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The George Washington Law Review, ISSN 0016-8076, is published in February, April, June, August, October, and December by students of The George Washington University Law School, 720 20th St., N.W., Washington, D.C. 20052. Email: gwlr@law.gwu.edu. Website: <http://www.gwlr.org>. Phone: (202) 994-4610. Fax: (202) 994-4609. Publication Office: Sheridan, PA, 450 Fame Avenue, Hanover, PA 17331. Please send address changes to the Editorial Office.

Subscriptions are \$50.00 per year; foreign, \$55.00 per year. District of Columbia residents please add 5.75% sales tax. Absent timely notice of termination, subscriptions are automatically renewed upon expiration. Periodicals postage is paid at Washington, D.C., and additional mailing offices.

Single issues of the current volume are available from the Editorial Office. Regular issues are \$10.00 each; symposia and *Annual Review of Administrative Law* issues, \$15.00 each; and double issues, \$20.00 each. To cover shipping charges, please add \$1.75 per issue to addresses in the United States, \$3.50 to Canada, \$3.75 to Mexico, and \$10.00 to elsewhere. For back issues of previous volumes, inquire of William S. Hein & Co., Inc., 2350 North Forest Road, Getzville, New York 14068. Microfilms of all volumes are available through William S. Hein & Co., Inc., as well.

POSTMASTER: Please send change of address and new subscriptions to The George Washington Law Review, ISSN 0016-8076, 2028 G St. NW, Suite LLC-022, Washington, D.C. 20052, at least 45 days before the date of the issue with which it is to take effect. Duplicate issues will not be sent without charge.

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Representations & Warranties, Fraud, and Risk Shifting: An Analytical Framework

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ABSTRACT

Do violations of contractual representations and warranties (“R&Ws”) merely shift risk by giving rise to contract-breach damages, or can they also give rise to fraud claims? This question is at the heart of numerous lawsuits, including billions of dollars of securitization-related litigation. Many agreements governing the issuance of securities in these transactions limit R&W breach claims to a sole contractual remedy—curing the violation or repurchasing nonconforming loans that caused the violation. Although parties making the R&Ws argue that this sole remedy should adequately shift risk, investor plaintiffs contend that it insufficiently shifts the risk if the violations are extensive. Plaintiffs also argue that extensive R&W violations should constitute fraud, and that in the presence of fraud, their remedies should not be limited. This Article seeks to resolve these issues and provide a more systematic framework for analyzing R&W breaches.

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INTRODUCTION

Do violations of contractual representations and warranties (“R&W”) merely shift risk by giving rise to contract-breach damages, or can they also give rise to fraud claims? That question is at the heart of billions of dollars of ongoing litigation, including lawsuits arising out of the 2008 financial crisis for which statutes of limitation were tolled. This Article seeks to answer that question.

Many contracts include R&Ws in order to reallocate risk between the parties and reduce information asymmetry—the common scenario where one party to a transaction, such as the seller of an asset, has greater information than the buyer or other parties to the transaction.¹ When used in asset-sale agreements, R&Ws are assertions by a seller to the buyer about the quality of the assets being sold.² When used in financing agreements, R&Ws are assertions by a borrower to the lender about the borrower’s financial condition, its ability to repay the financing, and the quality of the collateral.³ Whichever the context, this Article refers to the parties providing these assertions as “warrantors.”

¹ See NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE § 10.08(2)(b) (Tina L. Stark et al. eds., 1st ed. 2003) (discussing R&Ws as contractual tools of risk allocation); Sean J. Griffith, *Deal Insurance: Representation and Warranty Insurance in Mergers and Acquisitions*, 104 MINN. L. REV. 1839, 1840 (2020) (discussing R&Ws as a contractual solution to information asymmetry between sellers and buyers). R&Ws also reduce adverse selection, which in this context refers to the possibility that a seller—who has more information about its assets than the buyer—will sell the buyer its least desirable assets of the type on sale. See Patricia A. McCoy & Susan Wachter, *Representations and Warranties: Why They Did Not Stop the Crisis*, in EVIDENCE AND INNOVATION IN HOUSING LAW AND POLICY 289, 293 (Lee Anne Fennell & Benjamin J. Keys eds., 2017); see also George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489–94 (1970). R&Ws that reduce asymmetric information about the assets will necessarily reduce adverse selection. See *id.* at 490–92. The use of R&Ws to reduce adverse selection is well-established in other risk-shifting settings, like insurance. See KENNETH S. ABRAHAM & DANIEL SCHWARCZ, *INSURANCE LAW AND REGULATION* 11 (7th ed. 2020).

² See U.C.C. § 2-313 (AM. L. INST. & UNIF. L. COMM’N 2021) (discussing express warranties made by sellers of goods).

³ See *infra* notes 88–97 and accompanying text (discussing R&Ws in lending).

This Article analyzes contractual R&Ws, including their use to reallocate risk and reduce information asymmetry. It also builds a systematic framework for analyzing R&W violations or breaches—the terms being used herein synonymously.⁴ To provide real world grounding, this Article takes into account actual R&Ws used in business and finance, including those used in securitization transactions (“securitizations”). Described in more detail in Part I,⁵ securitizations exemplify the current controversy over the meaning of R&Ws.⁶ Because they incorporate the types of R&Ws found in both asset sales and financings,⁷ securitizations also broadly represent the problems.

A warrantor that breaches an R&W normally would be liable for contract-breach damages,⁸ which are calculated as expectation damages.⁹ Expectation damages can be an inefficient remedy for R&W breach, however, because they cannot always be calculated and awarded without cost.¹⁰ Professor Miller explains why:

[C]alculating the purchaser’s expectation damages for a breach of the seller’s representations would require courts to determine the difference in value between the loan as represented

⁴ Cf. *Breach*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/breach> [<https://perma.cc/CKA5-DE4W>] (defining “breach” as an “infraction or violation of a law, obligation, tie, or standard”).

⁵ See *infra* notes 30–42 and accompanying text.

⁶ See *infra* notes 22–28 and accompanying text (discussing the extensive litigation generated by said controversy).

⁷ See *infra* notes 35–42 and accompanying text.

⁸ See Stephen L. Sepinuck, *The Virtue of “Represents and Warrants”: Another View*, BUS. L. TODAY, Nov. 2015, at 1. A breach of R&Ws originally was considered a tort. See *Lyon Fin. Servs., Inc. v. Ill. Paper & Copier Co.*, 732 F.3d 755, 762–63 (7th Cir. 2013) (discussing the historical evolution of warranty law). Over time, however, “the warranty gradually came to be regarded as a term of the contract of sale . . . for which the normal remedy is a contract action.” WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 651 (3d ed. 1964); see also Sidney Kwestel, *Freedom from Reliance: A Contract Approach to Express Warranty*, 26 SUFFOLK U. L. REV. 959, 969 (1992) (arguing that warranties should be guided “solely [by] general contract principles”); *Indeck N. Am. Power Fund, L.P. v. Norweb plc*, 735 N.E.2d 649, 658–59 (Ill. App. Ct. 2000) (agreeing with New York courts that “warranty is a creature of contract”); *Ex parte Miller*, 693 So. 2d 1372, 1376 (Ala. 1997) (holding that “[e]xpress warranties should be treated like any other type of contract and interpreted according to general contract principles”). Solely for perspective, the Author notes, based on his almost thirty-year experience interacting with economic scholars in a law-and-economic context, that economists sometimes emphasize the purpose of R&Ws as being more to reduce information-asymmetry-based incentives for misbehavior than to impose liability for breach.

⁹ Robert T. Miller, *The RMBS Put-Back Litigations and the Efficient Allocation of Endogenous Risk Over Time*, 34 REV. BANKING & FIN. L. 255, 290–91 (2014); Tina L. Stark, *Another View on Reps and Warranties*, BUS. L. TODAY, Jan.–Feb. 2006, at 8–9.

¹⁰ See Miller, *supra* note 9, at 290–91. Professor Miller observes that expectation damages can be an especially inefficient remedy “when the purchaser alleges breaches of representations about many loans, [because] the inquiry would have to be performed separately for each loan.” *Id.* at 291.

in the contract and the actual value of the loan as it really existed. The former would be extremely difficult to determine, and if the court actually undertook such an inquiry, the results would be highly unpredictable The value of the loan as it actually existed at the time of suit, however, would be even more difficult to determine, and given the relatively small value of an individual loan (generally no more than a few hundred thousand dollars), the transaction costs involved in determining its true value would be huge in relation to the amount in controversy. Moreover, when the purchaser alleges breaches of representations about many loans, the inquiry would have to be performed separately for each loan.¹¹

Parties, therefore, have searched for alternative breach remedies, settling on a “cure-or-repurchase” remedy.¹² This remedy requires the warrantors either to correct—or “cure”—the violation or to repurchase nonconforming loans that caused the violation.¹³ Many, if not most, securitization agreements now provide this remedy as the sole remedy for R&W breach.¹⁴

Warrantors argue that contracting parties—including investors, which at least in a securitization context are mostly large, and thus presumably sophisticated, financial institutions¹⁵—routinely agree to this

¹¹ *Id.*

¹² *Id.* at 284.

¹³ *Id.* The New York Court of Appeals describes the cure-or-repurchase remedy as follows: [T]he remedy for breach of any of these imported representations and warranties and the remedy “with respect to any defective Mortgage Loan or any Mortgage Loan as to which there has been a breach of representation or warranty” under the Securitization Documents “shall be limited to the remedies specified” in the applicable Securitization Documents. In turn, the limited remedy provided in the Securitization Documents requires Countrywide [the applicable warrantor] to either repurchase [or] cure . . . nonconforming loans.

Ambac Assurance Corp. v. Countrywide Home Loans, Inc., 106 N.E.3d 1176, 1180 (N.Y. 2018) (quoting insurance agreement). The quoted language also contemplated substituting conforming loans for nonconforming loans, but that option is very limited due to tax consequences. Howard Ro, *A Road Map of Tax Consequences of Modifying Debt*, TAX ADVISER (June 1, 2012), <https://www.thetaxadviser.com/issues/2012/jun/ro-jun2012.html> [<https://perma.cc/E96K-YMV2>] (“[T]here could be adverse tax consequences to the borrower, lender, or purchaser of debt if there is a significant modification of the debt instrument.”).

¹⁴ See Miller, *supra* note 9, at 293. The Author also observed this cure-or-repurchase remedy in his capacity as an expert witness in 20–30 mortgage-backed securities (“MBS”) litigations, and many included R&W breaches among other claims. For more on the intricacies of R&W-breach litigations, see Tracy Lewis & Alan Schwartz, *Unenforceable Securitization Contracts*, 37 YALE J. ON REGUL. 164, 192–97 (2020).

¹⁵ See, e.g., June Rhee, *Getting Residential Mortgage-Backed Securities Right: Why Governance Matters*, 20 STAN. J.L., BUS. & FIN. 273, 275 (2015) (stating that securitization investors were generally considered “sophisticated” market participants); cf. 17 C.F.R. § 230.144A(a)(1) (2022)

remedy.¹⁶ Warrantors also contend that this remedy should adequately shift risk.¹⁷ Investor plaintiffs counter, however, that this remedy insufficiently shifts risk if the violations are extensive because the costs necessary to establish the existence of extensive violations and to prove causation can be prohibitively expensive.¹⁸ They also contend that extensive R&W violations should constitute fraud¹⁹ and that, in the presence of fraud, their remedies should not be limited.²⁰ Fraud claims can go beyond contract-breach damages and can even give rise to punitive damages.²¹

These disputes are prevalent. In numerous securitizations—especially those predating the 2008 financial crisis—more than 50%, and in some cases more than 80%, of the underlying loans are estimated to have breached one or more R&Ws.²² In response, investors and government agencies have filed hundreds of securitization-related lawsuits, alleging extensive R&W breaches.²³ Insurers of securitizations

(requiring ownership or management of “at least \$100 million [of] securities” for many definitions of “qualified institutional buyer”).

¹⁶ See, e.g., Brief for Defendant-Respondent/Cross-Appellant at 2–9, *Nomura Home Equity Loan, Inc. v. Nomura Credit & Cap., Inc.*, 19 N.Y.S.3d 1 (App. Div. 2015) (No. 650337/13) (arguing that a remedies limitation in a contract represents the parties’ agreement on the allocation of economic risk); Brief for Defendants-Respondents at 21–23, *In re Part 60 Put-Back Litig.*, 93 N.Y.S.3d 269 (App. Div. 2019) (No. 652877/14) (arguing that the sole remedy provision provides an adequate remedy for R&W breaches).

¹⁷ See Brief for Defendant-Respondent/Cross-Appellant at 44 n.38, *Nomura Home Equity Loan, Inc.*, 19 N.Y.S.3d 1 (No. 650337/13).

¹⁸ See *infra* notes 179–97 and accompanying text (analyzing these arguments). This Article’s use of the term “extensive” is intended to cover such synonymous terms as “widespread” and “pervasive.”

¹⁹ See Richard E. Gottlieb, Fredrick S. Levin, Amanda Raines Lawrence & A. Paul Heeringa, *Recent Developments in Residential Mortgage-Backed Securities Litigation*, 71 BUS. LAW. 689, 691 (2016) (observing that the theories of liability in these lawsuits “primarily have been couched in . . . breach of contract” and fraud based on R&W breaches).

²⁰ See, e.g., *Lone Star Fund V (U.S.)*, L.P. v. Barclays Bank PLC, No. 3:08-CV-0261-L, 2008 WL 4449508, at *9 (N.D. Tex. Sept. 30, 2008), *aff’d*, 594 F.3d 383 (5th Cir. 2010) (observing that the complaint asserts fraud claims which, under applicable law, cannot be limited by sole remedy provisions); *Precision Castparts Corp. v. Schultz Holding GmbH & Co. KG*, No. 20-cv-3029, 2020 U.S. Dist. LEXIS 125112, at *11–*13 (S.D.N.Y. July 15, 2020) (not enforcing a cap on indemnification in a sales agreement because the cap was fraudulently induced); *Online HealthNow, Inc. v. CIP OCL Invs., LLC*, No. 2020-0654, 2021 Del. Ch. Lexis 173, at *28–49 (Del. Ch. Aug. 12, 2021) (not enforcing a postclosing liability bar in a stock purchase agreement where the seller knowingly made false representations); see also 1 M & A PRACTICE GUIDE § 14.04 (Stephen I. Glover, et al. eds., 2023) (discussing cases not enforcing a fraudulently induced cap on indemnification in merger and acquisition (“M&A”) agreements).

²¹ See Glenn D. West & W. Benton Lewis, Jr., *Contracting to Avoid Extra-Contractual Tort Liability*, 64 BUS. LAW. 999, 1017 (2009).

²² Mark Adelson, *Representations and Warranties in Mortgage-Backed Securities*, 23 J. STRUCTURED FIN. 98, 100–01 (2017).

²³ See, e.g., Emily Strauss, *Crisis Construction in Contract Boilerplate*, 82 L. & CONTEMP. PROBS. 163, 167 (2019); see also John A. Ruddy, Murli Rajan & Iordanis Petsas, *A Study of RMBS*

have similarly filed numerous lawsuits, claiming “fraudulent inducement, breach of contract, and other violations.”²⁴ Additionally, investors have sued indenture trustees on securitization contracts²⁵ for failing to require the warrantors to repurchase nonconforming loans.²⁶

Settlements to date have ranged from a few million dollars to more than \$15 billion.²⁷ “[T]he banking industry [alone] has [already] incurred \$200 billion in [aggregate] fines, settlements[,] and related legal costs.”²⁸ Many lawsuits remain ongoing and “[n]ew cases are still being filed, based on long-standing tolling agreements.”²⁹ The outcome of billions of dollars of litigation thus turns on whether these R&W breaches merely contractually shift risk or could also constitute fraud. This Article seeks to resolve that issue as well as to provide a more systematic framework for generally analyzing R&W breaches.

This Article proceeds as follows. Part I reviews R&Ws used in securitizations and explains how R&Ws can reallocate risk and reduce information asymmetry. It also describes the cure-or-repurchase sole remedy for R&W breaches and discusses the resulting litigation. Part II provides a comparative overview of how R&Ws are used in other business and financial contexts, including sales of goods and services, lending, and merger-and-acquisition transactions. Finally, Part III analyzes the boundary between risk shifting and fraud, first historically and then normatively. That analysis also examines whether the existence of extensive R&W violations, even if unintended, should justify extracontractual claims that override sole remedy provisions.

Litigation Cases of Six Major U.S. Banks, 23 J. STRUCTURED FIN. 91, 91 (2017). For definitions of “MBS” and “RMBS,” see *infra* note 31.

²⁴ Jonathan Sablone, Troy K. Lieberman & Christopher E. Queenin, *RMBS Litigation: The Insurers as Victims?*, 26 J. TAX’N & REGUL. FIN. INSTS. 31, 33 (2013).

²⁵ These contracts typically are called pooling and service agreements or indentures. Rhee, *supra* note 15, at 284; Houman B. Shadab, Note, *Interpreting Indentures: How Disequilibrium Economics and Financial Asset Specificity Support Narrow Interpretation*, 75 S. CAL. L. REV. 763, 764 (2002).

²⁶ Rhee, *supra* note 15, at 314.

²⁷ Adelson, *supra* note 22, at 101–03 (providing tables of selected settlements).

²⁸ Ruddy et al., *supra* note 23, at 98.

²⁹ Donald Hawthorne, *NY Decision Does Not Mean the End of RMBS Litigation*, LAW360 (June 9, 2022, 6:04 PM), <https://www.law360.com/articles/1500620/ny-decision-does-not-mean-the-end-of-rmbs-litigation> [<https://perma.cc/D9PE-G4Z8>] (“Cases continue to proceed against the banks that originated mortgage loans and created RMBS and against the trustees and servicers of those securitizations. . . . [T]here may be more to come. Hundreds of millions of dollars remain at stake.”); see also Strauss, *supra* note 23, at 167 (“MBSs are creatures of contract, and much of the financial crisis litigation that remains is composed of contract claims, which typically have longer statutes of limitations.”).

I. R&Ws USED IN SECURITIZATION TRANSACTIONS

Securitizations typify the R&Ws found in both asset-sale and financing agreements and also exemplify the R&W-breach controversy.³⁰ In these transactions, the sponsor of the securitization (“sponsor”) purchases a pool, or large quantity, of mortgage loans or other rights to payment (collectively, “loans”³¹) from firms originating those loans (“originators”) and then sells them to a special purpose entity (“SPE”).³² To this extent, securitizations represent asset sales—the sales of the loans.³³ The originators and the sponsor typically act as warrantors,³⁴ making customary asset-sale R&Ws in favor of the SPE and its investors.³⁵ Those R&Ws cover the quality of the loans being sold,³⁶ including maintenance of the loan-underwriting³⁷ standards,³⁸ the fact that there is no adverse selection, and the creditworthiness of the loans and their collateral.³⁹

³⁰ See *supra* notes 6–8 and accompanying text.

³¹ Securitizations of mortgage loans are often referred to, in the securitization industry, by the MBS issued therein. SEC. INDUS. & FIN. MKTS. ASS’N, MBS FACT SHEET 1 (2011), https://www.sifma.org/wp-content/uploads/2018/01/MBS_FactSheet.pdf [<https://perma.cc/P69M-SXP3>]. References to “RMBS” simply mean securitizations involving the issuance of residential mortgage-backed securities—that is, securities that are backed or secured by home mortgage loans. *Id.* at 1.

³² See Steven L. Schwarcz, *What Is Securitization? And for What Purpose?*, 85 S. CAL. L. REV. 1283, 1292–93, 1295–98 (2012).

³³ Cf. *supra* note 13 and accompanying text (observing that loans are the relevant assets being sold in a securitization).

³⁴ In the Author’s experience as a lawyer and expert witness for thirty-five years, the originators make R&Ws to the sponsor and its transferees when they sell the sponsor their loans; the sponsor then makes some or all of these R&Ws to the SPE and investors when it sells the SPE the loans it purchased from the originators.

³⁵ Those investors are investors in the SPE’s debt securities. See *infra* note 40 and accompanying text.

³⁶ See U.C.C. § 2-313 *supra* note 2 and accompanying text (observing that R&Ws in asset-sale agreements are assertions by a seller to the buyer about the quality of the assets being sold); Adelson, *supra* note 22, at 98 (stating that R&Ws “[we]re essential elements of the transaction” and that “[t]here would be no private-label MBS without R&Ws”).

³⁷ Loan-underwriting guidelines are the guidelines under which a loan should be originated—that is, made. See FDIC, DIV. SUPERVISION & CONSUMER PROT., RISK MGMT. EXAMINATION MANUAL FOR CREDIT CARD ACTIVITIES 40 (Mar. 2007), https://www.fdic.gov/regulations/examinations/credit_card/pdf_version/ch7.pdf [<https://perma.cc/XL5P-8W3J>]. The use of the term “underwriting” in this context should be distinguished from the term’s use in connection with the sale of securities, in which “underwriting” refers to an investment bank facilitating that sale by either buying the securities and reselling them to investors or acting as the seller’s agent in arranging that sale to investors. See *Underwriting the Offering: Overview of a Securities Offering Underwriting Process*, BLOOMBERG L., <https://www.bloomberglaw.com/document/XE1RB1QS000000> [<https://perma.cc/L74N-XF3A>].

³⁸ See Adelson, *supra* note 22, at 102.

³⁹ See Miller, *supra* note 9, at 270–71. For RMBS, for example, the R&Ws about the quality of the loans and their collateral cover such matters as the loan-to-income and the debt-to-income

Securitization R&Ws also typify those found in financing agreements. Securitizations represent financings for two reasons: the SPE raises money to purchase the loans by issuing debt securities to investors, which are repayable from collections on the loans,⁴⁰ and the loan sales are actually priced as financings secured by the loans.⁴¹ Accordingly, each warrantor makes customary financing-related R&Ws in favor of the SPE and its investors covering the warrantor's legal existence, the enforceability of the securitization agreements, and the absence of fraud or any violation of law or contract.⁴²

A. *Reallocating Risk and Reducing Information Asymmetry*

The history of securitization shows that these customary asset-sale and financing-related R&Ws are intended to reallocate risk and reduce information asymmetry. Securitization began in the 1970s as a way to enable lenders, especially mortgage lenders, to multiply their financing capacity.⁴³ Traditionally, lenders held loans in their portfolio.⁴⁴ Securitization allows lenders to monetize—or securitize—those loans by effectively transforming them into securities sold to investors.⁴⁵ Lenders then can use the cash generated in the securitization to make new loans.⁴⁶

Securitizations were originally arranged through a government-sponsored enterprise (“GSE”), like Fannie Mae⁴⁷ or Freddie

ratios of the borrowers on those loans, the loan-to-value ratio of the mortgaged property, and the occupancy status of the mortgaged property. *See* Adelson, *supra* note 22, at 98; *see also* John Dunbar & David Donald, *The Roots of the Financial Crisis: Who Is to Blame?*, CTR. FOR PUB. INTEGRITY (May 6, 2009), <https://publicintegrity.org/inequality-poverty-opportunity/the-roots-of-the-financial-crisis-who-is-to-blame/> [<https://perma.cc/8CAW-MH7H>].

⁴⁰ Schwarcz, *supra* note 32, at 1295.

⁴¹ *See, e.g.*, Steven L. Schwarcz, *Financial Information Failure and Lawyer Responsibility*, 31 J. CORP. L. 1097, 1115 (2006) (explaining that all securitizations, economically, have loan-like pricing); *cf.* U.C.C. § 9-109 cmt. 4 (AM. L. INST. & UNIF. L. COMM’N 2021). Article 9 of the UCC (Secured Transactions) also covers sales of rights to payment in order to “avoid[] difficult problems of distinguishing between transactions in which a [right to payment] secures a[financing] obligation and those in which the [right to payment] has been sold outright. In many commercial financing transactions [alluding most especially to securitizations] the distinction is blurred.” *Id.*

⁴² *See infra* note 91 and accompanying text.

⁴³ *See* McCoy & Wachter, *supra* note 1, at 290; *see also* Aron M. Zuckerman, Note, *Securitization Reform: A Coasean Cost Analysis*, 1 HARV. BUS. L. REV. 303, 307–08 (2011).

⁴⁴ McCoy & Wachter, *supra* note 1, at 290.

⁴⁵ *See id.* at 1.

⁴⁶ *See, e.g.*, Zuckerman, *supra* note 43, at 306–08 (discussing the “[b]enefits of [s]ecuritization”); Steven L. Schwarcz, *Securitization and Post-Crisis Financial Regulation*, 101 CORNELL L. REV. ONLINE 115, 117 (2016) (explaining that securitization allows “originators to multiply their available funding by selling off their loans for cash”).

⁴⁷ Fannie Mae is a portmanteau of the Federal National Mortgage Association.

Mac,⁴⁸ but over time, private securitizations became the principal funding mechanism.⁴⁹ Although the shift to private securitizations expanded lending capacity, it also increased investor risk.⁵⁰ Private securitizers, unlike the GSEs, were not subject to regulatory oversight and constraints, and they allegedly did not always bear credit risk on the loans being sold.⁵¹ Information asymmetry became an issue because, “know[ing] more about the quality of the loans . . . than investors,” originators “ha[d] incentives to conceal negative information when selling th[e] loans.”⁵² Adverse selection also became a concern because investors feared that sponsors and “originators would retain their best loans and securitize the rest.”⁵³

Because of the high cost of verifying information, investors needed assurances about the quality of the loans underlying the securitizations.⁵⁴ To provide those assurances, sponsors and originators began providing R&Ws along the lines previously discussed.⁵⁵

B. *Sole Remedies for R&W Breach and Resulting Litigation*

Because expectation damages cannot always be calculated and awarded without cost,⁵⁶ parties to securitizations began using cure-or-repurchase as the sole remedy for an R&W breach.⁵⁷ Most securitization agreements now provide this sole remedy.⁵⁸

⁴⁸ Freddie Mac is a portmanteau of the Federal Home Loan Mortgage Corporation.

⁴⁹ See Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble*, 100 GEO. L.J. 1177, 1182–83 (2012).

⁵⁰ *Id.* at 1183.

⁵¹ See McCoy & Wachter, *supra* note 1, at 289; cf. Levitin & Wachter, *supra* note 49, at 1189.

⁵² McCoy & Wachter, *supra* note 1, at 293. Concealing that information would not violate Rule 10b-5 or other provisions of federal securities law because the loans themselves are not securities. See, e.g., *Kirschner v. JPMorgan Chase Bank, N.A.*, No. 17 Civ. 6334, 2020 WL 2614765, at *10 (S.D.N.Y. May 22, 2020) (finding that a syndicated bank loan is not a security).

⁵³ McCoy & Wachter, *supra* note 1, at 293; cf. Benjamin J. Keys, Tanmoy Mukherjee, Amit Seru & Vikrant Vig, *Did Securitization Lead to Lax Screening? Evidence from Subprime Loans*, 125 Q.J. ECON. 307, 311 (2010); Kathleen C. Engel & Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 FORDHAM L. REV. 2039, 2057 (2007) (explaining that securitization “investors . . . demand a . . . premium . . . for the risk of adverse selection”).

⁵⁴ See McCoy & Wachter, *supra* note 1, at 290.

⁵⁵ See *supra* notes 37–42 and accompanying text; see also Strauss, *supra* note 23, at 168 (“[R]epresentations and warranties are designed to help address the information asymmetries inherent in the securitization process . . .”); ADAM B. ASHCRAFT & TIL SCHUERMANN, UNDERSTANDING THE SECURITIZATION OF SUBPRIME MORTGAGE CREDIT 7 (Fed. Rsr. Bank N.Y. Staff Reps. No. 318 2008) (“[T]he information advantage of the arranger creates a standard lemons problem.”); Engel & McCoy, *supra* note 53, at 2057 (describing securitizations as possessing a “lemons problem”).

⁵⁶ *Supra* notes 10–11 and accompanying text.

⁵⁷ *Supra* notes 13–14 and accompanying text.

⁵⁸ *Supra* notes 13–14 and accompanying text.

The 2008 financial crisis led to widespread defaults on the mortgage loans underlying many securitizations, causing massive investor losses.⁵⁹ To try to recover these losses, investors filed hundreds of lawsuits—many of which remain ongoing—arguing that widespread defaults on the mortgage loans must be caused by extensive R&W violations and that such violations should justify overriding the cure-or-repurchase sole remedy.⁶⁰ “The theories of liability in th[e]se [cases] primarily have been couched in terms of breach of contract based on breaches of representations and warranties and common law fraud.”⁶¹

Under the limited authorities to date, some courts and commentators would disallow fraud claims based on R&W violations, even if extensive.⁶² Their rationale is that sophisticated parties should have “freedom of contract . . . to allocate” their respective “risks and responsibilities.”⁶³ Others suggest, to the contrary, that R&W violations, even if unintentional,⁶⁴ might justify a fraud-like rescission remedy if such violations are “so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract.”⁶⁵

⁵⁹ See William Constantine, Developments in Banking and Financial Law, *Justice or Retribution: The S&P Downgrade and Lawsuit*, 33 REV. BANKING & FIN. L. 504, 510 (2014).

⁶⁰ See *supra* notes 22–29 and accompanying text.

⁶¹ Gottlieb et al., *supra* note 19. Plaintiffs in several cases use a fraud-related theory to try to obtain greater damages than they would from sole remedy provisions. See, e.g., *Assured Guar. Mun. Corp. v. Flagstar Bank, FSB*, 920 F. Supp. 2d 475, 477 (S.D.N.Y. 2013); *CMFG Life Ins. Co. v. UBS Sec.*, 30 F. Supp. 3d 822, 824 (W.D. Wis. 2014); *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 928 N.Y.S.2d 229, 231 (App. Div. 2011); *Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc.*, 104 F. Supp. 3d 441, 453 (S.D.N.Y. 2015).

⁶² See Frederick R. Fucci, *Arbitration in M&A Transactions: Laws of New York and Delaware, Part III*, 71 DISP. RESOL. J. 1, 11–12 (2016); cf. *DynCorp v. GTE Corp.*, 215 F. Supp. 2d 308, 324 (S.D.N.Y. 2002) (explaining that, under New York law, fraud claims for breaching R&Ws can only be sustained if the plaintiff “can . . . demonstrate a legal duty separate from the . . . contract” or “a fraudulent misrepresentation . . . extraneous to the contract”).

⁶³ Fucci, *supra* note 62, at 12; see also *E. River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 873 (1986) (commenting that courts should not “intrude into the [sophisticated] parties’ allocation of risk”); *Koch Indus., Inc. v. Aktiengesellschaft*, 727 F. Supp. 2d 199, 216 (S.D.N.Y. 2010) (ruling that the sophistication of the plaintiffs weighed against them bringing a fraud claim to escape the sole remedy provision in their contract).

⁶⁴ Intentional R&W violations do constitute fraud. See, e.g., *Graham v. James*, 144 F.3d 229, 237 (2d Cir. 1998).

⁶⁵ *Id.* (quoting *Septembertide Publ’g, B.V. v. Stein & Day, Inc.*, 884 F.2d 675, 678 (2d Cir. 1989)); cf. Richard R.W. Brooks & Alexander Stremtizer, *Remedies On and Off Contract*, 120 YALE L.J. 690, 693 (2011) (arguing that “a . . . liberal right [to] rescission” would incentivize counterparties “to enhance the quality of performance” and improve contract efficiency); *Lummus Co. v. Commonwealth Oil Refin. Co.* 280 F.2d 915, 925 (1st Cir. 1960) (a party fraudulently induced to enter into a contract may elect to rescind the contract instead of seeking damages).

II. R&Ws USED IN OTHER BUSINESS CONTEXTS

To place these issues into a comparative context as well as to ensure completeness, Sections II.A, II.B, and II.C next examine how R&Ws are used in other business—including financial—contexts. That examination also explores similarities and differences in these uses of R&Ws. Thereafter, Section II.D summarizes the comparative insights, showing that R&Ws are widely used to reallocate risk and reduce information asymmetry regardless of the business context.

A. *Sales of Goods and Services*

1. *Sales of Goods*

Information asymmetries commonly arise in the sale of goods, epitomized by the classic “lemons problem” of selling a used car.⁶⁶ To assure buyers, sellers typically must make R&Ws about the condition of the car, including whether it has been in an accident or has a tendency to break down.⁶⁷

The Uniform Commercial Code (“UCC”) provides a comprehensive legal framework for using R&Ws to facilitate the sale of goods. Besides permitting express R&Ws,⁶⁸ it provides, “[u]nless excluded or modified” by the parties, that every sales contract by a merchant contains an implied warranty of merchantability, meaning that the goods “are fit for the ordinary purposes for which [they] are used” and satisfy other minimum quality standards.⁶⁹ This reflects the commercial reality that “the seller is generally in a better position than the buyer to control and evaluate the quality of the goods.”⁷⁰

The UCC’s R&W framework applies to all transactions in goods “regardless of the dollar amount involved, the complexity . . . of the goods sold,” or the sophistication “of the contracting parties.”⁷¹ Courts nonetheless consider buyer sophistication when assessing whether to enforce contractual limitations on R&Ws. For example, a court is more likely to find that a disclaimer of an implied warranty of merchantability

⁶⁶ See Akerlof, *supra* note 1, at 489–92.

⁶⁷ See *id.* at 489, 499 (discussing R&Ws and other forms of seller guarantees as a market mechanism to help solve the problem of asymmetric information when selling used cars).

⁶⁸ U.C.C. § 2-313 (AM. L. INST. & UNIF. L. COMM’N 2021).

⁶⁹ *Id.* § 2-314.

⁷⁰ Ellen Taylor, *Applicability of Strict Liability Warranty Theories to Service Transactions*, 47 S.C. L. REV. 231, 262–63 (1996); *cf.* Curtis R. Reitz, *Manufacturers’ Warranties of Consumer Goods*, 75 WASH. U. L.Q. 357, 359 (1997).

⁷¹ Edith Resnick Warkentine, *Article 2 Revisions: An Opportunity to Protect Consumers and “Merchant/Consumers” Through Default Provisions*, 30 J. MARSHALL L. REV. 39, 44 (1996).

is “conspicuous,”⁷² and thus enforceable, if the buyer is sophisticated.⁷³ R&Ws used in the sale of goods and those used in securitizations have important similarities but, for purposes of this Article’s analysis, unimportant differences. As is standard, both types of R&Ws are intended to reallocate risk and reduce information asymmetry.⁷⁴ Also, both types of R&Ws can be expressly agreed to.⁷⁵

Another similarity is that contracts for the sale of goods, like securitization contracts, sometimes limit buyers to a sole remedy for an R&W breach. The UCC allows sellers to limit the buyer’s remedies by “expressly agree[ing]” that a certain remedy is “exclusive, in which case it is the sole remedy.”⁷⁶ A sole remedy provision will be respected unless it “fail[s] of its essential purpose.”⁷⁷ Courts often consider the sophistication of a buyer when deciding whether a remedy has failed its essential purpose;⁷⁸ other things being equal, the more sophisticated the buyer, the less likely a court is to find that the remedy has failed its purpose.⁷⁹

As mentioned, the differences between R&Ws used in the sale of goods and those used in securitizations are unimportant. One difference is that R&Ws used in the sale of goods, unlike those used in securitizations, need not always be expressly agreed to.⁸⁰ This difference is irrelevant to this Article’s analysis. The other difference is likewise

⁷² See U.C.C. § 2-316(2) (AM. L. INST. & UNIF. L. COMM’N 2021) (requiring any exclusion or modification of an implied warranty of merchantability to “be conspicuous”).

⁷³ See Warkentine, *supra* note 71, at 61–65; cf. Meredith R. Miller, *Party Sophistication and Value Pluralism in Contract*, 29 *TOURO L. REV.* 659, 679 (2013) (“For sophisticated parties, . . . a rules-driven and a-contextual approach . . . lends itself to efficiency, predictability, and certainty.”).

⁷⁴ *Supra* Section I.A.; see also *supra* notes 69–71 and accompanying text.

⁷⁵ U.C.C. § 2-313 (AM. L. INST. & UNIF. L. COMM’N 2021); see McCoy & Wachter, *supra* note 1, at 293 (observing that because R&Ws in securitizations are negotiated, they can vary significantly).

⁷⁶ U.C.C. § 2-719(1)(b) (AM. L. INST. & UNIF. L. COMM’N 2021).

⁷⁷ *Id.* § 2-719(2); see also *id.* § 2-719 cmt. 1 (“[I]t is of the very essence of a sales [of goods] contract that at least minimum adequate remedies be available Thus any clause purporting to modify or limit the remedial provisions of this [UCC] Article [2] in an unconscionable manner is subject to deletion”); cf. *Sunny Indus., Inc. v. Rockwell Int’l Corp.*, Nos. 98-2824, 98-2875, 1999 U.S. App. LEXIS 7001, at *30 (7th Cir. Apr. 12, 1999) (explaining that “the UCC merely seeks to provide a buyer with the substance for which it bargained”). Unconscionability alone should not apply to securitizations because the traditional elements determining unconscionability—bargaining power, inequality, unsophistication of one party, and surprise in the inclusion of limited remedy—are inapplicable to those transactions. See *Telecom Int’l Am., Ltd. v. AT&T Corp.*, 280 F.3d 175, 195 (2d Cir. 2001).

⁷⁸ Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 *MO. L. REV.* 493, 511–12 (2010).

⁷⁹ *Id.* Also, the failure of a sole remedy to provide relief in certain situations does not mean it fails in its essential purpose because “the whole point of limiting remedies is to make some remedies unavailable.” *S. Fin. Grp., LLC v. McFarland State Bank*, 763 F.3d 735, 741 (7th Cir. 2014).

⁸⁰ See *supra* note 69 and accompanying text (discussing the UCC’s implied warranty of merchantability).

unimportant: R&Ws used in the sale of goods may warrant both their quality at the time of sale as well as their “output” quality—the latter meaning that the goods will function in a certain manner going forward.⁸¹ In contrast, R&Ws used in securitizations typically warrant only the quality of the loans at the time of their sale.⁸² This difference is unimportant to this Article’s analysis because it merely reflects that goods are tangible assets whereas loans are intangible rights to payment.⁸³

2. Sales of Services

R&Ws are sometimes used in connection with the sales of services.⁸⁴ Most service-related R&Ws are express warranties as courts generally refuse to extend UCC-like implied warranties to services contracts.⁸⁵

There are two arguments for not extending implied warranties to services. In the case of professional services, the “buyers” of such services

⁸¹ Lewis & Schwartz, *supra* note 14, at 172.

⁸² This observation is based on the Author’s experience as a lawyer, a scholar of securitizations, and an expert witness for almost forty years. Cf. Phillip Wm. Lear, *Representations, Warranties, Covenants, Conditions, and Indemnities: Stitching Them Together in the Purchase Agreement*, in 37 ROCKY MOUNTAIN MINERAL LAW FOUNDATION ANNUAL INSTITUTE § 3.02 (1991) (quoting *Representation*, BLACK’S LAW DICTIONARY (abr. 5th ed. 1983)) (explaining that R&Ws generally relate to past or existing facts that were given “before or at the time of making the contract”).

⁸³ Under the old adage that “possession is nine-tenths of the law,” the physical transfer of goods strongly evidences their sale. See K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062, 1121 (2022). Because loans are intangible rights that are not physically transferred, a complex body of jurisprudence surrounds whether or not they are sold. See *Benedict v. Ratner* 268 U.S. 353, 362 (1925) (Justice Brandeis observing that in the “transfer” of rights to payment, “there is nothing which corresponds to the delivery of possession of chattels”). A key factor in that jurisprudence is the degree of recourse that the buyer of the loan has against the seller if the loan fails to pay out according to its terms. See, e.g., STEVEN L. SCHWARCZ, *STRUCTURED FINANCE, A GUIDE TO THE PRINCIPLES OF ASSET SECURITIZATION* § 4:2 (Adam D. Ford ed., 3d ed. 2002) (“The most significant factor in the true sale determination [of rights to payment] appears to be the nature and extent of recourse that the transferee of the [rights to payment] has against the transferor.”). “As the degree of recourse increases, the likelihood that a court will find a true sale decreases.” *Id.* R&Ws as to the “output” quality of a loan, warranting that the loan will pay out going forward, are thus rarely used because they would introduce a degree of recourse that could undermine the loan’s sale. For example, in the leading case of *Major’s Furniture Mart, Inc. v. Castle Credit Corp.*, 449 F. Supp. 538 (E.D. Pa. 1978), *aff’d*, 602 F.2d 538 (3d Cir. 1979), the court analyzed the recourse provisions in an accounts receivable financing agreement to determine whether the transaction should be considered a sale or a secured loan. In holding the transaction to be a secured loan, the court reasoned that Castle attempted to shift all risks to Major’s and incur none of the risks or obligations of ownership. *Id.* at 543.

⁸⁴ E.g., Stacy-Ann Elvy, *Hybrid Transactions and the INTERNET of Things: Goods, Services, or Software?*, 74 WASH. & LEE L. REV. 77, 117 (2017).

⁸⁵ *Id.* Service buyers still may have negligence claims based on an implied duty of care. *Id.* at 116 n.152 (citing *Cargill, Inc. v. Ron Burge Trucking, Inc.*, No. 11-2394, 2013 WL 608520, at *3 (D. Minn. Feb. 19, 2013)).

are often unqualified to evaluate the quality of the services.⁸⁶ Furthermore, buyers of professional services do not buy a result but merely the diligence, care, and skill of a professional, which lends itself better to a noncontractual negligence claim.⁸⁷ These arguments are largely irrelevant to the types of R&Ws generally discussed in this Article.

B. Lending

In lending transactions, R&Ws help to reallocate risk and reduce information asymmetry by assuring the lender that it will be repaid in full, with interest, on a timely basis. To this end, the borrower of an unsecured loan typically makes R&Ws that it is legally bound under the loan agreement and any promissory notes;⁸⁸ its performance of those documents will not violate law or contract;⁸⁹ there has been no material adverse change in the borrower's financial condition or results of operations since a given reference date; no litigation is pending or threatened that would result in such a material adverse change;⁹⁰ and the information provided by the borrower in connection with the loan is true, complete, and accurate in all material respects.⁹¹ These R&Ws sometimes also cover the borrower's creditworthiness.⁹² For secured

⁸⁶ Taylor, *supra* note 70, at 263.

⁸⁷ See Dana Shelhimer, Comment, *Sales-Service Hybrid Transactions and the Strict Liability Dilemma*, 43 Sw. L.J. 785, 793 (1989); David Crump & Larry A. Maxwell, *Should Health Service Providers Be Strictly Liable for Product-Related Injuries? A Legal and Economic Analysis*, 36 Sw. L.J. 831, 836 (1982). Some also argue that sellers of services usually "lack the large . . . pool necessary to spread their losses effectively," in contrast to sellers of goods who may be better situated to spread the risk of losses. Shelhimer, *supra*, at 792.

⁸⁸ These usually state that the borrower is duly organized and validly existing under the law of the jurisdiction of its organization, that it has duly authorized, executed, and delivered the loan agreement and any promissory notes, and that such loan agreement and promissory notes are the borrower's legal, valid, and binding obligations, enforceable against the borrower in accordance with their terms. *See infra* note 91.

⁸⁹ These usually state that the execution and delivery by the borrower of such loan agreement and promissory notes do not, and the performance by the borrower of its obligations thereunder will not, result in a violation of the borrower's organizational documents or any contract to which the borrower is a party or any law, rule, or regulation applicable to the borrower. *See infra* note 91.

⁹⁰ These usually state that there are no actions, suits, proceedings, or investigations pending or threatened against the borrower that would, individually or in the aggregate, be reasonably expected to result in any such material adverse change. *See infra* note 91.

⁹¹ The above R&Ws, *see supra* notes 88–90 and accompanying text, reflect the Author's extensive experience as a lawyer, partner, and practice group chair at two of the world's leading law firms, whose practice included securitizations and other financings. *Cf.* The TriBar Opinion Committee, *Third-Party "Closing" Opinions*, 53 BUS. LAW. 591, 667–68 (1998) (illustrating a representative third-party legal opinion for a lending transaction, which substantively parallels many of the R&Ws delivered by the borrower itself).

⁹² Loan agreements more usually include assertions about a borrower's creditworthiness as ongoing covenants, rather than fixed-in-time R&Ws. *See infra* note 93.

loans, the borrower typically makes additional R&Ws covering the perfection, priority, enforceability, and value of the collateral.⁹³

In securitizations, the warrantors typically make these same kinds of R&Ws. The kinds of R&Ws covering unsecured loans assure the SPE and its investors that the warrantors will validly perform their securitization obligations;⁹⁴ the kinds of R&Ws covering secured loans assure the SPE and its investors of the perfection, priority, enforceability, and value of the loans underlying the securitization.⁹⁵ The only R&W not typically included in a securitization regards the warrantors' creditworthiness;⁹⁶ this R&W is not needed because, in a securitization, the primary source of investor repayment is the underlying loans.⁹⁷

C. Mergers and Acquisitions and Private Equity

Merger-and-acquisition and other private-equity (collectively "M&A") transactions are simply asset sales where the relevant asset is all or a substantial part of a business.⁹⁸ Like other asset sales, they face asymmetric information problems because sellers know more about the quality of their business, and the assets used therein, than buyers.⁹⁹ Contracting parties customarily use R&Ws to reduce that information asymmetry.¹⁰⁰

R&Ws also reallocate risk because an R&W breach may entitle the buyer to cancel the transaction¹⁰¹ and possibly also to claim damages.¹⁰²

⁹³ These additional R&Ws also reflect the Author's extensive experience, described *supra* note 91.

⁹⁴ See *infra* note 95.

⁹⁵ Again, these observations reflect the Author's extensive experience, described *supra* note 91. Cf. *supra* note 54 and accompanying text (observing that investors needed assurances about the quality of the loans underlying the securitizations).

⁹⁶ See *supra* note 92 and accompanying text.

⁹⁷ See *supra* note 40 and accompanying text.

⁹⁸ An M&A transaction that is not formally structured as an asset sale—such as a stock purchase or statutory merger—is still an asset sale in economic effect. Cf. *Cooper Indus. LLC v. City of South Bend*, 899 N.E.2d 1274, 1288 (Ind. 2009) (observing that "*de facto* mergers" and asset sales have similar economic consequences).

⁹⁹ Compare Griffith, *supra* note 1, at 1840, Andrae J. Marrocco, *Negotiating Critical Representations and Warranties in Franchise Mergers and Acquisitions—Part I*, 36 FRANCHISE L.J. 107, 108 (2016), and Will Pugh, Note, *Getting What You Bargained for: Avoiding Legal Uncertainty in Survival Clauses for a Seller's Representations and Warranties in M&A Purchase Agreements*, 12 J. BUS., ENTREPRENEURSHIP & L. 1, 3 (2019), with Strauss, *supra* note 23, at 167–68.

¹⁰⁰ Griffith, *supra* note 1, at 1851. Private deals usually contain more R&Ws because the lack of public information creates a greater information asymmetry. *Id.* at 1849–51.

¹⁰¹ *Id.* at 1856. Whether the deal is public or private, M&A agreements usually make the accuracy of the R&Ws an essential element of closing the transaction—that is, consummating the asset sale. Cf. *id.* at 1851.

¹⁰² See, e.g., *CBS Inc. v. Ziff-Davis Publ'g Co.*, 553 N.E.2d 997, 1000–01 (N.Y. 1990) (providing damages for a breach of a warranty).

Sophisticated sellers usually include sole remedy provisions that limit the amount of damages for R&W breaches to a specified percentage of the purchase price.¹⁰³

R&Ws, therefore, play a role in M&A transactions that is similar to their role in securitizations. There is, however, one critical difference: sellers in M&A transactions usually can make accurate R&Ws about what is being sold.¹⁰⁴ In contrast, sellers in securitizations sometimes lack full information about the loan pool.¹⁰⁵ This suggests that R&W breaches are more likely to be unintentional in securitizations than in M&A transactions.

D. Comparative Insights

The foregoing comparisons confirm that, regardless of the business context and notwithstanding their similarities and differences, R&Ws are widely used to reallocate risk and reduce information asymmetry. That insight also helps to inform an analysis of sole remedy provisions for an R&W breach.

R&Ws used for the sale of goods are governed by the UCC, which does not specifically address extensive R&W violations per se.¹⁰⁶ Nonetheless, it provides that a sole remedy provision will be respected unless it “fail[s] of its essential purpose.”¹⁰⁷ Courts often consider the buyer’s sophistication when deciding whether a remedy has so failed.¹⁰⁸

R&Ws used in securitizations and other business transactions not involving the sale of goods are not governed by statute.¹⁰⁹ Nonetheless, given that R&Ws are used the same way—to reallocate risk and reduce information asymmetry—regardless of whether or not they are governed by statute, the UCC concept that a sole remedy will be respected unless it “fail[s] of its essential purpose”¹¹⁰ should be sensible in both contexts. Furthermore, that concept is functionally similar to, if not the same as, the previously observed test for rescission: that the R&W breaches are “so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract.”¹¹¹ It also

¹⁰³ See West & Lewis, *supra* note 21, at 1019–20.

¹⁰⁴ See Griffith, *supra* note 1, at 1840, 1848–49.

¹⁰⁵ See Lewis & Schwartz, *supra* note 14, at 169–70.

¹⁰⁶ See U.C.C. §§ 2-313 to -314 (AM. L. INST. & UNIF. L. COMM’N 2021).

¹⁰⁷ See *supra* note 77 and accompanying text.

¹⁰⁸ See *supra* note 79 and accompanying text.

¹⁰⁹ Even though securitizations involve asset sales, the UCC does not apply because the relevant assets are loans or other rights to payment, not “goods.” See *supra* notes 30–32 and accompanying text.

¹¹⁰ See *supra* note 77 and accompanying text.

¹¹¹ See *Graham v. James*, 144 F.3d 229, 237 (2d Cir. 1998) (quoting *Septembertide Publ’g, B.V. v. Stein & Day, Inc.*, 884 F.2d 675, 678 (2d Cir. 1989)); see also *supra* note 65 and accompanying text. This rescission test might have some parallel in the contract-law doctrine of commercial

is somewhat analogous to the contract law doctrine of impossibility: contracts that are impossible to fulfill are void.¹¹² Similarly, it is sensible that sole remedy provisions should be more likely to be respected if the contracting parties are sophisticated.¹¹³

Applying these concepts, the fact that securitization parties are typically all sophisticated¹¹⁴ suggests that courts should enforce contractual cure-or-repurchase provisions in securitization agreements unless they fail of their essential purpose. Such a failure would mean that the cure-or-repurchase provisions prevent the R&Ws from reallocating risk and reducing information asymmetry. This Article later examines whether the existence of extensive R&W violations would cause that failure.¹¹⁵

III. R&W BREACH: THE BOUNDARY BETWEEN RISK SHIFTING AND FRAUD

Section III.A next examines, from a historical perspective, the boundary between risk shifting and fraud for R&W breaches. Section III.B then analyzes, more normatively, what that boundary

impracticability; rescission might become available when, for reasons unrelated to the excused party, performance of a contract becomes unrealistically difficult or costly to perform. *See* MASTR Asset Backed Sec. Tr. 2006-HE3 *ex rel.* U.S. Bank Nat'l Ass'n v. WMC Mortg. Corp., No. 11-2542, 2012 WL 4511065, at *6 n.10 (D. Minn. Oct. 1, 2012) (considering an impracticability theory concerning extensive R&W breaches, but denying rescission because plaintiff already foreclosed on the mortgage loans). The above rescission test might also appear to have some parallel to the doctrine of mutual mistake:

Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake

RESTATEMENT (SECOND) OF CONTS. § 152 (AM. L. INST. 1981). To succeed in an action for rescission based on mutual mistake, however, the alleged mistake must go to the subject of the parties' exchange and not merely to mistaken valuation; R&Ws backing the creditworthiness of investor certificates would appear to go to valuation, not to the subject of the exchange. *See, e.g.,* IKB Deutsche Industriebank AG v. Credit Suisse Sec. (USA) LLC, 135 N.Y.S.3d 396, 398 (App. Div. 2020) (ruling that "once the true nature of the credit risk materialized, the market value of the certificates declined, all of which goes to valuation, not to whether [plaintiff] received the agreed upon certificates").

¹¹² *See, e.g.,* MASTR Asset Backed Sec. Tr. 2006-HE3 *ex rel.* U.S. Bank Nat'l Ass'n v. WMC Mortg., LLC, 983 F. Supp. 2d 1104, 1112 (D. Minn. 2013) (denying trustee of MBS trust monetary damages when sole remedy provision is impossible to perform); *cf. In re* Part 60 Put-Back Litig., 165 N.E.3d 180, 189 (N.Y. 2020) (citing a lower court's "conclusion that where specific performance of cure or repurchase is impossible, a plaintiff in an RMBS case may pursue monetary damages in lieu of specific performance").

¹¹³ *See supra* notes 76–79 and accompanying text.

¹¹⁴ *See supra* note 15 and accompanying text.

¹¹⁵ *See infra* notes 177–78 and accompanying text (examining whether extensive R&W breaches should cause sole remedy provisions to fail of their essential purpose).

should be, taking into account the possible existence of intentional R&W breaches. Thereafter, Section III.C analyzes whether the existence of unintentional, but extensive, R&W violations should justify extracontractual claims that override sole remedy provisions.

A. Risk Shifting and Fraud: A Historical Perspective

The boundary between risk shifting and fraud for R&W breaches has a murky origin. In part, the murkiness reflects that warranty law initially developed from tort law and was recognized “as an action in deceit”¹¹⁶—a type of fraud claim.¹¹⁷ Over time, courts began to view warranty law as more grounded in contract than tort law, prompting Professor Prosser to colorfully characterize warranty law as a curious “hybrid born of the illicit intercourse of tort and contract.”¹¹⁸

In Britain, this muddling remains, persisting—at least partly—from the belief that there is a distinction between “representations” and “warranties.”¹¹⁹ British lawyers ostensibly view a “representation” as “a statement of fact or opinion which induces another party to enter into a contract,” but view a “warranty” merely as “a contractual term, secondary to the main purpose of a contract, which in effect gives the other party to the contract a right to an indemnity if the warranty is not true.”¹²⁰ A breach of a representation is considered deceitful, the remedy for which “can include rescission of the contract as well as damages.”¹²¹ In contrast, the remedy for breaching a warranty is “usually limited to damages.”¹²²

English lawyers recognize, though, “that it is sometimes difficult to establish exactly what statement belongs in one category or the other.”¹²³ Accordingly, British contracts, like American contracts, refer

¹¹⁶ Matthew J. Duchemin, Comment, *Whether Reliance on the Warranty Is Required in a Common Law Action for Breach of an Express Warranty*, 82 MARQ. L. REV. 689, 690 (1999) (quoting SAMUEL WILLISTON ET AL., WILLISTON ON SALES § 15:1 (5th ed. 1994)); see also William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1126–27 (1960).

¹¹⁷ See *Brown v. Underwriters at Lloyd's*, 332 P.2d 228, 232 (Wash. 1958) (observing that misrepresentation with deceit is fraud).

¹¹⁸ Prosser, *supra* note 116, at 1126; see also *Lyon Fin. Servs. Inc. v. Ill. Paper & Copier Co.*, 732 F.3d 755, 762 (7th Cir. 2013) (discussing the tort and contract origins of warranty law and concluding that “[w]arranty thus blurred the distinction between contract and tort”).

¹¹⁹ See West & Lewis, *supra* note 21, at 1008–10.

¹²⁰ *Subscription Finance Loan Agreement Series, Part 14: Representations and Warranties*, CADWALADER (Nov. 15, 2019), <https://www.cadwalader.com/fund-finance-friday/index.php?eid=444&nid=61> [<https://perma.cc/C4HG-UZJA>].

¹²¹ *Id.*; West & Lewis, *supra* note 21, at 1008 n.49.

¹²² CADWALADER, *supra* note 120.

¹²³ *Id.*

collectively to representations and warranties without purporting to distinguish the two.¹²⁴

American lawyers, in contrast, normally view “representations” and “warranties” as nearly synonymous.¹²⁵ Nonetheless, as in Britain, some American commentators regard a “representation” as a factual assertion.¹²⁶ To that extent, a breach arguably should expose the breaching party to a tort-based deceit—that is, fraud¹²⁷—claim.¹²⁸

These conflicting viewpoints provide an opening for parties to assert extracontractual fraud claims for an R&W breach. In the *Nomura Home Equity Loan Inc.* case,¹²⁹ for example, the dissent observed that “allegations of serious and pervasive misrepresentations regarding the level of risk in an investment with widespread, massive failures [would] support a claim . . . of fraud.”¹³⁰

Even in the United States, therefore, the issue of whether R&W breaches—and certainly the issue of whether widespread R&W breaches—would constitute fraud is unsettled.¹³¹ Unsettled law creates uncertainty, which can increase the cost and availability of credit: The National Bureau of Economic Research has found that “uncertainty has a direct effect on investment” and that “greater uncertainty tends to make investment less desirable” and “exerts a strong negative influence

¹²⁴ *Id.*

¹²⁵ See, e.g., Kenneth A. Adams, *A Lesson in Drafting Contracts: What's Up with 'Representations and Warranties'?*, 15 BUS. L. TODAY, Nov.–Dec. 2005, at 33, 33–35 (arguing that “representations” and “warranties” are near synonyms that play a similar legal function).

¹²⁶ See, e.g., SIMON M. LORNE & JOY MARLENE BRYAN, 11 ACQUISITIONS & MERGERS: NEGOTIATED & CONTESTED TRANSACTIONS § 3:57 (2023) (arguing that representations assert the truth of the represented statements, whereas warranties “allocate financial responsibility” for the warranted statement’s accuracy); Marialuisa S. Gallozzi & Eric Phillips, *Representation and Warranties Insurance*, 14 ENV’T CLAIMS J. 455, 455 (2002) (“[A] representation is a statement of fact about the current state of the business made by a seller to the buyer or by the buyer to the seller in a purchase agreement.”); Irwin A. Kishner, *The Changing Legal Landscape and Matters Affecting M&A Documentation*, in MERGERS AND ACQUISITIONS LAW 2016, at 17–18 (Aspatore 2016) (“Representations are statements of facts existing at the time the purchase agreement is executed . . .”).

¹²⁷ See *supra* note 117 and accompanying text (explaining why a tort-based action in deceit is a type of fraud claim).

¹²⁸ Cf. Stark, *supra* note 9, at 8–9 (“If a representation is intentionally false, a plaintiff can make a common law claim of deceit (a tort) . . .”); Sepinuck, *supra* note 8, at 2 (setting forth false representations as torts).

¹²⁹ *Nomura Home Equity Loan, Inc.*, Series 2006-FM2 by HSBC Bank USA, N.A. v. *Nomura Credit & Cap. Inc.*, 92 N.E.3d 743 (N.Y. 2017).

¹³⁰ *Id.* at 759 (Rivera, J., dissenting) (quoting Morgan Stanley Mortg. Loan Tr. 2006-13ARX v. Morgan Stanley Mortg. Cap. Holdings LLC, 36 N.Y.S.3d 458, 463 (App. Div. 2016)). Apparently, though, any such extracontractual claim would have to be pleaded with particularity. In *In re Part 60 Put-Back Litigation*, the court did not rule on whether there should be an extracontractual claim—in that case, for gross negligence—due to the alleged pervasive misrepresentations because the plaintiff had not formally pleaded that claim. *In re Part 60 Put-Back Litig.*, 165 N.E.3d 180, 190–91 (N.Y. 2020).

¹³¹ See *supra* note 61 and accompanying text.

on investment.”¹³² Federal courts likewise have found that uncertainty “would both impair bank financing and increase the costs of obtaining such financing.”¹³³ Uncertainty also creates a deleterious impact on “households’ access to small credit”¹³⁴ and “leads to higher loan interest rates and default probabilities.”¹³⁵

This Article next strives to reduce that uncertainty by analyzing what the boundary should be between R&W breaches that support a fraud—including tort-based deceit¹³⁶—claim and those that merely shift risk contractually.

B. *Toward a Normative Boundary Between Risk Shifting and Fraud*

Because the R&Ws discussed in this Article are contractual, a threshold question is whether courts should simply respect freedom of contract and enforce R&W agreements in accordance with their terms. In principle, voluntary bargaining should lead to an economically efficient outcome for the contracting parties.¹³⁷ Freedom of contract, however, should be subject to three limitations: paternalism, externalities, and public policy.¹³⁸

Paternalism, the idea “that there may be certain extreme situations when, as a matter of equity, a contracting party must be protected

¹³² John V. Leahy & Toni M. Whited, *The Effect of Uncertainty on Investment: Some Stylized Facts* 2–3 (Nat’l Bureau of Econ. Rsch., Working Paper No. 4986, 1995).

¹³³ *Worldwide Sugar Co. v. Royal Bank of Can.*, 609 F. Supp. 19, 26–27 (S.D.N.Y. 1984) (ruling that allowing “recovery from an advising bank on the basis of a terminated letter-of-credit arrangement would impose” uncertainty and increase financing costs); cf. *Kham & Nate’s Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1357 (7th Cir. 1990) (“Any attempt to add an overlay of ‘just cause’ . . . to the exercise of contractual privileges would reduce commercial certainty and breed costly litigation.”); John C. McCoid, II, *Bankruptcy, Preferences, and Efficiency: An Expression of Doubt*, 67 VA. L. REV. 249, 267–68 (1981) (observing that uncertainty whether creditors who receive a potentially preferential transfer may have to return it imposes “costs to their debtor-customers by increasing the cost of credit”).

¹³⁴ XIANG LI, BIBO LIU & XUAN TIAN, *POLICY UNCERTAINTY AND HOUSEHOLD CREDIT ACCESS: EVIDENCE FROM PEER-TO-PEER CROWDFUNDING* 28 (2018) (reporting on the peer-to-peer lending market).

¹³⁵ *Id.*; cf. Diana Olick, *Here’s Why It’s Suddenly Much Harder to Get a Mortgage, or Even Refinance*, CNBC (Apr. 13, 2020, 5:08 PM), <https://cnbc.com/2020/04/13/coronavirus-why-its-suddenly-much-harder-to-get-a-mortgage-or-even-refinance.html> [<https://perma.cc/EPD7-XP88>] (reporting that economic uncertainty arising from the coronavirus pandemic made mortgage loans more expensive and difficult to get).

¹³⁶ See *supra* note 117 and accompanying text.

¹³⁷ See MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 7 (1993) (observing that “if two parties are to be observed entering into a voluntary private exchange, the presumption must be that both feel the exchange is likely to make them better off, otherwise they would not have entered into it”).

¹³⁸ See Steven L. Schwarcz, *Rethinking Freedom of Contract: A Bankruptcy Paradigm*, 77 TEX. L. REV. 515, 535–39 (1999).

against his own weakness,”¹³⁹ should not apply in this Article’s context of business contracting. This is especially true for securitizations, given the sophistication of the relevant investors.¹⁴⁰

The extent to which freedom of contract should be limited by a contract’s externalities—its potential harm to noncontracting parties—is unclear; “many contracts create externalities, yet they are [still] enforced.”¹⁴¹ From the standpoint of externalities, R&W agreements should be enforced because only contracting parties have the right to rely on contractual R&Ws.¹⁴² R&W breaches should not, therefore, directly cause externalities. Although R&W breaches might indirectly cause externalities by causing systemically important contracting parties to fail, thereby harming third parties, that likelihood appears too remote and indirect to constrain freedom of contract.¹⁴³

Freedom of contract should also be limited by public policy.¹⁴⁴ To the extent R&W breaches are fraudulent, freedom of contract should be constrained by the public policy against fraudulent conduct: “The public policy against fraud is a strong and venerable one that is largely founded on the societal consensus that lying is wrong.”¹⁴⁵ Sole remedy provisions should not protect deceitful parties from extracontractual claims for fraud.¹⁴⁶

On that basis, R&W breaches should merely shift risk, in accordance with the contract, unless such breaches are themselves fraudulent. Traditionally, fraud requires intent.¹⁴⁷ Willful or otherwise intentional

¹³⁹ *Id.* at 548.

¹⁴⁰ See *supra* note 15 and accompanying text.

¹⁴¹ Schwarcz, *supra* note 138, at 552.

¹⁴² Even though originators in securitizations make R&Ws to the sponsor and its transferees, see *supra* note 34, those transferees are the SPE and its investors—which are all contracting parties. See *supra* text accompanying notes 31–32.

¹⁴³ See, e.g., Deborah Zalesne, *Enforcing the Contract at All (Social) Costs: The Boundary Between Private Contract Law and the Public Interest*, 11 TEX. WESLEYAN L. REV. 579, 606–07 (2005) (arguing that “[c]ontract law is . . . ill equipped to recognize . . . remote externalities” and that indirect externalities are typically tolerated).

¹⁴⁴ Cf. Schwarcz, *supra* note 138, at 536 (observing that the public policy limitation would not permit waivers that thwart a statute’s legislative policies).

¹⁴⁵ *Abry Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1035 (Del. Ch. 2006).

¹⁴⁶ Cf. *United Guar. Mortg. Indem. Co. v. Countrywide Fin. Corp.*, 660 F. Supp. 2d 1163, 1181 (C.D. Cal. 2009) (arguing that contracting should not allow parties to escape extracontractual duties); R. Joseph Barton, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, Note, 41 WM. & MARY L. REV. 1789, 1833–34 (2000) (same); Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 584 (2009) (same).

¹⁴⁷ See, e.g., 37 AM. JUR. 2D *Fraud and Deceit* § 24 (2024) (“The five traditional elements of fraud, each of which must be established by evidence that is not equally consistent with either honesty or deceit include: (1) a false representation; (2) in reference to a material fact; (3) made with knowledge of its falsity; (4) *with the intent to deceive*; and (5) on which an action is taken in justifiable reliance upon the representation.” (emphasis added)).

R&W breaches should, therefore, justify fraud claims.¹⁴⁸ Being extra-contractual, fraud claims could override contractual sole remedy provisions, such as the cure-or-repurchase remedy.

Integrating these concepts, this Article's proposed normative rule follows: R&W breaches should shift risk strictly according to the contractual terms, including any cure-or-repurchase or other sole remedy provision; however, intentional breaches should also justify extracontractual fraud claims.

This proposed normative rule makes sense on many levels. From an economic standpoint, the goal of R&Ws and remedy limitations is to more efficiently allocate risk between parties.¹⁴⁹ Freely contracting sophisticated parties are believed to efficiently allocate risk among themselves unless some parties are deceiving other parties.¹⁵⁰ The proposed normative rule additionally makes sense because it would operate to correct market failures: in this case, information asymmetry resulting from fraud.¹⁵¹ The primary purpose of economic and financial regulation is to help correct market failures.¹⁵²

The proposed normative rule would also be consistent with the Economic Loss Rule, sometimes known as the Economic Loss Doctrine, which generally prevents tort, including deceit-based, remedies for economic losses where parties contractually allocate their risk.¹⁵³

¹⁴⁸ Cf. *Abry Partners*, 891 A.2d at 1035 (observing that "parties may allocate the risk of factual error freely as to any error where the speaking party did not consciously convey an untruth").

¹⁴⁹ See *supra* note 74 and accompanying text (concluding that R&Ws are intended to reallocate risk and reduce information asymmetry).

¹⁵⁰ See, e.g., *Robinson Helicopter Co. v. Dana Corp.*, 102 P.3d 268, 275 (Cal. 2004) (explaining that "[a] breach of contract remedy assumes that the parties to a contract can negotiate the risk of loss occasioned by a breach," except that a party "cannot rationally calculate the possibility that the other party" will be deceitful); *Budgetel Inns, Inc. v. Micros Sys., Inc.*, 8 F. Supp. 2d 1137, 1148 (E.D. Wis. 1998) (stating that when a seller intentionally lies, "the party best situated to assess the risk of economic loss and allocate the risk is not the buyer, who cannot possibly know which of several statements may be a lie, but rather the seller, who clearly knows"); see also Steven C. Tourek, Thomas H. Boyd & Charles J. Schoenwetter, *Bucking the "Trend": The Uniform Commercial Code, the Economic Loss Doctrine, and Common Law Causes of Action for Fraud and Misrepresentation*, 84 IOWA L. REV. 875, 908–10 (1999).

¹⁵¹ Any further information asymmetry should be mitigated by the fact that the contracting parties are all sophisticated, as well as by the fact that the proposed rule would respect a risk-shifting measure of damages.

¹⁵² See, e.g., DAVID GOWLAND, *THE REGULATION OF FINANCIAL MARKETS IN THE 1990s* 21 (1990) (characterizing regulating markets to correct market failure as the "public interest theory"); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 335 (1974) ("[Economic] regulation is supplied in response to the demand of the public for the correction of inefficient or inequitable market practices."); cf. PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 756 (Michael J. Mandel ed., 15th ed. 1995) (defining "[m]arket failure" as "[a]n imperfection in a price system that prevents an efficient allocation of resources").

¹⁵³ The rule is often said to serve the purpose of maintaining the fundamental distinction between tort and contract law. Miller, *supra* note 78, at 510.

The Economic Loss Rule does not prevent a tort law remedy to discourage fraud, however, because parties cannot efficiently allocate the risk of fraud—and any attempt to do so would result in additional transaction costs.¹⁵⁴

Other possible versions of a normative rule for an R&W breach might be theoretically possible but not pragmatic. For example, such a rule could require lawyers to clearly distinguish between a “representation” and a “warranty” in future contracts, thereby triggering different remedies depending on which is breached.¹⁵⁵ However, lawyers might not always remember to document that distinction and, as the British experience shows, even if they remembered, lawyers could not always “establish exactly what statement belongs in one category or the other.”¹⁵⁶

One also might propose a “constructive” fraud rule that presumes fraud unless, for example, the warrantor engages in appropriate due diligence or takes other reasonable steps to try to establish the reasonableness of its R&Ws.¹⁵⁷ Due diligence could be costly, however, and warrantors should not incur that cost unless, under the circumstances, it adds net value.¹⁵⁸ In general, due diligence would not appear to add net value because liability for breach already should discourage warrantors from making unreasonable R&Ws. This Article later examines whether due diligence might nonetheless add net value if a warrantor should have known that extensive R&W violations could occur.¹⁵⁹

¹⁵⁴ See *Abry Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1035 (Del. Ch. 2006); *Robinson Helicopter Co.*, 102 P.3d at 274–75; *All-Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862, 867 (7th Cir. 1999).

¹⁵⁵ See *supra* notes 119–28 and accompanying text (discussing whether an R&W assertion provides factual assertions or merely enables indemnification if the assertion is breached).

¹⁵⁶ Cf. CADWALADER, *supra* note 120 (observing that even British lawyers recognize that “it is sometimes difficult to establish exactly what statement belongs in one category or the other”).

¹⁵⁷ Cf. Miller, *supra* note 9, at 290; Adelson, *supra* note 22, at 100–01; Joseph Philip Forte, *Representations and Warranties—The Capital Markets Context*, in 1 ALI-ABA COURSE OF STUDY MATERIALS: COMMERCIAL SECURITIZATION FOR REAL ESTATE LAWYERS 219, 222 (2002); Thomas J. Holdych & Bruce D. Mann, *The Basis of the Bargain Requirement: A Market and Economic Based Analysis of Express Warranties—Getting What You Pay for and Paying for What You Get*, 45 DEPAUL L. REV. 781, 839–40 (1996) (arguing that even where warrantors have incomplete information about the loans they are warranting, they still have better information than investors and could detect defects at a lower cost).

¹⁵⁸ The question of warrantor due diligence should be distinguished from a superficially related, but fundamentally different, question: Should investors engage in due diligence? In other contexts, this Author has argued that although it would be inefficient for investors individually to engage in due diligence if each has a relatively small investment, due diligence becomes especially compelling when a monoline insurer or other financial institution guarantees all or substantially all of the investor risk and can cost-effectively perform diligence through statistical sampling. See generally Steven L. Schwarcz, *Marginalizing Risk*, 89 WASH. U. L. REV. 487 (2012).

¹⁵⁹ See *infra* notes 200–05 and accompanying text.

C. *Should Extensive but Unintentional R&W Violations Override Sole Remedy Provisions?*

Under the normative rule proposed in Section III.B, the existence of intentional R&W violations—which would include, of course, the existence of extensive intentional violations—should justify extracontractual fraud claims that override sole remedy provisions. This Section examines whether the existence of extensive *unintentional* R&W violations should also justify such extracontractual claims.

As a matter of freedom of contract, unintentional R&W violations, even if extensive, should not override contractually agreed sole remedy provisions. Absent intentional violations, none of the limitations to freedom of contract—paternalism, externalities, and public policy—should apply.¹⁶⁰

This view is consistent with the few cases that have considered sole remedy provisions concerning extensive R&W violations. In *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*,¹⁶¹ for example, the highest court in New York upheld cure-or-repurchase sole remedy provisions negotiated between sophisticated parties.¹⁶² Ambac had insured several securitizations, on behalf of the investors.¹⁶³ Countrywide, the sponsor of the securitizations, made certain R&Ws to Ambac regarding the quality of the underlying loans.¹⁶⁴ In each transaction, Ambac's recourse for an R&W breach was contractually limited to the cure-or-repurchase sole remedy.¹⁶⁵

As a result of extensive defaults on the underlying loans, Ambac had to pay the investors much more than it anticipated for insurance claims.¹⁶⁶ Ambac alleged that the high default rate corresponded to extensive R&W violations, claiming that Countrywide fraudulently induced Ambac to insure the transactions.¹⁶⁷ Ambac sued Countrywide for breach of contract and fraud.¹⁶⁸ Rejecting the fraud claim, the court held that “courts must honor contractual provisions that limit liability or damages because those provisions represent the parties’ agreement

¹⁶⁰ See *supra* notes 138–45 and accompanying text; *cf. supra* note 147 and accompanying text (explaining that fraud requires intent).

¹⁶¹ 106 N.E.3d 1176 (N.Y. 2018). This Article's discussion of this case is partly informed by the excellent article by David B. Saxe, Danielle C. Lesser & Michael Mix, *From 'Nomura' to 'Ambac': Where Does the Law on Sole Remedy Clauses Stand?*, LAW.COM: N.Y.L.J. (Aug. 20, 2018, 1:30 PM), <https://www.law.com/newyorklawjournal/2018/08/20/082118saxe/> [<https://perma.cc/FZX5-CASU>].

¹⁶² *Ambac Assurance Corp.*, 106 N.E.3d at 1183–85.

¹⁶³ *Id.* at 1179.

¹⁶⁴ *Id.* at 1180.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1181.

¹⁶⁸ *Id.* at 1179.

on the allocation of the risk of economic loss in certain eventualities.”¹⁶⁹ It reasoned that

[c]ontract terms providing for a sole remedy are sufficiently clear to establish that no other remedy was contemplated by the parties at the time the contract was formed, for purposes of that portion of the transaction . . . especially when entered into at arm’s length by sophisticated contracting parties.¹⁷⁰

Similarly, in *Nomura Home Equity Loan Inc.*, New York’s highest court ruled that extensive R&W violations do not allow a plaintiff to escape a sole remedy provision.¹⁷¹ Although the plaintiff had agreed to a sole remedy provision, it argued that it should not be bound to that provision because there were extensive R&W violations.¹⁷² The court rejected the plaintiff’s argument, finding no support in the agreement that the sole remedy provision only applied to occasional breaches and not extensive breaches.¹⁷³

Clearly, though, courts should not respect a sole remedy provision that is, effectively, meaningless.¹⁷⁴ This view parallels the UCC’s rejection of a remedies limitation that fails in its essential purpose¹⁷⁵ and the judicial rejection of remedies limitations that are “so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract.”¹⁷⁶ Some R&W beneficiaries have thus argued that the existence of extensive violations makes a cure-or-repurchase

¹⁶⁹ *Id.* at 1184 (quoting *Nomura Home Equity Loan, Inc.*, Series 2006-FM2 by HSBC Bank USA, N.A. v. *Nomura Credit & Cap., Inc.*, 92 N.E.3d 743, 748 (N.Y. 2017)); cf. Warkentine, *supra* note 71, at 67–78 (discussing the enforceability of remedies limitations in transactions for goods); Ralph A. Anzivino, *The False Dilemma of the Economic Loss Doctrine*, 93 MARQ. L. REV. 1121, 1129–33 (2010) (discussing the contract limitations available to sellers and manufacturers); see also *supra* note 63 and accompanying text (citing similar sources).

¹⁷⁰ *Ambac Assurance Corp.*, 106 N.E.3d at 1184 (quoting *Nomura Home Equity Loan, Inc.*, Series 2006-FM2 by HSBC Bank USA, N.A., 92 N.E.3d at 748). But cf. *Clark v. Int’l Harvester Co.*, 581 P.2d 784, 798 (Idaho 1978) (holding that, under UCC section 2-719(2), “an exclusive remedy, which may have appeared fair and reasonable at the inception of the contract, as a result of later circumstances operates to deprive a party of a substantial benefit of the bargain”).

¹⁷¹ *Nomura Home Equity Loan, Inc.*, Series 2006-FM2 by HSBC Bank USA, N.A., 92 N.E.3d at 745.

¹⁷² *Id.* at 750.

¹⁷³ *Id.* But see *supra* notes 129–30 and accompanying text (discussing the dissent).

¹⁷⁴ Cf. *Rocanova v. Equitable Life Assurance Soc’y. of the U.S.*, 634 N.E.2d 940, 943–44 (N.Y. 1994) (contract breach damages ordinarily will be limited to those necessary to redress the wrong).

¹⁷⁵ See *supra* note 77 and accompanying text.

¹⁷⁶ See *Graham v. James*, 144 F.3d 229, 237 (2d Cir. 1998); cf. *supra* note 65 and accompanying text. For a discussion of what other remedies should apply if a remedy fails in its essential purpose, see Robert J. Williams, *Getting What You Bargained For: How Courts Might Provide a Coherent Basis for Damages That Arise When Remedies Fail of Their Essential Purpose*, 5 VA. L. & BUS. REV. 131, 146 (2010).

sole remedy prohibitively expensive, if not impossible, to enforce.¹⁷⁷ The New York Court of Appeals, however, has rejected that argument: “Plaintiff’s contention that that [sic] the pervasive nature of the [R&W] breaches will make it impossible for plaintiff to prove its case on a loan-by-loan basis has previously been considered and rejected by this Court as a basis to render the sole remedy provision unenforceable.”¹⁷⁸

This Article agrees that the existence of extensive R&W violations should not make a cure-or-repurchase sole remedy prohibitively expensive to enforce. As next shown, the scholarship purporting to demonstrate that prohibitive expense is flawed.

Some scholars claim that the verification costs necessary to establish the existence of extensive violations can be prohibitively expensive. Professors Lewis and Schwartz contend, for example, that it can be costly to establish whether any given loan violated an R&W at the time of its sale if, as was especially common during the 2008 financial crisis, the inquiry occurs years after that time.¹⁷⁹ Professors McCoy and Wachter illustrate this by suggesting that R&W-breach inquiries “alleging false loan-to-value ratios or appraised values [would] require reconstructing the actual appraised value at [the time of the sale], which is subject to debate and difficult to do.”¹⁸⁰

Debate and difficulty do not, however, necessarily make those inquiries prohibitively expensive.¹⁸¹ Moreover, R&W-breach inquiries “alleging false loan-to-value ratios or appraised values” do *not* always “require reconstructing the actual appraised value at” the time of the sale.¹⁸² Often, R&Ws regarding appraised value are assertions about the appraisal procedure, not about the accuracy of the appraisal itself.¹⁸³

¹⁷⁷ See, e.g., *In re Part 60 Put-Back Litig.*, 165 N.E.3d 180, 189 (N.Y. 2020) (“This Court . . . has not yet considered, let alone overruled, the Appellate Division’s conclusion that where specific performance of cure or repurchase is impossible, a plaintiff in [a securitization] case may pursue monetary damages in lieu of specific performance.”); cf. *infra* note 179 and accompanying text (citing scholars who argue that the existence of extensive breaches can make a cure-or-repurchase sole remedy prohibitively expensive to enforce).

¹⁷⁸ *In re Part 60 Put-Back Litig.*, 165 N.E. 3d at 190; accord *Nomura Home Equity Loan, Inc., Series 2006-FM2 by HSBC Bank USA, N.A.*, 92 N.E.3d at 751 (holding that the plaintiff “is expressly limited to the more specific Sole Remedy Provision . . . however many defective loans there may be”); *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 106 N.E.3d 1176, 1184–85 (N.Y. 2018) (upholding a sole remedy provision despite extensive R&W breaches).

¹⁷⁹ See Lewis & Schwartz, *supra* note 14, at 192–97; Strauss, *supra* note 23, at 171 (discussing the cost of proving causation and damages on a loan-by-loan basis).

¹⁸⁰ McCoy & Wachter, *supra* note 1, at 301.

¹⁸¹ Cf. Strauss, *supra* note 23, at 171 n.39 (“The cost and difficulties of re-underwriting a portfolio of MBS to determine liability and damages, though immense, do not render [the cure-or-repurchase sole remedy] *unenforceable*. It is more accurate to say that such [remedy is] expensive and cumbersome to enforce as written in events of mass breach . . .”).

¹⁸² *Contra supra* note 180 and accompanying text (making that allegation).

¹⁸³ See Don Coker, *Repurchase & Buyback Demands, Representations and Warranties Claims in Residential Mortgage-Backed Securities*, HGEXPERTS.COM (2012), <https://www.hgexperts.com>.

For R&Ws that make assertions about the appraisal procedure, R&W-breach inquiries would be relatively trivial: to confirm whether the required procedures were followed. R&W-breach inquiries regarding possible alleged “false loan-to-value ratios”¹⁸⁴ would then also be easy: the amount of the loan is clearly documented, and the “value” would simply be the appraised value as determined by the required procedure.

It also should be noted that the cure-or-repurchase remedy can be pursued if *any* R&W is violated.¹⁸⁵ In the unlikely event that proving breach of an R&W about a loan’s loan-to-value ratio or the collateral’s appraised value could be prohibitively expensive, the warrantors still would be obligated to cure or repurchase that loan if any other R&Ws were violated.¹⁸⁶ Violations of most of the other R&Ws—including no adverse selection, the creditworthiness of the loans, the loan-to-income and debt-to-income ratios of the borrowers, and the occupancy status of the mortgaged properties¹⁸⁷—should be easier to prove.¹⁸⁸

Scholars also argue that enforcing a cure-or-repurchase sole remedy would be prohibitively expensive because it would require proof of causation: Professors Lewis and Schwartz write, for example, that a “portfolio buyer who could prove a[n] [R&W] breach must also prove causation: that the breach, rather than exogenous factors, caused the buyer’s loss,”¹⁸⁹ and the portfolio buyer bears “the burden of proof in”

com/expert-witness-articles/repurchase-and-buyback-demands-representations-and-warranties-claims-in-residential-mortgage-backed-securities-24951 [https://perma.cc/6KEQ-4SYL] (describing the “Misrepresentation of Appraised Value” as follows, “This potential problem typically is one with the appraiser rather than a problem with the borrower since the borrower does not generate the appraisal or contribute towards the data used by the appraiser in formulating the value of the property My experience has been that Originators make sure that the appraisal is performed by an appropriately certified licensed appraiser, and rely upon the expertise of the appraiser.”). Fannie Mae and Freddie Mac likewise contemplate procedural R&Ws regarding appraised value. See, e.g., *MBS Disclosure Enhancement: Property Valuation Method*, FANNIE MAE (Jan. 13, 2020), https://capitalmarkets.fanniemae.com/mortgage-backed-securities/single-family-mbs/mbs-disclosure-enhancement-property-valuation-method [https://perma.cc/33CA-NYH9] (“The property value was obtained through an appraisal that was completed by a licensed or certified appraiser.”).

¹⁸⁴ *Contra* McCoy & Wachter, *supra* note 1, at 301; see also *supra* note 180 and accompanying text (raising that type of inquiry).

¹⁸⁵ *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 106 N.E.3d 1176, 1180 (N.Y. 2018) (observing that cure-or-repurchase is “the remedy for breach of *any* of these imported representations and warranties and the remedy ‘with respect to *any defective Mortgage Loan or any Mortgage Loan as to which there has been a breach of representation or warranty*’” (emphasis added)).

¹⁸⁶ *Supra* notes 12–14 and accompanying text.

¹⁸⁷ *Supra* notes 36–39 and accompanying text (discussing these R&Ws).

¹⁸⁸ Cf. McCoy & Wachter, *supra* note 1, at 300 (“Some breaches of representations and warranties are easily proven because they turn on commonly available evidence using objective standards.”).

¹⁸⁹ Lewis & Schwartz, *supra* note 14, at 192.

showing causation.¹⁹⁰ They contend that causation could not be proved “at acceptable cost.”¹⁹¹

Proving causation—for example, that an R&W violation at the time of a loan’s sale has caused the loan to default years later—could indeed be expensive, if even feasible. However, the premise of the proof-of-causation argument is *erroneous*. Enforcing the cure-or-repurchase remedy does not necessarily require proof of causation;¹⁹² it merely requires proof that a loan violated an R&W at the time of its sale¹⁹³—in which case the warrantors are obligated to either cure that violation or repurchase that loan.¹⁹⁴ As discussed, proving that a loan violated an R&W at the time of its sale should not be prohibitively expensive.¹⁹⁵

For these reasons, the existence of extensive violations should not make a cure-or-repurchase sole remedy prohibitively expensive to enforce. In the unlikely event, though, that extensive R&W violations would make such enforcement prohibitively expensive, courts should consider allowing statistical sampling to approximate the sole remedy damages without incurring full-review expenses.¹⁹⁶ Professor Miller

¹⁹⁰ *Id.* at 197.

¹⁹¹ *Id.*

¹⁹² *Cf.* ACE Sec. Corp. v. DB Structured Prods., Inc., 36 N.E.3d 623, 629–30 (N.Y. 2015) (“[The warrantor] represented and warranted certain facts about the loans’ characteristics as of March 28, 2006, when the MLPA and PSA were executed, and expressly stated that those representations and warranties did not survive the closing date. DBSP’s cure or repurchase obligation was the Trust’s remedy for a breach of *those* representations and warranties, not a promise of the loans’ future performance.”); *Mastr Adjustable Rate Mortgs. Tr. 2006-OA2 v. UBS Real Est. Sec. Inc.*, 12-cv-7322, 2015 WL 797972, at *1, *3 (S.D.N.Y. Feb. 25, 2015) (finding that where a cure-or-repurchase remedy was dependent on the R&W breach “materially and adversely affect[ing] the interests of the Certificateholders” in the relevant loan, explaining that materiality merely “require[s] proof of a significant increase in the risk of [the] loan’s default” and “reject[ing] the notion that the plaintiffs must prove an actual loss or default” (quoting the contracts at issue)). *But cf.* Strauss, *supra* note 23, at 170 (observing that whereas R&W beneficiaries “argue that any [R&W] breach increasing the risk of loss is material and adverse” and thus does not require proof of causation, sponsor-warrantors “maintain that [a R&W] breach is material and adverse [and thus actionable] only if it results in an actual loss on the loan”).

¹⁹³ *Cf. supra* note 13 and accompanying text (quoting a cure-or-repurchase provision).

¹⁹⁴ *See* *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 106 N.E.3d 1176, 1180, 1184–85 (N.Y. 2018). The Author’s thirty-five years of extensive experience as a lawyer and as an expert witness with securitization transactions, including cure-or-repurchase provisions documented therein, supports this conclusion: a cure-or-repurchase provision simply requires the warrantors either to correct, or “cure,” the breach or to repurchase the breaching loan; there is no requirement to also show that the R&W breach caused the loan to default.

¹⁹⁵ *See supra* notes 179–84 and accompanying text.

¹⁹⁶ Statistical sampling might be less directly relevant, however, to a cure-or-repurchase provision that contemplates curing or repurchasing specific actually nonconforming loans. *See* *Homeward Residential, Inc. v. Sand Canyon Corp.*, No. 12 Civ. 5067, 2017 WL 5256760, at *7 (S.D.N.Y. Nov. 13, 2017) (denying a motion for statistical sampling because cure-or-repurchase provision required proof of actual breaches); *Royal Park Invs. SA/NV v. HSBC Bank USA*,

notes, for example, that a “court could allow the plaintiff to prove its damages by taking a sample of the non-conforming loans and compute its damages for the sample and then extrapolate to its total damages in the suit.”¹⁹⁷

The foregoing analysis has shown that the existence of extensive unintentional R&W violations should not justify extracontractual fraud claims that can override sole remedy provisions. One might nonetheless ask whether the existence of those R&W violations should justify some type of *constructive* fraud rule; federal bankruptcy law, for example, provides a statutory precedent for a constructive fraud rule.¹⁹⁸ Should warrantors be liable for extracontractual claims for constructive fraud, or perhaps gross negligence,¹⁹⁹ if they should have known that extensive R&W violations could occur?²⁰⁰

Because the use of constructive fraud or gross negligence to override contractual provisions is not the norm, any such use should require a compelling policy basis.²⁰¹ In the context of R&W violations, where the contract itself provides a negotiated remedy, there does not appear to be such a compelling basis. Moreover, on a cost-benefit basis, this Article already has argued against a presumption of fraud which the warrantor could rebut by engaging in appropriate due diligence to try to establish the reasonableness of its R&Ws.²⁰² The costs likewise would not appear to justify the benefits if warrantors feel compelled to engage in due diligence simply because they fear that investor-plaintiffs could allege, *ex post*, that they should have known that extensive

N.A., No. 14-CV-08175, 2017 WL 945099, at *5 (S.D.N.Y. Mar. 10, 2017) (involving cure-or-repurchase sole remedies); *MASTR Adjustable Rate Mortgs. Tr. 2006-OA2*, 2015 WL 764665, at *11 (finding that cure-or-repurchase sole remedies “foreclose the ‘pervasive breach’ theory”); *W&S Life Ins. Co. v. Bank of N.Y. Mellon*, No. A1302490, 2017 WL 3392855, at *10–13 (Ohio Ct. Com. Pl. Aug. 4, 2017) (finding that statistical sampling was inappropriate where cure-or-repurchase provision required proof of actual breaches).

¹⁹⁷ Miller, *supra* note 9, at 291–92 n.137. For a source discussing the possibility of the parties using sampling techniques, Professor Miller references *ACE Securities Corporation v. DB Structured Products*, 965 N.Y.S.2d 844, 851 (N.Y. Sup. Ct. 2013), *rev’d on other grounds*, 977 N.Y.S.2d 229 (N.Y. App. Div. 2013). *Id.* But see Strauss, *supra* note 23, at 175–76 (observing that some courts have not yet allowed statistical sampling).

¹⁹⁸ See 11 U.S.C. § 548(a) (imposing liability for certain constructively fraudulent actions); accord CAL. CIV. CODE § 1573(1) (Deering 2024) (defining constructive fraud to include “any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault . . . by misleading another to his prejudice”).

¹⁹⁹ Cf. *supra* note 130 (discussing whether to allow an extracontractual claim for gross negligence due to alleged pervasive misrepresentations).

²⁰⁰ Due diligence might provide, for example, a defense against this constructive fraud claim. Cf. Therese H. Maynard, *The Affirmative Defense of Reasonable Care Under Section 12(2) of the Securities Act of 1933*, 69 NOTRE DAME L. REV. 57, 91 (1993) (explaining that section 11(b) of the Securities Act of 1933 has a “‘due diligence defense’” for loan underwriters).

²⁰¹ See *supra* note 130 and accompanying text.

²⁰² See *supra* notes 157–58 and accompanying text.

R&W violations could occur. Such a constructive fraud rule would invite litigation—and thus compel costly due diligence to avoid that litigation—any time there is even a remote chance of extensive R&W violations occurring.²⁰³

Furthermore, in the rare case, such as the lead-up to the 2008 financial crisis, where publicly available information indicates that there could be extensive R&W violations,²⁰⁴ the plaintiffs—including sophisticated securitization investors—arguably should know that, too. Such knowledge by plaintiffs should be a defense to any claim of constructive fraud against warrantors.²⁰⁵ It, therefore, is highly questionable whether the benefits of a constructive fraud rule for extensive R&W violations would exceed its costs.

CONCLUSION

This Article provides a systematic framework for analyzing R&W breaches. Its framework helps to resolve whether such violations, if extensive, should give rise to fraud claims in addition to contract-breach damages. These issues are not only jurisprudentially important; they also are at the heart of billions of dollars of ongoing litigation.²⁰⁶

The boundary between contract-breach damages and fraud for an R&W breach has a murky origin. Initially developing from tort law, under which an R&W breach would justify an action in deceit, warranty law is now viewed as more grounded in contract law. Nonetheless, continuing ambiguity provides an opening for parties to assert extra-contractual fraud claims for an R&W breach, creating legal uncertainty.

Analyzing an R&W breach from the perspective of freedom of contract helps to reduce that uncertainty. Freedom of contract is not absolute. Its limitations include the public policy against fraudulent conduct. Although R&W breaches should generally shift risk strictly according to the contractual terms, including any cure-or-repurchase

²⁰³ The very occurrence of extensive R&W breaches could, rightly or wrongly, create the impression that the warrantor should have known that such breaches could occur.

²⁰⁴ The rate of securitization issuance had risen so rapidly prior to the 2008 financial crisis that warrantors would have lacked the information necessary to truly “represent” the quality of the loans, suggesting that they should have known there *could* be extensive breaches. Cf. Lewis & Schwartz, *supra* note 14, at 167–70 (observing that the parties would be using R&Ws as a way to reallocate the risk of defective loans on the sponsor/originator); Miller, *supra* note 9, at 258 n.6, 264, 297 (same); McCoy & Wachter, *supra* note 1, at 289 (same).

²⁰⁵ Cf. Joseph Cioffi, *How Subprime RMBS Can Prepare Us for Subprime Auto Litigation in the Time of COVID-19*, WESTLAW: PRAC. INSIGHTS COMMENTS. (June 3, 2020), https://www.dglaw.com/wp-content/uploads/2021/09/Westlaw_Subprime_RMBS_Cioffi.pdf [https://perma.cc/PFQ5-HH3H] (noting that investor fraud claims that were brought in New York in 2013 were thrown out as untimely because “the plaintiff should have known . . . of [the] claims by 2010” due to “the widespread reports of subprime mortgage issues”).

²⁰⁶ McCoy & Wachter, *supra* note 1, at 299.

or other sole remedy provisions, the policy against fraudulent conduct should subject intentional R&W breaches to extracontractual fraud claims.

A related issue is whether the existence of unintentional, but extensive, R&W violations should justify extracontractual “constructive” fraud claims. Litigants argue that such extensive violations can make contract-breach damages prohibitively expensive to enforce and thus meaningless. In other contexts, there are precedents that allow rescission where contract-breach remedies fail in their essential purpose or strongly “defeat the object of the parties in making the contract.”²⁰⁷

The Article shows, however, that the existence of extensive R&W violations should not make contract-breach damages—or at least, the typical cure-or-repurchase sole remedy damages—prohibitively expensive to enforce. In the unlikely event that extensive violations would otherwise make such enforcement prohibitively expensive, courts should consider allowing plaintiffs to more efficiently—and cost-effectively—enforce sole remedy provisions by using statistical sampling to approximate the damages.²⁰⁸

²⁰⁷ *Graham v. James*, 144 F.3d 229, 237 (2d Cir. 1998) (quoting *Septembertide Publ’g, B.V. v. Stein & Day, Inc.*, 884 F.2d 675, 678 (2d Cir. 1989)).

²⁰⁸ *See supra* notes 196–97 and accompanying text (discussing statistical sampling and its possible limitations).

Effectively Irrebuttable Presumptions: Empty Rituals
and Due Process in Immigration Proceedings

Tiffany J. Lieu*

ABSTRACT

Rebuttable presumptions—ones that offer the opportunity to overcome a presumed fact—are a common fixture in U.S. civil law. Some rebuttable presumptions, however, are not in fact rebuttable at all and are instead rebuttable in name only. Nonetheless, courts often take at face value a presumption’s claim to be rebuttable when reviewing challenges to such presumptions. This Article contends that such so-called rebuttable presumptions should be recognized as a distinct category of presumptions: effectively irrebuttable presumptions. It argues that effectively irrebuttable presumptions violate constitutional due process norms because, although they offer proceedings, they deprive process. Part I examines a so-called rebuttable presumption in the immigration context, which, once triggered, precludes individuals from applying for persecution-based forms of relief. Part II proffers a four-part framework for defining effectively irrebuttable presumptions, which looks at the structure of the presumption, the ways it has (and has not) been implemented, and the number of cases that have successfully rebutted it. Part III argues that such effectively irrebuttable presumptions offend procedural due process norms. Applying two procedural due process frameworks, it argues that effectively irrebuttable presumptions violate the axiomatic guarantee of a meaningful opportunity to be heard at a full and fair hearing. Part IV then sets forth recommendations for procedural safeguards necessary to identify and bring effectively irrebuttable presumptions in line with due process norms. This Article focuses on the constitutional dilemma effectively irrebuttable presumptions pose in the immigration context, but its implications may reach broadly to other civil contexts.

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INTRODUCTION

In 2012, members of a drug cartel in Venezuela demanded that Henry Sanchez work for them as a drug trafficker.¹ After he declined, the drug cartel returned with an iPad full of photos of his wife and child and threatened to torture or kill them if he did not reconsider.² Left with no choice, Mr. Sanchez agreed to their demands.³ He ingested balloons of heroin and flew from Venezuela to the United States.⁴ When he arrived in Boston, the balloons ruptured in his stomach, sending him into a coma for four days.⁵ When he woke up, his wife told him that the drug cartel demanded that he waive his right to an attorney, decline assistance from the Venezuelan consulate, and confess to the police that he had acted alone in carrying drugs or they would kill her and

¹ *Sanabria Morales v. Barr*, 967 F.3d 15, 17 (1st Cir. 2020), *petition for reh’g en banc denied*, *Morales v. Garland*, 12 F.4th 830 (1st Cir. 2021) (Mem.). This Author was co-counsel in petitioning for rehearing of Mr. Sanchez’s case en banc, which was denied. *See id.* A pseudonym is used for purposes of this Article.

² *Sanabria Morales*, 967 F.3d at 17.

³ *See id.*

⁴ *Id.*

⁵ *Id.*

their son.⁶ Fearful of the cartel's threats, Mr. Sanchez initially complied with the demands and attempted to plead guilty to the charge of conspiracy to transport heroin; however, he later raised the possibility of a duress defense.⁷ As a result, the court rejected his plea and he ultimately pleaded guilty to the lesser offense of trafficking in eighteen grams or more of heroin.⁸ Based on this conviction, the Immigration Judge and the Board of Immigration Appeals ("Board" or "BIA") determined that Mr. Sanchez was deportable.⁹ They further concluded that he was ineligible for asylum and withholding of removal because the conviction was deemed to be a particularly serious crime—a designation that, by statute, renders an individual ineligible for asylum and withholding of removal.¹⁰

The immigration adjudicators¹¹ reached their particularly serious crime determination after applying an agency decision from 2002 called *Y-L*.¹² That case held that certain drug trafficking convictions are presumed to be particularly serious unless an individual rebuts the presumption by demonstrating extraordinary circumstances.¹³ Yet, while *Y-L* ostensibly announces a rebuttable presumption—a presumption that can be overcome—it is, in practice, not rebuttable at all. This reality is apparent from the structure of the presumption itself. To rebut the presumption, individuals must, at a minimum, meet six criteria, including that the transaction involved a de minimis amount of drugs and that the individual had only a peripheral role.¹⁴ The presumption precludes adjudicators from considering circumstances of coercion or duress—such as the threats of torture or death to his family that Mr. Sanchez faced—unless and until individuals satisfy all six criteria. Mr. Sanchez could not do so because, as the individual who physically transported the drugs, albeit under duress, he necessarily failed the criteria that the

⁶ *Id.*

⁷ *Id.* at 18.

⁸ *Id.*

⁹ *See id.*

¹⁰ Under the Immigration and Nationality Act ("INA"), an individual is ineligible for asylum and withholding of removal if he, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." 8 U.S.C. § 1158(b)(2)(A)(ii); *id.* § 1231(b)(3)(B)(ii). The INA does not define particularly serious crimes, but it provides that for withholding of removal, "an aggravated felony . . . for which [an individual was] sentenced to an aggregate term of imprisonment of at least 5 years" is per se a particularly serious crime. *Id.* § 1231(b)(3). For aggravated felony convictions resulting in sentences of fewer than five years, the Attorney General may determine that an aggravated felony constitutes a particularly serious crime. *See id.*

¹¹ This Article uses the term "immigration adjudicators" to collectively refer to immigration judges and the BIA.

¹² 23 I. & N. Dec. 270 (A.G. 2002).

¹³ *See id.* at 270.

¹⁴ *See id.* at 276–77.

individual be only peripherally involved.¹⁵ As a result, immigration adjudicators ordered Mr. Sanchez removed without considering, or being permitted to consider, the coercion and duress he suffered.¹⁶

Confounding results like that in Mr. Sanchez’s case are rife in cases triggering *Y-L*’s presumption. A review of publicly available Board decisions reveals that vanishingly few cases have, in fact, successfully overcome *Y-L*’s so-called rebuttable presumption in the two decades since it came down.¹⁷ Indeed, even cases that federal reviewing courts have identified as likely candidates for overcoming the presumption on remand have, when sent back down, failed to do so.¹⁸

Yet attempts to get courts to reckon with these implementation realities are unavailing. Litigants have argued that *Y-L* amounts to a per se category—rather than a rebuttable presumption—of particularly serious crimes for drug trafficking aggravated felonies.¹⁹ Courts that have addressed the issue, however, have taken *Y-L* at face value to conclude otherwise.²⁰ Those courts stress that the “Attorney General in *Y-L* purported *not* to be creating a per se rule,” and thus that the presumption is “[p]resumably” rebuttable.²¹

At a minimum, this divergence between the expected ability to rebut the presumption—and the inability to rebut in practice—calls into

¹⁵ Notably, there is no evidence that the immigration adjudicators in Mr. Sanchez’s case considered the six-factor test. As Judge Ojetta R. Thompson challenged in her dissenting opinion on appeal, the immigration adjudicators’ failure to apply the rebuttal test was legal error requiring remand. *See Sanabria Morales v. Barr*, 967 F.3d 15, 23–24 (1st Cir. 2020) (Thompson, J., dissenting). Nonetheless, the majority in Mr. Sanchez’s petition for review applied the factors themselves in the first instance. They concluded that he was not peripherally involved because he transported the drugs himself, and it was not a de minimis amount because the weight exceeded 200 grams, and he received \$8,000 in payment. *See id.* at 21–22.

¹⁶ *See id.* at 18.

¹⁷ As discussed *infra* Part I, this Author has encountered only one publicly available case that has successfully overcome the presumption.

¹⁸ *See infra* Part I.

¹⁹ *See, e.g., DeCarvalho v. Garland*, 18 F.4th 66, 70 (1st Cir. 2021); *Morales v. Garland*, 12 F.4th 830, 832 (1st Cir. 2021) (Mem.); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 945 (9th Cir. 2007); *Fernandez Segura v. Rosen*, 832 F. App’x 517, 518 (9th Cir. 2020) (Mem.); *Reyes-Sanchez v. Ashcroft*, 261 F. Supp. 2d 276, 286–87 (S.D.N.Y. 2003); *Ford v. Bureau of Immigr. & Customs Enf’t*, 151 F. App’x 152, 154 (3d Cir. 2005) (per curiam).

²⁰ *See, e.g., Miguel-Miguel*, 500 F.3d at 947 (“*Y-L* creates a strong presumption, not a per se rule.”); *Fernandez Segura*, 832 F. App’x at 518 n.1 (affirming *Miguel-Miguel* and holding that *Y-L* “did not designate drug trafficking crimes as per se particularly serious crimes”); *Ford v. Bureau of Immigr. & Customs Enf’t*, 151 F. App’x at 154 (same); *Reyes-Sanchez*, 261 F. Supp. 2d at 287 (same).

²¹ *See, e.g., Miguel-Miguel*, 500 F.3d at 945–47 (emphasizing that the “Attorney General in *Y-L* purported *not* to be creating a per se rule” and thus “[p]resumably *Y-L* will be interpreted consistent with this statement and there will be some cases in which its exception applies”); *Ford v. Bureau of Immigr. & Customs Enf’t*, 151 F. App’x at 154 (emphasizing that *Y-L* concluded its discussion of “particularly serious crime[s] with an unambiguous disavowal” of creating a per se category (quoting *Y-L*, 23 I. & N. Dec. 270, 276 (A.G. 2002))).

question courts' approach to deferring to, without analysis, the textual promises of presumptions. A presumption, while ostensibly proffering a rebuttal mechanism on its face, may not in practice be rebuttable at all. This Article proposes recognizing these presumptions as a distinct category and refers to them as "effectively irrebuttable presumptions" or "(ir)rebuttable presumptions." Such effectively irrebuttable presumptions exist in the interstice between rebuttable presumptions—ones that offer the opportunity to establish the nonexistence of a presumed fact²²—and irrebuttable presumptions—ones that are, in effect, substantive rules of law once triggered.²³ They borrow the name of the former but take the effect of the latter.

This new, interstitial category of presumptions has not been explored in any normative sense by courts or scholars. Although courts and scholars have analyzed the legal validity of irrebuttable presumptions,²⁴ the contours of and constitutional dilemma posed by effectively irrebuttable presumptions have remained unexplored. And although courts have alluded to presumptions that are effectively irrebuttable in a descriptive sense,²⁵ they have not passed normative judgment on the validity of such presumptions. This Article undertakes the project of defining effectively irrebuttable presumptions and developing a framework for determining when a so-called rebuttable presumption is rebuttable in name only.

Categorizing presumptions as effectively irrebuttable is not a mere identification exercise. At base, individuals subjected to such presumptions are afforded proceedings at which they may attempt to rebut the presumption, but proceedings are not synonymous with process. Such hearings are mere "empty ritual[s]" indeed if, in reality, no amount of evidence can rebut the presumption because of the way it is structured or because of the way the rebuttal mechanism is implemented—if even it is implemented.²⁶ Mr. Sanchez's case provides a stark example of the potential consequences. As a result of being subjected to the Y-L- presumption, Mr. Sanchez was deemed to have been convicted of a particularly serious crime without consideration of the coercion or duress that he suffered, and, accordingly, was rendered ineligible for

22 FED. R. EVID. 301 advisory committee's note on proposed rules; see, e.g., Joel S. Hjelmaas, *Stepping Back from the Thicket: A Proposal for the Treatment of Rebuttable Presumptions and Inferences*, 42 *DRAKE L. REV.* 427, 433 (1993) (distinguishing among rebuttable presumptions, inferences, conclusive presumptions, prima facie cases, and assumptions).

23 See Hjelmaas, *supra* note 22, at 433 (explaining that an irrebuttable presumption differs from a rebuttable presumption because no rebuttable evidence will be admitted).

24 See *infra* Section II.A.

25 See *infra* Section II.B.

26 See *Benham v. Ledbetter*, 785 F.2d 1480, 1491 (11th Cir. 1986).

withholding of removal that would have protected him from returning to his persecutors in Venezuela.²⁷

This Article thus argues that effectively irrebuttable presumptions violate the Fifth Amendment's Due Process Clause by depriving individuals of the right to an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'"²⁸ In so doing, this Article recognizes that effectively irrebuttable presumptions may arise in many civil contexts—administrative and nonadministrative—and that the constitutional inquiry may differ depending on the context. This Article limits its immediate analytical scope to the constitutional dilemma in the immigration context. It posits, however, that the impact of the due process concerns—and the defective hearings that they embody—may extend to other civil contexts, administrative or otherwise, in which effectively irrebuttable presumptions arise.

This Article proceeds in four parts. Part I explores the *Y-L*-presumption as a case study of how a presumption that is ostensibly rebuttable on the surface may, in fact, be irrebuttable in practice. This Part analyzes the structure of the *Y-L*-presumption and how immigration adjudicators have implemented it since its inception in 2002.

Part II proffers a framework for defining effectively irrebuttable presumptions. It does so first by laying the taxonomical foundation for rebuttable and irrebuttable presumptions before turning to cases in civil contexts that allude to presumptions that are effectively irrebuttable in a descriptive sense. A so-called rebuttable presumption crosses to being effectively irrebuttable when there is no realistic probability that the presumption can be rebutted, which may occur when one or more of the following four characteristics are present: (1) adjudicators fail to apply the rebuttal standard at all and instead treat the presumption, once triggered, as dispositive; (2) even where adjudicators do apply the presumption, structural barriers inhibit a party from rebutting it; (3) adjudicators set an unreasonable evidentiary standard for rebutting the presumption; or (4) few, if any, cases have successfully rebutted the presumption. This inquiry requires reviewing courts to look beneath a presumption's textual claim of being rebuttable to ascertain how the rebuttal mechanism is intended to operate and how it is, in fact, implemented.

Part III argues that hearings-turned-empty-rituals, by function of effectively irrebuttable presumptions, offend procedural due process norms. Applying two procedural due process frameworks, this Part argues that effectively irrebuttable presumptions violate the axiomatic guarantee of a meaningful opportunity to be heard at a full and fair hearing.²⁹ As a result, effectively irrebuttable presumptions cannot

²⁷ *Sanabria Morales v. Barr*, 967 F.3d 15, 19, 21 (1st Cir. 2020).

²⁸ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

²⁹ *See id.*

constitutionally exist as an interstitial presumption category—they must be made rebuttable in fact, or they must be claimed as irrebuttable in both name and substance. Part IV then sets forth recommendations for procedural safeguards necessary to identify and bring effectively irrebuttable presumptions in line with due process norms.

At their core, effectively irrebuttable presumptions are ones in which no amount of evidence that a noncitizen presents can overcome the presumption. Thus, while a noncitizen may ostensibly be afforded process—there is a hearing before an immigration judge where a noncitizen may put forth evidence to attempt to rebut the presumption—once the presumption is triggered, immigration adjudicators have effectively prejudged the outcome without fairly considering the evidence. In this way, any process is but an “empty ritual.”³⁰

I. *Y-L-*: A CASE STUDY ON REBUTTABLE PRESUMPTIONS IN NAME ONLY

In 2002, Attorney General John Ashcroft issued a decision in *Y-L-* that changed the immigration paradigm for all noncitizens with drug trafficking convictions seeking withholding of removal to flee persecution. *Y-L-* established that aggravated felony³¹ drug trafficking convictions are presumed to be particularly serious crimes—and thus preclusive of asylum and withholding of removal relief—unless the individual demonstrates exceptional circumstances.³² In practice, vanishingly few cases have successfully rebutted the particularly serious crime presumption since its 2002 inception. This Part explores the *Y-L-* presumption for particularly serious crimes and the ways in which it is—or is not—rebuttable in light of its structure and the way the presumption has—or has not—been implemented.

Under the Immigration and Nationality Act (“INA”),³³ an individual is ineligible for asylum and withholding of removal if, “having been convicted by a final judgment of a particularly serious crime, [the individual] constitutes a danger to the community of the United States.”³⁴ The INA does not define particularly serious crimes but provides two per se categories of such crimes. For purposes of asylum, a conviction deemed to be an aggravated felony is per se particularly serious.³⁵ For

³⁰ See *Benham v. Ledbetter*, 785 F.2d 1480, 1491 (11th Cir. 1986).

³¹ An aggravated felony is a term of art used to describe a category of offenses that carry particularly harsh immigration consequences for noncitizens. The list of aggravated felonies is statutorily enumerated in 8 U.S.C. § 1101(a)(43)(A)–(U). Notably, an offense need not be aggravated nor a felony to be considered an aggravated felony. See *Benham*, 785 F.2d at 1491.

³² See *Y-L-*, 23 I. & N. Dec. 270, 274 (A.G. 2002).

³³ 8 U.S.C. §§ 1101–1537.

³⁴ *Id.* § 1158(b)(2)(A)(ii); see also *id.* § 1231(b)(3)(B)(ii).

³⁵ *Id.* § 1158(b)(2)(B)(i).

purposes of withholding of removal, a conviction deemed to be an aggravated felony for which an individual was sentenced to an aggregate term of imprisonment of at least five years is per se particularly serious.³⁶ For all other offenses, the INA does not specify when a crime qualifies as particularly serious. In the withholding of removal context, the INA provides only that where an individual has an aggravated felony conviction for which they were sentenced to *fewer* than five years, that sentence “shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, [a noncitizen] has been convicted of a particularly serious crime.”³⁷

The agency has filled this statutory gap in the asylum and withholding of removal context by holding that, where the statute’s per se rules do not apply, adjudicators must determine whether a conviction is a particularly serious crime on an individual, case-by-case basis, applying what are known as the “*Frentescu* factors.”³⁸

Attorney General Ashcroft’s decision in *Y-L-* sidesteps the *Frentescu* factors and created a new regime for those seeking withholding of removal relief who have been convicted of an aggravated felony and were sentenced to fewer than five years. The decision consolidated the cases of *Y-L-*, *A-G-*, and *R-S-R-*, three separate individuals convicted of felony drug trafficking offenses.³⁹ Based on these convictions, *Y-L-*, *A-G-*, and *R-S-R-* were charged as removable for having been convicted of crimes that, among others, constitute aggravated felony offenses.⁴⁰ They applied for withholding of removal relief under 8 U.S.C. § 1231(b)(3)

³⁶ *Id.* § 1231(b)(3).

³⁷ *Id.*

³⁸ See, e.g., *B-Z-R-*, 28 I. & N. Dec. 563, 564 (A.G. 2022); *Frentescu*, 18 I. & N. Dec. 244, 247 (B.I.A. 1982). The Board in *Frentescu* set forth a multi-factor test, known as the “*Frentescu* factors,” to guide the case-by-case analysis. These include: “the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the [noncitizen] will be a danger to the community.” See *id.* Professor Fatma Marouf has argued that courts should apply the categorical approach for analyzing convictions to the particularly serious crime determination. See Fatma Marouf, *A Particularly Serious Exception to the Categorical Approach*, 97 B.U. L. REV. 1427, 1429 (2017).

³⁹ *Y-L-* was convicted of trafficking in cocaine and resisting an officer with violence in violation of FLA. STAT. ANN. §§ 893.135, 843.01 (West 2000 & Supp. 2002), a first-degree felony in Florida, for which he was sentenced to twenty-five months of incarceration. *Y-L-*, 23 I. & N. Dec. 270, 271 (A.G. 2002). *A-G-* was convicted of two counts of felony distribution of cocaine and one count of felony conspiracy to distribute cocaine, in violation of 21 U.S.C. §§ 841, 846, for which he received concurrent sentences of one year and a day on each count. *Id.* at 271. *R-S-R-* pled guilty to felony conspiracy to possess and transport multi-kilogram quantities of cocaine from Puerto Rico to New York, in violation of 21 U.S.C. § 846, and was sentenced to twenty-four months of incarceration. *Id.* at 271, 278.

⁴⁰ See *id.* at 271; 8 U.S.C. § 1227(a)(2)(A)(iii) (“Any [noncitizen] who is convicted of an aggravated felony at any time after admission is deportable.”); 8 U.S.C. § 1227(a)(2)(B)(i) (“Any [noncitizen] who at any time after admission has been convicted of a violation of (or a conspiracy

and protection under the U.N. Convention Against Torture (“CAT”).⁴¹ Immigration judges denied Y-L- and R-S-R- all requested relief but granted A-G-’s request for withholding of removal.⁴²

On appeal, the Board, in three separate opinions, held that while the drug trafficking convictions at issue constituted aggravated felonies, they were not particularly serious crimes for purposes of withholding of removal.⁴³ The Board accordingly determined that Y-L-, A-G-, and R-S-R- were entitled to withholding of removal.⁴⁴ In so doing, the Board relied on S-S-,⁴⁵ a 1999 Board decision that held that Congress intended per se categories of particularly serious crimes to be based only on the length of sentence imposed rather than on the category or type of conviction.⁴⁶ The Board in S-S- thus concluded that the particularly serious crime inquiry required an individual assessment of the circumstances surrounding the conviction, looking to the *Frentescu* factors.⁴⁷ Looking to the individual facts in the cases before it, the Board in Y-L- looked to Y-L-, A-G-, and R-S-R-’s cooperation with federal authorities in collateral investigations, their limited criminal history records, and the sentences imposed, and concluded that the convictions at issue were not particularly serious.⁴⁸

Attorney General John Ashcroft self-certified⁴⁹ the Board’s decisions and reversed—a decision that came at a moment when

or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is deportable.”).

⁴¹ Y-L-, 23 I. & N. Dec. at 271.

⁴² *Id.* at 272 & n.5.

⁴³ *Id.* at 272.

⁴⁴ *Id.*

⁴⁵ 22 I. & N. Dec. 458 (B.I.A. 1999).

⁴⁶ Y-L-, 23 I. & N. Dec. at 270, 272; S-S-, 22 I. & N. Dec. at 461–66. The Board in S-S- rejected efforts to create a per se category of particularly serious crimes for robbery convictions.

⁴⁷ S-S-, 22 I. & N. Dec. at 462.

⁴⁸ Y-L-, 23 I. & N. Dec. at 272.

⁴⁹ The Code of Federal Regulations authorizes the Attorney General to certify cases from the Board for review. 8 C.F.R. §§ 3.1(h)(1)(i), 1003.1(h)(1)(i) (“The Board shall refer to the Attorney General for review of its decision all cases which: (i) [t]he Attorney General directs the Board to refer to him.”); see Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 741, 743 (2019) (examining forms of political interference in immigration law, including certification cases); Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority*, 101 IOWA L. REV. 841, 841, 852 (2016) (describing how attorney general certification “could play an efficacious role in the executive branch’s development and implementation of its immigration policy” and explaining how the mechanism works). Historically, attorneys general only rarely used the self-certification mechanism, and when they did avail themselves of the process, it was a means of expanding the rights of respondents by reversing or vacating the certified Board decision. See Karen M. Sams, Comment, *Out of the Hands of One: Toward Independence in Immigration Adjudication*, 5 ADMIN. L. REV. ACCORD 85, 99 (2019). This historical practice shifted in 2001 under Attorney General Ashcroft, who used the certification process in “areas such as aggravated felonies and national security.” *Id.* at 100 (footnote omitted). The use of self-certification dramatically increased under

the confluence of drug enforcement, immigration, and national security reached a national fervor in the aftermath of the attacks of September 11, 2001.⁵⁰ *Y-L-* overrules *S-S-* and holds that “aggravated

the Trump Administration; former Attorney General Jeff Sessions, for instance, certified eight cases to himself over the course of his twenty-one-month tenure, including the much-criticized *A-B-*, 27 I. & N. Dec. 316 (A.G. 2018), which sharply restricted the asylum standard. *Id.* at 102; see also Maureen A. Sweeney, *Enforcing/Protection: The Danger of Chevron in Refugee Act Cases*, 71 ADMIN. L. REV. 127, 138–39 (2019) (describing how former Attorney General Sessions used his “powers aggressively” while in office, “with the apparent goals of limiting both procedural rights and substantive legal claims”); Jeffrey S. Chase, *The AG’s Certifying of BIA Decisions*, JEFFREY S. CHASE: OPS./ANALYSIS ON IMMIGR. L. (Mar. 29, 2018), <https://www.jeffreyschase.com/blog/2018/3/29/the-ags-certifying-of-bia-decisions> [<https://perma.cc/2CWY-M4R2>]. Scholars have cautioned that the attorney general certification process deprives individuals of basic procedural protections, such as notice about when decisions are being certified or an opportunity for briefing. See Laura S. Trice, Note, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766, 1766–70 (2010).

⁵⁰ Drug enforcement, immigration enforcement, and national security have intersected throughout history, but came to a head at a time of crisis in the early 2000s. As scholars have explained, illicit drug enforcement was not perceived as a serious issue in the eyes of public or law enforcement officials prior to the 1980s, but this narrative shifted after President Ronald Reagan proclaimed a war on drugs and President George H.W. Bush described illicit drug activity as the country’s “most pressing problem.” See César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U.C. DAVIS L. REV. 197, 204–05 (2018); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 62–73 (2010) (explaining the rise of the “War on Drugs” under the Reagan administration and its close ties to race in the United States). By the end of the 1990s, a public opinion poll reported that sixty-four percent of respondents considered drugs to be the United States’ most significant problem. See García Hernández, *supra*, at 204–05. By contrast, an opinion poll in 1981 found that only three percent of respondents considered reducing the supply of drugs in the United States to be the most important method of reducing crime. See *id.*; KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 44, 55 (1997). The public concern around illicit drug activity converged with immigration enforcement and national security following the attacks of September 11, 2001. While the intersection of immigration and criminal law enforcement began taking hold in the 1980s, the aftermath of September 11 firmly cemented immigration in the country’s national security apparatus. See, e.g., García Hernández, *supra*, at 200–07 (tracing the rise of the intersection between criminal and immigration law, also known as crimmigration). Congress created the Department of Homeland Security in November 2002 to prevent terrorism, secure U.S. borders, and administer U.S. immigration laws. See *Creation of the Department of Homeland Security*, DEP’T OF HOMELAND SEC. (May 8, 2023), <https://www.dhs.gov/creation-department-homeland-security> [<https://perma.cc/3FGD-NN69>]. Moreover, drugs became explicitly tied to terrorism in the national rhetoric. See, e.g., *Narco-Terror: The Worldwide Connection between Drugs and Terrorism: Hearing Before the Subcomm. on Tech., Terrorism, & Gov’t Info. of the Comm. on the Judiciary*, 107th Cong. (2002) [hereinafter *Narco-Terror Hearing*], <https://www.govinfo.gov/content/pkg/CHRG-107shrg85660/html/CHRG-107shrg85660.htm> [<https://perma.cc/6KFG-BDEX>]; *Drug Trade and the Terror Network: Hearing Before the Subcomm. on Crim. Just., Drug Pol’y & Hum. Res. of the Comm. on Gov’t Reform*, 107th Cong. (2001), <https://www.govinfo.gov/content/pkg/CHRG-107hhr81496/html/CHRG-107hhr81496.htm> [<https://perma.cc/TBB4-37PZ>] (expressing concern that the international drug trade fueled terrorism). It is within this domestic and geopolitical context that Attorney General Ashcroft certified *Y-L-* to render drug trafficking aggravated felonies presumptively particularly serious crimes preclusive of persecution-based immigration relief. Indeed, Attorney General Ashcroft emphasized the “devastating effects of drug trafficking

felonies involving unlawful trafficking in controlled substances presumptively constitute ‘particularly serious crimes,’” which bars individuals from withholding of removal.⁵¹ In so doing, the Attorney General stated that it “might be well within [his] discretion to conclude that all drug trafficking offenses are *per se* ‘particularly serious crimes’ under the INA.”⁵² However, he explicitly purported to leave open “the possibility of the very rare case where [a noncitizen] may be able to demonstrate extraordinary and compelling circumstances that justify treating a particular drug trafficking crime as falling short of that standard.”⁵³ While the Attorney General did not “define the precise boundaries” of those unusual circumstances, *Y-L-* clearly requires that, “at a *minimum*,” a noncitizen must meet six requirements:

- (1) a very small quantity of controlled substance; (2) a very modest amount of money paid for the drugs in the offending transaction; (3) merely peripheral involvement by the [noncitizen] in the criminal activity, transaction, or conspiracy; (4) the absence of any violence or threat of violence, implicit or otherwise, associated with the offense; (5) the absence of any organized crime or terrorist organization involvement, direct or indirect, in relation to the offending activity; and (6) the absence of any adverse or harmful effect of the activity or transaction on juveniles.⁵⁴

The Attorney General then specified that “[o]nly if *all* of these criteria were demonstrated by [a noncitizen] would it be appropriate to consider whether other, more unusual circumstances . . . might justify departure from the default interpretation that drug trafficking felonies are ‘particularly serious crimes.’”⁵⁵

Although the Attorney General in *Y-L-* explicitly disclaims creating a *per se* rule that aggravated felony drug trafficking convictions are particularly serious, in practice, the stated presumption operates as such. This is apparent from the structure of the presumption and its rebuttal mechanism. A noncitizen seeking withholding of removal must meet “*all* of these criteria;”⁵⁶ failure to meet any one factor is fatal to

offenses” to the public and explicitly connected drugs and national security, stating that “international terrorists increasingly employ drug trafficking as one of their primary sources of funding.” *Y-L-*, 23 I. & N. Dec. at 276. Eight days after *Y-L-* came down, Congress held a hearing on the worldwide connection between drugs and terrorism. See *Narco-Terror Hearing*, *supra*. In this way, *Y-L-* was a decision of its time.

⁵¹ *Y-L-*, 23 I. & N. Dec. at 274.

⁵² *Id.* at 276.

⁵³ *Id.*

⁵⁴ *Id.* at 276–77.

⁵⁵ *Id.* at 277.

⁵⁶ *Id.*

overcoming the presumption.⁵⁷ Consider, for example, a student who is convicted for possession with intent to distribute for sharing prescription Adderall to a classmate who struggled to fill her prescription due to a national shortage.⁵⁸ Under *Y-L-*, the student would fail to overcome the presumption because, under the third factor, she was more than peripherally involved in sharing Adderall.

Moreover, immigration adjudicators are not permitted to even consider “other, more unusual circumstances” until all six criteria are satisfied.⁵⁹ Immigration adjudicators, for example, may not consider mental health evidence,⁶⁰ ineffective assistance of

⁵⁷ *Y-L-* further provides that “such commonplace circumstances as cooperation with law enforcement authorities, limited criminal histories, downward departures at sentencing, and post-arrest (let alone post-conviction) claims of contrition or innocence do not justify such a deviation.” *Id.*; see also *Diaz v. Holder*, 501 F. App’x 734, 739 (10th Cir. 2012) (concluding that once the BIA determined that the respondent failed to meet two of the criteria, it did not err in failing to analyze all six criteria).

⁵⁸ Brief for Petitioner at 11, *DeCarvalho v. Garland*, 18 F.4th 66 (1st Cir. 2021) (No. 20-1711). Adderall is a drug prescribed to treat attention-deficit hyperactivity disorder (“ADHD”)—a disorder that impacts 11.6% of college students in the United States. See Awista Sherzada, *An Analysis of ADHD Drugs: Ritalin and Adderall*, 3 JOHNSON CNTY. CMTY. COLL. HONORS J. 1 (2012); Kevin Antshel, Anne Stevens, Michael Meinzer & Will Canu, *How Can We Improve Outcomes for College Students with ADHD?*, ADDITUDE (Oct. 11, 2023), <https://www.additudemag.com/college-students-and-adhd-improving-outcomes> [<https://perma.cc/VCW3-P5J2>]; *Data and Statistics About ADHD*, CTR. FOR DISEASE CONTROL & PREVENTION (Oct. 16, 2023), <https://www.cdc.gov/ncbddd/adhd/data.html> [<https://perma.cc/4PRC-VF52>] (reporting that 9.8% of children aged three to seventeen years old are diagnosed with ADHD). Adderall was in short supply in 2022. See *FDA Announces Shortage of Adderall*, U.S. FDA (Aug. 1, 2023), <https://www.fda.gov/drugs/drug-safety-and-availability/fda-announces-shortage-adderall> [<https://perma.cc/2NM5-7NTZ>] (reporting that the FDA posted a shortage of Adderall); Scott Simon, *There’s a Nationwide Shortage of Adderall Even as Prescriptions Reach an All-Time High*, NPR (Sept. 17, 2022, 8:04 AM), <https://www.npr.org/2022/09/17/1123629648/theres-a-nationwide-shortage-of-adderall-as-prescriptions-reach-an-all-time-high> [<https://perma.cc/D37G-5C2H>].

⁵⁹ *Y-L-*, 23 I. & N. Dec. at 277; see also *Infante v. Att’y Gen.*, 574 F. App’x 142, 146–47 (3d Cir. 2014) (concluding that the noncitizen failed to rebut the presumption which she did not address the fifth and sixth factors even though the Board found it “troubling” that the noncitizen had been in an abusive relationship and that the noncitizen likely met the de minimis quantity and monetary criteria when the transaction involved fewer than two grams of cocaine and \$100).

⁶⁰ See, e.g., *Fernandez Segura v. Rosen*, 832 F. App’x 517, 518 (9th Cir. 2020) (Mem.) (“*Y-L-*’s presumption requires a petitioner meet the six requirements before ‘other, more unusual circumstances [such as mental health evidence] might justify departure from the presumption.’” (alteration in original)). Notably, the Board has explicitly held that immigration adjudicators “may consider a respondent’s mental health in determining whether a respondent, ‘having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States.’” *B-Z-R-*, 28 I. & N. Dec. 563, 567 (A.G. 2022). *B-Z-R-*, however, did not involve the *Y-L-* presumption and does not opine on whether immigration adjudicators may consider mental health evidence even if the respondent cannot meet all six *Y-L-* factors. See *id.* At least one non-public Board decision has applied *B-Z-R-* to the *Y-L-* context and remanded to the immigration judge to consider whether the respondent’s mental health was a “mitigating factor rebutting the presumption of a particularly serious crime,” but did not clarify whether this inquiry may occur if the six factors are not met. [Redacted] (Nov. 8, 2022) (this decision is a nonpublic decision and was

counsel,⁶¹ or the fact that “the prospective distribution was solely for social purposes, rather than for profit” until individuals demonstrate all six criteria.⁶² Nor can adjudicators consider circumstances of coercion, such as evidence that an individual was forced to transport drugs lest drug cartels murder his wife and child.⁶³ The result is that immigration adjudicators are required to maintain the presumption where any of the six criteria are unmet without the ability to consider evidence of circumstances that may be directly relevant to an individual’s ability to meet the criteria and bear on the reason this presumption was deemed rebuttable in the first place. In this way, the mechanism for rebutting the particularly serious crime presumption is rigid and preclusive.

These structural barriers are compounded by the way immigration adjudicators have implemented the presumption in practice. A review of publicly available⁶⁴ BIA decisions demonstrate that immigration

shared with the Author by the respondent’s counsel of record; a copy of the decision is on file with the Author). The Board in that case did not opine on whether the respondent could rebut the *Y-L-* presumption. *Id.* The Board did, however, emphasize that “the Agency must take all reliable, relevant information into consideration . . . including the defendant’s mental condition at the time of the crime”—strong language in favor of requiring mental health evidence to be considered even in the *Y-L-* context. *Id.* (quoting *Gomez-Sanchez v. Sessions*, 892 F.3d 985, 996 (9th Cir. 2018)).

⁶¹ See *Diaz v. Holder*, 501 F. App’x 734, 737 (10th Cir. 2012).

⁶² *Y-L-*, 23 I. & N. Dec. at 277; see also *Infante*, 574 F. App’x at 146–47.

⁶³ See, e.g., *Sanabria Morales v. Barr*, 967 F.3d 15, 16, 21 (1st Cir. 2020) (finding that the noncitizen failed to rebut the presumption because he did not meet all six criteria even though he was forced to transport drugs by drug cartels who threatened to murder his wife and young child); Summary Order, *Nderere v. Holder*, 467 F. App’x 56, 59 (2d Cir. 2012) (remanding for the BIA to determine whether it is reasonable to exclude factors of coercion and duress in determining whether a crime is a particularly serious crime).

⁶⁴ This Author co-submitted a Freedom of Information Act (“FOIA”) inquiry with the Executive Office of Immigration Review (“EOIR”) requesting the number of cases in which respondents overcame *Y-L-*’s six-criteria test and copies of those cases. EOIR indicated that it could not produce this information or copies of any cases “because EOIR does not track this data.” See *FOIA Litigation*, NAT’L IMMIGR. LITIG. ALL., <https://immigrationlitigation.org/transparency-litigation-foia/> [<https://perma.cc/FA3J-KSET>]. Accordingly, this analysis of *Y-L-*’s implementation is based on all publicly available immigration judge and BIA decisions on Westlaw, Lexis, and Ben Winograd’s Index of Unpublished BIA Decisions, as well as federal appellate court decisions reviewing nonpublic Board decisions applying *Y-L-*. This Author notes, however, that many Board decisions are not made publicly available. The Board generally does not make publicly available unpublished decisions, which comprise the vast majority of its decisions. See U.S. DEP’T OF JUST., BD. OF IMMIGR. APPEALS PRAC. MANUAL § 1.4(d)(1) (2022) (“The vast majority of the Board’s decisions are unpublished, but the Board periodically selects cases to be published.”). From 2012 to 2016, the BIA issued 30,000 decisions each year, but only designated about 30 as precedential each year. See Raul Pinto, *The Board of Immigration Appeals Will Now Provide the Public with Access to Its Unpublished Decisions*, IMMIGR. IMPACT (Feb. 15, 2022), <https://immigrationimpact.com/2022/02/15/board-of-immigration-appeals-unpublished-decisions/> [<https://perma.cc/X8MN-9UPG>]. This practice is slated to gradually change pursuant to a settlement agreement arising from a lawsuit by the New York Legal Assistance Group. Stipulation of Settlement, *N.Y. Legal Assistance Grp. v. BIA*, No. 18-CV-09495 (S.D.N.Y. Feb. 9, 2022). Under the settlement, the Board is required to post its past decisions to a reading room. *Id.* at *3. This release will be gradual,

adjudicators have erected unreasonable evidentiary standards for the six criteria. As to the first and second criteria, immigration adjudicators have held that \$320 does not meet *Y-L*-’s “*de minimis* or inconsequential”⁶⁵ value criteria,⁶⁶ and that ten pounds of marijuana and five ounces of cocaine do not meet the *de minimis* volume criteria.⁶⁷ Indeed, in *Diaz v. Holder*,⁶⁸ the immigration judge found that the individual had rebutted the *Y-L*- presumption where the offense involved only sixteen pills and \$320.⁶⁹ On appeal, however, the Board reversed, summarily concluding that the immigration judge wrongly determined that \$320 was a *de minimis* value.⁷⁰

As to the peripheral involvement and lack of violence requirements under the third and fourth criteria, immigration adjudicators have rigidly relied on indictments and guilty pleas to find direct involvement without considering the circumstances of that involvement. In one case, a woman pleaded guilty to a grand jury indictment charging her with selling or dispensing 1.62 grams of cocaine to a police detective for \$100.⁷¹ In her immigration removal proceedings, the woman testified that she had an abusive partner who forced her to accompany him to drug sales and that, while she did not take money for the drugs, she pleaded guilty to the offense.⁷² Affirming the Board’s conclusion that she had not rebutted the presumption, the Third Circuit held that notwithstanding the *de minimis* volume and value involved and her testimony regarding the circumstances of the offense, her guilty plea was dispositive of the peripheral involvement criteria.⁷³ As to the sixth

however; the Board is set to post fifty percent of its past unpublished decisions by July 2026 and all of its past decisions by July 2027. *See id.* at *6. The reading room launched in January 2023. *FOIA Public Access Link (PAL)*, EXEC. OFF. OF IMMIGR. REV., <https://foia.eoir.justice.gov/app/Reading-Room.aspx> [<https://perma.cc/GY87-PE8K>]. In the meantime, nonpublic Board decisions must be accessed through a FOIA request. *See Emily Creighton, In a Win for Transparency, Court Orders Board of Immigration Appeals to Make Immigration Court Decisions Public*, IMMIGR. IMPACT (Feb. 18, 2021), <https://immigrationimpact.com/2021/02/18/immigration-court-decisions-public/> [<https://perma.cc/X8MN-9UPG>].

⁶⁵ *Y-L*-, 23 I. & N. Dec. at 277.

⁶⁶ *See Diaz*, 501 F. App’x at 737 (explaining that the immigration judge found that the individual rebutted the *Y-L*- presumption, but the BIA reversed because, *inter alia*, \$320 was not “*de minimis* or inconsequential”); *see also Abdulahad v. Barr*, 838 F. App’x 126, 133 (6th Cir. 2020) (holding that \$1000 to \$1500 is not a *de minimis* value).

⁶⁷ *See, e.g., Hui Zhao v. Att’y Gen.*, 191 F. App’x 160, 163 (3d Cir. 2006); *see also Abdulahad*, 838 F. App’x at 133 (finding that 500 grams of cocaine is not a small quantity).

⁶⁸ 501 F. App’x 734 (10th Cir. 2012).

⁶⁹ *Id.* at 737.

⁷⁰ *Id.* (affirming the Board’s finding that the respondent did not rebut the *Y-L*- presumption).

⁷¹ *See Infante v. Att’y Gen.*, 574 F. App’x 142, 146 (3d Cir. 2014).

⁷² *Id.* at 144, 146.

⁷³ *See id.* at 146–47 (“While it is troubling that Santos-Infante was in an abusive relationship, the evidence . . . was not strong enough to overcome the presumption . . . especially when she pleaded guilty to being the actor who committed the crime.”).

factor regarding the adverse effect of the activity on juveniles, immigration adjudicators have found that an individual fails to meet this requirement where he lives with his nine-year-old child⁷⁴ and where the conduct occurred within 1,000 feet of a school.⁷⁵

Tellingly, one federal reviewing court took at face value that *Y-L-* is, as it claims to be, rebuttable, reasoning that the compelling circumstances of the case before it may well rebut the presumption—yet, on remand, the Board maintained the presumption. In *Ford v. Bureau of Immigration & Customs Enforcement, Interim Field Office Director for Detention and Removal*,⁷⁶ the court held that *Y-L-* was, in fact, a rebuttable presumption and further opined that, based on the facts of the case, there was a possibility that it was “one of the ‘unusual circumstances’ where departure from the presumption might be justified.”⁷⁷ In that case, only a “small amount of cocaine” was involved; the noncitizen “testified that he had no involvement in the criminal activity” and was instead “merely in the wrong place at the wrong time”; the offense did not involve violence, organized crime, or adverse impact on juveniles.⁷⁸ On remand, however, the BIA held that no such departure was warranted because he failed to meet the *Y-L-* exception.⁷⁹

Quite apart from setting unreasonable standards for rebutting the presumption, many immigration adjudicators simply fail to acknowledge that rebuttal is possible, much less conduct any rebuttal analysis. A review of publicly available Board cases illustrates varying degrees of inadequate application. Immigration adjudicators frequently summarily state that an individual is precluded from withholding of removal because their drug trafficking aggravated felony is a particularly serious crime by citing *Y-L-* without anywhere acknowledging that *Y-L-* creates a rebuttable presumption, not an automatic rule.⁸⁰ Where immigration adjudicators do allude to the presumption, they do so in a boilerplate parenthetical—“aggravated felonies involving unlawful trafficking in controlled substances are presumptively particularly serious

⁷⁴ See *Delgado-Arteaga v. Sessions*, 856 F.3d 1109, 1113 (7th Cir. 2017), *overruled on other grounds by* *Garcia v. Sessions*, 873 F.3d 553 (7th Cir. 2017).

⁷⁵ *Floreal v. Att’y Gen.*, 606 F. App’x 35, 38 (3d Cir. 2015).

⁷⁶ 294 F. Supp. 2d 655 (M.D. Pa. 2003).

⁷⁷ *Id.* at 662–63 n.6.

⁷⁸ *Id.*

⁷⁹ See Brief in Support of Appellant at 3–5, *Ford v. Bureau of Immigr. & Customs Enf’t*, 151 F. App’x 152 (3d Cir. 2005) (No. 04-3652), 2004 WL 5040622.

⁸⁰ See, e.g., *Andre M. Gibbs*, XXXX-XXX-841, 2006 Immig. Rptr. LEXIS 6750, at *2 (B.I.A. Nov. 17, 2006) (stating summarily that the “conviction is for a drug trafficking offense that is both an aggravated felony and a particularly serious crime” with no further explanation (citing *Y-L-*, 23 I. & N. Dec. 270, 276 (A.G. 2002))); *Delroy Jones*, XXXX-XXX-141, 2006 Immig. Rptr. LEXIS 12427, at *2 (B.I.A. Dec. 14, 2006) (same); *Devon Bercham Kelly*, XXXX-XXX-863, 2008 Immig. Rptr. LEXIS 10610, at *10 (B.I.A. Apr. 17, 2008) (same); *Kwesi Shermon Bates*, XXXX-XXX-987, 2006 Immig. Rptr. LEXIS 10625, at *2 (B.I.A. July 25, 2006) (same).

crimes”—and summarily apply the presumption without acknowledging that the presumption is rebuttable, much less analyze whether the respondent has overcome the presumption.⁸¹ And where immigration adjudicators acknowledge that the presumption may be overcome in “the most extenuating circumstances that are both extraordinary and compelling,” they do not elucidate the six mandatory criteria nor actually determine whether the case presents such extenuating circumstances.⁸² At least one reviewing court has suggested that, given the failure to recognize the rebuttable presumption, it is unclear whether immigration adjudicators are “even aware of the exceptions to the presumption of seriousness announced in *Y-L-*.”⁸³ What is clear, however, is the practical effect of *Y-L-* as implemented: the presumption, once triggered, is dispositive.

⁸¹ See, e.g., Cecilia D. Guerrero, AXXX-XXX-565, 2016 Immig. Rptr. LEXIS 3891, at *4 (B.I.A. Feb. 10, 2016) (stating the proposition that “aggravated felonies involving unlawful trafficking in controlled substances are presumptively particularly serious crimes,” but finding that the “respondent has not put forth any argument to rebut application of the presumption in this case” (citing *Y-L-*, 23 I. & N. Dec. at 276)); Donald Duterval, AXXX-XXX-316, 2015 Immig. Rptr. LEXIS 26377, at *1–2 (B.I.A. Apr. 9, 2015) (stating that “we are sympathetic to the respondent’s case,” but finding him ineligible from withholding relief because his aggravated felony involving trafficking in a controlled substance is “presumptively deemed to constitute [a] particularly serious crime” (citing *Y-L-*, 23 I. & N. Dec. at 276)); Jose Manuel Bueno-Mercado, AXXX-XXX-194, 2010 Immig. Rptr. LEXIS 4141, at *3 (B.I.A. Oct. 25, 2010) (stating the proposition that “aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute ‘particularly serious crimes’” (quoting *Y-L-*, 23 I. & N. Dec. at 276)); Marc David Cadet, AXXX-XXX-303, 2008 Immig. Rptr. LEXIS 10167, at *2 (B.I.A. Dec. 17, 2008) (same); Mario D. Hernandez-Aguilar, AXXX-XXX-409, 2012 Immig. Rptr. LEXIS 4489, at *2 (B.I.A. Apr. 25, 2012) (same); Rene Marcelo Villarreal-Guajardo, AXXX-XXX-354, 2011 Immig. Rptr. LEXIS 1229, at *2 (B.I.A. May 4, 2011) (same); Luis C. Paulino, AXXX-XXX-037, 2014 Immig. Rptr. LEXIS 257, at *2–3 (B.I.A. Jan. 17, 2014) (same).

⁸² See, e.g., Hatim Jamil Zakar, AXXX-XXX-033, 2017 Immig. Rptr. LEXIS 25428, at *8 (B.I.A. Sept. 22, 2017) (stating the proposition that “convictions for drug trafficking crimes are presumptively convictions for particularly serious crimes under the Act unless the respondent demonstrates ‘the most extenuating circumstances that are both extraordinary and compelling’” (quoting *Y-L-*, 23 I. & N. Dec. at 274)); *Lavira v. Att’y Gen.*, 478 F.3d 158, 165 (3d Cir. 2007), *overruled on other grounds by Pierre v. Att’y Gen.*, 528 F.3d 180 (3d Cir. 2008) (remanding where the immigration judge failed to mention the six-part test, causing the court to “question, therefore, whether the IJ ever actually applied *Matter of Y-L-*”); *Sanabria Morales v. Barr*, 967 F.3d 15, 23–24 (1st Cir. 2020) (Thompson, J., dissenting) (explaining that the immigration judge and the Board legally erred by “appl[ying] the presumption” and making “[n]o reference to or discussion of the rest of the *Matter of Y-L-* test and its caveat with respect to extraordinary and compelling circumstances”).

⁸³ Summary Order, *Gelaneh v. Ashcroft*, 153 F. App’x 881, 887 (3d Cir. 2005); cf. Donald Adams, AXXX-XXX-350, 2005 Immig. Rptr. LEXIS 10613, at *3 (B.I.A. Dec. 19, 2005) (citing the *Y-L-* presumption and the need for “extenuating circumstances that are both extraordinary and compelling” to overcome the presumption) (remanding for the immigration judge to hold an evidentiary hearing to determine whether the respondent was convicted of a particularly serious crime for eligibility for withholding of removal and CAT protection).

As a result of these implementation realities, few, if any, cases have successfully rebutted the *Y-L-* presumption since its inception in 2003. In a First Circuit case in 2021, the government conceded at oral argument that it was not aware of any case that successfully rebutted the *Y-L-* presumption.⁸⁴ The First Circuit emphasized this dearth with concern and remanded to, inter alia, “provide the Attorney General with an opportunity to consider whether, based on the experience of two decades and Congress’s increasingly nuanced view of drug trafficking offenses, *Matter of Y-L-* may have turned out to over-shoot the mark.”⁸⁵

Only one publicly available Board decision has successfully rebutted the presumption.⁸⁶ In *R-G-G-*,⁸⁷ the BIA concluded, without much explanation, that the respondent’s 1992 California conviction for possession of cocaine base for sale was not a particularly serious crime because two to three grams of cocaine base is a “very small quantity of controlled substance,” \$80 to \$100 is a “very modest amount of money,” and “the additional aggravating factors specified in *Matter of Y-L-* are not present.”⁸⁸ While *R-G-G-*’s outcome in successfully overcoming the *Y-L-* presumption is atypical, the Board’s minimal explanation of its conclusion is assuredly typical of its approach to the presumption.

Y-L- thus serves as an example of a particular kind of presumption—an (ir)rebuttable presumption—that is explicitly rebuttable in name but may, in fact, be irrebuttable in practice. *Y-L-*, in this way, also serves as a cautionary example against accepting at face value a presumption’s claim to be rebuttable.⁸⁹

⁸⁴ *DeCarvalho v. Garland*, 18 F.4th 66, 70 (1st Cir. 2021); Oral Argument at 16:51, *DeCarvalho*, 18 F.4th 66 (No. 20-1711), https://www.ca1.uscourts.gov/sites/ca1/files/oralargs/20-1711_20210406-0832_01d5f06d17ba1430.mp3 [<https://perma.cc/FVA2-BEE6>].

⁸⁵ *DeCarvalho*, 18 F.4th at 71. As of the publication of this Article, this case remains pending on remand before the Board.

⁸⁶ This Article notes that it is possible that there are nonpublic cases that have successfully rebutted the presumption at the immigration judge or Board level. Decisions by the immigration judge and the Board, however, are largely not made public for privacy reasons. *See supra* note 64.

⁸⁷ AXXXXXX-495 (B.I.A. Mar. 2, 2016) (on file with the Author, obtained from Ben Winograd’s Index of Unpublished BIA Decisions).

⁸⁸ *Id.*

⁸⁹ *See, e.g., Miguel-Miguel v. Gonzales*, 500 F.3d 941, 945–47 (9th Cir. 2007) (emphasizing that the “Attorney General in *Y-L-* purported *not* to be creating a per se rule” and thus “[p]resumably *Y-L-* will be interpreted consistent with this statement and there will be some cases in which the exception applies”); *Fernandez Segura v. Rosen*, 832 F. App’x 517, 518 & n.1 (9th Cir. 2020) (Mem.) (affirming *Miguel-Miguel* and holding that *Y-L-* “did not designate drug trafficking crimes as per se particularly serious crimes”); *Reyes-Sanchez v. Ashcroft*, 261 F. Supp. 2d 276, 287 (S.D.N.Y. 2003) (same); *Ford v. Bureau of Immigr. & Customs Enf’t*, 151 F. App’x 152, 154 (3d Cir. 2005) (per curiam) (emphasizing that “*Y-L-* concluded its discussion of particularly serious crime[s] with an unambiguous disavowal” of creating a per se category).

II. A FRAMEWORK FOR EFFECTIVELY IRREBUTTABLE PRESUMPTIONS

Determining whether an ostensibly rebuttable presumption as in *Y-L-* is properly rebuttable or is in fact irrebuttable in practice presents a definitional inquiry—the contours of which have not yet been drawn. While courts and scholars have much discussed rebuttable presumptions and irrebuttable presumptions, none have identified or interrogated in any normative sense the interstitial category of presumptions that this Article refers to as effectively irrebuttable presumptions. This Part fills this gap by proffering a framework for effectively irrebuttable presumptions.

Drawing the contours of effectively irrebuttable presumptions is not a mere theoretical exercise; indeed, (ir)rebuttable presumptions may carry severe consequences. Where such effectively irrebuttable presumptions have a preclusive effect on forms of humanitarian relief, as in *Y-L-*, noncitizens may be deported to countries where they may be tortured or killed without a meaningful opportunity to defend against deportation. Mr. Sanchez's case illuminates these consequences. The immigration judge and the Board in his case did not inform him that the *Y-L-* presumption was rebuttable,⁹⁰ but whether this omission would have impacted the outcome of the case is doubtful. The presumption as structured prohibited the immigration judge and the Board from considering the circumstances of duress and coercion that forced Mr. Sanchez to transport drugs in the first instance and precluded Mr. Sanchez from overcoming the presumption.⁹¹ Mr. Sanchez was accordingly deemed to have been convicted of a particularly serious crime and barred from withholding of removal relief.⁹² As a result, he was ordered deported to a country where cartel members had threatened to murder his family.⁹³ Failure to interrogate the effect of presumptions—and whether and when ostensibly rebuttable presumptions cross into irrebuttable territory—thus has consequences of potentially fatal magnitude.

This Part begins by setting forth the extant taxonomy of rebuttable and irrebuttable presumptions as they are understood by courts and scholars. It then turns to the unexplored category of *effectively*

⁹⁰ *Sanabria Morales v. Barr*, 967 F.3d 15, 23 (Thompson, J., dissenting) (“[T]he IJ made no mention of the extraordinary-and-compelling-circumstances piece of the *Matter of Y-L-* test . . .”).

⁹¹ *See supra* Part I.

⁹² The immigration judge and the Board denied Mr. Sanchez's application for CAT protection after concluding that he did not demonstrate that he would be harmed by or with the acquiescence of the Venezuelan government. *See Sanabria Morales v. Barr*, 967 F.3d at 20.

⁹³ *See id.* at 21.

irrebuttable presumptions, drawing upon civil cases⁹⁴ that allude in a descriptive sense to such presumptions.

A. *Taxonomy of Rebuttable and Irrebuttable Presumptions*

Presumptions are a “permanent fixture” in U.S. civil law.⁹⁵ Yet, as many scholars have recognized, they are “the slipperiest member[s] of the family of legal terms.”⁹⁶ The Supreme Court has broadly defined a presumption as a “mandatory inference drawn from a fact in evidence.”⁹⁷ Scholars have more particularly defined presumption as “a predicate showing of facts that are logically linked to a resulting assumption or conclusion.”⁹⁸ In plain terms, a presumption provides that if fact X is true, then conclusion Y follows.⁹⁹

Rebuttable presumptions, then, are conclusions that, once drawn, may be overcome by introducing contrary evidence. Such presumptions “plac[e] upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it.”¹⁰⁰ In this way, rebuttable

⁹⁴ Use of presumptions in the criminal context involve different considerations that are beyond the scope of this Article. For discussion of the use of presumptions in criminal proceedings, see generally Harold A. Ashford & D. Michael Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165 (1969).

⁹⁵ See Hjelmaas, *supra* note 22, at 429, 433.

⁹⁶ James J. Duane, *The Constitutionality of Irrebuttable Presumptions*, 19 REGENT U. L. REV. 149, 158 (2006) (quoting 2 KENNETH S. BROUN, GEORGE E. DIX, EDWARD J. IMWINKELRIED, D. H. KAYE, ROBERT P. MOSTELLER, E. F. ROBERTS, JOHN W. STRONG & ELEANOR SWIFT, MCCORMICK ON EVIDENCE 497 (6th ed. 2006)). Scholars and courts have lamented that, despite the prevalence of presumptions in our legal system, courts and lawmakers have not settled on a uniform understanding of the concept. See Leo H. Whinery, *Presumptions and Their Effect*, 54 OKLA. L. REV. 553, 553–55 (2001) (describing “presumption” as “the slipperiest member of the family of legal terms,” and setting forth at least seven ways the term has been used by courts and lawmakers); 21 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE EVIDENCE § 5124 (2d ed. 2023) (lamenting that Congress and courts have failed to define presumption).

⁹⁷ Taylor v. Kentucky, 436 U.S. 478, 483 n.12 (1978).

⁹⁸ Maritza Karmely, *Presumption Law in Action: Why States Should Not Be Seduced into Adopting a Joint Custody Presumption*, 30 NOTRE DAME J.L. ETHICS & PUB. POL’Y 321, 331 (2016) (quoting Nancy Ver Steegh & Dianna Gould-Saltman, *Joint Legal Custody Presumptions: A Troubling Legal Shortcut*, 52 FAM. CT. REV. 263, 266 (2014)). Black’s Law Dictionary defines “presumption” as a “legal inference or assumption that a fact exists because of the known or proven existence of some other fact or group of facts.” *Presumption*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁹⁹ See WRIGHT & MILLER, *supra* note 96, at § 5124 (“A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action.” (quoting Uniform Rule 13)).

¹⁰⁰ FED. R. EVID. 301 advisory committee’s note on proposed rule; *Rebuttable Presumption*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“An inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence.”).

presumptions are evidentiary devices that switch the burden of proof or persuasion¹⁰¹ to the party subject to the presumption to rebut it.¹⁰²

An irrebuttable presumption, by contrast, is a “substantive rule of law that requires the finding of a presumed fact once certain basic facts are established.”¹⁰³ Once a triggering fact X is demonstrated, fact Y is automatically taken as true as a matter of law without any opportunity for the individual to challenge the veracity of fact Y. No burden shifting occurs, and the irrebuttable presumption “simply ends the discussion entirely.”¹⁰⁴

As the Supreme Court and scholars have recognized, irrebuttable presumptions are synonymous with conclusive presumptions¹⁰⁵ and per se rules.¹⁰⁶ The Supreme Court in *Michael H. v. Gerald D.*,¹⁰⁷ for example, acknowledged that an irrebuttable presumption is the same as a

¹⁰¹ Scholars have noted different approaches to rebuttable presumptions: in one, the presumption disappears upon the appearance of any contradicting evidence by the other party (the so-called “bursting bubble” theory); one where both the burden of proof and burden of persuasion shift to the party; and an intermediate position under which only the burden of proof shifts to the party but a presentation of contradicting evidence does not automatically defeat the presumption. See, e.g., Hjelmaas, *supra* note 22, at 436–38; Whinery, *supra* note 96 at 556–67. Federal Rule of Evidence 301, governing presumptions in civil cases, adopts this latter intermediate approach. See WRIGHT & MILLER, *supra* note 96, R. 301.

¹⁰² See John M. Phillips, Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449, 451 n.7 (1975); Whinery, *supra* note 96, at 553–55 (describing different types of presumptions in the civil and criminal contexts).

¹⁰³ See Hjelmaas, *supra* note 22, at 433 (explaining that an irrebuttable presumption, also referred to as a conclusive presumption, differs from a rebuttable presumption because no rebuttable evidence will be admitted); Phillips, *supra* note 102, at 451 (explaining that an irrebuttable presumption “may arise whenever a provision states or implies that one fact (the basic fact) is conclusive evidence of another fact (the presumed fact) that provides the ostensible rationale for the classification established by the provision”).

¹⁰⁴ Duane, *supra* note 96, at 158; see also JACK B. WEINSTEIN & MARGARET A. BERGER, 1 WEINSTEIN’S EVIDENCE MANUAL § 5.02 (1987) (“Fact B becomes another way of stating fact A if the presumption is irrebuttable.”).

¹⁰⁵ Black’s Law Dictionary defines conclusive, absolute, irrebuttable, and mandatory presumptions as synonymous. *Presumption*, BLACK’S LAW DICTIONARY (11th ed. 2019). Indeed, some scholars question whether irrebuttable presumptions should be considered “presumptions” at all. See Duane, *supra* note 96, at 160 (“[C]ourts and legal scholars universally agree that any so-called ‘irrebuttable presumption,’ regardless of whether one chooses as a matter of semantics to call it a true presumption, is not really a rule of evidence at all, but is actually a rule of *substantive* law masquerading in the traditional language of a presumption. . . . Any ordinary rule of substantive law can be easily recast into the language of an irrebuttable presumption, and vice versa, with no change in its meaning or operation.”); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 1 FEDERAL EVIDENCE § 3:6 (4th ed. 2023) (stating that conclusive or irrebuttable presumptions “are not really presumptions”); WEINSTEIN & BERGER, *supra* note 104 (“A so-called irrebuttable presumption does not satisfy the definition of a presumption because fact B must be assumed conclusively rather than conditionally.”).

¹⁰⁶ See *Coleman v. Thompson*, 501 U.S. 722, 737 (1991) (using “conclusive presumption” and “per se rule” interchangeably).

¹⁰⁷ 491 U.S. 110 (1989).

substantive rule of law, regardless of “whether framed in terms of a presumption or not.”¹⁰⁸ At issue in that case was a procedural and substantive due process challenge to a California state law that provided that, for purposes of determining legal parentage, a child is “conclusively presumed” to be the child of a wife and her husband if they live together and are neither sterile or impotent, even if the child was fathered out of wedlock.¹⁰⁹ As the Court opined, although an individual subject to an irrebuttable presumption¹¹⁰ is denied a particularized proceeding or any ability to refute the assumed fact, the same is true for any substantive rule of law that establishes classifications. In other words, “there is no difference between a rule which says that the marital husband shall be irrebuttably presumed to be the father, and a rule which says that the adulterous natural father shall not be recognized as the legal father.”¹¹¹

Having set forth the categorical foundation for rebuttable and irrebuttable presumptions, the next Section develops a framework for understanding a new, interstitial category of presumptions: effectively irrebuttable presumptions.

B. *Defining Effectively Irrebuttable Presumptions*

Effectively irrebuttable presumptions stand at the interstice between rebuttable and irrebuttable presumptions. They take the name of the former—individuals subject to them are entitled to an opportunity to demonstrate before an adjudicator that they overcome the presumption. In the *Y-L-* context, for example, respondents seeking withholding of removal are entitled to an individual merits hearing before an immigration judge to demonstrate their eligibility for relief. But effectively irrebuttable presumptions embody the consequences of irrebuttable presumptions—once the triggering fact is established, the conclusion automatically and irrevocably follows.

To understand the scope of effectively irrebuttable presumptions, it is useful to consider as a foil what *is* a properly rebuttable presumption. Consider, for example, the well-founded fear presumption in asylum law. To obtain asylum, an individual must demonstrate past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.¹¹² Where an asylum seeker demonstrates past perse-

¹⁰⁸ *Id.* at 119–20 (1989).

¹⁰⁹ *Id.* at 117 (quoting CAL. EVID. CODE § 621 (West 1989)).

¹¹⁰ The Supreme Court used the terms “conclusive presumption” and “irrebuttable presumption” interchangeably throughout the decision. *See id.* at 120–21.

¹¹¹ *Id.* at 120.

¹¹² *See* 8 U.S.C. § 1101(a)(42)(A) (defining a refugee as a person “unable or unwilling to return” to the country of origin because of “persecution or a well-founded fear of persecution” based on a protected ground); 8 C.F.R. §§ 208.13(b), 1208.13(b) (2022) (“The applicant may qualify

cution, that finding does not guarantee a grant of asylum;¹¹³ rather, past persecution establishes a presumption of future persecution,¹¹⁴ which the government may rebut by demonstrating by a preponderance of the evidence either that circumstances have changed such that the asylum seeker no longer has a well-founded fear of persecution, or that they can avoid future persecution by relocating to another part of their country of origin and that it would be reasonable to expect them to do so.¹¹⁵ If the government rebuts the presumption of future persecution, an individual is generally ineligible for asylum.¹¹⁶

A review of the caselaw demonstrates that the government regularly rebuts the well-founded fear presumption under both prongs.¹¹⁷ The government, for example, has demonstrated changed circumstances through changed political conditions, such as when the persecuting government has been removed from power¹¹⁸ or changed

as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.”).

¹¹³ See DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* § 2:17 (2023 ed.).

¹¹⁴ 8 C.F.R. §§ 208.13(b)(1), 1208.13(b)(1) (2022) (“An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim.”).

¹¹⁵ 8 C.F.R. §§ 208.13(b)(1)(i)–(ii), 1208.13(b)(1)(i)–(ii) (2022) (explaining that once the past persecution presumption is triggered, the burden shifts to the government to establish by a preponderance of the evidence either changed circumstances or that internal relocation is possible and reasonable).

¹¹⁶ If the government rebuts the presumption of a well-founded fear of future persecution, an asylum seeker may try to seek past-persecution-only asylum, also known as humanitarian asylum. A grant of humanitarian asylum requires establishing that there are compelling reasons arising out of the severity of the past persecution or the possibility of “other serious harm” in the applicant’s country of origin. See 8 C.F.R. §§ 208.13(b)(1)(iii)(B), 1208.13(b)(1)(iii)(B); Chen, 20 I. & N. Dec. 16, 19 (B.I.A. 1989).

¹¹⁷ See generally ANKER, *supra* note 113, §§ 2:19–2:22 (explaining the presumption and providing ample examples of cases in which the government rebutted the presumption). See also IRA J. KURZBAN, *IMMIGRATION LAW SOURCEBOOK* § 7h. (17th ed. 2020) (providing ample examples of cases in which the government rebutted the presumption).

¹¹⁸ See, e.g., *Thapachhetri v. Sessions*, 690 F. App’x 726, 728 (2d Cir. 2017) (holding that the government rebutted the presumption of future persecution because, although the individual was previously persecuted on account of his membership in a political party, that political party was now in power); *Trifoni v. Holder*, 351 F. App’x 19, 23 (6th Cir. 2009) (same); *Shehu v. Gonzales*, 443 F.3d 435, 437 (5th Cir. 2006) (holding that the government rebutted the presumption of future persecution when the government that previously persecuted the individual was no longer in power); *Mambwe v. Holder*, 572 F.3d 540, 547–49 (8th Cir. 2009) (concluding that the government rebutted the presumption of future persecution when the civil war in Angola had ended); *Singh v. Holder*, 753 F.3d 826, 833 (9th Cir. 2014) (concluding that country reports from the United States and the United Kingdom were sufficient to determine that there were changed conditions in India that affected the applicant’s claim that he would be persecuted as a Sikh member of a political party); *Ruci v. Holder*, 741 F.3d 239, 243–44 (1st Cir. 2013) (relying on 2009 Department of State report to establish changed conditions for Greeks in Albania); *Koliada v. INS*, 259 F.3d 482, 488 (6th Cir. 2001) (concluding that the government rebutted the presumption of future persecution when the political group that the asylum seeker supported was now in power in Ukraine).

personal circumstances of the asylum seeker.¹¹⁹ The government has also rebutted the presumption by demonstrating that the asylum seeker could relocate within the country.¹²⁰ In the view of at least one circuit, the government can meet its burden of rebutting the well-founded fear presumption without introducing its own evidence.¹²¹ The presumption of a well-founded fear of future persecution in asylum law is thus rebuttable in both name and practice, and stands in stark contrast to the *Y-L*-presumption.¹²²

In this view, federal appellate courts ought not, as they have in the *Y-L*-context, reject out of hand arguments that an ostensibly rebuttable presumption, in fact, effectively creates a *per se* rule.¹²³ A number of federal courts beyond the immigration context have looked beneath the textual surface and alluded to the concept of effectively irrebuttable presumptions.¹²⁴ Although these courts have not reached any normative conclusions about the constitutionality of such effectively irrebuttable presumptions, interrogating the contexts in which courts have invoked the concept is informative.

Drawing upon these cases, this Section establishes a definitional framework for effectively irrebuttable presumptions: a so-called rebuttable presumption crosses to being (ir)rebuttable where there is no realistic probability that the presumption can be rebutted. This may occur when one or more of the following four characteristics are present:

¹¹⁹ See, e.g., *Singh v. Barr*, 920 F.3d 255, 258 (5th Cir. 2019) (concluding that the government rebutted the presumption of future persecution when the asylum seeker testified that he was no longer politically active); *Ming Li Hui v. Holder*, 769 F.3d 984, 986–87 (8th Cir. 2014) (holding that the government rebutted the presumption when the asylum seeker, who claimed membership in a social group involving an abusive parent, turned 18); *Ixtlilco-Morales v. Keisler*, 507 F.3d 651, 653–55 (8th Cir. 2007) (holding that the applicant’s status as an adult was a changed circumstance for purposes of the presumption because his claim was based upon his mistreatment as a homosexual child).

¹²⁰ See, e.g., *Sherpa v. Barr*, 822 F.App’x 5, 6 (2d Cir. 2020) (upholding the Board’s conclusion that the government rebutted the presumption because the asylum seeker could reasonably relocate to another part of the country of origin, given that he had lived there for eight or nine months without being persecuted); *Saldana v. Lynch*, 820 F.3d 970, 976–78 (8th Cir. 2016) (concluding that the government rebutted the presumption because the applicant could relocate to another region); *Singh v. Holder*, 720 F.3d 635, 641–43 (7th Cir. 2013) (concluding that the government rebutted the presumption because Sikhs were no longer in danger in India and the asylum seeker could safely relocate).

¹²¹ See, e.g., *Singh*, 920 F.3d at 260 (concluding that the Board did not err in affirming that the government rebutted the presumption by using the asylum seeker’s cross-examination testimony because the regulations only “require[] the DHS to rebut the presumption by the preponderance of the evidence, not by *its* [own] evidence”); *Soto-Gomez v. Barr*, 815 F.App’x 782, 783 (5th Cir. 2020) (affirming that the government rebutted the presumption based solely on the asylum seeker’s own testimony that he had family in safer cities in Honduras).

¹²² See *supra* Part I.

¹²³ See *supra* notes 20–22.

¹²⁴ See, e.g., *Berry v. Sullivan*, 738 F. Supp. 942, 945 (W.D. Pa. 1990); *infra* Sections III.B.1–4.

(1) at a threshold level, adjudicators fail to apply the rebuttal standard at all and instead treat the presumption, once triggered, as dispositive, even where adjudicators do apply the presumption; (2) structural barriers inhibit a party from rebutting it; (3) adjudicators set an unreasonable evidentiary standard for rebutting the presumption; or (4) few, if any, cases have successfully rebutted the presumption. At bottom, an effectively irrebuttable presumption, whether based on one or a combination of these characteristics, is one where no amount of evidence proffered will reasonably rebut the presumption.

1. Adjudicators Fail to Evaluate Whether the Presumption Is Rebutted

Quite apart from *how* adjudicators employ the rebuttal standards is *whether* adjudicators, in fact, employ the rebuttal standard at all. Indeed, courts have found ostensibly rebuttable presumptions irrebuttable in practice when the adjudicator fails to conduct sufficient analysis of the rebuttal standard, reasonable or not, in the first instance.

In *Berry v. Sullivan*,¹²⁵ for example, the district court concluded that the presumption could, in theory, be rebutted but that, as implemented, it was irrebuttable.¹²⁶ *Berry* involved a claim for disability insurance and supplemental security income under the Social Security Act (“SSA”).¹²⁷ Under the SSA, an individual who is deemed to engage in “substantial gainful activity” during the period of claimed disability is ineligible for benefits.¹²⁸ Implementing regulations at the time provided that an applicant earning more than \$300 per month is presumed to engage in substantial gainful activity.¹²⁹ That presumption could be rebutted by showing that the applicant was not engaged in substantial activity “by evidence of the nature of the applicant’s work, the conditions of employment[,] and the adequacy of the applicant’s performance.”¹³⁰ The administrative law judge (“ALJ”) in *Berry* determined that the applicant triggered the presumption of substantial gainful activity and thus was ineligible for benefits for part of the claimed period because she received a stipend of \$400 per month as a foster parent.¹³¹

The district court reversed the ALJ’s decision because it treated the presumption as dispositive.¹³² The district court observed that

¹²⁵ 738 F. Supp. 942 (W.D. Pa. 1990).

¹²⁶ *Id.* at 945.

¹²⁷ Pub. L. No. 74-271, 49 Stat. 620 (codified as amended in scattered sections of 42 U.S.C.); *Berry*, 738 F. Supp. at 943–44.

¹²⁸ *Berry*, 738 F. Supp. at 944.

¹²⁹ *Id.* at 944–45.

¹³⁰ *Id.* at 945.

¹³¹ *Id.*

¹³² *Id.* at 946.

“once [the ALJ] determined plaintiff had met the income guidelines set forth in the regulations, the analysis ended.”¹³³ By failing to “view[] the actual circumstances involved” to determine whether the applicant could overcome the presumption by showing no substantial activity, the ALJ’s decision “had the effect” of impermissibly turning a presumption that “can be rebutted” into an “irrebuttable presumption.”¹³⁴ Perhaps intuitively, a presumption that is rebuttable on paper becomes irrebuttable in practice where the adjudicator fails to evaluate whether the presumption has been rebutted.

Even when an adjudicator applies the rebuttable presumption, however, a presumption may still be effectively irrebuttable in light of the presumption’s structure and implementation. The following Sections discuss these factors.

2. *Structural Barriers*

There is no realistic probability that a presumption can be rebutted when the mechanism for overcoming the presumption is structured in a way that renders it effectively impossible for an individual to rebut the presumption. The Supreme Court’s rejection of a proposed presumption regarding Exemption 7(D) of the Freedom of Information Act (“FOIA”)¹³⁵ in *U.S. Department of Justice v. Landano*¹³⁶ illustrates this principle. Exemption 7(D) of FOIA exempts the government from disclosing requested agency “records ‘compiled for law enforcement purposes’” if those records “‘could reasonably be expected to disclose’ the identity of,” or “information provided by, a ‘confidential source.’”¹³⁷ The government in *Landano* urged the Court to adopt a presumption that “all sources supplying information to the Federal Bureau of Investigation [“FBI”] . . . in the course of a criminal investigation are confidential sources” for purposes of Exemption 7(D).¹³⁸ The presumption “could be overcome only with specific evidence that a particular source had no interest in confidentiality.”¹³⁹

In rejecting the government’s proposed presumption, the Court opined that the “proposed presumption, though rebuttable in theory, is in practice all but irrebuttable.”¹⁴⁰ This is readily apparent from how the

¹³³ *Id.* at 945.

¹³⁴ *Id.* (“[T]he court concludes that the ALJ erred in terminating his analysis upon a finding that plaintiff had met the regulation presumption, without also viewing the actual circumstances involved.”).

¹³⁵ 5 U.S.C. § 552.

¹³⁶ 508 U.S. 165 (1993).

¹³⁷ *Id.* at 167 (quoting 5 U.S.C. § 552(b)(7)(D)).

¹³⁸ *Id.* at 167.

¹³⁹ *Id.* at 174.

¹⁴⁰ *Id.* at 176–77.

presumption is intended to operate. The presumption, once triggered, would permit the FBI to withhold information obtained from a confidential source as well as information about the source itself. In so doing, however, the presumption withholds from the requestor the prerequisite information it needs to overcome the presumption; without “knowledge about the particular source or the information being withheld,” a requestor would only “very rarely . . . be in a position to offer persuasive evidence that the source in fact had no interest in confidentiality” sufficient to overcome the presumption.¹⁴¹ The presumption, in other words, creates an effectively impossible task for the requestor, which violates principles of “fairness.”¹⁴² A presumption that demands individuals to present evidence that they do not and cannot have access to is rebuttable in name only.

Requiring an individual to prove a negative presents another structural barrier that may render a presumption effectively irrebuttable.¹⁴³ Consider, for example, Virginia’s framework for determining which of two widows, apparently married to the same deceased individual, is the lawful spouse for purposes of insurance payouts. To mediate such situations, Virginia employs a presumption that the marriage last-in-time is the valid one unless the prior spouse can show that their marriage was not terminated by death or divorce.¹⁴⁴ Courts have found the presumption to be rebuttable but, in so doing, have been careful to clarify that the prior spouse seeking to prove that theirs is the valid marriage need not “document the absence of a divorce dissolving the first marriage in every jurisdiction where a divorce could possibly have been obtained.”¹⁴⁵ That is, the prior spouse is not required to prove a negative,¹⁴⁶ as such a requirement would be “effectively irrebuttable.”¹⁴⁷

Whether a presumption is structurally rebuttable, however, “does not end the inquiry.”¹⁴⁸ Even if a presumption as crafted does not inhibit a party from overcoming it, the presumption may nonetheless be

¹⁴¹ *Id.* at 177.

¹⁴² *Id.* at 176 (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988)).

¹⁴³ *See, e.g., Freeman v. Pitts*, 503 U.S. 467, 505 (1992) (Scalia, J., concurring) (characterizing the presumption as “effectively irrebuttable . . . because the school district cannot prove the negative”).

¹⁴⁴ *See Hewitt v. Firestone Tire & Rubber Co.*, 490 F. Supp. 1358, 1362 (E.D. Va. 1980).

¹⁴⁵ *Id.* at 1365. Instead, courts have clarified that to overcome the presumption, a litigant must “show[] that no divorce was entered in jurisdictions where the parties resided or where on any reasonable basis a decree might have been obtained.” *Id.* at 1365; *see Bonner v. SYG Assocs.*, 498 F. Supp. 3d 859, 870 (E.D. Va. 2020).

¹⁴⁶ *See Hewitt*, 490 F. Supp. at 1362 (clarifying that an individual “need not ‘make plenary proof of a negative averment’” (quoting *DeRyder v. Metro. Life Ins. Co.*, 145 S.E.2d 177, 181 (Va. 1965))).

¹⁴⁷ *Id.* at 1365.

¹⁴⁸ *Thorne v. U.S. Dep’t of Def.*, 916 F. Supp. 1358, 1366 (E.D. Va. 1996).

effectively irrebuttable due to the manner in which adjudicators implement it in practice.

3. *Unreasonable Evidentiary Standards to Overcome the Presumption*

A presumption may be effectively irrebuttable where adjudicators set an unreasonable standard to satisfy the presumption's rebuttal mechanism. As courts have opined, where an adjudicator "requires extensive evidence to rebut [a] presumption," the adjudicator "effectively erects an irrebuttable and insurmountable barrier."¹⁴⁹

Consider the Third Circuit's reasoning in *Gayle v. Warden Monmouth County Correctional Institution*.¹⁵⁰ At issue in *Gayle* was what process is due at *Joseph*¹⁵¹ hearings to determine whether an individual is subject to mandatory immigration detention.¹⁵² Under *Joseph*, an individual may be placed in mandatory detention if the government merely demonstrates that there is "reason to believe"—i.e., probable cause—that the noncitizen is properly included in a mandatory detention category.¹⁵³ The burden then shifts to the detained noncitizen to show that the government is "substantially unlikely to prevail on its charge" at the eventual removal hearing . . . with either factual or legal arguments."¹⁵⁴

To comport with due process, the Third Circuit raised the government's burden of proof from a probable cause standard to a preponderance of the evidence standard.¹⁵⁵ In so doing, the court emphasized that the individual's burden to show that the government is substantially unlikely to prevail "is a heavy one."¹⁵⁶ Legal arguments "may only succeed if she presents 'precedent caselaw directly on point that mandates a finding that the charge of removability will not be sustained.'"¹⁵⁷ To underscore this concern, the court pointed out that, in the Board's view, an individual does not meet the "substantially likely"

¹⁴⁹ *Nunley v. City of Los Angeles*, 52 F.3d 792, 796 (9th Cir. 1995).

¹⁵⁰ 12 F.4th 321 (3d Cir. 2021).

¹⁵¹ 22 I. & N. Dec. 799 (B.I.A. 1999).

¹⁵² See *Gayle*, 12 F.4th at 326. Pursuant to the Board's decision in *Joseph*, noncitizens held in mandatory detention may challenge whether they are properly subjected to mandatory detention under 8 U.S.C. § 1226(c) in a hearing before an immigration judge. See *Joseph*, 22 I. & N. Dec. at 799. An individual is not considered properly included in a mandatory detention category if the immigration judge is convinced that the government is "substantially unlikely to establish, at the merits hearing, the charge or charges that subject the [noncitizen] to mandatory detention." *Id.* at 800, 808.

¹⁵³ *Gayle*, 12 F.4th at 330; *Joseph*, 22 I. & N. Dec. at 802.

¹⁵⁴ *Gayle*, 12 F.4th at 330.

¹⁵⁵ *Id.* at 333 (quoting *Joseph*, 22 I. & N. Dec. at 807).

¹⁵⁶ *Id.* at 330.

¹⁵⁷ *Id.* (quoting *Garcia*, AXX XX1 884, 2007 WL 4699861, at *1 (B.I.A. Nov. 5, 2007)).

standard even when they invoke precedential circuit court caselaw interpreting an analogous crime in a favorable light.¹⁵⁸ Such a high burden is particularly problematic because once an individual is deemed to be properly included within a mandatory detention category, detention “is in effect irrebuttable.”¹⁵⁹ Given the government’s low threshold to trigger these dire consequences and the high burden to overcome it, the court raised the government burden of proof to trigger mandatory detention.¹⁶⁰

A dissenting opinion in *United States v. McCall*¹⁶¹ further illustrates how rebuttal standards, when set to unreasonable levels, may render the underlying presumption insurmountable in practice. The presumption at issue in *McCall* involved a two-level sentencing enhancement under U.S. Sentencing Guidelines 2D1.1(b)(1) for possessing a firearm.¹⁶² To apply the enhancement, “if the government can show that the defendant actually or constructively possessed a weapon during the offense, it will enjoy a presumption that the weapon was connected to the offense.”¹⁶³ To rebut the presumption, an individual must show that “it was ‘clearly improbable’ that the weapon was connected with the offense.”¹⁶⁴ In the proceedings below, the district court applied the two-level sentencing enhancement after police officers found two rifles and drugs in Mr. McCall’s car during a routine traffic stop.¹⁶⁵ The Sixth Circuit affirmed on appeal, rejecting McCall’s argument that he rebutted the presumption.¹⁶⁶

Judge Karen Nelson Moore dissented, arguing that the district court applied the wrong standard in determining that Mr. McCall had failed to rebut the presumption. In Judge Moore’s view, the district court ignored the facts of the case—including that the firearms were unloaded hunting rifles and there was no ammunition in the car—and instead “relied on its own ‘experience [that] firearms are traded for drugs and vice versa all the time.’”¹⁶⁷ Judge Moore opined that “[i]f the district court’s general experience regarding the trade of firearms and drugs is all that is necessary to apply the enhancement, then the presumption

¹⁵⁸ *Id.* at 330 n.6 (quoting *Zamoripa-Tapia*, AXXX XX3 787, 2010 WL 2390763, at *1 (B.I.A. May 21, 2010)).

¹⁵⁹ *Id.* at 333.

¹⁶⁰ *Id.* (“[T]he presumption of dangerousness or flight risk under § 1226(c) is in effect irrebuttable once a detainee is found to be ‘properly included’ within that provision.” (quoting *Joseph*, 22 I. & N. Dec. at 805)).

¹⁶¹ 433 F.App’x 432 (6th Cir. 2011).

¹⁶² *Id.* at 432.

¹⁶³ *Id.* at 439.

¹⁶⁴ *Id.* (quoting *United States v. Wheaton*, 517 F.3d 350, 367 (6th Cir. 2008)).

¹⁶⁵ *See id.* at 433.

¹⁶⁶ *Id.* at 440.

¹⁶⁷ *Id.* at 440 (Moore, J., dissenting) (alteration in original).

that arises when a defendant possessed the firearm during the offense is, in effect, irrebuttable.”¹⁶⁸ In other words, when an adjudicator’s unsupported opinions supplant record evidence that supports overcoming the presumption, the adjudicator erects a near-impossible rebuttal standard that renders the presumption effectively irrebuttable.

Courts also look to outcomes in cases involving compelling circumstances as further indicia of whether adjudicators have erected unreasonable rebuttal standards.¹⁶⁹ These invoke, in a name, a sympathetic case inquiry: if not this case, then what case? Consider, for example, the court’s reasoning in *Elgin v. United States*,¹⁷⁰ which concerned a federal law requiring that men between the ages of eighteen and twenty-six register with the Selective Service System. Failure to register for the Selective Service System precludes an individual from federal employment unless that failure was unknowing or unwilling. The statute establishes a presumption that individuals “shall be deemed to have notice” of the registration requirement “upon publication by the President of a proclamation.”¹⁷¹ Because President Carter had published such a proclamation, individuals were presumed to have knowledge unless they could show by a preponderance of the evidence that their failure to register was not knowing and willful.¹⁷²

The district court concluded that the adjudicating body treated the presumption “for all intents and purposes [as] an irrebuttable presumption.”¹⁷³ In so doing, the court pointed to two unrelated cases with “compelling circumstances” that, “but for the . . . presumption, appear to have the indicia of lack of knowledge and intent.”¹⁷⁴ In one case, the individual moved to Canada when he was four years old and did not return to the United States until he was twenty-six years old.¹⁷⁵ By the

¹⁶⁸ *Id.*

¹⁶⁹ See, e.g., *Dir., Off. of Workers’ Comp. Programs, U.S. Dep’t of Lab. v. Congleton*, 743 F.2d 428, 431 (6th Cir. 1984) (reversing the ALJ’s grant of benefits under the Black Lung Benefits Act after finding that the Director of Labor had, in fact, successfully rebutted the presumption that the claimant’s widow was entitled to benefits; “[t]o hold otherwise” in light of the evidence “would, in effect, permit an *irrebuttable* presumption in favor of the claimant. . . . If the presumption has not been rebutted by the facts of the instant case, then this court is at a loss to conceive any situation in which the Director could prevail”); *Nagel v. Osborne*, 164 F.3d 582, 585 (11th Cir. 1999) (Clark, J., dissenting) (“If we say that the experts’ testimony did not overcome the presumption of insanity, I do not see what evidence would overcome the presumption.”).

¹⁷⁰ 594 F.Supp.2d 133 (D. Mass. 2009), *reconsideration granted but dismissed on other grounds* by *Elgin v. United States*, 697 F. Supp. 2d 187 (D. Mass. 2010), *vacated and remanded sub nom. Elgin v. U.S. Dep’t of Treasury*, 641 F.3d 6 (1st Cir. 2011), *aff’d Elgin v. Dep’t of Treasury*, 567 U.S. 1 (2012).

¹⁷¹ *Elgin*, 594 F. Supp. 2d at 139.

¹⁷² *Id.* at 139.

¹⁷³ *Id.* at 144.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* (discussing *Clarke v. Off. Of Pers. Mgmt.*, No. H-07-0662, 2007 WL 2363295 (S.D. Tex. Aug. 17, 2007)).

time he learned of the registration requirement, he was statutorily precluded from registering because of his age. The adjudicator nonetheless “ruled woodenly” that he was presumed to have notice of the requirements.¹⁷⁶ The other case involved a veteran who had served on active duty immediately after high school for almost fourteen years.¹⁷⁷ While the adjudicator noted that its decision “does not seem equitable,” it nonetheless found that he was ineligible for federal employment under the statutory presumption.¹⁷⁸ As *Elgin* illustrates, where cases present precisely the circumstances contemplated to overcome the presumption yet nonetheless fail to meet the standard as applied, the presumption is effectively irrebuttable in practice.

Intuitively, when a presumption sets forth a test for overcoming it, adjudicators must interpret and implement that rebuttal mechanism to an achievable degree. Adjudicators fail to do so, and the presumption is effectively irrebuttable, when they set an unreasonable evidentiary standard such that even cases with compelling circumstances directly relevant to the rebuttal mechanism cannot overcome the presumption.

4. *Numerosity of Cases That Have Successfully Rebutted the Presumption*

Finally, the extent to which cases have successfully overcome the presumption in the past is indicia of whether the presumption is in fact rebuttable. To be sure, it would be difficult to precisely define the number of successful rebuttals and the timeframe required to cross the threshold between rebuttable and (ir)rebuttable presumptions. Moreover, under the current regime where courts do not track presumption rebuttal rates, it would be difficult to statistically quantify in any certain terms the frequency at which the presumption is rebutted. Notwithstanding, historical case outcomes weigh in the balance in determining whether a presumption is rebuttable or (ir)rebuttable, along with other indicia of effectively irrebuttable presumptions discussed earlier.¹⁷⁹

In *Elgin*, for example, the court emphasized that the parties had not submitted and the court had not found any decisions in which an individual successfully overcame the presumption that individuals who failed to register for the Selective Service System did so knowingly and willfully.¹⁸⁰ This dearth of successful rebuttals indicated to the court that the presumption was “for all intents and purposes . . . an irrebuttable presumption.”¹⁸¹ Where there are no known cases in which

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See *supra* notes 169–78 and accompanying text.

¹⁸⁰ *Elgin*, 594 F. Supp. 2d at 144.; see *supra* Sections II.B.1–.3.

¹⁸¹ *Elgin*, 594 F. Supp. 2d at 144.

a presumption has been rebutted, as in *Elgin*, that dearth is certainly strong indicia that the presumption falls on the effectively irrebuttable side of the spectrum.

Complete absence of cases successfully rebutting a presumption, however, is not required for that presumption to be effectively irrebuttable. In a concurring opinion in a securities fraud action, Justice Clarence Thomas emphasized that “only six cases out of the thousands” of cases involving the presumption at issue had successfully rebutted it.¹⁸² He, accordingly, opined that “the so-called ‘rebuttable presumption’” was “largely irrebuttable” and “conclusive in practice.”¹⁸³

By contrast, in a case about classifying students as in-state or out-of-state for tuition purposes, the district court rejected the plaintiff’s contention that the presumption at issue was irrebuttable in practice because twenty-three of 106 appeals to the Review Committee—or 21.7%—and two of eight subsequent appeals to the Board of Regents—or 25%—successfully rebutted the presumption.¹⁸⁴ For that court, such numbers “tend[] to indicate that the presumption on nonresidence is rebuttable in its actual operation.”¹⁸⁵ Similarly, a court concluded that a presumption pertaining to the Department of Defense’s Don’t Ask Don’t Tell policy was in fact rebuttable because seven service members had successfully rebutted the presumption at issue.¹⁸⁶ Underscoring the importance of numerosity as a consideration, courts have requested that parties supplement the record with cases, if any, that have successfully overcome the presumption at issue.¹⁸⁷

* * *

Effectively irrebuttable presumptions are thus ones that look and sound rebuttable but, beneath the guise, are (ir)rebuttable in practice because of one or a combination of the characteristics discussed. An adjudicator may treat the presumption, once triggered, as dispositive and fail to apply the rebuttal standard. Even where adjudicators apply the rebuttal mechanism, their proverbial hands may be tied—the presumption as written may structurally preclude rebuttal or the rebuttal test may be set to an unachievable standard such that few, if any, cases successfully overcome the presumption. Accordingly, courts must look

¹⁸² *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 296 (2014) (Thomas, J., concurring in judgement).

¹⁸³ *Id.* at 296–97.

¹⁸⁴ *Michelson v. Cox*, 476 F. Supp. 1315, 1319–20 (S.D. Iowa 1979).

¹⁸⁵ *Id.* at 1320.

¹⁸⁶ *Richenberg v. Perry*, 97 F.3d 256, 262 (8th Cir. 1996).

¹⁸⁷ *See, e.g., Thorne v. U.S. Dep’t of Def.*, 916 F. Supp. 1358, 1366 (E.D. Va. 1996) (requesting supplemental evidence after determining that the “record is too sparse to permit a confident conclusion on this issue”).

beyond a presumption's facial claim that it is rebuttable to determine whether the presumption is, as written and as implemented, rebuttable.

III. EFFECTIVELY IRREBUTTABLE PRESUMPTIONS VIOLATE PROCEDURAL DUE PROCESS NORMS

The cases discussed in Part II allude to presumptions that are effectively irrebuttable in a descriptive sense but do not offer any normative judgment on such presumptions or their significance on a constitutional due process level. Scholars similarly have not identified or analyzed the constitutional significance of effectively irrebuttable presumptions. This Part thus turns, for the first time, to the due process implications of this new category of presumptions.

In so doing, this Part recognizes that effectively irrebuttable presumptions may, and likely do, arise in many civil contexts, as demonstrated in the preceding definitional discussion. They may be agency-created, extra-statutory presumptions, as in *Y-L*'s particularly serious crime presumption for immigration purposes and *Berry v. Sullivan*'s regulatory substantial gainful activity presumption for disability insurance.¹⁸⁸ Such presumptions may also arise from congressionally created statutes, as was the case with the Selective Service System presumption at issue in *Elgin v. United States*.¹⁸⁹ Although effectively irrebuttable presumptions, at core, all share the common characteristic of being ostensibly rebuttable but irrebuttable in practice, the analysis of their legality may depend on whether they arise in the administrative or non-administrative context and the precise contours of the adjudicatory and rebuttal procedures. As such, this Part does not undertake the task of analyzing effectively irrebuttable presumptions in *all* civil contexts. It instead returns to the immigration context as a case study of the constitutional dilemma such presumptions pose in the administrative law context. In particular, it explores whether the process that is provided to noncitizens—a hearing where they may attempt to rebut the presumption—satisfies the process that is constitutionally due. While the constitutional analysis here is limited to the immigration context, the underlying due process concerns may well apply more broadly to other civil contexts.

This Part proceeds in two steps. It first explains why effectively irrebuttable presumptions are procedurally and analytically distinct from irrebuttable presumptions and centers, descriptively, on hearings involving effectively irrebuttable presumptions as “empty rituals.” It then argues that such hearings-turned-empty-rituals, by function of

¹⁸⁸ See *supra* Section II.B.1.

¹⁸⁹ See *supra* Section II.B.3.

effectively irrebuttable presumptions, violate procedural due process norms.

A. *The “Empty Ritual” Dilemma*

At base, the legal import of presumptions that falsely claim to be rebuttable is rooted in their practical impact: they offer *proceedings* but deprive *process*. Procedurally, individuals subjected to so-called rebuttable presumptions are afforded a hearing where they ostensibly have an opportunity to rebut the presumption. In the case of the *Y-L-* and the well-founded fear of future persecution presumptions,¹⁹⁰ for example, individuals and the government can attempt to rebut the respective presumptions at an individual merits hearing. By their nature and operation, however, effectively irrebuttable presumptions “cannot be rebutted by any amount of uncontradicted evidence.”¹⁹¹ Where immigration adjudicators fail to consider the rebuttal mechanism in the first instance, any evidence, no matter how compelling, is ignored. Where the rebuttal mechanism is structurally or interpretively insurmountable, no evidence can reasonably reach the requisite level.

Effectively irrebuttable presumptions, then, turn hearings into “empty ritual[s]”¹⁹²—proceedings that, on the surface, permit individuals to present evidence and arguments to support their claims but, in reality, afford no process because action would be futile¹⁹³ or the adjudicator acts as a rubber stamp.¹⁹⁴ They embody pantomimes of the judicial process in performance only.

¹⁹⁰ See *supra* Section II.B.

¹⁹¹ *Benham v. Ledbetter*, 785 F.2d 1480, 1491 (11th Cir. 1986).

¹⁹² *Id.* Some courts have used the phrase “empty ritual” to generally describe futility or adjudicatory concerns at proceedings, but not in a constitutional sense. See *infra* notes 193–94.

¹⁹³ Courts have used the phrase “empty ritual” in determining whether defendants are required to renew motions for acquittal at the end of a trial where such a motion was previously denied. In *United States v. Pennington* for example, the court determined that the defendant was not required to renew the motion for acquittal, explaining that any renewal efforts would have been “empty rituals” because the trial court made clear that it did not believe the case warranted a new trial or a motion for acquittal. 20 F.3d 593, 597 n.2 (5th Cir. 1994); see, e.g., *United States v. DeLeon*, 247 F.3d 593, 596 n.1 (5th Cir. 2001) (concluding that the defendant was not required to renew the motion for acquittal where he first raised the motion when the government rested and did not present any of his own witnesses, explaining that “a subsequent motion minutes” after the court denied the first motion would have been an “empty ritual”); *United States v. Esquivel-Ortega*, 484 F.3d 1221, 1225 (9th Cir. 2007) (explaining that, given the “nature of the evidence” submitted following the denied motion for acquittal—the audio tape of a call whose transcript had already been admitted into evidence—“and the fact that the court had denied Esquivel’s motion for acquittal only a few moments earlier, requiring Esquivel to renew his motion at that point would have been ‘an empty ritual’” (quoting *Pennington*, 20 F.3d at 597 n.2)).

¹⁹⁴ See, e.g., *United States v. Al Mudarris*, 695 F.2d 1182, 1188 (9th Cir. 1983) (cautioning that “[t]he government is on notice that this court will not brook behavior that degrades the grand jury into a rubber stamp, and the testing of the prosecutor’s evidence into an empty ritual”); *United*

Effectively irrebuttable presumptions are thus procedurally and analytically distinct from irrebuttable presumptions. In the latter, there is no illusion of process—irrebuttable presumptions embody a substantive rule of law that offers no means of challenging the assumed conclusion.¹⁹⁵ As such, courts generally review¹⁹⁶ irrebuttable presumptions under a rationality standard, determining whether the inference is rationally related to a legitimate legislative classification.¹⁹⁷ In *Michael H. v. Gerald D.*, for example, the Supreme Court concluded that the irrebuttable presumption at issue was a substantive rule of law and

States v. de la Cruz-Paulino, 61 F.3d 986, 999 n.11 (1st Cir. 1995) (rejecting the government’s conclusory discussion of the sufficiency of the evidence of the defendant’s guilt on appeal because, “[d]espite the prosecution-friendly overtones of the standard of review, appellate oversight of sufficiency challenges is not an empty ritual” (quoting *United States v. Ortiz*, 966 F.2d 707, 711–12 (1st Cir. 1992))); *Rogers v. Barnhart*, 446 F. Supp. 2d 828, 834 (N.D. Ill. 2006) (explaining that the ALJ was not required to accept the applicant’s testimony at face value because ALJs are “not inert and wooden participants in an empty ritual, the preordained end of which is to award benefits to those in distress, regardless of whether they qualify under the [Social Security] Act”).

¹⁹⁵ See *supra* Section II.A.

¹⁹⁶ A detailed discussion of irrebuttable presumptions is beyond the scope of this Article. For further discussion on irrebuttable presumptions, see Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1686–88 (1992) (describing the evolution of the Supreme Court’s analysis of the constitutionality of irrebuttable presumptions); see also D. Michael Risinger, “Substance” and “Procedure” Revisited with Some Afterthoughts on the Constitutional Problems of “Irrebuttable Presumptions,” 30 UCLA L. REV. 189, 213 & n.70 (1982).

¹⁹⁷ For a brief period in the 1970s, the Supreme Court developed the so-called irrebuttable presumption doctrine, which provided that irrebuttable presumptions deny due process where it is not “necessarily or universally true in fact” that the basic fact implied the presumed fact and alternative procedures were available. See *Vlandis v. Kline*, 412 U.S. 441, 452 (1973). See generally *Bell v. Burson*, 402 U.S. 535 (1971); *Stanley v. Illinois*, 405 U.S. 645 (1972); *U.S. Dep’t of Agric. v. Murry*, 413 U.S. 508 (1973); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974). In *Vlandis*, the Supreme Court struck down a Connecticut statute that classified anyone living out of state at the time they applied to a state university to be a nonresident for purposes of tuition and fees. See *Vlandis*, 412 U.S. at 452. The Court concluded that the statute’s “permanent irrebuttable presumption of non-residence” unconstitutionally deprived individuals of the opportunity to present evidence demonstrating that they are bona fide residents entitled to the in-state rates “when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination.” *Id.* at 452–53. As scholars have noted, the Court’s analysis blurred the line between procedural and substantive due process and the irrebuttable presumption doctrine was conceptually equivalent to an equal protection challenge. See, e.g., Phillips, *supra* note 102, at 450; Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534, 1534–36 (1974); Risinger, *supra* note 196, at 213 & n.70. The Supreme Court significantly curtailed the irrebuttable presumption doctrine just a few years later in *Weinberger v. Salfi*, 422 U.S. 749, 777, 784 (1975), announcing a return to a more substantive approach to legislative classifications, which were to be reviewed under a rational basis test for equal protection. See *Black v. Snow*, 272 F. Supp. 2d 21, 29–30 (D.D.C. 2003) (explaining that *Salfi*, 422 U.S. at 749, “narrow[ed] the *Vlandis* analysis to cases in which the legislature is engaged in a kind of sleight-of-hand, feigning interest in one concern only then to erect a classification that excludes evidence obviously relevant to that concern”); *Michael H. v. Gerald D.*, 491 U.S. 110, 119, 124 (1989); Motomura, *supra* note 196, at 1686–88.

characterized the inquiry as “the adequacy of the ‘fit’ between the classification and the policy that the classification serves.”¹⁹⁸

Effectively irrebuttable presumptions, however, are more aptly considered under a procedural due process framework that interrogates the constitutional adequacy of the hearings they purport to offer. As will be discussed next, effectively irrebuttable presumptions render such hearings constitutionally defective.

B. *Procedural Due Process*

The Supreme Court has long held that the Fifth Amendment’s Due Process Clause applies to noncitizens in removal proceedings.¹⁹⁹ Noncitizens are accordingly entitled to basic safeguards,²⁰⁰ chief among them “the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”²⁰¹ That is, the right to “a full and fair hearing on their claims.”²⁰²

The problem posed by effectively irrebuttable presumptions is that, while individuals are afforded a hearing, such hearings are rendered neither full nor fair in light of the presumption—they become empty rituals. At least one court has opined that the effect of presumptions as empty rituals is constitutionally suspect.²⁰³ This Section evaluates the constitutional dilemma that effectively irrebuttable presumptions pose.

¹⁹⁸ *Michael H.*, 491 U.S. at 121; *see also* *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 791 (9th Cir. 2014).

¹⁹⁹ *See* *Reno v. Flores*, 507 U.S. 292, 306 (1993) (“[T]he Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings.”); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (“Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to [the] constitutional protection [of the Fifth Amendment’s Due Process Clause].”); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[T]he Due Process Clause applies to all ‘persons’ within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent.”); *Yamataya v. Fisher*, 189 U.S. 86, 99–100 (1903) (holding that due process applies in removal proceedings).

²⁰⁰ *See* ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 1162 (6th ed. 2020).

²⁰¹ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *see also* *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (hearing required before termination of welfare benefits).

²⁰² *Rusu v. INS*, 296 F.3d 316, 321–22 (4th Cir. 2002); *see also* *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000); *Burger v. Gonzales*, 498 F.3d 131, 134 (2d Cir. 2007).

²⁰³ *See, e.g., Benham v. Ledbetter*, 785 F.2d 1480, 1491 (11th Cir. 1986) (“If no amount of evidence offered at a release hearing by an insanity acquittee could rebut the presumption of insanity, the processes of proof in the due process hearing would be an *empty ritual*. The sole basis for argument would be an appeal to judicial discretion or mercy rather than to a process of proof.” (emphasis added)); *Nagel v. Osborne*, 164 F.3d 582, 585 (11th Cir. 1999) (Clark, J., dissenting) (“This court has stated that due process would not be consistent with a presumption that cannot be rebutted by any amount of uncontradicted evidence.”); *see also* *Foehl v. United States*, 238 F.3d 474, 480 (3d Cir. 2001) (holding that the Drug Enforcement Administration violated due process by failing to make a reasonable effort to provide adequate notice, because the “constitutional mandate of adequate notice cannot be treated as empty ritual”).

It does so by applying two due process frameworks. The Supreme Court in *Mathews v. Eldridge*²⁰⁴ established the framework for determining what process is constitutionally required under the due process clause. That framework notwithstanding, appellate courts facing due process challenges in the immigration context often apply the so-called fundamental fairness test, which finds a due process violation when a defect in the proceedings prejudiced the noncitizen.²⁰⁵ This Section argues that, under either framework, effectively irrebuttable presumptions violate noncitizens' due process rights. It begins by applying the latter fundamental fairness framework to demonstrate that effectively irrebuttable presumptions present procedural defects of constitutional proportions. It then applies the *Mathews v. Eldridge* framework to determine what safeguards due process requires.

1. Applying the Fundamental Fairness and No Prejudice Test

Appellate courts applying the fundamental fairness test start from the principle that noncitizens in removal proceedings are entitled to a full and fair hearing of their claims. Courts proceed with a two-step inquiry to determine whether a noncitizen was denied a full and fair hearing. The first step evaluates whether there was a defect in the removal proceeding—that is, the proceedings were “so fundamentally unfair that the [noncitizen] was prevented from reasonably presenting his case.”²⁰⁶ That defect reaches constitutional proportions at the second step if the noncitizen was prejudiced because of it.²⁰⁷ Prejudice generally

²⁰⁴ 424 U.S. 319 (1976).

²⁰⁵ As numerous scholars have explained, many appellate courts in the immigration context apply the fundamental fairness or related inquiry in place of the *Eldridge* balancing test. This is so even though no court has explicitly stated that, following *Landon v. Plascencia*, 459 U.S. 21 (1982), the *Mathews* test only applies to citizens and legal permanent residents (“LPR”). See Nimrod Pitsker, Comment, *Due Process for All: Applying Eldridge to Require Appointed Counsel for Asylum Seekers*, 95 CAL. L. REV. 169, 174–78 (2007) (“Although *Eldridge* permanently replaced *Gagnon* in civil proceedings for citizens, a robust *Eldridge* analysis has not been consistently applied in the immigration context . . . [I]n practice, courts have routinely applied the fundamental fairness criterion or one of its cousins . . . in determining constitutionally sufficient procedures.”); John R. Mills, Kristen M. Echemendia & Stephen Yale-Loehr, “*Death is Different*” and a Refugee’s Right to Counsel, 42 CORNELL INT’L L.J. 361, 364–65 (2009); Johan Fatemi, *A Constitutional Case for Appointed Counsel in Immigration Proceedings: Revisiting Franco-Gonzalez*, 90 ST. JOHN’S L. REV. 915, 924–29 (2016); Cindy S. Woods, *Barriers to Due Process for Indigent Asylum Seekers in Immigration Detention*, 45 MITCHELL HAMLINE L. REV. 319, 331–33 (2019) (“The *Eldridge* factors became the touchstone for fundamental fairness considerations in the civil context for citizens; however, courts have not traditionally applied this standard in non-citizen determinations.”); Beth J. Werlin, Note, *Renewing the Call: Immigrants’ Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393, 403–12 (2000).

²⁰⁶ *Colmenar*, 210 F.3d at 971 (citation omitted).

²⁰⁷ *Vasha v. Gonzales*, 410 F.3d 863, 872 (6th Cir. 2005); see *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1058 (9th Cir. 2005) (“For us to grant the petition for review on due process grounds,

occurs when the immigration adjudicator's conduct potentially affected the outcome of the proceedings.²⁰⁸

Effectively irrebuttable presumptions trigger concerns at both steps of the inquiry. This Section addresses the impact effectively irrebuttable presumptions have on two components of a full and fair hearing: a neutral arbiter²⁰⁹ and an individualized determination.

First, the Supreme Court has established that a decision maker fails to be neutral in violation of due process when, for example, they stand to gain from their decision or have personal connections to a case.²¹⁰ Inherent in the right to a neutral arbiter is that the arbiter has not “prejudg[ed] . . . the facts.”²¹¹ Indeed, appellate courts in the immigration context have repeatedly established that a full and fair hearing requires an “unbiased arbiter who has not prejudged their claims.”²¹² Effectively irrebuttable presumptions confound the right to a neutral arbiter either

Petitioner must show prejudice, ‘which means that the outcome of the proceeding *may have been affected* by the alleged violation.’” (quoting *Reyes-Melendez v. INS*, 342 F.3d 1001, 1006 (9th Cir. 2003))).

²⁰⁸ See *Colmenar*, 210 F.3d at 972; *Cano-Merida v. INS*, 311 F.3d 960, 965 (9th Cir. 2002) (affirming that the respondent “need not ‘explain exactly what evidence he would have presented’ in support of his application” and the court “may infer prejudice in the absence of any specific allegation as to what evidence [the respondent] would have presented . . . had he been provided the opportunity to present that evidence” (citation omitted)); *Abdallahi v. Holder*, 690 F.3d 467, 472 (6th Cir. 2012) (defining prejudice as when the defect “led to a substantially different outcome from that which would have occurred in the absence of these violations” (citation omitted)).

²⁰⁹ See, e.g., *CHEMERINSKY*, *supra* note 200, at 1162 (explaining that due process guarantees basic safeguards, including “an impartial decision maker”).

²¹⁰ See, e.g., *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (holding that it was unconstitutional to have an arbiter preside over a hearing where they could personally gain from their decision); *Williams v. Pennsylvania*, 579 U.S. 1, 24 (2016) (concluding that an individual was denied due process when a state supreme court justice participated in a decision after having been involved in the case as the district attorney); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886–87 (2009) (determining that an individual was denied due process when a state supreme court justice participated in a decision to overrule a \$50 million judgment against a party who donated millions to get the justice onto the court).

²¹¹ *Gibson*, 411 U.S. at 578–79.

²¹² *Ahmed v. Gonzales*, 398 F.3d 722, 725 (6th Cir. 2005); see also *Serrano-Alberto v. Att’y Gen.*, 859 F.3d 208, 213 (3d Cir. 2017) (stating that a noncitizen is entitled to “a decision on the merits of their claim by a ‘neutral and impartial arbiter’” (quoting *Abulashvili v. Att’y Gen.*, 663 F.3d 197, 207 (3d Cir. 2011))); *Zolotukhin v. Gonzales*, 417 F.3d 1073, 1075 (9th Cir. 2005) (holding that a neutral arbiter is “one of the most basic due process protections” and concluding that the “IJ’s prejudgment of the merits of petitioner’s case led her to deny Zolotukhin a full and fair opportunity to present evidence on his behalf” in violation of due process (citations omitted)); *Cano-Merida*, 311 F.3d at 964; *Sanchez-Cruz v. INS*, 255 F.3d 775, 779–80 (9th Cir. 2001); *Reyes-Melendez*, 342 F.3d at 1007; *Vasha*, 410 F.3d at 872–73; *Hassan v. Gonzales*, 403 F.3d 429, 436 (6th Cir. 2005); *Marincas v. Lewis*, 92 F.3d 195, 204 (3d Cir. 1996) (describing the need for a neutral judge as one of the most basic due process protections); see also *Abdulrahman v. Ashcroft*, 330 F.3d 587, 596 (3d Cir. 2003) (“[I]t is well established that ‘due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities.’” (citation omitted)); *Hussain v. Rosen*, 985 F.3d 634, 642–45 (9th Cir. 2021).

because the presumption as structured effectively prejudices the outcome, thereby removing the adjudicator from being able to apply the law and arrive at a different conclusion, or because the presumption permits the adjudicator to disregard the rebuttal mechanism entirely when the adjudicator has some bias.

Consider, for example, *Colmenar v. INS*,²¹³ which involved a doctor seeking asylum from the Philippines after receiving death threats because he treated an opposition party leader's son, who later died.²¹⁴ At the outset of the merits hearing, the immigration judge "indicated that he had already judged Colmenar's claim," referring to the case as a medical malpractice dispute that was an improper basis for asylum.²¹⁵ As a result, the immigration judge refused to permit Mr. Colmenar to testify about an incident that may have elucidated a political motive for the death threats, which could have been grounds for asylum.²¹⁶ In so doing, the immigration judge "behaved not as a neutral factfinder interested in hearing the petitioner's evidence, but as a partisan adjudicator seeking to intimidate Colmenar and his counsel."²¹⁷ Such prejudgment, the court held, denied Mr. Colmenar a "full and fair hearing or a reasonable opportunity to present evidence on his behalf."²¹⁸ The court further held that this defect prejudiced Mr. Colmenar because, had he been able to testify, there may have been a different outcome.²¹⁹ The court found prejudice even though it was unclear what Mr. Colmenar would have testified about; he only needed to demonstrate that the adjudicator's conduct potentially affected the outcome of the proceedings.²²⁰ In this way, an immigration adjudicator's prejudgment of a case may be constitutionally problematic because it precludes a noncitizen from presenting evidence on his behalf.

The constitutional concerns that prejudgment raises are not confined to cases where the immigration judge precludes an individual from presenting evidence. The right to be free of prejudgment and to fully present evidence would be meaningless without its logical corollary: evidence presented must, in fact, be considered.²²¹ As courts have held,

²¹³ 210 F.3d 967 (9th Cir. 2000).

²¹⁴ *See id.* at 969.

²¹⁵ *Id.* at 971.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 968.

²²⁰ *Id.* at 972.

²²¹ *Cf. Getachew v. INS*, 25 F.3d 841, 845 (9th Cir. 1994) (holding that "[c]orollary to the right to a hearing before deportation is the right to a deportation decision based on the record created during and before the hearing," and thus due process requires the Board "to refrain from taking administrative notice of facts not in the record unless the procedures it follows are fair under the circumstances").

“a hearing where an immigration judge cannot be said to have *fairly considered* the evidence presented by the petitioners is one where those petitioners have been deprived of due process.”²²² To conclude otherwise would render proceedings empty rituals indeed.

The Ninth Circuit suggested as much in *Reyes-Melendez v. INS*.²²³ At issue in that case was whether the noncitizen could demonstrate extreme hardship to his U.S. citizen child, whom he fathered through an affair, for purposes of suspension of deportation.²²⁴ The immigration judge declined to find extreme hardship.²²⁵ In so doing, however, the immigration judge “very early in the hearing” “judged” the noncitizen to be “morally bankrupt” for having a marital affair,²²⁶ and stated that she would not “‘reward’ him for having an ‘illicit relationship.’”²²⁷ The immigration judge acknowledged that the laws and “mores may have changed” regarding marital affairs but not, in her opinion, “to the point where that is acceptable by a reasonable person.”²²⁸ The Ninth Circuit concluded that the immigration judge’s conduct was constitutionally defective and prejudiced the noncitizen because her bias “prevented her from considering, yet alone weighing, the impact” of the evidence presented.²²⁹ In other words, an adjudicator violates due process when they make up their mind “before considering all relevant evidence.”²³⁰

Effectively irrebuttable presumptions mirror the concerns of this prejudgment dilemma: a presumption, once triggered, predetermines the outcome of the underlying issue, regardless of whether or what evidence is presented. In some cases, individuals may be precluded from presenting evidence in the first instance given the structure of the so-called rebuttable presumption. This was the case in *Landano*, in which the presumption operates to withhold the prerequisite information that individuals need to rebut the presumption.²³¹ In other cases, immigration adjudicators fail to inform individuals about the presumption or how it can be rebutted—as is common in cases applying *Y-L*.²³²

²²² *Ahmed v. Gonzales*, 398 F.3d 722, 725 (6th Cir. 2005) (emphasis added) (holding that the noncitizen was deprived of a fair hearing where the immigration judge based his adverse credibility determination and asylum denial on his misunderstanding of the evidence presented); *see also* *Amadou v. INS*, 226 F.3d 724, 727 (6th Cir. 2000) (holding that the noncitizen’s due process rights were violated when a translator prevented an immigration judge from understanding the evidence presented).

²²³ 342 F.3d 1001 (9th Cir. 2003).

²²⁴ *Id.* at 1004–05.

²²⁵ *Id.* at 1005.

²²⁶ *Id.* at 1007.

²²⁷ *Id.*

²²⁸ *Id.* at 1005.

²²⁹ *Id.* at 1007.

²³⁰ *Id.* at 1009.

²³¹ *See supra* Section II.B.2.

²³² *See supra* Part I.

This adjudicatory failure to inform individuals about and properly implement the presumption is particularly consequential given that many immigrants—especially those who are detained,²³³ as is the case for many individuals subjected to *Y-L*’s ambit—are not represented and are instead forced to navigate the “labyrinthine”²³⁴ immigration system pro se.²³⁵ For these individuals who understandably do not know how to—or even that they can—rebut the presumption, such presumptions effectively preclude them from presenting evidence.²³⁶ One cannot answer a question one did not know was asked. These cases, by operation of the effectively irrebuttable presumptions at play, suffer from the same defect as the adjudication in *Colmenar*: the presumption is akin to a prejudgment that obfuscates an individual’s meaningful opportunity to present evidence.²³⁷

Even where individuals are able to present evidence, the impact of effectively irrebuttable presumptions is that the evidence is not fairly considered. Where adjudicators treat a presumption as dispositive and thus fail to evaluate the rebuttal standard, the adjudicators have, as in *Berry v. Sullivan*²³⁸ and *Reyes-Melendez v. INS*,²³⁹ effectively made up their minds before reviewing the evidence. The same holds true for

²³³ See, e.g., ADITI SHAH & EUNICE HYUNHYE CHO, ACLU, NO FIGHTING CHANCE: ICE’S DENIAL OF ACCESS TO COUNSEL IN U.S. IMMIGRATION DETENTION CENTERS 6 (2022) (reporting that in fiscal year 2022, 78.7% of detained noncitizens in removal proceedings did not have counsel); *Who Is Represented in Immigration Court?*, TRAC IMMIGR. (Oct. 16, 2017), <https://trac.syr.edu/immigration/reports/485/> [<https://perma.cc/EED9-QQHC>] (reporting that the representation rates for detained individuals have ranged between ten and thirty percent between 2000 and 2017); INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 2–3 (2016) (reporting that only fourteen percent of detained immigrants manage to find legal counsel).

²³⁴ See, e.g., *Drax v. Reno*, 338 F.3d 98, 99–100 (2d Cir. 2003) (describing immigration law as “a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion”).

²³⁵ Although noncitizens have the right to counsel under the INA, they do not have the right to government-appointed and funded counsel. See 8 U.S.C. § 1362; see, e.g., Andrew Leon Hanna, Note, *A Constitutional Right to Appointed Counsel for the Children of America’s Refugee Crisis*, 54 HARV. C.R.-C.L. L. REV. 257, 265–67 (2019). Representation in removal proceedings, however, drastically increases an individual’s likelihood of success. See *Speeding Up the Asylum Process Leads to Mixed Results*, TRAC IMMIGR. (Nov. 29, 2022), <https://trac.syr.edu/reports/703/> [<https://perma.cc/GZC6-WPPE>] (reporting that the grant rate for represented asylum seekers in 2022 was forty-nine percent, as compared to eighteen percent for those who were not represented).

²³⁶ Recognizing the complexity of the U.S. immigration system, particularly for pro se individuals, federal appellate courts have unanimously agreed that immigration judges have a legal duty to develop the record in immigration court proceedings, grounded in either constitutional due process norms or the INA’s assurance that every noncitizen receives a meaningful, full, and fair hearing. See, e.g., *Quintero v. Garland*, 998 F.3d 612, 622–23 (4th Cir. 2021) (collecting cases across circuits and holding that immigration judges have a legal duty to develop the record). Courts have held that this duty “becomes especially crucial in cases involving unrepresented noncitizens.” *Id.* at 627.

²³⁷ See *supra* note 213.

²³⁸ See *supra* Section II.B.1.

²³⁹ See *supra* Section III.B.1.

adjudicators who set the standards for rebuttal to such levels that no amount of evidence can reasonably overcome the presumption.²⁴⁰ In this way, effectively irrebuttable presumptions frustrate the fundamental guarantee to a neutral arbiter.

(Ir)rebuttable presumptions thus effectively deny individuals the right to a neutral arbiter by, through their structure or implementation, affirmatively precluding individuals from presenting evidence or rendering any evidence presented futile. Hearings applying effectively irrebuttable presumptions then become empty rituals far short of the right to a full and fair hearing.

Second, effectively irrebuttable presumptions further offend another component of a full and fair hearing: the right to an individualized determination.²⁴¹ As at least one circuit has articulated, merely providing an individualized hearing does not satisfy the individualized determination requirement.²⁴² The Board must show “sufficient indicia” that an individualized determination was made.²⁴³ Immigration adjudicators fail to provide the individualized determination required by due process when they fail to provide any indication that they conducted a particularized consideration of the legal standard²⁴⁴ or otherwise fail to offer any explanation beyond a conclusory statement justifying their conclusion.²⁴⁵

²⁴⁰ See *supra* Section II.B.3.

²⁴¹ See, e.g., *Abdulai v. Ashcroft*, 239 F.3d 542, 549–50 (3d Cir. 2001), *superseded by statute* in *Samet v. Att’y Gen.*, 840 Fed. App’x. 701 (3d Cir. 2020) (“[T]he question for due process purposes is not whether the BIA reached the *correct* decision; rather, it is simply whether the Board made an individualized determination of [the noncitizen’s] interests”); *Chong v. Dist. Dir., INS*, 264 F.3d 378, 386 (3d Cir. 2001) (affirming that due process required that the noncitizen “have the right to an individualized determination of her interests”); *Kamara v. Att’y Gen.*, 420 F.3d 202, 211 (3d Cir. 2005); *de la Llana-Castellon v. INS*, 16 F.3d 1093, 1096 (10th Cir. 1994) (“In the adjudicative context, due process entitles a person to . . . an individualized determination of his interests”); *Rhoa-Zamora v. INS*, 971 F.2d 26, 33 (7th Cir. 1992) (“[T]he Board is required to “engage in a careful, individualized review of the evidence presented in [his] application[] and hearing[].” (alteration in original) (quoting *Kaczmarczyk v. INS*, 933 F.2d 588, 595 (7th Cir. 1991))).

²⁴² See, e.g., *Ford v. Bureau of Immigr. & Customs Enf’t’s Interim Field Off. Dir. for Det. & Removal*, 294 F. Supp. 2d 655, 662 (M.D. Pa. 2003) (concluding that the Board failed to provide an individualized determination even though there was an individualized hearing); *Gelaneh v. Ashcroft*, 153 F. App’x 881, 887 (3d Cir. 2005) (same); *Kamara*, 420 F.3d at 211–12 (conducting an individualized determination analysis even though there was an individualized hearing); *Chong*, 264 F.3d at 386 (same).

²⁴³ *Kamara*, 420 F.3d at 211 (quoting *Abdulai*, 239 F.3d at 550); see *Chong*, 264 F.3d at 386–87 (concluding that the Board provided an individualized determination when the noncitizen was afforded an opportunity to present arguments and evidence at a hearing and the Board “looked at the specific facts of Chong’s case” rather than “blindly following a categorical rule” that all drug convictions are “particularly serious crimes”).

²⁴⁴ See, e.g., *Gelaneh*, 153 F. App’x at 887.

²⁴⁵ See, e.g., *Ford v. Bureau of Immigr. & Customs Enf’t’s Interim Field Off. Dir. for Det. & Removal*, 294 F. Supp. 2d at 662–63.

In *Gelaneh v. Ashcroft*,²⁴⁶ for instance, the Third Circuit explicitly noted that, as a strictly legal manner, *Y-L-* created a “*presumption*,” and not a *per se* rule.”²⁴⁷ In practice, however, the immigration judge and the Board “automatically concluded” after a hearing that Mr. Gelaneh’s offense fell within the *Y-L-* presumption: the Board “simply noted the presumption of seriousness, and then summarily applied the presumption to Gelaneh’s offense.”²⁴⁸ Indeed, the Board “did not demonstrate that it was even aware of exceptions to the presumption of seriousness announced in *Y-L-*, let alone that it had determined that Gelaneh’s offense did not constitute such an exception.”²⁴⁹ Such conduct did not meet the individualized determination requirement.²⁵⁰ Although Mr. Gelaneh was afforded a hearing, the right to an individualized determination mandated that adjudicators determine whether Mr. Gelaneh met the six criteria enumerated in *Y-L-*.²⁵¹ The court opined that where “the Board treats a rebuttable presumption as an irrebuttable *per se* rule, it fails to provide the individualized determination that due process requires.”²⁵²

The district court in *Ford* similarly concluded that the Attorney General in *Y-L-* created a rebuttable presumption, but that in applying *Y-L-*, the Board failed to make an individualized determination.²⁵³ This was so because the Board stated only that it did “not find that the circumstances of the respondent’s conviction warrant a conclusion that he falls within the narrow exception outlined in *Matter of Y-L-*” and “failed to offer any explanation concerning why Petitioner did not meet the requirements of the exception.”²⁵⁴ Problematically, the “Board did not specify which facts precluded Petitioner from the exception. Nor did the Board weigh” any of the *Y-L-* factors.²⁵⁵ This violated the right to an

²⁴⁶ 153 F. App’x 881 (3d Cir. 2005).

²⁴⁷ *Id.* at 886.

²⁴⁸ *Id.* at 886–87.

²⁴⁹ *Id.* at 887.

²⁵⁰ *Id.* at 886–87.

²⁵¹ *Id.* at 887.

²⁵² *Id.*; see also *Chong v. Dist. Dir., INS*, 264 F.3d 378, 386–87 (3d Cir. 2001) (suggesting that the Board would fail to provide an individualized determination if it “blindly follow[ed] a categorical rule”). Despite concluding that the Board failed to consider the rebuttal test, the Third Circuit weighed the six-criteria test itself in the first instance and found that the Board’s error did not prejudice the respondent. See *Gelaneh*, 153 F. App’x at 887. Arguably, the reviewing court erred in applying the rebuttal mechanism in the first instance and should have instead remanded to the Board to do so.

²⁵³ *Ford v. Bureau of Immigr. & Customs Enf’t’s Interim Field Off. Dir. for Det. & Removal*, 294 F. Supp. 2d 655, 662–63 (M.D. Pa. 2003).

²⁵⁴ *Id.* at 662.

²⁵⁵ *Id.*

individualized determination, which “demands more than a conclusory statement.”²⁵⁶

Effectively irrebuttable presumptions, by their nature and operation, violate this right to an individualized determination in numerous ways. In some cases—as illustrated in *Ford* and *Gelaneh*²⁵⁷ regarding the *Y-L*-presumption and in *Berry*²⁵⁸ regarding the substantial gainful activity presumption for disability benefits—adjudicators fail to address the rebuttal mechanism at all. They fail to state the presumption, how it can be rebutted, or offer any explanation or evidence that they considered whether the individual can overcome the presumption. A hearing in this way does not yield an individualized determination. While the adjudicator may perform the motions of accepting evidence to overcome the presumption, the adjudicator cannot be deemed to make an individualized determination if they do not apply the standard to overcome the presumption.

This same effect occurs when an immigration judge does consider the rebuttal standard, but such consideration is an exercise in futility because the presumption as structured and implemented is impossible to overcome. No matter how individualized the assessment is, only a standard outcome can result. Effectively irrebuttable presumptions, in this way, nullify any individualized assessment and are fundamentally at loggerheads with providing an individualized determination.

Although the fundamental fairness test calls for a case-by-case analysis, on the whole, the neutral arbiter and individualized determination defects posed by effectively irrebuttable presumptions prejudice noncitizens in their removal proceedings. At bottom, effectively irrebuttable presumptions are ones where no amount of evidence can overcome the presumption. Surely, the use of an effectively irrebuttable presumption over a rebuttable presumption that is, in fact, reasonably rebuttable “potentially affect[s] the outcome of the proceedings”²⁵⁹ to a prejudicial degree.²⁶⁰

²⁵⁶ *Id.* at 663.

²⁵⁷ *See supra* Section III.B.1.

²⁵⁸ *See supra* Section II.B.1.

²⁵⁹ *Colmenar v. INS*, 210 F.3d 967, 972 (9th Cir. 2000).

²⁶⁰ For these same reasons, effectively irrebuttable presumptions also violate the INA’s requirement that noncitizens in removal proceedings “shall have a reasonable opportunity to examine the evidence against the [noncitizen], to present evidence on the [noncitizen’s] own behalf, and to cross-examine witnesses presented by the Government.” 8 U.S.C. § 1229a(b)(4)(B); *see also* 8 C.F.R. § 1240.1(c) (2022) (providing that immigration judges “shall receive and *consider* material and relevant evidence” (emphasis added)). A rigorous statutory analysis is beyond the scope of this Article, but the statutory violation is explored briefly here because courts generally prefer resolving challenges by statutory rather than constitutional interpretation, and because the statutory right to “present” evidence is rooted in constitutional due process precepts. *See Jacinto v. INS*, 208 F.3d 725, 727–28 (9th Cir. 2000). As others have argued, the right to meaningfully present evidence carries a necessary corollary—the right for that evidence to be fairly considered. *See*

2. *Applying the Mathews v. Eldridge Due Process Test*

Under the Supreme Court's *Mathews v. Eldridge* test, effectively irrebuttable presumptions similarly offend due process norms. In *Mathews v. Eldridge*, the Supreme Court explained that due process "is flexible and calls for such procedural protections as the particular situation demands."²⁶¹ To determine what process is due, courts balance three considerations:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²⁶²

When it comes to effectively irrebuttable presumptions, the private interest necessarily depends on the underlying subject of the presumption. Because presumptions in the immigration context often pertain to an individual's removability and eligibility for relief, the private interests coalesce around common harms: namely, deportation. Non-citizens precluded from applying for harm-based forms of relief may be deported to a country where they will suffer severe harm or death.²⁶³ Such is the case with the presumption in *Y-L-*, which bars an individual from applying for withholding of removal even if they have otherwise

Joshua S. Walden, Note, *A Right to Gather Evidence: Interpreting Statutory Protections for Detained Immigrants Facing Removal Hearings*, 31 STAN. L. & POL'Y REV. 103, 129 (2020) (interpreting the statutory term "present"). "Present," as defined by the dictionary, means "to lay . . . before a court as an object of inquiry." *Present*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/present> [<https://perma.cc/HYF4-TEEM>] (emphasis added); see Walden, *supra* note 260, at 129 (interpreting the INA to require safeguards for detained immigrants). This latter clause in the INA's requirement is significant: presenting evidence does not merely entail laying it forth before an adjudicator; rather, that evidence constitutes an "object of inquiry" for the adjudicator to fairly consider. See MERRIAM-WEBSTER, *supra*. Effectively irrebuttable presumptions vitiate this right. As previously discussed, immigration adjudicators applying an effectively irrebuttable presumption have, in practice, prejudged the case and failed to consider the evidence. Where a presumption, once triggered, predetermines the outcome of the issue, the "opportunity . . . to present evidence" would be toothless indeed. See 8 U.S.C. § 1229a(b)(4)(B).

²⁶¹ *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

²⁶² *Id.* at 335.

²⁶³ See, e.g., Mills et al., *supra* note 205, at 372–75 (arguing that refugees have a heightened private interest in avoiding death, torture, and serious bodily harm, and that "the interest of the refugee parallels the interest of death penalty litigants"); Sabrineh Ardan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J.L. REFORM 1001, 1004 (2015) ("Asylum seekers can face detention, torture, or even death if forced to return to their home countries.").

demonstrated that they will be persecuted or killed if forced to return to their country of origin.²⁶⁴ Even if noncitizens do not fear persecution in their country of origin, deportation itself is an exacting consequence. As the Supreme Court has recognized, noncitizens' private interest against deportation "is, without question, a weighty one."²⁶⁵ Noncitizens who are deported "lose the right to stay and live and work in this land of freedom" or "lose the right to rejoin [their] immediate family, a right that ranks high among the interests of the individual."²⁶⁶

Deportation may also harm a noncitizen's U.S. citizen family members who rely on them for support, such as young children or relatives with medical ailments. These family members face a Sophie's Choice: go to a foreign country where they may not speak the language or remain in the United States without their primary caretaker. Studies have shown that having a parent be detained or deported can have long-term adverse impacts on a child's health and development.²⁶⁷ These consequences are central to the presumption at issue in *In re Castillo-Perez*,²⁶⁸ an attorney general self-certified decision regarding eligibility for cancellation of removal relief for certain noncitizens who have lived in the United States for ten years.²⁶⁹ Among other requirements, individuals seeking cancellation of removal must demonstrate that they have good moral character and that their removal would cause extreme hardship to

²⁶⁴ See *supra* Part I.

²⁶⁵ *Landon v. Plasencia*, 459 U.S. 21, 34 (1982); see *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (acknowledging the liberty interests at stake in removal proceedings as the potential for the loss "of all that makes life worth living"); *Bridges v. Wixon*, 326 U.S. 135, 164 (1945) (recognizing that the hardship noncitizens face in removal proceedings is "often as great if not greater than the imposition of a criminal sentence"); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (calling deportation "a drastic measure and at times the equivalent of banishment or exile"); *Ardalan*, *supra* note 263 at 1004 ("The consequences of deportation are often just as severe as, if not more severe than, the consequences of criminal conviction.").

²⁶⁶ *Landon*, 459 U.S. at 34 (citations omitted); see also *Ng Fung Ho*, 259 U.S. at 284 (stating that deportation may result "in loss of both property and life; or of all that makes life worth living").

²⁶⁷ See, e.g., *U.S.-Citizen Children Impacted by Immigration Enforcement*, AM. IMMIGR. COUNCIL (June 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/us_citizen_children_impacted_by_immigration_enforcement_0.pdf [https://perma.cc/FGR3-MTLY] (collecting studies about the impact of family members experiencing immigration enforcement on children).

²⁶⁸ 27 I. & N. Dec. 664 (A.G. 2019).

²⁶⁹ Cancellation of removal is available to both LPR and non-LPRs, with different eligibility requirements for each category. See 8 U.S.C. § 1229b(a)–(b). LPR cancellation terminates a removal order against an LPR and reinstates the former LPR status if they were an LPR for five years or more, resided in the United States continuously for seven years with legal status, and have not been convicted of an aggravated felony. *Id.* § 1229b(a). Non-LPR cancellation terminates a removal order and grants LPR status to individuals who have been physically present in the United States for ten or more continuous years, have good moral character, have not been convicted of certain offenses, and establish that their removal would result in "exceptional and extremely unusual hardship" to a qualifying relative. *Id.* § 1229b(b)(1).

a U.S. citizen family member.²⁷⁰ As to the former, the Attorney General in *Castillo-Perez* held that an individual with two convictions for driving under the influence is presumed to lack good moral character unless the individual can demonstrate that the convictions “were an aberration.”²⁷¹ As a result, if an individual cannot defeat the good moral character presumption, they are precluded from cancellation of removal and will be deported even if they have lived in the United States for ten or more years and their removal would cause extreme hardship to a U.S. citizen family member.²⁷² The private interest in having a realistic opportunity to overcome rebuttable presumptions is thus grave for both the individual themselves and their families and communities.

On the other side of the balance, the government’s interests concerning effectively irrebuttable presumptions present a unique circumstance. The government’s interests include efficiency in backlogged immigration courts and reducing additional costs and resource needs.²⁷³ But concerning effectively irrebuttable presumptions, many of these efficiency and cost considerations have already been decided. Indeed, the agency necessarily opted to establish a rebuttable presumption rather than an irrebuttable presumption or per se rule.²⁷⁴ Thus, although requiring immigration adjudicators to analyze and explain whether an individual has rebutted a presumption may take time, and ensuring that rebuttal mechanisms—both how they are structured and their standards are interpreted—may cost resources and result in more individuals receiving relief, this is what the government intended in the first instance by creating a rebuttable presumption. And rebuttable presumptions themselves are cost-saving: as scholars have noted, they “avoid wasted time and effort when the presumed fact is strongly based on logic and common sense” and “avoid a procedural impasse caused by a lack of evidence.”²⁷⁵ In other words, safeguards to identify and eliminate effectively irrebuttable presumptions would ensure that rebuttable presumptions operate as the government intended. Moreover, “Financial cost alone is not a controlling weight in determining

²⁷⁰ 8 U.S.C. § 1229b(b)(1)(B), (D).

²⁷¹ *Castillo-Perez*, 27 I. & N. Dec. at 671. Whether or not the rebuttable presumption set forth in *Castillo-Perez* is in fact rebuttable is beyond the scope of this Article. Future work should apply the framework set forth in Part II *supra* to determine whether the presumption in *Castillo-Perez* is in fact rebuttable or effectively irrebuttable.

²⁷² *See, e.g., id.* at 665–66, 671–72.

²⁷³ *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 347 (1976) (including in the public interest “the administrative burden and other societal costs” associated with providing evidentiary hearings in disability benefit termination cases); Sabrineh Ardalán, *Asymmetries in Immigration Protection*, 85 BROOK. L. REV. 319, 344 (2019); Walden, *supra* note 260, at 130.

²⁷⁴ The Agency made this decision explicit in *Y-L-* when Attorney General Ashcroft opined that he could have, but declined to, establish a per se rule. 23 I. & N. Dec. 270, 276–77 (A.G. 2002).

²⁷⁵ Hjelmaas, *supra* note 22, at 434.

whether due process requires a particular procedural safeguard prior to some administrative decision.”²⁷⁶ In this way, government and private interests with respect to effectively irrebuttable presumptions are aligned.

The government and private interests align in other respects—namely, the public’s interest in abiding by its international treaty obligations. Pursuant to international treaty, the United States has *non-refoulement* obligations to not deport refugees to countries where they may be tortured or killed.²⁷⁷ Those treaty obligations are violated where, as in *Y-L-*, the government bars an individual from applying for humanitarian relief based on an extra-statutory, effectively per se rule disguised as a rebuttable presumption.²⁷⁸

The risk that applying an effectively irrebuttable presumption at a hearing erroneously deprives a noncitizen of their fundamental interests is, by the very nature of effectively irrebuttable presumptions, near certain. Be it the structure of the presumption or the ways in which it is implemented in practice, the import of effectively irrebuttable presumptions is that, once triggered, the outcome is all but predetermined. Hearings, in effect, become empty rituals. Unlike *Mathews v. Eldridge*, the inquiry is not whether a hearing is required by due process;²⁷⁹ rather, it is how to ensure that a hearing applying an effectively irrebuttable presumption provides the process that is due.

* * *

Under either analysis, effectively irrebuttable presumptions thus violate constitutional due process norms, which demand more than an empty ritual. Such presumptions cannot stand at the form-substance interstice between rebuttable and irrebuttable presumptions. If formulated as a rebuttable presumption, they must be, in fact, rebuttable.

These constitutional concerns supersede any agency deference that courts afford in the immigration context specifically and administrative agencies broadly.²⁸⁰ While courts and scholars have long recognized that

²⁷⁶ *Eldridge*, 424 U.S. at 348.

²⁷⁷ See Ardalan, *supra* note 273, at 328–30. The United States acceded to the 1967 Protocol Relating to the Status of Refugees, applying articles 2 through 34 of the 1951 United Nations Convention Relating to the Status of Refugees. U.N. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150, 176. Article 33 of the Convention provides that “[n]o Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened,” except where the individual, “having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.” *Id.* at art. 33(1)–(2).

²⁷⁸ See *Y-L-*, 23 I. & N. Dec. at 270; Ardalan, *supra* note 273, at 328–31.

²⁷⁹ *Eldridge*, 424 U.S. at 323.

²⁸⁰ Courts and scholars generally apply the two-step deference framework set forth in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), to review agency interpretations of statutes, including BIA and attorney general certified decisions. See, e.g., *Negusie v. Holder*,

the political branches are at their zenith when it comes to immigration matters,²⁸¹ agency authority to create per se rules is not unfettered.²⁸² So-called immigration exceptionalism and agency deference broadly stop at constitutional violations.²⁸³ At bottom, so-called rebuttable

555 U.S. 511, 516–17 (2009) (stating that *Chevron*'s application to immigration agency decisions is "well settled"); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446–48 (1987); see also Rachel Gonzalez Settlege, *Rejecting the Children of Violence: Why U.S. Asylum Law Should Return to the Acosta Definition of "A Particular Social Group,"* 30 GEO. IMMIGR. L.J. 287, 298 (2016) (explaining that federal courts generally apply the *Chevron* framework in reviewing BIA decisions). See generally Jaclyn Kelley-Widmer & Hillary Rich, *A Step Too Far: Matter of A-B-, "Particular Social Group," and Chevron*, 29 CORNELL J.L. & PUB. POL'Y 345 (2019) (applying the *Chevron* two-step framework to challenge the legality of Attorney General Sessions' certified decision in *A-B-*, 27 I. & N. Dec. 227 (A.G. 2018)). At the first step of the *Chevron* two-step framework, if courts determine that Congress has spoken unambiguously to the question at hand, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. If, however, "the statute is silent or ambiguous" as to Congress's intent, courts proceed to step two, which considers "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Courts uphold the agency interpretation so long as it is reasonable. See *id.* The *Chevron* analysis is admittedly deferential. See, e.g., Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 6, 33 fig. 2, 35 fig. 3 (2017) (finding that circuit courts resolved cases at *Chevron* step one thirty percent of the time, and of those cases upheld the agency interpretation thirty-nine percent of the time; of the seventy percent of agency interpretations that reached *Chevron*'s second step, courts upheld the agency's interpretation 93.8% of the time). But the reasonableness analysis necessarily has bounds lest it be toothless. See Matthew F. Soares, Note, *Agencies and Aliens: A Modified Approach to Chevron Deference in Immigration Cases*, 99 CORNELL L. REV. 925, 948 (2014) ("Although [*Chevron* step two] has often been treated in a rubber-stamp fashion, it ought not be.").

²⁸¹ See T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 34 (1990); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1392–94 (1999); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990) [hereinafter Motomura, *Phantom Constitutional Norms*] (describing the plenary power doctrine); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 465–83 (2009) (describing the evolution of deference principles in federal immigration law).

²⁸² See Kelley-Widmer & Rich, *supra* note 280, at 368. More broadly, immigration scholars have traced the decline of immigration exceptionalism and the plenary power doctrine's hold. See, e.g., Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 64, 118 (2015) (explaining that the Supreme Court has, "to a large extent, continued to bring U.S. immigration law into the jurisprudential mainstream" and that immigration exceptionalism is "slowly but surely . . . on its way out"); Alina Das, *Unshackling Habeas Review: Chevron Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 153–58 (2015) (explaining the decline of the plenary power doctrine); see also Motomura, *Phantom Constitutional Norms*, *supra* note 281, at 610 ("[C]ourts will continue to avoid this directly applicable constitutional [plenary power] doctrine through subconstitutional decisions that rely on phantom constitutional norms much more favorable to [noncitizens].").

²⁸³ See *Zadvydas v. Davis*, 533 U.S. 678, 695–700 (2001) (explaining that plenary power "is subject to important constitutional limitations" and rejecting the government's argument that it can detain noncitizens indefinitely post-removal order); *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1249 (10th Cir. 2008) ("It is well established that the canon of constitutional avoidance does constrain an agency's discretion to interpret statutory ambiguities, even when *Chevron* deference

presumptions that are, in fact, effectively irrebuttable may not use the rebuttable name as a shield from judicial and agency scrutiny and irrebuttable nature as a sword against individuals. The next Part accordingly recommends safeguards required to make effectively irrebuttable presumptions properly rebuttable in line with due process norms.

IV. RECOMMENDATIONS FOR SAFEGUARDS AGAINST EFFECTIVELY IRREBUTTABLE PRESUMPTIONS

Due process requires safeguards to identify effectively irrebuttable presumptions and ensure that such presumptions are in fact rebuttable. This Part proposes safeguards in the immigration context, but these recommended proactive and reactive measures may apply in other civil contexts in which effectively irrebuttable presumptions arise.

The first-order safeguard against effectively irrebuttable presumptions is identifying which presumptions are in fact rebuttable and which are effectively irrebuttable. The appropriate agency²⁸⁴ should undertake this identification exercise proactively by applying the four-part framework set forth in Part II to existing rebuttable presumptions to determine whether, based on the presumption's structure of implementation, the presumption is effectively irrebuttable. Consider an illustrative appraisal of the *Y-L-* presumption, beginning with the threshold issue that immigration adjudicators regularly fail to consider the minimum six criteria needed to overcome the presumption.²⁸⁵ In practice, the presumption, once triggered, is dispositive.²⁸⁶ Any analysis of the *Y-L-* presumption further requires interrogating whether the presumption as structured is preclusive—namely, whether it is reasonable to require that a respondent establish all six criteria before an immigration adjudicator may consider other extraordinary circumstances such as the coercion and duress that Mr. Sanchez suffered or mental health concerns.²⁸⁷ Or whether some of the factors contradict one another—for example, it would be difficult to make money from a drug transaction and be only peripherally involved. Even assuming that the presumption is structurally rebuttable, the standard for each of the minimum

would otherwise be due.”); Das, *supra* note 282, at 191–92 (“[T]here is little doubt that, where applicable, constitutional avoidance operates to trump *Chevron* deference. . . . The canon thus blocks deference to an agency interpretation that raises serious constitutional concerns.”).

²⁸⁴ In the immigration context, the responsible agency would be the EOIR or the Department of Justice.

²⁸⁵ See *supra* Part I.

²⁸⁶ See *supra* Part I (explaining that vanishingly few cases have successfully overcome the *Y-L-* presumption); DeCarvalho v. Garland, 18 F.4th 66, 71 (1st Cir. 2021) (expressing concern that “based on the experience of two decades and Congress’s increasingly nuanced view of drug trafficking offenses, *Matter of Y-L-* may have turned out to over-shoot the mark” (footnote omitted)).

²⁸⁷ See *Y-L-*, 23 I. & N. Dec. 270, 281 (A.G. 2002).

criteria needed to rebut the presumption is set at an unreasonable level. These structural and implementation issues are reflected in the problematic reality that, as the government tacitly conceded in *DeCarvalho v. Garland*,²⁸⁸ vanishingly few cases have successfully overcome the presumption. The *Y-L-* presumption, in this way, is ripe for amendment.

Admittedly, ascertaining whether immigration judges are, in fact, applying the presumption²⁸⁹ and how many cases have successfully overcome the presumption²⁹⁰ may be challenging where the agency has not maintained historical records about rulings on presumptions. Accordingly, to facilitate this identification process, the appropriate agency should establish a system to track and monitor how rebuttable presumptions are applied in proceedings and the outcomes thereof.²⁹¹ These efforts should track, at a minimum, whether the adjudicator evaluated the rebuttal mechanism or instead improperly treated the presumption as dispositive; what evidentiary or review standard the adjudicator applied in considering whether the presumption was rebutted; and whether the presumption was ultimately rebutted. Aggregating this information will facilitate proactively identifying effectively irrebuttable presumptions or, at the very least, marking for closer inspection presumptions with low rebuttal rates.

Safeguards are needed in a reactionary posture as well. Where litigants challenge presumptions as effectively irrebuttable, as numerous cases have done in the *Y-L-* context,²⁹² federal reviewing courts must look beyond the presumption's claim to be rebuttable. That the agency "purported . . . [to create only] a strong presumption, not a per se rule" cannot be taken at face value to yield a presumption that is "[p]resumably" rebuttable²⁹³; deference to agencies in creating extra-statutory interpretations halts at the borders of process violations.²⁹⁴ This is particularly true where presumptions that are rebuttable in name only act to circumvent judicial review. The Ninth Circuit's decision in *Blandino-Medina v. Holder*²⁹⁵ illustrates the discordance.

²⁸⁸ 18 F.4th 66, 70 (1st Cir. 2021). The First Circuit noted that the record was devoid of any examples that rebutted the *Y-L-* presumption. *See id.*, 18 F.4th at 71 n.4.

²⁸⁹ *See supra* Section II.B.1.

²⁹⁰ *See supra* Section II.B.4.

²⁹¹ EOIR confirmed that it does not currently track the outcome of cases applying *Y-L-*, in response to a FOIA request filed by this Author. *See supra* note 64.

²⁹² *See supra* note 19.

²⁹³ *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 945–47 (9th Cir. 2007) (emphasizing that "[t]he Attorney General in *Y-L-* purported *not* to be creating a per se rule" and thus "[p]resumably *Y-L-* will be interpreted consistent with this statement and there will be some cases in which its exception applies"); *see also* *Ford v. Bureau of Immigr. & Customs Enf't*, 151 F. App'x 152, 154 (3d Cir. 2005) (per curiam) (emphasizing that *Y-L-* concluded its discussion of "particularly serious crime[s]" with an unambiguous disavowal of creating a per se category).

²⁹⁴ *See supra* Part III.

²⁹⁵ 712 F.3d 1338 (9th Cir. 2013).

In *Blandino-Medina*, which involved the same particularly serious crime designation as at issue in *Y-L-*, the Board concluded that the offense of lewd and lascivious conduct with a child was per se a particularly serious crime that renders an individual ineligible for withholding of removal.²⁹⁶ The Ninth Circuit vacated the Board's decision.²⁹⁷ Applying the *Chevron*²⁹⁸ framework, the Ninth Circuit held that the Board was not authorized to create a new category of per se particularly serious crimes in the withholding of removal context and vacated the Board's per se category.²⁹⁹ The Ninth Circuit's decision notwithstanding, the Attorney General's decision in *Y-L-*, which effectively creates a per se category for certain drug trafficking aggravated felonies, circumvents a similar fate simply because it is a rebuttable presumption in name only.

In these cases involving effectively irrebuttable presumptions, courts should more closely examine the use of so-called rebuttable presumptions in immigration proceedings and apply the four-part framework set forth in Part II to determine if they are, in fact, rebuttable. In so doing, courts may instruct the parties to supplement the record with any known cases overcoming the presumption and the reasoning therein.³⁰⁰ Yet, even while increasing judicial scrutiny of challenged presumptions is a necessary safeguard, it is not alone sufficient. This reality is particularly salient given that many immigrants facing effectively irrebuttable presumptions like *Y-L-* are unrepresented and may not know how to or that they can directly challenge the presumption as a matter of law. That is, of course, assuming that they are aware of the presumption in the first instance—a tenuous supposition given that immigration adjudicators regularly fail to inform pro se noncitizens that *Y-L-* is rebuttable, much less how to rebut the presumption.³⁰¹ Both proactive and reactive safeguards are thus necessary.

Central to identifying and challenging effectively irrebuttable presumptions is information transparency. While the Executive Office of Immigration Review (“EOIR”) is making Board decisions publicly accessible pursuant to a settlement,³⁰² the release of cases is slow and does not include immigration judge adjudications. This omission is problematic because many respondents do not have counsel and are

²⁹⁶ See *id.* at 1340–41.

²⁹⁷ *Id.* at 1340.

²⁹⁸ 467 U.S. 837 (1984).

²⁹⁹ See *Blandino-Medina*, 712 F.3d at 1343–47.

³⁰⁰ See *Thorne v. U.S. Dep't of Def.*, 916 F. Supp. 1358, 1366 (E.D. Va. 1996) (requesting supplemental evidence after determining that the “record is too sparse to permit a confident conclusion on this issue”); *DeCarvalho v. Garland*, 18 F.4th 66, 71 (1st Cir. 2021) (stating that, on remand, “the government will have the opportunity to supplement the record with any evidence that the presumption can be overcome”).

³⁰¹ See *supra* Part I, Section III.A.

³⁰² See *supra* note 64 and accompanying text.

unable to appeal to the Board. Currently, immigration adjudications are generally available only through a FOIA request,³⁰³ which is time consuming and resource intensive and thus a barrier to meaningfully identifying and challenging effectively irrebuttable presumptions. The appropriate agency should make data for monitoring and tracking efforts publicly accessible, and, at a minimum, the agency should expeditiously make redacted immigration judge and Board decisions accessible so that the public may identify and challenge effectively irrebuttable presumptions.

Once a presumption is identified as effectively irrebuttable in practice, the presumption may be vacated in one of two ways. The attorney general can certify the offending Board or attorney general opinion and reconstitute or clarify the presumption to ensure that it is, in fact, rebuttable. This oversight and amendment mechanism is precisely what the First Circuit contemplated in *DeCarvalho v. Garland* when it remanded to the Board to “provide the Attorney General with an opportunity to consider whether, based on the experience of two decades and Congress’s increasingly nuanced view of drug trafficking offenses, *Matter of Y-L-* may have turned out to over-shoot the mark.”³⁰⁴ Alternatively, litigants may directly challenge the presumption’s constitutional and statutory validity in a petition for review before a federal appellate court, which is the only avenue for review of Board and attorney general decisions.³⁰⁵ Federal reviewing courts in this posture must carefully examine the effectively irrebuttable presumption and vacate it as violating due process.³⁰⁶

Surely, then, the probative value of establishing safeguards to ensure that so-called rebuttable presumptions are in fact rebuttable is high. The Due Process Clause “forbids the Government to stack the deck” against the noncitizen.³⁰⁷ Establishing these safeguards would ensure that so-called rebuttable presumptions operate as intended and preserve a noncitizen’s right to be meaningfully heard.

³⁰³ See Creighton, *supra* note 64.

³⁰⁴ *DeCarvalho*, 18 F.4th at 71 (footnote omitted).

³⁰⁵ Congress has delegated the authority to administer immigration law to the attorney general and has statutorily mandated that Board decisions must be reviewed by the relevant circuit court where the immigration judge sits. 8 U.S.C. § 1252(a)(2)(5), (b)(2); see Kelley-Widmer & Rich, *supra* note 280, at 352 n.31 (explaining the process for appealing Board and attorney general decisions).

³⁰⁶ See *supra* Part III.

³⁰⁷ *Landon v. Plasencia*, 459 U.S. 21, 41 (1982) (Marshall, J., concurring in part, dissenting in part) (stating that the government stacked the deck against the noncitizen where the noncitizen was not given adequate notice of the standards for exclusion or her right to retain counsel and present a defense, which “virtually assured that the Government attorney would present his case without factual or legal opposition”).

CONCLUSION

Rebuttable presumptions are a common fixture of the U.S. legal system and, when properly applied, offer adjudicatory efficiency in fair proceedings. Form and substance, however, do not always comport, as evidenced by presumptions that claim to be rebuttable in name but are effectively irrebuttable in practice. Individuals subject to such presumptions are offered a hearing at which they can attempt to overcome this presumption, but that hearing is merely an empty ritual when the presumption, as structured or implemented, is effectively impossible to rebut or where the adjudicator fails to apply the rebuttal standard at all. Any opportunity to overcome a presumption is also an empty ritual when the individual does not know about the presumption or that it can be rebutted in the first instance—a knowledge asymmetry facing many immigrants forced to navigate the complex U.S. immigration system *pro se*.

Effectively irrebuttable presumptions, understood as empty rituals, offend constitutional due process norms by circumventing fundamental components of fairness, including the right to a neutral arbiter and an individualized determination. In this light, immigration agencies and federal reviewing courts must look beneath the claim of a rebuttable presumption and instead look to its impact in practice. Agency deference norms stop at the borders of constitutional due process norms. Moreover, effectively irrebuttable presumptions cannot be used to impermissibly circumvent rebuttable presumptions.

Although this Article focuses on effectively irrebuttable presumptions in the immigration context, the impact of and constitutional dilemma inherent in such presumptions reaches beyond immigration to all civil contexts that employ rebuttable presumptions. Thus, agencies—whether the Department of Justice, the EOIR, or the appropriate governing agency in other civil contexts—must take affirmative action to identify and rectify effectively irrebuttable presumptions. Reviewing courts must take a closer look at challenges to presumptions as effectively irrebuttable and vacate those offending (ir)rebuttable presumptions. These safeguards are necessary to convert hearings as empty rituals to hearings that are full and fair as required by due process norms.

Free Speech Originalism: Unconstraining in Theory and Opportunistic in Practice

Caroline Mala Corbin*

ABSTRACT

Courts should not apply originalism in freedom of expression cases. Originalists claim that originalism prevents judges from imposing their own views. It does not—not in theory and not in practice. Instead, as the treatment of hate speech bans suggests, it is not principles but outcomes that determine whether and which version of originalism is used. Moreover, a true originalist First Amendment would likely lead to impoverished free speech protections.

Part I provides background on original public meaning originalism, the iteration of originalism currently favored by scholars. It also explains how the theory falls short of its original promise of limiting judicial discretion and instead tends to entrench the privilege of historically powerful groups.

Part II explains why originalism as a theory particularly fails when applied to free speech cases: because the original meaning of the First Amendment is notoriously elusive, it enables judges to select an interpretation that yields their desired outcome. Moreover, what little we can confidently conclude about the original meaning suggests a cramped view of free speech protections at the Founding and at Reconstruction.

Part III demonstrates that free speech originalism in practice is an opportunistic affair. Actual judging provides at least two additional occasions to exercise discretion: deciding whether to use originalism and which version to use. Part III starts by exploring how sometimes the Supreme Court applies originalism to speech cases but more often it does not, especially in its deregulatory “free speech Lochnerism” decisions. Part III next demonstrates that different types of originalism applied to hate speech bans can yield different outcomes, further demonstrating how originalism provides cover for motivated results—results that too often favor the powerful at the expense of the marginalized.

Although there exists an extensive literature on both originalism and hate speech, this Article makes several novel contributions: surprisingly few scholars have considered free speech originalism and fewer still, if any, with an eye

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toward questions of power and privilege. The analysis of original meaning extends beyond the Founding to include Reconstruction, an era regularly overlooked. Finally, the originalist analysis of hate speech is the first of its kind.

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INTRODUCTION

We are living in the age of originalism, or at least an originalist-friendly Supreme Court.¹ Not only has originalism taken over Second Amendment cases,² but it has gained a strong foothold in First Amendment religion cases, with originalism now the dominant

¹ Justice Thomas, Justice Gorsuch, Justice Kavanaugh, and Justice Barrett all self-identify as originalists. Mike Rappaport, *The Year in Originalism*, L. & LIBERTY (Mar. 24, 2021), <https://law-liberty.org/the-year-in-originalism/> [<https://perma.cc/P9PX-654W>] (“[T]here are now four avowed originalists on the Court—Thomas, Gorsuch, Kavanaugh, and Barrett.”). Chief Justice Roberts and Justice Alito regularly join originalist decisions such as *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 17 (2022) (striking New York gun regulation on the grounds that it was not “consistent with this Nation’s historical tradition of firearm regulation”).

² See, e.g., *Bruen*, 597 U.S. at 24 (“The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.”).

approach for resolving Establishment Clause disputes.³ Originalism has also been creeping into First Amendment freedom of expression cases.⁴ In fact, the Supreme Court recently observed that before it would recognize speech as unprotected, “the government must generally point to historical evidence about the reach of the First Amendment’s protections.”⁵ This Article argues that this trend should be resisted. Originalism is a highly problematic theory to determine the scope of our rights and is particularly ill-suited to speech rights.

Although some parts of the U.S. Constitution are clear on their face, such as the requirement that the President be thirty-five years old,⁶ others like “Congress shall make no law . . . abridging the freedom of speech, or of the press”⁷ are not. They articulate abstract principles that need to be interpreted. Originalism offers one approach to constitutional interpretation. Though many different versions of originalism exist, the two central tenets of almost every version are that the meaning of a constitutional provision was fixed at its adoption and that this fixed original meaning should constrain judicial interpretation.⁸

One of the main selling points of originalism is that it will curb judicial discretion.⁹ Originalists complain that unelected judges too often infuse their constitutional decisions with their own views and simply make up rights with no constitutional foundation, like the right to abortion.¹⁰ Originalism, they say, will prevent this by tethering the Constitution to its original meaning. Originalism as a theory, however, fails to curtail judicial discretion in deciding cases. Part I starts by

³ See, e.g., *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534–35 (2022) (“In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’” (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014))).

⁴ See *infra* Section III.A.1.

⁵ *Bruen*, 597 U.S. at 24 (emphasis omitted).

⁶ U.S. CONST. art. II, § 1 (“No Person . . . shall be eligible to the Office of President . . . who shall not have attained to the Age of thirty five Years . . .”).

⁷ U.S. CONST. amend. I.

⁸ See *infra* Section I.B; Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 3–4 (2018) (“Originalists hold that: (1) the meaning of a provision of the Constitution was *fixed* at the time it was enacted (the ‘Fixation Thesis’); and (2) that fixed meaning ought to constrain constitutional decisionmakers today (the ‘Constraint Principle’).” (emphasis omitted)).

⁹ See Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 602 (2004) (“By rooting judges in the firm ground of text, history, well-accepted historical traditions, and the like, originalists hoped to discipline them.”).

¹⁰ See *infra* note 20; *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231 (2022) (overruling *Roe v. Wade* on the grounds that the right is neither specifically listed in the Constitution nor “deeply rooted in this Nation’s history and tradition” (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997))); Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2401 (2006) (“For many informed people . . . the Supreme Court’s decision in *Roe* is the *über*-example, the 800-pound gorilla, of unrestrained judging.”).

summarizing well-known reasons why determinate outcomes are elusive for even the newest versions of originalism, which focus on original public meaning.¹¹ Part I then turns to the less explored point that originalism allows judges to entrench existing hierarchies, all while claiming inevitability. Given originalism's roots as a challenge to *Brown v. Board of Education*,¹² that may be a feature rather than a bug.¹³

Part II surveys the First Amendment's original public meaning at the Founding as well as at Reconstruction—an era regularly overlooked. It argues that the theory of originalism applied to freedom of expression is especially ill-advised because we can confidently conclude little about the original meaning of the First Amendment.¹⁴ This uncertainty allows originalist judges to reach outcomes that best fit their preexisting views. Moreover, what we do know suggests a narrow, shallow First Amendment protection so that an originalist approach to freedom of expression would slash existing free speech protections.

As Part III explores, originalism in practice is an opportunistic affair. First, sometimes the Supreme Court applies originalism in speech cases, as it did when it froze the categories of unprotected speech to those dating to the Founding, shutting out hate speech from consideration; sometimes the Supreme Court does not, as when it expanded free speech protections for corporations to such a degree that scholars describe our current era as one of free speech *Lochnerism*.¹⁵ Second, when the Supreme Court does perform an originalist analysis, it applies one particular version when another might lead to a different outcome. In fact, although the “original expected applications” strand applied to unprotected categories ultimately precludes hate speech bans, a different strand focusing on “original public meaning” might well permit them.¹⁶ The upshot is that originalism often provides cover for predetermined outcomes while maintaining the guise that the Constitution required them—and more often than not, what the Constitution seems to require benefits the powerful and privileged.

I. ORIGINALISM'S FAILURE TO CONSTRAIN

Modern originalism arose in response to what its proponents viewed as the excesses of the Warren and Burger Courts.¹⁷ They viewed

¹¹ See *infra* Section I.A.

¹² 347 U.S. 483 (1954).

¹³ See *infra* Section I.B.

¹⁴ See *infra* Section II.A.1.

¹⁵ See *infra* Section III.A.

¹⁶ See *infra* Section III.B.

¹⁷ See Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545, 554–55 (2006) (“No politically literate person could miss the

these Courts' groundbreaking decisions—which ended segregation¹⁸ and established women's right to abortion¹⁹—as illegitimate judicial lawmaking with no explicit foundation in the Constitution.²⁰ Originalism, they say, would prevent such judicial activism.²¹

Originalism's basic premise is that the meaning of a constitutional provision is fixed at the time of adoption (the "fixation thesis"),²² and that the fixed meaning should control constitutional interpretation today (the "constraint principle").²³ That is, we should understand constitutional provisions in the same way as the generation that approved the provision.²⁴ Proponents claim that interpreting ambiguous provisions²⁵ in this manner curtails judicial discretion and prevents unelected judges from infusing the Constitution with their own personal values.²⁶ Instead, proponents continue, it promotes fidelity to the Constitution, a document ratified by a supermajority.²⁷ Consequently, if the Due Process Clause of the Fourteenth Amendment was not understood as creating a

point that the Reagan Administration's use of originalism marked, and was meant to mark, a set of distinctively conservative objections to the liberal precedents of the Warren Court.").

¹⁸ See *Brown v. Bd. of Educ.*, 347 U.S., 483, 495 (1954).

¹⁹ See *Roe v. Wade*, 410 U.S. 113, 154 (1973).

²⁰ See, e.g., Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 291 (2007) ("Roe's critics [argue] that there is no constitutional basis for abortion rights or for a right of 'privacy'; the right is completely made up out of whole cloth . . ."); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 268 (2022) (criticizing *Roe v. Wade* as an exercise of "raw judicial power" (quoting *Roe*, 410 U.S. at 222 (White., J. dissenting))).

²¹ See Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1845 (2016) ("Constraining judges through text and history was held out to be the theory's central virtue and objective.").

²² Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015) ("The meaning of the constitutional text is fixed when each provision is framed and ratified: this claim can be called the *Fixation Thesis*.").

²³ *Id.* ("[T]he *Constraint Principle* . . . holds that the original meaning of the constitutional text should constrain constitutional practice.").

²⁴ See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 461 (2013) ("Together, the Fixation Thesis and the Constraint Principle form the core of originalism.").

²⁵ Textually straightforward provisions such as the President's age requirement generally do not generate controversy. See CONG. RSCH. SERV., R5129, *MODES OF CONSTITUTIONAL INTERPRETATION* 1, 1 n.8 (2018).

²⁶ See Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 243 (2009) ("[O]riginalists further contend that the determinacy provided by reliance on constitutional text, or at least on some objective guidepost for the fixed meaning of the constitutional text, is essential to constraining judges' ability to impose their own views under the guise of constitutional interpretation.").

²⁷ See Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1440, 1444 (2007) ("[T]he most common and most influential justification for originalism [is] popular sovereignty and the judicially enforced will of the people."); Andrew Coan, *The Dead Hand Revisited*, 70 EMORY L.J. ONLINE 1, 2 (2020) ("This argument from popular sovereignty is originalism's trump card.").

right to abortion during Reconstruction, then there is no constitutional right to abortion.²⁸

Notably, there is no single theory of modern originalism,²⁹ as there are at least two generations of originalism (old and new originalism)³⁰ and multiple strands within new originalism.³¹ First-generation originalists focused on the intent of the Framers of the Constitution.³² The focus then migrated to the intent of the ratifiers, as they made the Constitution binding.³³ With second-generation “new originalism,” the focus shifted again, this time to general public meaning.³⁴ In particular, today’s originalist enterprise for many is to uncover the understanding of a hypothetical reasonable citizen of the era.³⁵

Despite these updates, originalism still fails to deliver on its original promise of curtailing judicial discretion.³⁶ Although some originalist scholars are walking back claims about the ability³⁷—and even

²⁸ See John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 371 (2007) (describing “the constitutional right to abortion” as “the poster child for imposition of the judiciary’s own idiosyncratic values”).

²⁹ See Colby & Smith, *supra* note 26, at 258 (“[T]here is no single, formal, canonical version of originalism.”).

³⁰ See Whittington, *supra* note 9, at 599 (“The ‘old originalism’ flourished from the 1960s through the mid-1980s. The ‘new originalism’ has flourished since the early 1990s.”).

³¹ See Scott Soames, *Originalism and Legitimacy*, 18 GEO. J.L. & PUB. POL’Y 241, 242 (2020) (“Originalism is a family of theories . . .”).

³² See Barnett & Bernick, *supra* note 8, at 4.

³³ Cf. Whittington, *supra* note 9, at 610 (“It is the adoption of the text by the public that renders the text authoritative, not its drafting by particular individuals.”).

³⁴ See Amy Barrett, *Introduction: The Interpretation/Construction Distinction in Constitutional Law*, 27 CONST. COMMENT. 1, 1 (2010) (“The defining characteristic of new originalism is its argument that the original public meaning of the Constitution’s text should control its interpretation.”).

³⁵ See Colby & Smith, *supra* note 26, at 245 (“[S]everal of the most prominent academic proponents of originalism . . . seek to determine how the words of the Constitution ‘would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases, in context, at the time they were adopted, and within the political and linguistic community in which they were adopted.’” (emphasis omitted) (quoting Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1132 (2003))).

³⁶ See Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 617 (2008) (“The new originalism, like the old, fails to deliver on its claim about eliminating judicial subjectivity, judgment, and choice.”). Note that originalism now focuses on judicial constraint rather than judicial restraint. See Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 751 (2011) (“[A]lthough originalism in its New incarnation no longer emphasizes judicial restraint—in the sense of deference to legislative majorities—it continues to a substantial degree to emphasize judicial constraint—in the sense of promising to narrow the discretion of judges.” (emphasis omitted)).

³⁷ See, e.g., Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 419 (2013) (“By adopting the interpretation-construction distinction, the New Originalism frankly acknowledges that the text of ‘this Constitution’ does not provide definitive answers to all cases and controversies that come before Congress or the courts.”).

desirability³⁸—of originalism to limit judicial discretion, most proponents still maintain originalism yields objective, empirical outcomes.³⁹ In reality, originalism allows judges to be outcome driven (and usually antiprogressive) while claiming objectivity.⁴⁰ More specifically, judicial discretion is inevitable because courts cannot easily uncover the original meaning from a much earlier historical era, especially an original meaning that will determine how a case today should be decided. Original public meaning is not only elusive but may also be undesirable: even if it could provide clear answers, the regressive views of an elite group of long-dead people should not necessarily control.

A. *Elusiveness of Original Public Meaning*

Despite proponents' continued insistence that theirs is an objective, empirical inquiry,⁴¹ "new originalism" fails to constrain judges in any meaningful way.⁴² When Justice Alito warned against "the natural human tendency to confuse what [an] Amendment protects with our own ardent views,"⁴³ he could just as well be talking about public meaning originalism. There are many reasons why judges are poorly positioned to uncover the meaning of words written by people two centuries ago and apply it to the case before them without exercising considerable discretion. A few are examined below.

³⁸ See William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2214 (2017) ("[O]riginalist scholars today are much more equivocal about the importance and nature of constraining judges."). Having obtained greater control of the judiciary, conservatives' calls for judicial restraint have receded. The goal of curtailing judges has been replaced with embracing fidelity to the Constitution, even if it means unelected judges must overrule the political branches. See Whittington, *supra* note 9, at 609.

³⁹ See Colby, *supra* note 36, at 750 ("[W]hen it comes to the potential to constrain the Judiciary, and to produce objective, determinable right and wrong answers to specific constitutional questions, originalism no longer offers any appreciable advantage over nonoriginalism. . . . And yet, most New Originalists still do make that promise, at least to some degree.").

⁴⁰ See D.A. Jeremy Telman, *Originalism as Fable*, 47 HOFSTRA L. REV. 741, 744–45 (2018) (book review) ("[O]riginalists act in bad faith when they camouflage their policy preferences with the false judicial modesty of originalism. At least non-originalists are transparent and openly acknowledge that judges exercise constitutional powers of legal discretion." (footnote omitted)).

⁴¹ See, e.g., Barnett & Bernick, *supra* note 8, at 10 (describing the search for original public meaning as "an empirical investigation of linguistic usage").

⁴² Colby, *supra* note 36, at 769 (noting that new originalists "continue to insist that originalism is meaningfully constraining . . . because to do otherwise would undermine . . . the very mission of their theory").

⁴³ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 239 (2022); see also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) (complaining that "the main danger in judicial interpretation of the Constitution . . . is that the judges will mistake their own predilections for the law").

1. *Inevitable Uncertainty*

The original public meaning of a constitutional provision turns on the generally accepted meaning of words used by the Constitution,⁴⁴ yet contemporaneous texts like dictionaries, letters, newspapers, and other writings do not yield a single answer.⁴⁵ For example, dictionaries, one “of the most popular sources of interpretive evidence,”⁴⁶ define words, not phrases like “freedom of speech,”⁴⁷ and, in any event, offer multiple definitions.⁴⁸ Dictionaries of the era also tended to be prescriptive rather than descriptive, and therefore may not accurately reflect the general public meaning.⁴⁹ In fact, Samuel Johnson’s and Noah Webster’s dictionaries were each works of a single person and so reflected that person’s idiosyncratic views.⁵⁰ One empirical study concluded that dictionary definitions “would lead users to the wrong judgment about ‘ordinary meaning’ fairly often, once in every three to five cases.”⁵¹

Consulting more wide-ranging documents may complicate rather than clarify. Legal documents, including judicial opinions, summaries of the Constitutional Convention, the ratification debates, and the Federalist papers, may reveal that some phrases have both ordinary and legal meanings.⁵² Expanding the categories of documents, therefore, only provides more materials from which to cherry pick.⁵³

⁴⁴ See Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 445 (2007).

⁴⁵ See Krista M. Pikus, *When Congress Is Away the President Shall Not Play: Justice Scalia’s Concurrence in NLRB v. Noel Canning*, 114 MICH. L. REV. FIRST IMPRESSIONS 41, 43 (2015) (“Common sources for the ‘new originalism’ method include dictionaries, letters, and historical writings.”).

⁴⁶ Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 743 (2020).

⁴⁷ Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 283 (2019) (“Dictionaries typically define individual words, not phrases . . . [therefore] we may often miss the import of a given constitutional term if we just separately look up its component words in the dictionary.”).

⁴⁸ See *id.* at 286 (“[I]f there are alternative senses of a given term, a dictionary would list both of them. And it wouldn’t tell you which one is the one likely to be understood in a given linguistic context.”).

⁴⁹ See *id.* at 286; Eleanor Miller & Heather Obelgoner, *Effective but Limited: A Corpus Linguistic Analysis of the Original Public Meaning of Executive Power*, 36 GA. ST. U. L. REV. 607, 609 (2020) (“[N]either dictionaries nor legal texts accurately reflect generalized public meaning.”).

⁵⁰ See Lee & Phillips, *supra* note 47, at 285.

⁵¹ Tobia, *supra* note 46, at 735.

⁵² See Lee & Phillips, *supra* note 47 at 279 (describing Randy Barnett’s attempt to uncover the semantic meaning of “commerce” by “conducting a systematic linguistic survey of the constitutional record” including dictionaries, the Constitutional Convention, ratification debates, the Federalist Papers and judicial opinions).

⁵³ See Tobia, *supra* note 46, at 789 (“Republican [judicial] appointees tend to construe dictionary definitions broadly when interpreting the terms ‘keep,’ ‘bear,’ and ‘arms,’ but narrowly when interpreting the terms ‘cruel,’ ‘unusual,’ and ‘punishment.’”); Matthew D. Bunker, *Originalism 2.0 Meets the First Amendment: The “New Originalism,” Interpretive Methodology, and Freedom of*

The move to uncovering original meaning based on a corpus linguistic analysis does not eliminate these problems either.⁵⁴ In this data-driven approach, computers rather than individuals analyze large data sets of writing to arrive at definitions⁵⁵: “By reviewing lines of text from both sophisticated legal documents and more general writings from the era, researchers can potentially gain insight into the original meaning of a word by tracking the frequency and contextual usages most commonly associated with historical words and phrases across all genres of text.”⁵⁶ Setting aside the fact that “ordinary meaning sometimes diverges from ordinary use,” as one experiment found,⁵⁷ the analysis may still yield inconclusive or multiple meanings, and a large data set cannot necessarily determine which one of several possibilities should control.⁵⁸

Another reason why the original fixed meaning may be difficult to pinpoint is that a consensus about meaning never existed.⁵⁹ Among historians, the idea of consensus was “discredited more than a generation ago.”⁶⁰ In other words, the original public meaning cannot be discovered

Expression, 17 COMM’N L. & POL’Y 329, 345 (2012) (“The New Originalist range of relevant materials is sufficiently large—and a contemporary understanding of how representative they were of a ‘reasonable person’ assessment of the particular issue is sufficiently imprecise—that the judge is afforded vast interpretive latitude to draw from historical sources that are both unrelated to constitutional text and, presumably, congenial to the judge’s own preferences.”).

⁵⁴ See Lawrence M. Solan, *Can Corpus Linguistics Help Make Originalism Scientific?*, 126 YALE L. J.F. 57, 61 (2016) (“[T]here are many original public meanings of an expression, and the corpus does not provide much help in selecting among them.”).

⁵⁵ See generally Lee & Phillips, *supra* note 47, at 289–93. See also Matthew Jennejohn, Samuel Nelson & D. Carolina Núñez, *Hidden Bias in Empirical Textualism*, 109 GEO. L.J. 767, 769 (2021) (“In essence, the corpus linguistics method allows a user to search a large body of text, or corpus, for a particular word to identify patterns in usage that reveal information about a word’s meaning.”).

⁵⁶ Miller & Obelgoner, *supra* note 49, at 610.

⁵⁷ Tobia, *supra* note 46, at 790.

⁵⁸ See Solan, *supra* note 54, at 64 (acknowledging that “[l]ike the lexicographer,” an originalist employing corpus linguistics analysis “will have other choices to make about how narrowly or broadly, thinly or thickly, to construe a relevant word”).

⁵⁹ See Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 723–24 (2013) (“Most originalists assume the existence of a constitutional consensus where none existed and gather evidence in an arbitrary and highly selective fashion.”).

⁶⁰ Saul Cornell, “*To Assemble Together for Their Common Good*”: *History, Ethnography, and the Original Meanings of the Rights of Assembly and Speech*, 84 FORDHAM L. REV. 915, 918–19 (2015); Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1436 (2021) (“[N]o historian believes that any important document possesses a single intent or meaning.” (quoting ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION*, at xxiv (2019))).

because usually there is no universally accepted original public meaning, just contested meanings.⁶¹

Compounding this problem for the Bill of Rights is uncertainty surrounding the relevant time period.⁶² Should it be the Founding, when the Amendments were adopted, or Reconstruction, when the Fourteenth Amendment made possible the application of the rights to the states?⁶³ Perhaps it ought to reflect some synthesis of both?⁶⁴ Or perhaps what should control is the Reconstruction era understanding of the original meaning?⁶⁵

Yet another problem is that the excavation of the original meaning is a historical enterprise,⁶⁶ and judges are not trained historians.⁶⁷ As H. Jefferson Powell observed, even for the best-intentioned judge, “the limits imposed by time and training almost always will compel her to rely on secondary literature that she has little ability to evaluate or critique historically.”⁶⁸ Judges will inevitably get history wrong, especially where the historical record is scant, ambiguous, or contradictory.⁶⁹

⁶¹ See Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 971 (1998) (“Historical inquiry into the original understanding of a provision may sometimes reveal that . . . [i]ts very vagueness enabled it to mean all things to all persons: No single original meaning ever existed.”).

⁶² See Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 988 (2012) (“There is little reason, in principle, for an originalist to privilege the meaning of an incorporated right circa 1791 over its meaning in any other year prior to 1868.”); Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439, 1440 (2022) (“[D]oes the original Free Speech Clause have a different meaning and scope than the ‘incorporated’ Free Speech Clause?”).

⁶³ Cf. Barry Friedman, *Reconstructing Reconstruction: Some Problems for Originalists (and Everyone Else, Too)*, 11 U. PA. J. CONST. L. 1201, 1209 (2009) (“[W]ith a few notable exceptions . . . [originalists] have devoted little if any attention to the Second Founding.”).

⁶⁴ See, e.g., Lash, *supra* note 62, at 1441 (“There is only one Freedom of Speech Clause—the one the people spoke into existence in 1791 but then respoke in 1868.” (emphasis omitted)).

⁶⁵ See Greene, *supra* note 62, at 985 (“[W]hose view of the Bill of Rights’ original understanding is the one that controls—that of the modern judge or that of the Fourteenth Amendment ratifying generation?”).

⁶⁶ See Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935, 956 (2015) (“[I]n order to genuinely recover the original meaning of the constitutional text, originalists of any stripe must behave as historians.”).

⁶⁷ See Cornell, *supra* note 59, at 722 n.6 (collecting articles criticizing originalists’ “Use and Abuse of History”); Saul Cornell, *Reading the Constitution, 1787–91: History, Originalism, and Constitutional Meaning*, 37 L. & HIST. REV. 821, 822 (2019) [hereinafter Cornell, *Reading the Constitution*] (“Despite paying lip service to ideas about reading the Constitution historically, originalism continues to invoke the authority of history without actually engaging in a genuinely historical practice.”).

⁶⁸ H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 661 (1987).

⁶⁹ See Tushnet, *supra* note 36, at 609–10 (“The new originalism, like the old, presents a simulacrum of historical inquiry, because it is a lawyer’s enterprise dressed up as a historian’s.”); Jack N. Rakove, Commentary, *Confessions of an Ambivalent Originalist*, 78 N.Y.U. L. REV. 1346, 1348 (2003) (“I was, and remain, skeptical about the capacity of lawyers and jurists to pursue these

2. *Meaning as Principle*

Even if there were a single, uniform view of a particular constitutional provision that judges were capable of uncovering, it might not help answer the constitutional question at issue because, odds are, the provision articulates a principle. Indeed, much of the U.S. Constitution—one of the shortest constitutions in the world⁷⁰—states general principles rather than detailed rules.⁷¹ Principles, however, provide broad guidelines, not answers to specific questions.⁷² In these cases, constitutional meaning has “run out.”⁷³

Exacerbating this problem is that most constitutional cases present issues that did not exist when the constitutional provision was adopted.⁷⁴ Even if the Second Amendment protects the highly specific right to bear arms for self-defense in the home, that interpretation does not answer the question of whether that right extends to semiautomatic weapons, which did not exist in the eighteenth century—a time of mostly single-shot weapons.⁷⁵

inquiries on terms that would pass the professional muster of historians.”); Helen Irving, *Outsourcing the Law: History and the Disciplinary Limits of Constitutional Reasoning*, 84 *FORDHAM L. REV.* 957, 959–60 (2015) (“Judges are not ‘qualified’ to act as historians.”).

⁷⁰ At 4,400 words, the U.S. Constitution is the world’s oldest and shortest written constitution among major governments (excluding micronations). *Fascinating Facts About the U.S. Constitution*, CONSTITUTIONFACTS.COM, <https://www.constitutionfacts.com/us-constitution-amendments/fascinating-facts/> [<https://perma.cc/K455-CLQG>].

⁷¹ See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 *U. CHI. L. REV.* 101, 108 (2001) (noting that “the framers frequently used abstract language”).

⁷² See Robert J. Delahunty & John Yoo, *Saving Originalism*, 113 *MICH. L. REV.* 1081, 1097 (2015) (book review) (“Furthermore, even when the original public meaning of a clause was at first and still is now agreed upon, the applications of that clause might be uncertain, especially (but not only) when the original meaning is highly abstract and indeterminate.” (emphasis omitted)).

⁷³ See Heidi Kitrosser, *Interpretive Modesty*, 104 *GEO. L.J.* 459, 462 (2016) (“Once the text runs out, that is, once it ceases to tell us precisely what to do—either because it encodes a standard or principle subject to multiple applications, or because it establishes a thin rule and beyond that is silent—originalist interpretation can do no more work.”).

⁷⁴ See Powell, *supra* note 68, at 664–65 (“[T]he vast majority of contemporary constitutional disputes involve facts, practices, and problems that were not considered or even dreamt of by the founders.”).

⁷⁵ See Christopher Ingraham, *What ‘Arms’ Looked Like When the 2nd Amendment Was Written*, *WASH. POST* (June 13, 2016, 4:01 PM), <https://www.washingtonpost.com/news/wonk/wp/2016/06/13/the-men-who-wrote-the-2nd-amendment-would-never-recognize-an-ar-15/> [<https://perma.cc/662Y-Y75T>] (“Of course, semiautomatic firearms technology didn’t exist in any meaningful sense in the era of the founding fathers. . . . The typical firearms of the day were muskets and flintlock pistols. They could hold a single round at a time”); Eric Ruben, *Law of the Gun: Unrepresentative Cases and Distorted Doctrine*, 107 *IOWA L. REV.* 173, 206 (2021) (“By the eighteenth century, the matchlock was widely replaced by the flintlock, a more reliable design. Yet, like the matchlocks that preceded them, these founding-era guns were muzzle-loaders that were slow to load” (footnote omitted)); Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 *YALE L.J.* 99, 153 (2023) (“Americans in 1791 generally owned muzzle-loading flintlocks, ‘liable to misfire’ and incapable of firing multiple shots.” (quoting

To address this dilemma, new originalists urge a distinction between interpretation and construction.⁷⁶ Uncovering the fixed and discoverable original meaning is called constitutional *interpretation*.⁷⁷ Applying this meaning, often a principle, to specific cases is termed constitutional *construction*.⁷⁸ “In the ‘construction zone,’ adjudicators candidly acknowledge that there is no single correct answer to be gleaned from constitutional text and history.”⁷⁹

What guides, or restrains, judges in the construction zone? It depends on which originalist you ask, multiplying the available originalisms for deployment. Some originalists would fill the construction gap with default rules that reflect their policy preferences such as a presumption of deference to the political branches⁸⁰ or to the states.⁸¹ A few accept that provisions written at higher levels of abstraction are inherently open-ended, and consequently, originalism itself must be recognized as fairly open-ended.⁸²

Often construction relies upon “original expected applications,” which is how the people of the relevant era would have or did apply the

Randolph Roth, *Why Guns Are and Are Not the Problem: The Relationship Between Guns and Homicide in American History*, in *A RIGHT TO BEAR ARMS? THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT* 113, 117 (Jennifer Tucker et al. eds., 2019)); cf. Franklin E. Zimring, *Handgun Control, the Second Amendment, and Judicial Legislation in the D.C. Circuit: A Note on Parker v. District of Columbia*, 11 *NEW CRIM. L. REV.* 312, 315 (2008) (noting two differences “between historic and modern handguns—concealability and the capacity for automatic fire”).

⁷⁶ See Colby, *supra* note 36, at 731 (“The recognition that the Constitution often enacts broad principles, rather than narrow rules of decision, has fostered another significant development in originalist thought: the emergence of a distinction between ‘constitutional interpretation’ and ‘constitutional construction.’”).

⁷⁷ See Solum, *supra* note 24, at 457 (“‘Constitutional interpretation’ is the activity that discerns the communicative content (linguistic meaning) of the constitutional text.”).

⁷⁸ See *id.*, at 457 (“‘Constitutional construction’ is the activity that determines the content of constitutional doctrine and the legal effect of the constitutional text.”).

⁷⁹ Kitrosser, *supra* note 73, at 463; see also Barrett, *supra* note 34, at 1 (“[N]ew originalists do not contend that the Constitution’s original public meaning is capable of resolving every constitutional question.”); Christina Mulligan, *Diverse Originalism*, 21 *U. PA. J. CONST. L.* 379, 388 (2018) (“Many originalists have grown more accepting of and comfortable with the notion that some constitutional terms and phrases are underdetermined, vague, ambiguous, or open-textured.”).

⁸⁰ See Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not to)*, 115 *YALE L.J.* 2037, 2057 (2006) (arguing courts should defer to the political branches where constitutional meaning does not yield a determinant result).

⁸¹ See Gary Lawson, *Dead Document Walking*, 92 *B.U. L. REV.* 1225, 1234 (2012) (proposing that “[i]n the event that there is any uncertainty about what this Constitution means in any specific application, resolve the uncertainty against the existence of federal power and in favor of the existence of state power” (emphasis omitted)).

⁸² See Solum, *supra* note 24, at 458 (“[T]he construction zone is ineliminable: the actual text of the U.S. Constitution contains general, abstract, and vague provisions that require constitutional construction for their application to concrete constitutional cases.”).

broad principle to specific cases.⁸³ Some originalists explicitly invoke original expected applications.⁸⁴ Others acknowledge the need for construction yet claim that their construction derives from empirical, objective guidance from history such as the “spirit of the provision”—which often simply boils down to original expected applications.⁸⁵ After all, “It is difficult to conceive of better evidence of the ‘semantic intention’ behind constitutional text than how that text was expected to be applied.”⁸⁶

In sum, even originalists acknowledge the difficulty of deciding a case without some degree of judicial discretion. Ultimately, originalism is as value laden as alternatives like the living constitutional theory. The main difference is that living constitutionalists are much more transparent about the values that inform their decision.⁸⁷ Yet even those originalist scholars and judges who concede that construction is inevitable still regularly claim a mantle of objectivity and insist that their guidelines do not reflect personal preferences.⁸⁸

⁸³ Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 818 (2012) (defining original expected applications as “how people at the time of adoption would have intended or expected the text to be applied”).

⁸⁴ See McGinnis & Rappaport, *supra* note 28, at 371 (“[T]he Constitution’s original meaning is informed by, but not exhausted by, its original expected applications. In particular, the expected applications can be strong evidence of the original meaning.”).

⁸⁵ For example, Barnett and Bernick argue for construction informed by the spirit of the provision. Barnett & Bernick, *supra* note 8, at 34 (“A rule must be applied [in the construction zone]. . . . We hold that that rule must be informed by the Constitution’s original spirit.”). They insist this is an empirical endeavor. *Id.* at 34 (“[T]he inquiry into the law’s spirit is no less grounded in empirical facts than inquiry into the law’s letter.”). But then they suggest that the spirit can be gleaned from “consulting what was said about them both in public and in private” and by examining “those functions that the Framers, Ratifiers, and members of the public understood particular provisions to serve.” *Id.* at 34–35. As a practical matter, the original understanding of the function of a provision seems to overlap with original expected applications.

⁸⁶ Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 663 (2009); Balkin, *supra* note 83, at 822 (“Today most conservative originalists agree with me that we are not bound by original expected applications, only by original meaning. But the way they cash out original meaning often leads them to model it fairly closely on original expected applications . . .”).

⁸⁷ See Eric J. Segall, *The Concession That Dooms Originalism: A Response to Professor Lawrence Solum*, 88 GEO. WASH. L. REV. ARGUENDO 33, 46 (2020) (“Whereas most Living Constitutionalists concede judges inevitably have that discretion, Originalists today still often claim that only their theory can limit the power of runaway federal judges.”). In addition, because living constitutionalism advocates interpreting the Constitution with an eye toward current values, it necessarily articulates those values. See Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1244 (2019).

⁸⁸ See, e.g., *supra* notes 39, 42 and accompanying text. Yet somehow, their “unbiased and objective” analysis of history yields answers that match their preferences. For example, the self-described “good faith” analysis of libertarians Barnett and Bernick led them to conclude first, that the Second Amendment does not allow gun regulations that Scalia approved in *Heller* and second, that Congress lacks authority to regulate activities that substantially affect interstate commerce. Barnett & Bernick, *supra* note 8, at 38–39, 44–45. But see, e.g., Saul Cornell, “Infants”

B. *Regressiveness of Original Public Meaning*

Even if there were agreement on the original meaning of the Constitution, and this consensus were readily discoverable, it still should not automatically dictate the outcome of constitutional cases today. Apart from the fact that the original generation may not have been originalist,⁸⁹ it is less, not more, democratic for our constitutional rights to be controlled by the views of citizens long dead rather than the values of citizens alive now.⁹⁰ Most problematic is that the retrograde views of the hypothetical reasonable Founding-era citizen would reinforce the historical privilege of some and the historical marginalization of many.⁹¹ Unfortunately, these asymmetrical effects may be a feature rather than a bug of originalism.⁹²

The supermajoritarian justification for originalism fails twice over because originalism cedes control not only to a long dead generation,

and Arms Bearing in the Era of the Second Amendment: Making Sense of the Historical Record, 40 YALE L. & POL'Y REV. INTER ALIA 1, 3 (2021) (“[T]hose who live by the originalist sword may also perish by it: for much of American history, gun regulations were much more onerous and robust than gun-rights advocates have credited.”).

⁸⁹ See Bunker, *supra* note 53, at 333 (“[A] strong originalism might be regarded as self-refuting since it ignores the actual intent of the framing generation—that the Constitution be interpreted according to the legal norms of the time, which were by no means exclusively originalist in nature.”); Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2, 80 (2020) (arguing the Founding generation “had confidence in the Constitution’s durability not because they assumed that future generations would or could derive a fixed and timeless meaning from its words, but because they expected judges would interpolate the text to govern the ‘unforeseen’”); Saul Cornell, *President Madison’s Living Constitution: Fixation, Liquidation, and Constitutional Politics in the Jeffersonian Era*, 89 FORDHAM L. REV. 1761, 1774 (2021) (“[T]he legal methods used to interpret [the Constitution] were contested throughout this period and no consensus ever emerged.”); Jack Rakove, *The Framers of the Constitution Didn’t Worry About ‘Originalism,’* WASH. POST (Oct. 16, 2020, 3:43 PM), https://www.washingtonpost.com/outlook/originalism-constitution-founders-barrett/2020/10/16/1906922e-0f33-11eb-8a35-237ef1eb2ef7_story.html [<https://perma.cc/FF5U-9NAN>] (arguing that the Framers would not “have thought of themselves as ‘originalists’”).

⁹⁰ This is known as the dead hand problem. Originalists insist that it is undemocratic for unelected, unaccountable judges to determine the scope of constitutional protections rather than the supermajority who approved the United States Constitution. The problem, as Christian Mulligan points out, is that the people in that supermajority are all dead, and “why [should] the values and views of dead people . . . govern living individuals who now exist in a wildly different cultural context”? Mulligan, *supra* note 79, at 394; see also Coan, *supra* note 27, at 11 (“For those defenders of originalism who view popular sovereignty as paramount, the only principled response to the dead hand problem is probably to abandon originalism altogether.”).

⁹¹ See Greene, *supra* note 86, at 659 (asking “how rote obedience to the commitments of voters two centuries distant and wildly different in racial, ethnic, sexual, and cultural composition can be justified on democratic grounds” (emphasis omitted)).

⁹² See *id.* at 832 (“[T]he modern GOP’s constitutional ‘originalism’ grew directly out of resistance to *Brown*.”). See generally Calvin TerBeek, “*Clocks Must Always Be Turned Back*”: *Brown v. Board of Education and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821 (2021).

but also to that generation's ruling elite.⁹³ Moreover, originalism ties the scope of constitutional protections to a time when prejudices based on race, sex, and religion, among other characteristics, were widespread, which helps entrench the power of those already privileged in society.⁹⁴ Unfortunately, the origins and demographics of originalism supporters suggest this is precisely what was intended.

To start, it is not true that a supermajority ratified the Constitution. Large swaths of Americans were excluded from the ratifying conventions.⁹⁵ Native Americans were excluded.⁹⁶ African Americans were excluded.⁹⁷ Women of all races were excluded.⁹⁸ Non-Christians were unlikely to be plentiful.⁹⁹

This undemocratic exclusion is not resolved by arguing that the original meaning stems from the understanding of an imagined reasonable person from the same era rather than the actual ratifiers, who may not be representative.¹⁰⁰ The understanding of the theoretical reasonable person will undoubtedly be the understanding of a white Christian man, as this elite group of men created and controlled most materials originalists use to glean meaning,¹⁰¹ and their understanding may differ

⁹³ See Coan, *supra* note 27, at 3 (“It is *de rigueur* for critics of originalism to point out that originalism is not, in fact, rule by the people but rather rule by dead, white, male landowners.”); Boyce, *supra* note 61, at 914 (“To the extent that the Constitution as originally understood sought to entrench the power of oligarchic constituent minorities, its authority in a modern democratic society is problematic.”).

⁹⁴ Cf. Michael S. Lewis, *Evil History: Protecting Our Constitution Through an Anti-Originalism Canon of Constitutional Interpretation*, 18 U.N.H. L. REV. 261, 266 (2020) (book review) (“[A]n originalist methodology [should] confront the full brunt of our past, both good and evil. Very few do.”).

⁹⁵ See Jamal Greene, *Originalism's Race Problem*, 88 DENV. U. L. REV. 517, 518 (2011) (“Voting for delegates to the state conventions largely excluded women, Indians, blacks, and those who did not own property.”).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Cf. Mulligan, *supra* note 79, at 397 (“[I]f the Framers were indifferent or hostile to certain people's interests, one could reasonably surmise, in the absence of further evidence, that those interests were likely not advanced by the Constitution.”).

¹⁰⁰ Cf. Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 584 (2011) (“[The] interpretive goal [of public meaning originalists] is to understand how an informed reader of the time would have understood the legal commands it issued. . . . [They suppose] that the imagined reader of the past exists in a disinterested world, detached from political commitments. . . . Exactly who this imaginary reader is nonetheless remains something of a mystery . . .”).

¹⁰¹ See Mulligan, *supra* note 79, at 392 (“The overwhelming majority of evidence of original meaning comes from the speech and writings of elite white men—largely because the Constitution was itself written by elite white men, and because elite white men produced most published writing, and the most writing about the Constitution in the founding era.”). For example, for his originalist analysis of “commerce,” Randy Barnett surveyed every use of “commerce” gleaned from the Philadelphia Convention, the Federalist Papers, the ratification debates, and eight years of the

from Americans whose understandings were not consulted or even memorialized.¹⁰² “To the extent that white women and people of color interpreted the Constitution differently, those interpretations are less likely to have been recorded and identified.”¹⁰³

Moreover, even if the originalism enterprise did not start with the reasonable meaning as understood by white Christian men, it would probably end up there, given that the judiciary deciding the question of what a reasonable person believes is itself mostly white Christian men.¹⁰⁴ It has been repeatedly documented that when faced with a reasonable person test,¹⁰⁵ the “reasonable person” often shares the same attributes and assumptions as the judge.¹⁰⁶ This may well be an unconscious process, but it occurs nonetheless.¹⁰⁷ For example, when analyzing whether a reasonable person would conclude that the government was endorsing Christianity in violation of the Establishment Clause,¹⁰⁸ Christian and non-Christian judges arrive at different conclusions.¹⁰⁹ Similarly, when

Pennsylvania Gazette—all texts produced predominantly by elite white Christian men. Barnett, *supra* note 37, at 416.

¹⁰² Cf. Saul Cornell, *The People's Constitution vs. the Lawyer's Constitution: Popular Constitutionalism and the Original Debate Over Originalism*, 23 YALE J.L. & HUMANS. 295, 303 (2011) (“Recovering how the Constitution might have been read by ordinary Americans requires moving beyond the familiar canonical texts consulted by Originalist scholarship.”).

¹⁰³ Mulligan, *supra* note 79, at 392.

¹⁰⁴ As of 2019, sitting federal judges were overwhelmingly white (73%) and male (80%). Danielle Root, Jake Faleschini & Grace Oyenubi, *Building a More Inclusive Federal Judiciary*, CTR. AM. PROGRESS (Oct. 3, 2019), <https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/> [<https://perma.cc/J83F-2CVR>]. Meanwhile, a 2017 study found that 78.4% of circuit judges were Christian and 19% Jewish. *Id.*

¹⁰⁵ Cf. Colby, *supra* note 36, at 724 (“In essence, [originalism] became a reasonable person test . . .”).

¹⁰⁶ Cf. Cornell, *Reading the Constitution*, *supra* note 67, at 833 (describing how the 1980s enthusiasm for German reception theory, where imagined readers were key, cooled when “studies of actual readers demonstrated that erroneous assumptions and ideological bias invariably distorted the ideal readers constructed by modern scholars”).

¹⁰⁷ See James C. Phillips, *Which Original Public?*, 25 CHAP. L. REV. 333, 336 (2022) (“But using an objective standard for the average, ordinary, or competent person at the time a constitutional provision is adopted will mean that a judge’s personal views or intuition, consciously or unconsciously, will be doing a lot more work in discerning meaning.”); see also Rakove, *supra* note 100, at 586 (“An imaginary originalist reader who never existed historically can never be a figure from the past; the reader remains only a fabrication of a modern mind. How the existence of such a figure can offer a constraint on the excesses of judicial discretion seems equally a fabrication as well.”).

¹⁰⁸ The endorsement test, which was used to determine whether a government action violated the Establishment Clause, asked whether a reasonable person, aware of the history and context of the challenged religious activity or display, would conclude that the government was endorsing religion. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 866 (2005).

¹⁰⁹ See Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 572 (2004) (finding that Jewish judges were significantly more likely to find an Establishment Clause violation compared with Christian judges); cf. Jay D. Wexler, *The Endorsement Court*, 21 WASH. U. J.L. & POL’Y 263, 285 (2006) (“It is very difficult for judges who are themselves not, for the

analyzing whether a reasonable person would find that an employer had created a sexually or racially hostile work environment in violation of Title VII,¹¹⁰ male and female judges,¹¹¹ and white and black judges¹¹² reach different conclusions. This bias will undoubtedly also play a role when judges discern what a reasonable eighteenth-century citizen would understand a particular constitutional provision to mean, never mind how it applies to a specific set of facts.¹¹³ Thus, whether due to the written sources or the interpreter of those sources, courts' original public meaning (and application of it) is likely to reflect the original understanding of a reasonable man who is white and Christian, among other traits.¹¹⁴

But even if none of this were true, originalism still facilitates the entrenchment of hierarchies because it ties constitutional protections to time periods marked by inequalities.¹¹⁵ Today, we reject the view that

most part, members of minority traditions to understand those perceptions and to empathize with them.”).

¹¹⁰ Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17. An employer violates Title VII with conduct that is “severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

¹¹¹ See, e.g., Sue Davis, Susan Haire & Donald R. Songer, *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129, 131 (1993) (finding that even when controlling for political affiliation and region, female judges are more likely than male judges to support employment discrimination claimants); Theresa M. Beiner, *Diversity on the Bench and the Quest for Justice for All*, 33 OHIO N.U. L. REV. 481, 485 (2007) (summarizing studies of political scientist Nancy Crowe as finding that in split sex discrimination appeal decisions, among white Democrats, 90% of female judges supported the claimant compared with 76% of male ones, and that among white Republicans, the numbers were 53% for female judges compared to 28% for male); Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 401 (2010) (“[F]emale and male judges differ significantly in their treatment of Title VII sex discrimination suits.”).

¹¹² See, e.g., Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1134 (2009) (summarizing political scientist Nancy Crowe as finding “African American judges held for plaintiffs . . . over twice as often in race discrimination cases, as compared to White judges”); see also *id.* at 1149, 1156 (finding that African American judges are more likely to find racial harassment than white judges, regardless of party: 47% of African American Democratic judges versus 27.1% of white Democratic judges and 43% of African American Republican judges versus 16.6% of white Republican judges).

¹¹³ Cf. Tushnet, *supra* note 36, at 609 n.4 (“What would a reasonably well-informed contemporary have understood the terms to mean? Well, just about what I understand them to mean, because [I can pretend that I have cleansed my mind of all post-adoption knowledge and then assert that] I am reasonably well-informed.” (alteration in original)).

¹¹⁴ One could also be privileged along other dimensions, including sexual orientation and gender identity.

¹¹⁵ This is true even without the original Constitution's explicitly racist provisions. “It is not just that people of African descent were not represented at Philadelphia or at the state ratifying conventions, but that the Constitution that emerged from those conventions preserved and protected both slavery itself and slavery's institutional infrastructure.” Greene, *supra* note 95, at 518–19. The infamous Three-Fifths Clause increased the slave states' power by counting powerless

women must remain in the private sphere of home and childrearing.¹¹⁶ Yet, given that separate spheres ideology dominated during Reconstruction, the original meaning of the Equal Protection Clause arguably did not extend to equality between the sexes.¹¹⁷ When asked whether the Equal Protection Clause barred discrimination on the basis of sex, Justice Scalia replied, “It doesn’t. Nobody ever thought that that’s what it meant. Nobody ever voted for that.”¹¹⁸ Nor is this simply one idiosyncratic view.¹¹⁹ Congress passed laws limiting married women’s rights fairly soon after the Fourteenth Amendment’s ratification—with no apparent controversy.¹²⁰ The Fourteenth Amendment itself discriminates against women in its second section by extending suffrage protections to male voters only, not female ones.¹²¹ Why should we tie our constitutional rights to eras that held beliefs we now find repugnant? In an understatement, Christine Mulligan noted, “Originalism has a difficult relationship with race and gender.”¹²²

For some number of originalists, its regressive tendencies may be part of its appeal.¹²³ Political scientist Calvin TerBeek has documented

slaves for representatives and electoral vote purposes; the Fugitive Slave Clause mandated the return of escaped slaves; and the Importation Clause precluded any slave trade ban until 1808. Greene, *supra* note 95, at 519.

¹¹⁶ *Contra* Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (“The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator.”).

¹¹⁷ See Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213, 250 n.236 (2017) (“The central convention in separate-spheres ideology, which emerged toward the middle of the nineteenth century, was its strong demarcation between the realm of home, on the one hand, and the realm of work, on the other.”).

¹¹⁸ University of California Television, *Legally Speaking: Antonin Scalia*, YOUTUBE (Mar. 17, 2011), <https://youtu.be/KvttIukZEtM?si=LKdJsP9C0bw0LHBD&t=1021> [<https://perma.cc/EU2H-ZQZJ>]; Stephanie Condon, *Scalia: Constitution Doesn't Protect Women or Gays From Discrimination*, CBS NEWS (Jan. 4, 2011, 5:33 PM), <https://www.cbsnews.com/news/scalia-constitution-doesnt-protect-women-or-gays-from-discrimination/> [<https://perma.cc/DFZ9-MQHG>]; Although Justice Scalia did not take this position in *United States v. Virginia*, 518 U.S. 515, 566–68 (1996) (Scalia, J., dissenting), he still dissented from the holding that the categorical exclusion of women from Virginia’s preeminent public university violated the Equal Protection Clause.

¹¹⁹ See Friedman, *supra* note 63, at 1214 (“[O]riginalists who seek to make the case for gender equality . . . consistent with the original understanding are swimming upstream.”); Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1230 (2000) (“The [Fourteenth] Amendment was understood not to disturb the prevailing regime of state laws imposing very substantial legal disabilities on women, particularly married women.”). See generally *id.*

¹²⁰ See Farnsworth, *supra* note 119, at 1258.

¹²¹ See U.S. CONST. amend. XIV, § 2 (“[W]hen the right to vote . . . is denied to any of the male inhabitants of such State . . .”).

¹²² Mulligan, *supra* note 79, at 380.

¹²³ This is not true for all originalists, but the fact that originalism regularly reaches conservative outcomes harmful to disadvantaged groups and yet is not a dealbreaker is telling. See Ethan Dawson, *Serving Only to Oppress: An Intersectional and Critical Race Analysis of Constitutional*

how “the modern GOP’s constitutional ‘originalism’ grew directly out of resistance to *Brown* [*v. Board of Education*],” the landmark Supreme Court decision that ended de jure segregation.¹²⁴ Because direct attacks on the Fourteenth Amendment were too obvious,¹²⁵ conservatives instead argued that *Brown* was unfaithful to the Reconstruction Amendment’s original intent.¹²⁶ For this reason, Reva Siegal and Robert Post have argued originalism began as a political practice: “The political practice of originalism thus reflected (and continues to reflect) conservative commitments that are not determined by objective and disinterested historical research into the circumstances of the Constitution’s ratification.”¹²⁷ In short, it is no accident that originalism arose in conservative circles.¹²⁸

Nor is it a coincidence that staunch supporters are overwhelmingly conservative.¹²⁹ An empirical survey of public attitudes about originalism found that supporters of originalism tend to be conservative, white Christian men.¹³⁰ Not all, obviously—Clarence Thomas is a devoted originalist, and so apparently is Amy Coney Barrett—but

Originalism Inflicting Harm, 11 IND. J.L. & SOC. EQUAL. 294, 300–02 (2023) (“When historically marginalized or disadvantaged groups seek equality in greater society, an originalist argument against such rights has been typical.”).

¹²⁴ TerBeek, *supra* note 92, at 832. TerBeek adds that conservatives then “rewrote their own history” in part “to erase the uncomfortable racial origins of modern originalism.” *Id.*

¹²⁵ See *id.* at 827 (“But, like interposition, a sustained attack on the Fourteenth Amendment’s validity was too transparent.”).

¹²⁶ See *id.* at 827–28; see also, e.g., BARRY GOLDWATER, *THE CONSCIENCE OF A CONSERVATIVE* 29 (1960) (“The [Fourteenth] [A]mendment was not intended to, and therefore it did not outlaw racially separate schools.”); Alfred Avins, *Literacy Tests, The Fourteenth Amendment and District of Columbia Voting: The Original Intent*, 1965 WASH. U. L.Q. 429, 462 (“[I]t was not the original intent of the framers of the fourteenth amendment to forbid English-language or other literacy tests . . .”).

¹²⁷ Post & Siegel, *supra* note 17, at 556–57.

¹²⁸ Cf. James E. Fleming, *The New Originalist Manifesto*, 28 CONST. COMMENT. 539, 544 (2013) (book review) (“The old originalism is an *ism*—a conservative ideology that emerged in reaction to the Warren Court (and early Burger Court).”).

¹²⁹ See Friedman, *supra* note 63, at 1210 (“Though there are originalist stirrings on the ideological left, in the main the enterprise of original understanding has been one for conservatives.”).

¹³⁰ Among originalists polled, 86% were white compared with 2% who were black and 4% who were Hispanic. 57% of originalists were men. Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356, 371 (2011). Religion-wise, 52% were born-again/evangelical, representing only one strand of Christianity. *Id.* at 373. In contrast, only 17% of the nonoriginalists were born again/evangelical. *Id.* Additionally, 76% of the originalists believe in the literal truth of the Bible, and 87% agree that public schools should be permitted to start each day with a prayer. *Id.* at 372, 380.

most.¹³¹ Moreover, allies are overwhelmingly politically conservative¹³²: 76% of originalists described themselves as conservative (with only 6% self-identifying as liberal)¹³³ and 85% as Republican or leaning Republican.¹³⁴ Certainly, their views are politically conservative. For example, 83% of originalists in this survey agree that “[w]e have gone too far in pushing equal rights in this country,” and 91% did not think that same-sex marriages should be legal.¹³⁵ Thus, apart from a few liberals trying to reclaim it,¹³⁶ originalism is generally a conservative theory of constitutional interpretation. But again, it should surprise no one that “a theory of constitutional interpretation where the scope of constitutional protection is pinned to a time rife with hierarchies based on race, religion, sex, etc., is likely more appealing to those who have historically been privileged along these dimensions.”¹³⁷

Granted, because of its malleability, originalist decisions are not inevitably regressive,¹³⁸ but originalism facilitates those decisions, thereby allowing conservatives to reach their preferred outcomes while denying that their preferences played any role.¹³⁹ Instead, they claim that the fixed meaning of the Constitution made them do it.

¹³¹ See Mulligan, *supra* note 79, at 391 (“Compared to the rest of the legal academic community, originalists tend to hold conservative or libertarian political philosophies, tend to be white, and tend to be male.”).

¹³² See Greene et al., *supra* note 130, at 360 (“It should come as little surprise that originalists share the characteristics traditionally associated with political conservatives.”).

¹³³ Fifteen percent report that they are slightly conservative, 46% conservative, and 15% extreme conservative. *Id.* at 374. No originalist identified as extreme liberal, while 3% said they were liberal and 3% slightly liberal. *Id.* Seventeen percent chose moderate. *Id.*

¹³⁴ Thirty-four percent of originalists self-identified as leaning Republican, 14% as not strong Republican, and 37% as strong Republican. *Id.*

¹³⁵ *Id.* at 376, 379.

¹³⁶ See, e.g., Balkin, *supra* note 20, at 292 (arguing for a “right to abortion based on the original meaning of the constitutional text” (emphasis omitted)).

¹³⁷ Caroline Mala Corbin, *Justice Scalia, the Establishment Clause, and Christian Privilege*, 15 FIRST AMEND. L. REV. 185, 216 (2017); see also Mary Anne Case, *The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism*, 29 CONST. COMMENT. 431, 448 (2014) (“The substantive rules that were in place and reaffirmed by the Framers of both the original Constitution and the post-Civil War Amendments with respect to women are, for both personal and ideological reasons, rules I don’t want to live with.”).

¹³⁸ See Colby, *supra* note 36, at 763–64 (explaining that fidelity to the Constitution that is defined at a high level of generality does not preclude finding a constitutional right to abortion—one of the very conclusions that sparked the popularity of modern originalism in the first place).

¹³⁹ Compare Barnett, *supra* note 37, at 415 (“Originalism . . . seeks to establish an empirical fact about the objective meaning of the text at a particular point in time.”), with Jennejohn et al., *supra* note 55, at 771 (“To continue ignoring this issue [of hidden bias] is to risk infecting judicial decisionmaking with the structural biases endemic to American society—and embedded in its linguistic patterns—under the guise of an ostensibly neutral, objective interpretive approach.”).

II. FREE SPEECH ORIGINALISM

Applying originalism to the First Amendment is particularly ill-advised. Because First Amendment speech protections are stated at a high level of generality, judges, at best, have only a broad principle to decide specific cases, making “construction” inevitable.¹⁴⁰ At a minimum, then, free speech originalism will allow judges to reach their preferred conclusion while claiming the Constitution required it.

To the extent there was any historical consensus, the original understanding—whether at the Founding or at Reconstruction—was far narrower than our conception of free speech today.¹⁴¹ A detailed review of how these generations understood the First Amendment is beyond the scope of this Article, but a truly originalist analysis would completely reshape First Amendment doctrine and result in a severely diminished constitutional right.

Complicating matters is that there are two First Amendment provisions that protect expression today: the Free Speech Clause and the Press Clause.¹⁴² For the Founding generation, the Press Clause was the more significant clause;¹⁴³ “Press” referred to the printing press and therefore protected publications, the era’s only mass media.¹⁴⁴ Today, the Press Clause has been subsumed into the Free Speech Clause and, therefore, lacks any distinct vitality.¹⁴⁵ I refer to First Amendment protection to cover both clauses but note that equating or conflating the two clauses (as courts do) already departs from the original meaning. My main goal, however, is not to provide a detailed analysis of each separate clause’s original meaning, but to emphasize that protection at these earlier times was contested and ultimately quite limited.

¹⁴⁰ See Barrett, *supra* note 34, at 1–2 (“When the original public meaning of the text establishes a broad principle rather than a specific legal rule, interpretation alone cannot settle a dispute. In that event, the need for construction arises. The First Amendment is a classic example.”).

¹⁴¹ See Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 13 (2011) (“The framing-era conception of freedom of speech and the press was anything but capacious, at least by contemporary standards.”).

¹⁴² See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press.”).

¹⁴³ See Rosenthal, *supra* note 141, at 15 (noting that although all state constitutions protected freedom of the press at the Founding, only Pennsylvania and Vermont explicitly protected freedom of speech).

¹⁴⁴ Ashutosh Bhagwat, *Posner, Blackstone, and Prior Restraints on Speech*, 2015 BYU L. REV. 1151, 1165; Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 270 (2017) (“In eighteenth-century English, ‘the press’ was a reference to printing; the term did not refer to journalists until the nineteenth century.”).

¹⁴⁵ See Ronnell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. U. L. REV. 567, 573 (2017) (noting that the Supreme Court does not interpret the Press Clause “in any manner that might distinguish it from the Speech Clause”).

A. *Narrow Contested View During Founding*

When historians describe the Founding-era debates over the scope of First Amendment protection for speech, they typically recount a very narrow band of protection.¹⁴⁶ Everyone agreed that the First Amendment banned prior restraints, where the government would license or censor speech before publication.¹⁴⁷ Some, however, would have stopped there.¹⁴⁸ Others believed the First Amendment should cover certain natural rights without specifying exactly what they comprised.¹⁴⁹ Regardless of the amendment's precise scope, almost no one denied that those rights could be curbed to promote the general welfare.¹⁵⁰ This is a far cry from modern jurisprudence, where public interests, even strong ones, are routinely rejected as sufficient grounds for limiting speech.

Protections that are taken for granted today find little historical support. For example, notably absent from the early debates is any indication that content-based regulations are presumptively unconstitutional under the First Amendment.¹⁵¹ On the contrary, these neutrality requirements "are twentieth-century innovations."¹⁵² Nor is there much evidence that the First Amendment initially reached commercial advertisements or corporate speech generally, to highlight just a couple of examples.¹⁵³

1. *Coverage Limited*

The Founding generation agreed that the First Amendment barred prior restraints. Some would limit it to prior restraints, reading the First Amendment as codifying the English common law as espoused by Blackstone, whose Commentaries were enormously influential during this period.¹⁵⁴ According to Blackstone:

¹⁴⁶ See, e.g., Christopher Wolfe, *Originalist Reflections on Constitutional Freedom of Speech*, 72 SMU L. REV. 535, 535 (2019) (describing the "real meaning" of the Free Speech and Press Clauses as "much narrower than the modern understanding of free speech").

¹⁴⁷ See, e.g., Tyler Broker, *Free Speech Originalism*, 81 ALB. L. REV. 45, 48 (2018).

¹⁴⁸ See, e.g., *id.*

¹⁴⁹ See Campbell, *supra* note 144, at 269 ("For the Founders, however, mentioning a 'freedom to do something' naturally alluded to natural rights, without any need for further clarification or consistent terminology.").

¹⁵⁰ See Jud Campbell, *The Emergence of Neutrality*, 131 YALE L.J. 861, 879–80 (2021).

¹⁵¹ Cf. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) ("Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

¹⁵² Campbell, *supra* note 150, at 865.

¹⁵³ See *infra* notes 317–26 and accompanying text.

¹⁵⁴ See Rosenthal, *supra* note 141, at 13 ("Blackstone's account was enormously influential in colonial-era American law, which largely accepted this view of the power to punish expression thought to be harmful.").

The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. . . . [T]o punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order.¹⁵⁵

Not only did many contemporaries agree with Blackstone's view, but so did state law and state judicial decisions.¹⁵⁶ Consequently, many scholars argue that this was the original meaning of the First Amendment.¹⁵⁷ Indeed, Ashutosh Bhagwat writes that "the First Amendment's history as reaching only prior restraints on speech has a long pedigree and strong support."¹⁵⁸ If accurate, most of our free speech jurisprudence is at odds with the original meaning of the First Amendment.

Some scholars highlight the downfall of seditious libel after the 1735 trial of John Peter Zenger as evidence that Blackstone's views did not fully capture the First Amendment's original public meaning.¹⁵⁹ In that prosecution—the last colonial sedition trial¹⁶⁰—Zenger was acquitted on the grounds that his diatribes against the governor were true despite the judge instructing the jury that truth was not a defense.¹⁶¹ To the extent Zenger's trial might suggest a broader meaning of the First Amendment, its scope broadened only slightly to provide certain safeguards for seditious libel, including a jury determination of seditiousness, truth as a defense, and a requirement of malicious intent.¹⁶² Then again, the demise of seditious libel against the increasingly unpopular British colonial government did not necessarily mean that it was a dead letter against the United States government of we the people.¹⁶³

The contentious debates surrounding the passage of the Sedition Act of 1798¹⁶⁴—often examined for insight into the First Amendment's

¹⁵⁵ 4 WILLIAM BLACKSTONE, COMMENTARIES *151–52 (emphasis omitted).

¹⁵⁶ See Rosenthal, *supra* note 141, at 15 ("[N]o state had departed from Blackstone either by judicial decision or statute with respect to either freedom of speech or the press.").

¹⁵⁷ See, e.g., Wolfe, *supra* note 146, at 536 ("That is, the common law understanding of freedom of the press as expressed in Blackstone was what the founders wrote into the First Amendment.").

¹⁵⁸ Bhagwat, *supra* note 144, at 1153.

¹⁵⁹ See, e.g., Rosenthal, *supra* note 141, at 17.

¹⁶⁰ See *id.* at 14 ("As a practical matter, the Zenger trial seems to have led to the demise of seditious libel in colonial America; the Zenger prosecution appears to have been the last of its kind in the colonies.").

¹⁶¹ See *id.*

¹⁶² See Bhagwat, *supra* note 144, at 1170–71.

¹⁶³ See Rosenthal, *supra* note 141, at 14.

¹⁶⁴ An Act in Addition to the Act, Entitled "An Act for the Punishment of Certain Crimes Against the United States," ch. 74, § 2, I Stat. 596 (1798); see Kurt T. Lash & Alicia Harrison,

original meaning—also fail to offer definitive answers. Passed by a Federalist administration and used against their political rivals,¹⁶⁵ the Act proscribed “any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame”¹⁶⁶ and incorporated all the post-Zenger safeguards.¹⁶⁷ “[I]t seems that by 1798, undiluted Blackstonism was too much for even the advocates of seditious libel to stomach.”¹⁶⁸

The successful passage of the Sedition Act comports with the narrow-but-not-quite-Blackstonian view of the First Amendment, as does the fact that the courts roundly rejected challenges to the law.¹⁶⁹ If this view represents the meaning of the First Amendment, then it offers very little protection,¹⁷⁰ especially because the baseline assumption remained that speech harmful to the public good could be punished.

At the same time, the fierce political debates surrounding the Sedition Act suggest a lack of consensus on the meaning of the First Amendment. Supporters—usually Federalists—insisted the Sedition Act was perfectly constitutional.¹⁷¹ Detractors—usually anti-Federalist Democratic-Republicans—vociferously disagreed.¹⁷² At the very least, this disagreement underscores the difficulty of ascertaining meaning from two centuries ago.

Then again, opposition to the Sedition Act did not necessarily equate to an expansive view of the First Amendment. Many Democratic-Republicans opposed it on the grounds that the federal government lacked the power to pass it. For example, St. George Tucker, publisher of the preeminent early American version of Blackstone’s Commentaries,

Minority Report: John Marshall and the Defense of the Alien and Sedition Acts, 68 OHIO ST. L.J. 435, 447–48 (2007).

¹⁶⁵ See Lash & Harrison, *supra* note 164, at 444 (“In the summer of 1798, party politics and a looming war with France spurred the enactment of the Alien and Sedition Acts by the Fifth Congress of the United States.” (footnote omitted)); Jonathan Gienapp, *The Foreign Founding: Rights, Fixity, and the Original Constitution*, 97 TEX. L. REV. ONLINE 115, 127 (2019); see also Wolfe, *supra* note 146, at 537 (“[The Framers] understood that democracy was an experiment, and, witnessing the French Revolution, they were not blindly optimistic that it would inevitably work out. In that world—so foreign to us and our sensibilities—sedition was not a marginal annoyance but a very real threat.”).

¹⁶⁶ Ch. 74, § 2, I Stat. 596.

¹⁶⁷ See Bhagwat, *supra* note 144, at 1174.

¹⁶⁸ See Rosenthal, *supra* note 141, 19–20.

¹⁶⁹ See Michael Kent Curtis, *Teaching Free Speech from an Incomplete Fossil Record*, 34 AKRON L. REV. 231, 244 (2000) (“Judges, including Supreme Court justices, trotted around their circuits and lectured grand juries on the constitutionality of the Sedition Act.”).

¹⁷⁰ See Solum, *supra* note 24, at 504 (“[I]t might be the case that the seemingly vague phrase ‘freedom of speech’ was a phrase of art, understood by lawyers to refer to a specific rule—perhaps the rule against prior restraints.”).

¹⁷¹ See Curtis, *supra* note 169, at 243.

¹⁷² See *id.*

disagreed with Blackstone's hardline view yet nonetheless thought that *states* had the power to punish seditious libel.¹⁷³ Jefferson likewise believed that although the federal government possessed no enumerated power to regulate speech, state governments had ample power to do so.¹⁷⁴ Thus, "unlike modern speech libertarians, Jefferson recognized the legitimacy of suppressing seditious speech—he merely wanted it done by the states, not the federal government."¹⁷⁵

Other foes of the Sedition Act envisioned broader protection for speech but were not precise about its scope. Madison, for example, belonged to the camp that believed citizens must be able to criticize their government in a republic but conceded the difficulty of drawing the line "between the liberty and licentiousness of the press."¹⁷⁶

Given all these various positions—and this only scratched the surface—it is unlikely consensus ever existed over what exactly the First Amendment covered. "Benjamin Franklin probably came closest to stating the truth of the matter when he said in 1789 regarding the First Amendment that 'few of us' had any 'distinct Ideas of its Nature and Extent.'"¹⁷⁷ And if, as historian Leonard W. Levy confirmed, many Framers lacked a clear idea, never mind a shared one, then the general population probably had not reached an agreement about the First Amendment's meaning either.¹⁷⁸

2. *Regulations for Common Good Welcome*

An alternative originalist view of the First Amendment sees the Press Clause as codifying the common law positive right against prior restraints of the press with perhaps some safeguards, while the Speech Clause codifies the natural rights of speaking, writing, and publishing. Under this view, persuasively advanced by Jud Campbell, the *scope* of coverage remains contested, but there was consensus that the *depth* of protection was fairly shallow.¹⁷⁹

¹⁷³ See, e.g., Rosenthal, *supra* note 141, at 21.

¹⁷⁴ See Wolfe, *supra* note 146, at 536; Campbell, *supra* note 150, at 880 ("Most critics of the Sedition Act of 1798 . . . accepted the legality of sedition prosecutions but argued that they had to take place at the state level. That was Thomas Jefferson's position." (footnote omitted)).

¹⁷⁵ Wolfe, *supra* note 146, at 536.

¹⁷⁶ Rosenthal, *supra* note 141, at 20 (quoting James Madison, *The Virginia Report of 1799–1800*, in *FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON* 197, 214 (Leonard W. Levy ed., 1966)).

¹⁷⁷ Bhagwat, *supra* note 144, at 1179 (quoting Benjamin Franklin, *An Account of the Supreme Court of Judicature in Pennsylvania*, in 10 *THE WRITINGS OF BENJAMIN FRANKLIN* 37 (Albert Henry Smyth ed., 1907)).

¹⁷⁸ See *id.* at 1180 ("[F]ew [Framers] clearly understood what they meant by the free speech-and-press clause, and we cannot know that those few represented a consensus." (quoting LEONARD LEVY, *EMERGENCE OF A FREE PRESS* 268 (1985))).

¹⁷⁹ See generally Campbell, *supra* note 144.

Rights in the eighteenth century did not mean the same thing as rights in the twenty-first century.¹⁸⁰ Today, we think of rights as a shield against government overreach.¹⁸¹ But in the eighteenth century, “early Americans did not think that individual liberty was protected primarily through limiting government; rather they assumed that liberty was often best protected by empowering government ‘in the right kind of way.’”¹⁸² Unrepresentative government institutions might threaten liberty, but representative government institutions like legislatures and juries were trusted to protect rights.¹⁸³

The eighteenth century also recognized two kinds of rights: positive rights and natural rights.¹⁸⁴ Positive rights were those that were defined concerning the government,¹⁸⁵ and “specified things that the government had to do or could not do.”¹⁸⁶ In contrast, natural rights were innate human capacities that people could exercise on their own, without any government involvement.¹⁸⁷ These are the rights every person possesses in the state of nature.¹⁸⁸ Furthermore, according to Campbell, the “freedom to do something” was immediately understood

¹⁸⁰ See Jud Campbell, *Compelled Subsidies and Original Meaning*, 17 FIRST AMEND. L. REV. 249, 262 (2018) (“[T]he Founders thought very differently about rights than we do today.”); Gienapp, *supra* note 165 at 119 (criticizing originalists for “all too often filter[ing] the subject through modern sensibilities, convinced that Founding-era Americans conceived of rights much as we long have”).

¹⁸¹ See Campbell, *supra* note 144, at 253 (“[N]atural rights at the Founding scarcely resembled our modern notion of rights as determinate legal constraints on governmental authority.”).

¹⁸² Gienapp, *supra* note 165, at 119 (emphasis omitted) (quoting JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 165–66* (2018)). According to social contract theory, people left the risky state of nature and formed government in order to better protect their rights. Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. 517, 526–27 (2019) (“All individuals, social-contract theory posited, surrendered some of their ‘natural rights’ . . . for the greater security of those rights as a whole.”).

¹⁸³ See Gienapp, *supra* note 165, at 119–20 (“For most at the Founding, protecting rights was a matter not of disabling government but rather of creating and empowering representative political institutions. Whereas unrepresentative government posed a threat to liberty, representative government was the peculiar bulwark of liberty.”); *id.* at 123 (noting that “Founding-era Americans” celebrated “legislatures and juries” as “genuinely representative of the people’s interests”).

¹⁸⁴ See Campbell, *supra* note 180, at 262; see also Nicholas C. Ulen, *Corporations, Natural Rights, and the Assembly Clause: An Originalist Critique of Corporate Speech Jurisprudence*, 10 WAKE FOREST J.L. & POL’Y 25, 37 (2019) (“Natural law theorists believed that an entirely separate, almost transcendental, body of law existed apart from the body of positive law that governed societies.”).

¹⁸⁵ See Campbell, *supra* note 180, at 262 (“[P]ositive rights were defined explicitly in terms governmental authority. The rights to a jury trial and to habeas corpus, for instance, were positive rights because they were procedures provided by the government.” (footnote omitted)).

¹⁸⁶ Campbell, *supra* note 150, at 876.

¹⁸⁷ See Campbell, *supra* note 180, at 262 (“Natural rights were all the things that we could do simply as humans, without the intervention of a government.”).

¹⁸⁸ See Campbell, *supra* note 144, at 268.

as the freedom to exercise a natural right.¹⁸⁹ In the case of freedom of speech, it meant the natural right to speak, write, and publish.¹⁹⁰

A critical feature of natural rights was their ready restriction by competing interests. To start, natural rights came with certain inherent limits—these rights never extended to interfering with the natural rights of others.¹⁹¹ The government, meanwhile, could limit natural rights if two conditions were met. First, the people must consent to the limit, either directly or through their representatives.¹⁹² Second, the limit must advance the public good.¹⁹³ Moreover, the assessment of public good was to be made by the legislature, not the judiciary.¹⁹⁴ Thus, “the First Amendment . . . left ample room for the government to regulate speech in promotion of the public good, so long as it respected customary legal protections as well.”¹⁹⁵

The lone exception was inalienable natural rights: “Unlike ordinary natural rights, which were regulable to promote the public good, certain *inalienable* natural rights imposed more determinate constraints on legislative power.”¹⁹⁶ Campbell argues one such right was the “freedom to make well-intentioned statements of one’s thoughts”¹⁹⁷—essentially freedom to express opinions in good faith.¹⁹⁸

Apart from that exception, natural rights ended where the public good began.¹⁹⁹ Consequently, limits on speech deemed harmful to the general welfare were commonplace, including bans on blasphemy and swearing.²⁰⁰ Although people might dispute what constituted the

¹⁸⁹ *Id.* at 269 (“For the Founders, however, mentioning a ‘freedom to do something’ naturally alluded to natural rights . . .”).

¹⁹⁰ *See id.* at 253.

¹⁹¹ *See id.* at 271 (“At a minimum, natural law required that individuals not interfere with the natural rights of others.”); Ulen, *supra* note 184, at 40 (“[T]o the extent that exercising one’s individual liberties would infringe upon another’s protected rights, the sovereign had both the necessary authority and duty to step in and prevent the infringement . . .”).

¹⁹² *See* Campbell, *supra* note 180, at 263 (“First, natural rights could be restricted only when the people themselves consented to the restriction, either in person or through their political representatives.”).

¹⁹³ *See id.* at 264 (“Second, the government could restrict natural rights only when doing so promoted the public good . . .”).

¹⁹⁴ *See* Campbell, *supra* note 144, at 253 (“And assessing the public good—generally understood as the welfare of the entire society—was almost entirely a legislative task, leaving very little room for judicial involvement.”).

¹⁹⁵ *Id.* at 313.

¹⁹⁶ *Id.* at 280.

¹⁹⁷ *Id.* at 283.

¹⁹⁸ *See id.* at 310 (“Indeed, the Founders constantly mentioned that the inalienable right to speak was limited to those who spoke with decency and truth.”).

¹⁹⁹ *See id.* (“[S]tate governments routinely and uncontroversially restricted plenty of speech that did not directly violate the rights of others.”).

²⁰⁰ *See* Campbell, *supra* note 182, at 529 (“Unsurprisingly, then, English and American law recognized plenty of limitations on speech through rules against defamation, blasphemy, perjury,

common good, they did not dispute that the government could regulate speech for the common good.²⁰¹

* * *

This brief excursion into the Founding era suggests that the original meaning of the First Amendment vis-à-vis freedom of speech was contested and narrow. Apart from banning prior restraints, there may have been no consensus regarding what kind of expression the First Amendment covered. To the degree there was any consensus beyond prior restraints, it may be that the First Amendment protected the natural rights of reading, writing, and publishing.²⁰² However, the legislature could regulate these rights if they detracted from the public good.²⁰³ In other words, even if coverage was broad, the protection was shallow outside of a few areas, like good faith opinions and prior restraints.

Ultimately, the First Amendment's original meaning, lacking both clarity and consensus, will not constrain judges today. Other than protecting against prior restraints, the First Amendment, at most, provides some basic principles, and their application to today's cases falls in the ever-manipulable construction zone, not the interpretation zone. Although proponents may employ analogies to support broader coverage and deeper protection, the same can be done in the other direction. And the latter may be more persuasive, given the widely accepted view that the government may regulate for the common good.

Indeed, this history does not establish a Founding era pedigree for much of today's doctrine. If as narrow as Blackstone, or Blackstone-plus, then many fewer regulations would implicate the First Amendment. Even assuming a broader original meaning that encompasses citizens' natural rights of writing, speaking, and publishing, the First Amendment would probably not reach, for example, corporate advertising or corporate speech in general, as corporations are artificial entities, not natural people with natural rights.²⁰⁴ Also in question is whether natural rights include "speech" such as money expenditures.²⁰⁵ Finally, today's default presumption that any content regulation is unconstitutional unless it

profane swearing, and so forth."); Note, *Blasphemy and the Original Meaning of the First Amendment*, 135 HARV. L. REV. 689, 690 (2021) ("[T]he original public meaning of the First Amendment, whether in 1791 or in 1868, allowed for criminalizing blasphemy." (footnote omitted)).

²⁰¹ See Campbell, *supra* note 144, at 277 ("Yet while the Founders broadly agreed that governmental power should be defined and exercised only to promote the general welfare, they often disagreed passionately about the details.").

²⁰² See *id.* at 253.

²⁰³ See *id.* at 310.

²⁰⁴ See *infra* Section III.A.2.

²⁰⁵ Cf. Eric J. Segall, *Originalist Fiction as Constitutional Faith*, U. CHI. L. REV. ONLINE, JAN. 6, 2020, at 3 ("The First Amendment's original meaning cannot tell us whether mandatory union dues implicate strong free speech concerns.").

passes strict scrutiny contradicts the Founding's starting presumption that any natural right can be limited for the public good.²⁰⁶ The bottom line is that "[i]f the Supreme Court wanted to apply only those legal rules that the Founders recognized (or likely would have recognized), a huge swath of modern case law would have to go."²⁰⁷ Even if some curtailment of the Free Speech Clause might be beneficial, its wholesale retrenchment would not.²⁰⁸

B. *Narrow Contested View During Reconstruction*

Perhaps the fixed original meaning of the Free Speech Clause should not be tied to the Founding but to Reconstruction.²⁰⁹ Scholars and courts have regularly overlooked the Reconstruction Amendments in construing freedom of expression protections,²¹⁰ even though the enactment of the Fourteenth Amendment is what makes the First Amendment applicable to the states.²¹¹ Nevertheless, moving the clock forward does not offer greater clarity or support a more expansive First Amendment.²¹²

It is true that after the Civil War, Blackstone did not have the same purchase as he did at the beginning of the century when his view that the First Amendment prohibited only prior restraints remained "alive and well."²¹³ In the antebellum 1830s, Justice Story wrote that "[t]he doctrine laid down by Mr. Justice Blackstone, respecting the liberty of the press, has not been repudiated (so far as is known) by any solemn decision of any of the state courts, in respect to their own municipal

²⁰⁶ See *supra* notes 186–90 and accompanying text; see also Claudia E. Haupt & Wendy E. Parmet, *Public Health Originalism and the First Amendment*, 78 WASH. & LEE L. REV. 231, 258 (2021) ("In 1791 . . . the police power was widely accepted as limiting individual rights in order to advance health, safety, or morals.").

²⁰⁷ Campbell, *supra* note 144, at 256.

²⁰⁸ See *infra* notes 304–54 and accompanying text (discussing Free Speech Lochnerism).

²⁰⁹ See Haupt & Parmet, *supra* note 206, at 237 (arguing that because the First Amendment was not incorporated until the Fourteenth Amendment, "it is quite unclear why an originalist would look . . . to the 1790s, rather than the 1860s").

²¹⁰ See William M. Carter, Jr., *The Second Founding and the First Amendment*, 99 TEX. L. REV. 1065, 1067 (2021) ("[C]ourts have generally ignored the Second Founding in interpreting the First Amendment.").

²¹¹ See Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling Citizens United with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 889 (2016) ("Because the First Amendment was incorporated against the states via the Due Process Clause of the Fourteenth Amendment, it may be argued that the relevant time period for analyzing . . . [speech regulations] is not 1789–91, but 1866–68.").

²¹² See Rosenthal, *supra* note 141, at 24 ("Nevertheless, by the time of the Fourteenth Amendment's ratification, developments in First Amendment jurisprudence had not been dramatic."); see Campbell, *supra* note 150, at 883 ("At least in its basic outlines, the law of expressive freedom remained stable throughout the nineteenth century.").

²¹³ Rosenthal, *supra* note 141, at 23.

jurisprudence.”²¹⁴ Later in the century, according to a treatise revised by Oliver Wendell Holmes, the strict Blackstonian view was increasingly superseded by one where truth was a recognized defense.²¹⁵ Yet this shift from strict Blackstone to a slightly less strict version is not a significant change. The Sedition Act itself, after all, had already incorporated truth as a defense, among other protections.²¹⁶

Similarly, the First Amendment natural rights to speak, write, and publish were still viewed as regulable in service of the public good. Thomas Cooley^{3/4} whose treatise was described by the *Heller*²¹⁷ Court as “massively popular,”²¹⁸ and by Lawrence Rosenthal as “the leading treatise of the Reconstruction era”^{219 3/4} wholeheartedly rejected the hardline Blackstone view,²²⁰ yet still maintained that speech could be restricted “in those cases of publications injurious to private character, or public morals or safety.”²²¹ According to Cooley, speech is protected “so long as it is not harmful in its character,”²²² and truth is a defense to libelous speech if “published with good motives and for justifiable ends.”²²³ Consequently, despite some evolution,²²⁴ the idea that harmful speech could be regulated consistent with the First Amendment still prevailed during Reconstruction.²²⁵ To be sure, it was not universal, but it was widely held.

Moreover, free speech doctrine saw little change in the latter half of the nineteenth century.²²⁶ Just as courts upheld the Sedition Act, courts prior to Reconstruction upheld laws criminalizing abolitionist

²¹⁴ *Id.* at 23–24, 24 n.104 (alteration in original) (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 731–32 (1833)).

²¹⁵ *See id.* at 24 (describing a trend toward recognizing truth as a defense for defamation claims in the 1873 revision of Kent’s *Commentaries on American Law*).

²¹⁶ Sedition Act of 1798, ch. 74, § 2, 1 Stat. 596 (1798).

²¹⁷ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

²¹⁸ *Id.* at 616.

²¹⁹ Rosenthal, *supra* note 141, at 25.

²²⁰ *See id.*; DAVID M. RABBAN, FREE SPEECH IN ITS THE FORGOTTEN YEARS 197 (1997) (arguing that Cooley “reject[ed] the application of the English common law of bad tendency to speech on matters of public affairs” although he acknowledged that it survived in the United States in other areas).

²²¹ Rosenthal, *supra* note 141, at 25 (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 429–30 (1868)).

²²² *Id.*

²²³ *Id.*

²²⁴ It may be that what counted as regulable harmful speech evolved, “or at least a stronger showing of bad tendency had become required to overcome the speaker’s liberty interests.” *Id.* at 29.

²²⁵ *See id.* at 24 (“Throughout the nineteenth century, the bad-tendency test continued to predominate in thinking about the First Amendment . . .”).

²²⁶ Even into the early twentieth century, Blackstone’s exceedingly narrow view of the First Amendment still appeared in Supreme Court decisions. *See, e.g., Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

speech.²²⁷ And courts during the Reconstruction era upheld laws criminalizing anti-Reconstruction speech, such as former confederate officer and Mississippi newspaper editor William McCardle's vitriolic and virulently racist harangues against Northerners and African Americans.²²⁸ In rejecting McCardle's freedom of expression claim, the federal district court trying his case concluded that while the Speech and Press Clauses protected the right to criticize the government, "this does not sanction any abuse made of either."²²⁹ As Wendy Swanberg has observed, today it may seem "preposterous" to imprison a journalist for extreme editorials, but to nineteenth century jurists, it was a "perfectly logical" punishment for abusing the right to free speech.²³⁰

Indeed, Reconstruction-era courts treated free speech defenses with disdain. David Rabban's comprehensive book details how "[a] pervasive judicial hostility to virtually all free speech claims" characterized judicial decisions before World War I, where "[j]udges in both federal and state courts overwhelmingly invoked the alleged 'bad tendency' of speech to deny claims of abridgment in numerous doctrinal settings."²³¹ According to Rabban, this "bad tendency" test reigned supreme between the Civil War and World War I.²³²

Although "libertarian notions of free speech are very difficult (though not impossible) to find in American law prior to the twentieth century,"²³³ the courts alone do not determine the meaning of constitutional provisions, and the general population did not always share their narrow view. For example, Michael Kent Curtis noted court decisions "ignored the substantial popular understanding—strengthened in the debate over the Sedition Act and the crusade against slavery—that a broad right to discuss public questions was a privilege of American

²²⁷ See MICHAEL KENT CURTIS, *FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY* 416 (2000) ("Likewise, no Southern court struck down bans on antislavery speech as a violation of its state's constitution. . . . Nor did the United States Supreme Court ever void any Southern statute banning antislavery speech.").

²²⁸ See *id.* at 340 (noting that McCardle "used racist language with a frequency and slant that are chilling today"). See generally Wendy Swanberg, *Ex Parte McCardle and the First Amendment During Reconstruction*, in *A PRESS DIVIDED: NEWSPAPER COVERAGE OF THE CIVIL WAR* 333 (David B. Sachsman ed., 2014) (describing how *McCardle* represented the politics of the rebel South during Reconstruction era).

²²⁹ *Id.* at 340. The Supreme Court never decided the merits because Congress stripped the Court of jurisdiction after oral arguments. *Id.* at 348–49. See generally *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868).

²³⁰ Swanberg, *supra* note 228, at 334.

²³¹ RABBAN, *supra* note 220, at 2; see also *id.* at 15 ("[N]o group of Americans was more hostile to free speech claims before World War I than the judiciary, and no judges were more hostile than the justices on the United States Supreme Court.").

²³² *Id.* at 132.

²³³ Swanberg, *supra* note 228, at 334–35.

citizens.”²³⁴ At the same time, the views of the courts cannot be ignored. Certainly, a reasonable and informed citizen of the Reconstruction era would take legal doctrine into account, and therefore consider it important that the courts still clung to the narrowest view. As in earlier days, universal consensus about the scope of protection was nonexistent.

William M. Carter, Jr. argues that the Reconstruction Amendments and the “the Second Founding” they represent effected a significant change in freedom of speech.²³⁵ The Reconstruction Amendments were designed to dismantle the Slave Power permitted by the First Founding,²³⁶ and this fundamental reordering of society required re-envisioning the First Amendment. Previously, “[t]he American slave regime severely punished Blacks’ freedom of speech and speech about Black freedom.”²³⁷ That is, “the suppression of the constitutional right of free speech [was] a tool to maintain slavery and racial subjugation.”²³⁸ No more. The First Amendment would no longer exclude African Americans from its protection.²³⁹ Nor would it sanction the criminalization of abolitionist speech, as it often had prior to Reconstruction.²⁴⁰

As momentous as this shift was, it did not necessarily change the doctrinal scope of the First Amendment; instead, it merely extended narrow First Amendment rights to more people. Nor did it necessarily displace the presumption that speech may be restricted to promote the

²³⁴ CURTIS, *supra* note 227, at 388. Abolitionists often opposed the “bad tendency” test because opponents regularly claimed that antislavery speech had a natural tendency to incite slaves to violence and rebellion, even if it did not explicitly advocate revolt. *Id.* at 207–08, 211.

²³⁵ Carter, *supra* note 210, at 1083 (“The active denial of, and lack of effective protection for, enslaved persons’ and abolitionists’ rights of freedom of speech, conscience, and assembly was one of the primary legacies of the First Founding’s constitutional order that the Second Founding was designed to eliminate.”); *see also* CURTIS, *supra* note 227, at 357 (“The Civil War was a second American revolution.”).

²³⁶ *See* Carter, *supra* note 210, at 1071–72 (“The Reconstruction Amendments and statutes enacted pursuant thereto were also intended to dismantle the overarching Slave Power that the Second Founding’s Framers believed had perverted the nation since the First Founding.”).

²³⁷ *Id.* at 1084.

²³⁸ *Id.* at 1087.

²³⁹ *See id.* at 1072 (“One incident of the Slave Power was the denial of freedom of speech, conscience, and assembly to enslaved and free Blacks and their abolitionist allies.”).

²⁴⁰ *See id.* at 1084 (“Mississippi’s Slave Code, for example, authorized a sentence ranging from imprisonment at hard labor for up to twenty-one years to the death penalty for ‘using language having a tendency to promote discontent among free colored people, or insubordination among slaves.’” (quoting J. Clay Smith Jr., *Justice and Jurisprudence and the Black Lawyer*, 69 NOTRE DAME L. REV. 1077, 1107 (1994))); *see also id.* at 1087 (noting that Senator Charles Sumner had complained that “[n]obody in the Slave States can speak or print against Slavery, except at the peril of life or liberty” (quoting Cong. Globe, 36th Cong., 1st Sess. 2597 (1860) (statement of Sen. Charles Sumner))); CURTIS, *supra* note 169, at 252 (describing how the North Carolina Supreme Court upheld the conviction and imprisonment of a minister for distributing an antislavery book).

public welfare. Rather, it reflected a radical reconception of what the public welfare did, or did not, require.²⁴¹

Ultimately, the Fourteenth Amendment's passage does not significantly alter earlier conclusions about the First Amendment. First, there still was no consensus about the scope of the First Amendment at Reconstruction.²⁴² Thus, the principal critique of originalism still stands as applied to the First Amendment: it fails to curtail judges' discretion in deciding cases even as originalists continue to claim otherwise.²⁴³ Second, even if the First Amendment's coverage widened slightly, it did not widen enough to justify much of today's doctrine.²⁴⁴ The meaning of the First Amendment evolved and perhaps expanded but "[t]hat is not to say that the public meaning of free speech and a free press was anything close to libertarian—the bad tendency test was firmly established at the start of the twentieth century."²⁴⁵

III. UNPRINCIPLED APPLICATION

The judicial practice of originalism reveals yet more layers of discretion at play, further undercutting any claim that originalism prevents judges from smuggling in their own preferences. Actual judging provides at least two additional junctions for the exercise of discretion: first, judges may choose whether or not to apply originalism; second, they may choose which version of originalism to apply.²⁴⁶ Notably, the Supreme Court rarely issues originalist free speech decisions, which undermines any claim that the Constitution demands the particular outcome of its originalist analysis when it occasionally does. Moreover, the existence of so many varieties of originalism allow judges to apply the version that yields their desired outcome.²⁴⁷ Consequently, originalism in practice does not constrain courts, even assuming that originalism in theory might. Whether courts exploit this flexibility

²⁴¹ Cf. Carter, *supra* note 210, at 1079 ("Enslaved Blacks, abolitionists, and the Reconstruction Framers believed that the First Founding's constitutional order would have to be changed in order to eliminate slavery. . . . [And] that the end of slavery would and should represent a new constitutional order, not merely a continuation of the existing order . . .").

²⁴² See CURTIS, *supra* note 227, at 357 ("[T]he most we can hope to achieve [about the meaning of free speech during Reconstruction] is probability and a hypothesis that is stronger than its competitors.").

²⁴³ In addition, regardless of scope, the First Amendment only articulates an abstract principle.

²⁴⁴ Cf. Stephen M. Griffin, *Optimistic Originalism and the Reconstruction Amendments*, 95 TUL. L. REV. 281, 285 (2021) ("[T]he painful reality [is] that relative to the point of view of Americans in the twenty-first century, nineteenth-century constitutional law had many unfortunate aspects.").

²⁴⁵ Rosenthal, *supra* note 141, at 29–30.

²⁴⁶ See Colby & Smith, *supra* note 26, at 291–92.

²⁴⁷ See *id.* at 292–93.

consciously or unconsciously, no one should take seriously the claim that a court's originalist conclusion about the First Amendment was driven by original public meaning alone.²⁴⁸ Unfortunately, the Court's decisions usually work to entrench power imbalances, as is evident in its treatment of hate speech.

A. *Occasional Originalism*

The Supreme Court's free speech decisions seldom turn on an originalist analysis—and often do not even undertake one—probably because as described above, even the most expansive original conception of free speech offers much less protection than current doctrine. But instead of abandoning this approach for all free speech cases, the Supreme Court occasionally pens a decision that turns on originalism (or at least purports to).²⁴⁹ Indeed, it was dispositive for a trio of cases in which the Court declared that it was freezing the categories of unprotected speech to those that have existed since the Founding.²⁵⁰ This new rule effectively precludes expanding unprotected categories beyond what white Christian men found sufficiently harmful two hundred years ago, thereby making it impossible to recognize something like hate speech as an unprotected category.²⁵¹

Although the Supreme Court insisted on looking to the eighteenth century to decide whether the government can outlaw certain categories of harmful speech, it failed to do so when expanding protection in ways that might raise the eyebrows of even the most reasonable eighteenth-century citizen, such as protecting a corporation's commercial speech, or really, any corporate speech, including compelled commercial disclosures.²⁵² The Court's decisions equating expenditures to speech have likewise also escaped meaningful originalist analysis.²⁵³ This originalism avoidance has enabled what many have termed free speech

²⁴⁸ See Friedman, *supra* note 63, at 1234 (“Generalizing, one ought properly to be skeptical of any interpretive methodology that so consistently seems to yield results favored by any particular political ideology.”).

²⁴⁹ See Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2168 (2015) (“The idea that the low-value categories of speech have always existed, and always existed beyond the scope of constitutional concern, is a historical myth or what we might call an ‘invented tradition.’”).

²⁵⁰ See *United States v. Stevens*, 559 U.S. 460, 465 (2010); *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 792 (2011); *United States v. Alvarez*, 567 U.S. 709, 717 (2012).

²⁵¹ Or more accurately, what the Supreme Court has determined those citizens to consider beyond First Amendment protection.

²⁵² See *infra* notes 319–24 and accompanying text.

²⁵³ See *infra* notes 335–45 and accompanying text.

Lochnerism, a development that hampers the regulation of powerful entities in the public interest.²⁵⁴

1. *Selective Originalism: The Court Uses Originalism*

Creating an outlier in its free speech jurisprudence, the Supreme Court has adopted an originalist approach to unprotected categories of speech. These categories lie outside the protection of the First Amendment, such that the government may ban them in their entirety without triggering any free speech scrutiny.²⁵⁵ Established examples include incitement, defamation, true threats, fighting words, and obscenity.²⁵⁶

Before its turn to originalism, the Supreme Court described unprotected categories as those with “such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”²⁵⁷ In other words, the free speech value of the category is extremely slight and greatly outweighed by the harm it creates.²⁵⁸ According to the main theories of the Free Speech Clause, free speech value might include helping our search for knowledge, facilitating democratic self-governance, or promoting individual autonomy.²⁵⁹

Yet, in *United States v. Stevens*,²⁶⁰ the Supreme Court outright refused to even consider the government’s argument that depictions of animal cruelty should be added to the list of unprotected categories of speech on the grounds that it contributes little or nothing to free speech goals while inflicting great harm.²⁶¹ The Court did not explicitly invoke an originalist approach, but it repeatedly emphasized that the officially recognized unprotected categories date to the passage of the Bill of Rights. For example, it wrote that “[f]rom 1791 to the present” certain

²⁵⁴ Cf. Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1963 (2018) (“An aggressive, libertarian First Amendment, it is increasingly recognized, has the potential to crowd out egalitarian norms across the social field, propagating inequalities of sex, gender, race, and religion along with inequalities of fiscal and cultural capital.”).

²⁵⁵ After *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), however, viewpoint-based restrictions on speech, including unprotected categories of speech, will trigger strict scrutiny.

²⁵⁶ See *United States v. Alvarez*, 567 U.S. 709, 717–18 (listing unprotected categories).

²⁵⁷ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (describing fighting words).

²⁵⁸ Cf. *id.* (describing fighting words as “no essential part of any exposition of ideas” and “not in any proper sense communication of information or opinion safeguarded by the Constitution” (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940))).

²⁵⁹ See Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1291–92 (2014) (describing theories).

²⁶⁰ 559 U.S. 460 (2010).

²⁶¹ See *id.* at 469. Congress had criminalized the creation, sale, or possession of photographs or videos where “a living animal is intentionally maimed, mutilated, tortured, wounded, or killed” unless the depiction had “serious religious, political, scientific, educational, journalistic, historical, or artistic value.” *Id.* at 465 (quoting 18 U.S.C. § 48).

“historic and traditional categories long familiar to the bar” have been unprotected, and that these “narrowly limited classes of speech” have “never been thought to raise any Constitutional problem.”²⁶² In contrast, although banning cruelty to animals also dates to the colonial era,²⁶³ the Court was “unaware of any similar tradition excluding depictions of animal cruelty.”²⁶⁴ (Of course, the Court failed to acknowledge that the technology used to capture depictions of animal cruelty, like photography and video, did not exist at the time.) The Court essentially held that an unprotected category must date to the Founding, and it would not entertain any new ones.

Besides refusing to weigh the harms of depicting animal cruelty against its free speech value, the Court denies ever relying upon such a balancing test.²⁶⁵ Instead, the Court denigrates the balancing approach—the approach it previously used for determining unprotected categories—as “a free-floating test” that is “startling and dangerous.”²⁶⁶ The Court admits that it has sometimes described historically unprotected categories as having slight free speech value and high harm, but “such descriptions are just that—descriptive. They do not set forth a test.”²⁶⁷

In subsequent cases, including *Brown v. Entertainment Merchants Ass’n*²⁶⁸ and *United States v. Alvarez*,²⁶⁹ the Court reaffirmed *Stevens*’ holding that unprotected categories of speech are “confined to the few ‘historic and traditional categories [of expression] long familiar to the bar.’”²⁷⁰ The Court allows that there may be undiscovered categories that have existed since the Founding,²⁷¹ designating them as belonging to “a long (if heretofore unrecognized) tradition of proscription.”²⁷² The Court does not, however, explain how a longstanding and

²⁶² *Id.* at 468–69.

²⁶³ *See id.* at 469 (noting that bans date to “the early settlement of the Colonies”).

²⁶⁴ *Id.* (emphasis omitted).

²⁶⁵ *See id.* at 471 (“When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis.”); *id.* at 472 (“Our decisions . . . cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.”).

²⁶⁶ *Id.* at 470; *see also* *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (“[T]his Court has rejected as ‘startling and dangerous’ a ‘free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits.’” (alterations in original) (quoting *Stevens*, 559 U.S. at 470)).

²⁶⁷ *Stevens*, 559 U.S. at 471.

²⁶⁸ 564 U.S. 786 (2011).

²⁶⁹ 567 U.S. 709 (2012).

²⁷⁰ *Id.* at 717 (alteration in original); *see also supra* note 249 and accompanying text.

²⁷¹ *See Stevens*, 559 U.S. at 472 (“Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.”).

²⁷² *Brown*, 564 U.S. at 792.

traditional category of unprotected speech can be both centuries old and still unknown.²⁷³

Under its new rule, which it has recently reaffirmed,²⁷⁴ the Supreme Court has refused to recognize depictions of animal cruelty,²⁷⁵ extremely violent videos vis-à-vis minors,²⁷⁶ and intentional lies about receiving military honors as unprotected categories of speech.²⁷⁷ Lower courts concluded the same with categories ranging from knowingly false campaign information,²⁷⁸ to cyberbullying,²⁷⁹ to discredited sexual orientation conversion “therapies” for minors.²⁸⁰

One of the ironies marking the Court’s trio of cases on unprotected categories of speech is that the two most ardent originalists at the time, Justice Scalia and Justice Thomas,²⁸¹ joined Justice Alito’s *Alvarez* dissent, which argued that the Stolen Valor Act’s²⁸² ban on lies about receiving military honors should have been constitutional.²⁸³ In making its case, the dissent is not altogether clear whether it is claiming that the law passes strict scrutiny,²⁸⁴ or that lies about receiving military medals ought to be viewed as an unprotected category of speech; it may be a bit of both.

In arguing to uphold the Stolen Valor Act, the dissent parts ways with the rule that unprotected categories must date to the Founding, writing that “[w]e have also described as falling outside the First Amendment’s protective shield certain false factual statements that were neither illegal nor tortious at the time of the Amendment’s adoption.”²⁸⁵

²⁷³ See *id.*

²⁷⁴ See *supra* note 5 and accompanying text.

²⁷⁵ See *Stevens*, 559 U.S. at 472.

²⁷⁶ See *Brown*, 564 U.S. at 795 (“California’s argument would fare better if there were a long-standing tradition in this country of specially restricting children’s access to depictions of violence, but there is none.”).

²⁷⁷ See *United States v. Alvarez*, 567 U.S. 709, 718 (2012) (“Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements.”).

²⁷⁸ See *Care Comm. v. Arneson*, 638 F.3d 621, 633–34 (8th Cir. 2011).

²⁷⁹ See *People v. Marquan M.*, 19 N.E.3d 480, 485 (N.Y. 2014) (noting that cyberbullying does not fall into any unprotected category recognized in *Stevens*, *Alvarez*, and *Brown*).

²⁸⁰ See *Otto v. City of Boca Raton*, 981 F.3d 854, 865 (11th Cir. 2020) (“No one has argued that the [conversion therapy bans] fall into these categories of unprotected speech, and we do not see how they could.”).

²⁸¹ One survey from 2012 found that 30.4% (17 out of 56) of Justice Scalia’s free speech opinions contained originalism; for Justice Thomas, it was 29.4% (10 out of 34). Derigan Silver & Dan V. Kozlowski, *The First Amendment Originalism of Justices Brennan, Scalia and Thomas*, 17 COMM’N L. & POL’Y 385, 402, 408 (2012).

²⁸² Stolen Valor Act of 2005, 18 U.S.C. § 704.

²⁸³ See *United States v. Alvarez*, 567 U.S. 709, 739 (2012) (Alito, J., dissenting).

²⁸⁴ See *infra* note 288.

²⁸⁵ *Alvarez*, 567 U.S. at 747.

The dissent also tracks the discredited balancing test by arguing that lies about receiving military honors inflict both tangible and nontangible harms while lacking all free speech value.²⁸⁶ As to harms, the dissent writes, not only do the lies “debase the distinctive honor of military awards,” but an imposter taking undeserved credit is, to quote a legitimate Medal of Honor recipient, akin to a “slap in the face of veterans who have paid the price and earned their medals.”²⁸⁷ Granted, avoiding these harms may amount to a compelling government interest, but the Court never applies strict scrutiny.²⁸⁸

Next, the dissent expends paragraphs on the low free speech value of false statements of fact and especially outright lies about receiving a military medal of honor,²⁸⁹ bluntly concluding that “[t]he lies covered by the Stolen Valor Act have no intrinsic value.”²⁹⁰ Thus, the dissent addresses each requirement of the discredited balancing test. Yet, apart from acknowledging that certain lies have long been constitutionally forbidden,²⁹¹ its analysis does not explore the original meaning of the First Amendment vis-à-vis lies, especially lies about receiving military honors.

My argument is not that these holdings are necessarily incorrect but that the Court’s inconsistent reliance on originalism appears outcome determinative. Unprotected categories of speech are one of the only areas of free speech where the Court’s interpretation of original meaning controls. This approach, however, effectively precludes creating new categories of unprotected speech such as hate speech and constitutionalizes the priorities of the eighteenth-century elite. Those of the Founding generation who controlled and shaped the law were vulnerable to defamation and understood its potential damage, and so defamation is unprotected.²⁹² In contrast, hate speech, not even a concept in that era, will never be an unprotected category because the

²⁸⁶ See *id.* at 743.

²⁸⁷ *Id.*

²⁸⁸ To be fair, the dissent also argues that alternative means of protecting the integrity of the medals advanced by the majority were not sufficient, suggesting a *sub silentio* tailoring analysis. See *id.* at 744–45.

²⁸⁹ See *id.* at 746–50.

²⁹⁰ *Id.* at 750; see also *id.* at 753 (“Neither of the two opinions endorsed by Justices in the majority claims that the false statements covered by the Stolen Valor Act possess either intrinsic or instrumental value.”).

²⁹¹ See *id.* at 747–48 (mentioning that laws forbidding fraud, perjury, and defamation date to the Founding, but also noting the constitutionality of criminal statutes “with no close common-law analog” such as falsely claiming to be a federal official).

²⁹² Cf. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2375–76 (1989) (“When the legal mind understands that reputational interests . . . must be balanced against first amendment interests, it recognizes the concrete reality of what happens to people who are defamed. Their lives are changed. Their standing in the community, their opportunities, their self-worth, their free enjoyment of life is limited.”).

Court's originalism controls.²⁹³ Even in this one area, originalist Justices did not want to be bound by its unwelcome conclusion that people may lie about receiving military honors. That is, in addition to the broader inconsistency of sometimes relying on originalism and sometimes not, even within a doctrinal area that relies on originalism, at least some originalist Justices demurred when it did not yield their desired outcome.

2. *Originalism Avoidance: The Court Avoids Originalism*

The *Alvarez* dissent previews a more widespread phenomenon in First Amendment decisions: the Supreme Court generally avoids originalism. At least the *Alvarez* dissent gestured to what was happening at the Founding.²⁹⁴ Most cases do not. If the Supreme Court were truly committed to originalism, it would consistently perform a thorough originalist analysis, even if it ultimately follows precedent. Yet the cases that expanded First Amendment protections often fail to engage with the original meaning at all or do so minimally. In short, “the ‘originalist’ Justices are only opportunistically originalist. When original meaning does not support the result they want to reach, they tend to ignore it.”²⁹⁵

The dearth of originalist analysis is apparent in several strands of cases where the Roberts Court expanded free speech protection, including regulation of economic activities and campaign finance.²⁹⁶ The ever-expanding Free Speech Clause is even finding its way into antidiscrimination law.²⁹⁷ The unfortunate pattern that emerges is that attempts to regulate in favor of those less powerful have fallen in the name of free speech. Missing in most of these decisions is any serious effort to uncover whether the original meaning of the Free Speech Clause compels those conclusions.

One realm where originalism avoidance is particularly stark is in the cases that helped usher in “free speech *Lochnerism*.”²⁹⁸ *Lochner v. United*

²⁹³ It is no wonder originalism holds greater appeal to the privileged.

²⁹⁴ See *United States v. Alvarez*, 567 U.S. 709, 741 (2012) (Alito, J., dissenting).

²⁹⁵ Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 Nw. U. L. REV. 727, 729 (2009) (footnote omitted).

²⁹⁶ See Yasmin Dawood, *Election Law Originalism: The Supreme Court's Elitist Conception of Democracy*, 64 St. Louis U. L.J. 609, 610 (2020) (“In recent years, the Court majority has become increasingly hostile to the regulation of campaign finance and has acted strenuously against measures meant to level the playing field.”).

²⁹⁷ See, e.g., *infra* notes 344–48 and accompanying text (discussing *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*).

²⁹⁸ See William French, Note, *This Isn't Lochner, It's the First Amendment: Reorienting the Right to Contract and Commercial Speech*, 114 Nw. U. L. REV. 469, 472 (2019) (“[T]he fact that *Lochner* is so universally derided has proved irresistible for Justices seeking to condemn the expanding protections for commercial speech on similar grounds. . . . And because the label of ‘*Lochner*’ sparks such a visceral reaction, these comparisons have taken hold in the corresponding scholarship as well.”).

States,²⁹⁹ a 1905 case considered part of the anticanon, declared unconstitutional a labor law protecting bakery workers from exploitation.³⁰⁰ During the *Lochner* era, the Supreme Court enshrined laissez-faire economics by invalidating scores of economic regulations based upon the substantive due process right to contract.³⁰¹ This doctrine was eventually repudiated in the 1930s, with economic regulations triggering no more than rational basis scrutiny under the Fourteenth Amendment.³⁰²

The libertarian, deregulatory impulses behind those business-friendly decisions are now reappearing in free speech decisions.³⁰³ The Supreme Court has been striking down regulations in the name of free speech, with the lower courts following suit.³⁰⁴ As Amanda Shanor aptly summarizes: “In the First Amendment context, plaintiffs across the country are increasingly invoking the Free Speech Clause as a shield against what a generation ago would have been viewed as ordinary economic regulation subject to lax, if any, constitutional review.”³⁰⁵ Companies have attacked on First Amendment grounds minimum wage requirements,³⁰⁶ informational disclosures,³⁰⁷ food warnings and

²⁹⁹ 198 U.S. 45 (1905).

³⁰⁰ See Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 135 (2016) (“[A] growing number of scholars, commentators, and judges have likened aspects of recent First Amendment jurisprudence to *Lochner v. New York*’s anticanonical liberty of contract.” (footnote omitted)).

³⁰¹ See Amanda Shanor, *Business Licensing and Constitutional Liberty*, 126 YALE L. J.F. 314, 315 (2016) (“Often called the *Lochner* era, that period from the end of the Gilded Age through much of the Great Depression has come to symbolize the judicial striking down of economic regulation.”).

³⁰² See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 390 (1937).

³⁰³ See Shanor, *supra* note 300, at 134 (“[T]he First Amendment has emerged as a powerful deregulatory engine.”).

³⁰⁴ See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 357 (2002) (striking on free speech grounds federal prohibitions on the commercial advertisement or promotion of compounded drugs); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011) (striking down law limiting pharmaceutical company’s use of doctor’s prescription information); see *infra* note 313 for lower court decisions.

³⁰⁵ Shanor, *supra* note 301, at 316; see also Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1208–09 (2015) (“These claims mirror *Lochner*-era claims in their structure: they posit a constitutional right, held by business interests (be they sole proprietors or corporate entities), which immunizes them from government regulation, often regulation that relies upon state interests in public health, safety, and welfare.”).

³⁰⁶ See *Int’l Franchise Ass’n v. Seattle*, 803 F.3d 389, 389–90, 408 (9th Cir. 2015) (rejecting a business challenge to a Seattle ordinance raising the city’s minimum wage).

³⁰⁷ See *Am. Meat Inst. v. USDA*, 760 F.3d 18, 21 (D.C. Cir. 2014) (en banc) (challenging the USDA-mandated country of origin label on certain meat).

disclosures,³⁰⁸ safety regulations,³⁰⁹ the requirement to post workers' rights information,³¹⁰ as well as antidiscrimination laws.³¹¹ Businesses have likewise mounted challenges against union fees.³¹² Moreover, many free speech challenges to what were previously considered routine economic regulations are succeeding.³¹³ And because most human interactions, including commercial ones, are conducted via speech, there seems to be no limit to potential claims.³¹⁴

The same deregulatory drive has also manifested in campaign finance regulations, where federal, state, and local governments have attempted to limit the corrupting influence of money in politics. The risk of deregulation is that those with the most money will exert an outsized influence on government, leading to politicians representing their donors' interests rather than their constituents.³¹⁵ Nevertheless,

³⁰⁸ See *Monster Beverage Corp. v. Herrera*, No. EDCV 13-00786, 2013 WL 4573959, at *11–12 (C.D. Cal. Aug. 22, 2013) (successfully challenging mandatory warnings for highly caffeinated energy drinks); *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 114–15, 131–34 (2d Cir. 2009) (rejecting restaurant association's free speech challenge to city law requiring certain restaurants to post calorie content information on menus).

³⁰⁹ See *Vivid Ent., LLC v. Fielding*, 965 F. Supp. 2d 1113, 1124–27 (C.D. Cal. 2013) (rejecting adult entertainment company's free speech challenge to county ordinance implementing a condom requirement in pornography production).

³¹⁰ See *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 959 (D.C. Cir. 2013) (holding that businesses cannot be compelled to post notice of labor laws under the Free Speech Clause).

³¹¹ See *Elane Photography, LLC v. Willock*, 309 P.3d 53, 58–59 (N.M. 2014) (photographer challenging on free speech grounds a New Mexico Human Rights Act requirement that businesses serve same-sex customers); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 621–25 (2018) (bakery claiming that public accommodation law requiring them to serve same-sex couple violates free speech); see also *303 Creative LLC v. Elenis*, 600 U.S. 570, 577–80 (2023) (website company arguing that antidiscrimination law violates its free speech right).

³¹² See *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 882–86 (2018) (holding that mandatory union fees for public sector employees violate the First Amendment, even if just for collective bargaining services).

³¹³ See, e.g., *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 373 (D.C. Cir. 2014) (requiring producers to disclose whether minerals are “conflict free” violated manufacturers' First Amendment rights); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1208 (D.C. Cir. 2012) (striking an FDA regulation requiring graphic tobacco warning labels as violating the tobacco companies' First Amendment rights); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 747–48 (8th Cir. 2019) (holding that the Minnesota Human Rights Act prohibiting sexual orientation discrimination in places of public accommodation violated videographers' free speech); *Brush & Nib Studios, LC v. City of Phoenix*, 448 P.3d 890, 895 (Ariz. 2019) (holding Phoenix's antidiscrimination law violated stationary store's speech in violation of the First Amendment by forcing them to produce wedding invitations for same-sex couples).

³¹⁴ See Kendrick, *supra* note 305, at 1212 (“[C]ountless activities involve ‘speech.’”).

³¹⁵ Cf. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986) (“Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace.”).

the Supreme Court has repeatedly struck attempts to regulate money in elections.³¹⁶

These cases were not originalist decisions. Well into the mid-twentieth century, the Supreme Court considered regulations of commercial speech—like advertising or labels whose main goal is to make a sale³¹⁷—as economic regulations that triggered no free speech scrutiny.³¹⁸ When the Court first extended limited free speech protection to commercial speech, its justification was not grounded in an originalist analysis.³¹⁹ The case which established the doctrinal framework for commercial speech likewise makes no attempt to link the original meaning of the Free Speech Clause to protection for commercial speech.³²⁰ Nor does the Court's more recent decision in *Sorrell v. IMS Health Inc.*,³²¹ which hints that commercial speech ought to be protected against content-based regulations to the same degree as noncommercial speech.³²²

A similar absence pervades the cases establishing free speech protection for the noncommercial speech of corporations. Although many people believe that the Supreme Court granted corporate “persons” free speech rights equivalent to that of natural people in

³¹⁶ See *Randall v. Sorrell*, 548 U.S. 230, 262 (2006) (striking Vermont spending and contribution limits); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457, 482, 491 (2007) (striking federal limits on “electioneering communications”); *Citizens United v. FEC*, 558 U.S. 310, 318–19, 372 (2010) (striking federal limits on corporate expenditures); *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 562 U.S. 1282 (2011) (striking Arizona public financing scheme); *McCutcheon v. FEC*, 572 U.S. 185, 192–93 (2014) (striking federal aggregate limits on contributions); *Thompson v. Hebdon*, 589 U.S. 1, 2–6 (2019) (striking Alaska’s individual contributions limits).

³¹⁷ The Supreme Court has defined commercial speech as speech that does no more than propose a commercial transaction. See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562 (1980); see also Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 *Lox. L.A. L. Rev.* 67, 75 (2007) (defining commercial speech as “expression advocating purchase”).

³¹⁸ See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (“[T]he Constitution imposes no . . . restraint on government as respects purely commercial advertising.”).

³¹⁹ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976); see also *id.* at 763–64 (emphasizing the benefits to audiences as consumers and as voters to a free flow of commercial information). *Bigelow v. Virginia*, 421 U.S. 809 (1975), which protected speech that was partially political and partially commercial, *id.* at 822, also lacked any originalist analysis.

³²⁰ See *Cent. Hudson*, 447 U.S. at 566 (describing the “four-part analysis” that developed for commercial speech cases, which approximates intermediate scrutiny).

³²¹ 564 U.S. 552 (2011).

³²² Rather than apply the *Cent. Hudson* test for commercial speech, *Sorrell* spent some time explaining how the commercial speech regulation was content- and speaker-based, and must pass heightened scrutiny because “[c]ommercial speech is no exception.” *Id.* at 566; see also *Matal v. Tam*, 582 U.S. 218, 251 (2017) (Kennedy, J., concurring) (“‘Commercial speech is no exception,’ the Court has explained, to the principle that the First Amendment ‘requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys.’” (quoting *Sorrell*, 564 U.S. at 566)).

Citizens United v. FEC,³²³ corporate free speech rights had been recognized decades earlier in *First National Bank of Boston v. Bellotti*,³²⁴ and had been cemented by later decisions³²⁵—none of which turn on an originalist analysis.³²⁶

Citizens United, a Roberts Court decision, expanded corporate speech rights by striking laws that limited election expenditures.³²⁷ Overruling previous decisions,³²⁸ *Citizens United* held the government could not limit corporate “independent expenditures,” thereby allowing businesses to spend as much as they like from their general treasury on speech advocating for specific candidates (“express advocacy”), including political advertisements for a candidate close to an election (“electioneering communications”).³²⁹ In the fifty-page majority opinion, precedent was repeatedly invoked,³³⁰ while originalism received one paragraph—nothing more than a nod toward originalism.³³¹ Although

³²³ 558 U.S. 310 (2010).

³²⁴ 435 U.S. 765, 777 (1978) (holding that a corporation’s speech on political issues was as protected as any other political speech because “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual”).

³²⁵ Citing *Bellotti*, the Court held that a law barring ConEd from including political advocacy in its billing envelopes violated the Free Speech Clause. *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 533–35 (1980). Citing *Bellotti* again, the Court held it violated the Free Speech Clause to require a utility company to include third party speech in its billing envelopes. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 8–9, 20–21 (1986).

³²⁶ Chief Justice Burger’s concurrence in *Bellotti* does invoke originalism. He argues that the Framers did not mean to limit freedom of the press to any particular group (like newspapers), and that if the First Amendment covers media corporations (like newspapers) then it should cover other corporations. *Bellotti*, 435 U.S. at 795, 798–800 (Burger, J., concurring). No one joined him.

³²⁷ See *Citizens United*, 558 U.S. at 339 (“Section 441b’s prohibition on corporate independent expenditures is thus a ban on speech.”). The Court had previously distinguished campaign *contributions*, i.e., giving money to a political candidate or entity (some of which still can be limited) from campaign *expenditures*, i.e., spending money on speech advocating the election or defeat of a candidate. *Citizens United* held that the McCain-Feingold Bipartisan Campaign Reform Act of 2002 restrictions on corporate-funded *expenditures* violated the free speech rights of corporations and unions. *Id.* at 365.

³²⁸ See *id.* (overruling *Austin v. Mich. State Chamber of Com.*, 494 U.S. 652, 655 (1990) (upholding laws barring independent expenditures by corporations)); *McConnell v. FEC*, 540 U.S. 93, 203–09 (2003) (upholding laws banning corporations from spending general funds on electioneering).

³²⁹ See *Citizens United*, 558 U.S. at 311–12.

³³⁰ See, e.g., *id.* at 342 (“The Court has recognized that First Amendment protection extends to corporations.”) (citing multiple cases, including *Bellotti*); see also *id.* at 343 (describing previous decisions).

³³¹ See Jonathan A. Marcantel, *The Corporation as a “Real” Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221, 230 (2011) (“[A]lthough the [*Citizens United*] Court invoked the concept of ‘original understanding’ of the Constitution, the Court did not attempt to analyze the language of the Constitution or documents contemporaneous to the drafting and ratification of the Constitution or its amendments to support its position.”). Rather than an originalist analysis, the Court made an originalist claim that it was irrelevant that the modern corporation (including the modern

Justice Scalia's concurrence mentioned originalism, it was primarily to rebut the originalist critique mounted by Justice Stevens's dissent.³³²

Citizens United also belongs to a line of cases that extends First Amendment protection to expenditures, a position that the Supreme Court has not supported with originalist bona fides. The Supreme Court first equated spending money with speaking in *Buckley v. Valeo*,³³³ arguing that expensive mass media was indispensable to modern day political campaigns,³³⁴ and therefore limiting independent expenditures on political communications limited speech itself.³³⁵ Although *Buckley* protected individuals' right to fund political speech,³³⁶ *Citizens United* extended that right to corporations.³³⁷ *Buckley* makes no reference to the original meaning of the First Amendment and neither do subsequent decisions that expand *Buckley*'s reach. Recently, for example, in *Janus v. AFSCME*,³³⁸ the Court struck down mandatory union dues for public employees as violating the Free Speech Clause,³³⁹ dealing such a potentially severe blow to the continued vitality of public sector unions³⁴⁰ that Justice Kagan accused the Court of "weaponizing the First Amendment."³⁴¹ Other than an acontextual Jefferson quotation,³⁴²

media corporation) was unknown at the Founding. The Court implies but does not clearly articulate that if the original understanding extends the First Amendment to media corporations like newspapers that disseminate political ideas, then it ought to extend to nonmedia corporations that disseminate political ideas. See *Citizens United*, 558 U.S. at 353. Basically, coverage for *The New York Times* must mean coverage for Exxon. Except that it does not necessarily follow; for example, *The Times* can invoke the Press Clause in a way that Exxon cannot.

³³² See *Citizens United*, 558 U.S. at 385–90 (Scalia, J., concurring).

³³³ 424 U.S. 1 (1976).

³³⁴ See *id.* at 19 (“[V]irtually every means of communicating ideas in today’s mass society requires the expenditure of money. . . . The electorate’s increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.”).

³³⁵ See *id.* at 18–19.

³³⁶ Specifically, *Buckley* struck down a cap on independent expenditures for individuals. See *id.* at 51.

³³⁷ See *Citizens United*, 558 U.S. at 365.

³³⁸ 585 U.S. 878 (2018).

³³⁹ The Court had previously held it was unconstitutional to force non-union members to contribute money to be used for ideological political advocacy. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235–36 (1977). *Janus* held that it was unconstitutional compelled speech to require nonmembers to contribute union dues (“fair share fees”) that were used for bread-and-butter collective bargaining activities, like negotiating wages and benefits. *Janus*, 585 U.S. at 893 (finding mandatory agency fees amounts to compelled speech in violation of the Free Speech Clause).

³⁴⁰ See Jessica Levinson, *Supreme Court Decision on Janus v. AFSCME Likely to Permanently Weaken Public Unions*, NBC NEWS (Feb. 26, 2018, 4:36 PM), <https://www.nbcnews.com/think/opinion/supreme-court-decision-janus-v-afscme-likely-permanently-weaken-public-ncna851376> [<https://perma.cc/CXT9-VXR3>].

³⁴¹ *Janus*, 585 U.S. at 955 (Kagan, J., dissenting).

³⁴² The Supreme Court quotes Thomas Jefferson on compelled financial support of religion to bolster their conclusion: “As Jefferson famously put it, ‘to compel a man to furnish contributions

the Supreme Court's discussion of originalism is cabined to rejecting the union's originalist claim about public employees lacking free speech rights; the Court makes no originalist arguments to support equating union dues with speech.³⁴³

The same pattern appears in another alarming development: free speech challenges to antidiscrimination law. Christian-owned businesses are increasingly arguing that it violates their free speech rights to serve LGBTQ customers.³⁴⁴ In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,³⁴⁵ for example, a bakery claimed, first, that baking a wedding cake was expressive conduct protected by the Free Speech Clause, and, second, that requiring them to create a wedding cake for a same-sex couple violated the Free Speech Clause by compelling them to express a message contrary to their beliefs.³⁴⁶ Though the Supreme Court sided with the bakery on free exercise grounds,³⁴⁷ Justice Thomas, joined by Justice Gorsuch, championed the free speech claim without ever mentioning originalism.³⁴⁸

Many reasons may underlie the absence of originalist analysis in these cases. Originalism was not yet in fashion when the earliest ones were decided. Even when originalism became ascendent for conservative justices, it can be difficult to garner five votes, so close cases will settle on the narrowest holding that a majority will join. Still, the Roberts Court—the Court that has made original understanding the touchstone for unprotected categories of speech as well as the religion clauses of

of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.” *Id.* at 893 (quoting Thomas Jefferson, *A Bill for Establishing Religious Freedom*, in 2 PAPERS OF THOMAS JEFFERSON 545 (J. Boyd ed., 1950)). The irony is that when it comes to the actual compelled financial support of religion, the Supreme Court ignores Jefferson and his strong separation of church and state views. *See, e.g.,* *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 466–67 (2017) (mandating direct cash grant to a church with no mention of Jefferson).

³⁴³ Citing *Garcetti v. Ceballos*, 547 U.S. 410, 410 (2006), which held there was no free speech protection for public employee speech made pursuant to official duties, because the union hoped the Court might be receptive to an originalist argument that the Free Speech Clause did not reach public employees. *Janus*, 585 U.S. at 901. The Supreme Court concluded that the union failed to offer sufficient evidence to support its claim. *Id.* at 903–04 (“The Union offers no persuasive founding-era evidence that public employees were understood to lack free speech protections.”). It further observed that the historical evidence of speech limits on public employees was inapposite because, unlike this case, those involved employee speech that might threaten important government interests. *Id.* Moreover, the Court noted, nothing like modern day unions existed at the Founding; therefore, “the Union cannot point to any accepted founding-era practice that even remotely resembles the compulsory assessment of agency fees from public-sector employees.” *Id.* at 904–05.

³⁴⁴ *See supra* notes 311, 313.

³⁴⁵ 584 U.S. 617 (2018).

³⁴⁶ *See id.* at 632–33.

³⁴⁷ *See id.* at 638.

³⁴⁸ *See id.* at 654–67 (Thomas, J., concurring).

the First Amendment³⁴⁹—has not buttressed its expansive view of First Amendment freedom of expression with originalist analysis.

B. *Multiple Originalisms and Hate Speech Bans*

In addition to inconsistent invocation of originalism, the Supreme Court does not always rely on the same type of originalism.³⁵⁰ Because there are so many versions of originalism,³⁵¹ judges may pick the one (or the amalgam) that results in their preferred outcome,³⁵² all while claiming that the original meaning dictates the outcome.³⁵³ In the most prominent example of free speech originalism—the Supreme Court’s originalist justification for freezing unprotected categories of speech—the Court’s analysis relies heavily on original expected applications. A different strand of originalism, however, might generate a different conclusion.

The constitutional fate of hate speech bans illustrates this flexibility. Original expected applications originalism and original public meaning originalism produce different results when applied to hate speech. Or, more realistically, original expected applications yields one result while original public meaning reveals a principle that could go either way. That is, although the original expected applications approach the Supreme Court adopted in *Stevens* suggests that any law barring hate speech violates the First Amendment, the original public meaning is not as conclusive.

Although there are myriad definitions of hate speech,³⁵⁴ I will slightly modify Mari Matsuda’s proposal by defining hate speech as speech that denigrates or dehumanizes a person based on a constitutionally protected characteristic like race, ethnicity, nationality, sex, sexual orientation, gender identity, or religion and that subordinates one group to

³⁴⁹ See, e.g., *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534–35 (2022).

³⁵⁰ Cf. Boyce, *supra* note 61, at 914 (“The Court’s originalists, it is argued, have failed to apply a consistent originalist methodology . . .”).

³⁵¹ See Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1919 (2012) (“[O]riginalism has fragmented into an enormous number of different theories.”).

³⁵² See Colby & Smith, *supra* note 26, at 240 (“[C]laims that originalism has a unique ability to produce determinate and fixed constitutional meaning . . . stumble when one considers the rapid evolution and dizzying array of versions of originalism . . .”).

³⁵³ See *id.* at 247 (“[O]riginalists can and often do move from one version of originalism to another as they decide different issues, thus allowing them to reach results that they personally prefer, all the while claiming (and likely mistakenly believing) that they are being guided by nothing more than the external constraint of history.”).

³⁵⁴ See, e.g., *Hate speech*, BLACK’S LAW DICTIONARY (11th ed. 2019) (Black’s Law Dictionary defines hate speech as “[s]peech whose sole purpose is to demean people on the basis of race, ethnicity, gender, religion, age, disability, or some other similar ground, esp. when the communication is likely to provoke violence”).

another.³⁵⁵ Racist speech meant to maintain white supremacy is perhaps the most familiar type of hate speech. Classic examples include burning a cross in a black family's front yard or using the n-word as an epithet. (The boundaries may not be sharp, but neither are they for many well-accepted categories like "fighting words," or "intentional infliction of emotional distress.")³⁵⁶ At its core, racist hate speech "is the structural subordination of a group based on an idea of racial inferiority."³⁵⁷

1. *Original Expected Applications*

The Supreme Court's trio of cases on unprotected categories, using original expected applications, generally precludes a hate speech ban. Original expected applications originalism seeks to identify "how people living at the time the text was adopted would have expected it would be applied."³⁵⁸ Some of the best evidence of how the Founding generation expected a constitutional provision be applied is how it was, in fact, applied. For example, if segregation was commonly practiced immediately after the Reconstruction Amendments were passed, then the original expected applications of the Equal Protection Clause probably does not bar segregation.³⁵⁹ Or if the government regularly sponsored Christian prayers during the Founding era, then arguably Christian legislative prayers do not violate the Establishment Clause today.³⁶⁰

³⁵⁵ Matsuda focuses on racist hate speech, which she describes as having three characteristics: "1. The message is of racial inferiority; 2. The message is directed against a historically oppressed group; and 3. The message is persecutorial, hateful, and degrading." Matsuda, *supra* note 292, at 2357.

³⁵⁶ One wonders why racist hate speech has not been accepted as a type of fighting words or intentional infliction of emotional distress. See Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 152–57 (1982) (discussing cases where courts concluded that racist insults were not sufficiently outrageous). The latter was precluded by the Roberts Court decision in *Snyder v. Phelps*, 562 U.S. 443, 458 (2011), which granted protection to speech that intentionally inflicts emotional distress on a private individual so long as it implicates a matter of public concern. There, homophobic hate speech at a soldier's funeral (e.g., "God hates f[**]s") was held to address the important topic of "homosexuality in the military." *Snyder*, 562 U.S. at 447–48, 454. By analogy, the Supreme Court could find that "God hates n—s" to address the important topic of race in America.

³⁵⁷ Matsuda, *supra* note 292, at 2358 ("[R]acist speech proclaims racial inferiority and denies the personhood of target group members. . . . Racism is more than race hatred or prejudice. It is the structural subordination of a group based on an idea of racial inferiority. Racist speech is particularly harmful because it is a mechanism of subordination, reinforcing a historical vertical relationship.").

³⁵⁸ Balkin, *supra* note 20, at 296.

³⁵⁹ See *supra* notes 124–28 and accompanying text (explaining that the ability to make exactly this argument sparked the modern originalist movement).

³⁶⁰ See *Town of Greece v. Galloway*, 572 U.S. 565, 578 (2014) (upholding Christian prayers before town meetings in part because "[t]he Congress that drafted the First Amendment would have been accustomed to invocations containing explicitly religious themes of the sort respondents find objectionable").

Relying on original expected applications, the *Stevens* Court held that if and only if evidence establishes that a category of speech fell outside the protection of the First Amendment at the Founding would the category do so now.³⁶¹ Thus, the unprotected categories of speech today are identical to those in the Founding era, no more and no less.³⁶² The *Stevens* Court's analysis of unprotected categories is brief.³⁶³ First, it announces there are certain categories of unprotected speech that date to the Bill of Rights. "From 1791 to the present" . . . the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas.'³⁶⁴ Next, it insists that this list is fixed and has never changed: "[The First Amendment] has never 'include[d] a freedom to disregard these traditional limitations.'³⁶⁵ It then lists the unprotected categories.³⁶⁶ Finally, it concludes by vilifying its previously employed balancing test as absurd and denies ever relying upon it. "[A] free-floating test for First Amendment coverage . . . is startling and dangerous."³⁶⁷

In so ruling, the Supreme Court made no attempt to document the actual meaning of the First Amendment at the Founding, or how that meaning justifies excluding these particular categories from First Amendment protection. It was enough that these were the categories of speech that fell outside the First Amendment in 1791.³⁶⁸

Andy Koppelman has nicknamed this type of original expected applications analysis as "I Have No Idea Originalism," as it fails to articulate the original meaning or even the principle behind a particular constitutional provision.³⁶⁹ "The argument is essentially, 'I have no idea what this provision means. But whatever it means, it can't prohibit this, because the [Framing generation] approved of it.'³⁷⁰ Or vice versa: whatever the First Amendment means, it cannot recognize this as an unprotected category because the Framing generation did not.³⁷¹

³⁶¹ See *United States v. Stevens*, 559 U.S. 460, 472 (2010).

³⁶² Some of them may not have been discovered yet, see *supra* notes 270–73 and accompanying text, but the universe of unprotected categories is complete.

³⁶³ See *Stevens*, 559 U.S. 460 at 468–70.

³⁶⁴ *Id.* at 468.

³⁶⁵ *Id.* (alteration in original) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992)).

³⁶⁶ See *id.*

³⁶⁷ *Id.* at 470.

³⁶⁸ Actually, there is a slight nuance in that these unprotected categories have been outside the First Amendment *since* the Founding (as opposed to simply *at* the Founding). However, there is no discussion in *Stevens* or other cases on what role the continuity of the unprotected status plays, if any.

³⁶⁹ Koppelman, *supra* note 295, at 737.

³⁷⁰ "Framing generation" was substituted for "Framers," *id.* at 737, but the main point stands.

³⁷¹ Prioritizing different original practices might also result in different outcomes. In *Brown*, the majority struck a ban on sales of violent video games to minors by reviewing practices vis-à-vis violent speech, while Justice Thomas, in dissent, looked to practices vis-à-vis minors, namely

Giving the Supreme Court the benefit of the doubt on its history,³⁷² its original expected applications analysis points to the unconstitutionality of hate speech bans. *Stevens* and its progeny make clear that the Court will not recognize as unprotected any category of speech that was not an unprotected category during the Founding era, and admittedly missing from that list is hate speech. Consequently, hate speech is fully protected by the Free Speech Clause, and any laws targeting it are content-based and therefore presumptively unconstitutional.³⁷³ Thus, the Supreme Court's purportedly originalist analysis yields free speech protection for what most would agree is odious speech.

The Supreme Court even went a step further in *R.A.V. v. City of St. Paul*,³⁷⁴ which involved a cross burned on a black family's lawn.³⁷⁵ At issue was a St. Paul, Minnesota law barring hate speech on the basis of race, color, creed, religion, or gender.³⁷⁶ The Supreme Court of Minnesota interpreted the law to fall into one of the Supreme Court's recognized categories of unprotected speech, namely fighting words, and upheld the law on this basis.³⁷⁷

The U.S. Supreme Court reversed.³⁷⁸ Writing for the majority, avowed originalist Justice Scalia announced a new rule: content-based regulations of speech *within* an unprotected category will nevertheless trigger strict scrutiny in the same way that content-based regulations of fully protected speech do.³⁷⁹ And in the case before it, banning hate speech fighting words failed strict scrutiny.³⁸⁰

Even as the Court carved out exceptions to its new rule (with nary a mention of this rule or its exceptions existing at the Founding),³⁸¹ it refused to recognize St. Paul's law as satisfying any of them.³⁸² For example, one exception to the newly minted rule would allow banning a subset of the unprotected category if it represented the very worst of

"speech to minor children bypassing their parents." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786 (2011) (Thomas, J., dissenting).

³⁷² A benefit it does not deserve. See Lakier, *supra* note 249, at 2168.

³⁷³ A ban on hate speech is content-based and, therefore, presumptively unconstitutional. See *supra* note 151 and accompanying text. Of course, as Jud Campbell has demonstrated, "these neutrality principles are new." Campbell, *supra* note 150, at 865.

³⁷⁴ 505 U.S. 377 (1992).

³⁷⁵ See *id.* at 379.

³⁷⁶ See *id.* at 380.

³⁷⁷ See *id.* at 380–81.

³⁷⁸ See *id.* at 396.

³⁷⁹ See *id.* at 377–78.

³⁸⁰ See *id.* at 395–96 (holding that the government's goal is compelling but content-neutral alternatives existed, namely banning all fighting words rather than just hateful ones).

³⁸¹ See *id.* at 387.

³⁸² See *id.* at 391.

that category.³⁸³ Nevertheless, Justice Scalia flatly rejected the idea that hate speech might constitute the very worst kind of fighting words, even though it is difficult to imagine what better supercharges fighting words than overt racism.³⁸⁴

R.A.V., which was decided before the Court's originalist trio of cases on unprotected speech,³⁸⁵ might be excused for its paltry originalism analysis.³⁸⁶ *Matal v. Tam*,³⁸⁷ in contrast, is of more recent vintage,³⁸⁸ and it accepts the "originalist" reasoning of the earlier cases to conclude that a racial slur was fully protected speech.³⁸⁹ Any interest in preventing hateful demeaning speech conflicts with the First Amendment's goal of protecting "speech expressing ideas that offend."³⁹⁰

Originalism barely surfaced in *Matal v. Tam*. More to the point, the Court's superficial original expected applications analysis for unprotected categories was only one of several originalist analyses available. Rigidly applying expected applications will always result in the protection of speech that was not blacklisted at the Founding.³⁹¹ A different originalist analysis, based upon the original public meaning of the First Amendment, or at least the original principle for deciding when categories fell outside it, might lead to a different result, as the next section explores. Instead, the Court opted for an approach that effectively

³⁸³ See *id.* at 388 ("To illustrate: A State might choose to prohibit only that obscenity which is the most patently offensive in its prurience . . ." (emphasis omitted)).

³⁸⁴ See *id.* at 424 (Stevens, J., concurring) ("This . . . judgment—that harms caused by racial, religious, and gender-based invective are qualitatively different from that caused by other fighting words—seems to me eminently reasonable and realistic.").

³⁸⁵ The case is notable for reshaping doctrine in order to strike down hate speech bans. See *id.* at 415 (Blackmun, J., concurring) ("[T]he Court manipulated doctrine to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults are of greater harm than other fighting words.").

³⁸⁶ The *R.A.V.* Court mentions that certain unprotected categories date to the Bill of Rights, *id.* at 382–83, but it offers no discussion of original meaning or attempt to ground its various new rules and exceptions in that original meaning.

³⁸⁷ 582 U.S. 218 (2017).

³⁸⁸ In *Tam*, the federal government refused to grant trademarks "which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." 15 U.S.C. § 1052. While the terms of this "disparagement" clause were much broader than hate speech, *Tam* involved a refusal to issue a trademark for "[s]lants," "a derogatory term for persons of Asian descent." *Matal*, 582 U.S. at 223. The music group seeking registration, "The Slants," wanted to reclaim the word, much like the LGBTQ community have with the word "queer." *Id.* at 228.

³⁸⁹ *Matal*, 582 U.S. at 247.

³⁹⁰ *Id.* at 246. The Court continues: "Speech that demeans on the basis of race . . . is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" *Id.* (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

³⁹¹ Or more precisely, the Founding as it is envisioned by the Court's historical analysis.

guarantees protection for hate speech, even if it is degrading, demeaning, and dehumanizing.

2. *Original Public Meaning*

Switching from original expected applications to original public meaning—or the original meaning as best we can identify today—might well change the outcome. The original public meaning at the Founding, with its limited scope and emphasis on promoting the public good, intimates that the First Amendment should not protect hate speech. Furthermore, the original public meaning of the First Amendment at Reconstruction, a time when ending the historical oppression of black Americans figured prominently, does not indicate otherwise. What follows is not a definitive exhumation of original public meaning, but an exploration that nonetheless suggests that a different originalism may yield a different outcome.

a. *Minimal First Amendment Coverage*

It is entirely possible that based on original meaning, the First Amendment would not reach hate speech at the Founding or at Reconstruction, such that laws barring it would spark no constitutional inquiry. Although hate speech may not have been specifically recognized as unprotected, this failure signifies little when so much, if not most, speech was unprotected.

As discussed in Section II.A, the First Amendment at the Founding may have covered no more than prior restraints and certain additional protections against seditious libel. If coverage were that minimal, then most speech restrictions would not trigger First Amendment review at all.

Even assuming the Founding era viewed the First Amendment as reaching the natural right to speak, write, and publish,³⁹² it also understood that these rights had inherent limits. “At a minimum, natural law required that individuals not interfere with the natural rights of others.”³⁹³ Yet that is exactly what hate speech does. Hate speech tends to silence its targets, interfering with *their* natural right to speak, write, and publish.³⁹⁴

The power dynamics of hate speech facilitates this silencing. Situating hate speech in the nation’s history of racial subordination, critical race theorists argue that hate speech is not simply an expression

³⁹² See *supra* notes 187–90 and accompanying text.

³⁹³ Campbell, *supra* note 144, at 271.

³⁹⁴ See Susan M. Gilles, *Images of the First Amendment and the Reality of Powerful Speakers*, 24 CAP. U. L. REV. 293, 295–96 (1995) (“The hate speaker claims to be silenced, when his speech in fact silences.”).

of dislike but an assertion of power: “In reality, those who hurl racial epithets do so because they feel empowered to do so. Indeed, their principal objective is to reassert and reinscribe that power.”³⁹⁵ Reminiscent of the Klan’s “reign of terror,”³⁹⁶ a cross burned on your front lawn warns that your presence here, in a white neighborhood, is neither deserved nor welcomed.³⁹⁷ Unsurprisingly, the Jones family in *R.A.V.* was the first black family in their working-class St. Paul neighborhood.³⁹⁸

Victims like the Jones family well understand that hate speech may foreshadow violence, and so the safest course is silence.³⁹⁹ Any response might make them targets for further attacks, and not just expressive ones.⁴⁰⁰ As *R.A.V.*’s Laura Jones noted, “If you’re black and you see a cross burning, you know it’s a threat, and you imagine all the church bombings and lynchings and rapes that have gone before, not so long ago . . . A burning cross is a way of saying, ‘We’re going to get you.’”⁴⁰¹ These sentiments were echoed by another victim from a different Supreme Court case, who explained that “[he] was ‘very nervous’ . . . because ‘a cross burned in your yard . . . tells you that it’s just the first round.’”⁴⁰² Targets of hate speech may also be too

³⁹⁵ Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871, 884 (1994) (footnote omitted).

³⁹⁶ *Virginia v. Black*, 538 U.S. 343, 352–53 (2003) (“Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan. . . . The Klan fought Reconstruction and . . . imposed ‘a veritable reign of terror’ throughout the South.” (quoting STETSON KENNEDY, SOUTHERN EXPOSURE 31 (1991))).

³⁹⁷ See Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 WIS. L. REV. 1425, 1464 (“[H]ate speech is often a punishment for targets presuming to go where they do not belong.”).

³⁹⁸ See Tamar Lewin, *Hate-Crime Law Is Focus of Case on Free Speech*, N.Y. TIMES (Dec. 1, 1991), <https://www.nytimes.com/1991/12/01/us/hate-crime-law-is-focus-of-case-on-free-speech.html> [<https://perma.cc/E3PK-KEAZ>]. Before the Jones’ neighbor burned the cross on their lawn in the middle of the night, their tires had been slashed. *Id.*

³⁹⁹ See Matsuda, *supra* note 292, at 2330–31 (“Members of target-group communities tend to know that racial violence and harassment is widespread, common, and life-threatening; that ‘the youngsters who paint a swastika today may throw a bomb tomorrow.’” (quoting GA. STATE ADVISORY COMM. TO THE U.S. COMM. ON CIVIL RIGHTS, PERCEPTIONS OF HATE GROUP ACTIVITY IN GEORGIA 3 (1982))).

⁴⁰⁰ See Delgado & Yun, *supra* note 395, at 885 (“The idea that talking back is safe for the victim . . . simply does not correspond with reality. It ignores the power dimension to racist remarks [and] forces minorities to run very real risks . . .”).

⁴⁰¹ Lewin, *supra* note 398.

⁴⁰² *Virginia v. Black*, 538 U.S. 343, 350 (2003) (quoting James Jubilee, whose neighbor in Virginia Beach, Virginia, attempted to burn a cross in his yard).

shocked to respond,⁴⁰³ or they may consider it futile.⁴⁰⁴ The result is still silence.

Although this silencing effect is most obvious with racist cross burnings,⁴⁰⁵ it is true for a range of hate speech. Charles Lawrence laments that “members of subordinated groups . . . must learn the survival techniques of suppressing and disguising rage and anger at an early age.”⁴⁰⁶ In short, hate speech, which are attacks by the powerful against those who are not, intrudes on the silenced victims’ own natural right to speak.⁴⁰⁷ Thus, if the original public meaning of the First Amendment encompasses natural rights, it should exclude hate speech because of the inherent limits of natural rights.⁴⁰⁸ And this analysis does not even consider how hate speech’s dehumanization likewise infringes on their targets’ natural rights.⁴⁰⁹

The Reconstruction Amendments bolster the notion that the First Amendment does not reach hate speech, especially racist hate speech. Recall that although the contours of free speech doctrine changed little, the specifics changed in response to the profound constitutional reordering brought about by the Reconstruction Amendments. The Second Founding, after all, was meant to end slavery and the historical degradation and subjugation of black Americans.⁴¹⁰ In addition to creating new rights, these Amendments modified existing ones like freedom of expression.

Even a Supreme Court hostile to Reconstruction agreed that the Thirteenth Amendment’s declaration that “neither slavery, nor involuntarily servitude . . . shall exist in the United States” put an end to

⁴⁰³ See Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 452 (“Women and minorities often report that they find themselves speechless in the face of discriminatory verbal attacks. . . . Fear, rage, shock, and flight all interfere with any reasoned response.”).

⁴⁰⁴ See Delgado & Yun, *supra* note 395, at 885 (“What would be the answer to ‘N[**]ger, go back to Africa. You don’t belong [here]’?”).

⁴⁰⁵ Even the Supreme Court understood that “often the cross burner intends that the recipients of the message fear for their lives.” *Black*, 538 U.S. at 357. Justice Thomas argued that burning a cross with the intent to intimidate was not even speech but terrorist conduct: “[T]his statute prohibits only conduct, not expression. And, just as one cannot burn down someone’s house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point.” *Id.* at 394 (Thomas, J., dissenting).

⁴⁰⁶ Lawrence, *supra* note 403, at 455.

⁴⁰⁷ See Charles J. Ogletree, Jr., *The Limits of Hate Speech: Does Race Matter?*, 32 GONZ. L. REV. 491, 502 (1997) (“Rather than promoting speech . . . [hate] speech produces silence.”).

⁴⁰⁸ See *supra* note 191 and accompanying text (explaining that natural rights end when their exercise would interfere with the natural rights of others).

⁴⁰⁹ See Moran, *supra* note 397, at 1464 (“The unofficial [critical race] narrative describes, as one of the most distinctive and profound harms of hate speech, the denial of the target’s humanity.”).

⁴¹⁰ See Carter, *supra* note 210, at 1114 (“The Second Founding’s aim was to create a new constitutional order that dismantled slavery in all of its aspects.”).

all—private or government—“badges and incidents of slavery.”⁴¹¹ Jennifer Mason McAward argues that the original public meaning of “incident,” and sometimes “badge” as well,⁴¹² both terms of art,⁴¹³ captures the specific disabilities that “necessarily accompanied the institution of slavery,”⁴¹⁴ ranging from the inability to own property or testify in court to denial of education or the right to speak.⁴¹⁵ But, “the term ‘badge’ can also be a metonym for the kinds of attitudes or behaviors that were constitutive of slavery as an American institution.”⁴¹⁶ Foremost among them is white supremacy⁴¹⁷: “Racial supremacy and American slavery went hand in hand.”⁴¹⁸ Thus, if the Thirteenth Amendment took aim at anything that facilitated slavery,⁴¹⁹ racist hate speech should be within its sights. With its purpose and effect of furthering racial subordination and white supremacy, racist hate speech is the embodiment of a lingering “badge[] and [] incident[] of slavery.”⁴²⁰

⁴¹¹ The Civil Rights Cases, 109 U.S. 3, 27–28 (1883) (“[T]he thirteenth amendment . . . clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United State[s] . . .”).

⁴¹² See Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 575 (2012).

⁴¹³ See *id.* at 566.

⁴¹⁴ *Id.* at 575.

⁴¹⁵ Senator James Harlan argued the Thirteenth Amendment banned slavery as well as its necessary incidents, “including ‘the prohibition of the conjugal relation,’ the ‘abolition . . . of the parental relation,’ the inability to ‘acquir[e] and hol[d] property,’ the deprivation of ‘a status in court’ and ‘the right to testify,’ the ‘suppression of the freedom of speech and of the press,’ and the deprivation of education.” *Id.* at 573 (alterations in original) (quoting CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864) (statement of Sen. Harlan)).

⁴¹⁶ Darrell A.H. Miller, *The Thirteenth Amendment, Disparate Impact, and Empathy Deficits*, 39 SEATTLE U. L. REV. 847, 856 (2016).

⁴¹⁷ See Edward H. Kyle III, *Symbolism and the Thirteenth Amendment: The Injury of Exposure to Governmentally Endorsed Symbols of Racial Superiority*, 25 MICH. J. RACE & L. 77, 95 (2019) (“[T]he intention of the Thirteenth Amendment was not merely the ending of literal slavery, but also an ending to those elements that allowed the institution of slavery to exist. . . . [T]he philosophy of racial supremacy was identified as one such element.”).

⁴¹⁸ *Id.* (“The foundation of the moral acceptance of American slavery was the belief that the enslaved race was so inferior to the enslaving race that its subjugation was not only morally correct, it was a natural state that benefited the enslaved.”).

⁴¹⁹ See Mehmet K. Konar-Steenberg, *Root and Branch: The Thirteenth Amendment and Environmental Justice*, 19 NEV. L.J. 509, 527 (2018) (“Statements by the amendment’s supporters lend support to the idea that the amendment was intended to go beyond slavery and address racial subordination.”). Senator Wilson of Massachusetts insisted the Thirteenth Amendment “obliterat[ed] the last lingering vestiges of the slave system; its chattelizing, degrading and bloody codes; its dark, malignant barbarizing spirit; all it was and is, everything connected with it.” *Id.* (alterations in original). And Senator Charles Sumner argued it abolished slavery “root and branch . . . in the general and the particular . . . in length and breadth and then in every detail.” William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1343 (2007).

⁴²⁰ Cf. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440–41, 445 (1968) (Douglas, J., concurring) (“The true curse of slavery is . . . [that it] produced the notion that the white man was of superior

Meanwhile, if the Fourteenth Amendment's Equal Protection Clause was meant to eliminate caste systems and guarantee full and equal citizenship for all Americans, then expression attempting to preserve the racial hierarchy at the heart of slavery violates that ideal.⁴²¹ And certainly there is historical support for this original meaning. For example, Darren Hutchinson argues that "[t]he history of Congressional Reconstruction supports an emancipatory construction of the Equal Protection Clause."⁴²² After all, the Fourteenth Amendment was enacted to combat the Black Codes—the Southern states' attempt to recreate racial subordination as best they could.⁴²³

Whether the Reconstruction Amendments barred hate speech is not dispositive, as my focus is not the direct effect of the Reconstruction Amendments but the way they inform the First Amendment. Reasonable citizens of the era may well have understood that the Reconstruction Amendments—the Thirteenth Amendment's ban on all indicia of slavery, together with the Fourteenth Amendment's promise of equality—modified the scope of the First Amendment to leave hate speech outside its walls.

Finally, the Reconstruction meaning of the First Amendment should be informed by the United States' newest citizens,⁴²⁴ who would no doubt agree that the driving impetus of the Reconstruction Amendments was their freedom and equality.⁴²⁵ For the reasonable Reconstruction African American, speech was not only valuable in itself "but also worth protecting as a means to achieving a goal; the end of slavery and the formation of a constitutional order wherein Blacks would be full participants, and freedom rather than subjugation would

character, intelligence, and morality. . . . Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men.").

⁴²¹ See Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787, 792 (1992) ("When hate speech is employed with the purpose and effect of maintaining established systems of caste and subordination, it violates [the Equal Protection Clause's] core value [of full and equal citizenship].").

⁴²² Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1, 15 (2017); see also Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2439 (1994) ("Originally the Fourteenth Amendment to the Constitution was understood as an effort to eliminate racial caste—emphatically not as a ban on distinctions on the basis of race.").

⁴²³ See Hutchinson, *supra* note 422, at 13–14.

⁴²⁴ Cf. Guyora Binder, *Did the Slaves Author the Thirteenth Amendment? An Essay in Redemptive History*, 5 YALE J.L. & HUMANS. 471, 483 (1993) ("African-Americans were, of course, excluded from the political process, voiceless before the law, and absent from the nation's constitutive myths.").

⁴²⁵ Cf. James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 435 (2018) ("African American leaders . . . insisted that the [Thirteenth Amendment's] abolition of slavery necessarily entailed not only outlawing the full-fledged conditions of slavery and servitude, but also eliminating each and every element of the slave system.").

be the default state.”⁴²⁶ In short, neither the Founding nor the Reconstruction understanding of the First Amendment seems to reach hate speech.

b. Shallow First Amendment Protection

Even assuming hate speech falls inside rather than outside the First Amendment’s ambit under the original public meaning, protection would be fairly shallow because natural rights could be curtailed if their exercise undermined the public good. Indeed, some defined natural rights to exclude any right that would harm the general welfare.⁴²⁷ Even under the broader definition, no one questioned the government’s prerogative to regulate for the public good. “[W]hether inherently limited by natural law or qualified by an imagined social contract, retained natural rights were circumscribed by political authority to pursue the general welfare.”⁴²⁸

As a result, speech deemed harmful to society—such as blasphemy and swearing—could be and regularly was restricted, even if it did not directly interfere with the rights of others.⁴²⁹ “[T]hough the Founders broadly acknowledged that speaking, writing, and publishing were among their natural rights, governmental limitations of expressive freedom were commonplace.”⁴³⁰ Even plays that might be “morally corrupting” could be banned.⁴³¹

Hate speech is corrosive to the public good. At the very least, “Because hate speech frequently silences its victims—those who, more often than not, are already heard the least—the community loses the benefit of the victims’ voices.”⁴³² Consequently, as a matter of free speech, hate speech eliminates a distinctive, much needed viewpoint from the marketplace of ideas and undermines democracy by impoverishing public discourse.⁴³³

Hate speech also reenacts hierarchies that subvert the necessary and fundamental assumption of our democracy: all people are created

⁴²⁶ Carter, *supra* note 210, at 1109.

⁴²⁷ See Campbell, *supra* note 144, at 274–75.

⁴²⁸ *Id.* at 276.

⁴²⁹ See *id.* at 276–77.

⁴³⁰ *Id.* at 276.

⁴³¹ *Id.* at 277.

⁴³² N. Douglas Wells, *Whose Community? Whose Rights?—Response to Professor Fiss*, 24 CAP. U. L. REV. 319, 320 (1995).

⁴³³ See Ogletree, *supra* note 407, at 501 (noting that in many other countries, hate speech is “regarded as hindering [democracy] by closing off the spaces in which minorities are able to participate in public debate”); Lawrence, *supra* note 421, at 801 (“A burning cross not only silences people like the Joneses, it impoverishes the democratic process and renders our collective conversation less informed.”).

equal.⁴³⁴ In other words, “the spread of bigotry signals a diminution of egalitarian ideals in society.”⁴³⁵ And this does not remotely exhaust the harms of hate speech as it fails to detail the psychological harm to targets as well as the severe curtailment of their liberty.⁴³⁶ It also overlooks the perpetuation of discrimination and promotion of violence.⁴³⁷ In short, the elimination of hate speech would enhance the public welfare.

Although the right to articulate one’s opinion was considered an inalienable natural right, it never extended to lies or views made in bad faith, a category that could readily encompass hate speech.⁴³⁸ Indeed, racist hate speech is more akin to a slap in the face than a conversational gambit⁴³⁹: burning a cross on a black family’s front yard is not an invitation to discuss the role of race in the United States.⁴⁴⁰ As Charles Lawrence III argued, “The racial invective is experienced as a blow, not a proffered idea, and once the blow is struck, it is unlikely that dialogue will follow.”⁴⁴¹

In sum, hate speech laws do not necessarily clash with the original public meaning of the First Amendment, which envisioned narrow and shallow free speech protection. To start, hateful speech was unlikely to be considered within the ambit of the First Amendment. Even assuming the First Amendment covered natural rights as well as prior restraints, natural rights did not extend to interfering with the rights of others, and inalienable natural rights did not extend to statements made in bad faith. Moreover, given the innumerable harms of hate speech, it would

⁴³⁴ Cf. Delgado, *supra* note 356, at 157 (“Racial insults . . . conjure up the entire history of racial discrimination in this country.”).

⁴³⁵ Alexander Tsesis, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 SANTA CLARA L. REV. 729, 772 (2000).

⁴³⁶ See *supra* notes 406–09 and accompanying text; Matsuda, *supra* note 292, at 2337 (“In order to avoid receiving hate messages, victims have had to quit jobs, forgo education, leave their homes, avoid certain public places . . . and otherwise modify their behavior and demeanor.”).

⁴³⁷ See Richard Ashby Wilson & Molly K. Land, *Hate Speech on Social Media: Content Moderation in Context*, 52 CONN. L. REV. 1029, 1033 (2021) (“The data now available on social media . . . allow researchers to empirically test whether there are visible, measurable harms resulting from hate speech. Studies thus far indicate that speech that denigrates and generates discriminatory animus against social groups such as immigrants or religious minorities does increase the risk of real-world violence against them.”). See generally Tsesis, *supra* note 435, at 740–55 (describing how racist propaganda that became embedded in culture facilitated atrocities against Jews in Germany, and against African Americans and Native Americans in the United States).

⁴³⁸ See *supra* notes 197–98 and accompanying text.

⁴³⁹ See Lawrence, *supra* note 403, at 452 (“The experience of being called ‘n[**]ger,’ ‘sp[**]c,’ ‘J[**]p,’ or ‘k[**]ke’ is like receiving a slap in the face.”).

⁴⁴⁰ See Lawrence, *supra* note 421, at 796 (“The primary intent of the cross burner in *R.A.V.* was not to enter into a dialogue with the Joneses, or even with the larger community.”); Delgado & Yun, *supra* note 395, at 885 (“Racist speech is rarely a mistake, rarely something that could be corrected or countered by discussion.”).

⁴⁴¹ Lawrence, *supra* note 403, at 452.

be considered acceptable for the legislature to bar it to advance the public good.

Of course, given the inevitable construction that must occur, this is not the only potential conclusion. But in contrast to the Supreme Court's original expected applications originalism, an original public meaning originalism does not foreclose the constitutionality of hate speech laws. Thus, the claim that originalism guarantees that Justices merely apply the one true meaning of the Constitution to the case before them, or even curtails judicial discretion much at all, cannot stand.

Does the possible constitutionality of a hate speech ban under the original meaning of the First Amendment give lie to my claim that originalism is a theory of the privileged? Perhaps. But it more likely demonstrates how malleable it is. My main point is that originalism has either been ignored or deployed by conservatives to reach their preferred outcome all while claiming impartiality and inevitability. The reality is that we will never see the current Supreme Court uphold hate speech bans under an originalist theory. As quick as some Justices are to equate lying about military medals to "a slap in the face,"⁴⁴² a majority seems woefully blind to how hate speech actually better fulfills the analogy.⁴⁴³

CONCLUSION

Despite originalists' claims to the contrary, an originalist First Amendment, both in theory and in practice, provides little meaningful constraint on judges. The Roberts Court has avoided originalism in its free speech *Lochnerism* decisions yet has embraced it, or at least one strand of it, in its unprotected categories decisions that effectively preclude hate speech bans. A different strand focused on original public meaning may yield a contrary result, especially given the inherent limits of natural rights, as well as widespread acceptance that the people through their legislatures may limit speech in the public interest. Indeed, faithful adherence to the First Amendment's true original meaning might completely reshape freedom of expression jurisprudence, explaining why it is generally avoided. In the end, First Amendment originalism will no doubt serve to legitimize decisions that further entrench the powerful and ignore the needs of the marginalized.

⁴⁴² See *supra* note 287.

⁴⁴³ See *supra* notes 439–41 and accompanying text.

NOTE

Antitrust Enforcement in the Pharmaceutical Industry: Analyzing Patents Under the Rule of Reason

Charles W. Schmidt*

ABSTRACT

American consumers and lawmakers across the political spectrum agree that prescription drug prices are far too high. This Note identifies an antitrust cause of action that could drastically reduce the prices of the most expensive prescription drugs. Under section 1 of the Sherman Antitrust Act (“Section 1”), all agreements that unreasonably restrain trade are illegal. Patents are agreements between inventors and the public, and under antitrust “rule of reason” analysis, some patents, i.e., patents covering lifesaving medicines for which there are no close substitutes, may unreasonably restrain trade and therefore violate Section 1. The rule of reason analysis in this Note weighs the long-term economic benefits of robust patent protection against the relatively short-term economic inefficiencies of patent protection.

While the benefits of patents almost always outweigh the harms, patents on lifesaving medicines for which there are no close substitutes are economically unique. Demand for these medicines remains immense, regardless of how high prices climb, because patients need them to live. Prices soar, sometimes to millions of dollars per dose, and the public ultimately shoulders the cost. This Note argues that under Section 1 rule of reason analysis, the patents that enable these extraordinarily high prices may unreasonably restrain trade.

* J.D. 2024, The George Washington University Law School; B.A. 2019, University of Colorado Boulder. I owe many thanks to: *The George Washington Law Review* editors—especially Devin Louis—for working to prepare this Note for publication; Professor William Kovacic for discussing early stages of this Note idea with me; Mark Obmascik for pointing me in the right direction with drug research; and my parents, Corky and Jane Schmidt, for their consistent love and support.

For now, the antitrust action proposed in this Note is likely unavailable under Supreme Court precedents that appear to immunize patents from antitrust scrutiny. This Note suggests amendments to federal law that would abrogate patents' implicit antitrust immunity and, where a Section 1 violation is proven, provide for compulsory patent licensing to generic drugmakers for a reasonable royalty. These amendments could save Americans billions annually on prescription drugs while preserving pharmaceutical companies' incentives to develop new medicines.

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INTRODUCTION

Prescription drug spending in the United States has captured considerable public attention in recent years¹—and with good reason. In 2021, American patients and their insurers spent \$603 billion on

¹ See Elisabeth Rosenthal, *Public Opinion is Unified on Lowering Drug Prices. Why Are Leaders Settling for Less?*, KFF HEALTH NEWS (Nov. 18, 2021), <https://khn.org/news/article/public-opinion-prescription-drug-prices-democratic-plan> [https://perma.cc/W8UA-BYKZ]; Ashley Kirzinger, Audrey Kearney, Mellisha Stokes, Liz Hamel & Mollyann Brodie, *The Public Weighs In On Medicare Drug Negotiations*, KFF (Oct. 12, 2021), <https://www.kff.org/health-costs/poll-finding/public-weighs-in-on-medicare-drug-negotiations> [https://perma.cc/DV6H-WXQF].

prescription drugs,² and they spend more than twice as much on prescription drugs per capita than the average comparable country.³ But many are unable to participate in the spending: in a June 2020 survey, 24% of Americans reported that they or a member of their household did not purchase drugs prescribed to them because they could not afford to.⁴ Those who cannot afford their medications pay an even more staggering price: a 15–22% higher mortality rate.⁵

The prescription drug market is divided between brand-name drugs, which make up just 16% of prescribed drugs but account for 88% of drug revenue, and unbranded generic drugs (“generics”), which make up 84% of prescribed drugs and account for just 12% of drug revenue.⁶ Brand-name drugs are more expensive than generics in part because brand-name drugs are often protected by one or more patents on, for example, the active ingredient or method of manufacturing the drug.⁷ With sufficient patent protection, a prescription drug manufacturer can legally exclude competitors from the market for the drug covered by their patent(s).⁸ The patent owner can then set higher drug prices than they could if they had to compete with other sellers of the same drug.⁹

Patent law provides an economic incentive to innovate: if you come up with an invention and share the details of it with the

² SONAL PARASRAMPURIA & STEVEN MURPHY, U.S. ASSISTANT SEC’Y FOR PLAN. AND EVALUATION, OFF. OF SCI. & DATA POL’Y, ISSUE BRIEF ON TRENDS IN PRESCRIPTION DRUG SPENDING, 2016–2021, at 1 (2022).

³ See Nisha Kurani, Dustin Cotliar & Cynthia Cox, *How Do Prescription Drug Costs in the United States Compare to Other Countries?*, PETERSON-KFF HEALTH SYS. TRACKER (Feb. 8, 2022), <https://www.healthsystemtracker.org/chart-collection/how-do-prescription-drug-costs-in-the-united-states-compare-to-other-countries> [<https://perma.cc/A9VL-CQBK>]; see also Letter from Elizabeth Warren, U.S. Sen., et al. to Hon. Xavier Becerra, Sec’y of the Dep’t of Health & Hum. Servs. (June 23, 2022).

⁴ Dan Witters, *In U.S., Large Racial Divide in COVID-19 Cost Concerns*, GALLUP NEWS (July 29, 2020), <https://news.gallup.com/poll/316052/large-racial-divide-covid-cost-concerns.aspx> [<https://perma.cc/7ZVR-ESL3>]; see also Letter from Elizabeth Warren, U.S. Sen., et al. to Hon. Xavier Becerra, Sec’y of the Dep’t of Health & Hum. Servs. (June 23, 2022).

⁵ See Sarah C. Van Alsten & Jenine K. Harris, *Cost-Related Nonadherence and Mortality in Patients with Chronic Disease: A Multiyear Investigation*, NATIONAL HEALTH INTERVIEW SURVEY, 2000–2014, 17 PREVENTING CHRONIC DISEASE 1, 1 (2020) (finding that patients skipping or delaying doses of medication due to their not being able to afford prescriptions is linked to a “15% to 22% higher all-cause mortality rates for all [medical] conditions”).

⁶ See ANDREW M. MULCAHY, CHRISTOPHER WHALEY, MAHLET G. TEBEKA, DANIEL SCHWAM, NATHANIEL EDENFIELD & ALEJANDRO U. BECERRA-ORNELAS, RAND CORP., INTERNATIONAL PRESCRIPTION DRUG PRICE COMPARISONS 20 (2021).

⁷ See Frazer A. Tessema, Aaron S. Kesselheim & Michael S. Sinha, *Generic but Expensive: Why Prices Can Remain High for Off-Patent Drugs*, 71 HASTINGS L.J. 1019, 1021–23 (2020); see also Olga Gurgula, *Strategic Patenting by Pharmaceutical Companies – Should Competition Law Intervene?*, 51 IIC INT. REV. INTELL. PROP. COMPETITION. L. 1062 (2020).

⁸ See *infra* notes 89–90 and accompanying text; see also Tessema et al., *supra* note 7, at 1021–23.

⁹ See *infra* Section I.A.; see also Tessema et al., *supra* note 7, at 1021.

public, the government will grant you a monopoly on your invention for a twenty-year term.¹⁰ This quid pro quo creates a binding contract between the inventor and the public whereby the inventor gains the right to exclude competitors from the market for their invention.¹¹ This power to exclude competitors leads to higher prices for patented goods.¹² The basic rationale for patent law is that innovation is worth the premium consumers pay for it.¹³ This Note seeks to ascertain just how far that rationale extends.

Specifically, this Note considers how patents on lifesaving medicines for which there are no close substitutes would fare if challenged as unreasonable restraints of trade in violation of section 1 of the Sherman Antitrust Act (“Section 1”).¹⁴ This Note argues patents on lifesaving medicines for which there are no close substitutes might be illegal “contract[s] . . . in restraint of trade” under Section 1 because consumers are exceptionally vulnerable to high prices when their lives depend on whether they can access patented medicines.¹⁵ The Section 1 action described in this Note could be brought by a state attorney general on grounds that competitive failures in prescription drug markets have resulted in exorbitant prices that overburden their state’s public health insurance programs.¹⁶

If the Section 1 action described herein were successful, the defendant patent owner would likely have to pay damages to the state bringing the suit, license their patents to generic drugmakers,¹⁷ and ultimately lower their prices.¹⁸ For now, the Section 1 action described herein may be little more than a thought experiment, as its viability relies on the assumption that patents are eligible to be challenged under

¹⁰ See *infra* notes 89–90 and accompanying text.

¹¹ See MARTIN J. ADELMAN, RANDALL R. RADER & JOHN R. THOMAS, PATENT LAW 411 (5th ed. 2019); see also *infra* note 96 and accompanying text.

¹² See *infra* Part I.

¹³ See *infra* Section II.A.

¹⁴ 15 U.S.C. § 1 (“Every contract . . . in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (“[T]he Court has repeated time and again that § 1 ‘outlaw[s] only unreasonable restraints.’” (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997))).

¹⁵ 15 U.S.C. § 1; see *infra* Sections III.B–.C.

¹⁶ See 15 U.S.C. § 15c(a)(1) (“Any attorney general of a State may bring a civil action in the name of such State . . . in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title.”).

¹⁷ See *infra* Section III.C (discussing patent licensing for a reasonable royalty as a less restrictive alternative to patent enforcement).

¹⁸ See IMS INST. FOR HEALTHCARE INFORMATICS, PRICE DECLINES AFTER BRANDED MEDICINES LOSE EXCLUSIVITY IN THE U.S. (2016), <https://www.iqvia.com/-/media/iqvia/pdfs/institute-reports/price-declines-after-branded-medicines-lose-exclusivity-in-the-us.pdf> [https://perma.cc/6WET-DVNJ] (discussing how increased competition results in lower drug prices).

Section 1 in the first place. Federal courts may be reluctant to entertain a Section 1 challenge to patent rights because Supreme Court precedents imply that patents are immune from Section 1 antitrust enforcement.¹⁹ However, the Supreme Court has not definitively decided whether patents are immune from Section 1 challenges,²⁰ and in any case, such policy questions are best left to Congress.²¹ Congress should proactively resolve the issue by amending federal law to clarify the extent to which plaintiffs may challenge patent rights under Section 1.

Part I of this Note examines the prices of patented medicines and identifies the entities that pay those prices.²² Part II provides necessary background on patent law, antitrust law, and the fraught relationship between them.²³ Part III, proceeding from the assumption that patents are not immune to Section 1 challenges, explains why patents on lifesaving medicines for which there are no close substitutes are problematic under Section 1.²⁴ Part IV explains that, for now, patents are likely immune to Section 1 challenges and suggests statutory amendments that would permit the Section 1 action described herein to proceed on the merits.²⁵

I. HIGH PRICES OF PATENTED MEDICINES

Patent-protected medicines can have extraordinarily high prices. For example, Zolgensma, a patent protected biologic medicine discussed in Part I.A, costs \$2.1 million per dose.²⁶ Upon its release, it was the most expensive drug in the world,²⁷ and its patent protection²⁸ enables its high price.²⁹ High prescription drug prices are paid by several entities including private and public insurers; but, whether directly or indirectly, high prescription drug prices ultimately land on the American public,

¹⁹ See cases cited *infra* notes 262–67 and accompanying text.

²⁰ See *infra* notes 262–67 and accompanying text.

²¹ *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) (“[F]undamental policy questions [are] appropriately resolved in Congress . . .”).

²² See *infra* Part I.

²³ See *infra* Part II.

²⁴ See *infra* Part III.

²⁵ See *infra* Part IV.

²⁶ See *infra* note 33 and accompanying text.

²⁷ Rebecca Robbins & Stephanie Nolen, *A Dilemma for Governments: How to Pay for Million-Dollar Therapies*, N.Y. TIMES (Jan. 25, 2023), <https://www.nytimes.com/2023/01/24/health/gene-therapies-cost-zolgensma.html> [<https://perma.cc/6FZW-4XWP>].

²⁸ See U.S. Patent No. 7,906,111 (filed Sept. 30, 2004); Determination of Regulatory Review Period for Purposes of Patent Extension; ZOLGENSMA, 86 Fed. Reg. 33307, 33308 (June 24, 2021).

²⁹ See Gurgula, *supra* note 7, at 1063.

who, along with politicians on both sides of the aisle, demand lower drug prices.³⁰

A. *Setting a Price: Zolgensma*

Without a Zolgensma treatment, type one spinal muscular atrophy (“SMA”), a rare birth defect, is usually fatal within a patient’s first two years of life.³¹ However, a single dose of Zolgensma, a patented biologic medicine sold by Novartis, can extend an SMA patient’s life for several years.³² Novartis decided to set the price for one Zolgensma treatment at \$2.1 million.³³ How did they determine that price? Zolgensma was surely costly to develop, but Novartis has not said *how* costly,³⁴ and the price is not necessarily based on the cost of research and development (“R&D”).³⁵ Because Zolgensma is patent protected³⁶ and no other medicines on the market treat SMA nearly as well as Zolgensma,³⁷ the only limit on the price of Zolgensma is what insurers are willing to pay for SMA patients to live.³⁸ When Novartis brought Zolgensma to

³⁰ See *infra* Sections I.B–C.

³¹ See generally *A Deeper Look into SMA, ZOLGENSMA*, <https://www.zolgensma.com/sma-progression> [<https://perma.cc/49UR-2WSP>] (providing an overview of typical SMA progression without Zolgensma treatment).

³² See *Novartis Shares Zolgensma Long-Term Data Demonstrating Sustained Durability Up to 75 Years Post-Dosing; 100% Achievement of All Assessed Milestones in Children Treated Prior to SMA Symptom Onset*, NOVARTIS (Mar. 20, 2023), <https://www.novartis.com/news/media-releases/novartis-shares-zolgensma-long-term-data-demonstrating-sustained-durability-75-years-post-dosing-100-achievement-all-assessed-milestones-children-treated-prior-sma-symptom-onset> [<https://perma.cc/Y63D-YNV6>] (discussing study that showed that even “up to 75 years post-dosing, children who were treated [with Zolgensma] after presenting symptoms of SMA maintained all previously achieved motor milestones”).

³³ Robbins & Nolen, *supra* note 27 (mentioning “Zolgensma’s list price of \$2.1 million”).

³⁴ See Mark Nuijten, *Pricing Zolgensma—the World’s Most Expensive Drug*, 10 J. MKT. ACCESS & HEALTH POL’Y 1, 3 (2022) (stating “[t]he . . . costs for R&D . . . are derived from published literature” where the cited literature was not specific to Zolgensma).

³⁵ See Nicola Davies, *Putting a Price on Life: Is the Answer Outside Pharma?*, REUTERS EVENTS (Nov. 4, 2019), <https://www.reutersevents.com/pharma/access-and-evidence/putting-price-life-answer-outside-pharma#> [<https://perma.cc/LTV2-PQ6R>] (discussing that many factors—such as patent protection, economies of scale, uncertainty about benefits and side effects, short-term budget impacts, long-term cost offsets, and other considerations of what a “fair price” would be—all impact the cost of a drug, and providing commentary on Zolgensma from Dan Ollendorf, Director of Value Measurement and Global Health Initiatives at the Center for the Evaluation of Value and Risk in Health, who states, “Ultimately, by putting a value on a cure, we put a value on a human life”).

³⁶ See U.S. Patent No. 7,906,111 (filed Sept. 30, 2004).

³⁷ The closest substitute is Spinraza, which is not exceptionally close. See generally *Zolgensma vs Spinraza: What Are the Key Differences?*, DRUGS.COM (Dec. 11, 2023), <https://www.drugs.com/medical-answers/zolgensma-spinraza-key-differences-3555030> [<https://perma.cc/7V8H-CS27>] (comparing Zolgensma with Spinraza).

³⁸ See Emma Court, *‘Like We Were Being Forced to Gamble with Our Son’s Life’: Health Insurers Won’t Pay for a \$2.1 Million Drug for Kids, and Parents Say They’re Running Out of*

market in 2019, the drug held the title of the most expensive medicine in the world,³⁹ but its pricing model is not unique, and it has since lost the title to other lifesaving medicines.⁴⁰ Virtually all patent protected lifesaving medicines for which there are no close substitutes are priced in the same way, where the only cap on price is what people, through their insurers, will pay to live.⁴¹

B. Resulting Financial Burdens

No matter how a patient pays for a prescription drug, the burden of high drug prices inevitably lands on the American public.⁴² The most straightforward—but least common—payment method is payment out of pocket.⁴³ Given how expensive prescription drugs can be, most people would prefer not to pay out of pocket.⁴⁴ When someone cannot afford a prescription drug out of pocket and also does not have insurance, they are often forced to go without the drug,⁴⁵ risking catastrophic health consequences.⁴⁶ To avoid this scenario, they can enroll in a public insurance program such as Medicare or Medicaid, which are described below.⁴⁷ Sometimes, drug manufacturers give prescription drugs to uninsured people for free or at a substantially reduced price⁴⁸—and they must presumably factor these losses into their drug prices.

Time, BUS. INSIDER (July 26, 2019, 9:36 AM), <https://www.businessinsider.com/health-insurance-companies-deny-kids-with-sma-gene-therapy-zolgensma-2019-7> [<https://perma.cc/K96G-ULBW>] (highlighting the lack of alternative treatments for Zolgensma, the inability of patients to pay out of pocket, and the short window to treat patients to show that insurance companies hold significant power over whether someone receives treatment).

³⁹ See Robbins & Nolen, *supra* note 27.

⁴⁰ See *id.*

⁴¹ Steven G. Morgan, Hannah S. Bathula & Suerie Moon, *Pricing of Pharmaceuticals Is Becoming a Major Challenge for Health Systems*, 368 *BMJ* 67, 67 (2020).

⁴² See *infra* text accompanying notes 44–66. See generally Rebecca E. Woltz, *States, Preemption, and Patented Drug Prices*, 52 *SETON HALL L. REV.* 385, 389 (2021) (discussing how prescription drug prices often result in great personal costs for patients and place a strain on states' public funding).

⁴³ See Kurani et al., *supra* note 3 (explaining that out of pocket expenses accounted for about 15% of drug spending in the U.S.).

⁴⁴ See *id.*; Woltz, *supra* note 42, at 389–90; CONG. BUDGET OFF., *PRESCRIPTION DRUGS: SPENDING, USE, AND PRICES* 11 (2022).

⁴⁵ See Witters, *supra* note 4; Woltz, *supra* note 42, at 394–95.

⁴⁶ See Van Alsten & Harris, *supra* note 5.

⁴⁷ See *infra* note 61 and accompanying text.

⁴⁸ See generally Janet Nguyen, *Why Do Pharmaceutical Companies Give Away Some Expensive Drugs for Free?*, *MARKETPLACE* (Mar. 31, 2023), <https://www.marketplace.org/2023/03/31/why-do-pharmaceutical-companies-give-away-some-expensive-drugs-for-free> [<https://perma.cc/7NZK-RF3K>]; *Pharmaceutical Manufacturer Patient Assistance Program Information*, *CTRS. FOR MEDICARE & MEDICAID SERVS.* (Sept. 6, 2023, 4:51 PM), <https://www.cms.gov/medicare/coverage/prescription-drug-coverage/patient-assistance-program> [<https://perma.cc/5RZQ-49AB>].

Alternatively, patients can pay for a prescription drug through their insurance.⁴⁹ Insurance can be provided by either a private insurance company or by state governments through programs including Medicare and Medicaid.⁵⁰ This Section discusses private and public insurance separately because there are significant differences between them. Private insurance companies spread individual medical expenses out over large groups of insured people.⁵¹ These people generally pay an annual lump sum (i.e., a “premium”) to their insurance company, and in exchange, their insurance company agrees to pay some portion of their medical expenses.⁵² Some people (e.g., those who incur minimal medical expenses) pay more for insurance coverage than their insurer ends up paying for their medical expenses.⁵³ Their overpayment covers medical expenses of people who incur more in medical expenses than they pay for insurance coverage.⁵⁴ So if someone with private insurance undergoes a \$2.1 million Zolgensma treatment, a large group of insured people, rather than just the one patient receiving the treatment, will pay the bill.⁵⁵

Additionally, private insurers often bargain with healthcare providers, drug manufacturers, and pharmacies to negotiate lower prices for their patients.⁵⁶ This business model works inasmuch as it generally enables insured people to incur enormous medical expenses without going broke.⁵⁷ Yet individual savings become collective burdens as insurance companies pass ever-increasing healthcare costs onto insured people by raising premiums, reducing coverage, or both.⁵⁸ While insured

⁴⁹ See generally *How U.S. Health Insurance Works*, STANFORD VADEN HEALTH SERVS., <https://vaden.stanford.edu/insurance-referral-office/health-insurance-overview/how-us-health-insurance-works> [https://perma.cc/TDB7-73BA].

⁵⁰ See KATHERINE KEISLER-STARKEY & LISA N. BUNCH, U.S. CENSUS BUREAU, P60-274, HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2020, at 3 (2021), <https://www.census.gov/content/dam/Census/library/publications/2021/demo/p60-274.pdf> [https://perma.cc/B3SM-ECEG] (“In 2020, private health insurance coverage continued to be more prevalent than public coverage at 66.5 percent and 34.8 percent, respectively.”); see also *infra* note 61.

⁵¹ See generally *How U.S. Health Insurance Works*, *supra* note 49.

⁵² See generally *id.*

⁵³ See generally *id.*

⁵⁴ See generally *id.*

⁵⁵ See generally *id.*

⁵⁶ See generally *id.*

⁵⁷ See *id.*

⁵⁸ See Ann Carrns, *Expect Higher Health Insurance Premiums, but Not A Lot Higher*, N.Y. TIMES (Nov. 4, 2022), <https://www.nytimes.com/2022/11/04/your-money/health-insurance-premiums-employer-plans.html> [https://perma.cc/8772-FVNC]; Wolitz, *supra* note 42, at 398–99. See generally *How U.S. Health Insurance Works*, *supra* note 49.

people generally will not go bankrupt from a \$2.1 million treatment,⁵⁹ that financial burden still makes its way back to members of the public.⁶⁰

Public insurance works similarly, but it tends to be far less expensive than private insurance as it is heavily subsidized by the federal government.⁶¹ Public insurance options include, most notably, Medicare (generally for people at least sixty-five years old)⁶² and Medicaid (for low-income people).⁶³ While most Medicare and Medicaid funding comes from federal tax revenue, Medicare and Medicaid are administered by the states.⁶⁴ A key difference between public and private health insurance is that it is difficult—and was, until recently, forbidden—for public insurance programs to negotiate prescription drug prices with manufacturers and pharmacies.⁶⁵ Just as private insurance companies pass the financial burdens of high drug prices onto members of the public via higher premiums and reduced coverage, states and the federal government pass the burdens of high drug prices on to members of the public via higher taxes.⁶⁶

C. Demand for Lower Prices

Prescription drug price reform is one of the few areas in American politics where almost everyone seems to agree on what the problem

⁵⁹ See generally Carrns, *supra* note 58; *How U.S. Health Insurance Works*, *supra* note 49.

⁶⁰ Often, there are more steps involved than indicated here. For example, where employers pay for their employees' health insurance, the financial burden of higher premiums may fall on employers. See Carrns, *supra* note 58. Even then, employers pass the burden onto their employees (by, e.g., reducing compensation or firing people), clients (by, e.g., raising prices), or both. See *id.*; Matthew Rae, Rebecca Copeland & Cynthia Cox, *Tracking the Rise in Premium Contributions and Cost-Sharing for Families with Large Employer Coverage*, PETERSON-KFF HEALTH SYS. TRACKER (Aug. 14, 2019), <https://www.healthsystemtracker.org/brief/tracking-the-rise-in-premium-contributions-and-cost-sharing-for-families-with-large-employer-coverage> [https://perma.cc/WH42-MMXS].

⁶¹ Depending on a person's income, Medicare or Medicaid coverage may be free. See *Costs*, MEDICARE.GOV, <https://www.medicare.gov/basics/costs/medicare-costs> [https://perma.cc/KX2L-H2KK]; *Medicaid & CHIP Coverage*, HEALTHCARE.GOV, <https://www.healthcare.gov/medicaid-chip> [https://perma.cc/H54H-MCBF].

⁶² *When Can I Sign Up for Medicare?*, MEDICARE.GOV, <https://www.medicare.gov/basics/get-started-with-medicare/sign-up/when-can-i-sign-up-for-medicare> [https://perma.cc/5RTC-Z5XW].

⁶³ *About Us*, MEDICAID.GOV, <https://www.medicaid.gov/about-us/index.html> [https://perma.cc/B4BE-7FVS].

⁶⁴ Note that state governments also cover some of the costs of Medicare and Medicaid. See *How Do States Pay for Medicaid?*, PETER G. PETERSON FOUND. (June 2, 2023), <https://www.pgpf.org/budget-basics/budget-explainer-how-do-states-pay-for-medicare> [https://perma.cc/6E63-7K3N].

⁶⁵ See Memorandum on Medicare Drug Price Negotiation Program from Chiquita Brooks-LaSure, Adm'r for Ctrs. for Medicare & Medicaid Servs. (Jan. 11, 2023) (explaining that the 2022 Inflation Reduction Act authorized Medicare to negotiate the price of prescription drugs and was the first time this negotiating power was given to U.S. public insurance programs).

⁶⁶ See *How Do States Pay for Medicaid?*, *supra* note 64; Daniel E. Baker, *High Drug Prices: So Who Is to Blame?*, 52 HOSP. PHARMACY 5, 5 (2017).

is: prices are too high.⁶⁷ Consumers across the board want lower drug prices,⁶⁸ and federal legislators from both major parties purport to champion this cause.⁶⁹ The executive branch appears to be in agreement.⁷⁰ President Biden spent nearly six minutes of his 2023 State of the Union address speaking about Americans' need for lower drug prices, receiving raucous applause from a bipartisan audience.⁷¹ And under the guidance of Lina Khan, President Biden's appointee for Chair of the Federal Trade Commission ("FTC"),⁷² the FTC has taken a special interest in antitrust enforcement in the pharmaceutical industry.⁷³

The entities with the strongest incentives to reduce the prices of patented medications include, of course, those who shoulder the burdens of high drug prices: insurance companies, the federal government, state governments, and the public at large.⁷⁴ Seeking to lower prescription drug prices, representatives of these groups have brought, and will presumably continue to bring, antitrust enforcement actions against drug companies.⁷⁵

II. PATENT & ANTITRUST LAW: UNRESOLVED TENSION

Patent and antitrust law share a complicated relationship.⁷⁶ Both areas of law seek to promote consumer welfare, and, in a sense, both

⁶⁷ See *A Political Rarity: Almost Everyone Agrees We Need to Change Drug Prices*, KFF HEALTH NEWS (Oct. 13, 2021), <https://kffhealthnews.org/morning-breakout/a-political-rarity-almost-everyone-agrees-we-need-to-change-drug-prices> [<https://perma.cc/FHX9-HNA7>].

⁶⁸ See Rosenthal, *supra* note 1.

⁶⁹ See Joseph Choi, *House Republicans Open Investigation into Role of Intermediaries in Prescription Drug Prices*, THE HILL (Mar. 1, 2023, 3:39 PM), <https://thehill.com/policy/health-care/3879512-house-republicans-open-investigation-into-role-of-intermediaries-in-prescription-drug-prices> [<https://perma.cc/C8SL-5DBC>]; Sheryl Gay Stolberg & Rebecca Robbins, *Democrats' Long-Sought Plan for Lowering Drug Costs Is at Hand*, N.Y. TIMES (Aug. 5, 2022), <https://www.nytimes.com/2022/08/05/us/politics/medicare-drug-costs.html> [<https://perma.cc/JZZ8-LJEE>].

⁷⁰ See *infra* notes 71–73 and accompanying text.

⁷¹ See C-SPAN, *President Biden Delivers 2023 State of the Union & Republican Response*, YouTube, at 00:53:54–00:59:40 (Feb. 7, 2023), <https://www.youtube.com/watch?v=sfe2sOi-apk> [<https://perma.cc/4HUG-Q3WB>].

⁷² Press Release, FTC, Lina M. Khan Sworn in as Chair of the FTC (June 15, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/06/lina-m-khan-sworn-chair-ftc> [<https://perma.cc/U6HH-CR7Y>].

⁷³ For example, in 2022 the FTC hosted a two-day workshop “to explore new approaches to enforcing the antitrust laws in the pharmaceutical industry.” *The Future of Pharmaceuticals: Examining the Analysis of Pharmaceutical Mergers*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/events/2022/06/future-pharmaceuticals-examining-analysis-pharmaceutical-mergers> [<https://perma.cc/4V8F-DQ52>].

⁷⁴ See *supra* text accompanying notes 44–66.

⁷⁵ See, e.g., *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013); *Mayor of Balt. v. AbbVie Inc.*, 42 F.4th 709 (7th Cir. 2022).

⁷⁶ See generally FTC, *TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY* 1–2 (2003) [hereinafter *FTC INNOVATION REP.*] (explaining the

seek to promote competition.⁷⁷ But they work in fundamentally different ways. Patent law promotes competition between innovators by awarding a limited monopoly to the first inventor to file a patent application for a new invention,⁷⁸ while antitrust law promotes competition by preventing the accumulation and exercise of monopoly or market power.⁷⁹ This Part explains principles of patent law⁸⁰ and antitrust law⁸¹ before discussing the tension between them⁸²—tension that could be addressed by the Section 1 litigation proposed in Part III.⁸³

A. *The Purpose and Function of Patent Law*

The purpose of the patent system is “To promote the Progress of . . . useful Arts[] by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries.”⁸⁴ A patent is essentially a prize the government awards to an inventor for meeting the legal requirements of the patent application process.⁸⁵ The main legal requirement is to file a patent application⁸⁶ demonstrating that the inventor has genuinely invented a new and useful product or process.⁸⁷ Patent applications are typically published eighteen months after they are filed with the U.S. Patent and Trademark Office (“USPTO”), thereby availing the claimed invention to the public.⁸⁸

interaction between patent and antitrust law, the two fields’ similar goals, and their competing interests).

⁷⁷ See *id.*

⁷⁸ See U.S. CONST. art. I, § 8, cl. 8; *New Patent Cover*, U.S. PAT. & TRADEMARK OFF., <https://10millionpatents.uspto.gov/newpatentcover.html> [<https://perma.cc/C5VG-L6CZ>].

⁷⁹ See *infra* Section II.B.

⁸⁰ See *infra* Section II.A.

⁸¹ See *infra* Section II.B.

⁸² See *infra* Section II.C.

⁸³ See *infra* Part III.

⁸⁴ U.S. CONST. art. I, § 8, cl. 8.

⁸⁵ The appearance of a patent cover bears resemblance to that of a prize, as does the language used to grant patents. See *New Patent Cover*, *supra* note 78 (“The requirements of law have been complied with, and it has been determined that a patent on the invention shall be granted under the law. Therefore, this United States Patent grants to the person(s) having title to this patent the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States . . .”).

⁸⁶ See 35 U.S.C. § 111(a).

⁸⁷ A patent application must satisfy four criteria before a patent may issue. Specifically, the application must demonstrate that the claimed invention is (1) patent-eligible subject matter, (2) novel, (3) nonobvious to a person of ordinary skill in the art, and (4) enabled by the teaching provided in the patent specification. See 35 U.S.C. §§ 101–103, 112(a).

⁸⁸ See 35 U.S.C. § 122(b). There are limited exceptions where national security mandates secrecy and where the applicant certifies that they will seek a patent for the claimed invention only in the United States. 35 U.S.C. §§ 181, 122(b)(2)(B); see *Files Open to the Public*, 37 C.F.R. § 1.11(a) (2023) (“The specification, drawings, and all papers relating to the file of: A published application; a patent; or a statutory invention registration are open to inspection by the public . . .”).

The prize for meeting the applicable legal requirements is “the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States”⁸⁹ for twenty years from the time the patent application was filed.⁹⁰ Anyone who violates a patent owner’s rights by, for example, manufacturing and selling the patented invention, has infringed the patent⁹¹ and may be held liable to the patent owner for damages.⁹² But perhaps the most valuable remedy for patent infringement is an injunction preventing the defendant from continuing to infringe.⁹³ An injunction—and the threat of obtaining one—is particularly valuable because it enables the patent owner to enforce a monopoly on their invention.⁹⁴ Alternatively, a patent owner may agree to refrain from seeking or enforcing an injunction in exchange for a handsome licensing fee from an infringer.⁹⁵

Importantly for the purposes of this Note, patents are agreements (i.e., contracts) between inventors and the public.⁹⁶ Under the patent laws, the public agrees to grant inventors temporary monopolies over their inventions in exchange for, *inter alia*, inventors’ public disclosure of their inventions.⁹⁷ These agreements usually confer substantial benefits on both parties. Inventors, for their part, gain assurance that if their patent rights are violated by infringers, they have powerful legal remedies available to them.⁹⁸ This assurance makes it worthwhile for people to invest their time, energy, and money in the R&D required to develop

⁸⁹ 35 U.S.C. § 154(a)(1); *New Patent Cover*, *supra* note 78.

⁹⁰ *See* 35 U.S.C. § 154(a)(2).

⁹¹ *See id.* § 271(a).

⁹² *See id.* § 284.

⁹³ *See id.* § 283. But injunctive relief is sometimes unavailable even where the patent owner prevails, especially where the patent owner is a nonpracticing entity—i.e., an entity that does not make or sell the patented invention—or the patented invention is a small component of a larger product. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (holding an injunction may issue only if (1) the patent owner would suffer irreparable harm absent an injunction, (2) money damages alone are inadequate, (3) the balance of hardships between the patent owner and the infringer warrants equitable relief, and (4) an injunction would not harm the public interest); *see also id.* at 396–97 (Kennedy, J., concurring) (arguing that nonpracticing entities and owners of patents on small components are generally less deserving of injunctions).

⁹⁴ *See* FTC, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 5 (2011) [hereinafter FTC EVOLVING IP MARKETPLACE REP.].

⁹⁵ *See id.*

⁹⁶ *See infra* notes 155, 177–78 and accompanying text.

⁹⁷ *See* 35 U.S.C. §§ 154(a)(2), 271 (codifying patent rights); *see also supra* note 88 and accompanying text (discussing the public disclosure requirement).

⁹⁸ *See supra* notes 89–95 and accompanying text.

a new invention.⁹⁹ In turn, entire industries are catalyzed.¹⁰⁰ And in exchange, the public gains the knowledge of how to “make and use” new inventions.¹⁰¹ At the end of a patent term, members of the public may thus make, use, or sell the invention without having invested any of the time, energy, or money required to develop it.¹⁰²

B. *The Purpose and Function of Antitrust Law*

Antitrust law has a wide variety of purposes, the most prominent of which is to promote consumer welfare.¹⁰³ Antitrust law promotes consumer welfare by inducing and maintaining competition in product markets, as competition among sellers keeps prices low, which is good for consumers.¹⁰⁴ Antitrust law generally disfavors monopolized markets as monopolists do not have to compete with other sellers and can, therefore, maximize profits by reducing their output below competitive levels and raising prices above competitive levels.¹⁰⁵ Monopolized markets are economically inefficient and reduce consumer welfare.¹⁰⁶

Of course, the real-world economy is more nuanced than economic models,¹⁰⁷ and antitrust laws attempt to account for this nuance.¹⁰⁸ Some firms that do not have monopoly power nonetheless violate antitrust

⁹⁹ See Miriam Marcowitz-Bitton & Yotam Kaplan, *Recalibrating Patent Protection for COVID-19 Vaccines: A Path to Affordable Access and Equitable Distribution*, 12 U.C. IRVINE L. REV. 423, 425–26 (2022).

¹⁰⁰ See, e.g., *id.* (discussing incentives presented by patents for COVID-19 vaccine development); see also Nathan Yates, *I Have Spinal Muscular Atrophy. Critics of the \$2 Million New Gene Therapy Are Missing the Point*, STAT (May 31, 2019), <https://www.statnews.com/2019/05/31/spinal-muscular-atrophy-zolgensma-price-critics> [<https://perma.cc/BL75-S7RE>] (arguing the high prices of patented medicines such as Zolgensma—the SMA treatment—enable their development); *Sanofi-Synthelabo v. Apotex, Inc.*, 470 F.3d 1368, 1383–84 (Fed. Cir. 2006) (discussing “the importance of the patent system in encouraging innovation” in the pharmaceutical industry).

¹⁰¹ 35 U.S.C. § 112(a) (requiring that a patent application disclose how to “make and use” the patented invention); see *supra* note 88 and accompanying text (discussing the public disclosure requirement for patents).

¹⁰² 60 AM. JUR. 2D *Patents* § 633, Westlaw (database updated Mar. 2023).

¹⁰³ PHILIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* § 100a, Lexis (database updated May 2023) (“[T]he principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively . . .”).

¹⁰⁴ See *id.* §§ 401, 402b2. See generally *id.* § 402 (providing a detailed explanation of how a perfectly competitive market promotes consumer welfare).

¹⁰⁵ See *id.* § 403a–b.

¹⁰⁶ See *id.* § 403b.

¹⁰⁷ See *id.* § 406a (explaining that “conditions in real markets never satisfy the assumptions of the model perfectly”).

¹⁰⁸ See generally *id.* ch. 4B (explaining several ways in which U.S. antitrust policy departs from the basic principles discussed above).

laws,¹⁰⁹ and some firms that do have monopoly power are perfectly within the law.¹¹⁰ Rather than strictly targeting monopolists, antitrust laws generally target firms that have “market power.”¹¹¹ Under antitrust law, “market power is the abilities (1) to price substantially above the competitive level *and* (2) to persist in doing so for a significant period without erosion by new entry [by competitors] or expansion [of the relevant market].”¹¹²

There is no agreed upon method for determining whether a defendant has market power, but courts routinely look to a few key indicators: the defendant’s share of the product market at issue,¹¹³ the price elasticity of demand for the product (i.e., the extent to which the quantity demanded of the product decreases in response to price increases),¹¹⁴ and the ease with which potential competitors may enter the product market.¹¹⁵ For purposes of this Note, it suffices to understand that if a defendant holds a high share of the market for a product that has a low price elasticity of demand and high barriers to entry, that defendant likely has market power, if not full-blown monopoly power.¹¹⁶ For instance, recall Zolgensma, which is made and sold by pharmaceutical giant Novartis.¹¹⁷ Due to Zolgensma’s patent protection,¹¹⁸ Novartis can maintain a 100% share of the market for Zolgensma, as patent enforcement is an insurmountable barrier to entry for potential competitors.¹¹⁹ And since patients who need Zolgensma will likely die without it, as the drug has no close substitutes,¹²⁰ demand for Zolgensma likely does not diminish as price increases—that is, demand for Zolgensma is *inelastic*.¹²¹ But to be clear, market power is only illegal if obtained or

¹⁰⁹ See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220 (1940) (upholding convictions under Section 1 where defendants had neither monopoly nor oligopoly power).

¹¹⁰ See *Verizon Commc’ns, Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.”).

¹¹¹ *Ohio v. Am. Express Co.*, 585 U.S. 529, 541 (2018) (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984)).

¹¹² AREEDA & HOVENKAMP, *supra* note 103, § 501.

¹¹³ See generally *id.* § 532.

¹¹⁴ See generally *id.* § 507.

¹¹⁵ See generally *id.* § 420.

¹¹⁶ See *id.* § 532b (“[A] firm with a large market share may lack monopoly power because of highly elastic demand, ready expansion, or entry by others.”).

¹¹⁷ See *supra* Section I.A.

¹¹⁸ See U.S. Patent No. 7,906,111 (filed Sept. 30, 2004).

¹¹⁹ See *supra* notes 78, 89 and accompanying text.

¹²⁰ See *supra* note 37 and accompanying text.

¹²¹ See Morgan et al., *supra* note 41.

exercised in some impermissible way,¹²² such as through an agreement that unreasonably restrains trade.¹²³

A court's analysis of whether and to what extent a defendant has market power plays a crucial role in many actions brought under Section 1.¹²⁴ Under Section 1, "every contract" that unreasonably restrains trade is illegal.¹²⁵ The paradigmatic example of such a contract is a price fixing agreement between companies that purport to compete with one another in the same product market.¹²⁶ But in Section 1 cases that do not involve conduct as obviously egregious as price fixing, courts perform "rule of reason" analyses to determine liability.¹²⁷

Under the antitrust rule of reason,¹²⁸ the standard burden shifting process is as follows. The plaintiff bears the initial burden of proving the existence of a prima facie anticompetitive agreement, which can be done by demonstrating (1) the defendant has market power and (2) the defendant is party to "an agreement whose likely effect in the presence of [the defendant's market] power is an increase in price or a reduction in output."¹²⁹ The burden then shifts to the defendant to show that the allegedly anticompetitive agreement "in fact furthers some procompetitive objective."¹³⁰ If the defendant succeeds, the court must determine whether the same "procompetitive objective" could be achieved by some alternative means that would be less harmful to competition than the agreement at issue.¹³¹ If the court finds there is no viable, less restrictive alternative to the agreement at issue, the court decides antitrust liability by simply weighing the anticompetitive harms of the agreement against its procompetitive benefits.¹³²

¹²² AREEDA & HOVENKAMP, *supra* note 103, § 502 n.8 ("[A]ntitrust law generally requires improper conduct before condemning market power.").

¹²³ See *infra* note 125 and accompanying text.

¹²⁴ See *infra* note 129 and accompanying text.

¹²⁵ 15 U.S.C. § 1; *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) ("[T]he Court has repeated time and again that § 1 'outlaw[s] only unreasonable restraints.'" (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997))).

¹²⁶ See, e.g., *In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772, 772 (N.D. Ill. 2017) (alleged price fixing scheme in the chicken industry involving Tyson Foods, Pilgrim's Pride, and several other chicken suppliers).

¹²⁷ See *State Oil Co.*, 522 U.S. at 10.

¹²⁸ The analysis provided herein is for horizontal restraints only—i.e., restraints on competition between direct competitors. Vertical restraints—e.g., a restraint imposed by a supplier on a retailer—are analyzed under a modified rule of reason framework. See, e.g., *Leegin*, 551 U.S. at 907.

¹²⁹ AREEDA & HOVENKAMP, *supra* note 103, § 1914b (alteration added).

¹³⁰ *Id.* § 1914c (citing *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993)).

¹³¹ *Id.* § 1914c (At this juncture, "[s]ome courts give the plaintiff the burden of showing that some workable less restrictive alternative is available . . . others give the defendant the burden of showing that no such alternative exists.").

¹³² *Id.* § 1912i (citing *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1111 (1st Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995)).

C. *Perpetual Tension Between Patent and Antitrust Law*

While patent and antitrust law do not necessarily contradict each other, their purposes and functions are in tension with one another.¹³³ Patents convey market power to some patent owners,¹³⁴ and antitrust law makes some forms of market power illegal.¹³⁵ Patent law temporarily insulates some patent owners from competition, and antitrust law seeks to promote competition.¹³⁶ But in another sense, the goals of patent law and antitrust law are in harmony.¹³⁷ Both areas of law seek to increase the variety of products available to consumers, and both promote competition insofar as patent law incentivizes competitors to race to be the first to invent the next big invention, and antitrust law explicitly targets anticompetitive behavior.¹³⁸ Moreover, antitrust law does not illegalize market power itself.¹³⁹ It merely illegalizes market power achieved by or exercised through agreements that unreasonably restrain trade¹⁴⁰ and market power achieved or maintained through anticompetitive means.¹⁴¹

This tension is best explained by comparing the long-term policy objectives of patent law with the short-term policy objectives of antitrust law. Patent law is premised on the notion that short-term economic inefficiency is a small price to pay for a system that, in the long term, reliably

¹³³ See Hannah M. Lasting, Note, *Big Pharma, Big Problems: COVID-19 Heightens Patent-Antitrust Tension Caused by Reverse Payments*, 44 SEATTLE U. L. REV. 591, 592 (2021) (explaining that “antitrust law aims to prevent monopolies,” while patent law aims to permit limited monopolies where there is some greater public interest).

¹³⁴ See AREEDA & HOVENKAMP, *supra* note 103, § 518 (“[I]f strong demand for a good or process creates the possibility of market power, the patent laws serve to protect that power by forbidding others from duplicating what the patent covers.” (emphasis omitted)).

¹³⁵ See *Ohio v. Am. Express Co.*, 585 U.S. 529, 541 (2018) (explaining that antitrust law seeks to distinguish restraints that benefit competition from those that harm it).

¹³⁶ See Lasting, *supra* note 133, at 592.

¹³⁷ See FTC INNOVATION REP., *supra* note 76, at 1–2 (discussing how both areas of law seek to promote innovation that will benefit the public); *FTC v. Qualcomm Inc.*, 969 F.3d 974, 988 (9th Cir. 2020) (“‘[A] central goal of both patent and antitrust law is the promotion of the public benefit through a competitive economy.’ . . . ‘[P]atent and antitrust laws are complementary, the patent system serving to encourage invention and the bringing of new products to market by adjusting investment-based risk, and the antitrust laws serving to foster industrial competition.’” (first quoting *Int’l Wood Processors v. Power Dry, Inc.*, 792 F.2d 416, 427 (4th Cir. 1986); and then quoting *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1362 (Fed. Cir. 1999))).

¹³⁸ See FTC INNOVATION REP., *supra* note 76, at 1–2.

¹³⁹ See *Verizon Commc’ns, Inc. v. L. Offs. of Curtis v. Trinko, LLP*, 540 U.S. 398, 407 (2003) (“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.”); AREEDA & HOVENKAMP, *supra* note 103, § 502 n.8 (“[A]ntitrust law generally requires improper conduct before condemning market power.”).

¹⁴⁰ See 15 U.S.C. § 1; *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007).

¹⁴¹ See 15 U.S.C. § 2; *Trinko*, 540 U.S. at 407.

produces innovative products and processes.¹⁴² The argument goes, even though patents enable sellers to temporarily charge supracompetitive prices, the patent system is well worth it because a steady stream of patent-protected inventions inspires investment in technology-based industries and enables the United States to compete with other highly innovative countries in the international marketplace.¹⁴³

By comparison, antitrust law focuses on shorter-term realities for consumers.¹⁴⁴ From the antitrust perspective, it is problematic for sellers to charge prices that far exceed their costs (i.e., supracompetitive prices) because at the end of the day, this leaves consumers with less money in their pockets and a constrained supply of products.¹⁴⁵ Thus, despite the long-term procompetitive focus of the patent system, individual patents can harm competition in the short term. Section 1's rule of reason provides a framework for weighing short-term competitive harm against long-term procompetitive benefits to determine legality.¹⁴⁶

FTC v. Actavis, Inc.,¹⁴⁷ a case the Supreme Court decided in 2013, provides an example of how courts can evaluate patent-related conduct in the pharmaceutical industry under the rule of reason. In *Actavis*, the Court evaluated the legality of a settlement agreement reached between Solvay, the patent owner, and a group of generic drugmakers that had allegedly infringed, and sought to invalidate, Solvay's patent.¹⁴⁸ Under the settlement agreement, the generic drugmakers promised to refrain from (1) challenging the validity of Solvay's patent and (2) entering the market for the patented product, a testosterone gel,¹⁴⁹ until the patent expired in exchange for payments totaling about \$250 million.¹⁵⁰ The Court held that such agreements, termed "reverse payment" agreements, where patent owning plaintiffs pay generic drugmaker defendants to refrain from challenging the validity of their patents, may violate Section 1 and should be analyzed under the rule of reason.¹⁵¹

¹⁴² See Paul Morinville & Terry Fokas, *The U.S. Patent System, Not China's IP Policies, Is the Reason Behind America's Decline in Global Competitiveness*, IPWATCHDOG (Mar. 1, 2018, 7:15 AM), <https://ipwatchdog.com/2018/03/01/u-s-patent-system-americas-decline-competitiveness/id=94249> [https://perma.cc/BNB3-8699]; Wolitz, *supra* note 42, at 401.

¹⁴³ See Morinville & Fokas, *supra* note 142.

¹⁴⁴ See *United States v. Apple, Inc.*, 791 F.3d 290, 334–35 (2d Cir. 2015) (finding that long-term competitive benefits did not justify short-term price fixing).

¹⁴⁵ See generally AREEDA & HOVENKAMP, *supra* note 103, § 502.

¹⁴⁶ See *supra* note 132 and accompanying text.

¹⁴⁷ 570 U.S. 136 (2013).

¹⁴⁸ See *id.* at 136–37, 140.

¹⁴⁹ See Mike Leonard, *AbbVie Wins Preliminary Antitrust Ruling in AndroGel Litigation*, BLOOMBERG L. (Mar. 24, 2022, 11:48 AM), <https://news.bloomberglaw.com/antitrust/abbvie-wins-preliminary-antitrust-ruling-in-androgel-litigation> [https://perma.cc/XDA5-QNJS] (describing the patented product as a "testosterone booster").

¹⁵⁰ See *Actavis*, 570 U.S. at 145.

¹⁵¹ See *id.* at 159.

The Court decided to subject reverse payment agreements to rule of reason analysis because the agreements could improperly extend the term of Actavis's patent monopoly, thereby preventing money from "flow[ing] . . . to consumers in the form of lower prices."¹⁵² This holding demonstrates the Court's willingness to apply the rule of reason to patent-related agreements like the reverse payment agreements at issue. But the Court stopped short of evaluating patents *themselves* under the rule of reason.¹⁵³

Indeed, it does not appear that a patent has ever been challenged as an agreement that in and of itself unreasonably restrains trade under Section 1. If such an action were to proceed on the merits, it would provide an opportunity for a court to address the tension between patent law and antitrust law head-on by determining whether the patent is justified under the rule of reason. Part III imagines how such an action might proceed on the merits, and Part IV explains why, absent statutory changes recommended in this Note, a defendant could likely avoid litigation on the merits.

III. ON THE MERITS: ANALYZING PATENTS UNDER THE RULE OF REASON

This Part considers how a patent could be challenged as an agreement that unreasonably restrains trade and thereby violates Section 1 of the Sherman Act. It also clarifies that precious few patents would actually be vulnerable under the Section 1 rule of reason analysis, and the remedy in such an action would *not* be to invalidate the patent at issue. Instead, it would be to compel licensing of the challenged patent to generic drugmakers for a reasonable royalty.

A. *Patents Are Contracts*

Under the rule of reason, the plaintiff bears the initial burden of demonstrating that the defendant is party to a prima facie anticompetitive agreement, which, for present purposes, requires a showing that a patent is an agreement.¹⁵⁴ Patents are commonly referred to as contracts,¹⁵⁵

¹⁵² See *id.* at 154.

¹⁵³ See *id.* at 158–59 (holding limited to reverse payment agreements).

¹⁵⁴ See *supra* note 129 and accompanying text.

¹⁵⁵ See, e.g., *FTC v. Actavis, Inc.*, 570 U.S. 136, 149 (2013) (“‘[T]he public is given a novel and useful invention’ in ‘consideration for its grant [of a patent].’” (quoting *United States v. Singer Mfg. Co.*, 374 U.S. 174, 199 (1963) (White, J., concurring))); *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int’l Inc.*, 534 U.S. 124, 142 (2001) (“The disclosure required by the Patent Act is ‘the *quid pro quo* of the right to exclude.’” (quoting *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 484 (1974))); *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 63 (1998) (“[T]he patent system represents a carefully crafted bargain that encourages both the creation and the public disclosure of new and useful advances in technology, in return for an exclusive monopoly for a limited period of time.”); *ADELMAN ET AL.*,

but since antitrust precedents generally do not describe them as such,¹⁵⁶ this Section argues that they indeed are contracts. As explained above,¹⁵⁷ a patent is an agreement between the public and an inventor wherein the public gains the knowledge of an invention via its public disclosure, and in exchange, the inventor receives a limited right to exclude others from making, selling, offering for sale, or importing their invention.¹⁵⁸

Basic principles of contract law support the proposition that patents are contracts. A contract is usually formed by offer and acceptance.¹⁵⁹ In the case of a patent, the offer is the federal law, codified in Title 35 of the U.S. Code, promising that a patent “shall” be awarded to any person who meets the requirements of law for a patent to issue.¹⁶⁰ To be a legitimate offer, an offer must empower the offeree to create a contract by accepting the offer.¹⁶¹ An offer can be accepted by either promise or performance, as specified in the offer.¹⁶² An inventor is empowered to accept the offer codified at Title 35 by performing in accordance with the mandates of that Title (e.g., filing an adequate patent application to be published after eighteen months and paying the requisite fees).¹⁶³ Inventors are empowered to accept the offer in that, if their patent application meets the requirements of law, then the contract is made—the patent “shall” issue without the need for further action on the applicant’s part.¹⁶⁴

Although the agreement is not in effect the moment the filer accepts the offer of Title 35 by performance, as the patent does not immediately issue,¹⁶⁵ the acceptance is still valid.¹⁶⁶ The government has

supra note 11, at 411 (“Analogized to the contract law, the Patent Act permits the formation of binding agreements between inventors and the public. Under these agreements, inventors receive exclusive rights in exchange for full disclosure of their inventions.”).

¹⁵⁶ See, e.g., *Mayor of Balt. v. AbbVie Inc.*, 42 F.4th 709 (7th Cir. 2022) (discussing patents at length in the context of antitrust law but not acknowledging that they are agreements).

¹⁵⁷ See generally *supra* Section II.A.

¹⁵⁸ See *supra* note 89 and accompanying text.

¹⁵⁹ RESTATEMENT (SECOND) OF CONTS. § 17 cmt. b (AM. L. INST. 1981) (“The typical contract is a bargain, and is binding without regard to form.”); *id.* § 3 cmt. d (“A bargain is ordinarily made by an offer by one party and an acceptance by the other party . . .”).

¹⁶⁰ See 35 U.S.C. § 102(a) (providing that a person who meets the legal requirements “shall be entitled to a patent”); *id.* § 131.

¹⁶¹ See RESTATEMENT (SECOND) OF CONTS. § 24 (AM. L. INST. 1981) (“An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that *his assent to that bargain . . . will conclude it.*” (emphasis added)).

¹⁶² *Id.* § 30 (“An offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act . . . [u]nless otherwise indicated by [its] language . . .”).

¹⁶³ See 35 U.S.C. §§ 102(a), 131; *supra* notes 86–88 and accompanying text.

¹⁶⁴ See 35 U.S.C. §§ 102(a), 131.

¹⁶⁵ *Id.* § 131 (providing that a patent application must be examined and approved before a patent issues).

¹⁶⁶ See *infra* note 167 and accompanying text.

permissibly, in its offer, reserved the right to verify that the inventor's performance in acceptance of the offer accords with the requirements of Title 35.¹⁶⁷ By examining the inventor's patent application in accordance with USPTO procedures, the government is simply verifying that the inventor has accepted the offer codified in Title 35.

In addition to offer and acceptance, there is an exchange of valuable consideration between the government, representing the public, and the applicant: "the public is given a novel and useful invention" in 'consideration for its grant [of a patent].'¹⁶⁸ In publicly disclosing how to "make and use" their invention,¹⁶⁹ the applicant is giving away valuable knowledge that the applicant could have kept to themselves as a trade secret.¹⁷⁰ This is valuable to the public because it contributes to the body of scientific knowledge and enables the development of follow-on innovations.¹⁷¹ The inventor also agrees to forfeit their patent rights after the twenty-year patent term, at which time anyone in the public may make and use the patented invention without fear of liability.¹⁷² The government's consideration—the patent, which conveys the "right to exclude"¹⁷³—is valuable to the applicant because it insulates them from competition.¹⁷⁴

Due to the valid offer and acceptance and the exchange of consideration,¹⁷⁵ it is clear that a patent is a contract. Moreover, the notion that a patent is an agreement is well established, albeit not often acknowledged in the antitrust context.¹⁷⁶ Patents are often described as agreements in scholarship,¹⁷⁷ textbooks,¹⁷⁸ and cases.¹⁷⁹

¹⁶⁷ See RESTATEMENT (SECOND) OF CONTR. § 30 cmt. a (AM. L. INST. 1981) ("The offeror is the master of his offer.").

¹⁶⁸ *FTC v. Actavis, Inc.*, 570 U.S. 136, 149 (2013) (quoting *United States v. Singer Mfg. Co.*, 374 U.S. 174, 199 (1963) (White, J., concurring)).

¹⁶⁹ 35 U.S.C. § 112(a); see *supra* note 101 and accompanying text.

¹⁷⁰ Andrew Beckerman-Rodau, *The Choice Between Patent Protection and Trade Secret Protection: A Legal and Business Decision*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 371, 376–77 (2002).

¹⁷¹ Katherine J. Strandburg, *What Does the Public Get? Experimental Use and the Patent Bargain*, 2004 WIS. L. REV. 81, 91 (2004).

¹⁷² See *supra* notes 100–02 and accompanying text.

¹⁷³ 35 U.S.C. § 154(a)(1); see *supra* note 89 and accompanying text.

¹⁷⁴ See *supra* notes 93–94 and accompanying text.

¹⁷⁵ See *supra* Section II.A.

¹⁷⁶ See *supra* note 155.

¹⁷⁷ See, e.g., Rachel Marie Clark, Note, *Collateral Estoppel of Claim Interpretation After Markman*, 86 MINN. L. REV. 1581, 1583 (2002) ("A patent is an agreement between an inventor and the federal government."); R. Oosterlinck, *The Intergovernmental Space Station Agreement and Intellectual Property Rights*, 17 J. SPACE L. 23, 26 (1989) ("A patent is an agreement between a State and an inventor.").

¹⁷⁸ See, e.g., ADELMAN ET AL., *supra* note 11, at 411 ("Analogized to the contract law, the Patent Act permits the formation of binding agreements between inventors and the public. Under these agreements, inventors receive exclusive rights in exchange for full disclosure of their inventions.").

¹⁷⁹ See, e.g., cases cited *supra* note 155.

B. Which Patents Raise Concerns Under the Rule of Reason?

Very few of the approximately three million active U.S. patents¹⁸⁰ would raise serious concerns under a Section 1 rule of reason analysis. To meet their initial burden under Section 1, a plaintiff—for example, a state attorney general representing their state’s public insurance programs—would need to demonstrate (1) the defendant has market power and (2) the defendant is party to “an agreement whose likely effect in the presence of [the defendant’s market] power is an increase in price or a reduction in output.”¹⁸¹ For present purposes, these two elements logically merge into the sole inquiry of whether the defendant patent owner has gained market power from their patents.

The Supreme Court used to presume that all patents conferred market power on their owners.¹⁸² But in *Illinois Tool Works, Inc. v. Independent Ink, Inc.*,¹⁸³ the Court abandoned this presumption, agreeing with “Congress, the antitrust enforcement agencies, and most economists . . . that a patent does not necessarily confer market power upon the patentee.”¹⁸⁴ Patents do not necessarily confer market power for antitrust purposes because some patents cover products for which comparably priced substitutes are widely available.¹⁸⁵ If the owner of such a patent attempted to raise the price of their product above competitive levels, consumers would simply start buying substitute products instead.¹⁸⁶ Consider the now expired patent on a Gillette safety razor

¹⁸⁰ See *U.S. Patent Statistics Chart: Calendar Years 1963–2020*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm [<https://perma.cc/G2XS-T56N>]; *Statement of Commissioner for Patents Andrew Hirshfeld Before the United States Senate Subcommittee on Intellectual Property Committee on the Judiciary*, U.S. PAT. & TRADEMARK OFF. (Oct. 30, 2019), <https://www.uspto.gov/about-us/news-updates/statement-commissioner-patents-andrew-hirshfeld-united-states-senate> [<https://perma.cc/H7VZ-H5VF>] (mentioning that there are “approximately 3 million patents currently in force” in the U.S.); Press Release, World Intell. Prop. Org., *World Intellectual Property Indicators Report: Worldwide Trademark Filing Soars in 2020 Despite Global Pandemic*, U.N. Press Release PR/883 (Nov. 8, 2021), https://www.wipo.int/pressroom/en/articles/2021/article_0011.html [<https://perma.cc/C87F-8LWH>] (stating that there are approximately 3.3 million U.S. patents currently in force).

¹⁸¹ See AREEDA & HOVENKAMP, *supra* note 103, § 1914b.

¹⁸² *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984) (“[I]f the Government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power.”).

¹⁸³ 547 U.S. 28 (2006).

¹⁸⁴ *Id.* at 45–46.

¹⁸⁵ See *infra* notes 186–88 and accompanying text.

¹⁸⁶ See AREEDA & HOVENKAMP, *supra* note 103, § 501 (“[F]orbidden everyone else from a [sic] making a patented product brings the defendant patentee no market power when consumers have little use for it or can buy adequate substitutes from others.”); Kenneth J. Burchfiel, *Patent Misuse and Antitrust Reform: ‘Blessed Be the Tie?’*, 4 HARV. J.L. & TECH. 1, 74 (1991) (“[I]n an economic sense, the essential element of market power is negated if there are acceptable substitutes for the tying product available from others at comparable prices.”).

with three blades.¹⁸⁷ Indeed, Gillette's patent entitled it to a "monopoly" on the specific safety razors that fell within the protection of its patent,¹⁸⁸ but Gillette's razor still had to compete with all the other razors on the market that did not fall within its patent protection.¹⁸⁹ If Gillette had attempted to set prices above competitive levels, their customers presumably would have switched to a competitor's razor.¹⁹⁰ Accordingly, the many patents covering inventions that are either economically inviable¹⁹¹ or too easily replaced with comparably priced substitutes¹⁹² do not confer market power and thus could not be the subject of the Section 1 action proposed in this Note.

Nonetheless, "A patent may control an important market. For example, it was once impossible to project a motion picture film or make a lightbulb or plain-paper copier without access to patents that dominated those markets."¹⁹³ For any market-controlling patent, a plaintiff could easily demonstrate that the patent confers market power, if not full-blown monopoly power.¹⁹⁴ Such patents definitionally confer market power on their owners because the patents themselves define a market; accordingly, there are no adequate substitutes for consumers to turn to if prices rise above competitive levels¹⁹⁵—which they inevitably will, assuming an economically rational patent owner.¹⁹⁶ Patents in this category are initial candidates for the Section 1 action proposed in this Note.

Under rule of reason analysis, the burden would then shift to the defendant to advance a procompetitive justification for its patent.¹⁹⁷ In most cases, the defendant would be able to advance strong, but not necessarily decisive, procompetitive justifications.¹⁹⁸ The defendant

¹⁸⁷ U.S. Patent No. 6,212,777 (filed Sept. 22, 1994).

¹⁸⁸ Interestingly, as construed by the Federal Circuit, this patent covered safety razors with three *or more* razors. *See Gillette Co. v. Energizer Holdings, Inc.*, 405 F.3d 1367, 1371 (Fed. Cir. 2005).

¹⁸⁹ *See, e.g.,* Randal C. Picker, *The Razors-and-Blades Myth(s)*, 78 U. CHI. L. REV. 225, 239–43 (2011) (explaining that Gillette's patented disposable razors from the early 1900s, U.S. Patent Nos. 775,134 and 775,135, still had to compete with other noninfringing razors, such as the Ever-Ready razor and Gem Junior razor, which were priced low enough that "Gillette shavers could switch easily if Gillette blade prices were too high").

¹⁹⁰ *See id.*

¹⁹¹ *See, e.g.,* Apparatus for Facilitating the Birth of a Child by Centrifugal Force, U.S. Patent No. 3,216,423 (filed Jan. 15, 1963).

¹⁹² *See supra* notes 184–187 and accompanying text.

¹⁹³ AREEDA & HOVENKAMP, *supra* note 103, § 1737c.

¹⁹⁴ *See id.* § 533.

¹⁹⁵ *See id.*

¹⁹⁶ *See id.* § 403.

¹⁹⁷ *See supra* note 129 and accompanying text.

¹⁹⁸ *See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101 (1984) (explaining that it can be a compelling justification to show that the product market at issue would not even exist without the challenged restraint on trade).

patent owner would be able to point to the Court's holding in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*¹⁹⁹ that agreements in restraint of trade can be justified on the grounds that they make something available to consumers that would otherwise be unavailable, i.e., that they bring new inventions and efficiencies to the market, or new value to consumers.²⁰⁰ Using this decision, owners of market-defining patents may simply point to the evidence of their market power and say, "Look at what people are willing to pay for the product we invented. This new patented product is what we bring to consumers, and we know how much people value it because we see what they will pay for it." The patent owner would explain, "The only reason we felt comfortable investing time and money to develop such a wonderful invention is because we knew that if we succeeded, our patent protection would permit us to set high prices that recoup our initial investment."²⁰¹

The burden would then shift back to the plaintiff to prove the existence of a less restrictive alternative, i.e., to prove that the same procompetitive objective advanced by the defendant could be achieved in a way that is less harmful to competition.²⁰² This Note assumes that in *almost* every case, the plaintiff would not be able to meet this burden because most patents—even most market-defining patents—are limited in the harm they can inflict on competition.²⁰³ The reason is that patent owners' ability to set supracompetitive prices is usually limited by the fact that as prices increase, fewer consumers will purchase the product.²⁰⁴ In other words, demand for most products is somewhat elastic.²⁰⁵ Since consumer willingness to go without a product limits how harmful most patents can be to competition,²⁰⁶ it is unlikely that a plaintiff could demonstrate a convincing, less restrictive alternative to most patents.

¹⁹⁹ 441 U.S. 1 (1979).

²⁰⁰ See *id.* at 21–22; see also AREEDA & HOVENKAMP, *supra* note 103, § 1504 ("The clearest and most legitimate benefit is that which makes possible the very activity that is allegedly restrained.").

²⁰¹ See Morinville & Fokas, *supra* note 142; Wolitz, *supra* note 42, at 401; FTC EVOLVING IP MARKETPLACE REP., *supra* note 94, at 1 ("The patent system plays a critical role in promoting innovation across industries from biotechnology to nanotechnology, and by entities from large corporations to independent inventors.").

²⁰² See Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 97–91 (2021) (discussing the "less restrictive alternative" rule).

²⁰³ See Morgan et al., *supra* note 41, at 67 (explaining that demand for most patented goods is somewhat elastic because consumers either do not really need the goods or are willing to delay consumption until prices fall due to, e.g., increased competition after expiration of a market controlling patent).

²⁰⁴ See *supra* notes 114–21 and accompanying text.

²⁰⁵ See AREEDA & HOVENKAMP, *supra* note 103, § 507.

²⁰⁶ See *id.*

But lifesaving medicines for which there are no close substitutes are unique because consumers cannot simply go without them.²⁰⁷ Thus, patents on such medicines are extremely restrictive and leave more room for a plaintiff to prove the existence of a less restrictive alternative. Patents on lifesaving pharmaceuticals are uniquely restrictive because of the sheer magnitude of the market power such patents confer on their owners.²⁰⁸ Relevant attributes of the pharmaceutical industry that contribute to that market power can be summarized as follows:

The pharmaceutical sector can potentially abuse market power because of the inelasticity of demand for necessary medicines. Unlike consumers of ordinary goods, consumers of patented medicines—also known as patients with medical needs—may not be in a position to defer consumption until prices fall. Also, unlike ordinary consumers, patients are often insulated from the cost of the treatments owing to various forms of collective financing—most notably, public or private health insurance. Companies can exploit the vulnerability of patients and collective financing schemes by asking for prices that far exceed standard definitions of value for money.²⁰⁹

A state attorney general challenging a patent on a lifesaving medicine for which there are no close substitutes could argue that consumers' (i.e., patients') unique economic vulnerabilities in the pharmaceutical industry put them at the mercy of patent owners. The resulting economic inefficiencies—prices that far exceed costs and overburden consumers, insurers, and the public at large—outweigh procompetitive justifications for the patent. The next Section explains in more detail the arguments a plaintiff could advance in their rule of reason analysis of a patent on a lifesaving medicine.

C. Magnitude of Competitive Harm and Viability of Compulsory Licensing for a Reasonable Royalty as a Less Restrictive Alternative

The Supreme Court has already acknowledged that consumer vulnerability in healthcare can ring antitrust alarm bells.²¹⁰ In particular,

²⁰⁷ See Morgan et al., *supra* note 41, at 67 (explaining that consumption of lifesaving medicine is often urgent, in contrast to consumption of many ordinary goods, which consumers can afford to delay); Wolitz, *supra* note 42, at 394 (arguing lifesaving medicines are necessities rather than luxuries, which differentiates them from many other valuable goods).

²⁰⁸ See Morgan et al., *supra* note 41, at 67.

²⁰⁹ *Id.*

²¹⁰ See *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 461–62, 464 (1986) (holding that an agreement among dentists to refuse to provide patient x-rays to the patients' insurers, thereby preventing the insurers from evaluating the fairness of treatment costs, violated Section 1).

the Court has recognized that where consumers are uninformed about the goods or services they are purchasing, “the proper functioning of the price-setting mechanism of the market [is likely to be disrupted].”²¹¹ Consumers of lifesaving medicines are particularly vulnerable in two unique ways: first, their demand for medicines is completely inelastic, and second, they are systemically deprived of price information that they could otherwise use to negotiate lower prices.²¹² Elasticity of demand is a key concept in measuring market power.²¹³ If demand for a product is highly elastic, meaning the quantity of the product demanded declines sharply in response to price increases, then even a firm with a very high market share for that product may not have market power.²¹⁴

The two reasons why demand for a product would be elastic are (1) there are widely available close substitutes for the product, or (2) consumers are willing to simply go without the product.²¹⁵ The patents this Note imagines plaintiffs challenging are patents on medicines for which there are no close substitutes, so reason (1) for elasticity does not apply. And reason (2) does not apply because, due to the lifesaving nature of the medicines, consumers are unwilling—or unable—to go without them.²¹⁶ Accordingly, the demand for lifesaving medicines for which there are no close substitutes is highly inelastic. In such inelastic markets, where consumers are vulnerable and have no real choice about whether to purchase goods, the extent of a patent owner’s market power is exorbitant.

This market power is enhanced by the lack of price transparency in the pharmaceutical industry.²¹⁷ Consumers are often unaware of just how much their medicines cost, and they are therefore unable to properly negotiate those prices.²¹⁸ One reason for price obscurity is the prevalence of middlemen in the pharmaceutical industry.²¹⁹ Consumers may know what they pay out of pocket for a medicine, but since

²¹¹ *Id.*; see *New York v. Actavis PLC*, 787 F.3d 638, 645–47 (2d Cir. 2015).

²¹² See *Morgan et al.*, *supra* note 41, at 67 (explaining that people with life-threatening medical needs often cannot defer consumption of lifesaving medicine until prices fall and that health insurance insulates them from knowing the true cost of their medicine).

²¹³ See *AREEDA & HOVENKAMP*, *supra* note 103, § 507 (noting market power varies with the rate at which buyers substitute products).

²¹⁴ When consumers are simply unwilling to pay supracompetitive prices for a product, even a monopolist will have to keep prices at competitive levels. See *id.* § 532b (“When very elastic demand is not captured in the market definition, we can have a ‘monopolist’ without any market power.”).

²¹⁵ See *id.* § 507.

²¹⁶ See *Morgan et al.*, *supra* note 41, at 67; see, e.g., *supra* note 31 and accompanying text (explaining that without a Zolgensma treatment, type one spinal muscular atrophy is usually fatal within a patient’s first two years of life).

²¹⁷ See *Morgan et al.*, *supra* note 41, at 67.

²¹⁸ See *id.*

²¹⁹ See *id.*

most consumers have insurance, they are not aware of the true price of the medicine.²²⁰ Indeed, the actual cost of a medicine generally varies depending on who a patient's insurer is and which insurance plan they are on.²²¹ Additionally, since insurance companies spread costs across large groups of insured people, only some of whom require the most expensive medicines, consumers are doubly removed from the costs of the medicines they consume.²²²

Consequently, for insured people, would-be outrage over price is likely diminished because the economic harm caused by unfair pricing is spread out over many people rather than concentrated on just the few people who consume the medicines.²²³ However, the aggregate amount of economic harm done by supracompetitive prices is the same as if those prices were paid by individuals—it is just spread out.²²⁴ In this way, pharmaceutical suppliers are able to keep consumer complaints to a minimum without actually reducing prices.²²⁵ This is unique to the healthcare industry; in most industries, people know how much the products they consume cost as they review the prices and then decide whether to buy them.²²⁶ But in healthcare, people, by and large, do not know the prices of their medicines; they are simply following their doctors' advice and hoping that insurance will cover the costs.²²⁷ A result of this price obscurity is that consumers are unsure whether they should complain to drug manufacturers about prices or to insurers about prescription drug benefits.²²⁸

The procompetitive justifications for patents on lifesaving medicines are strong, as defendant patent owners can emphasize that they

²²⁰ See *id.*

²²¹ See *supra* Section I.B.

²²² See Morgan et al., *supra* note 41, at 67; *supra* Section I.B.

²²³ See Morgan et al., *supra* note 41, at 67.

²²⁴ See generally *id.*

²²⁵ See Wolitz, *supra* note 42, at 416 (explaining that consumers generally direct their outrage at insurers who refuse to cover certain treatments rather than at sellers who charge exorbitant prices for those treatments). But note that this is only true for insured people. Uninsured people, who are not insulated from the true prices of medications, are often financially decimated by the costs. See generally Karen Davis, *The Costs and Consequences of Being Uninsured*, 60 MED. CARE RSCH. & REV. 89S (2003), https://www.commonwealthfund.org/sites/default/files/documents/___media_files_publications_in_the_literature_2003_jun_the_costs_and_consequences_of_being_uninsured_davis_consequences_itl_663_pdf.pdf [<https://perma.cc/2YGK-ZV82>].

²²⁶ See *New York v. Actavis PLC*, 787 F.3d 638, 645 (2d Cir. 2015); Gregory Day, *The Necessity in Antitrust Law*, 78 WASH. & LEE L. REV. 1289, 1322 (2021) (stating that, for most goods, consumers are presumed to have options of buying a substitute item or nothing at all).

²²⁷ See *Actavis PLC*, 787 F.3d at 645–46 (discussing the “price disconnect” between patients and doctors; noting that “the doctor may not know or even care about the price [of medicine] and generally has no incentive to take the price into account”). See generally Court, *supra* note 38.

²²⁸ See Wolitz, *supra* note 42, at 416 (explaining that consumers are misled by the invisibility of drug price regulation: they only see rising insurance costs and thus a conflict between them and their insurers, rather than the true conflict, which is between consumers and drug sellers).

will have less incentive to invest in the development of lifesaving medicines if they cannot rely on patent protection for the medicines they develop.²²⁹ Thus, a sufficient less restrictive alternative would have to preserve incentives to invest in drug R&D while preventing defendant patent owners from maintaining profit-maximizing prices. Such an alternative could likely be achieved because the gulf between pharmaceutical innovators' R&D costs and their enormous profits indicates that R&D would still be incentivized even if its profitability were substantially reduced.²³⁰

A less restrictive alternative could be compulsory licensing of the defendant's patent to a generic drugmaker for a reasonable royalty. To be clear, this would deprive a defendant patent owner of the right to absolutely exclude others from making and using their invention.²³¹ The upshot would be increased generic competition in markets for lifesaving medicines, resulting in not just greater supply and lower prices, but also lives saved. Reasonable royalties are often awarded to patent owners who prevail in patent infringement cases.²³² The Supreme Court has already upheld compulsory patent licensing for a reasonable royalty as an appropriate remedy in antitrust cases brought under section 2 of the Sherman Act.²³³

A reasonable royalty award would work as a less restrictive alternative to the absolute right to enjoin competition because reasonable royalties are calculated based on what royalty a patent owner could command in a hypothetical negotiation with a licensee, which would of course account for the patent owner's R&D costs.²³⁴ Requiring defendants to license the patents covering their medicine for a reasonable royalty would preserve incentives to invest in R&D by permitting defendants to continue earning a profit from their patents.²³⁵ Because the award of a reasonable royalty has been a workable remedy in

²²⁹ See *supra* note 201 and accompanying text.

²³⁰ See Wolitz, *supra* note 42, at 404–05 (From 2009 to 2019, pharmaceutical companies had higher returns on invested capital than any other sector, with an average return of 17.3%; for every \$1 spent on cancer drug R&D, making the median return \$14.50).

²³¹ See 35 U.S.C. §§ 154(a)(2), 271 (patent owners' right to exclude).

²³² See, e.g., *Vectura Ltd. v. GlaxoSmithKline LLC*, 981 F.3d 1030, 1045 (Fed. Cir. 2020) (affirming award of a reasonable royalty for infringement of a pharmaceutical patent); *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970) (providing a list of factors for courts to consider when determining a reasonable royalty in an infringement case). The statutory basis for awarding a reasonable royalty in patent infringement cases is 35 U.S.C. § 284.

²³³ See, e.g., *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 351 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

²³⁴ See, e.g., *Wright v. United States*, 53 Fed. Cl. 466, 470 (2002) (factoring a patent owner's R&D costs into a reasonable royalty calculation).

²³⁵ See *Georgia-Pacific*, 318 F. Supp. at 1120 (the eighth factor directs courts to account for the profitability and commercial success of the patented product).

infringement cases,²³⁶ it could also be a workable less restrictive alternative in an antitrust action.

Consider how compulsory licensing for a reasonable royalty could work for Zolgensma, the \$2.1 million SMA medicine discussed in Section I.A. An attorney general of a state whose Medicaid program covers Zolgensma for its members—Colorado, for example²³⁷—could file a lawsuit against Novartis alleging a violation of Section 1.²³⁸ The theory of harm would be that Colorado taxpayers are harmed by Novartis's exclusion of competitors from the market for Zolgensma.²³⁹ Colorado could meet its initial Section 1 burden by alleging the existence of a contract that gives Novartis market power in the market for Zolgensma.²⁴⁰ The contract in this case would be the Zolgensma patent.²⁴¹ Novartis could defend by raising the procompetitive justification that without patent protection, it would not have invested in developing Zolgensma and bringing it to market, the theory being that consumers benefit from patent protection of new medicines like Zolgensma.²⁴² Colorado could respond that a less restrictive alternative to absolute patent protection would be generic²⁴³ licensing for a reasonable royalty.²⁴⁴ Colorado could argue Novartis would have still had the incentive to develop and

²³⁶ See, e.g., *id.*

²³⁷ See Marc Williams, *Colorado Medicaid Executes Its First Pharmaceutical Value-Based Contracts*, COLO. DEP'T OF HEALTH CARE POL'Y & FIN. (Mar. 22, 2022), <https://hcpf.colorado.gov/colorado-medicare-executes-its-first-pharmaceutical-value-based-contracts> [https://perma.cc/7H2R-KCN6].

²³⁸ *Supra* note 16 and accompanying text.

²³⁹ See *supra* Section I.A.; *supra* notes 50–55 and accompanying text (explaining how, because private insurance companies spread individual medical expenses out over large groups of insured people, those who incur minimal medical expenses pay more for insurance coverage than their insurer pays for their medical expenses, and that this overpayment rises as the price of medicine rises, culminating in situations such as the \$2.1 million Zolgensma treatment, where a large group of insured people pay the high price derived from a high need and lack of competition).

²⁴⁰ See *supra* notes 128–29, 193–96 and accompanying text. Patents on lifesaving medicines can grant control of important markets if the medicine is novel and there are no adequate substitutes for consumers.

²⁴¹ See U.S. Patent No. 7,906,111 (filed Sept. 30, 2004); *supra* Section III.A.

²⁴² See *supra* notes 197–201 and accompanying text; see also Yates, *supra* note 100.

²⁴³ Zolgensma is a type of medicine called a “biologic.” See *How ZOLGENSMA Works*, ZOLGENSMA, <https://www.zolgensma.com/how-zolgensma-works> [https://perma.cc/CFU9-7RK5] (Zolgensma “is a type of medicine called gene therapy.”); *What is Gene Therapy?*, U.S. FDA (July 25, 2018), <https://www.fda.gov/vaccines-blood-biologics/cellular-gene-therapy-products/what-gene-therapy> [https://perma.cc/L8U9-3MA2] (“Gene therapy products are biological products regulated by the FDA’s Center for Biologics Evaluation and Research.”). “Generic” versions of biologics are usually called “biosimilars” rather than “generics,” but because both “generic” and “biosimilar” refer to imitations of branded drugs, this Note uses “generics” broadly to include both traditional generics and biosimilars. See *Biological Product Definitions*, U.S. FDA, <https://www.fda.gov/files/drugs/published/Biological-Product-Definitions.pdf> [https://perma.cc/PGK5-95NU].

²⁴⁴ See *supra* notes 229–36 and accompanying text.

market Zolgensma if Novartis were entitled to a reasonable royalty from competitors.²⁴⁵

If the court were convinced of the less restrictive alternative, Novartis would be liable for a Section 1 violation, and the court could fashion an appropriate compulsory licensing remedy.²⁴⁶ An appropriate remedy would first, forbid Novartis from seeking to enjoin generic drugmakers from developing and marketing a Zolgensma generic, and second, establish a reasonable royalty based in part on the costs of developing Zolgensma, which Novartis could permissibly solicit from any infringing generic drugmaker. The court would likely have to retain continuing jurisdiction over the case to ensure Novartis's compliance with the remedy and then adjudicate any future issues that may arise regarding, for example, whether a generic attempting to come to market is actually infringing the Zolgensma patent and, therefore, required to pay the reasonable royalty.²⁴⁷

The result would be that a generic version of Zolgensma could be developed and brought to market without liability for patent infringement beyond the reasonable royalty. If the reasonable royalty is low enough, generic drugmakers will be incentivized to try their hand at developing a generic.²⁴⁸ After securing Food and Drug Administration ("FDA") approval for the generic, the generic drugmakers would be able to come to market and compete with brand-name Zolgensma.²⁴⁹ Price competition would do the rest; lower prices would lessen the burden on insurers and patients and improve access to Zolgensma.²⁵⁰ As a result, more SMA patients could survive.²⁵¹

Plaintiffs could use this Section 1 theory to introduce competition into markets for several other patent-protected medicines. The theory could work for any medicine that (1) is protected by one or more patents, (2) is medically necessary to save patients' lives, and (3) has no

²⁴⁵ See generally *supra* note 230 and accompanying text. But this argument would depend on facts specific to Novartis's business, which Colorado could obtain through discovery.

²⁴⁶ See *supra* note 131 and accompanying text (discussing liability where the court finds there is a less restrictive alternative to the defendant's conduct); 15 U.S.C. § 4 (statutory authority for injunctive relief).

²⁴⁷ See, e.g., *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 351, 354 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) (establishing continuing jurisdiction to enforce the court's remedy of compulsory patent licensing for a reasonable royalty where the defendant violated antitrust law).

²⁴⁸ The lower the royalty, the more likely it is for generics to enter the market. See AREEDA & HOVENKAMP, *supra* note 103, § 421c ("One is much readier to invest \$1 than \$20 for a 10 percent chance of reaping \$100 annually.").

²⁴⁹ "Federal law requires all new drugs in the U.S. be shown to be safe and effective for their intended use prior to marketing." *Unapproved Drugs*, U.S. FDA (June 2, 2021), <https://www.fda.gov/drugs/enforcement-activities-fda/unapproved-drugs> [<https://perma.cc/D7CU-UKNJ>].

²⁵⁰ See generally *supra* Section I.B.

²⁵¹ See *supra* note 38 and accompanying text.

close substitutes. A complete list of medicines fitting these criteria is beyond the scope of this Note,²⁵² but the list would likely include several of the most expensive biologic²⁵³ and small molecule medicines.²⁵⁴

IV. OFF THE MERITS: THE CASE FOR ANTITRUST IMMUNITY AND OTHER CONSIDERATIONS

The antitrust action proposed in this Note, while plausible on the merits, would likely fail before proceeding to the merits due to a defendant's strong case for implied immunity from antitrust liability. The main flaw with the action proposed in this Note is that it relies on the premise that a patent owner could be forbidden from exercising their rights under a valid patent, granted by operation of federal statutory law, on grounds that the exercise of those rights would violate another federal law.²⁵⁵ Congress deliberately crafted the patent laws²⁵⁶ and presumably did not intend for the rights granted to inventors under those laws to violate other laws, such as Section 1,²⁵⁷ that were also deliberately crafted by Congress.²⁵⁸ Nonetheless, the rule of reason analysis conducted in Part III reveals that the policy rationales for robust and absolute patent protection wear thin in markets for lifesaving medicines for which there are no close substitutes.²⁵⁹ Accordingly, Congress

²⁵² The bounds of such a list would be difficult to demarcate. Consider, for instance, the issues that might arise in determining what exactly counts as a drug that is “medically necessary to save patients’ lives” for present purposes. But note that extremely high prices of certain drugs provide a strong indication that those drugs fit the criteria, as these criteria enable extremely high drug prices in the first place. *See, e.g., supra* Section I.A (discussing how Zolgensma’s price came to be so high and why other lifesaving medicines also have such high prices).

²⁵³ “[Biologics] are generally large, complex molecules. [They] may be produced through biotechnology in a living system, such as a microorganism, plant cell, or animal cell, and are often more difficult to characterize than small molecule drugs.” *Biological Product Definitions*, *supra* note 243. Biologics tend to be more expensive than small molecules. Favour D. Makurvet, *Biologics vs. Small Molecules: Drug Costs and Patient Access*, MED. IN DRUG DISCOVERY, Mar. 2021, at 4–7. Zolgensma is an example of a biologic that could be challenged under the Section 1 theory in this Note. *See supra* notes 238–52 and accompanying text.

²⁵⁴ Small molecule medicines are “drugs made by chemical synthesis Most patented drugs in the market and their generics are small molecules.” Makurvet, *supra* note 253, at 1. A small molecule medicine that could be challenged under the Section 1 theory in this Note is Trikafta, a cystic fibrosis treatment that costs “roughly \$326,000 per patient per year.” Fraiser Kansteiner, *Vertex Pricing Under Fire—Again—as Activists Press 4 Governments for Trikafta Generics*, FIERCE PHARMA (Feb. 7, 2023, 10:59 AM), <https://fiercepharma.com/pharma/vertexs-trikafta-pricing-under-pressure-again-patients-and-activists-press-4-governments> [<https://perma.cc/WL6K-6EKC>].

²⁵⁵ *See supra* Part II.

²⁵⁶ 35 U.S.C. §§ 1–390.

²⁵⁷ 15 U.S.C. § 1.

²⁵⁸ *See* United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (standing for the proposition that statutory provisions should be read so that they “produce[] a substantive effect that is compatible with the rest of the law”).

²⁵⁹ *See supra* Part III.

should consider amending Chapter 1 of Title 15 of the U.S. Code to abrogate patents' implied immunity from antitrust enforcement to the extent such immunity exists.

Statutory and common law rules establish various antitrust immunities.²⁶⁰ For example, under 15 U.S.C. § 17, workers who agree to collectively negotiate via a labor union are immune from antitrust enforcement against legitimate union activities.²⁶¹ In addition to these explicit immunities, the Supreme Court has recognized some implicit immunities to antitrust enforcement for various activities related to federal and state government action.²⁶² In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,²⁶³ the Court made the broad comment that “it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out.”²⁶⁴ But in that case, the comment was dicta,²⁶⁵ and in the cases cited to support the comment, the holdings were limited to the particular government actions challenged, not government action generally.²⁶⁶ While the Court has not explicitly held that implied antitrust immunity protects the exercise of one's absolute right to exclude under a valid patent, it has assumed as much.²⁶⁷ Accordingly, it is unlikely that the Section 1 action described in this Note would succeed in court if brought under current federal law.

The likelihood that such an action would not succeed in court merely highlights an opportunity for Congressional intervention. Prescription drug prices, especially for patent-protected lifesaving medicines for which there are no close substitutes, are exorbitant and

²⁶⁰ See, e.g., 15 U.S.C. §§ 13c, 17, 37, 37b; *United States v. Rock Royal*, 307 U.S. 533, 559–60 (recognizing implied immunity for federal statutory and regulatory scheme permitting price fixing in the milk industry).

²⁶¹ See 15 U.S.C. § 17.

²⁶² See, e.g., *Rock Royal*, 307 U.S. at 559–60 (recognizing implied immunity for federal statutory and regulatory scheme permitting price fixing in the milk industry where milk producer associations had “a vital interest in the establishment of an efficient marketing system”); *Parker v. Brown*, 317 U.S. 341, 352, 362–63 (1943) (antitrust immunity for certain state regulatory schemes permitting price fixing due to state sovereignty, where state schemes did not “substantially impair[] the national interest in the regulation of commerce”); *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961) (antitrust immunity for people who successfully petitioned their state government to establish a monopoly).

²⁶³ 365 U.S. 127 (1961).

²⁶⁴ *Id.* at 136.

²⁶⁵ See *id.* at 127–28, 136.

²⁶⁶ See *Rock Royal*, 307 U.S. at 559–60; *Parker*, 317 U.S. at 352, 363.

²⁶⁷ See *FTC v. Actavis, Inc.*, 570 U.S. 136, 148 (2013); *United States v. Line Material Co.*, 333 U.S. 287, 305 (1948) (listing among uncontested issues in the case, “[w]ithin the limits of the patentee's rights under his patent, monopoly of the process or product by him is authorized by the patent statutes”).

place an unjustified burden on the public.²⁶⁸ The antitrust rule of reason provides a suitable framework for identifying patents that are not justified under the usual innovation-incentivization rationale for patents.²⁶⁹ While the Supreme Court has narrowed the reach of antitrust law with the implied immunity doctrine, perhaps it is time for a return to the century old principle that “[patent rights] are indeed very definite and extensive, but they [are not] a[] universal license against positive prohibitions. The Sherman law is a limitation of . . . rights which may be pushed to evil consequences and therefore restrained.”²⁷⁰

To avail the Section 1 action proposed in this Note to state attorneys general, Congress should amend Title 15, Chapter 1 of the U.S. Code by adding the following section setting forth the circumstances under which a plaintiff could bring a Section 1 action challenging a patent as an unreasonable restraint of trade²⁷¹:

* * *

15 U.S. Code § 39 - Antitrust laws applicable to patents on lifesaving medicines

(a) Patents are contracts

For purposes of determining liability under section 1 of this title, a valid United States patent is a “contract.”²⁷²

(b) Persons who may bring an action under section 1 alleging a patent unreasonably restrains trade

Only a state attorney general may bring an action against a patent owner on the theory that a patent unreasonably restrains trade.²⁷³

(c) Patent subject matter limitation

A patent is subject to challenge under Section 1 as an unreasonable restraint of trade only if it covers a lifesaving medicine.

(d) Definition of “lifesaving medicine”

- (i) As used in subsection (c), “lifesaving medicine” means any drug or biological product that, if properly administered, is reasonably likely to prevent death for a substantial portion of patients having the condition the drug treats.²⁷⁴
- (ii) “Life-saving medicine” shall be construed broadly.

²⁶⁸ See discussion of Zolgensma *supra* Sections I.A., III.B–C.

²⁶⁹ See *supra* Section III.B.

²⁷⁰ Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912).

²⁷¹ Note that the footnotes in this proposed code section are intended as substantiation for the purposes of this Note, not additional proposed statutory language.

²⁷² See *supra* Section III.A.

²⁷³ See 15 U.S.C. § 9.

²⁷⁴ See, e.g., *supra* note 32 and accompanying text (Zolgensma, when properly administered, can extend the lives of those with SMA for up to several years).

- (iii) The applicable definition of “drug” is provided in section 321(g)(1) of title 21, and the applicable definition of “biological product” is provided in section 262(i)(1) of title 42.²⁷⁵

(e) Applicable remedies

- (i) Where a patent is proven to unreasonably restrain trade under section 1, the district court shall issue a decree-
 - (A) forbidding the defendant from seeking, in any United States forum, injunctive relief against alleged patent infringers whose alleged infringement results from the alleged infringer’s good faith attempt to develop and market a medicine that is bioequivalent or bio-similar to the medicine covered by the challenged patent;²⁷⁶
 - (B) permitting the defendant to solicit a reasonable royalty from patent infringers whose infringement results from a good faith attempt to develop and market a medicine that is bioequivalent or bio-similar to the medicine covered by the challenged patent;²⁷⁷
 - (C) establishing the district court’s continuing jurisdiction, for a reasonable time, over the matter to oversee enforcement of the decree and resolve any issues that arise as to, for example, whether a third party has actually infringed the defendant’s patent, or the reasonableness of a royalty.²⁷⁸
- (ii) For purposes of this section, a reasonable royalty is a royalty substantially likely to result in the defendant’s recovery of costs the defendant incurred for the research and development of the medicine in question. A royalty is reasonable only if it preserves, to some extent, innovators’ incentives to invest in the development of new lifesaving medicines. The reasonableness of a royalty is within the district court’s discretion.²⁷⁹

²⁷⁵ This provision defines drugs and biologics consistently with the definitions used by the FDA. *See* 21 U.S.C. § 321(g)(1); 42 U.S.C. § 262(i)(1).

²⁷⁶ *See* 15 U.S.C. § 1 (granting district courts some discretion in deciding how to punish anti-trust violations); 15 U.S.C. § 9 (providing for district courts to be “invested with jurisdiction to prevent and restrain violations” in context of other antitrust violations).

²⁷⁷ *See supra* notes 233–36 and accompanying text (explaining why a reasonable royalty is a viable remedy).

²⁷⁸ *See supra* note 247 and accompanying text.

²⁷⁹ *See supra* notes 230, 248 and accompanying text (discussing reasonableness of royalties and R&D).

- (iii) A finding of liability under Section 1 has no effect on the validity of the challenged patent.
- (iv) Monetary damages may not be awarded where a defendant is liable under Section 1 only for ownership of a patent that unreasonably restrains trade.²⁸⁰

* * *

The main consequence of this proposed new section is that, where a violation is proven, the defendant may no longer use their patent to fully exclude competitors from the market; they may use it only to solicit a reasonable royalty from generic competitors.

CONCLUSION

The long-term global economic supremacy envisioned by patent law and day-to-day economic efficiencies championed by antitrust law are, in some respects, irreconcilable. However, Congress should not sit idly by in the face of this tension while patients' access to lifesaving medicine hangs in the balance. Upholding a patent owner's absolute right to exclude infringers is, in most circumstances, reasonable and justified by the strong incentive to innovate that the U.S. economy relies on.²⁸¹ But that justification only carries so much weight, and it may not sufficiently justify the right to exclude competitors from markets for lifesaving medicines. Under a rule of reason analysis, some patents on lifesaving medicines could be found to unreasonably restrain trade,²⁸² but due to patents' probable immunity from antitrust law, that rule of reason analysis is likely unreachable absent congressional intervention.²⁸³ By amending federal antitrust law as recommended in this Note, Congress could preserve the incentives of patent law, lift an enormous financial burden off the public, and improve patients' access to lifesaving medicines.²⁸⁴

²⁸⁰ This provision is intended to avoid a chilling effect on R&D by limiting defendants' potential liability.

²⁸¹ See *supra* notes 197–206 and accompanying text.

²⁸² See *supra* Sections III.B–.C.

²⁸³ See *supra* Part IV.

²⁸⁴ See *id.*

NOTE

Helpful Industry or Officious Intermeddlers: Assessing U.S. Champerty Law Through the Lens of Third-Party Funding in International Dispute Resolution

Josef Wolfgang Paulson*

ABSTRACT

International commercial arbitration is experiencing a period of rapid growth as a means of dispute resolution. As arbitration can be an expensive process, there has also been a growth in the practice of third-party funding for arbitration. The old British common law doctrines of maintenance and champerty, which seek to prevent “officious intermeddlers” from gaining a stake in the lawsuits of others, stand as potential barriers to the wider proliferation of third-party dispute resolution funding. These old doctrines are alive and well in some nations but abolished in others, and confusion can result. Within the United States, there is similar variance across the several states. To avoid confusion and maximize efficiency in the realm of international trade, the United States should adopt unifying federal legislation that abolishes the doctrines of champerty and maintenance, establishes funding agreement disclosure guidelines, and standardizes U.S. law on third-party dispute resolution funding.

* J.D., May 2024, The George Washington University Law School; B.A., 2016, University of Southern California. I would like to thank the hardworking associates, members, and editors of *The George Washington Law Review* for their thoughtful contribution to the preparation of this Note. I would also like to thank my family for their unwavering love and support, my friends for their kindness and perspective, and my partner and best friend, Catherine, for her profound thoughtfulness and relentless encouragement.

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INTRODUCTION

Few fields of dispute resolution have seen such rapid growth in the past fifty years as international commercial arbitration. The International Centre for the Settlement of Investment Disputes (“ICSID”) was formed by the World Bank in 1965 to establish a neutral forum to resolve disputes “between States and nationals of other States.”¹ From its inception until 1990—the first twenty-five years of its existence—ICSID

¹ MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 246–47 (3d ed. 2017).

registered only twenty-six cases.² As trade began to globalize and international state investment became more common around the turn of the millennium, however, arbitration became an increasingly sought-after means of dispute resolution, and ICSID's dispute volume grew dramatically.³ In fiscal year 2022 alone, ICSID administered 346 cases⁴—a striking increase over the rough average of one new case registered per year for the first quarter century of ICSID's operations.⁵ The increase in volume has been meteoric.

Separately, in early 2000s England, a “revolution” was occurring in the world of civil litigation funding.⁶ In 1967, England abolished the “[o]bsolete [c]rime[]” of champerty, an old English doctrine outlawing a third party from funding another's unrelated lawsuit with a possible recovery contingent upon the outcome of the suit.⁷ In the years that followed, the United Kingdom became the prime location for a blossoming litigation-finance industry.⁸ In 2007, Harbour Litigation Funding was formed in London, one of the first dedicated dispute resolution finance corporations, which today has a total combined claim value of \$19 billion.⁹ A culture emerged in which there existed “a recognition that England and Wales is the best place to litigate.”¹⁰ The former President of the U.K. Supreme Court recognized litigation funding as “the life-blood of the justice system” and instrumental in maintaining an “inclusive” society.¹¹

² *Id.* at 247.

³ *See id.* at 246–47.

⁴ INT'L CTR. FOR SETTLEMENT OF INV. DISPS., ANNUAL REPORT 24 (2022), https://icsid.worldbank.org/sites/default/files/publications/ICSID_AR.EN.pdf [<https://perma.cc/4RL4-WXJK>].

⁵ *See supra* note 2 and accompanying text.

⁶ Michael Zander, *Will the Revolution in the Funding of Civil Litigation in England Eventually Lead to Contingency Fees?*, 52 DEPAUL L. REV. 259, 259 (2002).

⁷ Criminal Law Act 1967, c. 58, § 13 (Eng. & Wales) (abolishing “any distinct offence under the common law in England and Wales of maintenance (including champerty . . .)”); *see also* Timothy Liang, *Champerty: Relic of a Bygone Era?*, 32 SING. L. REV. 181, 182 (2014).

⁸ *See* Lord Neuberger, President, U.K. Sup. Ct., Harbour Litigation Funding First Annual Lecture: From Barretry, Maintenance and Champerty to Litigation Funding ¶¶ 1–10 (May 8, 2013), <https://www.supremecourt.uk/docs/speech-130508.pdf> [<https://perma.cc/H8NW-7NLA>]; *A Brief History of Litigation Finance*, PRACTICE, Sept.–Oct. 2019, available at <https://clp.law.harvard.edu/knowledge-hub/magazine/issues/litigation-finance/a-brief-history-of-litigation-finance/> [<https://perma.cc/SBK5-DYU7>].

⁹ *See Our History*, HARBOUR LITIG. FUNDING, <https://www.harbourlitigationfunding.com/about-us/history/> [<https://perma.cc/7DL8-5WTA>].

¹⁰ Owen Bowcott, *Litigation Funders Become Big Business, Enjoying Booming Market in UK*, THE GUARDIAN (May 25, 2012, 12:15 PM) (quoting Susan Dunn, Founder, Harbour Litigation Funding), <https://www.theguardian.com/law/2012/may/25/litigation-funders-booming-market-uk> [<https://perma.cc/6RNA-VLTJ>].

¹¹ Lord Neuberger, *supra* note 8, at ¶¶ 52–53; *see also* Jonathan Barnett, Lucas Macedo & Jacob Henze, *Third-Party Funding Finds Its Place in the New ICC Rules*, KLUWER ARB. BLOG (Jan. 5, 2021), <http://arbitrationblog.kluwerarbitration.com/2021/01/05/>

The boom in international dispute resolution via arbitration mirrors the increase in litigation funding in the United Kingdom and around the world. As arbitration and private dispute resolution became more common internationally and litigation funding became big business, views on the topic began to shift, and third-party involvement in legal disputes became more acceptable, at least in theoretical discussion.¹² This evolution in thinking toward more widespread tolerance of the practice resulted in a rapidly shifting area of law for a major part of the global economy.¹³ The widespread adoption of such third-party funding arrangements for dispute resolution carries both risks and benefits, and not all nations are on the same legal playing field when it comes to this evolution, which, as this Note addresses, can lead to inequities, inefficiencies, and even potential legal liability for international lawyers.¹⁴

Third-party funding in international commercial arbitration works largely the same as third-party funding in litigation and has been experiencing a similar boom in the past few decades.¹⁵ Because of the potential risks for conflicts of interest and the tainting of arbitral awards by concerns regarding arbitrators' connections to these third parties, arbitral rules increasingly require disclosure of funding arrangements well in advance of substantive hearings within the arbitration.¹⁶ Giving arbitrators blanket authority to request funding agreement documents

third-party-funding-finds-its-place-in-the-new-icc-rules/ [https://perma.cc/W9AN-3Q3B] (quoting Neuberger and discussing the increased global prominence of recognition and regulation of third-party funding).

¹² See, e.g., Zander, *supra* note 6, at 261–67 (discussing the shift over time in England toward acceptance of third-party funding in an evaluation of conditional fee arrangements); Barnett et al., *supra* note 11 (recognizing the increased volume of funding in international commercial arbitration as indicating that third-party funding is “[h]ere to [s]tay”).

¹³ See generally Liang, *supra* note 7 (examining the shift in legal perspectives on champerty and maintenance in the U.K. from 1993 to 2014); Edouard Bertrand, *The Brave New World of Arbitration: Third-Party Funding*, 29 SWISS ARB. ASS'N BULL. 607 (2011) (exploring the potential economic and ethical implications of the “[b]rave [n]ew [w]orld” of third-party funding in arbitration); Prashant Krishan & Gaurav Tyagi, *New Trend in International Commercial Arbitration Third Party Funding*, 4 INT'L J.L. MGMT. & HUMANS. 1671 (2021) (recognizing third-party funding as an important touchstone in discussions of international commercial arbitration due to its considerable recent uptick).

¹⁴ See *infra* Part III.

¹⁵ Jennifer A. Trusz, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 GEO. L.J. 1649, 1658–62 (2013).

¹⁶ See Barnett et al., *supra* note 11 (“The overarching purpose of [mandated disclosure of funding arrangements in arbitral rules] is, again, to avoid conflicts of interest throughout the life of an arbitration, to ensure no arbitrator risks any such conflict . . . , and to ensure the enforceability of an award.”); see, e.g., INT’L CTR. FOR SETTLEMENT OF INV. DISPS., ICSID ARBITRATION RULES r. 14, in ICSID CONVENTION, REGULATIONS AND RULES 88, 98 (2022), https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf [https://perma.cc/7HBB-663V] (“The Tribunal may order disclosure of further information regarding the [third-party] funding agreement and the non-party providing funding . . .”).

themselves, however, poses alternative risks. Due to the sensitive nature of these agreements and the information within them, ordering their disclosure to the arbitral panel or to opposing parties risks giving undue access to privileged or other necessarily confidential information, which can create unfairness and partiality.¹⁷ Some international arbitral institutions have begun slowly shifting provisions in their regulations to account for such funding arrangements, attempting to titrate disclosure requirements to a level that does not unfairly disadvantage either party or risk tainting awards while also not chilling the growing field of third-party arbitration funding.¹⁸

Within the United States, the landscape for dispute resolution funding in both litigation and arbitration is highly variable. Third-party funding is regulated entirely at the state level by state statutes, professional codes, and common law.¹⁹ There is currently no federal legislation which addresses the legality of third-party dispute resolution funding.²⁰ Some U.S. states today expressly permit third-party litigation funding, although the scope of permissible practice varies;²¹ others continue to outlaw champertous funding arrangements.²² Some states maintain statutory prohibitions on champerty with carveouts for certain types of funding transactions.²³ Individuals or entities offering third-party funding services may strategically structure their funding agreements as loans rather than investments to tiptoe between differences among states' usury laws where they may not apply in commercial litigation

¹⁷ Kirstin Dodge, Jonathan Barnett, Lucas Macedo, Patryk Kulig & Maria Victoria Gomez, *Can Third-Party Funding Find the Right Place in Investment Arbitration Rules?*, KLUWER ARB. BLOG (Jan. 31, 2022), <http://arbitrationblog.kluwerarbitration.com/2022/01/31/can-third-party-funding-find-the-right-place-in-investment-arbitration-rules/> [https://perma.cc/8EX5-X84T].

¹⁸ See INT'L CTR. FOR SETTLEMENT OF INV. DISPS., WORKING PAPER NO. 5: PROPOSALS FOR AMENDMENT OF THE ICSID RULES 278–79 (2021), <https://icsid.worldbank.org/sites/default/files/documents/WP%205-VOLUME1-ENG-FINAL.pdf> [https://perma.cc/G74D-9TA3] (evaluating different suggested amendments to ICSID's rules on funding disclosures in light of their administrability and fairness to funded and nonfunded parties).

¹⁹ Elizabeth Korchin, Eric Blinderman & Patrick Dempsey, *In Review: Third Party Litigation Funding in USA*, LEXOLOGY (Nov. 22, 2021), <https://www.lexology.com/library/detail.aspx?g=66de1180-f371-4be9-8dfc-5739d826225a> [https://perma.cc/7SK6-XGTA].

²⁰ See *id.*

²¹ See Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 98–99 (2011).

²² Delaware and Florida, jurisdictions with prominent corporate activity and industry, maintain prohibitions on champerty. See Steven K. Davidson, Michael J. Baratz, Molly Bruder Fox & Chris Paparella, *Litigation Funding Update—Abolishing Common Law Champerty*, STEPTOE (July 7, 2020), <https://www.steptoelaw.com/en/news-publications/litigation-funding-update-abolishing-common-law.html> [https://perma.cc/XHN8-WMUW].

²³ New York prohibits champerty by statute but exempts transactions “having an aggregate purchase price of at least five hundred thousand dollars.” N.Y. JUD. LAW § 489(2) (McKinney 2023); see Davidson et al., *supra* note 22.

transactions.²⁴ The confusion arising from jurisdictional contradictions indicates a need for change.

This Note argues that the problems arising from divergent laws governing dispute resolution funding in the United States should be solved by passing federal legislation that establishes a uniform stance on third-party funding arrangements. This unification would be achieved by finally abolishing the doctrines of champerty and maintenance, and standardizing disclosure and transparency requirements for funding agreements between parties and funding entities. Part I explores the history and origins of the doctrines of maintenance and champerty, how they have evolved over time, and the rise of international commercial arbitration and of third-party funding as a component of the industry. Part II considers the difficulties inherent in establishing disclosure requirements for third-party funding arrangements through the lens of international arbitration, namely in balancing the desire to detect conflicts of interest and ensure the validity of judgments against the risk of unduly prejudicing either party. Part III investigates the international clashes between national laws on the topic of third-party funding as well as domestic conflicts of law among the several states of the United States and the negative impacts of those conflicts on U.S. interests. Part IV concludes by presenting this Note's proposed solution: unifying federal legislation which abolishes champerty and regulates third-party dispute resolution funding in the United States.

I. THE CONVERGENT HISTORICAL PATHS OF CHAMPERTY AND INTERNATIONAL ARBITRATION

To understand the modern state of dispute resolution funding in the international commercial sphere, one must trace back and understand the origins of champerty and the concerns which animated the doctrine at its inception. This historical context evidences the degree to which the world and the legal ecosystem have changed.²⁵ Legal dispute resolution occupies a different place in society today than it has in centuries past. Modern international arbitration favors freedom and flexibility, and there is space for third-party funding within the field so long as it is accounted for appropriately.²⁶

²⁴ See Korchin et al., *supra* note 19.

²⁵ See *infra* notes 33–37 and accompanying text.

²⁶ See generally MOSES, *supra* note 1, at 1, 269–70 (highlighting the flexibility of arbitration as a major strength in international commercial dispute resolution, and suggesting that—although concerns may arise, including potential conflicts of interest—third-party funding can support claims that otherwise may not be brought).

A. *History and Origins of Maintenance, Champerty, and Litigation Funding*

The unease with which courts and individuals have historically viewed the funding of legal disputes by third parties is encapsulated in the common law tort of champerty, which traces its origins back several centuries.²⁷ Black's Law Dictionary defines "champerty" as

[a]n agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds; specif[ically], an agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim.²⁸

In other words, champerty occurs when a third party with no personal stake in a lawsuit lends aid to one of the suit's parties in exchange for part of the payout if that party prevails in the suit.²⁹ Some conceive of champerty as "gambling" on lawsuits by third parties.³⁰ Champerty is a subspecies of maintenance,³¹ an equally old English common law tort which refers more generally to the improper interference by an uninvolved party in the lawsuit of another, either financially or otherwise.³²

The doctrines of champerty and maintenance originated in medieval England, where nobles and lords were very strong, and courts were comparatively weak.³³ The concept arose from a concern that feudal lords would manipulate their power and wealth to unduly influence the justice system, throwing their resources and influence behind otherwise weak claims in pursuit of outcomes which better suited their goals.³⁴ As English social structure evolved, courts became stronger and more independent from the ruling class, and the concerns originally animating the

²⁷ See Chiann Bao, *Third Party Funding in Singapore and Hong Kong: The Next Chapter*, 34 J. INT'L ARB. 387, 388 (2017).

²⁸ *Champerty*, BLACK'S LAW DICTIONARY (11th ed. 2019).

²⁹ See Carol Langford, *Betting on the Client: Alternative Litigation Funding Is an Ethically Risky Proposition for Attorneys and Clients*, 49 U.S.F. L. REV. 237, 237–39 (2015).

³⁰ See, e.g., Anthony J. Sebok, *Betting on Tort Suits After the Event: From Champerty to Insurance*, 60 DEPAUL L. REV. 453, 456–57 (2011); Langford, *supra* note 29.

³¹ Sebok, *supra* note 30, at 453.

³² *Maintenance*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Improper assistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case; meddling in someone else's litigation."). This Note focuses on champerty, but discussions involving litigation funding often mention both champerty and maintenance, occasionally using the terms interchangeably.

³³ See Bao, *supra* note 27, at 388.

³⁴ See *id.*

doctrines subsided.³⁵ England finally abolished criminal and civil liability for champerty in 1967, thereby legalizing dispute resolution funding arrangements that would have previously been barred under the doctrine.³⁶ The U.K. House of Lords has since described the doctrines of maintenance and champerty as “so old that their origins can no longer be traced” and “almost invisible.”³⁷

B. American Jurisprudence

The Supreme Court of the United States has only tangentially considered questions of maintenance and champerty, typically relying on the definition of maintenance from Blackstone's Commentaries: “officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it.”³⁸ Champerty, however, is the more directly applicable tort to describe modern third-party dispute resolution funding schemes,³⁹ and its definition is highly variable across jurisdictions.⁴⁰ At common law, as originally inherited from the British, both maintenance and champerty were torts; in the United States today, the legality of these activities varies by state.⁴¹ Some U.S. states have passed statutes specifically addressing champerty,⁴² some states rely on judge-made rules

³⁵ *See id.*

³⁶ Criminal Law Act 1967, c. 58, §§ 13, 14 (Eng. & Wales); *see also* Bao, *supra* note 27, at 388.

³⁷ *Giles v. Thompson* [1993] UKHL 2, [1994] 1 AC 142 [1] (appeal taken from Eng.).

³⁸ 4 WILLIAM BLACKSTONE, COMMENTARIES *134; *see, e.g., In re Primus*, 436 U.S. 412, 424 n.15 (1978); *Sprint Commc'ns Co. v. APCC Servs.*, 554 U.S. 269, 306 n.3 (2008) (Roberts, C.J., dissenting). Many state courts have also used this definition in cases of external intermeddling in litigation, with minor grammatical changes as reflected in its republication in various legal treatises. *See, e.g., Locklear v. Oxendine*, 65 S.E.2d 673, 676 (N.C. 1951) (quoting Blackstone's definition); *Christie v. Sawyer*, 44 N.H. 298, 300 (1862) (same); *Andrews v. Thayer*, 30 Wis. 228, 233 (1872) (same); *Manning v. Sprague*, 18 N.E. 673, 673 (Mass. 1888) (same); *McKellips v. Mackintosh*, 475 N.W.2d 926, 928 (S.D. 1991) (quoting 14 C.J.S. *Champerty and Maintenance* § 1 (1939)); *State ex rel. Carr v. Cabana Terrace, Inc.*, 153 So. 2d 257, 259 (Miss. 1963) (quoting 10 AM. JUR. 2d *Champerty and Maintenance* § 3 (1962)); *In re Ratner*, 399 P.2d 865, 874 (Kan. 1965) (quoting 10 AM. JUR. 2d *Champerty and Maintenance* § 2 (1962)); *Newkirk v. Cone*, 18 Ill. 449, 453 (1857).

³⁹ *See supra* note 29 and accompanying text.

⁴⁰ *See, e.g., infra* notes 47–51 and accompanying text.

⁴¹ *See Sebok, supra* note 21, at 98–99, 107; STEVEN GARBER, ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWN, AND UNKNOWN 17 (2010).

⁴² *See, e.g.,* MISS. CODE ANN. § 73-3-57 (2023) (making “[c]hamperty and maintenance unlawful”); GA. CODE ANN. § 13-8-2(a)(5) (2023) (“Contracts deemed contrary to public policy include . . . [c]ontracts of maintenance or champerty.”).

emerging from the evolving common law,⁴³ and some states have left the question largely unanswered.⁴⁴

Among the roughly half of U.S. states that maintain champerty prohibitions, the rationales for doing so vary.⁴⁵ Some state courts cite potential risks, such as a flood of litigation or tainting the attorney-client relationship.⁴⁶ Some state courts use definitions that outright describe champerty as “unlawful,”⁴⁷ while others describe it merely as an “agreement”⁴⁸ or “bargain”⁴⁹ without attaching a judgment as to the lawfulness of the activity. Some states’ definitions contemplate a third party who takes on the supported claim entirely at his own cost and risk,⁵⁰ while

⁴³ See, e.g., *Wilson v. Harris*, 688 So. 2d 265, 269–70 (Ala. Civ. App. 1996) (looking to other states’ courts’ nonbinding decisions on champerty to inform a decision on a champertous arrangement absent state statutory guidance); *Johnson v. Wright*, 682 N.W.2d 671, 676–80 (Minn. Ct. App. 2004) (acknowledging that “[c]ase law in Minnesota concerning champerty and maintenance is neither abundant nor recent,” and discussing general common law principles and definitions as well as considering common law approaches to champerty and maintenance in other U.S. jurisdictions).

⁴⁴ See Sebok, *supra* note 21, at 100 n.167.

⁴⁵ See *id.* at 98–107.

⁴⁶ See, e.g., *Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83, 87 (Cal. Ct. App. 1976).

The almost certain end result of merchandizing such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.

Id.

⁴⁷ *WFIC, LLC v. La Barre*, 148 A.3d 812, 818 (Pa. Super. Ct. 2016) (“Champerty may be defined as the *unlawful* maintenance of a suit in consideration of some bargain to have a part of the thing in dispute or some profit out of the litigation.” (emphasis added) (quoting *In re Frazier’s Est.*, 75 Pa. D. & C. 577, 594 (Orphans’ Ct. 1951))).

⁴⁸ *Mut. of Omaha Bank v. Kassebaum*, 814 N.W.2d 731, 735–36 (Neb. 2012) (“Champerty consists of an *agreement* whereby a person without interest in another’s suit undertakes to carry it on at his or her own expense, in whole or in part, in consideration of receiving, in the event of success, a part of the proceeds of the litigation.” (emphasis added) (quoting *Andersen v. Ganz*, 572 N.W.2d 414, 418 (Neb. Ct. App. 1997))).

⁴⁹ *Osprey, Inc. v. Cabana Ltd. P’ship*, 532 S.E.2d 269, 273 (S.C. 2000) (“Champerty is defined as a *bargain* by a person with a plaintiff or a defendant for a portion of the matter involved in a suit in the event of a successful termination of the action, which the person undertakes to maintain or carry on at his own expense.” (emphasis added)).

⁵⁰ *DaimlerChrysler Corp. v. Kirkhart*, 561 S.E.2d 276, 283 (N.C. Ct. App. 2002) (“‘Champerty’ is a form of maintenance whereby a stranger makes a ‘bargain’ with a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to *carry on the party’s suit at his own expense*.” (emphasis added) (quoting *Smith v. Hartsell*, 63 S.E. 172, 174 (N.C. 1908))).

others only require that the funder supply some unspecified quantum of aid in exchange for a portion of the winnings if the claim is successful.⁵¹

A lawyer evaluating a proposed funding arrangement must ascertain the legality of champerty in that jurisdiction in order to determine whether the arrangement is permissible. Whether an arbitral award is enforced within a jurisdiction can hinge upon whether it is deemed contrary to that jurisdiction's public policy,⁵² and absent unifying federal legislation, each state's unique amalgamation of champerty-related caselaw and statutes becomes emblematic of that state's public policy on the topic. Lawyers involved in arbitrations considering third-party funding therefore must attempt to ascertain this potentially confusing policy in states where they may need to seek enforcement of an award.

There is one form of fee arrangement similar to champerty with which many U.S. lawyers should be familiar: the contingency fee. When a lawyer takes a client on a contingency fee basis, the lawyer agrees to represent or provide legal services in pursuit of a judgment or settlement in exchange for a percentage of the client's ultimate recovery if the client's suit is successful.⁵³ Historically, many jurisdictions found contingency fee agreements to be champertous in that they represent an offer of services to help a litigant pursue their claim in exchange for a part of any potential judgment proceeds.⁵⁴ However, U.S. courts have long held that contingency fees are not champertous.⁵⁵ Contingency fees are very common in the United States today;⁵⁶ the American Bar Association Model Rules of Professional Conduct provide specifically for the use of contingency fees in approved applications in the attorney-client relationship.⁵⁷

⁵¹ *Maslowski v. Prospect Funding Partners*, 944 N.W.2d 235, 237 (Minn. 2020) ("Champerty is 'an agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who *supports or helps enforce the claim*.'" (emphasis added) (quoting *Champerty*, BLACK'S LAW DICTIONARY (11th ed. 2019))).

⁵² See *infra* note 131 and accompanying text.

⁵³ See Arthur L. Kraut, Note, *Contingent Fee: Champerty or Champion?*, 21 CLEV. ST. L. REV. 15, 15 (1972).

⁵⁴ See Adrian F. Twomey & M. Litt, *Competition, Compassion, and Champerty: The Contingent Fee in Profile*, 4 IRISH STUDENT L. REV. 1, 7 (1994); Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625, 626–27 (1995); see, e.g., *Key v. Vattier*, 1 Ohio 132, 133 (1823) (finding an attorney-client agreement by which the attorney's only compensation would be part of the property in dispute if his client won to be illegal and void as champertous).

⁵⁵ See Kraut, *supra* note 53, at 21; *Williams v. City of Philadelphia*, 57 A. 578, 579 (Pa. 1904) ("Contingent fees are not illegal. . . . [T]he law has long been settled that contracts for such fees are lawful and enforceable by the courts, and something more than the mere contingency of the compensation is necessary to make them champertous.").

⁵⁶ See Painter, *supra* note 54, at 626 nn.3–9 and accompanying text.

⁵⁷ MODEL RULES OF PRO. CONDUCT r. 1.5(c) (AM. BAR ASS'N 2020) ("A fee may be contingent on the outcome of the matter for which the service is rendered A contingent fee agreement

As a form of litigation funding which once was illegal as champertous but now is widely accepted, contingency fee arrangements can serve as a helpful reference point in considering the place of third-party dispute resolution funding in the twenty-first century American legal system. Contingency fee arrangements and third-party funding both have the potential to grant indigent litigants access to the justice system they might not have had otherwise, but they retain critics due to their potential negative moral implications.⁵⁸

C. *Arbitration as a Means of International Commercial Dispute Resolution*

Arbitration is a private system of dispute resolution by which parties are able to settle a legal dispute without necessarily involving the judicial courts of any nation.⁵⁹ Because the decisions of arbitral tribunals lack governmental force, parties must consent to give them power; this is most commonly achieved by including a binding arbitration clause in the parties' commercial contract.⁶⁰ In the absence of such a clause, parties can mutually consent to submit a dispute to arbitration by a "submission agreement."⁶¹

Arbitrators are not judges or other governmental actors—in fact, they need not even be lawyers—but rather private citizens appointed by the parties involved in the dispute.⁶² Rather than following typical civil procedural requirements as to which jurisdiction's law should be applied, arbitrators make decisions based on which law or laws the parties have designated to govern their contract.⁶³ For example, if an arbitration clause says that any dispute arising in an automotive manufacturing transaction is to be decided by applying German substantive automotive manufacturing law, the arbitrators must use that law—even if none of the arbitrators, neither of the parties, nor the seat of the arbitration itself has any connection to Germany or German law.

International commercial arbitrations can be facilitated by a preexisting administering institution or can be conducted ad hoc, in which the

shall be in a writing signed by the client and shall state the method by which the fee is to be determined . . .").

⁵⁸ Kraut, *supra* note 53, at 16 ("The claim is made that the attorney, by reason of the contingent fee contract, is changed from a knight in shining armor, protecting his client's case, into an *ambulance chaser* and *shyster*, protecting only his fee."); *id.* at 26 ("Litigation in these areas [of major public policy issues, such as workers' rights and discrimination] is initiated primarily by individuals and groups too poor to pay a fixed fee. The contingent fee system has allowed persons, who otherwise could not afford a lawsuit, to assert their claims and have their day in court . . .").

⁵⁹ MOSES, *supra* note 1, at 1.

⁶⁰ *See id.* at 1–2.

⁶¹ *Id.* at 20.

⁶² *Id.* at 2.

⁶³ *See id.* at 63.

arbitral tribunal is “[f]ormed for [the] particular purpose” of resolving a specific dispute by the parties themselves.⁶⁴ In an ad hoc arbitration, the parties are responsible for handling the many administrative steps in operating an arbitration and either create or choose rules to govern their procedure.⁶⁵ In institutional arbitration, the parties hand over responsibility for much of the administration to the arbitral institution and operate their arbitration pursuant to that institution’s procedures and protocols.⁶⁶ Most arbitral institutions maintain and utilize their own sets of arbitral rules, which provide specific regulations for issues including arbitrator appointments, discovery and disclosure, time limits on proceedings, how to challenge an arbitrator, raising questions of bias or conflicts of interest, and the form and structure of awards.⁶⁷ Rules can vary across regions as different institutions adopt new ideas but generally shift along similar lines over time to reflect commonly agreed-upon best practices in the field.⁶⁸

Given the private nature of arbitration, one might wonder, What happens if a party fails to comply with a decision—for example, by refusing to pay what it owes? Even though arbitration is administered separately from court systems, international agreements and domestic laws permit court enforcement of valid arbitral awards with the strength of a legal judgment.⁶⁹ To this end, an important international agreement in the field is the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention.⁷⁰ The domestic courts of all state parties to the Convention—which currently number 172, including the United

⁶⁴ *Ad Hoc*, BLACK’S LAW DICTIONARY (11th ed. 2019); see also *Arbitration*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “ad hoc arbitration” as “1. Arbitration of only one issue. 2. An arbitration that does not involve an arbitration provider or institution to administer the proceeding”).

⁶⁵ See MOSES, *supra* note 1, at 10. The United Nations Commission on International Trade Law (“UNCITRAL”) maintains and distributes Arbitration Rules and a Model Law, which are frequently used in ad hoc arbitrations. See U.N. COMM’N ON INT’L TRADE L., UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, Annex 1, U.N. Doc. A/40/17, U.N. Sales No. E.08.V.4 (2008); U.N. COMM’N ON INT’L TRADE L., Rep. on the Work of Its Forty-Third Session, U.N. Doc. A/65/17, at 79–98 (2010).

⁶⁶ See MOSES, *supra* note 1, at 10–13. Some of the most prominent arbitral institutions today include the ICC International Court of Arbitration, the American Arbitration Association’s International Centre for Dispute Resolution, the London Court of International Arbitration, the Hong Kong International Arbitration Center, and the Singapore International Arbitration Centre.

⁶⁷ See, e.g., *Arbitration Rules*, INT’L CHAMBER OF COM. (Jan. 1, 2021), <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/> [<https://perma.cc/VXK2-WKB9>]; THE LONDON CT. OF INT’L ARB., ARBITRATION RULES (2020).

⁶⁸ See MOSES, *supra* note 1, at 10–13; Barnett et al., *supra* note 11.

⁶⁹ See MOSES, *supra* note 1, at 1–3.

⁷⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

States⁷¹—must undertake to enforce valid arbitration awards rendered in any other member state.⁷² The Convention provides a list of grounds on which parties may seek to prevent enforcement of awards, which includes incapacity of the parties; improper composition or procedure of the arbitral tribunal; an arbitrator acting in excess of the authority granted by the parties; lack of notice or fairness in the proceedings; invalidity of an agreement under the chosen law or the law of the seat nation; or a competent authority of the chosen legal jurisdiction or the seat nation setting aside a pending award.⁷³ Because most nations' laws provide that an arbitrator conflict of interest is grounds for challenging an arbitral award—including the United States⁷⁴—the discovery of such a conflict can seriously impair a victorious party's ability to seek enforcement of that award later.⁷⁵

D. *The Recent Rise of Third-Party Funding in International Commercial Arbitration*

In the ever-growing world of commercial arbitration as a means of international dispute resolution, third-party funding continues to gain a more solid foothold in the field.⁷⁶ Arbitration can be a very expensive process, especially in larger disputes requiring a tribunal of more than one arbitrator and disputes involving expert or technical input or extensive document requests.⁷⁷ Parties facing a binding arbitration agreement that are unable to cover their portion of arbitration costs can turn to third-party funding as a potential solution.⁷⁸

Although hard data is elusive due to the private and confidential nature of international commercial arbitration,⁷⁹ scholars have noted signs of an increased volume of international commercial arbitrations

⁷¹ U.N. Comm'n on Int'l Trade L., *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N., https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 [<https://perma.cc/3HR6-78XK>]. The United States ratified the New York Convention on September 30, 1970. *Id.*; see also U.S. Federal Arbitration Act, Pub. L. No. 91-368, 84 Stat. 692 (1970) (codified at 9 U.S.C. §§ 201–08).

⁷² New York Convention, *supra* note 70, 21 U.S.T. at 2519, 330 U.N.T.S. at 38.

⁷³ *Id.* at 21 U.S.T. at 2520, 330 U.N.T.S. at 40–42. See *MOSES*, *supra* note 1, at 231–38. There is also a public policy challenge available under the Convention. See *infra* note 131 and accompanying text.

⁷⁴ 9 U.S.C. § 10(a)(2) (allowing U.S. courts to vacate arbitral awards “where there was evident partiality or corruption in the arbitrators”).

⁷⁵ See Dalal Alhouthi & Georgia Fullarton, *Conflicts of Interest in International Commercial Arbitration*, CHARLES RUSSELL SPEECHLYS (Aug. 4, 2023), <https://www.charlesrussellspeechlys.com/en/insights/expert-insights/dispute-resolution/2023/conflicts-of-interest-in-international-commercial-arbitration/> [<https://perma.cc/43R3-95TM>].

⁷⁶ Barnett et al., *supra* note 11.

⁷⁷ See *MOSES*, *supra* note 1, at 56–57, 164–65.

⁷⁸ See *id.* at 269–70.

⁷⁹ Trusz, *supra* note 15, at 1651.

involving third-party funding, including an increase in such funding in domestic litigation.⁸⁰ Domestic legislation in nations representing major hubs of international commerce has begun to evolve to accommodate funding relationships in international commercial disputes previously viewed as illegally champertous.⁸¹ This evolution has led to a shift in large-scale institutional commercial arbitration toward an acceptance of third-party funding.⁸² Today, there are numerous large, profitable corporations built primarily around providing funding to parties in litigation and arbitration.⁸³ These entities may voluntarily join industry self-regulating organizations, such as the Association of Litigation Funders of England and Wales, but at present, no country has established an official binding regulatory system for such enterprises.⁸⁴

Proponents of third-party funding in international commercial arbitration highlight its potential to promote more widespread access to justice by enabling impecunious individuals to explore the possibility of bringing a claim which they would otherwise lack the means to pursue.⁸⁵ Simply by applying for funding, prospective claimants receive

⁸⁰ See *id.*; Sarah E. Moseley, Note, *Disclosing Third-Party Funding in International Investment Arbitration*, 97 TEX. L. REV. 1181, 1181, 1186–92 (2019) (comparing the relative merits of third-party funders of funding arbitrations versus litigations, since most arbitration funders are also litigation funders).

⁸¹ For example, Hong Kong amended its laws in 2017 to define terms related to third-party funding, establish codes of practice, and exempt such funding agreements from penalties in the arbitration context, while maintaining the tort of champerty. Arbitration and Mediation Legislation (Third Party Funding) (Amendment), No. 6, (2017) 2 O.H.K., §§ 98E–98O. The same year, Singapore abolished the torts of maintenance and champerty entirely. Civil Law Act, (Cap 43, 2017 Rev Ed) § 5A (Sing.). For further discussion on these changes, see Bao, *supra* note 27, at 387–89 and Varun Mansinghka, *Third-Party Funding in International Commercial Arbitration and Its Impact on Independence of Arbitrators: An Indian Perspective*, 13 ASIAN INT'L ARB. J. 97, 99–104 (2017) (reviewing updates in United Kingdom, Singapore, Hong Kong, and India).

⁸² See *Third Party Funding in Arbitration—More Commonly Used*, STOCKHOLM CHAMBER OF COM. ARB. INST. (Dec. 20, 2021), <https://sccarbitrationinstitute.se/en/news-events/news/third-party-funding-arbitration-more-commonly-used> [<https://perma.cc/CUS3-88B3>].

⁸³ Most of these firms were formed in the late 2000s. See *A Brief History of Litigation Finance*, *supra* note 8. Some major players include Omni Bridgeway, headquartered in Australia; Baker Street Funding, in New York; and Woodsford Group and Burford Capital, both based in the U.K. *Arbitration Financing*, OMNI BRIDGEWAY, <https://omnibridgeway.com/litigation-funding/arbitration-financing> [<https://perma.cc/S5GA-CS54>]; *International Arbitration Financing*, BAKER ST. FUNDING, <https://bakerstreetfunding.com/litigation-financing/international-arbitration> [<https://perma.cc/N4UA-KGWJ>]; *Litigation Funding*, WOODSFORD GRP. LTD., <https://woodsford.com/us/litigation-funding> [<https://perma.cc/AV5Y-YHF5>]; *Disputes We Finance*, BURFORD CAP. LLC, <https://www.burfordcapital.com/what-we-do/disputes-we-finance> [<https://perma.cc/7WKL-F6A4>].

⁸⁴ Jean Kalicki, *Third-Party Funding in Arbitration: Innovation and Limits in Self-Regulation (Part 1 of 2)*, KLUWER ARB. BLOG (Mar. 13, 2012), <http://arbitrationblog.kluwerarbitration.com/2012/03/13/third-party-funding-in-arbitration-innovation-and-limits-in-self-regulation-part-1-of-2/> [<https://perma.cc/BLT8-Y4DT>].

⁸⁵ See Trusz, *supra* note 15, at 1656–57.

a helpful assessment of the merits of their case through the rigorous scrutiny that funding entities apply to a potential case before electing to establish an agreement.⁸⁶ If the claim is selected and an agreement is created, claimants can gain the funder's assistance in selecting counsel, among other resources.⁸⁷

II. CHALLENGES IN BALANCING DISCLOSURE REQUIREMENTS FOR THIRD-PARTY FUNDING AGREEMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION

While the emergence of third-party funding into mainstream international commercial arbitration carries a number of potential benefits, it poses risks as well, perhaps most notably regarding conflicts of interest and disclosure.⁸⁸ Conflicts with third-party funders can threaten the impartiality of an arbitral tribunal and the validity of the ensuing award.⁸⁹ The risk of such conflicts increases if members of the tribunal are initially unaware of a funder's involvement.⁹⁰

A. *The Risks of Inadequate Disclosure: Conflicts of Interest and Tainted Arbitral Awards*

In arbitration, as in any legal process, conflicts of interest can arise where a practitioner's personal interests clash with her legal duties.⁹¹ If two corporations bring a case in a U.S. court and the assigned judge owns a financial stake in one of the party corporations, the judge would be expected to recuse herself or otherwise acknowledge the inherent conflict as a barrier to her adjudication of that suit.⁹² Under International Bar Association ("IBA") guidelines, the same is expected of arbitrators.⁹³ Rules from most major arbitral institutions provide that

⁸⁶ See *id.* at 1657; see, e.g., John Lazar, *Adding Value Beyond Capital: During Case Review*, BURFORD CAP. LLC (Oct. 12, 2019), <https://www.burfordcapital.com/insights-news-events/insights-research/adding-value-beyond-capital-during-case-review/> [<https://perma.cc/9ZPN-YVCQ>].

⁸⁷ See Trusz, *supra* note 15, at 1657.

⁸⁸ See *id.*

⁸⁹ See Moseley, *supra* note 80, at 1193.

⁹⁰ See *id.* (explaining that even if an arbitrator cannot be biased if they are not aware of a conflict, disclosing conflicts avoids issues with the enforceability of an award later because it is not reliable to expect that conflicts will not be exposed later on); MOSES, *supra* note 1, at 270 (noting that a conflict of interest cannot be avoided if it is not disclosed).

⁹¹ See *Conflict of Interest*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A real or seeming incompatibility between one's private interests and one's public or fiduciary duties.").

⁹² See MODEL CODE OF JUD. CONDUCT r. 2.11 (AM. BAR ASS'N 2020) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. . . .").

⁹³ See INT'L BAR ASS'N, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION 5 (2014).

the “impartiality” and “independence” of an arbitrator are extremely important to the overall sanctity of an arbitration, as well as the validity of its resulting award, and any indication to the contrary is grounds for removing that arbitrator from the tribunal.⁹⁴ Since arbitrators are private citizens appointed to individual disputes and not full-time public servants like judges, the risks for conflicts can be even higher in arbitration than in litigation.⁹⁵

The presence of third-party funding agreements in commercial arbitration further complicates potential conflicts of interest due to the possibility of connections between the funder and members of the arbitral tribunal.⁹⁶ An arbitrator with a financial connection to a funder of one of the parties to the arbitration would pose a major risk of bias and partiality toward the funded party, as an arbitrator who stood to financially gain from the success of one party would surely struggle to be entirely neutral in her decision making. In apparent recognition of this risk, the 2014 IBA Guidelines expanded “parties’ duty of disclosure of any relationship, direct or indirect, between the arbitrator and the party” to include “relationships with persons or entities having a direct economic interest in the award to be rendered in the arbitration, such as an entity providing funding.”⁹⁷

Unlike judges in courts of governmental authority, however, arbitrators are only empowered to make orders and demands of parties to the extent that the rules governing that arbitration allow.⁹⁸ While arbitrators can typically request production of documents directly related to the legal matter at issue from either party, documents pertaining to a party’s private finances may fall beyond their reach.⁹⁹

⁹⁴ See, e.g., INT’L CHAMBER OF COM., *supra* note 67, arts. 11, 14 (requiring that arbitrators be independent and impartial to all parties in the arbitration and providing for procedures for challenging the appointment of an arbitrator on an alleged lack of independence and impartiality); U.N. COMM’N ON INT’L TRADE L., *supra* note 65, arts. 11–13 (requiring proactive disclosure by appointed arbitrators of “any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence” and providing grounds for removal of an arbitrator for violation thereof).

⁹⁵ See MOSES, *supra* note 1, at 141–47 (explaining potential conflicts of interest risks for arbitrators). For example, arbitrators who come from private practice may be more likely to have connections to large firms and multinational corporations, making it more difficult to fully check for all possible conflicts than a career judge whose personal life and holdings are more regularly scrutinized. See *id.*

⁹⁶ See Moseley, *supra* note 80, at 1189–90.

⁹⁷ INT’L BAR ASS’N, *supra* note 93, at 16.

⁹⁸ See *supra* note 63 and accompanying text.

⁹⁹ See generally Pelin Baysal & Bilge Kağan Çevik, *Document Production in International Arbitration: The Good or the Evil?*, KLUWER ARB. BLOG (Dec. 9, 2018), <https://arbitrationblog.kluwerarbitration.com/2018/12/09/document-production-in-international-arbitration-the-good-or-the-evil/> [https://perma.cc/M5W5-L9L5] (discussing a case where a party submitted financial expert reports to the arbitrators but not all the documents those experts reviewed, and a court ultimately nullified the award).

Recent changes to the guiding rules of various international arbitral institutions acknowledge the existence and potential impacts of third-party funding on arbitral proceedings and take steps toward regulating disclosure in such funding arrangements.¹⁰⁰ These rules generally require parties receiving funding to disclose the presence and identity of the funder as soon as the funding agreement is established in order to give the tribunal and opposing party adequate warning of the potential for conflict.¹⁰¹ In ad hoc international commercial arbitrations in which the arbitral agreement is the primary controlling document, parties are free to establish their own guidelines for whether to permit third-party funding and, if so, what the disclosure requirements will be.¹⁰² If the losing party does not pay, however, and court enforcement is sought, an award resulting from an ad hoc arbitration using third-party funding may still be vulnerable to later issues, potentially from an undiscovered conflict of interest or a public policy conflict with the laws of the jurisdiction where enforcement is sought.¹⁰³

Scholars' opinions vary on how much parties must disclose to ensure thorough conflicts checks and fair dealings.¹⁰⁴ Some urge diligence about early disclosure of third-party funding to detect potential conflicts of interest given the risk of an arbitral award being invalidated on conflict grounds.¹⁰⁵ Others warn that because of the inherent sensitivity and strategic value of information present in most third-party funding agreements, disclosure requirements unfairly disadvantage the funded party by granting undue access to tactical aspects of their case.¹⁰⁶ For unifying legislation to adequately address the risks associated with

¹⁰⁰ See, e.g., *Admin. Res. 18/2016: Recommendations Regarding the Existence of Third-Party Funding in Arbitrations Administered by CAM-CCBC*, CTR. FOR ARB. & MEDIATION CHAMBER COM. BRAZ.-CAN. (July 20, 2016), <https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/administrative-resolutions/ar-18-2016-recommendations-regarding-the-existence-of-third-party-funding-in-arbitrations-administered-by-cam-ccbc/> [https://perma.cc/C4UD-MAMK]; CHINA INT'L ECON. & TRADE ARB. COMM'N, INTERNATIONAL INVESTMENT ARBITRATION RULES art. 48 (2024); H.K. INT'L ARB. CTR., ADMINISTERED ARBITRATION RULES art. 44 (2018).

¹⁰¹ See, e.g., CHINA INT'L ECON. & TRADE ARB. COMM'N, *supra* note 100, art. 48; H.K. INT'L ARB. CTR., *supra* note 100, art. 44.

¹⁰² See MOSES, *supra* note 1, at 10.

¹⁰³ See *supra* notes 70–75 and accompanying text; *infra* note 131 and accompanying text. For an overview of fourteen major commercial jurisdictions' legal stances on third-party funding, see *Jurisdiction Guide to Third Party Funding in International Arbitration*, PINSENT MASONS (May 7, 2021, 12:37 PM), <https://www.pinsentmasons.com/out-law/guides/third-party-funding-international-arbitration> [https://perma.cc/38KX-WFN9].

¹⁰⁴ Compare Barnett et al., *supra* note 11 (“Disclosure and transparency seek to avoid conflicts of interest between an arbitral tribunal and the parties (or any related parties, including funders), thereby ensuring the enforceability of an award.”), with Dodge et al., *supra* note 17 (“[D]isclosure of details of the funding agreement provides an unfair advantage to the non-funded party, creating an unbalanced position that arbitrators and arbitral institutions should avoid.”).

¹⁰⁵ See Barnett et al., *supra* note 11.

¹⁰⁶ See Dodge et al., *supra* note 17.

third-party dispute resolution funding, it must carefully titrate the appropriate balance of disclosure to detect conflicts of interest without exposing overly sensitive confidential information.

The primary consequence threatened by conflicts stemming from inadequate disclosure of third-party funding agreements is the potential to taint, and ultimately weaken the enforceability of, the arbitral award.¹⁰⁷ If, after a final award has been rendered, it is discovered that an arbitrator's impartiality was undermined, that is typically grounds for nullifying or setting aside the award.¹⁰⁸ In international arbitration, awards are granted at the location where the arbitration takes place, which is often a neutral forum.¹⁰⁹ To collect their payment, prevailing parties generally must bring that award to the jurisdiction where the losing party's assets are based.¹¹⁰ If the losing party is less than fully compliant in handing over what is owed, collecting the judgment may require enforcing the award with the strength of a judgment from that nation's courts¹¹¹—which can only be accomplished if the sanctity and enforceability of an award have been maintained.

Once an arbitral tribunal has rendered its award and finished its duties, it becomes *functus officio*¹¹² and loses all of its legal power.¹¹³ After this point, tribunals are generally only capable of reconvening within a limited time period to clarify or correct ministerial errors.¹¹⁴ Once that period has passed, generally only a court-ordered remand may compel further duties by the tribunal and cannot require a substantively changed ruling.¹¹⁵ Arbitral awards are therefore quite final

¹⁰⁷ See Alexander J. Bělohávek, *Procedural Irregularities and Arbitrator Misconduct During Proceedings*, in THE CAMBRIDGE HANDBOOK OF JUDICIAL CONTROL OF ARBITRAL AWARDS 54, 62 (Larry A. DiMatteo et al. eds., 2021).

¹⁰⁸ See, e.g., 9 U.S.C. § 10(a) (“[A U.S. court] may make an order vacating the award . . . where there was evident partiality or corruption in the arbitrators”); New York Convention, *supra* note 70, art. V, ¶ 1 (allowing national courts of state parties to the Convention to refuse recognition and enforcement of a foreign arbitral award if a party demonstrates that the composition of the arbitral tribunal or procedure “was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place”).

¹⁰⁹ MOSES, *supra* note 1, at 51–52. Many international commercial arbitrations occur in locations where large arbitral institutions have been set up, typically in places known as centers for international commerce such as London, Hong Kong, and Singapore. See *id.* at 12–14.

¹¹⁰ See *id.* at 226–27.

¹¹¹ See *supra* notes 70–75 and accompanying text.

¹¹² *Functus officio* is Latin for “having performed his or her office,” and is used in legal contexts to mean “without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.” *Functus Officio*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹¹³ MOSES, *supra* note 1, at 202–03.

¹¹⁴ *Id.* at 213–14.

¹¹⁵ See *id.* at 214–15; see also *T. Co. Metals LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 342–43 (2d Cir. 2010) (holding that a *functus officio* arbitral panel may reconvene after an award

once rendered, so a prevailing party has few options for redress if a potential conflict that renders the award unenforceable is discovered after the award is signed.¹¹⁶

If the presence of a third-party funder is not discovered until after an arbitral tribunal has become *functus officio*, foreign courts may find a conflict of interest that prevents them from enforcing the tribunal's judgment.¹¹⁷ Unlike court judgments, which can be enforced in their respective nations without secondary consideration, private international commercial arbitrations do not automatically carry the force of law;¹¹⁸ the independence and impartiality of an arbitral tribunal are key to ensuring the legitimacy of the arbitral process and the ultimate enforceability of the award.¹¹⁹ It is therefore important that participants in arbitration receiving aid or funding from uninvolved third parties initially disclose at least the presence of the funder so that the arbitral panel can make necessary adjustments to the composition of the tribunal.

B. *The Risks of Too Much Disclosure: Unfair Tactical Advantages and Jurisdictional Futility*

The 2022 amendments to the ICSID Rules allow arbitrators to not only require parties to disclose the presence and identity of potential funders but also to disclose the funding agreement itself.¹²⁰ Some foresee negative consequences of the amendments arising from a disclosure scope that is now too broad.¹²¹ Because funding agreements are made to specifically fit each potential recipient's needs based on their financial situation and the nature of their case, they can contain potentially sensitive

has been rendered to correct clerical mistakes or mathematical errors, and may only reconvene to reinterpret the record or modify any more substantive conclusion if the parties have agreed to grant the arbitrator further authority).

¹¹⁶ See MOSES, *supra* note 1, at 216–24.

¹¹⁷ See Rachel Howie & Geoff Moysa, *Financing Disputes: Third-Party Funding in Litigation and Arbitration*, 57 ALTA. L. REV. 465, 492–96 (2019) (discussing how delayed or absent disclosure of the presence of a third-party funder can constitute a conflict of interest, causing enforcement issues for the resulting award); see also Ridhima Sharma, *Third Party Funding in International Commercial Arbitration*, 12 NAT'L U. ADVANCED LEGAL STUD. L.J. 61, 70–71 (2018) (examining Singaporean arbitration law, which requires third-party funders to follow disclosure regulations or otherwise waive their ability to enforce their rights).

¹¹⁸ See MOSES, *supra* note 1, at 1–3.

¹¹⁹ See Howie & Moysa, *supra* note 117, at 492–96.

¹²⁰ INT'L CTR. FOR SETTLEMENT OF INV. DISPS., *supra* note 16, at r. 14(4) (“The Tribunal may order disclosure of further information regarding the funding agreement and the non-party providing funding pursuant to Rule 36(3).”). These amendments mark the fourth time the Rules have been updated and represent the most extensive changes to date. *ICSID Rules and Regulations Amendment*, INT'L CTR. FOR SETTLEMENT OF INV. DISPS. (July 1, 2022), <https://icsid.worldbank.org/resources/rules-amendments> [<https://perma.cc/92DH-97WP>].

¹²¹ See, e.g., Dodge et al., *supra* note 17.

information, such as frank—and potentially damaging—internal assessments of the merits of the case or confidential communications.¹²² Requiring a party to share the contents of such an agreement with the arbitral tribunal and the opposing party therefore presents a large privacy risk for funders and funded parties.¹²³ The information may bear so specifically on questions related to the merits of the dispute that the risks of bias or strategic unfairness persist even if disclosure is limited to only the arbitrators.¹²⁴ Because funding agreements typically arise only after lengthy negotiations between the litigant and the funder regarding the perceived merits of the case, an agreement document containing these assessments may irrevocably alter the ability of the arbitrator to consider the merits without bias.¹²⁵

Rules that extend as far as these amendments also raise potential procedural and administrability concerns across jurisdictions. Because commercial arbitration is a private method of law, its provisions for confidentiality and disclosure must always bow to legal requirements coming from sources of law carrying governmental authority.¹²⁶ Prior to the adoption of the amendments, ICSID recognized in its Working Papers that information regarding a funding agreement may be entitled to protection from disclosure in certain jurisdictions as confidential business information, under attorney-client privilege, or “otherwise confidential.”¹²⁷ In cases where binding state law in the seat of the arbitration prevents the disclosure of certain items or, conversely, requires access to documents meant to be kept secret, arbitral rules would have to defer to the relevant state law, creating potential jurisdictional inequities and unfairness in their application.¹²⁸ In an international dispute

¹²² See *id.*

¹²³ See *id.*; INT’L CTR. FOR SETTLEMENT OF INV. DISPS., *supra* note 18, at 279.

¹²⁴ Dodge et al., *supra* note 17 (“The danger that a funding agreement will inappropriately impact an arbitrator’s assessment of a case means that even *in camera* review of funding agreements should not be required absent compelling circumstances.”).

¹²⁵ See *id.*

¹²⁶ See MOSES, *supra* note 1, at 57–58 (“Even if the parties agree on confidentiality provisions, these provisions may be overridden if there is a court challenge.”); see also AM. ARB. ASS’N, DRAFTING DISPUTE RESOLUTION CLAUSES: A PRACTICAL GUIDE 32 (2013), https://www.adr.org/sites/default/files/document_repository/Drafting%20Dispute%20Resolution%20Clauses%20A%20Practical%20Guide.pdf [<https://perma.cc/57ME-RGNT>] (“Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.” (emphasis added)).

¹²⁷ INT’L CTR. FOR SETTLEMENT OF INV. DISPS., *supra* note 18, at 279.

¹²⁸ See MOSES, *supra* note 1, at 57–58. For example, communications between an in-house counsel and her employer or client are protected by the doctrine of attorney-client privilege in the United States, but they are *not* protected by its E.U. analog, “legal professional privilege.” See Jacques-Philippe Gunther, William H. Rooney, Christina Hummer & Rebecca N. Zimmer, *Beware: Legal Privilege Rules Differ Between the U.S. and the EU*, WILLKIE FARR & GALLAGHER (June 19, 2008), <https://www.willkie.com/-/media/files/publications/2008/06/>

resolution system like commercial arbitration, drafters of arbitral rules must be careful not to infringe upon the national laws of countries where they hope to operate in order to keep the playing field as fair and equal as possible.

III. CONFLICTS OF LAW REGARDING CHAMPERTY AND DISPUTE RESOLUTION FUNDING

In addition to conflicts of law associated with disclosure, varying definitions and legalities associated with champerty and dispute resolution funding can give rise to complex situations where lawyers and funders become unsure of whether their arrangements are permissible. The varying treatment of champerty in national laws can potentially result in situations where a lawyer's relationship with a client is normal and acceptable in the client's home country but illegal in the lawyer's home country.¹²⁹ A parallel scenario persists among U.S. states given the inconsistency of domestic champerty laws.¹³⁰ These problems can be mitigated by the unification of law and understanding on these topics.

A. *Variations in Champerty Laws and the Effect on Commerce and Dispute Resolution*

Nations whose laws retain older definitions of champerty that conflict with modern understandings of third-party funding create potential complications for all parties to commercial disputes involving a party from that nation. The New York Convention provides that the national courts of a country where enforcement of a foreign arbitral award is sought may refuse enforcement of that award when it is "contrary to the public policy of that country."¹³¹ The presence of a third-party funder in an arbitration would present precisely this type of public policy obstacle to enforcing that arbitration's award in a jurisdiction where champerty was illegal.¹³² These "holdout" nations thus present roadblocks even

beware--legal-privilege-rules-differ-between-the___/files/legalprivilegerulesdifferbetweenusand-eupdf/fileattachment/legalprivilegerulesdifferbetweenusandeu.pdf [https://perma.cc/Q3SX-FEU4].

¹²⁹ See *infra* Section III.A.

¹³⁰ See *infra* Section III.B.

¹³¹ New York Convention, *supra* note 70, art. V(2)(b).

¹³² See MOSES, *supra* note 1, at 219–20. See generally Hussein Haeri, Clàudia Baró Huelmo & Giacomo Gasparotti, *Third-Party Funding in International Arbitration*, GLOB. ARB. REV. (Dec. 30, 2022), <https://globalarbitrationreview.com/guide/the-guide-ma-arbitration/4th-edition/article/third-party-funding-in-international-arbitration> [https://perma.cc/GG4H-FMUM] (discussing how third-party funding can be found contrary to public policy in common law and civil law jurisdictions). For example, punitive damages may be granted in arbitration under U.S. law but may not in many civil law jurisdictions; if one took such an arbitral award granting punitive damages rendered in the U.S. and sought its enforcement in one of those foreign jurisdictions, it

when they are not the seat of the arbitration but merely the location where awarded assets are sought.¹³³

Nations like Mexico and Serbia, whose laws fail to speak directly to the legality of champerty and third-party funding, create situations where counsel entering into disputes involving a party from that nation must seek out alternative indicators of that nation's public policy to predict whether the presence of third-party funding will render an award unenforceable.¹³⁴ Other jurisdictions maintain legal prohibitions on champerty but rely on judge-made rules or narrow statutory amendments carving out specific allowances for certain types of third-party litigation and arbitration funding, such as Hong Kong and New Zealand.¹³⁵ Ireland, among the fiercer holdouts, maintains legal prohibitions on champerty and maintenance for any potential funder who lacks a personal stake in the dispute, meaning no uninvolved large for-profit funding entity may lend funding to a party in an Irish legal dispute.¹³⁶ In an increasingly globalized world of open international commerce, variations in the legality of third-party dispute resolution funding present obstacles to reliability and chill commercial transactions with entities from certain nations compared with others.

B. *Negative Effects on U.S. Interests Resulting from Conflicts in Legal Treatment of Champerty and Funding Relationships*

The hazardous landscape of champerty laws in the United States presents great obstacles to foreign lawyers and firms looking to partner with U.S. enterprises and may push businesses to look elsewhere for

would likely be refused by that jurisdiction's courts as contrary to public policy. MOSES, *supra* note 1, at 209–10.

¹³³ See, e.g., MOSES, *supra* note 1, at 243–44 (describing how a Chinese court declined to enforce an arbitral award for monies owed to a heavy metal band because their music was deemed “against ‘national sentiments,’ and accordingly, contrary to the social and political interests [of China]”).

¹³⁴ See Paloma Castro, *In Review: Third Party Litigation Funding in Mexico*, LEXOLOGY (Dec. 8, 2022), <https://www.lexology.com/library/detail.aspx?g=eced1332-2c5b-46e0-ac26-abc0714caa6c> [<https://perma.cc/W66V-YSCN>]; Sima Živulović, *Admissibility of Third-Party Funding in Arbitration Proceedings in Serbia: A Search for a Definitive Answer*, KLUWER ARB. BLOG (Aug. 8, 2022), <http://arbitrationblog.kluwerarbitration.com/2022/08/08/admissibility-of-third-party-funding-in-arbitration-proceedings-in-serbia-a-search-for-a-definitive-answer/> [<https://perma.cc/73TB-2HZT>].

¹³⁵ See Irene Lee Wing Yun, *In Review: Third Party Litigation Funding in Hong Kong*, LEXOLOGY, <https://www.lexology.com/library/detail.aspx?g=a1afe95b-0aed-432e-842b-3383d6d5a872> [<https://perma.cc/6LTA-HHP5>]; Jason Geisker & Simon Gibbs, *In Review: Third Party Litigation Funding in New Zealand*, LEXOLOGY (Dec. 8, 2022), <https://www.lexology.com/library/detail.aspx?g=24bc9642-572d-4950-b2c0-0df19367503d> [<https://perma.cc/X686-WZHE>].

¹³⁶ See Colin Monaghan, *Dispute Resolution Update: Third Party Litigation Funding in Ireland*, MASON HAYES & CURRAN (Feb. 24, 2021), <https://www.mhc.ie/latest/insights/dispute-resolution-update-third-party-litigation-funding-in-ireland> [<https://perma.cc/JTB4-FUUV>].

their international commercial needs. Imagine a lawyer representing a U.K. businessperson in arbitration for a dispute with a U.S. corporation that is incorporated in New Jersey, maintains its principal place of business in New York, and keeps the majority of its assets in California. How should that lawyer advise her client if the client seeks to secure funding from a U.K. dispute-resolution-funding firm? Will the funder need to be disclosed at the outset? Will the presence of the funder render the award unenforceable depending on where the client may need to seek enforcement to obtain the assets?

Under the present system, it is essentially impossible for the lawyer to give coherent advice to her client. In 2021, the U.S. District Court for the District of New Jersey adopted new local rules requiring proactive disclosure by parties of any third-party funding arrangement within thirty days of filing.¹³⁷ Conversely, since 2019, several federal district courts in California have held that parties are *not* entitled to discovery of information regarding an opposing party's funding arrangement with a third party.¹³⁸ New York has codified champerty and so bars funding arrangements by statute, but maintains statutory carveouts for transactions above a value threshold, manifesting a likely public policy opposition to arbitral awards touched by third-party funding—except in certain circumstances.¹³⁹

Perhaps not surprisingly, in light of this confusion, the United States has lagged compared with the United Kingdom, which has led the way into the modern era of third-party funding for litigation and arbitration.¹⁴⁰ From its formal abolishment of the doctrines of champerty and maintenance in the Criminal Law Act 1967¹⁴¹ to its emerging culture of widespread acceptance of funding, the United Kingdom has driven the industry forward and seen payoffs: a boom in its litigation finance

¹³⁷ See D.N.J. Civ. R. 71.1 (requiring parties to disclose “information regarding any person or entity that is not a party and is providing funding for some or all of the attorneys’ fees and expenses for the litigation on a non-recourse basis in exchange for (1) a contingent financial interest based upon the results of the litigation or (2) a non-monetary result that is not in the nature of a personal or bank loan, or insurance”).

¹³⁸ See *MLC Intell. Prop., LLC v. Micron Tech., Inc.*, No. 14-CV-03657-SI, 2019 WL 118595, at *1–2 (N.D. Cal. Jan. 7, 2019) (order denying discovery), *aff’d*, 10 F.4th 1358 (Fed. Cir. 2021); Kenneth Harmon, *California’s Evolving Views on Disclosure of Litigation Funding*, LEXSHARES (Oct. 4, 2021), <https://www.lexshares.com/resources/california-litigation-funding-disclosure> [<https://perma.cc/93DL-WZG6>] (“In contrast [to the New Jersey Rule], state and federal courts in other states have generally leaned in the opposite direction, rejecting attempts to discover litigation funding-related documents on relevance grounds or in recognition of work-product protections.”). However, two California district courts have “local rules requiring disclosure of non-parties with a financial interest in the case at the inception of civil litigation.” Harmon, *supra* note 138.

¹³⁹ See *supra* note 23 and accompanying text.

¹⁴⁰ See Trusz, *supra* note 15, at 1661.

¹⁴¹ Criminal Law Act 1967, c. 58 (Eng. & Wales).

sector.¹⁴² The United Kingdom is projected to remain at the helm of the litigation funding market for the foreseeable future.¹⁴³

On the international stage, nations are expected to put forth a sole organ which can speak on behalf of that nation with a single voice and allow it to be treated as a unified entity.¹⁴⁴ For federalized nations, this sole organ comes from the central federal government;¹⁴⁵ in the United States's case, the executive branch usually occupies that role.¹⁴⁶ However, without unifying law in the United States on the question of third-party dispute resolution funding, the external perception of the United States's legal stance becomes an amalgamation of state laws.¹⁴⁷

The Framers foresaw the commercial problems that would arise from divergent laws among the several states and accordingly granted Congress the all-important Commerce Clause power to regulate commerce with other countries and between the states.¹⁴⁸ The Supreme Court has long held that Congress's ability to legislate to control interstate commerce is singular, striking down state laws which step into that regulatory sphere.¹⁴⁹ The Court has found state laws violated the exclusive purview of Congress even where no federal law yet existed,

¹⁴² See *supra* notes 6–10 and accompanying text.

¹⁴³ *EU and UK Market Are Set to Capture 15.8% of Global Litigation Funding, Poised for Strongest Growth Worldwide*, LITIG. FIN. J. (Oct. 18, 2022), <https://litigationfinancejournal.com/eu-and-uk-market-are-set-to-capture-15-8-of-global-litigation-funding-poised-for-strongest-growth-worldwide/> [<https://perma.cc/4LLF-HNQ3>] (“The United Kingdom is set to be the biggest single market contributor [in the next five years], with annual investment potential reaching USD 1bn.”).

¹⁴⁴ See Montevideo Convention on the Rights and Duties of States art.2, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 (“The federal state shall constitute a sole person in the eyes of international law.”). The Montevideo Convention is widely accepted as codifying customary international law on statehood and thus applying beyond its signatories to all subjects of international law. See Timothy Meyer, *Codifying Custom*, 160 U. PA. L. REV. 995, 1036 (2012); Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403, 413–16 (1999).

¹⁴⁵ See Edward L. Rubin, *The Role of Federalism in International Law*, 40 B.C. INT'L & COMPAR. L. REV. 195, 204 (2017) (“[A]llowing one nation to deal with subsidiary units of another on the basis of the fact that the subsidiary possesses a decision-making role would in effect dissolve the nation-state as the unit of international relations . . .”).

¹⁴⁶ See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936) (establishing the president of the United States as the “sole organ” of the nation's federal government in the field of international relations).

¹⁴⁷ See Korchin et al., *supra* note 19 (presenting an overview of the myriad legal factors and potentially applicable rules in the United States that a foreign lawyer must consider when approaching third-party funding).

¹⁴⁸ U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . .”).

¹⁴⁹ This has come to be known as the “Negative Commerce Clause” or “Dormant Commerce Clause” doctrine. See, e.g., *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557, 576–77 (1886) (striking down an Illinois state statute which regulated interstate commercial and passenger trains); *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 678 (1981) (invoking the dormant

reflecting a preference for a uniform federal standard over a patchwork of state laws.¹⁵⁰

Today, there is a similar need for a uniform national standard on third-party dispute resolution funding, and Congress should use its power to unify American law on the topic. Without such a unification, the landscape of U.S. law on champerty and third-party dispute resolution funding is a mess of changes, amendments, carveouts, and often direct contradictions.

IV. A POTENTIAL SOLUTION: UNIFICATION OF U.S. FEDERAL LAW ON CHAMPERTY AND THIRD-PARTY FUNDING IN LITIGATION AND ARBITRATION

The United States has the power to solve these conflicts of laws and disclosure disagreements and help protect U.S. trade interests. Congress should pass unifying legislation which abolishes the torts of maintenance and champerty and standardizes disclosure requirements for third-party dispute resolution funding. Such an act would homogenize the American legal landscape for litigation funding and clarify U.S. public policy on the matter, signaling to the international community that U.S. courts would not resist enforcing arbitral awards where funding was used and ensuring equitable dispute resolution when transacting with U.S. entities.

Congress has made attempts in the past to address third-party dispute resolution funding but has fallen short of adequate solutions to the several problems currently facing the United States. The latest proposed legislation was the Litigation Funding Transparency Act,¹⁵¹ which was introduced most recently in 2021.¹⁵² The Act had been introduced twice before, in 2018¹⁵³ and in 2019,¹⁵⁴ and failed to pass both times;¹⁵⁵ the 2021 attempt was referred to subcommittee in October of 2021, where it

commerce clause in invalidating an Iowa state law which burdened interstate commerce in its inconsistency with other states' regulations and federal interests).

¹⁵⁰ See, e.g., *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 783 (1945) (striking down an Arizona statute regulating train cars on interstate railways for conflicting with Congress's Commerce Clause power even absent any extant applicable federal law due to the belief that a uniform federal standard would better solve the issue).

¹⁵¹ H.R. 2025, 117th Cong. (2021).

¹⁵² *Id.*

¹⁵³ S. 2815, 115th Cong. (2018).

¹⁵⁴ S. 471, 116th Cong. (2019).

¹⁵⁵ See Stephanie Spangler & Dai Wai Chin Feman, *How Courts Are Shaping Disclosure of 3rd-Party MDL Funding*, LAW360 (Apr. 16, 2020, 5:39 PM), <https://www.law360.com/articles/1264346/how-courts-are-shaping-disclosure-of-3rd-party-mdl-funding> [https://perma.cc/7WJM-BCLM].

to privileged information and irreparably biasing factfinders.¹⁶³ Instead, the proposed unifying legislation should contain a full description of what information should be present in the signed agreement that is disclosed to the court and what information should be kept protected and confidential.

As a guiding principle, what is disclosed to the court should be enough information to know who is involved and has a stake in the dispute, and anything that might implicate conflicts of interest, but nothing that includes privileged information. The legislation should define “funding agreement” to include the identity of the funding entity as well as any parent, subsidiary, or partner entities attached to that funder that would stand to gain from a successful outcome in the funded case. This way, all parties can be sure that there are no connections through which the factfinder might be financially motivated to have the case come out a certain way or any other avenue by which a funder might exert undue influence over the proceedings.¹⁶⁴ However, the legislation should clarify that any information which is privileged under U.S. law—or, in cases involving foreign parties, privileged under the national law of the foreign party’s home country—must not be included in the funding agreement.¹⁶⁵ The agreement should also be required to exclude any information pertaining to the funder’s or the funded parties’ assessments of the merits of the case to avoid any potential bias or prejudice in the adjudication of the case.¹⁶⁶ By striking this balance, the legislation can ensure that arbitrators and courts have enough information upfront to ward off conflicts of interest and maintain the integrity of the proceedings without disadvantaging either party in a dispute.

Whether or not this specific legislative proposal is adopted, the field of third-party dispute resolution funding demands closer regulatory scrutiny overall. Last year, Sysco Corporation, a multinational restaurant supply firm, used litigation funding from Burford Capital to bring antitrust suits against certain pork and poultry producers, but Sysco ended up suing Burford for improperly intervening in the lawsuit and blocking attempted settlements that Burford believed were too low.¹⁶⁷ The parties eventually settled and dropped their claims.¹⁶⁸

¹⁶³ See *supra* Section II.B.

¹⁶⁴ See *supra* Section II.A.

¹⁶⁵ See *supra* Section II.B.

¹⁶⁶ See *supra* Section II.B.

¹⁶⁷ *In re Pork Antitrust Litig.*, No. 18-CV-1776, 2024 WL 511890, at *2–4 (D. Minn. Feb. 9, 2024) (order denying substitution of parties); see Mike Leonard & Justin Wise, *Sysco Accuses Burford Capital of Meddling in Antitrust Deals (I)*, BLOOMBERG L. (Mar. 9, 2023, 5:11PM), <https://news.bloomberglaw.com/business-and-practice/sysco-accuses-burford-capital-of-meddling-in-antitrust-deals> [<https://perma.cc/DDG7-QRDQ>].

¹⁶⁸ See Emily R. Siegel, *Burford and Sysco End Legal Dispute Over Antitrust Claims*, BLOOMBERG L. (June 28, 2023, 7:15 PM), <https://news.bloomberglaw.com/business-and-practice/burford-and-sysco-end-legal-dispute-over-antitrust-claims> [<https://perma.cc/8GJC-RT9X>].

Although never decided on the merits, these alleged actions taken by a funding entity represent a starkly negative example of the type of intermeddling by third parties that the law seeks to prevent. This kind of improper behavior further reinforces the need for unifying legislation and more detailed oversight in this field to both protect litigants and arbitral parties and stabilize the legal footing of the industry.

CONCLUSION

Arbitration as a means of international commercial dispute resolution is a rapidly growing field, and third-party funding appears to be establishing itself as a permanent component. The increasingly outdated doctrines of champerty and maintenance present obstacles to progress, and the United States should abolish these doctrines in its national law to avoid falling behind. Through unifying federal legislation that abolishes these doctrines and directly regulates third-party dispute resolution funding, the United States can ensure that it remains a valuable center for global trade and commerce into the next century.

That said, there remain valid criticisms regarding the practice of third-party dispute resolution funding and questions for which there do not yet exist satisfying answers. Policymakers and practitioners should remain vigilant of the possible negative side effects of the funding industry and keep a watchful eye for warning signs, such as a rise in frivolous litigation or evidence of abuses of power and wealth. The unification of champerty law proposed by this Note, however, represents a measured and necessary first step toward modernizing U.S. law, avoiding oppressive conflicts of law issues, and creating a more efficient international framework for dispute resolution, which will help the United States take a stronger position in the global industry of dispute-resolution funding.

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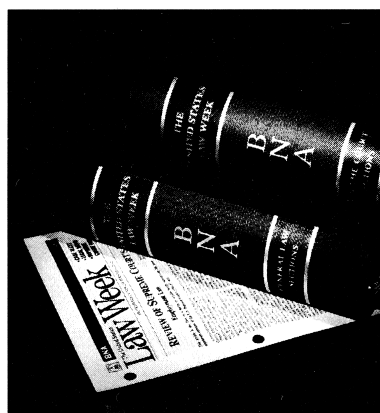
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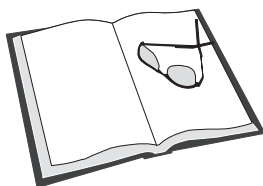
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