina Affo, *Philly Is Pouring Millions into Violence Prevention as Shootings Soar. What Does that Money Buy?*, PHILA. INQUIRER (June 24, 2021), <https://www.inquirer.com/news/philadelphia/philly-is-pouring-millions-into-violence-prevention-shootings-soar-what-does-that-money-buy-20210624.html> [https://perma.cc/N9CR-54J3] (\$20 million in funding in Philadelphia to violence prevention groups, including Mothers in Charge); White House Community Intervention Press Release, *supra* note 4.

²³¹ See, e.g., *supra* Part I.

²³² Dolovich, *supra* note 110, at 506–07 (“reject[ing] the ‘either/or’ approach of comparative efficiency” and “aim[ing] not to champion the least bad alternative, but instead to understand how and why existing prisons and jails, public *and* private, fall so far short of the ideal.”).

This Part addresses the question: In light of this more nuanced view of the private influence, how should policymakers think about and regulate the public/private divide?

This Article calls for policymakers to embrace the role of non-state actors in the criminal system, but to do so in a deliberate way. Private influence is a defining characteristic of the criminal system. It cannot be excised. But more than that, public and private frequently operate in a symbiotic relationship—when one ebbs, the other flows to fill the void. This is not necessarily beneficial or harmful—private influence can be used to serve any ideology. What policymakers should do is regulate in ways that embrace the benefits of private influence but also address the most pressing governance concerns (be it lack of transparency or accountability, or another issue).²³³

This Part concludes by applying these lessons in two specific contexts: (1) the role of community-based violence prevention organizations, and (2) law enforcement's access to private surveillance and the private data market.

A. *The Inseparability & Reciprocity of Public & Private*

A full accounting of the roles of public and private actors in the criminal system makes clear that the two are inextricably intertwined.²³⁴ There can be no purely private or purely public system; the two share a symbiotic relationship.

Government cannot function without private actors. The state cannot efficiently build all the goods it needs, be it vehicles or body cameras. Public prisons rely on a bevy of private goods and services, from flexible pens and paper utensils to healthcare, transportation, and communication.²³⁵ The private sector is especially critical in a world of advancing AI and algorithmic technologies, where companies

²³³ In response to the judiciary's failure to turn constitutional principles into meaningful limits on public actors in the criminal system, many have called for additional regulation, either legislative or administrative. *E.g.*, Friedman & Ponomarenko, *supra* note 140, at 1850–51 (“Even if the Constitution has nothing to say about this, it seems altogether appropriate for there to be rules—formulated with public input . . .”). For a discussion of different regulatory approaches, and the values behind them, see generally John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205 (2015); Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 MICH. L. REV. 485, 537–44 (2013).

²³⁴ See Simmons, *supra* note 6, at 968–69 (“A more appropriate definition might be that a criminal justice system is one that responds to, processes, and resolves criminal activity—and such a system may or may not involve the state.”).

²³⁵ See EISEN, *supra* note 22, at 73–76; see also Emma Kaufman, *The Prisoner Trade*, 133 HARV. L. REV. 1815, 1858 (2020).

have a yawning comparative advantage over government.²³⁶ Even beyond contracting out, the inseparability continues: private individuals decide whether to call the police, law enforcement depends on witness cooperation to build a case, and so on.

But the private sector also relies on public actors. For example, many private entities depend on public spending. This is true of the prison industrial complex, but also for many CBOs that offer nonpunitive and noncarceral approaches.²³⁷

Not only are the public and private spheres inseparable, but they often operate in a reciprocal relationship. There is an ebb and flow between the two: expansion of one can displace the other; and when one withdraws or is inadequate, the other often steps in. Anticipating this ebb-and-flow is crucial to foreseeing the real-world impacts of policy reforms.

Take, for example, ongoing debates about police funding. The defund movement focuses on shrinking police resources to limit policing's reach. Ideology aside, sound policymaking must account for the likely ebb-and-flow of the public and private sectors. If legislators limit police funding, they must be conscious of the ways that the private sector might replace the public sector. For example, police may turn to private funding, private individuals and businesses may install more surveillance, neighborhoods might turn to private security.²³⁸

²³⁶ See, e.g., John J. Lennon, Opinion, *The Cost of Calling My Mom From Prison*, N.Y. TIMES (Feb. 12, 2021), <https://www.nytimes.com/2021/02/12/opinion/prison-internet-technology-jpay.html> [<https://perma.cc/N9HZ-JD6N>].

²³⁷ See, e.g., *Funded Programs*, CRIM. JUST. INV. INITIATIVE, <http://cjii.org/funding/funded-programs/> [<https://perma.cc/N7MM-LUME>] (Manhattan District Attorney's Office listing a wide variety of CBOs and non-profits funded by forfeiture funds); Press Release, N.Y.C. Mayor's Off. of Crim. Just., Shootings Fell Sharply in Neighborhoods Operating NYC-Funded "Cure Violence" Programs, New Study Shows (Oct. 2, 2017), <https://criminaljustice.cityofnewyork.us/press-release/shootings-fell-sharply-in-neighborhoods-operating-nyc-funded-cure-violence-programs-new-study-shows/> [<https://perma.cc/2BT8-4EJG>] (discussing municipal funding of Cure Violence initiative).

²³⁸ See, e.g., Stephen Rushin & Roger Michalski, *Police Funding*, 72 FLA. L. REV. 277, 313 (2020) ("Underfunding may also increase pressure on law enforcement agencies to find alternative revenue streams."); Gregory Pratt, *In Wake of Looting, Chicago to Spend \$1.2 Million on Private Security Firms to Help Protect Businesses*, CHI. TRIB. (June 6, 2020, 1:10 PM), <https://www.chicagotribune.com/news/breaking/ct-chicago-hires-private-security-firms-20200606-6d75fp7srzaz3hildnaqrko6u-story.html> [<https://perma.cc/S8JV-DPTH>]; Rebecca Ellis, *Fatal Shooting Exposes Murky Role of Portland's Hired Guards*, PORTLAND TRIB. (July 24, 2021), <https://pamplinmedia.com/pt/9-news/516492-412725-fatal-shooting-exposes-murky-role-of-portlands-hired-guards> [<https://perma.cc/KN79-NMT2>]; Suzanne Phan, *Community Believes Crime Is up in Chinatown-ID, Explores Possibility of Hiring Security*, KOMO NEWS (Sept. 15, 2021), <https://komonews.com/news/operation-crime-justice/community-believes-crime-is-up-in-chinatown-id-explores-possibility-of-hiring-security> [<https://perma.cc/N5WL-QMX5>]; J.D. Capelouto,

The point here is not a normative one, but simply that lawmakers must think through these possibilities in advance and have sensible regulatory responses.

As another example, consider how public and private actors use physical force to ensure public safety. In general, people vest government with authority to use force and violence against members of the community to ensure collective safety. This authority, which is usually exercised by police, is meant to displace vigilantism and private retribution.²³⁹ But when government is unable (or unwilling) to provide for adequate security, private actors step in.

The results can be both troubling and hopeful. Although the affluent can afford to supplement government-sponsored security with private police and surveillance, less affluent neighborhoods do not have the same options. When government fails to provide for security and neighborhoods lack resources and investment, private individuals can resort to self-help. This can sometimes mean high levels of violence and the emergence of criminal organizations, but it can also lead to the rise of community-led antiviolence organizations.²⁴⁰

New Buckhead Security Plan Could Cost \$1.6M; Councilors Donating \$125K, ATLANTA J.-CONST. (Dec. 28, 2020), <https://www.ajc.com/news/atlanta-news/new-buckhead-security-plan-could-cost-16m-councilors-donating-125k/XNQ7FSRJ15CIZDNRZ4C37GFNAY/> [https://perma.cc/YCR4-VV4B]; Gordon R. Friedman, *Portland City Council OK's \$10 Million for City Hall Security over Protestors' Shouts and Jeers*, OREGONIAN (May 22, 2019, 12:09 PM), <https://www.oregonlive.com/portland/2019/05/portland-city-council-oks-10-million-for-city-hall-security-over-protesters-shouts-and-jeers.html> [https://perma.cc/8ML3-G7PJ]; Lisa Fickenschner, *Retailers Beef up Security as Looting Fears Continue*, N.Y. POST (June 4, 2020, 10:48 PM), <https://nypost.com/2020/06/04/retailers-beef-up-security-as-looting-fears-continue-to-rise/> [https://perma.cc/RWP2-BCAG]; Geoff Baker, *More Businesses Fearing Property Damage Hire Private Security Guards in Wake of Protests*, SEATTLE TIMES (June 11, 2020, 11:31 PM), <https://www.seattletimes.com/business/local-business/more-businesses-fearing-property-damage-hire-private-security-guards-in-wake-of-protests/> [https://perma.cc/4EQE-7KE5]; Nellie Bowles, *Why Is a Tech Executive Installing Security Cameras Around San Francisco*, N.Y. TIMES (July 13, 2020), <https://www.nytimes.com/2020/07/10/business/camera-surveillance-san-francisco.html> [https://perma.cc/2ZDR-Q9CK]; see also Candice Bernd, *"Defund Police" Doesn't Mean Hire Private Guns—but Cities Are Doing Just That*, TRUTHOUT (Sept. 1, 2020), <https://truthout.org/articles/defund-police-doesnt-mean-hire-private-guns-but-cities-are-doing-just-that/> [https://perma.cc/YZ7Y-X8X6].

²³⁹ Sklansky, *supra* note 146, at 89–91.

²⁴⁰ See, e.g., THOMAS ABT, BLEEDING OUT: THE DEVASTATING CONSEQUENCES OF URBAN VIOLENCE—AND A BOLD NEW PLAN FOR PEACE IN THE STREETS 66 (2019) (“In neighborhoods where cynicism runs high, if somebody beats up your cousin, you don’t call the police; you reach out to friends and family to ‘handle your business.’”); Sklansky, *supra* note 49, at 1170 (“The private security industry forms part of at least two larger phenomena in contemporary criminal justice. . . . The second is the ‘pluralizing of policing’—that is, the partial displacement of public policing not only by private security personnel, but also by community volunteers.” (footnote omitted)).

The point here is to take seriously the lesson of Part II: private influence neither is intrinsically beneficial nor harmful. It can come with both positive and negative effects and can be harnessed to promote any political agenda. While some private actors are used to funnel people into the criminal system (e.g., private police), others divert people from incarceration (e.g., restorative justice programs). Whereas some private actors promote government secrecy, others promote transparency.²⁴¹

Even nonprofits can be turned in service of different carceral approaches. Although there are a growing number of nonprofits embracing antiviolence, restorative justice, and even abolitionist goals, there are plenty of nonprofits pushing in the opposite direction. Victims' rights groups take "tough-on-crime" positions.²⁴² Labor organizations erect obstacles to removing police officers accused of egregious misconduct.²⁴³ Nonprofit police foundations are established for the express purposes of raising discretionary funds for police.²⁴⁴ These foundations often allow police to purchase surveillance equipment, investigative tools, and more while skirting public oversight.²⁴⁵

²⁴¹ Compare *supra* note 79 (discussing Harris Corporation's used on NDAs), with *supra* note 177 and accompanying text (discussing corporate built transparency portals and usage logs).

²⁴² See, e.g., Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 750 (2007) ("The victims' rights movement is and always has been a product of conservative tough-on-crime ideology."); Markus Dirk Dubber, *The Victim in American Penal Law: A Systematic Overview*, 3 BUFF. CRIM. L. REV. 3, 6 (1999) (characterizing the victims' rights movement as "fueled by grassroots campaigns of concerned citizens backed by politicians eager to outdo their opponents in the tough-on-crime competition"). For a vision of a less harmful victims' movement, see Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 334 (2020) ("True victims' rights advocacy focuses on what victims themselves want rather than the embrace of tough-on-crime narratives that serve as little more than ill-kept or empty promises. What victims want may well be what restorative justice has to offer. It is time to give it more serious consideration.").

²⁴³ See, e.g., Levin, *supra* note 200, at 1340 (summarizing dominant critiques of police unions, including that "they operate as impediment to reform by opposing specific policies and shielding officer misconduct").

²⁴⁴ See Zachary Warmbrodt, *New Racial Justice Target: Defund the Police Foundations*, POLITICO (Sept. 18, 2020, 4:30 AM), <https://www.politico.com/news/2020/09/18/new-racial-justice-target-defund-police-foundations-417423> [<https://perma.cc/9ZQX-LH3A>]; Kari Paul, *How Target, Google, Bank of America and Microsoft Quietly Fund Police Through Private Donations*, GUARDIAN (June 18, 2020, 4:12 PM), <https://www.theguardian.com/us-news/2020/jun/18/police-foundations-nonprofits-amazon-target-microsoft> [<https://perma.cc/T9FP-3V3H>] ("Police proponents say the foundations have emerged as police departments face budget cuts and are a means to supplement the force with top-of-the-line technology and weaponry.").

²⁴⁵ See *supra* note 29 and accompanying text. There are also non-profits that themselves operate advanced surveillance systems and provide police with direct access to those systems. See Dave Maass & Matthew Guariglia, *San Francisco Police Accessed Business District Camera Network to Spy on Protestors*, ELEC. FRONTIER FOUND. (July 27, 2020), <https://www EFF.org/>

In short, private actors do not fit a particular ideology—they are a means to many ends.²⁴⁶

B. Parity Across Public & Private

Given that private influences are unavoidable and can be harnessed to serve any end, policymakers ought to regulate their impact in ways that capture benefits and minimize harms. This prescription is simple enough, but rarely occurs today.

Rather than tailoring regulation to the persistent tangle of public and private, many existing legal rules and institutions place undue weight on the public/private line. This approach, in turn, leaves regulatory gaps. Constitutional restrictions, discussed above, are one example—they apply only when the state action test is met and thus largely fall by the wayside when private actors are involved.²⁴⁷ Open records laws are another example.²⁴⁸ Rather than trying to plug these gaps one at a time, a broader shift is needed.

Policymakers should deploy a “parity-focused” approach to regulation—regulation that targets and guards against the harms at stake, whether they result from public or private actors.²⁴⁹ When it comes to constitutional gaps, for example, a parity-focused approach favors revising certain constitutional doctrines that sharply distinguish between public and private actors. The private search doctrine is one such candidate.²⁵⁰

The Supreme Court has already taken a step toward parity around law enforcement access to a person’s location information. In

deeplinks/2020/07/san-francisco-police-accessed-business-district-camera-network-spy-protestors [https://perma.cc/5CZ8-JPSJ].

²⁴⁶ Cf. Freeman, *supra* note 132, at 1295 (“The trouble with ideological positions of this sort, on both sides of the privatization debate, is their intransigence in light of arguments about the empirical consequences of privatization. Empirically grounded claims about how privatization works, or might be made to work, are unlikely to move either side from its core beliefs.”).

²⁴⁷ See *supra* notes 183–85 and accompanying text.

²⁴⁸ See *supra* note 162 (discussing open records laws).

²⁴⁹ See William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1825 (2016) (“[A] court should ask whether government officials have engaged in an investigative act that would be unlawful for a similarly situated private actor to perform.”).

²⁵⁰ The private search doctrine allows law enforcement to conduct a warrantless search when a warrant would normally be required because a private party has already conducted the search. Compare *United States v. Jacobsen*, 466 U.S. 109, 115 (1984) (permitting warrantless search so long as law enforcement did not exceed the scope of the private search), with *State v. Eisefeldt*, 185 P.3d 580, 585–86 (Wash. 2008) (barring warrantless search under Washington Constitution because the individual’s privacy interest is not extinguished simply because a private actor has searched).

Carpenter v. United States,²⁵¹ the Court established a warrant requirement for location tracking via private cell-site location data, despite the fact that a private entity, not police, originally collected the information.²⁵² This is a step toward parity, and the *Carpenter* Court acknowledged as much: “Whether the Government employs its own surveillance technology . . . or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements”²⁵³ Whether and how courts will extend *Carpenter* remains to be seen.

A parity-focused approach would have a significant impact on private financing of the criminal system. As explained above, policing agencies use private philanthropy to purchase surveillance, upgrade equipment, and fund a variety of specialized units while skirting legislative (budgetary) oversight.²⁵⁴ Regulators could confront this democratic governance problem head on by, for example, requiring the same entity responsible for the agency’s budget to approve all donations and grants of significant value.²⁵⁵ Lawmakers might also require that anticipated donations or grants be accounted for in the budgeting process,²⁵⁶ or that contractors hired with those funds comply with open records laws.

There are a few recent examples of this type of parity-focused approach. A number of municipalities have enacted legislation that brings surveillance technologies under legislative oversight regardless of whether the technology was purchased with public or private funds.²⁵⁷ A group of lawmakers recently proposed a ban on law en-

²⁵¹ 138 S. Ct. 2206 (2018).

²⁵² *Id.* at 2221.

²⁵³ *Id.* at 2217 (“Although such records are generated for commercial purposes, that distinction does not negate Carpenter’s anticipation of privacy in his physical location.”).

²⁵⁴ *See supra* notes 30–31, 149, 167.

²⁵⁵ *See* CIVIL RIGHTS AND CIVIL LIBERTIES AUDIT OF BALTIMORE’S AERIAL INVESTIGATION RESEARCH (AIR) PROGRAM pt. IV (2020) <https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/5fc290577acac6192a142d61/1606586458141/AIR+Program+Audit+ReportFINAL+%28reduced%29.pdf> [https://perma.cc/9S8Z-MUV5] (recommending ways to improve democratic governance and accountability around Baltimore’s AIR program).

²⁵⁶ *See* Lemos & Charles, *supra* note 29, at 1189 (“[T]he lesson of modern democratic theory is that the democratic process matters. Obsessing over process is not fetishizing, but reflects the conviction that a robust, inclusive political process is the best way of ensuring that decisions about public policy are made in the interest of the public. A well-functioning democratic process is, in this sense, a fundamental aspect of individual liberty.”).

²⁵⁷ *See, e.g.,* N.Y.C., N.Y., Local Law No. 65 (July 15, 2020); Am. C.L. Union, Community Control Over Police Surveillance (CCOPS) Model Bill, (Apr. 2021), <https://www.aclu.org/legal->

forcement access to certain types of data sold by private data brokers.²⁵⁸ But again, these developments remain the exception.

To be clear, a parity-focused approach does not require treating all nonstate actors precisely like state actors. Rather, it encourages legislators to carefully weigh the likely benefits and harms and regulate to mitigate those harms while preserving benefits.

Consider private police. Given the accountability gaps that exist around private police,²⁵⁹ policymakers ought to consider imposing some of the legal obligations that apply to public officers. For example, lawmakers could require private police to follow Fourth Amendment limits on arrest and detention. Or they might impose affirmative *Brady*-like obligations—requiring that private police disclose any exculpatory information in their possession, and even requiring prosecutors turn over impeachment information about private personnel.²⁶⁰ Legislatures might extend the exclusionary rule to reach private police (or at least those who are licensed).²⁶¹ Regulators could also require private police to collect data on stops, searches, and use of force, like their public counterparts.²⁶²

Of course, perfect equivalence between public and private police can be both impractical and undesirable. As government employees, police are given certain civil servant protections that policymakers may not want to grant private police. Although police budgets are subject to legislative oversight, it would be impractical to require every business or neighborhood that employs private security to go through the same public process. We may not want all private security to wear body cameras or even carry firearms. There may even be constitutional restrictions that would be unreasonable to impose of certain types of private security guards.²⁶³

Still, a presumption of parity between public and private as a guiding regulatory principle would do much to address many of the governance issues that exist across the criminal system today.

document/community-control-over-police-surveillance-ccops-model-bill [https://perma.cc/ZHM7-QE3T].

²⁵⁸ Adi Robertson, *Lawmakers Propose Ban on Police Buying Access to Clearview AI and Other Data Brokers*, VERGE (Apr. 21, 2021, 11:52 AM), <https://www.theverge.com/2021/4/21/22395650/wyden-paul-fourth-amendment-is-not-for-sale-act-privacy-data-brokers-clearview-ai> [https://perma.cc/88K6-64F3] (discussing the Fourth Amendment Is Not For Sale Act).

²⁵⁹ See *supra* notes 180–85 and accompanying text.

²⁶⁰ See *Brady v. Maryland*, 373 U.S. 83, (1963).

²⁶¹ See M. Rhead Enion, Note, *Constitutional Limits on Private Policing and the State's Allocation of Force*, 59 DUKE L.J. 519, 519, 548 (2009).

²⁶² See Rushin, *supra* note 82, at 198.

²⁶³ See Joh, *supra* note 45, at 585–97 (discussing broad range of private police work).

C. Applications

The remainder of this Article applies the lessons outlined above to two specific cases: (1) the role of community-based violence prevention organizations, and (2) law enforcement's access to private surveillance and the private data market.

1. Community-Based Violence Prevention Strategies

Understanding the symbiotic relationship between the public and private sectors should inform how communities implement violence prevention strategies, and the role of private actors in those strategies.

In a system where public and private are so intertwined, it is a mistake to think that violence prevention is solely the job of government or the police.²⁶⁴ Private individuals and entities are at the front line of violence and violence prevention. They are the perpetrators, survivors, and witnesses to crime. Community leaders play a key role in fostering cooperation with law enforcement, without which police would be largely powerless.²⁶⁵ More importantly, there is a growing

²⁶⁴ In fact, society might benefit if policymakers considered whether there are greater roles that non-state actors can play in seemingly “core” public areas, such as charging and sentencing decisions.

The traditional view is that making charging decisions is a core function of the public prosecutor. We have seen the consequences of this approach: overly harsh charging and sentencing decisions that fall on the most powerless segments of our society. *See, e.g.,* Simonson, *supra* note 108, at 253. But there is an alternative view beginning to emerge—a community-centered model of prosecution that asks what sort of charging and sentencing decisions are right for the local neighborhood or community. This model sees a decreased role for the public prosecutor and an increased role for hyper-local, non-governmental justice-focused programs. *Cf. Capers, supra* note 96, at 1586–87 (discussing the possibility of “using the public fisc . . . to also fund private prosecutions” and allowing victims to initiate prosecutions with judges and grand juries acting as gatekeepers); Simonson, *supra* note 108, at 256 (“This Essay is part of a larger vision of the importance of leaving the sphere of criminal law open to communal resistance and to agonistic participation—forms of direct participation that engage with powerful state institutions in a respectful but adversarial manner.”); Adriaan Lanni, Implementing the Neighborhood Grand Jury (“[P]ermitt[ing] local community members to play an active role in prosecutorial charging decisions and policies would help alleviate some of the political pathologies that have led to mass incarceration and the crisis of legitimacy.”), in *GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY* 171, 172 (Roger Anthony Fairfax, Jr. ed., 2011).

²⁶⁵ Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 *CRIME & JUST.* 283, 284 (2003) (“The police and courts depend upon public cooperation for their effectiveness. For example, the police need community help in identifying criminals and fighting crime.”); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 *OHIO ST. J. CRIM. L.* 231, 233 (2008) (“To be effective in lowering crime and creating secure communities, the police must be able to elicit cooperation from community residents. Security cannot be produced by either the police or community residents acting alone—it requires cooperation.”); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 *MICH. L. REV.* 567, 604 (2008) (“As the Los Angeles sanc-

body of evidence that violence prevention and alternative responder CBOs can have tremendous violence prevention benefits, without the punitive and carceral approach of law enforcement.²⁶⁶

But the flip side of the inseparability of public and private is that these CBOs cannot succeed on their own. Many of today's most promising interventions are not siloed from the public system. CAHOOTS, for example, still relies on the public emergency dispatch system to receive calls.²⁶⁷ Many violence interrupters are government funded.²⁶⁸ More fundamentally, there will always be situations that require the coercive power of the state—not as a first resort, but as the last. Violent individuals will need to be restrained; mental health interventions will be needed, some of them involuntary. Even summonses and desk appearance tickets eventually need to be enforced. This does not mean that law enforcement is the right *first* response, but it suggests that community-based alternatives must work in tandem with government.

Rather than seeking to excise public actors or private ones, violence prevention should involve a holistic strategy that brings together all of these disparate entities, including privately operated ones and the business community, to work toward a common goal.²⁶⁹

tuary order declares, "[t]he [LAPD] is sensitive to the principle that effective law enforcement depends on a high degree of cooperation between the Department and the public it serves." (quoting L.A., Cal., Chief of Police Special Order No. 4 (Nov. 27, 1979)); *see also supra* note 72 and accompanying text.

²⁶⁶ *See supra* notes 56, 62–66 and accompanying text (discussing various alternative responder models).

²⁶⁷ *See What Is Cahoots?*, WHITE BIRD CLINIC (Oct. 29, 2020), <https://whitebirdclinic.org/what-is-cahoots/> [<https://perma.cc/4RYM-W482>] ("CAHOOTS calls come to Eugene's 911 system or the police non-emergency number. Dispatchers are trained to recognize non-violent situations with a behavioral health component and route those calls to CAHOOTS."); *see also* BRIAN BLICK ET AL., STAR PROGRAM EVALUATION 1 (Jan. 8, 2021), https://wp-denver-ite.s3.amazonaws.com/wp-content/uploads/sites/4/2021/02/STAR_Pilot_6_Month_Evaluation_FINAL-REPORT.pdf [<https://perma.cc/6DQ4-6SVQ>] (discussing Denver's STAR program, a community response program developed after Eugene, Oregon's CAHOOTS program).

²⁶⁸ *See*, Press Release, White House Briefing Room, Fact Sheet: President Biden's Budget Invests in Reducing Gun Crime to Make Our Communities Safer (Mar. 28, 2022), <https://www.whitehouse.gov/omb/briefing-room/2022/03/28/fact-sheet-president-bidens-budget-invests-in-reducing-gun-crime-to-make-our-communities-safer/> [<https://perma.cc/DZE2-YXB2>] (proposing \$500 million for community violence intervention programs); *Governor Hochul Announces State Has Provided \$30 Million in Grants to Fight Gun Violence over Last Three Months*, N.Y. STATE, <https://www.governor.ny.gov/news/governor-hochul-announces-state-has-provided-30-million-grants-fight-gun-violence-over-last> [<https://perma.cc/VT6Y-3JB6>].

²⁶⁹ *See, e.g.*, MAYOR BRANDON M. SCOTT, BALTIMORE CITY COMPREHENSIVE VIOLENCE PREVENTION PLAN 19 (2021) (highlighting, among other things, a "focus on building capacity for

But while doing so, policymakers should be careful to ensure these private entities and CBOs do not operate unchecked and avoid the governance pitfalls discussed in Part II. First, the fact that an entity purports to represent “community” views, should not insulate it from meaningful public accountability. “Community,” after all, includes a multitude of views on crime and public safety and is no guarantee of positive outcomes.²⁷⁰ Second, policymakers and the public should require basic transparency and data collection. Doing so will not only facilitate public governance, but also allow meaningful assessment of the impact and efficacy of these approaches.²⁷¹ Third, there must be regulatory structures in place that provide legal accountability to deter, detect, and discipline misconduct. Regardless of the philosophy or ideology of the entity at issue, it would be naïve not to prepare for this possibility.²⁷² Fourth, even when it comes to com-

community-based organizations”), <https://mayor.baltimorecity.gov/sites/default/files/Mayor-Scott-ComprehensiveViolencePreventionPlan-1.pdf> [<https://perma.cc/5QQ5-YMFC>].

²⁷⁰ See John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711, 747–48 (2020); Robert Weisberg, *Restorative Justice and the Danger of “Community,”* 2003 UTAH L. REV. 343, 343; Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215, 238–239; see generally Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48 (2000) (discussing modern criminal procedure as a response to mob-dominated trials of African Americans in the early 20th century).

²⁷¹ See Editorial, *Are Any of Philly’s Anti-Violence Tactics Working? Without Better Tracking, We’ll Never Know.*, PHILA. INQUIRER (Nov. 30, 2021), <https://www.inquirer.com/opinion/editorials/record-number-of-homicides-in-philadelphia-20211130.html> [<https://perma.cc/TV25-VLVB>] (“An evaluation of the Community Crisis Intervention Program, the city’s violence interruption effort, has never been completed despite the program being in existence for years. Without an analysis of that crucial data, the truth is that city officials are responding to a crisis as if they’re wandering in the dark, hoping that our efforts work and assuming that without them, things would have been worse.”).

²⁷² See Gimbel & Muhammad, *supra* note 56, at 1529–30 (noting there have been allegations of criminal conduct against Cure Violence interrupters); Juliana Kim, *The Many Abuse Accusations Against a Housing Executive*, N.Y. TIMES (Feb. 10, 2021), <https://www.nytimes.com/2021/02/10/nyregion/rivera-abuse-allegations-new-york.html> [<https://perma.cc/X3K8-7UH4>] (detailing fraud and abuse allegations against housing nonprofit).

The Shomrim, a community patrol of individual from the Heredi Jewish community, have been accused of a range of misconduct—from discrimination to vigilantism. See, e.g., Stephen Averill Sherman, *Many Cities Are Rethinking the Police, but What Are the Alternatives?*, RICE KINDER INST. FOR URB. RSCH.: URB. EDGE (Jul. 22, 2020), <https://kinder.rice.edu/urbanedge/2020/07/22/many-cities-are-rethinking-police-what-are-alternatives> [<https://perma.cc/HD8P-KPR4>]; Adeoye Johnson, Comment, *Neighborhood Watch: Invading the Community, Evading Constitutional Limits*, 18 U. PA. J.L. & SOC. CHANGE 459, 459–61 (2016); Sarah M. Sternlieb, Comment, *When the Eyes and Ears Become an Arm of the State: The Danger of Privatization Through Government Funding of Insular Religious Groups*, 62 EMORY L.J. 1411, 1422–24 (2013).

George Zimmerman, a neighborhood watch volunteer, shot and killed Trayvon Martin, an unarmed black teenager, igniting a national debate about racial profiling. See Yamiche Alcindor, *Trial Turns to Zimmerman’s Neighborhood-Watch Role*, USA TODAY (June 25, 2013, 11:21 PM),

munity-based violence prevention strategies, policymakers should be wary of the distorting role of financial incentives. Requiring disclosure of funding sources, spending, and priorities is a start, but even non-profit social justice organizations can be coopted “to support the status quo and replace accountability to communities with accountability to wealthy donors and institutions.”²⁷³ Even government funding can come with strings that distort the underlying mission.²⁷⁴

In short, it makes sense for jurisdictions to deploy violence prevention strategies that include roles for private, community-based organizations, but before empowering these entities, policymakers should regulate in ways that address the governance difficulties that exist with much of privatization.

2. *Private Surveillance and the Private Data Market*

These same lessons apply to law enforcement’s reliance on private surveillance and privately held data.

Modern technology and big data have transformed the ways that law enforcement conducts criminal investigations.²⁷⁵ This transformation has given private companies an ever-expanding role.²⁷⁶ From the tech giants that transmit and store our communications,²⁷⁷ to data bro-

<https://www.usatoday.com/story/news/2013/06/25/zimmerman-trial-trayvon-neighborhood-watch/2455163/> [<https://perma.cc/AF7W-DEPZ>]; see also *supra* note 51 (discussing criticism of neighborhood watch associations).

²⁷³ Elana Redfiled, Pooja Gehi & Gabriel Arkles, *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. FOR SOC. JUST. 579, 600 (2010). For a discussion of the relationship between the political process, criminal justice reform, and interest groups, see generally Michael Haber, *CED After #OWS: From Community Economic Development to Anti-Authoritarian Community Counter-Institutions*, 43 FORDHAM URB. L.J. 295, 307–09 (2016); THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX (INCITE! ed., 2007); Alizabeth Newman, *Reflections on VAWA’s Strange Bedfellows: The Partnership Between the Battered Immigrant Women’s Movement and Law Enforcement*, 42 U. BALT. L. REV. 229, 251 (2013) (citing *id.* at 3).

²⁷⁴ On the possibility of coercion in restorative justice programs, see Hanan, *supra* note 57, at 132 (“This example highlights the problem of coercion in diversionary programs. The accused understands that she will be prosecuted if she cannot reach an agreement that is satisfactory to the complaining witness. The complaining witness may be able to use the threat of prosecution as leverage against the defendant. The accused is put in the position of capitulating with the demands of the complaining witness and, if she does not capitulate, the case will be prosecuted criminally.” (footnote omitted)); cf. Ric Simmons, *Private Plea Bargains*, 89 N.C. L. REV. 1125, 1127–28 (2011) (noting that threats of prosecution can be used to coerce private settlements).

²⁷⁵ See FERGUSON, *supra* note 53.

²⁷⁶ See Rozenshtein, *supra* note 86, at 105.

²⁷⁷ See Aliza Vigderman & Gabe Turner, *The Data Big Tech Companies Have on You*, SECURITY.ORG (Aug. 23, 2021), <https://www.security.org/resources/data-tech-companies-have/> [<https://perma.cc/E7ZZ-SARY>].

kers that aggregate public records into detailed dossiers,²⁷⁸ everyday decisions made by private companies—what data to collect, how frequently to delete data, or whether to oppose a government request for information—make or break criminal investigations and define many aspects of our rights and liberties.

Many scholars and advocates have raised important concerns about the dangers of law enforcement's access to troves of privately held data.²⁷⁹ By tapping into these reservoirs, law enforcement can obtain far more information about us than it could possibly capture directly, and it does so without many traditional constitutional safeguards.²⁸⁰ This expansive access presents grave risks to individual privacy and security against government overreach. History demonstrates that this overreach is likely to be directed toward the same racial and ethnic groups that traditionally bear the brunt of overpolicing.²⁸¹ There is also well-founded concern that these tools will be turned against journalists, political dissidents, and others expressing their First Amendment freedoms.²⁸²

But the solution is not to close off law enforcement from the private data market. First, such an approach is impractical. Law enforcement investigations have always depended on information from private actors. In an analog world, those sources were people (e.g., victims, witnesses, whistleblowers), but in an increasingly digital world, those sources are largely digital.

Second, there are potential benefits to requiring law enforcement to access sensitive data via private actors rather than operating its own

²⁷⁸ See Lauren Sarkesian & Spandana Singh, *How Data Brokers and Phone Apps Are Helping Police Surveil Citizens Without Warrants*, ISSUES IN SCI. & TECH. (Jan. 6, 2021), <https://issues.org/data-brokers-police-surveillance/> [<https://perma.cc/P9LB-25VZ>] (describing how data brokers collect our personal data and noting “government law enforcement agencies are rapidly becoming major buyers.”); Steven Melendez & Alex Pasternack, *Here Are the Data Brokers Quietly Buying and Selling Your Personal Information*, FAST CO. (Mar. 2, 2019), <https://www.fastcompany.com/90310803/here-are-the-data-brokers-quietly-buying-and-selling-your-personal-information> [<https://perma.cc/9KR6-3JZ3>].

²⁷⁹ E.g., BARRY FREIDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION, ch. 10 (2017).

²⁸⁰ See *id.* at 237 (“Under current Supreme Court decisions, virtually any information you provide to anyone is ‘voluntarily’ given and thus fair game for the government to grab.”); *supra* note 33; *infra* notes 291–292.

²⁸¹ See generally KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS (2017); RUHA BENJAMIN, RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE (2019).

²⁸² See, e.g., Complaint for Declaratory Judgment and Injunctive Relief, Farrell-Smith v. Oregon Dep’t of Just., No. 21-cv-47809 (Or. Cir. Ct. Dec. 14, 2021).

databases.²⁸³ When law enforcement maintains its own databases, there are few barriers to accessing the information. Querying a government-maintained warrant database, a DNA database, or a license-plate reader database, for example, does not require judicial authorization.²⁸⁴ When law enforcement has direct access to camera infrastructure, it can monitor the cameras in real time, run advanced analytics like facial recognition, and store the data indefinitely.²⁸⁵ The results of unfettered law enforcement access are well documented: officers access the data for personal purposes; racial, ethnic, and political minorities are disproportionately targeted; and so on.²⁸⁶ But when private entities are the data custodians, they can act in ways that create separation-of-powers protections that other branches of government have largely abdicated.²⁸⁷ Particularly since the Snowden NSA revelations, the largest technology companies have pushed back against law enforcement data requests.²⁸⁸ Apple famously opposed court orders to hack its iPhones in connection with the terrorist shooting in San Bernardino.²⁸⁹ Other companies require warrants rather

²⁸³ This Article focuses on one potential benefit, but there are others. *See, e.g.*, Farhang Heydari, *Understanding Police Reliance on Private Data*, HOOVER INST., Oct. 7, 2021, at 2.

²⁸⁴ *See* *United States v. Yang*, 958 F.3d 851, 858–9, 861–62 (9th Cir. 2020).

²⁸⁵ *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-105309, FACIAL RECOGNITION TECHNOLOGY: FEDERAL LAW ENFORCEMENT AGENCIES SHOULD HAVE BETTER AWARENESS OF SYSTEMS USED BY EMPLOYEES (2021).

²⁸⁶ *See* Associated Press, *Police Sometimes Misuse Confidential Work Databases for Personal Gain*, CBS NEWS (Sept. 30, 2016, 8:59 AM), <https://www.cbsnews.com/news/police-sometimes-misuse-confidential-work-databases-for-personal-gain-ap/> [<https://perma.cc/T3BB-BURW>].

²⁸⁷ *See* Heydari, *supra* note 283; *see also* Rozenshtein, *supra* note 86, at 105 (“By entrusting our data processing and communications to a handful of giant technology companies, we’ve created a new generation of *surveillance intermediaries*: large, powerful companies that stand between the government and our data and, in the process, help constrain government surveillance.”).

²⁸⁸ Scott Shackford, *5 Years After Snowden, Has Anything Changed?*, REASON (June 6, 2018, 8:30 AM), <https://reason.com/2018/06/06/5-years-after-snowden-has-anything-chang/> [<https://perma.cc/BTB7-BWUB>].

²⁸⁹ Apple Inc.’s Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search, and Opposition to Government’s Motion to Compel Assistance, *In re* Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, Cal. License Plate 35KGD203, No. 5:16-CM-00010-SP (C.D. Cal. Feb. 25, 2016), 2016 WL 2771267.

than turning over customer data via subpoena.²⁹⁰ Microsoft challenges secrecy orders attached to search warrants.²⁹¹

Given the impracticability and undesirability of cutting off law enforcement from access to privately held data, policymakers must find ways to regulate law enforcement access so as to capture the potential benefits while addressing the governance difficulties. This means ensuring democratic accountability, transparency, legal accountability, and mitigating perverse financial incentives.

One key will be addressing gaps in existing legal accountability, particularly the Fourth Amendment's inapplicability to police reliance on the private data market.²⁹² Why would law enforcement not tap into ancestry-DNA websites when access is largely unregulated? Why obtain a warrant to attach a GPS to a suspect's vehicle if you can instead purchase location data or obtain access to private surveillance devices like Automatic License Plate Readers ("ALPRs"), neither of which require a warrant?²⁹³

Regulatory approaches are emerging to close these loopholes. Maryland and Montana recently enacted legislation to govern law enforcement use of forensic genetic genealogy searching via companies like Ancestry, 23andMe, GEDMatch, and FamilyTreeDNA.²⁹⁴ Utah

²⁹⁰ Ring, for example, requires formal legal process or certain exigent circumstances before turning over customer videos. See *Ring Law Enforcement Guidelines*, RING, <https://support.ring.com/hc/en-us/articles/360001318523-Ring-Law-Enforcement-Guidelines> [https://perma.cc/SL2Q-YBXH].

²⁹¹ See, e.g., First Amended Complaint for Declaratory Judgment, *Microsoft Corp. v. U.S. Dep't of Just.*, 233 F. Supp. 3d 887 (W.D. Wash. 2017) (No. 2:16-cv-00538).

²⁹² Cf. Ric Simmons, *From Katz to Kyllo: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 HASTINGS L.J. 1303, 1306 (2002) (arguing that courts should focus on "only the *result* of the search—the type of information that was acquired"). Utah, for example, has moved to legislatively limit aspects of the third-party doctrine. See generally H.B. 57, 2019 Leg., Gen. Sess. (Utah 2019) (requiring law enforcement obtain a warrant for location information, whether obtained directly by law enforcement or indirectly via private third parties).

²⁹³ See Orin S. Kerr, *Buying Data and the Fourth Amendment*, HOOVER INST., Nov. 17, 2021, at 11.

On ALPRs, see generally AXON AI & POLICING TECH. ETHICS BD., *AUTOMATED LICENSE PLATE READERS* (2019).

²⁹⁴ See Jennifer Lynch, *Modern-Day General Warrants and the Challenge of Protecting Third-Party Privacy Rights in Mass, Suspicionless Searches of Consumer Databases*, HOOVER INST., Sept. 23, 2021; Virginia Hughes, *Two New Laws Restrict Police Use of DNA Search Method*, N.Y. TIMES (May 31, 2021), <https://www.nytimes.com/2021/05/31/science/dna-police-laws.html> [https://perma.cc/2QE5-G8VN]; see also Sonia M. Suter, Erin E. Murphy & Natalie Ram, Opinion, *Maryland Can Be a Model for Regulating Law Enforcement Use of Genetic Databases*, WASH. POST (June 18, 2021, 2:00 PM), <https://www.washingtonpost.com/opinions/2021/06/18/maryland-genetic-databases-law-enforcement-regulation-model/> [https://perma.cc/ZEQ2-RPAA].

law bars government entities from using privately captured ALPR data without a warrant or court order, unless the private entity meets certain requirements.²⁹⁵ Many jurisdictions have taken a parity-focused approach to eavesdropping.²⁹⁶ A bipartisan group of senators recently proposed the Fourth Amendment is Not for Sale Act to close the data-broker loophole to the warrant requirement.²⁹⁷

Whenever private actors are involved, governance questions should be at the fore. Law enforcement's reliance on private surveillance and access to privately held data is no exception. But just as it is impossible to excise private influence from the criminal system writ large, so too would it be impossible to cut off law enforcement's access to private data. Instead, what is required is a parity-focused approach—one that does not unduly focus on the public/private line, but instead brings accountability and transparency through regulation.

CONCLUSION

The harms of the criminal system require a renewed policymaking focus. But if we are to capitalize on current momentum to transform our criminal system, we need a fuller understanding of the true scope of private influence. Regulators must appreciate how thoroughly intertwined the public and private spheres are, they must embrace it, and they must build regulatory schemes that account for it. These lessons are as relevant for traditional reformers as they are for defunders and abolitionists; they apply with force to the use of new technologies and big data, as well as to reliance on community-based interventions. This approach offers a path to transforming a system that has failed so many for too long.

²⁹⁵ UTAH CODE ANN. § 41-6A-2005(4) (West 2014).

²⁹⁶ See, e.g., JAMES G. CARR, PATRICIA L. BELLIA & EVAN A. CREUTZ, *LAW OF ELECTRONIC SURVEILLANCE* § 3:69 (2021) (discussing Title III's application to private eavesdropping); Laura K. Donohue, *Technological Leap, Statutory Gap, and Constitutional Abyss: Remote Biometric Identification Comes of Age*, 97 MINN. L. REV. 407, 490 (2012) ("Title III reached beyond Section 605 to govern federal and state officials, as well as private actors."); CAL. PENAL CODE §§ 631–32 (West 2011); MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(3) (West 2019).

²⁹⁷ Press Release, Sen. Ron Wyden, Wyden, Paul and Bipartisan Members of Congress Introduce the Fourth Amendment Is Not for Sale Act (Apr. 21, 2021), <https://www.wyden.senate.gov/news/press-releases/wyden-paul-and-bipartisan-members-of-congress-introduce-the-fourth-amendment-is-not-for-sale-act-> [https://perma.cc/E3H4-4ZPZ] ("This bill closes that legal loophole and ensures that the government can't use its credit card to end-run the Fourth Amendment.").

NOTE

Presidents Trumping the Courts: Considering Alternatives to the President as Judicial Nominator

*Steven Hess**

ABSTRACT

Judges are the lifeblood of constitutional order, and their independence is paramount to the rule of law. In light of the politicization of judicial appointments, it is worth asking if the American constitutional design of 1787 continues to safeguard judicial independence. The Framers designed an appointment system that split the appointment procedure between the President and the Senate to maintain judicial independence. The President has the power of nomination, and the Senate has the power to confirm nominees. This Note focuses on the President's power to nominate. Seismic changes to the political system, and to the President's constitutional power, have undermined judicial independence and subjected the judiciary to salient presidential bias. Given both political and legal shifts, the nomination process should be vested in the Speaker of the House, a democratic representative more directly accountable to the people.

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INTRODUCTION

Speaking to reporters, President Trump prophesized about the 2020 election: “I think this will end up in the Supreme Court, and I think it’s very important that we have nine Justices.”¹ This pronouncement came less than two months before the election, and immediately following Justice Ruth Bader Ginsburg’s death.² The President hur-

¹ David Jackson & Joey Garrison, *Trump Says He Wants to Fill Supreme Court Seat Quickly in Case Justices Need to Settle Election Dispute*, USA TODAY (Sept. 24, 2020, 5:57 PM) (quoting Donald Trump, President, Statement to Reporters), <https://www.usatoday.com/story/news/politics/elections/2020/09/23/trump-need-fill-supreme-court-seat-quickly-because-election/3501368001/> [https://perma.cc/9CX9-P8QL].

² See Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NPR (Sept. 18, 2020, 7:28 PM), <https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87> [https://perma.cc/FE2S-EV2Z].

riedly sought a replacement,³ and the Senate majority leader made clear that any nominee would be confirmed on the President's timetable.⁴ After confirming Justice Barrett, Trump lost the election by a clear margin.⁵ Faced with defeat, the President bucked democratic norms and filed lawsuits across the nation to overturn the election.⁶ As part of this effort, the state of Texas brought suit against key swing states, arguing that those states' internal election laws were unconstitutional.⁷ Texas's junior senator, Ted Cruz, volunteered to argue the case before the Court on the President's behalf.⁸ President Trump broadcasted the case to his supporters, stating "[w]e will be INTERVENING in the Texas (plus many other states) case. This is the big one. Our Country needs a victory!"⁹

The Supreme Court ultimately rejected the Texas lawsuit,¹⁰ and the courts around the country denied the campaign's other judicial challenges.¹¹ Nevertheless, the saga demonstrates the powerful role

³ See Jessica Schneider, *Trump Offered Amy Coney Barrett the SCOTUS Job Less than 72 Hours After Ginsburg's Death*, CNN (Sept. 29, 2020, 8:51 PM), <https://www.cnn.com/2020/09/29/politics/barrett-trump-questionnaire/index.html> [https://perma.cc/YW5M-2BHM].

⁴ See Katie Wadington, *Then and Now: What McConnell, Others Said About Merrick Garland in 2016 vs. After Ginsburg's Death*, USA TODAY (Sept. 19, 2020, 2:41 PM), <https://www.usatoday.com/story/news/politics/2020/09/19/what-mcconnell-said-merrick-garland-vs-after-ginsburgs-death/5837543002/> [https://perma.cc/9J3R-XYP3].

⁵ See Jason Lange & Doina Chiacu, *Georgia, Wisconsin Recounts Likely Will Not Change Trump Election Defeat, Officials Say*, REUTERS (Nov. 18, 2020, 12:15 AM), <https://www.reuters.com/article/us-usa-election/georgia-wisconsin-recounts-likely-will-not-change-trump-election-defeat-officials-say-idUSKBN27Y0G6> [https://perma.cc/H3QU-6MMS].

⁶ See Anita Kumar & Gabby Orr, *Inside Trump's Pressure Campaign to Overturn the Election*, POLITICO (Dec. 21, 2020, 4:30 AM), <https://www.politico.com/news/2020/12/21/trump-pressure-campaign-overturn-election-449486> [https://perma.cc/K8T9-QAFB].

⁷ Lawrence Hurley, *U.S. Supreme Court Swiftly Ends Trump-Backed Texas Bid to Upend Election Results*, REUTERS (Dec. 11, 2020, 6:40 PM), <https://www.reuters.com/article/us-usa-election-trump/u-s-supreme-court-swiftly-ends-trump-backed-texas-bid-to-upend-election-results-idUSKBN28L2YY> [https://perma.cc/EL9H-N6FE].

⁸ Elizabeth Thompson, *Ted Cruz Blasted for Agreeing to Argue Texas Lawsuit to Overturn the Presidential Election*, DALL. MORNING NEWS, (Dec. 10, 2020, 5:10 PM), <https://www.dallasnews.com/news/politics/2020/12/10/ted-cruz-blasted-for-agreeing-to-argue-texas-law-suit-to-overturn-the-presidential-election/> [https://perma.cc/334D-JQKG].

⁹ Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 9, 2020), <https://twitter.com/realDonaldTrump/> [https://perma.cc/P598-TUFY]. This tweet has since been removed. For reference to this tweet, see Brett Samuels, *Trump Says He Will Intervene in Texas Election Lawsuit*, HILL (Dec. 9, 2020, 9:50 AM), <https://thehill.com/homenews/administration/529408-trump-says-he-will-intervene-in-texas-election-lawsuit> [https://perma.cc/S8X5-CMAC].

¹⁰ *Texas v. Pennsylvania*, 592 U.S. 155 (2020).

¹¹ Jacob Shamsian & Sonam Sheth, *Trump and His Allies Filed More than 40 Lawsuits Challenging the 2020 Election Results. All of Them Failed.*, BUS. INSIDER (Feb. 22, 2021, 5:03 PM), <https://www.businessinsider.com/trump-campaign-lawsuits-election-results-2020-11> [https://perma.cc/8MXX-MHRX].

courts play in modern politics. During Justice Barrett's appointment proceedings, for example, many Democrats argued that if they won the election, they should ignore established norms and "pack" the Supreme Court.¹² Then-presidential candidate Joe Biden was dragged into the controversy but remained elusive about his intentions.¹³

It is hard to blame Presidents for exploiting their nomination power. Since *Bush v. Gore*,¹⁴ where the Supreme Court effectively decided the presidential election in a 5–4 decision, the Court has struck down portions of the Voting Rights Act,¹⁵ found action on political gerrymandering to be an unreviewable political question,¹⁶ and decided "an unprecedented wave of election litigation" brought about because of the COVID-19 pandemic.¹⁷ As Trump observed, "[t]he stakes for our country are incredibly high. Rulings that the Supreme Court will issue in the coming years will decide the survival of our Second Amendment, our religious liberty, our public safety and so much more."¹⁸

This Note argues that the federal appointment system is outdated and focuses on the judicial nomination process. Part I discusses the history of judicial appointments in the United States from the colonial era to the twentieth century. Part II critiques the President's power of nomination, arguing that the power allows the President to trump the Senate's advice and consent role, and exert outsized influence on the judiciary. Finally, Part III argues that the United States should vest the judicial nomination power in the Speaker of the House. Her office combines the same advantages as the President and is simultaneously more representative and democratically accountable.

¹² See, e.g., Paul Waldman, *There's No More Doubt: Democrats Have to Expand the Supreme Court*, WASH. POST (Oct. 27, 2020, 12:56 PM), <https://www.washingtonpost.com/opinions/2020/10/27/theres-no-more-doubt-democrats-have-expand-supreme-court/> [https://perma.cc/BT4D-EX3L].

¹³ See Charlie Savage & Katie Glueck, *Biden Punts on Expanding the Supreme Court, Calling for a Panel to Study Changes*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2020/10/22/us/politics/biden-supreme-court-packing.html> [https://perma.cc/FM62-8FFJ].

¹⁴ 531 U.S. 98 (2000).

¹⁵ *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

¹⁶ *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

¹⁷ Lila Hassan & Dan Gluan, *COVID-19 and the Most Litigated Presidential Election in Recent U.S. History: How the Lawsuits Break Down*, PBS (Oct. 28, 2020), <https://www.pbs.org/wgbh/frontline/article/covid-19-most-litigated-presidential-election-in-recent-us-history/> [https://perma.cc/KBC6-U5NG].

¹⁸ Grace Segers, *Trump Names Amy Coney Barrett as His Supreme Court Nominee*, CBS NEWS (Sept. 26, 2020, 9:24 PM), <https://www.cbsnews.com/news/amy-coney-barrett-acceptance-speech-donald-trump-white-house/> [https://perma.cc/Q2TA-6JHZ].

I. HISTORY OF AMERICAN JUDICIAL APPOINTMENTS

This Part addresses the history of judicial appointments to demonstrate how, and why, the constitutional appointment system is intertwined with the separation of powers. Section I.A discusses appointments prior to the enactment of the Constitution and reviews the drafting of the Appointments Clause. Section I.B examines the Constitution's textual commitment to the separation of powers. Finally, Section I.C concludes by discussing the practice of appointments in the first century of the United States. This Part demonstrates that although the Framers broke with tradition to create a new system of separation of powers, that system is still bound by political party dynamics. When political conditions are favorable, the system works as intended. When conditions are poor, the system breaks.

A. *Early Judicial Systems and the Constitutional Convention*

In contrast to the modern written Constitution, colonial America had no uniform system of laws.¹⁹ Governors acted as judges and dealt with issues on an ad-hoc basis.²⁰ In the odd cases where judges were appointed, they were removable at-will by the governor.²¹ As legislatures formed, and the Crown's interests waned, the colonists took a confrontational and active role in establishing a system based on the rule of law and rooted in a separation of powers.²² The first attempt at a lasting constitution following the revolution, the Articles of Confederation ("Articles"), limited the judiciary by allowing for only two federal courts.²³ First, Congress alone could "appoint[] courts for the trial of piracies and felonies committed on the high seas . . . provided that no member of congress shall be appointed a judge of any of the said courts."²⁴ Second, in disputes between two or more states, Congress was the "last resort on appeal," and would "name three persons out of each of the united states" to preside.²⁵ Congress was the only national

¹⁹ See Erwin C. Surrency, *The Courts in the American Colonies*, 11 AM. J. LEGAL HIST. 253, 253 (1967).

²⁰ *Id.* at 257–58, 268.

²¹ See *id.* at 369.

²² See Scott D. Gerber, *The Origins of an Independent Judiciary in North Carolina, 1663–1787*, 87 N.C. L. REV. 1771, 1771 (2009) (noting that there was "almost continuous conflict between the executive and the assembly over control of the courts, and the political theorizing that suggested a solution to that conflict, directly influenced the nature of the judicial institution").

²³ ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 1.

²⁴ *Id.*

²⁵ *Id.* para. 2. The Articles included an extensive procedure for narrowing the size of the

entity responsible for appointments, and its members could serve as judges in disputes between states.²⁶

While the United States muddled its way to independence, the Articles failed to provide a strong central government able to mediate disputes.²⁷ To remedy this inadequacy, wealthy aristocrats called the Constitutional Convention.²⁸ Most delegates could be classified as “Whigs,” who believed in private enterprise and representative government.²⁹ A smaller but important faction believed that a limited monarchy would be the proper form of administration.³⁰ Those members of the Convention argued that an “energetic” executive branch would be able to address the nation’s problems without being beholden to political faction.³¹

The Virginian delegates circulated their conception of a new constitution, known as the Virginia Plan.³² It would establish a national legislature with a lower chamber selected by “the people of the several States.”³³ This chamber would then select members for the upper chamber,³⁴ and the national legislature would select a national executive to a single, non-renewable term.³⁵ There would also be “one or

Court. It is worth noting that this formal process was only used once. See Robert J. Taylor, *Trial at Trenton*, 26 WM. & MARY Q. 521, 521 (1969).

²⁶ See ARTICLES OF CONFEDERATION OF 1781, art. IX, paras. 1, 2.

²⁷ See *Vices of the Political System of the United States, April 1787*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-09-02-0187> [https://perma.cc/VAS7-92SV]. For a discussion of the Articles’ shortcomings, see generally KEITH L. DOUGHERTY, *COLLECTIVE ACTION UNDER THE ARTICLES OF CONFEDERATION* (2001) (detailing various issues with the weak central government, including an inability to collect taxes and raise a military).

²⁸ CHARLES COLEMAN THATCH JR., *THE CREATION OF THE PRESIDENCY* 20–21 (1969).

²⁹ See ERIC NELSON, *THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING* 15–16 (2014).

³⁰ See *id.* at 69–70.

³¹ Hamilton explained this concept as:

[Energy] is essential to the protection of the community against foreign attacks: It is not less essential to the steady administration of the laws, to the protection of property against those irregular and high handed combinations, which sometimes interrupt the ordinary course of justice, to the security of liberty against the enterprises and assaults of ambition, of faction and of anarchy. . . . The ingredients, which constitute energy in the executive, are first unity; secondly duration; thirdly an adequate provision for its support, fourthly competent powers.

THE FEDERALIST NO. 70, at 471–72 (Alexander Hamilton) (Jacob Ernest Cooke ed., 1961).

³² The purpose of the plan was originally to gauge the disposition of the various delegates to reform. See MARY SARAH BILDER, *MADISON’S HAND* 43 (2015).

³³ THE VIRGINIA PLAN, art. 4, https://www.senate.gov/civics/common/generic/Virginia_Plan_item.htm [https://perma.cc/35GE-53Z4].

³⁴ See *id.* art. 5.

³⁵ See *id.* art. 7.

more supreme tribunals, and[] inferior tribunals to be chosen by the National Legislature.”³⁶ The judiciary would “hold their offices during good behaviour; and . . . receive punctually at stated times fixed compensation.”³⁷ Although unfinished, the Virginia Plan laid the foundation for debates with a clear vision of a popularly elected legislature as the wellspring of authority, delegating executive and judicial functions to coordinate, separate branches.³⁸

The debates at the Convention whittled away the Virginia plan and separated power from the legislature. Some argued that “numerous bodies” would fail to make proper appointments because of “[i]ntrigue, partiality, and concealment.”³⁹ James Madison, the chief architect of the Constitution,⁴⁰ and others responded that the small and limited Senate would be “sufficiently stable and independent to follow their deliberate judgments.”⁴¹ Indeed, early in the Convention, the delegates unanimously approved a plan for the Senate to unilaterally appoint judges.⁴² The small states later undermined this consensus, however, when they forced an agreement to give states equal representation in the Senate.⁴³ Some members of the larger states, who had supported appointment of judges by the Senate, no longer felt they could support the original plan.⁴⁴ For days, the delegates to the Convention argued whether appointment by the Senate or the President would better reflect the separation of powers and popular sentiment.⁴⁵ But the power of appointment remained with the Senate until Whigs and Monarchists radically altered the text in a compromise behind closed doors.⁴⁶ The President would be selected by the Electoral College, not by the legislature.⁴⁷ Judges would be nominated

³⁶ *Id.* art. 9.

³⁷ *Id.* art. 9.

³⁸ Madison, one of the chief authors, saw the judiciary and the executive as having similar roles. Both acted merely to execute the orders of the legislature. The difference between them lay primarily in that the executive had responsibility for the collective interest and had more latitude to accomplish its goals. See JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 311–13 (Adrienne Koch ed., 1966).

³⁹ *Id.* at 67.

⁴⁰ Madison’s work during the Convention has led him to be known as the “Father of the Constitution.” *Who’s the Father of the Constitution?*, LIBR. OF CONG., <https://www.loc.gov/wiseguide/may05/constitution.html> [<https://perma.cc/7JK3-MTEK>].

⁴¹ MADISON, *supra* note 38, at 68.

⁴² See *id.* at 112–15.

⁴³ See *id.* at 253–56.

⁴⁴ See *id.* at 314–17.

⁴⁵ See *id.* at 297–336.

⁴⁶ See BILDER, *supra* note 32, at 211–12.

⁴⁷ See Madison, *supra* note 38, at 573–79.

by the President, with advice and consent of the Senate, instead of by the Senate alone.⁴⁸

B. The Appointments Clause and the Separation of Powers

The Constitution does not have only one strategy for dividing power, but rather “enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”⁴⁹ The independence of the judiciary from the executive exemplifies this dual strategy of “both separate and shared powers.”⁵⁰ First, the Framers divided the appointment power and shared it between the executive and legislative branches.⁵¹ Second, they created structural safeguards in the judiciary to protect its independence.⁵² The process for judicial appointment is found in Article II, section II:

[The President] shall have Power, . . . [to] nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law ⁵³

Contrast this language with the first section of Article II, which vests “the executive Power” in the President.⁵⁴ Section II’s first words do not say that the President shall have “*the sole* power” or shall have “*the* power.”⁵⁵ Rather, these first words foreshadow that the power vested in this clause is shared.

Article II limits the President’s control of the judiciary by dividing the appointment power. Section II states that the President may nominate, “and by and with Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States. . . .”⁵⁶ Judges, being either of the Supreme Court or principal officers,⁵⁷ are *nominated* by the President, and *confirmed* by

⁴⁸ See *id.*

⁴⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

⁵⁰ MICHELLE BELCO & BRANDON ROTTINGHAUS, *THE DUAL EXECUTIVE: UNILATERAL ORDERS IN A SEPARATED AND SHARED POWER SYSTEM* 6 (2017).

⁵¹ See U.S. CONST. art. II, § 2.

⁵² See *id.* art. III, § 1.

⁵³ *Id.* art. II, § 2.

⁵⁴ *Id.* art. II, § 1.

⁵⁵ See *id.* art. II, § 2.

⁵⁶ See *id.*

⁵⁷ See *Buckley v. Valeo*, 424 U.S. 1, 125–27 (1976).

the Senate.⁵⁸ Although the appointment power is shared, the individual responsibilities of the branches are held to the exclusion of other actors.⁵⁹ The Senate may not coerce the President into exercising his nomination power.⁶⁰ And since the founding of the Republic, courts have refused to second-guess the President or the Senate's choices, because "[t]he power of nominating . . . and the power of appointing the person nominated, are political powers."⁶¹ Because the Senate has sole discretion over the confirmation power, it may deny the President's nominee indefinitely.⁶² Even without holding a vote, the Senate may obstruct the nominee through "senatorial courtesy, filibuster, indefinite senatorial holds on nominees, informal private meetings between senators and nominees, public confirmation hearings, and . . . the Senate Judiciary Committee."⁶³ When the President and a majority of the Senate are of different parties, this power is used to incredible effect.⁶⁴

Article III separates the judicial power from the political branches. The judiciary was "designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government."⁶⁵ Specifically, the Constitution states:

⁵⁸ Some scholars argue that the advice and consent function should be read as not requiring an affirmative vote; that if enough time has passed, the President's nominee is approved. See generally Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940 (2013). Although that article advocated against extending this change to judicial nominees, the logic could easily be extended to judicial nominees. See *id.* at 973–74.

⁵⁹ See Michael J. Gerhardt & Michael Ashley Stein, *The Politics of Early Justice: Federal Judicial Selection 1789–1861*, 100 IOWA L. REV. 551, 564 (2015).

⁶⁰ See *Orloff v. Willoughy*, 345 U.S. 83, 90 (1953); *Keim v. United States*, 177 U.S. 290, 293 (1900).

⁶¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 167 (1803).

⁶² See, e.g., Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NPR (June 29, 2018, 5:00 AM), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now> [<https://perma.cc/Z574-FGCJ>].

⁶³ Jason Eric Sharp, *Constitutional Law—Separation of Powers—Restoring the Constitutional Formula to the Federal Judicial Appointment Process: Taking the Vice Out of “Advice and Consent,”* 26 U. ARK. LITTLE ROCK L. REV. 747, 754 (2004).

⁶⁴ See, e.g., Christopher Wolfe, *The Senate's Power to Give “Advice and Consent” in Judicial Appointments*, 82 MARQ. L. REV. 355, 362–64 (1999). In 1987, President Reagan nominated Judge Bork to the Supreme Court. See *id.* at 362. The newly elected Democrat majority in the Senate held lengthy hearings that, along with other factors, plummeted Bork's favorability. See *id.* The Senate rejected Bork, as well as Reagan's following nomination. See *id.* Virtually no judges were rejected from 1894–1968 during which Presidents almost never faced a majority opposition in the Senate. See *id.* at 361.

⁶⁵ *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955).

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.⁶⁶

In contrast to the appointment power, “[t]he” judicial power is vested in the courts.⁶⁷ The text thus makes clear its purpose of separated branches.⁶⁸ But more than merely asserting that the judiciary is an independent institution, Article III seeks to guarantee independence through formal mechanisms.⁶⁹ First, the Constitution precludes the legislature from diminishing wages of federal judges.⁷⁰ Hamilton, who played a key role in convincing New York to accede to the Constitution by writing the *Federalist Papers*,⁷¹ argued that “power over a man’s subsistence amounts to a power over his will.”⁷² Whether or not this proposition is entirely true, the Supreme Court has acknowledged that “control over the tenure and compensation of judges is incompatible with a truly independent judiciary, free of improper influence from other forces within government.”⁷³

Second, the Framers created an extremely limited removal mechanism to foster judicial independence. The only constitutionally prescribed method for removal is through Article I,⁷⁴ giving the House “sole Power of Impeachment,”⁷⁵ and the Senate “the sole Power to try all Impeachments” with the “[c]oncurrence of two thirds of the Members present.”⁷⁶ Indeed, the Framers heavily debated the method of

⁶⁶ U.S. CONST. art. III, § 1.

⁶⁷ Compare U.S. CONST. art. III, § 1, with *id.* art. II, § 2, cl. 2.

⁶⁸ See *id.* art. III, § 1.

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ *Federalist Papers: Primary Documents in American History*, LIBR. OF CONG., <https://guides.loc.gov/federalist-papers/full-text> [<https://perma.cc/9N3L-QA5F>].

⁷² THE FEDERALIST NO. 79, at 398 (Alexander Hamilton) (Ian Shapiro ed., 2009) (emphasis omitted).

⁷³ See *United States v. Will*, 449 U.S. 200, 218 (1980); see also *id.* at 217–21 (reviewing the history of the compensation clause and its importance for judicial independence); Linda Greenhouse, *Chief Justice Advocates Higher Pay for Judiciary*, N.Y. TIMES (Jan. 1, 2007), <https://www.nytimes.com/2007/01/01/us/01scotus.html> [<https://perma.cc/M563-YBVG>] (noting that Chief Justice Roberts has advocated for increased pay to the judiciary to ensure an independent and well-staffed judiciary).

⁷⁴ See *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955).

⁷⁵ U.S. CONST. art. I, § 2.

⁷⁶ *Id.* § 3.

impeachment and removal.⁷⁷ A more lenient removal power “would either not be practiced upon or would be more liable to abuse than calculated to answer any good purpose.”⁷⁸ History demonstrates that this process is rare and onerous: only fifteen judges have been impeached, and only eight have been removed.⁷⁹

C. *Judicial Appointments: 1789–1900*

The appointment of judges revolves around political parties, despite the Framers’ hopes that such parties would be left behind as an unfortunate vestige of the monarchical system.⁸⁰ Madison argued that the greatest advantage of the Constitution was “its tendency to break and control the violence of faction.”⁸¹ President Washington warned that “the common and continual mischiefs of the spirit of Party are sufficient to make it the interest and the duty of a wise People to discourage and restrain it.”⁸² It is ironic, then, that Washington heralded a Federalist administration.⁸³ During Washington’s first term, the Federalist party occupied a majority of House seats.⁸⁴ More importantly for judicial appointments, the Federalist party controlled a majority of the Senate throughout Washington’s entire administration,⁸⁵ and from 1789–1791 and 1795–1797, Federalists controlled a supermajority of this chamber.⁸⁶ This majority acted quickly to dominate the halls of government: Congress passed the Judiciary Act of 1789⁸⁷ and Washington nominated Federalists for every judicial position,⁸⁸ each con-

⁷⁷ For a discussion of the debate between the Framers regarding the wording of the impeachment and removal provisions, see *Nixon v. United States*, 506 U.S. 224, 233–35 (1993).

⁷⁸ THE FEDERALIST NO. 79, *supra* note 72, at 399 (Alexander Hamilton).

⁷⁹ *Judges and Judicial Administration—Journalist’s Guide*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/judges-and-judicial-administration-journalists-guide> [https://perma.cc/C9G2-Y28L].

⁸⁰ See RON CHERNOW, ALEXANDER HAMILTON 390 (2004).

⁸¹ THE FEDERALIST NO. 10, *supra* note 72, at 47 (James Madison) (Ian Shapiro ed., 2009).

⁸² *Farewell Address, 19 September 1796*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/05-20-02-0440-0002> [https://perma.cc/JP95-ZXYR].

⁸³ See Gerhardts & Stein, *supra* note 59, at 564.

⁸⁴ See *Party Division of the House of Representatives, 1789 to Present*, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Party-Divisions/Party-Divisions/> [https://perma.cc/AGB8-KT3B].

⁸⁵ See *Party Division*, U.S. SENATE, https://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm [https://perma.cc/RXS6-QGV2].

⁸⁶ See *id.*

⁸⁷ ch. 20, 1 Stat. 73 (codified as amended in scattered sections of 28 U.S.C.).

⁸⁸ See Gerhardts & Stein, *supra* note 59, at 565–66.

firmed by the Federalist-controlled Senate within two days.⁸⁹ This pattern continued until the Federalists lost control of government, at which point they attempted to pack the judiciary to frustrate their political foes.⁹⁰

Judicial appointments were relatively streamlined during the nineteenth century because the President and Senate were generally of the same party.⁹¹ But the appointment system did break down on the rare occasions where this unity was not established.⁹² Appointments were partisan: almost every nomination to the Supreme Court was from the same party of the President,⁹³ and the Senate confirmation vote almost always broke down along partisan lines.⁹⁴ When the Senate was controlled by a different party than the President, the system failed. In the last year of the John Quincy Adams presidency, for example, the Jacksonian Senate refused to confirm Adams's qualified nominees.⁹⁵ Similarly, John Tyler's shift from the Democratic party to the Whig party left him with no political allies in the Senate when he assumed the presidency after Harrison's death.⁹⁶ Without political friends, he nominated true friends over the traditional party insiders.⁹⁷ It took him nine attempts to fill a Supreme Court seat.⁹⁸ Nevertheless, from 1789 to 1900, there were only twenty-two years in which the same party did not control both the presidency and the Senate, making the confirmation process relatively streamlined.⁹⁹

⁸⁹ See Richard S. Arnold, *Judicial Politics Under President Washington*, 38 ARIZ. L. REV. 473, 477 (1996).

⁹⁰ See Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 477 (2018). This action ignited a constitutional crisis in which Democratic-Republicans sought to eliminate the positions of new judges. See *id.* Federalists argued that this would violate the constitutional separation of powers. See *id.* In the end, the Supreme Court held that the offices of the judiciary could be eliminated by a Democratic-Republican passed statute, thereby removing those judges. See *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803).

⁹¹ See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENT PROCESS* 55–56 (2000).

⁹² See *id.*

⁹³ Only three of fifty-eight nominees were not from the same party. *Id.*

⁹⁴ See Gerhardt & Stein, *supra* note 59, at 554.

⁹⁵ See *id.* at 579–80.

⁹⁶ See *id.* at 587.

⁹⁷ See *id.*

⁹⁸ See *id.*

⁹⁹ Compare *Party Division*, *supra* note 85, with *United States Presidential Election Results*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/United-States-Presidential-Election-Results-1788863> [<https://perma.cc/A653-EH7G>].

II. SEPARATION OF POWERS AND APPOINTMENTS IN THE MODERN ERA

The Constitution's text and relevant caselaw make evident that "[t]he principle of separation of powers is embedded in the Appointments Clause."¹⁰⁰ The Framers sought to create a government of independent branches to prevent "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective."¹⁰¹ By creating such divisions, the hope was that "[a]mbition [would] be made to counteract ambition."¹⁰² Each branch of government would jealously guard their interests and covet the powers of the other branches.¹⁰³ Indeed, the authors of the Constitution anticipated that this political dynamic would create "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."¹⁰⁴

The method of selecting the President plays a critical role in how he exercises the power of nominations.¹⁰⁵ Historically, party figures selected candidates that they believed matched their party's beliefs, and that were broadly popular.¹⁰⁶ Today, however, the selection process "is one of the most complex, lengthy, and expensive in the world."¹⁰⁷ Although the party still retains a role in the process,¹⁰⁸ outside money, individualistic campaigns, new media, and the ability to win nominations through strong factional support have substantially undermined the party's role.¹⁰⁹ A nominee may be thrown into

¹⁰⁰ Freytag v. Comm'r., 501 U.S. 868, 882 (1991).

¹⁰¹ THE FEDERALIST NO. 47, *supra* note 72, at 245 (James Madison).

¹⁰² THE FEDERALIST NO. 51, *supra* note 72, at 264 (James Madison).

¹⁰³ *See id.*

¹⁰⁴ Buckley v. Valeo, 424 U.S. 1, 122 (1976).

¹⁰⁵ *See generally* Jonathan Masters & Gopal Ratnam, *The U.S. Presidential Nominating Process*, COUNCIL ON FOREIGN RELS. (Jan. 13, 2020, 7:00 AM), <https://www.cfr.org/backgroundunder/us-presidential-nominating-process> [<https://perma.cc/GVX7-HM9U>].

¹⁰⁶ *See* CAITLIN E. JEWITT, THE PRIMARY RULES: PARTIES, VOTERS, AND PRESIDENTIAL NOMINATIONS 23–54 (2019); *see also* Nicolas Motz, *Who Emerges from Smoke-Filled Rooms? Political Parties and Candidate Selection*, 52 SOC. CHOICE & WELFARE 161, 161 (2019) (noting that in competitive elections, Party elites would "select candidates according to the preferences of the median voter").

¹⁰⁷ Masters & Ratnam, *supra* note 105.

¹⁰⁸ *See generally* MARTY COHEN, DAVID KAROL, HANS NOEL & JOHN ZALLER, THE PARTY DECIDES: PRESIDENTIAL NOMINATIONS BEFORE AND AFTER REFORM (2008).

¹⁰⁹ *See* Marty Cohen, David Karol, Hans Noel & John Zaller, *Party Versus Faction in the Reformed Presidential Nominating System*, 49 PS: POL. SCI. & POL. 701, 704–08 (2016).

the Presidency by a small but passionate section of the base.¹¹⁰ Once President, he alone controls the entirety of the executive branch, and its four-million employees.¹¹¹ If voters do not like his performance, they have one indirect opportunity to remove him,¹¹² and no direct means of accountability.¹¹³

This Note argues that the constitutional design is outdated and no longer sufficient to protect the judiciary from undue influence by the executive. This Part focuses on presidential powers relative to the other branches. Section II.A discusses three key changes to the text and practice of the Constitution that developed in the twentieth century. Section II.B argues that those changes undermine the separation of the presidency and the courts.

A. *Changes to Appointments in the Twentieth Century*

Beginning in the twentieth century, three changes to the system of American government have fundamentally modified the appointment procedure: (1) the increasingly important role the judiciary plays in modern politics; (2) the Seventeenth Amendment to the Constitution, which made Senators popularly elected; and (3) the sorting of parties. Collectively, these changes have aggrandized the President's power over the appointment system, and within American government generally, contrary to the original intent of the Framers and the text of the Constitution.

1. *Federal Expansion and Judicial Power*

The Framers viewed the judiciary as the “least dangerous” branch of government.¹¹⁴ It has no control over money and no agents under its authority are able to enforce its directives.¹¹⁵ In fact, the power of judicial review was not decided until *Marbury v. Madison*,¹¹⁶ and only after the Civil War did Congress permanently grant the inferior courts federal question jurisdiction.¹¹⁷ This dynamic changed after the Su-

¹¹⁰ See Matthew C. MacWilliams, *Who Decides When the Party Doesn't? Authoritarian Voters and the Rise of Donald Trump*, 49 PS: POL. SCI. & POL. 716, 716 (2016).

¹¹¹ See generally *The Executive Branch*, WHITE HOUSE, <https://obamawhitehouse.archives.gov/1600/executive-branch> [<https://perma.cc/T2TL-RK84>]; U.S. CONST. art. II, § 1.

¹¹² See *infra* Section III.B.2.

¹¹³ See U.S. CONST. amend. XXII.

¹¹⁴ THE FEDERALIST NO. 78, *supra* note 72, at 329 (Alexander Hamilton).

¹¹⁵ See *id.*

¹¹⁶ 5 U.S. (1 Cranch) 537 (1803).

¹¹⁷ See Act of March 3, 1875, § 1, 18 Stat. 470 (current version at 28 U.S.C. § 1331(a)). For a more detailed description of the expansion of judicial authority by statute, see generally FELIX

preme Court reinterpreted aspects of the Constitution to facilitate federal action.¹¹⁸ In particular, the Court's reinterpretation of the Commerce Clause allowed Congress to implement an array of statutes that were previously nonstarters.¹¹⁹ The expansion of federal action entailed greater importance for the courts: in the 1930s only ten percent of cases in federal court involved nonproperty cases, but by the 1960s, most federal cases involved constitutional issues.¹²⁰

Today, many of the nation's most fundamental issues are decided by the Supreme Court, rather than litigated in Congress.¹²¹ Since the turn of the millennium, the Court has heard cases on rights of gun ownership,¹²² recognition of same sex marriages,¹²³ the regulation of money in politics,¹²⁴ and whether transgender individuals are protected under the Civil Rights Act of 1964.¹²⁵ Judges are expected to protect the party's legislation from legal criticism, and the composition of the Court has an enormous effect on a President's agenda and legacy.¹²⁶

2. *The Seventeenth Amendment*

Senators were originally chosen by state legislatures.¹²⁷ One purpose of this design was to make the Senate resistant to the short-term fluctuations in public sentiment.¹²⁸ To a significant degree, the old de-

FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* (2006).

¹¹⁸ See Alfred C. Aman Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1109–16 (1988).

¹¹⁹ See *id.*

¹²⁰ NANCY SCHERER, *SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS* 13–14 (2005).

¹²¹ See *id.*

¹²² See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹²³ See *Obergefell v. Hodges*, 576 U.S. 644 (2015).

¹²⁴ See *Citizens United v. FEC*, 558 U.S. 310 (2010).

¹²⁵ Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000a–2000h); see *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

¹²⁶ See Gerhardt, *supra* note 93, at 132.

¹²⁷ U.S. CONST. art. 1, § 3.

¹²⁸ See Wendy J. Schiller, Charles Stewart III & Benjamin Xiong, *U.S. Senate Elections Before the 17th Amendment: Political Party Cohesion and Conflict 1871–1913*, 75 J. POL. 835, 836 (2013). Many of the Framers were deeply worried about unchecked public sentiment. As stated in the Federalist papers, “The danger of disturbing the public tranquillity by interesting too strongly the public passions, is a still more serious objection against a frequent reference of constitutional questions to the decision of the whole society.” THE FEDERALIST NO. 49, *supra* note 72, at 258 (James Madison).

sign insulated Senators from political pressure.¹²⁹ Because politicians in state legislatures have knowledge and interests that are distinct from the public they represent, parties in state legislatures were not always able to “contain internal factions and competing interests to reach agreement.”¹³⁰ As a result, “Senate elections were contentious, and winning majority control of the state legislature did not always ensure an easy electoral process.”¹³¹ With the enactment of the Seventeenth Amendment to the Constitution, however, senators were “elected by the people thereof.”¹³² The effect of this change was substantial and immediate: senators changed their voting patterns, particularly before elections.¹³³

Accountability generally is a positive characteristic, but it can have adverse consequences. As a result of their dependence on private interest groups to mobilize voters, directly-elected senators depend more on lobbyists.¹³⁴ Increasingly, the same advocacy groups influencing the President play a major role in Senate confirmations.¹³⁵ This shift has been fueled by the advent of new media platforms, including radio and TV, which allowed lobbyists to easily critique candidates and disseminate information.¹³⁶ Senators historically played a major role in selecting nominees and advising the President, but the Seventeenth Amendment effectively diverted nominations from elected representatives to ideological lobbyists.¹³⁷

3. *Sorted Political Parties in Competitive Politics*

Two trends are necessary in understanding U.S. politics. First, members of the American parties share little in common. Second, neither party has been able to stay in government, enact its agenda over a long-time horizon, and be held accountable for those actions. Those dual features have led the parties to fight more bitterly against one another, and to seek alternatives to legislation to enact their agenda.

¹²⁹ See Schiller et al., *supra* note 128, at 836.

¹³⁰ *Id.* at 835.

¹³¹ *Id.*

¹³² U.S. CONST. amend. XVII, § 1.

¹³³ See William Bernhard & Brian R. Sala, *The Remaking of an American Senate: The 17th Amendment and Ideological Responsiveness*, 68 J. POL. 345, 345 (2006).

¹³⁴ See generally Kathleen Bawn, Martin Cohen, David Karol, Seth Masket, Hans Noel & John Zaller, *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 PERSPS. ON POL. 571 (2012).

¹³⁵ See Gerhardt, *supra* note 93, at 69–70.

¹³⁶ See *id.* at 72–73.

¹³⁷ See *id.* at 50, 70.

Despite partisan conflict in Congress, the American public is not more partisan than it was historically.¹³⁸ There are approximately as many people with “liberal” and “conservative” beliefs as there were in previous eras.¹³⁹ What has changed, however, is that the parties have become clearly demarcated: liberals join the Democratic party and conservatives the Republican party.¹⁴⁰ This pattern of particular groups moving toward one party to represent them is called “sorting.”¹⁴¹ Sorting makes each party more internally homogenous and increasingly distinct from the other.¹⁴² Although sorting was not unknown in America, for many decades the national parties were more an amalgamation of various local interests than cohesive and centralized organizations.¹⁴³

Sorted parties may be desirable. The overwhelming majority of voters know little about politics and are unable to keep up with each politician’s individual views, stances, and voting record.¹⁴⁴ Sorting helps ensure that parties are accountable because voters know the positions of the parties for which they are voting.¹⁴⁵ When a party has the capacity to govern, that information is slowly disseminated to the public, with elections acting as a referendum on the party’s actions.¹⁴⁶ Thus, as “long as the majority party governs competently and wins popular approval, it continues in office.”¹⁴⁷

When parties are of roughly equal political power, however, the unique nature of the American system undermines accountability and exacerbates issues with sorted parties. Sorting leads individuals to

¹³⁸ See Morris P. Fiorina, *UNSTABLE MAJORITIES: POLARIZATION, PARTY SORTING & POLITICAL STALEMATE* 23–25 (2017).

¹³⁹ See *id.*

¹⁴⁰ See *id.* at 77.

¹⁴¹ EZRA KLEIN, *WHY WE’RE POLARIZED* 42, 48 (2020).

¹⁴² See Fiorina, *supra* note 138, at 77.

¹⁴³ See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 135–37 (1957). Some have argued that unsorted, nonpolarized parties are an aberration. See generally KLEIN, *supra* note 141, at 1–101 (noting that the United States is the only nation with long-standing nonsorted parties, and that this scenario arose out of peculiarities of American political history).

¹⁴⁴ See generally RICK SHENKMAN, *JUST HOW STUPID ARE WE?: FACING THE TRUTH ABOUT THE AMERICAN VOTER* (2009) (noting that misinformation, spin, and other manipulative techniques make it difficult for the average voter to follow politics effectively). For the argument that voters are well informed, see Donald Wittman, *Why Democracies Produce Efficient Results*, 97 J. POL. ECON. 1395, 1399–1401 (1989). For the argument that voters are not only misinformed, but irrational, see BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICY* 2 (2007).

¹⁴⁵ See DOWNS, *supra* note 143, at 112–15.

¹⁴⁶ See FIORINA, *supra* note 138, at 84; see also MORRIS P. FIORINA, *RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS* 89–106 (1981).

¹⁴⁷ FIORINA, *supra* note 138, at 68.

view members of the other party as more extreme than they are.¹⁴⁸ And because sorted parties are actually further away from each other politically, their capacity for bipartisanship or cooperation is greatly diminished.¹⁴⁹ The unique nature of U.S. institutions, which demand massive majorities to pass legislation, compounds this issue.¹⁵⁰ When one party has a mandate, Congress operates as intended; but when the parties are roughly equal in political power, the system creates divided government wherein neither party is viewed as legitimate.¹⁵¹ Without the ability to pass laws, each party is pushed by their ever-demanding base to ignore norms that might otherwise moderate their behavior.¹⁵²

* * *

American democracy is thus caught in a powerful web that undermines the appointment system. Each political faction views the other with disdain and suspicion, but neither is able to consistently implement their political preferences through legislation.¹⁵³ The judicial branch is thus called upon to bypass legislative gridlock.¹⁵⁴ The Seventeenth Amendment makes the Senate, once imagined as a stalwart against such public demands, susceptible to public passions, leading politics to course through judicial confirmations.¹⁵⁵ Interest groups play a commanding role in the selection and confirmation of judicial

¹⁴⁸ See *id.* at 60–61.

¹⁴⁹ See *id.* at 78. This does not mean that Congress does literally nothing. Each party worries primarily that the other party will receive public recognition for passing good legislation. Thus, where there is less media attention on a bill, the greater likelihood that it is to pass. See Simon Bazelon & Matthew Yglesias, *The Rise and Importance of Secret Congress*, SLOW BORING (June 21, 2021), <https://www.slowboring.com/p/the-rise-and-importance-of-secret> [https://perma.cc/SUA3-MBHB].

¹⁵⁰ See Fiorina, *supra* note 138, at 85.

¹⁵¹ Because many do not have a deep understanding of the American governmental system, most people do not know who to blame when things are not working. In general, blame is shifted on the parties in Congress. See Stephen P. Nicholson, Gary M. Segura & Nathan D. Woods, *Presidential Approval and the Mixed Blessing of Divided Government*, 64 J. POL. 701, 701–02 (2002) (noting that Presidents often shift blame onto Congress); see also KLEIN, *supra* note 141, at 180–86 (noting that Presidential systems like the United States, in contrast to Parliamentary or semi-Presidential systems, have failed in every other attempt).

¹⁵² See KLEIN, *supra* note 144, at 180–86.

¹⁵³ See *id.*; FIORINA, *supra* note 138, at 5–6.

¹⁵⁴ Empirical research demonstrates that where parties are factionalized, or where long-term decisions are unlikely to pay off in the political system, political actors use courts for change. See Nickolas E. Jorgensen, *Cleavages, Courts, and Credible Commitments: The Politics of Judicial Independence* 5 (2006) (Ph.D. dissertation, University of Michigan) (ProQuest).

¹⁵⁵ Martin Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 GEO. WASH. L. REV. 587, 589 (1963); cf. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975).

nominees.¹⁵⁶ Those interest groups press for individuals aligned with them, and their ideological preferences, rather than the assorted and contradictory interests of a broad-based party.¹⁵⁷

B. *Weakening Constitutional Safeguards*

Changes to the text and practice of the Constitution leave the judiciary susceptible to undue influence. The judiciary is not a tool or extension of the executive, but it is biased toward presidential preferences. This Section discusses the reasons why sharing powers with the Senate fails as a political safeguard, and then why the Article III protections are an insufficient constitutional check.

1. *Advice and Consent*

In the judicial nomination process, the office and powers of the President are at a decided advantage over the institutional preferences of the Senate. The President connects personally with the nominee and lures out the individual's judicial philosophy.¹⁵⁸ Those seeking nomination to the bench undergo long and complicated interviews, and may be asked to make their case for selection to the President himself.¹⁵⁹ Interested Presidents may freely ask candidates anything behind closed doors.¹⁶⁰ In contrast, judicial candidates often refuse to answer substantive questions from senators, arguing that it violates the separation of powers.¹⁶¹ Even if the Senate wanted to protect its

¹⁵⁶ Shapiro, *supra* note 155, at 589.

¹⁵⁷ *Id.*

¹⁵⁸ See CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* 135–40 (2007). During the Trump administration, for example, aide Don McGahn played the pivotal role of screening judicial nominees. See Peter Nicholas, *Trump's Fury at Don McGahn Is Misplaced*, ATLANTIC (May 22, 2019), <https://www.theatlantic.com/politics/archive/2019/05/don-mcgahn-helped-trump-remake-federal-courts/589957/> [<https://perma.cc/9X8X-RUGU>]. Because of his close ties to the Federalist Society and other conservative circles, McGahn “develop[ed] a pipeline of candidates” who would dramatically expand the conception of executive power. *Id.* For Supreme Court picks, McGahn selected a large list of candidates, giving the President wide space to interview, and choose between, potential contenders. See Joel Achenbach, *How Trump and Two Lawyers Narrowed the Field for His Supreme Court Choice*, WASH. POST (July 8, 2018), https://www.washingtonpost.com/politics/how-trump-narrowed-the-field-for-his-supreme-court-pick/2018/07/08/b9d3b16a-808c-11e8-b660-4d0f9f0351f1_story.html [<https://perma.cc/9DSE-N7PV>]. Indeed, McGahn's close experiences working alongside other lawyers at Jones Day, Patton Boggs, and the National Republican Congressional Committee played an instrumental role in understanding their judicial philosophy and narrowing the field. See *id.*

¹⁵⁹ EISGRUBER, *supra* note 158, at 140.

¹⁶⁰ See *id.*; see, e.g., Achenbach, *supra* note 158.

¹⁶¹ See BENJAMIN WITTES, *CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES* 67–68 (2006).

interests through the judiciary, senators have to rely on previous decisions of nominees to glean a candidate's philosophy.¹⁶²

This informational asymmetry is not new. The President always could speak to the judges he nominated.¹⁶³ What is different is the weakened state of parties in selecting nominees and restraining the President.¹⁶⁴ Parties once stood as gatekeepers against populism and demagoguery, but today are too weak to stand against their electoral base, or against the Presidents chosen by that constituency.¹⁶⁵ Historically, potential judicial nominees came up through the party's representatives in Congress and other party actors.¹⁶⁶ Nominees therefore had close relationships with politicians throughout the country and were more sympathetic to the legislature.¹⁶⁷ The Senate has, however, been largely replaced by a small group of highly motivated members of the public who demand that nominees share in their political preferences.¹⁶⁸ Lobbyists groups advocate directly to the President and place their members throughout the halls of government.¹⁶⁹

Nor can the Senate easily protect its interests. Cooperation is difficult in large and diverse multimember bodies.¹⁷⁰ The President has the dominant position in such a confrontation because he never has to nominate anyone to the Senate's liking.¹⁷¹ The Senate's recourse, rejecting all nominees, is likely to fail because senators hope to work with the President on other legislative agendas.¹⁷² Because of political sorting, a President and Senate controlled by different parties will be unlikely to cooperate on appointments.¹⁷³ The Senate is thus divided between naysayers and partisan devotees; when the President's party

¹⁶² See EISGRUBER, *supra* note 158, at 161–62.

¹⁶³ President Tyler, for example nominated eight nominees that were rejected before a compromise was reached. See Gerhardt & Stein, *supra* note 59, at 587.

¹⁶⁴ This phenomenon is sometimes referred to as an era of weak parties and high partisanship. See, e.g., Julia Azari, *Weak Parties and Strong Partisanship Are a Bad Combination*, VOX (Nov. 3, 2016, 4:40 PM), <https://www.vox.com/mischiefs-of-faction/2016/11/3/13512362/weak-parties-strong-partisanship-bad-combination> [<https://perma.cc/2D8N-FTL5>].

¹⁶⁵ See KLEIN, *supra* note 141, at 172–73, 178–79.

¹⁶⁶ See GERHARDT, *supra* note 93, at 50–51.

¹⁶⁷ See *id.*

¹⁶⁸ See *id.* at 70–72.

¹⁶⁹ See SCHERER, *supra* note 120, at 13; see also *supra* note 158 and accompanying text.

¹⁷⁰ See THE FEDERALIST NOS. 76, 77 (Alexander Hamilton).

¹⁷¹ See THE FEDERALIST NO. 77 (Alexander Hamilton).

¹⁷² See *infra* Section III.C.

¹⁷³ See *supra* Section II.A.2; see also *supra* Section II.B (discussing cases of frustration in judicial appointments when the President and Senate were of different parties).

controls Congress, senators will have strong calls from their base to support the President's nominations.¹⁷⁴

Members of the same party have strong incentives to avoid fights that undermine the position of the President or his nominee.¹⁷⁵ Not only would doing so hurt their immediate political standing, but it would hurt the President's—and by extension their—legacy.¹⁷⁶ Moreover, the President will threaten allied Senators who obstruct or harass his appointees.¹⁷⁷ Even if the President “cannot reshape the contours of the political landscape,”¹⁷⁸ he can powerfully employ the position of his office to focus public attention squarely on a senator's intransigence.¹⁷⁹ Senators must weigh the potential for embarrassment, harassment, and refusal by the President to cooperate, against vague notions of institutional capacity, and the chance that individual judges will expand the executive power.¹⁸⁰

2. *Judicial Independence*

The formal independence of the judiciary does not secure it from favoritism towards the President. Even if judges face no pressure from the executive, Presidents will have picked nominees *because* they honestly share his view of Presidential power.¹⁸¹ Judges have long been

¹⁷⁴ See SCHERER, *supra* note 120, at 11–13.

¹⁷⁵ See GERHARDT, *supra* note 93, at 44, 132. It seems increasingly likely that most judicial positions will be filled only when the President and Senate are the same party. See Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527, 530–31 (1998).

¹⁷⁶ See GERHARDT, *supra* note 93, at 44, 132.

¹⁷⁷ For an introduction to the President's persuasion power, see GEORGE C. EDWARDS III, *THE STRATEGIC PRESIDENT: PERSUASION AND OPPORTUNITY IN PRESIDENTIAL LEADERSHIP* 1–18 (2009).

¹⁷⁸ *Id.* at 188.

¹⁷⁹ See *id.* at 188–89; see also Henriët Hendriks, *The Battleground Effect: How the Electoral College Shapes Post-Election Political Attitudes and Behavior* 152–69 (2009) (Ph.D. dissertation, University of Minnesota) (noting that Senators often rely on Presidents for reelection). During the Kavanaugh hearings, for example, Trump lobbied vulnerable Democrats to support the nominee. See Ella Nilsen, *Trump Is Starting to Pressure Red-State Democrats to Support His Supreme Court Pick*, Vox (July 9, 2018, 9:13 PM), <https://www.vox.com/2018/7/9/17549092/red-state-democrats-trump-supreme-court-nominee-brett-kavanaugh> [https://perma.cc/CS3F-ZB9E]. One of these senators, Joe Manchin, helped push then-Judge Kavanaugh over the line in a 50–48 vote. Emily Knapp, Brent Griffiths & Jon McClure, *Kavanaugh Confirmed: Here's How Senators Voted*, POLITICO (Oct. 6, 2018, 4:02 PM), <https://www.politico.com/interactives/2018/brett-kavanaugh-senate-confirmation-vote-count/> [https://perma.cc/93BL-8QFH].

¹⁸⁰ See Justin H. Kirkland & R. Lucas Williams, *Representation, Neighboring Districts, and Party Loyalty in the U.S. Congress*, 165 PUB. CHOICE 263, 263 (2016); see also Edward T. Swaine, *The Political Economy of Youngstown*, 83 S. CAL. L. REV. 263, 297 n.147 (2010).

¹⁸¹ See Grove, *supra* note 90, at 508–11. President Franklin Roosevelt, for example, attempted to pack the court with judges sympathetic to his views. See *id.*

chosen because they share political visions with the President.¹⁸² President Nixon, for example, boldly announced that he would nominate judges to more severely punish criminal offenders.¹⁸³ The Supreme Court has implicitly acknowledged the power of nominations in their opinions regarding removals.¹⁸⁴ After removing officers, the President appoints those who act more in line with his interests.¹⁸⁵ This logic implies that, in general, the President consistently appoints those with his preferences.¹⁸⁶

Presidents do face setbacks, but these examples are rare and extreme.¹⁸⁷ Roosevelt's attempt to pack the Supreme Court failed because it was a unique and aggressive attack on both the judiciary and senatorial legitimacy.¹⁸⁸ The rejection of Reagan's nominee, Judge Robert Bork, occurred after Republicans had lost the Senate, making his nomination a political burden as soon as it reached the Judiciary Committee.¹⁸⁹ Similarly, while the Supreme Court exercised its independence by unanimously ordering that President Nixon turn over his recordings,¹⁹⁰ the Court merely held that there is no "*absolute, unqualified* Presidential privilege of immunity from judicial process under all circumstances."¹⁹¹ The Court only mustered this narrow holding when the President was at twenty-five percent approval during the impeachment trial.¹⁹² But the Court's willingness to hold Presidents accountable did not survive long past this moment of Presidential vulnerability, as the Court soon granted Nixon a novel executive privilege theory,

¹⁸² See LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 60 (2006). Both Washington and Adams filled the court with Federalist judges. See *id.*

¹⁸³ S. Sidney Ulmer & John A. Stooley, *Nixon's Legacy to the Supreme Court: A Statistical Analysis of Judicial Behavior*, 3 FLA. ST. U. L. REV. 331, 331–32 (1975); see also SCHERER, *supra* note 120, at 36.

¹⁸⁴ See, e.g., *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197–200 (2020) (explaining that the President's removal power enables him to better control the bureaucracy).

¹⁸⁵ See *id.*

¹⁸⁶ See *id.*

¹⁸⁷ See EISGRUBER, *supra* note 158, at 132–34.

¹⁸⁸ See Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 275–77 (2017).

¹⁸⁹ Then-Senator Joe Biden, for example, declared that blocking Bork was analogous to stopping court packing. See Grove, *supra* note 90, at 514.

¹⁹⁰ *Nixon v. United States*, 418 U.S. 683, 683 (1974).

¹⁹¹ *Id.* at 706 (emphasis added).

¹⁹² See Andrew Kohut, *From the Archives: How the Watergate Crisis Eroded Public Support for Richard Nixon*, PEW RSCH. CTR. (Sept. 25, 2019), <https://www.pewresearch.org/fact-tank/2019/09/25/how-the-watergate-crisis-eroded-public-support-for-richard-nixon/> [https://perma.cc/3CC3-PX6W].

encompassing “absolute immunity from damages liability predicated on his official acts.”¹⁹³

The President’s powers allow him to bring favorable cases to the courts, thereby influencing the law in his favor. The exact contours of the law are often unclear, and judicial results uncertain.¹⁹⁴ In particular, the “comprehensive and undefined”¹⁹⁵ powers of Article II create enormous hurdles in conflicts over the separation of powers. The President is vested with the executive power¹⁹⁶ and an obligation to ensure that the laws “be faithfully executed.”¹⁹⁷ But the lack of clarity about these phrases has left a “zone of twilight”¹⁹⁸ in which the President’s powers, relative to the other branches, remain unclear. Because the executive generally has enforcement discretion, the President may bring cases that have good facts if his actions are challenged.¹⁹⁹

The impact of discretion cannot be understood until its absence is felt. In *Department of Commerce v. New York*,²⁰⁰ for example, the Court ruled that the administration could not add a citizenship question to the census, because its stated rationale was “incongruent with what the record reveal[ed] about the agency’s priorities and decision-making process.”²⁰¹ Justice Roberts noted that the Court’s “review is deferential, but we are ‘not required to exhibit a naiveté from which ordinary citizens are free.’”²⁰² The Court concluded that “[i]n these unusual circumstances, the District Court was warranted in remanding to the agency.”²⁰³ This case illustrates a moment where the administration failed to have its way because of simple, self-imposed errors.²⁰⁴ In

¹⁹³ See *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

¹⁹⁴ See EISGRUBER, *supra* note 158, at 21–30.

¹⁹⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J. concurring).

¹⁹⁶ U.S. CONST. art. II, § 1.

¹⁹⁷ *Id.* § 3.

¹⁹⁸ See *Youngstown*, 343 U.S. at 637.

¹⁹⁹ See *Heckler v. Chaney*, 470 U.S. 821 (1985) (holding that the FDA’s decision not to enforce agency regulation is unreviewable as agency inaction). In certain areas of policy, such as foreign policy, executive deference is even greater. See *Haig v. Agee*, 453 U.S. 280, 291 (1981).

²⁰⁰ 139 S. Ct. 2551 (2019).

²⁰¹ *Id.* at 2575–76.

²⁰² *Id.* (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977)).

²⁰³ *Id.* at 2576.

²⁰⁴ Similarly, after the Trump administration failed multiple times to implement a Muslim ban due to poor agency coordination, one legal commentator referred to the administration as “malevolence tempered by incompetence.” Benjamin Wittes, *Malevolence Tempered by Incompetence: Trump’s Horrifying Executive Order on Refugees and Visas*, LAWFARE (Jan. 28, 2017, 10:58 AM), <https://www.lawfareblog.com/malevolence-tempered-incompetence-trumps-horrifying-executive-order-refugees-and-visas> [<https://perma.cc/U892-HWBV>].

general, however, a strategic President will manipulate timing and situations to aggrandize his position.²⁰⁵

Legal-political dynamics between the President and Congress further strengthen the Presidency. In *Youngstown Sheet & Tube Co. v. Sawyer*,²⁰⁶ Justice Jackson stated that where the President acts with the blessing of Congress, he acts with all the power of the federal government.²⁰⁷ But where he acts “in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers.”²⁰⁸ To avoid Congressional disapproval, the President is therefore encouraged to avoid Congress altogether.²⁰⁹ An active Congress may respond to executive overreach by passing legislation to rebuff the President.²¹⁰ As noted previously, however, legislators have been relegated to performers for their base.²¹¹ When the President’s party controls one of two chambers—or at least one-third of the Senate—it is highly unlikely that Congress can act through legislation.²¹² Compounding this issue, Congressional activity might be read by

²⁰⁵ Justice Jackson noted that a single holding for the President can distort constitutional meaning forever. “[O]nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution . . . the Court for all time has validated the principle . . .” *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

²⁰⁶ 343 U.S. 579 (1952).

²⁰⁷ *See id.* at 635–37.

²⁰⁸ *Id.* Jackson’s *Youngstown* framework is popular among the Court and members of Congress. *See Swaine, supra* note 180, at 267 n.15; Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1217 (2006).

²⁰⁹ *See Swaine, supra* note 180, at 304–24.

²¹⁰ *See id.* at 325–39.

²¹¹ *See supra* Section II.A; *see, e.g.,* Drew DeSilver, *Congress Continues Its Streak of Passing Few Significant Laws*, PEW RSCH. CTR. (July 31, 2014), <https://www.pewresearch.org/fact-tank/2014/07/31/congress-continues-its-streak-of-passing-few-significant-laws/> [https://perma.cc/LVN9-BGND].

²¹² *See supra* Section II.A.3.

courts as an acquiescence of those powers.²¹³ In this twilight sleep of Congress, presidential power ever grows.²¹⁴

III. SPEAKER AS NOMINATOR

Part II argued that the President should not hold the power of nomination because this power creates a separation of powers conflict of interest. Instead, this Note proposes the Speaker be the nominator. Her office is more accountable and more democratically representative than the President. She is responsible to the public through regular elections and by the factions of her party. And because the Speaker is nominated by members from across the country, she better exemplifies the geographic and ideologic diversity of the country. Finally, because she lacks significant control of the bureaucracy and is chosen by the caucus, not the public, her office does not threaten the separation of powers.

A. *Proposal*

Hamilton argued the advantage of the President in nominations was that “as far as republican principles will admit, [he has] all the requisites to energy.”²¹⁵ He then asked if the appointment system “combine[s] the requisites to safety, in a republican sense—a due dependence on the people, [and] a due responsibility?”²¹⁶ This Note has argued that the energy of the executive in its modern adaptation offers too much preference to the President. To address similar issues, some other proposals strip the appointment system from the political

²¹³ See, e.g., *Comm. on Judiciary v. McGahn*, 951 F.3d 510, 519 (D.C. Cir. 2020) (holding that Congress lacked standing to sue to enforce its subpoenas, in part because “the political branches have long resolved most of their differences through ‘negotiation and accommodation’” (quoting Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1132 (2009))). Although overruled by *Comm. on Judiciary v. McGahn*, 968 F.3d 755 (D.C. Cir. 2020) (en banc), this case demonstrates pitfalls for Congress wherever courts “have few authorities to guide [them]—sparse constitutional text, no statute, a handful of out-of-context cases, and a set of more-or-less ambiguous historical sources.” *McGahn*, 951 F.3d at 518; see also *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 23 (2015) (holding the recognition power to belong exclusively to the President in part because “the major historical examples . . . establish[] no more than that some Presidents have chosen to cooperate with Congress, not that Congress itself has exercised the recognition power”).

²¹⁴ As Justice Jackson noted in an earlier version of his opinion, “If [Congress] does not rise to its occasions, if it is petty, partisan, or indecisive[,] power will gravitate to the Executive by force of public opinion whether this Court affirms or not.” Robert H. Jackson, Draft Conurrence, *Youngstown Sheet & Tube Co. v. Sawyer* at 28 (May 22, 1952) (on file with the Library of Congress, Manuscript Division, Papers of Robert H. Jackson, Box 176).

²¹⁵ See THE FEDERALIST NO. 77, *supra* note 72, at 390 (Alexander Hamilton).

²¹⁶ *Id.*

branches.²¹⁷ This Note presumes that because of the judiciary's important political role, partisan factions will continue to struggle over the appointment procedure.²¹⁸ Given this inevitable conflict, the important choice of judicial appointments should be responsive to the public will.

The Framers considered giving the appointment power to the House but rejected that approach. Hamilton wrote:

I cannot imagine that [uniting the House of Representatives for making appointments] is likely to gain the countenance of any considerable part of the community. A body so fluctuating and at the same time so numerous, can never be deemed proper for the exercise of that power. Its unfitness will appear manifest to all All the advantages of the stability, both of the Executive and of the Senate, would be defeated by this union, and infinite delays and embarrassments would be occasioned.²¹⁹

Hamilton's demand for nominations by a single person is powerful.²²⁰ This Note's proposal accepts that multimember bodies are improper, and suggests vesting *solely* the Speaker with the power, subject to advice and consent of the Senate. As a result, her office would remain the "single object for the jealousy and watchfulness of the people."²²¹ The office of the Speaker takes advantage of the separation of powers system by keeping the nomination power within the political branches, but in an office with greater dependence on the people (referred to by Hamilton as democratic representation), and due responsibility (referred to by Hamilton as accountability).

The President could theoretically delegate nominations to the Speaker without any change in the law. President Carter, for example, left the choice of many of his nominees to a merit-selection board.²²² But because this would be a political and not legal solution, lasting change would require a constitutional amendment.²²³ Amendments

²¹⁷ See, e.g., Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 193 (2019).

²¹⁸ See *supra* Sections II.A.1–3.

²¹⁹ THE FEDERALIST NO. 77, *supra* note 72, at 389–90 (Alexander Hamilton).

²²⁰ Indeed, only two states now use legislatures for judicial nominations. See *id.*; see also THE FEDERALIST NO. 70, *supra* note 31, at 472 (Alexander Hamilton) ("The ingredients, which constitute energy in the executive, are first unity, secondly duration, thirdly an adequate provision for its support, fourthly competent powers.").

²²¹ THE FEDERALIST NO. 70, *supra* note 31, at 479 (Alexander Hamilton).

²²² See Sheldon Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 246, 254 (1978).

²²³ See U.S. CONST. art. V.

generally require two-thirds of both chambers of Congress or two-thirds of states to propose the amendment.²²⁴ Three-fourths of states would then have to vote to ratify the change.²²⁵

B. Advantages of the Speaker as Judicial Nominator

Congressional structure plays a significant role in the Speaker's incentives. Congress is divided into a Senate and a House of Representatives.²²⁶ The House is "composed of members chosen every second year by the people of the several states,"²²⁷ and current law states that there are 435 members.²²⁸ The Constitution does not dictate how members are selected, leaving that issue to Congress and the states.²²⁹ In the modern era, states use single-member districts, wherein a single candidate is elected.²³⁰ Once the members of the House are elected, they are responsible for "ch[oo]sing] their Speaker and other Officers."²³¹ In modern practice, the party caucuses select their nominations for Speaker,²³² who is then chosen by majority vote.²³³ Only three Speakers have resigned from the position, an additional four have resigned from the House, and none has ever been formally removed.²³⁴

1. Accountability

This Section argues that the Speaker is more accountable to the American public than the President. This is a result of two major factors. First, her Party has the power and the incentive to choose candidates popular with the public. Second, elections hold her and her

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ U.S. CONST. art. I, § 1.

²²⁷ *Id.* § 2.

²²⁸ See 2 U.S.C. § 2a; Mark Strand & Tim Lang, *How the House Elects Its Speaker*, CONG. INST. (Dec. 28, 2018), <https://www.congressionalinstitute.org/2018/12/28/how-the-house-elects-its-speaker/> [<https://perma.cc/528Q-5GGA>].

²²⁹ U.S. CONST. art. I, § 4.

²³⁰ 2 U.S.C. § 2(c) (requiring "no district to elect more than one Representative," except under certain conditions). States are not required to use single-member districts. For a history on their use, see generally JAY K. DOW, *ELECTING THE HOUSE: THE ADOPTION AND PERFORMANCE OF THE U.S. SINGLE-MEMBER DISTRICT ELECTORAL SYSTEM* (2017).

²³¹ U.S. CONST. art. I, § 2.

²³² VALERIE HEITSHUSEN, CONG. RSCH. SERV., R44243, *ELECTING THE SPEAKER OF THE HOUSE OF REPRESENTATIVES: FREQUENTLY ASKED QUESTIONS 2* (2020), <https://fas.org/sgp/crs/misc/R44243.pdf> [<https://perma.cc/9KJT-RHE8>].

²³³ See *id.*

²³⁴ See *id.* at 1 n.2.

political party accountable when they fail to nominate generally acceptable judges.

The first means of accountability stems from the fact that the Speaker is accountable to the elected representatives of her party. The House has the sole power of choosing the Speaker and removing her.²³⁵ The Speaker knows that “a tribal partisan loyalty strengthens [the Speaker], *provided* he or she delivers the electoral and policy goods.”²³⁶ These members, in return, are closely connected to their constituents, and are pressured to support popular nominees.²³⁷ As a result, members of the House would pressure the Speaker to choose popular judicial nominees and to avoid those who would be controversial with her party or the broader electorate.²³⁸ Relatedly, she is disincentivized from choosing nominees whose ideology is far from the mainstream.²³⁹

A second major consequence is that the party has significant control over the selection of nominees.²⁴⁰ The Speaker is in a precarious situation: at any moment a majority of her party could remove her for someone who can do the job better.²⁴¹ This, in turn, means that party leaders share information with their caucus and need to consider the entire party’s policy preferences when deciding who to nominate or what to place on the legislative agenda.²⁴² This dynamic respects the

²³⁵ See U.S. CONST. art. I, § 2.

²³⁶ See Richard Heffernan, *Exploring (and Explaining) the British Prime Minister*, 7 BRITISH J. POL. & INT’L RELS. 605, 611 (2005) (emphasis added).

²³⁷ In 2020, for example, Pew found that sixty-four percent of individuals cited Supreme Court appointments as “very important” to their vote. *Election 2020: Voters are Highly Engaged, but Nearly Half Expect to Have Difficulties Voting*, PEW RSCH. CTR. (Aug. 13, 2020), <https://www.pewresearch.org/politics/2020/08/13/election-2020-voters-are-highly-engaged-but-nearly-half-expect-to-have-difficulties-voting/> [<https://perma.cc/C3UC-ZR22>].

²³⁸ This dynamic has been reflected in the bills party leaders introduce. See GARY W. COX & MATHEW D. MCCUBBINS, *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES* 17–49 (2005).

²³⁹ See generally André Blais, Richard Nadeau, Elisabeth Gidengil & Nail Nevitte, *The Formation of Party Preference: Testing the Proximity and Directional Models*, 40 EUR. J. POL. RSCH. 81 (2001) (evaluating models of voter behavior and finding that a legislator’s proximity to voters’ preferences do better electorally).

²⁴⁰ Kaare Strøm, *Delegation and Accountability In Parliamentary Democracies*, 37 EUR. J. POL. RSCH. 261 (2000). It is impossible to know exactly what mechanisms the party would use to influence the Speaker. As discussed *supra* Section III.B.1, however, judicial appointments historically came up through recommendations by the party, as opposed to interest groups lobbying the President, implying a similar dynamic would likely occur.

²⁴¹ See *supra* notes 232–39.

²⁴² See *supra* notes 232–39.

diversity of the party, winnows candidates, and provides a remedy when Speakers gamble the political lives of members.²⁴³

Contrary to being a weakness, the possibility of removal is a strength of the Speaker. The Speaker's power is contingent on the size of her majority: she will have more flexibility the larger her caucus is.²⁴⁴ Similarly, the larger some faction in Congress, the more likely that that faction will influence her decisions or deny her legislative power.²⁴⁵ When a Speaker is plagued by multiple factions able to deny a majority, her Speakership will be under threat.²⁴⁶ This dynamic makes legislation difficult, even if the Speaker is replaced.²⁴⁷ Nevertheless, because party leaders are able to exert substantial influence over their caucus, even when it is highly divided, the possibility of replacing the Speaker is unlikely to materialize.²⁴⁸

This dynamic would likely also appear in judicial nominations and would occasionally slow the nomination process. Insofar as intraparty divisions occasionally prevent nominations, that is desirable. Party rules state that the Speaker needs only a simple majority of their own party to secure the Speakership.²⁴⁹ Thus, the Speaker might only

²⁴³ The Supreme Court has similarly recognized this method of accountability in removal cases. *See* *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010) (“[T]he Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary.”).

²⁴⁴ *See* Wilhelmina Jacoba Maria de Ruiter, *Walking, the Tightrope: Political Accountability, Blame, and Ministerial Survival in Two Parliamentary Systems* 35–38 (2019) (Ph.D. dissertation, Utrecht University).

²⁴⁵ *See* Carly Schmitt, Chera LaForge & Hanna K. Brant, *Drinking the Tea: The Tea Party Movement and Legislative Agendas in the U.S. Senate*, 46 *CONG. & PRESIDENCY* 60, 60–61 (2019).

²⁴⁶ In 2015, for example, Speaker John Boehner suddenly stepped down. *See* Matthew Yglesias, *John Boehner's Resignation, Explained*, *Vox* (Sept. 25, 2015, 12:22 PM), <https://www.vox.com/2015/9/25/9397997/john-boehners-resignation-explained> [https://perma.cc/59LM-8NT8]. This was incredibly rare, as party leaders “normally either step[] down following an electoral defeat or else . . . announce[] it well in advance and calmly lead[] the troops through one last election campaign.” *Id.* His resignation was caused by a Tea Party willing to shut down the government, against the preferences of the Speaker and other members of his caucus. *See id.*

²⁴⁷ After Boehner stepped down, Republicans had difficulty choosing a speaker. Paul Ryan, looked to by all factions of the party, did not want to take the position because the caucus was so obviously wrought with factionalism. *See* Kelsey Snell, *Why Paul Ryan Doesn't Want to Be House Speaker*, *WASH. POST* (Oct. 8, 2015), <https://www.washingtonpost.com/news/powerpost/wp/2015/10/08/why-paul-ryan-doesnt-want-to-be-house-speaker/> [https://perma.cc/3R63-XFKF].

²⁴⁸ *See* STRØM ET AL., *supra* note 240, at 69 (noting that factions balk at the “doomsday device” of removal).

²⁴⁹ *See, e.g.*, OFF. OF THE PARLIAMENTARIAN, 115TH CONG., *COMPILATION OF SELECTED RULES OF THE REPUBLICAN CONFERENCE AND DEMOCRATIC CAUCUS* (Comm. Print 2017) (“[A] majority vote of those present and voting at a Democratic Caucus shall bind all Members of the Caucus.”).

represent one-half of one-half of the House.²⁵⁰ Intraparty factionalism may thus prevent a Speaker who represents so few from taking permanent action on behalf of the nation.²⁵¹

In addition to her accountability through the party, the Speaker is accountable through elections. If the Speaker's party loses a majority of seats, she will lack the majority to survive removal or pass legislation.²⁵² Party leaders are also pressured to step down after they lose substantial seats in elections.²⁵³ Speakers therefore have an interest, both for their own survival and to enforce their preferred policies, in their caucus winning elections. The nomination of then-Judge Kavanaugh shortly before the 2018 midterms illustrates this point. Kavanaugh was deeply unpopular at the time of his nomination²⁵⁴ and became increasingly unpopular after Christine Blasey Ford accused him of sexually assaulting her.²⁵⁵ Particularly in the House, Republi-

²⁵⁰ See *id.*; Strand & Lang, *supra* note 228.

²⁵¹ In 2012, for example, Republicans won a majority of the chamber with a minority of the votes. *Election Statistics: 1920 to Present*, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Election-Statistics/Election-Statistics/> [<https://perma.cc/8XEW-X3RX>]. Because of his limited caucus, Speaker Boehner had more defections “than in any other speaker’s election in over two decades.” Micah Cohen, *Were the G.O.P. Votes Against Boehner a Historic Rejection?*, FIVETHIRTYEIGHT (Jan. 4, 2013, 8:10 AM), <https://fivethirtyeight.com/features/were-the-g-o-p-votes-against-boehner-a-historic-rejection/> [<https://perma.cc/Y6BA-6PDN>]. The Freedom Caucus was able to block Boehner from passing key legislation. See Lauren Fox, *John Boehner Unchained: Why the House Speaker Finally Stood Up to the Far Right*, U.S. NEWS (Dec. 12, 2013, 5:24 PM), <https://www.usnews.com/news/articles/2013/12/12/john-boehner-unchained-why-the-house-speaker-finally-stood-up-to-the-far-right> [<https://perma.cc/TTN6-SQ99>]. Boehner only passed appropriations bills when he bucked those members of his party and cooperated with Democrats. See *id.*

²⁵² See U.S. CONST. art. I, § 2.

²⁵³ Fredrik Bynander & Paul ‘t Hart, *The Politics of Party Leader Survival and Succession: Australia in Comparative Perspective*, 42 AUSTL. J. POL. SCI. 47, 53–54 (2007). This source discusses the Australian Prime Minister. The structure of the Prime Minister vis-à-vis Parliament is highly analogous to the relationship between the Speaker and the House, and therefore valuable for comparison.

²⁵⁴ Nathaniel Rakich, *Brett Kavanaugh Is Polling Like Robert Bork and Harriet Miers*, FIVETHIRTYEIGHT (July 18, 2018, 1:15 PM), <https://fivethirtyeight.com/features/brett-kavanaugh-is-polling-like-robert-bork-and-harriet-miers/> [perma.cc/Q6AC-FZ86] (reviewing polling from Fox News, Gallup, and Pew Research Center).

²⁵⁵ Janie Velencia & Perry Bacon Jr., *Kavanaugh May Be Getting More Unpopular*, FIVETHIRTYEIGHT (Sept. 21, 2018, 5:46 PM), <https://fivethirtyeight.com/features/kavanaugh-may-be-getting-more-unpopular/> [<https://perma.cc/K2HD-4UZX>] (This Note does not take a position on the allegations, and only notes the effect on polling.); see also Nate Silver, *The GOP’s Least-Worst Option Is if Kavanaugh Withdraws—And Soon*, FIVETHIRTYEIGHT (Sept. 25, 2018, 6:36 AM), <https://fivethirtyeight.com/features/the-gops-least-worst-option-is-if-kavanaugh-withdraws-and-soon/> [<https://perma.cc/Q5BH-N8T4>] (“No one this unpopular has ever been confirmed to the Supreme Court; the only previous nominees who polled as poorly as Kavanaugh either had their names withdrawn (Harriet Miers) or lost their confirmation vote (Robert Bork).”).

cans were adversely impacted by this choice in nominee,²⁵⁶ losing forty seats and the majority in the midterm.²⁵⁷ It is impossible to know whether or not then-Speaker Ryan would have nominated someone different.²⁵⁸ Perhaps he would have believed that the Kavanaugh confirmation was worth gambling his authority—or perhaps he would have chosen a less risky conservative nominee. In either case, the choice would be the Speaker’s, and not left to a President not up for election.

2. *Democratic Representation*

The President is not, and has never been, “directly accountable to the people through regular elections.”²⁵⁹ Rather, states choose “a Number of Electors, equal to the whole number of Senators and Representatives” of that state in Congress.²⁶⁰ This is not mere semantics. A majority of delegates at the Convention opposed making the Senate the sole seat of judicial appointments after the Framers decided that the Senate would represent states rather than people.²⁶¹ Madison stated that if “the [Senate] alone should have this power, the Judges might be appointed by a minority of the people . . . which could not be justified on any principle.”²⁶² Washington similarly wrote, “if injudicious or unpopular measures should be taken by the Executive under the new Government with regard to appointments, the Government itself would be in the utmost danger of being utterly subverted by those measures.”²⁶³

It is problematic, then, that the Presidency has reflected antidemocratic principles. Five times in U.S. history an individual has

²⁵⁶ See Nate Silver, *Why the House and Senate Are Moving in Opposite Directions*, FIVETHIRTYEIGHT (Oct. 14, 2018, 9:20 AM), <https://fivethirtyeight.com/features/why-the-house-and-senate-are-moving-in-opposite-directions/> [https://perma.cc/QX8T-MQMQ].

²⁵⁷ *U.S. House Election Results 2018*, POLITICO, <https://www.politico.com/election-results/2018/house/> [https://perma.cc/A2NX-RDFK].

²⁵⁸ There is strong evidence, however, that the Republican leaders would not have nominated Kavanaugh precisely because they thought his nomination would be a political issue. See Maggie Haberman & Jonathan Martin, *McConnell Tries to Nudge Trump Toward Two Supreme Court Options*, N.Y. TIMES (July 7, 2018), <https://www.nytimes.com/2018/07/07/us/politics/trump-mcconnell-supreme-court.html> [https://perma.cc/9CUT-NV2D].

²⁵⁹ *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020).

²⁶⁰ U.S. CONST. art. II, § 1.

²⁶¹ See *supra* Section II.A.

²⁶² MADISON, *supra* note 38, at 344.

²⁶³ *Letter from George Washington to Samuel Vaughan, March 21, 1789*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/05-01-02-0325> [https://perma.cc/J9RM-C4HX]; see also THE WRITINGS OF GEORGE WASHINGTON 480 (Jared Sparks ed., 1835).

lost the popular vote and won the electoral college.²⁶⁴ Four of those elections occurred when the parties were highly sorted, and neither party had a commanding political advantage.²⁶⁵ This outcome might be acceptable if this resulted in divided government, and merely frustrated majoritarian will. But when the electoral college selects the popular vote loser, it almost always has given that individual a majority in the Senate.²⁶⁶ Thus, at times of great political tension, the power of appointment risks being wholly vested in minoritarian government.

While a justification for the Electoral College is to protect states, the Speaker better reflects geographic diversity. Members of the House have a substantial impact on the Speaker's decision making.²⁶⁷ This is particularly true where members know what they are voting for, and where they can estimate the impact of their votes.²⁶⁸ Presidents have little or no electoral incentive to assist states that would never vote for them.²⁶⁹ Although Presidents do not have to disregard opposing states, they are unlikely to face electoral consequences.²⁷⁰ Contrast this with the House, where thirteen Democrats represent Texas²⁷¹ and eleven Republicans represent California, including the

²⁶⁴ Those moments include John Q. Adams in 1824, Rutherford B. Hayes in 1876, Benjamin Harris in 1888, George W. Bush in 2000, and Donald Trump in 2016. Dave Roos, *5 Presidents Who Lost the Popular Vote But Won the Election*, HISTORY (Nov. 2, 2020), <https://www.history.com/news/presidents-electoral-college-popular-vote> [https://perma.cc/8C8G-QN7E].

²⁶⁵ FIORINA, *supra* note 138, at 3–18. For example, only twenty-two years before 1900 did the United States have divided control of government. *See supra* Section II.B. Most of those twenty-two years occurred during a highly sorted period after the Civil War. *See supra* Section II.B.

²⁶⁶ Hayes's party had forty of seventy-six seats. Harrison's party had fifty-one of eighty-eight seats. Bush's party had fifty of 100 seats (with Vice-President Cheney able to break ties). Trump's party had fifty-one of 100 seats. *See Party Division, supra* note 85. This result makes sense. The electoral college rebalances political strength away from the popular will, and towards state preference. Thus, whenever the electoral college selects popular vote losers, it is apt to empower them with the Senate. *See* U.S. CONST. art I, § 1; *id.* art II, § 1.

²⁶⁷ *See supra* Section III.B.1.

²⁶⁸ *See* Frances E. Lee, *Geographic Politics in the U.S. House of Representatives: Coalition Building and Distribution of Benefits*, 47 AM. J. POL. SCI. 714, 714–21 (2003) (comparing the effect of House members on the distribution of funds through earmarks versus state grants).

²⁶⁹ *See* Costas Panagopoulos, *Campaign Dynamics in Battleground and Nonbattleground States*, 73 PUB. OP. Q. 119, 119 (2009).

²⁷⁰ Donald Trump received 32.8% of the vote in Massachusetts in 2016. Despite falling even further in 2020, he faced no electoral consequence. *Massachusetts Presidential Results*, POLITICO (Jan. 6, 2021, 4:41 PM), <https://www.politico.com/2020-election/results/massachusetts/> [https://perma.cc/8747-HMMG]; *Massachusetts Results*, N.Y. TIMES (Aug. 1, 2017, 11:22 AM) <https://www.nytimes.com/elections/2016/results/massachusetts> [https://perma.cc/4RPN-7HNR].

²⁷¹ *Texas 2020 House Election Results*, POLITICO (Jan. 6, 2021, 4:41 PM), <https://www.politico.com/2020-election/results/texas/house/> [https://perma.cc/K5PX-C7LA].

Minority leader Kevin McCarthy.²⁷² Because uncompetitive states often have districts represented by both parties, the party and its leadership are still held accountable to those states.²⁷³

C. Addressing Separation of Powers Concerns

Vesting the Speaker with the nomination power does not pose a threat to the separation of powers. The Senate would still “be an excellent check upon a spirit of favoritism,” and would “prevent the appointment of unfit characters.”²⁷⁴ Senators often rely on the President for their reelection prospects,²⁷⁵ and the President has a unique ability to speak to the nation and shape viewpoints and debates.²⁷⁶ Because of the different modes of election between the House and the Senate, the Speaker’s and Senate’s incentives will often conflict when voting margins are thin.²⁷⁷ Nor can the Speaker overcome Article III protections. She does not direct the executive branch and lacks the ability to influence which cases come before the court.²⁷⁸ In contrast to Presidents, the Speaker lacks the single-minded focus on protecting her institutional power.²⁷⁹ Indeed, she, along with members of Congress, have often been willing to delegate vast authority to the President, rather than attempt to horde all power for themselves.²⁸⁰

Even if the Speaker threatened Presidential powers, the President has sufficient power to defend his office. Constitutional doctrine advantages him when Congress is too slow or divided to act.²⁸¹ He can negotiate by refusing to issue orders or directing agencies to operate contrary to the preferences of Congress.²⁸² If Congress remains in-

²⁷² *California 2020 House Election Results*, POLITICO (Jan. 6, 2021, 4:41 PM), <https://www.politico.com/2020-election/results/california/house/> [<https://perma.cc/A2NX-RDFK>].

²⁷³ See *House Forecast*, FIVETHIRTYEIGHT, <https://projects.fivethirtyeight.com/2020-election-forecast/house/> [<https://perma.cc/8SV9-952X>] (placing eighty-four House seats in districts that are not “Solid D” or “Solid R” across thirty-nine states).

²⁷⁴ THE FEDERALIST NO. 76, *supra* note 72, at 385 (Alexander Hamilton).

²⁷⁵ Hendriks, *supra* note 179, at 152–80.

²⁷⁶ See Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 73–75 (2017).

²⁷⁷ See, e.g., Silver, *supra* note 256.

²⁷⁸ See U.S. CONST. art. II, §§ 1, 2.

²⁷⁹ See Swaine, *supra* note 180, at 301; see, e.g., 8 U.S.C. § 1182(f) (giving the President, whenever he finds necessary, the power to “suspend the entry of all [foreign nationals] or any class of [foreign nationals],” into the United States or establish “restrictions he may deem to be appropriate”).

²⁸⁰ See Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 190–211 (2011).

²⁸¹ See discussion of the *Youngstown* framework, *supra* Section III.B.2.

²⁸² See Christina M. Kinana, *Control Without Confirmation: The Politics of Vacancies in*

calcitrant, he can threaten to veto legislation until the Speaker cooperates.²⁸³ The President is particularly advantaged in this regard. Each House member will selfishly want to cooperate with the President to implement their preferred policies.²⁸⁴ A Speaker will therefore have difficulty bucking the President unless a majority of the House is united in asserting themselves, even at the cost of legislative priorities.²⁸⁵

CONCLUSION

When the Constitution was written, the President was given the judicial nomination power to act as a check on the legislature. This dynamic has flipped. The President has the upper hand in his dealings with the other political branch. The unity of his office, his power over the federal bureaucracy, and his political influence make the potential for Presidential havoc on the judiciary too great. The Speaker offers all the advantages of the President without the same potential for harm. The Constitution should be amended to reflect this fact.

Presidential Appointments, 115 AM. POL. SCI. REV. 559, 559 (2021); Adam J. White, *Executive Orders as Lawful Limits on Agency Policymaking Discretion*, 93 NOTRE DAME L. REV. 1569, 1570–87 (2018).

²⁸³ See U.S. CONST. art. I, § 7.

²⁸⁴ See Hendriks, *supra* note 179, at 5.

²⁸⁵ See *id.*

NOTE

Give Up Your Face, and a Leg to Stand on Too: Biometric Privacy Violations and Article III Standing

*Sojung Lee**

ABSTRACT

*The standing doctrine says that a plaintiff only has standing when that plaintiff has suffered a concrete injury that is fairly traceable to the defendant, and the court can likely provide redress for the injury. The doctrine becomes complicated when addressing instances of privacy harms because these harms are usually intangible and sometimes speculative. This is especially true for cases of biometric privacy, where the alleged harm comes from a violation of a biometric privacy statute regulating the collection, use, and storage of a person's biometric data. There has been division among the courts as to whether such a statutory violation amounts to a concrete injury sufficient for Article III standing. This Note argues that, after the decision in *TransUnion v. Ramirez*, courts should apply *Ramirez* to allow standing in biometric privacy suits. To read *Ramirez* otherwise would lead to an absurd result and a usurpation of legislative determinations. Therefore, in order to respect legislative intent and protect people's privacy interests, this Note argues that courts should allow Article III standing in instances of biometric privacy statutory violations.*

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INTRODUCTION

Privacy data in the form of biometric identifiers is valuable in a technology age with substantial data collection by businesses. Clearview AI, Inc., a small company in New York, used a technique called screen scraping¹ to collect around three billion images of peoples' faces across platforms such as Google, Facebook, Venmo, and YouTube, and create a massive facial recognition database.² The company offers a service that enables any user to upload a picture of an individual, view public photos of that person, and even provide the

¹ "Screen scraping is the process of collecting screen display data from one application and translating it so that another application can display it." *Screen Scraping*, TECHOPEDIA, <https://www.techopedia.com/definition/16597/screen-scraping> [https://perma.cc/SR39-QNHH].

² Katherine Soule, *Facial Recognition: A Clear View to Dystopia*, JDSUPRA (May 13, 2020), <https://www.jdsupra.com/legalnews/facial-recognition-a-clear-view-to-22273/> [https://perma.cc/2DZ7-FUTH].

links to those photos.³ This service not only sounds like a rather convenient gift for potential stalkers, but is also now a tool in the hands of hundreds of law enforcement agencies, including the Federal Bureau of Investigation and the Department of Homeland Security.⁴ It can be used to find activists at social protests, or someone who decided to “Like” a certain page on Facebook, “revealing not just their names but where they lived, what they did and whom they knew.”⁵

There are several uneasy implications in this situation. One is the potential misuse or misapplication of technology toward the general public—especially if data breaches place the data in the possession of more sinister third parties. Another is the ease with which billions of pictures of people were collected and cataloged without their permission or knowledge of what the photos were being used for.⁶ Following a data breach in early 2020, Clearview, the tiny startup that now wields so much power in biometric information, reassured the public by stating that “[u]nfortunately, data breaches are part of life in the 21st Century.”⁷

Data used for facial recognition falls into a class of unique physical, behavioral, or biological characteristics called biometrics.⁸ Biometric data includes fingerprints, face and iris scans, keystroke dynamics, and even the way someone walks.⁹ Biometric data is unique in that an individual’s biometric identifiers generally cannot be replaced if compromised.¹⁰ A password, PIN number, and credit card are easily replaceable if compromised. But in the advent of facial recognition, fingerprinting, and iris scans for identification and security purposes, an individual’s facial features, an index fingerprint, or an eyeball cannot be reissued at all.¹¹

³ Kashmir Hill, *The Secretive Company that Might End Privacy as We Know It*, N.Y. TIMES (Nov. 2, 2021), <https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html> [<https://perma.cc/8RGJ-HMNG>] (describing Clearview as a “tool that could end your ability to walk down the street anonymously”).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Clearview AI: Face-collecting Company Database Hacked*, BBC NEWS (Feb. 27, 2020), <https://www.bbc.com/news/technology-51658111> [<https://perma.cc/QQ82-7HHG>].

⁸ *Biometrics*, U.S. DEP’T OF HOMELAND SEC. (Dec. 14, 2021), <https://www.dhs.gov/biometrics> [<https://perma.cc/2YGE-5ZBV>].

⁹ WORLD BANK, *Biometric Data*, in PRACTITIONER’S GUIDE 122–28 (2019), <https://id4d.worldbank.org/guide/biometric-data> [<https://perma.cc/DS3J-96HD>].

¹⁰ *Id.*

¹¹ *Id.*

There is no federal law in the United States that regulates biometric data yet.¹² Privacy law in the United States has taken a sectoral approach, with some federal laws such as the Health Insurance Portability and Accountability Act of 1996 (“HIPPA”)¹³ and the Gramm-Leach-Bliley Act¹⁴ directed only to specific industries. Some states have already passed protective measures restricting the collection and use of biometric data, particularly due to the increasing use of biometric information and the potential for its misuse.¹⁵ State legislation accomplishes this regulation either through a biometric privacy law or a general data privacy law, which defines biometric data as an area for protection.¹⁶ A prominent example of a biometric privacy law is Illinois’s Biometric Information Privacy Act (“BIPA”),¹⁷ which regulates the collection and use of biometric data.¹⁸ Because there is not yet a federal statute regulating biometric information, cases involving biometric privacy issues do not arise on the first instance based on a federal statute, but on state statutes.¹⁹ As privacy is a significant and current issue, discussions about privacy will likely continue to expand as a major focus point for legislatures going forward.²⁰

A common trend shows that biometric privacy cases are usually brought in state court, removed to federal court by defendants,²¹ and

¹² *The Proliferation of Biometric Data and Legislation to Regulate its Use*, TANNENBAUM HELPERN SYRACUSE & HIRSCHTRITT LLP, <https://www.thsh.com/publications/the-proliferation-of-biometric-data-and-legislation-to-regulate-its-use> [<https://perma.cc/S9H2-WSNR>].

¹³ Pub. L. No. 104-191, 110 Stat. 1936 (codified in scattered sections of 26 U.S.C., 29 U.S.C., 42 U.S.C.). Among other things, this act regulates the storage of medical information. *Id.* §§ 261–264, 110 Stat. 1936, 2021–34 (codified at 42 U.S.C. § 1320d).

¹⁴ Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified in scattered sections of 12 U.S.C., 15 U.S.C.). Among other things, this act regulates financial institutions in safeguarding sensitive data. *Id.* §§ 501–510, 113 Stat. 1338, 1436–45 (codified at 15 U.S.C. §§ 6801–6809).

¹⁵ Kristine Argentine & Paul Yovanic, *The Growing Number of Biometric Privacy Laws and the Post-COVID Consumer Class Action Risks for Businesses*, JDSUPRA (June 9, 2020), <https://www.jdsupra.com/legalnews/the-growing-number-of-biometric-privacy-62648/> [<https://perma.cc/3CV5-7YFP>].

¹⁶ As of 2020, eight states have passed laws regulating biometric information, and another eleven have at least proposed biometric privacy legislation within the past decade. *Id.*

¹⁷ 740 ILL. COMP. STAT. 14 (2021).

¹⁸ Argentine & Yovanic, *supra* note 15.

¹⁹ In particular, the Illinois Biometric Privacy Act has a private right of action for recovering statutory damages when defendants do not comply with the statute. *See id.*; *see infra* Part I.

²⁰ *See Senators Seek Limits on Biometric Data Collection*, IDENTITY WEEK (Aug. 6, 2020), <https://identityweek.net/senators-seek-limits-on-biometric-data-collection/> [<https://perma.cc/F6RH-CPG8>]. In 2020, U.S. Senator Jeff Merkley introduced a national biometric privacy law with Senator Bernie Sanders. *Id.* Other pieces of legislation will likely be considered and proposed while concerns about privacy continue to grow.

²¹ *See, e.g., Hilliard v. Panera, LLC*, No. 1:21-cv-00233 (N.D. Ill. Jan 14, 2021); *Brewton v. First Student, Inc.*, No.1:20-cv-07017 (N.D. Ill. Nov 25, 2020).

then dismissed for lack of Article III standing.²² Article III standing is a doctrine that describes the ability of a party to have the right to bring a lawsuit to the federal courts.²³ The lack of standing will cause the case to be dismissed and the court will not hear the lawsuit.²⁴ The Supreme Court created a three-part test for the standing doctrine, and the first part involves finding an injury-in-fact that is “concrete and particularized” and “actual or imminent.”²⁵ When a biometric privacy suit reaches a federal court, however, there has been a lack of general consensus among the federal courts over whether a plaintiff suing for biometric privacy violations has a sufficiently “concrete and particularized” injury to sustain Article III standing.²⁶

The Second Circuit and the Ninth Circuit have ruled in direct opposition with each other on this matter, creating a circuit split.²⁷ The point of dispute is whether or not plaintiffs have alleged a concrete and cognizable injury when plaintiffs only allege violations of a statutory procedural right.²⁸ While the Second Circuit has found no concrete injury—and thus, no standing—when companies are not complying with biometric privacy statutes,²⁹ the Ninth Circuit recognizes such procedural violations as sufficiently concrete injuries for standing.³⁰

Most recently, the Supreme Court found no injury for procedural violations of the Fair Credit Reporting Act of 1970 (“FCRA”)³¹ in *TransUnion LLC v. Ramirez*,³² but it is yet to be seen how this decision will be applied to cases in federal court concerning biometric information. As the Supreme Court has declined to grant review on whether procedural violations of state biometric privacy statutes constitute an injury,³³ the situation remains unclear for potential litigants.

²² See *Hazlitt v. Apple Inc.*, 500 F. Supp. 3d 738 (S.D. Ill. 2020), *vacated sub nom. In re Apple Inc.*, No. 20-8033, 2021 WL 2451296 (7th Cir. Jan. 22, 2021).

²³ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

²⁴ See *id.*

²⁵ *Id.*

²⁶ Greg Margolis & Jane Metcalf, *What You Do Know Can't Hurt You: Standing and the Illinois Biometric Privacy Act*, PATTERSON BELKNAP (Sept. 2, 2020), <https://www.pbwt.com/misbranded/what-you-do-know-cant-hurt-you-standing-and-the-illinois-biometric-privacy-act/> [https://perma.cc/PU99-XHCV].

²⁷ See *id.*

²⁸ *Compare Santana v. Take-Two Interactive Software, Inc.*, 717 F. App'x 12, 15 (2d Cir. 2017), with *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1270 (9th Cir. 2019).

²⁹ See *Santana*, 717 F. App'x at 15.

³⁰ See *Patel*, 932 F.3d at 1270.

³¹ Pub. L. No. 91-508, 84 Stat. 1128 (1970) (codified at 15 U.S.C. § 1681).

³² 141 S. Ct. 2190, 2207–14 (2021).

³³ *Supreme Court Leaves the Door Open for Expansive Biometric Privacy Lawsuits*,

This leaves room for confusion for private entities collecting, using, and storing biometric information because of the inconsistent application of the law.

This Note argues that federal courts should apply *Ramirez* to allow standing in cases involving biometric data collection or usage, thus following the Ninth Circuit's model for biometric privacy cases, because biometric privacy violations are sensitive and permanent in nature. More specifically, federal courts should not apply *Ramirez* literally in lawsuits alleging biometric privacy violations because literal application would lead to the absurd results of denying standing for countless longstanding statutes, under deterrence, stagnation in the law, and a usurpation of the legislative branch. Allowing plaintiffs to litigate in federal court will recognize and protect the sensitivity of their biometric information by keeping companies handling this data, like Clearview, under scrutiny and accountable for their actions.

Part I of this Note gives a brief overview of standing under *Spokeo, Inc. v. Robins* ("*Spokeo I*")³⁴ and the implications of *Ramirez* on the standing doctrine. Part II describes the positions of the Ninth, Second, and Seventh Circuits on the issue of statutory violations and standing in biometric privacy cases, detailing the landmark cases and each court's rationale for its stance. Part III argues that federal courts should apply *Ramirez* to allow Article III standing in instances of biometric privacy violations and should not read the *Ramirez* holding literally because that would only lead to illogical outcomes.

I. BACKGROUND

Article III of the Constitution provides the basis for the standing doctrine by mandating that judicial power only extend to cases and controversies.³⁵ The Supreme Court developed judicial standing through case law to ensure both that federal courts do not go beyond their traditional authorities and that the category of litigants to file suit in federal court is properly limited.³⁶ Standing requires that (1) the plaintiff has suffered an injury-in-fact, (2) which is fairly traceable to the alleged conduct, and (3) is likely to be redressed by a favorable judicial decision.³⁷ The first factor is the heart of the issue

O'MELVENY & MYERS LLP (Jan. 23, 2020), <https://www.omm.com/resources/alerts-and-publications/alerts/supreme-court-leaves-the-door-open-for-expansive-biometric-privacy-lawsuits/> [<https://perma.cc/MP3W-HMT7>].

³⁴ 578 U.S. 330 (2016).

³⁵ U.S. CONST. art. III, § 2.

³⁶ See *Spokeo I*, 578 U.S. at 337–38.

³⁷ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

for alleged biometric privacy violations and whether there is sufficient Article III standing, and therefore this Note will consider only the first factor in more detail. In particular, biometric privacy claims under the private right of action granted by the Biometric Information Privacy Act, have faced significant barriers in court over whether plaintiffs have suffered an actual, concrete injury sufficient to pursue litigation.³⁸

A. *Spokeo*, *Ramirez*, and the “Injury-in-fact” Requirement

For years, the Supreme Court offered guidelines for deciding what constitutes an “injury-in-fact” without setting forth a clear rule, leaving lower courts struggling to interpret its meaning.³⁹ In *Spokeo*, the Supreme Court was presented with the question of whether a plaintiff suing under the FCRA had sufficient standing to bring an action in federal court when there was a willful violation of the FCRA absent actual harm or claim of damages.⁴⁰ The Supreme Court remanded to the lower court without deciding the standing issue.⁴¹ The Court stated, however, that even in cases of statutory violations, Article III standing required a concrete injury.⁴² Although intangible injuries could be considered concrete, the Court held that the injury-in-fact requirement was not automatically fulfilled whenever a statute articulated a statutory right with means to sue for violations of that right.⁴³ At the same time, the Court also stated that it was possible for a violation of a procedural right itself to be sufficient, and additional harm did not need to be shown to prove injury-in-fact.⁴⁴ The Court left it to the lower courts to decide under which circumstances a mere statutory violation was enough to clear the standing hurdle.⁴⁵ The flexible standard set in *Spokeo* left lower courts trying to interpret and apply *Spokeo*’s concrete injury requirement for Article III standing, often leading to inconsistent applications of the *Spokeo* decision between courts.⁴⁶

³⁸ See *infra* Section I.B.

³⁹ See *Spokeo I*, 578 U.S. at 339–43; see also *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982).

⁴⁰ *Spokeo I*, 578 U.S. at 333–35.

⁴¹ *Id.* at 334–35.

⁴² *Id.* at 341 (holding that plaintiff “could not . . . allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III”).

⁴³ *Id.* at 342–44.

⁴⁴ *Id.* at 340–44.

⁴⁵ *Id.* at 342–44.

⁴⁶ See, e.g., *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 463 & n.2 (7th Cir. 2020) (finding any unwanted text message caused a concrete injury for purposes of standing after applying

Recently, the Supreme Court offered a bit of clarity with its 5–4 decision in *Ramirez*, when the Court revisited the situation of inaccurate credit reports and requirements for Article III standing.⁴⁷ In *Ramirez*, TransUnion issued a report that identified the plaintiff, Ramirez, as a potential terrorist simply because he shared a first and last name with an individual on the government’s terrorist watch list.⁴⁸ After a dealership refused to sell him a car, Ramirez filed a class action suit on behalf of himself and thousands of other people who had also been incorrectly identified.⁴⁹ Although the Court decided that Ramirez had suffered a concrete injury, it held that only those who, like Ramirez, also had this information disseminated to third parties had a claim, while the rest who had merely been misidentified as a terrorist did not.⁵⁰ Thus, in *Ramirez*, the majority clarified that a plaintiff in a class action claiming a mere statutory violation does not have standing and therefore cannot win statutory damages, even if that violation would otherwise entitle them to statutory damages.⁵¹ One dissent in this 5–4 decision was quick to point out that this was an unacceptable assertion of control by the judiciary over the legislature by noting that “never before [had the] Court declared that legislatures are constitutionally precluded from creating legal rights enforceable in federal court” if the rights were not grounded historically or at common law.⁵²

The question of whether or not there was a concrete injury has always been at the forefront of many information privacy and security claims. In many cases of alleged privacy violations, plaintiffs have their data compromised, but courts are often reluctant to recognize a cognizable injury with just the acquisition of data because courts traditionally view harm as something both current and materialized.⁵³ The decision in *Ramirez* reinforces this notion. Privacy claims become more unclear if the data or information involved has not yet been

Spokeo); *Salcedo v. Hanna*, 936 F.3d 1162, 1173 (11th Cir. 2019) (finding that single unwanted text message did not result in type of harm that constitutes injury-in-fact for purposes of standing).

⁴⁷ *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021).

⁴⁸ *Id.* at 2201.

⁴⁹ *Id.* at 2201–02.

⁵⁰ *Id.* at 2207–14.

⁵¹ *Id.* at 2205–14.

⁵² *Id.* at 2221 (Thomas, J., dissenting).

⁵³ See Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data-Breach Harms*, 96 TEX. L. REV. 737, 754 (2018) (arguing that courts are overly narrow in insisting data breach harms be both “visceral” and “vested” before harm is recognized).

inappropriately used or disseminated to third parties.⁵⁴ Different interpretations by federal courts before *Ramirez* led to a circuit split on the issue of standing and biometric privacy violations.⁵⁵ After *Ramirez*, the courts will be a testing ground for the newly articulated standing concepts.⁵⁶

The judicial branch, however, has generally been slow to address the severe privacy issues that come with modern advancements in technology and biometrics.⁵⁷ The lack of a strong legal framework and judicial safeguards regarding biometric data is leading to mass privacy violations.⁵⁸ Biometric data will continue to be a major modern privacy concern for privacy experts, domestic and international legislatures,⁵⁹ and litigants in federal courts despite *Ramirez*. As federal courts begin to grapple with *Ramirez* and continue wrestling with how to handle biometric data and its unique sensitivities, this Note recommends that federal courts distinguish *Ramirez* from the biometric data context.

B. Biometric Privacy Claims Under BIPA

As technologies continue to advance, biometric data has become an invaluable source of information to many businesses.⁶⁰ The role and application of biometric information is increasingly expanding throughout various industries in the world, from law enforcement to businesses, for purposes of security, identification, and authentica-

⁵⁴ Priscilla Fasoro & Lauren Wiseman, *Standing Issues in Data Breach Litigation: An Overview*, COVINGTON & BURLING LLP (2018), <https://www.insideprivacy.com/data-security/data-breaches/standing-issues-in-data-breach-litigation-an-overview> [https://perma.cc/23E8-Y44K].

⁵⁵ See *infra* Part II.

⁵⁶ Abby L. Risner & Lauren A. Daming, *SCOTUS Decision in TransUnion LLC v. Ramirez Raises Hurdle for Establishing Standing in Class Action Claims Under the Illinois Biometric Information Privacy Act and Other Data Privacy and Consumer Protection Statutes*, WESTLAW TODAY (July 13, 2021), https://www.greensfelder.com/media/publication/583_Risner_Daming_Westlaw%20Today.pdf [https://perma.cc/S8EF-3WB2].

⁵⁷ See Vivek Wadhwa, *Laws and Ethics Can't Keep Pace with Technology*, MIT TECH. REV. (Apr. 15, 2014), <https://www.technologyreview.com/2014/04/15/172377/laws-and-ethics-cant-keep-pace-with-technology/> [https://perma.cc/AR92-2448].

⁵⁸ See Jennifer Lynch & Adam Schwartz, *Victory! Illinois Supreme Court Protects Biometric Privacy*, ELEC. FRONTIER FOUND. (Jan. 25, 2019), <https://www.eff.org/deeplinks/2019/01/victory-illinois-supreme-court-protects-biometric-privacy> [https://perma.cc/Q2FS-Y3WU].

⁵⁹ See Danny Ross, *Processing Biometric Data? Be Careful, Under the GDPR*, IAPP (Oct. 31, 2017), <https://iapp.org/news/a/processing-biometric-data-be-careful-under-the-gdpr/> [https://perma.cc/M9PP-WNA7] (“GDPR specifically singles out biometric data as a ‘sensitive’ category of personal information, warranting robust protection.”).

⁶⁰ See Elizabeth M. Walker, *Biometric Boom: How the Private Sector Commodifies Human Characteristics*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 831, 834–35 (2015).

tion.⁶¹ Because biometric identifiers are unique in nature, they are regarded by companies to be secure, convenient, and more reliable data for identification and security purposes.⁶² The use of biometric identifiers are therefore likely to become even more prevalent in the future.⁶³ But the potential misuse and risks apparent from this trajectory have rightfully raised concerns about security and privacy rights.⁶⁴

In response, some states have proposed and passed legislation that sets the framework for the collection, retention, and destruction of biometric data by private entities.⁶⁵ Illinois's BIPA has been at the forefront of biometric privacy regulations because it is the oldest and most comprehensive biometric privacy law in the United States.⁶⁶ Because there are few laws governing biometric data that exist in the United States,⁶⁷ many other states are attempting to implement, or are in the process of implementing, similar legislation to BIPA, following a current movement towards state regulation of biometric information.⁶⁸ Before 2018, only Illinois, Texas, and Washington had biometric privacy laws.⁶⁹ Within a year, the number almost tripled.⁷⁰ BIPA still remains particularly relevant to the plaintiffs' bar because until recently it was the only statute that regulated biometric privacy and included a private right of action for any Illinois resident "aggrieved" by a violation of the Act.⁷¹ California's Consumer Privacy Act of 2018

⁶¹ Examples include facial recognition used by casinos to identify known card counters and corporations using heartbeats to authenticate employees. Jayshree Pandya, *Hacking Our Identity: The Emerging Threats from Biometric Technology*, FORBES (Mar. 9, 2019, 12:26 PM), <https://www.forbes.com/sites/cognitiveworld/2019/03/09/hacking-our-identity-the-emerging-threats-from-biometric-technology/> [https://perma.cc/9PHH-XVQT].

⁶² See *The Proliferation of Biometric Data and Legislation to Regulate its Use*, *supra* note 12.

⁶³ *Id.*

⁶⁴ *Biometric Security Poses Huge Privacy Risks*, SCI. AM. (Jan. 1, 2014), <https://www.scientificamerican.com/article/biometric-security-poses-huge-privacy-risks/> [https://perma.cc/A8HR-LSFK].

⁶⁵ Soule, *supra* note 2.

⁶⁶ See 740 ILL. COMP. STAT. 14/5(e) (2021); Christopher Ward & Kelsey C. Boehm, *Developments in Biometric Information Privacy Laws*, FOLEY & LARDNER LLP (June 17, 2021), <https://www.foley.com/en/insights/publications/2021/06/developments-biometric-information-privacy-laws> [https://perma.cc/8HX8-TVYM].

⁶⁷ In Europe, the General Data Protection Regulation ("GDPR") also regulates biometric data and defines the term quite broadly. See *The Proliferation of Biometric Data and Legislation to Regulate its Use*, *supra* note 12; Argentine & Yovanic, *supra* note 15.

⁶⁸ Arkansas, California, Texas, and Washington are four states that have developed legislation modeled on BIPA. Ward & Boehm, *supra* note 66.

⁶⁹ Argentine & Yovanic, *supra* note 15.

⁷⁰ *Id.*

⁷¹ 740 ILL. COMP. STAT. 14/20 (2021).

(“CCPA”)⁷² identifies “personal information” beyond biometric identifiers while also providing for a private right of action, though consumers can only sue if their information is accessed or disseminated without authorization.⁷³ While BIPA does not prohibit the collection of biometric data itself, the act demands certain affirmative obligations from the private entities that choose to do business within Illinois,⁷⁴ including notice and written consent from the individual whose biometric data is being collected.⁷⁵ Importantly, BIPA’s private right of action provides any Illinois resident “aggrieved by a violation” of the statute the right to sue and seek damages for violations of its provisions, ranging from \$1,000 up to \$5,000 for reckless or intentional violations.⁷⁶

BIPA litigation has been on the rise for consumer class actions across the United States because of the statute’s broader scope compared with other state biometric privacy statutes, and the possibility of statutory damages.⁷⁷ In many cases, the defendant will remove the case to federal court under diversity of citizenship jurisdiction, and then move to dismiss for lack of Article III standing.⁷⁸ In 2020, how-

⁷² CAL. CIV. CODE §§ 1798.100–1798.199.100 (West 2020).

⁷³ *Id.* §§ 1798.140, 1798.150. The CCPA’s application to businesses and its employees began in January 2020 and will surely continue to shape the legal landscape of biometric privacy claims. See *The Proliferation of Biometric Data and Legislation to Regulate its Use*, *supra* note 12.

⁷⁴ The issue of personal jurisdiction is a separate issue, and one that can make it difficult for Illinois residents to bring suit in Illinois when a national company is headquartered in a different state. Plaintiffs, however, are still able to sue these companies for BIPA violations in other states, including the companies’ home states. See Joshua Fattal, David Kantrowitz & Natalie Perez, *Recent Decisions in Illinois Limit BIPA’s Reach, but California Begs to Differ*, JD-SUPRA (Mar. 8, 2021), <https://www.jdsupra.com/legalnews/recent-decisions-in-illinois-limit-bipa-9126655/> [<https://perma.cc/C9R7-MUGD>].

⁷⁵ Monica R. Chmielewski, Samuel D. Goldstick, Aaron K. Tantleff, John L. Litchfield & Patrick J. McMahon, *Biometric Privacy: Illinois Supreme Court Decision Allows Claims to Proceed Without Showing of Actual Harm*, FOLEY & LARDNER LLP (Feb. 4, 2019), <https://www.foley.com/en/insights/publications/2019/02/biometric-privacy—illinois-supreme-court-decision> [<https://perma.cc/4YE8-4DAC>].

⁷⁶ 740 ILL. COMP. STAT. 14/20 (2021).

⁷⁷ See Rochelle Swartz & David T. Cohen, *Rivera v. Google Bolsters Article III Challenges to Privacy Suits - but Risks Remain*, ORRICK HERRINGTON & SUTCLIFFE LLP (Jan. 24, 2019), <https://blogs.orricks.com/trustanchor/2019/01/23/rivera-v-google-bolsters-article-iii-challenges-to-privacy-suits-but-risks-remain/> [<https://perma.cc/47BH-LDHK>].

⁷⁸ See, e.g., *Hazlitt v. Apple Inc.*, 500 F. Supp. 3d 738 (S.D. Ill. 2020), *vacated sub nom. In re Apple Inc.*, No. 20-8033, 2021 WL 2451296 (7th Cir. Jan. 22, 2021) (vacated and remanded to reconsider in light of subsequent decisions); *Bryant v. Compass Grp. USA, Inc.*, 958 F.3d 617, 620 (7th Cir. 2020). A review of Illinois dockets over a three-month period showed that thirty-six of forty-eight BIPA complaints were removed from state court, revealing the frequency of this occurrence. Jennifer Marsh, *Analysis: 7th Circuit’s BIPA Rulings Provide State Court Roadmap*, BLOOMBERG L. (Feb. 18, 2021, 11:46 AM), <https://news.bloomberglaw.com/tech-and-telecom->

ever, BIPA filings in federal courts brought by plaintiffs significantly increased as well under diversity jurisdiction, following new case law that clarified Article III standing requirements for biometric privacy suits.⁷⁹ The circuit split therefore directly influences the choice in forum available to litigants, as well as whether a case will be heard or dismissed before reaching the merits.⁸⁰ While *Ramirez* sheds some light on the choice of forum issue, the decision does not stop forum shopping in biometric privacy cases because *Ramirez* does not resolve the standing question within the biometric space. Individuals might still choose the circuit that they believe will lead to a favorable outcome, looking to previous BIPA decisions and the courts' application of *Spokeo*.

Lawsuits under BIPA often may concern failure to provide written notice about the details of the collection of their biometric information, or failure to obtain written consent,⁸¹ under section 15(b).⁸² Additionally, under section 15(a), some plaintiffs may allege injury through violation of the written policy requirement, which states that entities must publicly provide a written policy for the retention period and subsequent destruction of the biometric data they were collecting and storing.⁸³ At times, the claim also may involve section 15(c), which forbids private entities from selling, trading, or profiting from some-

law/analysis-7th-circuits-bipa-rulings-provide-state-court-roadmap [https://perma.cc/2RB8-GCML].

⁷⁹ The landmark decision by the Illinois Supreme Court finding standing for plaintiffs for a violation of BIPA without “actual injury” opened the door for BIPA litigation and further discussions about Article III standing in federal court. *See infra* Section II.A.1. Federal complaints alleging BIPA claims more than doubled from 2018 to 2019 and had already almost doubled again by mid-2020. Jennifer Marsh, *Analysis: Biometrics Privacy Class Actions Increase This Year*, BLOOMBERG L. (Nov. 6, 2020, 4:18 AM), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-biometrics-privacy-class-actions-increase-this-year> [https://perma.cc/SZG4-WS2E]. The increase in BIPA complaints continued until 2021, after which the amount of BIPA complaints remained relatively steady. Kristin L. Bryan, Christina Lamoureux & Dan Lonergan, *2021 Year in Review: Biometric and AI Litigation*, NAT'L L. REV. (Jan. 5, 2022), <https://www.natlawreview.com/article/2021-year-review-biometric-and-ai-litigation> [https://perma.cc/3ASY-78Y4].

⁸⁰ *See* Risner & Daming, *supra* note 56.

⁸¹ A current bill being considered by the Illinois General Assembly that would change BIPA's language from “written release,” to “consent” including through “electronic means,” suggests that currently the “written” consent requirement under BIPA would not be satisfied through electronic agreement. *See* Grace Barbic, *Lawmakers Revisit Data Collection Privacy Laws*, CAPITOL NEWS ILL. (Mar. 10, 2021), <https://capitolnewsillinois.com/NEWS/lawmakers-revisit-data-collection-privacy-laws> [https://perma.cc/CN65-TANT].

⁸² 740 ILL. COMP. STAT. 14/15(b) (2021).

⁸³ *Id.* 14/15(a).

one's biometric identifiers.⁸⁴ Whether these plaintiffs are sufficiently "aggrieved by a violation" in these instances to have Article III standing to bring BIPA suits in federal court has been an imperative question for courts.

II. CURRENT INTERPRETATION OF THE STANDING DOCTRINE IN BIOMETRIC PRIVACY LITIGATION

The federal courts have yet to fully consider *Ramirez*'s reluctance to acknowledge statutory violations as concrete injuries. Thus, the *Spokeo* decision still provides the main guideposts for different circuits to come up with their own approach towards Article III standing within the biometric space. This Part explores how, under *Spokeo*, the question of whether a procedural violation of BIPA causes concrete injury sufficient for Article III standing has resulted in a circuit split among the Ninth, Second, and Seventh Circuits. Section A describes the Ninth Circuit's holding that violations of BIPA inflicted harm on plaintiffs by denying their common law right to privacy, which fulfilled the standing requirement. Section B details the Second Circuit's holding that a mere procedural violation of BIPA did not result in a concrete injury that satisfied Article III standing. Section C explains that the Seventh Circuit mainly agreed with the Ninth Circuit in finding a violation of personal rights, which constituted a concrete and particularized injury that satisfied Article III standing, though the court distinguished between the different sections of BIPA.

A. The Ninth Circuit's Application of the Law

The Ninth Circuit has found sufficient injury and Article III standing where there have been violations of concrete privacy interests protected by statutory provisions.⁸⁵ On remand, the Ninth Circuit in *Robins v. Spokeo, Inc.* ("*Spokeo II*")⁸⁶ found that the harm requirement of *Spokeo* depended on whether the statutory provisions were implemented to protect the plaintiff's concrete rights, and whether violations alleged actually harmed, or resulted in a material risk of harm, to those interests.⁸⁷ In this case, Robins claimed that a company, Spokeo, willfully violated a statutory provision by publishing false information about him on its website.⁸⁸ Using the harm require-

⁸⁴ *Id.* 14/15(c).

⁸⁵ *See* Campbell v. Facebook, Inc., 951 F.3d 1106, 1119 (9th Cir. 2020).

⁸⁶ 867 F.3d 1108 (9th Cir. 2017).

⁸⁷ *See id.* at 1110–11, 1117.

⁸⁸ *Spokeo, Inc. v. Robins (Spokeo I)*, 578 U.S. 330, 333 (2016).

ment interpretation, the Ninth Circuit held that the plaintiff still satisfied Article III's concrete harm requirement.⁸⁹ The rationale depended on the fact that the statutory provision in this case, the FCRA, was enacted by Congress to protect consumers from the dissemination of false information and inaccurate consumer reports.⁹⁰ The Court reasoned that these protections were related to privacy protections available at common law and served to protect the consumer's concrete rights, which could be harmed by incorrect credit reports.⁹¹ The Ninth Circuit held that the FCRA violation caused sufficient injury to confer standing.⁹²

1. *Rosenbach v. Six Flags Entertainment Corp.*

The reasoning that a procedural violation of biometric privacy constitutes harm sufficient for standing has its origins in state court. In *Rosenbach v. Six Flags Entertainment Corp.*,⁹³ a minor challenged an amusement park for collecting his thumb print without his informed consent, which is a requirement under BIPA.⁹⁴ The Illinois Supreme Court ruled that a plaintiff only needs to allege a violation of BIPA rather than actual harm to have a claim under the Act.⁹⁵ The court recognized that the legislature codified an individual's "right to privacy in and control over their biometric identifiers and biometric information," which was important due to the particularly sensitive and unique nature of biometric identifiers.⁹⁶ Because plaintiffs were "clearly . . . 'aggrieved'" by the BIPA violations, which took away their right to privacy and to control their own biometric information, the court found that the injury was "real and significant."⁹⁷ The *Rosenbach* decision led to hundreds of BIPA lawsuits filed in Illinois courts.⁹⁸ The *Rosenbach* ruling that a plaintiff could be aggrieved

⁸⁹ *Spokeo II*, 867 F.3d at 1118.

⁹⁰ *Id.* at 1113.

⁹¹ *Id.* at 1114–15.

⁹² *Id.* at 1117.

⁹³ 129 N.E.3d 1197 (Ill. 2019).

⁹⁴ *Id.* at 1201–02.

⁹⁵ *Id.* at 1201–02, 1207.

⁹⁶ *Id.* at 1206 (finding that the moment there is a statutory violation, "the right of the individual to maintain [his or] her biometric privacy vanishes into thin air" (quoting *Patel v. Facebook, Inc.*, 290 F. Supp. 3d 948, 954 (N.D. Cal. 2018))).

⁹⁷ *Id.*

⁹⁸ Richard R. Winter, Rachel C. Agius & William F. Farley, *BIPA Update: Class Actions on the Rise in Illinois Courts*, HOLLAND & KNIGHT LLP (July 22, 2019), <https://www.hklaw.com/en/insights/publications/2019/07/bipa-update-class-actions-on-the-rise-in-illinois-courts> [https://perma.cc/NFR6-JYY7].

under BIPA without a concrete injury, combined with subsequent federal BIPA cases finding sufficient injury-in-fact for Article III standing in federal court, made it easier for plaintiffs to bring suit in federal court or allege BIPA class actions in general.⁹⁹

2. Patel v. Facebook, Inc.

In 2019, the Ninth Circuit directly addressed the standing question in BIPA lawsuits when a class of Illinois plaintiffs sued the tech giant Facebook using *Rosenbach* as precedent.¹⁰⁰ In the landmark case *Patel v. Facebook, Inc.*,¹⁰¹ a class action alleged violation of BIPA when Facebook scanned and identified users in uploaded pictures for its “Tag Suggestions” program, doing so without prior written notice or consent under Section 15(b), and without a compliant data retention schedule under Section 15(a).¹⁰² Facebook argued that the plaintiffs were not “aggrieved” by BIPA violations and could not bring the action because there was no actual, tangible injury for Article III standing.¹⁰³

The *Patel* court reached a decision that suggested that challenges to Article III standing for future BIPA litigation in federal court lacked viability.¹⁰⁴ Because BIPA is intended to protect peoples’ concrete privacy interests by giving them certain rights over the collection, storage, and dissemination of their biometric information, the alleged statutory violations actually harmed or posed a material risk in harming those privacy interests.¹⁰⁵ The court held that a violation of this right articulated by the statute prevented people from exercising these rights, which itself is a concrete injury-in-fact.¹⁰⁶ The argument from Facebook that there was no actual injury because the statutory violation was merely procedural in nature was denied.¹⁰⁷ The Ninth Circuit found *Rosenbach* persuasive when reasoning that the purpose

⁹⁹ See Marsh, *supra* note 79.

¹⁰⁰ See *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1264, 1269, 1274 (9th Cir. 2019).

¹⁰¹ 932 F.3d 1264 (9th Cir. 2019).

¹⁰² *Id.* at 1268.

¹⁰³ *Id.* at 1267.

¹⁰⁴ Gary R. Clark, Meghan C. O’Connor & Sarah A. Erdmann, *Ninth Circuit Rejects Article III Standing Argument for BIPA Claims*, QUARLES & BRADY LLP (Sept. 6, 2019), <https://www.quarles.com/publications/ninth-circuit-rejects-article-iii-standing-argument-for-bipa-claims/> [<https://perma.cc/Q9K8-6TFK>].

¹⁰⁵ *Patel*, 932 F.3d at 1272–75.

¹⁰⁶ *Id.* at 1274.

¹⁰⁷ *Id.* at 1274–75.

of BIPA was to protect concrete rights in privacy, not just procedural rights.¹⁰⁸

B. The Second Circuit's Application of the Law

The Second Circuit has found that plaintiffs have failed to allege a real injury, or a risk of one, for statutory violations of biometric privacy. In previous cases, the Second Circuit had also applied *Spokeo* by identifying a procedural right conferred by Congress and considering whether this right was at a “risk of real harm” upon a procedural violation.¹⁰⁹ The court used this reasoning in *Santana v. Take-Two Interactive Software, Inc.*,¹¹⁰ where plaintiffs alleged BIPA violations when a video game maker enabled users to create an individualized avatar through face-scanning technology.¹¹¹ Before doing so, users had to agree to terms and conditions that stated that facial scans might be “recorded or screen captured during gameplay.”¹¹²

The court assumed, without deciding, that BIPA was enacted to “prevent the unauthorized use, collection, or disclosure of an individual’s biometric data,” but it found that none of the violations were a material risk of harm to privacy interests of plaintiffs because the defendant informed users of the face scan in the terms and conditions.¹¹³ The court held that there was no harm for the purposes of standing because the plaintiffs failed to show that the procedural violations committed would create a material risk that would actually occur.¹¹⁴ *Santana* was the first appellate court to dismiss a lawsuit for lack of standing where procedural violations of BIPA were alleged, and therefore the subsequent Ninth Circuit ruling in *Patel* was in direct tension with it.¹¹⁵ When the Supreme Court denied certiorari after

¹⁰⁸ See *id.* at 1273.

¹⁰⁹ *Strubel v. Comenity Bank*, 842 F.3d 181, 190 (2d Cir. 2016) (quoting *Spokeo, Inc. v. Robins* (*Spokeo I*), 578 U.S. 330, 341 (2016)).

¹¹⁰ 717 F. App’x 12 (2d Cir. 2017).

¹¹¹ *Id.* at 14.

¹¹² *Id.* at 13–14.

¹¹³ *Id.* at 15.

¹¹⁴ While the defendant did not inform users on the retention period in violation of BIPA, the court found no material risk of harm because plaintiffs could not prove that the defendant would fail to properly destroy their biometric data when they were supposed to, or that they lacked proper protocols to do so. *Id.* at 16–18. Nor did the plaintiffs allege that consumer data was being disseminated or accessed by third parties without their consent, even though they claimed the defendant was transmitting and storing user biometric identifiers in a way that risked tracing the information back to the user’s identity. *Id.*

¹¹⁵ See Laura Maechten, *The Second Circuit Weighs in on Tidal Wave of Class Actions Under the Illinois Biometric Privacy Act*, SEYFARTH SHAW LLP: WORKPLACE CLASS ACTION BLOG (Nov. 29, 2017), <https://www.workplaceclassaction.com/2017/11/the-second-circuit-weighs->

Facebook appealed the *Patel* ruling, it declined to resolve the resulting circuit split.¹¹⁶

C. *The Seventh Circuit's Application of the Law*

The Seventh Circuit has generally landed between the decisions reached by the Ninth and Second Circuits, finding Article III standing for violation of certain sections of BIPA, but not others. In *Bryant v. Compass Group USA, Inc.*,¹¹⁷ employees for a call center had to scan and use fingerprints to use the vending machine in a workplace cafeteria.¹¹⁸ The plaintiffs filed a class action and alleged violations of Section 15(b) and Section 15(a) of BIPA.¹¹⁹ Section 15(b) prescribes the informed consent and written policy requirement of the Act, while Section 15(a) provides the obligation private entities have to disclose a data retention schedule and guidelines for destroying collected biometric data.¹²⁰ The Seventh Circuit in *Bryant* held that a violation of Section 15(b) amounts to an injury-in-fact to satisfy Article III standing without alleging further injury.¹²¹ Because the company failed to follow BIPA regulations by collecting employee fingerprints without giving them opportunity to consider whether the terms of the collection and usage were acceptable, employees were deprived of this right, and injury-in-fact was sufficiently established by this statutory violation.¹²²

In *Bryant*, the Seventh Circuit interpreted the *Spokeo* decision as allowing the legislature to decide when there has been a concrete injury “previously inadequate in law,”¹²³ and that this injury did not have to be tangible.¹²⁴ On the other hand, the claim under 15(a) was not a concrete and particularized injury when the company did not make publicly available its written policy detailing a retention sched-

in-on-tidal-wave-of-class-actions-under-the-illinois-biometric-privacy-act/ [https://perma.cc/3FDN-6GA7]; see discussion *infra* Section III.A.2.

¹¹⁶ See *Supreme Court Leaves the Door Open for Expansive Biometric Privacy Lawsuits*, *supra* note 33.

¹¹⁷ 958 F.3d 617 (7th Cir. 2020).

¹¹⁸ *Id.* at 619–20.

¹¹⁹ *Id.* at 617–20.

¹²⁰ *Id.* at 617–25.

¹²¹ *Id.* at 626–27.

¹²² *Id.*

¹²³ *Id.* at 621 (quoting *Spokeo, Inc. v. Robins (Spokeo I)*, 578 U.S. 330, 341 (2016)).

¹²⁴ *Id.* at 621–24. The court mainly relied on Justice Thomas’s concurrence in *Spokeo* to reach its decision, where he distinguished between “private” and “public” rights. See *id.* at 623–24. Because the plaintiffs’ claim in *Bryant* concerned their own personal biometric information, the court determined this to be a “private” right that was sufficient to show “injury-in-fact without further tangible consequences.” *Id.* at 624.

ule and guidelines for future destruction of biometric information.¹²⁵ The court reasoned that the right conferred by 15(a) was a public right, not a private one owed to individuals.¹²⁶

The Seventh Circuit later revisited the Section 15(a) issue and this time, reached a decision that comported more with the Ninth Circuit, which found Article III standing for violations of both Sections 15(a) and 15(b) of BIPA. In *Fox v. Dakkota Integrated Systems, LLC*,¹²⁷ the Seventh Circuit held that a violation of Section 15(a) was also a concrete injury sufficient for standing when a company failed to develop a data collection policy, which resulted in retaining a former employee's biometric data unlawfully after she left the company.¹²⁸ Later, in *Thornley v. Clearview AI, Inc.*,¹²⁹ however, the court reiterated its stance on public and private rights.¹³⁰ In *Thornley*, the defendant collected the plaintiff's biometric identifiers and sold them to third parties in violation of section 15(c) of BIPA,¹³¹ which prohibits private entities from selling, leasing, trading, or profiting from an individual's biometric identifiers.¹³² The Seventh Circuit reasoned that a violation of this section breached a duty to the overall public, not an individual plaintiff.¹³³ Thus, similar to the ruling in *Bryant*, the court held that there was no Article III injury for the *Thornley* plaintiffs.¹³⁴

While the Seventh Circuit was willing to find standing in certain circumstances, it distinguished between violations of different types of rights that constituted Article III injury.¹³⁵ Still, by clarifying that it was possible for there to be Article III standing from procedural violations of both Section 15(a) and 15(b), the Seventh Circuit represented a movement toward allowing biometric privacy claims in federal court. This ruling contrasted with that of the Second Circuit, which rejected Article III standing for both sections 15(a) and (b) of BIPA.¹³⁶ Although federal courts have not had the chance to fully apply the new instructions laid down in *Ramirez*, the current circuit split highlights the uncertainty of courts on how to generally approach the standing

¹²⁵ *Id.* at 626.

¹²⁶ *Id.*

¹²⁷ 980 F.3d 1146 (7th Cir. 2020).

¹²⁸ *Id.* at 1154–55.

¹²⁹ 984 F.3d 1241 (7th Cir. 2021).

¹³⁰ *Id.* at 1245.

¹³¹ *Id.* at 1242–43.

¹³² 740 ILL. COMP. STAT. 14/15(c) (2021).

¹³³ *Thornley*, 984 F.3d at 1245–47.

¹³⁴ *Id.* at 1248.

¹³⁵ *See id.*

¹³⁶ *See supra* Section II.B.

doctrine for biometric privacy litigation, which will likely continue in the future.

III. INTERPRETING *SPOKEO*, *RAMIREZ*, AND PRIVATE RIGHTS OF ACTION

The circuit split regarding standing in cases concerning biometric privacy violations creates issues for both plaintiffs and defendants. An increasing number of cases have been brought under BIPA in recent years,¹³⁷ particularly due to the 2019 Illinois Supreme Court decision in *Rosenbach*,¹³⁸ which opened the door for BIPA litigation by holding that plaintiffs do not have to demonstrate actual harm to qualify as an “aggrieved” person under the Act.¹³⁹ Afterwards, the Ninth and Seventh Circuits, finding that there was concrete injury when defendants did not comply with BIPA provisions, led to increased BIPA litigation in federal court brought by plaintiffs under diversity jurisdiction.¹⁴⁰ Within the influx of BIPA cases, large corporations also continue to remove cases from state court to federal court under diversity jurisdiction, and then move to dismiss for lack of Article III standing.¹⁴¹ There have even been instances where the plaintiffs themselves have asked the court to remand the case from federal court back to state court by alleging lack of concrete injury-in-fact for standing.¹⁴² It is clear that the standing doctrine is being strategically manipulated by litigants to find favorable fora—a situation that would not be necessary if the courts were more unified in approach.

Inconsistent application of the law across the country also leads to uncertainties about when and where to file suit, unpredictable outcomes, and raises a question of inherent unfairness when different jurisdictions are enforcing the same law in different manners. Although litigants have the option to choose the most advantageous forum to litigate BIPA claims, this could potentially raise litigation costs and inefficiency in reaching consistent outcomes. Federal courts should apply a uniform standard to decrease such future uncertainties and contradictory results.

¹³⁷ See *supra* Section II.B. From 2018–2019, about 213 BIPA cases were filed in Illinois state and federal courts. Winter et al., *supra* note 98.

¹³⁸ *Rosenbach v. Six Flags Ent. Corp.*, 129 N.E.3d 1197, 1201–02 (Ill. 2019).

¹³⁹ Winter et al., *supra* note 98.

¹⁴⁰ Marsh, *supra* note 79.

¹⁴¹ See, e.g., *Hazlitt v. Apple Inc.*, 500 F. Supp. 3d 738 (S.D. Ill. 2020), *vacated sub nom. In re Apple Inc.*, No. 20-8033, 2021 WL 2451296 (7th Cir. Jan. 22, 2021).

¹⁴² See, e.g., *Bryant v. Compass Grp. USA, Inc.*, 958 F.3d 617, 620 (7th Cir. 2020).

Section A of this Part argues that courts reviewing biometric privacy cases should apply *Ramirez* in a manner that recognizes biometric privacy violations as concrete harms sufficient for Article III standing. The *Ramirez* decision illustrates that courts still have an inadequate understanding of privacy harms, and to apply the holding literally in biometric privacy suits would reach an absurd result. Therefore, the circuit split in biometric privacy cases will remain relevant even after *Ramirez*, because not only have courts been unable to fully appreciate *Ramirez* yet, they also cannot do so within the biometric privacy context without leading to these absurd results. If such results would arise from a strict application of *Ramirez*, the alternative is to look at the ways the biometric privacy legal landscape has already been shaped by the previous circuit split.

Section B reveals that, by stripping away the protections afforded by statute, corporations and businesses have little incentive to do their best in safeguarding consumers' sensitive biometric information. In addition, the *Ramirez* holding should not be interpreted literally because of a separation of powers argument. In this sense, the federal judiciary should not overstep the authority of state legislators by denying standing to rights expressly given by statutes, because it should be the prerogative of the legislative branch, not the courts, to decide substantive rights. Finally, Section C argues that based on the biometric privacy legal landscape already developed, courts should follow the Ninth Circuit's approach until the Supreme Court further clarifies standing in this context.

A. *Courts Should Apply Ramirez to Find Concrete Injury for Biometric Privacy Violations*

In *Ramirez*, the Supreme Court made it clear that for standing in federal courts, plaintiffs must show an additional injury beyond a statutory violation—harm of a protected right that has a “close historical or common-law analogue” recognized by courts in the past.¹⁴³ The Court added, however, that this “does not require an exact duplicate in American history and tradition.”¹⁴⁴ This statement was meant to clarify the rather ambiguous direction given in *Spokeo*, which called courts to look at both the judgment of Congress and a harm that was traditionally a basis for lawsuits in English or American courts, without elaborating on how to do so.¹⁴⁵ The *Ramirez* decision instructs that

¹⁴³ *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021).

¹⁴⁴ *Id.*

¹⁴⁵ *See id.*

plaintiffs have standing to pursue violations of laws creating a legal right only if the harm has an analogue historically or at common law, though the injury does not need to be an exact match.¹⁴⁶ For example, in *Ramirez*, the Court likened the harm when consumers were mistakenly identified as potential terrorists to the tort of defamation.¹⁴⁷ Because publication of the defaming statement is a requirement for defamation, and there, the false identification had only been retained for most of the plaintiffs in the suit and not disseminated to third parties, the Court found an insufficiently close relationship to confer standing for those plaintiffs.¹⁴⁸ The idea was that they suffered no concrete injury because there cannot be injury to their reputation without the publication or dissemination of information.¹⁴⁹

Courts reviewing biometric privacy cases should follow the Ninth Circuit's model and apply *Ramirez* in a way that recognizes biometric privacy violations as concrete harms sufficient for Article III standing. Because biometric identifiers are unique, sensitive, and different from other types of personal information,¹⁵⁰ courts should not follow the *Ramirez* decision the way it was applied in the *Ramirez* context, and instead return to the legal analysis that already exists under the various BIPA cases in instances regarding biometric data. Fundamentally, the facts of *Ramirez* and the resulting alleged harm are distinguishable from and do not apply to biometric privacy suits. The *Ramirez* plaintiffs claimed there had been reputational harm based on inaccurate credit files because of the defendant's failure to use reasonable procedures to ensure accuracy under FCRA as well as a failure to notify them that a problem existed with their record at all.¹⁵¹ On the other hand, biometric privacy suits will mainly concern harms stemming from improper *collection* and *storage* of biometric data.¹⁵² Under BIPA, this occurs when entities collect and store biometric identifiers without proper notice, obtainment of written consent, and disclosures like a written biometric privacy policy for consumers.¹⁵³ This type of injury to an individual is not reputational; the focus is not on adverse effects from the publication of inaccurate information, but the harvesting of the most sensitive biological data from our bodies. The ar-

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 2208–09.

¹⁴⁸ *Id.* at 2209–13.

¹⁴⁹ *Id.*

¹⁵⁰ *See supra* Section I.B.

¹⁵¹ *See Ramirez*, 141 S. Ct. at 2202.

¹⁵² *See supra* Section I.B.

¹⁵³ *See supra* Section I.B.

gument against finding standing in *Ramirez* does not apply because the harm identified by biometric privacy statutes is nothing like the harm of defamation. Thus, even if there is no dissemination to third parties, or “publication,” courts should still recognize concrete harms in instances of biometric privacy violations.

In fact, *Ramirez* identified several privacy torts, such as intrusion upon seclusion, as harms that meet the articulated criteria for standing.¹⁵⁴ The intrusion upon seclusion tort, unlike defamation, does not require the dissemination of private information.¹⁵⁵ By specifically recognizing a privacy tort that does not require disclosure of information, *Ramirez* implies that there can be types of privacy violations that are concrete injuries sufficient for standing even without dissemination to third parties.¹⁵⁶ Violations of biometric privacy statutes should be considered such a harm, especially because the harm protected against is not reputational.

1. Courts Have Difficulty Understanding Privacy Harms

Courts should also not read *Ramirez* literally because courts are uncertain about how to approach privacy violations,¹⁵⁷ and *Ramirez* is still ambiguous enough that courts will likely continue to struggle to interpret the holding. Interpreting *Ramirez* in a way that completely shuts the door for potential litigants in federal courts is too hasty in the era of mass data collection and could lead to under deterrence and other undesirable results. Although *Ramirez* clarifies *Spokeo* in many ways, it also adds several layers of ambiguity to the already muddled doctrine. For one, how close does the injury approximately need to be to its supposed historical or common law analogue? Where is the cut-off point in the timeline for a harm to be “historical”? Given these ambiguities, courts should be wary to apply *Ramirez* at its face value to a concept that is already difficult for courts to grapple with, like modern privacy harms.

Lower courts had already reached widely different results in their attempts to apply the previous *Spokeo* decision to biometric data privacy harms. For example, both the Ninth and Seventh Circuits rightfully saw that BIPA was enacted in order to give Illinois residents the

¹⁵⁴ See *Ramirez*, 141 S. Ct. at 2204.

¹⁵⁵ See *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 462 (7th Cir. 2020) (explaining that tort of intrusion upon seclusion rests upon defendants’ invasion of privacy).

¹⁵⁶ See *Ramirez*, 141 S. Ct. at 2204.

¹⁵⁷ See, e.g., *Santana v. Take-Two Interactive Software, Inc.*, 717 F. App’x 12, 15 (2d Cir. 2017); *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1270 (9th Cir. 2019).

right to control the collection, storage, and use of their biometric data, and therefore, violating the act was equivalent to violating peoples' concrete interests in that right.¹⁵⁸ The circuits, however, diverged when it came to section 15(a) of BIPA, which mandates companies to make publicly available its written policy on biometric data, including its retention schedule and guidelines for future destruction of the biometric information it has collected.¹⁵⁹ When Section 15(a) was at issue, *Bryant* found no concrete injury because it found that a failure to develop and publish a data collection policy is a bare procedural violation.¹⁶⁰ Yet later in *Dakkota*, the Seventh Circuit would go on to acknowledge that there could be Article III standing in Section 15(a) where no written retention and destruction policy for biometric data was provided and the defendant failed to destroy biometric data after the plaintiff left the company.¹⁶¹ The Seventh Circuit distinguished *Bryant* from *Dakkota* by stating that even though failing a general and public duty to disclose data retention and destruction policies was not an adequate concrete harm, the harm alleged in *Dakkota* was one of compliance resulting in unlawful retention.¹⁶² Namely, the defendant's noncompliance with BIPA by not developing and publicly disclosing a data collection policy led to an unlawful retention of biometric identifiers, which is a sufficient concrete injury.¹⁶³

Then later, the Seventh Circuit in *Thornley* also found no injury from a section 15(c) violation, analogizing the section with its previous reasoning in *Bryant* for section 15(a).¹⁶⁴ The court found that the defendant violated a public duty rather than a private duty for its sale of the plaintiff's biometric identifiers, and so the plaintiff had no standing in federal court.¹⁶⁵ Plaintiffs thus have standing to pursue a claim in the Seventh Circuit when their biometric identifiers are collected and retained without proper notice and consent, but they do not have standing when a company fails to provide consumers with an adequate data collection policy or even sells their biometric identifiers to third

¹⁵⁸ See *supra* Part II.

¹⁵⁹ See *supra* Part II.

¹⁶⁰ *Bryant v. Compass Grp. USA, Inc.*, 958 F.3d 617, 626 (7th Cir. 2020).

¹⁶¹ *Fox v. Dakkota Integrated Sys., LLC*, 980 F.3d 1146, 1153–56 (7th Cir. 2020).

¹⁶² *Id.*

¹⁶³ “She accuses Dakkota of violating the full range of its section 15(a) duties by failing to develop, publicly disclose, and comply with a data-retention schedule and guidelines for the permanent destruction of biometric data when the initial purpose for collection ends.” *Id.* at 1154.

¹⁶⁴ *Thornley v. Clearview AI, Inc.*, 984 F.3d 1241, 1245–49 (7th Cir. 2021).

¹⁶⁵ *Id.* In *Bryant*, the Seventh Circuit similarly determined that the defendant's failure to follow the statutory publication requirements violated a duty to the public and not to the private plaintiff, and so the plaintiff had no standing in federal court. *Bryant*, 958 F.3d at 626.

parties for profit.¹⁶⁶ This discrepancy just within the Seventh Circuit between interpretations of different provisions of BIPA illustrates that courts perhaps have a sense that there was concrete harm to plaintiffs, but are unsure how to exactly square those harms with the existing standing doctrine.

But generally, courts tend to not have a clear understanding of privacy harms at all. For instance, the Second Circuit's *Santana* case assumed that the purpose of BIPA was "to prevent the unauthorized use, collection, or disclosure of an individual's biometric data" and found that the collection and disclosure of facial scans did not pose a material risk of harm to this interest, particularly because plaintiffs knew their data was being collected and did not allege that the data might be improperly accessed by third parties.¹⁶⁷ The outcomes of *Santana*, *Ramirez*, and others like them¹⁶⁸ result from an overly narrow interpretation of privacy harm that focuses on the dissemination of information leading to physical proof of harm, such as identity theft or tangible financial losses.¹⁶⁹ But what is the point of a protective privacy law if redress is only available to victims after the very situation the law is trying to protect against actually happens? Retroactive remedies do not change the fact that someone's data was already compromised and their privacy invaded as a result. This is more of a concern when it comes to biometric privacy, where biometric identifiers are uniquely sensitive to the individual and cannot be changed like a password whenever there is a data breach.¹⁷⁰

2. *Courts Applying Ramirez Literally Will Lead to Absurd Results*

Additionally, *Ramirez* should not be read and applied literally because to do so would lead to absurd results. There have already been scholars who have pointed out that if *Ramirez*'s instructions are read literally, and only violations of rights protected historically or at common law are allowed in federal court from now on, this could

¹⁶⁶ *Dakkota*, 980 F.3d at 1153–56 (failure to provide written policy and failure to destroy data); *Bryant*, 958 F.3d at 626 (failure to provide adequate data collection policy); *Thornley*, 984 F.3d at 1245–49 (sale of biometric identifiers).

¹⁶⁷ *Santana v. Take-Two Interactive Software, Inc.*, 717 F. App'x 12, 15 (2d Cir. 2017).

¹⁶⁸ Similarly, in *Rivera v. Google, Inc.*, 366 F. Supp. 3d 998 (N.D. Ill. 2018), the court found that there was no material harm because the plaintiffs did not dispute that their face templates had not yet been shared to third parties, or that there had been unauthorized access to their biometric information. *Rivera*, 366 F. Supp. 3d at 1006–07.

¹⁶⁹ See Solove & Citron, *supra* note 53, at 741.

¹⁷⁰ See *supra* Section I.B.

drastically limit the ability to sue under countless already established laws.¹⁷¹ Many well-litigated federal laws that plaintiffs depend upon are congressionally created statutory rights with seemingly no historical or common law equivalent.¹⁷² In his dissent in *Ramirez*, Justice Thomas used the example of copyright law, which gives copyright holders the right to sue for infringement for statutory violations without having to show monetary loss.¹⁷³ If *Ramirez* is applied literally, then there will no longer be standing for many of these existing laws; surely the Supreme Court did not intend for that kind of massive upheaval throughout various sectors when litigants across the country are suddenly cut off from their desired forum.

Furthermore, preventing people from being able to bring biometric privacy suits in federal court could impact the deterrent effect intended by BIPA and biometric statutes similar to it. There has to be an incentive for companies and businesses to meet the reasonable standard of care in collecting, using, and safeguarding peoples' biometric information. The monetary awards to plaintiffs for violations of protective measures are a way to nudge these businesses to clean up procedures and ensure that biometric identifiers are being handled with the maximum possible vigilance, as illustrated by BIPA's provisions awarding more damages if the violation was reckless or intentional.¹⁷⁴ Entities have less incentive to make substantive changes when there is a lesser chance of noticeable penalties.¹⁷⁵ Because of the higher level of responsibility that comes with handling extremely sensitive information, these entities should be appropriately scrutinized and regulated. It would make little sense to remove an extra layer of protection from the plaintiffs' arsenal by blocking another avenue of accountability in federal court.

Biometric data falls into the category of particularly sensitive information, and its release could permanently increase risk to the indi-

¹⁷¹ Erwin Chemerinsky, *What's Standing After TransUnion LLC v. Ramirez*, N.Y.U. L. REV. ONLINE 269, 283 (2021).

¹⁷² *Id.* (pointing out Freedom of Information Act, Family and Medical Leave Act, Fair Housing Act, and many others as examples of such laws that would be in danger if *Ramirez* is applied literally in the future).

¹⁷³ *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2217 (2021) (Thomas, J., dissenting).

¹⁷⁴ See 740 ILL. COMP. STAT. 14/20 (2021).

¹⁷⁵ *TransUnion* provides the perfect example of such an entity. *Ramirez* was not the first time that *TransUnion* was sued for inaccurately reporting someone as a potential terrorist or drug trafficker. See *Cortez v. Trans Union, LLC*, 617 F.3d 688 (3d Cir. 2010). But in the aftermath, *TransUnion* still failed to implement any meaningful or preventative measures. *Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1021 (9th Cir. 2020) (*TransUnion* "made surprisingly few changes" after a small penalty in *Cortez*).

vidual because it is unique to that person and cannot be readily changed.¹⁷⁶ There are already methods of printing a replica of someone's fingerprint, creating iris images for iris scanners, and even "fooling voice scanners with sound-morphing tools."¹⁷⁷ Preventing these privacy harms is the reason biometric privacy and other privacy statutes are enacted in the first place. Therefore, retroactive remedies after the fact are quite useless.¹⁷⁸ This goal of protecting the public's privacy interests was recognized by the Ninth Circuit in *Patel* when the court reasoned that BIPA was enacted to protect those privacy interests by giving people the right to control their biometric information; therefore, a violation of this right would amount to a concrete injury.¹⁷⁹

Part of the issue are the vague standards set by *Spokeo* that left room for lower courts to determine the nature of privacy harms, leading to a constrained interpretation as courts search for the basis of traditional harms found in common law.¹⁸⁰ Although *Ramirez* offered some clarification on the matter, its holding—like *Spokeo*—was particular to the FCRA and to the reasoning that most of the plaintiffs' erroneous information had not yet been sent to third parties.¹⁸¹ But the lower courts should not apply these holdings too broadly for cases of privacy harm, especially those concerning biometric information, because of the unique and unalterable nature of biometric identifiers. Cases involving sensitive biometric data should be distinguished because at the instance dissemination occurs, the data is forever compromised and cannot be changed or fixed like inaccurate credit reports.¹⁸² Being reported as a potential terrorist is less than ideal, but there is something much more intimate regarding data that is part of some-

¹⁷⁶ See Chaminda Hewage, *Stolen Fingerprints Could Spell the End of Biometric Security – Here's How to Save It*, CONVERSATION (Aug. 20, 2019, 8:06 AM), <https://theconversation.com/stolen-fingerprints-could-spell-the-end-of-biometric-security-heres-how-to-save-it-122001> [<https://perma.cc/MG6R-RKKE>].

¹⁷⁷ *Id.*

¹⁷⁸ See Daniel Solove, *The Trouble with Spokeo: Standing, Privacy Harms, and Biometric Information*, TEACHPRIVACY (Jan. 6, 2019), <https://teachprivacy.com/trouble-with-spokeo-standing-privacy-harms-and-biometric-information/> [<https://perma.cc/FU87-EKG6>] (pointing out that many privacy laws articulate a right to deletion of data, erasure, or a right to be forgotten, such as the Children's Online Privacy Protection Act, the EU General Data Protection Regulation, and the CCPA).

¹⁷⁹ See *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1270–75 (9th Cir. 2019).

¹⁸⁰ See Matthew S. DeLuca, *The Hunt for Privacy Harms After Spokeo*, 86 FORDHAM L. REV. 2439, 2463 (2018).

¹⁸¹ See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2211–13 (2021).

¹⁸² Hewage, *supra* note 176.

one's body—the difference between losing agency over your name temporarily or your fingertips permanently.

In situations involving biometric data, courts using the standing doctrine to deny privacy suits leave the public without much protection during the modern age of mass data collection. In the absence of a comprehensive national data security law, personal data is currently regulated by a myriad of federal and state laws including HIPPA, the Gramm-Leach-Bliley Act, and state laws like the CCPA.¹⁸³ However, due to limited enforcement mechanisms, as well as retroactive remedies, the public is still left vulnerable to the exposure of their data.¹⁸⁴ Leaving the ability to sue under longstanding statutes with statutorily created rights of action in doubt and stripping away protective measures in the handling of unique biometric identifiers are the undesirable and absurd outcomes that would result from applying *Ramirez* literally.

B. The Supreme Court in Ramirez Has Encroached on the Legislative Branch

Courts should also read *Ramirez* narrowly in its application because to do otherwise would undoubtedly undermine separation of powers. The Supreme Court in *Ramirez* has encroached on the legislative branch by denying the legislative ability to create statutory rights and stating that Congress cannot “transform something that is not remotely harmful into something that is.”¹⁸⁵ Even though the *Ramirez* Court stated that separation of powers was actually being facilitated by restricting standing,¹⁸⁶ limiting the congressional power to provide rights of actions appears to have exactly the opposite effect. This is especially so because Congress has historically been able to create rights sufficient for Article III standing without judicial limitations.¹⁸⁷ The legislative branch is in the best position to address new concerns because it is capable of an agile and complete policy response, and to place limitations on this ability now would arguably result in the stagnation of progress.¹⁸⁸

¹⁸³ See *supra* notes 12–20, 65–77 and accompanying text.

¹⁸⁴ See Daniel J. Marcus, *The Data Breach Dilemma: Proactive Solutions for Protecting Consumers' Personal Information*, 68 DUKE L.J. 555 (2018).

¹⁸⁵ *Ramirez*, 141 S. Ct. at 2205 (quoting *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018)).

¹⁸⁶ *Id.* at 2203.

¹⁸⁷ *Id.* at 2220–21 (Thomas, J., dissenting).

¹⁸⁸ Chemerinsky, *supra* note 171, at 287 (pointing out that many serious harms are recog-

Similarly, inherent within the various biometric privacy legislation enacted, including BIPA, are rights regarding peoples' biometric privacy, including the right to have control over biometric information. The Ninth Circuit interpreted BIPA to incorporate a right to understand the collection and use of biometric identifiers in order for people to be a part of the decision-making process of their own personal data.¹⁸⁹ The CCPA, which includes biometric data in its regulations,¹⁹⁰ also has a right of notice provision where consumers must be informed about the biometric data that is being collected, used, or stored by a company.¹⁹¹ Part of the right of notice is the mandate that people should know how long an entity will hold onto the biometric data until it is permanently destroyed.¹⁹² It can be interpreted that by enacting laws like the CCPA or BIPA, various legislatures have determined that various types of privacy harms exist beyond just the dissemination of data, for which there should be sufficient statutory remedies or redress available.

Federal court decisions regarding the standing doctrine for biometric privacy issues will influence how effectively state legislatures can protect biometric data.¹⁹³ BIPA in particular allows for a private right of action that emphasizes that the legislature intended for those individuals who have been injured in this manner to pursue relief in court.¹⁹⁴ It is significant that BIPA, out of all the other state biometric privacy statutes, has a private right of action, especially because most other biometric privacy statutes do not.¹⁹⁵ The wording of a statute is a sign of how the legislature views the severity of the harm and can help courts determine if a violation of that statute sufficiently leads to concrete injury. For BIPA, the Illinois legislature decided that biometric

nized today, such as “[d]iscrimination based on race, sex, religion, or sexual orientation” that would not have been recognized in the past or at common law).

¹⁸⁹ See *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1269–75 (9th Cir. 2019).

¹⁹⁰ CAL. CIV. CODE § 1798.140(b) (West 2020).

¹⁹¹ *Id.* §§ 1798.100, 1798.110, 1798.115.

¹⁹² *Id.*

¹⁹³ See Michelle Jackson, *Opting Out: Biometric Information Privacy and Standing*, 18 DUKE L. & TECH. REV. 293, 304 (2020).

¹⁹⁴ See Solove, *supra* note 178 (arguing that legislatures do not “give out private rights of action loosely” and that “judges ought to show a lot more respect for the legislature’s determination”).

¹⁹⁵ As of early 2021, BIPA is the only state biometric privacy law that provides for a private right of action, although a proposed New York biometric privacy law mirrors BIPA and includes a similar private right of action. Glenn T. Graham & Paul A. Rosenthal, *Proposed NY Biometric Privacy Act Would Allow Private Right of Action*, KELLEY DRYE & WARREN LLP (Jan. 8, 2021), <https://www.adlawaccess.com/2021/01/articles/proposed-ny-biometric-privacy-act-would-allow-private-right-of-action/> [https://perma.cc/CDE3-QRJG].

privacy was important enough to allow a remedy within the law and that a private right of action is a proper enforcement tool.¹⁹⁶ As discussed previously, the legislative branch often creates small damages to increase incentives for entities to improve their procedures.¹⁹⁷

It is not up to the courts to use the standing doctrine to supplant injuries identified by statutes with its own judgment.¹⁹⁸ In his scathing dissent in *Ramirez*, Justice Thomas pointed out that the majority decided on its own that the Constitution “prohibits consumers from vindicating their rights in federal court,” and this was “despite Congress’ judgment that such misdeeds deserve redress.”¹⁹⁹ Justice Kagan also dissented, pointing out that the Court transformed standing law “from a doctrine of judicial modesty into a tool of judicial aggrandizement.”²⁰⁰ While the fear of a flood of litigation is valid—and arguably already in the midst of occurring²⁰¹—the standing doctrine should not be a tool used by courts to usurp the will of legislatures.²⁰² Denying standing because the injury is not “real” enough to meet the standard interpreted by courts is also to decide the “substantive content of those rights”²⁰³ and allows courts to second guess what the legislative branch judged as actionable under the law. This can prevent effective legislative action moving to address arising instances of harm before such harms can be completed.²⁰⁴ The state legislature in Illinois has determined private rights of action should exist for biometric privacy violations because they are so distinct from other types of harms. If the legislative branch has identified a new type of harm, then according to the separation of powers, the judicial branch should not restrict this ability by becoming the gatekeeper of what it subjectively believes is a real injury or not. Thus, lower courts should also not read the *Ramirez* decision as instructions or permission to encroach upon the separation of powers.

¹⁹⁶ See Solove, *supra* note 178.

¹⁹⁷ See *supra* Section III.A.

¹⁹⁸ See Daniel Townsend, *Who Should Define Injuries for Article III Standing?*, 68 STAN. L. REV. ONLINE 76, 84 (2015) (“Deciding which injuries are worth vindicating more properly belongs in the policy realm than the judicial one.”).

¹⁹⁹ *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021) (Thomas, J., dissenting) (“The Constitution does no such thing.”).

²⁰⁰ *Id.* at 2225 (Kagan, J., dissenting).

²⁰¹ See Marsh, *supra* note 79.

²⁰² Felix T. Wu, *How Privacy Distorted Standing Law*, 66 DEPAUL L. REV. 439, 458 (2017).

²⁰³ *Id.*

²⁰⁴ *Id.* at 459 (criticizing how “scrutiny of harms [by federal courts] undermines the legislature’s ability to act to prevent harms proactively, rather than only addressing completed harms”).

CONCLUSION

In the wake of *Spokeo*, a circuit split developed as courts continued to grapple with the standing doctrine. Now after *Ramirez*, courts should apply the holding narrowly to instances of biometric privacy violations in order to avoid the absurd result of closing the door to federal court, taking away protective measures, and usurping the will of the legislative branch by undermining the separation of powers. Privacy issues are becoming increasingly prevalent and legislated, and it is crucial for courts to reach a common consensus to avoid widely inconsistent application of the law and to set clear standards for businesses and private entities collecting and utilizing biometric data. The distinctiveness of biometric data, as well as the accelerating spread of its use, should concern courts as much as it has concerned the legislatures that have articulated protections in the form of statutes such as BIPA. For this reason, courts should avoid dismantling the protections granted and allow standing in instances of people asserting their biometric privacy rights.

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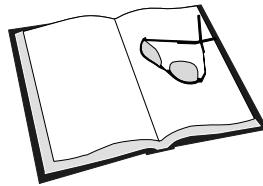
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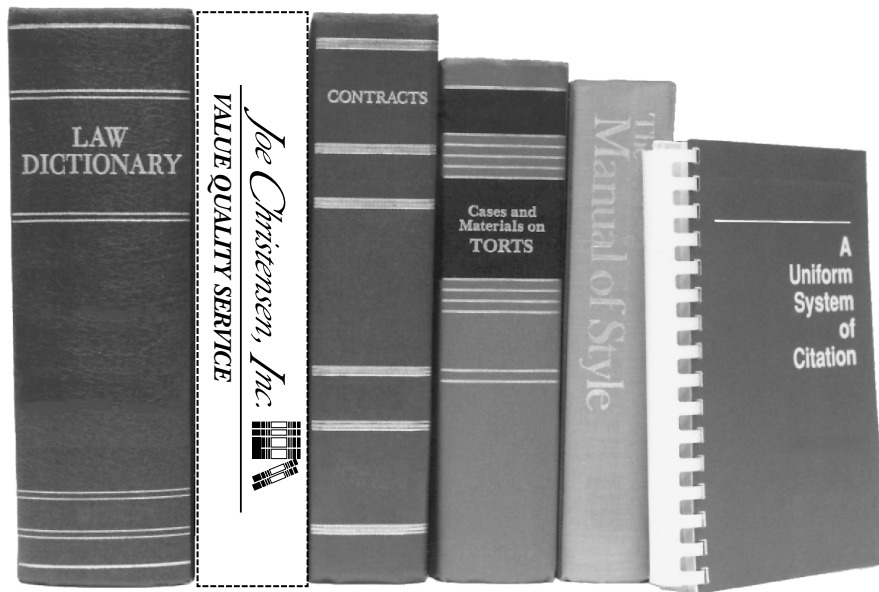
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