

THE GEORGE WASHINGTON LAW REVIEW



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Unoriginal Textualism

Frederick Schauer

ABSTRACT

The burgeoning debates about constitutional interpretation show no signs of abating. With surprisingly few exceptions, however, those debates involve a contrast between textualism understood as some form of originalism, on the one hand, and various varieties of less textually focused living constitutionalism on the other. In conflating textualism with originalism, however, the existing debates ignore the possibility of a nonoriginalist textualism—a textualism tethered not to original intent and not to original public meaning but instead to contemporary public meaning—public meaning now. This Article explains the plausibility of just such an “unoriginal” textualism and argues that it might serve the guidance and constraint functions of a constitution better than any of the alternatives now on offer.

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INTRODUCTION

The Constitution of the United States is very old. And very short. And very difficult to amend.

Each of these observations is true to the point of banality. But when taken together they form the background for generations of debate about American constitutional interpretation. More importantly, the age, brevity, and virtual unamendability of (most of) the text of the Constitution of the United States has combined to flatten the theoretical terrain, excluding from serious consideration an interpretive option that would be more obvious were the constitution newer, longer, and more easily amendable. That option—textualism without originalism—is the focus of this Article.

Existing debates about constitutional interpretation routinely contrast some variety of “living Constitution” constitutionalism with some variety of originalism. Under the living Constitution cluster of theories, interpretation of the Constitution should take account of the shifting and evolving nature of the world and the problems it throws at us, consequently allowing interpretations to change with changes in the background social, political, economic, and institutional considerations against which constitutional interpretation takes place.¹ But under the originalist cluster, the meaning of the Constitution is “fixed” at the time that the relevant language becomes part of the

¹ Prominent examples include STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 33–34 (2005); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 1–5 (2010); William J. Brennan Jr., *Construing the Constitution*, 19 U.C. DAVIS L. REV. 2, 7 (1985) (stressing the “adaptability” of the Constitution to “current problems and current needs”); Lawrence C. Marshall, *Contempt of Congress: A Reply to the Critics of an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 2467, 2478 (1990) (noting the importance “of breathing life into a document originated by those long dead”); Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963). Although the term “living Constitution” dates at least as far back as HOWARD LEE MCBAIN, *THE LIVING CONSTITUTION* 3, 11 (1927), the modern usage of the phrase is commonly associated with then-Justice William Rehnquist, who was against it, William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976), but nevertheless provided a useful recapitulation of the origins of the phrase and of the idea. See *id.* at 693–94. And see generally the critique of the Rehnquist article in John Denvir, *Justice Rehnquist and Constitutional Interpretation*, 34 HASTINGS L.J. 1011 (1983).

Constitution.² For a long time, this fixity of meaning at the time of adoption was thought to come from the intentions at the time of those who wrote or adopted the relevant language.³ In recent decades, however, original intent originalism has been largely supplanted by original meaning originalism, according to which the source of constitutional meaning is located in the conventional or public—and, occasionally, technical—meaning of the language at the time of enactment.⁴ In other words, original public meaning originalism is concerned not with what the authors, drafters, framers, or ratifiers intended, but with the meanings at the time of what they *said*.

Both original meaning originalists and original intent originalists purport to be, and are typically labeled as, textualists.⁵ Because living

² See generally Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015); see also Lawrence B. Solum, *Themes from Fallon on Constitutional Theory*, 18 GEO. J.L. & PUB. POL'Y 287, 291–92 (2020) (summarizing the fixation thesis). And note as well Joseph Story's observation that we "have a fixed, uniform, permanent construction . . . not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and forever." 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 426 (5th ed. 1905). Some originalists distinguish between interpretation and construction, thus loosening the hold that original meaning may have on the decision of actual controversies. See, e.g., Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 458–67 (2013) [hereinafter Solum, *Originalism and Constitutional Construction*], but whether that distinction, if sound—see Frederick Schauer, *Constructing Interpretation*, 101 B.U. L. REV. 103, 109 (2021)—sacrifices too much of the impetus for originalism is a question I am happy to leave to internecine debates among originalists.

³ In addition to Rehnquist, *supra* note 1, prominent explanations and endorsements of original intent originalism include RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); Larry Alexander, *Originalism, or Who is Fred?*, 19 HARV. J.L. & PUB. POL'Y 31 (1996); Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions*, in L. & INTERPRETATION 357, 360–63 (Andrei Marmor ed., 1995); Raoul Berger, *An Anatomy of False Analysis: Original Intent*, 1994 BYU L. REV. 715; Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 709–10 (2009); Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 464–65 (1986).

⁴ See *infra* Sections I.C–D.

⁵ See, e.g., Lillian R. BeVier, *Some Reflections on Justice Scalia*, 84 U. CHI. L. REV. 2163, 2163 (2017); Stephanos Bibas, *The Limits of Textualism in Interpreting the Confrontation Clause*, 37 HARV. J.L. & PUB. POL'Y 737, 737, 740 (2014); Leah M. Litman, *New Textualism and the Thirteenth Amendment*, 104 CORNELL L. REV. ONLINE 138, 141 (2019); John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1355 (1998); Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 676 (2019); James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1532 (2011); Suzanna Sherry, *Textualism and Judgment*, 66 GEO. WASH. L. REV. 1148, 1148 (1998). For resistance to the conflation of originalism with textualism, see Tom W. Bell, *The Constitution as if Consent Mattered*, 16 CHAP. L. REV. 269, 269 (2013) (arguing that nonoriginalist textualism better promotes a "respect for liberty"); Ilya

constitutionalism is understood as taking the actual text of the document less seriously,⁶ one or another variety of originalism is considered to be, at least by its adherents, the approach most faithful to the idea of having a canonical written constitution. Commitment to the text is consequently assumed to entail a commitment to some form of originalism.⁷

This ubiquitous juxtaposition of living constitutionalism (or anti-originalism, if you will) with textualism as originalism is curious, however, because it omits an important possibility. If we were dealing with statutes and not the Constitution, textualism might be understood as committed to interpretation on the basis of what the relevant statutory language means *now*, not to what that language meant at some point in the past,⁸ and not to what the drafters of that language in-

Somin, "Active Liberty" and Judicial Power: What Should Courts Do to Promote Democracy?, 100 NW. U. L. REV. 1827, 1851–52 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)). And for the simple claim that textualism is based on contemporary meaning, a claim that precedes the modern debates about originalism, see PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7, 26–32 (1982) (describing "textual argument" as legal argument "drawn from a consideration of the present sense of the words of the provision").

⁶ The living constitutionalists of a few decades ago were quite explicit about their rejection of textual constraint, a point often made in the name of "noninterpretivism." See MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 10–11 (1982); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975). More recently, see the descriptive account and normative endorsement in David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 5 (2015).

⁷ See, e.g., ILAN WURMAN, *A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM* 132 (2017). By contrast, Andrew Coan argues that nothing about constitutional interpretation follows from the fact of having a written constitution. Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025 (2010). To the contrary, I argue here that some variety of textualism does follow from the Constitution's writtenness, but that what follows is not necessarily, and not desirably, an originalist version of textualism. In saying "follow," however, I do not deny Cass Sunstein's claim that the very idea of interpretation does not logically or conceptually entail one or another theory of interpretation. Cass R. Sunstein, *There is Nothing that Interpretation Just Is*, 30 CONST. COMMENT. 193 (2015). Rather, I argue only that the normative arguments for a written constitution also provide the normative basis for contemporary meaning textualism.

⁸ See *Muscarello v. United States*, 524 U.S. 125, 128, 139 (1998) (relying on contemporary sources for definition of "carry" in a statute enacted in 1968); see also, e.g., *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 684 (2010) (using 1989 and 2009 dictionaries to reaffirm ordinary meaning of word enacted in a 1947 modification of a 1935 statute); *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993) (implicitly using "plain meaning" of language enacted in 1940 in concluding that the language in 1993 was "unambiguous, unequivocal, and unlimited"); Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103. I say "might" in the text because there are some opinions, contra *Muscarello*, *New Process Steel*, and *Conroy*, that—in using dictionaries to determine plain or public meaning—use dictionaries con-

tended.⁹ In the context of constitutional interpretation, however, originalism of one sort or another as an account of textualism—indeed, as pretty much the *only* account of textualism—seems to have emerged from the fact that the Constitution is very old, with most of its importantly contested provisions having become part of the Constitution in 1787, 1791, or 1868. Without this overlay of ancientness, debates about constitutional interpretation would likely resemble debates about statutory interpretation, with adherents of so-called plain meaning interpretation engaged in intellectual combat with adherents of so-called purposivism.¹⁰

The goal of this Article is to suggest that the existing debates about constitutional interpretation have neglected to take sufficiently seriously the constitutional counterpart of the plain meaning position in statutory interpretation. In statutory context, most lawyers, judges, and commentators recognize at least the respectability and arguably the dominance of the idea that statutes should be interpreted according to the plain or public meaning of their language now, and not at the time of enactment.¹¹ When the inquiry shifts to the language of the Constitution, however, this position becomes virtually invisible, largely on account of, to repeat, the age of the most important items

temporaneous with the statutory enactment. *See, e.g.*, *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1755 (2019) (Alito, J., dissenting); *see also Bostock v. Clayton County*, 140 S. Ct. 1731, 1772 (2020) (Alito, J., dissenting) (using 1964, the date of enactment of the Civil Rights Act of 1964, as the touchstone for textual meaning). And Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 269–71 (2020), argues for what she calls a “formalistic textualism” that takes account of text, but not extratextual purpose, and assumes that the “formalistic” meaning of the text is the meaning at the time of enactment.

⁹ *See Conroy*, 507 U.S. at 519 (Scalia, J., concurring in the judgment) (“The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.”). For extensive accounts of modern textualism’s anti-intentionalism in statutory interpretation, *see generally* Grove, *supra* note 8; Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006); Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857 (2017).

¹⁰ For a thorough overview of these debates, *see generally* CALEB NELSON, STATUTORY INTERPRETATION 299–362 (2011). *Compare* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997), *with* AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (Sari Bashi trans., 2005).

¹¹ *See supra* note 8. Insofar as there is a view that the textual meaning of a statute should be determined by reference to the time of enactment and not to the time of interpretation, *see Aaron v. SEC*, 446 U.S. 680, 696 n.13 (1980) (using a 1934 dictionary in 1980 to determine plain meaning of a term enacted in 1934). This Article can be taken as arguing, *a fortiori*, against that position in statutory interpretation as well as in constitutional interpretation. And in debating the application of the eighteenth-century Alien Tort Statute, the opinions of the various justices make reference both to contemporaneous and to more contemporary sources of meaning but without settling on which should be controlling. *See Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1941 (2021).

of American constitutional text. But perhaps we have too quickly rejected the position we can call *contemporary meaning textualism*. Of course, the meaning of language changes over time, and no one would seriously claim that the guarantee of a “Republican Form of Government” in Article IV¹² protects the constitutional supremacy of the contemporary Republican Party, or that the power of the United States, under the same section and upon request from a state, to protect a state against “domestic Violence”¹³ has anything to do with what the phrase “domestic violence” is *now* widely understood to mean. But these phrases are the exceptions, and most of the document can be nonconfusingly read by someone armed only with the tools of contemporary language usage, leaving aside the techniques of historical excavation. The aim of this Article is thus to challenge the too-easy conflation of textualism with originalism, to develop the idea of non-originalist textualism that emerges out of rejecting this conflation, and to suggest, albeit more tentatively, that contemporary meaning textualism may both explain a considerable amount of existing constitutional interpretive practice and provide a normatively attractive alternative to any of the positions now the subject of the debates about constitutional interpretation.

I. THE TEXTUAL MOORINGS OF MODERN ORIGINALISM

It is rarely a bad idea to survey the terrain before exploration begins. And although such a survey of the terrain of theories of constitutional interpretation risks wasting both trees and the time of many readers, it can nevertheless assist in precisely situating the nature of the claims made here. And with that disclaimer out of the way, let the survey begin.

A. *It All Started with McCulloch*

Generations of undergraduates, including the author of this article, were first introduced to *McCulloch v. Maryland*¹⁴ in undergraduate constitutional law classes as the locus of Chief Justice Marshall’s ominous warning “[t]hat the power to tax involves the power to destroy.”¹⁵ Then we arrived at law school, took the law school version of

¹² “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive . . . against domestic Violence.” U.S. CONST. art. IV, § 4.

¹³ *Id.*

¹⁴ 17 U.S. (4 Wheat.) 316 (1819).

¹⁵ *Id.* at 431.

the course in constitutional law, and discovered that the aspect of *McCulloch* that had been featured in undergraduate courses—the concern about state taxation of federal entities—had been demoted to the far less important topic of intergovernmental immunities.¹⁶ *McCulloch*’s importance, in the law school framing of the decision, was located principally not in ideas about intergovernmental immunities, but instead in the seemingly more important topic of congressional power and the constitutional limitations upon it. And in considering this aspect of the reframed *McCulloch*, the class paused, if we were fortunate, to consider the deeper meaning of “we must never forget, that it is a constitution we are expounding.”¹⁷

At least from Chief Justice Marshall’s perspective, this cryptic phrase is widely understood to imply not only that constitutions were different from ordinary legislation, but also that a large part of this difference resided in a constitution’s vagueness and consequent flexibility.¹⁸ As a result, Marshall in *McCulloch* is often taken as the founding parent of the very idea of a “living constitution.”¹⁹ A constitution,

¹⁶ See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 454 (3d ed. 2009) (mentioning *McCulloch* in one sentence on the dormant commerce clause); JESSE H. CHOPER, MICHAEL C. DORF, RICHARD H. FALLON JR. & FREDERICK SCHAUER, CONSTITUTIONAL LAW: CASES, COMMENTS, AND QUESTIONS (13th ed. 2019) (devoting two short paragraphs to federal immunity from state taxation, including one sentence on this aspect of *McCulloch*); GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, CONSTITUTIONAL LAW 61 (7th ed. 2013) (containing nothing on state taxation of the federal government, but quoting the “power to destroy” language in the principal treatment of the case); KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 75, 294 (18th ed. 2013) (mentioning *McCulloch* in the few sentences in the book on federal immunity from state taxation).

¹⁷ *McCulloch*, 17 U.S. at 407 (emphasis omitted). For elaboration and analysis of this phrase, see MARK R. KILLENBECK, *McCulloch v. Maryland: Securing a Nation* 7–8 (2006); Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701, 702–07 (2016).

¹⁸ See Ian Bartrum, *Constitutional Value Judgments and Interpretive Theory Choice*, 40 FLA. STATE U. L. REV. 259, 279 (2013); Joel K. Goldstein, *Constitutional Change, Originalism, and the Vice Presidency*, 16 U. PA. J. CONST. L. 369, 376 (2013) (attributing to Marshall the idea of an “elastic” Constitution); Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147, 162–63 (2012) (reviewing JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011) & JACK M. BALKIN, LIVING ORIGINALISM (2011)) (distinguishing two possible meanings of flexibility in Chief Justice Hughes’ use—in *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934)—of the Marshall quote).

¹⁹ See Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 11 n.25 (1998) (crediting Marshall with having given “living constitutionalism its mantra”); R. Randall Kelso, *Contra Scalia, Thomas, and Gorsuch: Originalists Should Adopt a Living Constitution*, 72 U. MIA. L. REV. 112, 138 (2017) (attributing “support for a living constitution model” to Marshall).

and thus this Constitution, is, under this understanding of Marshall's view, a broad framework, with the details to be worked out over time in light of changing circumstances, values, and problems. And the task of working out these details was to be left to the courts, especially the Supreme Court.

Perhaps surprisingly to the contemporary reader, this model of how the Constitution was to be understood and interpreted was widely accepted and rarely challenged in the century and a half following *McCulloch*. Although there were plainly sharp divisions among the justices (and commentators) in the latter part of the nineteenth century and the first half of the twentieth, such divisions were only occasionally expressed as differences about interpretive principles or approaches.²⁰ When Oliver Wendell Holmes vehemently objected to the Court majority's decision in *Lochner v. New York*,²¹ for example, the debate was about the role of the Court in a democracy and not about how a particular text should or should not be interpreted.²² And so too in the 1930s, when controversies over the constitutionality of New Deal and related state social legislation again sharply divided the Court, but with little attention on either side of that divide to the general principles by which a written constitution should be interpreted.²³ The debates were about substance and not about interpretation, and certainly not about theories of interpretation. Indeed, even *United States v. Carolene Products Co.*,²⁴ whose footnote four²⁵ was to be-

²⁰ This is emphatically not to claim that issues of constitutional interpretation were not widely discussed in the founding era. See generally Saul Cornell, *President Madison's Living Constitution: Fixation, Liquidation, and Constitutional Politics in the Jeffersonian Era*, 89 *FORDHAM L. REV.* 1761 (2021); Saul Cornell, *Reading the Constitution, 1787–91: History, Originalism, and Constitutional Meaning*, 37 *L. & HIST. REV.* 821 (2019); Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 *FORDHAM L. REV.* 935 (2015); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 *Nw. U. L. REV.* 751 (2009). My claim here, a claim that is at most peripheral to the principal claims of this Article, is only that explicit attention to modern-style interpretive debates was rarely seen in the Supreme Court cases from the middle of the nineteenth century to the middle of the twentieth, and rarely seen as well in the commentary about those cases.

²¹ 198 U.S. 45 (1905).

²² See *id.* at 74–75 (Holmes, J., dissenting).

²³ See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (rejecting Commerce Clause challenge to NLRB power); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (accepting Commerce Clause challenge to wage and hour restrictions on the coal industry); *Nebbia v. New York*, 291 U.S. 502 (1934) (rejecting substantive due process challenge to price control in the milk industry); *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (upholding substantive due process challenge to ice business regulation).

²⁴ 304 U.S. 144 (1938).

²⁵ *Id.* at 152 n.4.

come a central source for at least one view about constitutional interpretation,²⁶ attracted little dissent at the time over the interpretive principles it presupposed.

B. Enter the Warren Court

The relative lack of explicit attention to constitutional interpretive principles that had existed for multiple generations shifted dramatically with the Warren Court's entry onto the scene. Although *Brown v. Board of Education*²⁷ and *Miranda v. Arizona*²⁸ were perhaps the most visible examples, numerous Warren Court decisions overturned previous precedents,²⁹ recognized rights that previous courts had rejected,³⁰ and heralded an era that its critics labeled "activism" in their milder moments³¹ and "usurpation"³² or "tyranny"³³ when they were being less guarded. But now, almost for the first time, the criticized decisions were charged not only with being wrong as a matter of constitutional policy, as with Holmes's dissent in *Lochner*, but also with having made interpretive mistakes in interpreting a written document.³⁴ And although some of the comparatively new focus on interpretation surrounded discussions of *Brown* and various criminal procedure and voting rights decisions,³⁵ it was not until the 1970s,

²⁶ See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75–77 (1980) (understanding the *Carolene Products* footnote as being largely about the importance of political participation).

²⁷ 347 U.S. 483 (1954).

²⁸ 384 U.S. 436 (1966).

²⁹ E.g., *Baker v. Carr*, 369 U.S. 186, 208–09 (1962) (holding legislative apportionment challenges justiciable and distinguishing *Colegrove v. Green*, 328 U.S. 549 (1946)); *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961) (holding exclusionary rule applicable to states and overruling *Wolf v. Colorado*, 338 U.S. 25 (1949)).

³⁰ E.g., *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (right to travel); *Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963) (right to appointed counsel).

³¹ See, e.g., WALLACE MENDELSON, *JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT* 118 (1961); Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195, 1208–09 (2009); Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CALIF. L. REV. 1441, 1462 (2004).

³² See, e.g., Raoul Berger, *Insulation of Judicial Usurpation: A Comment on Lawrence Sager's "Court-Stripping" Polemic*, 44 OHIO STATE L.J. 611, 636 (1983) (quoting G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* 239 (1982)).

³³ See, e.g., CARROL D. KILGORE, *JUDICIAL TYRANNY* 14 (1977).

³⁴ See, e.g., BERGER, *supra* note 3, at 18; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31 (1959).

³⁵ Although most references to "constitutional interpretation" in the 1950s and 1960s turn out to be about the substance and not the methodology of constitutional decisionmaking, notable exceptions include, most famously, Wechsler, *supra* note 34, and THOMAS REED POWELL, *VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION* (1956); Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J.

technically no longer the Warren era, that questions of interpretation became as prominent as they now are.

The principal impetus for this change of focus was *Roe v. Wade*,³⁶ although some of the change can be seen in interpretive debates surrounding the sex discrimination decisions as well.³⁷ Now, almost for the first time, the criticisms of court decisions to which the critics objected were explicitly framed in the language of constitutional interpretation rather than broader constitutional policy.³⁸ Typically, the Court was accused of having ignored the intentions of the drafters,³⁹ and the responses sounded in *McCulloch* or simply acknowledged and defended a mode of constitutional decisionmaking that was unashamedly nontextual and nonintentional.⁴⁰

During the period in which the battle lines were drawn between intentionalism and noninterpretivism, the text played little more than a supporting role. Although what we might call “weak intentionalism” maintained that the original intentions of the drafters were determinative only when the text was unclear,⁴¹ the more common “strong intentionalism” viewed the text not as a self-standing source of constitutional authority, but instead merely as evidence of original in-

319 (1957); Paul G. Kauper, Professor of Law, Univ. of Mich. L. Sch., Supreme Court: Trends in Constitutional Interpretation (June 6, 1958), in 24 F.R.D. 155 (1959); Benjamin F. Wright, *The Supreme Court Cannot Be Neutral*, 40 TEX. L. REV. 599 (1962). And note the 1956 observation that “[i]t is too much to say that what was actually contemplated by the framers of a constitutional text fixes its meaning for all time.” Charles Fairman, *Foreword: The Attack on the Segregation Cases*, 70 HARV. L. REV. 83, 87 (1956).

³⁶ 410 U.S. 113 (1973).

³⁷ Compare Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011) (defending the sex discrimination decisions as interpretively legitimate), with Craig v. Boren, 429 U.S. 190, 217 (1976) (Burger, C.J. dissenting) (criticizing heightened scrutiny for sex discrimination as lacking “independent constitutional basis”).

³⁸ “[T]he abortion cases . . . rekindled the debate about the legitimacy of noninterpretive review more than any other constitutional decisions of recent times.” Michael J. Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278, 351 (1981); see generally Symposium, *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259 (1981); Symposium, *Judicial Review Versus Democracy*, 42 OHIO STATE L.J. 1 (1981).

³⁹ See, e.g., Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 374–81 (1981) (defending reliance on original intent); see also sources cited *supra* note 3.

⁴⁰ See sources cited *supra* note 6; see also generally Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); David A.J. Richards, *Human Rights as the Unwritten Constitution: The Problem of Change and Stability in Constitutional Interpretation*, 4 U. DAYTON L. REV. 295 (1979).

⁴¹ See, e.g., Paul Finkelman, *Intentionalism, the Founders, and Constitutional Interpretation*, 75 TEX. L. REV. 435, 450 (1996) (reviewing JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996)) (arguing that recourse to original intent is necessary because of indeterminate constitutional language).

tent.⁴² Typically, the text was acknowledged as perhaps the best evidence there was of original intent, but some strong intentionalists nevertheless argued that unmistakable evidence of original intent could trump even clear text inconsistent with that intent.⁴³

What characterized this period therefore was the relative absence of a group of strong textualists. The text was not overly important for the Marshallian living constitutionalists, but nor was it even for the intentionalists, for whom the text was, in one way or another, subservient to the thoughts and plans of the people who had written the text.

C. *And Then There Was Justice Scalia*

When Justice Antonin Scalia arrived at the Supreme Court in 1986, his views about the interpretation of legal texts were already well formed by his career as an academic, as a member of multiple administrative agencies, and, most importantly, as a judge in the court with the most concentrated experience of statutory interpretation, the United States Court of Appeals for the District of Columbia Circuit.⁴⁴ And as an experienced—and opinionated—practitioner of the art of statutory interpretation, Justice Scalia came to the Court with strongly positive views about the importance of legal texts and equally strongly negative views about the relevance of legislative history or legislative intentions in interpreting those texts.⁴⁵

⁴² John Hart Ely, not himself a strong intentionalist in the sense described in the text, nevertheless viewed the text as evidence of original intent and not of independent authority, observing “that the most important datum bearing on what was intended is the constitutional language itself.” ELY, *supra* note 26, at 16 (emphasis omitted). And for a critique of viewing the text in this evidentiary way, as opposed to the text being independently authoritative and not merely evidence of something else, see Frederick Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 808–12 (1982).

⁴³ See especially BERGER, *supra* note 3; Raoul Berger, *A Political Scientist as Constitutional Lawyer: A Reply to Louis Fisher*, 41 OHIO STATE L.J. 147, 162–67 (1980). A valuable analysis in statutory context is Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982).

⁴⁴ See, e.g., *What Made Antonin Scalia Influential*, TIME (Feb. 13, 2016, 6:15 PM), <https://time.com/4220692/antonin-scalia-biography/> [<https://perma.cc/4MYD-V8TT>].

⁴⁵ See SCALIA, *supra* note 10, at 29–41. Justice Scalia’s views are also embodied in, for example, *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 302 (2010) (Scalia, J., concurring in part and concurring in the judgment); *Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring in part and concurring in the judgment); *Conroy v. Aniskoff*, 507 U.S. 511, 518–19 (1993) (Scalia, J., concurring in the judgment); *Begier v. IRS*, 496 U.S. 53, 68–70 (1990) (Scalia, J., concurring in the judgment); *Hirschey v. FERC*, 777 F.2d 1, 7–8 (D.C. Cir. 1985) (Scalia, J., concurring). For commentary, see, for example, NELSON, *supra* note 10, at 299–361; William N. Eskridge Jr., *The*

Because most—actually almost all—federal regulatory statutes are not nearly as old as the important and contested parts of the Constitution, questions about the interpretation of federal statutes typically involved, at the time that Justice Scalia entered the fray, one of two problems. One was the problem of how to interpret an indeterminate—usually for reason of vagueness—statute (or regulation) whose language did not answer the question at hand. And the other was how to deal with a linguistically determinate statute or regulation whose literal interpretation seemed to produce an odd, counterintuitive, immoral, or otherwise suboptimal result. Examples of the former—the problem of vagueness—include questions about interpreting the prohibition on “contract[s], combination[s], . . . or conspirac[ies] in restraint of trade or commerce” in the Sherman Antitrust Act⁴⁶ and on “any device, scheme, or artifice to defraud” in Rule 10b-5⁴⁷ promulgated pursuant to Section 10(b) of the Securities Exchange Act of 1934.⁴⁸ And the latter—the problem of awkward or embarrassing precision—is illustrated by *Yates v. United States*,⁴⁹ in which the literal language of the Sarbanes-Oxley Act of 2002 criminalizing the destruction or concealment of “any record, document, or tangible object” to obstruct a federal investigation,⁵⁰ appeared to encompass the acts of Mr. Yates in throwing a small grouper back into the ocean in order to avoid prosecution for taking an undersized fish—that fish being the “tangible object” under the statute.⁵¹

The traditional way that courts have dealt with both of these problems—the problem of statutory indeterminacy and the problem of determinate statutory texts yielding embarrassing results—was to consult the legislative history and to make the decision most consis-

New Textualism, 37 UCLA L. REV. 621, 650–56 (1990); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988).

⁴⁶ 15 U.S.C. §§ 1–2; see Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205, 1220 (2021); Derrian Smith, Note, *Taming Sherman’s Wilderness*, 94 IND. L.J. 1223, 1229 (2019).

⁴⁷ 17 C.F.R. § 240.10b-5 (2020).

⁴⁸ 15 U.S.C. § 78j(b).

⁴⁹ 574 U.S. 528 (2015).

⁵⁰ 18 U.S.C. § 1519.

⁵¹ More famous but less amusing than *Yates* is *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889), addressing the question whether an heir who had murdered the testator could inherit under the testator’s will. As both the majority and the dissent in *Riggs* recognized, the applicable New York statute, the Statute of Wills, was not at all vague in relevant part, and appeared clearly to allow the murdering heir to inherit. But whether to follow the clear text to its uncomfortable conclusion was exactly what divided the court. For more extensive discussion, see RONALD DWORKIN, *LAW’S EMPIRE* 15–20 (1986); NELSON, *supra* note 10, at 5–26; FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 33–35 (2009).

tent with what the enacting legislature had intended, or, based on extrapolating from the legislative history, what the enacting legislature would have done had they been confronted with the problem at hand.⁵² But Justice Scalia would have none of it. Believing that legislative history was often itself indeterminate, that items in the legislative history were often inserted after the fact by individual legislators, and that, most importantly, only the enacted text had received the assent of the legislature, he refused to be controlled—or even much guided—by legislative intent in any form, insisting that the text and the text alone should be the guide to statutory interpretation.⁵³

For Justice Scalia, this approach carried over to the domain of constitutional interpretation. As with his views about evidence of legislative intention in statutory interpretation, Justice Scalia believed that evidence of the intentions of drafters, framers, or ratifiers had no place in interpreting the written constitution. All that was ratified, he insisted, was the text and nothing but the text, and what we might know about the thoughts of James Madison, for example, was simply irrelevant, as were what we might learn from Madison's notes, or the notes of anyone else.⁵⁴

But Justice Scalia also believed—the “also” is crucial, as we shall see—that the idea of a living Constitution was pernicious, and that the whole point of a constitution (and indeed of law itself) was to allow a polity or its representatives at one time to bind that polity in the future, regardless of what that future polity might believe or desire and regardless of what might seem best at some future time.⁵⁵ And because Justice Scalia believed both that the present should be bound by the past and that evidence of past intentions was not authoritative in interpreting a text, he was led to the conclusion⁵⁶ that the meaning of the text *when it was ratified* was the meaning that constrained future generations and future interpreters.⁵⁷

⁵² NELSON, *supra* note 10, at 231–417.

⁵³ See *supra* note 45.

⁵⁴ See *id.*; see also *District of Columbia v. Heller*, 554 U.S. 570, 589–91 (2008) (Scalia, J.) (interpreting the words of the Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 53–57 (2004) (Scalia, J.) (interpreting the Confrontation Clause of the Sixth Amendment); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 Nw. U. L. REV. 923, 926 (2009). And for a skeptical view of both the soundness and the influence of Justice Scalia's views, see Jamal Greene, *The Age of Scalia*, 130 HARV. L. REV. 144, 153–65 (2016).

⁵⁵ See generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

⁵⁶ Yes, the locution is mostly counterfactual. Justice Scalia rarely followed the lead of others when he disagreed.

⁵⁷ See *supra* note 45.

D. *And so . . .*

The point of the foregoing recapitulation, in addition to general framing and background, is to emphasize, first, that the very idea of a written constitution does not preclude a flexible and expansive interpretation of that written constitution, as Chief Justice Marshall and many living constitutionalists since have stressed. Second, that a commitment to being bound by the past is consistent with (but does not logically entail) the original-intent-originalism that prevailed implicitly for many generations and explicitly in the 1950s, 1960s, and 1970s. And third, that understanding textualism as originalism (or vice versa) emerges from the conjunction of two different premises: the importance, contra the so-called noninterpretivists, of the written text as an authoritative text, and the importance, contra the living constitutionalists, of being bound by decisions made in the past.

Once we understand, however, that the contemporary conjunction, and therefore the conflation, of originalism and textualism is contingent and not necessary, and involves the conjunction of two distinct premises, we can expose the possibility of another approach. This approach is suppressed by contemporary formulations, and its plausibility is the focus of this Article. It is an approach that treats the text as genuinely authoritative⁵⁸ and constraining, as against both the living constitutionalists and the original intent originalists. It also treats the meaning of the text as the meaning at the time of interpretation – now – as against the original-meaning-originalists. Explaining and justifying that approach will occupy the remainder of this Article.

II. ON THE POSSIBILITY OF A NONORIGINALIST TEXTUALISM

A. *The Very Idea of Public Meaning*

Is it even possible to interpret a very old document according to the contemporary meaning of language written long ago? Intentionalists of one sort or another would say no, insisting that it is impossible to interpret language without knowing the communicative intentions of those who first wrote that language.⁵⁹ Given that the whole point of

⁵⁸ “Nothing but the text itself was adopted by the people.” 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 406 (4th ed., 1873).

⁵⁹ See, e.g., Larry Alexander, *Connecting the Rule of Recognition and Intentionalist Interpretation: An Essay in Honor of Richard Kay*, 52 CONN. L. REV. 1513 (2021); Larry Alexander, *Simple-Minded Originalism*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 87–98 (Grant Huscroft & Bradley W. Miller eds., 2011); Larry Alexander & Saikrishna Prakash, “*Is That English You’re Speaking?*” *Why Intention Free Interpretation is Impossible*, 41 SAN DIEGO L. REV. 967 (2004); Richard S. Kay, *Original Intentions, Standard*

language is to communicate thoughts, propositions, ideas, and so on from speaker, or writer, to listener, or reader, we might think that understanding language requires understanding the content that the language is intended to communicate.⁶⁰

But if we thought that, we would be mistaken. Given that we are not mind-readers, we learn about the thoughts—and intentions—of others by the language they use. And the language they use is accessible to us because our ability to understand what others are saying, and thus what others want us to understand, depends on the existence of conventions—shared understandings—of what certain words, phrases, sentences, and grammatical structures mean, even if we have never heard the particular sentence before.⁶¹

Imagine, for example, that the shells wash up on the beach and by coincidence wind up in a pattern that looks like C–A–T.⁶² I daresay that most of us, seeing this pattern, would immediately think of cats—and not dogs, walruses, hamburgers, or smartphones. And that is because, and only because, the pattern of the shells resembles what we

Meanings, and the Legal Character of the Constitution, 6 CONST. COMMENT. 39 (1989); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988).

⁶⁰ Sources cited *supra* note 59. See generally RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* 1 (2012); Scott Soames, *Toward a Theory of Legal Interpretation*, 6 N.Y.U. J.L. & LIBERTY 231, 231 (2011).

⁶¹ On the existence and nature of conventions of language that transmit meaning independent of the intentions of particular language users—*utterance meaning*, as philosophers put it—on particular occasions, see PETER JONES, *PHILOSOPHY AND THE NOVEL* 183–84 (1975); Palle Leth, *Utterance Interpretation and Actual Intentions*, 31 AXIOMATHES 279 (2021); DAVID LEWIS, *Languages and Language*, in *PHILOSOPHICAL PAPERS* 163, 166 (1983); JOHN R. SEARLE, *Literal Meaning*, in *EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS* 117 (1979); Eike von Savigny, *Sentence Meaning and Utterance Meaning: A Complete Case Study*, in *MEANING, USE, AND INTERPRETATION OF LANGUAGE* 423 (Rainer Bäuerle, Christoph Schwarze & Arnim von Stechow eds., 1983). And for precisely this claim in the context of constitutional interpretation, see Connie S. Rosati, *Alexander's "Simple-Minded Originalism,"* in *MORAL PUZZLES AND LEGAL PERPLEXITIES: ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER* 153 (Heidi M. Hurd ed., 2019). In this Article I intentionally talk of utterance meaning and not of sentence meaning, although the two are related. Sentence meaning is largely acontextual, but utterance meaning, still not speaker's meaning, is the meaning that is derived from certain words or sentences in the larger linguistic context in which they are uttered. Consider, for example, John Marshall's argument in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 387–88 (1819), that the presence of the phrase "absolutely necessary" elsewhere in the Constitution implied that the unmodified word "necessary" in the Necessary and Proper Clause meant something other than absolutely necessary. The implication came from the text alone, and not from anything about intentions, but the text that produced the implication was broader than simply one sentence. And on the sense of utterance meaning used here, see generally Stephen Neale, *Paul Grice and the Philosophy of Language*, 15 LINGUISTICS & PHIL. 509, 515 (1992).

⁶² The example is self-plagiarized from Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 527–28 (1988).

have conventionally called the letters “C,” “A,” and “T,” and because these letters, again conventionally, when arranged in this order, are understood to represent cats.

The important feature of this example is that no one⁶³ has intended anything. Language has a conventional meaning whose conventional status gives the components of that convention a speaker-independent and intention-independent existence, making it possible for us to associate the conventionally extant symbols with what it is that the symbols are conventionally understood to stand for. This, as it is technically described, is an *utterance meaning*, or perhaps the narrower idea of a *sentence meaning*, but both exist apart from *speaker meaning*, that is, what a speaker intends (or means, in a different sense of “mean”) to communicate.⁶⁴ Typically, of course, speakers communicate, and thus make listeners aware of what they intend to communicate, by the use of utterance meaning, but what a speaker intends to do with an utterance meaning no more makes an utterance meaning the speaker meaning than using a saw turns a carpenter into a saw. Saws are tools that enable carpenters to do things, but saws exist independently of carpenters and independently of what carpenters may use them to do on particular occasions. And so too do utterance meanings enable speakers to communicate thoughts, ideas, propositions, and so on, even as those utterance meanings exist independently of speakers and independently of what speakers may use them to do on particular occasions.

The idea of an utterance meaning is thus the basic building block of any “public meaning” theory of legal interpretation, and not only the contemporary public meaning account I offer here. Original public meaning originalists, following in the wake of Justice Scalia’s transformation of originalism from original intent originalism to original public meaning originalism,⁶⁵ presuppose that constitutional language had intention-independent meanings in 1787, 1791, and 1868, to take the three most important “original” dates.⁶⁶ And in order to presuppose this, original public meaning originalists necessarily must accept the idea of utterance meaning. They must accept, apart from questions

⁶³ At least assuming the absence of an all-powerful God who has nothing better to do with her, his, or its time.

⁶⁴ See *supra* note 61, and specifically the discussion of the distinction between utterance meaning and sentence meaning.

⁶⁵ See *supra* Section I.C.

⁶⁶ These being the dates of the original Constitution, the Bill of Rights, and the Fourteenth Amendment, respectively. U.S. CONST. art. VII; Transcription of the 1789 Joint Resolution of Congress Proposing 12 Amendments to the U.S. Constitution; U.S. CONST. amend. XIV.

about how we know what that public meaning was, that there is such a thing as public meaning, that public meaning is created by conventions of language, and that it is possible to interpret that public conventional meaning without relying on the intentions—the mental states—of those who wrote, approved, or ratified that language. Accordingly, the account I offer here rests on common ground with almost all contemporary originalists, a group that rejects speaker's meaning in favor of public meaning. Of course, original public meaning originalists argue that it was the public meaning then and not now that matters, but that claim presupposes that there is such a thing as public meaning, that it is distinct from the intentions of the users of the language whose interpretation is at issue, and that such public meaning is—certainly in theory, and often in practice—ascertainable to a usable degree.

B. A Word About "Public"

In describing the idea of intention-independent utterance meaning, I have been casually describing it, consistent with usage in contemporary constitutional theory, as "public" meaning. But this is too casual. The basic idea is not that the meaning is necessarily public in some grand sense, although it might be. Rather, the idea is that utterance meaning derives from the linguistic conventions of a linguistic community. That linguistic community, however, need not be the public at large. It might be a nontechnical subset of the public at large, as with the way in which the sandwiches described as "heroes" or "subs" in much of the United States are known as "grinders" in New England, and the way in which the same New Englanders use the word "frappe" to designate the soda-fountain drink that much of the rest of the United States knows as "milkshakes" or, rarely, as "ice cream sodas." But when one New Englander uses the word "grinder," another New Englander will typically know what she is referring to, just because of what that word means in their shared linguistic community.

More commonly, and certainly more relevantly to this Article, many linguistic communities are professional or technical. Although inhabitants of Vermont and New Mexico are not members of the same geographic subcommunity (or sub-subcommunity) of the community of English speakers, and thus use different words to describe a meat and cheese sandwich on a long roll, Vermont physicians are members of the same, and overlapping, subcommunity as New Mexico physicians. Both Vermont and New Mexico physicians therefore use words like "asthenia" and "hydroxyapatite" that have utterance meanings

clear to them but largely unknown to those outside their nongeographic linguistic subcommunity.

The relevance of this here is that lawyers and judges, just like physicians and New Englanders, are members of a linguistic subcommunity. Consequently, legal instruments containing phrases such as “reverter,” “bill of attainder,” and, perhaps, “letters of marque and reprisal” can have meanings known to lawyers and judges but largely unknown to the larger community of English speakers. The issue of legal technical language has profound implications for many approaches to constitutional interpretation,⁶⁷ but I do not want to get ahead of things. For now, the only point is that the idea of public meaning, and the commitment to intention-independent utterance meaning that it necessarily incorporates, does not exclude the possibility of “publics” smaller than the entire population, and encompasses only those who are members of a linguistic subcommunity smaller than the population at large.

C. *Two Objections Considered*

1. *The Argument from Context*

A common response to the idea that there can be self-standing linguistic meaning is that what we believe to be meaning derived solely from the words, phrases, or sentences, in fact presupposes some context. Even my ability to think “cat” when I see the C–A–T array of shells on the beach presupposes a world in which that association comes from speakers having a shared idea of the context in which they are speaking, even if that context is not actually present here. The entire idea of literal meaning, so the argument continues, presupposes some context in which the language is used.⁶⁸

At some level the argument is plainly right. But recognizing that there must be at least some presupposed context for the idea of utterance meaning to work does not mean that the understood context cannot be widely shared in much the same way that conventional semantic meanings are shared.⁶⁹ When at the dinner table I say,

⁶⁷ See generally McGinnis & Rappaport, *supra* note 20; John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321 (2018); Schauer, *supra* note 2; Frederick Schauer, *Is Law a Technical Language?*, 52 SAN DIEGO L. REV. 501 (2015). And on legal technical language more generally, see especially Mary Jane Morrison, *Excursions into the Nature of Legal Language*, 37 CLEVELAND STATE L. REV. 271 (1989).

⁶⁸ This is the basic thrust of the argument of Larry Alexander, among others. See Alexander, *supra* note 59.

⁶⁹ See SEARLE, *supra* note 61.

“Please pass the salt,” no one would understand me to be asking the person nearest the salt to stand up and throw the salt across the room in the manner of a quarterback “passing” a football. And if you simply say “yes” when I ask you if you know what time it is, you demonstrate that you are an outlier to a conventional linguistic usage shared by all or virtually all of the members of our linguistic community. Accordingly, when I say that utterance meaning is “acontextual” and that utterance can communicate and be understood acontextually, I express in shorthand form the idea that language meaning for members of a linguistic community is a function of the contextual assumptions of all or most of the members of that linguistic community. That being so, it follows that language meaning, although admittedly dependent on context in this larger sense, nevertheless can and does exist independently of the particular context of a particular utterance.⁷⁰

2. *The Argument from Contextual Enrichment*

Although the idea of context itself cannot undercut the idea of conventional utterance meaning, the more serious challenge, not wholly unrelated to the argument from context, is based on the idea that most communications involve not only bare semantic content—acontextual utterance meaning—but also pragmatic (in the technical sense) or contextual enrichments or other modifications that depend on more particular contexts.⁷¹ Consider, for example, what is technically called “conversational implicature.”⁷² When I say, “Are you having dessert?” and you respond, “I’m on a diet,” your literally nonresponsive answer is understood as “no” by virtue of an understood implication. Or if I tell my class, truthfully, that Professor Jones, my colleague and their professor, is sober today, I have not only made an accurate statement about Jones today but also implied an inaccurate one about Jones on other days. The implication of my observation is that I would have observed this, and reported on it, only if it was in

⁷⁰ See generally FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991).

⁷¹ The idea is attributable to the philosopher Paul Grice. See generally H.P. GRICE, *STUDIES IN THE WAY OF WORDS* (1989); H.P. Grice, *Utterer’s Meaning and Intentions*, 78 *PHIL. REV.* 147 (1969); H.P. Grice, *Meaning*, 66 *PHIL. REV.* 377 (1957). For subsequent explication, see 3 *SYNTAX AND SEMANTICS: SPEECH ACTS* (Peter Cole & Jerry L. Morgan eds., 1975); Wayne A. Davis, *Implicature*, *STAN. ENCYCLOPEDIA OF PHIL.* (Edward N. Zalta ed., 2019), <https://plato.stanford.edu/archives/fall2019/entries/implicature/> [<https://perma.cc/K5GY-TMJG>].

⁷² See sources cited *supra* note 67.

some way remarkable.⁷³ I have thus implied, falsely, that there are days on which Jones is not sober.

In a constitutional context, therefore, the point of one possible objection to making much of utterance meaning by itself is that even if most constitutional provisions do have a conventional semantic utterance meaning, that meaning only captures some of what the drafters wanted to convey.⁷⁴ Consider, for example, *Crawford v. Washington*⁷⁵ and the raft of ensuing Supreme Court decisions⁷⁶ seeking to interpret and apply the Sixth Amendment requirement that defendants be afforded “the right . . . to be confronted with the witnesses against [them].”⁷⁷ The word “confront” appears to have an ordinary and accessible meaning, and so too does the word “witnesses.” But in order to determine the full original meaning of the entire clause, Justice Scalia for the *Crawford* majority was required to, or believed he was required to, determine what that phrase fully meant, in context, in 1791. And for that he looked at various historical sources, not, he insisted, to determine what the drafters or ratifiers of the Bill of Rights intended in 1791, but to determine what the phrase was understood *fully* to mean at that time.⁷⁸

But suppose that Justice Scalia had not engaged in this historical contextualization. Although he recognized that multiple interpretations might have been possible,⁷⁹ he still might have been able to understand what the words “confront” and “witness” meant in ordinary English in 1791, or even what they meant in technical lawyer’s English at the time. And in doing so, he might have been able to reach a conclusion, not unlike the one he actually reached, based solely on the utterance meaning of the words involved, leaving aside any possible contextual enrichments.

Much the same applies to those, most prominently John Hart Ely, who would reject the idea that there is any substantive component at all in the guarantees of “due process” in the Fifth and Fourteenth

⁷³ As the philosopher John Searle puts it: “No remark without remarkableness.” JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 144–45 (1969).

⁷⁴ See Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 288–93 (2017) [hereinafter Solum, *Originalist Methodology*]; Solum, *Originalism and Constitutional Construction*, *supra* note 2, at 465–66.

⁷⁵ 541 U.S. 36 (2004).

⁷⁶ See, e.g., *Ohio v. Clark*, 576 U.S. 237 (2015); *Michigan v. Bryant*, 562 U.S. 344 (2011); *Davis v. Washington*, 547 U.S. 813 (2006).

⁷⁷ U.S. CONST. amend. VI.

⁷⁸ *Crawford*, 541 U.S. at 42–62 (“We must therefore turn to the historical background of the Clause to understand its meaning.”).

⁷⁹ *Id.* at 42–43.

Amendments.⁸⁰ For Ely and others,⁸¹ the word “process” is about procedure, and only procedure, and was so understood not only now but also in 1791 and 1868. And although again various contextual enrichments may enable us (or may enable original public meaning originalists) to determine the *full*, or at least “full-er” meaning of that term at the time of enactment, or at any other time, we cannot say that the unenriched text has *no* utterance meaning. That meaning might be *sparse*, as it is said,⁸² but sparse is different from nonexistent. Indeed, recent events regarding the process for electing the President of the United States have highlighted the point, because the controversies and conflicts arising out of the 2020 election have almost entirely focused on the sentences and phrases in the Constitution alone and about what those phrases require. Whether it be the procedures in Article II and in the Twelfth Amendment that establish and govern the Electoral College,⁸³ or the dates specified in the Twentieth Amendment,⁸⁴ the electoral events that commenced on November 4, 2020, and culminated in the inauguration on January 20, 2021, were noteworthy in part for the amount of attention paid to the sparse and unenriched text of the Constitution as well as to the sparse and unenriched text of the various statutes enacted by Congress in accordance with the constitutional text.⁸⁵ Recent events have thus made clear, if it was not already clear, that the argument from contextual enhancement cannot plausibly be understood as maintaining that unenriched interpretation is impossible. At best the argument supports the conclusion that unenriched interpretation—sometimes rid-

⁸⁰ ELY, *supra* note 26, at 18. *But see* Jamal Greene, *The Meaning of Substantive Due Process*, 31 CONST. COMMENT. 253, 253–57 (2016) (arguing that “substantive due process,” although redundant, is not self-contradictory).

⁸¹ *See* Monaghan, *supra* note 39, at 364.

⁸² *See* Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1939 (2013).

⁸³ U.S. CONST. art. II, § 1, cl. 3; U.S. CONST. amend. XII.

⁸⁴ *Id.* amend. XX, §§ 1–2.

⁸⁵ *See* ELIZABETH RYBICKI & L. PAIGE WHITAKER, CONG. RSCH. SERV., RL32717, COUNTING ELECTORAL VOTES: AN OVERVIEW OF PROCEDURES AT THE JOINT SESSION, INCLUDING OBJECTIONS BY MEMBERS OF CONGRESS (2020). The full history of the 2020 election and its aftermath has yet to be written, but a relatively comprehensive account, one which refers to the unenriched text of the Constitution, is Maggie Haberman & Annie Karni, *Pence Said to Have Told Trump He Lacks Power to Change Election Result*, N.Y. TIMES (Sept. 14, 2021), <https://www.nytimes.com/2021/01/05/us/politics/pence-trump-election-results.html> [<https://perma.cc/PA3L-GFSS>]; and most recently, and most comprehensively, see generally VICTORIA F. NOURSE, *THE IMPEACHMENTS OF DONALD TRUMP: AN INTRODUCTION TO CONSTITUTIONAL INTERPRETATION* (2021).

ing under the banner of “plain meaning”⁸⁶—is sometimes or often incomplete. But that does not defeat the idea that even an incomplete interpretation is often sufficient to answer the questions raised under it. Incomplete interpretation, even if sometimes not optimal, is both possible and often satisfactory.

D. On the Possibility of Contemporary Public Meaning Textualism

What emerges from the foregoing is the conclusion that a textualism not tethered to original public meaning is, at the very least, possible. Indeed, this conclusion should not be surprising to today’s original public meaning originalists. If they can accept that there was a public meaning in 1787 or 1791 or 1868, then they are committed to accepting that there can be a public meaning in 2022. And if those same original public meaning originalists can accept that the public meaning of more than 200 years ago is accessible to them, then, again, they cannot avoid accepting that the public meaning of 2022 is accessible to the interpreters of 2022.

The only plausible objection to the possibility—and, to repeat, at least for now, the possibility only—of a contemporary public meaning textualism would be some variety of intentionalism. If it is simply impossible to interpret language without reference to the communicative intentions of the users of that language, then a contemporary public meaning textualism can never get off the ground. But then neither can original public meaning textualism. And intentionalism as a theory of language fails for the reasons detailed above, with the shells on the beach example illustrating the basic point. Any plausible intentionalism, just as with any plausible intention-based theory of language generally, must accept that even intentions can only be conveyed by the deployment of conventional understandings—conventional meanings. Original public meaning originalism avoids the slide into pure original intentions originalism only by accepting, and properly so, the existence of intention-independent meaning. Such meaning may be sparse, but sparse is not nothing. The question then is whether intention-independent contemporary meaning can be, as it is with respect to statutory interpretation, a respectable and possibly desirable approach to constitutional interpretation. Having established, hopefully,

⁸⁶ See, e.g., *Chiafalo v. Washington*, 140 S. Ct. 2316, 2330 (2020) (Thomas, J., concurring in the judgment); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1402 n.47 (2020) (plurality opinion of Gorsuch, J.); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 842 (2015) (Roberts, C.J., dissenting).

that such an approach is possible, the question then turns to whether it is desirable.

III. THE CONSTRAINING CONSTITUTION

A. *The Nature and Costs of Constitutional Constraint*

Constitutions, and especially written constitutions, do many things. Most obviously, they *constitute*. They establish governments, and in doing so they do more than regulate preexisting institutions and preexisting behavior. Rather, constitutions create institutions that would otherwise not exist.⁸⁷ The Constitution of the United States, for example, creates the institution of Congress,⁸⁸ the institution of the Presidency,⁸⁹ the institution of the Supreme Court,⁹⁰ and many other institutions besides.⁹¹

In addition to creating the institutions of government, and thus creating government, constitutions also serve important settlement functions. In the face of actual or potential disagreement about how governments should operate and what, substantively, they should do, constitutions settle, even if not permanently, many of these disagreements by taking the matters about which people disagree off the table.⁹² Although there are plausible arguments, for example, that a country operates best when it is organized largely centrally and vertically—as in France⁹³—the U.S. Constitution, in constituting states with independent powers, simply removes the basic question of federalism—or not—from consideration, even as of course there remain disagreements around the edges.⁹⁴ And although, again, a plausible

⁸⁷ On the distinction between constitutive and regulative functions, and constitutive and regulative rules, see SEARLE, *supra* note 73, at 33–42.

⁸⁸ U.S. CONST. art. I, § 1.

⁸⁹ *Id.* art. II, § 1.

⁹⁰ *Id.* art. III, § 1.

⁹¹ For example, the electoral college, *id.* art. II, § 1, the State of the Union address, *id.* art. II, § 3, and a constitutional convention for amending the Constitution, *id.* art. V.

⁹² See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (explaining and justifying the value of settlement for settlement's sake); Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 GEO. J.L. & PUB. POL'Y 475, 479–80 (2016) (same); Roderick M. Hills, Jr., *Mistaking the Window-Dressing for the Window*, 91 JUDICATURE 146, 146–47 (2007) (reviewing KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS* (2006)) (same); Strauss, *supra* note 6, at 55 (same); Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1865 (same).

⁹³ See Ralph Nelson, *The Federal Idea in French Political Thought*, 5 PUBLIUS 7 (1975).

⁹⁴ Even the most expansive views about national power, for example, accept that the states have a degree of independent governing authority that cannot be overridden by the national government. See, e.g., *Perez v. United States*, 402 U.S. 146 (1971) (upholding federal

case might be made for requiring defendants in criminal cases to testify and be subject to cross-examination in open court,⁹⁵ the Fifth Amendment renders otherwise conceivable disagreements about the very idea of a privilege against self-incrimination beyond discussion.⁹⁶ In these and many other ways, having a constitution, and especially a written one with the entrenchment that writing engenders,⁹⁷ settles many of the matters about which we might otherwise disagree.

Less concretely, constitutions also serve various symbolic or communicative functions.⁹⁸ The virtues of a constitution as rallying cry, manifesto, rhetorical device, symbol of the nation, or public statement of shared values are often overstated,⁹⁹ but they are not nonexistent.¹⁰⁰ And even if the symbolic *effect* of a constitution may not be as great as sometimes asserted, there can be little doubt that constitutions are often *intended* to have that effect and are drafted and celebrated with that goal in mind.

Of equal importance to the foregoing (and other) functions, however, constitutions are instruments of constraint.¹⁰¹ And although the

power to regulate seemingly local loansharking); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding application of Civil Rights Act of 1964 to largely but not completely local businesses); *Wickard v. Filburn*, 317 U.S. 111 (1942) (allowing national regulation of in-state activities that, when aggregated, had national effects).

⁹⁵ The case was often made, with characteristic vitriol, by Jeremy Bentham. See Michael A. Menlowe, *Bentham, Self-Incrimination and the Law of Evidence*, 104 L.Q. REV. 286 (1988).

⁹⁶ See U.S. CONST. amend. V.

⁹⁷ See SCHAUER, *supra* note 70, at 68–72; Strauss, *supra* note 6, at 55.

⁹⁸ See, e.g., Akhil Reed Amar, *Plessy v. Ferguson and the Anti-Canon*, 39 PEPP. L. REV. 75, 76 (2011) (noting the symbolic importance of the U.S. Constitution); Edward S. Corwin, *The Constitution as Instrument and as Symbol*, 30 AM. POL. SCI. REV. 1071 (1936); Aliza Plener Cover, *Archetypes of Faith: How Americans See, and Believe in, Their Constitution*, 26 STAN. L. & POL'Y REV. 555 (2015); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 17–18 (1984) (describing the Constitution as “a sacred symbol”); Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290 (1937); Sanford Levinson, “*The Constitution*” in *American Civil Religion*, 1979 SUP. CT. REV. 123; Laura Valentini, *On the Value of Constitutions and Judicial Review*, 11 CRIM. L. & PHIL. 817 (2017).

⁹⁹ For admirably deflationary views about the symbolic, communicative, or rhetorical value of constitutions and judicial decisions enforcing them, see generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (challenging claims that the Constitution and Supreme Court opinions can change public opinion); Michael J. Klarman, *Fidelity, Indeterminacy, and the Problem of Constitutional Evil*, 65 FORDHAM L. REV. 1739 (1997) (arguing that the Constitution’s linguistic indeterminacy substantially undercuts its symbolic effect).

¹⁰⁰ As an empirical study of the phenomenon has concluded, see generally Larry R. Baas, *The Constitution as Symbol: Patterns of Meaning*, 8 AM. POL. Q. 237 (1980); Larry R. Baas, *The Constitution as Symbol: The Interpersonal Sources of Meaning as a Secondary Symbol*, 23 AM. J. POL. SCI. 101 (1979).

¹⁰¹ See Richard H. Fallon Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975 (2009).

long-term goal of constitutional constraint might be to keep bad officials from doing bad things, the principal way in which this is accomplished is by keeping all officials, including good ones, from doing certain things, even when those things are good things done for good purposes.¹⁰² In other words, a constitution not only keeps bad officials from doing bad things, but also keeps good officials from doing good ones in the service of larger or longer-term values.¹⁰³

A number of concrete issues and cases will make this point clearer. Consider, for example, the protection under the First Amendment of truly awful people saying truly awful and potentially dangerous things. Clarence Brandenburg suggesting to his fellow Klansmen that acts of “revengeance” against African-Americans and Jews might be necessary is one prominent example,¹⁰⁴ and so too with the homophobic statements of the Reverend Fred Phelps and his compatriots at the Westboro Baptist Church,¹⁰⁵ the puppy torturers whose profit-making films were protected in *United States v. Stevens*,¹⁰⁶ and the encouragers or enablers of sexual violence whose encouragements almost always lie well within the domain of constitutionally protected speech.¹⁰⁷

Much the same, and just as obviously, applies to the various protections afforded to defendants in criminal cases. The protections of the Fourth, Fifth, and Sixth Amendments plainly (and properly) produce the acquittal, dismissal, or nonincarceration of people who are genuinely guilty, for fear, wisely, of excessive empowerment of police, prosecutors, and other law enforcement arms of the state.¹⁰⁸ But as

¹⁰² See *id.* at 980.

¹⁰³ See Frederick Schauer, *The Annoying Constitution: Implications for the Allocation of Interpretive Authority*, 58 WM. & MARY L. REV. 1689, 1694 (2017) [hereinafter Schauer, *The Annoying Constitution*] (arguing that self-constraint is problematic in enforcing long-term constitutional values in the face of short-term seemingly good policies); Frederick Schauer, *Constitutionalism and Coercion*, 54 B.C. L. REV. 1881, 1895 (2013) (arguing that coercion is necessary to uphold second-order constitutional constraints).

¹⁰⁴ *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam). “African-Americans” is not the term that Clarence Brandenburg used.

¹⁰⁵ See *Snyder v. Phelps*, 562 U.S. 443, 448–49, 460–61 (2011).

¹⁰⁶ See 559 U.S. 460, 472 (2010).

¹⁰⁷ See *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 332–34 (7th Cir. 1985) (holding unconstitutional a restriction on nonobscene sexually subordinating and sexual-violence-encouraging speech).

¹⁰⁸ See, e.g., *Nix v. Williams*, 467 U.S. 431, 443 (1984) (upholding Fourth Amendment rights of an “obviously guilty” defendant); *Linkletter v. Walker*, 381 U.S. 618, 650 (1965) (Black, J., dissenting) (acknowledging that the Fourth Amendment makes it more difficult to convict the guilty); *Trupiano v. United States*, 334 U.S. 699, 709 (1948) (noting that the Fourth Amendment protects the guilty as well as the innocent); *Twining v. New Jersey*, 211 U.S. 78, 91 (1908) (recog-

with the First Amendment cases, the effect of recognizing and upholding the rights even of guilty defendants is to impose short-run public interest costs in the name of long-run public interest or individual-rights benefits. In the service of long-term benefits, the protections of the Fourth, Fifth, and Sixth Amendments constrain law enforcement even when it operates in good-faith pursuit of the guilty. And properly so.

The constitutional demand of public interest (or general welfare) sacrifice in the name of larger and deeper constitutional values is not only about individual rights. State governors and legislators seeking to provide competitive advantages to local (and, sometimes, genuinely indigenous¹⁰⁹) businesses are often not doing so for corrupt or self-interested reasons, but, nevertheless, dormant commerce clause doctrine frequently impedes these officials in their well-meaning and public interest-focused efforts.¹¹⁰ So too with separation of powers at the federal level, where bipartisan efforts to adapt a government structure designed in 1787 to the realities of twentieth and twenty-first century governance may run afoul of the way in which the Constitution often prohibits even the most benign and well-meaning of such efforts.¹¹¹

B. The Targets of Constitutional Constraint

If at least one of the chief purposes of the Constitution is thus to constrain even well-meaning officials pursuing genuinely public interested policies, then we must ask just how this constraint can be operationalized. One possibility, of course, is that the officials who are to be constrained should be considered free to pursue such public interested policies, with the courts then available to declare such policies unconstitutional. In his proposed speech regarding the so-called gold clauses,¹¹² and in an actual letter in the wake of the Supreme Court

nizing that the Fifth Amendment provides “shelter to the guilty”); *Moore v. Czerniak*, 534 F.3d 1128, 1195–96 (9th Cir. 2008) (Bybee, J., dissenting) (lamenting Sixth Amendment’s freeing of a “plainly guilty” defendant).

¹⁰⁹ See *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984) (invalidating protectionist tax designed to protect indigenous Hawaiian pineapple wine producers).

¹¹⁰ See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 583–88 (1997) (striking down refusal to extend tax exemption for nonprofits to nonprofits operated principally for the benefit of nonresidents); *Hughes v. Oklahoma*, 441 U.S. 322, 338–39 (1979) (invalidating state effort to preserve state natural resources for state residents); *S. Pac. Co. v. Arizona*, 325 U.S. 761, 781–82 (1945) (holding that safety-motivated railroad restriction placed unconstitutional burden on interstate commerce).

¹¹¹ See, e.g., *INS v. Chadha*, 462 U.S. 919, 944–46 (1983) (invalidating one-house veto even when the product of bipartisan congressional approval).

¹¹² The so-called gold clauses, pursuant to which a creditor could demand payment in gold,

decision invalidating the National Industrial Recovery Act,¹¹³ President Franklin Roosevelt urged just such a strategy, telling Congress that it was their job to enact the legislation that it thought best served the public interest, leaving it to the Supreme Court to decide whether that legislation violated the Constitution.¹¹⁴

The same approach, not surprisingly, seems to appeal to modern-day members of Congress. When Congress overwhelmingly passed the Flag Protection Act of 1989,¹¹⁵ only weeks after the Supreme Court's decision in *Texas v. Johnson*,¹¹⁶ the members could not have helped but know that the legislation was doomed from the outset to constitutional invalidation.¹¹⁷ So too with efforts to prohibit virtual child pornography¹¹⁸ and to release the police from the alleged shackles of *Miranda v. Arizona*.¹¹⁹ In all of these instances the legislation was predictably invalidated, yet there is no evidence that any member of Congress lost any votes for departing from clear Supreme Court precedent in coming out against flag burners, child pornographers, and criminals of all stripes.

These examples all involved public officials essentially disregarding patently applicable Supreme Court decisions. Whether those on-all-fours decisions were actually controlling—binding—on Congress or on the executive branch is hugely contested, and judicial departmentalists would see little amiss with a state of affairs in which members of Congress decided according to its own constitutional judgment even in the face of applicable Supreme Court decisions.¹²⁰ But if, to

were declared unenforceable in Executive Order 6102. President Roosevelt prepared his speech on the assumption that this Executive Order would be invalidated, but the Supreme Court upheld its constitutionality, and the speech was never delivered. See *Perry v. United States*, 294 U.S. 330 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); *Norman v. Balt. & Ohio R.R. Co.*, 294 U.S. 240 (1935).

¹¹³ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

¹¹⁴ See KATHLEEN M. SULLIVAN & NOAH FELDMAN, *CONSTITUTIONAL LAW* 26 (18th ed. 2013).

¹¹⁵ Pub. L. No. 101–131, 103 Stat. 777.

¹¹⁶ 491 U.S. 397, 399 (1989) (invalidating on First Amendment grounds the Texas prohibition on desecrating the American flag).

¹¹⁷ As indeed transpired. See *United States v. Eichman*, 496 U.S. 310 318–19 (1990) (invalidating the Flag Protection Act of 1989 as unconstitutional viewpoint discrimination).

¹¹⁸ See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 254–56 (2002) (invalidating those provisions of the Child Pornography Prevention Act of 1996 that prohibited material not using images of actual children).

¹¹⁹ *Dickerson v. United States*, 530 U.S. 428, 432 (2000) (overturning congressional statute aimed at overturning *Miranda v. Arizona*, 384 U.S. 436 (1966)).

¹²⁰ So-called departmentalists, a politically eclectic group including Abraham Lincoln, Franklin Roosevelt, Ronald Reagan's Attorney General Edwin Meese, and Professors Steven Calabresi and Sanford Levinson, maintain that each branch—department—of government is le-

the contrary, Supreme Court decisions ought actually to constrain nonjudicial officials more broadly than simply constraining the actual parties to those decisions, then the flag-burning, child pornography, and *Miranda* scenarios exemplify situations in which the second-order constraints on first-order policy or political decisions have gone largely unenforced, or at least belatedly enforced, and thus in which the goals of a constraining constitutional order are frustrated. When the very officials who are to be constrained have the authority to interpret the meaning of the constraints on them, it should come as little surprise that those officials will typically find that they are not in fact constrained.¹²¹

gitimately entitled to make its own judgments of constitutionality, and thus that the Supreme Court's determinations of constitutionality bind only the judicial branch. For full-throated defenses of departmentalism, see, iconically, Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987); see also Steven G. Calabresi, *Thayer's Clear Mistake*, 88 NW. U. L. REV. 269 (1993); Sanford Levinson, *Could Meese Be Right This Time?*, 61 TUL. L. REV. 1071 (1987); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994); Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713 (2017); Kevin C. Walsh, *Originalist Law Reform, Judicial Departmentalism, and Justice Scalia*, 84 U. CHI. L. REV. 2311 (2017). And for equally full-throated defenses of so-called judicial supremacy, see *Dickerson*, 530 U.S. at 428; *Cooper v. Aaron*, 358 U.S. 1 (1958); Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455 (2000); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997). More nuanced positions, qualifiedly recognizing the arguments for both departmentalism and judicial interpretive supremacy, include Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 L. & CONTEMP. PROBS. 105 (2004); Richard H. Fallon Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487 (2018); Frank I. Michelman, *Living with Judicial Supremacy*, 38 WAKE FOREST L. REV. 579 (2003); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027 (2004). And on the closely related controversies about what is often called "popular constitutionalism," compare Larry D. Kramer, *We the Court*, 115 HARV. L. REV. 4 (2001), with Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)).

¹²¹ See Schauer, *The Annoying Constitution*, *supra* note 103, at 1703–04. Self-interested or self-empowering interpretation is but an application of the well-studied phenomenon of *motivated reasoning*—that is, the tendency of people to perceive the factual world in a way that reflects their normative preferences. The initial insight and research on motivated reasoning is Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 480 (1990). Subsequent elaborations and explanations include Peter H. Ditto, David A. Pizzaro & David Tannenbaum, *Motivated Moral Reasoning*, 50 PSYCH. LEARNING & MOTIVATION 307 (2009); Keith E. Stanovich & Richard F. West, *Natural Myside Bias is Independent of Cognitive Ability*, 13 THINKING & REASONING 225 (2007); Keith E. Stanovich, Richard F. West & Maggie E. Toplak, *Myside Bias, Rational Thinking, and Intelligence*, 22 CURRENT DIRECTIONS PSYCH. SCI. 259 (2013). And for an application of motivated reasoning to constitutional decisionmaking, see generally Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1 (2011).

As a descriptive matter, however, things tend to be different when the constitutional text is clear. Presidents do not run for third terms, even when they are popular at the end of their second term, and that is because the clear language of the Twenty-Second Amendment prohibits them from doing so.¹²² Candidates for President who win the popular vote nationally accept, even if grudgingly, the mechanism of the Electoral College.¹²³ Those who are nineteen years old are never denied the right to vote because of their age, at least after the adoption of the Twenty-Sixth Amendment.¹²⁴ And rarely are presidential pardons of the undeserving legally challenged, the textually explicit pardon power being so textually unlimited.¹²⁵

All of this suggests that, as a descriptive matter, the Constitution is understood to speak in many of its clauses directly to those it seeks to constrain.¹²⁶ But it does so most effectively when it speaks most clearly. This phenomenon has not been lost on contemporary constitutional drafters, who tend to avoid the kinds of “majestic generalities”¹²⁷ that characterize much of the United States Constitution, opting instead for longer and more detailed documents that can provide more guidance and more constraint by speaking not to courts, or at least not only to courts, but instead to those officials the documents actually seek to guide and constrain.¹²⁸

¹²² U.S. CONST. amend. XXII, § 1.

¹²³ The presidential elections of 1888, 2000, and 2016 being the clearest examples. *See* Jerry Schwartz, *They Lost the Popular Vote but Won the Elections*, AP (Oct. 31, 2020), <https://apnews.com/article/AP-explains-elections-popular-vote-743f5cb6c70fce9489c9926a907855eb> [<https://perma.cc/Z63S-YHF2>].

¹²⁴ U.S. CONST. amend. XXVI, § 1.

¹²⁵ *See* U.S. CONST. art. II, § 2, cl. 1; *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871) (noting unlimited nature of pardon power); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) (same). Recent entries in the long list of unreviewable and unreviewed pardons of the undeserving include Bill Clinton’s pardon of Marc Rich and Donald Trump’s pardon of Charles Kushner. *See* E.J. Dionne Jr., *Bill Clinton’s Last Outrage; The President’s Defenders Feel Betrayed by His Pardon of Marc Rich*, BROOKINGS (Feb. 6, 2001), <https://www.brookings.edu/opinions/bill-clintons-last-outrage-the-presidents-defenders-feel-betrayed-by-his-pardon-of-marc-rich/> [<https://perma.cc/TZ5Z-XKSF>]; Maggie Haberman & Michael S. Schmidt, *Trump Gives Clemency to More Allies, Including Manafort, Stone and Charles Kushner*, N.Y. TIMES (Jan. 17, 2021), <https://www.nytimes.com/2020/12/23/us/politics/trump-pardon-manafort-stone.html> [<https://perma.cc/8CSQ-BE8F>].

¹²⁶ Strauss, *supra* note 6, at 12 (although arguing that the constitutional text does little work in litigated cases, recognizes that “some issues are so conclusively settled by the text that they are never litigated”).

¹²⁷ *Fay v. New York*, 332 U.S. 261, 282 (1947).

¹²⁸ *See* Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1652–58 (2014) (comparing United States and other national constitutions in length and detail); Christopher W. Hammons, *Was James Madison Wrong? Rethinking*

C. *On Constraint and Interpretation*

The examples described above provide some evidence for the conclusion that officials appear willing to accede directly to constitutional constraints when those constraints speak clearly and precisely but not when constitutional constraint is embodied in the vague clauses that produce so much conflict and litigation. Perhaps much—and arguably most—of the Constitution of the United States therefore turns out to be a poor vehicle for directly constraining and guiding officials without the intervention of the courts. The constitutional text as it exists is often so vague in its language and so gap-laden in its coverage as to be particularly ineffective in performing at least one of its major functions. But it is, to put it mildly, too late in the day to do something about that state of affairs, even assuming that it would be good to try to start over or propose wholesale revision, which it would not be.

Given the nature of the text that we do have, there remains the possibility that interpretive strategies can compensate for the deficiencies of the existing text. One of these strategies, albeit not one that is the principal focus of this Article, is rule-promulgation by interpretation. Although it is fashionable in some circles to make fun of the Supreme Court when it offers its detailed prescriptions through three- and four-part tests,¹²⁹ those tests often do via interpretation what a more detailed constitution would do directly. Few police officers, for example, are uncertain about what to say to custodial suspects about their rights, and that lack of uncertainty emerges from the regulation-like clarity of the Supreme Court's instructions in *Miranda v. Arizona*,¹³⁰ instructions that in the Court's opinion tell officers under most circumstances what to say, whom to say it to, and when to say it.¹³¹

the American Preference for Short, Framework-Oriented Constitutions, 93 AM. POL. SCI. REV. 837, 845–46 (1999) (same for American state constitutions).

¹²⁹ See, e.g., Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 98–99 (1993) (criticizing the “medieval earnestness” of detailed Supreme Court opinions); Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 169 (1985) (arguing that the “formulaic style” of opinions is “obtrusively elaborate” and “cumbersome”). And for a defense of what Horwitz and Nagel criticize, see Frederick Schauer, *Abandoning the Guidance Function: Morse v. Frederick*, 2007 SUP. CT. REV. 316; Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455 (1995).

¹³⁰ 384 U.S. 436 (1966).

¹³¹ *Id.* at 467–73.

Miranda and an annoyingly small number of other cases¹³² are, however, largely about the Supreme Court's outputs. But if we refocus our attention from outputs to inputs, we find ourselves back where we started—with the question of what to use in interpreting the Constitution—in interpreting a text whose language is often so vague as to give virtually no guidance to the interpreters. But when formulated in this way, the question of what to use in interpreting the Constitution can only be answered satisfactorily if we direct our attention to the vital but too-often-ignored question of just who it is that is doing the interpreting.

Overwhelmingly, the literature on constitutional interpretation takes as its paradigm interpreter a Supreme Court Justice, or, sometimes, the Supreme Court collectively.¹³³ Occasionally, that literature recognizes that judges other than Supreme Court Justices also interpret the Constitution.¹³⁴ And sometimes there is even acknowledgment that certain agencies and offices, the Office of Legal Counsel most prominently, also must interpret the Constitution.¹³⁵ But rarely is very much attention paid to members of Congress,¹³⁶ state legislators, city council members, police officers, prosecuting attorneys, and teachers in public schools, among many others, who must also interpret the Constitution. Does not the Constitution also speak to them? In the 2019 Term, after all, the Supreme Court decided a mere fifty-

¹³² The two-part test for sex discrimination, *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724–26 (1982); *Craig v. Boren*, 429 U.S. 190, 197–200 (1976), the three-part test for obscenity, *Miller v. California*, 413 U.S. 15, 24–25 (1973), and the four-part test for commercial advertising, *Cent. Hudson Gas & Elec. Co. v. Publ. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561–66 (1980), fall far short of *Miranda* in directly apply-able clarity, but they do structure the inquiry in a way that the constitutional language they interpret does not.

¹³³ See Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 459 (2012) (lamenting the “[Supreme] Court-centered account” that dominates the writing about constitutional interpretation).

¹³⁴ *Id.* (describing lower court constitutional interpretation as the “forgotten stepchild of constitutional theory”). To the same effect, see Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 307–08 (2005); Patricia M. Wald, *Upstairs/Downstairs at the Supreme Court: Implications of the 1991 Term for the Constitutional Work of the Lower Courts*, 61 U. CIN. L. REV. 771, 772 (1993).

¹³⁵ Among too-few sources, see generally Johnsen, *supra* note 120; Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303 (2000); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005); Bertrall L. Ross II, *Administrative Constitutionalism as Popular Constitutionalism*, 167 U. PA. L. REV. 1783 (2019).

¹³⁶ There is, of course, a large literature arguing that Congress and the executive branch should have the power to interpret the Constitution unencumbered by Supreme Court decisions. See Johnsen, *supra* note 120. But that literature tends to say little if anything about just how those branches ought to exercise that power.

nine cases on the merits with full opinions after briefing and oral argument.¹³⁷ And although obviously a much larger number of constitutional cases is decided by other federal courts and by state courts, the notion that there is no constitutional law and thus no constitutional constraint unless and until some particular controversy has been adjudicated by a court seems not only cumbersome and inefficient, but in some tension, to say the least, with the idea that federal, state, and local officials have an obligation to follow the Constitution.¹³⁸

The foregoing conclusion is in need of further elaboration. More specifically, the initial claim here, a claim I hope is not controversial, is that rule systems, and *a fortiori* specific rules, can tell their addressees what those addressees may, must, or must not do. The addressees may choose not to obey, or they may obey for fear of punishment or other sanctions, or they may obey because they have internalized the rules or the rule systems, but they are still the direct addressees—the audience, or the targets—of individual rules and of systems of rules, unmediated by official or institutional interpreters. This observation is hardly surprising. After all, most drivers stop at most “stop” signs most of the time without waiting for a court to adjudicate whether their particular act of stopping is or is not encompassed by this sign in this place at this time. And although the Internal Revenue Service might wish that the rate of tax compliance were even higher than it is, the rule system that we know as tax law tends, again, to operate more or less effectively without constant judicial intervention.

A useful contrast with the previous examples might come from the way in which refereed or umpired sports and games typically operate. At least at organized competitive levels, the umpires or referees are there to make a decision about *every* play, or pitch, or shot, or whatever. The apocryphal umpire who said “they ain’t nothin’ [until] I call[] ‘em,”¹³⁹ said something important about baseball, and, con-

¹³⁷ See *The Supreme Court, 2019 Term, The Statistics*, 134 HARV. L. REV. 610, 619 (2020).

¹³⁸ The argument that there is no law, or at least no constitutional law, unless and until a court has decided the issue has a surprising and disturbing presence. When Senator Patrick Leahy in 2011 objected that a proposed voluntary pay cut by members of the Senate would violate the Twenty-Seventh Amendment, Senator Barbara Boxer countered with the argument that because no court had decided the issue, the Twenty-Seventh Amendment did not constrain. See Josiah Ryan, *Dem Senator Slams Dem Colleague’s Measure as Unconstitutional*, HILL FLOOR ACTION BLOG (Mar. 1, 2011), <https://thehill.com/blogs/floor-action/senate/84108-dem-senator-slams-dem-colleagues-measure-as-unconstitutional/> [<https://perma.cc/X26M-C6FE>]. And for other examples, see Frederick Schauer, *Official Obedience and the Politics of Defining “Law,”* 86 S. CAL. L. REV. 1165, 1171 n.24 (2013).

¹³⁹ The quoted sentence is the punch line of the oft-repeated story of the three umpires, originally in Hadley Cantril, *Perception and Interpersonal Relations*, 114 AM. J. PSYCHIATRY 119,

versely, something equally important about law. In law, unlike in baseball, we do not have roving judges observing the entirety of our behavior and adjudicating our every act as lawful—or not. Rather, law operates by virtue of the way in which legal rules purport to control behavior independent of adjudication and independent of authoritative interpretation.

If the conclusions in the previous paragraph are even close to being correct, then it follows that in important ways the Constitution speaks, or ought to speak, not only to judges but also directly to those whose behavior the Constitution purports to control and constrain. It ought to speak to a President who is deciding whether some profitable private arrangement with a non-U.S. business is or is not the kind of “emolument” prohibited by Article I of the Constitution.¹⁴⁰ It ought to speak to a prosecutor or police officer wishing to know whether the use of an out-of-court statement requires allowing the defendant to “confront” the maker of the statement, as required by the Sixth Amendment.¹⁴¹ It ought to speak to members of Congress attempting to follow the Constitution in determining their roles in dealing with impeachment and with trials of impeachments,¹⁴² as well as the limits of their powers to disqualify or expel their members.¹⁴³ It ought to speak to a judge adjudicating a demand for a jury trial in a civil case arising under a statute enacted by Congress in 1933.¹⁴⁴ And so on. And on. And on.

An important feature of these, and countless other examples, is that often there is no Supreme Court decision dealing with the question, and there is often neither the time nor the resources for the constrained official to try to figure out what some word, phrase, or sentence was publicly understood to mean in 1787, or 1791, or 1868.

126 (1957). As the story goes, one umpire says that some pitches are balls and some are strikes, and he calls them as they are. The second umpire says that some are balls and some are strikes, and he calls them as he sees them. And then the third umpire says, “they ain’t nothin’ ‘till I calls ‘em.” *Id.* at 126.

¹⁴⁰ For a sample of the litigation raising the emoluments question during the Trump Administration, none of which reached the merits, see *Citizens for Resp. & Ethics in Wash. v. Trump*, 953 F.3d 178, 184 (2d Cir. 2019), *remanded with instructions to dismiss as moot*, *Trump v. Citizens for Resp. & Ethics in Wash.*, 141 S. Ct. 1262 (2021); *Blumenthal v. Trump*, 949 F.3d 14, 16 (D.C. Cir. 2020); *District of Columbia v. Trump*, 930 F.3d 209, 211 (4th Cir. 2019).

¹⁴¹ *See supra* notes 75–77 and accompanying text.

¹⁴² *See supra* note 85 and accompanying text.

¹⁴³ *Cf. Powell v. McCormack*, 395 U.S. 486, 548 (1969) (holding that the House of Representatives’ power to exclude was limited to the qualifications stated in the Constitution).

¹⁴⁴ *See Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc.*, 68 F. Supp. 3d 486, 498 (S.D.N.Y. 2014) (holding that the Seventh Amendment required a jury trial for a claim under § 11 of the Securities Act of 1933 but not for a claim under § 12(a)(2)).

As a result, if it is important that the Constitution constrain officials, and if it is important that it do so even in the absence of litigation, then it follows that it is equally important that those whom the Constitution seeks to constrain be able to understand the Constitution directly. And although, for all practical purposes, the Constitution's irremediable vagueness may make such an aspiration a fantasy for many of the document's most consequential provisions, it does not do so for all of them. And for those words and phrases that do have relatively determinate meanings, the constraint function can be served only if we understand the Constitution to mean now what its language means *now* to its addressees. This is textualism, but it is not the textualism of meanings from a century and a half to more than two centuries ago. It is the textualism of the text now, and thus of the text's meaning now. It is the textualism that tells Congress how to count the votes of the presidential electors without having to engage in extensive historical research, just as it is the textualism that does the same for the Senate in determining how to conduct an impeachment trial,¹⁴⁵ for the prosecutor deciding whether to present evidence coming from a witness not present for trial,¹⁴⁶ and for any official seeking to determine what the Constitution requires under circumstances in which no court has yet authoritatively adjudicated the issue.

The argument for contemporary meaning textualism therefore is the argument from guidance. The most obvious manifestation of that guidance function comes when the Constitution constrains even well-meaning officials from doing what they would otherwise be inclined to do on policy or political grounds, but the guidance function is not limited to constraining. As the examples of counting electoral votes and determining impeachment procedures illustrate, guidance is applicable even when constraint, in the sense of second-order constitutional constraints on first-order policy preferences, is not at issue. But whether constraining or just instructing, the Constitution, as with any other law, is likely to operate most efficiently and effectively when its addressees know what the law requires without the intervention of the courts. If we think that "stop" signs work best when motorists stop simply because the sign tells them to, then we can imagine the same dynamic, at one or several removes, for the Constitution. And if we believe that, then we should accept the value of a constitution that

¹⁴⁵ See *Nixon v. United States*, 506 U.S. 224, 237–38 (1993) (refusing, on political question grounds, to review Senate determination that a Senate committee, and not the full Senate, could be empowered to hear the evidence in the trial of a judicial impeachment).

¹⁴⁶ See *supra* text accompanying notes 75–77.

can, in theory and even sometimes in practice, guide in much the same way as the “stop” sign guides. And for this guidance to be effective, the guiding document must speak the same language as those it addresses. Contemporary meaning textualism is based on the idea that only if we understand the language of the Constitution as it means now can those who seek guidance now know what the Constitution requires of them.¹⁴⁷

D. *Does It Matter?*

To recapitulate, the claim here is that interpreting the Constitution according to its public meaning at the time of interpretation is the approach to constitutional interpretation that best serves the constraining and guiding functions of a constitution. These constraining and guiding functions are chief among the principal reasons—perhaps *the* principal reasons—for having a constitution, and especially a written constitution, in the first place. Although a constitution in a weak sense is a prerequisite for having what we can understand as a government and what we can understand as a state, the chief *raison d'être* for having a single written constitution, as opposed to the largely unwritten constitutions that exist, most prominently, in the United Kingdom, New Zealand, and Israel, is that written constitutions, by virtue of their writtenness, more effectively impose second-order constraints on the first-order policy or political preferences of officials.¹⁴⁸ Although an unwritten but internalized rule or norm or principle might constrain, the very fact that unwritten rules lack a canonical formulation makes it easy for those who are allegedly constrained to understand the constraining rule in such a way as to soften or eliminate the constraint. When there is a canonical formulation, however, such self-empowering reformulation is far less possible. Accordingly, written

¹⁴⁷ My argument for contemporary meaning textualism is thus to be distinguished from the very different argument for a very similar conclusion in Bell, *supra* note 5. Bell argues that the legitimacy of constitutional governance depends on the consent of the governed now and such consent requires a populace that can now understand what they are consenting to. And he argues, further, that seeing the Constitution in this way is liberty enhancing. My argument here for constraint on and guidance of officials is, by contrast, agnostic as to whether such guidance or constraint increases or decreases the liberty of citizens. My argument is from the functions of a written constitution, but it is no more and no less than that.

¹⁴⁸ Second-order constraints on first-order policy decisions are an application of the basic idea, chiefly attributable to Joseph Raz, of exclusionary reasons—reasons that exclude other reasons, and thus, reasons that exclude what would otherwise be good reasons from consideration. JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 37–45 (2d ed. 1990); *see also* JOSEPH RAZ, *THE AUTHORITY OF LAW* (1979); Schauer, *Is Law a Technical Language?*, *supra* note 67; Cass R. Sunstein & Edna Ullmann-Margalit, *Second-Order Decisions*, 110 *ETHICS* 5 (1999).

constitutions recognize that both officials and the public have great political and psychological difficulty in subjugating their first-order preferences to less immediate values of both process and substance.¹⁴⁹ Written constitutions take advantage of the very rigidity of a writing to make it more difficult for officials to interpret a constraining rule so as to eliminate the constraint. Understanding the Constitution as speaking directly and clearly to officials is accordingly an important adjunct to the role of a constitution as guiding and constraining those officials. And doing so requires understanding constitutional language in terms of contemporary meaning—how the constraining text is understood by the constrained officials at the time of constraint—and not in terms of what historical research might reveal.

Constitutional constraint is thus likely to function best when constrained officials can directly understand what they may not do. But that conclusion invites the question whether preferring contemporary meaning textualism to original meaning textualism better facilitates that understanding. In other words, does preferring contemporary meaning textualism to original meaning textualism make a difference, and, if so, how much? At this point in the inquiry, however, we need to distinguish between outcome difference and methodological difference, and I will address each of these in turn.

Outcome difference is a straightforward idea. Will using one method—here, contemporary meaning textualism—produce different outcomes than using another—here, original meaning textualism? But it is far from obvious that the differences are substantial. In some instances, there will indeed be differences. If “dollars” meant something different in kind, and not just in value, in 1791 than it does now, as Lawrence Solum has suggested,¹⁵⁰ then the “twenty dollars” criterion

¹⁴⁹ See *supra* note 121. The issue, as Professor Daryl Levinson felicitously puts it, is whether officials and the public have preferences for law *qua* law as opposed to substantive preferences for what the particular content of particular laws happens to be. Daryl Levinson, *The Inevitability and Indeterminacy of Game-Theoretic Accounts of Legal Order*, 42 L. & SOC. INQUIRY 28 (2017). As should be apparent from this Article, I have my doubts, as does Levinson, about the strength of those preferences, either for officials or for the public to whom they are typically responsive. See Frederick Schauer, *Preferences for Law?*, 42 L. & SOC. INQUIRY 87 (2017); Frederick Schauer, *How (and If) Law Matters*, 129 HARV. L. REV. F. 350 (2016); Frederick Schauer, *The Political Risks (If Any) of Breaking the Law*, 4 J. LEGAL ANALYSIS 83 (2012). And although it should also be apparent that I lament this state of affairs, Thoreau would have applauded. “It is not desirable to cultivate a respect for the law, so much as for the right.” Henry David Thoreau, *On the Duty of Civil Disobedience* (1849), reprinted in WALDEN AND “CIVIL DISOBEDIENCE” 222, 223 (1980).

¹⁵⁰ Solum, *Originalist Methodology*, *supra* note 74, at 281–82 (pointing out that “dollar” in 1791 referred to a Spanish silver dollar and not to anything resembling modern paper money).

in the Seventh Amendment's guarantee of a jury trial in civil cases in federal courts will be different under a contemporary meaning approach than under an original meaning approach. And perhaps, but only perhaps, the original public meaning of "the freedom . . . of the press" meant something different in the era of the largely local print press than it does in the contemporary world of electronic press and social media.¹⁵¹

But these examples, although not an exhaustive list, seem to be exceptions. In most cases the differences between original public meaning and contemporary public meaning will turn out to be inconsequential. Some of that inconsequentiality is a function of particular concrete words and phrases meaning pretty much the same thing across the centuries. We may debate about the scope of application of the Article III and Sixth and Seventh Amendment rights to a jury trial,¹⁵² between 1787 or 1791 and now. Much the same can be said about almost all the legislative procedures in Articles I and II, such that now, as in 1787, it is clear that bills imposing taxes must originate in the House of Representatives,¹⁵³ that impeachments are commenced in the House and then tried in the Senate,¹⁵⁴ that the date of a presidential election is for Congress to determine.¹⁵⁵ So too with the power of Congress to create the lower federal courts,¹⁵⁶ the procedures for amending the Constitution,¹⁵⁷ the method of creating new states,¹⁵⁸ and on and on and on. With respect to the basic operation of government, little of how the Constitution reads now is different from how it would have been read when first written or adopted.

Let me emphasize what the foregoing paragraphs do *not* claim. Most importantly, they do not claim that the Constitution is always

¹⁵¹ See Sonja R. West, *The "Press," Then & Now*, 77 OHIO STATE L.J. 49 (2016) (comparing modern electronic and social media with the press as it was understood at the time of adoption of the Press Clause).

¹⁵² The right to trial by jury in criminal cases is guaranteed both in Article III ("The Trial of all Crimes . . . shall be by Jury" U.S. CONST. art. III, § 2) and the Sixth Amendment ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury" *Id.* amend. VI), and in civil cases by the Seventh Amendment for "Suits at common law, where the value in controversy shall exceed twenty dollars." *Id.* amend. VII. Unlike almost all of the other provisions of the Bill of Rights, the right to trial by jury in civil cases has not been held to be incorporated within the protections of the Fourteenth Amendment against *state* interference. See *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916).

¹⁵³ U.S. CONST. art. I, § 7.

¹⁵⁴ *Id.* art. I, §§ 2–3.

¹⁵⁵ *Id.* art. II, § 1.

¹⁵⁶ *Id.* art. III, § 1.

¹⁵⁷ *Id.* art. V.

¹⁵⁸ *Id.* art. IV, § 3.

clear, or even that the Constitution is usually clear. The document abounds with vagueness, and even the occasional ambiguity. Those indeterminacies are not and cannot be resolved by the text alone. Nothing in the text can tell us what is or is not an unreasonable search and seizure,¹⁵⁹ or which punishments are cruel,¹⁶⁰ or what forms of interstate transactions or interstate effects qualify as “[c]ommerce . . . among the several States” to determine the limits of congressional power.¹⁶¹ But these indeterminacies exist in the text as originally written, and nothing in the difference between how that text would be understood as text in 1787, 1791, or 1868 and how it is understood now either creates or ameliorates the indeterminacy. The word “commerce” or the phrase “commerce among the several states” *means*, as a linguistic matter, the same thing now as it did in 1787.¹⁶² And if interpreting that vague phrase in 1787, or in 1819 (the year that *McCulloch* was decided), involved different political and constitutional values from those that hold sway now, those differences, however we might characterize them, are not linguistic. In the same fashion, filling in the contours of Fourth Amendment unreasonableness or Eighth Amendment cruelty was no different as a linguistic matter in 1791 or 1868 than it is now, even if the moral and policy considerations involved in that filling have changed.

The import of the lack of substantial linguistic shift, or “drift,” as it is sometimes put,¹⁶³ for most of the language of the Constitution supports the conclusion that understanding the linguistic dimension of constitutional interpretation would not vary substantially with substituting contemporary meaning textualism for original meaning textualism. From a purely semantic sense we might say therefore that original public meaning textualism is “intensionally”¹⁶⁴ equivalent to contemporary meaning textualism for the overwhelming bulk of constitutional questions. That equivalence still leaves much work to be done, but it is the same kind of work in 2022 as it was in 1803—the date of

¹⁵⁹ *Id.* amend. IV.

¹⁶⁰ *Id.* amend. VIII.

¹⁶¹ *Id.* art. I, § 8, cl. 3.

¹⁶² See John Harrison, *Unoriginalism* (Dec. 22, 2020) (unpublished manuscript) (on file with author).

¹⁶³ EDWARD SAPIR, *LANGUAGE: AN INTRODUCTION TO THE STUDY OF SPEECH* 157–82 (1921).

¹⁶⁴ Not “intentionally,” but “intensionally,” in the sense that philosophers distinguish intension from extension. See David J. Chalmers, *On Sense and Intension*, 16 *PHIL. PERSPS.* 135 (2002); Nicholas Rescher, *The Distinction Between Predicate Intension and Extension*, 57 *REVUE PHILOSOPHIQUE DE LOUVAIN* 623 (1959).

*Marbury v. Madison*¹⁶⁵—even if the products of that work vary dramatically.

When we turn from applications to methods, however, things appear very different. The very idea of contemporary public meaning textualism is itself agnostic among the various ways in which interpreters might determine the content of contemporary public meaning. They might, as they have traditionally done in cases of statutory interpretation, rely on their own knowledge or intuitions as competent speakers of the language in which the relevant legal document is written.¹⁶⁶ Or they might rely on dictionaries, understood as compilations of actual usage at the time of compilation.¹⁶⁷ More scientifically, they might use the various modern “big data” techniques that ride under the banner of “corpus linguistics.”¹⁶⁸ But regardless of the methods used, the target of the interpretive inquiry is the same—how is the relevant language likely to be understood now by its expected addressees?

When contemporary meaning is the target, the entire nature of the interpretive enterprise changes, even if the results of that inquiry may be less dramatic than we might have suspected. For judges, and especially for judges not blessed with the benefits of three or four law clerks, a law library whose staff is available for research, and a barrage of information-laden amicus briefs, the interpretive task becomes quite different. In other words, for judges other than the Justices of

¹⁶⁵ 5 U.S. (1 Cranch) 137 (1803).

¹⁶⁶ See Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 739 (2020) (discussing collective, linguistic, and individual intuition).

¹⁶⁷ See *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1722–24 (2017); *Muscarello v. United States*, 524 U.S. 125, 127–28 (1998); James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court’s Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 495 (2013); A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 71 (1994); Tobia, *supra* note 166, at 730; Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1437–40 (1994).

¹⁶⁸ See *Wilson v. Safelite Group, Inc.*, 930 F.3d 429, 440–43 (6th Cir. 2019); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 828–35 (2018); James C. Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J.F. 21, 27–29 (2016); Lawrence M. Solan, *Can Corpus Linguistics Help Make Originalism Scientific?*, 126 YALE L.J.F. 57, 58–59 (2016); Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1643–45; Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 289–90 (2019). But if I am correct in arguing that contemporary meaning textualism is more usable by those who are to be constrained by the Constitution, then methods such as corpus linguistics, as opposed to consultation of one’s own linguistic knowledge or even consultation of a dictionary, would be inconsistent with this virtue of relatively easy usability.

the United States Supreme Court, the process of interpretation under a contemporary public meaning approach will involve those judges acting, it might be said, as judges and not as amateur historians.

The methodological differences between original meaning textualism and contemporary meaning textualism are even more apparent if we look not at judges when they are interpreting the Constitution but instead at nonjudicial officials—the ones whose actions are genuinely the direct object of constitutional constraint. Perhaps the difference between judges and nonjudicial officials might be of little consequence to those with a strong view of judicial interpretive supremacy, for under an assumption of judicial interpretive supremacy nonjudicial officials are still expected to defer to the courts in determining the scope of constitutional constraint.¹⁶⁹ The difference between original public meaning and contemporary public meaning would, however, be very important from a departmentalist perspective.¹⁷⁰ If nonjudicial officials are entitled and perhaps even encouraged to engage in their own constitutional interpretation without deferring to the interpretations of courts, then an approach to constitutional interpretation that is actually usable by such officials has much to recommend it. Although it is at least (slightly) realistic to suppose that judges will have the time, resources, and support to engage in the historical research that any form of originalism requires, it is bizarre to imagine that the same holds true not only for members of Congress and members of the state legislatures, but for the host of everyday city councilors, administrative officials, enforcement officers, and all of the others whose actions are subject to constitutional constraint. For these officials, contemporary meaning textualism at least holds out the promise of them both feeling and being constrained. Yet if they were to understand themselves as being constrained only by what those words meant generations or literally centuries ago, the likelihood that they will impose second-order constitutional constraints on their own first-order policy or political preferences, small as it is, will become even smaller.

The foregoing focus on what we might call *direct*—i.e., not mediated by judges—constitutional constraint highlights the major virtue

¹⁶⁹ On the contrast between judicial interpretive supremacy and so-called departmentalism, see *supra* text accompanying note 120.

¹⁷⁰ See *id.* On the other hand, and as both Tara Grove and John Harrison have suggested to me, if contemporary meaning is often highly similar to 1787, 1791, or 1868 meaning, then contemporary meaning might be valuable as a reliable evidentiary guide, even for an originalist, to original meaning.

of a contemporary public meaning textualism. More than a focus on historical meaning that requires the interpreter to engage in historical inquiry, a focus on contemporary meaning requires the interpreter only to do what the subjects of law—and, indeed, the interpreters and enforcers of law—do on a routine basis. That is not to say the task will always be easy. Legal texts are often vague and sometimes ambiguous. And occasionally they indicate morally or politically difficult outcomes even when they are clear. But the more that constitutional interpretation departs from “ordinary” legal interpretation, the more it seems like the almost exclusive province of a Supreme Court that decides an ever-smaller number of cases and decides even the ones it does decide on ever-narrower grounds. Conversely, the more that constitutional interpretation converges with the kind of legal interpretation that most judges and most officials and, indeed, most legal subjects engage in on a daily basis, the likelihood increases that those whose constraint is the principal object of constitutional governance will actually wind up not only feeling constrained but also being constrained.

CONCLUSION: CONSTITUTIONALISM’S MULTIPLE GOALS

The tenor of the closing sentences of the previous section notwithstanding, constitutional governance serves multiple goals, not all which are compatible with each other. And however tempting it may be to see the Constitution as serving only one master goal, or as serving multiple goals all of which operate together, the temptation should be resisted. Tradeoffs are inevitable, and Panglossian efforts to deny that serving some goals may impede others will result in avoiding the difficult problems that inhere in all aspects of governance, constitutional or otherwise.

The goal of this Article has therefore not been to argue that constraining officials is the only or even the principal goal of constitutionalism in general or of the Constitution of the United States in particular. But nor are the various other goals often touted for constitutionalism—liberty, equality, democratic legitimacy, and scores of others—usefully understood as singularly dominant. This Article is best understood therefore as arguing that guidance and constraint are important constitutional goals, and that *these* goals are best served by adopting contemporary public meaning textualism as the appropriate interpretive approach. Whether the virtues so achieved require the subjugation of all of the other values and goals of constitutionalism is a question that this Article does not even dare to answer.

The Making of the Supreme Court Rules

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ABSTRACT

The reality that rules define institutions is no less applicable to the Supreme Court. Yet the literature on the Supreme Court Rules, and the rulemaking process behind them, is practically nonexistent. Part of the reason is that the rulemaking process for the Supreme Court Rules is a black box—the Court promulgates its rules with neither oversight nor transparency. This Article, relying on interviews with current and former government officials, opens that black box to reveal the history of the rulemaking process for the Supreme Court Rules from the 1980s to the present. That process, as contrasted with the open and participatory rulemaking process for the lower-court rules, is highly secretive and insular. The Article analyzes the justifications of such an approach and finds that none are persuasive. The Article then turns to modest proposals for reform that will benefit the rulemaking process at marginal cost.

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INTRODUCTION

The federal courts are creatures of rules. Statutory rules authorize their jurisdiction and other powers. Court-created rules govern the nuts and bolts of specific proceedings. Common-law rules fill the gaps. Variations and crossovers permeate these rough allocations, but the point is that rules define the institution.

Congress has long authorized the federal courts to make and adopt rules of practice and procedure for themselves. In 1937, the Supreme Court adopted the revolutionary Federal Rules of Civil Procedure, which established a uniform set of procedural rules for civil cases in the nation's federal district courts. Additional sets of federal rules for criminal cases, appeals, and other areas followed, as well as local rules for each court. Much has been written about these rules and the process for making them. Entire law school courses are devoted to them. These rules are the lifeblood of practice in the lower federal courts for both lawyers and judges alike.

The Supreme Court has its own rules, too, and those rules—no less than the rules that govern the lower federal courts—are essential to defining the Supreme Court as an institution. The Supreme Court Rules calculate deadlines for the filing of documents, establish stan-

dards for the Court's exercise of its certiorari discretion, prescribe the mechanism for seeking stays and other relief requested in applications to individual justices, establish procedures for original actions before the Court, and more. As Felix Frankfurter and James Landis once wrote, "the history of the Supreme Court . . . derives meaning to no small degree from the cumulative details which define the scope of its business, and the forms and methods of performing it—the Court's procedure, in the comprehensive meaning of the term."¹

An accounting of the Supreme Court Rules is thus crucial to understanding the institution itself. Yet very little commentary on the Supreme Court Rules exists. Since the 1950s, the commentary on the Supreme Court Rules has been descriptive and oriented toward contemporary practitioners.² In contrast with the voluminous academic interrogation of the lower-court rules and their history, the Supreme Court Rules have been neglected and overlooked.

This disparity is especially glaring with respect to the rulemaking process itself. If rules define an institution, then the process for making those rules—who makes them, how they are made, what policies are infused in them, and why—is the key to controlling the institution.³ The rulemaking process for the lower courts is statutorily prescribed and exhibits a highly formal process marked by numerous layers of review, transparency, and broad participation. Anyone can propose a rule amendment and comment on proposals. The identities of all persons involved in the rulemaking process, along with their roles, are publicly disclosed. Rulemakers' meetings are open, and

¹ FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* xxxvi (1928). Frankfurter and Landis had a broad conception of procedure in mind, but they surely were including the Supreme Court Rules.

² The Supreme Court practitioner's bible, *Supreme Court Practice*, now in its eleventh edition, states as its "specific purpose" to give a present-day accounting of the rules "that a Supreme Court practitioner needs to know." STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, *SUPREME COURT PRACTICE* vii (11th ed. 2019). Bob Stern and Gene Gressman helpfully published an article after each major revision of the Supreme Court Rules from 1960 to 2005, but those pieces were primarily explanatory rather than analytic. Volume 23 of *Moore's Federal Practice* contains a description of and commentary on the Supreme Court Rules, with some historical analysis. 23 JAMES WM. MOORE & MARSHA E. KALMAN, *MOORE'S FEDERAL PRACTICE* § 500 (3d ed. 2021). None of these sources focuses on the rulemaking process.

³ See Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 991 (1996) ("The power over the procedural environment in which cases are heard and decisions are rendered is probably the power that is nearest the core of institutional judicial independence."); Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733, 734 (1995) ("A judiciary that cannot create its own procedural rules is not an independent judiciary.").

their deliberations are recorded. If one is worried that the Chamber of Commerce or the Association of Trial Lawyers of America is having too much influence in the making of lower-court rules, one need only look to the comments submitted by those groups (which are public), track the changes in the drafts and their explanatory notes (which are also public), and review the detailed minutes of the advisory committee that works on the drafts (which are also public) to determine whether that interest group's suggestions have influenced the end product. The lower-court rulemaking process is open for inspection.

By contrast, the Supreme Court Rules are made in a black box. For more than 150 years, the Supreme Court would simply issue an order, out of the blue, with a new rule or rule amendment. The Court sometimes does that even today. The Court has never publicly disclosed its rulemaking process. The Court does not reveal who provides input on rule proposals, what that input is, or why the input does or does not influence the rule changes the Court ultimately makes. The Court promulgates its rules without detailed explanation of the changes or the Court's rationale for making them. The lack of broad participation means that the Supreme Court could be unaware of—or purposefully ignoring—valid practitioner or public interests. At the same time, if groups or individuals with particular agendas are influencing the Supreme Court Rules behind the scenes, it is very likely that no one would know.

In this Article, I open the Court's black box of rulemaking and, in the process, offer three contributions. First, relying on contemporary interviews of current and former Court personnel, I make a descriptive contribution by documenting the Court's rulemaking process over the last three decades, especially in contrast with the process for making the lower-court rules. Second, I make an analytical contribution by mining and assessing the potential justifications for why the Court has chosen a more insular and secretive process for its own rulemaking. Third, I make a normative contribution by urging modest reforms to the rulemaking process for the Supreme Court Rules.

Part I begins by setting out the open and participatory process for making the lower-court rules. Statutory prescriptions since 1988 mandate a multilayered process that delegates specific rulemaking roles to diverse rulemaking actors. The rules are continuously and openly studied. Rulemaking stages are transparent with opportunities for public participation. Two congressionally created entities—the Administrative Office and the Federal Judicial Center—assist the rulemakers with information and data. These rulemaking features

have both positive and negative effects, but most agree that the openness and broad participation generally produce better rulemaking, legitimate the process, and enhance accountability to Congress.

Part II contrasts the lower-court rulemaking process with the secretive and insular process for making the Supreme Court Rules. Unlike lower-court rulemaking, Congress has set no rulemaking parameters, structures, or oversight requirements for the making of the Supreme Court Rules; nor has Congress required continuous study of the Supreme Court Rules. The Supreme Court may, if it wishes, consult no one in promulgating its rules; nor need it give any reasons for rule amendments. The Court has never disclosed publicly its rulemaking process, the role of the rulemaking actors inside the Court, or how any Court outsiders have formally or informally participated in rulemaking.

Part II relies on numerous interviews with current and former government officials to reveal that, under this hands-off approach, the rulemaking process for the Supreme Court Rules remains semiformal, cloistered, and secretive. The Clerk's Office plays a centralizing role in the rulemaking process by taking the lead on drafting rule amendments and soliciting input from certain Court personnel and perhaps specific outsiders. That work is overseen by a Rules Committee of justices. In 1995, the Court, for the first time, began a sporadic practice of publicly posting rule proposals and providing a short period of time for public comment. It appears that some comments have influenced the final rule as adopted. But the Court refuses to reveal any comments it received, the identity of those who submitted comments, or how the comments affected, if at all, the final version of the rule.

Part III analyzes potential explanations and justifications for the Court's choice to follow a more insular and secretive process for making its own rules, including that the Supreme Court Rules are the Court's business alone, that traditions of secrecy and insularity in other aspects of the Court's business justify similar protections for the Supreme Court Rules, that the Court's rulemaking process produces the advantages of flexibility and efficiency, and that the Court's close-to-the-vest approach helps reinforce its special status as the only constitutional court and as the apex of the federal judiciary. This Part concludes that although each explanation has some purchase, they cannot, even in the aggregate, justify the extreme levels of secrecy and isolation that permeate the rulemaking process for the Supreme Court Rules.

Part IV advances four modest reforms. Because the virtues of public participation through notice and comment are strong, while the burdens are light, the Court should follow a default practice of notice and comment, with specified conditions for particular deviations from that practice. To enhance the legitimacy of the Court's rulemaking, the Court should publish any public comments received, following the example of the lower-court rulemaking process. For the same reason, the Court should also publish its rulemaking process, identifying the stages and the rulemaking roles in each stage. Finally, the Court should voluntarily commit to periodic self-study of its rules and rulemaking process, just as Congress has required for the lower courts. These reforms should reap many of the benefits of the open and participatory design of the lower-court rules without overburdening the Court or subjecting it to the tribulations of full-blown bureaucracy. The Article concludes with some additional thoughts for the future.

I. RULEMAKING FOR THE LOWER COURTS

Historians and legal academics have well documented the revolutionary nature and subsequent evolution of the Rules Enabling Act,⁴ which today delegates to the Supreme Court the supervisory power to promulgate “rules of practice and procedure” for the federal courts.⁵

⁴ E.g., Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 944–70 (1987). I use the common epigraph “Rules Enabling Act” throughout to refer generally to the rulemaking authorizations contained in Title 28 of the U.S. Code. I refer to the Enabling Act of 1934 specifically as the “Enabling Act.”

⁵ 28 U.S.C. §§ 2071–72. Congress has long delegated to the Supreme Court some supervisory rulemaking authority over lower-court rules. See Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (Process Act) (obliging federal courts to conform to state law in common-law actions and to apply “principles, rules and usages” of equity in equity actions, “subject . . . to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same”); See also Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 516, 518 (“[T]he Supreme Court shall have full power and authority, from time to time, to prescribe, and regulate, and alter, the forms of writs and other process to be used and issued in the district and circuit courts of the United States, and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings, in suits at common law or in admiralty and in equity pending in the said courts, and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and generally the forms and modes of proceeding to obtain relief, and the forms and modes of drawing up, entering, and enrolling decrees, and the forms and modes of proceeding before trustees appointed by the court, and generally to regulate the whole practice of the said courts, so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein.”). The Supreme Court, under its delegated authority, promul-

The congressional delegation “imposes significant procedural requirements,”⁶ and the rulemaking procedures overall feature informed study, transparency, levels of review, and broad participation.⁷ This Part details the rulemaking process as it has existed since 1988.

A. Rulemaking Committee Makeup and Structure

Congress has created the Judicial Conference,⁸ a council of judges who make policy for the federal courts.⁹ The Judicial Conference operates through committees, including the statutorily required Committee on Rules of Practice and Procedure, colloquially called the Standing Committee.¹⁰ Congress authorized the Judicial Conference to create rulemaking advisory committees, and the Judicial Conference has long done so.¹¹ The Chief Justice appoints committee members,¹² but Congress directed that such committees “consist of members of the bench and the professional bar, and trial and appellate judges.”¹³ The memberships of the Judicial Conference, Standing Committee, and all advisory committees are publicly available.¹⁴

B. Continuous Study

Rulemaking is best waged when armed with information. Congress has charged the Judicial Conference with the responsibility to

gated the Equity Rules by court order in 1822, 1842, and 1912. *See* Rules of Practice for the Courts of Equity of the United States, 20 U.S. (7 Wheat.) v (1822); Rules of Practice for the Courts of Equity of the United States, 42 U.S. (1 How.) xli (1842); Rules of Practice for the Courts of Equity of the United States, 226 U.S. 627 (1912). Additionally, the Supreme Court promulgated the Admiralty Rules in 1845 and 1921. *See* Rules of Practice of the Courts of the United States in Causes of Admiralty and Maritime Jurisdiction, 44 U.S. (3 How.) iii (1845); Rules of Practice for the Courts of the United States in Admiralty and Maritime Jurisdiction, 254 U.S. 671 (1921). In 1872, however, Congress passed the Conformity Act, which obligated lower federal courts to apply state procedure in actions at law, “any rule of court to the contrary notwithstanding.” Act of June 1, 1872, ch. 255, 17 Stat. 196–97. This proscription prevented the Supreme Court from promulgating lower-court rules for common-law actions until passage of the Enabling Act in 1934.

⁶ Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103 (2002).

⁷ For some depictions, see Richard Marcus, *Confessions of a Federal “Bureaucrat”: The Possibilities of Perfecting Procedural Reform*, 35 W. ST. U. L. REV. 103 (2007).

⁸ Pub. L. No. 85-513, 72 Stat. 356 (July 11, 1958) (codified at 28 U.S.C. § 331).

⁹ *About the Judicial Conference*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference> [https://perma.cc/R7L2-PATZ].

¹⁰ 28 U.S.C. §§ 331, 2073(b).

¹¹ *About the Judicial Conference*, *supra* note 9.

¹² *Id.*

¹³ 28 U.S.C. § 2073(a)(2).

¹⁴ *About the Judicial Conference*, *supra* note 9.

study the operation and effect of the federal rules of practice and procedure,¹⁵ a responsibility that the Judicial Conference largely fulfills through its committees¹⁶ along with two congressionally established entities: the Administrative Office of the U.S. Courts (“AO”)¹⁷ and the Federal Judicial Center (“FJC”).¹⁸

The AO, an agency within the judicial branch, produces an annual report on the state of the lower federal courts, which is publicly available, and which contains detailed data on operations, case management, and recent and proposed amendments to federal rules, among many other things.¹⁹ As required by Congress, the AO tracks and makes publicly available a trove of information on the workings and business of the federal courts, including docket loads, makeups, and statistics.²⁰

The FJC, the primary research arm of the judicial branch,²¹ “studies judiciary operations and recommends to the Judicial Conference how to improve the management and administration of the federal courts.”²² The FJC often undertakes empirical studies of specific elements of litigation or judicial management in the lower federal courts. Rulemakers regularly request, and occasionally rely upon, FJC studies

¹⁵ 28 U.S.C. § 331.

¹⁶ See, e.g., A SELF-STUDY OF FEDERAL JUDICIAL RULEMAKING: A REPORT FROM THE SUBCOMMITTEE ON LONG RANGE PLANNING TO THE COMMITTEE ON RULES OF PRACTICE, PROCEDURE AND EVIDENCE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1996), reprinted in 168 F.R.D. 679, 683 (1996) [hereinafter SELF-STUDY].

¹⁷ 28 U.S.C. §§ 601–13.

¹⁸ 28 U.S.C. §§ 620–29.

¹⁹ See *Annual Report 2019*, U.S. Cts., <https://www.uscourts.gov/statistics-reports/annual-report-2019> [https://perma.cc/XX6H-KZ9K].

²⁰ *Federal Court Management Statistics*, U.S. Cts., <https://www.uscourts.gov/statistics-reports/analysis-reports/federal-court-management-statistics> [https://perma.cc/CK22-ATRM]; *Federal Judicial Caseload Statistics*, U.S. Cts., <https://www.uscourts.gov/statistics-reports/analysis-reports/federal-judicial-caseload-statistics> [https://perma.cc/76JU-NVFW]; 28 U.S.C. § 604(a).

²¹ 28 U.S.C. § 620(a) (“There is established within the judicial branch of the Government a Federal Judicial Center, whose purpose it shall be to further the development and adoption of improved judicial administration in the courts of the United States.”); see also *id.* § 620(b) (specifying the FJC’s functions as “to conduct research and study of the operation of the courts of the United States” and “to develop and present for consideration by the Judicial Conference of the United States recommendations for improvement of the administration and management of the courts of the United States,” among others).

²² *Judicial Administration*, U.S. Cts., <https://www.uscourts.gov/about-federal-courts/judicial-administration> [https://perma.cc/8AVZ-X69R]. Congress established the FJC by statute in 1967. See 28 U.S.C. §§ 620–29.

when considering amendments to federal rules.²³ All FJC reports are publicly available on the FJC website.²⁴

C. Rulemaking Process

Congress has set some rulemaking procedures by statute and has charged the Judicial Conference to fill in details by “prescrib[ing] and publish[ing] the procedures for the consideration of proposed rules.”²⁵ Fulfilling that directive, the Judicial Conference has adopted and published the procedures for lower-court rulemaking in the *Guide to Judiciary Policy*.²⁶

Anyone can submit proposed rule changes or recommendations to the Standing Committee Secretary.²⁷ Every submission is publicly available on the U.S. Courts website and includes the name, address, and e-mail address of the submitter.²⁸ The website offers guidelines for submitting proposals and examples of draft proposals.²⁹ The Secretary acknowledges receipt of proposals, logs them in a consolidated, sortable, and searchable repository on the U.S. Courts website, and refers them to the appropriate advisory committee.³⁰

All committee discussions of a proposal are recorded in detailed meeting minutes and agenda books, which are then posted on the U.S.

²³ See, e.g., JOE S. CECIL, GEORGE W. CORT, MARGARET S. WILLIAMS & JARED J. BATAILLON MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *Iqbal* 1 (Fed. Jud. Ctr. 2011) (producing a report, requested by the Judicial Conference, on the effect of two Supreme Court cases interpreting Rule 8).

²⁴ *Reports & Studies*, FED. JUD. CTR., <https://www.fjc.gov/research/reports-and-studies> [<https://perma.cc/G56U-WQY5>].

²⁵ 28 U.S.C. § 2073.

²⁶ *Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees*, in 1 GUIDE TO JUDICIARY POLICY § 440 (2011) [hereinafter JUDICIAL CONFERENCE PROCEDURES]. Early publications of the Judicial Conference procedures were included in the notices of proposed rules. See, e.g., Proposed Amendments to Federal Rules, 195 F.R.D. 95, 598–601 (2000). The Judicial Conference first adopted rulemaking procedures in 1983 and anticipated many of the statutory directives in the 1988 Act. See Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, 98 F.R.D. 337, 347–52 (1983).

²⁷ JUDICIAL CONFERENCE PROCEDURES, *supra* note 26, at § 440.20.20.

²⁸ *How to Suggest a Change to Federal Court Rules and Forms*, U.S. CTS., <https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-suggest-change-federal-court-rules-and-forms> [<https://perma.cc/2DKU-NCWZ>].

²⁹ *Id.*

³⁰ JUDICIAL CONFERENCE PROCEDURES, *supra* note 26, at § 440.20.20. The repository includes the full text of each proposal submitted, the identity of the person or entity who submitted it, the date of submission, the rules targeted for amendment, and a regularly updated status of the rulemaking bodies' consideration of the proposal. *Rules Suggestions*, U.S. CTS., <https://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/rules-suggestions> [<https://perma.cc/YX5H-5TS8>].

Courts website.³¹ All advisory committee meetings are, in the ordinary course, open to the public, and each is preceded by notice to the public of the date, time, and location of the meeting.³² Interest groups routinely send representatives to committee meetings.³³

If the committee decides to move forward with a proposal, the committee reporter will draft amendments, explanatory committee notes, and copies or summaries of the recommendations or suggestions received by the committee.³⁴ When the advisory committee recommends an amendment proposal for publication, it must submit that amendment proposal, explanatory note, and basis for recommendation to the Standing Committee for preapproval.³⁵ The recommendation must include the advisory committee's "evaluation of competing considerations."³⁶ The recommendation and report are made public and posted on the U.S. Courts website.³⁷

The Standing Committee will consider recommendations for publication of proposed rule amendments at its next meeting, which is public. Meeting deliberations are recorded in detailed minutes and an agenda book, both of which are posted on the U.S. Courts website.³⁸ If the Standing Committee approves a proposal for publication, the Secretary will circulate the proposed change to the bench, bar, and public via the *Federal Register*, the U.S. Courts website, and legal publica-

³¹ *Records of the Rules Committees*, U.S. Cts., <https://www.uscourts.gov/rules-policies/records-rules-committees> [<https://perma.cc/667L-QUPV>].

³² 28 U.S.C. § 2073(c). To be fair, advisory committees sometimes allocate work to subcommittees, and any subcommittee conference calls are not subject to the same transparency requirements as full-committee meetings. See Richard Marcus, *Rulemaking's Second Founding*, 169 U. PA. L. REV. 2519, 2544 (2021) ("Despite the extensive disclosure via agenda books of what the subcommittees have been doing and regular review during full Advisory Committee meetings of these subcommittee efforts, the Subcommittee conference calls are not open to all, or regarded as subject to the openness mandate of the 1988 Act.").

³³ See Marcus, *supra* note 32, at 2535 ("The Advisory Committee also hears regularly from a number of organizations, which ordinarily send representatives to attend its meetings as well as make proposals for rule changes and comment on pending topics of Committee consideration and on published amendment drafts. Examples include the Litigation Section of the American Bar Association, the American College of Trial Lawyers, the Lawyers for Civil Justice, the American Association for Justice, and the National Employment Lawyers Association.").

³⁴ JUDICIAL CONFERENCE PROCEDURES, *supra* note 26, at § 440.20.30(b).

³⁵ 28 U.S.C. § 2073(d) (requiring that any committee recommendation "shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate views").

³⁶ JUDICIAL CONFERENCE PROCEDURES, *supra* note 26, at § 440.20.30(c).

³⁷ *Records of the Rules Committees*, U.S. Cts., <https://www.uscourts.gov/rules-policies/records-rules-committees> [<https://perma.cc/B9VQ-7ME6>].

³⁸ 28 U.S.C. § 2073(c); *Records of the Rules Committees*, *supra* note 37.

tions.³⁹ Judicial Conference rules admonish that publication “should be as wide as possible.”⁴⁰ The Secretary must separately notify members of Congress, federal judges, and the chief justice of each state’s highest court, with a link to the proposal materials.⁴¹

The public comment period must, by default,⁴² extend for at least six months after publication,⁴³ during which the advisory committee must, by default, conduct public hearings on the proposed change, with advance notice of the times and places of hearings published in the *Federal Register* and on the U.S. Courts website.⁴⁴ The hearings must be recorded, and, by default, a transcript must be produced.⁴⁵ Hearing recordings and transcripts are posted on the U.S. Courts website.⁴⁶

During the public comment period, a multitude of interested parties and diverse members of the public submit comments.⁴⁷ All public comments are posted on a U.S. Courts webpage that organizes the comments by submitter, date, and rule proposal.⁴⁸ When the public-comment period ends, the advisory committee prepares a summary of the written comments and of the hearing testimony.⁴⁹

At its next meeting, which, as usual, is open to the public and recorded, the advisory committee then considers revisions in light of the information received during the public-comment period and documents its reasons for making any revisions. If the advisory committee makes substantial revisions, the proposed amendment should, pre-

³⁹ JUDICIAL CONFERENCE PROCEDURES, *supra* note 26, at §§ 440.20.40(a), 440.20.40(a)(2).

⁴⁰ *Id.* § 440.20.40(a).

⁴¹ *Id.* § 440.20.40(a)(1).

⁴² The Standing Committee can shorten the public-comment period or eliminate public hearings if deemed unnecessary or if expedited procedures are needed “and that appropriate notice to the public can still be provided and public comment obtained,” but any such deviation from the default must be communicated, with explanation, to the Judicial Conference. *Id.* § 440.20.40(d). Such deviations are rare.

⁴³ *Id.* § 440.20.40(b).

⁴⁴ *Id.* § 440.20.30(a); *Rules & Policies: About the Rulemaking Process*, U.S. Cts., <https://www.uscourts.gov/rules-policies/about-rulemaking-process> [<https://perma.cc/V7JJ-2TWA>].

⁴⁵ JUDICIAL CONFERENCE PROCEDURES, *supra* note 26, at § 440.20.40(c).

⁴⁶ *Rules & Policies: Transcripts and Testimony*, U.S. Cts., <https://www.uscourts.gov/rules-policies/records-rules-committees/transcripts-and-testimony> [<https://perma.cc/T9FT-XH8L>].

⁴⁷ The 2017 proposal to amend Rule 30(b)(6) to require the parties to confer in good faith about the matters for examination of organizational depositions generated more than 1,700 submitted comments. *See* Marcus, *supra* note 32, at 2538.

⁴⁸ *Rules & Policies: Rules Comments*, U.S. Cts., <https://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/rules-comments> [<https://perma.cc/N2ZU-US3L>].

⁴⁹ JUDICIAL CONFERENCE PROCEDURES, *supra* note 26, at § 440.20.50(a).

sumptively, be republished for an additional period of public comment.⁵⁰

The advisory committee then submits a report and recommendation to the Standing Committee with each proposed rule change, a separate report of the comments received, explanation of any revisions made after the notice-and-comment period, and an explanation of competing considerations examined by the advisory committee.⁵¹ The advisory committee typically will include extensive “Advisory Committee Notes,” which also go through the same approval process, and which often offer detailed explanations and guidance from the advisory committee on the amendment’s rationale and its application to particular situations.⁵² All of these materials are published and maintained on the U.S. Courts website.⁵³

At a public meeting, the Standing Committee will consider recommended rule amendments and may accept, reject, modify, or return to the advisory committee any amendment.⁵⁴ The Standing Committee’s actions, reasons, and deliberations are recorded in the meeting minutes and agenda book, which are posted and maintained as publicly available on the U.S. Courts website.⁵⁵ If the Standing Committee approves a rule amendment, the Standing Committee transmits the approved changes, together with the advisory committee’s report, to the Judicial Conference.⁵⁶ The Judicial Conference will consider the proposal, at one of its biennial meetings, which, although not public, is documented in a Report of the Proceedings and posted on the U.S. Courts website.⁵⁷ If the Judicial Conference approves, it will transmit the rule amendment to the Supreme Court.

The Supreme Court will then consider the proposal. Although the Supreme Court has, on occasion, rejected an amendment proposal,⁵⁸ it usually approves proposals by order and transmits them to Congress by May 1. Congress then has until December 1 to act to delay the

⁵⁰ *Id.* § 440.20.50(b).

⁵¹ *Id.* § 440.20.50(c).

⁵² Struve, *supra* note 6, at 1158.

⁵³ JUDICIAL CONFERENCE PROCEDURES, *supra* note 26, at § 440.20.60(b)-(c); *Records of the Rules Committees*, *supra* note 37.

⁵⁴ *Id.* § 440.30.20(c).

⁵⁵ *Id.*; *Records of the Rules Committees*, *supra* note 37.

⁵⁶ JUDICIAL CONFERENCE PROCEDURES, *supra* note 26, at § 440.30.20(d).

⁵⁷ *Reports of the Proceedings—Judicial Conference*, U.S. Cts., <https://www.uscourts.gov/about-federal-courts/reports-proceedings-judicial-conference-us> [<https://perma.cc/P4JR-ZC38>].

⁵⁸ For an example of the Court refusing to transmit to Congress an amendment proposal, in 1991, see Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 843 (1993).

effective date, reject the proposal, or modify it.⁵⁹ Absent congressional action, the proposal becomes law on December 1.

D. *Effects of the Lower-Court Rulemaking Process*

As the existing literature on lower-court rulemaking has documented, this layered, formalized, open, and informed process has both upsides and downsides. One upside is the benefit of having the input of a wide range of experts and interest groups—including the judges, practitioners, and academics on the advisory committees; the gamut of other stakeholders who submit comments in the notice-and-comment period; and the data and studies of the AO and the FJC. Such input is seen as generally leading to better rulemaking.⁶⁰ One “striking” example, as recounted by one of the reporters to the Civil Rules Advisory Committee, was the January 1997 mini-conference on discovery amendments, which, as proposed by the committee, were “plain va-

⁵⁹ Congress intervenes sporadically. The most notable example was Congress’s effective rejection (though with subsequent partial codification) of the proposed Federal Rules of Evidence, in 1973. Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9. For a more minor example, in 1983, Congress passed a law stating that the proposed amendments to Rule 4 of the Federal Rules of Civil Procedure, which had been approved on August 2, 1982, “shall not take effect.” Act of Jan. 12, 1983, Pub. L. No. 97-462, § 5, 96 Stat. 2530.

⁶⁰ See Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 223 (1997) (insisting that the rulemaking process “include the practicing bar”); Marcus, *supra* note 32, at 2538 (“[T]he public comment requirement has served the Committee well”); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 459–60 (1993) (praising the involvement of judges for the expertise they bring). Admittedly, the rulemakers have not always heeded that input, or the need for it, in the past. A notable post-1988 example is the 1993 amendment adding mandatory disclosures to the discovery rules. As Professor Linda Mullenix noted, the rulemakers proposed the amendment without sufficient study or knowledge. See Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 810 (1991) (“[T]here is virtually no empirical study of the current practice of such informal discovery, the efficacy of such experiences, or the result of informal discovery. There also is no literature describing the types of cases in which lawyers elect to use informal discovery, whether the attorney discusses this choice with the client, or the extent to which opposing counsel cooperates. There are no analyses of the use of these methods and the relative ease in obtaining information needed for adequate trial preparation. There has been neither empirical research assessing the efficiency and cost savings achieved through informal discovery methods, nor any assessment of attorney and client satisfaction with informal discovery.”). Further, the rulemakers pressed forward with the proposal even after receiving more than 200 comments on it, most of them negative. *Mandatory Pretrial Disclosure Idea, Under Fire, Likely to Be Dropped by Panel*, DAILY REP. FOR EXCS. (D.C.), Apr. 1, 1992, at C-1; Randall Samborn, *U.S. Civil Procedure Revisited*, NAT’L L.J. (D.C.), May 4, 1992, at 1 (describing how the Advisory Committee was “bombarded with negative comments” on its proposed 1993 amendment to Rule 26). More recently, rulemakers seem to have consciously attended to the interests of stakeholders marginalized in the past. See Burbank, *supra*, at 243 (noting “rulemakers’ recent attitudes towards cooperation with the practicing bar”).

nilla,” but the mini-conference participants redirected the committee to a more pressing problem—e-mail discovery and Rule 34 document production.⁶¹ The reporter concluded: “But for the outreach efforts, the Committee might not have gotten wind of these problems until much later.”⁶²

To be sure, the membership of the rulemaking committees features some homogeneity of interests, characteristics, and viewpoints⁶³ that can lead rulemakers to overvalue certain stakeholder interests.⁶⁴ But that fact stems largely from the particular appointments made rather than the design of the committee framework itself. Further, it is a failure only in relativistic terms. After all, no one contends that the process would be better if it reverted to when the Supreme Court promulgated lower-court rules all by itself, and even critics applaud the evolution of rulemaking toward openness and participation.⁶⁵

Another benefit is the legitimacy that broad participation and transparency bring to the process. Whether legitimacy is in the nature of the democratic participation or in the principled and informed deliberation that it fosters,⁶⁶ all agree that the participation and trans-

⁶¹ Marcus, *supra* note 32, at 2536.

⁶² *Id.*

⁶³ See Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institution Approach*, 15 NEV. L.J. 1559, 1565 (2015) (documenting the trend of increasing judicial membership); Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 L. & CONTEMP. PROBS. 229, 232 (1998) (arguing that “increased judicial participation in the drafting process” has progressed “to the point of domination”); STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 77–82 (2017) (documenting the shift from generalist practitioners to plaintiff or defense attorneys on the Committee); Brooke D. Coleman, #SoWhiteMale: Federal Civil Rulemaking, 113 NW. U. L. REV. 407, 408 (2018) (reporting that of the 136 members who served on the Civil Rules Advisory Committee from 1934–2018, 116 were white men); Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1017 (2016) (discussing the increase in attorneys on the Civil Rules Advisory Committee who specialize in complex litigation); Elizabeth Thornburg, *Cognitive Bias, the “Band of Experts,” and the Anti-Litigation Narrative*, 65 DEPAUL L. REV. 755, 767 (2016) (describing the Committee members as “operat[ing] in the rarified world of complex litigation”).

⁶⁴ See Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513, 515 (1996) (arguing that the rulemakers have been too aligned with judicial interests); Yeazell, *supra* note 63, at 231 (“[A] judicially dominated rulemaking process is more likely to produce faulty rules and, just as important, rules perceived to be faulty.”).

⁶⁵ See, e.g., Yeazell, *supra* note 63, at 235 n.28 (“[T]he process used to produce rules should be visible, open, and transparent.”) (alteration in original).

⁶⁶ Compare Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 890 (1999) (“[T]he legitimacy of the court rulemaking process does not derive from public participation or political accountability, but instead from a model of principled deliberation akin to common law reasoning.”), with Jordan M. Singer, *The Federal Courts’ Rulemaking Buffer*, 60 WM. & MARY L. REV. 2239, 2297–98

parency enhance the legitimacy of the process. Because court rules are neither neutral nor nonsubstantive,⁶⁷ norms of government accountability—even for those who will not stand for reelection—demand that rulemaking be open and transparent.⁶⁸

The lower-court rulemaking process has its downsides. The many layers, broad participation, and deliberate pace cause heavier workloads, a protracted process, an increasingly politicized process, and the propensity for small-ball changes.⁶⁹ A recent discovery proposal, for instance, generated more than 2,300 comments.⁷⁰ Successful rulemaking usually takes at least three years.⁷¹ The notice-and-comment period provides a forum for interest-group lobbying by those who support or oppose proposals,⁷² and the unseemliness of partisan lobbying of rulemakers, especially of judges who may see themselves as bringing an air of neutrality to the process, may lead rulemakers to avoid controversial areas for reform.⁷³ The process tends to weed out

(2019) (“The opening of court-centered rulemaking to public involvement in the 1970s and 1980s was necessary to maintain the federal court system’s legitimacy in the rulemaking arena.”).

⁶⁷ Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1472-73 (1987).

⁶⁸ See Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1348-49 (2011) (tying transparent rulemaking to governmental legitimacy). Cf. Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943 (2006) (detailing the history and effects of public participation in agency rulemaking).

⁶⁹ See Scott Dodson, *Should the Rules Committees Have an Amicus Role?*, 104 VA. L. REV. 1, 8-9 (2018) (stating that the participatory process leads to “caution, accommodation, compromise, and, at times, capitulation”).

⁷⁰ Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 19, 23 (2016).

⁷¹ *Overview for the Bench, Bar, and Public*, U.S. CTS., <https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public> [<https://perma.cc/5N4Q-X9ZW>].

⁷² See Robert G. Bone, “To Encourage Settlement”: Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure, 102 NW. U. L. REV. 1561, 1612 (2008) (“Since the 1980s, the court rulemaking process has become increasingly politicized.”); Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 460-61 (2013) (noting the same trend); Mullenix, *supra* note 60, at 843-55 (describing lobbying efforts targeting Advisory Committee members). Cf. Richard Marcus, *Procedural Polarization in America?* (U.C. Hastings. Coll. of L., Research Paper No. 183, 2013) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841422 [<https://perma.cc/99WB-PGEP>] (detailing the polarization of procedural rulemaking). *But see* Marcus, *supra* note 32, at 2535 (conceding that “[o]ne could perhaps regard some of these [participants] as lobbyists of a sort” but concluding that “the participation of such people has been a boon, not a burden”).

⁷³ BURBANK & FARHANG, *supra* note 63, at 120 (“When rulemakers are judges, and when justification for rule changes must be publicly articulated in light of a public evidentiary record, in addition to (and potentially contradicting) judicial experience and common sense, those judges may be reluctant to become involved in controversies in which their decisions can be tarred with a political label.”). *See also* Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary’s Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1171 (1996) (ar-

aggressive proposals, such that amendments today skew toward modest adjustments over grand reforms.⁷⁴ These downsides, and others, are balanced against the upsides of transparency, openness, and structured bureaucracy.

II. RULEMAKING FOR THE SUPREME COURT

In contrast to the formal, bureaucratic, public, informed, and participatory process set up by the Rules Enabling Act for the lower-court rules, the Supreme Court has charted a far more insular, private, go-it-alone approach to its own rules, as the following sections detail.

A. *Statutory Authorization*

In contrast to the lower-court rules, Congress has taken a hands-off approach to the Supreme Court Rules, both in studying the rules and in the rulemaking process. As for study, although Congress charged the AO with studying the “dockets of the courts” and compiling “statistical data and reports as to the business of the courts,”⁷⁵ Congress defined “courts” to exclude the Supreme Court.⁷⁶ Similarly, Congress uniquely excluded the Supreme Court Rules from its charge to the Judicial Conference of a “continuous study of the operation and effect of the federal rules of practice and procedure.”⁷⁷ Finally, although Congress has, without exclusion, charged the Judicial Conference with studying the business of “the courts of the United States”⁷⁸ and the FJC with researching the “operation of the courts of the United States,”⁷⁹ neither the Judicial Conference nor the FJC has seemingly made any attempt to study the Supreme Court Rules.⁸⁰ The

guing that the current process forces the judiciary into the political fray without a good way to stay above it).

⁷⁴ See Scott Dodson, *A Negative Retrospective of Rule 23*, 92 N.Y.U. L. REV. 917, 922–24, 933 (2017) (reviewing failed proposals to Rule 23 and documenting the Advisory Committee’s preference for “amendment minimalism”); Steinman, *supra* note 70, at 5 (concluding that the 2015 discovery amendments “seem to confirm the view that the rules amendment process is unlikely to yield significant changes to the Federal Rules of Civil Procedure”); Yeazell, *supra* note 63, at 231 (worrying that the process “is likely to produce paralysis rather than reform”).

⁷⁵ 28 U.S.C. § 604(a).

⁷⁶ *Id.* § 610.

⁷⁷ *Id.* § 331.

⁷⁸ *Id.*

⁷⁹ *Id.* § 620(b).

⁸⁰ Based on a survey of the available research, there is only one FJC study of the Supreme Court, but it did not mention the Supreme Court Rules. See FED. JUD. CTR., REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972) [hereinafter FREUND COMMISSION REPORT]. For more discussion of that study, see *infra* text accompanying notes 333–40.

upshot is that studies of, and data on, the Supreme Court Rules are practically nonexistent.⁸¹

As for rulemaking, the Rules Enabling Act authorizes all federal courts to prescribe local rules,⁸² but Congress uniquely exempted the rulemaking process for the Supreme Court Rules from the four requirements imposed on other local rules: (1) that courts appoint an advisory committee to handle most of the drafting work, (2) that local-rule proposals go through a public notice-and-comment period, (3) that local rules be reviewed and subject to modification by the Judicial Conference, and (4) that adopted local rules be furnished to the AO and made publicly available.⁸³ In fact, aside from the requirement that the Court's rules be "for the conduct of [its] business" and "consistent with" congressional acts, Congress has put no constraints on the rulemaking process for the Supreme Court Rules.⁸⁴ Thus, Congress has enabled the Supreme Court to promulgate and amend its own rules without oversight or outside participation even while establishing agencies and councils for the study of lower-court rules, and while imposing multilayered review, transparency requirements, and broad democratic participation for the lower-court rules. With few exceptions, the Court has done just that, as the following Sections detail.

⁸¹ By contrast, academic studies of various uncodified aspects of the Supreme Court's business, such as docket size, voting trends, and internal procedures, are in wide supply. *E.g.*, Lee Epstein & Eric A. Posner, *Supreme Court Justices' Loyalty to the President*, 45 J. LEGAL STUD. 401 (2016); Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219 (2012).

⁸² 28 U.S.C. § 2071(a).

⁸³ *Id.* § 2071(b) ("Any rule prescribed by a court, *other than the Supreme Court*, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment.") (emphasis added); *id.* § 2071(c)(2) ("Any other rule prescribed by a court *other than the Supreme Court* under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.") (emphasis added); *id.* § 2071(d) ("[C]opies of all rules prescribed by a court *other than the Supreme Court* under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public.") (emphasis added); *id.* § 2077(b) ("Each court, *except the Supreme Court*, that is authorized to prescribe rules of the conduct of such court's business under section 2071 of this title shall appoint an advisory committee for the study of the rules of practice and internal operating procedures of such court The advisory committee shall make recommendations to the court concerning such rules and procedures.") (emphasis added).

⁸⁴ *Id.* § 2071(a). Technically, the Supreme Court Rules, like all local rules, must also be consistent with the lower-court rules prescribed by the Supreme Court under the Rules Enabling Act. *See id.* But although that requirement is a considerable constraint on lower-court local rulemaking, *see, e.g.*, Samuel P. Jordan, *Local Rules and the Limits of Trans-Territorial Procedure*, 52 WM. & MARY L. REV. 415, 436 (2010) (describing rampant conflicts between local rules and the Federal Rules of Civil Procedure), it is hardly any constraint on the Supreme Court Rules because the lower-court rules rarely have occasion to affect them.

B. A Brief History of the Supreme Court Rules, 1789–1986

The story of the Supreme Court Rules really goes back to 1789. Two days after passage of the Judiciary Act of 1789,⁸⁵ the Court issued what might be considered its first rule: an order regarding the seals of the federal courts.⁸⁶ However, the Court did not issue any rules regarding its practice or procedure until August 1792, when Attorney General Edmund Randolph asked “to be informed of the system of practice by which the attornies and counsellors of this Court shall regulate themselves and of the place in which rules in causes here depending shall be obtained.”⁸⁷ The Court responded that if the Attorney General and other practitioners “have any remarks to offer on the subject of the mode of practice to be adopted here this Court are willing to hear them.”⁸⁸ It is doubtful that the Court received any remarks from outsiders. The very next day, Chief Justice Jay indicated that the justices would “consider the practice of the Courts of Kings Bench and of Chancery in England as affording outlines for the practice of this Court and that they will from time to time make such alterations therein as circumstances may render necessary.”⁸⁹

For the next 150 years or so, the Court followed the general practice of issuing an order, usually without warning or outside input, when it wished to amend its rules. This informal, ad hoc, private, and insular process remained true through the late 1900s, even as the rulemaking process for the lower courts was evolving toward transparency and layered participation under the Rules Enabling Act.⁹⁰

⁸⁵ Act of Sept. 24, 1789, ch. 20, 1 Stat. 83. Among many other things, the Judiciary Act granted each federal court, including the Supreme Court, the power to promulgate local rules not inconsistent with law. *Id.* § 17.

⁸⁶ Order of Sept. 26, 1789, *reprinted in* 210 U.S. 471, 472 n.2 (1907). Interestingly, it was not until three days later that Congress passed a bill specifically empowering the Supreme Court to provide seals for itself and the circuit courts. Act of Sept. 29, 1789, ch. 21, § 1, 1 Stat. 93.

⁸⁷ *The Minutes of the Supreme Court of the United States 1789–1806 – August Term 1792 to February Term 1794*, 5 AM. J. LEGAL HIST. 166, 168 (1961).

⁸⁸ *Id.*

⁸⁹ *Id.* at 169. This rule continued in force, at least for original actions before the Supreme Court, until 1939. Compare Rule 5, 286 U.S. 596 (1932) (maintaining the semblance of the 1792 language), with Rule 5, Order of Feb. 13, 1939, 306 U.S. 671 (1939) (directing that original cases will follow the same procedure, by default, as appellate cases). This early event shows that the history of the Supreme Court Rules is long, and that the Court wrestled with formulating a rulemaking process even in its nascent years. The Court’s invitation to the Attorney General and bar is illuminating, and no doubt there is much to be gleaned from a detailed and comprehensive assessment of the whole history of the Supreme Court Rules. I hope to document that full history in later projects.

⁹⁰ The one major exception was the process leading to the 1954 Revision of the Supreme Court Rules, in which the Court appointed an advisory committee to shoulder most of the wor-

In 1969, Warren Burger replaced Earl Warren as Chief Justice. Burger, who “was very much into the administrative side of things,”⁹¹ convinced Congress to create, in 1972, the position of Administrative Assistant to the Chief Justice, akin to a chief of staff, who helped funnel information and communication to the Chief Justice.⁹² In 1975, Burger also hired a young Jim Duff as Aide to the Chief Justice, a position Duff held until 1979. (Duff later became Administrative Assistant to Chief Justice William Rehnquist from 1996-2000, and a long-time Director of the AO in 2006).⁹³ In 1977, Burger hired Jeffrey Morris, who had been a Judicial Fellow in 1976-77, as Research Assistant to the Administrative Assistant to the Chief Justice. Morris held that position until 1981 and, during that time, often worked with Burger directly on administrative matters.⁹⁴

Given Burger’s interest in judicial administration and rules of court, one might have thought that the rulemaking process of the Supreme Court Rules would change to a more formalized or bureaucratic process, perhaps even be centralized through the Administrative Assistant or other chambers staff. But that did not occur. Instead, the Court continued its insular and private process for rulemaking, with periodic revisions punctuated by one-off amendments. And it appears that Burger’s chambers staff neither worked on any Supreme Court Rule amendments nor had any particular role in the rulemaking process.⁹⁵ Similarly, neither the AO nor the Judicial

kload of the revision. See Frederick Bernays Wiener, *The Supreme Court’s New Rules*, 68 HARV. L. REV. 20, 38 (1954). The 1954 Revision is discussed more fully *infra* text accompanying notes 259–64. In a minor exception leading up to the 1967 Revision, the Court requested and received input from the Advisory Committee on Appellate Rules regarding a proposed amendment to Supreme Court Rule 49, which set procedures for using habeas corpus to obtain the appearance of prisoners appearing before the lower courts. See Bennett Boskey & Eugene Gressman, *The 1967 Changes in the Supreme Court’s Rules*, 42 F.R.D. 139, 159 (1967).

⁹¹ Telephone Interview with Douglas McFarland, Professor Emeritus, Hamline Univ. Sch. of L. (Sept. 3, 2020). See also E-mail from Jeffrey Morris, Professor of L., Touro L. Ctr., to Scott Dodson, Professor of L., U.C. Hastings Coll. of L. (Feb. 5, 2021, 5:25 PM) (on file with author) (“Burger . . . took seriously his role as head of the federal court system (and as titular head of America’s state courts) and was heavily involved in matters affecting them.”).

⁹² Pub. L. No. 92-238, § 1, 86 Stat. 46 (1972) (codified as amended at 28 U.S.C. § 677).

⁹³ Telephone Interview with James C. Duff, Former Dir. of the Admin. Off. of the U.S. Cts. (Sept. 1, 2020).

⁹⁴ E-mail from Jeffrey Morris to Scott Dodson, *supra* note 91.

⁹⁵ E-mail from Douglas McFarland, Professor Emeritus of Hamline Univ. Sch. of L., to Scott Dodson, Professor of L., U.C. Hastings Coll. of L. (Sept. 3, 2020, 9:09 AM) (on file with author); Telephone Interview with Jeffrey Morris, Professor of L., Touro L. Ctr. (Oct. 1, 2020). The Administrative Assistant was usually aware of any rulemaking that was taking place because the Court was, and remains, a relatively small operation, but the Clerk of the Court was the hub for rulemaking. See Telephone Interview with James C. Duff, *supra* note 93.

Conference played any role in the rulemaking process for the Supreme Court Rules.⁹⁶ The rulemaking process for the Supreme Court Rules continued to be ad hoc, informal, and cloistered—a product primarily of the justices and the Clerk of the Court.⁹⁷

C. *The 1990 Revision*

In 1985, the Court appointed Joseph F. Spaniol, Jr., a longtime AO deputy, to the position of Clerk of the Court.⁹⁸ Shortly thereafter, in 1986, Burger retired, and William Rehnquist was confirmed as Chief Justice to succeed him.

When Spaniol arrived in the Clerk's Office, he inherited a file kept by the previous Clerk that contained accumulated suggestions for rule changes made by attorneys, staff, judges, and justices.⁹⁹ With anticipated congressional changes to the Court's mandatory appellate jurisdiction in the works, those suggestions languished in the Clerk's Office for a few years.¹⁰⁰ Nevertheless, Spaniol took the initiative, early in his tenure, to draft some rule amendments based on the accumulated suggestions, the impending statutory change, and some of his own ideas.¹⁰¹ One idea he had was to remove the gendered pronoun "he" to make the rules genderless; this change was less an affirmative recognition of the changes in practitioner and justice demographics and more because the lower-court rules, in which Spaniol had been heavily involved prior to becoming Clerk, were undergoing a similar change.¹⁰²

By the time the Judicial Improvements and Access to Justice Act passed in November 1988, which eliminated most of the Court's mandatory appellate jurisdiction,¹⁰³ Spaniol was ready with draft

⁹⁶ Telephone Interview with Joseph Frederick Spaniol, Jr., Eighteenth Clerk, Sup. Ct. (Sept. 2, 2020) (Spaniol was a longtime employee at the AO starting in the 1950s and through into the 1980s; he held a variety of positions there, including Division Chief, General Counsel, Assistant Director, and Deputy Director); Telephone Interview with James C. Duff, *supra* note 93 (Duff indicated that the AO Director might be consulted if a Supreme Court Rule amendment affected or was affected by the rules or operations of the lower courts).

⁹⁷ Telephone Interview with James C. Duff, *supra* note 93.

⁹⁸ Telephone Interview with Joseph Frederick Spaniol, Jr., *supra* note 96.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* Two prominent commentators surmised that Justice O'Connor might have influenced this change, either affirmatively or just by her presence on the Court. See Bennett Boskey & Eugene Gressman, *The Supreme Court's New Rules for the Nineties*, 128 F.R.D. 295, 307–08 (1990). I found no evidence to support that suspicion.

¹⁰³ Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 401, 102 Stat. 4642, 4648–49 (1988).

amendments.¹⁰⁴ At that time, the Court had no set rulemaking procedure.¹⁰⁵ Chief Justice Rehnquist had appointed a Rules Committee of justices, made up of Justice John Paul Stevens (chair) and Justice Antonin Scalia.¹⁰⁶ Spaniol took his draft amendments to Stevens on a Friday in the spring of 1989. Stevens called him with some questions on Monday, which Spaniol then answered.¹⁰⁷ Later, Scalia spoke with Spaniol and suggested reordering some of the rules. Spaniol reordered the rules as he suggested and resubmitted the revisions.¹⁰⁸

In the fall of the 1989 Term, the Court approved the rules in conference and issued an order, on December 5, adopting the revision, effective January 1, 1990, largely as drafted by Spaniol.¹⁰⁹ It does not appear that anyone other than Spaniol and the justices played any role in the rulemaking process.¹¹⁰ Nor were any of the discussions, documents, or processes made public despite the 1988 Act's dramatic opening of the rulemaking process for the lower-court rules.¹¹¹

Some rule amendments truly were housekeeping rules, such as the announcement that the Clerk's Office would close on Saturdays, and Rule 30.1, which extended deadlines to the next day the Clerk's

¹⁰⁴ Telephone Interview with Joseph Frederick Spaniol, Jr., *supra* note 96.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* It is not clear how long the Rules Committee had been in service. A Rules Committee was appointed as early as the 1952 Term, when Chief Justice Fred Vinson appointed a Committee of the Supreme Court of the United States on the Revision of the Rules made up of Justices Stanley Reed, Felix Frankfurter, William O. Douglas, and Robert Jackson. *See* Wiener, *supra* note 90, at 33. But it is not clear whether the committee persisted into the 1980s.

¹⁰⁷ Telephone Interview with Joseph Frederick Spaniol, Jr., *supra* note 96.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*; SUP. CT. R. 18.1 (1990).

¹¹⁰ *See* Telephone Interview with Joseph Frederick Spaniol, Jr., *supra* note 96; E-mail from Joseph Frederick Spaniol, Jr., Eighteenth Clerk, Sup. Ct., to Scott Dodson, Professor of L. at U.C. Hastings Coll. of L. (Sept. 2, 2020, 2:20 PM) (on file with author). Chris Wright, who served as Assistant Solicitor General from 1986 to 1994, did not review or comment on any of the 1990 Supreme Court Rules amendments (or any other rule amendment). *See* E-mail from Christopher J. Wright, Assistant Solic. Gen., Off. of Solic. Gen., to Scott Dodson, Professor of L., U.C. Hastings Coll. of L. (Oct. 5, 2020, 5:29 PM) (on file with author).

¹¹¹ The 1988 Act also created a Federal Courts Study Committee to "examine problems and issues currently facing the courts of the United States" and to "develop a long-range plan for the future of the Federal judiciary," including assessments of "the structure and administration of the Federal court system," and to report and make recommendations to the Judicial Conference, the President, the Congress, and others. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702 § 102(b), 102 Stat. 4642, 4644 (1988). The Committee was charged with "a complete study of the courts of the United States." *Id.* § 105. Although the Act's language appeared to charge the Federal Courts Study Committee with studying all federal courts, including the Supreme Court, there is no indication that the Committee considered the Supreme Court Rules or their rulemaking process, and its report does not mention those items.

Office was open when a deadline fell on a Saturday.¹¹² Yet other amendments altered the procedures applicable to practitioners. As contemporary commentators noted: “In many areas the 1990 Rules confront the practicing bar with a need to modify old habits and old procedures.”¹¹³ Rule 13, for example, was amended to increase the certiorari deadline in Rule 13.1 from sixty to ninety days for criminal cases and to increase the maximum extension period for the criminal deadline from an extra thirty days to an extra sixty days.¹¹⁴ New Rule 29.2 provided that filing by courier was timely only when received rather than when mailed (as provided for first-class, postage-prepaid mail through the United States Postal Service).¹¹⁵ The Court raised filing fees significantly. And the Court added a new admonition to amici in Rule 37.1: “An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An *amicus* brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored.”¹¹⁶

The 1990 Rules exhibited two features that may have been oversights and surely would have incited comments had they been proposed to the public in draft form. The first, Rule 18.1, provided that a notice of appeal must be filed with the clerk of the district court within thirty days after entry of judgment, but that deadline conflicted with the Balanced Budget and Emergency Deficit Control Act of 1985, which imposed a statutory deadline for certain appeals of just ten days.¹¹⁷ The second, Rule 11, eliminated without explanation the rule that a timely petition for rehearing in a criminal case tolls the certiorari deadline until the denial of rehearing or entry of a new judgment.¹¹⁸ Rule 13.4 retained that tolling provision for civil petitions.¹¹⁹

¹¹² SUP. CT. R. 30.1.

¹¹³ Boskey & Gressman, *supra* note 102, at 297.

¹¹⁴ SUP. CT. R. 13 (1989) (repealed 1995).

¹¹⁵ SUP. CT. R. 29.2.

¹¹⁶ SUP. CT. R. 37.1 (1989) (repealed 1995). The Court also added a new condition to Rule 5.1 that an applicant for admission must “have been free from any adverse disciplinary action whatsoever” three years preceding. SUP. CT. R. 5.1 (1989) (repealed 1995). A new provision in Rule 8.2 provided that the Court may sanction a member of its bar “for conduct unbecoming . . . or for failure to comply with these Rules or any Rule of the Court.” SUP. CT. R. 8.2 (1989) (repealed 1995). The Court added a provision that incorporates the prisoner mailbox rule of *Houston v. Lack*, 487 U.S. 266, 276 (1988). Boskey & Gressman, *supra* note 102, at 302–03, n.12.

¹¹⁷ Compare 2 U.S.C. § 922(b), with Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177 § 274 (1985).

¹¹⁸ Compare SUP. CT. R. 11.3 (1980) (containing Rule 11.3), with SUP. CT. R. 11 (1990) (eliminating Rule 11.3).

It is not clear why the Court eliminated this tolling rule; perhaps the Court thought that, because the criminal deadline is nonjurisdictional, equitable-tolling principles established in the case law were more appropriate.¹²⁰ Yet if that was the Court's rationale, it is in tension with the Court's simultaneous decision to affirmatively codify in Rule 29 the prisoner mailbox rule established in *Houston v. Lack*.¹²¹

D. The 1995 Revision

The 1990s brought a number of personnel changes to the Court. Most importantly for the Supreme Court Rules, Spaniol retired as Clerk in 1991, and William Suter was appointed to replace him.¹²²

Suter played basketball in college before attending law school and then entering the Army, where he served in the JAG Corps, eventually achieving the rank of major general and the position of Acting Judge Advocate General. After thirty years of Army service, he announced plans to retire. He heard from friends that the position of Clerk of the Court was opening and, knowing that he liked administration, applied. Justice Sandra Day O'Connor, who was on the Court's Personnel Committee, called Suter to interview with her and the other Personnel Committee members—Justice Antonin Scalia and Justice Anthony Kennedy. Suter spoke with them for about an hour, and the next day, O'Connor called him to come meet the Chief Justice.¹²³

Suter did so the following day. Rehnquist's fireplace was crackling in his chambers, and O'Connor started by announcing that the Committee had recommended hiring Suter—"so that [he] could keep playing basketball," she joked—and Rehnquist finished by confirming that the whole Court had voted 9-0 to extend him an offer.¹²⁴ "So," the Chief continued, "when can you start?" Suter responded that his retirement was effective January 31, 1991.¹²⁵ "Then we'll see you February 1," responded Rehnquist dryly.¹²⁶

¹¹⁹ SUP. CT. R. 13.4 (1990).

¹²⁰ See, e.g., *Communist Party of Ind. v. Whitcomb*, 414 U.S. 441, 446 n.4 (1974) (tolling the time to docket an appeal).

¹²¹ 487 U.S. 266 (1988); see SUP. CT. R. 29.2 (1990).

¹²² Telephone Interview with William K. Suter, Former Clerk of the U.S. Sup. Ct. (Sept. 8, 2020).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

When Suter arrived at the Court on February 1, he met Justice Byron White, who noted Suter's long military career and asked: "What am I supposed to call you?" Suter responded: "Bill." White replied: "I like General better. We're all gonna call you General."¹²⁷ And so they did.

Suter saw a large part of his role as Clerk as making sure the Court functioned smoothly behind the scenes and to fix things that were broken. For example, he always helped prepare advocates who were arguing cases before the Court, and he would greet them in the Lawyers Lounge with tissues and cough drops. Once, a rookie advocate's suit lining started falling out the inside of his jacket. Suter was ready with needle and thread (and a little duct tape) to patch him up.¹²⁸ In the early 1990s, a female lawyer in the prep room asked him: "Where's our restroom?"¹²⁹ There was a public women's restroom at the end of the hall, but only a men's restroom in the prep area. Suter made a point to install a women's restroom in the prep area.¹³⁰

Early in his tenure, O'Connor pressed Suter on his role with the Supreme Court Rules. "Now, here's what my colleagues and I want you to do," she told him. "We want you to militarize this place. Get this place cleaned up. Get some rules. Just like you do in the Army."¹³¹ According to Suter, although the justices knew the importance of rules and process, most of them did not like the business of court administration as much as they liked the substantive law and doctrine. For the most part, the justices, including the Chief Justice, trusted him to oversee the rulemaking process and deferred to him.¹³²

Still, the hope that Suter would bring formality and process to rulemaking got off to a rocky start. In April 1991, just a few months after Suter began, the Court issued a per curiam order adding Rule 39.8, which imposed new restrictions on frivolous in forma pauperis filings.¹³³ The new rule was so controversial among the justices that three justices (Thurgood Marshall, John Paul Stevens, and Harry Blackmun) dissented, in two separate opinions.¹³⁴ Perhaps for that reason, the Court's order came with an explanation for the rule change, an unusual departure from past amendment practice. Yet de-

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *In re* Amendment to Rule 39, 500 U.S. 13 (1991).

¹³⁴ *Id.* at 14–15.

spite the controversy surrounding the new rule, Suter had no idea the rule was being adopted until the order was issued.¹³⁵

Suter found that “there was no process for the rules” except to leave them be “while no one was squawking.”¹³⁶ He began building a file on possible rule amendments. Some inconsistencies, gaps, or problems he found himself, but Suter also relied on outside suggestions. Of note, Suter recognized that the main printers of Supreme Court briefs dealt with many of the formatting rules on a routine basis, so he periodically sought their input on potential rule amendments.¹³⁷

Suter also established a semiformal standard operating procedure for rulemaking, centralized in the Clerk’s Office. When ideas for rule amendments would come up—initiated by him, Court insiders, or outsiders such as regular Court practitioners or the Solicitor General’s office—Suter would keep a record of them in a file.¹³⁸ Suggestions could come formally in writing or informally in telephone conversations or in casual conversation.¹³⁹ As credible rule suggestions amassed, Suter would coordinate with the Rules Committee and the Chief Justice to determine when to amend the rules.¹⁴⁰

By 1994, Suter was ready to propose a revision. In the intervening years, Marshall, White, and Blackmun retired and were replaced by Justice Clarence Thomas, Justice Ruth Bader Ginsburg, and Justice Stephen Breyer, respectively. Ginsburg, in particular, had an interest in court procedure. She had been on the D.C. Circuit’s rules committee, and she had both taught and written about court procedure as a

¹³⁵ Telephone Interview with William K. Suter, *supra* note 122.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Professor Alan Morrison, who was Director of the Public Citizen Litigation Group for many years and who has argued twenty cases before the Court, once approached Suter about why the Court required a public notary to witness a signature in the application for admission to the Supreme Court bar. Suter responded that he did not know but would investigate. Upon investigation inside the Court, Suter received the answer: because that’s the way it’s always been done. Suter decided that it was time to reconsider the practice, so he told Morrison that he would work on eliminating the notary requirement. Telephone Interview with Alan B. Morrison, Lerner Fam. Assoc. Dean for Pub. Int. & Pub. Serv., Geo. Wash. Univ. L. Sch. (Sept. 25, 2020); Telephone Interview with William K. Suter, *supra* note 122. Another time, Morrison wrote a letter to the Clerk suggesting a rule change that might allow more leniency for recent Supreme Court judicial clerks to assist attorneys with cases before the Court. The Clerk wrote Morrison back to inform him that the Court had considered his request and had declined to make such a change. Telephone Interview with Alan B. Morrison, *supra*.

¹⁴⁰ Telephone Interview with William K. Suter, *supra* note 122.

law professor at Rutgers.¹⁴¹ So, after she had served on the Café Committee for a year, Rehnquist added her to the Rules Committee along with Stevens and Scalia.¹⁴²

When Suter approached the Rules Committee about possible amendments, Ginsburg pressed for a new procedure akin to the procedure developed for the lower-court rules, namely, assembling an advisory group of outside lawyers to take the lead on the drafting work and then publishing amendment proposals for notice and comment. Suter was uncomfortable with assembling a group because he thought it unseemly for the Court to pick and choose among outsiders. According to Suter, they compromised: the rule revisions would be drafted internally but would, at least for major proposed revisions, go through a notice-and-comment period.¹⁴³

Under this new procedure, then, Suter would draft a set of rules revisions and add a clerk's comment purporting to explain the rule change briefly so that the public might better understand the change. He would then circulate the proposed revision to the Reporter of Decisions, the Marshal, the Librarian, the Public Information Office, and other internal Court personnel implicated by the rule changes. Almost invariably, these recipients had no comment.¹⁴⁴

Suter would keep the Administrative Assistant to the Chief Justice—later renamed Counselor—apprised of the process. The position under Rehnquist held a large portfolio. Harvey Rishikof, Administrative Assistant from 1994–1996, was aware of the rulemaking process but was not directly involved,¹⁴⁵ and it appears that subsequent office-

¹⁴¹ Scott Dodson, *A Revolution in Jurisdiction*, in *THE LEGACY OF RUTH BADER GINSBURG*, 137 (2005).

¹⁴² Telephone Interview with William K. Suter, *supra* note 122. It is traditional for the most junior justice to serve on the Café Committee. Stephen Breyer became the most junior justice a year after Ginsburg was appointed, and he remained the junior justice—and on the Café Committee—for more than a decade. *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* It is unclear how involved the Counsel's Office has been in rulemaking. Suter did not mention involving that office, and one Administrative Assistant said she would be "surprised" if the Counsel's Office was involved under Rehnquist because Rehnquist viewed that office's mandate narrowly. Telephone Interview with Sally Rider, Professor, Univ. of Ariz. James E. Rogers Coll. of L. (Sept. 14, 2020). However, other Administrative Assistants recalled the Counsel's Office being at least kept aware of proposed amendments. Telephone Interview with James C. Duff, *supra* note 93; Telephone Interview with Harvey Rishikof, Former Admin. Assistant to the Chief Justice of the U.S. Sup. Ct. (Aug. 23, 2020); *see also* E-mail from Jeffrey Morris, *supra* note 91 (recalling that, under Burger, the Court's two "law officers" were involved in the Court's rulemaking process).

¹⁴⁵ Telephone Interview with Harvey Rishikof, *supra* note 144.

holders likewise did not actively participate in the rulemaking.¹⁴⁶ Suter did not usually seek input from anyone in the lower-court rulemaking apparatus, such as the Director of the AO or the Secretary of the Judicial Conference or any members of the Standing Committee or advisory committees.¹⁴⁷

Formally, no outside input was sought or received, but it is unclear how much was sought or received informally. Contemporaneous commentators reported “some informal consultation between lawyers and the Clerk’s Office” and that, in at least one instance, “the Clerk, after obtaining authorization from the Committee of the Justices, made available a draft of a proposed revision to a very few lawyers for their comments and suggestions.”¹⁴⁸ Once, Alan Morrison wrote a letter, joined by a dozen or so other Supreme Court practitioners, proposing a restructuring of the Court’s argument sessions to alleviate end-of-term pressures. According to Morrison, the Court asked for the Solicitor General’s views on the proposal, and, when the Solicitor General responded without a recommendation, the Court declined to adopt the proposal.¹⁴⁹ In light of the close relationship between the Court and the Solicitor General’s office, it would not be surprising if the Clerk regularly requested the Solicitor General to review rule proposals, even proposals not in the public notice-and-comment period.¹⁵⁰ There is some anecdotal evidence that certain former Solicitors General were consulted, but I have not been able to confirm that.¹⁵¹

After proposal review, Suter would then send the proposed revision to the Rules Committee. Although the justices’ clerks were not a formal part of the rulemaking process, and although most justices tried to shield them from such work, a few—mostly from Ginsburg’s chambers—did participate from time to time, mostly by contributing

¹⁴⁶ Telephone Interview with William K. Suter, *supra* note 122.

¹⁴⁷ *Id.*

¹⁴⁸ Bennett Boskey & Eugene Gressman, *The Supreme Court’s New Rules – Model 1995*, 164 F.R.D. 80, 84 (1995).

¹⁴⁹ Telephone Interview with Alan Morrison, *supra* note 139.

¹⁵⁰ Telephone Interview with Sally Rider, *supra* note 144.

¹⁵¹ Seth Waxman, who was Solicitor General from 1997–2001, stated that the Solicitor General’s Office always submitted comments during a notice-and-comment period, but that he personally was never consulted informally on drafts after leaving the Solicitor General’s Office. E-mail from Seth Waxman, Former Solic. Gen. of the U.S., to Scott Dodson, Professor of L., U.C. Hastings Coll. of L. (Sept. 15, 2020, 2:59 PM) (on file with author). Ted Olson, who was Solicitor General from 2001–2004, also stated that as he recalled, he was never consulted informally on rule amendments after leaving the office. E-mail from Theodore B. Olson, Former Solic. Gen. of the U.S., to Scott Dodson, Professor of L., U.C. Hastings Coll. of L. (Sept. 9, 2020, 12:18 PM) (on file with author).

wordsmithing editing.¹⁵² After committee review and approval, the Rules Committee would send the revision to the Chief Justice, who circulated the proposal to each justice for conference.¹⁵³ At a designated conference, the justices would vote to approve the proposal for public notice and comment.¹⁵⁴

At times, before the vote, a justice might discuss the proposed revision with Suter. For example, one proposal changed the date of filing from the date of Clerk receipt to the date of mailing as post-marked so that the date could be readily ascertained by both the Clerk and the parties. One justice worried that such a shift might degrade the importance of the Court, but Suter pushed back until the justice relented, telling him, “Okay, have it your way, General.”¹⁵⁵ Under Suter’s tenure, proposed revisions “sailed through conference without a hitch.”¹⁵⁶

Upon approval by the Court, Suter would, in the normal course, post the proposed revision for notice and comment.¹⁵⁷ Suter usually received a number of comments, many of which helpfully pointed out problems or subtle improvements in the language.¹⁵⁸ Suter and his staff would revise the proposed amendments in light of comments before sending the final draft amendments, along with select comments received, to the Rules Committee.¹⁵⁹ Upon committee approval, the Chief Justice would circulate the amendments to the other justices for a final vote at conference.¹⁶⁰ Upon final vote, the new rules would be published, along with an effective date.¹⁶¹ Meanwhile, Suter kept meticulous records on all rulemaking activities for each rule change, including internal and external correspondence and memos from the justices.¹⁶² He kept all rule drafts and comments submitted from within and from outside the Court. Those rulemaking documents and details have never been made public.¹⁶³

That was how the 1995 Rules revision was processed. The Court released proposed rules on March 13, 1995, with comments due by

¹⁵² Telephone Interview with William K. Suter, *supra* note 122.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

April 28.¹⁶⁴ About two dozen sets of comments were submitted, some of which “appear to have had a significant influence on the final version of the Rules.”¹⁶⁵ The final revision was adopted by the Court on July 26, effective October 2.¹⁶⁶

The 1995 revision included a number of important rule changes, including rules pertaining to the timeliness of corrections to defective certiorari petitions, changes to the start of the thirty-day certiorari-petition deadline, and others.¹⁶⁷ Of note, Rule 30 prescribed additional procedures when an application for an extension of time was acted on in the first instance by the Clerk, a gap left open by the 1990 Rules.¹⁶⁸

The final rules also contained two important changes that were not in the proposed rules published for notice and comment. In the first change, Rule 10 gave additional guidance about the standards for granting a certiorari petition by changing the 1990 formulation of “only when there are special and important reasons” to “only for compelling reasons,” and by inserting the word “important” into three of the four criteria that previously lacked the word.¹⁶⁹ The amendments also added the following warning that a petition “is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”¹⁷⁰ It is not clear whether submitted comments or some other impetus caused the Court to adopt these changes.

In the second change, Rule 15 was amended to direct the Clerk, “no less than 10 days after the brief in opposition is filed” to distribute cert petitions to the Court, to give time for a reply brief.¹⁷¹ Previously,

¹⁶⁴ Boskey & Gressman, *supra* note 148, at 84.

¹⁶⁵ *Id.* at 85.

¹⁶⁶ *Id.* at 80.

¹⁶⁷ Rule 14 was amended to provide that timely but defective petitions will be returned by the Clerk with an indication of the deficiency, and that a corrected petition received “no more than 60 days after the date of the Clerk’s letter” will be deemed timely. Amended Rule 15 provided for the thirty-day deadline for a respondent’s opposition to cert brief to start when the case is “put on the docket” rather than when respondent receives the petition (to avoid confusion about when the deadline began or if there are multiple respondents). Amended Rule 35 provided that successor public officers, though automatically substituted, shall be identified by the parties. The amendments added new Rule 44.5 to provide that the Clerk will not file any amicus brief in support or, or in opposition to, a petition for rehearing. Rule 33 was amended to update the printing rules with computerization in mind. A number of minor or stylistic amendments were also adopted. *See id.* at 81–82.

¹⁶⁸ *Id.* at 92.

¹⁶⁹ *Id.* at 89.

¹⁷⁰ SUP. CT. R. 10 (1995).

¹⁷¹ SUP. CT. R. 15 (1995).

a petitioner did not know when the papers would be distributed for conference; often the Clerk would do so immediately upon receiving the opposition brief.¹⁷² The new rule gave the petitioner ten days to file a reply brief to be assured it would be included in the distribution to the justices.¹⁷³ This rule change likely stemmed from comments submitted by practitioners.¹⁷⁴

E. 1997 to 2013

The late 1990s and 2000s brought many changes to the Court, including an electronic revolution, the impeachment of President Bill Clinton, 9/11, anthrax scares at the Court, and major changes in Court personnel. Throughout these changes, the rulemaking procedures implemented by Suter largely stayed consistent, with sporadic deviation from the notice-and-comment procedure.

In 1996, just a few months after the effective date of the 1995 Rules, Suter proposed another rule amendment. It had become common practice for parties to fund and even draft amicus briefs submitted nominally by outside amici,¹⁷⁵ and Suter was concerned that parties were using amicus briefs to circumvent the page limits imposed on party briefs.¹⁷⁶ The practice was sufficiently alarming to the Chief Justice that Jim Duff, then Rehnquist's Administrative Assistant, followed the Court's rulemaking response fairly closely.¹⁷⁷ On March 18, Suter published the following proposed amendment to the amicus rule: "Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall identify, in the bottom margin of the first page of text, every person or entity, other than the *amicus curiae* or its counsel, who made any contribution, in money or services, to the cost of preparing and submitting the brief."¹⁷⁸

The proposal brought more public attention than expected,¹⁷⁹ and, reportedly, a number of adverse comments were submitted in response.¹⁸⁰ Perhaps in response to the comments received, the Court dispensed with the proposed language "any contribution, in money or

¹⁷² Boskey & Gressman, *supra* note 148, at 86.

¹⁷³ *See id.* at 85.

¹⁷⁴ *Id.*

¹⁷⁵ Bennett Boskey & Eugene Gressman, *The 1997 Restatement and Revisions of the Supreme Court's 1995 Rules*, 170 F.R.D. 30, 32 (1997).

¹⁷⁶ Telephone Interview with William K. Suter, *supra* note 122.

¹⁷⁷ Telephone Interview with James C. Duff, *supra* note 93.

¹⁷⁸ *Proposed Rules*, 164 F.R.D. 581, 583 (1996).

¹⁷⁹ Telephone Interview with James C. Duff, *supra* note 93.

¹⁸⁰ Boskey & Gressman, *supra* note 175, at 31.

services” in favor of “author[ship]” and “monetary contribution.” The Court adopted the final rule in January 1997 along with minor changes to other rules¹⁸¹:

Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and shall identify every person or entity, other than the *amicus curiae*, its members, or its counsel, who made a monetary contribution to the preparation or submission of the brief. The disclosure shall be made in the first footnote on the first page of text.¹⁸²

In 1998, the Court approved revisions to the Federal Rules of Appellate Procedure for the Courts of Appeals, which were to take effect on December 1, 1998. And so, on October 6, 1998, Suter published for comment proposed rule amendments to the Supreme Court Rules conforming to those changes. For example, the amendments proposed to change the required corporate disclosures of “nonwholly owned subsidiaries” to disclosure of “any publicly held company that owns 10% or more of the corporation’s stock,” a change tracking the Appellate Rules amendments.¹⁸³

In addition, the amendments proposed to delete, in Rule 13.3’s definition of when the ninety-day period for filing a cert petition begins, the provision that a suggestion for a rehearing en banc in the Court of Appeals is not a petition for rehearing that would toll the deadline to file a cert petition “unless so treated by the United States court of appeals.”¹⁸⁴ New Rule 41(b) of the Federal Rules of Appellate Procedure codified the equivalent treatment of panel-rehearing petitions and en banc rehearing petitions, so the Supreme Court Rule provision in 13.3 was superfluous. Only a few comments were reportedly received,¹⁸⁵ and the Court adopted the rule amendments in January 1999, effective May 3, 1999.¹⁸⁶

On November 18, 2002, Suter published new proposed rules, with an end date for comments of December 2, an extraordinarily short

¹⁸¹ *Id.* at 33–36.

¹⁸² SUP. CT. R. 37.6 (1997).

¹⁸³ Bennett Boskey & Eugene Gressman, *The Supreme Court’s 1999 Revisions of its Rules*, 183 F.R.D. 603, 609 (1999).

¹⁸⁴ SUP. CT. R. 13.3.

¹⁸⁵ Boskey & Gressman, *supra* note 183, at 603.

¹⁸⁶ The 1999 Amendments also changed the format for the printing of briefs. *See id.* at 604–08.

time period over the Thanksgiving holiday week.¹⁸⁷ The Court reportedly received four sets of comments.¹⁸⁸ The final rules were adopted January 27, 2003, effective May 1,¹⁸⁹ and made minor changes to filing procedures, including changing the start date of a number of deadlines from the date the clerk receives the triggering filing to the date of filing. The rules also authorized commercial carriers for filing papers and made other minor amendments.¹⁹⁰

On March 14, 2005, the Court issued two rule amendments without notice or comment for the first time since 1995.¹⁹¹ Although the Court did not explain why it did not give advance notice and an opportunity for public comment, the most likely explanation was based on the unique circumstances precipitating the two amendments, which ended up being minor, conforming, and somewhat time sensitive. One amendment closed a gap in the certiorari timing of Rule 13.3, which had not previously indicated the effect on certiorari timing of an untimely petition for rehearing or sua sponte rehearing in the Court of Appeals. The prior year, in *Hibbs v. Winn*,¹⁹² the Court considered the timing effect when a Court of Appeals recalled its own mandate and ordered briefing on whether it should rehear the case en banc. Justice Ginsburg, writing for a unanimous Court, noted that the procedure was not addressed by Rule 13.3 but nevertheless held that the lower court's actions made the judgment nonfinal and thus the petition timely.¹⁹³ The 2005 rule amendment conformed Rule 13.3 to *Hibbs*, as the Clerk's comment to the new rule confirmed.¹⁹⁴ The second change amended Rule 47 to specify that the term "state court" includes the Guam and Northern Mariana courts, over which the Supreme Court obtained certiorari jurisdiction by statutes that became effective in 2004.¹⁹⁵ The need for a rule amendment came to be realized when

¹⁸⁷ Press Release, Sup. Ct. of the U.S. (Nov. 18, 2002).

¹⁸⁸ Bennett Boskey & Eugene Gressman, *Supreme Court Rules: The 2003 Revisions*, 213 F.R.D. 505, 506 (2003).

¹⁸⁹ Press Release, Sup. Ct. of the U.S. (Jan. 27, 2003), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_01-27-03 [<https://perma.cc/TA5Z-MLFB>].

¹⁹⁰ Boskey & Gressman, *supra* note 188, at 508–15.

¹⁹¹ Press Release, Sup. Ct. of the U.S. (Mar. 14, 2005), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-14-05 [<https://perma.cc/2ED4-U9LG>]. For commentary on the 2005 amendments, see Bennett Boskey & Eugene Gressman, *Supreme Court Rules: Minor 2005 Changes*, in 1 AAA WEST'S FED. FORMS, SUP. CT. APP'X N (5th ed. 2019).

¹⁹² 542 U.S. 88 (2004).

¹⁹³ *Id.* at 96–99, 114.

¹⁹⁴ See SUP. CT. R. 13.3 (2005), Clerk's Comment.

¹⁹⁵ Pub. L. No. 108-378, § 2, 118 Stat. 2206 (Oct. 30, 2004) (giving the Supreme Court certiorari appellate jurisdiction over Guam courts); 48 U.S.C. § 1824 (giving the Ninth Circuit appel-

Suter fielded an anxious phone call in 2004 inquiring about the procedures for certiorari review from Northern Mariana courts.¹⁹⁶

O'Connor retired from the Court on January 31, 2006, and Rehnquist died on September 3, 2005. They were replaced by Chief Justice John Roberts and Justice Samuel Alito. Roberts and Alito brought new interest and approaches to the Supreme Court Rules. They were more attuned to the need for the rules to be modernized and able to withstand the challenges of evolving technology.¹⁹⁷ Alito, in particular, was interested in rules, having chaired the Appellate Rules Advisory Committee. So, Roberts appointed Alito to the Rules Committee to replace longtime committee member Stevens. Despite his own interest in court procedure, Roberts tended to leave the rulemaking process that Suter had implemented largely intact and entrusted to the Clerk.¹⁹⁸ According to Sally Rider, the Counselor to the Chief Justice from 2000 to 2006, the Counselor's rulemaking role under Roberts remained largely unchanged from that under Rehnquist, with the Counselor being aware of rulemaking but not particularly involved because the process continued to be centralized by the Clerk's Office.¹⁹⁹

The Court returned to the notice-and-comment process in 2007, when it posted proposed rules on May 14, 2007, adopting them shortly after on July 17, effective October 1.²⁰⁰ The amendments were minor and mostly conforming to changes in the Appellate Rules, and there are no reports of comments being filed.²⁰¹

late jurisdiction over the Northern Mariana courts until May 1, 2004, with reversion then to the Supreme Court's certiorari jurisdiction).

¹⁹⁶ Telephone Interview with William K. Suter, *supra* note 122.

¹⁹⁷ Telephone Interview with Sally Rider, *supra* note 144.

¹⁹⁸ Telephone Interview with William K. Suter, *supra* note 122.

¹⁹⁹ Telephone Interview with Sally Rider, *supra* note 144.

²⁰⁰ Press Release, Sup. Ct. of the U.S. (May 14, 2007), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_05-14-07 [<https://perma.cc/2LL5-L5S8>]; Press Release, Sup. Ct. of the U.S. (July 17, 2007), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_07-17-07 [<https://perma.cc/996B-BSZB>].

²⁰¹ The amendments changed page-count limits in Rule 33 to word-count limits, consistent with similar changes in new amendments to the Federal Rules of Appellate Procedure; revised the briefing schedule under Rule 25; and revised some procedures pertaining to the filing of amicus briefs under Rule 37. The amendments also altered Rule 37 to require amicus briefs at the merit stage to be due seven days after the brief for the party supported is filed, a requirement that was not published for notice and comment but that followed parallel changes in the Federal Rules of Appellate Procedure. See Press Release, Sup. Ct. of the U.S. (July 17, 2007), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_07-17-07 [<https://perma.cc/6RVE-844V>].

In 2010, with Alito now on the Rules Committee, the Court adopted a set of rule amendments without notice and comment for the second time since 1995.²⁰² Unlike in 2005, the 2010 amendments were neither conforming nor time-sensitive. Further, these amendments addressed matters of substantial interest to advocates appearing before the Court. The amendments, among other things, reduced the word-count limit for merits-stage reply briefs, clarified that only an attorney admitted to the Supreme Court Bar may file an *amicus* brief, and prohibited extensions of time for merits-stage *amicus* briefs.²⁰³

In 2013, the Court again adopted a set of rule amendments without notice and comment.²⁰⁴ These amendments included, by the Clerk's own assessment, "several significant changes."²⁰⁵ The amendments expanded the number of days the Clerk would wait to distribute a case for conference from 10 to 14, giving petitioners more time to file a reply brief; clarified that parties may file a blanket consent to *amicus* briefs under Rule 37; relieved state-court-appointed attorneys from the obligation to file an affidavit of indigency; required electronic service of documents at the time of filing under Rule 29.3; and added a requirement to merits-stage motions under Rule 21.²⁰⁶ It does not appear that the Court received input even from the Solicitor General on these rule changes.²⁰⁷

F. 2013 to Present

Bill Suter retired in the summer of 2013 and was succeeded by the Court's longtime Legal Counsel Scott Harris. Before departing, Suter compiled a large Clerk's Office Operations Manual, modeled after the Army's Continuity of Operations Planning manuals, containing all of the detailed procedures he had developed and maintained during his twenty-two years as Clerk of the Court, including those pertaining to the rulemaking process for the Supreme Court Rules.²⁰⁸ Harris appears largely to have continued Suter's rulemaking process for the Supreme Court Rules.

²⁰² Press Release Sup. Ct. of the U.S. (Jan. 12, 2010), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_01-12-10new [<https://perma.cc/3R96-M5RJ>].

²⁰³ *Id.*

²⁰⁴ Press Release, Sup. Ct. of the U.S. (Apr. 29, 2013), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-29-13 [<https://perma.cc/J86J-WSCV>].

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ E-mail from Donald Verrilli, Former Solic. Gen. of the U.S., to Scott Dodson, Professor of L., Univ. Cal. Hastings L. (Sept. 21, 2020, 2:09 PM) (on file with author).

²⁰⁸ Telephone Interview with William K. Suter, *supra* note 122.

Under Harris's tenure, the Supreme Court Rules have been amended twice. In 2017, the Court adopted, without notice or comment, rule amendments "necessary to implement the Court's electronic filing system,"²⁰⁹ which went live on November 13, 2017. These amendments were not controversial.

On November 1, 2018, the Court announced proposed rule changes and invited public comment for the first time since 2007.²¹⁰ The proposed amendments were picked up by media outlets and widely publicized.²¹¹ Three proposed amendments were adopted as proposed. The first required the parties to provide a list of all related cases so that justices who participated in those related cases could recuse themselves early.²¹² The rationale was to avoid belated recusals, as in *Washington v. United States*, when Kennedy realized he had participated in a related case more than thirty years earlier; without Kennedy, the Court split 4-4 and affirmed without opinion.²¹³ A second proposal required that a reply brief in a case scheduled for argument be received by the Clerk not later than ten days before the date of argument.²¹⁴ The third made explicit that paper remains the official form of filing even though electronic filing is also required.²¹⁵

A fourth proposal, to reduce the word limit in merits briefs, generated negative comments. A group of eighteen law firms with prominent Supreme Court practices submitted a letter opposing the word-limit reductions as "harmful" to advocacy in high-profile cases.²¹⁶ The Court threw the commentators a bone but not much else. On April 18, 2019, the Court adopted the rule amendments largely as proposed,

²⁰⁹ Press Release, Sup. Ct. of the U.S. (Sept. 27, 2017), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-27-17 [<https://perma.cc/ZNN3-8SL4>].

²¹⁰ Press Release, Sup. Ct. of the U.S. (Nov. 1, 2018), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_11-01-18 [<https://perma.cc/AM44-RFGA>].

²¹¹ See, e.g., Amy Howe, *Court announces proposed rule changes*, SCOTUSBLOG (Nov. 1, 2018), <https://www.scotusblog.com/2018/11/court-announces-proposed-rule-changes/> [<https://perma.cc/5H9S-MP7J>].

²¹² Press Release, Sup. Ct. of the U.S. (Nov. 1, 2018), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_11-01-18 [<https://perma.cc/6JGA-3G2Q>].

²¹³ Tony Mauro, *Two Surprise Supreme Court Orders Show Why Recusals Matter*, NAT'L L.J. (June 11, 2018), <https://www.law.com/nationallawjournal/2018/06/11/two-surprise-supreme-court-orders-show-why-recusals-matter/> [<https://perma.cc/Q64E-DBUW>].

²¹⁴ Press Release, Sup. Ct. of the U.S. (Nov. 1, 2018), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_11-01-18 [<https://perma.cc/N8BB-MA95>].

²¹⁵ *Id.*

²¹⁶ See Tony Mauro, *Supreme Court Advocates Push Back on 'Harmful' Proposed Word Limits*, NAT'L L.J. (Nov. 30, 2018), <https://www.law.com/nationallawjournal/2018/11/30/supreme-court-advocates-push-back-on-harmful-proposed-rules-changes/> [<https://perma.cc/GS8C-QDHX>].

with one exception: the adoptions left intact the previous word limit for reply briefs.²¹⁷ The Court did not explain its change of heart on reply briefs, nor did it explain why it found the practitioners' letter otherwise unpersuasive.²¹⁸

G. Summary

The present state of the rulemaking process for the Supreme Court Rules appears to be semiformal, with little transparency and only sporadic outside input. The Clerk's Office centralizes the process, with suggestions coming there first. When the Clerk deems the time ripe for a rule amendment, perhaps with the approval of the Rules Committee of justices, the Clerk will draft proposed amendments and circulate them to internal Court personnel and, possibly, specific outsiders, finally proposing them to the justices on the Rules Committee. None of the drafts, discussions about the drafts, or comments about the drafts are made public.

It is not clear who decides whether to put an amendment proposal through a notice-and-comment period, what the standards for that decision are, or how long that period should be. If the proposal does get posted for notice and public comment, the Clerk posts the proposal on the Supreme Court's website as a press release, often with a sentence or two summarizing the changes. The Court does not reveal any of the comments it receives or even whether it received comments. After reconsideration of the proposal by the Clerk in light of any comments, the Clerk sends a final draft proposal to the Rules Committee. The final draft is not made public.

Upon final approval by the Rules Committee, perhaps with modifications by the justices, the Chief Justice circulates the proposal to all the justices for consideration at conference, whereupon the justices vote to approve the rule amendments, perhaps, again, with modifications. Neither the justices' deliberations nor any changes made are disclosed to the public.²¹⁹ The Clerk then publishes the revised rules, along with a spare Clerk's Comment explaining the rule, on the Court's webpage. The final, approved rule amendment, plus any approved proposal posted for notice and comment, are the only parts of rulemaking process visible to the public.

²¹⁷ Press Release, Sup. Ct. of the U.S. (Apr. 18, 2019), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-18-19 [<https://perma.cc/VBE7-4JC6>].

²¹⁸ *Id.*

²¹⁹ A comparison between a proposal published for comment and the final rule can reveal changes but not who made them or why.

This closed and cloistered process is in contrast to the open and participatory process for lower-court rulemaking. It is even in some tension with the process the Court uses when it issues opinions on substantive law. In litigated cases, the Court allows amici—often hordes of amici—to participate and even publicly invites specific amici to participate.²²⁰ All briefs of parties and amici are public, the record is public, and a transcript of oral argument is made and posted publicly. Although the justices' internal deliberations are not public, the justices make public their opinions, which are supported by careful and detailed reasoning. In many ways, the process for issuing an amendment to the Supreme Court Rules is more insular and secretive than the Court's adjudicative process for deciding a case.

III. JUSTIFYING THE DIFFERENCES IN RULEMAKING

What justifies the Court's choice of such a process for the making of its own rules? I discuss and evaluate possible justifications below.

A. *The Court's Business Alone*

The Court's cloistered and secretive attitude to the making of the Supreme Court Rules might stem from the perception that the rules are nobody's business but the Court's: as one former staffer put it (without necessarily endorsing it), "How we run our shop is up to us."²²¹ A weaker form of the "nobody's business" attitude is the view that no one else really cares.

But these attitudes and views do not reflect reality—legally or practically. Legally, Congress has at least some say over the rules of practice and procedure for the Supreme Court.²²² Putting aside the difficult question of whether—and to what extent—the Court can fashion its own rules in the absence or in contravention of congressional authorization,²²³ scholars and the Court generally agree that

²²⁰ See Aaron-Andrew P. Bruhl & Adam Feldman, *Separating Amicus Wheat from Chaff*, 106 GEO. L.J. ONLINE 135, 135 (2017) (reporting that amicus briefs in argued cases number nearly 1,000 each term); Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1902 (2016) (reporting that "the marquee cases attract[] briefs in the triple digits"). The Court regularly invites the Solicitor General to file an amicus brief in cases pertaining to the interests of the United States, and often appoints an amicus to argue a legal position at issue in the case that neither party contests.

²²¹ Telephone Interview with Douglas McFarland, *supra* note 91.

²²² See U.S. CONST. art. III, § 2, cl. 2.

²²³ Compare, e.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 428–29 (1793) ("The mode [of service of process], if it be not otherwise prescribed by law, or long usage, is in the discretion of the Court"), with *id.* at 432–33 (Iredell, J., dissenting) ("I conceive, that all the Courts of the United States must receive, not merely their organization as to the number of Judges of which

Congress has some authority, even primary authority, over the Supreme Court's practice and procedures.²²⁴ Congress has long assumed its primacy, for even when delegating local rulemaking power to the Court in the Judiciary Act of 1789, Congress qualified that delegation as allowing only rules "not repugnant to the laws of the United States."²²⁵

It is true that Congress has given the Court the widest authorization to make its own rules.²²⁶ But that does not mean that Congress does not care about the rules or the rulemaking process the Court has instituted. Congress has, at times, cared a great deal about the lower-court rules and its rulemaking process.²²⁷ Congress has also, at times, cared a great deal about the Court's jurisdiction—both the scope of its jurisdiction and the way the Court exercises its discretionary certiorari jurisdiction.²²⁸ If, for example, Congress believed that the Court's guidance for exercising its discretion to grant certiorari review, presently in Supreme Court Rule 10, was excluding important cases, Congress might assert corrective measures, theoretically by prescribing certio-

they are to consist; but all their authority, as to the manner of their proceeding, from the Legislature only."). Cf. *United States v. Hill*, 26 F. Cas. 315, 317 (C.C.D. Va. 1809) (Marshall, Cir. J.) (holding that federal circuit courts had power to summon grand jury even though no statute explicitly gave them this power, because circuit courts could not give effect to statutes granting them criminal jurisdiction in absence of such power).

²²⁴ The source and scope of Congress's authority are subject to vigorous debate. Compare, e.g., John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997) (sourcing Congress's power over the Court's appellate jurisdiction in the Exceptions Clause), and William Van Alstyne, *A Critical Guide to Ex parte McCardle*, 15 ARIZ. L. REV. 225, 270 (1973) (same), with David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 B.Y.U. L. REV. 75, 79-80 (sourcing Congress's authority in the Necessary and Proper Clause). Compare also *Bank of the United States v. Halstead*, 23 U.S. (10 Wheat.) 51, 61 (1825) ("Congress might regulate the whole practice of the Courts, if it was deemed expedient so to do."), with *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (asserting that the federal courts have inherent powers that "cannot be dispensed with . . . because they are necessary to the exercise of all others"). For other important commentary on the division of authority over court rulemaking, see, e.g., Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677 (2004); Daniel J. Meador, *Inherent Judicial Authority in the Context of Civil Litigation*, 73 TEX. L. REV. 1805 (1995); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001). I need not wade into those troubled waters, for my argument depends not on the source or scope but only on the existence of some congressional authority to regulate the Supreme Court's procedures.

²²⁵ Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 23, 83.

²²⁶ See *supra* Section II.A.

²²⁷ See Burbank, *supra* note 224.

²²⁸ See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000) (detailing the history of the Court's certiorari jurisdiction).

rari standards itself or by expanding the Court's mandatory appellate jurisdiction. At the very least, Congress might want to know the basis for any changes the Court makes to Rule 10.

Practically, the rules are much more than just the Court's business. The Supreme Court Rules affect practitioners and parties, too. As Bill Suter acknowledged, "It's the lawyers who practice at the Court who live, and die, by the Rules."²²⁹ From the earliest days of the Court, its bar has needed to know and understand its rules of practice and procedure.²³⁰ Thus, the rules directly affect practitioners.²³¹ Further, the Supreme Court Rules have affected practitioners and their clients in egregiously unfair ways. In 1952, an attorney filed a petition for certiorari in the Supreme Court on the ninety-first day after the lower court entered judgment.²³² When the clerk deemed the filing as untimely, the attorney objected and pointed to Rule 38(2), which specified the time for filing as the time prescribed by Section 8 of the 1925 Act, which itself specified as "three months."²³³ The clerk explained, however, that Congress replaced the 1925 Act's deadline with ninety days in 1948.²³⁴ The Supreme Court Rule, however, had not been updated. Thus, the attorney's filing was timely under the Court's own rules but untimely under the prevailing statute, and so the clerk rejected the filing.²³⁵ More generally, in 1991, Suter "became aware that the Rules needed an overhaul" because "[t]hey were loaded with trip wires and land mines that caused hardships to the [Supreme Court] Bar."²³⁶ The history of the Supreme Court Rules is replete with opacity, errors, omissions, and misleading provisions.²³⁷

Even less egregious examples abound. The letter sent by a group of eighteen law firms protesting the 2018 proposed word-count reductions shows practitioner interest even in some of the more mundane aspects of the rules.²³⁸ Many Supreme Court Rules specifically address procedures pertaining to litigation involving the United States, repre-

²²⁹ E-mail from William K. Suter, Former Clerk of the U.S. Sup. Ct., to Scott Dodson, Professor of L., U.C. Hastings Coll. of L. (Sept. 4, 2020, 2:18 P.M.) (on file with author).

²³⁰ See *supra* text accompanying notes 87–89.

²³¹ See, e.g., Boskey & Gressman, *supra* note 102, at 297 ("In many areas the 1990 Rules confront the practicing bar with a need to modify old habits and old procedures.").

²³² This story is recounted in Wiener, *supra* note 90, at 32–33.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ E-mail from William K. Suter, *supra* note 229.

²³⁷ The sorry state of the Supreme Court Rules prior to the 1954 revision, for example, is documented in Wiener, *supra* note 90, at 21–32.

²³⁸ See *supra* text accompanying notes 216–18.

sented by the Solicitor General's Office, which presumably would be very interested in any rulemaking that might affect those procedures.²³⁹ The Court's own practice of publishing some proposals for public comment, coupled with the fact that comments are in fact submitted by both the Solicitor General and by members of the Court's private bar, shows that practitioners care both about the rules and about the rulemaking process. The state of the rules—and how they are made—is very much the business of, and of interest to, legislators and practitioners before the Court.

B. *Traditions of Secrecy and Insularity*

The Supreme Court has always been a tradition-steeped, insular, and notoriously secretive institution.²⁴⁰ Internal correspondence, opinion drafts, and the justices' deliberations are all kept confidential. In 1987, the Court adopted a written code of conduct for Supreme Court law clerks,²⁴¹ which dictates that law clerks owe the Court and their individual justices "complete confidentiality, accuracy, and loyalty" and admonishes law clerks "never disclose to any person any confidential information received in the course of the law clerk's duties."²⁴² In addition, Chief Justice Roberts warns each incoming class of law clerks against leaking information, and most justices reiterate their intense dislike of breaches of confidence.²⁴³ The same general norms of

²³⁹ The Department of Justice is well represented on the advisory committees in the rulemaking process for the lower-court rules, including having the Solicitor General be an ex officio member of the Appellate Rules Advisory Committee. See *Membership of the Committee on Rules of Practice and Procedure and Advisory Rules Committees*, Advisory Committee on Appellate Rules, U.S. Cts. (Jan. 4, 2022), https://www.uscourts.gov/sites/default/files/committee_roster_for_web_current.pdf [<https://perma.cc/A8TG-7Q57>].

²⁴⁰ See Peter G. Fish, *Secrecy and the Supreme Court: Judicial Indiscretion and Reconstruction Politics*, 8 WM. & MARY L. REV. 225, 225 (1967) ("Of America's political institutions, the United States Supreme Court is the most remote and insulated."); Rory K. Little, *Clerking for a Retired Supreme Court Justice—My Experience of Being "Shared" Among Five Justices in One Term*, 88 GEO. WASH. L. REV. ARGUENDO 83, 105–06 (2020) ("The U.S. Supreme Court has always been, for many reasons, shrouded in secrecy.").

²⁴¹ DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 127 (Aaron Javicas ed., 9th ed. 2011).

²⁴² See Todd C. Peppers, *Of Leakers and Legal Briefers: The Modern Supreme Court Law Clerk*, 7 CHARLESTON L. REV. 95, 104–05 (2012). Consistent with its jealously guarded confidentiality, the Court has consistently refused to make copies of the Code of Conduct available to the public. *Id.*

²⁴³ See Jack Goldsmith, *Temple of Silence: Why SCOTUS Leaks Less than the CIA*, NEW REPUBLIC (June 23, 2012), <http://www.tnr.com/article/politics/magazine/104219/jack-goldsmith-SCOTUS-Leaks-CIA> [<https://perma.cc/G7AQ-LNCA>].

secrecy are impressed upon staff.²⁴⁴ As Justice Ginsburg was once quoted about the fate of cases prior to the release of the Court's opinions, "Those who know don't talk . . . And those who talk don't know."²⁴⁵

She was mostly right.²⁴⁶ Leaks happen on rare occasion,²⁴⁷ and when they do, the Court can act aggressively to protect its secrets.²⁴⁸ In the early 1900s, a law clerk conspired with outsiders to use nonpublic information about pending cases to profit in the stock market. The Chief Justice referred the matter to the Department of Justice, suggesting that it warranted criminal investigation.²⁴⁹ After Professor Ed-

²⁴⁴ See EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* vi–vii (1998).

²⁴⁵ See Goldsmith, *supra* note 243.

²⁴⁶ Ryan C. Black & Timothy R. Johnson, *Behind the Velvet Curtain: Understanding Supreme Court Conference Discussions Through Justices' Personal Conference Notes*, 19 J. APP. PRAC. & PROCESS 223, 224 (2018) ("The system [of confidentiality and security at the Court's conference] works so well that the Court has seldom experienced information leaks about how it will decide or about what transpires at conference.").

²⁴⁷ Several law clerks leaked information about the Court's deliberations in *Bush v. Gore*. See David Margolick, Evgenia Peretz & Michael Shnayerson, *The Path to Florida*, VANITY FAIR, Oct. 2004, at 310, 319–20. It is fair to say that the Roberts Court has been plagued by several leaks in high-profile cases. See, e.g., Josh Gerstein & Alexander Ward, *Supreme Court has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2022), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [<https://perma.cc/DQW4-WSYX>]; Joan Biskupic, *Anger, Leaks and Tensions at the Supreme Court During the LGBTQ Rights Case*, CNN (July 28, 2020), <https://www.cnn.com/2020/07/28/politics/neil-gorsuch-supreme-court-lgbtq-civil-rights-act-alito/index.html> [<https://perma.cc/7E2N-XMPC>]; Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 2, 2012), <http://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law/> [<https://perma.cc/3T7A-VVLJ>].

²⁴⁸ See, e.g., Tierney Sneed, *Escalation of Supreme Court's Leak Probe Puts Clerks in a 'No-Win' Situation*, CNN (June 1, 2022), <https://edition.cnn.com/2022/06/01/politics/supreme-court-clerks-leak-investigation-phones-affidavit-abortion/index.html> [<https://perma.cc/QFM4-274Z>] (reporting that "court officials tasked with leading the investigation" into the leak of a draft opinion on abortion rights asked clerks to "turn over private phone data and sign affidavits"). Ironically, the leaks sometimes come from the justices themselves. In 1979, Bob Woodward and Scott Armstrong published a bombshell book on the inner workings of the Court. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979). "The Book," as the justices called it, "generated intense controversy both inside and outside the Court." David J. Garrow, *The Supreme Court and The Brethren*, 18 CONST. COMMENT. 303, 303, 305 (2001). One columnist wrote that "[t]he Justices are brothers in the style of Cain and Abel. This book will destroy the Court's collegiality, if there is any to destroy." George F. Will, *The Injudicial Justices*, NEWSWEEK, Dec. 10, 1979, at 140. As it turned out, though, a number of the justices themselves were primary sources for the book. See Garrow, *supra*, at 304–05 (calling Stewart the "secret instigator and primary early source" for the book and concluding that the evidence strongly suggests that Rehnquist was also a source).

²⁴⁹ See John B. Owens, *The Clerk, the Thief, His Life as a Baker: Ashton Embry and the Supreme Court Leak Scandal of 1919*, 95 NW. U. L. REV. 271, 277–78 (2000).

ward Lazarus published a book detailing internal happenings at the Court during his time as a law clerk to Justice Harry Blackmun, Court personnel, including justices, insisted on calling him “The Rat.”²⁵⁰ The Court threatened legal action against Professor Peter Irons after he unexpectedly released transcripts and audiotapes of several oral arguments that previously had not been publicly disseminated.²⁵¹ In addition, the public release of Justice Thurgood Marshall’s papers a few months after his death caused “an uproar at the [C]ourt”²⁵² and was condemned by Chief Justice Rehnquist.²⁵³

These institutional pressures and norms may explain why several current or recent court staff personnel, in responding to my requests for interviews, declined to offer nonpublic information on the record. Longtime Deputy Public Information Officer Ed Turner, for example, must have been channeling Justice Ginsburg when he wrote: “What I will tell you isn’t very interesting, and what is interesting I won’t tell you.”²⁵⁴

Deliberative secrecy when deciding cases is one thing. Confidentiality in conference, deliberations, and opinion-drafting allows for candid exploration of difficult and sometimes uncertain legal arguments, the opportunity to explore wrong or wrongheaded positions without premature backlash, and the incentive to arrive at reasoned, defensible results.²⁵⁵ As Scott Idelman has written, “Only if judges are truly free to deliberate over and experiment with the development of the law, relatively immune from the extrinsic pressures potentially triggered by compulsory candor, will that development transpire in a coherent and intelligent manner.”²⁵⁶ Felix Frankfurter once wrote that

²⁵⁰ See LAZARUS, *supra* note 244.

²⁵¹ See Jeffery L. Sheler, *No, It Doesn’t Please the Court*, U.S. NEWS & WORLD REP., Sept. 13, 1993, at 14. Eventually, the Court changed its tune and adopted a new policy of allowing unrestricted public access to audiotapes of oral argument. See Linda Greenhouse, *Supreme Court Eases Restrictions on Use of Tapes of Its Arguments*, N.Y. TIMES, Nov. 3, 1993, at A22.

²⁵² Tony Mauro, *Tales of the Court*, USA TODAY, May 27, 1993, at 1A.

²⁵³ See Neil A. Lewis, *Chief Justice Assails Library on Release of Marshall Papers*, N.Y. TIMES (May 26, 1993), <https://www.nytimes.com/1993/05/26/us/chief-justice-assails-library-on-release-of-marshall-papers.html> [<https://perma.cc/3FDM-F7Q2>].

²⁵⁴ E-mail from Edward L. Turner, Former Deputy Pub. Info. Officer, Sup. Ct. of the U.S., to Scott Dodson, Professor of L., U.C. Hastings Coll. of L. (Oct. 13, 2020, 5:59 PM) (on file with author).

²⁵⁵ See Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018, 1024, 1028 (1996). The Court has accepted this premise as a basis for certain claims of executive privilege. See *U.S. v. Nixon*, 418 U.S. 683, 708 (1974) (“A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.”).

²⁵⁶ Scott C. Idelman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1373

deliberative secrecy “is essential to the effective functioning of the Court.”²⁵⁷

Perhaps so.²⁵⁸ But the secrecy that surrounds the Supreme Court’s rulemaking is another thing entirely. Extending the deliberative secrecy of the adjudicative process to the rulemaking process demands some justification. I can think of three possible justifications: (1) that secrecy and insularity is a tradition that should be continued for tradition’s sake, (2) that the rulemaking process needs secrecy and insularity for the same reasons as the adjudicatory process, and (3) that secrecy and insularity in the rulemaking process protects against a slippery slope that jeopardizes the secrecy of adjudication decisionmaking. None holds much water.

1. Tradition

The first potential justification is tradition. Whenever one asks why the Court persists in a particular course of conduct, a likely answer will be “because it’s always been done this way.”

With respect to the Supreme Court Rules, though, it *hasn’t* always been done this way. The Court experimented, starting in 1995, with publishing rule proposals for public notice and comment, something it had never done for its own rules before. More drastically, in 1952, the Court, recognizing that the Supreme Court Rules were then woefully outdated and disorganized, determined that a complete revision of the Rules was needed.²⁵⁹ To take the lead on the revision (which ultimately became the 1954 Revision) and to accommodate the “needs and desires of the Bar for changes,” the Court appointed a formal consulting group—an advisory committee of sorts—composed

(1995). See also Tony Mauro, *Tales of the Court*, USA TODAY, May 27, 1993, at A1 (quoting Professor Stephen Carter as arguing that the justices “can’t have a free and open exchange of views if it’s all going to be public knowledge”).

²⁵⁷ Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 (1955).

²⁵⁸ Or perhaps not. See Fish, *supra* note 240, at 240 (concluding that a serious leak in the Taney Court about a pending high-profile case “neither altered the political situation in Missouri nor materially changed the institutional status of the Court”). In any event, many deliberations and other insider information are eventually revealed through the publication of justices’ papers and through other historical research. See Black & Johnson, *supra* note 246, at 224. It does not appear that any such revelations—even the immediate release of Justice Thurgood Marshall’s papers—have ever really damaged the Court’s reputation or ability to function.

²⁵⁹ As Chief Justice Earl Warren later remarked, “Clarity, simplicity, and a logical arrangement of the rules were among the objectives. . . . Another objective was completeness Our aim in this regard has been achieved. Counsel need not resort to textbooks, nor be reliant on the Clerk’s Office for guidance” Earl Warren, Chief Justice, U.S. Sup. Ct., Address Before the American Law Institute Annual Meeting (May 19, 1954), in 31 A.L.I. 1, 4 (1954).

of attorneys with “firsthand knowledge of [Court] practice” and academics who “had made a special study of procedural questions.”²⁶⁰

The consulting group included Clerk of the Court Harold B. Willey and seven outsiders: Acting Solicitor General Robert L. Stern, Warner W. Gardner (private practice), Professor Henry M. Hart, Charles A. Horsky (private practice), Professor James William Moore (also a member of the Civil Rules Advisory Committee), Professor Herbert Wechsler, and Frederick Bernays Wiener (private practice).²⁶¹ Wiener was designated the group’s reporter to the Rules Committee of justices,²⁶² and he subsequently published a detailed history of the group’s process, thinking, and proposals,²⁶³ although he wrote that “the communications between the committee and its reporter must be regarded as privileged in the highest degree.”²⁶⁴ No one has contended that the opening of the normal rulemaking process to include the consulting group and the publishing of Wiener’s article describing the rulemaking process, the rules changes, and their rationales had any negative effect on the Court, the Supreme Court Rules, or their rulemaking process.

On rare occasions, the Court itself reveals more detail about particular rule amendments or rule revisions when justices dissent.²⁶⁵ In April 1991, for example, the Court promulgated new Rule 39.8, which imposed new restrictions on frivolous filings by in forma pauperis applicants.²⁶⁶ Three justices—Marshall, Stevens, and Blackmun—dissented in two separate published opinions, prompting the Court to publish a per curiam opinion explaining in some detail the rationale behind the rule amendment.²⁶⁷ In this instance, the Court itself disclosed some of the decisionmaking and internal disagreements involved in the rulemaking process.

The history of the Court’s own rulemaking suggests that tradition for tradition’s sake is no answer to why the Court follows its current process.

²⁶⁰ *Id.*

²⁶¹ Revised Rules of the Sup. Ct. of the U.S., 346 U.S. 943, 945–46 (1953); Wiener, *supra* note 90, at 39 n.86.

²⁶² Wiener, *supra* note 90, at 39. The Rules Committee was chaired by Reed; other members included Frankfurter, Douglas, and Jackson. *Id.* at 38 n.82.

²⁶³ *Id.* at 39.

²⁶⁴ *Id.* at 40.

²⁶⁵ See, e.g., Rule, No. 37, 30 U.S. (5 Pet.) 724 (1831) (Baldwin, J., dissenting); 48 U.S. (7 How.) v (1849) (Woodbury, J., declining to join); Revised Rules of the Sup. Ct. of the U.S., 346 U.S. 943, 946 (1953) (Black, J., dissenting).

²⁶⁶ *In re* Amendment to Rule 39, 500 U.S. 13 (1991).

²⁶⁷ *Id.*

2. *Necessity*

The second potential justification is the necessity of secrecy and insularity for effective rulemaking. The history of rulemaking belies, even inverts, that necessity. By most accounts, the 1954 Revision of the Supreme Court Rules, which involved a consulting group of outsiders, was highly successful.²⁶⁸ For at least some of the 1954 amendments, it could be argued that *the consulting group* was necessary for effective rulemaking. The consulting group's reporter wrote that the old rules exhibited the "indefensible feature" of perfecting appeals from state courts and from federal courts in civil cases, which was "burdensome to litigants, to judges, and to court officials, and it was distinctly unhelpful to the Court itself."²⁶⁹ Yet although the pathway for reform of this rule was laid at least as of 1948, the Court did not act until prodded by the consulting group.²⁷⁰ The reporter explained: "In this instance, the failure to act reflects the condition that, broadly speaking, most of the inconveniences of the old system had very little if any direct impact on the members of the Supreme Court itself."²⁷¹ In other words, the expertise, insights, and perspectives of outside practitioners and academics were necessary for effective reform.

Subsequent revisions support the idea that secrecy and insularity are detrimental to, rather than supportive of, rulemaking efficacy. At times, submitted public comments seem to have influenced the final version of a rule amendment in ways that improved the language or accommodated interests of the Supreme Court Bar.²⁷² By contrast, some rule amendments that did not go through public notice and comment have been promulgated with omissions or errors that may have been discovered through a more collaborative rulemaking process.²⁷³

The benefits of transparency and broad participation to Supreme Court rulemaking are also supported, by analogy, to rulemaking in other contexts, including agency rulemaking and lower-court rulemak-

²⁶⁸ See, e.g., Wiener, *supra* note 90, at 94.

²⁶⁹ *Id.* at 40.

²⁷⁰ *Id.* at 47.

²⁷¹ *Id.* at 47–48.

²⁷² See, e.g., Boskey & Gressman, *supra* note 148, at 85 (opining that comments "appear to have had a significant influence on the final version" of the 1995 Revision). The Court's nondisclosure of submitted comments stymies a full accounting of the role that comments have played in influencing the Court's rule proposals over the years.

²⁷³ For example, the 1990 Revision amended Rule 18.1 to set a thirty-day deadline for filing a mandatory appeal, which conflicted with the ten-day deadline for mandatory appeals under the Balanced Budget and Emergency Deficit Control Act of 1985. Compare SUP. CT. R. 18.1 (1990), with 2 U.S.C. § 922(b) (1985).

ing. It is true that transparency and participation in these rulemaking areas further values—like enhanced accountability to the electorate or to Congress—that are not as applicable to the Supreme Court Rules.²⁷⁴ But even independent of accountability, transparency and participation make agency rulemaking and lower-court rulemaking generally more effective too.²⁷⁵ The idea that different people with different interests and different knowledge bases can identify suboptimal aspects of rule proposals that may go unnoticed by a smaller, homogenous set of rulemakers ought to be applicable to Supreme Court rulemaking too.

Openness, transparency, and participation do lead to one valid concern: the risk of becoming a forum for lobbying or intense partisanship. Some commentators have worried about such concerns in the lower-court rulemaking process.²⁷⁶ Maintaining insularity and secrecy for the Supreme Court Rules does allow the Court to stay above any partisan or political fray that might otherwise be encouraged by openness and engagement. Yet any concerns seem modest at best, at least in comparison to the lobbying and partisanship that comes with the Court's core function of case adjudication. There, the party briefs and amicus briefs, which are publicly available, stake out positions and arguments that can be intensely partisan and polarizing and that the Court necessarily must engage in its role as adjudicator.²⁷⁷ To avoid that milieu, the Court does not resort to secrecy or closed doors but, rather, to openness and disclosure by way of reasoned decisionmaking.

²⁷⁴ See Burbank, *supra* note 224, at 1696 (identifying an accountability rationale in the 1988 amendments to the lower-court rulemaking process); Caroline Cecot & Robert W. Hahn, *Transparency in Agency Cost-Benefit Analysis*, 72 ADMIN. L. REV. 157, 161 (2020) ("Transparency in government decisionmaking—defined as information about decisions and the decisionmaking process that is provided to the public—lies at the core of a well-functioning democracy because it allows interested parties to hold decisionmakers accountable for their decisions.").

²⁷⁵ Cecot & Hahn, *supra* note 274, at 161 ("Transparency is also important in improving government decisionmaking over time, steering an agency toward decisions that have the sturdiest basis in available science and allowing interested parties to replicate results, catch errors, and promote relevant research."); Stephen M. Johnson, *Beyond the Usual Suspects: ACUS, Rulemaking 2.0, and a Vision for Broader, More Informed, and More Transparent Rulemaking*, 65 ADMIN. L. REV. 77, 79 (2013) ("[B]roader and more informed public participation should produce 'better' rules in that the rules are more rational and defensible because the agencies receive data and identify issues that they might not otherwise have considered adequately."). See generally CASS R. SUNSTEIN, *HOW CHANGE HAPPENS* (2019); TRANSPARENCY: THE KEY TO BETTER GOVERNANCE? (Christopher Hood & David Heald eds. 2006).

²⁷⁶ See *supra* text accompanying notes 72–73.

²⁷⁷ For commentary on the role of amicus briefs, see Larsen & Devins, *supra* note 220.

The rub is that the Court's current levels of secrecy and insularity do not appear necessary—or even particularly beneficial—to the rulemaking process for the Supreme Court Rules. To the contrary, engaging broader participation and providing more fulsome explanations could very well improve the rulemaking process and offer better rules and guidance to practitioners, resulting in more efficiency and efficacy for the Court's business.

3. *Prophylaxis*

The third potential justification is to guard against the slippery slope of undermining any beneficial secrecy and insularity in the adjudicative decisionmaking process. But opening the rulemaking process is unlikely to lead down such a slippery slope. For one, the rulemaking process and the adjudicatory process are on entirely different slopes. Rulemaking presents no cases to prejudge, no parties to upset with unsettled expectations, no precedent to be made, and far less political heat to endure. Unlike the core judicial power of adjudication, rulemaking is operational and procedural. Rulemaking is important, to be sure, but it involves a process that is, in character and expectations, quite different from adjudication.

For another, the Court has navigated that slippery slope well even on the adjudicatory side. The Court nearly prosecuted Peter Irons for releasing audiotapes of oral arguments in the 1980s, but, today, the Court releases oral-argument recordings promptly on its own and, at times, offers real-time broadcasting of oral arguments.²⁷⁸ The Supreme Court website and electronic filing system disclose “a wealth of information about the Court” and “the Court's opinions, orders, rules, and argument transcripts.”²⁷⁹ None of these moves toward openness and transparency have presented any real threat to the core confidences of adjudicatory decisionmaking.

C. *Efficiency and Flexibility*

The Court's current approach to rulemaking offers the logistical virtues of being relatively efficient and flexible. If the Court wishes, it can change a rule immediately and unilaterally, without submitting to layers of review and without sifting through comments and input. One

²⁷⁸ See Press Release, Sup. Ct. of the U.S., Media Advisory Regarding October Teleconference Argument Audio (Oct. 1, 2020), https://www.supremecourt.gov/publicinfo/press/press-releases/ma_10-01-20 [<https://perma.cc/2K79-2EMV>] (announcing live audio broadcasts of telephonic Supreme Court arguments).

²⁷⁹ See SHAPIRO ET AL., *supra* note 2, at x.

former clerk expressed a concern that opening the rulemaking process up might generate a lot of “makework.”²⁸⁰ There is something to that concern. The Court has a relatively small staff and limited resources,²⁸¹ and the lower-court rulemaking process has shown that even minor rulemaking can generate significant numbers of comments and often years of shuttling among the layers of review.²⁸²

Still, it seems doubtful that the workload generated by a more open and participatory process for amending the Supreme Court Rules would be even close to commensurate with that generated by the lower-court rulemaking process, which affects a broader swath of participants and is the front line of court justice. And the Court does have resources. The Clerk’s Office alone has a clerk, four deputies, and twenty-seven other assistants.²⁸³ The FJC and AO could offer additional support for Supreme Court rulemaking, though Congress might need to specifically empower AO assistance.²⁸⁴ If needed or appropriate, the Court could appoint an advisory committee of outside experts to assist in studying or drafting rule proposals, as it successfully did for the 1954 Revision. Together, these resources seem plausibly sufficient for the kind of workload likely to be generated by a more involved rulemaking process. If more help is needed, Chief Justice Burger’s successful request to Congress in the 1970s to create an Administrative Assistant position shows that Congress can be amenable to creating and funding administrative support for the Court.²⁸⁵

Aside from managing workload, flexibility can be important when a need for immediate amendment arises. Such circumstances have occurred periodically throughout the history of the Supreme Court Rules. For example, when Congress passed the Military Justice Act, effective August 1, 1983, which for the first time granted the Supreme Court authorization to review certain military decisions,²⁸⁶ the Court quickly promulgated rule amendments to conform to the statutory changes, with the new rule provisions made effective on the same

280 Telephone Interview with William K. Suter, *supra* note 122.

281 E-mail from Jeffrey Morris, *supra* note 91.

282 See *supra* text accompanying notes 69–74.

283 SHAPIRO ET AL., *supra* note 2, at 1–28.

284 See *supra* Parts I.B, II.A.

285 See *supra* text accompanying notes 91–94.

286 Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1405 (1983) (codified at 28 U.S.C. § 1259).

day as the statute.²⁸⁷ A number of similar circumstances have arisen in more recent years.²⁸⁸

Though important, flexibility need not control the process. A more open and participatory process can accommodate unusual needs for speed through default rules and exceptions. The lower-court rulemaking process, for example, allows the Judicial Conference to make exceptions when more expeditious rulemaking is warranted.²⁸⁹ Congress, too, has recognized that the need for speed can justify exceptions to the usual rulemaking process. In its delegation of local rulemaking authority, Congress instructed that, although lower-court local rulemaking must, by default, proceed through “appropriate public notice and an opportunity for comment,”²⁹⁰ the court “may proceed under this section without public notice and opportunity for comment” if it “determines that there is an immediate need for a rule.”²⁹¹ As these default-and-exception regimes suggest, transparent and participatory processes can adequately accommodate flexibility when the need arises.

D. *Maintaining the Court’s Status*

As Jim Duff put it:

The Supreme Court is just different. Different from its inception. It is the only court specifically created under the Constitution, for example. . . . And it is the only court with a set Term every year. And it is the court that has the last word on the Constitution. . . . As a result, distinctions permeate many aspects of the administration of the Supreme Court. The Court views itself as different from the lower courts. And the lower courts view the Supreme Court as different from their operations as well. And to a great degree, this is necessary both to reinforce the authority of the Supreme Court and to reflect the practical, everyday differences between the courts.²⁹²

Duff’s observation has a ring of truth, but it is worth asking whether certain adjustments to the Court’s local rulemaking process

²⁸⁷ See Bennett Boskey & Eugene Gressman, *The Supreme Court’s New Certiorari Jurisdiction over Military Appeals*, 102 F.R.D. 329, 329–30 (1984).

²⁸⁸ E.g., *supra* text accompanying notes 191–96 (discussing the 2005 amendments).

²⁸⁹ See JUDICIAL CONFERENCE PROCEDURES, *supra* note 26, at § 440.20.40(d).

²⁹⁰ 28 U.S.C. § 2071(b).

²⁹¹ *Id.* § 2071(e).

²⁹² Telephone Interview with James C. Duff, *supra* note 93.

would really erode the Court's special status as the head of the judicial branch and as the only constitutional court.

Under the current circumstances, any erosion seems very unlikely. In the local rulemaking context, Congress already has accentuated the Court's special status by explicitly and specifically exempting the Supreme Court from most statutory requirements on local rulemaking applicable to all other federal courts.²⁹³ It is hard to see how the Court's special status would be diminished if the Court itself, on its own terms, were to open its rulemaking process up and invite more participation from interested stakeholders.

As documented above, the Court has already done so in a number of ways, including by instituting, in 1995, its own notice-and-comment practice for the Supreme Court Rules, and, for the 1954 Revision, by appointing a formal consulting group to draft the revision.²⁹⁴ Even though these procedures mirror aspects of the lower-court rulemaking process, no one has suggested that they diminished the Court's status.

Further, the Court itself seems fainthearted about protecting its special status when it comes to court rulemaking. Congress has long given the Supreme Court the primary role in promulgating rules for the lower courts, an assignment that can be seen as a tip of the hat to the Court's position at the apex of the judicial hierarchy. Yet the Court has often treated that rulemaking assignment as misplaced, with the Court and individual justices occasionally disclaiming substantive approval of rules.²⁹⁵ In the early 1980s, Congress even considered removing the Court from the lower-court rulemaking process entirely, and Chief Justice Warren Burger wrote in response: "The Members of

²⁹³ See, e.g., 28 U.S.C. § 2071(b) ("Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment."); § 2071(c)(2) ("Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference."); § 2071(d) ("Copies of rules prescribed under subsection (a) by a district court shall be furnished to the judicial council, and copies of all rules prescribed by a court other than the Supreme Court under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public."); § 2077(b) ("Each court, except the Supreme Court, that is authorized to prescribe rules of the conduct of such court's business . . . shall appoint an advisory committee for the study of the rules of practice and internal operating procedures of such court.").

²⁹⁴ See *supra* text accompanying notes 259–64.

²⁹⁵ See Order, 146 F.R.D. 403 (1993) (approving the 1993 amendments under a process-based rationale and disclaiming any implication "that the Court itself would have proposed these amendments in the form submitted"); Struve, *supra* note 6, at 1127–29, 1154 (documenting instances in which justices disclaimed independent judgment on the merits of amendment proposals).

the Court see no reason to oppose legislation to eliminate this Court from the rule making process.”²⁹⁶ These sentiments undermine the idea that the Court fears that changes in court rulemaking might erode its special status.

Congress could, however, backtrack from its hands-off approach to the Supreme Court Rules and attempt to prescribe significantly more oversight or bureaucracy to the Court’s local rulemaking. Such an effort might do more than threaten the Court’s special status; the effort might threaten its very independence, depending upon how intrusive Congress purports to be. This effort might also put the Court in a position of having to decide whether such oversight is constitutional.²⁹⁷ Congress has asserted its control over court rulemaking in the past, most notably in 1988, when, concerned about rulemaker overreaching and wanting to send a wake-up call to the rulemaking bodies, Congress revamped the lower-court rulemaking process, imposed significantly more process and oversight, and dramatically reduced the Supreme Court’s supervisory role.²⁹⁸ And in other areas, such as judicial ethics and access to courts, Congress has suggested an interest in imposing new regulations on the Supreme Court.²⁹⁹

The question, though, is whether reasoned, voluntary changes to the Court’s current local rulemaking process is likely to incite Congress to assert control over or otherwise intrude in the rulemaking process for the Supreme Court Rules in a way that would pose a real threat to the Court’s status and independence. The answer would seem to be no. Congress passed the 1988 Act in response to a lower-court rulemaking process that had become *too* insular and unaccountable; the Act moved lower-court rulemaking in the direction of trans-

²⁹⁶ Letter from Hon. Warren E. Burger, to Rep. Robert W. Kastenmeier (May 12, 1983), reprinted in *Hearings on Oversight and H.R. 4144 Before the Subcomm. on Cts., Civ. Liberties, and the Admin. of Just. of the House Comm. on the Judiciary, 98th Cong.* at 195 (1983–84). About a year later, Burger reversed course, but that reversal was likely because of pressure from *state* rulemakers who worried about their status. See Burbank, *supra* note 224, at 1721–22.

²⁹⁷ For literature on the differing views of the scope of Congress’s authority over the Supreme Court’s procedure, see Burbank, *supra* note 224.

²⁹⁸ Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, §§ 401–03, 102 Stat. 4648–52 (1988). For extended discussion, see Burbank, *supra* note 224, at 1693–98.

²⁹⁹ See Twenty-First Century Courts Act, H.R. 6017, 116th Cong., 2d Sess. (Feb. 28, 2020) (proposing to require the Supreme Court to promulgate a code of conduct for the justices, to prescribe recusal rules for the justices, and to require livestreamed oral argument). Currently, the judicial ethics rules do not apply to justices of the Supreme Court. See Code of Conduct for United States Judges, 2A GUIDE TO JUDICIARY POLICY 2 (Mar. 12, 2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [https://perma.cc/U5WG-4YZ7].

parency and participation. If anything, it is the Court's choice to proceed with a secretive, go-it-alone attitude that is likely to spark congressional concern, not any changes toward transparency and participation.³⁰⁰

IV. REFORMING THE SUPREME COURT RULEMAKING PROCESS

The previous Part suggested that there is room for beneficial changes to the rulemaking process for the Supreme Court Rules that will neither overwhelm the Court with work nor subject the Court to unwarranted scrutiny. This Part offers some modest proposals.

A. *Default Notice and Comment*

Starting in 1995, the Court began publishing draft amendment proposals for notice and public comment. This practice was a welcome development. Because the advocates (and printers) have to live with rule changes, they can provide input that can be important to them yet underappreciated, or even overlooked, by the Court. Comments submitted in response to published proposals seem to have influenced the final versions in a number of instances.³⁰¹ By contrast, the 1990 Revision, promulgated without a notice-and-comment period, likely contained two oversights that would have been discovered and corrected in a notice-and-comment period.³⁰² Notice and comment ensure that the Rules adequately reflect both the needs of the Court and the needs and interests of practitioners and the public.³⁰³ Further, provid-

³⁰⁰ As Professor Steve Burbank has eloquently written with respect to the court rulemaking's shared enterprise between Congress and the courts: "Rather than waging a losing battle about power, far better to seek to forestall irrationality and irresponsibility through genuine dialogue, informed and nourished by the respect that is due to all branches of government and that is required if we are to honor the genius of those who fought and died for our liberty." Burbank, *supra* note 224, at 1735–36; *see also* Burbank, *supra* note 60, at 246 (calling for "a cooperative study of existing arrangements for implementing procedural change by representatives of the three branches of government and representatives of the practicing bar"); *cf.* Geyh, *supra* note 73, at 1234 (proposing a "permanent, independent, fifteen-member Interbranch Commission on Law Reform and the Judiciary" to facilitate dialogue between Congress and the courts).

³⁰¹ *See supra* text accompanying notes 164–218.

³⁰² *See supra* text accompanying notes 117–21.

³⁰³ *Cf.* Burbank, *supra* note 60, at 236 (urging, in the context of lower-court rulemaking, an open conversation among the judiciary, bar, and Congress for "a shared vision of the need for change"); Struve, *supra* note 6, at 1136 (observing, in the context of lower-court rulemaking, that "the Court appears less representative, less knowledgeable, and perhaps more liable to engraft erroneous policy choices on the Rules" and that "members of the Court may be more sensitive to the interests of the judiciary than to those of litigators"); Edson R. Sunderland, *Rules of Court Governing Practice and Procedure*, 9 Mo. B.J. 198, 200, 202 (1938) (stating that "[l]awyers . . . are

ing transparency and inviting comment from those interested stakeholders is a courtesy that enhances the reputation of the Court.³⁰⁴

Yet the Court has never committed itself to the notice-and-comment practice, and, in recent years, the Court has followed the practice only sporadically. In the last four revisions of the Supreme Court Rules, the Court has published advance notice of proposals and invited comment only once, and one of those three revisions promulgated without input, the 2010 Revision, made important changes that directly affected the practicing bar.³⁰⁵ Nor has the Court ever publicly explained the conditions under which it opts for notice and comment.

The Court should publicly commit to a default notice-and-comment practice, with expressed reasons for departure from that default practice. Such formalization and standardization will alert the public to the nature of particular rule amendment and ensure that the Court is developing rules and rulemaking norms in a principled way and with appropriate input. The default of notice and comment should apply even for technical or conforming amendments; only alacrity, an obvious need for conformance to a statutory change, or other unusual needs, publicly stated, should justify dispensing with notice and comment. The default-and-exception standards for the notice-and-comment requirement in the lower-court rulemaking process provide appropriate models for similar standards for the Supreme Court Rules.³⁰⁶

The two main downsides to more standardized adherence to notice and comment—makework and tensions—present only minor risks, if any at all. The relatively small cohort of high-minded and reputation-cultivating Supreme Court practitioners is unlikely to create makework or antagonism with the Court. In 2007, for example, the Court published minor proposed changes to its rules and received no

in a better position than judges to understand the public attitude toward the administration of justice”).

³⁰⁴ Cf. DANIEL PATRICK MOYNIHAN, COUNTING OUR BLESSINGS: REFLECTIONS ON THE FUTURE OF AMERICA 121 (1980) (“Emulation by one branch of another [can] eliminate any appearance of disparate levels of legitimacy.”).

³⁰⁵ See *supra* text accompanying notes 202–18.

³⁰⁶ See JUDICIAL CONFERENCE PROCEDURES, *supra* note 26, at § 440.20.40 (“The Standing Committee may shorten the public comment period or eliminate public hearings if it determines that the administration of justice requires a proposed rule change to be expedited and that appropriate notice to the public can still be provided and public comment obtained. The Standing Committee may also eliminate public notice and comment for a technical or conforming amendment if the Committee determines that they are unnecessary. When an exception is made, the chair must advise the Judicial Conference and provide the reasons.”).

comments.³⁰⁷ In 2002, the Court received only four comments.³⁰⁸ Likewise, in 1998, the Court received only a handful of comments.³⁰⁹ It is true that other amendments, namely, the 2017 proposed amendment reducing word-court limits, the 1996 amendment requirement disclosures in the preparation and financing of amicus briefs, and the 1995 Revision, generated greater numbers of comments, some of which were negative.³¹⁰ But the number of comments never appeared to exceed about thirty in any comment period, and, in each case, the comments appear to have been helpful to the Court's rulemaking. Further, there is no indication that any set of comments was inappropriately caustic or created any friction between the Court and its practicing bar. Compared to the comment practice in the lower-court rulemaking process, the comment process for the Supreme Court Rules amounts to a positive, productive conversation with only the lightest of burdens. A default notice-and-comment process should be continued, standardized, and formalized.

B. Publication of Comments Received

Although the Court has published rule proposals for notice and public comment, the Court has never published the comments submitted. Because the Supreme Court is not subject to the Freedom of Information Act,³¹¹ it appears the public has no way to obtain them, short of obtaining them directly from the submitters themselves.³¹² The Court also refuses to disclose the identities of the submitters. The result is that the public generally is unaware of both the identities of those who submitted comments and the substance of the comments submitted. This practice of nondisclosure is in contrast with the lower-court rulemaking process: the U.S. Courts website publishes all comments submitted in the lower-court rulemaking process in a chart that is searchable and sortable.³¹³

The Supreme Court should publish the comments submitted. On the upside, disclosing comments is likely to enhance the legitimacy of the Court's rulemaking process. Publication enables members of the public and interested stakeholders to know what information the

³⁰⁷ See *supra* text accompanying notes 200–01.

³⁰⁸ See *supra* text accompanying notes 187–90.

³⁰⁹ See *supra* text accompanying notes 183–86.

³¹⁰ See *supra* text accompanying notes 164, 210–18.

³¹¹ See 5 U.S.C. § 552(f).

³¹² A reporter obtained a copy of one submitted comment in 2017. See *supra* text accompanying note 216.

³¹³ See *supra* text accompanying notes 27–30.

Court is considering when discussing proposed amendments. Publication exposes the sources of any influences—and the influences themselves—pressed during the process. Publication thus will reveal whether particular commentators exercise outsized influence in the making of the Supreme Court Rules and whether the Supreme Court is responsive to legitimate public and practitioner interests expressed in submitted comments. As for downsides, the costs to make comments public—uploading the materials received to the Court’s website—are miniscule. Any submitter privacy interests are marginal at best. Nor has publication of comments chilled the submission of comments in the lower-court rulemaking process. The benefits of posting comments vastly outweigh the costs.

C. Publication of the Rulemaking Process

The Court does not disclose its rulemaking process.³¹⁴ It should. Transparency about the rulemaking process advances both legitimacy and efficacy.

Transparency advances legitimacy because those who watch the Court do not have to wonder whether the Court is seeking or relying on inappropriate or insufficient input and information, or whether the Court is using different rulemaking procedures for different rule amendments. Transparency also advances efficacy. Publicizing the process allows interested parties to know how the rulemaking process works so that they can participate most effectively, thereby supplying information most relevant and useful for the Court’s consideration, leading to better, more informed rulemaking. Transparency will also allow academic scholars, and perhaps Congress, to suggest appropriate rulemaking reforms.

The Court’s website already is a repository of information about case opinions, about oral arguments, and on informal internal processes for deciding cases, among many other Court matters. The website includes a link to the minutes of all official Court meetings. The website also maintains a webpage on “Rules and Guidance,” which includes links to the current set of Supreme Court Rules and to all historical versions of the Supreme Court Rules. This webpage contains links to a number of helpful “guides” and “guidelines” for various aspects of practice, such as use of the electronic filing system, how to file certain cases and briefs, and information on scheduling and de-

³¹⁴ Most of the law clerks I interviewed, including those who clerked for the Chief Justice or justices on the Rules Committee, had no knowledge of the rulemaking process for the Supreme Court Rules.

livery of documents to the Clerk’s Office.³¹⁵ A black-and-white screenshot of the webpage as of July 1, 2021, follows:

Rules and Guidance

Court Rules

- Rules of the Supreme Court (Effective July 1, 2019) (PDF)
- Summary of 2019 Rules Changes (PDF)
- Historical Rules of the Supreme Court

Guides for Counsel

- Guidelines for the Submission of Documents to the Supreme Court’s Electronic Filing System (Updated Nov. 20, 2017) (PDF)
- Guide to Filing Paid Cases (Effective July 1, 2019) (PDF)
- Guide to Filing *In Forma Pauperis* Cases (Effective July 1, 2019) (PDF)
- Guide to Filing *Amicus Curiae* Briefs (October 2019) (PDF)
- Guidance on Scheduling (February 2020) (PDF)
- Guide for Counsel in Cases to be Argued (October Term 2019) (updated October 3, 2019) (PDF)
- Booklet-Format Specification Chart (Effective July 1, 2019) (PDF)
- Delivery of Documents to the Clerk’s Office

Forms

- Waiver Form (PDF)
- Oral Argument Form (PDF)

Circuit Assignment of Justices

- Assignment Order (PDF)
- Circuit Map (PDF)

Case Distribution Schedule

- Case Distribution Schedule – October Term 2020 (PDF)

COVID-19 Announcements

Adding a new link, bulleted under the “Court Rules” header, to information about the rulemaking process for the Supreme Court Rules would fit seamlessly into the topics and guidance already publicly browsable on the webpage. Rulemaking information disclosed should include the steps in the process, the general sense of the timing of each step, the role of each rulemaking actor, the kinds of comments desired by the Court and in what form they should be submitted, and whose opinions—both inside and outside the Court—the Court solicits as a matter of course. The Judicial Conference’s publicly available *Guide to Judiciary Policy*, which prescribes and publishes the rulemaking process for the lower-court rules,³¹⁶ provides a useful template, though a sufficient description of the rulemaking process for the Supreme Court Rules likely could be detailed with far more brevity—

³¹⁵ *Rules and Guidance*, Sup. Ct. of the U.S. https://www.supremecourt.gov/filingandrules/rules_guidance.aspx [<https://perma.cc/Z6Z6-BMYF>].

³¹⁶ See *supra* Section I.C.

in a paragraph or two—because the Supreme Court Rules undergo a far simpler process than the lower-court rules.

Along with the rulemaking process itself, the Court could include on the same webpage links to all historical rule *proposals*, which currently are buried in a chronological list of all press releases issued by the Court,³¹⁷ and links to comments received during any notice-and-comment period, as recommended in the preceding section. The lower-court rulemaking webpages and comment repository on the U.S. Courts website offer usable templates.³¹⁸

Publishing the rulemaking process would not mean hamstringing the Court to rigidity. Like the default nature of many of the lower-court rules, the rulemaking process for the Supreme Court Rules, even if formalized in a published disclosure, can still be subject to change at the discretion of the Court, upon specified circumstances. The more important goal is to disclose the existing rulemaking process to provide transparency into the rulemaking process behind the Supreme Court Rules.

D. *Commitment to Periodic Self-Study*

Congress has charged the Judicial Conference with a continual study of the lower-court rules, supported by its committees, the AO, and the FJC.³¹⁹ Ongoing inspection can produce advantages, both in the making of effective rules and in promoting humility in rulemaking itself. Humility and self-restraint can, in turn, help keep rulemaker ambition in check and ameliorate friction between the judicial branch and Congress.³²⁰

For example, in June 1993, the Judicial Conference's Standing Committee directed the Subcommittee on Long Range Planning to undertake a thorough study of the federal judicial rulemaking procedures, including: (1) a description of existing procedures; (2) a summary of criticisms and concerns; (3) an assessment of how existing procedures might be improved; and (4) appropriate proposed recommendations.³²¹ The Subcommittee did so and submitted a detailed report on all four directives, including recommendations to increase the

³¹⁷ *Press Releases*, Sup. Ct. of the U.S. <https://www.supremecourt.gov/publicinfo/press/pressreleases.aspx> [<https://perma.cc/A8B3-9FCB>].

³¹⁸ See *About the Rulemaking Process*, *supra* note 44.

³¹⁹ 28 U.S.C. § 331.

³²⁰ See Burbank, *supra* note 224, at 1737 (“The result of the judiciary’s self-restraint is likely to be few occasions of friction when the Court promulgates, and few overrides of, proposed Federal Rules of Civil Procedure.”).

³²¹ SELF-STUDY, *supra* note 16, at 683.

diversity (both professionally and personally) of the composition of the Standing Committee and advisory committees,³²² increase advisory committee knowledge by distributing to their members relevant publications,³²³ increase reliance on empirical research as opposed to anecdotal experiences,³²⁴ keep the goal of national uniformity,³²⁵ keep the primary drafting responsibility with advisory committees,³²⁶ and continue attentiveness to rule style and language,³²⁷ among other recommendations.

To be sure, correlation between self-study and self-restraint is not always apparent. The immediate effects of the 1995 self-study on rulemaker ambition were ambivalent, perhaps because they were outweighed by prevailing personal and political agendas.³²⁸ But the longer view suggests that the rulemakers have attended to some of the self-study's recommendations more closely, and the 2000s were marked by significantly more rulemaker restraint and commitment to informed rulemaking.³²⁹ Honest introspection may not be a panacea, especially in the face of strong countervailing pressures, but it can also produce beneficial changes.

Congress has not mandated any study of the Supreme Court's rules, and, as explained in Part II.A, most of the congressional charges of judicial study of rules of court exempt the Supreme Court.³³⁰ However, Congress's charges to the Judicial Conference to study the business of "the courts of the United States"³³¹ and to the FJC to research the "operation of the courts of the United States"³³² are broad enough to encompass the Supreme Court.

The judiciary's historical instances of Supreme Court study are few and, to date, have either avoided recommendations entirely or have had no relevance to the Supreme Court Rules. As for avoidance, the 1995 self-study, for example, considered "whether the High Court

³²² *Id.* at 696, 701.

³²³ *Id.* at 697.

³²⁴ *Id.* at 699.

³²⁵ *Id.* at 702.

³²⁶ *Id.* at 702–03.

³²⁷ *Id.* at 703–04.

³²⁸ See Burbank & Farhang, *supra* note 63, at 1588–89 (characterizing rulemaker activity in the late 1990s as "Janus-like" and documenting the personnel and political influences of the era).

³²⁹ See *id.* at 1592–93 (detailing rulemaking in the 2000s); Burbank, *supra* note 224, at 1736–37 (arguing that rulemakers have heeded some of the recommendations of the 1995 self-study).

³³⁰ See *supra* text accompanying notes 75–79.

³³¹ 28 U.S.C. § 331 (2018).

³³² *Id.* § 620(b).

should continue its role in the statutory scheme” of lower-court rulemaking³³³ but ultimately decided “to leave to the Justices themselves the question whether there should be any change in their role.”³³⁴ As for relevance, in 1971, Chief Justice Warren Burger, concerned with the dramatic rise in the Court’s docket, used his power as chairperson of the FJC Board to appoint a “Study Group” of professors and practitioners to analyze the caseload of the Supreme Court and to make recommendations.³³⁵ The Study Group received helpful data from the Clerk of the Court and the FJC staff, and it considered a variety of jurisdictional and procedural changes.³³⁶ The resulting Freund Commission Report ultimately recommended the establishment of a National Court of Appeals,³³⁷ the elimination of mandatory appeals to the Court,³³⁸ and, although conceding the “difficult[y] for outsiders to assess the internal practices of the Court,”³³⁹ some modest changes to the Court’s internal practices,³⁴⁰ but it did not mention the Supreme Court Rules.

Nevertheless, there is one instance in which the Supreme Court voluntarily commissioned a study of the Supreme Court Rules: the 1952 appointment of a consulting group that spearheaded the work on the 1954 Revision.³⁴¹ The Court appointed that group of outsiders to help the Rules Committee of justices “ascertain the defects and difficulties” of the existing rules and to “propose[] [a] thorough revision.”³⁴² The consulting group did so, reporting that many of the rules were opaque, ambiguous, misleading, confusing, or obsolete, and that they had achieved this state because of the Court’s practice to amend rules episodically, as an individual need arose, rather than engage in more systematic and comprehensive study and revision, which the consulting group provided for the 1954 Revision.³⁴³ The consulting

³³³ SELF-STUDY, *supra* note 16, at 705.

³³⁴ *Id.* at 706.

³³⁵ The Study Group included Paul A. Freund, chair (Harvard), Alexander M. Bickel (Yale), Peter Ehrenhaft (D.C. Bar), Russel D. Niles (Institute of Judicial Administration), Bernard Segal (former ABA president), Robert L. Stern (former Acting SG), and Charles Wright (Texas). *See* FREUND COMMISSION REPORT, *supra* note 80, at ix.

³³⁶ *Id.* at ix–x.

³³⁷ *Id.* at 18.

³³⁸ *Id.* at 25.

³³⁹ *Id.* at 39.

³⁴⁰ *Id.* at 39–46.

³⁴¹ *See supra* text accompanying notes 259–64.

³⁴² Wiener, *supra* note 90, at 38.

³⁴³ *Id.* at 21–38.

group appears to have been highly successful in performing its duties for the Court.³⁴⁴

Informally, the Clerk's Office continually studies the Supreme Court Rules by noting any problems that it finds, by collecting suggestions for changes, and by communicating with the justices about proposals. As the hub for the Court's rulemaking, the Clerk's Office would seem, in the ordinary course, well-positioned for coordinating piecemeal amendments. But more comprehensive study, especially with regard to accommodating interests outside of the Court, would seem to require outside assistance. In one instance, in 1859, the Court ordered the Clerk to "collect all the rules adopted by this Court," "designate those which are obsolete or have been repealed," "arrange and classify all those now in force under their appropriate heads," and "report the same to this Court."³⁴⁵ The Clerk dutifully fulfilled the Court's directive, but not very effectively.³⁴⁶

To avoid overburdening the Clerk's Office, the Court should, from time to time, engage the FJC in a more comprehensive study, perhaps supplemented by the appointment of a small consulting group of outsiders and the Clerk of the Court, to ensure that its rules as a whole are adequately meeting the Court's needs, are accommodating the interests of the bar and the public at large, and are consistent with practice. Such periodic study may very well find that the Supreme Court Rules are working optimally and need no immediate action. That would be valuable enough. Or the study may reveal, as the 1954 Revision's consulting group found, that the Supreme Court Rules need pressing attention. Either outcome would be worthwhile. And even apart from the outcome, the deep engagement with the Supreme Court Rules and the interests of the stakeholders would be educational for many of those involved in the process.

CONCLUSION

This Article has shined some light on the rulemaking process for the Supreme Court Rules, revealing the stark differences between that process and the process for making the lower-court rules. Those differences suggest that the making of the Supreme Court Rules could move toward the lower-court process's norms of openness, transparency, and participation. Those moves need not be dramatic leaps;

³⁴⁴ See *supra* text accompanying note 268.

³⁴⁵ Wiener, *supra* note 90, at 34.

³⁴⁶ Wiener, *supra* note 90, at 35 (asserting that the Clerk's draft in response to the Court's 1859 directive "was not an arrangement that was either helpful or notably logical").

the reforms I propose are incremental steps that follow apace the 1995 institution of the practice of providing public notice and comment. Yet these reforms should also improve both the process of making the Supreme Court Rules and the rules themselves.

Rectifying Wrongful Convictions Through the Dormant Grand Jury Clause

Colin Miller*

ABSTRACT

In 1995, Lamar Johnson was convicted of a murder in St. Louis. Twenty-two years later, St. Louis Circuit Attorney Kimberly Gardner created a Conviction Integrity Unit ("CIU") to review possible wrongful convictions. After reviewing Johnson's case, the CIU concluded that Johnson was innocent. Then, consistent with her special responsibility as a prosecutor to seek to remedy wrongful convictions, Gardner filed a motion for a new trial. The court, however, denied the motion, holding that there was no enabling legislation in Missouri authorizing CIUs to seek relief for wrongful convictions. Gardner is not alone in her inability to rectify wrongful convictions. Although the number of CIUs has increased, most jurisdictions still do not have such a unit, and several CIUs exist in states that, like Missouri, lack enabling legislation.

Conversely, it has perhaps never been easier for prosecutors to commence criminal proceedings that culminate in wrongful convictions. The Fifth Amendment Grand Jury Clause provides that no person shall be subjected to a trial for felony charges unless there is a grand jury presentment or indictment. The grand jury's historical mission was "to clear the innocent, no less than to bring to trial those who may be guilty," and yet grand juries now return indictments in approximately ninety-nine percent of cases. Meanwhile, the use of presentments waned in the wake of the Civil War and was effectively declared dead in the criminal charging context in 1946. Historically, however, grand jury presentments were used not only to accuse wrongdoers of criminal behavior but also to call attention to issues of public concern. With the demise of presentments in the criminal charging context, this other historical function of the grand jury has largely fallen into disuse.

This Article advances the original thesis that there is a dormant Grand Jury Clause that prosecutors can use to revive the common law power of presentment and fulfill their responsibility to rectify wrongful convictions. Under this dormant Grand Jury Clause, a prosecutor who believes her office previously secured a wrongful conviction can take the case to a grand jury. If the grand jury agrees with the prosecutor, it can submit a wrongful conviction presentment to a judge, who can vacate the conviction under the inherent power of the court. By doing so, prosecutors can restore some of the glory of the common law grand jury and create a powerful new tool to right wrongs.

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INTRODUCTION

In 1995, Lamar Johnson was convicted of the murder of his former friend Marcus Boyd in St. Louis.¹ Twenty-two years later, Kimberly Gardner took office as the St. Louis Circuit Attorney and quickly created a Conviction Integrity Unit (“CIU”) to review possible wrongful convictions.² After reviewing Johnson’s case, the CIU concluded in a report that (1) Johnson was the victim of police and prosecutorial misconduct, and (2) “Johnson did not shoot Boyd and had nothing to do with Boyd’s murder, and he should not be in prison for the crime.”³ Then, consistent with her special responsibility as a prosecutor to seek to remedy wrongful convictions under Model Rule of Professional Conduct 3.8(h),⁴ Gardner filed a motion for a new trial.⁵ The trial court, however, denied the motion, holding that (1) a prosecutor cannot file a motion for a new trial on behalf of a defendant; (2) a motion for a new trial must be filed within twenty-five days of the return of the verdict; and (3) there was no enabling legislation

¹ See Emily Hoerner, *St. Louis Prosecutor: Fabricated and Hidden Evidence by Police, Prosecutor Led to Wrongful Conviction*, INJUSTICE WATCH (July 23, 2019), <https://www.injusticewatch.org/news/2019/st-louis-prosecutor-calls-to-overturn-conviction-based-on-fabricated-police-evidence-undisclosed-witness-payments/> [<https://perma.cc/7JA8-LR9E>].

² See *id.*

³ REPORT OF THE CONVICTION INTEGRITY UNIT: STATE V. LAMAR JOHNSON, CASE NO. 22941-03706A-01 45 (2019) [hereinafter JOHNSON REPORT], <https://themip.org/wp-content/uploads/2019/07/Lamar-Johnson-CIU-Report.pdf> [<https://perma.cc/BFW8-8C2L>].

⁴ MODEL RULES OF PRO. CONDUCT r. 3.8(h) (AM. BAR ASS’N 2020).

⁵ State’s Motion for a New Trial Based on Newly Discovered Evidence of Innocence, Perjury, and False Testimony and Misconduct So Prejudicial That the Outcome of the Trial Is Unreliable, or in the Alternative, Motion for a Hearing on the Newly Discovered Evidence, State v. Johnson, No. 22941-03706A-01 (Mo. Cir. Ct. July 19, 2019), <https://www.scribd.com/document/419521917/Motion-for-a-new-trial> [<https://perma.cc/3CAU-MDP7>].

in Missouri authorizing CIUs to seek relief for wrongful convictions.⁶ This decision was later affirmed by the state court of appeals⁷ and state supreme court.⁸

Gardner is not alone in her inability to rectify wrongful convictions and fulfill her special responsibility as a prosecutor under Rule 3.8(h). Although the number of CIUs has increased over the past decade,⁹ most jurisdictions still do not have such a unit, and several CIUs exist in states that, like Missouri, lack enabling legislation that allow prosecutors to rectify wrongful convictions.

Conversely, it has perhaps never been easier for prosecutors to commence criminal proceedings that culminate in wrongful convictions. The Fifth Amendment Grand Jury Clause and many state counterparts provide that no person shall be subjected to a trial for felony charges unless there is a grand jury presentment or indictment.¹⁰ The grand jury is an ancient institution that predates even the trial jury and whose historical mission was “to clear the innocent, no less than to bring to trial those who may be guilty.”¹¹ And yet, the grand jury has become little more than a rubber stamp for prosecutors. Grand juries now return indictments in approximately ninety-nine percent of cases,¹² validating Judge Sol Wachtler’s classic statement that “a Grand Jury would indict a ‘ham sandwich.’”¹³ Meanwhile, the other document mentioned in the Grand Jury Clause—the presentment—in which the grand jury issues a report without a bill of indictment laid before it, has been neutered. The use of presentments waned in the wake of the Civil War and was effectively declared dead in the crimi-

⁶ See Order at 14–15, *State v. Johnson*, No. 22941-03706A (Mo. Cir. Ct. Aug. 23, 2019), <https://bloximages.newyork1.vip.townnews.com/stltoday.com/content/tncms/assets/v3/editorial/7/5c/75c4e19c-9220-5b21-acae-14d9aad821d0/5d6032524f933.pdf.pdf> [https://perma.cc/5WHN-QC4P] (denying State’s motion for a new trial).

⁷ See *State v. Johnson*, No. ED108193, 2019 WL 7157665, at *1 (Mo. Ct. App. Dec. 24, 2019).

⁸ See *State v. Johnson*, 617 S.W.3d 439, 445 (Mo. 2021).

⁹ See *infra* note 106 and accompanying text.

¹⁰ U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . .”).

¹¹ *United States v. Dionisio*, 410 U.S. 1, 16–17 (1973).

¹² Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury’s Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171, 1176 (2008); Nino C. Monea, *The Fall of Grand Juries*, 12 NE. U. L. REV. 411, 419 n.45 (2020) (“Today, the federal grand jury indictment rate hovers around 99 percent.”).

¹³ *In re Grand Jury Subpoena of Stewart*, 545 N.Y.S.2d 974, 977 n.1 (Sup. Ct.), *modified*, 548 N.Y.S.2d 679 (App. Div. 1989).

nal charging context through the enactment of Federal Rule of Criminal Procedure 7(a)(1) and several state counterparts.¹⁴

Historically, however, grand jury presentments were used not only to accuse wrongdoers of criminal behavior but also to call attention to issues of public concern like failing infrastructure and unsanitary correctional facilities.¹⁵ With the demise of presentments in the criminal charging context, this other historical function of the grand jury has largely fallen into disuse.¹⁶

This Article advances the original thesis that there is a dormant Grand Jury Clause that prosecutors can use to revive the common law power of presentment and fulfill their responsibility to rectify wrongful convictions. Under this dormant Grand Jury Clause, a prosecutor who believes her office previously secured a wrongful conviction can take the case to a grand jury. If the grand jury agrees with the prosecutor, it can submit a wrongful conviction presentment to a judge, who can vacate the conviction under the inherent power of the court. By doing so, prosecutors can restore some of the glory of the common law grand jury and create a powerful new tool to right wrongs.

In Part I, this Article traces the history of innocence claims in this country, culminating in the CIU roadblock faced by prosecutors such as Gardner. Part II then digs into the common law origins of the grand jury and the eventual decline of the presentment power to its current state of dormancy. Next, Part III reviews the Supreme Court's dormant Commerce Clause jurisprudence as a possible model for recognition of a dormant Grand Jury Clause. Part IV adds an assessment of two criminal clauses that the Supreme Court revived after centuries of dormancy. Finally, Part V sets forth the proposal that prosecutors in jurisdictions with or without CIUs should be able to take innocence claims to grand juries who can issue wrongful conviction presentments to judges with the power to right wrongs.

I. THE RISE OF RECTIFYING WRONGFUL CONVICTIONS AND THE CIU ROADBLOCK

A. Introduction

Currently, wrongful convictions are seen as a significant problem due to a disproportionate impact on innocent African American men like Lamar Johnson, who, compared to their Caucasian counterparts,

¹⁴ See *infra* notes 230–35 and accompanying text.

¹⁵ See *infra* notes 195–205 and accompanying text.

¹⁶ See *infra* notes 236–66 and accompanying text.

are more likely to be wrongfully convicted and serve more time before being released.¹⁷ But this was not always the case. This Section traces the history of innocence claims in this country through six eras: (1) innocence skepticism; (2) the DNA revolution; (3) the emergence of the Innocence Project and the Innocence Network; (4) the creation of the special responsibility of prosecutors to rectify wrongful convictions; (5) the emergence of CIUs; and (6) the CIU roadblock that this Article's proposal seeks to resolve.

B. *Innocence Skepticism*

There was little written about wrongful convictions in this country until 1932.¹⁸ Indeed, in a 1923 opinion, the esteemed Judge Learned Hand wrote that:

Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.¹⁹

These concerns became inverted in the public eye in the wake of the convictions of anarchists Nicola Sacco and Bartolomeo Vanzetti.²⁰ In 1921, Sacco and Vanzetti, Italian immigrants, were convicted of robbery and sentenced to die “during the height of the post-World War I Red Scare amidst much fervor and public outcry against both foreigners and anarchists.”²¹ The two men later appealed based upon “recanted testimony, conflicting ballistics evidence, a prejudicial pre-

¹⁷ See Barbara O'Brien & Kristen Parker, *African-Americans More Likely to be Wrongfully Convicted*, MICH. STATE UNIV., <https://research.msu.edu/innocent-african-americans-more-likely-to-be-wrongfully-convicted/> [<https://perma.cc/A7B6-A2BJ>] (noting that (1) African American defendants convicted of murder are fifty percent more likely to be innocent than their Caucasian counterparts, and (2) African American exonerees serve about three more years than their Caucasian counterparts before being released).

¹⁸ Richard A. Leo, *Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction*, 21 J. CONTEMP. CRIM. JUST. 201, 203 (2005) (“The history of the study of wrongful conviction in America began with Yale law professor Edward Borchard’s (1932) book, *Convicting the Innocent*.”).

¹⁹ *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

²⁰ Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 435, 470 n.141 (2004) (“Widespread interest in the problem of wrongful convictions in the 1930s appears to have been largely the result of the Sacco-Vanzetti case, together with the publication of Edwin Borchard’s *Convicting the Innocent* in 1932.”).

²¹ Meghan Levine, Note, *The Competing Roles of an Attorney in a High-Profile Case: Trying a Case Inside and Outside of the Courtroom*, 28 GEO. J. LEGAL ETHICS 683, 685–86 (2015).

trial statement by the jury foreman, and a confession by an alleged participant in the robbery.”²²

While the confession in particular led many to believe that Sacco and Vanzetti were wrongfully convicted,²³ the Supreme Judicial Court of Massachusetts denied their appeal in 1926.²⁴ One year later, “protests on their behalf were held in every major city in North America and Europe, as well as Tokyo, Sydney, S[ã]o Paulo, Rio de Janeiro, Buenos Aires, and Johannesburg.”²⁵ The protests, however, were unsuccessful; later that year, Sacco and Vanzetti were executed via the electric chair.²⁶

Although the appeals by Sacco and Vanzetti fell upon deaf ears, comments by the district attorney prosecuting them found an active audience. In 1932, Yale law professor Edwin Montefiore Borchard published his groundbreaking book *Convicting the Innocent*, in which he dissected sixty-five cases of wrongful convictions.²⁷ In the Preface to the book, Borchard wrote, “[a] district attorney in Worcester County, Massachusetts, a few years ago is reported to have said: ‘Innocent men are never convicted. Don’t worry about it, it never happens in the world. It is a physical impossibility.’ The present collection of sixty-five cases, which were selected from a much larger number, is a refutation of this supposition.”²⁸

Although this Preface was cryptic, Borchard later wrote the following in a letter to *New Republic* Editor George Soule (after Congress passed legislation to compensate the wrongfully convicted):²⁹ “The effort [to pass compensation legislation] received a new lease of life through the statement made by the District Attorney in the Sacco-

²² *FBI Files on Sacco and Vanzetti on Microfilm*, CORNELL UNIV. LIBR. [hereinafter *FBI Files*], <https://rmc.library.cornell.edu/EAD/htmldocs/KCL06082mf.html> [https://perma.cc/2B2F-N2VR].

²³ Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 158 (1987).

²⁴ *Commonwealth v. Sacco*, 151 N.E. 839, 864 (Mass. 1926).

²⁵ *FBI Files*, *supra* note 22.

²⁶ Kevin Francis O’Neill, *Muzzling Death Row Inmates: Applying the First Amendment to Regulations that Restrict a Condemned Prisoner’s Last Words*, 33 ARIZ. ST. L.J. 1159, 1163 n.23, 1173 n.98 (2001). Sacco “used his last words to declare: ‘Long live anarchy!’” *Id.* at 1163 n.23.

²⁷ EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE*, at xiii (1932).

²⁸ *Id.* at vii.

²⁹ Jeffrey S. Gutman, *Are Federal Exonerees Paid?: Lessons for the Drafting and Interpretation of Wrongful Conviction Compensation Statutes*, 69 CLEV. ST. L. REV. 219, 228 (2021) (“The only thing which appeared to put wrongful conviction compensation again on the legislative docket was the 1932 publication of Professor Borchard’s *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice*.”).

Vanzetti case, who remarked that ‘Innocence Men (sic) are never convicted. . . .’”³⁰

In *Convicting the Innocent*, Professor Borchard identified several causes of the sixty-five wrongful convictions he studied, including “mistaken identifications, inadequate lawyering, police or prosecutorial misconduct, false or coerced confessions, and perjury.”³¹ The leading cause of wrongful conviction in these cases was eyewitness misidentification, which existed in twenty-nine of these cases, including eight in which Borchard concluded that “the wrongfully accused person bore not the slightest resemblance to the real culprit” and twelve in which he found that “the resemblance was not at all close.”³² Borchard advocated in the book “for improvements in the prosecution and police; eyewitness identifications, especially where victims of violent crimes make identifications; expert-witness testimony; and resources for poor defendants and defense attorneys.”³³

Although Borchard’s wrongful conviction mosaic was compelling, the narratives in his book “failed to persuade others that wrongful convictions represented a systemic problem in the criminal justice system as opposed to a few anomalous, if deeply troubling, travesties of justice.”³⁴ Over the next half century or so, “there was typically one big-picture book or major article published every decade or so on the subject of miscarriages of justice,” which was often a retread of the territory covered by Borchard.³⁵ Meanwhile, over that same period of time, “the problem of wrongful conviction generated very little interest among criminal justice officials, policy-makers or the public.”³⁶

One prosecutor has said that “before DNA testing revealed otherwise, prosecutors believed wrongful convictions were so uncommon that there was little need to worry about them happening in their own office.”³⁷ And, indeed, according to the National Registry of Exonera-

³⁰ Marvin Zalman, *Edwin Borchard’s Innocence Project: The Origin and Legacy of His Wrongful Conviction Scholarship*, 1 *WRONGFUL CONVICTION L. REV.* 124, 142 (2020) (alteration in original).

³¹ Margaret Raymond, *The Problem with Innocence*, 49 *CLEV. ST. L. REV.* 449, 463 (2001).

³² *State v. Raymond*, 486 P.2d 93, 94 n.1 (Wash. 1971).

³³ Tim Bakken, *Models of Justice to Protect Innocent Persons*, 56 *N.Y.L. SCH. L. REV.* 837, 841 (2011/12).

³⁴ Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 *OHIO ST. J. CRIM. L.* 7, 12 (2009).

³⁵ Leo, *supra* note 18, at 203.

³⁶ Leo & Gould, *supra* note 34, at 12.

³⁷ Daniel Kroepsch, Note, *Prosecutorial Best Practices Committees and Conviction Integrity Units: How Internal Programs Are Fulfilling the Prosecutor’s Duty to Serve Justice*, 29 *GEO. J. LEGAL ETHICS* 1095, 1098 n.21 (2016).

tions, between the founding of this country in 1776 and 1988, there were only 438 exonerations, or just under two per year.³⁸

C. *The DNA Revolution*

Deoxyribonucleic acid, or DNA, “is an extremely long, thread-like chain of molecules found in the nucleus of every cell of the body (except for certain cells, such as red blood cells, which do not have a nucleus).”³⁹ The DNA revolution began in 1984. In that year, English geneticist Sir Alec Jeffreys discovered that (1) “certain regions of DNA contained DNA sequences that were repeated over and over again next to each other,”⁴⁰ and (2) “the number of repeated sections present in a sample could differ from individual to individual.”⁴¹ These repeated sections came to be known as variable number tandem repeats (“VNTRs”) or “DNA fingerprint[s]” that could be used to identify individuals “with probabilities greater than one-in-four billion.”⁴²

Dr. Jeffreys’s DNA fingerprinting was first used in court in 1985 to prove that a Ghanaian boy who was denied entry to the United Kingdom was likely “the son of a Ghanaian woman who held rights of settlement in [the U.K.]”⁴³ The next year, DNA fingerprinting was first used in a criminal case in which two young girls were raped and murdered in Leicestershire, England and a suspect confessed to one of the crimes.⁴⁴ DNA testing of semen found on the two victims produced the “completely unexpected” result that another man, Colin Pitchfork, actually committed both crimes.⁴⁵ In 1988, Pitchfork became the first person convicted by DNA evidence.⁴⁶ That same year, there was the first DNA prosecution in the United States, with Florid-

³⁸ NATIONAL REGISTRY OF EXONERATIONS: EXONERATIONS BEFORE 1989, <https://www.law.umich.edu/special/exoneration/Pages/ExonerationsBefore1989.aspx> [<https://perma.cc/VQ9R-T4CV>].

³⁹ William C. Thompson & Simon Ford, *DNA Typing: Acceptance and Weight of the New Genetic Identification Tests*, 75 VA. L. REV. 45, 61 n.76 (1989).

⁴⁰ JOHN M. BUTLER, *FORENSIC DNA TYPING: BIOLOGY & TECHNOLOGY BEHIND STR MARKERS 2* (1st ed. 2001).

⁴¹ *Id.*

⁴² Louis J. Elsas II, *A Clinical Approach to Legal and Ethical Problems in Human Genetics*, 39 EMORY L.J. 811, 812 (1990).

⁴³ K.F. Kelly, J.J. Rankin & R.C. Wink, *Method and Applications of DNA Fingerprinting: A Guide for the Non-Scientist*, 1987 CRIM. L. REV. 105, 108–09.

⁴⁴ Jessica Gabel Cino, *Tackling Technical Debt: Managing Advances in DNA Technology that Outpace the Evolution of Law*, 54 AM. CRIM. L. REV. 373, 378 (2017).

⁴⁵ *Id.*

⁴⁶ *Id.*

ian Tommie Lee Andrews also being convicted of a double rape/homicide.⁴⁷

The following year—1989—saw the first exonerations based on DNA. In 1984, Carolyn Jean Hamm had been found raped and hanged in her home in Arlington, Virginia, with her hands bound behind her with a Venetian blind cord.⁴⁸ Detectives thereafter interrogated David Vasquez about the crime for hours.⁴⁹

Vasquez, who had a sub-70 IQ, eventually admitted to the crime, but he (1) initially said that he tied Hamm's hands behind her back with ropes, his belt, and a coat hanger before being told that they were bound with a Venetian blind; and (2) initially said that he stabbed Hamm before being told [by the police] that she was hanged.⁵⁰

After unsuccessfully asserting that his confession was involuntary, "Vasquez pleaded guilty to second-degree murder and burglary to avoid the death penalty."⁵¹ Subsequent DNA testing revealed that "Timothy Wilson Spencer was guilty of a series of similar crimes that led to him being dubbed the 'Southside Strangler.'"⁵² "Based on the similar modus operandi of these crimes and the likelihood that it was Spencer who had killed Hamm, Virginia Governor Gerald L. Baliles pardoned Vasquez on January 4, 1989."⁵³

Later that year, Gary Dotson became the second DNA exoneree after serving ten years for the 1977 aggravated kidnapping and rape of sixteen-year-old Cathleen Crowell.⁵⁴ DNA testing of semen on the victim's underpants excluded Dotson as a source and provided a match for Crowell's boyfriend.⁵⁵ It was then revealed that Crowell created the rape allegation to have a cover story in case her boyfriend had impregnated her.⁵⁶ Dotson was eventually exonerated on August 14, 1989.⁵⁷

⁴⁷ *Id.*

⁴⁸ Colin Miller, *Why States Must Consider Innocence Claims After Guilty Pleas*, 10 U.C. IRVINE L. REV. 671, 675 (2020).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See Dolores Kennedy, *Gary Dotson*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3186> [<https://perma.cc/4AQF-Y4K4>].

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

Over the past few decades, DNA testing has become even more advanced, allowing an increasing number of defendants to prove their innocence.⁵⁸ Since 1989, there have been 375 DNA exonerations, including twenty-one DNA exonerations of people who had spent time on death row.⁵⁹

D. *The Innocence Project and the Innocence Network*

In 1992, Barry Scheck and Peter Neufeld founded “the Innocence Project as a legal clinic at Benjamin N. Cardozo School of Law.”⁶⁰ The Project was based on the principle that “[i]f DNA technology could prove people guilty of crimes, it could also prove that people who had been wrongfully convicted were innocent.”⁶¹ Scheck and Neufeld were impelled to create the Project based upon their work in the Marion Coakley case.⁶²

In 1985, Marion Coakley, a man with an IQ in the midseventies, was convicted of the rape and robbery of Irma Lopez despite witnesses testifying that Coakley was at a bible study meeting at the time of the crime.⁶³ Attorneys at the Bronx Defenders represented Coakley at trial.⁶⁴ When those attorneys learned that Coakley might include a claim of ineffective assistance of counsel in his appeal, they referred the case to Barry Scheck and Peter Neufeld, who were both alumni of the Bronx Defenders.⁶⁵

Scheck and Neufeld explored the possibility of using DNA evidence to try to exonerate Coakley, but “[t]he DNA tests were inconclusive, and the team was eventually able to prove Coakley innocent through other means.”⁶⁶ Nonetheless, the Coakley case led Scheck

⁵⁸ See John Shaw, Comment, *Exoneration and the Road to Compensation: The Tim Cole Act and Comprehensive Compensation for Persons Wrongfully Imprisoned*, 17 TEX. WESLEYAN L. REV. 593, 617 (2011).

⁵⁹ *Exonerate the Innocent*, INNOCENCE PROJECT, <https://www.innocenceproject.org/exonerate/> [<https://perma.cc/55A5-FX5V>].

⁶⁰ *Our Start*, INNOCENCE PROJECT, <https://25years.innocenceproject.org/start/> [<https://perma.cc/W32V-348X>].

⁶¹ *Id.*

⁶² *Id.*

⁶³ Rory O’Sullivan, *The Innocence Project: A Short History Since 1983*, BLACKPAST (Mar. 8, 2018), <https://www.blackpast.org/african-american-history/perspectives-african-american-history/innocence-project-short-history-1983/> [<https://perma.cc/82JU-GJX7>]; Hyungjoo Han, *Marion Coakley*, NAT’L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetailpre1989.aspx?caseid=59> [<https://perma.cc/J5AM-RXST>].

⁶⁴ O’Sullivan, *supra* note 63.

⁶⁵ *Id.*

⁶⁶ *DNA’s Revolutionary Role in Freeing the Innocent*, INNOCENCE PROJECT (Apr. 18,

and Neufeld to realize “the potential of DNA technology to reverse wrongful convictions.”⁶⁷

After the formation of the Innocence Project in 1992, a number of other groups and schools began organizations that were “dedicated to proving claims of innocence that had been almost impossible to prove without DNA.”⁶⁸ One of these schools was the Northwestern University School of Law, which “started the Center for Wrongful Convictions under their Bluhm Legal Clinic” in 1999.⁶⁹ The next year, the Innocence Project and the Center for Wrongful Convictions joined forces to form the Innocence Network,⁷⁰ which is currently a “coalition of organizations dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted, [and] working to redress the causes of wrongful convictions.”⁷¹ As of 2021, members of the Innocence Network have worked on over 190 DNA exonerations.⁷²

Although the initial Innocence Project at Cardozo began with a mere four staff members, “it has grown into a substantial and well-funded non-profit organization with more than fifty employees.”⁷³ Conversely, “many of the fifty-five U.S. innocence organizations that are Innocence Network members ‘are underfunded, understaffed, and overworked.’”⁷⁴ As an example, in 2016, I and my colleagues from the wrongful conviction podcast *Undisclosed* began working with the Georgia Innocence Project (“GIP”) on the case of Joey Watkins.⁷⁵ At the time, the GIP had one employee, was housed in a nail salon with no heat, internet, phone, or fax machine, and had one month’s operating expenses in the bank.⁷⁶

2018), <https://innocenceproject.org/dna-revolutionary-role-freedom/> [https://perma.cc/38X4-WRL4].

⁶⁷ *Id.*

⁶⁸ *Who We Are*, INNOCENCE NETWORK [hereinafter INNOCENCE NETWORK], <https://innocencenetwork.org/category/who-we-are> [https://perma.cc/TD29-YBY3].

⁶⁹ Mark A. Godsey & Thomas Pulley, *The Innocence Revolution and Our “Evolving Standards of Decency” in Death Penalty Jurisprudence*, 29 U. DAYTON L. REV. 265, 270 (2004).

⁷⁰ *Id.* at 271.

⁷¹ INNOCENCE NETWORK, *supra* note 68.

⁷² *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://innocenceproject.org/dna-exonerations-in-the-united-states/> [https://perma.cc/AM4T-6S5W].

⁷³ Marvin Zalman & James Windell, *The Bite Mark Dentists and the Counterattack on Forensic Science Reform*, 83 ALB. L. REV. 749, 805 (2019/20).

⁷⁴ *Id.* at 805–06.

⁷⁵ See *The State v. Joey Watkins Episodes*, UNDISCLOSED, <https://undisclosed-podcast.com/episodes/season-2/> [https://perma.cc/S283-9W99].

⁷⁶ See E-mail from Clare Gilbert, Exec. Dir., Georgia Innocence Project, to author (Dec. 18, 2018, 12:12 PM) (on file with author). In March 2020, the Supreme Court of Georgia held

In the same year that the Innocence Project and the Center for Wrongful Convictions formed the Innocence Network, Scheck, Neufeld, and Jim Dwyer published *Actual Innocence: Five Days to Execution and Other Dispatches From the Wrongly Convicted*.⁷⁷ In the book, the authors analyzed sixty-two of the first sixty-seven DNA exonerations the Innocence Project had produced and found nine factors that led to wrongful convictions: (1) eyewitness misidentifications; (2) police and prosecutorial misconduct; (3) perjury; (4) jailhouse snitches; (5) false confessions; (6) junk science; (7) ineffective assistance of counsel; (8) public outrage over heinous crimes; and (9) racial bias.⁷⁸ In a commentary that preceded the book, Scheck and Neufeld wrote that “in many respects the reasons for the conviction of the innocent in the DNA cases do not seem strikingly different than those cited by Yale Professor Edwin Borchard in his seminal work, *Convicting the Innocent*.”⁷⁹

E. The Special Responsibilities of a Prosecutor

There was a significant increase in the number of DNA and non-DNA exonerations between 1989 and 2003 as well as a specific spike between 2000 and 2003, when there was an average of forty-four exonerations per year.⁸⁰ During this 2000 to 2003 range, there was a spate of high-profile exonerations, including the exoneration of Steven Avery, which was later covered in the Netflix docuseries *Making a Murderer*.⁸¹

Avery had been convicted of the 1985 rape of Penny Ann Beerntsen, who was assaulted while jogging on the Lake Michigan shoreline near Two Rivers, Wisconsin.⁸² The jury found Avery guilty despite sixteen alibi witnesses placing Avery about forty miles away in Green

that Watkins’s jury misconduct and *Brady* claims in his successor habeas petition could move forward. See *Watkins v. Ballinger*, 840 S.E.2d 378 (Ga. 2020); see also *Brady v. Maryland*, 373 U.S. 83 (1963).

⁷⁷ JIM DWYER, PETER NEUFELD & BARRY SCHECK, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000).

⁷⁸ *Id.* at 246–59.

⁷⁹ Peter Neufeld & Barry C. Scheck, Commentary, *CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL*, at xxviii, xxx (1996).

⁸⁰ Kelly J. Minor, Note, *Prohibiting the Death Penalty for the Rape of a Child While Overlooking Wrongful Execution: Kennedy v. Louisiana*, 54 S.D. L. REV. 300, 320 n.231 (2009).

⁸¹ See Michael C. Griesbach, *Why Avery Matters*, 84 WIS. LAW., Mar. 2011, at 6, 54.

⁸² See Maurice Possley, *Steven Avery*, NAT’L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3003> [<https://perma.cc/4NKR-GP4T>].

Bay at a time that would have made it highly unlikely that he could have committed the crime.⁸³ In 2002, attorneys for the Wisconsin Innocence Project secured a court order authorizing DNA testing of thirteen pubic hairs recovered from Beerntsen at the crime scene.⁸⁴ That testing revealed that those hairs were a “match” for Gregory Allen, who was serving sixty years for a sexual assault that occurred after the attack on Beerntsen.⁸⁵ On September 11, 2003, the Manitowoc District Attorney’s Office and the Wisconsin Innocence Project filed a successful joint motion to dismiss the charges against Avery.⁸⁶

In response to high profile exonerations such as the one in the Steven Avery case, the American Bar Association amended Model Rule of Professional Conduct 3.8, which covers the special responsibilities of a prosecutor.⁸⁷ Previously, Rule 3.8 was solely concerned with preventing wrongful convictions on the front end, stating that a prosecutor shall do things such as refraining from prosecuting charges not based on probable cause, making sure an accused is advised of the right to counsel, and timely turning over material exculpatory evidence.⁸⁸

The effort to expand the focus of Rule 3.8 so that prosecutors were also obligated to remedy wrongful convictions on the back end began in 2006.⁸⁹ In that year, the Report of the Association of the Bar of the City of New York determined that

[i]n light of the large number of cases in which convicted defendants have been exonerated, most often as a result of DNA testing but also as a result of other proof that they were wrongfully convicted, it is appropriate to obligate prosecutors’ offices to give serious consideration and devote office resources to the consideration of credible post-conviction claims of innocence.⁹⁰

The Report proposed that “prosecutors have ethical responsibilities upon learning of new and material evidence that shows that it is

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See Griesbach, *supra* note 81, at 54.

⁸⁸ See MODEL RULES OF PRO. CONDUCT r. 3.8(a), (b), (d) (AM. BAR ASS’N 2008).

⁸⁹ See Stephen J. Saltzburg, *ABA Model Rules of Professional Conduct Special Responsibilities of a Prosecutor: 3.8(g) & (h)*, 37 SW. U. L. REV. 935, 938 (2008).

⁹⁰ NYC Bar Ass’n, Comm. on Pro. Resp., *Proposed Prosecutorial Ethics Rules*, 61 RECORD 69, 73 (2006), https://www2.nycbar.org/Publications/record/vol_61_no_1.pdf [<https://perma.cc/Q4YP-7FXU>].

likely that a convicted person was innocent.”⁹¹ Specifically, “[t]hese responsibilities include a duty to disclose the evidence [to the defense], to conduct an appropriate investigation, and, upon becoming convinced that a miscarriage of justice occurred, to take steps to remedy it.”⁹²

The New York State Bar Association and ultimately the American Bar Association adopted the Report’s findings.⁹³ As a result, in 2008, the ABA added Model Rules of Professional Conduct 3.8(g) and 3.8(h).⁹⁴ They state that

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor’s jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor’s jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.⁹⁵

In a letter recommending that the ABA adopt these Rules, Stephen J. Saltzburg, the Chair of the ABA Section of Criminal Justice, wrote that “[p]rosecutors’ offices have institutional disincentives to comport with these obligations and, as courts have recognized, their failures are not self-correcting by the criminal justice process.”⁹⁶ He

⁹¹ Saltzburg, *supra* note 89, at 938.

⁹² *Id.*

⁹³ *See id.* at 939.

⁹⁴ John S. Dzienkowski, *Ethical Decisionmaking and the Design of Rules of Ethics*, 42 HOFSTRA L. REV. 55, 69 (2013). Only nineteen states have adopted versions of Model Rules 3.8(g) and (h), so these obligations are only advisory in most states. *See* Bruce A. Green & Ellen Yaroshefsky, *Should Criminal Justice Reformers Care About Prosecutorial Ethics Rules?*, 58 DUQ. L. REV. 249, 259 (2020).

⁹⁵ MODEL RULES OF PRO. CONDUCT r. 3.8(g), (h) (AM. BAR ASS’N 2020).

⁹⁶ Saltzburg, *supra* note 89, at 939.

then expressed hope that “[c]odification of these obligations, which are meant to express prosecutors’ minimum responsibilities, will help counter these institutional disincentives.”⁹⁷

F. *The Rise of the Conviction Review Unit*

The addition of Rules 3.8(g) and (h) coincided with the dawn of the era of CIUs. A Conviction Review Unit (“CRU”) or CIU “conducts extrajudicial, fact-based review of secured convictions to investigate plausible allegations of actual innocence. A CRU is typically contained within a local prosecutor’s office.”⁹⁸ Essentially, “[t]he creation of a CRU is a public commitment by the [district attorney] to ensure the accuracy, and therefore the legitimacy—that is, the integrity—of all criminal convictions secured by the Office.”⁹⁹

While the ABA was deciding whether to adopt Rules 3.8(g) and (h) in 2007, Dallas County District Attorney Craig Watkins created the first CIU.¹⁰⁰ Initially helmed by prosecutor Mike Ware and then by prosecutor Patricia Cummings,¹⁰¹ the Dallas County CIU has produced thirty-seven exonerations,¹⁰² second only to the 147 exonerations issued by the Harris County (Houston) CIU, which was started in 2009.¹⁰³ Progressive Prosecutor Larry Krasner later hired Cummings in 2018 to helm Philadelphia’s reinvigorated CIU, which had

⁹⁷ *Id.*

⁹⁸ JOHN HOLLWAY, CONVICTION REVIEW UNITS: A NATIONAL PERSPECTIVE 2 (Apr. 2016), <https://www.law.upenn.edu/live/files/5522-cru-final> [https://perma.cc/2U7X-PYE7].

⁹⁹ *Id.* at 10.

¹⁰⁰ Meghan J. Ryan & John Adams, *Cultivating Judgment on the Tools of Wrongful Conviction*, 68 SMU L. REV. 1073, 1116 (2015); see also Chris McGreal, *Dallas Chief Prosecutor Craig Watkins Fights Injustice and Racism*, GUARDIAN (Apr. 20, 2010, 2:54 PM), <https://www.theguardian.com/world/2010/apr/20/dallas-prosecutor-craig-watkins-injustice> [https://perma.cc/DCX2-25N3]. Previously, the San Diego County District Attorney’s Office and the Santa Clara County District Attorney’s Office started proto-CRUs in 2000 and 2004. See Justin Brooks & Zachary Brooks, *Wrongfully Convicted in California: Are There Connections Between Exonerations, Prosecutorial and Police Procedures, and Justice Reforms?*, 45 HOFSTRA L. REV., Winter 2016, at 373, 389–90.

¹⁰¹ Jessica Pishko, *No County for Innocent Men*, D MAG. (May 15, 2018, 11:30 AM), <https://www.dmagazine.com/frontburner/2018/05/dallas-county-exonerations-innocent-conviction-integrity-unit/> [https://perma.cc/LFU6-L95M].

¹⁰² Dallas County CIU Exonerations, NAT’L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detail.aspx?View=%7bFAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7%7d&FilterField1=Group&FilterValue1=CIU&FilterField2=county_x0020_of_x0020_Crime&FilterValue2=Dallas [https://perma.cc/6NL9-N3ZW] (filter “County of Crime” by “Dallas”; then filter “Tags” by “CIU”).

¹⁰³ Harris County CIU Exonerations, NAT’L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/detail.aspx> [https://perma.cc/SQG2-V57M] (filter “County of Crime” by “Harris”; then filter “Tags” by “CIU”).

only issued three exonerations in its four years of existence.¹⁰⁴ With Cummings in charge, Philadelphia's CIU has produced twenty-three exonerations in the last four years.¹⁰⁵

There are currently ninety-one CRUs across the country, consisting of eighty-three countywide CRUs and eight statewide CRUs (six run by offices of six state Attorneys General, one run by a state Department of Justice, and one by the United States Attorney's Office for the District of Columbia).¹⁰⁶ The 2020 Annual Report by the National Registry of Exonerations refers to CRUs and Innocence Organizations ("IOs")—largely Innocence Network members—as "Professional Exonerators."¹⁰⁷ According to the Annual Report, there were 129 exonerations in 2020, with (1) sixty-one having CRU participation; (2) fifty-eight having IO participation; (3) eighty-four having either CRU or IO participation; and (4) thirty-five having CRU and IO cooperation.¹⁰⁸

One of the benefits of many CRUs is that they can secure relief for defendants who may not be able to obtain relief on their own. Three real world cases are instructive. First is the case of Theophalis Wilson, also known as "Binky." In 1989, "three young men—22-year-old Otis Reynolds, 19-year-old Gavin Anderson, and his 17-year-old brother, Kevin Anderson—were found murdered in separate locations of Philadelphia, Pennsylvania."¹⁰⁹ The court convicted seventeen-year-old Theophalis Wilson and others for the murders, in large part based on the testimony of James White, an alleged accomplice.¹¹⁰

¹⁰⁴ See Philadelphia County CIU Exonerations, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> [https://perma.cc/SQG2-V57M] (filter "County of Crime" by "Philadelphia"; then filter "Tags" by "CIU"); Christopher Moraff, *New Philadelphia DA Larry Krasner Hits Reset on the Office's Troubled Conviction Review Unit*, APPEAL (Feb. 15, 2018), <https://theappeal.org/new-philadelphia-da-larry-krasner-hits-reset-on-the-offices-troubled-conviction-review-unit-acc2c14412b4/> [https://perma.cc/Y9WQ-XC66].

¹⁰⁵ Philadelphia County CIU Exonerations, *supra* note 104.

¹⁰⁶ *Conviction Integrity Units*, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx> [https://perma.cc/H37Y-RR7L].

¹⁰⁷ NAT'L REGISTRY EXONERATIONS, 2020 ANNUAL REPORT (2021), <https://www.law.umich.edu/special/exoneration/Documents/2021AnnualReport.pdf> [https://perma.cc/2Q4V-ZA7H].

¹⁰⁸ *Id.* See generally *Bonus Episode—Theophalis Wilson*, UNDISCLOSED (Jan. 21, 2020, 12:12 PM), <https://omny.fm/shows/undisclosed/theophalis-wilson> [https://perma.cc/QD3U-96HQ] (describing the exoneration of Theophalis Wilson after Philadelphia's CIU began a comprehensive review of his case in 2018). Note that the 2020 Annual Report uses the term CIU, which is interchangeable with CRU.

¹⁰⁹ Maurice Possley, *Theophalis Wilson*, NAT'L REGISTRY EXONERATIONS (Feb. 3, 2020), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5668> [https://perma.cc/46B9-7DFK].

¹¹⁰ See *id.*

White claimed that Wilson and the others shot two of the victims in a van and threw their bodies out of the van while it was in motion.¹¹¹ By 2018 Wilson had exhausted his appeals, but the Philadelphia CIU began reviewing new evidence in the case, including (1) White's recantation of his testimony, and (2) an expert's conclusion that, from the physical evidence such as the lack of tears in the victims' clothes and the victims' blood flow patterns, it was impossible that they were thrown from a moving vehicle.¹¹² In January 2020, Wilson and the CIU filed joint stipulations of fact under Pennsylvania law to vacate Wilson's convictions, Judge Tracy Brandeis-Roman granted it, and Wilson was released.¹¹³

Second, there is the case of Willie Veasy, also known as "Pee Wee." In 1993, Willie Veasy was convicted of murdering John Lewis, also known as the "Jamaican," in North Philadelphia based on his confession and Denise Mitchell's eyewitness identification.¹¹⁴ By 2017, Veasy had filed two unsuccessful Post-Conviction Relief Act ("PCRA") petitions and sought to file a third Hail Mary PCRA petition that was likely procedurally barred.¹¹⁵ Around the same time, he also filed an application with the CIU seeking an exoneration based on evidence gathered by the Pennsylvania Innocence Project and the aforementioned *Undisclosed* podcast. The new evidence included (1) a statement by Mitchell that she was legally blind;¹¹⁶ (2) statements by Veasy's supervisors that he was working at a Houlihan's restaurant as a dishwasher at the time of the murder;¹¹⁷ (3) an expert's conclusion that Veasy's confession was likely a false confession;¹¹⁸ and (4) undis-

¹¹¹ *Id.*

¹¹² See *Bonus Episode—Theophalis Wilson*, *supra* note 108.

¹¹³ See *id.* at 32:41, 33:20; see also Samantha Melamed, *A 'Perfect Storm' of Injustice: Philly Man Freed After 28 years as DA Condemns 'Decades' of Misconduct*, PHILA. INQUIRER (Jan. 21, 2020), <https://www.inquirer.com/news/philadelphia-da-larry-krasner-conviction-integrity-unit-exoneration-theophalis-wilson-christopher-williams-20200121.html> [<https://perma.cc/B2VD-MSQG>].

¹¹⁴ Ken Otterbourg, *Willie Veasy*, NAT'L REGISTRY EXONERATIONS (Aug. 13, 2021), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5624> [<https://perma.cc/SF74-BM7E>].

¹¹⁵ See *Petition for Post-Conviction Relief Pursuant to 42 Pa. C.S. § 9541, et seq.*, Commonwealth v. Veasy, No. CP-51-CR-641521-1992 (Pa. C.P. Phila. Cnty. June 23, 2017).

¹¹⁶ See *The State v. Willie Veasy: Episode 4—Recantation*, UNDISCLOSED, at 08:59 (Nov. 13, 2017), <https://undisclosed-podcast.com/docs/willie-veasy/Veasy%20-%20Episode%204%20-%20Recantation.pdf> [<https://perma.cc/4Z8W-38AX>].

¹¹⁷ See *The State v. Willie Veasy: Episode 3—The Alibi*, UNDISCLOSED, at 21:49 (Nov. 6, 2017), <https://undisclosed-podcast.com/docs/willie-veasy/Veasy%20-%20Episode%203%20-%20The%20Alibi.pdf> [<https://perma.cc/YXD6-ZQFY>].

¹¹⁸ See *The State v. Willie Veasy: Episode 2—The Confession*, UNDISCLOSED, at 16:49, 17:13

closed documents regarding an alternate suspect.¹¹⁹ On October 1, 2019, the CIU filed an answer that effectively joined Veasy's third PCRA petition and asked that his conviction be vacated.¹²⁰ Eight days later, Judge Leon Tucker vacated Veasy's conviction.¹²¹

Third, there is the case of Joseph Webster. On November 22, 1998, someone killed Leroy Owens in Nashville, Tennessee by repeatedly striking him in the head with a cinder block.¹²² A jury eventually found Webster, who wears a mouth full of gold teeth, guilty of Owens's murder, largely based on a female eyewitness's identification.¹²³ When attorney Daniel Horwitz started representing him, Webster had exhausted his appeals, including a claim of ineffective assistance of trial counsel.¹²⁴ Webster then brought a petition for writ of error coram nobis, claiming that the State failed to disclose (1) a woman's statement that her ex-boyfriend—Webster's stepbrother—had bragged about committing the murder, and (2) statements by two male eyewitnesses giving physical descriptions of the assailant that did not match Webster's characteristics.¹²⁵

This petition likely would not have been successful because it turned out that this evidence had been disclosed to trial counsel, who simply failed to use it.¹²⁶ But before the court adjudicated the merits of the appeal, Horwitz filed a motion to put a pause on the petition while the Davidson County (Nashville) CRU considered the case.¹²⁷ Eventually, that CRU joined Horwitz's petition, recommending that the court vacate Webster's conviction based on evidence gathered by Horwitz, the Innocence Project, and the *Undisclosed* podcast, which demonstrated that (1) the stepbrother committed the murder; (2) Webster was not the source of DNA recovered from the cinder block; and (3) the female eyewitness likely misidentified Webster be-

(Oct. 30, 2017), <https://undisclosed-podcast.com/docs/willie-veasy/Veasy%20-%20Episode%202%20-%20The%20Confession.pdf> <https://perma.cc/UY8R-CRX7>.

¹¹⁹ See *id.* at 00:22.

¹²⁰ Otterbourg, *supra* note 114.

¹²¹ *Id.*

¹²² Ken Otterbourg, *Joseph Webster*, NAT'L REGISTRY EXONERATIONS (Nov. 30, 2020), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5865> [<https://perma.cc/QV3H-DFHL>].

¹²³ *Id.*

¹²⁴ See *id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Appellant's Notice of Voluntary Dismissal, *Webster v. Tennessee*, No. M2016-02309-CCA-R3-PC (Tenn. Ct. App. Mar. 31, 2017), <https://scotblog.org/wp-content/uploads/2018/07/Webster-Motion-to-Dismiss-Appeal.pdf> [<https://perma.cc/7KKN-9XVK>] (offering a court-mandated update on the status of the case).

cause she spoke to the assailant at close range and never mentioned that he had gold teeth.¹²⁸ Ultimately, on November 10, 2020 a judge granted the petition and dismissed the charges against Webster.¹²⁹ Although many CRUs and CIUs are prolific in obtaining exonerations, over half of them—fifty-one out of ninety-one total—have not issued a single exoneration since their inception.¹³⁰ Critics often derisively refer to these units as “CRINOs,” which stands for “Conviction Review In Name Only.”¹³¹ In other words, while one could conclude that these units simply found no wrongful convictions, there are concerns that they were simply created as publicity stunts to garner good press.¹³² The Quattrone Center, which studies CRUs, once wrote that “[a] CRINO is arguably worse than no CRU at all, since it not only retards the progress of criminal justice accuracy and reform, it makes the operation of sincere CRUs more difficult in other jurisdictions.”¹³³

G. *The CRU Roadblock*

Although CRINOs are an issue, a potentially larger issue involves CRUs that investigate old convictions, conclude that they were wrongful, and yet lack the power to rectify them. One example can be seen in the Lamar Johnson case referenced in the introduction. As noted, in 1995, Johnson was convicted of murdering his former friend Marcus Boyd.¹³⁴ After a deep dive into the case, Kimberly Gardner’s CIU issued a sixty-six-page report with eight key factual findings:

- (1) The State, through Assistant Circuit Attorney (ACA) Dwight Warren, failed to conduct a competent investigation into the death of Boyd and engaged in serious prosecutorial misconduct throughout the case;
- (2) The only eyewitness to the crime, [Greg] Elking, was paid to identify Johnson as one of the shooters. These payments, totaling more than \$4,000, as well as [the] State’s assistance

¹²⁸ See Otterbourg, *supra* note 122. See generally *State v. Joseph Webster Episodes*, UNDISCLOSED, <https://undisclosed-podcast.com/episodes/state-v-joseph-webster/> [https://perma.cc/8J8Y-Y5UB].

¹²⁹ Otterbourg, *supra* note 122. Notably, although the CRU was able to join Horwitz’s petition, it lacked the power to independently seek relief for Webster. In a subsequent case, after the CRU determined that Paul Shane Garrett had been wrongfully convicted of a murder, it could not file for his conviction to be tossed. Instead, the CRU had to get the Tennessee Innocence Project to represent Garrett so that it could file for relief on his behalf. See Telephone Interview with Sunny Eaton, Dir., Conviction Rev. Unit, Nashville Dist. Att’y’s Off. (Aug. 5, 2021).

¹³⁰ *Conviction Integrity Units*, *supra* note 106.

¹³¹ HOLLWAY, *supra* note 98, at 5.

¹³² *Id.*

¹³³ *Id.* at 19.

¹³⁴ See *supra* note 1 and accompanying text.

in the dismissal of numerous tickets were not disclosed to the defense;

(3) Elking told St. Louis Metropolitan Police Department (hereinafter “SLMPD”[]) officers repeatedly, and on multiple occasions, that Boyd was murdered at night by two African-American males wearing ski masks covering all facial features except their eyes, and that these facts prevented him from being able to make an identification. Elking was unable to identify the perpetrators from a lineup containing Johnson three times, and Elking was only able to make an identification after officers told him which number to choose. Nonetheless, the prosecution proceeded to trial. Elking’s inability to identify the assailants was exculpatory and impeaching evidence and was not disclosed to the defense;

(4) SLMPD officers engaged in a widespread falsification of witness statements to create motive evidence that did not exist. A thorough investigation revealed that these reports are false and witnesses deny making statements attributed to them in the police reports;

(5) The State failed to disclose material impeachment evidence concerning jailhouse informant William Mock’s (hereinafter “Mock”) extensive criminal history, drug history, past history as an informant for the State, and the extensive assistance provided to Mock by the State, as well as Mock’s racial animus toward African-Americans;

(6) The State failed to correct false and misleading testimony from State witnesses, misled the jury, and otherwise engaged in misconduct that violated Johnson’s constitutional rights;

(7) The actual perpetrators, Johnson’s co-defendant Campbell and another man James “BA” Howard (hereinafter “Howard”), credibly confessed to the shooting of Boyd in signed sworn affidavits, personal writings dating back to 1996, and in interviews with counsel for Johnson and the CIU. Letters from Campbell denying Johnson’s involvement were confiscated by and in the possession of the State, however, no action was taken to correct the wrongful conviction of Johnson; and,

(8) Johnson was tried before his co-defendant, Campbell. After Johnson[’s] trial, Campbell’s counsel discovered the full extent of Mock’s criminal history, which had not been disclosed to Johnson or his counsel. This evidence, along with Elking’s refusal to assist with the prosecution of Campbell, forced the State to reduce the charges against Campbell. As a result, Campbell—one of the true perpetrators—was given a deal wherein he pled guilty to a voluntary manslaughter

charge and received a sentence of seven years. As a result of errors outlined above, Johnson received a sentence of life without parole.¹³⁵

These factual findings led to the CIU's ultimate conclusion that "Johnson did not shoot Boyd and had nothing to do with Boyd's murder, and he should not be in prison for the crime."¹³⁶ The CIU noted that it was filing the report pursuant to the prosecutor's duty to rectify wrongful convictions under Model Rules of Professional Responsibility 3.8(g) and (h).¹³⁷ Gardner subsequently filed a motion for a new trial on behalf of Johnson.¹³⁸

The trial court, however, denied the motion, holding that (1) a prosecutor cannot file a motion for a new trial on behalf of a defendant; (2) a motion for a new trial must be filed within twenty-five days of the return of the verdict; and (3) there was no enabling legislation in Missouri authorizing CIUs to seek relief for wrongful convictions.¹³⁹ With regard to enabling legislation, the court contrasted Missouri with other states that allow for petitions for writs of actual innocence to be filed at any time, by any party.¹⁴⁰ The decision by the trial court was later affirmed by the state court of appeals¹⁴¹ and state supreme court.¹⁴²

Similarly, Kevin Strickland has served over forty-three years for his alleged involvement with three other men in a 1978 triple homicide in Jackson County, Missouri that also left Cynthia Douglas injured.¹⁴³ After a hung jury at his first trial, Strickland was convicted at a second

¹³⁵ JOHNSON REPORT, *supra* note 3, at 3–4.

¹³⁶ *Id.* at 45.

¹³⁷ *Id.* at 42–43.

¹³⁸ *See supra* note 5 and accompanying text.

¹³⁹ *See Order, supra* note 6, at 14–15.

¹⁴⁰ *See id.*

¹⁴¹ *See State v. Johnson*, No. ED 108193, 2019 WL 7157665 (Mo. Ct. App. Dec. 24, 2019).

¹⁴² *See State v. Johnson*, 617 S.W.3d 439 (Mo. 2021). I worked with State Senator Jamilah Nasheed on enabling legislation that would allow Gardner to file for a new trial on behalf of Johnson. *See* Colin Miller (@EvidenceProf), TWITTER (Jan. 8, 2020, 10:26 AM), <https://twitter.com/EvidenceProf/status/1214931496688963584> [<https://perma.cc/96FK-APQV>]. That legislation was put on pause during Johnson's appeal, but a similar bill recently passed that potentially could lead to relief for Johnson and Kevin Strickland, whose case is discussed *infra*. *See* Rebecca Rivas, *Pending Law to Correct Wrongful Convictions Could Depend on Missouri Attorney General*, MO. INDEP. (June 1, 2021, 7:59 AM), <https://missouriindependent.com/2021/06/01/pending-law-to-correct-wrongful-convictions-could-depend-on-missouri-attorney-general/> [<https://perma.cc/Y58V-MN3U>].

¹⁴³ *See* Angie Ricono, *Jailed Kansas City Man Innocent After 43 Years, Prosecutor and Legal Team Says*, KCTV5 (May 10, 2021), https://www.kctv5.com/news/investigations/jailed-kansas-city-man-innocent-after-43-years-prosecutor-and-legal-team-says/article_8fe1d582-b183-11eb-9f90-6b443970fb16.html [<https://perma.cc/6P77-6UCU>].

trial based largely on Douglas's eyewitness identification.¹⁴⁴ Douglas, however, has since recanted her identification, and Strickland's alleged accomplices have named a previously unidentified person as the fourth perpetrator of the crime.¹⁴⁵

In November 2020, Strickland's legal team submitted the case to the Jackson County Prosecutor's CIU.¹⁴⁶ After reviewing the case, the CIU "concluded in a letter that '[r]eliable, corroborated evidence now proves that Mr. Strickland is factually innocent [sic] of the charges for which he was convicted in 1979. In the interests of justice, Mr. Strickland's conviction should be set aside, he should be promptly released, and he deserves public exoneration.'"¹⁴⁷ Like Gardner, Jackson County Prosecuting Attorney Jean Peters Baker could not file an appeal; Strickland's team filed a petition for a new trial, which Baker could not join.¹⁴⁸ On June 2, 2021, the Supreme Court of Missouri denied the petition without explanation.¹⁴⁹

These types of issues are not limited to Missouri. On Wednesday, July 19, 1995, between 12:30 a.m. and 1:00 a.m., Jefferson County Deputy Sheriff William G. Hardy was fatally shot in the parking lot of a hotel in Birmingham, Alabama.¹⁵⁰ Ardragus Ford and Toforest Johnson were eventually prosecuted for the murder, with Ford's first trial ending in a hung jury and his second trial ending in an acquittal.¹⁵¹ Johnson's first trial also ended with a hung jury, but he was convicted after a second trial.¹⁵² The jurors convicted Johnson despite two alibi witnesses testifying that they saw Johnson at a night club on a Tuesday night or Wednesday morning in July 1995—probably July 18th and 19th—between 11:00 p.m. and 2:00 a.m.¹⁵³ Essentially, the only evi-

¹⁴⁴ See *id.*

¹⁴⁵ Press Release, Midwest Innocence Project, Jackson County Prosecutor States MIP & BCLP Client Kevin Strickland Is Actually Innocent (May 10, 2021), <https://themip.org/clients/kevin-strickland/> [https://perma.cc/C636-TED2].

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* (alteration in original).

¹⁴⁸ See *id.*

¹⁴⁹ See Luke X. Martin, *The Jackson County Prosecutor Says Kevin Strickland Is Innocent. Why Is He Still Behind Bars?*, KCUR 89.3 (June 2, 2021, 8:50 AM), <https://www.kcur.org/news/2021-06-01/the-jackson-county-prosecutor-says-kevin-strickland-is-innocent-why-is-he-still-behind-bars> [https://perma.cc/C5Y4-JEGW].

¹⁵⁰ *Johnson v. State*, 823 So. 2d 1, 9–10 (Ala. Crim. App. 2001).

¹⁵¹ See *With Newly Discovered Evidence of Prosecutorial Misconduct, Alabama Death-Row Prisoner Hopeful to Win New Trial*, DEATH PENALTY INFO. CTR. (Dec. 20, 2019), <https://deathpenaltyinfo.org/news/with-newly-discovered-evidence-of-prosecutorial-misconduct-alabama-death-row-prisoner-hopeful-to-win-new-trial> [https://perma.cc/866Y-E6VW].

¹⁵² *Id.*

¹⁵³ See *Johnson*, 823 So. 2d at 13. Both alibi witnesses testified "that Johnson was wearing a

dence connecting Johnson to the crime was a witness named Violet Ellison, who testified “that she had eavesdropped on a phone call in which someone she believed to be Johnson admitted to the shooting.”¹⁵⁴ Ellison’s testimony, however, “didn’t fit other evidence in the crime,” and the State allegedly failed to disclose that Ellison came forward seeking reward money and was in fact paid \$5,000 for her testimony.¹⁵⁵

In 2019, attorneys for Johnson filed an appeal, claiming, *inter alia*, that the State had committed a violation under *Brady v. Maryland*¹⁵⁶ by failing to disclose information about Ellison seeking and receiving a reward for her testimony.¹⁵⁷ Subsequently, on March 16, 2020, Jefferson County Circuit Judge Teresa Pulliam denied that motion, finding that Johnson had failed to prove prosecutorial misconduct.¹⁵⁸ Johnson then appealed, and his appeal has been supported by Jefferson County District Attorney Danny Carr,¹⁵⁹ who recently launched a CRU.¹⁶⁰ Although Carr lacked the ability to join Johnson’s appeal,¹⁶¹ he filed an amicus curiae brief stating, “[i]t is the district attorney’s position that in the interest of justice, Mr. Johnson, who has spent more than two decades on death row, be granted a new trial.”¹⁶² On

navy blue ‘Tommy Hilfiger’ brand shirt with stripes on the collar” at the night club, and Johnson was wearing that shirt in a mugshot that was “taken when [Johnson] was arrested in the early morning hours of July 19, 1995.” *Id.* That said, one of the alibi witnesses testified that she saw Johnson on the second Tuesday of July 1995, which would have been July 11 (into July 12), 1995. *Id.*

¹⁵⁴ Kyle Whitmire, *Whitmire: Give Toforest Johnson a New Trial. Or Better, a Pardon Now.*, AL.COM (Mar. 12, 2021, 9:22 AM), <https://www.al.com/news/2021/03/whitmire-give-toforest-johnson-a-new-trial-or-better-a-pardon-now.html> [https://perma.cc/6VJY-UVWE].

¹⁵⁵ *Id.*

¹⁵⁶ 373 U.S. 83 (1963).

¹⁵⁷ Beth Shelburne, *Hearing for Man on Alabama’s Death Row Seeking New Trial Ends With No Decision*, 6 WBRC (June 7, 2019, 2:00 PM), <https://www.wbrc.com/2019/06/07/hearing-man-alabamas-death-row-seeking-new-trial-ends-with-no-decision/> [https://perma.cc/W7ND-FZDY].

¹⁵⁸ See Beth Shelburne, *Jefferson County Judge Denies New Trial in Possible Wrongful Death Row Conviction*, 6 WBRC (Mar. 17, 2020, 9:13 PM), <https://www.wbrc.com/2020/03/18/jefferson-county-judge-denies-new-trial-possible-wrongful-death-row-conviction/>. [https://perma.cc/NGK2-CA6Z]

¹⁵⁹ Whitmire, *supra* note 154.

¹⁶⁰ Carol Robinson, *‘We Seek Justice’: Jefferson County District Attorneys to Tackle Wrongful Convictions*, AL.COM (Nov. 30, 2020, 2:24 PM), <https://www.al.com/news/birmingham/2020/11/we-seek-justice-jefferson-county-district-attorneys-to-tackle-wrongful-convictions.html> [https://perma.cc/V4L3-TPL7].

¹⁶¹ Alabama law contains no provision that allows prosecutors to file or join motions for new trials based on evidence of innocence or wrongful convictions.

¹⁶² Kim Chandler, *Alabama County’s DA Urges New Trial for Death Row Inmate*, AP

May 6th, 2022, the Alabama Court of Criminal Appeals ruled against Johnson.¹⁶³

The Lamar Johnson, Kevin Strickland, and Toforest Johnson cases are thus all examples of the CRU roadblock. The prosecutor who determined that Theophalis Wilson was wrongfully convicted was able to bring a successful motion for a new trial on behalf of a defendant who might not have been able to bring one on his own.¹⁶⁴ Additionally, the prosecutors in the Willie Veasy and Joseph Webster cases were able to get their convictions vacated by joining the defendants' filings, which likely would not have succeeded on their own.¹⁶⁵

Conversely, Kimberly Gardner was not able to move for a new trial on behalf of Lamar Johnson, and the prosecutors in the Kevin Strickland and Toforest Johnson cases were not able to join the defendants' appeals.¹⁶⁶ Thus, even though the prosecutors in all three cases believed that their office had secured a wrongful conviction, they have been unable to right these wrongs. Moreover, a majority of jurisdictions do not even have CIUs, so prosecutors in those jurisdictions have no way to investigate claims that people prosecuted by their office were wrongfully convicted. In the next Part, this Article delves into the history of the grand jury, the institution that can clear this CRU roadblock.

II. THE GRAND JURY AND THE GRAND JURY CLAUSE

A. *Introduction*

The grand jury might at first appear an odd choice as a tool for rectifying wrongful convictions given its current reputation as a rubber stamp for prosecutors pursuing criminal charges. This Part, however, traces the history of the grand jury, including its now largely dormant power to issue presentments on official misconduct and matters of public interest.

NEWS (June 13, 2020), <https://apnews.com/article/3ca98f9399f88188cc1542fabfb82082> [https://perma.cc/AF98-BCC5].

¹⁶³ See Beth Shelburne, *Alabama Appeals Court Rules Against High-Profile Death Row Prisoner*, 6 WBRC (May 8, 2022, 10:45 PM), <https://www.wbrc.com/2022/05/09/alabama-appeals-court-rules-against-high-profile-death-row-prisoner/> [https://perma.cc/R3QL-6Z9X].

¹⁶⁴ See *supra* notes 109–13 and accompanying text.

¹⁶⁵ See *supra* notes 115–17, 122–26 and accompanying text.

¹⁶⁶ See *supra* notes 139–42, note 148, note 161 and accompanying text.

B. *History of the Grand Jury*

The grand jury is an ancient institution whose progenitor pre-dates even the trial jury.¹⁶⁷ Its roots can be traced to the Norman Conquest¹⁶⁸ when William the Conqueror was dissatisfied with the practice of criminal accusations being “heard before ‘moots,’ a ‘town meeting kind of body’ which did not lend itself towards protecting the identity of the participants.”¹⁶⁹ William the Conqueror replaced these moots with “the practice of sending barons into villages where they summoned ‘important men from the neighborhood,’ who were placed under oath and questioned primarily about financial affairs, but criminal matters as well.”¹⁷⁰

A century after the Norman Conquest, “King Henry II established a series of statutory enactments—known as assizes—that broadened William the Conqueror’s use of neighborhood men into a criminal investigatory body.”¹⁷¹ Specifically, in 1166, King Henry II issued the Assize of Clarendon, which created what was known as the accusing jury by ordering that “in every county and in every hundred the twelve most lawful men of each hundred and the four most lawful men of each vill should be sworn to present any man who was suspected of serious crime either to the King’s Justice or to the sheriff.”¹⁷²

The use of the word “present” in the Assize of Clarendon referred to one product of an accusing jury’s deliberations: the presentment.¹⁷³ A presentment was an allegation by the accusing jury that someone had committed a crime based on “their own knowledge or observation, without any bill of indictment laid before them at the suit of the king.”¹⁷⁴ In turn, this definition explains the second product of

¹⁶⁷ See Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 7–8 (2002) (“The trial jury itself is a direct descendant of the grand jury in both an ideological and an institutional sense, since the institution of the trial jury evolved out of the grand jury over six hundred years ago.”).

¹⁶⁸ See Richard H. Kuh, *The Grand Jury “Presentment”: Foul Blow or Fair Play?*, 55 COLUM. L. REV. 1103, 1106 (1955) (noting that historians have found “institutions analogous to the indicting jury in various cultures antedating the Norman conquest, although no actual link has been established between any of these pre-Norman bodies and the grand jury”).

¹⁶⁹ *Commonwealth v. Dupont*, 9 Mass. L. Rptr. 1, 10 (Super. Ct. 1998).

¹⁷⁰ *Id.*

¹⁷¹ Brian R. Gallini, *Bringing Down a Legend: How an “Independent” Grand Jury Ended Joe Paterno’s Career*, 80 TENN. L. REV. 705, 737 (2013).

¹⁷² *Id.* (emphasis omitted) (quoting THEODORE FRANK THOMAS PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 88 (5th ed. 2011)).

¹⁷³ *Id.*

¹⁷⁴ 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 298 (Robert Bell ed., 1772).

an accusing jury's deliberations: the indictment.¹⁷⁵ If the King believed that someone committed a crime, he would send a bill of indictment to the accusing jury, which would issue a "true bill" endorsing the indictment (or assert "not found" if rejecting it).¹⁷⁶

If an accusing jury issued a presentment or a true bill/indictment, the accused could then defend himself by swearing to his denial and submitting to an "ordeal by water, wherein the accused was slowly lowered by rope into a body of water."¹⁷⁷ If the accused floated, he was found guilty, and his punishment was the loss of one of his feet and his right hand as well as banishment.¹⁷⁸ Meanwhile, if the accused sank, he was declared innocent, but, even if he could be resuscitated after being pulled out of the water, he was still banished.¹⁷⁹ Therefore, an accusing jury's accusation "was equivalent to banishment, at least."¹⁸⁰

Finally, in 1215, King John abolished ordeal by water¹⁸¹ and created the right to trial by jury in the Magna Carta.¹⁸² In pertinent part, the Magna Carta provided that "[n]o freeman shall be hurt in either his person or property, unless by lawful judgment of his peers or equals, or by the laws of the land."¹⁸³ The number of trial jurors was twelve, the same as the number of jurors on the accusing jury, and "[m]embers of the accusing jury often were placed on the trial jury."¹⁸⁴

If the King was angered by the accusing jury's failure to return a true bill, he could fine or imprison its members.¹⁸⁵ Based on the recognition that accusing jurors might be under the sway of the Crown, defendants were eventually allowed to prevent accusing jurors from

¹⁷⁵ See *United States v. Cox*, 342 F.2d 167, 187–88 (5th Cir. 1965) (Wisdom, J., concurring).

¹⁷⁶ *Id.*

¹⁷⁷ Kuh, *supra* note 168, at 1107 n.14.

¹⁷⁸ See *id.*; see also *Hurtado v. California*, 110 U.S. 516, 529–30 (1884).

¹⁷⁹ *Hurtado*, 110 U.S. at 529–30.

¹⁸⁰ *Id.*

¹⁸¹ Theodore M. Kranitz, *The Grand Jury: Past-Present-No Future*, 24 MO. L. REV. 318, 320 (1959).

¹⁸² See *State v. Ellis*, 120 N.E. 218, 219 (Ohio 1918).

¹⁸³ *Id.*

¹⁸⁴ Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103, 108 n.48 (1992).

¹⁸⁵ George Edward Dazzo, *Opening the Door to the Grand Jury: Abandoning Secrecy for Secrecy's Sake*, 3 D.C. L. REV. 139, 143 n.28 (1995) ("Grand jurors who did not vote to find the accused guilty angered the King and could be fined, imprisoned, or both."); see also *State v. Vinegra*, 376 A.2d 150, 156–57 (N.J. 1977) (Hughes, C.J., dissenting) ("In 1667 a court held that grand jurors ought not be fined or imprisoned for failure to return a true bill desired by the King.").

serving as trial jurors upon objection.¹⁸⁶ Later, in 1352, under the reign of King Edward III, legislators enacted a per se prohibition on accusing jurors serving as trial jurors, “thus giving rise to two juries, the accusers and the triers.”¹⁸⁷ Thereafter,

when one of the king’s traveling justices arrived to hear disputes, the local sheriff would choose twelve men from the immediate surrounding community to serve as jurors, and then would select an additional group of twenty-four men (usually knights) from a larger area to serve a[s] an accusing body for the entire county.¹⁸⁸

This additional group, which was later reduced to twenty-three men,¹⁸⁹ came to be known as the “grand jury” because it was larger in number than the trial jury.¹⁹⁰

During the first five hundred years of its existence, the accusing/grand jury “served exclusively as a sword for the Crown to consolidate power and to prosecute suspected lawbreakers.”¹⁹¹ Then, in 1681, the grand jury began to assume a new role “as the protector of an accused against an overzealous prosecutor.”¹⁹² In that year, two London grand juries refused to indict the Earl of Shaftesbury and his follower Stephen Colledge, supporters of the Protestant cause who were accused of treason by King Charles II.¹⁹³ These cases led to the concept of grand jury secrecy, which “insulated the jurors from the pressures of the Crown and permitted the grand jury to guard the people against the oppressive power of autocratic government.”¹⁹⁴

As grand juries gained independence from the Crown, they “began to act ‘as a sort of “third estate” of the shire, or county “House of Commons,” giving the opinion of the county on matters of public concern.”’¹⁹⁵ To achieve that purpose, “[t]he presentment, originally a

¹⁸⁶ See Kranitz, *supra* note 181, at 320.

¹⁸⁷ Charles S. Potts, *Criminal Procedure from Arrest to Appeal: A Book Review*, 26 TEX. L. REV. 607, 621–22 (1948) (reviewing LESTER BERNHARDT ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* (1947)).

¹⁸⁸ Commonwealth v. Dupont, No. CRIM. A. 85-981-987, 1998 WL 559694, at *16 (Mass. Super. Ct. Aug. 28, 1998).

¹⁸⁹ See Kranitz, *supra* note 181, at 320.

¹⁹⁰ See *Grand Jury*, BLACK’S LAW DICTIONARY 855 (6th ed. 1990).

¹⁹¹ Barry Jeffrey Stern, *Revealing Misconduct by Public Officials Through Grand Jury Reports*, 136 U. PA. L. REV. 73, 83 (1987).

¹⁹² Simmons, *supra* note 167, at 8.

¹⁹³ Stern, *supra* note 191, at 83–84.

¹⁹⁴ *In re Russo*, 53 F.R.D. 564, 568–69 (C.D. Cal. 1971); see also JoEllen Lotvedt, Note, *Availability of Civil Remedies Under the Grand Jury Secrecy Rule*, 47 CATH. U. L. REV. 237, 240 n.14 (1997).

¹⁹⁵ Stern, *supra* note 191, at 84.

form of criminal accusation, was adapted by the grand jury to report publicly on a variety of noncriminal subjects.”¹⁹⁶ Eventually, grand juries began issuing presentments on issues ranging from misconduct by public officials to the failure to properly maintain bridges and prisons.¹⁹⁷ Indeed, the use of the presentment was “so routine that parliament provided that no money was to be spent on the repair of bridges, jails, prisons, or houses of correction unless the need was first established by a grand jury presentment.”¹⁹⁸

The British subsequently exported this expanded version of the grand jury, “with the elements of secrecy and independence,”¹⁹⁹ to colonial America.²⁰⁰ In the criminal realm, “[m]any state constitutions drafted in the first decades after the Revolution assumed the existence of grand juries, while a few explicitly mentioned or protected grand juries.”²⁰¹ Thereafter, “[v]irtually every state admitted to the Union during its first three decades included a constitutional guarantee of grand jury indictment [or presentment] in serious criminal cases.”²⁰² More generally, though, “[t]he state grand jury was defended . . . as a method of furthering popular control over government.”²⁰³ Specifically, in addition to investigating criminal behavior, “[g]rand juries acted in the nature of local assemblies: making known the wishes of the people, proposing new laws, protesting against abuses in government, performing administrative tasks, and looking after the welfare of their communities.”²⁰⁴ Colonial grand juries would investigate and issue presentments on misconduct by public officials, “ensuring that the official’s conduct would come under public review.”²⁰⁵

C. *The Grand Jury Clause*

The original draft of the United States Constitution did not reference the grand jury, presentments, or indictments.²⁰⁶ The drafters of

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 84 n.31.

¹⁹⁹ Lotvedt, *supra* note 194, at 240 n.14.

²⁰⁰ Stern, *supra* note 191, at 84.

²⁰¹ Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 ADMIN. L. REV. 465, 475 (1992).

²⁰² *Id.* at 476.

²⁰³ *Id.*

²⁰⁴ RICHARD D. YOUNGER, *THE PEOPLE’S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634–1941*, at 2 (1963).

²⁰⁵ Stern, *supra* note 191, at 85.

²⁰⁶ See Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Com-*

the Constitution, though, did include the Criminal Trial Jury Clause in Article III, Section 2 of the Constitution.²⁰⁷ It states that

[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.²⁰⁸

James Madison proposed rights amendments to the Constitution, including amendments to this Clause that would have explicitly stated several rights, including the right of an accused not to be subjected to a jury trial “in all crimes punishable with loss of life or member” until after a “presentment or indictment by a grand jury.”²⁰⁹

The House of Representatives, however, opposed the idea of altering the language of the Constitution “and instead decided to set out the rights amendments in a ‘supplementary’ format.”²¹⁰ At the urging of the Anti-Federalists,²¹¹ this supplementary format ultimately became the Bill of Rights, with the pertinent portion of Madison’s proposal becoming the Grand Jury Clause of the Fifth Amendment.²¹² That Clause states that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.”²¹³

There was little discussion of the grand jury generally during ratification in 1791,²¹⁴ but the Supreme Court has since interpreted infamous crimes as felonies, i.e., crimes with a maximum punishment of more than one year incarceration.²¹⁵ Perhaps the reason that there was little discussion of the grand jury was the fact that there was little dis-

mon-Law Warrantless Arrest Standards and the Original Meaning of “Due Process of Law”, 77 MISS. L.J. 1, 139 (2007).

²⁰⁷ See *id.*

²⁰⁸ U.S. CONST. art. III, § 2.

²⁰⁹ Davies, *supra* note 206, at 139, 142 n.457.

²¹⁰ *Id.* at 140.

²¹¹ Wright, *supra* note 201, at 476.

²¹² See Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398, 411–12 (2006).

²¹³ U.S. CONST. amend. V.

²¹⁴ Fairfax, *supra* note 212, at 412 (“There is little discussion in the ratification debates regarding the grand jury generally and virtually no discussion of the relationship of grand jury indictment to jurisdiction.”).

²¹⁵ See *Ex parte Wilson*, 114 U.S. 417, 429 (1885). The infamous crime is likely derived from the “infamia” under Roman Law. See *United States v. Cox*, 342 F.2d 167, 187 (5th Cir. 1965) (Wisdom, J., concurring).

pute about the scope of its powers.²¹⁶ Even though the Grand Jury Clause was an anti-Federalist initiative,²¹⁷ James Wilson, a Federalist, one of the most influential drafters of the Constitution and an Associate Justice of the Supreme Court, said the following about the grand jury in 1791:

It has been alleged, that grand juries are confined, in their inquiries, to the bills offered to them, to the crimes given them in charge, and to the evidence brought before them by the prosecutor. But these conceptions are much too contracted: they present but a very imperfect and unsatisfactory view of the duty required from grand jurors, and of the trust reposed in them. They are not appointed for the prosecutor or for the court: they are appointed for the government and for the people: and of both the government and people it is surely the concernment, that, on one hand, all crimes, whether given or not given in charge, whether described or not described with professional skill, should receive the punishment, which the law denounces; and that, on the other hand, innocence, however strongly assailed by accusations drawn up in regular form, and by accusers marshalled in legal array, should, on full investigation, be secure in that protection, which the law engages that she shall enjoy inviolate.[]

The oath of a grand juryman—and his oath is the commission, under which he acts—assigns no limits, except those marked by diligence itself, to the course of his inquiries: why, then, should it be circumscribed by more contracted boundaries? Shall diligent inquiry be enjoined? And shall the means and opportunities of inquiry be prohibited or restrained? The grand jury are a great channel of communication, between those who make and administer the laws, and those for whom the laws are made and administered. All the operations of government, and of its ministers and officers, are within the compass of their view and research. They may suggest public improvements and the modes of removing public inconveniences: they may expose to public inspection, or to public punishment, public bad men, and public bad measures.²¹⁸

²¹⁶ See Fairfax, *supra* note 212, at 412.

²¹⁷ See *id.* at 411–12.

²¹⁸ *In re Phila. Cnty. Grand Jury*, April 1943, 32 A.2d 199, 208–09 (Pa. 1943) (Maxey, C.J., dissenting) (citations omitted).

D. The Demise of the Grand Jury Presentment

In the early nineteenth century, the preliminary hearing developed as an alternate mechanism for determining whether there was sufficient evidence to take a criminal defendant to trial.²¹⁹ Unlike grand jury proceedings, which are private, prosecutorial proceedings held before lay jurors, preliminary hearings are “public, adversary proceedings” held before magistrate judges.²²⁰ Many thus came to see grand jury proceedings “as ‘costly, slow, amateur, and prone to error,’ not to mention secretive and unfair, given the defendant’s lack of representation at the proceedings.”²²¹

Beginning in the 1850s, these criticisms led some states to abandon the requirement of a presentment or indictment for felony prosecutions and instead allow for felony prosecutions by information, a charging document that does not require grand jury approval.²²² This led to the question of whether the Fifth Amendment requirement of a grand jury presentment or indictment for felony prosecutions applied to the states through the incorporation doctrine.

The United States Supreme Court ultimately resolved this issue in its 1884 opinion in *Hurtado v. California*.²²³ In *Hurtado*, Joseph Hurtado was charged via information, not given a grand jury proceeding, convicted of first-degree murder, and sentenced to the death penalty.²²⁴ After he was convicted, Hurtado appealed, challenging the constitutionality of Article 1, Section 8 of the California Constitution, which stated that:

Offences heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law. A grand jury shall be drawn and summoned at least once a year in each county.²²⁵

According to *Hurtado*, this section violated the Fifth Amendment Grand Jury Clause, which he claimed was made applicable to the states through the incorporation doctrine under the Fourteenth Amendment.²²⁶ The Supreme Court disagreed. It held that (1) the

²¹⁹ See *State v. Christiansen*, 2015 UT 74, ¶ 17, 365 P.3d 1189, 1192.

²²⁰ *Id.*

²²¹ *Id.* ¶ 17, 365 P.3d at 1192–93.

²²² See *id.* ¶ 18, 365 P.3d at 1193.

²²³ 110 U.S. 516 (1884).

²²⁴ *Id.* at 518.

²²⁵ *Id.* at 517, 519.

²²⁶ See *id.* at 519–20.

Fifth Amendment's Grand Jury Clause and its Due Process Clause—"No person shall be . . . deprived of life, liberty, or property, without due process of law"—are distinct clauses; (2) the Fourteenth Amendment merely references due process—"[n]or shall any State deprive any person of life, liberty, or property, without due process of law"—but not grand jury presentments or indictments; and (3) "due process of law" in the Fourteenth Amendment thus "was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any [state felony] case."²²⁷

Therefore, the Fifth Amendment to the United States Constitution does not require state prosecutors to procure grand jury approval before taking defendants to trial on felony charges. That said, under state constitutional or statutory provisions, every state still uses grand juries as a required or permissive procedure "for initiating a criminal prosecution or 'as an investigative tool.'"²²⁸ Specifically, in the wake of *Hurtado*: (1) twenty-three states require a grand jury indictment for serious crimes; (2) twenty-five states, including California, allow for either prosecution by indictment or information; and (3) two states allow prosecutors to "utilize the grand jury for investigative purposes only."²²⁹

Conversely, "in the overwhelming majority of jurisdictions presentments are no longer a part of the machinery in indicting one for a crime."²³⁰ The current death of grand jury presentments in the criminal charging context can be traced back to the same general time period when *Hurtado* was decided. After the Civil War, commentators questioned the use of presentments to instigate felony prosecutions due to (1) increased skepticism "of the grand jury's knowledge of community affairs as populations grew," and (2) doubts about "whether the grand jury could independently understand increasingly complex laws and investigatory techniques."²³¹ These questions led to a sharp decline in the use of grand jury presentments, with the Supreme Court recognizing in 1906 in *Hale v. Henkel*²³² that "presentments have largely fallen into disuse in this country."²³³

²²⁷ *Id.* at 520, 534–35.

²²⁸ Bennett L. Gershman, *The "Perjury Trap"*, 129 U. PA. L. REV. 624, 630 n.16 (1981).

²²⁹ Nicole Smith Futrell, *Visibly (Un)Just: The Optics of Grand Jury Secrecy and Police Violence*, 123 DICK. L. REV. 1, 5 n.8 (2018).

²³⁰ *Stoots v. State*, 325 S.W.2d 532, 536 (Tenn. 1959).

²³¹ Gallini, *supra* note 171, at 742.

²³² 201 U.S. 43 (1906), *overruled on other grounds by* *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964).

²³³ *Id.* at 61.

The Federal Rules of Criminal Procedure finally declared the presentment a dead letter in the federal criminal charging context in 1946. Federal Rule of Criminal Procedure 7(a)(1) states that “[a]n offense (other than criminal contempt) must be prosecuted by an indictment if it is punishable: (A) by death; or (B) by imprisonment for more than one year.”²³⁴

Meanwhile, the accompanying Advisory Committee’s Note to the Rule pointed out that “[p]resentment is not included as an additional type of formal accusation, since presentments as a method of instituting prosecutions are obsolete, at least as concerns the Federal courts.”²³⁵

The decline in the use of presentments to institute prosecutions roughly coincided with the decline in the use of presentments to report on official misconduct and matters of public concern. In 1903, a New York grand jury in Nassau County made a presentment to a court “in which the board of supervisors [of Nassau County] and two men who had acted as clerks of the board were censured for not performing the duties of their respective offices in a manner to meet the approval of the grand jury.”²³⁶ The individuals who were censured thereafter moved to quash the presentment.²³⁷ In a majority opinion by Justice Almet F. Jenks denying the motion to quash in 1905, the court held that the presentment was a proper exercise of the grand jury’s inquisitorial powers.²³⁸ Justice Jenks then added, “I do not think that a presentment as a report upon the exercise of inquisitorial powers must be stricken out if it incidentally point[s] out that this or that public official is responsible for omissions or commissions, negligence or defects.”²³⁹

The dissenting opinion of Justice John M. Woodward, however, was much more influential. According to Justice Woodward, “[t]here are two great purposes [of the grand jury]—one to bring to trial those who are properly charged with crime, the other to protect the citizen against unfounded accusation of crime.”²⁴⁰ Therefore, “[w]hen the grand jury goes beyond this, and attempts to set up its own standards, and to administer punishment in the way of public censure, it is de-

²³⁴ FED. R. CRIM. P. 7(a)(1).

²³⁵ FED. R. CRIM. P. 7(a)(1) advisory committee’s note.

²³⁶ *In re Jones*, 92 N.Y.S. 275, 277 (Sup. Ct. 1905) (Woodward, J., dissenting), *appeal dismissed*.

²³⁷ *Id.*

²³⁸ *Id.* at 276 (majority opinion).

²³⁹ *Id.* at 277.

²⁴⁰ *Id.* at 279 (Woodward, J., dissenting).

feating the very purposes it was intended to conserve; and its action cannot, therefore, be lawful.”²⁴¹

Justice Woodward’s dissent “was the first judicial pronouncement” that presentments alleging misconduct by public officials are quasi-criminal charges that lead to condemnation “without trial, the opportunity to be heard, or the right to assert [a] defense.”²⁴² Over the next half century, courts across the country widely cited his dissent to quash grand jury presentments accusing specific public officials of misconduct.²⁴³ As one court observed after declaring Justice Woodward’s dissent “a convincing and sound argument,”

A presentment is a foul blow. It wins the importance of a judicial document; yet it lacks its principal attributes—the right to answer and to appeal. It accuses, but furnishes no forum for a denial. No one knows upon what evidence the findings are based. An indictment may be challenged—even defeated. The presentment is immune. It is like the ‘hit and run’ motorist. Before application can be made to suppress it, it is the subject of public gossip. The damage is done. The injury it may unjustly inflict may never be healed.²⁴⁴

Therefore, “[p]resentments have become disfavored as a means of revealing official misconduct without initiating a prosecution” because they are seen as public, quasi-criminal allegations against individuals who cannot rebut them in court.²⁴⁵

In light of these issues, twenty-nine states have recognized a separate statutory or judicial authority for grand juries to issue reports of varying breadth on their observations.²⁴⁶ In some of these twenty-nine states, grand juries have broad authority to issue reports “on matters affecting the ‘public welfare’ or ‘public interest.’”²⁴⁷ Conversely, in another subset of these twenty-nine states, grand juries are only author-

²⁴¹ *Id.*

²⁴² J. Hadley Edgar, Jr., Comment, *The Propriety of the Grand Jury Report*, 34 TEX. L. REV. 746, 749 & n.21 (1956).

²⁴³ See Kuh, *supra* note 168, at 1110 (“Although the majority of the court affirmed the denial of a motion to set aside and quash a report, the dissent has been heavily relied upon by subsequent decisions in New York and elsewhere quashing reports.”); Note, *The Grand Jury as an Investigative Body*, 74 HARV. L. REV. 590, 594 n.29 (1961) (“The most widely cited opinion opposing reports is the dissent in *In the Matter of Jones*.”).

²⁴⁴ *People v. McCabe*, 266 N.Y.S. 363, 366–67 (Sup. Ct. 1933).

²⁴⁵ *In re Grand Jury Proceedings*, 813 F. Supp. 1451, 1463 (D. Colo. 1992).

²⁴⁶ SARA SUN BEALE, WILLIAM C. BRYSON, TAYLOR H. CRABTREE, JAMES E. FELMAN, MICHAEL J. ELSTON & KATHERINE EARLE YANES, *GRAND JURY LAW AND PRACTICE* § 2:2 (2d ed. 1997 & Supp. 2011).

²⁴⁷ *Id.*

ized to report “on a few specific topics [that] are authorized by statute.”²⁴⁸ Meanwhile, “[i]n the remaining states, the grand jury has no clear statutory or judicial authority to issue reports.”²⁴⁹

In some jurisdictions, courts have held that grand juries retain the historical power of presentment in addition to this new authority to report. For example, in *In re Presentment by Camden County Grand Jury*,²⁵⁰ an attempted jail break led to a grand jury investigation and the issuance of a “report” to an assignment judge about “irregularities at the jail.”²⁵¹ After the assignment judge denied a motion to expunge the report, the sheriff in charge of the jail appealed.²⁵² In denying that appeal, a New Jersey appellate court held that “[t]he document in question, although called a ‘report’ by the grand jury, is treated by the appellant as a presentment, and properly so.”²⁵³ According to the court, “although criminal presentments have vanished, the term, ‘presentment by a grand jury,’ has also been employed for centuries to designate the findings of a grand jury with respect to derelictions in matters of public concern, particularly of officials, which may fall short of being criminal offenses.”²⁵⁴

Conversely, in some jurisdictions, courts have held that grand juries have no independent authority to issue presentments and that they can only issue reports under this new statutory or judicial authority. For example, the United States District Court for the District of Colorado has held that “[t]he grand jury document labelled as a ‘presentment’ can no longer be called, strictly speaking, a presentment. It is a *report*.”²⁵⁵ The court collapsed this dichotomy due to its assertion that “[t]he distinction between a presentment and a report is that only the latter is governed by standards which aim to soften foul blows, and grand juries may no longer issue documents failing those standards.”²⁵⁶

Missouri, the home of the Lamar Johnson and Kevin Strickland cases, provides a pertinent example. Missouri’s first and second state constitutions both contained provisions that required a grand jury presentment or indictment before a prosecutor could take a defendant to

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ 89 A.2d 416 (N.J. 1952).

²⁵¹ *Id.* at 417–18.

²⁵² *Id.* at 422.

²⁵³ *Id.* at 423.

²⁵⁴ *Id.*

²⁵⁵ *In re Grand Jury Proceedings*, 813 F. Supp. 1451, 1463 (D. Colo. 1992).

²⁵⁶ *Id.*

trial on certain criminal charges.²⁵⁷ Like California, Missouri subsequently amended its state constitution to allow for criminal prosecutions based on indictment or information, eliminating the presentment as part of the criminal charging context.²⁵⁸

Missouri has also enacted statutes detailing the grand jury's power to issue reports, creating the question of whether Missouri grand juries retain the common law power to issue presentments on public officials and matters of public concern. This question came to a head in *In re Interim Report of Grand Jury Convened for March Term of Seventh Judicial Circuit of Missouri 1976*.²⁵⁹ In that case, the planning director and zoning enforcement officer of the Clay County Planning and Zoning Commission moved to expunge a grand jury's interim report censuring him.²⁶⁰ The director argued that

a grand jury should either indict or be quiet; that public policy and concepts of fair play require that it do one or the other, because a person accused by indictment is afforded an opportunity to refute the charge by answer and to present his defense at a trial, but where the accusation is by report he is denied that opportunity.²⁶¹

The Supreme Court of Missouri assumed “that at common law a grand jury had the duty and the authority to report the results of its investigation of the official acts of officers having charge of public funds.”²⁶² But the court then noted that Missouri statutory provisions currently only grant grand juries the power to (1) issue indictments, and (2) examine and report on the condition of public buildings.²⁶³ The court then inferred “that the general assembly intended that the common law applicable to grand juries be superseded by these statutes.”²⁶⁴ This inference made the grand jury's interim report unlawful because “[t]here is simply no basis in the statute for assuming that the legislature intended to empower a grand jury to report the result of its investigation where that result disclosed that there was not sufficient grounds for indictment.”²⁶⁵ As such, the court held that “[t]he report

²⁵⁷ See *Blair v. Ridgely*, 41 Mo. 63, 81–82 (1867); *State v. Ledford*, 3 Mo. 102, 103–04 (1832).

²⁵⁸ See MO. CONST. art. I, § 17.

²⁵⁹ 553 S.W.2d 479 (Mo. 1977).

²⁶⁰ *Id.* at 479.

²⁶¹ *Id.* at 480.

²⁶² *Id.* at 481.

²⁶³ *Id.* at 482.

²⁶⁴ *Id.* at 481.

²⁶⁵ *Id.* at 482.

filed in this case should be expunged from the record because it is not authorized by law, and because it is a quasi-official accusation of misconduct which movant is precluded from answering in an authoritative forum.”²⁶⁶

E. *Grand Jury as Rubber Stamp*

With the presentment power largely falling into disuse, most grand juries now simply process indictments, serving as rubber stamps for prosecutors.²⁶⁷ The indictment process typically plays out across one of two timelines: (1) a prosecutor brings a criminal complaint against a criminal defendant and then a bill of indictment before the grand jury, which has to confirm or dispel the prosecutor’s claim of probable cause through a “true bill” or “no true bill”; or (2) a prosecutor thinking of charging a defendant beta tests her case before a grand jury with a bill of indictment that results in a “true bill” and then criminal charges or a “no true bill.”²⁶⁸

For decades, there have been questions about whether the modern grand jury continues to carry out its core mission of clearing the innocent. As noted, in 1985, Court of Appeals of New York Chief Justice Sol Wachtler famously said that “a Grand Jury would indict a ‘ham sandwich,’”²⁶⁹ and that statement is now more true than ever. In the last year with complete data from the Bureau of Justice Statistics—2010—U.S. attorneys prosecuted more than 162,000 federal cases, and grand juries issued no true bills in only eleven of them.²⁷⁰ Although there is no comprehensive data on state jury indictment rates, it is exceedingly rare for state grand juries to return no true bills.

²⁶⁶ *Id.*

²⁶⁷ See, e.g., *In re* April 1977 Grand Jury Subpoenas, 584 F.2d 1366, 1385 (6th Cir. 1978) (“They claim the grand jury no longer serves any protective function and that the minuscule percentage of ‘no bills’ reflects reality: that the grand jury is only a rubber stamp for the prosecution.”); Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 248 (2006) (“In most jurisdictions, the screening mechanisms for the prosecutor’s charging decision, such as the grand jury and the preliminary hearing, are relatively weak—ranging from being mere rubber stamps of the prosecutor’s decision to dismissing only a small percentage of charges and criminal cases.”); Robert L. Misner, *In Partial Praise of Boyd: The Grand Jury as Catalyst for Fourth Amendment Change*, 29 ARIZ. ST. L.J. 805, 828 (1997) (“In the federal system, the grand jury is seen as little more than a prosecutorial rubber stamp that follows the wishes of the prosecution in more than 99 percent of the matters before it.”).

²⁶⁸ See, e.g., *United States v. Cox*, 342 F.2d 167, 187–88 (5th Cir. 1965) (Wisdom, J., concurring) (stating the two options for the grand jury to take as true bill or no true bill).

²⁶⁹ *In re* Grand Jury Subpoena of Stewart, 545 N.Y.S.2d 974, 977 n.1 (Sup. Ct.).

²⁷⁰ See MARK MOTIVANS, U.S. DEP’T JUST., NCJ 239914, FEDERAL JUSTICE STATISTICS 2010—STATISTICAL TABLES 12 tbl.2.3 (2013).

For example, in Greenville County, South Carolina, “grand juries . . . returned true bills 99.9 percent of the time on more than 18,700 indictments” between 2011 and 2015.²⁷¹

III. THE DORMANT COMMERCE CLAUSE

A. Introduction

As noted in the prior Sections, despite being referenced in the Fifth Amendment to the U.S. Constitution as well as most state constitutions, the grand jury power of presentment has largely fallen dormant. Beyond the reasons given in Section II.D, this dormancy makes some sense given that there is no constitutional provision detailing the power of presentment. But could courts infer the scope of the power of presentment and revive it from its current dormant state? This Part reviews how the Supreme Court did just that with the dormant Commerce Clause.

B. The Development of the Dormant Commerce Clause

The Commerce Clause can be found in Article I, Section 8, Clause 3 of the United States Constitution.²⁷² It states that “[t]he Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”²⁷³ Some scholars have referred to the explicit text of this clause as the active Commerce Clause because it is an affirmative grant of authority to Congress to regulate certain types of commerce.²⁷⁴ The Supreme Court has held that this active Commerce Clause authorizes Congress to regulate three broad categories of activity: (1) “the channels of interstate commerce”; (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities”; and (3) “those activities

²⁷¹ See Romando Dixon, *Is Greenville Grand Jury System Fair to Defendants?*, GREENVILLE NEWS (Aug. 10, 2015, 8:32 AM), <https://www.greenvilleonline.com/story/news/local/2015/08/07/greenville-grand-jury-system-fair-defendants/31300075/> [<https://perma.cc/7FB8-ZH2J>].

²⁷² U.S. CONST. art. I, § 8, cl. 3.

²⁷³ *Id.*

²⁷⁴ See, e.g., Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1149 (2000) (referring to the Commerce Clause as the “active” Commerce Clause); Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL’Y 395, 407–08 (1998) (discussing the “active” Commerce Clause in the context of the original Dormant Commerce Clause).

having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.”²⁷⁵

The Supreme Court, however, has also recognized that there is a negative, or dormant, Commerce Clause that concomitantly precludes states from discriminating against and/or burdening interstate commerce.²⁷⁶ The history of this jurisprudence can be traced to the Court’s 1824 opinion in *Gibbons v. Ogden*.²⁷⁷ In 1798, before steamboats existed, “the New York legislature passed a law giving [Robert] Livingston the exclusive right to navigate ‘all boats that might be propelled by steam on all waters within the territory, or jurisdiction of the state, for the term of twenty years.’”²⁷⁸ With Livingston as his financier, Robert Fulton later invented the steamboat in 1807, and New York passed a subsequent law extending Livingston’s monopoly, which included Fulton.²⁷⁹ In response, New Jersey passed a law providing “that if any New Jersey citizen be restrained under the New York law from operating a steamboat between the two states, he could sue in New Jersey and win damages and triple costs.”²⁸⁰

Subsequently, Aaron Ogden obtained a license from Livingston and Fulton to operate a steamboat between New York and New Jersey; thereafter, wealthy former plantation owner Thomas Gibbons had a feud with Ogden and set out to destroy Ogden’s business by (1) obtaining “a permit under the Coastal Licensing Act, which Congress had passed in 1793, to regulate ‘ships and vessels to be employed in the coastal trade and fisheries,’” and (2) commissioning a large steamboat—the *Bellona*—to be captained by twenty-four-year-old Cornelius Vanderbilt and ferry passengers between New York and New Jersey.²⁸¹ Litigation soon ensued, with the case eventually reaching the United States Supreme Court.²⁸²

In an opinion written by Chief Justice John Marshall, the Supreme Court concluded that New York’s steamboat monopoly law conflicted with Congress’s Coastal Licensing Act, rendering New

²⁷⁵ *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (citations omitted).

²⁷⁶ *See, e.g.*, *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997) (“The negative or dormant implication of the Commerce Clause prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby ‘imped[es] free private trade in the national marketplace.’”) (citations omitted) (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980)).

²⁷⁷ 22 U.S. (9 Wheat.) 1, 209–12 (1824).

²⁷⁸ Michael R. Levinson, *Full Steam Ahead*, LITIGATION, Fall 2010, at 49, 49.

²⁷⁹ *See id.*

²⁸⁰ *Id.* at 50.

²⁸¹ *Id.*

²⁸² *Id.*

York's law unconstitutional under the Supremacy Clause.²⁸³ In dicta, however, Justice Marshall addressed the question of whether the Commerce Clause also limits the states' power to regulate interstate commerce even in the absence of federal legislation.²⁸⁴ Justice Marshall noted that "[i]t has been contended by the counsel for [Gibbons], that, as the word 'to regulate' implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing."²⁸⁵

In response, Justice Marshall explained the Constitution's grant of authority to Congress under the Commerce Clause:

The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure solely to the benefit of the grantee; but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant.²⁸⁶

Justice Marshall seemed imply that Congress and only Congress could regulate certain types of interstate commerce, meaning that (1) Congress could exercise this power, or (2) Congress could choose not to exercise this power, meaning it would lay dormant rather than the states or the people being able to fill the void and exercise that power.

Five years later, Justice Marshall's reasoning became clearer in *Willson v. Black Bird Creek Marsh Co.*²⁸⁷ In *Willson*, the Delaware legislature authorized the Black Bird Creek Marsh Company to erect a dam across a creek that opened into the Delaware Bay, obstructing the navigation of the creek by a vessel that was enrolled and licensed under federal navigation laws.²⁸⁸ In the majority opinion authored by Justice Marshall, the Supreme Court rejected the argument that the Delaware legislature's authorization could "be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."²⁸⁹ In other words, as the Court would later reiterate in its 1851 opinion in *Cooley*

²⁸³ See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 239–40 (1824).

²⁸⁴ See *id.* at 189.

²⁸⁵ *Id.* at 209.

²⁸⁶ *Id.* at 189.

²⁸⁷ 27 U.S. (2 Pet.) 245 (1829).

²⁸⁸ *Id.* at 248.

²⁸⁹ *Id.* at 252.

v. Board of Wardens,²⁹⁰ (1) Congress has exclusive authority over certain types of interstate commerce, with Congressional dormancy not opening the door to state regulation; but (2) Congress does *not* have exclusive authority over other types of interstate commerce, meaning that states *can* regulate these types of commerce in the absence of Congressional regulation.²⁹¹ Starting with *Coolley*, the Court's dormant Commerce Clause jurisprudence has been a quagmire, with the Court applying no fewer than four different models to resolve cases.²⁹²

C. *The Modern Dormant Commerce Clause*

The Court's modern interpretation of the dormant Commerce Clause is that the Clause is driven by concerns about states engaging in economic protectionism, i.e., states passing laws to benefit in-state economic interests while burdening out-of-state competitors.²⁹³ In its 1970 opinion in *Pike v. Bruce Church, Inc.*,²⁹⁴ the Supreme Court set forth three types of state laws that violate this dormant Commerce Clause: (1) state laws that facially discriminate against interstate commerce, such as a law restricting out-of-state wineries but not in-state wineries from selling wine directly to consumers in a state;²⁹⁵ (2) state laws that harbor a discriminatory purpose, such as a facially neutral North Carolina law prohibiting the display of state apple grades on closed containers based on evidence that the legislative intent was to discriminate against apples from Washington;²⁹⁶ and (3) state laws with a discriminatory effect, such as a facially neutral law imposing an assessment on all milk sold in Massachusetts that was entirely offset by a subsidy provided solely to in-state dairy farmers.²⁹⁷

The Supreme Court has held that “[t]he bounds of these restraints appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court giving effect to its basic purpose.”²⁹⁸ Instead, this dormant Commerce Clause is “a

²⁹⁰ 53 U.S. (12 How.) 299 (1851).

²⁹¹ *Id.* at 319–20.

²⁹² See Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 273–77 (2017).

²⁹³ See *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988); see also *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013).

²⁹⁴ 397 U.S. 137, 142 (1970).

²⁹⁵ See *Granholtz v. Heald*, 544 U.S. 460, 466 (2005).

²⁹⁶ See *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 352–53 (1977).

²⁹⁷ See *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994).

²⁹⁸ *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978).

self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce.”²⁹⁹

IV. DORMANT CRIMINAL CLAUSES

A. *Introduction*

The Supreme Court has not only found that there is a dormant portion of the Commerce Clause. It has also found that there are dormant portions of certain criminal clauses. This Part explores two instances in which the Supreme Court has recognized implied portions of criminal clauses that had lain dormant for centuries.

B. *The Right to Self-Representation*

The Sixth Amendment to the United States Constitution provides that

[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.³⁰⁰

Courts often refer to the final clause of the Sixth Amendment as the Assistance of Counsel Clause.³⁰¹ As with the Commerce Clause, there is an active portion of the Sixth Amendment, including an active portion of the Assistance of Counsel Clause: the requirement that the State provide counsel to indigent defendants charged with certain crimes.³⁰²

In its 1976 opinion in *Faretta v. California*,³⁰³ however, the Court found that there was also a less obvious power contained in the Sixth Amendment, which this Article calls the dormant Assistance of Counsel Clause. This power, which had lain dormant for roughly two centuries, is the right to self-representation at trial.³⁰⁴ In *Faretta*, Anthony

²⁹⁹ S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984).

³⁰⁰ U.S. CONST. amend. VI.

³⁰¹ See, e.g., Flanagan v. United States, 465 U.S. 259, 266–67 (1984) (referring to the Assistance of Counsel Clause).

³⁰² See Gideon v. Wainwright, 372 U.S. 335, 339–40 (1963). In *Gideon*, the Court found that the Assistance of Counsel Clause was applicable against the states pursuant to the incorporation doctrine under the Fourteenth Amendment. See *id.* at 344–45.

³⁰³ 422 U.S. 806 (1975).

³⁰⁴ See *id.* at 807, 811–12.

Faretta was charged with grand theft.³⁰⁵ When Faretta indicated that he wanted to represent himself rather than proceed with a public defender, the judge initially granted his request before reversing this ruling, finding “that Faretta had no constitutional right to conduct his own defense.”³⁰⁶ After Faretta was convicted, his appeal eventually reached the United States Supreme Court.³⁰⁷

The Supreme Court agreed with Faretta that he had the right to self-representation.³⁰⁸ The Court began by noting that, under the Sixth Amendment generally, “[i]t is the accused, not counsel, who must be ‘informed of the nature and cause of the accusation,’ who must be ‘confronted with the witnesses against him,’ and who must be accorded ‘compulsory process for obtaining witnesses in his favor.’”³⁰⁹ From this, the Court was able to deduce that, “[a]lthough not stated in the Amendment in so many words, the right to self-representation—to make one’s own defense personally—is thus necessarily implied by the structure of the Amendment.”³¹⁰

The Court then added that the Assistance of Counsel Clause “supplements this design. It speaks of the ‘assistance’ of counsel, and an assistant, however expert, is still an assistant.”³¹¹ Therefore, “[t]he language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.”³¹²

Moreover, the Court concluded that its reading of the Sixth Amendment was “reinforced by the Amendment’s roots in English legal history.”³¹³ According to the Court, in the deeply rooted history of English criminal law, there was only one tribunal that forced counsel upon unwilling defendants: the odious Star Chamber, which the Tudors and Stuarts used to exorcise political and religious dissenters.³¹⁴ Accordingly, the English common law at the time of the found-

³⁰⁵ *Id.* at 807.

³⁰⁶ *Id.* at 808–10.

³⁰⁷ *Id.* at 812.

³⁰⁸ *See id.* at 818–36.

³⁰⁹ *Id.* at 819.

³¹⁰ *Id.*

³¹¹ *Id.* at 820.

³¹² *Id.*

³¹³ *Id.* at 821.

³¹⁴ *See* Colin Miller, *Impeachable Offenses?: Why Civil Parties in Quasi-Criminal Cases Should Be Treated Like Criminal Defendants Under the Felony Impeachment Rule*, 36 PEPP. L. REV. 997, 1003 (2009).

ing of the United States was “that ‘no person charged with a criminal offence can have counsel forced upon him against his will.’”³¹⁵ In the American colonies, this same “basic right of self-representation was never questioned,” and the Court could find “no instance where a colonial court required a defendant in a criminal case to accept as his representative an unwanted lawyer.”³¹⁶

Although some state proposals for the Bill of Rights had language securing the right of an accused to be heard by himself, the final version of the Sixth Amendment only overtly spoke about the right to the assistance of counsel.³¹⁷ But the Court concluded that “[i]f anyone had thought that the Sixth Amendment, as drafted, failed to protect the long-respected right of self-representation, there would undoubtedly have been some debate or comment on the issue.”³¹⁸ This was because “the colonists and the Framers, as well as their English ancestors, always conceived of the right to counsel as an ‘assistance’ for the accused, to be used at his option, in defending himself.”³¹⁹ In other words, “[t]he Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation.”³²⁰

C. *The Right to Present a Defense*

As noted in the previous Section, under the Sixth Amendment, a criminal defendant affirmatively has the right “to have compulsory process for obtaining witnesses in his favor.”³²¹ Facially, this Compulsory Process Clause only “guarantee[s] that the accused shall have the power to subpoena witnesses.”³²² Indeed, for nearly “two centuries, courts interpreted this Compulsory Process Clause as merely conferring on criminal defendants the procedural right of being able to subpoena or otherwise secure the presence of witnesses at trial.”³²³ Therefore, the “Compulsory Process Clause had become almost a dead letter after 170 years of desuetude.”³²⁴

³¹⁵ *Faretta*, 422 U.S. at 826.

³¹⁶ *Id.* at 827–28.

³¹⁷ *See id.* at 831–32.

³¹⁸ *Id.* at 832.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ U.S. CONST. amend. VI.

³²² *Taylor v. Illinois*, 484 U.S. 400, 406 (1988).

³²³ Colin Miller, *Dismissed with Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present a Defense*, 61 BAYLOR L. REV. 872, 898–99 (2009).

³²⁴ *United States v. Victor*, 10 M.J. 69, 75 (C.M.A. 1980).

Beginning with its 1967 opinion in *Washington v. Texas*,³²⁵ however, the Supreme Court has found that there is what this Article calls the dormant Compulsory Process Clause. And this dormant portion of the Clause contains “the right to present a defense.”³²⁶ In *Washington*, eighteen-year-old Jackie Washington dated Jean Carter until her mother forbade the relationship.³²⁷ Carter then started dating another young man.³²⁸ Thereafter, a group of boys, including Washington and Charles Fuller, drove to Carter’s house and threw bricks at the house during dinnertime.³²⁹ As the new boyfriend exited the house, all of the boys except for Washington and Fuller ran back to the car, and either Washington or Fuller fatally shot the new boyfriend with a shotgun.³³⁰

Because Fuller held the shotgun when he and Washington regrouped with the other boys at the car, the Dallas District Attorney first charged Fuller with the murder.³³¹ Fuller’s murder trial ended with a conviction after the jury rejected his defense that he fired the shotgun at the steps of the house and never saw the ex-boyfriend.³³²

After Fuller was convicted, the district attorney then turned around and charged Washington with murder with malice.³³³ At trial, the judge precluded Washington from putting Fuller on the witness stand, despite indications that Fuller would have testified that Washington tried to persuade him to leave and actually left before Fuller fired the fatal shot.³³⁴ The judge did so pursuant to two Texas statutes, which provided “that persons charged or convicted as coparticipants in the same crime could not testify for one another, although there was no bar to their testifying for the State.”³³⁵

After Washington was convicted of murder, he appealed, with his appeal eventually reaching the United States Supreme Court.³³⁶ In its opinion, the Court advanced its dormant Compulsory Process Clause theory, holding that

[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to

³²⁵ 388 U.S. 14 (1967).

³²⁶ *Id.* at 19.

³²⁷ *Id.* at 15.

³²⁸ *Id.*

³²⁹ *See id.*

³³⁰ *See id.* at 15–16.

³³¹ *See id.* at 16.

³³² *Id.* at 16 & n.3 (citing *Fuller v. State*, 397 S.W.2d 434, 435 (Tex. Crim. App. 1966)).

³³³ *Id.* at 15.

³³⁴ *Id.* at 16.

³³⁵ *Id.* at 16–17; *see also Fuller*, 397 S.W.2d at 435.

³³⁶ *Washington*, 388 U.S. at 14.

present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.³³⁷

As with the dormant Commerce Clause and the dormant Assistance of Counsel Clause, the Court was able to reach this conclusion by digging into the origin of the Clause.³³⁸ The Court noted that Justice Joseph Story's *Commentaries on the Constitution of the United States* "observed that the right to compulsory process was included in the Bill of Rights in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all."³³⁹ Therefore, even though England had abolished this common law prohibition at the time of the founding, "the Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury."³⁴⁰

Applying this logic to case at hand, the Court was able to hold that Washington

was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense.³⁴¹

In reaching this conclusion, the Court deduced that "[t]he Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use."³⁴²

V. THE DORMANT GRAND JURY CLAUSE AND RECTIFYING WRONGFUL CONVICTIONS

A. Introduction

This Article advances the thesis that there is similarly a dormant Grand Jury Clause in the Federal Constitution and state counterparts that allows prosecutors to submit cases of wrongful convictions to

³³⁷ *Id.* at 19.

³³⁸ *Id.* at 19–23.

³³⁹ *Id.* at 19.

³⁴⁰ *Id.* at 20.

³⁴¹ *Id.* at 23.

³⁴² *Id.*

grand juries so that they can issue presentments to judges who can then vacate those convictions. This Part explains this thesis in four parts: (1) the Federal Grand Jury Clause and state counterparts contain a dormant Grand Jury Clause, which grants grand juries self-executing authority to exercise their common law powers, including the power to issue presentments; (2) the grand jury is a constitutional fixture not textually assigned to any branch of government, meaning that its power to present on issues of public concern has not been and cannot be circumscribed; (3) allowing a prosecutor to present a wrongful conviction case to a grand jury is consistent with the grand jury's core missions and common law history; and (4) after a grand jury makes a wrongful conviction presentment to a judge, the judge can vacate the conviction pursuant to the inherent power of the court.

1. The Dormant Grand Jury Clause

a. Introduction

The Fifth Amendment Grand Jury Clause to the U.S. Constitution and the original constitutions for most states, including the last two states admitted to the Union,³⁴³ provide that felony prosecutions cannot proceed without a grand jury presentment or indictment.³⁴⁴ Strictly speaking, these provisions merely provide a personal right: the right of a defendant not to be subjected to a felony trial without a grand jury presentment or indictment. And yet, given that grand juries immediately began issuing indictments or presentments without any separate constitutional or legislative grant of authority, this Article argues the logical conclusion is that these provisions contained an unspoken, self-executing, constitutional cede of authority for grand juries to continue exercising their common law powers. This self-executing power is what this Article dubs the dormant Grand Jury Clause.

Although this Article advances the novel thesis that there is a dormant Grand Jury Clause, the thesis is not unprecedented. Instead, over the last century, the Supreme Court has held in numerous cases that the Grand Jury Clause grants grand juries self-executing authority

³⁴³ See ALASKA CONST. art. I, § 8 ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . ."); HAW. CONST. art. I, § 10 ("No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . .").

³⁴⁴ See, e.g., U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .").

to exercise their common law powers.³⁴⁵ The following Sections explore several of those opinions.

b. Hale v. Henkel

*Hale v. Henkel*³⁴⁶ is the previously mentioned 1906 case in which the Supreme Court declared that “presentments have largely fallen into disuse in this country.”³⁴⁷ Immediately after this declaration, however, the Court reaffirmed that grand juries do retain the power of presentment.³⁴⁸ *Hale* involved a subpoenaed defendant in an antitrust case who refused to answer questions or produce documents despite being offered immunity.³⁴⁹ The grand jury then made a presentment that the witness was in contempt, prompting an appeal.³⁵⁰

In rejecting that appeal, the Supreme Court began by tracing the grand jury power of presentment from the English common law to early American history.³⁵¹ Then, immediately after noting that presentments had largely fallen into disuse, the Court cited Constitution codrafter James Wilson’s aforementioned statement that, *inter alia*, the commission under which grand jurors act “assigns no limits, except those marked by diligence itself.”³⁵² Finally, after citing both state and federal precedent, the Court concluded that, although now rarely used, grand juries clearly retain the power of presentment.³⁵³

c. Blair v. United States

In *Blair v. United States*,³⁵⁴ three defendants appealed orders finding them in contempt based on “their refusal to obey an order directing them to answer certain questions asked of them before a federal grand jury” that was investigating possible criminal conduct before any criminal charges had been brought.³⁵⁵ In affirming these contempt orders in 1919, the Supreme Court held that

[t]he Fifth Amendment and the statutes relative to the organization of grand juries recognize such a jury as being pos-

³⁴⁵ See *infra* Sections V.A.1.b–f.

³⁴⁶ 201 U.S. 43 (1906).

³⁴⁷ *Id.* at 61.

³⁴⁸ See *id.*

³⁴⁹ *Id.* at 46.

³⁵⁰ *Id.*

³⁵¹ *Id.* at 59–60.

³⁵² *Id.* at 62.

³⁵³ *Id.* at 62–63.

³⁵⁴ 250 U.S. 273 (1919).

³⁵⁵ *Id.* at 276.

sessed of the same powers that pertained to its British prototype, and in our system examination of witnesses by a grand jury need not be preceded by a formal charge against a particular individual.³⁵⁶

According to the Court, the American grand jury, like its British prototype, is “a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.”³⁵⁷

d. *United States v. Thompson*

In *United States v. Thompson*,³⁵⁸ a Pittsburgh grand jury issued a true bill on seventeen of forty-seven counts in a district attorney’s indictment charging the president of a bank with violations of the National Bank Act.³⁵⁹ Subsequently, the U.S. Attorney General appointed a special assistant to cooperate with the district attorney regarding the remaining charges.³⁶⁰ Then, without asking for authorization by the court, the district attorney and the assistant presented an indictment with the remaining charges to a grand jury in Erie, Pennsylvania, which returned a true bill on all thirty charges.³⁶¹ The trial judge granted the bank president’s motion to quash the second indictment on “the ground that the grand jury had considered the subject of that indictment, not of its own motion, but upon the suggestion of the district attorney without any previous authority given [to] him by the court.”³⁶²

On appeal to the United States Supreme Court, the government advanced two propositions, including the proposition

[t]hat the power and duty of the grand jury to investigate is original and complete, susceptible of being exercised upon its own motion and upon such knowledge as it may derive from any source which it may deem proper, and is not therefore dependent for its exertion upon the approval or disapproval of the court; that this power is continuous and is therefore not exhausted or limited by adverse action taken by a grand

³⁵⁶ *Id.* at 282.

³⁵⁷ *Id.*

³⁵⁸ 251 U.S. 407 (1920).

³⁵⁹ *Id.* at 408–09.

³⁶⁰ *Id.* at 409.

³⁶¹ *Id.*

³⁶² *Id.* at 410.

jury or by its failure to act, and hence may thereafter be exerted as to the same instances by the same or a subsequent grand jury.³⁶³

The Supreme Court reversed the decision to quash the second indictment in 1920, finding that it did not need to “cite the extensive array of authorities from which the Government deduces these propositions” because they were clearly established in *Hale* and *Blair*.³⁶⁴

e. Costello v. United States

In *Costello v. United States*,³⁶⁵ Frank Costello appealed his conviction “for wilfully attempting to evade payment of income taxes,” claiming that the grand jury improperly indicted him solely upon hearsay evidence.³⁶⁶ In 1956, the Supreme Court disagreed, observing that “neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act.”³⁶⁷ The Court dug into the history of grand juries, finding that “[t]he grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders.”³⁶⁸ As such, the Court concluded “[t]here is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor.”³⁶⁹ Therefore, because the English grand jury acquired “independence in England free from control by the Crown or judges,” the Court refused to exercise supervisory authority over the American grand jury.³⁷⁰ According to the Court, doing so would have “run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules.”³⁷¹

f. United States v. Dionisio

In *United States v. Dionisio*,³⁷² a judge ruled Antonio Dionisio in contempt of court for refusing to furnish a voice exemplar in response

³⁶³ *Id.* at 413.

³⁶⁴ *Id.* at 414.

³⁶⁵ 350 U.S. 359 (1956).

³⁶⁶ *Id.* at 359–60.

³⁶⁷ *Id.* at 362.

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.* at 364.

³⁷² 410 U.S. 1 (1973).

to a grand jury subpoena in a gambling investigation.³⁷³ The Seventh Circuit found that this contempt ruling was improper, holding “that the Fourth Amendment required a preliminary showing of reasonableness before a grand jury witness could be compelled to furnish a voice exemplar.”³⁷⁴ The Supreme Court disagreed in 1973, initially noting that “[t]he Fifth Amendment guarantees that no civilian may be brought to trial for an infamous crime ‘unless on a presentment or indictment of a Grand Jury.’”³⁷⁵ From this language, the Court was able to deduce that “[t]his constitutional guarantee presupposes an investigative body ‘acting independently of either prosecuting attorney or judge,’ whose mission is to clear the innocent, no less than to bring to trial those who may be guilty.”³⁷⁶ Therefore, “[a]ny holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public’s interest in the fair and expeditious administration of the criminal laws.”³⁷⁷

g. Conclusion

By itself, the Federal Fifth Amendment Grand Jury Clause and state counterparts only grant a personal right for defendants to avoid felony trials without grand jury presentments or indictments. In isolation, this Clause makes no sense; instead, it implies that there must be a grand jury imbued with the constitutional power to issue both presentments and indictments. Or, as the Court put it in *Dionisio*, “[t]his constitutional guarantee presupposes an investigative body ‘acting independently of either prosecuting attorney or judge,’ whose mission is to clear the innocent, no less than to bring to trial those who may be guilty.”³⁷⁸ In this way, the Grand Jury Clause is similar to the clauses mentioned earlier in this Article: (1) the Commerce Clause’s (semi-exclusive) grant of authority to Congress to regulate interstate com-

³⁷³ *Id.* at 2–4.

³⁷⁴ *Id.* at 8.

³⁷⁵ *Id.* at 16 (quoting U.S. CONST. amend. V).

³⁷⁶ *Id.* at 16–17 (citation omitted) (quoting *Stirone v. United States*, 361 U.S. 212, 218 (1960)).

³⁷⁷ *Id.* at 17. The Court closed by observing that

The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor, but if it is even to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it.

Id. at 17–18.

³⁷⁸ *Id.* at 16–17 (citation omitted) (quoting *Stirone*, 361 U.S. at 218).

merce presupposes the states' concomitant inability to burden or discriminate against interstate commerce;³⁷⁹ (2) the Sixth Amendment right to the assistance of counsel presupposes a right to proceed without the assistance of counsel;³⁸⁰ and (3) the Sixth Amendment right to compel witnesses to attend trial presupposes the defendant's right to have them testify to present evidence for their case.³⁸¹ Moreover, similar to the dormant Commerce Clause, the powers contained in this dormant Grand Jury Clause must be self-executing, or, as the Court held in *Thompson*, the "power and duty of the grand jury to investigate is original and complete, susceptible of being exercised upon its own motion."³⁸² Otherwise, grand juries would not have been able to issue presentments and indictments in the early days of this country without any constitutional or legislative provisions setting forth their powers.

Furthermore, it makes sense that there was no constitutional provision setting forth the powers of the grand jury for the same reason that there was no constitutional provision establishing the right to self-representation. In both cases, the power at issue was so well established in the common law and beyond reproach that there was no need to have a constitutional provision spelling it out.³⁸³ Finally, as the Court made clear in several of the above opinions, the post-Constitution grand jury retains all of its common law powers, including the power to issue presentments on issues of public interest.³⁸⁴

2. *The Non-Textual Assignment of the Grand Jury*

a. *Introduction*

Even if federal and state grand juries originally had the power of presentment, that leaves the question of whether they still retain that power. There are two developments that theoretically could call that power into question. The first is the fact that both the federal government and most states have found that grand jury presentments are no longer sufficient to prosecute defendants on felony charges. These changes, however, merely expanded the personal right protecting defendants against felony prosecutions and did not limit the grand jury's power to issue presentments. Both federal and state courts have held

³⁷⁹ See *supra* Section III.B.

³⁸⁰ See *supra* Section IV.B.

³⁸¹ See *supra* Section IV.C.

³⁸² 251 U.S. 407, 413 (1920).

³⁸³ See *supra* notes 216–18, 317–20 and accompanying text.

³⁸⁴ See *supra* notes 356–57, 368–71 and accompanying text.

that grand juries can still issue presentments accusing defendants of felony crimes;³⁸⁵ such a presentment is simply insufficient to take a defendant to trial without an indictment signed by the prosecutor.³⁸⁶ Such a reading would be consistent with *Costello* and *Dionisio*, which were both issued after Federal Rule of Criminal Procedure 7(a)(1) and which both held that the grand jury still has the same self-executing powers as its common law counterpart.³⁸⁷ Moreover, even if these changes were seen as limiting the grand jury's power to issue presentments in the criminal charging context, they should have no impact on the grand jury power to issue presentments on matters of public concern. If, as argued in the prior Section, American grand juries initially had separate powers to issue presentments accusing defendants of crimes and reporting on matters of public concern, any limitation on the accusing power should not be seen as a limitation on the distinct reporting power.

This, however, takes us to the second change, which involves states passing laws creating a separate grand jury reporting power. Are courts, such as the Supreme Court of Missouri, correctly interpreting these grand jury reporting laws as limitations on the common law power of presentment? This Section argues that they are not and that these statutes cannot be seen as limitations because the grand jury is not textually assigned to any branch of the government, meaning its core powers cannot be circumscribed.

b. United States v. Williams and the Grand Jury as Unassigned Constitutional Fixture

In *United States v. Williams*,³⁸⁸ John H. Williams, Jr. was indicted on federal charges based on allegedly overstating the value of his assets and interest income to secure a bank loan.³⁸⁹ Upon learning during discovery that the prosecutor had failed to present evidence that he deemed exculpatory, Williams moved to dismiss the indictment.³⁹⁰ After the district court granted the motion and the Tenth Circuit af-

³⁸⁵ See, e.g., *In re* Report and Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1222 & n.12 (D.D.C. 1974) (collecting cases).

³⁸⁶ See, e.g., *Hoskins v. Maricle*, 150 S.W.3d 1, 18 (Ky. 2004).

³⁸⁷ *United States v. Dionisio*, 410 U.S. 1, 16 (1973); *Costello v. United States*, 350 U.S. 359, 362–64 (1956).

³⁸⁸ 504 U.S. 36 (1992).

³⁸⁹ *Id.* at 38.

³⁹⁰ See *id.* at 39.

firmed on appeal, the United States Supreme Court reversed in an opinion authored by Justice Scalia in 1992.³⁹¹

According to Justice Scalia, the grand jury is “rooted in long centuries of Anglo-American history” even though it “is mentioned in the Bill of Rights, but not in the body of the Constitution.”³⁹² As such, the grand jury “has not been textually assigned, therefore, to any of the branches described in the first three Articles.”³⁹³ Instead, it “is a constitutional fixture in its own right.”³⁹⁴ Justice Scalia then expounded that “[i]n fact the whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people.”³⁹⁵ Therefore, “[a]lthough the grand jury normally operates . . . in the courthouse and under judicial auspices, its institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm’s length,” and “[t]he grand jury requires no authorization from its constituting court to initiate an investigation.”³⁹⁶ Justice Scalia then reviewed the Court’s prior precedent to hold “that any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings.”³⁹⁷ Applying this logic to reject the defendant’s argument that a prosecutor has a duty to disclose exculpatory evidence to the grand jury, Justice Scalia concluded that any power the judiciary might have over the grand jury “certainly would not permit judicial reshaping of the grand jury institution, substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself.”³⁹⁸

c. Conclusion

Some courts, such as the Supreme Court of Missouri, have concluded that new laws granting reporting powers to the grand jury inferentially circumscribe the grand jury power of presentment.³⁹⁹ But the Supreme Court in *Williams* found that the grand jury is a constitu-

³⁹¹ See *id.* at 39–40.

³⁹² *Id.* at 47 (quoting *Hannah v. Larche*, 363 U.S. 420, 490 (1960) (Frankfurter, J., concurring in result)).

³⁹³ *Id.*

³⁹⁴ *Id.* (quoting *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir. 1977)).

³⁹⁵ *Id.*

³⁹⁶ *Id.* at 47–48.

³⁹⁷ *Id.* at 50.

³⁹⁸ *Id.*

³⁹⁹ See *supra* notes 255–66 and accompanying text.

tional fixture that is not textually assigned to the judiciary, executive, or legislative branch.⁴⁰⁰ As such, the power of any of these three branches over the grand jury is limited and does not permit reshaping the grand jury institution. Therefore, a state legislature merely creating a grand jury power to report would not and could not displace the deeply rooted power to present on issues of public concern, just as the Supreme Court could not require a prosecutor to disclose exculpatory evidence to a grand jury.

This then takes us to the heart of this Article, which is the inverse of the question presented in *Williams*: can the government require prosecutors not to disclose exculpatory evidence to a grand jury?

3. *Wrongful Conviction Presentments and the Core Missions of the Grand Jury*

As noted in Section II.D, the main reason for the decline in the use of grand jury presentments that censure public officials is that they are quasi-criminal charges without procedural protections or the ability of the official to contest the report in court.⁴⁰¹ In this sense, they fulfill neither the grand jury's function of clearing the innocent nor its function of bringing to trial those who may be guilty.

Conversely, wrongful conviction presentments would fulfill two of the grand jury's core purposes. First, they would facilitate the clearing of the innocent. The proposal in this Article would apply in two scenarios: (1) cases in which a CIU in a jurisdiction without enabling legislation concludes that a defendant was wrongfully convicted, and the prosecutor takes the CIU's report to a grand jury; and (2) cases in which a prosecutor in a jurisdiction without a CIU believes that a defendant may have been wrongfully convicted and presents evidence and witnesses to a grand jury. In either case, if the grand jury believes that the defendant was wrongfully convicted, it could issue a presentment to a judge, which, as explained in the next Section, would allow the judge to clear the innocent defendant.

Second, wrongful conviction presentments would allow for grand juries to continue vindicating the rights of incarcerated individuals. As noted, when grand juries first gained independence, one popular presentment subject was the failure to properly maintain correctional facilities.⁴⁰² Indeed, as discussed, the use of the presentment was "so routine that [P]arliament provided that no money was to be spent on

⁴⁰⁰ *Williams*, 504 U.S. at 47.

⁴⁰¹ See *supra* Section II.D.

⁴⁰² See *supra* note 197 and accompanying text.

the repair of bridges, jails, prisons, or houses of correction unless the need was first established by a grand jury presentment.”⁴⁰³ And, although some states have (or at least claim to have) limited the power of presentment through narrower grand jury reporting laws, many of these laws include the power to report on the condition of correctional facilities and the treatment of inmates.⁴⁰⁴

Moreover, historically, grand juries have been active in vindicating the rights of individual inmates. In one unsettling example, a grand jury in Darlington, South Carolina in 1852 issued a presentment to a judge “call[ing] attention to their discovery in the dungeon of the jail of a slave named Scipio, who had been sentenced . . . to two years imprisonment and five hundred lashes.”⁴⁰⁵ The presentment successfully petitioned the judge to lessen the sentence due to the grand jury’s fear that the punishment “would probably endanger the slave’s life.”⁴⁰⁶

Thus, allowing wrongful conviction presentments would fulfill two of the grand jury’s core missions. In some cases, these presentments would not implicate the concern about condemning public officials without procedural protections. For example, in the previously mentioned Joseph Webster case, the evidence pointing to his innocence had been turned over to the defense, meaning that he could be freed without a finding of official misconduct.⁴⁰⁷ Similarly, there are plenty of wrongful conviction cases with issues such as recanting witnesses and postconviction DNA testing that can allow for exonerations without any finding of official misconduct.⁴⁰⁸

Finally, as in the Lamar Johnson case, there are plenty of wrongful conviction cases involving alleged misconduct by public officials. Grand jury presentments calling attention to this official misconduct

⁴⁰³ Stern, *supra* note 191, at 84 n.31.

⁴⁰⁴ See Jonathan Witmer-Rich, *Restoring Independence to the Grand Jury: A Victim Advocate for Police Use of Force Cases*, 65 CLEV. ST. L. REV. 535, 547 nn.71–75 (2017) (citing statutes from Alabama, Alaska, Arkansas, California, Georgia, Nebraska, North Dakota, and Ohio).

⁴⁰⁵ H.M. HENRY, *THE POLICE CONTROL OF THE SLAVE IN SOUTH CAROLINA* 54 (1914).

⁴⁰⁶ *Id.* at 55.

⁴⁰⁷ See *supra* notes 122–29 and accompanying text; see also Otterbourg, *supra* note 122 (“But Gibson had received the information; he had just not acted on it at trial or provided it to Webster’s attorneys in their initial appeals.”).

⁴⁰⁸ See, e.g., *supra* notes 22, 122, 145; see also Elizabeth Webster, *Postconviction Innocence Review in the Age of Progressive Prosecution*, 83 ALB. L. REV. 989, 1015 (2019/20) (“Nevertheless, recantation evidence has contributed to hundreds of exonerations, including several assisted by prosecutor interviewees in this study.”); Sarah Lucy Cooper & Daniel Gough, *The Controversy of Clemency and Innocence in America*, 51 CAL. W. L. REV. 55, 109 (2014) (noting that over 320 exonerations “have been proven conclusively by post-conviction DNA evidence”).

thus could be seen as implicating the same concerns that led to the decline of presentments censuring public officials. On the other hand, the CIU report criticizing public officials in the Lamar Johnson cases is publicly available and posted on the internet.⁴⁰⁹ It is questionable whether a grand jury presentment would actually add insult to injury, and as will be explored in the next Section, a wrongful conviction presentment could actually provide a forum for accused officials to defend themselves.

4. *Inherent Power of the Court*

a. *Introduction*

A grand jury's ability to send a wrongful conviction presentment to a judge would be relatively meaningless without the judge's ability to act on it. On the other hand, if a judge could act on such a presentment, it could result in the release of innocent defendants who could not bring their own appeals based on statutes of limitations, restrictions on successor habeas petitions, and other roadblocks. This final Section uses the Watergate presentment and a recent wrongful conviction case as, the model for wrongful conviction presentments and proof of concept, respectively.

b. *The Watergate Presentment*

In *In re Report and Recommendation of June 5, 1972 Grand Jury*,⁴¹⁰ a federal grand jury issued a sealed presentment on the Watergate break-in to a judge that "strongly recommend[ed] that accompanying materials be submitted to the Committee on the Judiciary of the House of Representatives for its consideration."⁴¹¹ Seven people implicated in the presentment subsequently objected to its disclosure.⁴¹²

Before resolving the issue, the United States District Court for the District of Columbia "invited all counsel who might conceivably have an interest in the matter, without regard to standing, to state their positions concerning disposition."⁴¹³ After that hearing, the court rejected the objection to disclosure, finding that federal grand jury reporting statutes did not cut back on the common law power of pre-

⁴⁰⁹ See generally *supra* note 3 and accompanying text.

⁴¹⁰ 370 F. Supp. 1219 (D.D.C. 1974).

⁴¹¹ *Id.* at 1221.

⁴¹² *Id.*

⁴¹³ *Id.*

sentment.⁴¹⁴ Instead, the court cited to Constitution codrafter James Wilson’s previously mentioned statement that, *inter alia*,

The grand jury are a great channel of communication, between those who make and administer the laws, and those for whom the laws are made and administered. All the operations of government, and of its ministers and officers, are within the compass of their view and research. They may suggest public[] improvements, and the modes of removing public[] inconveniences: they may expose to public[] inspection, or to public[] punishment, public[] bad men, and public[] bad measures.⁴¹⁵

Therefore, the grand jury was able to send a presentment with a recommendation to the judge—to send the presentment to the Judiciary Committee—that the judge was able to act upon.⁴¹⁶ The court did take note of cases allegedly *per se* prohibiting the presentment power but found that they instead “enumerate[d] the factors militating against approval of the specific reports at issue and refrain[ed] from a blanket denial of reporting powers.”⁴¹⁷ And the court found that those factors did not apply in the case at hand because the court had given the implicated individuals their day in court by inviting them and their attorneys to the hearing about whether to send the presentment to the Judiciary Committee.⁴¹⁸

This Article recommends a similar procedure for wrongful conviction presentments that would actually be preferable to the status quo for public officials in jurisdictions such as St. Louis. Currently, as noted, there is a publicly available CIU report implicating public officials in the wrongful conviction of Lamar Johnson, with no procedure for either Johnson or the public officials to clear their names.⁴¹⁹ Under this Article’s wrongful conviction presentment proposal, however, after the grand jury sends a judge its presentment, the judge would invite all interested parties to a hearing where evidence, testimony, and arguments could be presented. Then, at the end of that hearing, there would likely be one of three outcomes:

- (1) the judge could vindicate both the defendant and any public official involved if the judge found that the defen-

⁴¹⁴ See *id.* at 1222–26.

⁴¹⁵ *Id.* at 1223.

⁴¹⁶ *Id.* at 1231.

⁴¹⁷ *Id.* at 1224.

⁴¹⁸ *Id.* at 1225–26.

⁴¹⁹ See *supra* note 1 and accompanying text.

- dant was wrongfully convicted in the absence of official misconduct;
- (2) the judge could vindicate just the defendant by finding that she was wrongfully convicted at least in part based on official misconduct; or
 - (3) the judge could vindicate the public officials by finding that the defendant was rightfully convicted in the absence of misconduct.⁴²⁰

Through this procedure, both the defendant and the public officials would have a forum in which they could try to prove their innocence. But could courts in fact ignore roadblocks such as statutes of limitation and restrictions on successor habeas petitions to grant relief in response to wrongful conviction presentments?

c. The Terrance Lewis Exoneration and the Inherent Power of the Court

Courts maintain an inherent power to correct miscarriages of justice in certain circumstances.⁴²¹ In deciding whether to apply this power, courts consider factors such as “the clarity of the error, its gravity, its character . . . , the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result.”⁴²² Courts have applied their inherent power to strike down wrongful convictions.⁴²³ They used to apply this power somewhat broadly to forgive untimely actual innocence habeas petitions before Congress largely limited this power by enacting the one-year Antiterrorism and Effective Death Penalty Act (“AEDPA”) statute of limitations.⁴²⁴ This AEDPA statute of limitation had been an issue for Terrance Lewis, also known as “Stink,” when I started working on his case for the *Undisclosed* podcast. Lewis was seventeen years old when he and two other men were convicted of the 1996 murder of Hulon Howard in his home in Philadelphia.⁴²⁵ At a federal habeas hearing, an eyewitness testified that Lewis was not one of the three men she saw enter and leave Howard’s home shortly before and after the shooting, and one of Lewis’s alleged ac-

⁴²⁰ See *supra* note 1 and accompanying text.

⁴²¹ See, e.g., *United States v. Teeter*, 257 F.3d 14, 25–26 (1st Cir. 2001).

⁴²² *Id.* at 26.

⁴²³ See, e.g., *United States v. Williams*, 790 F.3d 1059, 1075–76 (10th Cir. 2015).

⁴²⁴ *Id.*

⁴²⁵ See Maurice Possley, *Terrance Lewis*, NAT’L REGISTRY EXONERATIONS (June 3, 2019), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5571> [https://perma.cc/4AK4-73VZ].

complices testified that Lewis was not involved in the crime.⁴²⁶ In 2010, Magistrate Carol Sandra Moore Wells found that Lewis was actually innocent but that his habeas petition was untimely and thus procedurally barred under the AEDPA.⁴²⁷

While I worked on Lewis's case, he had a pending resentencing hearing under *Miller v. Alabama*⁴²⁸ as a juvenile lifer and had filed a successor habeas petition as well as a petition with the Philadelphia CIU.⁴²⁹ When reviewing the police file in Lewis's case for the podcast, we found previously undisclosed notes from a police interview with the State's key eyewitness in which she stated that the perpetrator she knew as "Stink" had the last name Muhammad.⁴³⁰ This new information *might* have allowed Lewis's successor habeas petition to proceed or alternatively *might* have led to relief from the CIU.

But the State ordered that Lewis had to abandon his habeas claim to get his juvenile resentencing hearing scheduled, and the CIU had not completed its review of the case by the date of that hearing.⁴³¹ As Lewis entered the courtroom on May 21, 2019, he fully expected that he would simply be resentenced.⁴³² Instead, Common Pleas Judge Barbara McDermott began inquiring into the evidence of Lewis's innocence.⁴³³ Even though the case was only before her for resentencing, Judge McDermott exercised the inherent power of the court to declare Lewis innocent and set him free.⁴³⁴

The Terrance Lewis case thus stands for the proposition that a judge can use the inherent power of the court to vacate a defendant's wrongful conviction as long as the case is properly before her on some actionable ground. A wrongful conviction presentment would do just that. As noted multiple times, Constitution codrafter James Wilson said, "[t]he grand jury are a great channel of communication, between those who make and administer the laws, and those for whom the laws are made and administered" and "[a]ll the operations of government, and of its ministers and officers, are within the compass of their view

⁴²⁶ See *id.*

⁴²⁷ See *id.*

⁴²⁸ 567 U.S. 460 (2012).

⁴²⁹ See Possley, *supra* note 425.

⁴³⁰ See *Omar 60 & Walnut Notes*, UNDISCLOSED, <https://undisclosed-podcast.com/docs/terrance-lewis/Omar%2060%20and%20Walnut%20Notes.pdf> [<https://perma.cc/2QFJ-3EK2>].

⁴³¹ See Possley, *supra* note 425.

⁴³² See *id.*

⁴³³ See *id.*

⁴³⁴ See *id.*

and research.”⁴³⁵ The Supreme Court cited Wilson’s statement to reaffirm the presentment power in *Hale v. Henkel*, and the judge in the Watergate case cited it to rule that he could act upon the grand jury’s request to send its grand jury presentment to the Judiciary Committee.⁴³⁶ Similarly, this great channel of communication should be able to send a wrongful conviction presentment to a judge with the actionable request that she set an innocent man free.

CONCLUSION

The scourge of wrongful convictions plagues this country and especially African American men like Lamar Johnson. With the modern grand jury acting as little more than a rubber stamp for criminal charges, it has perhaps never been easier for prosecutors to put in motion the machinery that manufactures these wrongful convictions. And yet, with the passage of Model Rules of Professional Responsibility 3.8(g) and (h) and the rise of the Conviction Integrity Unit, many prosecutors now have the obligation and the ability to rectify wrongful convictions. In jurisdictions with CIUs but no enabling legislation, however, prosecutors face a new roadblock in their efforts to right wrongs. Prosecutors in these jurisdictions, as well as prosecutors in jurisdictions without CIUs, should be able to use the same body that starts the ball rolling on these wrongful convictions to rectify them years later.

Although the grand jury power of presentment has largely fallen into disuse, it still exists under the dormant Grand Jury Clause. Under this dormant Grand Jury Clause, a prosecutor who believes her office might have produced a wrongful conviction can take the case before a grand jury. If that grand jury believes that the defendant in the case was wrongfully convicted, it can issue a presentment to a judge, who can vacate the conviction under the inherent power of the court. By doing so, prosecutors can revive the dormant power of presentment and rectify wrongful convictions.

⁴³⁵ *In re* Report and Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1223 (D.D.C. 1974).

⁴³⁶ See *supra* notes 407–14 and accompanying text.

NOTE

Can We Agree to Agree? Forming Interstate Agreements to Address Water Pollution

Alyssa Sieja*

ABSTRACT

Nonpoint source pollution, such as agricultural pollution, accounts for most of the pollution that currently impairs waterways in the United States. The Clean Water Act, however, largely leaves regulation of this type of pollution to state management and regulation. This leads to a patchwork of differing water quality standards and control methods throughout the country. This patchwork effect is detrimental when waterways flow downstream from one state into the next. Thus, an interstate problem requires an interstate solution.

Although the Clean Water Act typically requires minimal collaboration between states for management of nonpoint source pollution, the Third Circuit's decision in American Farm Bureau Federation v. EPA affirmed the use of total maximum daily loads ("TMDL") for watershed level pollution. The creation of the 2010 Chesapeake Bay TMDL was the first large-scale attempt at using multijurisdictional TMDLs to reduce water pollution in interstate waterways. The Chesapeake Bay TMDL, however, has seen disputes and challenges. This type of TMDL has yet to be recreated because of the unique legislative and political forces that aligned for its creation.

As a solution, multijurisdictional TMDLs should be incorporated into interstate compacts to provide an enforcement mechanism to hold other states accountable for their pollution reduction. With nonpoint source pollution knowing no boundaries, there must be a more effective method to ensure neighboring states will implement appropriate water pollution reduction con-

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trols. Interstate compacts offer a way for states to enhance the strength of their TMDL agreements by incorporating enforcement and reducing unnecessary federal intrusion.

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Large-scale pollution of air and waterways is no respecter of political boundaries, and its effects extend far beyond those who cause it.

—President Lyndon B. Johnson¹

INTRODUCTION

The Mississippi River watershed, the largest watershed in the United States, is comprised of thirty-one states and covers approxi-

¹ President Lyndon B. Johnson, Special Message to the Congress on Conservation and Restoration of Natural Beauty (Feb. 8, 1965).

mately 1.2 million square miles of land from New York to Montana.² This large swath of land accounts for ninety-two percent of the country's agricultural exports.³ This massive amount of crop production results in high levels of nutrient discharges into the Mississippi River and its tributaries.⁴ Once these nutrients make it to the Gulf of Mexico, they contribute to a several-thousand-square-mile hypoxic zone that forms every summer, rendering the area devoid of most aquatic life.⁵ Agriculture in the Mississippi River Basin attributed over ninety percent of the nutrient loadings in the hypoxic zone.⁶ The reoccurrence of the hypoxic zone in the northern Gulf of Mexico prompted the creation of a task force in 1998, charged with providing "direction and support" for nutrient management activities within the watershed.⁷ This "direction and support," however, was not accompanied by any on-the-ground action.⁸ Frustrated with the Environmental Protection Agency's ("EPA") failure to set water quality standards in the basin, environmental organizations sought to compel federal agency action under section 303(c) of the Clean Water Act ("CWA") in *Gulf Restoration Network v. Jackson*.⁹ The environmental organizations argued that the EPA had a duty to set water quality standards and establish total maximum daily loads ("TMDL"), at a minimum, for nitrogen and phosphorus in the mainstem of the Mississippi River and the Northern Gulf of Mexico.¹⁰

The EPA responded by citing many of the common criticisms of increased federal participation in state water pollution control in its denial of the request—e.g., federal participation in large-scale pollu-

² C.S. SNYDER, INT'L PLANT NUTRITION INST., PROGRESS IN REDUCING NUTRIENT LOSS IN THE MISSISSIPPI RIVER BASIN—BUT EFFECTS ON GULF HYPOXIA STILL LAG 1–2 (2017).

³ *Mississippi River Facts*, NAT'L PARK SERV. (Feb. 10, 2022), <https://www.nps.gov/miss/riverfacts.htm> [<https://perma.cc/ZD3F-QHLM>].

⁴ Richard S. Davis & Pamela D. Marks, *Is the Chesapeake Bay Really Leading the Way in Managing Major Watersheds?*, 38-APR MD. B.J. 4 (2005).

⁵ See generally U.S. ENV'T PROT. AGENCY, MISSISSIPPI RIVER/GULF OF MEXICO WATERSHED NUTRIENT TASK FORCE 2015 REPORT TO CONGRESS 5–8 (2015) (discussing the impacts of nutrients in the Gulf of Mexico). Excess nutrients in the Gulf trigger an increase in algae growth that consumes oxygen, resulting in low dissolved oxygen for other organisms. *Id.* at 5. This low dissolved oxygen, coupled with changing temperatures in the summer months, results in hypoxic zones, or dead zones. *Id.* at 5.

⁶ Davis & Marks, *supra* note 4, at 7.

⁷ U.S. ENV'T PROT. AGENCY, CHARTER OF THE MISSISSIPPI RIVER/GULF OF MEXICO WATERSHED NUTRIENT TASK FORCE (1998).

⁸ See generally U.S. ENV'T PROT. AGENCY, MISSISSIPPI RIVER/GULF OF MEXICO WATERSHED NUTRIENT TASK FORCE 2017 REPORT TO CONGRESS 9–11 (2017).

⁹ No. 12–677, 2013 WL 5328547 (E.D. La. Sept. 20, 2013), *vacated and remanded sub nom.* *Gulf Restoration Network v. McCarthy*, 783 F.3d 227 (5th Cir. 2015).

¹⁰ *Id.* at *2.

tion management is expensive, resource intensive, and arguably less efficient than a cooperative, state-first model.¹¹ The federal government's refusal to meaningfully intervene, however, does not preclude the individual states from voluntarily coming together to commit to a watershed-wide TMDL. To ensure that the TMDL carries enforceable requirements, the Mississippi River states should create an interstate compact, requiring implementation of the TMDL and including enforcement provisions for any state that does not follow the terms of the pollution reduction agreement.

This Note explains why multijurisdictional TMDLs should be incorporated into interstate compacts to provide an enforceable and effective method of nonpoint source pollution reduction. Part I discusses the historical and statutory influences on current interstate water regulations. These influences include traditional usage of interstate compacts in water law, the CWA's deference to states regarding nonpoint source pollution, and state collaboration under the CWA. Part II introduces an example of current efforts to manage nonpoint source pollution in an interstate waterway. In the past two decades, the Chesapeake Bay has become the Nation's most comprehensive attempt at water quality improvement in a widespread, regional watershed. Finally, Part III addresses the challenges that have emerged through current water pollution regulatory efforts and advocates for states to incorporate multijurisdictional TMDLs into interstate compacts to create a system that is more efficient and enforceable but still maintains state sovereignty.

I. HISTORICAL AND STATUTORY INFLUENCES ON INTERSTATE WATER AGREEMENTS

Currently, interstate water pollution control is largely governed by the CWA.¹² Under the CWA, the EPA has a statutory mandate to "restore and maintain the . . . integrity of the Nation's waters."¹³ Due to the nature of land use regulation, however, much of the work to reduce and control water pollution is done at the state level. Prior to the 1970s, when there was a lack of overarching federal environmental legislation, states relied upon interstate agreements and interstate cooperation for any disputes that arose. This history provides examples of successful, and not-so-successful, techniques for approaching inter-

¹¹ *Id.* at *2-3.

¹² *See* 33 U.S.C. §§ 1251-1387.

¹³ *Id.*

state agreements.¹⁴ In addition to agreements among states, other influences on the U.S. water pollution control regime include the balance between federal and state authority and the expanding boundaries of regulatory authority.

A. *Using Interstate Compacts to Negotiate Water Agreements*

Interstate compacts have been used in America since the seventeenth century.¹⁵ Boundary disputes between colonies were settled with compacts subject to approval by the King of England.¹⁶ Interstate compacts are, in the simplest form, contracts entered into by states to address shared problems.¹⁷ There are many reasons why a state would agree to join a compact: furthering policy goals; impacting the design of the compact; and limiting potential federal interference into the compact's subject matter.¹⁸ Generally, interstate compacts are negotiated by representatives of the agreeing states and subsequently approved by the respective state legislatures.¹⁹ Following approval by the state legislature, the compact becomes established in state law and enforceable in state courts.²⁰

Certain interstate compacts also require consent from Congress. The Compact Clause of the Constitution provides that “[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State.”²¹ The Supreme Court has interpreted the Compact Clause to only require congressional consent when formation of the compact “may encroach upon or interfere with” the supremacy of the federal government.²² If the compact is not related to a subject matter typical for congressional legislation, it is not a possible interference with federal interest and does not require congress-

¹⁴ See *infra* Section I.A.1, for a discussion of the historical use of interstate agreements in water allocation disputes.

¹⁵ Leonard A. Weakley, *Interstate Compacts in the Law of Air and Water Pollution*, 3 NAT. RES. LAW. 81, 82 (1970).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Ann O'M. Bowman & Neal D. Woods, *Why States Join Interstate Compacts*, in COUNCIL ON STATE GOV'TS, BOOK OF THE STATES 2017, at 19 (2017), <http://knowledgecenter.csg.org/kc/system/files/Bowman%202017.pdf> [<https://perma.cc/T866-4BTF>].

¹⁹ LAW LIBR. OF CONG., GLOB. LEGAL RSCH. CTR., INTERSTATE COMPACTS IN THE UNITED STATES 2 (2018).

²⁰ Weakley, *supra* note 15, at 86.

²¹ U.S. CONST. art. I, § 10.

²² *Virginia v. Tennessee*, 148 U.S. 503, 518–19 (1893) (finding that there are situations, such as bordering states agreeing to “drai[n] the district” that is infected with cholera or plague, that should not require consent of Congress—particularly because Congress may not be in session at the time).

sional consent.²³ As a result, any compact created regarding water pollution in interstate waters would require congressional consent.²⁴ Congress has cited its authority under the Commerce Clause for the basis of almost every environmental statute passed, including the CWA.²⁵ In enacting the CWA, Congress specifically provided for the creation of interstate compacts, stating, “[n]o . . . compact shall be binding . . . until it has been approved by the Congress.”²⁶ After they receive the consent of Congress, compacts are enforceable in state or federal court.²⁷ Compacts are enforced according to their terms, following the principles of contract law.²⁸ Interstate compacts have been created on a variety of subject matters,²⁹ but have been particularly influential in U.S. water law.

1. *The Traditional Use of Interstate Compacts: Water Allocation Disputes*

Before water pollution was a concern in the United States, water allocation challenges plagued the western United States, especially the states of the Colorado River Basin.³⁰ The doctrine of prior appropriation—the standard for water use in the water-scarce western states—creates a property right in the diversion of a waterway for a beneficial purpose.³¹ Those who appropriate the water first—i.e., senior appropriators—are able to divert water at the expense of other states.³² States located downstream on the Colorado River feared that upstream states would divert large quantities of water, leaving them with

²³ See *Cuyler v. Adams*, 449 U.S. 433, 440 (1981).

²⁴ See *Weakley*, *supra* note 15, at 83.

²⁵ See, e.g., *Riverside Bayview Homes v. United States*, 474 U.S. 121, 132–33 (1985) (analyzing the jurisdiction of the 1972 CWA Amendments under Congress’s Commerce Clause authority).

²⁶ 33 U.S.C. § 1253.

²⁷ See *LAW LIBR. OF CONG.*, *supra* note 19, at 1–2.

²⁸ See *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (finding that the principles of contract law suggest rectifying a failure to perform in the past as well as ordering future performance).

²⁹ See generally *LAW LIBR. OF CONG.*, *supra* note 19, at 10 (referencing the Multistate Tax Compact, Port Authority of New York and New Jersey, Atlantic States Marine Fisheries Commission, and the Midwestern Higher Education Compact).

³⁰ See, e.g., *Kansas v. Colorado*, 185 U.S. 125 (1902); *Wyoming v. Colorado*, 259 U.S. 419 (1922); *Nebraska v. Wyoming*, 325 U.S. 589 (1945).

³¹ JAMES RASBAND, JAMES SALZMAN, MARK SQUILLACE & SAM KALEN, *NATURAL RESOURCES LAW AND POLICY* 862–63 (3d ed. 2016) (noting that the doctrine of prior appropriation is often described as “first in time, first in right”) (citing CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 231–35 (1992)).

³² *Id.*

less water than they needed.³³ In 1922, the Supreme Court validated this fear in *Wyoming v. Colorado*³⁴ and extended the doctrine of prior appropriation to a state's right to divert water.³⁵ The Court noted that prior appropriation was a background principle of law in both Wyoming and Colorado and had been widely applied in instances in which a dispute arose out of *private* appropriators of interstate streams.³⁶ They reasoned that when the dispute arose out of two *state* appropriators, it naturally followed that application of the prior appropriation doctrine is both "eminently just" and "equitable to all concerned."³⁷ Following this decision, the Colorado River Basin states became fearful that the quickly developing state of California would establish a priority right to water.³⁸ The states sought an agreement to ensure that water was equitably distributed.³⁹

Over time, "numerous compacts, federal laws, court decisions and decrees, contracts, and regulatory guidelines collectively known as the 'Law of the River'" have regulated water allocation of the Colorado River between seven states and Mexico.⁴⁰ The heart of the "Law of the River" is the 1922 Colorado River Compact, which effectively split the Colorado River basin into an "upper division" and "lower division."⁴¹ By splitting the basin into separate divisions, the drafters of the compact allocated half of the total water supply to each division, and the states within each division could form agreements about how to further allocate their division's half of the water supply.⁴² This allowed the two divisions to negotiate among a smaller

³³ See *Sharing Colorado River Water: History, Public Policy and the Colorado River Compact*, ARROYO (Univ. of Ariz. Water Res. Rsch. Ctr.), Aug. 1997 at 1 [hereinafter *Sharing Colorado River Water*], https://wrrc.arizona.edu/sites/wrrc.arizona.edu/files/attachment/arroyo_1997_v10_n1_w.pdf [https://perma.cc/6743-WNZJ].

³⁴ 259 U.S. 419 (1922).

³⁵ *Id.* at 470.

³⁶ *Id.* The Court went so far as to mention that the doctrine was even incorporated into the state constitutions of Wyoming and Colorado to prevent any departure from the status quo.

³⁷ *Id.*

³⁸ See *Arizona v. California*, 373 U.S. 546, 556 (1963), *judgment entered sub nom. Arizona v. California*, 376 U.S. 340 (1964), *amended sub nom. Arizona v. California*, 383 U.S. 268 (1966), *and amended sub nom. Arizona v. California*, 466 U.S. 144 (1984); see also *Sharing Colorado River Water*, *supra* note 33, at 2.

³⁹ See generally *Sharing Colorado River Water*, *supra* note 33, at 2–3 (describing the Colorado River Compact, which formed between seven Colorado River Basin states to determine their rights to river water in the wake of *Wyoming v. Colorado*).

⁴⁰ *The Law of the River*, U.S. DEP'T. OF THE INTERIOR BUREAU OF RECLAMATION (Mar. 2008), <https://www.usbr.gov/lc/region/g1000/lawofrvr.html> [https://perma.cc/BT7B-PWHE].

⁴¹ COLORADO RIVER COMPACT art. III (1922), <https://www.usbr.gov/lc/region/g1000/pdfiles/crcompact.pdf> [https://perma.cc/H9C7-WS4Z].

⁴² *Id.* art. I.

group of states, hopefully leading to a more efficient resolution of possible disputes regarding the allocation of water between them. The lower division states had a time constraint to apportion their respective water due to the proposed Boulder Canyon Project, including development of a dam and canal.⁴³ The water was officially apportioned among the lower division states in the Boulder Canyon Project Act of 1928 ("Project Act").⁴⁴ The upper division states, however, did not officially apportion their 7.5 million acre-feet for another twenty years in the Upper Colorado River Basin Compact of 1948.⁴⁵ This delay did not negatively impact the lower division states, so long as they did not exceed their collective half.⁴⁶

Creation and enforcement of the Law of the River compact, however, was not without conflict. Creation of the compact required compromise between the state's delegates, and even after compromise was achieved, the Arizona governor refused to ratify the compact.⁴⁷ Tensions grew between Arizona and California, both lower division states, particularly because of the Project Act,⁴⁸ which created a canal and dam that greatly increased California's ability to access the water.⁴⁹ Arizona finally ratified the compact in 1944 to begin their own reclamation project.⁵⁰ Eight years later, Arizona petitioned the Court for a judicial apportionment of the lower division's half, leading to the decision in *Arizona v. California*.⁵¹ In *Arizona v. California*, the Court confirmed that Congress provided a specific method of apportionment within the lower division states when it passed the Project Act⁵² and that Congress authorized the Secretary of the Interior to apportion water between the states if the states failed to agree on a compact.⁵³ Although creation of the Law of the River faced challenges, it has weathered many storms since its creation and is one of the nation's

⁴³ See *Sharing Colorado River Water*, *supra* note 33, at 4.

⁴⁴ Pub. L. No. 70-642, § 4(a), 45 Stat. 1067 (1928) (codified at 43 U.S.C. § 617).

⁴⁵ See *Sharing Colorado River Water*, *supra* note 33, at 2. The lower division states initially apportioned their respective 7.5 million acre-feet of water in the Boulder Canyon Project Act of 1928 due to pending development projects, while the upper division states did not officially apportion their 7.5 million acre-feet for another twenty years in the Upper Colorado River Basin Compact of 1948. *Id.* at 4.

⁴⁶ See *id.*

⁴⁷ *Id.*

⁴⁸ 43 U.S.C. § 617.

⁴⁹ See *Sharing Colorado River Water*, *supra* note 33, at 4.

⁵⁰ *Id.*

⁵¹ 373 U.S. 546 (1963).

⁵² *Id.* at 565-66.

⁵³ *Id.* at 579.

strongest and most preeminent examples of an interstate water agreement.

2. *The Less Common Use of Interstate Compacts: Water Pollution Disputes*

Although less customary than water allocation compacts, a handful of interstate compacts have used to address water pollution, most of which were created before the implementation of the modern TMDL program.⁵⁴ To be truly effective, a compact must provide explicit terms for enforcement.⁵⁵ Some water pollution compacts, however, are silent on enforcement.⁵⁶ One enforcement mechanism that water pollution compacts employ is the creation of an interstate body or commission with representation from all signatory states.⁵⁷ A prominent example of an interstate water pollution control agreement by interstate compact is the Ohio River Valley Water Sanitation Compact (“Ohio River Compact”).⁵⁸ The Ohio River Compact was negotiated and ratified by eight states and obtained congressional consent in 1940.⁵⁹ The Ohio River Compact had the effect of drastically increasing the use of treatment facilities for industrial waste along the Ohio River at a time when federal regulation was nonexistent.⁶⁰ The Ohio River Compact created the Ohio River Valley Water Sanitation Commission (“ORSANCO”), consisting of three members from all states

⁵⁴ See, e.g., Louisiana-Mississippi Tangipahoa River Waterway Compact of 1988, 1988 La. Sess. Law Serv. 630 (West); Mississippi River Interstate Pollution Phase-Out Compact, La. Stat. Ann. § 30:2091; New England Interstate Water Pollution Control Compact of 1947, Conn. Gen. Stat. § 22a-309; Ohio River Valley Water Sanitation Compact of 1948, 45 Ill. Comp. Stat. 60/0.01; Potomac Valley Compact of 1970, Pub. L. No. 91-407, 84 Stat. 856 (1970).

⁵⁵ See James W. Curlin, *The Interstate Water Pollution Compact—Paper Tiger or Effective Regulatory Device?*, 2 *ECOLOGY L. Q.* 333, 345 (1972). In his article, Curlin argues that interstate compacts can be, and have been, both “paper tigers” and effective regulatory devices. *Id.* at 353. Curlin emphasizes the need for express enforcement provisions but notes that without goodwill efforts by the signatory states, the compact will not be successful. *Id.* at 355.

⁵⁶ See *id.* at 350.

⁵⁷ See *id.* at 345.

⁵⁸ OHIO REV. CODE ANN. § 6113.01 (West).

⁵⁹ See *Ohio River Valley Water Sanitation Compact*, THE COUNCIL OF STATE GOV'TS, <https://apps.csg.org/ncic/Compact.aspx?id=150> [https://perma.cc/BV9B-88G6].

⁶⁰ See Cedric Rose, *How ORSANCO's Role As Steadfast Defender Of The Ohio River Has Changed*, CINCINNATI PUB. RADIO (Feb. 4, 2020), <https://www.wvxu.org/post/how-orsancos-role-steadfast-defender-ohio-river-has-changed#stream/0> [https://perma.cc/W8V8-LJNH] (“Before ORSANCO, less than 1% of the sewage generated along the river received treatment. Just 18 years later, 99% of it went through treatment plants. By 1965, 90% of the 1,705 industrial establishments along the river’s length complied with ORSANCO’s minimum industrial waste requirements.”).

that were parties to the agreement.⁶¹ Under the express terms of the agreement, the commission has the authority to conduct investigations, hearings, and issue orders to any “municipality, corporation, person, or other entity discharging sewage or industrial waste” to compel compliance with the agreement.⁶² ORSANCO has the authority to compel member states to adopt water standards by member vote.⁶³ Although ORSANCO has this authority on paper, in reality it is unlikely to be employed because the terms of the agreement require a vote of two out of three commissioners from each state, including the state that violated the standards.⁶⁴ Although ORSANCO is still in operation, the 1972 Amendments to the CWA drastically changed the way water pollution was regulated and made certain aspects of the Ohio River Compact redundant.⁶⁵ Today, those discharging sewage and industrial waste, as provided for in the Ohio River Compact, are regulated under the CWA and are required to obtain permits and maintain records for the pollution that they discharge in proscribed waterways.⁶⁶ The next Section discusses the impact of the modern CWA on management of nonpoint source pollution.

B. State Authority Over Nonpoint Source Pollution

Since the CWA was passed in 1972, control of point source pollution—e.g., water pollution from industrial and municipal sources—has seen great improvement while control of nonpoint source pollution has remained largely unaddressed.⁶⁷ The CWA does not define nonpoint source pollution, but the EPA considers nonpoint source pollution to be anything that is not point source pollution as defined in the CWA.⁶⁸ Point source is, in turn, defined in the CWA to include “any discernible, confined and discrete conveyance”⁶⁹ The defini-

⁶¹ *Id.* ORSANCO is still in operation today, operating programs for improvement of water quality in the Ohio River basin. See ORSANCO, <http://www.orsanco.org/> [<https://perma.cc/E5F7-ML2A>].

⁶² OHIO REV. CODE ANN. § 6113.01 (West).

⁶³ See Rose, *supra* note 60.

⁶⁴ See *id.*

⁶⁵ See *id.*; Lara D. Guercio, *The Struggle Between Man and Nature—Agriculture, Nonpoint Source Pollution, and Clean Water: How to Implement the State of Vermont’s Phosphorous TMDL Within the Lake Champlain Basin*, 12 VT. L. REV. 455, 460 (2011).

⁶⁶ 33 U.S.C. § 1342(a)(1).

⁶⁷ See Guercio, *supra* note 65, at 460.

⁶⁸ *Basic Information about Nonpoint Source (NPS) Pollution*, U.S. ENV’T PROT. AGENCY (July 8, 2021), <https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution> [<https://perma.cc/MFZ7-WDZ3>].

⁶⁹ 33 U.S.C. § 1362 (14).

tion of point source goes on to expressly exclude “agricultural stormwater discharges and return flows from irrigated agriculture.”⁷⁰ This ensures that this traditionally state-controlled industry will not be overtaken by federal regulation.⁷¹

There are many different examples of nonpoint source pollution,⁷² but this Note only discusses agricultural pollution. Although the proposed solution applies to all forms of nonpoint source pollution, agricultural pollution is the most prevalent form and is at the forefront of many current water pollution disputes. Because agriculture is a large industry in the United States,⁷³ it consequently accounts for the impairment of a large portion of rivers, streams, lakes, reservoirs, ponds, and estuaries throughout the country.⁷⁴ The most prevalent source of pollution from agriculture is excess nutrients—commonly nitrogen and phosphorus.⁷⁵ Harmful algal blooms that form as a result of excess nutrients in the water often lead to ecological disaster, human illnesses, and significant economic loss.⁷⁶ Federal,

⁷⁰ *Id.*

⁷¹ Although agricultural stormwater escapes regulation as a point source, the CWA includes concentrated animal feeding operations (“CAFOs”) as point sources. *Id.* The EPA determines when animal feeding operations are considered “concentrated” for purposes of CWA permitting based on the number of animals, the animal sector, and whether the operation is found to be a “significant contributor of pollutants.” *Regulatory Definitions of Large CAFOs, Medium CAFO, and Small CAFOs*, U.S. ENV’T PROT. AGENCY, https://www.epa.gov/sites/production/files/2015-08/documents/sector_table.pdf [<https://perma.cc/NMW9-ZLCH>]. CAFOs present unique problems because they often produce much more manure than the operation itself is able to utilize. *See generally* CARRIE HRIBAR, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES 2 (2010), https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf [<https://perma.cc/A5X2-FZFV>]. A single feeding operation with 800,000 pigs can produce more manure in a year than the amount of sanitary waste produced by the city of Philadelphia in a year. *Id.*

⁷² *See generally* *Basic Information about Nonpoint Source (NPS) Pollution*, *supra* note 68 (including sediment from construction sites, excess fertilizers from residential lawns, urban runoff, abandoned mine pollution, and atmospheric deposition).

⁷³ *See generally* PAUL D. CAPEL, KATHLEEN A. MCCARTHY, RICHARD H. COUPE, KATIA M. GREY, SHEILA E. AMENUMEY, NANCY T. BAKER, & RICHARD L. JOHNSON, U.S. GEOLOGICAL SURV., AGRICULTURE—A RIVER RUNS THROUGH IT—THE CONNECTIONS BETWEEN AGRICULTURE AND WATER QUALITY 43–65 (2018) (describing the changes in the agricultural industry and the connection to water pollution).

⁷⁴ *Watershed Assessment, Tracking & Environmental Results: National Causes of Impairment*, U.S. ENV’T PROT. AGENCY, http://ofmpub.epa.gov/waters10/attains_nation_cy.control#causes [<https://perma.cc/7XSQ-PSW9>].

⁷⁵ Jan G. Laitos & Heidi Ruckriegle, *The Clean Water Act and the Challenge of Agricultural Pollution*, 37 VT. L. REV. 1033, 1037 (2013).

⁷⁶ U.S. ENV’T PROT. AGENCY, A COMPILATION OF COST DATA ASSOCIATED WITH THE IMPACTS AND CONTROL OF NUTRIENT POLLUTION I-1 (2015). Economic losses can occur from decreases in tourism and commercial fishing; decreased property value; and high costs associated with managing the pollution. *Id.* at ES-2.

state, and local governments spend billions of dollars every year to combat the damaging effects of nutrient pollution.⁷⁷

Although nonpoint source pollution is a widespread problem affecting water quality, it is not regulated by the two basic permit programs of the CWA that apply to the discharge of a pollutant from a *point source* into a “water of the United States.”⁷⁸ While point source dischargers are required to obtain permits under sections 402 or 404 of the CWA—which directly regulate the amount of pollutants that they are allowed to discharge—management of nonpoint source pollution is largely left to the states.⁷⁹ Congress recognized the widespread impacts of nonpoint source pollution when drafting and enacting the 1972 amendments to the CWA,⁸⁰ but made deliberate choices to focus on the more easily addressable form of pollution: point sources.

Multiple provisions of the CWA expressly recognize and address nonpoint source pollution; however, the provisions reiterate Congress’s intent to leave the bulk of nonpoint source management to the states. Section 208 sought to address nonpoint source pollution by requiring states to adopt waste treatment management plans that identified agricultural nonpoint sources of pollution and provide “methods . . . to control to the extent feasible such sources.”⁸¹ Although states submitted a total of 222 plans by 1982, these plans were largely ineffective due to implementation failures, lack of financial support, and lack of EPA oversight, among other things.⁸² Federal funding for the program ended in 1981 and the program is no longer in effect.⁸³ In 1987, however, Congress adopted another planning provision—section 319—requiring states to submit “state assessment reports” and develop “state management programs” to address nonpoint source pollution.⁸⁴ Section 319 still plays a significant role in the national framework for nonpoint source pollution: \$172 million was spent across 319 grants funded by the EPA in 2020.⁸⁵ Although section 319’s planning requirements were more effective than previ-

⁷⁷ *Nutrient Pollution: The Effects*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/nutrientpollution/effects> [<https://perma.cc/L5VY-EVE9>].

⁷⁸ 33 U.S.C. §§ 1311, 1362.

⁷⁹ See Laitos & Ruckriegle, *supra* note 75, at 1040.

⁸⁰ See S. REP. NO. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3705 (“It has become clearly established that the waters of the Nation cannot be restored and their quality maintained unless the very complex and difficult problem of nonpoint sources is addressed.”).

⁸¹ 33 U.S.C. § 1288(b)(2)(F).

⁸² See Guercio, *supra* note 65, at 467–68.

⁸³ *Id.* at 467.

⁸⁴ 33 U.S.C. § 1329.

⁸⁵ *319 Grant Program for States and Territories*, U.S. ENV’T PROT. AGENCY (Feb. 2, 2022)

ous requirements, states maintained the voluntary control measures they chose to put in place, so there was no enforceable federal *requirement* that the agriculture industry comply with the measures.⁸⁶

Section 303(d) of the CWA requires that states identify and list waters that are unable to achieve the EPA-established water quality standards after all technology-based controls are implemented.⁸⁷ After a waterway, or segment thereof, is listed, the state is technically required to create a TMDL for each pollutant to ensure that the ambient water quality standards can be met.⁸⁸ Although the TMDL program was adopted in 1972, the program remained fairly dormant for nearly two decades while the EPA focused its attention and resources on the programs that provided more immediate results—the technology-based control methods.⁸⁹ The program was forced out of obscurity in 1984 when a citizen suit was brought to compel the EPA to establish TMDLs for pollutants in Lake Michigan after the state failed to do so.⁹⁰

A TMDL is a planning tool to help guide the state to reach the established water quality standards.⁹¹ In its simplest form, a TMDL contains a quantitative level of pollution that would still allow the waterway to attain the applicable water quality standards.⁹² If a state fails to create the TMDL—or submits an unsatisfactory TMDL—the CWA authorizes the EPA to create one on its behalf.⁹³ By creating TMDLs, states have the ability to determine how best to allocate the necessary pollution reductions. It is often easier for states to apply stricter limits on point sources, because those limits are enforceable through National Pollutant Discharge Elimination System (“NPDES”) permits,

<https://www.epa.gov/nps/319-grant-program-states-and-territories> [https://perma.cc/7SS5-SERD].

⁸⁶ See Robert W. Adler, *Water Quality and Agriculture: Assessing Alternative Futures*, 25 ENVIRONS: ENV'T L. & POL'Y J. 77, 80 (2002).

⁸⁷ See CLAUDIA COPELAND, CONG. RSCH. SERV., R42752, CLEAN WATER ACT AND POLLUTANT TOTAL MAXIMUM DAILY LOADS (TMDLS) 1 (2012).

⁸⁸ *Id.* TMDLs are often referred to as “pollution budgets” because they serve as a way for states to recognize how much of a pollutant, in total, they are able to discharge in order to achieve the standards.

⁸⁹ *Id.* at 79.

⁹⁰ See *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984).

⁹¹ *Id.*

⁹² *Id.*

⁹³ See *id.* at 996 (holding that when a state fails to submit a TMDL, this amounts to a constructive submission of an unsatisfactory TMDL prompting the EPA’s statutory duty to create a TMDL for the state); *Columbia Riverkeeper v. Wheeler*, 944 F.3d 1204, 1211 (9th Cir. 2019) (concluding that EPA has a nondiscretionary duty to issue a TMDL, within thirty days of the state listing the impaired water pursuant to § 303(d)).

so this is often what states choose to address first.⁹⁴ Municipal and industrial point sources, however, correctly argue that their operations have been disproportionately regulated because nonpoint sources are contributing a large portion of pollution to waters but are not facing targeted regulation like municipal and industrial sources are.⁹⁵

States retain full authority to determine how, and if, they choose to implement TMDLs.⁹⁶ Therefore, implementation among the states is variable.⁹⁷ In *Friends of Pinto Creek v. EPA*,⁹⁸ the Ninth Circuit addressed a scenario in which a waterway was listed on Arizona's 303(d) list of impaired waters, yet the state had no plan in place to bring the waterway into compliance.⁹⁹ In that case, the EPA attempted to issue an NPDES permit to allow mine-related discharges into Pinto Creek, a waterway that was already in excess of water quality standards and on the list of impaired waters.¹⁰⁰ The court held that NPDES permits cannot be issued for point source discharges into waters already in excess of water quality standards if the state has no plan in place to bring the waterway, or segment thereof, into compliance.¹⁰¹ The decision limited the states' ability to continue allowing point sources—i.e., NPDES permit holders—to discharge pollution while neglecting their responsibility to bring the waterway into compliance.¹⁰² This seemingly addresses one of the loopholes of the TMDL program. The court reasoned that the plain language of the CWA suggests that no permit should be issued to a new discharger if the discharge will contribute to an existing violation of water quality standards.¹⁰³ Because of heavy industrial reliance on NPDES permits, this is, in theory, supposed to serve as an incentive for states to *at least* create a plan to work toward compliance rather than continuing to pollute an already impaired waterway. The court noted that this does not impose a requirement that the state begin remediation toward

⁹⁴ See COPELAND, *supra* note 87, at 6.

⁹⁵ See *id.*

⁹⁶ See *Pronsolino v. Nastri*, 291 F.3d 1123, 1128–29 (9th Cir. 2002) (“States must implement TMDLs only to the extent that they seek to avoid losing federal grant money; there is no pertinent statutory provision otherwise requiring implementation of § 303 plans or providing for their enforcement.”).

⁹⁷ See COPELAND, *supra* note 87, at 6.

⁹⁸ 504 F.3d 1007 (9th Cir. 2007).

⁹⁹ See *id.* at 1009–15.

¹⁰⁰ See *id.*

¹⁰¹ See *id.* at 1014.

¹⁰² *Id.* at 1012.

¹⁰³ *Id.*

compliance, but only that there is a plan in place.¹⁰⁴ The requirements and stringency of the required plan, however, are largely unclear. Ultimately, this may just be a formality that serves as a small road-bump to the issuance of the permit.

The agricultural industry, among others, has long feared the use of TMDLs as tools for nonpoint source pollution management.¹⁰⁵ In *Pronsolino v. Nastri*,¹⁰⁶ for example, an applicant for a tree harvesting permit challenged the EPA's authority to impose a TMDL on the Garcia River—a river only polluted by nonpoint sources of pollution.¹⁰⁷ The Ninth Circuit upheld the application of TMDLs to waterways impaired solely by nonpoint source pollution.¹⁰⁸ The court held that the EPA can require states to submit a TMDL for waters impaired only by nonpoint source pollution, and if the state fails to, the EPA can create the TMDL for them.¹⁰⁹ Although waste load allocations for point sources can be assured through permits, TMDLs for waters impaired by nonpoint pollution require “reasonable assurance” that the proposed load reductions from nonpoint sources can ultimately be attained.¹¹⁰ In 2011, the EPA rejected the Lake Champlain TMDL in part because of a lack of reasonable assurances of nonpoint source load reductions.¹¹¹ The EPA found that the TMDL, and the accompanying implementation plan, did not identify any programs in existence, or with a source of funding, to ensure that nonpoint sources would meet their load allocation.¹¹² Even if the TMDL includes reasonable assurance of needed load reductions, it is left to the states to determine how to implement and allocate the TMDL. When the wa-

¹⁰⁴ See *id.* at 1013.

¹⁰⁵ See Greg LaBarge, *How Does a TMDL Affect Agriculture?*, OHIO FARMER (Aug. 31, 2021), <https://www.farmprogress.com/conservation/how-does-tmdl-affect-agriculture> [https://perma.cc/KF5H-NFHT] (questioning whether the effect of a TMDL on agriculture is “something to fear”).

¹⁰⁶ 291 F.3d 1123 (9th Cir. 2002).

¹⁰⁷ *Id.* at 1129. EPA disapproved the state's original the list of impaired waters as required by § 303(d) and after the state rejected an opportunity to amend it, the EPA established an impaired waters list for the state. Following state inaction, the EPA established a TMDL for the Garcia River setting the amount of sediment sixty percent lower than historical loadings. *Id.*

¹⁰⁸ *Id.* at 1131.

¹⁰⁹ *Id.* at 1137.

¹¹⁰ See COPELAND, *supra* note 87, at 6.

¹¹¹ Letter from H. Curtis Spalding, EPA Reg'l Adm'r, to Deborah Markowitz, Vt. Sec'y of State (Jan. 24, 2011), <https://www.epa.gov/sites/production/files/2015-09/documents/2002-lake-champlain-tmdl-disapproval-decision.pdf> [https://perma.cc/2Q7J-MJX6] (on file with author).

¹¹² *Id.* The TMDL imposed less stringent waste load allocations on a treatment plant and planned to rely more heavily on nonpoint source reductions to achieve water quality standards. *Id.*

terway spans multiple jurisdictions, however, decisions on implementation and allocation become increasingly challenging.

C. Expanding the CWA to Encourage Interstate Collaboration

Regulation of interstate waters fits squarely within Congress's constitutional authority to regulate interstate commerce.¹¹³ Pursuant to this authority, the CWA includes multiple provisions that expressly prompt cooperation among states when dealing with interstate waters,¹¹⁴ likely due to the widespread and apparent challenges that states dealt with in the water apportionment context. Under § 319(g), states that do not meet applicable water quality standards are able to petition the EPA to convene an interstate management conference with states that contribute significant nonpoint source pollution to the waterway in question.¹¹⁵ One interstate management conference to discuss the Northeast Regional Mercury TMDL has come about as a result of this provision.¹¹⁶ Section 402(b)(5) of the CWA allows for any downstream state that may be affected by the issuance of an NPDES permit, or state equivalent, to submit recommendations to the permitting state and the EPA.¹¹⁷ Although upstream states must write their NPDES permits to ensure that point sources meet the water quality standards of the downstream states,¹¹⁸ there is no such assumption for nonpoint sources. Lastly, § 518(e)(3) extends cooperation provisions to Indian tribes.¹¹⁹ Specifically, this section creates a duty for the EPA to consult with Indian tribes and provide a "mechanism" for the reso-

¹¹³ See *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 304 (3d Cir. 2015) (citing *United States v. Lopez*, 514 U.S. 549, 558 (1995)) ("Broadly speaking, then, the federal Government's traditional authority to regulate [channels of interstate commerce] is secure."). Throughout multiple iterations of rules defining "Waters of the United States" ("WOTUS"), regulation of interstate waters as WOTUS has not been in question until the promulgation of The Navigable Waters Protection Rule under the Trump Administration. The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (Apr. 21, 2020). Even though the definition of WOTUS plays a large role in the applicability of the CWA to certain interstate waters, this unsettled aspect of water pollution law is outside the scope of this Note.

¹¹⁴ See, e.g., 33 U.S.C. §§ 1329(g), 1342(b)(5), 1377(e)(3).

¹¹⁵ *Id.* § 1329(g).

¹¹⁶ See generally *Clean Water Act Section 319(g) Management Conference June 22-23, 2010 Meeting Summary*, ENV'T PROT. AGENCY, https://www.epa.gov/sites/production/files/2015-09/documents/319g_meeting_summary_9-2.pdf [<https://perma.cc/5EUL-Q4FF>] (summarizing the topics of discussion at the two-day conference).

¹¹⁷ 33 U.S.C. § 1342(b)(5).

¹¹⁸ See *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992).

¹¹⁹ 33 U.S.C. § 1377(e)(3).

lution of any conflict caused by differing water quality standards set by Indian tribes and the neighboring states.¹²⁰

Although section 303 of the CWA—which contains the TMDL and impaired waters list requirements—does not expressly provide for interstate collaboration, it does not limit the definition of a TMDL in a manner that applies only to a water segment within a given state.¹²¹ The EPA has long encouraged states to develop TMDLs on a regional or watershed level for efficiency and consistency in restoration within the watershed.¹²² This watershed level approach led to the development of many statewide TMDLs that apply to a specific pollutant, including Minnesota’s mercury TMDL and New Hampshire’s chlorine TMDL.¹²³ The broad interpretation of a TMDL made it possible to utilize one TMDL to address larger watersheds that cover more than one state or jurisdiction.¹²⁴ For example, a handful of multijurisdictional TMDLs were developed including the Northeast Regional Mercury TMDL,¹²⁵ TMDL for dissolved oxygen in Long Island Sound,¹²⁶ and the Chesapeake Bay TMDL (“Bay TMDL”).¹²⁷

II. CURRENT STATE OF INTERSTATE WATER POLLUTION CONTROL: THE CHESAPEAKE BAY MODEL

Along with the challenges that generally arise when developing a TMDL for an impaired intrastate waterway—such as determining the most efficient ways to achieve reduction and a balance of state inter-

¹²⁰ *Id.*

¹²¹ See 33 U.S.C. § 1313(d)(1)(C).

¹²² See COPELAND, *supra* note 87, at 10.

¹²³ See *id.*

¹²⁴ *Id.*

¹²⁵ CONN. DEP’T OF ENV’T PROT., ME. DEP’T OF ENV’T PROT., MASS. DEP’T OF ENV’T PROT., N.H. DEP’T OF ENV’T SERV., N.Y. STATE DEP’T OF ENV’T CONSERVATION, R.I. DEP’T OF ENV’T MGMT., VT. DEP’T OF ENV’T CONSERVATION & NEW ENGLAND INTERSTATE WATER POLLUTION CONTROL COMM’N, NORTHEAST REGIONAL MERCURY TOTAL MAXIMUM DAILY LOAD 5 (2007), <https://neiwpcc.org/wp-content/uploads/2020/08/FINAL-Northeast-Regional-Mercury-TMDL.pdf> [<https://perma.cc/PU7W-6S8D>] (focusing on reducing atmospheric deposition of mercury into Northeast waterways to meet desired fish tissue concentrations).

¹²⁶ N.Y. STATE DEP’T OF ENV’T CONSERVATION & CONN. DEP’T OF ENV’T PROT., A TOTAL MAXIMUM DAILY LOAD ANALYSIS TO ACHIEVE WATER QUALITY STANDARDS FOR DISSOLVED OXYGEN IN LONG ISLAND SOUND 2 (2000), <http://longislandsoundstudy.net/wp-content/uploads/2010/03/Tmdl.pdf> [<https://perma.cc/6RM4-6E6E>] (setting nitrogen reduction targets for New York and Connecticut to decrease the extent and duration of hypoxic conditions in Long Island Sound).

¹²⁷ U.S. ENV’T PROT. AGENCY, CHESAPEAKE BAY TMDL EXECUTIVE SUMMARY 3 (2010) [hereinafter TMDL EXECUTIVE SUMMARY], https://www.epa.gov/sites/default/files/2014-12/documents/bay_tmdl_executive_summary_final_12.29.10_final_1.pdf [<https://perma.cc/6D5H-DHHS>].

ests—developing a multijurisdictional TMDL presents additional challenges, most notably, the need for state cooperation.¹²⁸ Each state must willingly agree to participate in the TMDL process with another jurisdiction because there is no legal requirement for them to do so. Further, it is possible that neighboring states have different policy priorities, established designated uses for waterways, water quality standards, or nonpoint source control methods,¹²⁹ so one state may be required to accommodate stricter limits because of the limits established in the other state. The Bay TMDL—the largest and most complex TMDL developed to date—required six states and the District of Columbia to grapple with these issues when identifying pollution reduction goals.¹³⁰

The Chesapeake Bay watershed consists of seven jurisdictions and over 18 million people.¹³¹ Since 1983, the Chesapeake Bay Program has been utilizing written agreements between Maryland, Pennsylvania, Virginia, and the District of Columbia to facilitate restoration of the Bay.¹³² Following a citizen suit filed against the EPA for Virginia's failure to create a TMDL, the Chesapeake 2000 agreement ("Chesapeake 2000") was signed to reaffirm the previous commitments.¹³³ Chesapeake 2000 included numerous restoration goals, including reducing nutrient pollution in the Bay by enough to remove the Bay and its tidal tributaries from the 303(d) list of impaired waters by 2010.¹³⁴ Although Chesapeake 2000 did not mention a future

¹²⁸ See generally COPELAND, *supra* note 87, at 10 (noting the additional challenges posed by multijurisdictional TMDLs).

¹²⁹ *Id.*

¹³⁰ TMDL EXECUTIVE SUMMARY, *supra* note 127, at 1. The TMDL addresses pollution from Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia, and the District of Columbia. *Id.*

¹³¹ *Chesapeake Bay*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/topic/chesapeake-bay> [<https://perma.cc/8C56-CJT4>].

¹³² See CHESAPEAKE BAY PROGRAM, THE CHESAPEAKE BAY AGREEMENT OF 1983 (1983), https://www.chesapeakebay.net/documents/1983_CB_Agreement2.pdf [<https://perma.cc/9Y4D-2LBG>]. The 1983 agreement was the first attempt at a collaborative effort to address pollution in the Chesapeake Bay. The agreement showed that Chesapeake Bay restoration would become a policy concern for the Bay states, and it established a Chesapeake Executive Council to oversee the restoration plans of the states. *Id.* It did not, however, include any enforceable requirements or schedules for action. *Id.* The second agreement, however, signed in 1987, included a variety of different goals and deadlines to meet them. CHESAPEAKE BAY PROGRAM, 1987 CHESAPEAKE BAY AGREEMENT (1987), https://www.chesapeakebay.net/content/publications/cbp_12510.pdf [<https://perma.cc/KZ4P-DRRB>].

¹³³ CHESAPEAKE BAY PROGRAM, CHESAPEAKE 2000 (2000), https://www.chesapeakebay.net/documents/cbp_12081.pdf [<https://perma.cc/V3P9-L7AY>].

¹³⁴ *Id.*

TMDL, it represented an interstate compact among the states agreeing to commit to restoring the Chesapeake Bay.

Although Chesapeake 2000 included lofty goals, there were no consequences for failure to achieve the goals. In 2000, Congress passed the Chesapeake Bay Restoration Act that amended the CWA and imposed an affirmative duty on the EPA to continue Chesapeake Bay restoration efforts under the CWA.¹³⁵ After the EPA announced that various goals of Chesapeake 2000 would not be met, environmental organizations filed suit against the EPA alleging that the agency breached its duty under the CWA, the Administrative Procedure Act (“APA”),¹³⁶ and the Chesapeake Bay Agreements.¹³⁷ The settlement agreement in that case became the force behind creation of the Bay TMDL.¹³⁸

The Bay TMDL, created by the EPA with substantial input from the Bay states, is unique because it provided express allocations—including target dates—and required reasonable assurances that water quality standards would be met.¹³⁹ Each state was required to submit to the EPA a Watershed Implementation Plan (“WIP”) that detailed the state’s proposed plan on how they would approach the required pollution reduction.¹⁴⁰ The Bay TMDL is also unique because it was created in conjunction with the Chesapeake Bay Protection and Restoration Executive Order,¹⁴¹ which directed federal agencies to create a framework to guide the states and the District of Columbia in the restoration of the Bay.¹⁴² The Bay TMDL includes a detailed accountability framework with four main components: (1) WIPs submitted by the Bay states to the EPA; (2) interim milestones to demonstrate pollution reduction progress; (3) a federal progress tracking system; and (4) consequences in the form of “federal actions if the jurisdictions fail to develop sufficient WIPs, effectively implement their WIPs, or fulfill

¹³⁵ 33 U.S.C. § 1267.

¹³⁶ Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified in scattered sections of 5 U.S.C.).

¹³⁷ Complaint at 2, *Fowler v. EPA*, No. 1:09-CV-00005 (D.D.C. Jan. 5, 2009).

¹³⁸ COPELAND, *supra* note 87, at 12. The agreement required the EPA to establish the Bay TMDL by December 31, 2010, required watershed implementation plans, and required reasonable assurances for controlling nonpoint source pollution. *Id.*

¹³⁹ *Am. Farm Bureau Fed’n v. EPA*, 792 F.3d 281, 292 (3d Cir. 2015).

¹⁴⁰ *Id.* at 291–92. Where the EPA was unconvinced that the WIP would be sufficient, such as Pennsylvania’s urban stormwater budget and West Virginia’s agricultural pollution budget, they imposed a “backstop adjustment” that would require more stringent point source limitations if the states cannot meet the nonpoint allocations. *Id.* at 292.

¹⁴¹ Exec. Order No. 13,508, 3 C.F.R. § 203–204 (2010).

¹⁴² *Id.*

their 2-year milestones.”¹⁴³ The “federal actions” include implementing stricter NPDES permit limits on point sources in under-performing jurisdictions, increased NPDES program oversight, required offsets, and redirecting or conditioning EPA grants, among other actions.¹⁴⁴ Even with these possible federal actions, there has been dispute between the Bay states about disproportionate implementation and lack of progress.

A. *Challenging the Bay TMDL: American Farm Bureau Federation v. EPA*

In *American Farm Bureau Federation v. EPA*,¹⁴⁵ a coalition of trade groups challenged the main components of the Bay TMDL, arguing that the TMDL is only authorized to be a number and that the Bay TMDL usurped the traditional state power to regulate land use.¹⁴⁶ The Third Circuit analyzed the Farm Bureau’s challenges under *Chevron v. NRDC*¹⁴⁷ to determine if the EPA’s actions represented a reasonable interpretation of the CWA’s TMDL requirements.¹⁴⁸ The court concluded that the term “TMDL” in the CWA is ambiguous because it is susceptible to multiple meanings.¹⁴⁹ Further, the court recognized that the CWA requires that the TMDL account for nonpoint and point source pollution, but the CWA is silent on how to account for them.¹⁵⁰ Deferring to the agency, the court found that the EPA’s development of this TMDL reflects a “reasonable and . . . legitimate policy choice . . . in administering a less-than-clear statute.”¹⁵¹

American Farm Bureau Federation was a monumental case for multijurisdictional TMDLs. Prior to this case, TMDLs established the maximum daily amount of pollution for the waterway, but states would have the option to apply all the pollution reduction to point sources if they wished. The Bay TMDL, in contrast, specified waste

¹⁴³ CHESAPEAKE BAY TMDL SECTION 7 REASONABLE ASSURANCE AND ACCOUNTABILITY FRAMEWORK 7-5 (2010) [hereinafter TMDL SECTION 7], https://www.epa.gov/sites/production/files/2014-12/documents/cbay_final_tmdl_section_7_final_0.pdf [<https://perma.cc/F44G-B57F>].

¹⁴⁴ Letter from Shawn M. Garvin, Reg’l Adm’r, EPA Region 3, to L. Preston Bryant, Va. Sec’y of Nat. Res. (Dec. 29, 2009), https://www.epa.gov/sites/production/files/2015-07/documents/bay_letter_1209.pdf [<https://perma.cc/M26G-46Z6>].

¹⁴⁵ 792 F.3d 281 (3d Cir. 2015).

¹⁴⁶ *Id.* at 291–92.

¹⁴⁷ 467 U.S. 837 (1984).

¹⁴⁸ *Am. Farm Bureau Fed’n*, 792 F.3d at 294 (citing *Chevron*, 467 U.S. 837).

¹⁴⁹ *Id.* at 306.

¹⁵⁰ *Id.* at 300.

¹⁵¹ *Id.* at 309.

load allocations for point sources and required load allocations to nonpoint source sectors such as agricultural and urban runoff. The *American Farm Bureau Federation* court went further than the *Pronsolino* court, which merely held that TMDLs can be used for waterways solely impaired by nonpoint source pollution.¹⁵² In *American Farm Bureau Federation*, the court upheld the EPA's use of authority to apply specific load allocations to nonpoint sources and reasoned that even if the CWA does not specifically require that the EPA's final TMDL allocate portions of the load among the different sources, the EPA has the authority to do so.¹⁵³ The court applied a new, broader meaning to the term "TMDL" and upheld EPA authority used to make them stronger.

B. *The Bay TMDL Since American Farm Bureau Federation*

Following the Third Circuit's decision in *American Farm Bureau Federation v. EPA*, and the Supreme Court's denial of certiorari, the legality of multijurisdictional TMDLs to address nonpoint source pollution has not been debated. The enforcement challenges of the Bay TMDL, however, have led many to wonder whether the multijurisdictional TMDL method of pollution control can be relied upon.¹⁵⁴ Although the Bay has seen progress in the reduction of nonpoint source pollution and many of the Bay states have made great strides to reduce their impact, this large-scale form of TMDL is not likely to be recreated in the same manner.

Typically, the EPA does not have the authority to enforce a TMDL or punish a state for lack of implementation of a TMDL.¹⁵⁵ Although the Bay TMDL includes a detailed accountability framework to help ensure the implementation of the TMDL, the document itself states that the accountability framework "is not itself an approvable part of the TMDL."¹⁵⁶ This follows the EPA's long standing position that a TMDL "does not impose any binding implementation requirements on the States," and that "the Bay TMDL does not di-

¹⁵² See *Pronsolino v. Nastri*, 291 F.3d 1123, 1139 (9th Cir. 2002).

¹⁵³ *Am. Farm Bureau Fed'n*, 792 F.3d at 300.

¹⁵⁴ See generally Letter from Chris Van Hollen et al., U.S. Senator, to Andrew Wheeler, EPA Adm'r 4 (Jan. 10, 2020), <https://www.vanhollen.senate.gov/imo/media/doc/Van%20Hollen%20Letter%20to%20EPA%20on%20Chesapeake%20Bay%20TMDL.pdf> [<https://perma.cc/7PWF-XD4Z>] (questioning whether the EPA intends to continue pursuing restoration efforts under the Chesapeake Bay TMDL framework).

¹⁵⁵ See *supra* notes 91–97 and accompanying text.

¹⁵⁶ TMDL SECTION 7, *supra* note 143, at 7–5.

rectly regulate any sources or require any permits.”¹⁵⁷ This begs the question: where does the federal authority for the implementation of the TMDL come from, if it exists at all?

The Chesapeake Bay Restoration Act of 2000 amended the CWA giving the EPA the authority to “ensure that management plans are developed and implementation is begun.”¹⁵⁸ When the EPA created the Bay TMDL, however, they noted that the federal actions available to ensure compliance are all based on existing EPA authorities,¹⁵⁹ avoiding any presumption that it relied on a new authority. The EPA cited its existing authority in its oversight role of the state-assumed NPDES programs and the federal administration of grant funding programs.¹⁶⁰

Despite the accountability framework of the Bay TMDL, states have made disproportionate efforts to reduce pollution. As the watershed works its way closer to the 2025 pollution reduction targets set out in the TMDL, some states are much closer to their goals than others,¹⁶¹ leading to tension among the states. In January 2020, Dana Aunkust, the EPA Chesapeake Bay Program Director, reportedly stated that the 2025 targets of the Bay TMDL were “not enforceable.”¹⁶² This statement triggered backlash from senators and representatives of several Bay states who wrote a letter to then-EPA Administrator Andrew Wheeler to determine whether the EPA plans to “remain an active member of the [Bay] partnership” and to determine the EPA’s plan for enforcement of the TMDL.¹⁶³ In September 2020, the disputes over the Bay TMDL came to a boil when Maryland, the District of Columbia, Virginia, and Delaware (collectively “the states”) filed a lawsuit against the EPA.¹⁶⁴ A group of environmental organizations, including the Chesapeake Bay Foundation, also filed suit against the EPA for failing to perform their statutory duties under the CWA, the Administrative Procedure Act and the Chesapeake Bay Agreements.¹⁶⁵

¹⁵⁷ Letter from Cosmo Servidio, EPA Reg’l Adm’r, to U.S. Senator Chris Van Hollen 1 (Jan. 28, 2020).

¹⁵⁸ 33 U.S.C. § 117(g)(1).

¹⁵⁹ See Letter from Shawn M. Garvin, *supra* note 144, at n.6.

¹⁶⁰ *Id.*

¹⁶¹ See Mike Argento, *Pennsylvania is Failing the Chesapeake Bay—Here’s How That Affects You*, YORK DAILY REC. (Feb. 4, 2021) (finding that Pennsylvania has the largest pollution reduction gap to close before the 2025 target).

¹⁶² Letter from Chris Van Hollen, *supra* note 154, at 1.

¹⁶³ *Id.* at 4.

¹⁶⁴ Complaint, Maryland v. Wheeler, 1:20-cv-02530 (D.D.C. Sept. 10, 2020).

¹⁶⁵ Complaint, Chesapeake Bay Found., Inc. v. EPA, 1:20-cv-02529 (D.D.C. Sept. 10, 2020).

The states brought the suit under section 117 of the CWA, arguing that the EPA failed to comply with its duty to ensure that the states of Pennsylvania and New York develop and implement sufficient management plans.¹⁶⁶ Additionally, the states argued that the EPA's approval of plans by Pennsylvania and New York was arbitrary and capricious under section 706 of the APA.¹⁶⁷ The states did not, however, seek enforcement of the TMDL because, like many courts have held, TMDLs are not themselves legally enforceable. The results of these challenges, and the success of the Bay TMDL efforts, are still unknown. As it stands, the EPA and the Bay states are still working toward the 2025 Bay TMDL goal of having the required pollution control measures in place to "fully restore the Bay."¹⁶⁸

III. COMBINING INTERSTATE COMPACTS AND TMDLS TO REDUCE WATER POLLUTION

Although multiple provisions in the CWA expressly address nonpoint source pollution,¹⁶⁹ the text of those provisions and the legislative history of the 1972 amendments suggest that Congress did not intend for the current CWA to be the ultimate solution to the "complex and difficult" problem of nonpoint source pollution.¹⁷⁰ Large-scale changes in the Nation's pollution management system, or amendment to the CWA, is unlikely in the near future. These congressionally driven actions would require federal political support that does not currently exist. Therefore, multijurisdictional TMDLs are, quite literally, the wave of the future. Neither interstate compacts nor multijurisdictional TMDLs alone are flawless methods of controlling interstate agricultural water pollution. Together, however, these two legal tools create a method for state collaboration that can be more efficiently enforced while still limiting federal involvement in an area of regulation that has typically been left to the states.

Multijurisdictional TMDLs should be incorporated into interstate compacts to create a long-lasting collection of interstate agreements, similar to the Law of the River.¹⁷¹ To achieve the most efficiency, the compacts should include express terms for creation, enforcement, and dispute resolution of the multijurisdictional TMDL. Further, the

¹⁶⁶ Complaint, *Maryland v. Wheeler*, *supra* note 164 at 2.

¹⁶⁷ *Id.*

¹⁶⁸ TMDL EXECUTIVE SUMMARY, *supra* note 127, at 1.

¹⁶⁹ See *supra* text accompanying notes 81–86.

¹⁷⁰ See S. REP. NO. 92-414 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3705.

¹⁷¹ See *supra* Section I.A.1.

agreement can create an interstate body, similar to ORSANCO,¹⁷² that is charged with these duties. By addressing these likely challenges before they arise, the states will have a cooperative framework independent of the EPA or the courts.

Although this solution requires voluntary efforts by states, as interstate compacts do, states would likely enter into this type of agreement because it can fit into the nonpoint source pollution management programs that states already enforce, including existing TMDLs. The benefits would include more efficient enforcement of the TMDL and increasing state's participatory roles while reducing the need for federal involvement.

A. Interstate Compacts as Enforcement Mechanisms for TMDLs

TMDLs have been widely used for the past two and a half decades and have proven to be a beneficial tool for reducing point source pollution. Despite this, nutrient pollution is still widespread. This is the result of many factors, including that states are more likely to take the path of least resistance and apply stricter requirements to point sources than attempt to restrict agriculture operations. This is largely a result of deficiencies in implementation and enforcement. If TMDLs are merely "informational tools" that assist states with their pollution management, there are no consequences if states choose not to achieve the TMDL's goals. The Bay TMDL, however, is different because it includes a plan for federal oversight. But, as evidenced by the suits brought against the EPA,¹⁷³ inclusion of a federal oversight plan does not guarantee federal enforcement. Although the states have a method of compelling action by filing suit against the EPA under the APA, this is time consuming, resource intensive, and uncertain—given courts' willingness to defer to the agency.¹⁷⁴

Unlike TMDLs, interstate compacts can be enforced by a signatory state just as a contract can be enforced by a private party. By incorporating the TMDL into a compact, states can compel their partnering states to take action toward the agreed upon goal. In a large-scale regional effort, such as management of interstate water pollution, it is likely that states will put forth unequal effort, so accountability is imperative. For example, in the Chesapeake Bay restoration efforts, Pennsylvania and New York—the states furthest from

¹⁷² See *supra* notes 61–65 and accompanying text.

¹⁷³ See *supra* notes 164–65 and accompanying text.

¹⁷⁴ See, e.g., *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 294 (3d Cir. 2015) (citing *Chevron v. NRDC*, 467 U.S. 837 (1984)).

the Bay—are the ones that are lagging behind. This can be attributed to the adage, “out of sight, out of mind.”¹⁷⁵ The Chesapeake Bay is not alone in this phenomenon. In the Mississippi River Basin, for example, the citizens of Louisiana are the first to feel the effects of the nutrient pollution in the Gulf of Mexico.¹⁷⁶ An interstate compact would address these challenges head-on, like in the Law of the River, where division of states into two groups made initial agreement—and later, implementation—more efficient.¹⁷⁷ This approach would work well in large watersheds, such as the Mississippi River Basin, because of the initial challenges of agreement. It is unlikely that a group of thirty or more states could agree to any specific terms. It is more likely, however, that the entire group of Basin states could agree to a general proposition, such as a general intent to restore the Gulf. Then as the groups get smaller and more regional, the agreements could get more specific and concrete.

Interstate compacts would create more certainty—both inside and outside of the courtroom. The current method of compelling “enforcement” under the APA is both inefficient and uncertain. Although an important benefit of compacts is their enforceability in court, they can also reduce the need to resort to litigation. Litigation is inherently a reactive process; one that occurs after a wrong has been alleged. In contrast, utilizing a compact can provide non-litigation enforcement mechanisms to proactively address issues that may arise in implementation and enforcement of the TMDL. Therefore, an effective compact would address the initial immediate issues as well as create a plan for how to handle potential challenges in the future.

Further, interstate compacts that incorporate TMDLs are enforceable by the states themselves, independent of federal involvement. Federal enforcement of TMDLs is dependent on whether the current political administration prioritizes it. States should not be subject to the whims of federal politics because the presence of pollution does not change every four or eight years. The Bay TMDL is illustra-

¹⁷⁵ Robert McCartney, *Trump’s Crusade Against Environmental Protection Reaches the Chesapeake Bay*, WASH. POST (Jan. 27, 2020) (quoting Chris Van Hollen, Maryland Sen., Letter to U.S. Env’t Prot. Agency), https://www.washingtonpost.com/local/md-politics/trumps-crusade-against-environmental-protection-reaches-the-chesapeake-bay/2020/01/26/74926d46-3e1b-11ea-baca-eb7ace0a3455_story.html [https://perma.cc/8TJC-YJFD].

¹⁷⁶ See Rocky Kistner, *There’s an Environmental Disaster Unfolding in the Gulf of Mexico*, HUFFINGTON POST (July 11, 2019, 5:45 AM), https://www.huffpost.com/entry/mississippi-louisiana-gulf-coast-environmental-disaster_n_5d262c42e4b0583e482b28ed [https://perma.cc/K2ZQ-B5XD] (discussing the impacts on nutrient pollution in the Mississippi River on Louisiana shrimpers, crabbers, and oystermen).

¹⁷⁷ See *supra* Section I.A.1.

tive on a national scale. The Obama Administration heavily prioritized the restoration of the Chesapeake Bay, as evidenced by Obama's Chesapeake Bay Protection and Restoration Executive Order.¹⁷⁸ The Trump Administration, in contrast, outwardly sought to rollback Chesapeake Bay restoration efforts through lack of enforcement and dramatic cuts in federal funding.¹⁷⁹ Multiple state leaders disagreed with the Trump Administration's indifference toward Chesapeake Bay restoration efforts.¹⁸⁰

Although Chesapeake Bay restoration efforts started out as a partnership between states, over time the states began to view the efforts as opposing parties with the EPA playing the role of "referee."¹⁸¹ If the "referee's" priorities change every few years, there will never be consistent enforcement of the agreement. The state's only recourse is to challenge the EPA's position, like in *Maryland v. Wheeler*.¹⁸² But because agency actions and statutory interpretations are given broad deference by courts, as evidenced by *American Farm Bureau Federation*,¹⁸³ the outcome of a challenge to an EPA position, even a changing position, is uncertain.

Interstate compacts can create agencies like ORSANCO that serve as the enforcing body actively implementing pollution reduction efforts to achieve the compact goals.¹⁸⁴ ORSANCO, for example, has been in operation for over eighty years and consists of members from every state involved, as well as technical staff members who perform on-the-ground water monitoring and assessment.¹⁸⁵ ORSANCO's enforcement authority, however, has been limited because pollution management efforts are still subject to state and federal legislation.

But the existence of this interstate body can have other benefits. An interstate body allows the agreement to serve as a "living" partnership that can adapt to changing circumstances over time. Because these administrative bodies are comprised of state leaders, they are more apt than a federal agency to know what challenges are being

¹⁷⁸ Exec. Order No. 13,508, 3 C.F.R. §§ 203–204 (2010).

¹⁷⁹ See Marissa J. Lang, *Trump Plan Again Guts Funding for Chesapeake*, WASH. POST, Feb 14, 2020, at B1.

¹⁸⁰ See, e.g., Letter from Chris Van Hollen, *supra* note 154.

¹⁸¹ See McCartney, *supra* note 175.

¹⁸² Complaint, *Maryland v. Wheeler*, 1:20-cv-02530 (D.D.C. Sept. 10, 2020).

¹⁸³ See *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 294 (3d Cir. 2015) (citing *Chevron v. NRDC*, 467 U.S. 837 (1981)).

¹⁸⁴ See Rose, *supra* note 60.

¹⁸⁵ See *id.*

faced within the state and, most importantly, care more about addressing them.

B. Reduction of Federal Intrusion in a Traditionally State Managed Field

For as long as pollution regulation has existed in the United States, nonpoint source pollution has evaded extensive federal regulation.¹⁸⁶ Nonpoint source pollution control, and agricultural pollution, is often thought of as a type of land use regulation.¹⁸⁷ Because of this, implementation of agricultural best management practices has long been thought of as a local issue and any federal attempt at stricter regulations for nonpoint source pollution are not looked upon fondly by the agriculture industry.¹⁸⁸ Prior to *American Farm Bureau Federation*, a House Agriculture Committee hearing to review the Bay TMDL highlighted the hostility of the agriculture industry toward the EPA-created load allocation for the agricultural sector within the Bay states.¹⁸⁹ While referring to the Bay TMDL, an American Farm Bureau Federation President stated, “[i]f we’re going to let the [federal] government dictate where we can and cannot farm . . . then this is not the Land of Liberty.”¹⁹⁰

To the disdain of the agriculture and timber industries, the *Pronolino* court reasoned that the text of the CWA supported EPA’s long-standing interpretation of section 303(d) that TMDLs can be created

¹⁸⁶ See MEGAN STUBBS, CONG. RSCH. SERV., R41622, ENVIRONMENTAL REGULATION AND AGRICULTURE 1–2 (2014).

¹⁸⁷ *Id.*

¹⁸⁸ See generally AM. FARM BUREAU FED’N, REGULATORY IMPROVEMENT AND REFORM: A PRIORITY FOR AMERICAN AGRICULTURE 2 (2016), https://www.fb.org/files/AFBF_White_Paper_on_Regulatory_Reform.pdf [<https://perma.cc/S3LB-J5JJ>] (“Unlike nearly any other economic enterprise, a farm is not simply a business: it’s often a family’s home. When a government regulation affects the ability of a farmer to use his or her land, that regulatory impact ‘hits home’—not just figuratively but literally.”).

¹⁸⁹ *Hearing to Review the Chesapeake Bay TMDL, Agricultural Conservation Practices, and Their Implications on National Watersheds: Hearing before the Subcomm. on Conservation, Energy, and Forestry*, 112th Cong. 105 (2011) (statement of Hobe Bauhan, President, Virginia Poultry Fed’n) (“EPA should do more to recognize the tools and programs that are working in Virginia, in other states in the Chesapeake Bay watershed, and across the nation. Overrunning states with a heavyhanded Federal permitting and penalty scheme—using the Federal TMDL’s questionable data and modeling assumptions—only imposes more costs and paperwork for family farms, and achieves marginal benefits at best to water quality.”).

¹⁹⁰ Christopher Doering, *AFBF: Federal Regulations Are the Biggest Threat to Farmers*, DES MOINES REG. (Jan. 10, 2016, 12:14 PM) (quoting Bob Stallman, Am. Farm Bureau Fed’n, Former President), <https://www.desmoinesregister.com/story/money/agriculture/2016/01/10/federal-regulations-biggest-threat-farmers/78131422/> [<https://perma.cc/EQ8Y-F7A6>].

for a waterway impaired solely by nonpoint sources.¹⁹¹ The court concluded that even if the statute was ambiguous, the EPA's interpretation controls the waterway, and the state is required to create a TMDL to attain the applicable water quality standards.¹⁹² Although the plaintiffs in *Pronsolino* raised federalism concerns, the court maintained that its holding would not "upset the balance of federal-state control established in the CWA."¹⁹³ The court recognized that the EPA did not include implementation or monitoring plans in the TMDL purposefully in order to allow the state to retain those traditionally state responsibilities.¹⁹⁴ Although this addresses the federalism concerns, it does not make the TMDL any more effective. This follows the established position that TMDLs are not themselves federal regulation, rather, they are tools that are required and can later be implemented by states, if they choose to do so.

When faced with the water allocation challenge of the Colorado River, the states chose to negotiate a compact to allocate the water to prevent future disputes, prevent federal involvement into what was thought of as a traditionally state law issue, and avoid expensive and onerous litigation.¹⁹⁵ One of the common criticisms of the Bay TMDL is the EPA's significant role in its creation and implementation. The EPA's process to create the TMDL included providing the states with target loads, approving their submitted WIPs, and supplementing any gaps in WIPs by adjusting, drafting, and finalizing the TMDL after public comment.¹⁹⁶ Although the court upheld the EPA's use of federal authority in the Bay TMDL, there was specific statutory authority for the Bay TMDL that does not exist for other waterways, like the

¹⁹¹ See *Pronsolino v. Nastri*, 291 F.3d 1123, 1139 (9th Cir. 2002).

¹⁹² See *id.* at 1139–40.

¹⁹³ *Id.* at 1140.

¹⁹⁴ *Id.* "California chose both *if* and *how* it would implement the Garcia River TMDL. States must implement TMDLs only to the extent that they seek to avoid losing federal grant money; there is no pertinent statutory provision otherwise requiring implementation of § 303 plans or providing for their enforcement." *Id.*

¹⁹⁵ *Sharing Colorado River Water*, *supra* note 33, at 2. This compact, however, was not perfect and disagreements among the states resulted in delays in ratification. As exemplified by the disputes between Arizona and California, decades of litigation ensued to finalize agreements between the lower division states and the federal government, which ultimately played a substantial and multifaceted role in managing the water apportionment. This is not to say that the Law of the River method of collaboration was not groundbreaking for its time and should not be recreated.

¹⁹⁶ *Frequent Questions About the Chesapeake Bay TMDL*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/chesapeake-bay-tmdl/frequent-questions-about-chesapeake-bay-tmdl#anchor23> [<https://perma.cc/Y3AL-VQME>].

Mississippi River Basin.¹⁹⁷ Further, states are inherently more aware of the status and needs of the agriculture industry in their state. Like in the Colorado River Basin, the Law of the River created a way for the state officials to agree amongst themselves on terms that they felt would be best for their state needs and ultimate development goals.¹⁹⁸ The use of the interstate compact allows states to negotiate and agree *amongst themselves* how best to allocate pollution. This solution strikes a balance between encouraging states to employ their reserved authority and encouraging cooperation to achieve pollution reduction.

CONCLUSION

The United States is home to many water bodies that carry pollution from one state through another, including the Colorado and Mississippi Rivers. Nutrients from Minnesota farms travel thousands of miles before ending up in the Gulf of Mexico.¹⁹⁹ Regardless of how strictly the Gulf-adjacent states of Louisiana or Mississippi regulate water pollution, if Illinois or South Dakota is not doing the same, their pollution reduction efforts may be in vain. Before too long, states in these watersheds will be forced to address the agricultural pollution that is overwhelming their waterways, much like the Chesapeake Bay states. The Bay TMDL shows that wide-reaching multijurisdictional TMDLs require additional procedures and more accountability measures than a TMDL for a waterway wholly within one state. Thus, interstate pollution requires an interstate solution. The silver lining is that these states have the Chesapeake Bay as an example of what does and does not work, and can learn from the mistakes made in the Bay restoration efforts. Interstate compacts are a useful and readily available tool that states can use to incorporate multijurisdictional TMDLs and can have binding effects while still ensuring the states have a voice in their creation and implementation.

¹⁹⁷ See generally *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 291–92 (3d Cir. 2015).

¹⁹⁸ See *supra* Section I.A.1.

¹⁹⁹ The headwaters of the Mississippi River are in northern Minnesota at Lake Itasca, approximately 2,300 miles from the Gulf of Mexico. Michael Woodside, *The Challenge of Tracking Nutrient Pollution 2,300 Miles*, U.S. GEOLOGICAL SURV. (Mar. 6, 2017), <https://www.usgs.gov/news/challenge-tracking-nutrient-pollution-2300-miles> [<https://perma.cc/R3TV-37ZN>].

NOTE

Remedying the Health Implications of Structural Racism Through Reparations

*Kendall Lawrenz**

ABSTRACT

From the early introduction of slavery to the United States, not only did the economic prosperity of slavery depend on extracting reproductive labor from Black birthing people, but so did the field of medicine. Enslaved Black people were experimented on and forced to undergo inhumane procedures in the name of science, yet as the medical profession grew Black people were then denied the benefit of the same medical services that were available to white people in the United States.

In recent years it has become more apparent that structural racism in health care is a public health crisis. Yet often there is less focus on how the legal community and the federal government have contributed to upholding structural racism and what legal and moral obligation these institutional actors have to make amends for the harm it has caused. The injustice of structural racism in health care is not only the effect it has on public health, but also the reality that those who are most directly harmed also bear the cost of this injustice with no legal remedy to challenge it. The law is not designed to protect against structural racism, and as a result those who continue to be oppressed

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and marginalized on a systemic level bear the cost. Too often this cost falls more directly on Black people in the United States. Nowhere is this more evident than in looking at racial disparity in Black maternal and infant mortality that persists regardless of wealth or other socio-economic indicators.

This Note argues that the federal government has both a legal obligation and a moral obligation to provide reparations to Black birthing people who continue to experience racial disparities in pregnancy outcomes due in part to structural racism. The legal system is not currently designed to provide remedies for the harms that structural racism has created and continues to perpetuate for Black birthing people. However, this Note explores the ways that the legal system's design could in fact allow for such remedies using a reparations model that is based on similar examples of reparations-type programs the federal government has previously created.

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INTRODUCTION

On a slave farm in Alabama in 1844, James Marion Sims founded a small hospital where he conducted experimental procedures¹ and established his legacy as the “Father of Gynecology.”² A statue dedicated to Sims’s legacy stood on a pedestal outside of the New York Academy of Medicine to honor his work—that is until 2018, when the New York City mayoral commission recommended its removal in an attempt to “reckon[] with history.”³ The history at issue was the torture and experimentation on enslaved Black women—including Anarcha, Betsey, and Lucy—whose forced contributions to the fields of obstetrics and gynecology were discarded and erased while Sims’s contributions were glorified.⁴

As the historian Deirdre Cooper Owens describes, the medical research that developed from Sims’s work, and the work of other white surgeons who experimented on enslaved Black people in pursuit of scientific discovery, was fundamentally flawed.⁵ This experimentation was fueled by assumptions about the biological inferiority and higher pain tolerance of Black women.⁶ These women were either owned or contracted, and the experiments focused on developing techniques that could be used to treat white patients.⁷ The experimenters then returned “treated” Black women to their owners to continue to provide reproductive labor.⁸ The medical racism, abuse, and neglect that forged the field of obstetrics and gynecology require not only a reckoning with historical harms, but also with their modern implications for Black birthing people.

The Centers for Disease Control and Prevention (“CDC”) released data in 2019 showing Black women are three times more likely

¹ DEIRDRE COOPER OWENS, *MEDICAL BONDAGE: RACE, GENDER, AND THE ORIGINS OF AMERICAN GYNECOLOGY* 36 (2017).

² See Camila Domonoske, ‘Father of Gynecology,’ Who Experimented on Slaves, No Longer on Pedestal in NYC, *NAT’L PUB. RADIO* (Apr. 17, 2018, 1:39 PM), <https://www.npr.org/sections/thetwo-way/2018/04/17/603163394/-father-of-gynecology-who-experimented-on-slaves-no-longer-on-pedestal-in-nyc> [https://perma.cc/6VQU-6V7P].

³ *Id.*

⁴ *Id.*

⁵ See COOPER OWENS, *supra* note 1, at 23.

⁶ See *id.*

⁷ See Domonoske, *supra* note 2; COOPER OWENS, *supra* note 1, at 28.

⁸ See COOPER OWENS, *supra* note 1, at 38.

to die from pregnancy-related causes than white women, regardless of education level or economic status.⁹ The history of medical abuse cannot be separated from the political and legal pressures that initially exacerbated the demand for Black women's reproductive labor in order to support the growth of the slave population in the United States.¹⁰ The historical demands of reproductive labor, the abuse of enslaved Black women to achieve such demands, and the perpetuation of flawed scientific and medical practices as a result contribute to the ongoing maternal health crisis for Black birthing people.

The CDC has acknowledged that a racial disparity in pregnancy-related deaths exists and attributes the disparity, in part, to "variation in quality healthcare, underlying chronic conditions, structural racism, and implicit bias."¹¹ These factors—especially structural racism and implicit bias—are particularly challenging to address due to the long and complicated history of racial oppression that has blurred the causal thread of harms and effects. Black birthing people continue to face disproportionately high adverse birthing outcomes without either (1) a right to maternal health care or (2) an ability to bring a successful legal challenge to obtain relief for harms due to this racial disparity.

The United States legal system is not designed to provide relief for the harms caused by structural racism or racial bias, except in circumstances where discrimination is abundantly clear and intentional.¹² This Note focuses specifically on the relief due to Black birthing people who continue to experience the harms perpetuated by the United States health care system. These harms are preventable, fueled by federal and state action and inaction, and have not been redressed by courts.

Reparations on the part of the federal government are necessary to address the modern racial disparity in health care services that Black birthing people continue to experience. Reparations have an important role in the broader conversation about improving Black

⁹ Press Release, Ctrs. Disease Control and Prevention, Racial and Ethnic Disparities Continue in Pregnancy-Related Deaths (Sept. 5, 2019 1:00 PM), <https://www.cdc.gov/media/releases/2019/p0905-racial-ethnic-disparities-pregnancy-deaths.html> [<https://perma.cc/J8LQ-TL7P>]. The Centers for Disease Control and Prevention ("CDC") press release also noted "[d]isparities were persistent and did not change significantly between 2007-2008 and 2015-2016." *Id.*

¹⁰ See *infra* Part I.

¹¹ *Working Together to Reduce Black Maternal Mortality*, CTRS. DISEASE CONTROL AND PREVENTION (Apr. 6, 2022), <https://www.cdc.gov/healthequity/features/maternal-mortality/index.html> [<https://perma.cc/KC37-KD6W>].

¹² See *infra* Part II.

maternal and infant health outcomes because of both the legal and moral obligations the federal government owes to Black birthing people. Racism and its attendant harms have been perpetuated at a systemic level and therefore require systemic solutions. These solutions must be levied both independent of and in addition to efforts within the health system to combat racism in science and medicine. This Note analyzes the parameters of the federal government's legal and moral obligations to Black birthing people.

Part I of this Note explores the systemic oppression of Black people in the United States through laws and policies that favored slavery, segregation, and discrimination. This Part also explores how the systemic racial oppression of Black people has shaped the United States health care system.¹³ Part II demonstrates that, despite the harms created and perpetuated by government-sanctioned oppression of Black people, the legal system provides no remedy. Part III argues that reparations are the appropriate remedy for the racial disparity in maternal and infant health outcomes.

I. THE SYSTEMIC OPPRESSION OF BLACK PEOPLE IN THE UNITED STATES THROUGH LAW, POLICY, AND SOCIAL PRACTICES
HAS BEEN A DRIVER OF POOR
HEALTH OUTCOMES

Racism, solidified by law and policy, continues to drive health inequality. It is a public health crisis that demands intervention. The key questions are whether this intervention is entirely dependent on policy change, and what underlying legal frameworks may support action on the part of the federal government. It is crucial to begin by considering how the law created these harms and subsequently denied the possibility of relief from these harms. Failing to place the law in its

¹³ Although slavery in the United States has had a disparate impact on African American people and their ancestors, the segregation, racism, and discrimination that informed structural inequality in this country continues to be experienced by all Black people who come to the United States. This Note does not address the intricate socioeconomic frameworks that exist within the African diaspora and the wide variance in the lived experiences of Black people in this country. The main operating framework put forward here is that anti-Blackness is structural, and stems from the notion that African slaves who were brought to America were inferior, and because of the codification of this inferiority through federal and state laws, these inequities continue to be felt broadly by all people who present or identify as Black in America. See Camara Phyllis Jones, Benedict I. Truman, Laurie D. Elam-Evans, Camille A. Jones, Clara Y. Jones, Ruth Jiles, Susan F. Rumisha & Geraldine S. Perry, *Using "Socially Assigned Race" to Probe White Advantages in Health Status*, 18 *ETHNICITY & DISEASE* 496 (2008) (concluding that "[b]eing classified by others as *White* is associated with large and statistically significant advantages in health status, no matter how one self-identifies").

historical context would ignore the reality that the law is not an entity, but rather a series of written reflections of the people—most often wealthy, white men—who forged its meaning.¹⁴ The historical use of law and policy as tools of racial oppression are relevant to forging legal accountability for the harm this has caused for Black communities, and specifically the ongoing harm to Black birthing people.

A. *The Transatlantic Slave Trade and The Early Stages of Medical Racism*

The enslavement of Black people in America was documented as early as 1619 through the transatlantic slave trade and continued until at least 1808 when it was formally outlawed by the Constitution.¹⁵ The forcible removal of millions of African people to the United States was a treacherous and deadly journey that included forced marches to coastal ports, captive status, Middle Passage deaths during sea transport, and rampant exposure to disease and mistreatment.¹⁶ Survivors suffered exposure to an array of new diseases within the United States, vulnerability to which further exacerbated the trauma of the slave trade.¹⁷ The resulting poor health outcomes of African-born people—who were forced into the slave trade and transported to the

¹⁴ This Note utilizes a Critical Race Theory approach to analyze the connection between differential care in the American health system and this country's history of government-sanctioned slavery, segregation, and racism. The framework of Critical Race Theory has been advanced as a way for legal professionals to conceptualize how the law intersects and interacts with the perpetuation of disadvantage and harm to nonwhite people, and specifically in this context, to Black birthing people. The Critical Race Theory model aims to examine how white supremacy is maintained through social structures—particularly the structures of law and equal protection. See Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864, 1864–65, 1870 (1990); see also Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. L. FORUM 139, 139–40 (introducing intersectionality as an analytical method); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324–26 (1987) (describing the potential use of Critical Legal Studies by minority scholars); Milner S. Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855, 1859 (1990) (discussing the contributions of minority scholars to discussion of race in legal academia). For a comprehensive list of Critical Legal Theory readings, see Duncan Kennedy & Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984).

¹⁵ See W. MICHAEL BYRD & LINDA A. CLAYTON, *AN AMERICAN HEALTH DILEMMA: A MEDICAL HISTORY OF AFRICAN AMERICANS AND THE PROBLEM OF RACE: BEGINNINGS TO 1900*, at 191, 208 (2000).

¹⁶ See *id.* at 194.

¹⁷ *Id.*

United States—added fuel to the false construct that Black people were inherently sicker than white people.¹⁸

The combination of health disadvantage and differential treatment along racial lines became embedded in the social and legal structure of chattel slavery.¹⁹ For example, as early as 1705 the House of Burgesses, the legislative body of the Colony of Virginia, created provisions for the treatment of white servants, requiring proper diet, clothing, and lodging.²⁰ No such health provisions were made for enslaved Black people.²¹ An early failure of the legal system to create equal obligations for the health of white and Black people repeated, and this blueprint has become an underlying societal norm. By 1717, a white servant in South Carolina could complain to a justice of the peace if they were denied proper clothing, diet, or lodging, whereas enslaved Black people had no recourse for poor treatment.²²

The widespread mistreatment and disregard enslaved Black people experienced led to the evolution of a slave health subsystem of self-reliance.²³ Enslaved Black people would provide for their own care through African healing traditions, including midwifery, root doctors, and spiritual healers.²⁴ The retention of traditional African medicine as an alternative to the “master’s medicine” reflected both a mistrust of and exclusion from other medical services.²⁵

The portrayal of Black people as biologically inferior and in need of the protection of slave owners was used as a paternalistic defense of slavery as a social good.²⁶ However, to portray these efforts as a social good would ignore the economic interests that were at stake in such a system.²⁷ Disregard for the health of enslaved Black people was prof-

¹⁸ *Id.* at 204.

¹⁹ *Id.* at 198.

²⁰ *Id.* at 192.

²¹ *Id.*

²² *Id.* at 199.

²³ *See id.* at 202.

²⁴ *Id.*

²⁵ Kevin Outterson, *Tragedy and Remedy: Reparations for Disparities in Black Health*, 9 DEPAUL J. HEALTH CARE L. 735, 750 (2005).

²⁶ *See, e.g.*, BYRD & CLAYTON, *supra* note 15, at 207–08; GEORGE FITZHUGH, *SOCIOLOGY FOR THE SOUTH, OR THE FAILURE OF FREE SOCIETY* 83–95 (1854) (evoking imagery of charity, family, and friendship to support the continued enslavement of Black people for their own good and in their own best interest).

²⁷ As William Darity and Kirsten Mullen highlight in their review of the economic benefits of the institution of slavery, the United States—and specifically White Americans—gained both the monetary and positional power of slavery at the cost of the enslaved Black people who built that opportunity with their unpaid forced labor. *See* WILLIAM A. DARITY & A. KIRSTEN MULLEN, *FROM HERE TO EQUALITY* 51–68 (2020) (“The sale and forced labor of [B]lack bodies

itable only to the extent that slaveholders still had a ready source of unpaid labor. The economic interests inherent in viewing enslaved people as livestock also created the need for slave owners to provide certain basic health care.²⁸ The primary purpose of chattel slavery was the procurement of free labor, and, because enslaved Black people were considered human chattel property, slave owners sought to provide basic health accommodations as a means of preserving the economic value of the enslaved people they relied on for this labor.²⁹ The laws of this country have consistently operated to protect the property interest of the slave owner over the freedom and liberty of the enslaved Black person.

B. The Law's Embrace of Slavery, Segregation, and Discrimination in Medicine and Beyond

The Constitution, a document that created the structural underpinnings of the modern United States legal system, also formalized the inferior position of enslaved Black people within that system. The Constitution's wording made plain that its protections would not provide any shelter to an enslaved person who sought to escape forced servitude.³⁰ As originally drafted, the Constitution relegated enslaved Black people—who were referred to as “other persons”—to three-fifths of a “free person” for the purpose of apportioning Congressional seats.³¹ This inclusion incentivized the growth of slavery by affording slave states greater congressional representation without acknowledging enslaved people as full citizens, or even full people, with the right of a vote.³² Although the Constitution put an end to the

drove the commerce of the United States from the earliest days of the nation and made possible the world we inhabit today.”).

²⁸ Outterson, *supra* note 25, at 749–50.

²⁹ Outterson, *supra* note 25 at 748–50.

³⁰ U.S. CONST. art. IV, § 2, cl. 3 (“No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”).

³¹ U.S. CONST. art. I, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”); *see also* Brooke E. Newborn, *Correcting the Common Misreading of the “Three-Fifths” Clause of the U.S. Constitution: Clarifying the “Hostile Fraction,”* 80 PA. BAR ASS’N Q. 93, 94 (2009) (explaining that the Three-Fifths Clause was intended to increase political representation of Southern states in Congress).

³² *See* Newborn, *supra* note 31, at 94.

slave trade, it created a two-year window during which southern states could continue to import enslaved Black people in the short term.³³

From 1790 to 1808, there was a huge uptick in the number of enslaved people in the United States—from 697,624 in 1790 to about 3,953,760 in 1860.³⁴ This increase has been tied to both increased importation and “natural population growth.”³⁵ From 1830 to 1865, 5.6 million children were born into slavery.³⁶ Following the Constitution’s ban on the importation of African-born slaves in 1808, slave owners were increasingly dependent on the reproductive health and labor of enslaved Black women.³⁷ As a result, more white men started to enter the field of midwifery—previously a field predominantly occupied by women.³⁸ The burgeoning field of gynecology and the understanding of reproductive health was advanced by white male doctors conducting medical research on enslaved Black women.³⁹ Growing volumes of medical literature referred to these Black women as “breeder[s].”⁴⁰ Enslaved Black people were not only the recipients of poor health care, but also the “training material” for the developing field of medicine.⁴¹ The dehumanization enslaved Black people experienced was legitimized by the Constitution, as well as by the Supreme Court in its interpretation of the Constitution, creating and perpetuating systemic racial oppression.

³³ The Constitution guaranteed a two-year period in which the importation of slavery would be allowed to continue, although a tax or duty of no more than ten dollars would be collected for each person imported by the States and subjected to forced servitude. U.S. CONST. art. I, § 9, cl. 1 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”). The Constitutional provisions set forth to protect slavery were preserved under Article V of the Constitution, which prohibited any amendment to the Constitution that would put an end to the slave trade before 1808. U.S. CONST. art. V; see generally James Oakes, “*The Compromising Expedient*”: Justifying a Proslavery Constitution, 17 CARDOZO L. REV. 2023 (1996).

³⁴ J. David Hacker, *From ‘20. and Odd’ to 10 Million: The Growth of the Slave Population in the United States*, 41 SLAVERY & ABOLITION 840, 840 (2020).

³⁵ *Id.* at 840–41, 843–44.

³⁶ Between 1830 and 1865, 5.6 million children were born into slavery, making up about 60 percent of the over 9.3 million children born into slavery between 1620 and 1865. *Id.* at 846.

³⁷ COOPER OWENS, *supra* note 1, at 15–17.

³⁸ *Id.*

³⁹ See *id.* at 17.

⁴⁰ *Id.* at 19.

⁴¹ BYRD & CLAYTON, *supra* note 15, at 212.

In *Dred Scott v. Sandford*,⁴² the Supreme Court affirmed what the Constitution implied: that the “negro race” were a “separate class of persons”⁴³—not citizens but a “subordinate and inferior class of beings.”⁴⁴ The Supreme Court’s holding in *Dred Scott* cited to art. I, § 9, cl. 1 and art. IV, § 2, cl. 3 of the Constitution as “conclusively” showing that no formerly enslaved person or their descendants were intended to be embraced by any of the provisions of the Constitution.⁴⁵ *Dred Scott* was handed down nearly seventy years after the ratification of the Constitution and forty-nine years after the formal end of the transatlantic slave trade. In this decision, the Supreme Court made clear that the Constitution protected the property rights of slave owners over the basic dignities of enslaved Black people and their descendants.⁴⁶

Some commentators have argued that the historical abuses of slavery have already been remedied. As then-Senate Majority Leader Mitch McConnell stated in 2018, “We’ve tried to deal with our original sin of slavery by fighting a civil war, by passing landmark civil rights legislation. We elected an African American president.”⁴⁷ Despite subsequent attempts to amend the Constitution and recognize the equal status of formerly enslaved Black people, however, the period of segregation in public accommodations and narrow readings of the private right to challenge discrimination on a systemic level has preserved the inequities that slavery forged.⁴⁸

⁴² 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

⁴³ *Id.* at 410–12.

⁴⁴ *Id.* at 404–05. The Court distinguished Black people from Native Americans and emigrants, both of whom were eligible for citizenship based on their status as “free and independent people,” unlike current and formerly enslaved Black people. *See id.* at 403–04, 411 (“No one of that race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise.”).

⁴⁵ *Id.* at 411. The Court’s holding affirmed what the practice of chattel slavery laid bare—Black people were so mistreated that were their status as fellow-citizens recognized, it would undermine all that democracy stood for. *See id.* at 416 (“[I]t is hardly consistent with the respect due to these States, to suppose that they regarded at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized . . .”).

⁴⁶ *See id.* at 447–52.

⁴⁷ Ted Barrett, *McConnell Opposes Paying Reparations: ‘None of Us Currently Living Are Responsible’ for Slavery*, CNN (June 19, 2019, 10:39 PM), <https://www.cnn.com/2019/06/18/politics/mitch-mcconnell-opposes-reparations-slavery> [<https://perma.cc/AT6T-F7VF>]. McConnell also noted that because no one currently alive was responsible, and the process of figuring out who to compensate would be too difficult because subsequent waves of immigrants have also faced discrimination, reparations are not a good idea. *Id.*

⁴⁸ The COVID-19 pandemic highlighted the extent of racial disparities in health that continue today. *See, e.g.*, James Louis-Jean, Kenney Cenat, Chidinma V. Njoku, James Angelo &

The disregard for the humanity of enslaved Black people did not cease when slavery was abolished. Although the abolition of slavery uplifted enslaved Black people to the status of free citizens of the United States, the plan for delivering on this freedom was not properly prioritized. In a letter Abraham Lincoln wrote to Horace Greeley on August 22, 1862, he stated:

If there be those who would not save the Union unless they could at the same time *save* slavery, I do not agree with them. If there be those who would not save the Union unless they could at the same time *destroy* slavery, I do not agree with them. My paramount object in this struggle *is* to save the Union, and is *not* either to save or to destroy slavery. If I could save the Union without freeing *any* slave I would do it, and if I could save it by freeing *all* the slaves I would do it; and if I could save it by freeing some and leaving others alone, I would also do that. What I do about slavery and the colored race, I do because I believe it helps to save this [sic] Union; and what I forbear, I forbear because I do *not* believe it would help to save the Union. I shall do *less* whenever I shall believe what I am doing hurts the cause, and I shall do *more* whenever I shall believe doing more will help the cause.⁴⁹

Lincoln's words rang true, and at every turn the federal government chose to do less. The cause was never freedom for enslaved persons; it was saving the Union.

C. *The Federal Government's Short-Lived Attempt to Provide Health Care to Formerly Enslaved Black People*

Following the Civil War, the federal government failed to deliver on many promises it made to freedmen who had been formerly enslaved. The lack of resources the government expended had a direct impact on the quality of health care available to freedmen. Freedmen were promised land redistribution and wages for backpay following the Emancipation Proclamation.⁵⁰ These promises largely failed to

Debbie Sanon, *Coronavirus (COVID-19) and Racial Disparities: A Perspective Analysis*, J. RACIAL & ETHNIC HEALTH DISPARITIES 1039, 1043 (2020).

⁴⁹ Letter from Abraham Lincoln to Horace Greeley (Aug. 22, 1862), *published in* Abraham Lincoln, *A Letter from the President*, DAILY NAT'L INTELLIGENCER, Aug. 23, 1862, <https://www.loc.gov/item/mal4233400/> [<https://perma.cc/9LDH-TDUL>].

⁵⁰ In the wake of the Civil War, the Reconstruction Era briefly seemed as if it might deliver a dismantling of plantations, redistributing slave owners' wealth to the newly freed Black people who were landless and without any resources. See Rhonda V. Magee, Note, *The Master's*

materialize, which left freedmen with limited resources.⁵¹ Prior to the Civil War, the slave health care system had provided limited access to medical services; following the Civil War, former slave owners had no incentive to provide any health services.⁵²

The federal government made a brief effort to ease the transition through the creation of the Bureau of Refugees, Freedmen, and Abandoned Lands (“Freedmen’s Bureau”).⁵³ However, the Freedmen’s Bureau ultimately failed to provide adequate relief. In Georgia, for example, the Freedmen’s Bureau established five hospitals,⁵⁴ but medical services soon ground to a halt because of local resistance to the program, poor organization, and inadequate funding.⁵⁵ One of the pitfalls of the program was that, by design, the Freedmen’s Bureau was created to provide medical services as a temporary program to ease the period of adjustment rather than a more long-term care option.⁵⁶ However, the influx of freedmen to cities in Georgia, coupled with an outbreak of smallpox in 1865, caused overcrowding of already limited resources.⁵⁷ The Freedmen’s Bureau continued to pressure rural public officials to care for freedmen with little success, and as a result access to care was more inconsistent in rural areas compared with urban areas.⁵⁸ When the Freedmen’s Bureau shuttered its medical services in Georgia in 1868, it left no health care system in its place.⁵⁹ Freedmen were once again dependent on hospitals and white officials despite limited assurances that providers and officials intended to step in and provide care to Black people.⁶⁰

The Freedmen’s Bureau’s efforts in Georgia and elsewhere reflect the failures of federal Reconstruction to provide for formerly enslaved persons, a failing which led to a segregated society. In this new post-slavery system, Black people were left to navigate a segregated

Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse, 79 VA. L. REV. 863, 886–88 (1993).

⁵¹ President Andrew Johnson had other plans and moved to rescind the lands that were promised through an amnesty proclamation that forced the restoration of confiscated plantation land to its former owners by defining the property rights as superior to the remedial rights of formerly enslaved people. *Id.* at 888–89.

⁵² See Outtersen, *supra* note 25, at 751–52.

⁵³ See Todd L. Savitt, *Politics in Medicine: The Georgia Freedmen’s Bureau and the Organization of Health Care, 1865-1866*, 28 CIVIL WAR HIST. 45, 45–46 (1982).

⁵⁴ *Id.* at 55–59.

⁵⁵ See *id.* at 46–47.

⁵⁶ See *id.* at 59.

⁵⁷ See *id.* at 59–60.

⁵⁸ *Id.* at 62–64.

⁵⁹ *Id.* at 61.

⁶⁰ *Id.* at 64.

medical system which discriminated against them, excluded them from hospitals,⁶¹ and performed substandard care.⁶² After the Civil War, state and local Jim Crow laws were enacted to replace slavery with a “caste system” that maintained the status quo of white supremacy.⁶³ This segregated system—which extended into the provision of health care services—was built with the support of federal tax dollars and federal policy and was upheld by the courts.⁶⁴ As the Court reasoned in *Plessy v. Ferguson*,⁶⁵ segregation was an appropriate state policy because states possessed the “liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.”⁶⁶ If a state statute authorized or required the separation of two races, it was not considered a violation of the Fourteenth Amendment.⁶⁷

D. The Dual Hospital System and The Government’s Racially Unequal Funding of Health Care Services

The *Plessy* holding set the precedent for “separate but equal” accommodations, providing legal support for a dual system of health care on the basis of race. During this period, Black people developed their own system of health care services, continuing a history of self-reliance. The rise in Black hospitals— from 63 hospitals in 1912 to 118 hospitals in 1918—represented an effort to combat the inadequate care otherwise available to Black patients in white-led and white-run hospitals, and was made possible by the rise in Black physicians and nurses.⁶⁸ Although Black hospitals, operated by and for Black individuals, provided necessary services to Black communities, inadequate funding left many Black hospitals struggling to remain operational.⁶⁹

⁶¹ Outterson, *supra* note 25, at 757–58.

⁶² Rodney G. Hood, *The “Slave Health Deficit:” The Case for Reparations to Bring Health Parity to African Americans*, 93 J. NAT’L MED. ASS’N 1, 2–3 (2001).

⁶³ Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 640 (1993) (referring to the caste system that formed as the underlying framework of systemic discrimination).

⁶⁴ *See id.*

⁶⁵ 163 U.S. 537 (1896), *abrogated by* Brown v. Board of Education, 347 U.S. 483 (1954).

⁶⁶ 163 U.S. at 550.

⁶⁷ *Id.* at 550–51.

⁶⁸ *See* VANESSA NORTINGTON GAMBLE, MAKING A PLACE FOR OURSELVES: THE BLACK HOSPITAL MOVEMENT, 1920-1945 3–13 (1995); *see also* David Barton Smith, *Healthcare’s Hidden Civil Rights Legacy*, 48 ST. LOUIS U. L.J. 37, 38–43 (2003) (presenting an overview of the dual systems of health that resulted from segregation in the health care system in which Black physicians and dentists treated Black patients in Black hospitals).

⁶⁹ *See, e.g.,* Moyra Schaffler, *The Rise and Decline of African-American Hospitals in Phil-*

Much like with the federal government's short-lived effort to provide medical services through the Freedmen's Bureau, funding remained the biggest barrier to the successful creation of a system of Black health care.⁷⁰ Cost concerns and challenging operational demands were not unique to Black hospitals, and it became increasingly clear that federal funding was necessary to spur the construction of more hospital facilities nationwide.⁷¹ However, the federal government's unequal funding of health care services disproportionately benefitted white communities and white patients, leaving Black hospitals and Black communities behind.⁷²

Prior to the twentieth century, physicians provided in-home services to those who could afford it, and hospitals were primarily religious organizations providing charitable services.⁷³ The rise of hospital-based healthcare was supported by the passage of the Hospital Survey and Construction Act of 1946 ("Hill-Burton Act"),⁷⁴ the enactment of Medicare and Medicaid in the 1965 Amendments to the Social Security Act under Title XVIII,⁷⁵ and the Emergency Medical Treatment and Active Labor Act ("EMTALA") of 1986.⁷⁶

Each of these federal intrusions into the health care system demonstrated the federal government's willingness to use tax dollars to expand access to health care. Congress created a statutory right to federally funded health care for qualifying individuals with the estab-

adelphia, HIDDEN CITY (Oct. 2, 2020), <https://hiddencityphila.org/2020/10/the-rise-and-decline-of-african-american-hospitals-in-philadelphia/> [https://perma.cc/RQR4-VV4H] (charting the history of Black hospitals in Philadelphia); Jamon Jordan, *Detroit Had 18 Black-Owned and Operated Hospitals: Why They Vanished*, DETROIT FREE PRESS (Feb. 27, 2022, 2:56 PM), <https://www.freep.com/story/opinion/contributors/2022/02/27/detroit-hospitals-black-history-month/6925953001/> [https://perma.cc/CL9V-VBZU].

⁷⁰ GAMBLE, *supra* note 68 at 6–10 (noting how the growth of Black hospitals was in large part the result of hard-fought efforts on the part of the Black community to finance medical facilities that would provide care to indigent Black patients who lacked access to adequate care). The reliance on raising such funds from the community, particularly from white philanthropists, posed its own challenges and gave white philanthropists an outsized influence over Black health. *Id.* at 105–06, 128–30.

⁷¹ See *infra* note 79 and accompanying text.

⁷² GAMBLE, *supra* note 68 at 45–49 (comparing the overall inadequacy of medical care in the early 20th century to the specific inadequacy of health care—even in emergencies—for Black patients who suffered higher morbidity and mortality rates than white patients).

⁷³ See Mark J. Garwin, *Immunity in the Absence of Charity: EMTALA and the Eleventh Amendment*, 23 S. ILL. U. L.J. 1, 1 (1998).

⁷⁴ Hospital Survey and Construction (Hill-Burton) Act, Pub. L. No. 79-725, 60 Stat. 1040 (1946).

⁷⁵ Social Security Amendments of 1965, Pub. L. No. 85-97, 79 Stat. 286.

⁷⁶ Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985, Pub. L. No. 99-272, § 9121, 100 Stat. 82, 164-67.

lishment of Medicaid and Medicare.⁷⁷ Congress also created a minimum treatment standard for patients who are in active labor and arrive at a Medicare-participating hospital with the establishment of EMTALA.⁷⁸ Congress took steps to elevate health care to the status of a pseudo-fundamental right, but ultimately fell short of providing sufficient legal protections to ensure equal access to quality care for Black patients. The federal government's shortcomings were particularly significant in the case of the Hill-Burton Act, which fueled racial disparities in health care by permitting federal funds to be directed toward building segregated hospitals.⁷⁹

The Hill-Burton Act was signed by President Harry Truman, who remarked at the time of signing that "This bill . . . lays a groundwork for providing more and better medical care for the people of our country. Its aim is to assist States in the construction of necessary physical facilities for furnishing adequate hospital, clinical and similar services to all their people."⁸⁰ Despite the promise of adequate services for all people, the Hill-Burton program embraced the funding of segregated hospital facilities, designating funds for 104 facilities that engaged in "complete racial exclusion" and 7000 facilities that were "segregate[d] by ward, room[,] or floor."⁸¹ This decision spurred the continued segregation of hospitals, using taxpayer money, yet deferred to the states to determine how health facility funds would be spent.⁸² Reporting at the time showed facilities were not built in the poorest areas of Southern states, citing "the fact that these poor areas lack the funds to build or maintain a hospital,"⁸³ and were concentrated in small towns rather than urban areas.⁸⁴

The practice of providing federal funding to the construction of segregated hospitals went unabated for twenty years,⁸⁵ until the 1963

⁷⁷ Social Security Amendments of 1965, Pub. L. No. 85-97, 79 Stat. 286.

⁷⁸ Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985, Pub. L. No. 99-272, § 9121, 100 Stat. 82, 164-67.

⁷⁹ Emily A. Largent, *Public Health, Racism, and the Lasting Impact of Hospital Segregation*, 133 PUB. HEALTH REPS. 715, 715 (2018).

⁸⁰ Statement by the President Upon Signing the Hospital Survey and Construction Act, PUB. PAPERS 413 (Aug. 13, 1946).

⁸¹ Outterson, *supra* note 25, at 768-70.

⁸² *See id.* at 767-68.

⁸³ *See* John W. Cronin, Louis S. Reed & Helen Hollingsworth, *Hospital Construction Under the Hill-Burton Program: Analysis of the Type, Size, and Location of Projects Being Built with Federal Aid*, 65 PUB. HEALTH REPS. 743, 746-52 (1950).

⁸⁴ *Id.* at 747.

⁸⁵ *See generally* Largent, *supra* note 79, at 715-16 (discussing the problem of segregation in hospitals prior to *Simkins* and the medical community's response to the decision).

decision in *Simkins v. Moses H. Cone Memorial Hospital*.⁸⁶ The Fourth Circuit's decision meant hospitals receiving federal funds could not deny Black medical professionals use of these facilities.⁸⁷ However, this remedy did not recoup funds that had already been directed to segregated facilities, nor did it alter the fact that many hospitals were placed in geographic locations that Black patients had more trouble accessing.⁸⁸

Under Hill-Burton, taxpayer money funded construction of segregated hospitals for nearly twenty years. Despite paying taxes under the same tax laws, Black taxpayers were denied the same benefits and quality of healthcare services as white taxpayers.⁸⁹ In 1964, the Public Health Service issued regulations that prohibited discrimination in facilities receiving Hill-Burton funds.⁹⁰ As with the effort to abolish slavery, the effort to prohibit segregation and discrimination in public accommodations receiving federal funds was too little too late. The racial disparity in health care was intrinsically woven into these facilities from their creation.

Part I of this Note presented a wide-ranging review of the ways slavery, segregation, and racism have shaped the United States health care system, in the context of the legal and political forces that provided support and funding for racial inequality in health care. The next Part of this Note explores possible legal remedies available to those who experience harm within the health care system on the basis of race. This Note concludes that the current legal remedies are inadequate and must be re-envisioned.

II. THE LIMITATIONS OF LEGAL REMEDIES TO STRUCTURAL RACISM IN HEALTH CARE

The right to health care has historically been recognized as a fundamental right in international settings.⁹¹ However, the right to health

⁸⁶ 323 F.2d 959, 969–70 (4th Cir. 1963), *cert denied*, 376 U.S. 938 (1964), *abrogated by* *Modaber v. Culpeper Memorial Hospital, Inc.*, 674 F.2d 1023, 1026 (4th Cir. 1982) (holding that the portion of the Hill-Burton Act that allowed “separate but equal” facilities was unconstitutional under the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *See id.*

⁹⁰ *See* Largent, *supra* note 79, at 718.

⁹¹ *See* CONST. OF THE WORLD HEALTH ORG. 1 (1946) (“The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.”); *see also* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25 (Dec. 10, 1948) (“Everyone has the

care has not been recognized as a constitutionally protected fundamental right within the United States legal system. Statutes such as Medicare and Medicaid make up the bulk of the federal government's effort to support accessible health care.⁹² The Supreme Court has held that only fundamental rights that are explicitly or implicitly guaranteed in the Constitution are considered substantive constitutional rights.⁹³ Despite the social value of safe housing and quality education, the Supreme Court has not recognized them as fundamental rights, and "the Constitution does not provide judicial remedies for every social and economic ill."⁹⁴ This distinction limits the availability of judicial remedies to protect social and economic ills—like the preventable racial disparity in maternal and infant health outcomes for Black birthing people—because health is not a constitutional right.

Yet, another constitutional interpretation is possible. As Justice Kennedy wrote in *Obergefell v. Hodges*,

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.⁹⁵

It was this evolving idea of liberty that the Court in *Obergefell* embraced when it held the fundamental right to marry included the right for same-sex couples to marry.⁹⁶ Were health care a fundamental right, a challenge to a federal or state law that abridged this right would be subject to strict scrutiny judicial review rather than a less

right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."); G.A. Res. 2200A (XXI), art. 12 (Dec. 16, 1966) ("The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.").

⁹² See David Orentlicher, *Rights to Healthcare in the United States: Inherently Unstable*, 38 AM. J.L. & MED. 326, 327 (2012).

⁹³ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31–37 (1973).

⁹⁴ *Id.* at 32 (quoting *Lindsey v. Normet*, 405 U.S. 56, 74 (1972)).

⁹⁵ 576 U.S. 644, 644–45 (2015) (recognizing the right to marry is a fundamental right under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and this right applies equally to same-sex couples).

⁹⁶ *Id.*

searching rational basis review.⁹⁷ While some laws do survive strict scrutiny, a majority do not.⁹⁸ Yet, even if health were a fundamental right that was afforded constitutional protection, this protection would not guarantee access for those without the financial ability to access the right.

A. *No Government Obligation to Provide Health Care*

The notion of a government obligation to provide medical care arises in certain distinct circumstances where a person under government control is dependent on the government for basic needs.⁹⁹ For example, the Supreme Court has recognized that under the Eighth Amendment, which prohibits “cruel and unusual punishments,”¹⁰⁰ the government has an obligation to provide medical care for the people the government incarcerates because the individual’s needs cannot be met through other means.¹⁰¹ This reasoning has been extended to include individuals who have been institutionalized and thus are dependent on the State.¹⁰²

Additionally, the Supreme Court has found that the Constitution sets forth certain implicit privacy rights that are absolute and fundamental to the concept of liberty, even where the Constitution does not explicitly mention a right to privacy.¹⁰³ Under the Fourteenth Amendment’s Due Process Clause, fundamental rights are protected under the Constitution from state infringement.¹⁰⁴ In *Roe v. Wade*,¹⁰⁵ the Supreme Court held that the right of personal privacy includes the decision over whether to obtain an abortion, and that, where “fundamental rights” are involved, any regulation of such rights must be justified by a compelling state interest.¹⁰⁶ However, in *Maher v. Roe*,¹⁰⁷ the Supreme Court shied away from identifying a constitu-

⁹⁷ See, e.g., *Rodriguez*, 411 U.S. at 40 (applying rational basis review where the challenged Texas law did not “impinge upon constitutionally protected rights” by using local property taxes to fund schools).

⁹⁸ Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006) (finding that from 1990 to 2003 only 30 percent of laws reviewed under strict scrutiny were upheld).

⁹⁹ KATHLEEN S. SWENDIMAN, CONG. RSCH. SERV., R40846, HEALTH CARE: CONSTITUTIONAL RIGHTS AND LEGISLATIVE POWERS 5 (2010).

¹⁰⁰ U.S. CONST. amend. VIII.

¹⁰¹ *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

¹⁰² *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982).

¹⁰³ *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

¹⁰⁴ *Id.* at 167–68.

¹⁰⁵ 410 U.S. 113 (1973).

¹⁰⁶ *Id.* at 154–55.

¹⁰⁷ 432 U.S. 464 (1977).

tional right to health care at the government's expense for pregnancy-related medical expenses.¹⁰⁸ In doing so, the Court reasoned that "when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations."¹⁰⁹

The Supreme Court has determined that financial need alone does not constitute "a suspect class for purposes of equal protection analysis."¹¹⁰ *Maier* allowed Congress to withhold subsidies for medically necessary abortion care under the Hyde Amendment.¹¹¹ The Court reasoned that the Due Process Clause of the Fourteenth Amendment may protect against unwarranted government interference in individual privacy rights, but does not entitle individuals to "such funds as may be necessary to realize all the advantages of that freedom."¹¹²

In *San Antonio Independent School District v. Rodriguez*,¹¹³ the Court held the Equal Protection Clause does not require absolute equality or equal advantage when a service, like education, is unequal as the result of wealth disparity.¹¹⁴ The Court's refusal to recognize a judicial remedy reflected the Court's general refusal to create additional substantive constitutional rights that are not explicitly or implicitly guaranteed by the Constitution.¹¹⁵

The Constitution and Supreme Court precedents demonstrate that there is no constitutional right to health care at the government's expense. Nor are there sufficient grounds to challenge unequal access to certain services, even where those services are either protected by the Constitution or fundamental to society, when the underlying disparity is driven by wealth inequality. However, the Constitution and the courts have recognized that there are certain statutory rights that protect individuals from discrimination in accessing medical services. The following Section provides a brief overview of this statutory framework.

¹⁰⁸ *Id.* at 469.

¹⁰⁹ *Id.* at 469–70.

¹¹⁰ *Id.* at 471.

¹¹¹ *Harris v. McRae*, 448 U.S. 297, 316–17 (1980).

¹¹² *Id.* at 318.

¹¹³ 411 U.S. 1 (1973).

¹¹⁴ *See id.* at 28–29.

¹¹⁵ *Id.* at 33–36.

B. Equal Protection Claims Are Difficult to Win and the Available Relief Is Limited

Under the Fourteenth Amendment's Equal Protection Clause, the State cannot "deny to any person within its jurisdiction the equal protection of the laws."¹¹⁶ Although the Equal Protection Clause does not apply to activities of private persons, and possibly private hospitals, federal courts have applied the Equal Protection Clause to hospitals where the State is significantly involved in their regulation or operation.¹¹⁷ This was the case in *Simkins*,¹¹⁸ which established the basis for overturning segregation practices in hospitals receiving federal funding.¹¹⁹

In addition to the Equal Protection Clause, Title VI of the Civil Rights Act¹²⁰ has similarly been utilized by the federal government to enforce compliance with antidiscrimination principles.¹²¹ Under Title VI of the Civil Rights Act, a private individual may sue to enforce Section 601 of Title VI,¹²² which prohibits discrimination in programs receiving federal financial assistance on the basis of race, color, or national origin, and obtain injunctive relief and damages.¹²³ Racial discrimination in hospitals and other health care services that receive federal financial assistance is remediable under Title VI.¹²⁴ Both Congress and the courts, however, have acted to limit the remedial effect of Title VI in the provision of health services.

The ability to enforce Title VI was significantly limited by *Alexander v. Sandoval*,¹²⁵ in which the Supreme Court held that there is no private right of action to enforce disparate impact regulations under Title VI and that § 601 prohibits only intentional discrimination.¹²⁶ The Court held that the only recourse to enforce disparate impact regulations was available under the independent application of § 602, au-

¹¹⁶ U.S. CONST. amend. XIV.

¹¹⁷ See, e.g., *Simkins v. Moses H. Cone Mem'l Hosp.*, 323 F.2d 959, 969–70 (4th Cir. 1963), *cert denied*, 376 U.S. 938 (1964).

¹¹⁸ See *supra* notes 80–90 and accompanying text.

¹¹⁹ See Sarah C. Carey, *A Constitutional Right to Health Care: An Unlikely Development*, 23 CATH. U. L. REV. 492, 495–501 (1974).

¹²⁰ Civil Rights Act of 1964 tit. VI, 42 U.S.C. § 2000d.

¹²¹ See Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination,"* 70 GEO. L.J. 1, 6–8 (1981).

¹²² Civil Rights Act of 1964 § 603, 42 U.S.C. § 2000d-2.

¹²³ Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d.

¹²⁴ See Adrian D. Samuels & Mariah J. Cole, *Utilizing Title VI As a Means to Eradicate Health Discrimination*, 10 J. HEALTH DISPARITIES RSCH. & PRAC. 30, 30, 34 (2017).

¹²⁵ 532 U.S. 275 (2001).

¹²⁶ See *id.* at 281, 293.

thorizing a federal agency to issue a regulation to proscribe activities creating a disparate impact on racial groups.¹²⁷ The ability to enforce regulations that have a disparate impact on Black communities and individuals has thus been reserved for federal agencies rather than private individuals.

Individuals may still challenge discriminatory health services under EMTALA¹²⁸ through a private action claim based on disparate treatment.¹²⁹ EMTALA requires hospitals participating in Medicare to provide screening and stabilization of individuals who present with an emergency condition if an emergency condition is detected.¹³⁰ EMTALA requires only an “appropriate medical screening” that is “within the capability of the hospital’s emergency department.”¹³¹ A lack of uniformity in defining this standard creates significant challenges for a private individual.¹³² EMTALA grants an individual a private right of action to challenge a hospital where the individual suffers personal harm as a result of the hospital’s violation of EMTALA.¹³³ However, courts have read in Eleventh Amendment immunity for state institutions like state university teaching hospitals, leaving protections only for individuals who seek treatment in private hospitals.¹³⁴

Discrimination on the basis of race is exceedingly hard to challenge through legal remedies, because the roots of the harm often go beyond a single actor and the institutionalization of harm persists.¹³⁵ This phenomenon is a result of legal and political forces that infused racialized practices in this country’s core institutions when they were

¹²⁷ See *id.* at 281.

¹²⁸ Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd.

¹²⁹ *Id.* § 1395dd(d)(2)(A).

¹³⁰ *Id.* § 1395dd(a)-(b).

¹³¹ *Id.* § 1395dd(a).

¹³² Several circuits have held that violations should not be determined against a national standard of care, but rather against the screening hospital’s regular practice. For example, the Fourth Circuit has held the determination of whether a medical screening is appropriate—given the capabilities of the hospital—should be left to the finder of fact. See *Power v. Arlington Hosp. Ass’n*, 42 F.3d 851, 859 (4th Cir. 1994). The plaintiff must make a threshold showing of differential treatment which is rebuttable by a hospital’s showing that the patient was given the same level of treatment other patients receive or that the physician did not believe the screening was necessary, and the plaintiff may then challenge this medical judgment by putting forward their own expert. *Id.* at 585; see also *Cleland v. Bronson Health Care Group, Inc.*, 917 F.2d 266, 268 (6th Cir. 1990) (interpreting the “vague phrase ‘appropriate medical screening’ to mean a screening that the hospital would have offered to any paying patient”).

¹³³ 42 U.S.C. § 1395dd(d)(2)(A).

¹³⁴ See Garwin, *supra* note 73, at 38–39.

¹³⁵ See, e.g., Shreya Atrey, *Structural Racism and Race Discrimination*, 74 CURRENT LEGAL PROBS. 1, 3–4 (2021).

created.¹³⁶ Both Title VI and EMTALA fall short of establishing a standard of care that protects Black people who encounter racism in the health care system.

An example of this shortfall is the Tuskegee Syphilis Study. The Tuskegee Syphilis Study, which lasted from 1932 through 1972, was led by the U.S. Public Health Service (“PHS”).¹³⁷ The PHS worked with local health agencies to recruit Black men from Macon County, Alabama to be part of an observational experiment on the long-term effects of untreated syphilis.¹³⁸ The PHS relied on deceptive practices to engage participants, advertising free health services without disclosing the nature of the study.¹³⁹

In 1974, a settlement of \$10 million was made to the 601 men who were the subjects of the Tuskegee Syphilis Study.¹⁴⁰ Additionally, the study participants’ wives, ex-wives, widows, and offspring each received lifetime medical and health benefits.¹⁴¹ However, no monetary award was given to any of the subjects’ sexual partners or their families, nor the community in Macon County, Alabama, which was rocked by the revelation that forty years of experimentation had been conducted on members of their community without the subjects’ knowledge.¹⁴²

Although the legal system was able to account for the direct harms of the Tuskegee Syphilis Study, the broader implications of the mistrust it evoked in the Black community towards the health care system were equally damaging and went largely unaddressed. The

¹³⁶ *Id.*

¹³⁷ See FRED D. GRAY, *THE TUSKEGEE SYPHILIS STUDY* 48 (1998).

¹³⁸ See *id.* at 48–73.

¹³⁹ See *id.* at 49–51. Researchers misled the men who were recruited, leading the men to believe the medical complications they were experiencing was a result of “bad blood,” and withheld penicillin treatment from infected participants. April Dembosky, *Stop Blaming Tuskegee, Critics Say. It’s Not An ‘Excuse’ For Current Medical Racism*, NAT’L PUB. RADIO (Mar. 23, 2021, 11:05 AM), <https://www.npr.org/sections/health-shots/2021/03/23/974059870/stop-blaming-tuskegee-critics-say-its-not-an-excuse-for-current-medical-racism> [https://perma.cc/JT67-XUJC].

¹⁴⁰ The settlement was divided into four categories: 1) \$37,500 to “[l]iving syphilitic group participants;” 2) \$15,000 to “[h]eirs of deceased syphilitic group participants;” 3) \$16,000 allocated to “[l]iving control group participants;” and 4) \$5,000 allocated to “heirs of deceased control group participants.” *The U.S. Public Health Service Syphilis Study at Tuskegee: Frequently Asked Questions*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 22, 2021), <https://www.cdc.gov/tuskegee/faq.htm> [https://perma.cc/8AYN-WPA4].

¹⁴¹ See *U.S. Public Health Service Syphilis Study at Tuskegee: The Tuskegee Timeline*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 22, 2021), <https://www.cdc.gov/tuskegee/timeline.htm> [https://perma.cc/XD56-6XZL].

¹⁴² See *U.S. Public Health Service Syphilis Study at Tuskegee: Frequently Asked Questions*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 22, 2021), <https://www.cdc.gov/tuskegee/faq.htm> [https://perma.cc/5FFK-KYS9].

medical mistrust resulting from the Tuskegee revelation has been correlated with a 1.5-year decline in the life expectancy for forty-five-year-old Black men.¹⁴³ The Tuskegee settlement did little to repair this harm, and the federal government made little effort to begin to regain the trust of Black people in the wake of revelations about the study.

III. TYING STRUCTURAL RACISM IN THE HEALTH CARE SYSTEM TO THE CASE FOR HEALTH REPARATIONS

The previous Sections of this Note have identified how slavery, segregation, and racism have interacted to create a dual system of health care—stratified along racial lines—in the United States.¹⁴⁴ The ratification of the Thirteenth Amendment on December 6, 1865,¹⁴⁵ the Fourteenth Amendment on July 9, 1868,¹⁴⁶ and Fifteenth Amendment on February 3, 1870,¹⁴⁷ spurred the slow unraveling of the South's hold on slavery. Although these amendments abolished slavery, the nation's underlying interest was in saving the Union by appeasing slaveholders.¹⁴⁸ This interest influenced the federal government to expend few resources to realize the Thirteenth, Fourteenth, and Fifteenth Amendments' equal rights guarantees.¹⁴⁹

The United States federal government has failed to adequately enforce these protections, and the courts have determined there is virtually no legal recourse for the harms that this failure has perpetuated. This Part considers how the failure to deliver on the promise of freedom to formerly enslaved Black people and the ancestors of formerly enslaved Black people in the United States is not only a moral failure, but a breach of implied duty. The federal government owes this duty until the promise of equality is upheld and Black people receive the unfettered enjoyment of citizenship without the infringement of systemic racial oppression. Structural racism undermines the promise of freedom that was guaranteed by the Thirteenth, Fourteenth, and Fifteenth Amendments.

The Tuskegee Syphilis Study settlement has laid the groundwork for a reparations model incorporating direct payments and provision of federal health services to remedy past wrongs. The model is insuffi-

¹⁴³ Marcella Alsan & Marianne Wanamaker, *Tuskegee and the Health of Black Men*, 133 Q.J. ECON. 407, 408 (2018).

¹⁴⁴ See *supra* Part I.

¹⁴⁵ U.S. CONST. amend. XIII.

¹⁴⁶ U.S. CONST. amend. XIV.

¹⁴⁷ U.S. CONST. amend. XV.

¹⁴⁸ Cf. Lincoln, *supra* note 49 and accompanying text.

¹⁴⁹ See *supra* text accompanying notes 49–60.

cient to address the broader impact of the study on the Black community as a whole, however, as it focuses on individual study participants without addressing the underlying distrust and harm that the study sowed. For reparations to be an effective model, they must be enacted on a broader basis and must be fundamentally structured toward a functioning health system rather than individual health outcomes.

A growing number of commentators have embraced the idea that racism is not simply an ideology, but a social system.¹⁵⁰ As former President of the American Public Health Association Camara Phyllis Jones argues, understanding the causes of racial health disparities should focus on analyzing the structures, policies, practices, and norms that impact who is advantaged and who is disadvantaged.¹⁵¹ Jones identifies three levels in which “racial” health disparities are produced: (1) differential care within the health care system, (2) differential access to health care, and (3) differences in exposure and life opportunities that create different levels of health and disease.¹⁵² The current legal framework may account for some of the harms that fall into this first level of health disparities, but is woefully deficient in addressing the second two levels.

Courts are willing to recognize proximate cause between a wrongful act and the purported injury suffered and provide a remedy, but they typically limit relief to “well-identified victims against well-identified wrongdoers.”¹⁵³ The Supreme Court has held that the question of recognizing broader remedies for harms related to slavery and discrimination should be left to Congress to determine the extent of government liability,¹⁵⁴ effectively forestalling the ability to litigate harms perpetuated by systemic racism without a congressional statutory right. As Mari J. Matsuda argues, this approach ignores the reality that victims and perpetrators often belong to groups that

¹⁵⁰ See, e.g., Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOCIO. REV. 465, 466–67 (1997) (arguing the term “racism” should be viewed as describing “the racial ideology of a racialized social system”); Camara Phyllis Jones, *Confronting Institutionalized Racism*, 50 PHYLON 7, 7, 9–10 (2002) (defining racism as a system where opportunity is structured based on the way a person looks, resulting in the unfair disadvantage of some individuals and groups and the unfair advantage of others).

¹⁵¹ See Jones, *supra* note 150, at 9–10.

¹⁵² Jones, *supra* note 150, at 8.

¹⁵³ Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 502 (2001).

¹⁵⁴ See *FDIC v. Meyer*, 510 U.S. 471, 486 (1994) (rejecting plaintiff’s constitutional claim against a federal agency, arguing that allowing individuals to seek damages against federal agencies rather than against individuals could create a significant financial burden for the federal government—a scope of liability that Congress is best positioned to determine).

historically have received collective treatment, and the issue of proximate cause is as much about the politics of line-drawing as it is about causal connection.¹⁵⁵ The courts have demonstrated an unwillingness to draw the line of culpability in a way that would provide remedies for implicit discrimination.

As Kimberlé Williams Crenshaw argues, the focus on civil rights legislation as the end of Black oppression has led society to “embrace[] the rhetoric of equal opportunity without fulfilling its promise.”¹⁵⁶ As Crenshaw points out, racial hierarchy was not resolved by facially race-neutral laws because racism remained part of the popular consciousness, underpinning the historical dominance of white superiority and legitimizing racial subordination of Black people.¹⁵⁷

As long as the stain of structural racism continues to contribute to the racial disparity in maternal and infant health outcomes, Black birthing people are experiencing a harm that is the federal government’s obligation to correct. Structural reform is necessary, and, as this Note has demonstrated, structural reform requires adequate funding. This Part focuses on the federal government’s obligation, how a similar obligation to Native American and Federal Indian Tribes has been fulfilled, and why a federally funded health program for Black birthing people is an appropriate structural reform.

A. *The Right and Privilege to Be Free from the Vestiges of Slavery*

The imagining of Black liberation through the Thirteenth Amendment was ultimately a half promise that the federal government has continuously failed to deliver on. In the absence of federal action, racism and racial hostility continue to relegate Black people in the United States to a position as lesser citizens. The impact of such racism on health care continues to devastate the Black community.

In *Hodges v. United States*,¹⁵⁸ Justice Brewer narrowly interpreted Congress’s authority to use the Thirteenth Amendment to regulate the private denial of individual rights.¹⁵⁹ The Court found that Congress could not intervene to address racial hostility toward African American manufacturers in their right to contract.¹⁶⁰ The Court held

¹⁵⁵ See Matsuda, *supra* note 13, at 380–85.

¹⁵⁶ Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1347 (1988).

¹⁵⁷ *Id.* at 1378–79.

¹⁵⁸ 203 U.S. 1 (1906), *overruled in part by* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

¹⁵⁹ See *id.* at 19–20.

¹⁶⁰ *Id.*

the Thirteenth Amendment did not specifically protect the “African race,” but instead applied to all races, thus limiting Congress’s ability to address individual rights specific to formerly enslaved people.¹⁶¹ The Court contended that the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments signified that formerly enslaved people were not wards of the government like Indian tribes, and thus not subject to Congress’s jurisdiction.¹⁶²

Justice Harlan challenged this contention in his dissent. He asserted that when Congress chose to eradicate slavery, it “acquired the power not only to legislate for the eradication of slavery, but the power to give full effect to this bestowment of liberty on these millions of people.”¹⁶³ Justice Harlan emphasized that the Thirteenth Amendment conferred both freedom and “the right and privilege of being free from the badges or incidents of slavery.”¹⁶⁴

The Court implied that, because formerly enslaved Black people were granted citizenship, they were not entitled to specific federal protections beyond the rights encompassed in the Thirteenth, Fourteenth, and Fifteenth Amendments. As the Jim Crow era demonstrated, however, formerly enslaved Black people did not receive equal citizenship. The failures of Congress and federal courts to fully guarantee equal protections of citizenship essentially rendered formerly enslaved Black people wards of the government. Formerly enslaved Black people and their ancestors have been unable to take full advantage of the benefits of citizenship—specifically access to quality health care—and remain dependent on the federal government. Continued health disparities demonstrate that the obligation to free Black people from the vestiges of slavery remains unfulfilled. The federal government must intervene to address racism in the American health system.

B. The Federal Government’s Fulfilment of Its Health Services Obligations Under Tribal Law

One example of the federal government fulfilling its obligation to a specific group of oppressed and marginalized people is in federal Indian law and the creation of the Indian Health Service (“IHS”). The IHS provides federally funded health services, including comprehensive primary and preventative care, to members of federally recog-

¹⁶¹ See *id.* at 18.

¹⁶² See *id.* at 19–20.

¹⁶³ *Id.* at 29 (Harlan, J., dissenting).

¹⁶⁴ *Id.* at 35.

nized tribes.¹⁶⁵ The relationship between the United States government and Native Americans is one fraught with mistreatment, exploitation, and broken promises; however, the role of Federal Indian law in shaping and reshaping this relationship is the focus of this Section.

Federal Indian law defines the trust responsibility that the federal government holds to Indian tribes and individual Indians through the Constitution, treaties between the United States and various Indian tribes, acts of Congress, and the Supreme Court's jurisprudence.¹⁶⁶ The trust relationship between the United States government and Indian Tribes establishes an obligation on the part of the federal government to provide health care to American Indians and Alaska Natives.¹⁶⁷ This trust relationship reflects the unique legal status of Indian Tribes: the Commerce Clause of the Constitution recognizes Congress's power to regulate Commerce with Indian Tribes,¹⁶⁸ and the Supreme Court has recognized "the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes."¹⁶⁹

The Supreme Court drew on the historical treatment of Indian Tribes to inform their "guardian-ward" status, referencing how the United States took possession of Tribal land and left Indian Tribes "uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence."¹⁷⁰ Additionally, the recognition of tribal sovereignty and classification of Indian tribes as a political community shaped the unique parameters

¹⁶⁵ Reference to the Indian Health Care Improvement Act and provision of health benefits to Indian tribes is not meant to glorify or disregard the continued disparity in Indian health in the United States. This Note does not specifically address Native Americans or Indian tribal health disparities, nor does it explore the ongoing efforts of Black freedmen and their ancestors to obtain tribal recognition from tribes who participated in the practice of chattel slavery. See generally, Earchiel Johnson, *Slaves of the Tribe: The Hidden History of the Freedmen*, PEOPLE'S WORLD (Nov. 29, 2017, 11:54 AM), <https://www.peoplesworld.org/article/slaves-of-the-tribe-the-hidden-history-of-the-freedmen/> [https://perma.cc/49LE-RS4G]. Reference to the IHCA is purely intended to demonstrate the framework federal policies towards Indian tribes have utilized, and the fact that the framework is imperfect has been and should continue to be analyzed and challenged.

¹⁶⁶ See DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR., MATTHEW L.M. FLETCHER & KRISTEN A. CARPENTER, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 2-3 (7th ed. 2017).

¹⁶⁷ See *Basis for Health Services*, INDIAN HEALTH SERV. (Jan. 2015), <https://www.ihs.gov/newsroom/factsheets/basisforhealthservices/> [https://perma.cc/B6FA-2NT6].

¹⁶⁸ U.S. CONST. art. I, § 8, cl. 3.

¹⁶⁹ *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

¹⁷⁰ *Id.* at 552 (quoting *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943)).

of the federal government's policies and obligations toward Indian tribes.¹⁷¹ For example, in *Morton v. Mancari*,¹⁷² the Court held that differential treatment of Indian tribal members is a cornerstone of Indian-American relations and does not constitute racial discrimination.¹⁷³

The paternalism, racism, and ignorance that laces through much of the federal government's historical approach to tribal relations cannot be understated and should not be ignored or downplayed. However, the federal government's provision of federal health services to Indian tribal members is a unique framework¹⁷⁴ that helps to advance the conversation about the provision of federal health services to groups that have faced historical harm as a result of federal policies and actions.

The Indian Health Care Improvement Act of 1976 ("IHCA") authorizes IHS activities¹⁷⁵ and allows the IHS to collect Medicare and Medicaid reimbursements.¹⁷⁶ The IHS is a federal agency within the Department of Health and Human Services that provides health services to members of federally recognized tribes with a mission of "rais[ing] the physical, mental, social, and spiritual health of American Indians and Alaska Natives to the highest level."¹⁷⁷ Unlike a health insurance program, the IHS provides medical services—including outpatient, ambulatory, emergency, dental, public health nursing, and preventative health care—directly through contracts with Indian Tribes or Tribal Organizations, and these services are not limited by a

¹⁷¹ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) (holding the Cherokee nation is a distinct political community and that the laws of the state of Georgia have no force over tribal land).

¹⁷² 417 U.S. 535 (1974).

¹⁷³ *See id.* at 552–53.

¹⁷⁴ Despite the utility of the framework, the implementation of health services primarily on Indian reservations creates challenges for a majority of Native Americans, who reside in urban and non-reservations and as a result must travel long distances for care. INSTITUTE OF MEDICINE, *UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE* 85 (Brian D. Smedley, Adrienne Y. Stith & Alan R. Nelson eds., 2003). Additionally, the program receives limited federal support and spending that falls below the per capita spending on other federal health programs. *Id.*

¹⁷⁵ 25 U.S.C. §§ 1601–1683; *see also* ELAYNE J. HEISLER, CONG. RSCH. SERV., R41630, *THE INDIAN HEALTH CARE IMPROVEMENT ACT REAUTHORIZATION AND EXTENSION AS ENACTED BY THE ACA: DETAILED SUMMARY AND TIMELINE 2* (2014).

¹⁷⁶ ELAYNE J. HEISLER, CONG. RSCH. SERV., R43330, *THE INDIAN HEALTH SERVICE (IHS): AN OVERVIEW* 18 (2016).

¹⁷⁷ *Agency Overview*, INDIAN HEALTH SERV., <https://www.ihs.gov/aboutihs/overview/> [https://perma.cc/9654-FKZ8].

medical benefit package as are health insurance plans.¹⁷⁸ Eligibility for access to benefits is based on recognized tribal membership, which generally is determined by the tribe and may include a descendent from a tribal roll traced by bloodline, minimum percentage of genealogical descent, proof of descent, or in some instances is determined by statute.¹⁷⁹

The obligation that the federal government owes to the descendants of formerly enslaved Black people is an obligation that stems from the historical treatment of enslaved Black people. The ongoing effects of this historical treatment has fueled the current public health crisis, as well as placed limitations on individual freedom by failing to raise Black people to the status of full citizens that are free from the vestiges of slavery. Racism and the racial inequality that Black people experience in the current health system is a vestige of slavery that renders Black people dependent on the federal government for health services. Reparations, in the context of health care, calls for the federal government to recognize its ongoing obligation to Black people who continue to be harmed by lack of access to health care.

The Constitution, as it was originally drafted, recognized enslaved Black people as a distinct group.¹⁸⁰ It is not enough to simply erase such a distinction through amendments that carry no legal might and fail to guarantee adequate enforcement mechanisms. As the body of federal Indian law reflects, historical wrongs require modern intervention, and as of today the federal government and the courts have failed to apply this set of principles to the experience of formerly enslaved Black people and their descendants. The conversation about

¹⁷⁸ ELAYNE J. HEISLER, CONG. RSCH. SERV., R43330, *THE INDIAN HEALTH SERVICE (IHS): AN OVERVIEW* 1, 10 (2016). The IHS system is primarily made up of hospitals, health centers, health stations, Alaska village centers, and youth regional treatment centers, which are predominantly located on or near reservations, totaling 118 IHS-operated and 534 tribally operated facilities, with an additional thirty-five urban Indian organizations in fifty-seven locations. *Id.* at 6–7, 9. Because most facilities are limited to outpatient services, specialty care and inpatient services may be accessed through contracted providers using the purchased/referred care program (“PRC”) or catastrophic health emergency fund (“CHEF”). *Id.* at 11. Additional telehealth behavioral resources are also available, as are paraprofessional services provided by community members who receive training through IHS. *Id.* at 10–12. The IHS provides specific services that target common health conditions of its beneficiaries, including a diabetes program, and behavioral health services for substance abuse and mental health, and the Maternal Child Health program, which aims to improve maternal outcomes through health promotion, risk reduction, and improvement of quality healthcare. *Id.* at 13–14; *Maternal and Child Health*, INDIAN HEALTH SERV., <https://www.ihs.gov/dccs/mch/> [<https://perma.cc/HQ9P-9VKH>].

¹⁷⁹ HEISLER, *supra* note 178, at 3.

¹⁸⁰ See *supra* notes 30–33 and accompanying text.

reparations is not simply about money, but about systemic failings that require systemic solutions.

C. Envisioning The Creation of a Trust Obligation to Black Birthing People

The vulnerabilities of this country's health care system have been laid bare. The health care system is unequal and in need of reform to address Black health disparities, particularly the disparity in maternal and infant health outcomes. Various models present themselves, though a path forward is far from clear. Despite this challenge, reparations are a viable path forward and potentially one of the only remedies that could address structural racism in a way that would expand health care access for Black birthing people.

Some scholars have noted that reparations to Black people are distinct from the services that have been directed toward fulfilling the trust obligation the federal government has with Indian tribes, because these claims are based on treaties resembling those between separate nations rather than a nation and its own citizens.¹⁸¹ As discussed previously,¹⁸² however, the Supreme Court has historically not considered formerly enslaved people to be citizens, but instead their own group with distinct rights.¹⁸³ This historical treatment was also reflected by the Constitution's classification of formerly enslaved Black people as "other persons."¹⁸⁴

Throughout history, Black people were regarded as helpless and dependent, and it was this status that was used to justify slavery.¹⁸⁵ Although the federal government's position on slavery shifted, it did so slowly, in flawed and inadequate half-steps that erased the facial "othering" of Black people but left behind the systemic and institutionalized structures of disparity and discrimination.¹⁸⁶ The federal government recognized the need to provide federal health services for formerly enslaved Black people and their descendants when it created the Freedmen's Bureau, and that need continues to exist today.¹⁸⁷

¹⁸¹ Verdun, *supra* note 63, at 648.

¹⁸² See *supra* Part III.A.

¹⁸³ See *supra* Part III.A.

¹⁸⁴ See *supra* Part I.B.

¹⁸⁵ See Michael E. Ruane, *A Brief History of the Enduring Phony Science That Perpetuates White Supremacy*, WASH. POST (Apr. 30, 2019), https://www.washingtonpost.com/local/a-brief-history-of-the-enduring-phony-science-that-perpetuates-white-supremacy/2019/04/29/20e6aef0-5aeb-11e9-a00e-050dc7b82693_story.html [https://perma.cc/T2X5-25T2].

¹⁸⁶ See *supra* Part II.

¹⁸⁷ See Georges C. Benjamin, *Health Inequity from the Founding of the Freedmen's Bureau to COVID-19*, 23 AM. MED. ASS'N J. ETHICS 189, 189 (2021).

The federal government failed to recognize the obligation that it owed to formerly enslaved Black people and their descendants, and the temporary nature of the Freedmen's Bureau was inadequate in fulfilling this obligation. This inadequacy continues to result in the perpetuation of harm. The medical services we know today were forged from the abuse and experimentation on enslaved Black people, and the gynecological services women continue to rely on were developed from the abuse endured by enslaved Black women.¹⁸⁸ Yet, Black women continue to experience inadequate access to these services, and to quality health care generally, despite the labor that was extracted from them to create it.¹⁸⁹

Formerly enslaved Black people and their descendants have not been adequately compensated for the labor they put into the creation of wealth and industry in this country, particularly the reproductive labor discussed in this Note. The federal government's tacit endorsement of chattel slavery legitimized such practices. Ongoing impacts of this disparate treatment have endured as a crisis of differential treatment within health services. The federal government is responsible for addressing these harms. The federal government must recognize that, as with the historical treatment of Indian tribes, the historical enslavement of Black people in the United States has resulted in its obligation to provide for those it left dependent and "othered."

A recent reparations plan put forward in Evanston, Illinois is one of the first programs in the United States to institute payments to Black residents for historical discrimination by providing them with direct payments in recognition of past wrongs.¹⁹⁰ The Evanston, Illinois municipal reparations program seeks to provide \$25,000 housing grants to Black residents to support homeownership and renovation.¹⁹¹ The plan, which is funded by collection of a three percent tax on marijuana, will be made available to ancestors and descendants of African American or Black residents of the city between 1919 and 1969, as well as a third category of people who experienced housing

¹⁸⁸ See COOPER OWENS, *supra* note 1, at 21, 25, 38.

¹⁸⁹ See Juanita J. Chinn, Iman K. Martin, & Nicole Redmond, *Health Equity Among Black Women in the United States*, 30 J. WOMEN'S HEALTH 212, 213 (2021).

¹⁹⁰ See Julie Bosman, *Chicago Suburb Shapes Reparations for Black Residents: 'It Is the Start'*, N.Y. TIMES (Mar. 22, 2021), <https://www.nytimes.com/2021/03/22/us/reparations-evanston-illinois-housing.html> [https://perma.cc/3F2R-UFH4].

¹⁹¹ Memorandum from Kimberly Richardson, Interim Assistant City Manager, to Mayor & Members of Evanston City Council (Mar. 22, 2021), <https://cityofevanston.civicweb.net/document/50624/Adoption%20of%20Resolution%2037-R-27,%20Authorizing%20the.pdf?handle=E11C7B73E1B6470DA42362AB80A50C46> [https://perma.cc/289C-THVB].

discrimination as a result of the city's discriminatory housing practices after 1969.¹⁹²

Some critics challenged the “Evanston model” as a housing subsidy dressed up as a reparations program.¹⁹³ This program, however, moves the conversation forward and acknowledges that subsidy programs must address disparities created by historical discrimination. Long-term reparations models must provide systemic remedies to address systemic problems.

Reparations must recognize the moral obligation that federal and local governments owe to the descendants of Black people. Federal policies relied on the false notion of Black inferiority. Thus, federal practices must address the inequitable and unequal health care system Black people continue to experience.

As the IHS model has demonstrated, the federal government may not be in the best position to act as a health care provider. The implementation of health services primarily on Indian reservations has led to significant challenges for a majority of Native Americans, who reside in urban and other non-reservation settings and must travel long distances for care.¹⁹⁴ As well, the program receives limited federal support, with spending below the per capita spending on other federal health programs.¹⁹⁵

Typically, Congress has relied on its Constitutional spending power for health care financing,¹⁹⁶ utilizing its power to collect taxes to provide for the “general Welfare of the United States.”¹⁹⁷ The current set of federally funded healthcare programs, including Medicare, Medicaid, and the Children’s Health Insurance Program, reflects that the United States is already reliant on a system in which government revenue is a key source for health care expenditures.¹⁹⁸ One of the largest sources of health subsidies are tax preferences for employer-provided health care benefits, followed by the exclusion of Medicare benefits.¹⁹⁹ One possible way to pay for a health care program for the descendants of formerly enslaved Black people who continue to experience significant health burdens would be to expand the estate tax.

¹⁹² *Id.*

¹⁹³ *See Bosman, supra* note 190.

¹⁹⁴ *See SMEDLEY ET AL., supra* note 174, at 85.

¹⁹⁵ *Id.*

¹⁹⁶ SWENDIMAN, *supra* note 99, at 7.

¹⁹⁷ U.S. CONST. art. I, § 8, cl. 1.

¹⁹⁸ *See SWENDIMAN, supra* note 99, at 8.

¹⁹⁹ STAFF OF J. COMM. ON TAXATION, JCX-66-08, TAX EXPENDITURES FOR HEALTH CARE 3, 20 (2008).

Research demonstrates that raising the estate tax would generate significant revenue,²⁰⁰ and this revenue stream would target generational wealth transfers among the wealthiest people in the country.

The tax system is an appropriate vehicle to fund a comprehensive health reparations program. The federal government has consistently sought to use taxpayer money to fund health services that supported segregated health facilities and failed to adequately fund hospitals and health care services in predominantly Black communities.²⁰¹ Black taxpayers have continued to pay into a system of federal health benefits of which they have not received adequate care. Given the high cost of health care in the United States and the disproportionate cost of health care that is experienced by Black people who are not only more likely to pay more for health insurance, but also less likely to hold insurance at all, the estate tax model would redistribute the benefit of lower overall health costs to those experiencing the most direct impact of our failed health system. This proposal would not simply provide a health benefit to the Black population, but also improve overall public health.

CONCLUSION

Black people in the United States continue to live with the badges and incidents of slavery—subjected to continued racial discrimination and marginalization as a result of the federal government's failure to adequately dismantle systemic racism. Despite the guarantees that were made by the federal government to formerly enslaved Black people and their ancestors through the Thirteenth, Fourteenth, and Fifteenth Amendments, these Constitutional protections have not been enforced to ensure equality of Black people in the United States. The legal precedent for a reparations program stems from the recognition that the unfulfilled promises of citizenship and equal status have established a unique relationship between the federal government and all Black people who were intended to receive the protection of these amendments. The nature of this relationship also implies the existence of certain legal obligations to Black people who have been denied these protections and thus forced to depend

²⁰⁰ WILLIAM G. GALE, CHRISTOPHER PULLIAM, JOHN SABELHAUS & ISABEL V. SAWHILL, BROOKINGS, *TAXING WEALTH TRANSFERS THROUGH AN EXPANDED ESTATE TAX* (2020), <https://www.brookings.edu/research/taxing-wealth-transfers-through-an-expanded-estate-tax/> [<https://perma.cc/Q3YE-T3SC>].

²⁰¹ See generally Largent, *supra* note 79, at 715–20.

more heavily on the federal government.²⁰² This obligation is directly related to the harms Black birthing people continue to experience because these harms have been attributed in part to structural racism and by extension the federal government.

In the absence of sufficient legal remedies to address structural racism in the health care system generally and in the disproportionate harms to Black birthing people specifically, structural change is an appropriate remedy to address structural harm. The reproductive labor that was extracted from enslaved Black women to sustain the institution of slavery in the United States has never been properly compensated, and that debt is owed by the federal government for the laws and policies that contributed to this harm. This harm has never been adequately remedied, and the resulting generational trauma that Black birthing people have experienced as a result of this failure is a health crisis that the federal government has a moral obligation to remedy.

²⁰² See *supra* Sections III.B.–C.

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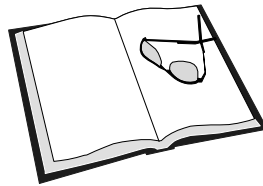
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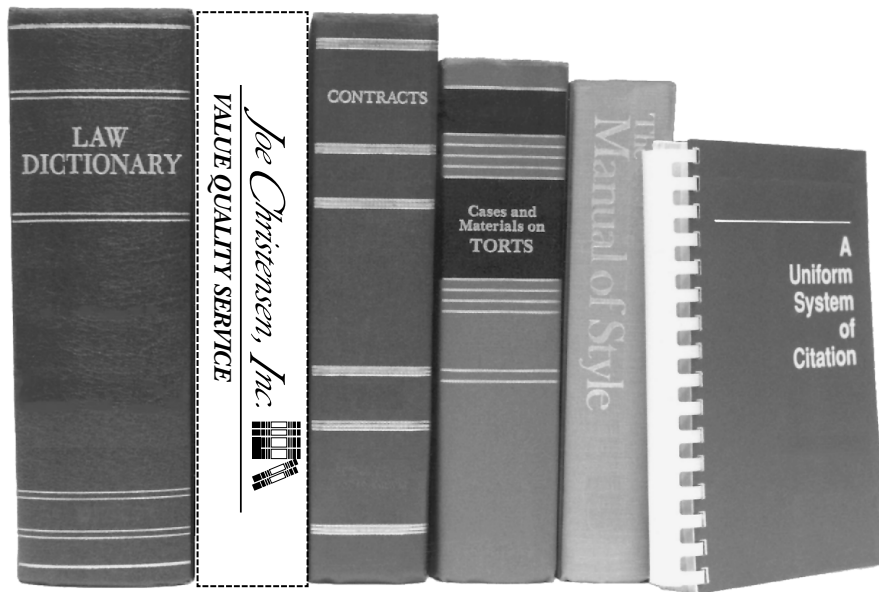
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