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MAKING THE CASE TO AVOID ENTERING THE *EBAY* MARKETPLACE: A RECOMMENDED ANALYTICAL FRAMEWORK FOR EVALUATING REQUESTS FOR PERMANENT INJUNCTIONS IN VIRGINIA

David W. Lannetti[*]
Jennifer L. Eaton[**]

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[*] Judge, Fourth Judicial Circuit of Virginia, and Adjunct Professor, Regent University School of Law and College of William & Mary School of Law. The views advanced in this Article represent commentary "concerning the law, the legal system, [and] the administration of justice" as authorized by Virginia Canon of Judicial Conduct 4(B) (permitting judges to "speak, write, lecture, teach," and otherwise participate in extrajudicial efforts to improve the legal system). These views therefore should not be mistaken for the official views of the Norfolk Circuit Court or this author's opinion as a circuit court judge in the context of any specific case.

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> *[W]hilst the role of judicial discretion involves a choice and is essential to ensure that justice is achieved, if the resort to justice is to be defensible and predictable, there needs to be identifiable principles or recognised factors to guide that discretion and to ensure that like cases are treated alike, for the benefit of the parties, their advisers and, if the case goes to trial, the judge.*[1]

INTRODUCTION

Injunctions serve a unique and vital role in the American legal system, but the inherent flexibility and imprecision of equitable relief, combined with a dearth of statutory guidance, make defining and applying a highly structured test to a permanent injunction request impractical. Over time, judicial injunctive analyses concentrated on the irreparability of injury and on a balancing of the hardships associated with the requested injunction;[2] courts sometimes also looked at ripeness, how the injunction would affect the public interest, and the scope of the injunctive order.[3] Against this backdrop, the United States Supreme Court in 2006 decided *eBay Inc. v. MercExchange, L.L.C.*, a patent dispute case, wherein the Court established a new four-factor permanent injunction formulation that it declared was based on well-established equitable principles.[4] This new analytical tool, which the Court characterized as a "test," was quickly adopted by federal courts—and some state courts—across the country in contexts well beyond patent litigation.[5] Despite its almost universal acceptance in the federal arena, the *eBay* test is both imprecise and incomplete. Although Virginia has not yet specifically endorsed or rejected the *eBay* test,[6] there is room for courts in the Commonwealth to benefit from the lessons offered by courts and commentators and to adopt a variation of the injunctive framework from the now infamous case.

Historically a product of courts of equity, the injunction came to be described as an extraordinary judicial remedy that ordered a specific party to act, or refrain from acting, in a certain way when an award of money damages from a court of law was inadequate.[7] The Chancellor, who

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[1] Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L.J. 1397, 1407–08 (2015) (quoting Graham Virgo, *Whose Conscience? Unconscionability in the Common Law of Obligations*, *in* DIVERGENCES IN PRIVATE LAW 293, 310 (Andrew Robertson & Michael Tilbury eds., 2016)).

[2] *See infra* text accompanying note 144; *see also* discussion *infra* Part II.C.

[3] *See infra* notes 181–82 and accompanying text.

[4] 547 U.S. 388, 391 (2006) (citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 311–13 (1982); Amoco Prod. Co. v. Gambell, 480 U.S. 531, 542 (1987)).

[5] *See infra* notes 149–60 and accompanying text.

[6] *See* discussion *infra* Part IV.

[7] *See* discussion *infra* Part II.

presided over equitable cases, was empowered to order relief that he believed was fair and just under the circumstances.[8] As was the case with most equitable remedies, the Chancellor had great adjudicatory discretion and, when appropriate, could fashion a suitable order.[9]

Virginia adopted English common law, including its injunctive relief case law, and Virginia permanent injunction law evolved with little statutory guidance. Both before and after *eBay,* Virginia movants[10] have been required to demonstrate certain elements strikingly similar to those in the *eBay* multi-factor test to justify their prayer for a permanent injunction.[11] It therefore might be tempting for a Virginia court to formally adopt the *eBay* test for Virginia permanent injunctions wholesale. Doing so, instead of using lessons learned from it to clarify and restate Virginia's injunctive formulation, would be shortsighted, as the *eBay* test and current Virginia injunctive guidance can be improved. Both inexplicably require proof of irreparable injury *and* inadequacy of damages, despite the fact that these two elements have similar origins, are often difficult to distinguish, and therefore should be treated as one factor; combining the two would foster clarity and streamline legal arguments. Additionally, the required balancing of the equities appears limited to only the hardships of the parties when other outside factors may weigh against awarding a permanent injunction. The current guidance also does not expressly examine the immediacy or likelihood of the threatened harm to determine the ripeness of a claim, nor does it evaluate the scope of the requested injunctive order.

Although permanent injunctive relief is designed to apply to a myriad of situations and is subject to the sound discretion of the court, more specific guidance is needed to better assist litigants, practitioners, and the court. Using the *eBay* test and current Virginia permanent injunction law as a starting point, a more accurate and complete analysis framework can be created. Such a construct would facilitate more logical, structured, and focused arguments when attempting to persuade a court to grant—or deny—a permanent injunction and would assist judges in consistently analyzing the appropriateness of a permanent injunction. This Article proposes such a framework.

Part I of this Article provides some general information about injunctive relief, including examples of preliminary injunctions and permanent injunctions. Part II briefly discusses the history of injunctive

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[8] *See* discussion *infra* Part II.B.

[9] *See* discussion *infra* Part II.D.

[10] In this Article, "movant" refers to the party requesting injunctive relief. The term is meant to have the same meaning as "movant," "petitioner," or "plaintiff" as used in other articles pertaining to federal and Virginia injunctions. Similarly, "non-movant" is intended to be synonymous with "respondent" or "defendant."

[11] *See* discussion *infra* Part IV.B.2.

relief, including the origin of equity courts, the concept of irreparable injury, and the historical discretion granted to the Chancellor in equity. Part III discusses the evolution of federal permanent injunction law, including applicable statutory guidance, and the development and interpretation of the four-part *eBay* test currently used by most federal courts. Part IV reviews the evolution of permanent injunctions in Virginia, including applicable statutes, reliance by some Virginia trial courts on federal preliminary injunction jurisprudence, and current Virginia permanent injunction law. Part V discusses the impact of *eBay* on both federal and state permanent injunction law. Finally, in light of Virginia not yet adopting the *eBay* test, Part VI proposes a structured analytical framework to apply when evaluating requests for permanent injunctions in the Commonwealth.

Ultimately, this Article offers multiple propositions to enhance the adjudication of permanent injunctive relief in Virginia. The authors conclude that the composition of any Virginia permanent injunction multiple-factor analysis should modify and expand both the *eBay* test and current Virginia permanent injunctive guidance, as each has room for improvement. In support of this conclusion, the authors discuss how *eBay* is imperfect and how Virginia courts can learn from those shortcomings in crafting a more accurate and complete permanent injunction test. The authors propose that the equitable framework for analyzing a Virginia permanent injunction request requires the movant to sequentially demonstrate that (1) the dispute is ripe for issuance of a permanent injunction, (2) the movant would suffer irreparable injury without the permanent injunction, (3) the balance of the equities does not preclude permanent injunctive relief, (4) the permanent injunction is not contrary to the public interest, and (5) the scope of the proposed injunctive order is not overbroad. Although the movant needs to make some showing of each of these factors for the court to even consider an injunctive order, the court must exercise its equitable discretion when evaluating each factor, especially the balancing-of-the-equities prong. This Article also provides a recommended methodology regarding how each of these factors should be analyzed. Of note, this proposed framework is not inconsistent with current Virginia permanent injunction guidance but rather coalesces and clarifies previously recognized equitable principles into a single, cohesive, and logical analysis tool.

I. INJUNCTIONS GENERALLY

The injunction, which is an equitable remedy, is a flexible judicial tool that has come to have wide-ranging applications over time.[12] Generally speaking, injunctions are in personam orders that are enforceable via the court's contempt power.[13] This, combined with the fact that equitable relief is available only after the court concludes that legal relief is inadequate, has led to the frequent statement that an injunction is an extraordinary remedy.[14]

All injunctions are designed to prevent future harm, although the injury associated with the anticipated harm may be either past or future.[15] In light of this temporal distinction and as a demonstration of the breadth of injunctive relief, injunctions can be classified as one of three types: preventive, reparative, or structural.[16] Preventive injunctions are designed to prevent future harm stemming from an injury that is anticipated but has not yet occurred, such as an order to a contractor not to cut down a tree that the movant believes is on her property.[17] The goal of reparative injunctions, by contrast, is to prevent future harm that emanates from an injury that has already taken place; an example is an injunctive order to an adjacent landowner to remove an encroachment

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[12] *See* David W. Raack, *A History of Injunctions in England Before 1700*, 61 IND. L.J. 539, 539 (1986) ("The injunction has been called the quintessential equitable remedy."). As the United States Supreme Court has opined, "Flexibility is a hallmark of equity jurisdiction." Winter v. Nat. Res. Def. Council, 555 U.S. 7, 51 (2008) (Ginsburg, J., dissenting) (citing Weinberger v. Romero Barcelo, 456 U.S. 305, 312 (1982)); *see also infra* Part II (tracing the history of injunctive relief).

[13] "One function of injunctions is to individuate the law's command, specifying its application to a particular [non-movant] in a particular situation." DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 275 (5th ed. 2019); *see also id.* at 285 ("It is an ancient maxim of equity that it acts in personam—on the person of [the non-movant].").

[14] *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (referring to "the extraordinary remedy of injunction"); *see also id.* at 311–12 ("[The injunction] is not a remedy which issues as of course or to restrain an act the injurious consequences of which are merely trifling. An injunction should issue only where the intervention of a court of equity is essential in order effectually to protect property rights against injuries otherwise irremediable.").

[15] DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 13 (1991) (noting that injunctions "aspire to prevent harm, or undo it, rather than let it happen and compensate for it").

[16] DAN B. DOBBS, LAW OF REMEDIES: DAMAGES–EQUITY–RESTITUTION 162, 164 (2d ed. 1993).

[17] *Id.* Preventive injunctions can be further divided into preventive injunctions and prophylactic injunctions based on the character of the dispute's ripeness. *See infra* note 268 and accompanying text.

from the movant's property.[18] Finally, structural injunctions consist of a series of preventive and reparative injunctions over time that attempt to address constitutionally defective existing social or political issues, such as school desegregation or prison reform.[19] Injunctions also can be classified based on whether they are providing preliminary relief—before full due process—or permanent relief.[20]

A. Preliminary Injunctions

Because preliminary injunctions—or temporary injunctions,[21] the equivalent Virginia remedy—are a form of preliminary relief, i.e., a judicial remedy granted before a full hearing on the merits, they often arise in situations in which immediate judicial action is required.[22] For

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[18] DOBBS, *supra* note 16, at 225. Of course, if the movant suffered harm prior to issuance of a reparative injunction, he will be entitled to recover any compensatory damages associated with that harm. *See* 2 CHARLES E. FRIEND & KENT SINCLAIR, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 33.02[2] (3d ed. 2017) (noting that often an injunction will be accompanied by a request for other relief so that the movant may also obtain full reparation for any injuries already suffered).

[19] *See* DOBBS, *supra* note 16, at 164 ("[Structural] injunctions are typically complex and invasive. They are likely to involve the judge in tasks traditionally considered to be non-judicial, that is, less about rights and duties and more about management."); *see also* JAMES M. FISCHER, UNDERSTANDING REMEDIES § 36.3 (3d ed. 2014) ("Structural injunctions operate on the large scale rather than the traditional, bipolar private dispute between a [movant] and a [non-movant]. Structural injunctions have come to dominate institutional reform litigation that came of age in the latter half of the twentieth century in cases involving school desegregation, prison administration, and mental health facility reform." (citations omitted)). "One way to think of structural injunctions is that they are just a collection of more specific preventive and reparative injunctions addressing a complex fact situation." LAYCOCK & HASEN, *supra* note 13, at 324. Courts typically can avoid judicial involvement in such societal evolution, citing the burden on the court associated with the ongoing supervisory role, yet sometimes they opt to spearhead change. *See infra* note 301 and accompanying text.

[20] *See* KENT SINCLAIR & LEIGH B. MIDDLEDITCH, VIRGINIA CIVIL PROCEDURE § 3.3[B] (5th ed. 2008) ("A permanent injunction reflects the court's determination of the merits of the question of injunctive relief and aims at the final disposition of the issues. Temporary [or preliminary] injunctions are issued to halt an action or proceeding for a limited period of time which the issuing court must specify in its order.").

[21] For an in-depth discussion of Virginia temporary injunctions, including a proposed "test" to evaluate related requests, see David W. Lannetti, *The "Test"—or Lack Thereof—for Issuance of Virginia Temporary Injunctions: The Current Uncertainty and a Recommended Approach Based on Federal Preliminary Injunction Law*, 50 U. RICH. L. REV. 273 (2015).

[22] KENT SINCLAIR, SINCLAIR ON VIRGINIA REMEDIES § 51-5[C], at 51-37 (5th ed. 2016) (noting that preliminary injunctive relief is available "when a [movant] needs immediate court action to avoid irreversible losses while waiting for the trial or hearing on the merits of the parties' dispute"). Federal injunction law also provides for "temporary restraining orders," which afford courts the opportunity to award preliminary relief after only an *ex parte* hearing. *See* FED. R. CIV. P. 65(b) (stating that a temporary restraining order may be issued without notice to an adverse party when certain conditions are met). Virginia has an analogous mechanism in the area of protective orders, allowing for "emergency protective

instance, a movant may seek a preliminary injunction to block votes of shareholders to approve a merger,[23] prevent the sale of a potentially dangerous product until proper testing can confirm the product is safe for public use,[24] or prevent a product manufacturer from suspending delivery to a distributor.[25] Although preliminary relief may be the extent of the movant's remedial needs in a particular case, a preliminary injunction normally serves as the foundation for a later permanent injunction.[26] Regardless, preliminary injunction jurisprudence has developed independent of permanent injunction case law.[27] This is likely because of the inherent distinctions between preliminary and permanent relief; unlike permanent injunctions, preliminary injunctions require immediate action, bypass full due process, and involve only temporary relief.[28] These differences make separate tests for granting preliminary and permanent injunctions appropriate.

Two years after *eBay* was decided, the United States Supreme Court in *Winter v. Natural Resources Defense Council* clarified the

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orders," VA. CODE ANN. §§ 16.1-253.4, 19.2-152.8 (2015 & Supp. 2019), and "preliminary protective orders," *id.* §§ 16.1-253.1, 19.2-152.9.

[23] New Iberia Bancorp v. Schwing, 664 So. 2d 784, 786 (La. Ct. App. 1995).

[24] United States v. Zen Magnets, LLC, 104 F. Supp. 3d 1277, 1278–80 (D. Colo. 2015).

[25] Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1200–01 (2d Cir. 1970) (describing movant's attempt to enjoin Ford Motor Co. from stopping deliveries to movant's car dealership after Ford suspected movant of taking advantage of Ford's warranty program).

[26] A prerequisite to filing a motion for a preliminary or temporary injunction is the filing of an underlying complaint or petition, which often seeks a permanent injunction. *See, e.g.*, SINCLAIR, *supra* note 22, § 51-1[D], at 51-7 (noting that a movant "may request a temporary injunction, *i.e.*, an injunction pendente lite to maintain the respective positions of the parties until the basic suit can be tried"). Consistent with this, one of the analysis factors in deciding whether to grant a preliminary injunction is the movant's likelihood of success on the merits of the underlying action. *See infra* note 32 and accompanying text; *see also* Esso Standard Oil Co. (P.R.) v. Freytes, 467 F. Supp. 2d 156, 161 (D.P.R. 2006) (discussing the different burdens on a movant in the "transition from preliminary injunction to permanent injunction"); Nw. Gas Ass'n v. Wash. Utils. & Transp. Comm'n, 168 P.3d 443, 451 (Wash. Ct. App. 2007) (explaining the process for obtaining an injunction as "generally progress[ing] from temporary restraining order, to preliminary injunction, to permanent injunction").

[27] *See* Lermer Ger. GmbH v. Lermer Corp., 94 F.3d 1575, 1577 (Fed. Cir. 1996) (emphasizing that preliminary injunctions and permanent injunctions are "two instruments [that] are distinct forms of equitable relief that have different prerequisites and serve entirely different purposes").

[28] *See* Lannetti, *supra* note 21, at 277–78 (noting that preliminary injunctions by definition bypass due process because they are decided prior to a full trial on the merits); *see also* FISCHER, *supra* note 19, § 31.3 ("The decision whether to grant temporary injunctive relief should favor the party with the most to lose if the court decides the request incorrectly." (citing John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978))).

long-established four-factor preliminary injunction standard.[29] Prior to *Winter*, the federal courts of appeals generally agreed with the four-factor approach but applied and analyzed those factors inconsistently.[30] In some circuits, a substantial showing of some factors allowed the court to ignore the remaining factors.[31] Consistent with prior precedent, the Supreme Court in *Winter* held that

> a [movant] seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.[32]

The specific issue in *Winter* was whether a "possibility" of irreparable injury is sufficient to satisfy the likelihood-of-irreparable harm factor, i.e., that irreparable harm is "likely."[33] The Court held that the term "likely" indicates that the movant must demonstrate "a clear showing" of irreparability and that a possibility therefore is insufficient.[34] Although reaction among the federal circuit courts after *Winter* was not uniform,[35] a plain reading of *Winter* indicates—and the Fourth Circuit Court of Appeals, which includes Virginia, subsequently held—that the *Winter* four-factor standard is a sequential analysis, requiring that the movant establish all four factors.[36]

B. Permanent Injunctions

Although permanent injunctive relief sometimes follows a related preliminary injunction, preliminary relief is not always a necessary predicate. The focus of this Article is on permanent injunctions, which are injunctive orders issued after a full hearing on the merits, e.g., a trial.[37] Permanent injunctions commonly arise, *inter alia*, in patent disputes when the prevailing patent holder, or patentee, seeks to enjoin the infringer from future violations of its patent rights to avoid the need for

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29 555 U.S. 7, 20 (2008).

30 Lannetti, *supra* note 21, at 288–89, 289 n.94.

31 *Id.* at 289–93.

32 *Winter*, 555 U.S. at 20. Other than the likelihood-of-success factor, the time frame of concern for each factor is between the preliminary injunction hearing and the full hearing on the merits, i.e., the permanent injunction trial. Lannetti, *supra* note 21, at 289.

33 *Winter*, 555 U.S. at 22.

34 *Id.*

35 *See* Lannetti, *supra* note 21, at 299, 303–10 (detailing the post-*Winter* circuit split).

36 *Id.* at 307–10.

37 FISCHER, *supra* note 19, § 33.0.

subsequent, substantially similar litigation.[38] Permanent injunctions also arise in other contexts, including in response to a successful bid protest,[39] cases involving the future exercise of property rights,[40] and, more generally, when individuals act in contravention of established contractual rights.[41]

II. A BRIEF HISTORY OF INJUNCTIVE RELIEF

Although referred to in modern case law as an "extraordinary remedy,"[42] the permanent injunction has been commonplace in some form or another since at least Roman times.[43] The invocation of equity, including injunctive relief, subsequently waxed and waned in medieval times and ultimately gained an independent foothold in the common law.[44] The equitable Court of Chancery initially complemented the Courts of Law, but an inevitable power struggle regarding which court had the final word resulted in the creation of the irreparable injury rule,

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[38] *See, e.g.*, W.L. Gore & Assocs. v. Garlock, Inc., 842 F.2d 1275, 1281–83 (Fed. Cir. 1988) (directing the district court to enter an appropriate permanent injunction to prevent a company from manufacturing or selling a patented filament). Because patent cases tend to be highly complex, costly, and time consuming, Herbert J. Hammond & Justin S. Cohen, *Intellectual Property Issues in E-Commerce*, 18 TEX. WESLEYAN L. REV. 743, 744–45 (2012), the benefit of a permanent injunction substantially limiting future litigation regarding the same subject matter preserves judicial resources as well as the parties' time and money.

[39] *See, e.g.*, Hunt Bldg. Co. v. United States, 61 Fed. Cl. 243, 280–81 (2004) (permanently enjoining the Air Force from accepting a bid because it had given preferential treatment to that bidder).

[40] *See, e.g.*, Ritchhart v. Gleason, 672 N.E.2d 1064, 1068 (Ohio Ct. App. 1996) (affirming a permanent injunction precluding unauthorized entry and continuing trespass on property); *see also* Collins v. Moran, No. 02CA218, 2004 Ohio App. LEXIS 1225, at *10–11, *13 (Ct. App. Mar. 17, 2004) (affirming a permanent injunction granting a non-exclusive right of way for ingress and egress across [the non-movant's] property).

[41] *See, e.g.*, Centennial Broad., LLC v. Burns, No. 6:06-CV-00006, 2006 U.S. Dist. LEXIS 70974, at *2, *38–39 (W.D. Va. Sept. 29, 2006) (granting a permanent injunction to preclude the non-movant from managing or controlling any AM or FM radio station as required by a non-compete agreement), *aff'd*, 254 F. App'x 977 (4th Cir. 2007).

[42] *See, e.g.*, Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982). It should be no surprise to law students or practitioners that the injunction is commonly referred to as an "extraordinary" remedy. Indeed, many civil procedure and remedies classes discuss the nature and purpose of the injunction. But it is worth noting that, in practice, some question the "extraordinary" nature of the injunction. *See, e.g.*, 4 NIMMER ON COPYRIGHT § 14.06 (2019) ("Given their antecedents in equity, preliminary injunctions are sometimes reflexively labeled an 'extraordinary remedy.' Nonetheless, in actual practice their issuance is actually ordinary, even commonplace.").

[43] Raack, *supra* note 12, at 539–41.

[44] *Id.* at 541–45.

instructing litigants that equitable relief would be available only if legal relief were inadequate.[45]

A. The Origin of Equitable Principles

In ancient Rome, the beginnings of the traditional injunction were evident in the Praetor's interdicts or, as they were sometimes called, the Praetor's edicts.[46] In the judicial context, the Praetor was a magistrate-like figure who was elected to serve as the administrator of justice.[47] For the Romans, a Praetor's interdict—from the Latin word "*interdicere*," meaning to "interpose by speech, prohibit, forbid"—was a remedy that directed and required citizens to take, or not take, certain actions.[48] These directives generally either prohibited an action, restored property to another, or required production of materials in court.[49]

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[45] In succinctly explaining the historical origins of the irreparable injury rule, Douglas Laycock observed the following:

> Equity developed in the court of chancery, which emerged in the fourteenth century, when the Chancellor began to regularize a procedure for dealing with petitions for the King's personal justice. Not surprisingly, there were intermittent complaints about this bypass of the regular courts. But the intermittent attacks on chancery did not preclude cooperation between chancery and the common law courts. Chancery was doing judicial work that the common law courts were ill-equipped to do. Gradually, the two courts reached an accommodation. Chancery would not duplicate the work of the common law courts, but it would do other judicial work that the common law courts had never done. In short, equity would take jurisdiction only if there were no adequate remedy at law. This is the origin of the irreparable injury rule.

Douglas Laycock, *The Death of the Irreparable Injury Rule,* 103 HARV. L. REV. 687, 699 (1990).

[46] JOHN ELIHU HALL, THE AMERICAN LAW JOURNAL, VOL. 5, at 271 (Baltimore, Edward J. Coale, et al. eds. 2d n.s. 1814).

[47] SHELDON AMOS, THE HISTORY AND PRINCIPLES OF THE CIVIL LAW OF ROME: AN AID TO THE STUDY OF SCIENTIFIC AND COMPARATIVE JURISPRUDENCE 45, 47 (London, Kegan Paul, Trench & Co., 1883). The history of the term "praetor" is itself long, as it stems back hundreds of years B.C. In the age of Cicero, eight Praetors were elected annually. ARTHUR HADRIAN ALLCROFT & WILLIAM FREDERICK MASOM, ROME UNDER THE OLIGARCHS: A HISTORY OF ROME, 202–133 B.C. 119 (London, Univ. Tutorial Press ed., 1892); *see also* CHARLES E. BENNETT, CICERO'S SELECTED ORATIONS: WITH INTRODUCTION, NOTES AND VOCABULARY, at xxv (1904) ("The praetors of Cicero's time were exclusively judicial officers. Like the consuls, they were elected by the *Comitia Centuriata*.").

[48] Raack, *supra* note 12, at 540 ("Interdicts were 'certain forms of words, by which the Praetor (the chief judicial magistrate of Rome) either commanded or prohibited something to be done . . . .'" (quoting 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 866 (5th ed. 1849)); *see also Interdict*, ETYMONLINE.COM, https://www.etymonline.com/word/interdict (last visited Oct. 4, 2019) (identifying the term "interdict" as originating around the 14th century with French and Latin origins).

[49] Raack, *supra* note 12, at 540 ("Interdicts of the Praetor were of three sorts: prohibitory, forbidding an act; restitutory, ordering property to be restored to a party; and

Contrary to the Latin principle of "*audi alteram partem*," i.e., let the other side be heard, an interdict could be issued at an ex parte proceeding.[50] In part because of the potential unilateral nature of the proceedings, Praetors would not ordinarily order performance with much specificity, but instead would couch their commands with vague caveats or safe harbors.[51] For instance, an interdict might have the proviso "*vi taut clam*," i.e., by force or stealth, when ordering restoration of property pursuant to a claim that the property was altered or harmed by another in a secret fashion.[52] Such a mandate required restoration of the property *if* it had been modified by force or stealth, but did not require the non-movant to take any action if—contrary to the ex parte representation—no improper conduct had occurred.[53] Most interdicts focused on possession-related issues regarding property matters.[54]

As with many judicial remedies, the stated purpose of the interdicts was largely to maintain the status quo.[55] With this goal in mind, most interdicts unsurprisingly were prohibitory—to prevent harm and preserve the way of life of the citizenry.[56] Other aims of interdicts included speed and facilitating judicial economy.[57] But issuance of interdicts was not without its shortcomings. In addition to issues associated with ex parte proceedings, such as one-sided testimony and the lack of any cross-examination, interdicts lacked a formal mechanism to raise and adjudicate defenses.[58] Any defenses to an interdict would traditionally

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exhibitory, commanding a defendant to produce something in court. Although interdicts were of three types, the prohibitory form appears to have been the most common . . . .").

[50] ERNEST METZGER, AN OUTLINE OF ROMAN PROCEDURE, ROMAN LEGAL TRADITION 16 (2013) ("The magistrate, on application, ordered a person to do something or to refrain from doing something. An inquiry of the facts was not needed for an order to issue, and there were even instances where it issued *ex parte*. This seems remarkable until we appreciate that the order was not directed at a person *per se*, but against a person who was, in fact, as he was alleged to be. What this means in practice is that a magistrate, considering an interdict, need not decide whether the plaintiff had a valid claim in law, but only whether the plaintiff was in a deserving position relative to the *alleged* position of the defendant.").

[51] *See id.* (noting that the Praetor's ability to issue nondescript orders constituted "hedging" and benefitted a party who could prove that the reality of the situation greatly differed from the facts alleged in the order).

[52] *Id.*

[53] *Id.*

[54] Raack, *supra* note 12, at 540.

[55] Max Radin, *Fundamental Concepts of the Roman Law*, 13 CALIF. L. REV. 207, 223 (1925) ("But once established the interdicts were turned very early into a means of maintaining the proprietary status quo in all cases in which a judicial determination of ownership was available.").

[56] Raack, *supra* note 12, at 540–41. Not all interdicts were akin to an injunction. ERNEST METZGER, *Actions*, *in* A COMPANION TO JUSTINIAN'S INSTITUTES 4–5 (1997). Each was case-specific, and some were used as a preliminary form of relief. *Id.*

[57] METZGER, *supra* note 50, at 16.

[58] *Id.* at 16–17.

have to be raised at trial—similar to challenges to a permanent injunction—thereby precluding quick resolution of an improperly brought interdict.[59]

B. Common Law Equity

The emergence of injunctions in the common law began in England in the mid-eleventh century.[60] Although possibly an outcropping of Roman interdicts, common law injunctions may have also been inspired by writs issued by English Kings.[61] These writs, or instructions, commanded certain procedures or actions to resolve personal disputes.[62]

When common law and chancery courts began to develop in the late fourteenth century, equitable remedies—including the traditional injunction—became more common.[63] And it was not until the origin of the Court of Chancery that the term "injunction" came into existence.[64] As in Roman times, the stated purpose of the injunction at common law was, at least in part, to maintain the status quo, and injunctions traditionally prohibited someone from acting or mandated someone to take a certain action in order to avoid a less desirable result.[65]

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[59] *Id.* at 17.

[60] MARTIN HUSOVEC, INJUNCTIONS AGAINST INTERMEDIARIES IN THE EUROPEAN UNION: ACCOUNTABLE BUT NOT LIABLE? 184–85 (Lionel Bentley et al. eds., 2017).

[61] Raack, *supra* note 12, at 541, 544 ("As noted earlier in the discussion of Roman interdicts, it is, perhaps, not possible to know with certainty if the Chancellors based injunctions on these royal orders or writs. But clearly these orders have many points of agreement with injunctions used in Chancery.").

[62] *Id.* at 542–43.

[63] *Id.* at 544–45, 550, 553–55.

[64] *Id.* at 540 ("It does not appear that the term injunction was used to describe a judicial remedy until after the Chancery became a judicial body, in the later part of the fourteenth century."). The term "injunction" comes from the Latin word "*iniunctionem*," meaning "a command." *Injunction*, ETYMONLINE.COM, https://www.etymonline.com/search?q=injunction (last visited Oct. 4, 2019).

[65] Mandatory injunctions order the non-movant to affirmatively take some action while prohibitory injunctions order the non-movant to refrain from acting. DOBBS, *supra* note 16, at 163. Historically, courts were reluctant to issue mandatory injunctions that would alter the status quo. *Id.* at 163–64. Although prohibitory injunctions are theoretically less intrusive, that normally is merely semantics; most injunctions can be converted from mandatory to prohibitory, or vice versa, simply by modifying the wording of the court order. *Id.* Professor Dan Dobbs gives the example of a non-movant who previously deposited boulders on Blackacre, real property owned by the movant. *Id.* at 163. The movant could seek a mandatory injunction ordering the non-movant to remove all boulders he deposited on the property, which would alter the status quo. *Id.* Alternatively, the movant could seek a prohibitory injunction enjoining the non-movant from continuing to trespass upon Blackacre, which might appear to maintain the status quo, but in reality would require the same action by the non-movant as the mandatory injunction. *Id.* According to Dobbs, "[i]n many situations the two kinds of injunctions are different in form, but not in purpose or effect." *Id.* To avoid encouraging sleight-of-hand wordsmithing, there appears to be no

The Court of Chancery was separate and distinct from the Courts of Law.[66] Whereas the legal courts were rooted in statute and the common law, the Court of Chancery was established to allow the King's Chancellor to deal with equitable remedies where the common law was silent or where the legal court's remedy would be inadequate to make the movant whole.[67] The Court of Chancery became known as a "court of conscience," leaving decisions to the well-reasoned judgment and instincts of the Chancellor.[68]

As the legal courts became more technical, inflexible, and formal, the Chancellor began to expand the availability of equitable remedies, thereby enlarging the chancery courts' jurisdiction.[69] Although the legal courts and the equity courts theoretically were two separate and complementary remedial paths designed to dole out relief based on different causes of action, the expanding jurisdiction of the chancery courts eventually allowed litigants to bypass the legal courts and created overlaps in available remedies for a given cause of action.[70] The chancery courts soon began staying legal proceedings and even enjoining parties who prevailed in legal courts from enforcing their judgments in order to exercise chancery jurisdiction, which became highly contentious.[71] This apparent overreach came to a head in 1616, when King James convened a commission to essentially determine the preeminent court.[72] The commission found that the Court of Chancery's actions were within its rights and that the statutes stating otherwise were not binding on the chancery courts.[73] The King entered an order approving and ratifying the commission's report, thereby validating the supremacy of the crown.[74] Although legal courts occasionally handed down subsequent decisions disagreeing with the King's order, they were not controlling.[75] A judicial

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legitimate reason for holding the burden of proof for a mandatory injunction higher than that of a prohibitory injunction. The required action—or inaction—of the proposed injunctive order can be considered in the equitable analysis without reference to a mandatory versus prohibitory distinction.

66 7 ENCYCLOPEDIA OF THE LAWS OF ENGLAND 248 (2d. ed. rev. 1907).

67 *See id.* ("The remedy by injunction was purely equitable, and was not recognized in the Courts of common law. Indeed, the jurisdiction in equity had its origins in the fact that there was either no remedy at all at law, or the remedy was imperfect and inadequate.").

68 Raack, *supra* note 12, at 570 ("Chancery was still largely a court of conscience; the Chancellor had almost unfettered discretion to grant an appropriate remedy as his conscience dictated.").

69 LAYCOCK, *supra* note 15, at 22.

70 *Id.* at 19–20, 22.

71 Raack, *supra* note 12, at 572–80.

72 *Id.* at 579–80.

73 *Id.* at 580–82.

74 *Id.* at 582.

75 *Id.* at 584–85 ("There were decisions in the courts of law which reflected this disagreement with the King's decision. . . . But [these cases] were . . . merely of 'academic

hierarchy had been recognized, at least with respect to which court had the final say, setting the foundation for the irreparable injury rule: equitable relief is available only *after* legal relief is found to be inadequate.[76] In other words, a preference for legal remedies was established.[77]

With the chancery courts came the notion of equitable discretion.[78] But broad authority led to uncertainty and inconsistent application of injunctions.[79] The trend of free-wheeling equity continued beyond the formation and subsequent independence of the American colonies into the late nineteenth century, when the English court system was reorganized via the Supreme Judicature Act.[80] The Act appeared to finally offer some guidance to the Chancellor—albeit limited—regarding the circumstances under which injunctions should be granted.[81] According to the Act, "an injunction may be granted . . . in all cases in which it shall appear to the Court to be just or convenient that such order shall be made."[82] Although veiled in terms of a test or standard, the statutory language continued to clothe the judiciary with substantial discretion.[83] Issuing injunctions when, in its discretion, the Court of Chancery determined them to be "just" or "convenient" was virtually a blank check to grant relief without

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interest,' and were not controlling, since Chancery continued to enjoin parties from enforcing judgments.").

[76] *See, e.g.*, John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 530 (1978) ("When the right enforced by injunction was a right at law, enforceable by an action for damages, equity had no ground for intervention unless the damage remedy was inadequate. Irreparable injury thus became a source of equity jurisdiction in preliminary as well as final adjudications."); *see also* LAYCOCK, *supra* note 15, at 11 ("The irreparable injury rule creates a hierarchy of remedies; it says that legal remedies are preferred over equitable remedies.").

[77] LAYCOCK, *supra* note 15, at 6 ("The irreparable injury rule is stated as a rule of general applicability, for choosing between legal and equitable remedies, expressing a preference for legal remedies over the whole range of litigation."). Laycock argues that this was not necessarily intended. *Id.* at 20 ("So far as I can tell, a preference for legal remedies over equitable remedies played no part in the evolution of the [irreparable injury] rule.").

[78] Raack, *supra* note 12, at 553–54.

[79] *Id.* at 570 ("It is difficult to discern the emergence of general rules or principles governing the issuance of injunctions during [the 1500s and early 1600s]. This is, perhaps, due in part to the short and scanty condition of the reported cases. But a more compelling reason is that at the close of the sixteenth century there seem to have been, in fact, no binding rules, no clear and constant principles, concerning injunctions.").

[80] Supreme Court of Judicature Act 1873, 36 & 37 Vict. c. 66 (Eng.), *reprinted in* 2 LAW: MONTHLY MAG. LEGAL MATTERS 1 (Supp. 1873); Supreme Court of Judicature Act 1875, 38 & 39 Vict. c. 77 (Eng.).

[81] Supreme Court of Judicature Act 1873, *supra* note 80, at 18.

[82] *Id.*

[83] Jeffrey L. Wilson, Note, *Three If by Equity: Mareva Orders & the New British Invasion*, 19 ST. JOHN'S J.L. COMM. 673, 693 (2005) ("In construing the 1875 Act, English courts had broadly interpreted § 25(8), giving a wide, general power to judges.").

applying any stringent test or requirements, and the judiciary was aware of its abundant discretion.[84] This tradition of allowing broad judicial discretion to evaluate and award injunctive relief continues to this day and leaves an air of mystery and unpredictability to those seeking and adjudicating such relief.

C. The Concept of Irreparable Injury

As discussed *supra*, inadequacy of legal relief was the necessary key to pass through the entrance gate of English chancery courts.[85] And although the concept of irreparable injury is inherently a subjective one, it is rooted in the concept of adequacy—or inadequacy—of a legal remedy.[86] Although an irreparable injury is easily defined, applying the principle often requires judicial judgment and discretion, which makes predicting the outcome difficult, to say the least. Historically, there was no clear articulation of what would qualify as an irreparable injury.[87]

Under traditional applications, irreparable injury means that an award of money or monetary damages alone cannot make the movant whole.[88] Stated differently, if the court denies the requested injunction and the anticipated injury actually occurs, the money paid by the non-movant to the movant as compensatory damages will be insufficient for the movant—with access to an open market—to be restored to the position she would have been in had the injury not occurred.[89] Replacement of fungible goods in an orderly market is the antithesis of an irreparable injury because such goods are commodities that can be easily replaced.[90] By contrast, damage to real property is a common example of an irreparable injury, as all real property is deemed to be unique.[91] Even

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[84] *Id.* ("Lord Denning cited with approval *Beddow v. Beddow*, in which Sir George Jessel stated, 'I have unlimited power to grant an injunction in any case where it would be right or just to do so.'").

[85] *See supra* note 76 and accompanying text; *see also* FISCHER, *supra* note 19, § 21.1 ("The traditional ticket of admission to equitable remedies was the requirement that the remedy at law be inadequate.").

[86] LAYCOCK, *supra* note 15, at 22.

[87] *See id.* ("It should not be surprising that equity interpreted the irreparable injury rule in ways that expanded its jurisdiction. Once equity established a substantive equitable right, it enforced that right without any inquiry into whether some legal right might be just as good in a particular case.").

[88] Laycock, *supra* note 45, at 715.

[89] United States v. Virginia, 518 U.S. 515, 547 (1996) (citing Milliken v. Bradley, 433 U.S. 267, 280 (1977)); LAYCOCK & HASEN, *supra* note 13, at 275 (noting that an injunction "seeks to maintain [the movant] in his rightful position," i.e., "to prevent harm rather than compensate for harm already suffered").

[90] LAYCOCK, *supra* note 15, at 4–5.

[91] *See, e.g.*, LAYCOCK & HASEN, *supra* note 13, at 413 ("The traditional rule is that damages are never an adequate remedy for the loss of real estate or damages to real estate.

with some clear examples of when equitable relief is appropriate, the determination of irreparable injury normally is more nuanced and ultimately left to the equitable discretion of the court.[92]

Several scholars, most notably Douglas Laycock, have argued that the irreparable injury rule should be abolished because, in practice, it is a rule that does not impact the outcome.[93] According to Laycock, "The irreparable injury rule almost never bars specific relief, because substitutionary remedies are almost never adequate. At the stage of permanent relief, any litigant with a plausible need for specific relief can satisfy the irreparable injury rule."[94] This is the equivalent of saying that, assuming the rule is in place, anyone seeking equitable relief is presumed to have an irreparable injury and, absent some other reason, is entitled to the relief sought.[95]

There are also other legitimate reasons to retain the irreparable injury rule. To illustrate this, assume that *A* contracts with *B* for *A* to provide a certain number of fungible goods to *B* in the absence of any market distortions. Afterwards, *C* comes along and offers *A* more money for those same goods—perhaps due to the immediate availability of the goods. *B* then sues *A* for specific performance, i.e., a permanent injunction ordering *A* to provide the goods as contracted, despite the apparent adequacy of damages[96]—perhaps because *B* does not want to bear the transaction costs associated with covering for the lost goods. Without the irreparable injury rule, the court should grant *B*'s request for specific performance.[97] This situation not only would preclude *A*'s efficient breach

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The rule is routinely applied to leases as well as sales, and to all sorts of other claims about real estate, from encroachments to interference with easements to violation of condominium restrictions.").

[92] *See infra* Part II.D.

[93] *See generally* LAYCOCK, *supra* note 15 (presenting his thesis, based on exhaustive research of applicable case law, that the irreparable injury rule is dead); *see also* Laycock, *supra* note 45 (describing the origin of the irreparable injury rule). Even Laycock admits that the irreparable injury rule can serve as a tiebreaker. LAYCOCK, *supra* note 15, at 22–23.

[94] LAYCOCK, *supra* note 15, at 23.

[95] Doug Rendleman contends that "instead of being prerequisites for the [movant], the standards of inadequacy, irreparability, balancing, and the public interest should be affirmative defenses for the [non-movant]." Rendleman, *supra* note 1, at 1429.

[96] Even under the narrowest definition of adequacy, replacement of fungible goods in an orderly market represents an adequate legal remedy. LAYCOCK, *supra* note 15, at 4–5 (opining that when money damages are used to replace fungible goods or routine services in an orderly market, "damages and specific relief are substantially equivalent [because, either way, the movant] winds up with the very thing he wanted, and the preference for specific relief becomes irrelevant").

[97] *Id.* Without the irreparable injury rule, non-breaching parties could demand specific performance of the contract, and—absent the requirement to prove inadequacy of damages—courts theoretically would enforce such a demand.

of contract;[98] it would also deprive *B* of his constitutional right to a jury trial.[99] Additionally, it would allow *B* to seek enforcement against *A* via the court's contempt power when *A* otherwise would be limited to a money judgment, with the inherent risk of uncollectability.[100] Regardless, as Laycock himself subsequently admitted, the irreparable injury rule will not be eradicated anytime soon.[101]

As discussed *infra*, confusion surrounding irreparable injury nevertheless continues to this day, as some courts—including the United States Supreme Court and Virginia appellate courts—require movants to

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[98] An "efficient breach" is defined as "[a]n intentional breach of contract and payment of damages by a party who would incur greater economic loss by performing under the contract." *Breach of Contract – Efficient Breach*, BLACK'S LAW DICTIONARY (10th ed. 2014). As Judge Posner points out, however,

> in some cases a party is tempted to break his contract simply because his profit from breach would exceed his profit from completing performance. He will do so if the profit would also exceed the expected profit to the other party from completion of the contract, and hence the damages from breach.

RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 150–52 (8th ed. 2011). The breaching party would need to pay the non-breaching party damages associated with the breach, but a rational breaching party would still come out ahead, as a net profit would remain after paying those damages. *Id.*

[99] *See* 2 FRIEND & SINCLAIR, *supra* note 18, § 33.02[2] ("[A] party seeking injunctive relief is seeking equitable relief, and in the present Virginia system—as in the past—there is no constitutional right to trial by jury, and, except in the case of a plea to an equitable claim or an advisory jury . . . , no statutory right."). The constitutional right to a jury trial is limited to "suits in common law," which has been interpreted not to include trials of equitable matters. U.S. CONST. art. III, § 2; Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 347–48 (1998). Although some scholars have argued that this distinction is unwarranted, it is well-established. *See, e.g.*, Rendleman, *supra* note 1, at 1422 (opining, when discussing jury trials, that "[t]he division between Law and Equity developed historically because of conditions that no longer exist; the distinction is neither logical nor functional, indeed it is often outright irrational").

[100] *See* Douglas Rendleman, *The Trial Judge's Equitable Discretion Following* eBay v. MercExchange, 27 REV. LITIG. 63, 73 (2007) (noting that the judge's ability to "employ personal sanctions as contempt" and the absence of a right to a jury trial are the "two major procedural differences between an equitable injunction and legal damages"). Enforcement of a legal judgment for damages normally involves separate court actions, e.g., writs of execution or garnishment, that normally cannot result in a finding of contempt or imprisonment of the non-movant. LAYCOCK, *supra* note 15, at 17 (noting also that there is an exception for "highly preferred debts, such as the support of children and spouses"). Invoking the injunctive power of contempt in situations where damages are equivalent arguably would bring back debtor's prison, which is unacceptable as a matter of public policy. *Id.* at 17–18. Allowing equitable relief under such circumstances would, as Laycock put it, improperly convert an "impersonal judgment" into a "personal command." *Id.* at 14–15.

[101] LAYCOCK & HASEN, *supra* note 13, at 399 (noting that, as of 2018, "[n]o court has explicitly repudiated the irreparable injury rule"). "To paraphrase Mark Twain, the reports of the death of the irreparable injury requirement appear to have been exaggerated; the debate is over the extent of the exaggeration." FISCHER, *supra* note 19, § 21.0.

prove irreparable injury *and* inadequacy of damages when the two concepts are, in fact, synonymous.[102]

D. The Historical Discretion of the Chancellor

The authority granted by the King to his Chancellor included substantial discretion to wield the "strong arm" of injunctive power.[103] The Court of Chancery was understood to be a "court of conscience," with its orders representing the conscience of the Chancellor.[104] Not everyone supported the breadth of discretion provided to the Chancellor, leading to complaints that the Courts of Chancery were "encroaching on the jurisdiction of [the] Court of Common Law by the granting of subpoenas and injunctions."[105]

With broad equitable discretion came uncertainty and the very real possibility of inconsistency.[106] In the late seventeenth century, English legal scholar John Selden summarized the downside of equitable discretion best when he said the following:

> Equity is A Roguish thing, for Law wee [sic] have a measure know what to trust too. Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower soe [sic] is equity. Tis all one as if they should make the Standard for the measure wee [sic] call A foot, to be the Chancellors foot; what an uncertain measure would this be; One Chancellor has a long foot another A short foot a third an indifferent foot; tis the same thing in the Chancellors [sic] Conscience.[107]

The "Chancellor's foot" reference became an iconic symbol representing the uncertainty—and arguably the pitfall—of equitable

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[102] *See infra* notes 273–77 and accompanying text.

[103] George Franklin Bailey, The Growth of the Equitable Remedy of Injunction 2–3 (June 1895) (unpublished LLB thesis, Cornell University Law School) (on file with the Cornell University Law Library, Historical Theses and Dissertations Collection).

[104] Rendleman, *supra* note 1, at 1400.

[105] Bailey, *supra* note 103, at 4.

[106] *See* Rendleman, *supra* note 1, at 1401 (noting that remedies scholar Peter Birks "felt so strongly that 'discretionary remedialism' was an outrage against certainty and predictability that he advocated dissolving the study of remedies as a separate inquiry").

[107] JEFFERSON H. POWELL, "CARDOZO'S FOOT": THE CHANCELLOR'S CONSCIENCE AND CONSTRUCTIVE TRUSTS 1 (1993) (quoting SIR EDWARD FRY, TABLE TALK OF JOHN SELDEN 43 (Sir Frederick Pollock ed., 1927)) (describing a compilation of Selden's private conversations by a secretary published in 1689 that was grammatically edited for ease of readability).

discretion.[108] Unlike at law, the Chancellor had great flexibility to craft a remedy to address the particular facts and circumstances of a case.[109] In doing so, he likely would consider the procedural posture, the contextual background, the events leading up to the dispute, the facts of the case, and the motives and culpability of the parties; he might also consider his own personal knowledge of the litigants and their counsel, the lawyers' strategies and tactics, his own research, his philosophical or political beliefs, and his personal experience with similar cases.[110]

Over time, courts would state that equitable discretion is not meant to indicate that the Chancellor is clothed with unfettered discretion to do whatever he wants; rather, he is to reasonably consider all of the facts and circumstances of the case when fashioning a fair and just remedy.[111] As Judge Posner put it, "The fact that a proceeding is equitable does not give the judge a free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness, however enlightened those views may be."[112] Current equity practice embraces rules and standards, and modern judges do not possess the limitless discretion of medieval Chancellors.[113]

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[108] *See, e.g.*, T. Leigh Anenson & Gideon Mark, *Inequitable Conduct in Retrospective: Understanding Unclean Hands in Patent Remedies*, 62 AM. U.L. REV. 1441, 1490 n.322, 1492 n.337 (2013); *see also* Rendleman, *supra* note 100, at 69–70 ("Skeptics add that judicial informality and lack of precise rules with a concomitant emphasis on discretion, flexibility, and conscience lead to unpredictable results.").

[109] Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944)) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.").

[110] Rendleman, *supra* note 1, at 1401; *see also* Rendleman, *supra* note 100, at 68 ("[C]ertainty resided in the common law courts, justice in the chancellor's equity.").

[111] *See* LAYCOCK & HASEN, *supra* note 13, at 322 ("Courts of last resort have frequently reiterated that equitable discretion is discretion to consider all the relevant facts, not discretion for the trial judge to do whatever he wants."); Rendleman, *supra* note 100, at 65 ("'Discretion' describes the judge's freedom, power, or authority to decide a dispute by choosing among permissible solutions, according to what he thinks best, within, I maintain, the limits of the governing law.").

[112] *In re* Chi., Milwaukee, St. Paul & Pac. R.R., 791 F.2d 524, 528 (7th Cir. 1986).

[113] *See In re* Freligh, 894 F.2d 881, 887 (7th Cir. 1989) ("A modern . . . equity judge does not have the limitless discretion of a medieval Lord Chancellor to grant or withhold a remedy. . . . Modern equity has rules and standards, just like law. . . . [However,] the ratio of rules to standards is lower in equity than in law . . . ."); *see also* Rendleman, *supra* note 1, at 1401 (noting that "[a] more positivistic approach relies less on the judge's strength of character and more on developing principles, standards, and rules to structure, confine, and limit the judge's discretion"); *id.* at 1408–09 ("[W]hilst the role of judicial discretion involves a choice and is essential to ensure that justice is achieved, if the resort to justice is to be defensible and predictable, there needs to be identifiable principles or recognised [sic] factors to guide that discretion and to ensure that like cases are treated alike, for the benefit of the parties, their advisers and, if the case goes to trial, the judge.").

III. THE EVOLUTION OF FEDERAL PERMANENT INJUNCTION LAW

A. Statutory Guidance

There is very little statutory guidance regarding injunctive relief. The *Federal Rules of Civil Procedure*, which have been promulgated by the United States Supreme Court under the authority of the *United States Code*,[114] has a rule titled "Injunctions and Restraining Orders"; however, it almost exclusively discusses preliminary relief.[115] In fact, the only portions of the rule that govern permanent injunctions relate to the contents of the court order and who is bound by the order.[116] In other words, there is nothing in the rules regarding how courts should analyze a permanent injunction petition.[117] Courts therefore have been guided by the common law and judicial decisions interpreting that law.[118]

B. Permanent Injunction Law Prior to eBay Inc. v. MercExchange, L.L.C.

Prior to *eBay*, there apparently was no succinct and broadly applicable judicial formulation to guide federal courts in evaluating requests for permanent injunctive relief, although certain commonalities could be observed. For instance, courts routinely focused on irreparability of injury, inadequacy of damages, or both.[119] They also frequently conducted some type of "undue hardship" or "balancing the equities" analysis, which was often expressed or evaluated as a comparison of the hardship to the non-movant with the benefits to the movant if the injunction were granted.[120] Some courts also evaluated the potential impact of the requested injunction on the public interest.[121] A common thread was a broad incorporation of equitable discretion, [122] including certain presumptions. For example, in patent disputes, if the movant demonstrated patent validity and infringement, irreparability of injury

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[114] 28 U.S.C. §§ 2072–73 (2012).

[115] FED. R. CIV. P. 65.

[116] FED. R. CIV. P. 65(d).

[117] There also is nothing in the rule to guide the courts' analysis of preliminary injunctions or temporary restraining orders. *See generally* FED. R. CIV. P. 65.

[118] *See, e.g.*, 7 DONALD S. CHISUM, CHISUM ON PATENTS § 20.04[2][a] (2019) (compiling pre-*eBay* patent law cases interpreting and ruling on requests for permanent injunctions).

[119] *See, e.g.*, Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (referring to "irreparable injury and the inadequacy of legal remedies").

[120] LAYCOCK & HASEN, *supra* note 13, at 419; *cf. Weinberger*, 456 U.S. at 312 (referring to balancing "the conveniences" and "possible injuries" of the parties).

[121] *See, e.g.*, *Weinberger*, 456 U.S. at 312 (referring to "the public consequences").

[122] *See infra* note 252 and accompanying text.

was presumed and a permanent injunction was issued, absent exceptional circumstances affecting the public welfare.[123] There was not, however, any specific guidance provided to litigants regarding how to successfully pursue injunctive relief or how to defeat such attacks.

To fill this gap, most federal appellate courts eventually established permanent injunctive guidelines that included some combination of the traditional injunctive elements.[124] For instance, the United States Court of Appeals for the Fourth Circuit held that a permanent injunction is an appropriate remedy "where (i) there is no adequate remedy at law, (ii) balancing the equities favors the moving party, and (iii) the public interest is served."[125]

C. The Four-Part Test Announced in eBay Inc. v. MercExchange, L.L.C.

To promote societal progress, the United States Constitution authorizes Congress to grant to authors and inventors exclusive rights to their creations for specific periods of time.[126] Pursuant to this authority, Congress over the years enacted patent acts, which courts interpreted broadly.[127] As mentioned, a general rule governing patent disputes eventually developed, holding that a court will issue a permanent injunction against potential infringers once the court finds patent validity and infringement.[128] This rule, which developed because damages in such

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[123] *See* MercExchange, L.L.C. v. eBay, Inc., 401 F.3d 1323, 1338 (Fed. Cir. 2005), *vacated and remanded*, 547 U.S. 388 (2006) ("Because the 'right to exclude recognized in a patent is but the essence of the concept of property,' the general rule is that a permanent injunction will issue once infringement and validity have been adjudged." (quoting Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1246–47 (Fed. Cir. 1989))); *see also* Roy H. Wepner & Richard W. Ellis, *The Federal Circuit's Presumptively Erroneous Presumption of Irreparable Harm*, 6 TUL. J. TECH. & INTELL. PROP. 147, 152 (2004) ("[Between the mid-1980s and the early 2000s], the Federal Circuit repeatedly restated and applied the presumption of irreparable injury. By 2003, the 'rule' had evolved into this succinct statement: 'irreparable harm is presumed when a clear showing of patent validity and infringement has been made.'" (quoting Oakley, Inc. v. Sunglass Hut Int'l, 316 F.3d 1331, 1345 (Fed. Cir. 2003)).

[124] *See* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1025–26 (2015) (reviewing the various circuit formulations).

[125] Nat'l Org. for Women v. Operation Rescue, 914 F.2d 582, 585 (4th Cir. 1990), *rev'd in part on other grounds sub nom.* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993).

[126] U.S. CONST. art. I, § 8 (authorizing Congress "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries").

[127] Sue Ann Mota, eBay v. MercExchange*: Traditional Four-Factor Test for Injunctive Relief Applies to Patent Cases, According to the Supreme Court*, 40 AKRON L. REV. 529, 530 (2007).

[128] *See supra* note 123 and accompanying text.

cases were "notoriously difficult to measure,"[129] acted as a rebuttable presumption of injunctive relief for a prevailing patent holder,[130] a presumption that was rarely overcome.[131]

MercExchange, L.L.C. owned certain patents for online marketing technology, including search engines to search multiple markets and internet commerce resources using internetworked auctions.[132] MercExchange sued, inter alia, eBay Inc., the owner of a cyber-forum for selling merchandise and hosting online stores.[133] The district court found that the relevant MercExchange patents were valid and that eBay had infringed upon those patents.[134] Contrary to the well-established

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[129] Ryan T. Holte, *The Misinterpretation of* eBay v. MercExchange *and Why: An Analysis of the Case History, Precedent, and Parties*, 18 CHAP. L. REV. 677, 718–19 (2015); *see also* Douglas Ellis et al., *The Economic Implications (and Uncertainties) of Obtaining Permanent Injunctive Relief After* eBay v. MercExchange, 17 FED. CIR. B.J. 437, 445 (2008) ("Certain kinds of harm associated with infringement may, in fact, be insurmountably difficult to quantify, irrespective of direct competition."); *cf.* Mark A. Lemley, *Did* eBay *Irreparably Injure Trademark Law?*, 92 NOTRE DAME L. REV. 1795, 1802 (2017) ("In practice, patent and copyright cases have tended to focus not on whether there was any amount of money that would satisfy the [movant], but instead on whether circumstances make it hard to accurately calculate the right amount of money. Thus, patent courts tend to grant injunctions in suits between competitors, not because it is impossible to compensate for infringement by competitors but because it is very hard to reconstruct what would have happened in the but-for world in which infringement did not occur.").

[130] *See, e.g.*, Reebok Int'l Ltd. v. J. Baker, Inc., 32 F.3d 1552, 1556 (Fed. Cir. 1994) ("A strong showing of likelihood of success on the merits coupled with continuing infringement raises a presumption of irreparable harm to the patentee. However, the presumption does not necessarily or automatically override the evidence of record. It is rebuttable." (internal citations omitted)).

[131] "Between 1984 and 2006, for instance, the Federal Circuit never once denied an injunction to a prevailing patentee." Lemley, *supra* note 129, at 1797; *see also* Leslie T. Grab, *Equitable Concerns of* eBay v. MercExchange*: Did the Supreme Court Successfully Balance Patent Protection Against Patent Trolls?*, 8 N.C.J.L. & TECH. 81, 95 (2006) (referring to the "automatic injunction rule set forth by the Federal Circuit"); Karen E. Sandrik, *Reframing Patent Remedies*, 67 U. MIAMI L. REV. 95, 97 (2012) (referencing what had been a "virtually automatic right to injunctive relief" prior to *eBay*); Engey Elrefaie, Note, *Injunctive Relief Post* eBay *and the Various Applications of the Four-Factor Test in Differing Technological Industries*, 2 HASTINGS SCI. & TECH. L.J. 219, 219 (2010) (referring to "the Federal Circuit's blanket rule of an automatic grant of injunctive relief in patent infringement cases").

[132] MercExchange, L.L.C. v. eBay, Inc., 401 F.3d 1323, 1325–26 (Fed. Cir. 2005), *vacated and remanded*, 547 U.S. 388 (2006). For additional detail regarding *eBay*, *MercExchange*, and the patents at issue, see Mota, *supra* note 127, at 533–35.

[133] *MercExchange*, 401 F.3d at 1325–26; Mota, *supra* note 127, at 535. As the Federal Circuit put it, "At issue in this case is the fixed-price purchasing feature of eBay's website, which allows customers to purchase items that are listed on eBay's website for a fixed, listed price." *MercExchange*, 401 F.3d at 1325. This feature is commonly referred to as eBay's "Buy It Now" feature, whereby a buyer can bypass an ongoing online auction and immediately purchase the auctioned item. Holte, *supra* note 129, at 683.

[134] MercExchange, L.L.C. v. eBay, Inc., 275 F. Supp. 2d 695, 711–12 (E.D. Va. 2003), *aff'd in part, rev'd in part*, 481 F.3d 1323 (Fed. Cir. 2005), *vacated and remanded*, 547 U.S. 388 (2006).

presumption of injunctive relief at this posture,[135] the court denied MercExchange's request for a permanent injunction.[136] Although the court recognized that injunctive relief was the norm upon a finding of infringement, it also noted that it had discretion to withhold entering an injunctive order.[137] It then opined as follows:

> Issuance of injunctive relief against [the non-movants] is governed by traditional equitable principles, which require consideration of (i) whether the [movant] would face irreparable injury if the injunction did not issue, (ii) whether the [movant] has an adequate remedy at law, (iii) whether granting the injunction is in the public interest, and (iv) whether the balance of the hardships tips in the [movant's] favor.[138]

The court applied this four-part analysis, concluding that MercExchange had not satisfied any of the prongs.[139]

The parties appealed the decision to the United States Court of Appeals for the Federal Circuit,[140] which held that the district court improperly denied MercExchange's request for a permanent injunction.[141] The court relied on the established general rule that a permanent injunction is warranted once patent infringement has been proved.[142] Without reference to the four-part formulation, the court found that there was not a sufficient basis to deny injunctive relief and ultimately reversed the district court's ruling.[143]

The United States Supreme Court granted certiorari[144] to decide whether the Federal Circuit erred in stating the "general rule that courts will issue permanent injunctions against patent infringement absent

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[135] *See supra* note 123 and accompanying text.

[136] *MercExchange*, 275 F. Supp. 2d at 715.

[137] *Id.* at 711 ("[T]he grant of injunctive relief against the infringer is considered the norm; however, the decision to grant or deny injunctive relief remains within the discretion of the trial judge." (internal citations omitted)).

[138] *Id.* (quoting Odetics, Inc. v. Storage Tech. Corp., 14 F. Supp. 2d 785, 794 (E.D. Va. 1998), *aff'd in part, rev'd in part on other grounds*, 185 F.3d 1259 (Fed. Cir. 1999)).

[139] *Id.* at 711–15.

[140] MercExchange, L.L.C. v. eBay, Inc., 401 F.3d 1323, 1323, 1326 (Fed. Cir. 2005), *vacated and remanded*, 547 U.S. 388 (2006). The United States Court of Appeals for the Federal Circuit has limited appellate jurisdiction, which includes intellectual property appeals; this is noteworthy, as there was no opportunity for other courts of appeals to interpret the Patent Act. 28 U.S.C. § 1295 (2012).

[141] *MercExchange*, 401 F.3d at 1326.

[142] *Id.* at 1338.

[143] *Id.* at 1339.

[144] eBay Inc. v. MercExchange, L.L.C., 546 U.S. 1029, 1029–30 (2005).

exceptional circumstances."[145] The Court, in a unanimous decision, concluded that the Federal Circuit's statement was erroneous and that "familiar [equitable] principles apply with equal force" to patent disputes.[146]

> According to well-established principles of equity, a [movant] seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A [movant] must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the [movant] and [the non-movant], a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.[147]

As indicated by the conjunctive phrasing, a movant must demonstrate all four factors in order to be awarded permanent injunctive relief.[148]

As remedies scholars were quick to point out, there was no previous "well-established" four-factor permanent injunction "test."[149] In fact, there was no clearly defined permanent injunction analysis tool at all.[150] There was, however, a well-established four-factor *preliminary injunction* analytical formulation that included three of the four *eBay* factors,[151]

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[145] eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (quoting *MercExchange*, 401 F.3d at 1339).

[146] *Id.* The Court pointed out that "the Patent Act expressly provides that injunctions 'may' issue 'in accordance with the principles of equity,'" *id.* at 392, and noted that the Court, when interpreting the Copyright Act—which has similar injunction-related language—"has consistently rejected invitations to replace traditional equity considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed," *id.* at 392–93 (citing N.Y. Times Co. v. Tasini, 533 U.S. 483, 505 (2001)).

[147] *eBay*, 547 U.S. at 391 (citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 311–13 (1982); Amoco Prod. Co. v. Gambell, 480 U.S. 531, 542 (1987)). As Douglas Laycock and Richard Hasen explain, both *Weinberger* and *Amoco* relied on *preliminary* injunction principles. LAYCOCK & HASEN, *supra* note 13, at 443–44.

[148] *eBay*, 547 U.S. at 391. According to some commentators, "[b]y suggesting that all four prongs must be shown separately under all circumstances, the *eBay* test appears to impose a substantially distinct form of analysis on courts." Mark P. Gergen et al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 211 (2012).

[149] *See, e.g.*, Rendleman, *supra* note 100, at 76 n.71 ("Remedies specialists had never heard of [*eBay*'s] four-point test.").

[150] *See, e.g.*, LAYCOCK & HASEN, *supra* note 13, at 445 ("There was no such test before, but there is now. The Supreme Court announcing a rule of law can make it so.").

[151] *See id.* (referring to "the genuinely traditional four-part test for preliminary injunctions"). Courts in every federal circuit have recognized this traditional test. *See, e.g.*, Jones v. City of Monroe, 341 F.3d 474, 476 (6th Cir. 2003) (reciting the four-part test); Mentor Graphics Corp. v. Quickturn Design Sys., Inc., 150 F.3d 1374, 1377 (Fed. Cir. 1998) (same);

which perhaps is from where the district court's four elements ultimately derived.[152] The fourth factor in the preliminary injunction analysis requires the movant to establish "that he is likely to succeed on the merits," which of course does not apply at the permanent injunction phase.[153] Meanwhile, the new fourth factor in the permanent injunction four-factor test—the inadequacy of legal remedies—is no different than the irreparable-injury factor, as discussed in more detail *infra*.[154]

Those who followed *eBay* as it traveled through the courts expected a narrow ruling that would delineate the rights between patent holders who marketed their inventions and those who primarily licensed their patents,

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Nautilus Grp., Inc. v. Icon Health & Fitness, Inc., 308 F. Supp. 2d 1198, 1207 (D. Wash. 2003) (same); Kemin Foods, L.C. v. Pigmentos Vegetales Del Centro S.A. De C.V., 240 F. Supp. 2d 963, 968 (S.D. Iowa 2003) (same); McData Corp. v. Brocade Commc'ns Sys., 233 F. Supp. 2d 1315, 1319 (D. Colo. 2002) (same); Sidel v. Uniloy Milacron, Inc., No. 1:01-CV-1080-CAP, 2001 U.S. Dist. LEXIS 24004, at *5 (N.D. Ga. Nov. 14, 2001) (same); Monsanto Co. v. Scruggs, 249 F. Supp. 2d 746, 748 (N.D. Miss. 2001) (same); Tate Access Floors, Inc. v. Interface Architectural Res., Inc., 132 F. Supp. 2d 365, 370 (D. Md. 2001) (same); Elf Atochem N. Am., Inc. v. LaRoche Indus., 85 F. Supp. 2d 336, 343 (D. Del. 2000) (same); SEB S.A. v. Montgomery Ward & Co., 77 F. Supp. 2d 399, 403 (S.D.N.Y. 1999) (same); Aero Indus. v. John Donovan Enters.-Fla., Inc., 80 F. Supp. 2d 963, 969 (S.D. Ind. 1999) (same); Bionx Implants, Inc. v. Innovasive Devices, Inc., 45 F. Supp. 2d 75, 76 (D. Mass. 1999) (same). The United States Supreme Court would adopt this preliminary injunction formulation two years after *eBay* in *Winter v. Natural Resources Defense Council, Inc. See supra* note 23 and accompanying text.

[152] The United States District Court for the Eastern District of Virginia in *MerchExchange* quoted *Odetics, Inc. v. Storage Tech. Corp.*, 14 F. Supp. 2d 785, 788 (E.D. Va. 1998), *aff'd in part, rev'd in part on other grounds*, 185 F.3d 1259 (Fed. Cir. 1999), which cited *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). 275 F. Supp. 2d 695, 711 (E.D. Va. 2003), *aff'd in part, rev'd in part*, 481 F.3d 1323 (Fed. Cir. 2005), *vacated and remanded*, 547 U.S. 388 (2006). *Weinberger* did not have a similar formulation, however. Instead, it relied on some familiar permanent—and preliminary—injunctive principles: "irreparable injury and the inadequacy of legal remedies," balancing "the conveniences" and "possible injuries" of the parties, and "the public consequences." *Weinberger*, 456 U.S. at 312. In other words, as in pre-*eBay* cases, there was no specific formulation, and there was no distinct separation of irreparable injury and inadequacy of damages. The district court either created the four-factor test sua sponte or morphed the well-established four-part preliminary injunction test. It is not clear whether the United States Supreme Court later relied on the district court's permanent injunction formulation or somehow created its own multi-factor analytical tool. *See* Rendleman, *supra* note 100, at 76 n.71 ("Although one might argue that the four points can be found in *Weinberger*, the Court appears to indicate a 'traditional' standard for a final injunction that never existed, except perhaps for a preliminary injunction."); *cf.* LAYCOCK & HASEN, *supra* note 13, at 444 ("The Court appears to have mostly taken its four-part test from the district court, which took it from one earlier district court opinion; putting irreparable injury in the past tense appears to have been an innovation in the Supreme Court.").

[153] Winter v. Nat. Res. Def. Council, 555 U.S. 7, 20 (2008). As several scholars put it, "[t]he *eBay* test omits success as a factor and instead doubles up on irreparable injury." Gergen et al., *supra* note 148, at 209.

[154] *See infra* notes 273–75 and accompanying text.

the so-called "patent trolls."[155] Instead, the Court opted to address broad equitable principles that went well beyond intellectual property law.[156] Some commentators pointed out—based on Justice Kennedy's dissent—that the Court's application of traditional equitable principles, including the elimination of an irreparability presumption, was based on modern intellectual property law, including the burgeoning presence of patent trolls.[157] After the case was decided, the Court had the opportunity

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[155] *See* Thomas L. Casagrande, *The Reach of* eBay Inc. v. MercExchange, L.L.C.*: Not Just for Trolls and Patents*, 44 HOUS. LAW. 10, 11 (2006) ("When the Supreme Court granted *certiorari*, intellectual property lawyers took it as a sign that the Court wanted to address the swelling criticism of 'patent trolls' and carve out a special rule to make it harder for patent trolls to target businesses."). "Patent trolls" pejoratively refers to patent holders who did not participate in researching or developing the invention, who do not use the patented technology, and who—instead of seeking to exclude others from infringing—desire only to collect licensing fees. Grab, *supra* note 131, at 83–84. The term was coined "because the license fees [that patent trolls] demand and frequently get are like paying fairy tale trolls to cross a bridge." Casagrande, *supra* note 155, at 11. "Many patent trolls focus their business solely on enforcement of intellectual property rights." Grab, *supra* note 131, at 85. According to one commentator, "[t]he purpose of the four-factor [*eBay*] test is to differentiate between those patentees who do not practice their invention because of inadequate capacity or insufficient capital, such as start-up companies or independent inventors, as opposed to patent trolls who exist solely to license the technology to those who use it." *Id.* at 82. Of note, the *eBay* majority opinion specifically recognizes that "some patent holders, such as university researchers or self-made inventors," might qualify for injunctive relief despite preferring to license their patents. eBay Inc. v. MercExchange, 547 U.S. 388, 393 (2006).

[156] Some commentators have argued that the United States Supreme Court intended that *eBay* be viewed narrowly. *See, e.g.*, Gergen et al., *supra* note 148, at 204 (opining that "[t]he Court apparently did not mean for its articulation of this four-factor test to work a general change in U.S. remedies law" and that Chief Justice Roberts's concurrence indicates that the majority's opinion "should not be expected to work a sea change even in patent law" (citing *eBay*, 547 U.S. at 395 (Robert, C.J., concurring))). At the same time, alarmists claimed that *eBay* resulted in a seismic shift in remedies law. *See, e.g.*, *id.* at 204–05 (arguing that, as a result of *eBay*, "[t]he law of equitable remedies is in the midst of an American revolution" and that "the eBay opinion has had [a] cataclysmic effect"). The *eBay* majority opinion arguably sums up the Court's intent best: "We hold only that the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards." *eBay*, 547 U.S. at 394.

There apparently were no amicus curie briefs that specifically targeted the substance of the four-part equitable test, likely because the Federal Circuit opinion—unlike the district court—made no mention of the formulation. *See* Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 168 (2008) (characterizing *eBay* as "a spectacular example of the confusion that can result from litigating a remedies issue without a remedies specialist"); *see also* Holte, *supra* note 129, at 727 ("After the Federal Circuit opinion, . . . the Supreme Court's disputed injunction matters focused on one completely different issue—whether the Federal Circuit erred in not considering the four equitable factors but instead citing a 'general rule' that injunctions should issue.").

[157] John M. Golden, *"Patent Trolls" and Patent Remedies*, 85 TEX. L. REV. 2111, 2113 (2007) ("Justice Kennedy and three other justices explicitly connected rejection of such a 'general rule' with concern about so-called patent trolls by suggesting that the traditional practice of issuing permanent injunctions had to be reconsidered in part because 'an industry

in subsequent cases to confine applicability of the *eBay* test to patent disputes.[158] It opted not to do so, however, and consequently there now is an established four-part federal "test" for all permanent injunctions.[159] As of 2018, twelve years after *eBay* was handed down, over 3,000 reported federal cases have cited the opinion.[160]

IV. THE EVOLUTION OF VIRGINIA PERMANENT INJUNCTION LAW

Modern Virginia common law, including equity, is derived from English common law unless specifically abrogated.[161] This is consistent with Virginia history and logical reasoning, as there was no pre-existing system of law when the English arrived in colonial Virginia.[162] Hence, the baseline Virginia injunctive law emanated from English common law.[163] The common law thereafter evolved in Virginia courts, although the legal profession in the Commonwealth continued to look to English law for

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has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees.'" (quoting *eBay*, 547 U.S. at 396)).

[158] *See, e.g.*, Bray, *supra* note 124, at 1029 ("The Court has not retreated. In a more recent case that arose under an entirely different statute, the National Environmental Policy Act, the Court invoked *eBay* as prescribing the test that '[a] plaintiff seeking a permanent injunction must satisfy.'" (quoting Monsanto Co. v. Geerton Seed Farms, 561 U.S. 139, 155–58 (2010))); *see also* Gergen et al., *supra* note 148, at 214–15 ("[Subsequent] decisions by both the Supreme Court and the U.S. Courts of Appeals for the Second and Ninth Circuits have left in tatters any notion that the significance of the Supreme Court's *eBay* test will largely be confined to patent law or even intellectual property law more generally.").

[159] *See* Gergen et al., *supra* note 148, at 214–15 (opining that "federal courts now commonly accept the *eBay* test as the test for injunctions in virtually all types of cases"); Holte, *supra* note 129, at 721 ("After *eBay*, the ability to receive an injunction in *all* areas of the law has been reduced dramatically.").

[160] LAYCOCK & HASEN, *supra* note 13, at 445.

[161] VA. CODE ANN. § 1-200 (2017 & Supp. 2019); *see* William Hamilton Bryson, *English Common Law in Virginia*, 6 J. LEGAL HIST. 249, 249, 253 (1985) ("The English common law, of course, was subject to revision and change by Virginia legislation.").

[162] Bryson, *supra* note 161, at 249. The Virginia Company, which was responsible for founding the Jamestown Colony, required "that litigation was to be settled 'as near to the common laws of England and the equity thereof as may be.'" *Id.* (quoting Articles, Instructions and Orders, Nov. 20, 1606, *in* 1 WILLIAM W. HENING, STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 68 (1823), *reprinted in* 1 COLONY LAW OF VIRGINIA, 1619-1660 (John D. Cushing ed., 1978)).

[163] *Id.* at 251 ("Equity along with the rest of the common law came to Virginia with the settlers.").

guidance well into the nineteenth century.[164] The evolution continues today, as the common law is "a dynamic, a changing, a growing thing."[165]

In most jurisdictions, including Virginia, the court's inherent power to issue injunctions is augmented by specific statutes that expressly authorize injunctive relief to remedy statutory violations.[166] In some cases, the statutory breach is all that must be proven, essentially bypassing the traditional multi-factor permanent injunction analysis.[167] Hence, injunctions stemming from statutory violations sometimes are issued without proving irreparability of injury or balancing equities.[168] This Article discusses only the court's inherent injunctive power to protect contract, tort, or property rights as derived from the common law.[169]

A. Statutory Guidance

Virginia provides almost no statutory guidance regarding the procedure governing injunctive relief generally or how courts should

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[164] *Id.* at 252–53. By then, reference to English law "was rendered no longer necessary by the accumulation of a large body of Virginia decisions in print and readily available." *Id.* at 253.

[165] *Id.* According to the Supreme Court of Virginia, "[t]he common law . . . is a flexible body of principles which are designed to meet, and are susceptible of adaptation to, new institutions, conditions, usages, and practices, as the progress of society may require." *Id.* at 253–54 (quoting Midkiff v. Midkiff, 113 S.E.2d 875, 877 (Va. 1960)). Of note, legal evolution in Virginia can be particularly slow. *See, e.g.*, Rendleman, *supra* note 1, at 1402 ("Virginia, a commonwealth that lets others try out innovations for a century or more, waited until 2006 to merge its dual courts [of law and equity].").

[166] *See* FISCHER, *supra* note 19, § 26.1.

[167] *Id.* ("In effect, the presence of an express equitable remedy for a violation of a statute meant that the equitable remedy was available as a matter of course upon establishment of the statutory breach."); *see also id.* (referring to "the entitlement theory to injunction relief"). Of note, the court's interpretation of the relevant statutory language sometimes determines whether invocation of the traditional injunctive analysis is required. *Id.*; *see also* Daniel A. Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 45 U. PITT. L. REV. 513, 513 (1983) ("It is by no means clear how to reconcile the tradition of equitable discretion with the needs of modern statutory enforcement."); Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 515–17 (2010) (arguing that courts should not balance equities when addressing statutory violations that prescribe equitable remedies). This in fact was the central—even if not explicitly stated—issue in *eBay*. FISCHER, *supra* note 19, § 26.1 (discussing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006)). The United States Supreme Court ultimately found that the traditional equitable analysis was required despite the Federal Circuit's interpretation of the statutory language in the Patent Act, i.e., that courts "may" issue injunctive orders. *eBay Inc.*, 547 U.S. at 391.

[168] FISCHER, *supra* note 19, § 26.1.

[169] This Article also does not discuss injunctions related to violations of "real covenants" or certain lease provisions, which—like statutory injunctions—do not adhere to the traditional permanent injunction equitable criteria. *See* SINCLAIR, *supra* note 22, § 51-2[A], at 51-17 to -18 (citing cases that illustrate the principle that parties seeking to enforce real covenants are exempt from the irreparable injury requirement).

analyze permanent injunction requests.[170] Circuit courts clearly have jurisdiction to award permanent injunctive relief, and they may at any time dissolve injunctions after reasonable notice to the adverse party of the grounds for such dissolution.[171] Beyond that, the *Code of Virginia* is silent regarding when permanent injunctions are appropriate and how courts should analyze petitions for permanent injunctions.[172] Additionally, nothing in the *Rules of Supreme Court of Virginia*—which are promulgated pursuant to Virginia constitutional and statutory authority[173]—discusses permanent injunctions. Judges and practitioners therefore must resort to case law for further guidance.

B. The State of Virginia Permanent Injunction Law

With very little legislative guidance, it has been up to Virginia courts to flesh out the law of injunctions in the Commonwealth. The result has been that courts considering petitions for permanent injunctions, relying on the common law, have not applied a consistent methodology.

1. Looking to Federal Injunction Law for Guidance

Virginia courts have looked to federal injunction law as persuasive authority in the past, sometimes even adopting it.[174] More specifically, courts in the Commonwealth have relied on federal law when evaluating Virginia temporary injunctions, which are analogous to federal preliminary injunctions.[175] By contrast, it does not appear that any

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[170] *See generally* VA. CODE ANN. §§ 8.01-620 to -634 (2015 & Supp. 2019).

[171] *Id.* §§ 8.01-620 to -625. Additionally, section 16.1-77(6) of the *Code of Virginia* provides that the general district courts have "[j]urisdiction to try and decide any cases pursuant to . . . the Virginia Freedom of Information Act . . . for writs of mandamus or for injunctions." *Id.* § 16.1-77(6). "By statute, general district courts may not issue injunctions in suits for interpleader," however. 2 FRIEND & SINCLAIR, *supra* note 18, § 1.05.

[172] *See generally* VA. CODE §§ 8.01-620 to -634.

[173] Both the Constitution of Virginia and the *Code of Virginia* authorize the Supreme Court of Virginia to promulgate rules governing the practice and procedures used in the courts of the Commonwealth. VA. CONST. art. VI, § 5; VA. CODE § 8.01-3.

[174] Lannetti, *supra* note 21, at 315. Of note, Virginia permanent injunction case law dates as far back as 1791. *See* Dandridge v. Lyon, Wythe 123, 128 (Va. High Ct. Ch. 1791), available at 1791 WL 261, at *1 (ordering a permanent injunction to stay execution of the trial court's judgment).

[175] Lannetti, *supra* note 21, at 315. Temporary injunctions also include ex parte preliminary injunctive relief, which is the equivalent of federal temporary restraining orders. VA. CODE § 8.01-629 (granting Virginia circuit court judges the discretion to issue an injunction without notice to the non-movant). The United States Court of Appeals for the Fourth Circuit opined that "there is no great difference between federal and Virginia standards for preliminary injunctions" and that "[b]oth draw upon the same equitable principles." Capital Tool & Mfg. v. Maschinefabrik Herkules, 837 F.2d 171, 173 (4th Cir. 1988). Although the Supreme Court of Virginia has not specifically affirmed this approach,

Virginia courts have expressly relied on federal injunction law when analyzing Virginia permanent injunctions but instead look to prior case law within the Commonwealth.[176] As some federal courts have noted, however, Virginia permanent injunction law is similar to pre-*eBay* federal permanent injunction law.[177] This pre-existing similarity makes a comparison between *eBay* and Virginia permanent injunction law less necessary, but it is demonstrative of the fact that, although there was no established federal multi-part permanent injunction framework prior to *eBay*, the *eBay* factors are in fact well-established equitable principles.

2. The Current Guidance Regarding Virginia Permanent Injunction Law

Although several reported Supreme Court of Virginia decisions discuss various elements of permanent injunctions that a movant must prove, apparently none of these decisions distills the injunctive analysis into a clear, comprehensive framework. A review of the case law nevertheless reveals certain elements on which courts of equity tend to focus. Consistent with the historical basis of injunctions, courts have usually required the movant to prove irreparable injury—the inability to avoid the threatened harmful act without an injunction—and/or inadequacy of damages—the insufficiency of monetary relief to adequately compensate the movant should the harmful act occur.[178] Judges also often

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many Virginia circuit courts have applied federal preliminary injunction law when analyzing Virginia temporary injunctions. Lannetti, *supra* note 21, at 315. In doing so, they have relied, at least impliedly, on the Fourth Circuit's proclamation. *Id.* (citing Fettig v. Touchstone Dev., 54 Va. Cir. 357, 358 (2001) (Loudon Cty.); Goldbecker v. Fairfax Cty. Bd. of Supervisors, 37 Va. Cir. 584, 586 n.2 (1994) (Spotsylvania Cty.); Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp., 28 Va. Cir. 220, 221–22 (1992) (Charlottesville City)).

[176] *See, e.g.*, Levisa Coal Co. v. Consolidation Coal Co., 662 S.E.2d 44, 53 (Va. 2008) ("The principles that a court must apply in properly exercising its discretion to grant or deny a permanent injunction have been identified in prior decisions of this Court.").

[177] *See infra* notes 183–84 and accompanying text.

[178] *See, e.g.*, *Levisa Coal Co.*, 662 S.E.2d at 53 (holding that issuance of an injunction requires proof of "irreparable harm for which the law will afford him no adequate remedy"); Shenandoah Acres, Inc. v. D.M. Connor, Inc., 505 S.E.2d 369, 371 (Va. 1998) (opining that an injunction is appropriate "when the harm from the interfering use is irreparable and cannot be adequately addressed in damages"); Richmond v. Hall, 466 S.E.2d 103, 106–07 (Va. 1996) (holding that "where the equities are equal, a Court of Equity will not interpose between two innocent men but will let the law prevail"); Black & White Cars v. Groome Transp., 442 S.E.2d 391, 395 (Va. 1994) (holding that to secure an injunction, a party "must show irreparable harm and the lack of an adequate remedy at law"); Wright v. Castles, 349 S.E.2d 125, 129 (Va. 1986) (same); Va. Beach SPCA, Inc. v. S. Hampton Rds. Veterinary Ass'n, 329 S.E.2d 10, 13 (Va. 1985) (same); Carbaugh v. Solem, 302 S.E.2d 33, 35 (Va. 1983) (opining that "lack of proof of irreparable harm is generally fatal" and that a "court of equity will not issue an injunction . . . if the petitioner has an adequate remedy at law"); Akers v. Mathieson Alkali Works, 144 S.E. 492, 494 (Va. 1928) (holding that an injunction will not be awarded where, inter alia, "the [movant] can be adequately compensated in damages"); S. & W. Ry. Co. v. Va. & Sw. Ry. Co., 51 S.E. 843, 845 (Va. 1905) (refusing to grant an injunction

have compared the harm to the movant without the requested injunction to the harm to the non-movant with the injunction, which they often refer to as balancing the hardships.[179] Courts sometimes have evaluated the impact the injunction would have on the public interest.[180] Finally, some courts have evaluated the ripeness of the dispute,[181] and others have evaluated the scope of the injunctive order.[182]

Although Virginia appellate courts have not distilled the permanent injunction elements into some sort of universal test,[183] several federal courts interpreting Virginia law have done exactly that. For example, in *Safeway Inc. v. CESC Plaza Ltd. Partnership*, the United States District Court for the Eastern District of Virginia opined that although the federal "three part articulation of the test for injunctive relief does not appear in the Virginia cases, it is consistent with Virginia case law, which likewise

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when "the remedy at law is adequate"); Callaway v. Webster, 37 S.E. 276, 276 (Va. 1900) (holding that a court will issue an injunction where "the injury is or would be irreparable, whenever the remedy at law is or would be inadequate").

[179] *See, e.g.*, McCauley v. Phillips, 219 S.E.2d 854, 858 (Va. 1975) (holding that "the determination whether to award an injunction is to be made by the chancellor, in the exercise of his discretion, after balancing the equities"); Mobley v. Saponi, 212 S.E.2d 287, 289 (Va. 1975) (holding that a court may deny an injunction where "the hardship to the [non-movant] . . . is disproportionate to the injury to the [movant]"); Seventeen, Inc. v. Pilot Life Ins., 205 S.E.2d 648, 653 (Va. 1974) ("If the harm that an injunction would cause to the [non-movant] would be out of proportion to the injury the [movant] seeks to remedy, a court of equity may properly deny injunctive relief."); *Akers*, 144 S.E. at 494 (holding that an injunction will not be awarded where, inter alia, "the injury to the [non-movant] is greater than the benefit to the [movant]"); Clayborn v. Camilla Red Ash Coal Co., 105 S.E. 117, 122 (Va. 1920) (holding that a court may deny an injunction where "the loss entailed upon the [movant] would be excessively out of proportion to the injury suffered by the [non-movant]").

[180] *See, e.g.*, *Mobley*, 212 S.E.2d at 289 (holding that an injunction will not be granted where "the hardship to the [non-movant] or to the public is disproportionate to the injury to the [movant]"); *Seventeen, Inc.*, 205 S.E.2d at 653 (holding that in determining whether to grant an injunction, a court must "consider the interests of the parties and of the public"); *Akers*, 144 S.E. at 494 (holding that an injunction will not be awarded where, inter alia, the injunction would result in a "serious detriment to the public" (quoting *Clayborn*, 105 S.E. at 122)).

[181] *See, e.g.*, *Shenandoah Acres*, 505 S.E.2d at 371–72 (opining that "the party seeking relief must show that the alleged harm is imminent, and not merely speculative or potential"); Large v. Clinchfield Coal Co., 387 S.E.2d 783, 786 (Va. 1990) (citing WTAR Radio-TV v. Va. Beach, 223 S.E.2d 895, 898 (Va. 1976)) (holding that good cause exists for issuing an injunction where, inter alia, "the wrong is actually threatened or apprehended with reasonable probability").

[182] *See* 2 FRIEND & SINCLAIR, *supra* note 18, § 33.02[8] (noting that, under Virginia law, in an injunctive order "the operative language must not be overly broad" and the order "must concretely address no more than is necessary" (first citing Turner v. Caplan, 396 S.E.2d 525 (Va. 2004); then citing Tran v. Gwinn, 554 S.E.2d 63 (Va. 2001))).

[183] In at least one case, *Akers v. Mathieson Alkali Works*, the Supreme Court of Virginia arguably came close to such a formulation. 144 S.E. at 494 (holding that an injunction will not be awarded where "the [movant] can be adequately compensated in damages," where "the injury to the [non-movant] is greater than the benefit to the [movant]," or where the injunction would result in a "serious detriment to the public").

focuses on the inadequacy of damages, the balance of equities, and the public interest."[184] By contrast, guidance provided to Virginia trial judges instructs them that the prerequisites for a permanent injunction are no adequate remedy at law,[185] irreparable injury to the movant,[186] and "whether the burden placed on the [non-movant] is excessively out of proportion to the benefit received by the [movant]."[187]

V. THE IMPACT OF *EBAY INC. V. MERCEXCHANGE, L.L.C.*

A. The Impact of eBay *on Federal Patent Law*

After the United States Supreme Court issued its ruling in *eBay*, many patent holders, intellectual property attorneys, and legal scholars were frustrated[188] and on guard.[189] The pre-*eBay* presumption that injunctive relief was available upon demonstration of patent infringement

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[184] 261 F. Supp. 2d 439, 467 (E.D. Va. 2003) (citing Black & White Cars v. Groome Transp., 442 S.E.2d 391, 395 (Va. 1994); Wright v. Castles, 349 S.E.2d 125, 129 (Va. 1986); Richmond v. Hall, 466 S.E.2d 103, 106–07 (Va. 1996); *Aker*s, 144 S.E. at 494); *Mobley*, 212 S.E.2d at 289. As discussed *supra*, some Virginia appellate courts also have discussed ripeness and the scope of the injunctive order in their permanent injunction analyses. *See supra* notes 181–84 and accompanying text.

[185] VIRGINIA CIVIL BENCHBOOK FOR JUDGES AND LAWYERS § 8.06[2][b] (2018–2019 ed. Matthew Bender) (citing Preferred Sys. Sols., Inc. v. GP Consulting, LLC, 732 S.E.2d 676 (Va. 2012); Fancher v. Fagella, 650 S.E.2d 519 (Va. 2007)). The *Benchbook* is a reference text—produced by Virginia circuit court judges at the direction of the Supreme Court of Virginia—that is provided to Virginia circuit court judges as a resource. *Id.* at iii.

[186] *Id.* (citing Levisa Coal Co. v. Consolidation Coal Co., 662 S.E.2d 44 (Va. 2008)).

[187] *Id.* (citing Pizzarelle v. Dempsey, 526 S.E.2d 260 (Va. 2000); *Black & White Cars*, 442 S.E.2d 391; *Akers*, 144 S.E. 492). The applicable *Benchbook* section also notes that, for statutory injunctions, "neither the lack of an adequate remedy at law nor irreparable harm must be shown." *Id.* (citing *Levisa Coal Co.*, 662 S.E.2d 44).

[188] The uproar from the patent bar—and later the intellectual property bar generally—stemmed not so much from the formulation of a "new" permanent injunction test but rather from the elimination of a longstanding presumption that patent owners are entitled to injunctive relief upon a showing of patent infringement. *See infra* notes 190–94 and accompanying text; *see also* Gergen et al., *supra* note 148, at 205, 212 (opining that courts have "repeatedly declared the *eBay* test to have swept aside long-settled presumptions about when injunctions should issue" and that "the *eBay* test's straitjacket might not even permit the district courts to use rebuttable presumptions"); *id.* at 215–16 (first citing Automated Merch. Sys., Inc. v. Crane Co., 357 F. App'x 297, 301 (Fed. Cir. 2009); then citing John M. Golden, *Principles for Patent Remedies*, 88 TEX. L. REV. 505, 578 & nn.406–07 (2010)) (noting that "many courts have openly recognized *eBay* as disruptive, in particular by requiring the abrogation of previously settled presumptions in favor of an injunction, including presumptions that continuing rights violations entail irreparable injury"). For other areas of the law, which were accustomed to proving irreparability, the impact of the *eBay* test arguably was minimal from a practical perspective. *See infra* notes 327–30 and accompanying text.

[189] *See* Sandrik, *supra* note 131, at 110–16 (detailing the impact of the *eBay* decision on patent holders).

was suddenly replaced with a requirement that the patent holder prove each element of the four-factor test, including irreparability.[190]

In the immediate aftermath of *eBay*, it was unclear how this new multi-factor test would affect patent dispute litigants. Patent holders were concerned that the burden they needed to satisfy when seeking injunctive relief increased overnight;[191] they could no longer expect a permanent injunction, which—prior to *eBay*—was virtually automatic.[192] The newly established irreparable-harm factor also raised the issue of how that element could be satisfied in the patent context. More specifically, the concern was that the nature of patents and their respective markets were not conducive to this new level of inquiry and that non-practicing patent holders would have a more difficult time enjoining infringers from competition.[193] As a result, uncertainty ensued regarding how to allege and defend against an assertion of irreparable harm.[194]

Federal courts were also left to wrestle with arguments that, even in a post-*eBay* world, the irreparable injury presumption was still alive and well.[195] In 2011, the United States Court of Appeals for the Federal Circuit in *Robert Bosch LLC v. Pylon Manufacturing Corp.* definitively held that the presumption of irreparable harm no longer exists in the patent context.[196] *Bosch* articulated certain factors that a patent holder may use to satisfy its burden of proving irreparable harm: (1) the parties' direct competition, (2) the patent holder's loss in market share and access to potential customers, and (3) the infringer's lack of financial wherewithal to satisfy a judgment.[197] In applying the elements, the Federal Circuit clearly pointed out that courts should still exercise their discretion "in

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[190] Bernard H. Chao, *After* eBay, Inc. v. MercExchange*: The Changing Landscape for Patent Remedies*, 9 MINN. J.L. SCI. & TECH. 543, 543–45 (2008).

[191] *See supra* note 146 and accompanying text.

[192] *See supra* note 131 and accompanying text.

[193] After all, the basis for the Federal Circuit's presumption of injunctive relief upon demonstration of patent infringement was the difficulty in proving damages. *See supra* note 129 and accompanying text.

[194] *See* Matthew C. Darch, Note, *The Presumption of Irreparable Harm in Patent Infringement Litigation: A Critique of* Robert Bosch LLC v. Pylon Manufacturing Corp., 11 NW. J. TECH. & INTELL. PROP. 103, 110–12 (2013) (pointing out that the Second, Fourth, and Ninth Circuits have eliminated the presumption of irreparable harm in preliminary injunction copyright cases while the First Circuit declined to decide the issue).

[195] *Id.* ("Following the *eBay* decision, the Federal Circuit considered the presumption of irreparable harm an open issue.").

[196] Robert Bosch LLC v. Pylon Mfg. Corp., 659 F.3d 1142, 1149 (Fed. Cir. 2011) ("We take this opportunity to put the question to rest and confirm that *eBay* jettisoned the presumption of irreparable harm as it applies to determining the appropriateness of injunctive relief.").

[197] *Id.* at 1150–51.

accordance with traditional principles of equity" when evaluating a movant's right to injunctive relief.[198]

Before *eBay*, patent holders could almost certainly rely on injunctive relief to protect their property interests; after *eBay*, they had to demonstrate each *eBay* factor, including irreparable harm.[199] If, as Laycock has opined, the irreparable injury rule should be eliminated because it is effectively "dead," or at least dormant,[200] *eBay* resurrected it. The prior presumption that injunctive relief was appropriate upon demonstration of patent infringement arguably was required due to the difficulty in demonstrating the irreparability of injury, i.e., the inadequacy of damages arising from patent infringement.[201] Laycock's premise that anyone who wants injunctive relief can satisfy the irreparable injury rule therefore appears flawed, at least in the intellectual property arena.[202]

The shift away from the presumption of irreparability primarily affected non-practicing patent holders—primarily patent trolls—more heavily than practicing patentees because awarding injunctive relief to non-practicing patent holders arguably had provided "undue leverage" to them previously in negotiations that often resulted in exorbitant licensing fees.[203] In fact, the relatively recent advent of patent trolls arguably played a significant role in the United States Supreme Court's decision in

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[198] *Id.* at 1148.

[199] *See supra* notes 123, 147 and accompanying text. In *eBay*, the United States Supreme Court "acknowledged that patents confer property rights upon their owners, including 'the right to exclude others from making, using, offering for sale, or selling the invention,'" but rejected the assertion that this supported a presumption of irreparability. *See* Christopher B. Seaman, *Permanent Injunctions in Patent Litigation After* eBay*: An Empirical Study*, 101 IOWA L. REV. 1949, 1965 (2016) (quoting eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 392 (2006)). A "property rule" is based on ownership, where the transfer of an entitlement requires the owner's consent. *Id.* at 1954, 1969. A "liability rule," by contrast, provides that a party can take the entitlement—even without consent—in exchange for payment of a fee. *Id.* at 1955, 1969.

[200] *See supra* notes 93–95 and accompanying text.

[201] *See supra* note 129 and accompanying text.

[202] Interestingly, Douglas Laycock noted in 1991 in his book *The Death of the Irreparable Injury Rule* that "damages from loss of intellectual property are notoriously difficult to measure" and that injunctions therefore "are a routine remedy for," inter alia, "infringement of patents, copyrights, or trademarks." LAYCOCK, *supra* note 15, at 47 (internal citations omitted).

[203] Seaman*, supra* note 199, at 1952, 1970. One university professor testified before the Federal Trade Commission as follows: "[E]ven though the ruling in *eBay* may not have expressly commanded that one look at whether it's a practicing or non-practicing entity to decide whether they're entitled to enjoin the infringer . . . the reality is . . . courts understand the *eBay* decision to actually mean that." Holte, *supra* note 129, at 719 (quoting Ron Hatznelson, Hearing on the Evolving IP Marketplace: The Operation of IP Markets, Remarks at the Federal Trade Commission 5, 62 (Mar. 18, 2009)).

eBay.[204] Even under the *eBay* test, permanent injunctions are still frequently granted in patent disputes—with patent holders obtaining permanent injunctions roughly three out of every four times—although many patent cases have shifted focus "from a property rule to a liability rule."[205]

B. The Impact of eBay *on Other Federal Law*

The non-intellectual property context has seen less change since *eBay*. This may be because the *eBay* decision itself relied upon non-intellectual property patent cases in establishing its four-part test and merely required that courts invoke traditional equitable principles.[206] As the Supreme Court in *eBay* noted, its ruling regarding patents was

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[204] *See* Gergen et al., *supra* note 148, at 244 ("To Justice Kennedy, and more so to intellectual property skeptics, perhaps the principal value of the *eBay* test comes from its use to deny injunctions to trolls."). Although not specifically stated, some interpreted Justice Kennedy's description of "patent holders" to be a reference to patent trolls. Casagrande, *supra* note 155, at 12. Justice Kennedy put it this way in his *eBay* concurring opinion, which was joined by Justices Stevens, Souter, and Breyer:

> In cases now arising trial courts should bear in mind that in many instances the nature of the patent being enforced and the economic function of the patent holder present considerations quite unlike earlier cases. An industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees. . . . For these firms, an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent. When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest. In addition[,] injunctive relief may have different consequences for the burgeoning number of patents over business methods, which were not of much economic and legal significance in earlier times. The potential vagueness and suspect validity of some of these patents may affect the calculus under the four-factor test.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 396–97 (2006) (Kennedy, J., concurring) (internal citations omitted). By contrast, "[h]istorically, patent disputes involved a patentee suing its licensee for exceeding the scope of the license or the practicing patentees infringing on each other's technology." Grab, *supra* note 131, at 97.

[205] Seaman, *supra* note 199, at 1969 (internal citations omitted); *see also* Rachel M. Janutis, *The Supreme Court's Unremarkable Decision in* eBay Inc. v. MercExchange, L.L.C., 14 LEWIS & CLARK L. REV. 597, 604 (2010) ("Practicing patent holders in direct competition with the infringer almost universally continue to receive an injunction upon a finding of infringement and validity." (internal citations omitted)).

[206] *eBay*, 547 U.S. at 391–92 (first citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 306 (1982) (discussing whether the Federal Water Pollution Act required enjoining the Navy from carrying out training operations in Puerto Rico); then citing Amoco Prod. Co. v. Gambell, 480 U.S. 531, 532 (1987) (discussing whether a preliminary injunction was appropriate to enjoin the sale of oil and gas leases related to federally owned land in Alaska)).

consistent with its prior copyright opinions.[207] Post-*eBay* copyright and trademark cases have closely followed *eBay*, at least in the context of preliminary injunctions.[208] By contrast, it remains an open issue whether irreparable harm is presumed in trademark infringement cases when a trademark plaintiff demonstrates likelihood of success on the merits.[209]

C. The Impact of eBay *on State Laws*

1. States Adopting the *eBay* Test

Because the Supreme Court created *eBay*'s formal permanent injunction test anew—albeit based on well-established equitable principles—and because its holding technically applies only to federal permanent injunctions, it is unsurprising that few states have adopted the *eBay* four-factor formulation to analyze permanent injunctions. Courts in

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[207] *Id.* The Court pointed out that "the Patent Act expressly provides that injunctions 'may' issue 'in accordance with the principles of equity,'" *id.* at 392, and noted that the Court, when interpreting the Copyright Act—which has similar injunction-related language—"has consistently rejected invitations to replace traditional equity considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed," *id.* at 392–93 (citing N.Y. Times Co. v. Tasini, 533 U.S. 483, 505 (2001)).

[208] *See* Lemley, *supra* note 129, at 1795 ("Copyright courts quickly followed suit, applying the [*eBay*] four-factor test. More recently, three circuits have held that the same four factors govern the grant of trademark injunctions, pointing to statutory language similar to that in the patent and copyright statutes." (first citing Perfect 10, Inc. v. Google, Inc., 653 F.3d 976 (9th Cir. 2011); then citing Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010))); *id.* at 1798–99 (discussing *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211 (11th Cir. 2008) and *Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 735 F.3d 1239 (9th Cir. 2013) (citing Ferring Pharm., Inc. v. Watson Pharm., Inc., 765 F.3d 205 (3d Cir. 2019))); *see also* Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc., 645 F.3d 26, 33 (1st Cir. 2011) ("Although *eBay* dealt with the Patent Act, in the context of a request for permanent injunctive relief, we see no principled reason why it should not apply in the present [trademark infringement] case.").

[209] *Voice of the Arab World*, 645 F.3d at 34. There, the court stated the following:

> [W]e conclude that a request to preliminarily enjoin alleged trademark infringement is subject to traditional equitable principles, as set forth by the Supreme Court in *eBay*, and more recently in *Winter*, which also discusses such principles. We, however, decline to address at this time the full impact of *eBay* and *Winter* in this area. For example, we do not address whether our previous rule, relied upon by the district court, i.e., "that a trademark plaintiff who demonstrates a likelihood of success on the merits creates a presumption of irreparable harm," is consistent with traditional equitable principles. In other words, we decline to decide whether the aforementioned presumption is analogous to the "general" or "categorical" rules rejected by the Supreme Court in *eBay*.

Id. (quoting Am. Bd. of Psychiatry & Neurology, Inc. v. Johnson-Powell, 129 F.3d 1, 3 (1st Cir. 1997) (citing *eBay*, 547 U.S. at 393–94)).

Alabama, Arizona, and Massachusetts, nevertheless have done so.[210] This is instructive because it demonstrates the broad reach of *eBay* and how its multi-factor evaluation scheme has been applied in both preliminary and permanent injunctive contexts.

The Supreme Court of Alabama addressed the *eBay* factors in a trademark infringement case a mere two years after the United States Supreme Court's decision.[211] In *Classroomdirect.com, LLC v. Draphix, LLC*, Classroomdirect.com—a seller of educational supplies—sued Draphix—a licensee and competitor—after a partial sale of its assets turned into a confusing and complicated web of alleged unfair competition and improper trade name use.[212] A jury ultimately awarded Classroomdirect.com compensatory damages, and the trial court issued a limited-in-scope permanent injunction that did not restrict Draphix's ability to continue using its trade name, "Teacher Direct," despite the alleged customer confusion with "Classroom Direct."[213] On appeal, the Supreme Court of Alabama cited the *eBay* factors and determined that the lower court did not abuse its discretion in awarding the narrowly tailored injunction.[214] Of note, the facts of this state case required interpretation of the Lanham Act—a federal law. It is unclear whether the Supreme Court of Alabama would have incorporated the *eBay* test in evaluating a case arising under state law.

In *River Springs Ranch Property Owners Ass'n v. L'Heureux*, an Arizona property owners' association sought injunctive relief enjoining certain property owners from operating a commercial dog breeding business from their property.[215] The trial court found that the property owners had violated the association's declaration and granted a permanent injunction.[216] In affirming the trial court's decision, the Arizona Court of Appeals reasoned that "enforcement of deed restrictions is effected through an injunction" and that the respondent had satisfied the four-factor test set forth in *eBay*.[217]

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[210] Classroomdirect.com, LLC v. Draphix, LLC, 992 So. 2d 692, 701–02 (Ala. 2008); River Springs Ranch Prop. Owners Ass'n v. L'Heureux, No. 1 CA-CV 09-0560, 2010 Ariz. App. Unpub. LEXIS 1285, at *8 (Ariz. Ct. App. Oct. 26, 2010); Inner-Tite Corp. v. Brozowski, No. 20100156, 2010 Mass. Super. LEXIS 159, at *65–66 (Mass. Supp. Apr. 14, 2010).

[211] *Classroomdirect.com*, 992 So. 2d at 701 ("Although this Court has not found a United States Supreme Court case discussing the standard of review to be applied specifically to a permanent injunction entered in a Lanham Act case, we note the discussion in *eBay*." (citing *eBay*, 547 U.S. at 391)).

[212] *Id.* at 695–99.

[213] *Id.* at 700.

[214] *Id.* at 701, 705–06.

[215] 2010 Ariz. App. Unpub. LEXIS 1285, at *1–2.

[216] *Id.*

[217] *Id.* at *8.

In *Inner-Tite Corp. v. Brozowski*, a Massachusetts employer sought a preliminary injunction against his employee to enjoin the employee from working for a competitor company, claiming that the employee breached a non-compete agreement.[218] When the employee failed to appear, the employer was granted a preliminary injunction.[219] At the conclusion of the related trial on the merits, the trial court granted the employer a permanent injunction.[220] Applying the *eBay* test, the court reasoned that the employer would suffer irreparable harm if the employee was not enjoined from working for the competitor, a greater harm would befall the employer if the secrecy/non-compete agreement was not enforced, and enforcement of the agreement was in the public interest.[221]

These cases show that there is precedent for state courts to rely on the federal court standard to guide how they review and analyze requests for injunctive relief.

2. Other States' Treatment of the *eBay* Test

A Shepard's® search of *eBay Inc. v. MercExchange, L.L.C.* revealed that only fifteen states have cited to *eBay* in published decisions.[222] Of those states, apparently none have expressly rejected the four-part permanent injunction test. That said, not all courts citing to *eBay* have expressly adopted its formulation either, opting instead to create their own version of the test or to just ignore it altogether. This seeming apathy could be because these courts have no need for further guidance on the issue, the courts have not had a permanent injunction issue ripe for review by the highest court, or some other reason exists.

One example of recognition without overt adoption of the *eBay* test is in *Rose Nulman Park Foundation* ex rel. *Nulman v. Four Twenty Corp.*, where the Rhode Island Supreme Court acknowledged the existence of *eBay* in the context of the public interest factor and then mirrored the other *eBay* elements when evaluating the merits of injunctive relief.[223] In that case, the movant property owner owned real property that was used

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[218] No. 20100156, 2010 Mass. Super. LEXIS 159, at *1 (Mass. Supp. Apr. 14, 2010).

[219] *Id.*

[220] *Id.* at *70–71.

[221] *Id.* at *65–70.

[222] This figure is based on a LexisAdvance® search and review of cases citing *eBay Inc. v. MercExchange, L.L.C.* that was current as of November 23, 2019. The search revealed the following states as having at least one case citing *eBay Inc. v. MercExchange, L.L.C.*: Alabama, Arizona, California, Connecticut, Delaware, Illinois, Massachusetts, Minnesota, Missouri, New Hampshire, New York, Oklahoma, Rhode Island, Texas, and Wisconsin. Mere citation or reference to a case, however, did not mean that the case included a relevant discussion useful for purposes of this Article.

[223] 93 A.3d 25, 32 (R.I. 2014).

as a public park.[224] Sometime after the property owner established the park, the [non-movant] purchased adjacent property.[225] After acquiring a site development plan that was approved by a registered professional engineer, the non-movant unknowingly built a single-family residence on the movant's property.[226] The movant sought a mandatory injunction ordering removal of the residence after becoming aware of the encroachment.[227] The state supreme court held that although the building was erected in good faith, the appropriate remedy for a continuing trespass was injunctive relief.[228] Although the court cited *eBay*'s public interest factor, it analyzed most closely the "relative hardship of the parties."[229] The court opined that the harm to the movant outweighed the harm to the non-movant because the encroachment was not minimal, the trustees of the park foundation were potentially liable for a penalty if the house remained on the property, and the building on the park property constituted an irreparable injury to the public.[230] The court could have easily cited and relied upon *eBay*'s four-factor test but chose not to.

Delaware, by contrast, has not yet firmly adopted the *eBay* test but has cited to it. In *Wayne County Employees' Retirement System v. Corti*, a Delaware shareholder filed for preliminary injunctive relief, solely on disclosure grounds, in order to prevent a special meeting of the company's shareholders.[231] The trial court denied the motion for a preliminary injunction because the shareholder failed to establish the likelihood of success on the merits of the disclosure claim; in doing so, it also cited to the *eBay* four-factor test,[232] at least suggesting that Delaware is open to following *eBay* in the future when considering requests for permanent injunctions.

The *eBay* case is still relatively new, and time will tell how the case will be adopted or abandoned by other states. But the Commonwealth has an opportunity to learn from *eBay* and adopt a clear framework for analyzing requests for permanent injunctions.

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[224] *Id.* at 26.
[225] *Id.* at 27.
[226] *Id.*
[227] *Id.*
[228] *Id.* at 33 (citing Santilli v. Morelli, 230 A.2d 860, 863 (R.I. 1967)).
[229] *Id.* at 30–32.
[230] *Id.* at 32.
[231] 954 A.2d 319, 322 (Del. Ch. 2008).
[232] *Id.* at 322–23, 329.

3. Virginia's Position Regarding the *eBay* Test

To date, no cases in the Commonwealth of Virginia have cited or relied upon *eBay* or its four-factor test expressly.[233] This apparent apathy is likely because Virginia's pre-*eBay* injunction analysis employed the same factors in considering whether to grant or deny permanent injunctive relief.

VI. THE FUTURE OF VIRGINIA PERMANENT INJUNCTION LAW

As discussed *supra*, the history of equity illustrates the benefits and risks of leaving an appropriate remedy to the discretion of the Chancellor or, in modern times, the judge.[234] Concomitant with broad equitable discretion is the inability of litigants to accurately predict on what factors the presiding judge will base her decision.[235] Although development of a rigid permanent injunction test that eliminates all equitable discretion is impractical—and arguably undesirable—the creation of a more specific analytical framework to guide the court's equitable analysis is possible and, indeed, would prove useful.[236] Such a framework would include requisite factors to be evaluated and prongs within some of those factors to be probed as part of the analysis.[237] Although judicial equitable discretion would still play a critical role, both courts and litigants would benefit from a logical analytical tool because it would provide a relatively detailed guideline to better predict the likelihood of prevailing on a petition for a permanent injunction.[238] This approach would hopefully result in more consistency, predictability, and clarity.

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[233] This figure is based on a LexisAdvance® search for *eBay Inc. v. MercExchange, L.L.C.*, and review of the Shepard's® results for *eBay Inc. v. MercExchange, L.L.C.*, both of which are current as of October 2, 2019.

[234] *See supra* Part II.

[235] *See* Rendleman, *supra* note 100, at 73–74 (discussing the "considerable discretion" a judge has regarding the adjudication of injunctions after *eBay*).

[236] *See* Rendleman, *supra* note 1, at 1413 (noting that some scholars have opined that "making findings on the [equitable] factors structures the judge's decision, focuses her judgment on the important issues, and provides a basis for appellate review").

[237] *See id.* at 1450 (opining that "the judge's discretionary decisionmaking ought to yield to her attention to rules, precedents, and standards keeping her pragmatic eye on consequences").

[238] *See id.* ("If courts were to reduce their use of equitable discretion, develop rules and standards, and decide discrete remedial issues according to uniform remedial criteria, then much progress would occur.").

A. The eBay *Test and Current Virginia Permanent Injunction Guidance Can Be Improved*

Despite their independent development, the *eBay* test and current Virginia permanent injunction law actually are very similar. Both require the movant to prove that (1) the injury is irreparable, (2) damages are inadequate, (3) the balance of hardships between the parties tips toward the movant, and (4) the requested injunction supports the public interest.[239] In addition to these four factors, some Virginia courts have also analyzed ripeness and the scope of injunctive relief in the context of requests for permanent injunctions; the selective inclusion of these additional considerations makes it difficult at times for practitioners and jurists to understand whether to analyze them.[240] The inconsistent application of "requirements" under Virginia law and the lack of a cohesive methodology to analyze each factor provide an opportunity for clarity in the form of a structured permanent injunction framework.

As an initial matter, any Virginia evaluation tool for permanent injunctive relief should include a ripeness factor.[241] Although a court needs to be satisfied that any case that comes before it is ripe, the ripeness analysis in permanent injunction cases is more complex than the traditional ripeness evaluation. As discussed *infra*, courts analyzing requests for permanent injunction must be satisfied that the case is ripe both temporally—something akin to an immediacy test, which is the typical notion of ripeness—and in the sense that the proffered harm will actually come to pass.[242]

Most problematic is that *eBay* and Virginia permanent injunction case law require the movant to prove *both* irreparable injury and inadequacy of damages. As discussed *infra*, this is redundant, as an injury is irreparable *because* money damages are inadequate to fully compensate the movant if the threatened harm occurs.[243] For clarity and simplicity, the composition of any Virginia permanent injunction multiple-factor

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[239] *See supra* notes 147, 178–82 and accompanying text. According to some scholars, "the factors enshrined in the *eBay* test are not wrong but instead are incomplete and mischaracterized along a number of dimensions." Gergen et al., *supra* note 148, at 233.

[240] *See supra* notes 181–84 and accompanying text.

[241] LAYCOCK & HASEN, *supra* note 13, at 275 ("Before an injunction will issue, the threat of injury must be ripe."). "The basic focus for ripeness is an inquiry whether the threatened harm or wrong, which the injunction is designed to remedy, will reoccur." FISCHER, *supra* note 19, § 30.0. Of note, reparative injunctions, which are designed to prevent future harm stemming from a *past* injury, "do not raise ripeness issues, because the wrongful act has already occurred." LAYCOCK & HASEN, *supra* note 13, at 312.

[242] *See infra* Part VI.B.1.

[243] *See infra* Part VI.B.2.

analysis therefore should eschew including both irreparable injury and inadequacy of damages as factors.

Both federal and Virginia law also could better articulate the balance-of-hardships factor. The balancing implies—and usually is analyzed as—a comparison of the harm to the non-movant with the benefits to the movant if the injunction is issued, a sort of cost-benefit analysis.[244] Although such a comparison may be warranted, there are several other issues that could result in an injunction being warranted—based on ripeness and irreparability—but ultimately not granted by a court.[245] Instead of simply balancing the hardships between the parties, the court therefore should balance *all* applicable equities.

Based on the recognized importance of the potential impact of injunctive relief on the public interest or on public policy,[246] the recommended multi-factor formulation should include a factor guiding courts and litigants to evaluate these issues.[247]

Due to the impact of injunctions on the non-movant's liberty—and perhaps on others—the analytical framework for Virginia permanent injunctions should include an analysis of the scope of the requested injunctive order. As discussed *infra*, courts need to ensure that their injunctive orders are not overbroad.[248]

Finally, courts need guidance regarding how to apply the recommended multi-factor permanent injunction analysis. As discussed *infra*, the authors recommend that, for a court to issue a permanent injunctive order, the movant should be required to satisfactorily demonstrate each of the factors. The court must use its equitable discretion when evaluating each factor, however, especially the balance-of-the-equities and public-interest factors.[249]

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[244] *See supra* note 120 and accompanying text. Some Virginia courts have compared the harm to the movant without the requested injunction to the harm to the non-movant with the injunction. *See supra* note 179 and accompanying text.

[245] *See infra* Part VI.B.3.

[246] *See, e.g.*, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24–26 (2008) (holding that the public interest in conducting realistic sonar military training exercises in support of national security outweighed the possible injury to—and the ability to study and observe—marine mammals); eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391–94 (2006) (holding that one factor of the permanent injunction test is that the public interest "would not be disserved").

[247] *See infra* Part VI.B.4.

[248] *See infra* Part VI.B.5.

[249] *See infra* notes 251–52 and accompanying text.

B. A Recommended Analytical Framework for Virginia Permanent Injunctions

Based on the above, the framework for all Virginia permanent injunctions should require the movant to demonstrate the following factors: (1) the dispute is ripe for issuance of a permanent injunction, (2) the movant would suffer irreparable injury without the permanent injunction, (3) the balance of the equities does not preclude permanent injunctive relief, (4) the permanent injunction is not contrary to the public interest or public policy, and (5) the scope of the proposed injunctive order is not overbroad.[250] Although this formulation may initially appear to be a "test," it is not meant to imply an objective analysis: the five factors are simply intended to indicate the areas a court should examine when analyzing an injunctive petition.[251] The analysis of each factor still often will require the court to exercise its equitable discretion.[252] Such a framework coalesces previously recognized analytical equitable elements under Virginia law into a single, cohesive evaluation tool.[253]

For the court to award a permanent injunction, the movant must demonstrate all five of these factors.[254] Each factor represents an intermediate step in the equitable analysis. From an application perspective, it makes sense to analyze the framework elements sequentially, as they are organized to facilitate judicial economy, and the failure to demonstrate any one of them precludes awarding a permanent

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[250] *See infra* notes 254–61 and accompanying text.

[251] Doug Rendleman recommended an approach to equitable discretion when there is no clear rule for the court to apply:

> Legislators, rulemakers, and earlier courts cannot formulate a rule, but they can identify factors and formulate guidelines or standards. Factors, standards, or guidelines may exist, but without any clear definition of their relative importance. These identify the questions the judge must ask to focus her judgment on the critical issues without forcing her answer.

Rendleman, *supra* note 1, at 1408.

[252] *Id.*

[253] *See supra* note 178 and accompanying text. This framework is not inconsistent with the *eBay* test, but rather clarifies and expands upon it. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 311–13 (1982); Amoco Prod. Co. v. Gambell, 480 U.S. 531, 542 (1987)) (holding that, in order to obtain a permanent injunction, a movant must demonstrate that (1) it has suffered an irreparable injury, (2) remedies available at law are inadequate to compensate the movant, (3) the balance of hardships between the movant and the non-movant warrants an equitable remedy, and (4) the public interest would not be disserved by the injunction).

[254] *eBay*, 547 U.S. at 391. This is consistent with application of the *eBay* test. *See supra* note 148 and accompanying text. Of note, some commentators have argued that this was a revolutionary departure from the traditional law on injunctions, which merely used equitable factors in "an overall balancing analysis." Gergen et al., *supra* note 148, at 210.

injunction.[255] Hence, there is no need to evaluate irreparability if the matter is not ripe for issuance of an injunction, and there is no need to balance the equities if the movant has not already proven irreparability.[256] Additionally, the balance-of-the-equities element can serve as an exception to granting an otherwise valid injunction; if the court gets this far through the framework, the movant already has demonstrated that the matter is ripe and that the anticipated harm is irreparable.[257] If the balance of the equities does not lean toward the movant, however, an injunction will not be awarded—despite the fact that the irreparable-injury prong has been satisfied.[258] In other words, if the balance of the equities does not tip in the movant's favor, this trumps the irreparable injury and the injunction will be denied.[259] If the balance of the equities does not preclude issuance of a permanent injunction, the court should then evaluate whether permanent injunctive relief supports the public interest or public policy, and then ensure that the injunctive order is not overbroad.

1. The Dispute Is Ripe for Issuance of a Permanent Injunction

Although all disputes must be ripe to be justiciable, the evaluation of injunctive ripeness is inherently more complex and worth including in a permanent injunction analysis framework.[260] Hornbook law is clear that courts—including those considering injunctive relief—only hear cases and controversies and do not issue advisory opinions.[261] Because injunctions

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[255] *See* Gergen et al., *supra* note 148, at 234 ("Filters that point toward and away from injunctions can limit error and save a lot of effort.").

[256] An argument could be made that, for similar reasons, the court should review the scope of the proposed injunctive order as a threshold issue. However, once the movant proves the other elements, the court can modify the proposed order, either based on a request from the parties or sua sponte. *See infra* notes 324–27 and accompanying text.

[257] *See infra* note 290 and accompanying text.

[258] *See infra* note 292 and accompanying text.

[259] *See infra* note 292 and accompanying text. Of course, if the harm about which the movant was concerned occurs, she would still be able to pursue a damages action against the non-movant. *See infra* note 292 and accompanying text.

[260] *See* LAYCOCK & HASEN, *supra* note 13, at 275 ("When the party who seeks an injunction shows potential irreparable injury, he has established merely one essential condition for relief. He must demonstrate in addition that there is real danger that the acts to be enjoined will occur." (quoting Humble Oil & Ref. Co. v. Harang, 262 F. Supp. 39, 43 (E.D. La. 1966))). As Douglas Laycock and Richard Hasen noted, the *eBay* "test does not even include proof of ripeness or propensity, though no one doubts this is also necessary to obtain a permanent injunction." *Id.* at 443.

[261] CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 12 (8th ed. 2017) ("The courts of the United States do not sit to decide questions of law presented in a vacuum, but only those questions that arise in a 'case or controversy.'"); *see also* LAYCOCK & HASEN, *supra* note 13, at 275 (referring to the "ripeness rule," which states the following: "Before an injunction will issue, the threat of injury must be ripe"). The rule against advisory

are designed to *prevent* harm, by definition the harm of concern is future harm, i.e., harm that has not yet occurred.[262] One aspect of ripeness therefore is the temporal proximity to, or immediacy of, the threatened harm.[263] The dispute is ripe if the court finds that the actual harm about which the movant is concerned is close enough in time to the pending controversy.[264]

This "close enough" metric may vary depending on the subject matter of the case and the proposed injunction. For instance, in patent cases, the issuance of a generic drug may be a half-dozen years in the future, but—given the nature of drug manufacturing and the necessary lead time for marketing, producing, and distributing such drugs—the threat of a patent infringer may make that time period close enough for the court to grant the requested relief. By contrast, if a neighbor is threatening to encroach on adjacent property a year from now, such a claim likely would not be deemed ripe.

In addition to the traditional immediacy ripeness, proposed injunctions should have to satisfy another aspect of ripeness: whether the act sought to be prevented actually will result in harm if it occurs. For example, in *Nicholson v. Connecticut Half-Way House, Inc.*, the movants—property owners and residents of a middle-class residential neighborhood—sought an injunction precluding a halfway house for prison parolees from opening because it would constitute a public nuisance.[265] The court found that, although the opening of the halfway house apparently was impending, there was insufficient proof that the

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opinions "recognizes the risk that comes from passing on abstract questions rather than limiting decisions to concrete cases in which a question is precisely framed by a clash of genuine adversary argument exploring every aspect of the issue." WRIGHT & KANE, *supra*, § 12 (citing United States v. Fruehauf, 365 U.S. 146, 157 (1961)).

[262] *See supra* note 15 and accompanying text.

[263] To intervene and issue injunctive relief, courts have held that the threatened harm must represent an "immediate harm" or an "imminent threat." *See* LAYCOCK & HASEN, *supra* note 13, at 279; *cf.* FISCHER, *supra* note 19, § 30.1 ("Reasonable probability that the harm will occur is usually sufficient to negate the [ripeness] concern, but courts may, on occasion, insist on a higher standard, such as reasonable certainty of harm or a showing that there will necessarily be a wrong." (citing Beck Dev. Co. v. S. Pac. Transp., 44 Cal. App. 4th 1160, 1192 (1996))). `

[264] Technically, as Douglas Laycock and Richard Hasen point out, it is the probability of harm and not the temporal proximity that makes an injunctive dispute ripe:

> It is sometimes said that the threatened harm must be imminent, or even immediate. That is true only in the sense that a threat of long-delayed harm is likely to be contingent and speculative. But where it is possible to say with substantial certainty that harm will occur eventually, and the facts are sufficiently developed for reliable decision, a suit to enjoin that harm is ripe even if the harm is not imminent.

LAYCOCK & HASEN, *supra* note 13, at 279.

[265] 218 A.2d 383, 384–85 (Conn. 1966), *discussed in* LAYCOCK & HASEN, *supra* note 13, at 293–95.

harm about which the movants were concerned—criminal activity in the neighborhood—would actually occur.[266] The Connecticut Supreme Court therefore reversed the trial court's decision to grant an injunction.[267] Some scholars refer to such relief—"injunctions that prohibit conduct that is not otherwise illegal"—as prophylactic injunctions, as opposed to preventive injunctions.[268]

2. The Movant Will Suffer Irreparable Injury Without the Permanent Injunction

Whether required to prove it once or twice, the long-established centerpiece of any injunctive request is proving irreparability of the anticipated injury.[269] This involves demonstrating that legal relief—a money judgment—would be insufficient to restore the movant to his or her pre-injury position.[270] In other words, given money and access to the marketplace, the issue is whether the movant could be adequately compensated.[271]

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[266] *Id.* at 386 ("The anticipation by the [movants] of the possible consequences of the [non-movant's] proposed use of the property can be characterized as a speculative and intangible fear. They have neither alleged nor offered evidence to prove any specific acts or pattern of behavior which would cause them harm so as to warrant the drastic injunctive relief granted by the court.").

[267] *Id.*

[268] Michael T. Morley, *Enforcing Equality: Statutory Injunctions, Equitable Balancing Under* eBay*, and the Civil Rights Act of 1964*, 2014 U. CHI. LEGAL F. 177, 180 (2014). *See also* LAYCOCK & HASEN, *supra* note 13, at 302 (defining a prophylactic injunction as an injunction that "enjoin[s] conduct that is lawful in itself in order to prevent, or reduce the likelihood of, possible wrongful consequences"). Laycock notes that reparative injunctions may also contain prophylactic provisions. *Id.* at 313. Additionally, prophylactic injunctions have been used as part of structural injunctive relief, where a court affirmatively orders prophylactic measures to address a social institutional problem. *See generally* Tracy A. Thomas, *The Continued Vitality of Prophylactic Relief*, 27 REV. LITIG. 99, 99–100 (2007) (explaining the current use of prophylactic injunctions and discussing their appropriate uses). For example, the United States Supreme Court approved the implementation of "racial quotas, gerrymandered attendance zones, and busing" to address school desegregation. *Id.* at 105 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22–31 (1971)).

[269] LAYCOCK, *supra* note 15, at vii ("The irreparable injury rule has been a fixture of Anglo-American law for half a millennium."). Under Virginia law, "[a]n injury is 'irreparable' if the injury is of such a nature that fair and reasonable redress may not be had, and to refuse the injunction would be a denial of justice." 2 FRIEND & SINCLAIR, *supra* note 18, § 33.02[4][a] (citing Thompson v. Smith, 154 S.E. 579, 586–87 (Va. 1930)).

[270] *See supra* notes 88–92 and accompanying text.

[271] Of note, there is no universally accepted definition of adequacy. Traditionally, it was understood that "[a] legal remedy is adequate only if it is as complete, practical, and efficient as the equitable remedy." LAYCOCK, *supra* note 15, at 22. Douglas Laycock points out that, under this definition, "the legal remedy almost never meets this standard." *Id.* Courts often employ a broader definition, however. *See generally id.* at 22–23 ("Courts do not

Although *eBay* added the element of inadequacy of damages to the federal permanent injunction test, which already included an irreparable-injury requirement, Virginia permanent injunctive relief case law inexplicably included both elements before and after *eBay*.[272] Some have attempted to argue that irreparable injury and inadequacy of damages can be distinguished—and courts often include separate discussions and rationales for each—but the elements are really one and the same.[273] The fact that money damages would be inadequate to provide full compensation to the movant if the threatened harm occurs is the reason why the injury is irreparable.[274] Historically, instances where the irreparable injury rule was properly applied separately from inadequacy of monetary damages were times where—on balance—the remedies at law and at equity seemed interchangeable; in such instances, the remedy at law would be preferred.[275]

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deny specific relief merely because they judge the legal remedy adequate. The irreparable injury rule almost never bars specific relief, because substitutionary remedies are almost never adequate. At the stage of permanent relief, any litigant with a plausible need for specific relief can satisfy the irreparable injury rule.").

[272] *See* cases cited *supra* note 178.

[273] *See* LAYCOCK, *supra* note 15, at 8–9 (explaining that there are no functional distinctions between inadequacy and irreparability); *see also* Gergen et al., *supra* note 148, at 207–08 (criticizing the *eBay* test because, inter alia, "the test redundantly states requirements of irreparable injury and inadequacy of legal remedies"); Lemley, *supra* note 129, at 1802 ("I confess that I don't see any logical way to distinguish [an irreparable injury and an inadequate legal remedy]."); Rendleman, *supra* note 100, at 87 ("To me, moreover, inadequate legal remedy and irreparable injury seem to be functionally, at least, one test."). Interestingly, the United States District Court for the Eastern District of Virginia recognized this fact in its decision upon remand of the *eBay* case from the United States Supreme Court. MercExchange, L.L.C. v. eBay, Inc., 500 F. Supp. 2d 556, 569 n.11 (E.D. Va. 2007) ("The irreparable harm inquiry and remedy at law inquiry are essentially two sides of the same coin; however, the court will address them separately in order to conform with the *four*-factor test as outlined by the Supreme Court."); *cf.* Bray, *supra* note 124, at 1027 n.162 (summarizing contrary views that irreparability and legal inadequacy are distinguishable).

[274] LAYCOCK, *supra* note 15, at 8–9. Douglas Laycock put it as follows: "The irreparable injury rule has two formulations. Equity will act only to prevent irreparable injury, and equity will act only if there is no adequate legal remedy. The two formulations are equivalent; what makes an injury irreparable is that no other remedy can repair it." *Id.* at 8.

[275] *Id.* ("The adequacy and irreparability formulations become different only when they are stated at different levels of generality—when one is stated in terms of the dysfunctional distinction between law and equity, and the other is stated in terms of a functional choice between two remedies, such as preliminary and permanent injunction. '*Equity* will act only when there is no adequate legal remedy' is assuredly not the same as 'a *preliminary injunction* will issue only to prevent irreparable injury.'"); *cf.* LAYCOCK & HASEN, *supra* note 13, at 387 ("The most useful attempted distinction is to use the 'adequate remedy' formulation to refer to the choice of remedies at final judgment, and the 'irreparable injury' formulation to refer to the requirements for interim relief pending final judgment—for preliminary injunctions and temporary restraining orders ('TROs')." (citing OWEN M. FISS & DOUG RENDLEMAN, INJUNCTIONS 59 (2d ed. 1984))).

Irreparability can be demonstrated in a variety of ways.[276] A common way of proving irreparability is to demonstrate damage to or loss of irreplaceable property.[277] Real property historically has been regarded as unique and therefore irreplaceable, so potential injury to a parcel of land—or improvements on that land—normally has been deemed to be irreparable.[278] Physical uniqueness also can include irreplaceable personal property, such as original artwork or heirlooms.[279] A movant also can prove irreparability by demonstrating that although cover theoretically is possible, market conditions (e.g., monopoly, shortage, or the difficulty of identifying a vendor to manufacture replacement goods) make acquisition of the replacement goods impossible or at least very difficult.[280]

The loss of certain intangible rights—such as civil rights or environmental rights—have been found to be irreparable because they cannot be purchased in the marketplace.[281] Unsurprisingly, personal injuries also have been found to be irremediable, to the extent injunctive orders to prevent such injuries can be put into place timely.[282] Courts have also recognized irreparability when damages are inherently difficult to measure, partly because specific relief precludes the need to calculate equivalent money damages; this includes lost goodwill, damage to reputation, and an attenuated impact on corporate operations or profits.[283] Some courts have even enjoined "irreparable" non-movant

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[276] *See generally* LAYCOCK, *supra* note 15, at 37–98.

[277] *See generally id.* at 37–72. "Injury is irreparable if [the movant] cannot use damages to replace the specific thing he has lost." *Id.* at 37.

[278] *Id.* at 37–38. According to Douglas Laycock, the rule "originated when land was the dominant form of wealth in the society and the key to social and political status, and when tract houses and condominiums did not exist"; the rule "is so well settled that it is rarely litigated anymore." *Id.* at 37, 38 (internal citation omitted).

[279] *Id.* at 39.

[280] *See id.* at 40, 42–44 (discussing cases). "A significant minority [of courts] hold that damages are adequate if replacement is difficult, so long as it is possible. But most courts have not required a showing that replacement is absolutely impossible at any price." *Id.* at 42 (internal citation omitted). These are the kinds of cases where the court's definition of "adequacy" is material. *See supra* note 271 and accompanying text. Of note, a plausible argument can be made that this is simply a proof issue and should not justify injunctive relief. *See generally supra* note 271 and accompanying text.

[281] LAYCOCK, *supra* note 15, at 41 (noting that these include "the right to vote, equal representation, an adequate hearing, integrated public facilities, minimally adequate treatment in a state prison, free speech, religious liberty, education, freedom from employment discrimination, freedom from unreasonable searches and seizures, or any similar civil or political right," as well as "clean air or water, a lost forest or species, or the cautionary effects of an environmental impact statement" (internal citations omitted)).

[282] *See id.* at 41–42 (noting that anticipatory protective orders against violence are the most common example).

[283] *See* LAYCOCK & HASEN, *supra* note 13, at 396–97 (explaining that commercial losses, like loss of goodwill, are irreparable because they are difficult to compensate and

actions that would affect the movant's ability to control its own business.[284]

Further, most jurisdictions have found that a multiplicity of suits, where damages are small and multiple legal actions are likely—such as a continuing or recurring trespass—can satisfy irreparability.[285] Of note, this is not a true inadequacy-of-damages argument; rather, it is an economic argument that acknowledges the inefficiency and unfairness of requiring the movant to visit the courthouse repeatedly and recognizes that the associated transaction costs could easily exceed any recovered damages.[286]

Courts have also found that certain conditions, which at first blush might appear to justify specific relief, are incompatible with issuance of an injunction. Although the non-movant's inability to pay a money judgment arguably is proof of inadequacy of damages, courts traditionally have not viewed insolvency or destitution as a permanent condition; such a situation might, however, give more weight to a proffer of irreparability on some other grounds.[287] Additionally, specific performance is not some

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error-prone). An argument can be made that the inherent difficulty of measuring damages is another demonstration of irreplaceability. *See supra* notes 277–82 and accompanying text.

[284] *See* LAYCOCK & HASEN, *supra* note 13, at 394–96 (discussing *Cont'l Airlines, Inc. v. Intra Brokers, Inc.*, 24 F.3d 1099 (9th Cir. 1994), which enjoined the non-movant from bartering, trading, or selling certain Continental Airlines discount travel coupons).

[285] *See* LAYCOCK, *supra* note 15, at 73–75 (stating that multiple suits to recover damages, which may not deter future violations, is an inadequate remedy); *see also* SINCLAIR, *supra* note 22, § 51-2[A], at 51-16 ("[W]here an injury committed by one against another is being constantly repeated, so that [the movant's] remedy at law requires the bringing of successive actions, the legal remedy is inadequate . . . ."). As Laycock notes, "The most common reason why the legal remedy would require multiple litigation is that damages might not deter repeated violations." LAYCOCK, *supra* note 15, at 73. Virginia courts have specifically recognized that a multiplicity of suits can satisfy irreparability. *See, e.g.*, Nishanian v. Sirohi, 414 S.E.2d 604, 606–07 (Va. 1992) (concluding that an injunction should have been issued for a continuing trespass); Seventeen, Inc. v. Pilot Life Ins. Co., 205 S.E.2d 648, 653 (Va. 1974) (stating that multiple trespasses that are individually trivial may be enjoined to avoid multiple legal actions); Boerner v. McCallister, 89 S.E.2d 23, 25 (Va. 1955) (explaining that continuous, individually trivial trespasses are considered to cause irreparable injury).

[286] *See* LAYCOCK & HASEN, *supra* note 13, at 439–40 (noting that "the prospect of multiple suits is not fictional at all if [the non-movant's] conduct might be profitable even after paying [the movant's] damages, or if the likely damages are too small to pay for the litigation"); SINCLAIR, *supra* note 22, §51-2[A], at 51-16 ("If [the non-movant's] trespasses are numerous and small, . . . legal remedies will probably be too expensive and inadequate and an injunction will issue.").

[287] *See* SINCLAIR, *supra* note 22, § 51-2[A], at 51-16 ("While mere insolvency would not generally be decisive of the right to grant an injunction, it constitutes in particular cases an important element in determining whether the court in the exercise of a sound discretion should award it." (quoting Cumbee v. Ritter, 96 S.E. 747, 748 (Va. 1918))); LAYCOCK & HASEN, *supra* note 13, at 435 ("It is not intended here to say that insolvency is never a consideration moving a chancellor. It frequently does, but not alone. The equitable remedy

magical incantation that automatically invokes injunctive relief; absent some other justification for injunctive relief, the only consequence of a breach of contract is the non-movant's obligation to pay damages.[288]

3. The Balance of the Equities Does Not Preclude Permanent Injunctive Relief

Most courts include some sort of balancing in their permanent injunction analysis.[289] Even if the movant demonstrates irreparability of injury, there might be some overriding reason that the court nevertheless will refuse to grant an injunction.[290] This is often referred to as "balancing the hardships" and traditionally involves comparing the cost of the non-movant's compliance with the injunction with the benefits realized by the movant with injunctive relief.[291] Hence, if the balancing tips disproportionately in favor of the non-movant, which is often referred to as "an undue hardship" on the non-movant, the court may elect not to award injunctive relief despite the acknowledged irreparable injury to the movant.[292] For instance, if a non-movant innocently constructs improvements that encroach on her neighbor's real property, a court likely would find that the neighbor/non-movant's compliance in removing the encroaching improvements would disproportionately outweigh the benefit to the movant of removal of the encroachment, i.e., the irreparable injury to the movant's real estate.[293] A court may also consider the non-movant's culpability; if the encroachment was intentional, as opposed to innocent,

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must exist independently. In balancing cases, it is a consideration that gives preponderance to the remedy." (quoting Heilman v. Union Canal Co., 37 Pa. 100, 104 (1860))).

[288] As Justice Holmes famously wrote about contract breaches, "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, – and nothing else." O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897). Any perceived moral obligation to adhere to contractual obligations is simply not recognized by the law. *See id.* at 462, 464 (explaining that keeping a contract at law is not a moral undertaking but is simply motivated by the potential obligation to pay compensation if the contract is breached).

[289] *See supra* note 120 and accompanying text.

[290] LAYCOCK & HASEN, *supra* note 13, at 399 ("A successful argument within the terms of the irreparable injury rule does not necessarily mean that [the movant] gets her choice of remedy. Many other conflicting considerations affect the *court's* choice of remedy.").

[291] FISCHER, *supra* note 19, § 31.2.3 ("The balance of hardship test used for permanent injunctive relief weighs the benefit of the injunction to the [movant] against the cost of the injunction to the [non-movant]. The test is essentially a cost-benefits analysis.").

[292] *See* LAYCOCK & HASEN, *supra* note 13, at 420 ("When the court denies the injunction because of undue hardship, [the movant] generally gets damages instead. Damages are generally inadequate in the sense that an injunction would be a better remedy.").

[293] *See id.* at 416–18 (discussing Whitlock v. Hilander Foods, Inc., 720 N.E.2d 302 (Ill. App. Ct. 1999)). Of course, if the movant ultimately is not granted an injunction, the movant will be able to recover damages for the taking of his property. *Id.* at 420.

a court likely would grant the requested permanent injunction despite the undue hardship on the non-movant.[294]

Of note, this traditional balancing is different than the balancing analysis that courts conduct when analyzing preliminary injunctive relief.[295] When the United States Supreme Court converted the well-established preliminary injunction four-factor analysis into a permanent injunction formulation, it essentially adopted the preliminary relief balance-of-the-hardships prong, i.e., a comparison of the parties' relative hardships, which is problematic.[296] A court's primary concern when balancing the hardships in a preliminary or temporary injunction scenario is the consequences—in light of bypassing the normal full due process by awarding preliminary relief—of the court making a wrong decision, i.e., granting or denying preliminary relief inconsistent with the ultimate permanent relief decision.[297] A court therefore essentially balances the hardships to the parties with and without court action, i.e., with the preliminary injunction versus without injunctive relief.[298] Additionally, the need for a quick court response and the relatively short duration of preliminary relief make evaluation of non-party equities, which often cannot come to light until after discovery and a full trial on the merits, normally unnecessary.[299]

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[294] *See* LAYCOCK & HASEN, *supra* note 13, at 419 ("[C]ourts also give heavy weight to [the non-movant's] culpability and to [the movant's] diligence or acquiescence, and a wide range of factual variations can influence these assessments."); *see also id.* (noting that, in certain cases, "courts will certainly care that [the non-movant] is (intentionally) doing less than it reasonably should to avoid the problem; they are less likely to care that [the non-movant] intentionally built the business that is the source of the problem"). Maurice Van Hecke surveyed building restriction violation injunction cases and concluded that "[m]ost frequently and significantly relied upon as an affirmative basis for injunction was the [non-movant's] willfulness. The cases abound with such appraisals as deliberate, defiant, flagrant, intentional, premeditated, and at his peril." *Id.* at 419–20 (quoting M.T. Van Hecke, *Injunctions to Remove or Remodel Structures Erected in Violation of Building Restrictions*, 32 TEX. L. REV. 521, 530 (1954)).

[295] *See* LAYCOCK & HASEN, *supra* note 13, at 457 ("At the stage of permanent relief, [the non-movant] is an adjudicated wrongdoer and [the movant] is his victim. . . . At the stage of preliminary relief, no wrongdoer has been finally identified.").

[296] *Compare* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (applying a four-factor test, including a balance of hardships analysis, to permanent injunctions), *with* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (stating that a four-factor test, which includes a balance-of-hardships factor, applies to preliminary injunctions).

[297] Lannetti, *supra* note 21, at 277.

[298] *See id.* at 289 ("[T]he 'balance of the equities' factor typically is evaluated by comparing the hardship of the movant *without* preliminary relief to the hardship of the non-movant *with* preliminary relief, i.e., the harm to each side assuming it does not acquire what it seeks."); FISCHER, *supra* note 19, § 31.2.3 ("The comparison is between the cost to the [movant] if the temporary injunction is denied and the cost to the [non-movant] if the temporary injunction is granted.").

[299] *See* SINCLAIR, *supra* note 22, § 51-1[A], at 51-4 (noting that preliminary injunctive relief "is considered in a near factual vacuum early in the litigation process, certainly without

The equities that courts have considered in traditional permanent injunction analyses—and which courts need to continue to consider—go beyond just balancing the potential hardship of the non-movant with the benefits to the movant.[300] A court may consider the burden on the court itself, primarily in the context of its continued supervision of the parties via possible additional injunctive and contempt orders; for instance, courts normally are leery to issue injunctive orders related to construction contracts lest they have to face subsequent petitions to show cause why one of the parties should not be held in contempt.[301] Courts also have declined to issue injunctions when constitutional rights are at issue. For instance, courts will not require a non-movant to perform a personal services contract, as it could be viewed as involuntary servitude in violation of the Thirteenth Amendment.[302] Additionally, courts normally will not order a party to act in a way that would prevent the exercise of free speech.[303]

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the protections and proof procedures that will apply in the hearing on the underlying issue of whether a [movant] is *entitled* to win an injunction in the case"); LAYCOCK, *supra* note 15, at 111 ("A preliminary order may inflict serious costs on a [non-movant] who had little time to prepare a defense or to present all that he could have prepared."); *cf.* FISCHER, *supra* note 19, § 31.2.3 (noting that third-party interests may be factored into the analysis).

[300] Additionally, limiting the balancing to the parties' hardships—as the United States Supreme Court does in *eBay*—requires the movant to improperly take on an additional burden. LAYCOCK & HASEN, *supra* note 13, at 444 ("Undue hardship has been a defense, with the burden on the guilty [non-movant] to show sufficient hardship to justify excusing him from complying with the law or undoing the consequences of his past violation."). An argument can be made that there is little practical difference; the failure of the movant to satisfy its burden of proving any hardship to the non-movant arguably results in the court concluding—absent the non-movant presenting evidence of such hardship—that there is no hardship.

[301] *See* LAYCOCK & HASEN, *supra* note 13, at 423–28 (discussing Lord & Taylor LLC v. White Flint, L.P., 780 F.3d 211 (4th Cir. 2015), where the court affirmed the district court's denial of Lord & Taylor's request for an injunction enjoining White Flint from implementing its redevelopment plan based on the undue burden of ongoing supervision). As Douglas Laycock and Richard Hasen put it, "[c]ourts don't want to be in the business of policing disputes over a shopping mall for decades." *Id.* at 428.

Of note, the court normally makes undue-burden-on-the-court decisions sua sponte. In doing so, courts can elect to take on such supervisory responsibility. Most structural injunctions addressing public policy, such as school desegregation and prison reform, resulted when the court opted to award injunctive relief *despite* likely continued court supervision. *Id.* at 428–29; *see supra* note 19 and accompanying text.

[302] LAYCOCK & HASEN, *supra* note 13, at 415. "Other promises in an employment contract—to preserve trade secrets or not to compete against the employer—are subject to sometimes stringent review for reasonableness, but if held reasonable, they can generally be specifically enforced." *Id.* at 416.

[303] *Id.* at 431, 434 (discussing *Willing v. Mazzocone*, 393 A.2d 1155 (Pa. 1978)). In *Willing*, the Supreme Court of Pennsylvania reversed a permanent injunction enjoining a protestor—who happened to be a former client of the movant law firm—from protesting outside the law firm offices. *Willing*, 393 A.2d at 1157–58 ("We cannot accept the Superior

Because "balancing the hardships" has come to have a limited specific legal connotation,[304] a better term for the balancing factor in a permanent injunction framework is a "balance of the equities."

4. The Permanent Injunction Is Not Contrary to the Public Interest

An injunction could also impact the larger public interest or public policy.[305] Although this does not occur frequently,[306] the United States Supreme Court has emphasized that it is an important consideration[307] that recognizes such public interests as national security,[308] maintaining the integrity of the patent system,[309] preventing false or misleading advertising,[310] avoiding consumer confusion,[311] and preventing tortious interference with contracting.[312] A cogent argument can be made that the impact on the public of the requested injunction should merely be one of the items to be considered in balancing the equities; however, the balancing factor normally is confined to issues involving the parties or the

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Court's conclusion that the exercise of the constitutional right to freely express one's opinion should be conditioned upon the economic status of the individual asserting that right.").

[304] *See supra* note 291 and accompanying text.

[305] *See, e.g.*, Weinberger v. Romero-Barcelo, 456 U.S. 305, 319–20 (1982) (recognizing national security as a public interest that needed to be considered in analyzing an injunctive relief request). In *Winter v. Natural Resources Defense Council*, the United States Supreme Court reversed the lower courts' preliminary injunction because the lower courts had not accorded sufficient weight to the public-interest factor in the injunctive standard. 555 U.S. 7, 12, 26–27 (2008). "The public interest usually follows legislative enactments, but it may have homegrown judicial origins. The two terms, public policy and public interest[,] are essentially synonymous and are interchangeable." FISCHER, *supra* note 19, § 31.2.4 (internal citations omitted).

[306] LAYCOCK & HASEN, *supra* note 13, at 444.

[307] *Weinberger*, 456 U.S. at 312–13.

[308] *See, e.g.*, United States v. Progressive, Inc., 467 F. Supp. 990, 992, 999–1000 (W.D. Wis. 1979) (explaining that the Supreme Court has an interest in national security and applying this principle to enjoin publication of restricted data in light of the public interest).

[309] *See, e.g.*, MercExchange, L.L.C. v. eBay, Inc., 275 F. Supp. 2d 695, 711 (E.D. Va. 2003), *aff'd in part, rev'd in part*, 481 F.3d 1323 (Fed. Cir. 2005), *vacated and remanded*, 547 U.S. 388 (2006).

[310] *See, e.g.*, J&M Turner, Inc. v. Applied Bolting Tech. Prods., Inc., Nos. 95-2179, 96-5819, 1997 U.S. Dist. LEXIS 1835, at *57–58 (E.D. Pa. Feb. 20, 1997) (suggesting that it is within the public interest that a court stop false or misleading advertising).

[311] *See, e.g.*, Gougeon Bros., Inc. v. Hendricks, 708 F. Supp. 811, 818 (E.D. Mich. 1988) (finding that limited preliminary injunctive relief was appropriate because "[t]rademark infringement, by its very nature, adversely affects the public interest"); Calamari Fisheries, Inc. v. Village Catch, Inc., 698 F. Supp. 994, 1015 (D. Mass. 1988) (explaining that the public has an interest in "not being deceived or confused about the products they purchase").

[312] *See, e.g.*, Score Bd., Inc. v. Upper Deck Co., 959 F. Supp. 234, 240 (D.N.J. 1997) (finding that an injunction was in the public interest because it would prevent interference with another's contractual rights and act to deter future interference).

court.[313] Having the impact on the public interest as a separate factor would prompt courts to consider this potentially important issue and remind the parties to address the topic when appropriate under the facts of a particular case.[314]

Injunction actions involving only private interests may not require a substantive analysis of the public-interest factor, depending on the facts of the case.[315] For instance, in a bilateral monopoly, where only the two parties have an interest in the outcome[316]—e.g., a private property encroachment, specific performance of a sales contract—there arguably is no effect on the public interest. In such cases, often the private interest can be characterized as a more generalized concern, such as "enforcement of private property rights" or "enforcement of contracts," as individual court rulings might be persuasive in future disputes.[317]

5. The Scope of the Proposed Injunctive Order Is Not Overbroad

Because permanent injunctions are in personam orders that command an individual to either act or refrain from acting, they affect

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[313] "The public interest factor frequently invites courts to indulge in broad observations about conduct that is generally recognizable as costly or injurious upon third parties or the public in general." FISCHER, *supra* note 19, § 31.2.4.

[314] Some have argued that this factor should not be part of the generic permanent injunction test because the impact of an injunction on the public interest infrequently arises or, like the hardship to the non-movant in the "balancing of the hardships," should be up to the non-movant to raise as an affirmative defense. *See, e.g.*, LAYCOCK & HASEN, *supra* note 13, at 444 ("[E]ach is unusual. Certainly it makes no sense to require [the movant] to 'demonstrate' all four elements of the test, implying that [the movant] must raise the issues of undue hardship and public interest and negate them in every case."); Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 794 (2012) ("Before *eBay*, the common understanding was that it was up to [the non-movant] to raise the question of the public interest as a kind of affirmative defense if the [non-movant] believed the injunction sought by the [movant] did not serve the public interest. Under the new test, however, the [movant] must demonstrate that the public interest 'would not be *disserved*' by a permanent injunction." (quoting eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006))).

[315] *See* 13 MOORE'S FEDERAL PRACTICE § 65.22[3] (Matthew Bender 3d ed.) (opining that "the public interest will not be as important as the other factors considered in the award of preliminary injunctive relief in actions involving only private interests").

[316] *See* POSNER, *supra* note 98, at 78 (describing a two-party transaction that does not affect others or the public at large).

[317] *See, e.g.*, Apple, Inc. v. Samsung Elecs. Co., 678 F.3d 1314, 1338 (Fed. Cir. 2012) (citing Abbott Labs. v. Andrx Pharm., Inc., 452 F.3d 1331, 1348 (Fed. Cir. 2006)) (finding that "the public is best served by enforcing patents that are likely valid and infringed"); Thalheimer v. City of San Diego, 645 F.3d 1109, 1128–29 (9th Cir. 2011) (affirming the district court's conclusion that the public interest in "upholding free speech and association rights" satisfied the public interest factor).

individual liberty.[318] This in fact is one of the justifications for requiring the movant to exhaust his or her legal remedies before requesting equitable relief.[319] In light of this infringement on liberty, the scope of the injunction should be as narrow as possible.[320] Additionally, the duration of the permanent injunction should be no longer than necessary.[321]

A prudent movant should ensure that the proposed order is drafted as narrowly in scope as possible because the court may, using its discretion, simply reject a proposed injunctive order that is overbroad.[322] For instance, if the movant fears increased criminal activity upon the opening of a new homeless shelter in a neighborhood—and can demonstrate the requisite ripeness, irreparability, and balancing of equities in its favor—an injunction ordering the shelter owner to discontinue operations altogether likely would be overbroad if enhanced security measures could adequately address the anticipated harm.[323]

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[318] *See* FISCHER, *supra* note 19, § 22.0 ("Because equity, as the expression of the Chancellor's conscience, could compel personal compliance, it could order a [non-movant] to do something that was foreclosed by the law courts or not do something that was permitted by the law courts.").

[319] *See* SINCLAIR, *supra* note 22, § 51-1[B], at 51-5 ("Commanding a person is something which only equity can do.").

[320] *See id.* § 51-1[A], at 51-4 ("It has long been held in Virginia that an injunction is an extraordinary remedy, and that an injunctive order therefore must be specific in its terms, and it must define the exact extent of its operation so that there may be compliance."); FISCHER, *supra* note 19, § 33.1 ("Injunctive relief should be only as burdensome as necessary to restore [the movant] to her rightful position, which is the position she would have occupied but for [the non-movant's] misconduct."); LAYCOCK & HASEN, *supra* note 13, at 281 (opining, in cases in which the non-movant already has acted improperly, "the scope of the past violation determines the scope of the remedy against future violations").

[321] *See* FISCHER, *supra* note 19, § 33.3 (noting that the duration of a permanent injunction should be no longer than necessary); *see also* SINCLAIR, *supra* note 22, at § 51-6[A], at 51-56 ("To the extent that the injunction is an invasion of a [non-movant's] freedoms, it ought to be tailored to the minimum time during which restriction of the [non-movant] will give warranted relief to the [movant]."). James Fischer provides, as an example, the case of *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970 (9th Cir. 1991). FISCHER, *supra* note 19, § 33.3. In *Lamb-Weston*, the district court found that a competitor/non-movant misappropriated trade secrets owned by the movant, and the movant sought injunctive relief. *Id*. In affirming the district court's decision to grant an injunction, the United States Court of Appeals for the Ninth Circuit discussed the appropriate duration of such relief as follows: "The appropriate duration of the injunction should be the period of time it would have taken the [non-movant], either by reverse engineering or by independent development, to develop the product legitimately without use of [the movant's] trade secrets." *Lamb-Weston*, 941 F.2d at 974–75 (quoting K2 Ski Co. v. Head Ski Co., 506 F.2d 471, 474 (9th Cir. 1974)).

[322] "The basic principle applicable to injunctions is that relief 'should be narrowly tailored to fit specific legal violations.'" FISCHER, *supra* note 19, § 33.1 (quoting Waldman Publ'g Corp. v. Landoll, Inc., 43 F.3d 775, 785 (2d Cir. 1994)) (citing Hayes v. N. State Law Enf't Officers Ass'n, 10 F.3d 207, 217 (4th Cir. 1993)).

[323] *See* LAYCOCK & HASEN, *supra* note 13, at 859 ("But certainly when [the movant] win[s] on the merits, it is well worth the time to draft the injunction as carefully as possible. [The movant's] victory will be embedded in, and largely reduced to, the specific language in

Additionally, if the court does not elect to modify an overbroad draft injunctive order sua sponte,[324] the non-movant can assert that the proposed order is overbroad and argue that, if the court grants an injunction over its objection, the court should narrow the scope of the order.[325]

6. Analyzing the Various Factors

There has been much criticism regarding *eBay*'s apparent replacement of equitable discretion—including presumptions—with a structured four-part test arguably devoid of judicial discretion.[326] But, as discussed *supra*, the United States Supreme Court's *eBay* ruling appears to be more limited; read narrowly, it simply holds that the statutory language of the Patent Act—indicating that courts *may* grant injunctive relief upon a finding of patent infringement—precludes courts from holding that permanent injunctive relief is presumed once infringement is established.[327] Instead, courts must rely on, and movants must demonstrate, the same equitable factors that are well-established in other areas of the law.[328] So in the context of intellectual property cases, and in order to account for modern advances, the irreparable injury rule has risen like a phoenix.[329]

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the injunction. The injunction is not a postscript to the lawsuit; the lawsuit is prologue to the injunction.").

[324] *See* Rendleman, *supra* note 100, at 93–94 ("Once the judge chooses an injunction, the judge has discretion to measure, draft, and implement it.").

[325] *See* Rendleman, *supra* note 1, at 1430–31 ("A judge's injunction decision need not be all or nothing—a shutdown order or a damages award. A judge's intermediate solution is a conditions injunction that eliminates, or reduces to tolerable, the defendant's harmful activity.").

[326] *See supra* note 156.

[327] *See supra* notes 146, 188 and accompanying text. As one commentator put it, *eBay* simply "brings patent cases in conformity with permanent injunction standards in other cases." Mota, *supra* note 127, at 542; *see also* Janutis, *supra* note 205, at 597 ("*eBay* is not a remarkable break from equitable practice. Indeed, the principles outlined by the court in its decision are neither novel [n]or surprising when viewed in light of previous precedents."); Bray, *supra* note 124, at 1029 ("The test in *eBay* is not '*the* traditional four-factor test,' but it is 'a *traditional* four-factor test.'"); Gergen et al., *supra* note 148, at 207 ("The *eBay* test does feature factors that courts have traditionally considered in deciding whether to grant injunctive relief.").

[328] *See* Casagrande, *supra* note 155, at 11 ("[T]he Supreme Court surprised many patent lawyers with a short-and-sweet opinion simply re-confirming basic, historical equitable principles."); *see also* Lemley, *supra* note 129, at 1798 ("While some commentators have (correctly) observed that [*eBay*'s] four-factor test was not traditional in equity, each of the factors the Court identified were in fact traditional considerations courts use in deciding whether to grant injunctions in other areas of the law.").

[329] *See supra* notes 202–07 and accompanying text.

The Supreme Court's jurisprudence regarding preliminary injunctions is instructive in understanding the *eBay* test and how the factors in a Virginia permanent injunctive framework might be analyzed.[330] The Court in *Winter*—which was decided two years after *eBay*—made it clear that each of the four factors of the preliminary injunction test must be satisfied,[331] and each must be applied in a relatively rigid and objective fashion. The movant must demonstrate that an irreparable injury is likely, which the Court has held is more than a mere possibility and some have argued should be interpreted as at least a fifty-percent likelihood.[332] The movant also must demonstrate that success on the merits, i.e., the eventual grant of a permanent injunction, is likely.[333] As mentioned in the discussion regarding balancing the equities, *supra*, the balancing of the hardships considers only the hardships of the parties in light of the court's concern that its preliminary relief decision—without the benefit of full due process—may be incorrect.[334] A permanent injunction framework need not be as objective as a preliminary injunction analysis and therefore can incorporate more equitable discretion by judges because, inter alia, permanent injunctions are only awarded after full due process and normally last much longer than preliminary injunctions.[335]

Like in *eBay* and *Winter*, the framework recommended in this Article similarly requires that the movant demonstrate each of the factors.[336] The recommended framework incorporates more equitable discretion than that applicable to preliminary injunction requests; however, such an approach arguably is more consistent with traditional equitable principles, which perhaps was intended by the United States Supreme Court in *eBay*. Depending on the circumstances, each of the factors in the recommended analytical framework may involve the court relying on equitable discretion. In applying this discretion, the authors offer the following items for courts and litigants to consider when analyzing each factor, with affirmative answers supporting injunctive relief. Of note, they

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[330] *See supra* notes 29–36 and accompanying text.

[331] *See supra* note 36 and accompanying text.

[332] Lannetti, *supra* note 21, at 297, 301–02.

[333] Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

[334] *See supra* notes 296–99 and accompanying text. There are, however, protections in place should the court get it wrong; the movant normally is required to post an injunction bond to cover damages for the non-movant's wrongful enjoinment should the court erroneously grant a preliminary injunction, and the movant can seek damages from the non-movant should the court erroneously deny a preliminary injunction. *See* LAYCOCK & HASEN, *supra* note 13, at 277 (discussing the remedy for erroneously denied preliminary relief); FISCHER, *supra* note 19, § 31.8 (discussing the remedy for erroneously granted preliminary relief).

[335] *See supra* note 28 and accompanying text.

[336] *See supra* notes 36, 148 and accompanying text.

are merely intended to indicate potential inquiries and are not meant to be exclusive considerations a court applies under the newly proposed framework.

With respect to ripeness, does the anticipated harm represent an immediate harm or imminent threat? Based on evidence presented by the movant, is the proffered harm reasonably likely to occur in the absence of the requested injunction? In the context of a structural injunction, has the social issue properly ripened for the judicial branch to take the lead in societal change? If the response to any of these inquiries is negative, then it is doubtful that any amount of equitable discretion would support the requested relief being granted; the inquiry would stop here, and the movant should not expect the desired injunctive relief.

Regarding irreparable injury, are damages difficult or virtually impossible to calculate? Is the property irreplaceable if the anticipated harm occurs and the movant is awarded damages? Is the patent holder producing and selling goods or does it have some interest in doing so in the future? Can the patent holder distinguish itself from one that is merely holding its patent primarily to obtain licensing fees? If the movant is relying on a multiplicity-of-suits argument, is the injury likely to continue or recur?

When balancing the equities, do the movant's benefits from the injunction outweigh any resultant hardship to the non-movant? Is the non-movant highly culpable for the action necessitating an injunction? Would the requested injunction avoid significant economic waste? Is continued court action, in the form of supervision, unlikely should an injunction be issued? Are constitutional rights unlikely to be impacted should the court issue the injunction?

As far as the possible effect on the public interest, will the injunction support the public at large or some public policy? If there is no direct impact on the public, are there larger general rights applicable to the general public that the injunction would support, such as the enforcement of property rights?

Regarding the scope of the injunctive order, is it drafted as narrowly as possible in order to address the anticipated harm, in terms of both breadth and duration? Does the assigned judge have a tendency to play a role in crafting an acceptable order as opposed to simply rejecting an unacceptable draft order? If a structural injunction is involved, is the reach of the proposed injunctive order reasonable?

In evaluating the merits of a case, the successful movant most likely can answer all or most of the relevant above-posed inquiries in the affirmative. Of course, the facts and subject matter of the particular case will dictate the appropriate inquiries. Courts should not shy away from exercising equitable discretion but—in applying the proposed permanent injunction framework—they should consider articulating the facts and

circumstances that weigh on their evaluation of each factor in order for Virginia's permanent injunction jurisprudence to continue to develop.

CONCLUSION

If presented with the opportunity, Virginia courts should not adopt the *eBay* multi-factor test as currently formulated. Instead, they should clarify and expand the guidance of current Virginia jurisprudence. The resultant modified framework for Virginia permanent injunctions should require the movant to sequentially demonstrate that (1) the dispute is ripe for issuance of an injunction, (2) the movant would suffer irreparable injury without the permanent injunction, (3) the balance of the equities does not preclude permanent injunctive relief, (4) the permanent injunction is not contrary to the public interest, and (5) the scope of the proposed injunctive order is not overbroad. Such a framework is not inconsistent with current Virginia permanent injunction guidance and does not extract the court's equitable discretion; rather, it synthesizes previously recognized analytical elements into a single, cohesive tool that fully incorporates equitable discretion. If adopted, adhering to this new framework would be logical and practical.

In applying this framework, practitioners should remember that ripeness is a threshold issue, but it must be both temporally appropriate and based on the likelihood that the threatened harm will actually come to fruition. Subject to the court's discretion, movants can satisfy irreparability of injury, i.e., inadequacy of damages, by proving (a) irreplaceability, due to, e.g., uniqueness, inability to cover, market distortion; (b) difficulty in determining damages, such as reputational damages; or (c) a multiplicity of suits. Even if irreparability is proven, a court's balancing of the equities may nevertheless result in denying an injunction if the court order would represent an undue burden on the non-movant, an undue burden on the court, an infringement on the non-movant's First Amendment rights, or an equivalent order of involuntary servitude against the non-movant. The public interest factor reminds the court to consider whether there might be a larger public interest or policy that would be impacted by the proposed injunction. Finally, because injunctions impact the liberty of the parties, and perhaps others, the court should ensure that any injunction that is granted is as narrowly tailored as possible.

Untangling the confusion and duplicity of the existing irreparable injury and inadequacy of damages prongs will provide judges and practitioners a framework for permanent injunctive relief that is easier to understand and apply. At the same time, broadening the balancing of the hardships of the parties to a balancing of all equities is consistent with traditional permanent injunction analyses and more properly allows the

court to exercise its equitable discretion. Continuing to require demonstration that the requested permanent injunction is not contrary to the public interest or public policy will force the parties and the court to review this important external factor. Meanwhile, adding requirements to demonstrate ripeness and that the injunctive order is not overbroad will better encapsulate a full permanent injunction analysis. With this new analytical tool, Virginia injunctive relief ideally will be easier to seek, to challenge, and to understand.

INDEPENDENT AGENCIES: HOW INDEPENDENT IS TOO INDEPENDENT

*Distinguished Panelists**

Hon. Sykes: Welcome, everyone. This is the Administrative Law and Regulation Practice Group. Our topic today is "Independent Agencies: How Independent Is Too Independent?" I would like to welcome you here this afternoon and also welcome those of you who are listening in the overflow rooms and online.

The Supreme Court has lately shown a greater interest in the constitutional limits on our independent agencies.[1] Statutory limits on the President's authority to remove agency officials raise questions under the Appointments Clause, the Take Care Clause, and the doctrine of separation of powers.[2] Today our panel will take up this topic under that broad heading of the question: How independent is too independent? As always, The Federalist Society has assembled a panel of all-stars for our discussion, distinguished scholars in the fields of administrative and constitutional law who will discuss and debate the law of independent-agency accountability and oversight.

First up this morning will be John Eastman, Professor of Law at Chapman University Law School, where he teaches constitutional law and legal history and runs the Constitutional Jurisprudence Clinic.[3] Professor Eastman is also a Senior Fellow at The Claremont Institute and Director of its Center for Constitutional Jurisprudence.[4] He holds a Ph.D. from Claremont and a J.D. from the University of Chicago Law School.[5] He

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* This panel was held on November 15, 2018, during the 2018 National Lawyers Convention in Washington, D.C. The panelists included: Professor William W. Buzzbee, Professor of Law, Georgetown; Professor John Eastman, Henry Salvatori Professor of Law & Community Service and Former Dean, Chapman University's Fowler School of Law and Senior Fellow, Claremont Institute; Mr. Henry Kerner, Special Counsel, Office of the Special Counsel; and Professor Jennifer Mascott, Assistant Professor, Antonin Scalia Law School, George Mason University; moderated by Hon. Diane S. Sykes, Circuit Judge, United States Court of Appeals for the Seventh Circuit. This Article is not a verbatim transcript of the discussion. The statements and questions have been edited for brevity and clarity.

1 *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019) (noting that the Supreme Court has shown a recent interest in the constitutional limitations of independent agencies); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd. ("PCAOB"), 561 U.S. 477, 483 (2010) (same).

2 *See* Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 OHIO ST. L.J. 391, 407 (2008) (explaining that "legislation disrupts the proper balance between the coordinate branches '[by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions'").

3 *Dr. John Eastman*, CHAP. U., https://www.chapman.edu/our-faculty/john-eastman (last visited Oct. 19, 2019).

4 *Id.*

5 *Id.*

clerked on the Fourth Circuit for Judge Michael Luttig and on the Supreme Court for Justice Thomas.[6]

Next up this afternoon is Jennifer Mascott, Assistant Professor of Law at George Mason's Antonin Scalia Law School, where she teaches administrative law.[7] Professor Mascott graduated *summa cum laude* from The George Washington University Law School and clerked for then-Judge Brett Kavanaugh of the United States Court of Appeals for the D.C. Circuit and then for Justice Clarence Thomas of the Supreme Court.

After Professor Mascott presents her opening remarks, we will hear from Henry Kerner who serves as Special Counsel in the Office of the Special Counsel.[8]

No. It is not what you are thinking about. Mr. Kerner runs the United States Office of Special Counsel ("OSC"), an independent federal investigative agency whose basic legislative authority is found in four federal statutes: the Civil Service Reform Act,[9] the Whistleblower Protection Act,[10] the Hatch Act,[11] and the Uniformed Services Employment and Reemployment Rights Act ("USERRA").[12] The agency is charged with safeguarding the integrity of the merit system in federal employment by protecting employees and applicants from prohibited personnel practices, including retaliation for whistleblowing.[13] He will tell you more about it in his remarks this afternoon. Mr. Kerner is a graduate of Harvard Law School and spent eighteen years as a prosecutor in California before coming to Washington, D.C., to serve in a series of positions on Capitol Hill: as an investigator for the House Committee on Oversight and for the Senate Permanent Subcommittee on Investigations.[14]

Rounding out our discussion this afternoon, we will hear from William Buzbee, Professor of Law at Georgetown University Law Center, where he teaches administrative law, legislation and regulation, and environmental law.[15] Professor Buzbee came to Georgetown from Emory

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[6] *Id.*

[7] *Jennifer Mascott*, Antonin Scalia SCH. L., https://www.law.gmu.edu/faculty/directory/fulltime/mascott_jennifer (last visited Oct. 19, 2019).

[8] *Henry Kerner Leadership*, U.S. OFF. SPECIAL COUNS., https://osc.gov/Pages/Leadership.aspx (last visited Oct. 19, 2019)

[9] Civil Reform Act of 1978, 5 U.S.C. § 1211 (2012).

[10] Whistleblower Protection Act of 1989, 5 U.S.C. § 2302(8)(B) (2012).

[11] Hatch Act of 1993, 5 U.S.C. § 7323(b)(2)(B)(i)(IX) (2012).

[12] Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994, 38 U.S.C. § 4324(a)(1) (2012).

[13] 5 U.S.C. § 2302(8)(B)(i)–(ii).

[14] *Henry Kerner Leadership*, *supra* note 8.

[15] *William Buzbee Faculty Profile*, GEO. U. L. CTR., https://www.law.georgetown.edu/faculty/william-w-buzbee/ (last visited Oct. 19, 2019).

Law School, where he had similar academic interests and teaching loads.[16] He earned his law degree from Colombia Law School and clerked for Judge Jose Cabranes of the United States Court of Appeals for the Second Circuit.[17]

With that, I will turn the podium over to Professor Eastman who will get us started.

Prof. Eastman: Thank you, Judge Sykes, and before I give my comments about this panel, I want to say that I am also the chairman of the Federalism & Separation of Powers Practice Group so I have duties related to that role.[18] For anybody interested in being considered for membership in the executive committee of that practice group, please let me, Juli Nix, or Dean Reuter know. We are always looking for new blood and eager people to help share the work of that important practice group.

For many years, I have thought about getting one of those Powerball glass bowls, putting letters into it, reaching in to take any five letters out, and seeing who could make the most number of federal agencies out of the random number we have. You would have to have a "C" in there for Commission and a "B" for Board. Federal agencies all seem to have those words, whether "FEC;" "SEC;" "FTC;" "NLRB;" "FERC;" or "CFPB." We are very keen on acronyms in this town. But I think these acronyms are symptoms of a deeper constitutional structure problem.

"How Independent Is Too Independent?" is the topic of this panel. My short answer is that any independence from constitutional officers is too independent. But I think Dean and Leonard would not be happy if I left it there so let me elaborate a little bit. We are trying to look at this issue after 200 years. Sometimes our ship of state has grown layers, and layers, and layers of barnacles, and until you start carving those away, it is a little hard to see the real questions, the underlying, fundamental questions. Consequently, I always like to return to first principles on these things. It is buried right there, deep in the Constitution, Article I, Section 1, Clause 1: "All legislative powers herein granted shall be vested in a Congress of the United States."[19]

From this constitutional text we get the non-delegation doctrine.[20] The doctrine has largely been dead since 1935,[21] but eighteen years ago,

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[16] *Id.*

[17] *Id.*

[18] *Dr. John C. Eastman*, FED. SOC'Y, https://fedsoc.org/contributors/john-eastman (last visited Nov. 14, 2019).

[19] U.S. CONST. art. I, § 1, cl. 1.

[20] Mistretta v. United States, 488 U.S. 361, 371–72 (1989).

[21] *See* Bernard W. Bell, *Dead Again: The Nondelegation Doctrine, the Rules/Standards Dilemma and the Line Item Veto*, 44 VILL. L. REV. 189, 189 (1999) (stating that the Supreme Court, from 1935 to 1999, only invalidated one law based on the non-delegation doctrine).

Justice Thomas in *Whitman v. American Trucking*, invited us to reconsider the intelligibility principle doctrine.[22] He says that even when the intelligibility principle doctrine is met, delegation of lawmaking power is allowed.[23] He goes on to explain that he "would be willing to address the question [of] whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."[24] And then, of course, in a series of cases a few years ago, Justice Thomas made good on that promise in *Department of Transportation v. Association of American Railroads* and stated, "We never even glance at the Constitution to see what it says about how this authority must be exercised and by whom."[25] He offered a blunt assessment of the competing visions at stake: "We should return to the original meaning of the Constitution. The government may create generally applicable rules of private conduct" through the legislative branch, not through the executive branch.[26] "We have too long abrogated our duty to enforce the separation of powers required by our Constitution," he said.[27] "We have overseen and sanctioned the growth of an administrative [state] system that concentrates . . . power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home"—I would say, not even an uncomfortable home—"in our constitutional structure. The end result [in that case] may be trains that run on time, although,"—this wonderful little paraphrase—"(although I doubt it), but the cost is to our Constitution and the individual liberty [that] it protects."[28]

Justice Thomas has done this a number of times,[29] and in another case, *Perez v. Mortgage Bankers*, that same year, he ties this to a kind of outgrowth of the Woodrow Wilsonian Progressive movement by stating that we are going to staff up these agencies with experts.[30] We are going to go beyond any political accountability because these agencies are more than just standing in the way; they are creating a "clumsy nuisance."[31] He quotes Woodrow Wilson stating that it is "a rustic handling of delicate machinery."[32] We need these experts to figure this stuff out better for us.[33]

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[22] Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

[23] *Id.*

[24] *Id.*

[25] Dep't of Transp. V. Ass'n of Am. R.R., 135 S. Ct. 1225, 1240 (2015).

[26] *Id.* at 1252.

[27] *Id.* at 1254.

[28] *Id.* at 1254–55.

[29] *See infra* notes 30–33 and accompanying text.

[30] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1223 n.6 (2015) (Thomas, J., concurring).

[31] *Id.*

[32] *Id.*

[33] *Id.*

It really is a dramatically different understanding of government and the role of the people and the ultimate authority of the people in deciding the course of our government. Therefore, the notion of independent agencies—even executive agencies—receiving delegations of lawmaking power dilutes accountability to the people.[34] The insulation from accountability is even more true when it comes to so-called administrative agencies.[35]

Piece one of this is the fundamental violation of the Article I command that the lawmaking power be exercised by Congress.[36] Not to be left out, we have that first Clause of Article II: "The executive power shall be vested in a [P]resident of the United States."[37] Full stop. The *entire* executive power. Now, the Constitution mentions other executive officers.[38] It mentions heads of departments.[39] It mentions the Vice President.[40] It mentions ambassadors, and councils, and military officers,[41] but all of them exercise their executive power derivative of the President.[42] I commend Jennifer Mascott's wonderful piece to your attention. I will do this so she does not have to. Her piece on the definition of "officer" which was recently published in the *Stanford Law Review*, I think, conclusively demonstrates that we have been much too stingy with our understanding of that term.[43] And why is that important? Well, the

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[34] *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1430 (2001) (explaining that independent agencies get their power from Congress who in turn also gives them broad discretion); Chuck Devore, *The Administrative State Is Under Assault and That's a Good Thing*, FORBES (Nov. 27, 2017, 1:53 PM), https://www.forbes.com/sites/chuckdevore/2017/11/27/the-administrative-state-is-under-assault-and-thats-a-good-thing/#239b534f393c (discussing how investing unelected bureaucrats with broad powers while insulating them from voter accountability leads to interpretations of public opinion that actually ignores the public's voice).

[35] *See* Catherine Y. Kim, *Plenary Power in The Modern Administrative State*, 96 N.C. L. REV. 77, 80–81 (2017) (explaining that many policies throughout the country are being made by those in agencies, not in Congress); Devore, *supra* note 34 ("Investing unelected bureaucrats with great power, then insulating [them] from representatives accountable to voters, goes a long way towards efficiently interpreting public opinion while in reality largely ignoring it.").

[36] U.S. CONST. art. I, § 1, cl. 1.

[37] *Id.*

[38] *Id.* art. II, § 2, cl. 2.

[39] *Id.* art. II, § 2, cl. 1.

[40] *Id.* art. II, § 4.

[41] *Id.* art. II, § 2, cl. 2.

[42] *Id.*

[43] *See* Jennifer L. Mascott, W*ho Are 'Officers of the United States'?*, 70 STAN. L. REV. 443, 450–51 (2018) (explaining that the modern understanding of the term "officer" is far too narrow).

broader the understanding of officer, the more accountability there is to the President for the basic, ongoing functions of the executive branch.[44]

Principal officers and inferior officers cover a lot more ground than we have come to realize.[45] Because we have too stingily interpreted those requirements, we have left whole aspects of executive authority immune from, or largely immune from, presidential control.[46] We get these cases coming up about who do you get to fire and how many layers of for-cause removal must there be for the removal to be constitutionally valid? But the fact of the matter is, we give much more protection to independent agencies and officers than the Constitution allows.[47] And we ought to revisit that fairly quickly.

The short answer is, *Myers v. United States* was right,[48] *Humphrey's Executor v. United States* was wrong,[49] and Justice Scalia got it right in his dissenting opinion in *Morrison v. Olson*.[50] It is time for us, I think, to revisit those cases. What would be left in such a world? Well, you could have commissions that make legislative recommendations without binding force. You might have commissions that could offer recommendations on the exercise of executive powers, such as when to use the pardon power and when not to use it, or the use of prosecutorial discretion, as long as those also do not have binding force. But if these unelected and unaccountable officers, who are unappointed by the constitutional process, are making judgements with binding force without the oversight of the President, it seems to me like you have got a real

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[44] *See id.* at 454 (explaining that many administrative employees who are considered nonofficers should be classified as officers so that they may become subject to executive department oversight).

[45] *See id.* at 499 (discussing how the concept of officers was originally understood to cover a larger group of administrative employees).

[46] *See id.* at 563 (explaining the modern practice of expecting each new President to select both principal and inferior officers for the new administration). However, "a proper understanding of 'officer' as correlated with the execution of any level of governmental duty" could result in the concept no longer being "associated with just the highest-level government jobs." *Id.*

[47] Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 774 (2013).

[48] *See* 272 U.S. 52, 122 (1926) ("The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity of including within the executive power as conferred the exclusive power of removal.").

[49] *See* 295 U.S. 602, 621 (1935) (holding that "the President's power is limited to removal for [] specific causes," unlike in *Myers*).

[50] Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (explaining that "all of the executive power" is vested in the President).

problem under Article II.[51] I will not get into the details of the cases. The other panelists will go into more detail about the current state of affairs, but things like the Consumer Financial Protection Bureau ("CFPB"), and what have you—these are front and center on those cases right now.[52]

Now, I do not want to leave the judiciary out of that because we also have a problem there: Article III, Section 1, Clause 1.[53] I know, they buried them all right at the beginning of each Section. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[54] That is a full stop as well. All of the judicial power is specified, that is then enumerated, is vested in the courts.[55] We now have agencies, though, that write their own rules from a delegation of lawmaking power.[56] They enforce their own rules without oversight from the duly elected Executive.[57] And then they adjudicate the enforcement of their own rules.[58] I would say that fits a little less comfortably—like not at all—within our constitutional design than the Founders had in mind.

For example, the case last term of *Lucia v. SEC*.[59] The phase two litigation of that idea ought not to be whether the officers were properly appointed—that is our Article II issue[60]—but can we be adjudicating private rights from within an executive agency, or worse, an independent agency completely removed from the judicial power of the United States? I think under our Constitution the answer to that is easy as well: we cannot. After all, it was Madison in *Federalist 47* that reminded us that "[t]he accumulation of all powers legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."[61]

Of course, he gets that from Montesquieu.[62] And let me just close with this wonderful passage from Montesquieu that should be familiar to many:

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[51] Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599, 1606 (2018) (stating that under Article II the President must have complete control over every aspect of administration of the law).

[52] *See infra* notes 85–87 and accompanying text.

[53] U.S. CONST. art. III, § 1, cl. 1.

[54] *Id.*

[55] *Id.*

[56] Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003, 1024 (2015).

[57] *See id.* at 1005 (explaining that administrative agencies promulgate binding rules that are like statutes, except that these rules lack oversight from the Executive Branch).

[58] *Id.* at 1041.

[59] 138 S. Ct. 2044 (2018).

[60] *Id.* at 2055.

[61] THE FEDERALIST NO. 47, at 245 (James Madison) (Ian Shapiro ed., 2009).

[62] CHARLES MONTESQUIEU, THE SPIRIT OF LAWS 173–74 (Thomas Nugent trans., 1752).

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty . . . . Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end to everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the [causes] of individuals.[63]

Our administrative state has violated this principle routinely over the last half century.[64] I am so excited to see the large number of Justices on the Supreme Court now engaging and revisiting some of those questions and starting to strip away some of the barnacles that have grown up on our ship of state. Thanks so much.

Prof. Mascott: I am Jen Mascott. Thank you, Professor Eastman, for those nice words. Thank you, Judge Sykes, for moderating the panel, and thank you Federalist Society for putting in all the time that it takes to get this convention together every year. I am really thankful to be here. I am going to start similar to how Professor Eastman started, by asking how independent is too independent for agencies? As Professor Eastman said, I think in a certain sense, the bottom-line answer is that any independence is too much.[65] That does not mean that government should neglect impartiality. Our elected leaders and all governmental actors need to serve everyone fairly and fulfill their oaths to the Constitution, and everybody in the executive branch and administrative agencies needs to seek to faithfully execute the law. But independence within our current governmental structure has come to mean independent from the control of the Executive and thus from electoral accountability.[66] Independent agencies today are wielding significant power, and we have gotten this idea in our modern system that we want a government staffed by scientific

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[63] *Id.*

[64] *See* Charles J. Cooper, *Confronting the Administrative State*, NAT'L AFF. (Fall 2015), https://www.nationalaffairs.com/publications/detail/confronting-the-administrative-state (highlighting cases from 1935 to 2001 in which courts have upheld the accumulation of legislative, executive, and judicial powers in particular independent agencies).

[65] *See supra* notes 38–46 and accompanying text.

[66] *See* Chuck DeVore, *supra* note 34 (explaining that the huge growth in independent agencies is directly adverse to representative democracy).

experts who are going to somehow independently do the right thing irrespective of direction from the politically elected Executive.[67] This is just flat wrong within our constitutional structure.

It is clear from the text of the Constitution; its structure; and its founding-era documents, like the ratification debates, that the Federal Government derives its power from the consent of the governed.[68] The Federal Government is supposed to have three branches, no more.[69] The executive and legislative branches, in particular, are to gain authority to exercise power by being elected.[70] One reason I belabor this point a little bit is that some contemporary scholars say that maybe now we need a new kind of an updated separation of powers framework, maybe one within administrative agencies themselves.[71] These scholars acknowledge that perhaps administrative agencies might be able to do things more efficiently,[72] and so maybe if we give agencies their own internal, soft, separation-of-powers-like constraints, then that will be adequate to mimic the constitutional structure.[73]

Perhaps notice-and-comment rulemaking can be like the public input required from elections, these scholars say.[74] Maybe the tenured, protected civil service can act like a non-partisan, mini Article III judiciary.[75] Well, this misunderstands the key point, I think, that James Madison makes about separation of powers in *Federalist 51*.[76] And that is that the branches get their ability to check each other by ultimately being accountable to the people through elections.[77] Madison wrote, "A dependence on the people is, no doubt, the primary control on the government."[78] There cannot be a floating set of key administrative entities that lack accountability back to their elected head.

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[67] *See id.* (explaining that bureaucrats will bring efficiency, but this could come at the risk of largely ignoring the will of the people).

[68] U.S. CONST. pmbl.; 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 3 (Jonathan Elliot ed., 2d ed. 1827).

[69] U.S. CONST. art. I, § 1; *id.* art. II, § 1; *id.* art III, § 1.

[70] *Id.* art. I, § 2, cl. 1–2.; *id.* art. II, § 1, cl. 1–3.

[71] Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 551 (2015).

[72] *Id.* at 527.

[73] *See id.* at 530 (explaining that the separation of powers within administrative agencies is implicit within the structure of the agency).

[74] Kristin E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 CORNELL L. REV. 262, 267 (2016) (explaining that the Vesting Clause of Article II allows those that belong to independent agencies to carry out the work of the executive branch).

[75] Paul R. Verkuil, *The Purpose and Limits of Independent Agencies*, 1988 DUKE L. REV. 257, 261 (1988).

[76] THE FEDERALIST NO. 51, at 263 (James Madison) (Ian Shapiro ed., 2009).

[77] *Id.*

[78] *Id.* at 264.

If some of our modern agencies fit anywhere within our constitutional structure, it would naturally be within the executive branch, as they are in theory executing or carrying out the law.[79] If that is the case, that means every action that they take needs to be subject to the authority of the Executive.[80] There needs to be a line of accountability somehow down to every level of power exercised within the executive branch back up to the President.[81] As Professor Eastman mentioned, the accountability of appointments and the ability to be able to remove and supervise officials and personnel within the executive branch are all key for accountability.[82] This is important to preserve the role of self-governance within our system and, quite frankly, to preserve individual rights. If our governmental system intrudes on the President's ability to exercise proper authority over the executive branch, then ultimately the people are going to lose some of the say in their governance.[83]

I think there are at least two areas of law that have recently been before the courts that relate to this issue of independence in administrative agencies. I think this provides a real opportunity for us to reinvigorate discussion about the proper size and scope of agencies. We need to reevaluate if there is any proper role for modern independent agencies, as they are now designed, within our constitutional structure and to reexamine whether agencies are properly being limited right now within the exercise of executive functions for which they are accountable, at least indirectly, back to the people through the Chief Executive.[84]

I think the most obvious line of cases that come to mind are the cases dealing with the constitutionality of the structure of the CFPB.[85] These cases have been in the news a lot because the D.C. Circuit has reviewed the constitutionality of the CFPB on two occasions now—finding it unconstitutional first at the panel level by then-Judge Kavanaugh.[86] This issue of the CFPB and its structure even came up a little bit during the recent confirmation hearings.[87] Basically, the idea of the case—and of then-Judge Kavanaugh's opinion—is that, as Professor Eastman mentioned, in 1935 the Supreme Court gave in *Humphrey's Executor* the

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[79] *See* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1173 (1992) (explaining that modern independent agencies may be created by Congress but that they still discharge the functions of the Executive Branch).

[80] *Id.* at 1165.

[81] *Id.* at 1166.

[82] *See id.* (explaining that the executive has the unlimited power to remove any officer who exercises power); *supra* notes 38–46 and accompanying text.

[83] Calabresi & Rhodes, *supra* note 79, at 1173.

[84] *See* Cooper, *supra* note 64 (discussing the need for an overhaul in the Court's independent agency jurisprudence so that accountability can be returned to the people).

[85] *See infra* notes 86–87, 94–102 and accompanying text.

[86] PHH Corp. v. CFPB, 839 F.3d 1, 8 (D.C. Cir. 2016).

[87] 164 CONG. REC. 141, 5908 (2018).

constitutional justification for independent agencies.[88] It was very inconsistent with the decision in *Myers* nine years prior, which gave executive accountability in large measure to the President.[89]

But in *Humphrey's Executor*, the Court went a different way.[90] The Court recognized that we have these commissions.[91] They are headed at the top by multiple people who represent both political parties.[92] We want these scientific experts at the top over these large substantive policy areas, and we want them to govern in a way that is not beholden to the politics of the President.[93] And what Judge Kavanaugh said in his opinion, basically, is that even if you agree with the *Humphrey's Executor* decision and give stare decisis effect to it, Congress is now structuring agencies in ways that go many steps beyond the independence and lack of executive control over commissions described in *Humphrey's Executor*.[94] He pointed out that the CFPB is headed by one director who is subject to removal only for cause.[95] Thus, instead of being accountable because of the need to govern this entity by working together as a team with folks at the top, this sole director is able to go on his or her own to run this big agency but not really subject to presidential control.[96]

Because the director has a five-year term, in theory, a President may not even ever have a chance to pick the head of the CFPB on the appointment side of the President's term.[97] The CFPB even has a lot more power than some other agencies because it is in charge of helping implement nineteen consumer financial protection statutes previously administered by multiple agencies.[98] One of the other key things that then-Judge Kavanaugh pointed out is that the CFPB does not have to report to Congress and get annual appropriations through the congressional process.[99] It can sort of on its own, up to a point, decide how much funds it needs from funding within the Federal Reserve.[100] And so then-Judge Kavanaugh said that even if you buy into the *Humphrey's*

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88 *PHH Corp*., 839 F.3d at 5–6 (citing Humphrey's Ex'r v. United States, 295 U.S. 602 (1935)).

89 *See* Myers v. United States, 272 U.S. 52, 122 (1926) (explaining that the Executive has the power to remove those that serve in the Executive Branch).

90 *See Humphrey's Ex'r*, 295 U.S. at 626 (emphasizing that the Court's ruling in *Myers'* narrowly pertained to the President's power to remove a postmaster of the first class).

91 *See id.* at 624 (discussing the existence of independent agencies).

92 *See id.* (considering the non-partisan nature of the commission).

93 *Id.* at 624–25 (explaining that those that are part of the independent agency are above the politics of the President because of their specialized knowledge).

94 PHH Corp. v. CFPB, 839 F.3d 1, 33 (D.C. Cir. 2016).

95 *Id.* at 8.

96 *Id.* at 33–34.

97 *Id.*

98 *Id.* at 36 n.16.

99 *Id.*

100 *Id.*

Executor line, this goes quite a bit beyond that, and this is unconstitutional.[101]

As you all probably know, the D.C. Circuit, sitting en banc, disagreed squarely with Judge Kavanaugh.[102] But the PHH-regulated entity in the case did not challenge the decision or bring it up to the level of the Supreme Court to give them a chance to review it because the D.C. Circuit, at the same time that it found the CFPB's structure to be fine, also found the penalty that the CFPB imposed to be problematic.[103] Therefore, PHH never had any incentive to go up to the Supreme Court.[104]

But over the summer, in a case litigated by former Ambassador Gray's firm, which is also White House Counsel's firm, and involving the State National Bank of Big Spring, the D.C. Circuit summarily affirmed its reasoning.[105] And, again, in *PHH Corp. v. CFPB*, the Court held the CFPB's structure to be constitutional.[106] Now, Big Spring Bank has filed a petition before the Supreme Court.[107] The government's response is not due until December 10th,[108] but perhaps if the Court decides to take that case, the constitutionality of the CFPB will be squarely before it.[109]

Also this summer, which only illustrates the pressing nature of this issue involving new agencies, the Fifth Circuit created a circuit split in the case *Collins v. Mnuchin*.[110] The case deals with the constitutionality of the Federal Housing Finance Agency,[111] which was created in 2008 to

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[101] *Id.* at 37.

[102] PHH Corp. v. CFPB, 881 F.3d 75, 110 (D.C. Cir. 2018) (en banc).

[103] *Id.* at 84; *see also PHH Corp.*, 839 F.3d at 39 n.19 (finding issue with CFPB's enforcement action and vacating the fine against PHH).

[104] *See PHH Corp.*, 839 F.3d at 10 (vacating CFPB's enforcement action against PHH).

[105] State Nat'l Bank of Big Spring v. Mnuchin, No. 18-5062, 2018 U.S. App. LEXIS 16266, at *1, *4 (D.C. Cir. June 8, 2018); *see* Michael Patrick Leahy, *Supreme Court May Hear David vs. Goliath Lawsuit on Constitutionality of CFPB*, BREITBART (Sept. 17, 2018), https://www.breitbart.com/politics/2018/09/17/supreme-court-may-hear-david-vs-goliath-lawsuit-on-constitutionality-of-cfpb/ (listing C. Boyden Gray and Gregory Jacob as head counsel for the case of *State National Bank of Big Spring v. Mnuchin*).

[106] *State Nat'l Bank of Big Spring*, 2018 U.S. App. LEXIS 16266, at *4.

[107] *State Nat'l Bank of Big Spring*, 2018 U.S. App. LEXIS 16266, *petition for cert. filed*, No. 18-307 (Sept. 6, 2018).

[108] *State Nat'l Bank of Big Spring v. Mnuchin*, SUP. CT. U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-307.html# (last visited Nov. 10, 2019).

[109] Since this panel was conducted, the Supreme Court has denied review of the petition for certiorari. State Nat'l Bank of Big Spring v. Mnuchin, No. 18-5062, 2018 U.S. App. LEXIS 16266 (D.C. Cir. June 8, 2018), *cert. denied*, 139 S. Ct. 916 (2019).

[110] 896 F.3d 640 (5th Cir. 2018).

[111] *Compare id.* at 646 (finding that the structure of the FHFA is unconstitutional because it "is headed by a single Director removable only for cause, does not depend on congressional appropriations, and evades meaningful judicial review"), *with* PHH Corp. v. CFPB, 881 F.3d 75, 84 (D.C. Cir. 2018) (upholding the constitutionality of the CFPB's structure, because "Congress's decision to establish an agency led by a Director removable only for cause is a valid exercise of its Article I legislative power").

oversee Fanny Mae and Freddie Mac in light of problems with mortgages.[112] Similar to the CFPB, this is another agency that is headed by one person who is subject to for-cause removal protections.[113] It is not easy for the Executive to supervise what is happening within the agency because this is another agency that does not have to report to Congress for annual appropriations.[114]

The Fifth Circuit, in a per curiam opinion, found that this structure was unconstitutional.[115] The opinion is written in a way that suggests that maybe there is no circuit split with the *PHH* decision because the court pretty clearly says that they are not holding that the removal protections alone are unconstitutional;[116] it is the combination of all these factors that makes it very hard for the Executive to supervise the agency at stake.[117]

But I think if the Court were to look at this, it is likely that they would find the two decisions to be in conflict.[118] That decision is not being petitioned right now to the Supreme Court because there are pending petitions for en banc rehearing within the Fifth Circuit.[119] But there is just case after case because regulated entities are facing lots of consequences, penalties, and fines from these agencies, and regulated entities are trying to figure out if the Constitution provides for supervision of what is happening.[120] I think before long these issues will come before the Court.

Also, to tie in to what Professor Eastman said about *Lucia v. SEC,* I actually think the *Lucia* decision is another key way in which the Court will have to look at removal protections.[121] As Professor Eastman mentioned, in *Lucia*, administrative law judges ("ALJs"), who preside over

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[112] *Collins*, 896 F.3d at 647.

[113] *Id.* at 649.

[114] *Id.* at 661–62, 668–69.

[115] *Id.* at 657.

[116] *See id.* at 666–70 (finding that several factors contribute to the unconstitutionality of FHFA's structure, including FHFA's for-cause removal restriction, FHFA's single-Director structure, the absence of a bipartisan leadership requirement, abnormal agency funding, and the lack of Executive control over FHFA's activities).

[117] *Id.* at 666.

[118] *Compare id.* at 646 (holding that it is unconstitutional to structure an independent agency such that it is headed by a sole director who is removable only for cause), *with* PHH Corp. v. CFPB, 881 F.3d 75, 84 (D.C. Cir. 2018) (holding an independent agency's structure constitutional even though it is led by a director who is removable only for cause).

[119] Two days prior to this panel, however, the United States Court of Appeals for the Fifth Circuit granted petition for rehearing en banc in the case of *Collins v. Mnuchin*. 908 F.3d 151, 152 (5th Cir. 2018), *reh'g granted* (en banc).

[120] *See, e.g.*, *Collins*, 896 F.3d at 646 (holding that the FHFA is unconstitutionally structured because it is a single-headed agency); *PHH Corp*, 881 F.3d at 84 (holding that the PHH's structure, which is led by a single director, is constitutional).

[121] *See* 138 S. Ct. 2044, 2049 (2018) (deciding the issue of whether ALJs of the Securities and Exchange Commission qualify as officers under the Appointments Clause in the Constitution).

formal agency hearings, were held to be officers of the United States, which means they need to be appointed by the President with Senate consent, by the President alone, by a department head or by a court of law.[122] I think, in reaching that decision, the Court very clearly put the ALJ's under Executive accountability in the front end.[123] And the question the Court creates causes us all to look again at these agency adjudicators who are exercising significant authority.[124] The controversy in *Lucia* arose because Mr. Lucia received a $300,000 penalty and was told that he has a lifetime bar from practicing in the securities industry.[125] This was a decision made by an administrative official who had not been appointed by any other officer.[126]

These are becoming big issues, and I think maybe that over the years the Court will start to see litigation on the back end. Are ALJs' removal protections too tough under *Free Enterprise Fund*?[127] If so, this may suggest that perhaps at some point there are too many layers of removal protections, thereby sizably restraining the President's authority to take care that the law is faithfully executed.[128] ALJs are subject by statute to removal for cause as determined by the Merit Systems Protection Board ("MSPB").[129] These officials preside over issues that are arguably significant because they may affect private rights.[130] Yet even if there is misconduct, these officials may only be removed if you convince an independent agency—and its commissioners—to find good cause.[131] That finding would then have to be approved by layers of people protected by for-cause removal within the MSPB.[132]

I think litigants probably will, and hopefully will, start to make challenges on the back end, as may be illustrated by the Solicitor General trying to get the Court in *Lucia* to take a look at whether there is also some trouble with supervision over agency adjudication.[133] As Professor

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[122] *Id.* at 2055.

[123] *See id.* (holding that ALJs are subject to the Appointments Clause and must be properly appointed to render decisions as officers).

[124] *See id.* at 2049 (discussing the significant extent of authority that ALJs possess and comparing ALJs' authority to "that of a federal district judge conducting a bench trial").

[125] *Id.* at 2049–50.

[126] *Id.* at 2051.

[127] Free Enter. Fund v. PCAOB, 561 U.S. 477 (2010).

[128] *Id.* at 497.

[129] 5 U.S.C. § 7521(a)–(b) (2012).

[130] *See Lucia*, 138 S. Ct. at 2066 (Ginsberg, J., dissenting) (noting that ALJs "wield extensive powers" because "[t]hey preside over adversarial proceedings that can lead to the imposition of significant penalties on private parties") (internal quotation marks omitted).

[131] *See* 5 U.S.C. § 7521(a) (stating that an action may be raised against an ALJ only for good cause).

[132] *See id.* (stating that an action against an ALJ is established and determined by the MSPB).

[133] *Lucia*, 138 S. Ct. at 2061.

Eastman said, this might cause us, in general, to question if adjudicators within agencies are perhaps hearing too many issues and cases to begin with.[134] Thanks a lot. I will look forward to the Question and Answer discussion.

Mr. Kerner: Good afternoon. As I was listening to these two excellent presentations, I wondered if they were talking about me. I was thinking, "Am I just Exhibit A of this unaccountable bureaucrat who has way too much power and is accountable to no one?" I am feeling very constitutionally infirm at the moment.

However, as my prepared remarks will hopefully illustrate, I think there is a very good reason why we have independent agencies. I am here to advocate on behalf of *some* independent agencies. One hint: CFPB–they are over there; we are over here.

First of all, it is really a great honor to be here. I appreciate being here. I have been coming to the Federalist Society's Lawyers Conventions for many, many years. In law school, I was the Vice President of the Federalist Society, and I have always been a very proud member. It is also a real honor to be among such distinguished panelists. Thank you for inviting me.

Some time ago, I completed a quiz asking me which Supreme Court justice's philosophy was most similar to mine. And I was really pleased when Antonin Scalia's picture popped up on my Facebook page. I did not know about all those privacy things then.

Today, however, I will advocate a position that the late, great Justice would likely disagree with. I will support the constitutionality and the importance of for-cause removal protections for some single independent agency heads.[135]

Most of us are familiar with the expression, "where you stand depends on where you sit."[136] I recently learned that the expression is apparently called Miles' Law, after some bureaucrat in the Truman administration.[137] It is obviously in my own self-interest, as a single head

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[134] *See* Jonah B. Galbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1098, 1098 (2018) (discussing the issues arising from the high volume of cases that ALJs adjudicate); *see, e.g.*, SOC. SEC. ADMIN., JUSTIFICATIONS OF ESTIMATES FOR APPROPRIATIONS COMMITTEES FISCAL YEAR 2015 144 (2014) (stating that ALJs working for the Social Security Administration decided 629,337 disability cases in 2013).

[135] See Morrison v. Olson, 487 U.S. 654, 723 (Scalia, J., dissenting), for a discussion on Justice Scalia's position on for-cause removal of independent agency heads, namely that "[t]here is, of course, no provision in the Constitution stating who may remove executive officers, except for the provisions for removal by impeachment."

[136] Rufus E. Miles, Jr., *The Origin and Meaning of Miles' Law*, 38 PUB. ADMIN. REV. 399, 399 (1978).

[137] *Id.*

of an independent agency, to favor for-cause-only removal. But I would support this position, at least in our case, even if I was not the head of the agency. For OSC to do its job credibly, it needs to truly be independent.[138]

Let me begin a little bit by giving you some background about the OSC. I appreciated the Judge laying out some of the things that we do. My job is enshrined in statute, it is at 5 U.S.C. § 1211, which establishes the OSC and provides that it shall be headed by the Special Counsel.[139] You will note the definite article before the words "Special Counsel" which are distinguished from that of the other Special Counsel we hear so much about in the news, and with whose investigation I am not involved.[140]

Whenever people call our office, which happens a lot, it is very important for people to know that we do not do anything with that.

Instead, the Special Counsel is appointed for a fixed term of five years by the President with the advice and consent of the Senate, and the Special Counsel heads up the United States OSC—a permanent, independent, federal investigative and prosecutorial agency whose primary mission is the safeguarding of the merit system in federal employment.[141] It does so by protecting employees and applicants from prohibitive personnel practices ("PPPs") and special reprisals for whistleblowing.[142] The agency also operates as a secure channel for federal whistleblower disclosures of violations of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, and substantial and specific danger to public health and safety.[143] In addition, OSC issues pieces of advice on the Hatch Act and enforces the Act's restrictions of partisan political activity by government employees.[144] Finally, OSC protects the civilian unemployment and reemployment rights of military

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[138] *See Strengthening Government Oversight: Examining the Roles and Effectiveness of Oversight Positions within the Federal Workplace: Hearing Before the Subcomm. on the Efficiency & Effectiveness of Fed. Programs & the Fed. Workforce of the U.S. S. Comm. on Homeland Sec. & Gov't Affairs*, 113th Cong. 45, 50 (2013) (statement of Carolyn N. Lerner, Special Counsel, U.S. Office of Special Counsel) (describing the nature and importance of OSC's prosecutorial role).

[139] 5 U.S.C. § 1211(a) (2012).

[140] *Compare id.* § 1211(a)–(b) (listing the requirements and duties of the Special Counsel as head of the OSC), *with* CYNTHIA BROWN & JARED P. COLE, CONG. RESEARCH SERV., R44857, SPECIAL COUNSEL INVESTIGATIONS: HISTORY, AUTHORITY, APPOINTMENT AND REMOVAL 2 (2019) (noting the distinction between the varying use and meaning of the phrase "special counsel," stating that "[t]he term 'special counsel,' when used in the context of independent criminal investigations of executive officials, is entirely distinct from the OSC, an independent federal agency").

[141] 5 U.S.C. § 1211(a); *see also* U.S. OFFICE OF SPECIAL COUNSEL, FISCAL YEAR 2019 CONGRESSIONAL BUDGET JUSTIFICATION *AND* PERFORMANCE BUDGET GOALS 75 (2019) [hereinafter CONGRESSIONAL BUDGET JUSTIFICATION] (stating OSC's primary mission).

[142] CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 141, at 3; *see also* 5 U.S.C. § 1212(a) (stating the protections that OSC provides against prohibited personal practices).

[143] CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 141, at 3.

[144] *Id.*

service members under USERRA, but once again, only against federal agencies.[145]

In fulfilling its oversight and prosecutorial responsibilities, Congress intended OSC to be independent of any direction or control of the President.[146] Because OSC is charged with oversight of the executive branch and prosecuting wrongdoing, such independence is crucial to fulfilling our mission.[147] The principle mechanisms that Congress utilized to ensure that OSC's decisions were unbiased and free of undue influence were to impose a five-year fixed term of office, and to restrict a President's power to remove the Special Counsel to instances of inefficiency, neglect of duty, or malfeasance in office.[148] The Supreme Court has recognized Congress's power to enact statutes that restrict the President's removal of power in ways that are compatible with the President's constitutional duty to faithfully execute the laws.[149]

In *Morrison v. Olson*, the Court ruled that Congress may impose for-cause removal restrictions up until they are of "such a nature that they impede the President's ability to perform his constitutional duty."[150] As we have learned from the presentations prior to this, however, some jurists and academics have criticized the independent, single head agency structure as unconstitutional.[151] In his dissent to the D.C. Circuit's *en banc* decision in *PHH*, now-Justice Kavanaugh argued that consecrating power in a single director as the structure of the CFPB—and also ours—creates a "greater risk of arbitrary decisionmaking and abuse of power, and a far greater threat to individual liberty."[152] To now-Justice Kavanaugh, the overarching constitutional concern with independent agencies, like the CFPB, is that they "exercise executive power but are

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[145] *See id.* ("OSC protects veterans and service members from job discrimination under the Uniformed Services Employment and Reemployment Right Acts (USERRA).").

[146] *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) (stating that when Congress creates agencies that include for-cause removal requirements, Congress intends for the agencies to be independent from presidential control).

[147] *A Review of the Office of Special Counsel and Merit Systems Protection Board: Hearing Before the Oversight of Gov't Mgmt. the Fed. Workforce, & the D.C. Subcomm. of the U.S. S. Comm. on Homeland Sec. & Governmental Affairs*, 112th Cong. 41–42 (2012).

[148] 5 U.S.C. § 1211(b) (2012).

[149] Morrison v. Olson, 487 U.S. 654, 691–92 (1988).

[150] *Id.* at 691.

[151] *See, e.g.*, Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 525–26 (2005) (discussing the bipartisan consensus against the use of independent counsels); *The Future of the Independent Counsel Act: Hearing Before the U.S. S. Comm. on Governmental Affairs*, 106th Cong. 248 (1999) [hereinafter *The Future of the Independent Counsel Act*] (statement of Janet Reno, Att'y Gen.) (expressing that the Independent Counsel Act is unconstitutional).

[152] PHH Corp. v. CFPB, 881 F.3d 75, 168 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

unchecked by the President," who is the only official imbued with the executive power by Article II and directly accountable to the people.[153]

Some commentators argue that the CFPB's constitutional woes could be cured by transforming the agency into a bipartisan, multi-member body like the Federal Trade Commission,[154] but because the President alone has the power to choose whom to appoint, bipartisan requirements are arguably on even shakier constitutional grounds than for-cause removal.[155] A bipartisanship requirement forces the President to appoint agency leaders from the opposing political party who may not be his preferred candidates and may not be in line with his policy directives.[156] By contrast, allowing the President to remove an independent agency head for inefficiency, neglect of duty, or malfeasance at least preserves the President's ability to ensure that the laws are faithfully executed.[157]

Of these three grounds, inefficiency may be the broadest, as Judge Griffith articulated in his concurrence in *PHH* .[158] He went further to say that it would not take much for a President to dismiss a recalcitrant agency head as being ineffectual so long as the President did not specify that it was because of a policy disagreement, like in a careless tweet, for example.[159] Of course, there could be some costs associated with that removal, such as Congressional hearings or a negative headline in the press: "President Fires Special Counsel."[160]

At least I hope that would be a disincentive. Of course, if he so chooses, the President can always fire the agency head anyway and remove him from office.[161] A likely lawsuit, even if it were to get past Justice Kavanaugh, would many years later at most result in backpay, as

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[153] *Id.*

[154] Datla & Revesz, *supra* note 47, at 795.

[155] Ronald J. Krotoszynski, Jr., et al., *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME L. REV. 941, 973, 975 (2015).

[156] *Id.* at 991–92.

[157] *See* Free Enter. Fund v. PCAOB, 561 U.S. 477, 496 (2010) (finding that when a President is stripped of his removal power, he cannot ensure the proper execution of laws).

[158] *PHH Corp.*, 881 F.3d at 131–32 (Griffith, J., concurring).

[159] *Id.* at 135–36.

[160] *See id.* at 148 n.8 (noting that a President may be faced with potential political costs if he removes an officer at will); *see also* Datla & Revesz, *supra* note 154, at 813–14 (discussing the incentives for agency heads to publicize a President's threat of removal and describing the costs associated with such exposure).

[161] *See* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1166 (2013) (discussing a President's ability to fire the head of federal agencies).

the remedy for the wrongly fired head.[162] In any event, the President can shed himself of an independent head.[163]

As I said from the outset, I support the structure of a single agency head with for-cause removal protections, but only for independent agencies whose oversight responsibilities have limited power over private citizens.[164] The calculus is quite different when it comes to more intrusive and powerful agencies like a CFPB.[165] It might, therefore, be instructive to illustrate the critical differences between OSC and the CFPB.

First, OSC is different from CFBP in that OSC cannot act alone to enforce any of our statutes.[166] At OSC we are wholly dependent on the MSPB, to adjudicate our complaints and to issue orders.[167] If we seek any corrective or disciplinary actions, we must either try to settle the case or file a complaint with the MSPB.[168] And the MSPB is always free to reject our reasoning and rule against us.[169] Unlike CFPB, OSC is by no means judge, jury, and executioner.[170] We do not have quasi-legislative or judicial powers.[171]

Second, OSC's independence is at the heart of OSC's mission.[172] OSC is charged with policing executive branch employees.[173] For example, OSC has exclusive jurisdiction to enforce the Hatch Act, a law that prohibits all federal employees, with the exception of the President and Vice President,

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[162] *See* 29 C.F.R. § 1614.501(c) (2017) (listing various remedies afforded to employees upon wrongful termination, including back pay); *see also Management Directive 110: Chapter 11 Remedies*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/federal/directives/md-110_chapter_11.cfm (last visited Nov. 11, 2019) (discussing the purpose and the common use of back pay relief in situations in which an employee of an agency was discriminated against).

[163] Vermeule, *supra* note 161, at 1166.

[164] *See, e.g.*, TODD GARVEY & DANIEL J. SHEFFNER, CONG. RESEARCH SERV., R45442, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES 4–6 (2018) (explaining the structural choices Congress possesses in creating independent agencies while noting the limitations such agencies have in restricting the public).

[165] *See Reviewing Independent Agency Rulemaking: Hearing Before the Subcomm. on Regulatory Affairs and Fed. Mgmt. of the U.S. S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. 66–67 (2016) (statement of Adam J. White, Research Fellow, The Hoover Institution) (discussing the extensive power of independent agencies like the CFPB and the threat such agencies pose against the American people and their constitutional rights).

[166] *See* CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 141, at 48 (stating that the OSC serves as an investigatory and prosecutorial extension of the MSPB).

[167] *Id.*

[168] *Prohibited Personnel Practices* (*5 USC § 2302(b)*), U.S. MERIT SYS'S PROTECTION BOARD, https://www.mspb.gov/ppp/ppp.htm (last visited Sept. 16, 2019).

[169] *Id.*

[170] *See* 5 U.S.C. § 1212(a)–(b) (listing the OSC statutory duties).

[171] *See id.* § 1212(b)(1)–(2) (delineating the Special Counsel's authority under the statute).

[172] CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 141, at 52.

[173] *See id.* at 8 (describing OSC's role in "fostering a productive Federal Workplace").

from using their job or tax payer dollars for partisan political purposes.[174] If an administration could fire the Special Counsel at will for investigating these lawful activities, then the Hatch Act is rendered toothless.[175]

A third important distinction between CFPB and OSC is that OSC's sole focus is on wrongdoing within the Federal Government.[176] We have no authority over private citizens or corporations, we cannot bring enforcement actions against the public, and we cannot issue law-like regulations.[177] Even our Hatch Act regulations reside within the Office of Personnel Management.[178] This narrow focus on government misconduct underscores the need for OSC's independence.[179] OSC's mission would be compromised if the Special Counsel were subject to at-will removal.[180] And unlike CFPB, the statutes we enforce have very limited impact on the United States economy.[181]

Fourth, unlike CFPB or the Fair Housing Finance Agency, a single-director-led agency whose structure was recently found unconstitutional by the Fifth Circuit, OSC is not completely unmoored from the executive and legislative branches.[182] The MSPB is made up of presidentially-appointed members with staggered term limits.[183] We, at OSC, also rely on budgetary appropriations from Congress, and even submit our annual budget justification to the Office of Management and Budget for review.[184] With our purse strings held by Congress, and the

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[174] Hatch Act, 5 U.S.C. § 7322 (2012); *see also* CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 141, at 49, 74 (explaining OSC's authority under the Hatch Act).

[175] *See* CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 141, at 6 (explaining that the purpose of the Hatch Act is to ensure that "[f]ederal employees are not coerced by their superiors into partisan political activity and that employees do not engage in partisan politics while on duty").

[176] *Id.* at 3.

[177] *See* BROWN & COLE, *supra* note 140, at 6–7.

[178] JACK MASKELL, CONG. RESEARCH SERV., R43630, HATCH ACT: CANDIDACY FOR OFFICE BY FEDERAL EMPLOYEES IN THE EXECUTIVE BRANCH 4 (2014).

[179] *See* CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 141, at 3 (highlighting OSC's focus on investigating wrongdoings that occur in the federal workplace).

[180] OSC's mission is to hold the Federal Government accountable for potential abusive conduct. *Id.* Thus, if the Special Counsel is subject to the authority of the very entity it is charged to regulate, then the OSC will not be able to effectively carry out its mission without OSC officers or employees fearing retaliation. *Id.*

[181] *See id.* (listing the various statutes that OSC enforces, including the Whistleblower Protection Act, the Hatch Act, and USERRA).

[182] *See* 5 U.S.C. § 1201 (2012) (giving executive authority to the President to appoint members of the MSPB).

[183] *Id.*

[184] *See, e.g.*, CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 141, at 4–5 (presenting the OSC's budgetary request to Congress); U.S. OFFICE OF SPECIAL COUNSEL, FISCAL YEAR 2018 CONGRESSIONAL BUDGET JUSTIFICATION *AND* PERFORMANCE BUDGET GOALS 5–7 (2018) (same); U.S. OFFICE OF SPECIAL COUNSEL, FISCAL YEAR 2017 CONGRESSIONAL BUDGET JUSTIFICATION *AND* PERFORMANCE BUDGET GOALS 4–5 (2017) (same).

commissioners of our adjudicatory board appointed by the Executive, OSC's only independent in that the Special Counsel enjoys some protection from at-will termination by the President—a small but necessary protection that allows OSC to fulfill its mission.[185] Independence allows me to stand firm when making what could be politically unpopular decisions.

Finally, restructuring always seems to be run by a bipartisan, multi-member board, as has been suggested for CFPB, but such a structure is incompatible with OSC's mission and function as a prosecutor.[186] As I have said a few times by now, OSC's main authority is to investigate cases of prohibitive personnel practices and Hatch Act violations and try those cases before the MSPB.[187] In my first year as Special Counsel, I have seen how decisions need to be made quickly and efficiently. In the past our process has been rightly criticized as at times being too slow.[188] Once a case is finally ready to be closed or a complaint for corrective action filed, having multiple principals at OSC would be inefficient and burdensome.[189]

Just like the structure of the executive branch, having a single, independent principal at OSC facilitates faster decision making while also maintaining built-in checks and balances.[190] The bottom line is that not all independent agencies are alike. OSC's mission is uniquely nonpartisan and the Special Counsel needs to be free from political pressure exerted by the executive branch.[191] Having a single agency head who can only be

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[185] *See* 28 C.F.R. § 600.7(d) (2008) (stating that the Special Counsel may only be removed by the Attorney General).

[186] *See* CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 141, at 48 (discussing OSC's prosecutorial duties).

[187] *Id.* at 48.

[188] *See, e.g.*, Prakash, *supra* note 151, at 525–26 ("In the wake of Kenneth Starr's investigation of several Clinton-era scandals, a bipartisan consensus emerged against the use of independent counsels."); *The Future of the Independent Counsel Act*, *supra* note 151, at 248 ("However, after working with the Act, I have come to believe—after much reflection and with great reluctance—that the Independent Counsel Act is structurally flawed and that those flaws cannot be corrected within our constitutional framework.").

[189] *See, e.g.*, *Five Years Later: A Review of the Whistle-Blower Protection Enhancement Act: Hearing Before the Subcomm. on Gov't Operations of the H. of Reps. Comm. on Oversight & Gov't Reform*, 115th Cong. 14–15 (2017) (statement of Eric Bachman, Deputy Special Counsel, U.S. Office of Special Counsel) (testifying to the OSC's inefficiency prior to the passage of the WPEA because the OSC was still required to close valid claims due to courts' narrow definitions of whistleblowing protections).

[190] *See, e.g.*, Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 126, 132 (1999) (arguing that independent agencies restore checks and balances and aid in governmental decision-making).

[191] *See* CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 141, at 48 (explaining the background and mission of the OSC); *see also* BROWN & COLE, *supra* note 140, at 3 (discussing the historical need for an independent agency free from political interference).

removed for cause is a protection vital to OSC's ability to uphold the law and fulfill its mission.[192] Thank you very much.

Prof. Buzbee: Well, first, I guess I look at my name and it says William Buzbee, Federalist Society, and I suddenly wonder what has happened. Just to be clear, I think I was asked to be here as a sort of counterpoint. And I do not agree with much of what I have heard, but let me reason my way to my conclusions, suggest that there are some important parts of the Constitution's and our laws' development that are being neglected in these discussions, and suggest why the view that almost any agency is constitutionally problematic is itself constitutionally problematic and unfaithful to the bargain we see in the Constitution.

Let me start off by saying that I think Special Counsel Kerner's points are a perfect example. At one point I think everyone has concerns with lack of accountability, but then when you start looking at each agency and try to understand what they do, you can see why radical justices, like Justice Scalia, were very concerned with making sure agencies abide by their statutory substantive and procedural criteria, which deals with much more than just a President's power to appoint or remove.[193] I would say that the discussion of *PHH, Free Enterprise Fund*, and *Lucia* are really important here today, not so much just for those cases, which mostly can be formally worked around without radical disruption of the Federal Government, but the next steps—the way in which they are a sort of toehold for reversals of long-standing administrative law and constitutional law.[194]

I think, starting right off, just as far as historical understandings, which are an underpinning of the first two speakers, I just commend to you two really great pieces of work. Jerry L. Mashaw's book, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law*, is a really important counterpoint to this idea that our country's world is just courts, legislatures, and Presidents because, he points out, variants of the administrative state emerged immediately in

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[192] *See* CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 141, at 3 (stating OSC's structuring as an independent agency); *see also supra* notes 179–81 and accompanying text.

[193] *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 713 (1988) (Scalia, J., dissenting) ("Besides weakening the Presidency by reducing the zeal of his staff, it must also be obvious that the institution of the independent counsel enfeebles him more directly in his constant confrontations with Congress, by eroding his public support."); Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring) ("An agency may not use interpretive rules to *bind* the public by making law, because it remains the responsibility courts to decide whether the law means what the agency says it means.").

[194] *See* Lucia v. SEC, 138 S. Ct. 2044, 2049 (2018) (holding that ALJs are officers under Article II); Free Enter. Fund v. PCAOB, 561 U.S. 477, 484 (2010) (holding that the President does not have the power under Article II to remove an inferior officer); PHH Corp. v. CFPB, 881 F.3d 75, 80 (D.C. Cir. 2018) (holding that the structure of the CFPB is constitutionally permissible).

the post-founding era.[195] He has a wonderful chapter, if you have never read it, on steamboat regulation, a very early form of health and safety regulation that was enacted when some of the Founders were probably getting quite long in the tooth, but some of them would have still been around at that point.[196]

I know some of you are familiar with the other work—I know Professor Mascott is—the work of Dr. John Mikhail, who is a colleague of mine at Georgetown.[197] I also know that there is a lot of reliance on *The Federalist Papers* as people talk through these issues.[198] Dr. John Mikhail has done some really fascinating work on *The Federalist Papers* themselves and their reliability, and *The Federalist Papers* are included in several of his pieces, including a very good article on the Necessary and Proper Clause.[199] Interestingly, what he points out is that when he started looking at *The Federalist Papers*—they were, as we all know, advocacy pieces written for different states' debates over the Constitution at different points in time[200]—he found that they were actually often inaccurate in describing the Constitution as it stood at that point.[201] That is, they were themselves strategic statements and documents.[202] Therefore, when we look at *The Federalist Papers*[203] or Montesquieu,[204] we have to be wary of that problem Justice Scalia liked to warn about, and we should be wary of any approaches to law where we

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[195] *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 42 (Yale Univ. Press ed., 2012) (discussing the early foundations of the original departments of the government).

[196] *Id.* at 189–90.

[197] Dr. John Mikhail is a professor and the Associate Dean for Research and Academic Programs at Georgetown Law. *See John Mikhail*, GEO. L.: FAC. & RES., https://www.law.georgetown.edu/faculty/john-mikhail/ (last visited Sept. 22, 2019) (listing Dr. Mikhail's biography and scholarship).

[198] *See, e.g.*, Clark, *supra* note 34, at 1326 (discussing how several Supreme Court decisions regarding the separation of powers safeguard federalism); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1059 (2014) (discussing the overlap between language found in *The Federalist Papers* and the Necessary and Proper Clause).

[199] *See* Mikhail, *supra* note 198, at 1129–30 (addressing pertinent facts surrounding the making of *The Federalist Papers*).

[200] *See id.* at 1057–58 (outlining the constitutional debate between states over the Necessary and Proper Clause).

[201] *See id.* at 1102–03 (illustrating the discrepancies arising from *The Federalist Papers* and other founding documents).

[202] *See id.* at 1127 (concluding that documents such as *The Federalist Papers* dispel any notion that the language of the Necessary and Proper Clause was misunderstood or novel during that time period).

[203] THE FEDERALIST NOS. 33, 40 (James Madison) (Ian Shapiro ed., 2009).

[204] MONTESQUIEU, *supra* note 62, at 18.

are "just look[ing] over the heads of the crowd and pick[ing] out our friends."[205]

Let us look at the Constitution at this point. First, we have to be careful about adding in the word "only" in connection with key Clauses. But more importantly, people quickly move to say the President is critical to accountability.[206] The President is critical to accountability, but there is no way in which you can look at the Constitution as saying the President is the exclusive source of accountability.[207] Most important in the Constitution, of course, is legislative power,[208] thankfully, people have mentioned that.[209] Legislative supremacy has, going back to the earliest Supreme Court decisions, been viewed as the core principle under our Constitution.[210] That is, when it comes to making policies, handing authority out, and requiring action, legislative supremacy is really the critical source of legitimacy and accountability in our government.[211] For reasons I will discuss, that concept ties in with long-standing views about the administrative state and the reason why it should be subject to law and constraint in addition to oversight by the President.[212]

Moving on, of course, there is this provision which is also talked past—the Necessary and Proper Clause.[213] You have to think about the fact that the Constitution conferred Congress with broad power in making

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[205] Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 36 (Amy Gutmann ed., 1997).

[206] *See supra* notes 38–46, 51, 81–83, 89, 157 and accompanying text.

[207] *See* U.S. CONST. art. I., § 1 (giving Congress the authority to control legislative matters); *id.* art. III, § 2 (giving the Judicial Branch the authority to control all cases arising under the Constitution).

[208] *Id.* art. 1, § 1.

[209] *See supra* text accompanying notes 19, 26, 36.

[210] Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 CASE W. RES. L. REV. 1129, 1132–33 (1992) (explaining the positivist argument that legislative supremacy is inherent in the Constitution).

[211] *See* THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009) (expressing that the legislative authority is the strongest power in a republican government); *see also* U.S. CONST. art I, § 1 (vesting all legislative power in Congress); Marbury v. Madison, 5 U.S. 137, 177–78 (1803) (holding that a law created by Congress is binding if it is constitutional); *see also* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc. ("NRDC"), 467 U.S. 837, 842–43 (1984) (requiring a court to give effect to the intent of Congress); Thomas W. Merrill, Marbury v. Madison *as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 504 (2004) (expressing that step one of *Chevron* deference maintains legislative supremacy and protects the rule of law by requiring courts to give effect to the intent of Congress when it is clear).

[212] *See infra* notes 221–26, 248–49 and accompanying text.

[213] U.S. CONST. art. I, § 8; Kurt Couchman, *No Presidential Power Is Beyond Congress*, HILL (Jan. 17, 2018, 2:30 PM) https://thehill.com/opinion/white-house/369379-no-presidential-power-is-beyond-congress (emphasizing that the Necessary and Proper Clause has been ignored and not used to make laws for carrying into effect the powers vested in the Constitution).

laws to structure the government.[214] If you look at the earliest cases that have sort of worked through the development of the administrative state and its permissible bounds, some of the earliest decisions point that out.[215] Congress chooses to make policy and how to structure how the government works.[216] Those are the fundamentals of the Necessary and Proper Clause.

Along those lines, for those of you who are eager to go back and read these key Supreme Court decisions, in Justice Breyer's dissent in *Free Enterprise Fund*, he has a whole first section where he is not taking on the decision, but where he reviews the law as it stands and as it still stands, since no cases were overruled in *Free Enterprise Fund*.[217] And he goes through the many forms of agencies over time, their structures, the checks on the agencies, the ways they are appointed, and the functions they fulfill.[218] He cites the cases by the Supreme Court that have upheld these many different forms of agencies.[219] That concept ties in again with legislative supremacy, and the Necessary and Proper Clause.[220]

Then, very importantly, the President has an obligation to take care that laws are faithfully executed.[221] One approach to that is that the President, and the President alone, decides what that means.[222] That is pretty antithetical to the development of administrative law going back to *Marbury v. Madison*.[223] The courts have a role in overseeing the government's functions, work, appointments, and faithful carrying out of

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[214] *See* U.S. CONST. art. I, § 8 (granting Congress the power to make all laws that are necessary and proper); Buckley v. Valeo, 424 U.S. 1, 138 (1976) (recognizing Congress's ability to create government offices under the Necessary and Proper Clause); McCulloch v. Maryland, 17 U.S. 316, 421 (1819) (holding that Congress has broad discretion in making laws).

[215] *See, e.g.*, *Buckley*, 424 U.S. at 138–39 (discussing how the Necessary and Proper Clause allows Congress to create government offices); Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) (expressing that Congress's authority to create quasi-legislative and quasi-judicial agencies cannot be doubted); Thomson v. Pac. R.R., 76 U.S. 579, 588–89 (1869) (recognizing that Congress has absolute authority to determine if a law is necessary and proper to carry out its enumerated powers).

[216] U.S. CONST. art. I, § 8; *see also McCulloch*, 17 U.S. at 420 (asserting that the Necessary and Proper Clause allows Congress to exercise its best judgment in executing its powers); Neomi Rao, *The Administrative State and the Structure of the Constitution*, HERITAGE FOUND. (June 18, 2018), https://www.heritage.org/the-constitution/report/the-administrative-state-and-the-structure-the-constitution (analyzing how Congress creates, structures, and empowers administrative agencies with policy-making authority).

[217] Free Enter. Fund v. PCAOB, 561 U.S. 477, 515–16, 520–21 (2010).

[218] *Id.* at 517–18, 521.

[219] *Id.* at 515, 519.

[220] *Id.* at 515; U.S. CONST. art. I, § 8.

[221] U.S. CONST. art. II, § 3.

[222] Bruce Ledewitz, *The Uncertain Power of the President to Execute the Laws*, 46 TENN. L. REV. 757, 759 (1979) (considering the view that the enforcement and execution of the laws is solely within the power and control of the President).

[223] Marbury v. Madison, 5 U.S. 137 (1803); Merrill, *supra* note 210, at 504, 511, 520.

the functions handed out by the legislature.[224] That is very critical to the President's obligation that the laws be faithfully executed.[225] When you look at the dozens, probably actually hundreds, of cases that have upheld the very basics of the modern administrative state, we see that a critical element within our system under the Constitution and laws is the concept that we do not have a President who is a freestanding, uncheckable king or queen, but instead, is an actor subject to law and who must act in conformity with the law.[226]

This is, in fact, the fundamental virtue of modern administrative law.[227] I think, actually, that—and I will not spend a long time quoting the many cases—probably the strongest voice in favor of this idea that the administrative state needs to be judicially checked and needs to be subject to law, both in its substantive criteria and its procedures, were dozens of cases by Justice Scalia where he emphasized this idea.[228] The problem, of course, is that if you start saying that every member of every agency is subject to unfettered, uncheckable removal, then you weaken all of those systems—every substantive criteria and every procedural choice becomes subject to intimidation or concerns. I think Special Counsel Kerner mentions that if his role were subject to unfettered removal by the President at any time, then the OSC would be a completely different agency, and it would really be unable to fulfill its functions.[229]

Moving on, I guess another really important point is a practical point, if agencies are viewed as fundamentally antithetical to the administrative state and we go, as Professor Eastman suggested, to something where there could be commissions that could make recommendations,[230] then

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[224] *Marbury*, 5 U.S. at 177–78.

[225] *See* Bob Goodlatte, *The President's Duty to Faithfully Execute the Law*, HERITAGE FOUND. (Nov. 6, 2014), https://www.heritage.org/report/the-presidents-duty-faithfully-execute-the-law (discussing the role of the courts in policing presidential obedience to the law while faithfully executing laws).

[226] *See, e.g.*, Kendall v. United States, 37 U.S. 524, 612–13 (1838) (holding that the President does not have the ability to forbid the execution of laws); *see also* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1878 (2015) (expressing that the Take Care Clause requires the president to obey constitutional laws).

[227] *See* Ass'n of Maximum Serv. Telecasters v. FCC, 853 F.2d 973, 976 (D.C. Cir. 1988) (stating that the fundamental principle of the modern administrative state is the rule of law); *see also* Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1254–55 (2014) (explaining that a substantive value of administrative law is the rule of law demanding a government of laws and not men).

[228] *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211–13 (2015) (Scalia, J., concurring) (discussing how courts are given the authority to resolve ambiguities in statutes and regulations and noting that courts should review agency interpretations without deference); City of Arlington v. FCC, 569 U.S. 290, 307 (2013) (expressing that an agency must follow what Congress has established with clear lines and how such agency cannot make interpretations beyond what ambiguities will fairly allow).

[229] *See supra* notes 146–48, 175, 179–80 and accompanying text.

[230] *See supra* notes 49–51 and accompanying text.

you start having just huge amounts of power being wielded, I suppose by—I was not clear who the commission would be making recommendations to—whether it be to Congress or to the President.[231] But then the question is that you essentially have the fleshing out of instructions by either Congress or perhaps the White House. Judges who are generalists—and talented generalists, of course—tend not to know the particulars of the fields in which regulation works.[232] And so it would require a very heroic conception of judicial knowledge and especially expertise in often very technical areas instead of just having commissions making recommendations, and then the details being worked out in front of Article III judges.

My sense here—and I gave some comments at the recent law professors' convention here a few weeks ago—I think it is really helpful to look at these questions of administrative law structure through a "bad man" perspective. You are probably familiar, or remember Justice Holmes and his view that you need to look at the law from the perspective of the "bad man."[233] That is someone who would be inclined not to abide by the law and then the question is, is it structured well when a person or people you do not think highly of wield that power?

I think when you look at administrative law and its many, many choices and Congress's many choices about regulation of the administrative state, what we have is, fundamentally, an extensive web of constraints to constrain—the bad regulator, the bad President, the bad or ignorant judge. What do we have? The Administrative Procedure Act ("APA"), one of the most enduring bodies of law going back to the mid 1940s,[234] which was really a compromise intended to protect business from unfettered and unchecked arbitrary power of agencies.[235] The APA itself underpins many of the concerns we are talking about today. Similarly, concerns about partisanship; political favoritism; and corruption, especially in regulated industries, led to the creation of the independent

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[231] *See supra* notes 49–51, 61, and 63 and accompanying text.

[232] *See* Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U.L. REV. 847, 856 (2012) (arguing that specialist judges are better suited to make decisions in issues involving highly complex fields).

[233] Hon. Oliver Wendell Holmes, Address Delivered at the Dedication of the New Hall of the Boston University School of Law 6 (Bost. Univ. Jan. 8, 1897).

[234] Administrative Procedure Act, 5 U.S.C. §§ 551–559 (2012); *see also* Bremer, *supra* note 227, at 1236 (labeling the APA as the basic framework for the administrative state).

[235] *See* Bremer, *supra* note 227, at 1236–38 (emphasizing that the APA aimed to prevent agencies from acting arbitrarily or capriciously); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U.L. REV. 1557, 1559–60, 1680 (1996) (illustrating the political battle over the New Deal, which undergirded the enactment of the APA); Robert H. Jackson, FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 2 (1941) (providing the final recommendation to the President regarding the enactment of the APA and discussing that powers must be exercised in nonarbitrary ways).

agencies.[236] Again, this reflects a desire to remove decisions from partisanship, corruption, and perhaps other venal motives.[237]

Procedural rigor in statutes—dozens of them—are wonderful to teach to students because the procedural intricacies of the modern administrative state really show quite nuanced and different understandings of the best way to attack challenging social ills.[238] But, again, all of those procedural mandates are very specific to different agencies and tasks.[239] If they all become, essentially, secondary to presidential whim, everyone should be concerned.

The partial protection from politics is one of the points I was going to make. I think Special Counsel Kerner made the point well.[240] For-cause protection is not complete protection from removal.[241] That is, if it were the case, no one would ever be fired in much of the world because for-cause protection is the norm in private employment.[242] For-cause protection is partial protection.[243] It is, essentially, protection if you are doing your job.[244] It is protection from dismissal for wrongful reasons.[245] That is an important part of protection from politics and raw use of power.[246] In addition, independent agencies, especially those agencies that are structured to have bipartisan members are also products of an effort to create some insulation from partisan politics and rancor.[247] I will not go into depth here.

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[236] Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 18–19, 23–24 (2010); *see also* ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 189–90 (Oxford Univ. Press 1941) (discussing the debates surrounding the FTC's creation, particularly those emphasizing the need to establish an independent body as a means of correcting the Department of Justice's partisan and pressure-controlled management of the antitrust laws).

[237] *See supra* note 236 and accompanying text.

[238] Bremer, *supra* note 227, at 1236–38 (discussing the importance of statutes within the administrative state and how they provide boundaries and promote commonly held core values).

[239] *Id.*

[240] *See supra* notes 152–53, 191–92 and accompanying text.

[241] *See supra* notes 152–53, 191–92 and accompanying text.

[242] *See* Samuel Estreicher & Jeffrey M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C.L. REV. 343, 343, 347–48 (2014) (explaining that most developed countries do not use at-will termination); Kenneth G. Dau-Schmidt, *Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform*, 94 MARQ. L. REV. 765, 826 (2011) (discussing how all European countries have statutory protection against unjust dismissal).

[243] *See* PHH Corp. v. CFPB, 881 F.3d 75, 90 (D.C. Cir. 2018) (explaining how for-cause protection limits bases for removal to reasons such as incompetence, neglect of duty, or malfeasance).

[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] Krotoszynski, Jr. et al., *supra* note 155, at 969.

The abundant law about reasoned decision-making is really something that everyone should celebrate. This whole body of law going back to *State Farm,* including cases that have allowed shifts to touch on market-based permits and the like, embraces the idea that agencies are obliged to engage in reasoned decision-making in which they engage with facts, criticism, statutes, and procedures required by law.[248] This whole body of law hinges on courts enforcing structures set up by Congress, which may involve some form of presidential oversight but not unfettered presidential power based on whatever factors the President chooses.[249]

I will also point out that the key precedents for the consistency doctrine were *State Farm*,[250] *FCC v. Fox* with the main opinion penned by Justice Scalia,[251] and the 2016 opinion by Anthony Kennedy in *Encino Motorcars*.[252] Those cases collectively say agencies can change policy, but they have to engage with facts and science in doing so.[253] Agencies have to offer good reasons for change, and they cannot leave unexplained inconsistency.[254] Again, a fundamental rule of law is virtue, which requires respect for the rule of law. The basic idea that regulations are standing and binding until validly changed is a very important tenet that will also disappear if removal is allowed at the whim of a President.[255]

I should stop there. I guess my sense here is that I worked in a public institution, environmental group, and I represented the industry for years in New York City so, whenever I think about administrative law, I always think back to what most of my business clients wanted. They were some

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[248] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 42–43 (1983); *see also* Ventura Broad. Co. v. FCC, 765 F.2d 184, 189–90 (D.C. Cir. 1985) (requiring the FCC to exercise reasoned decision-making).

[249] *See* 5 U.S.C. § 7521(a)–(b) (2012) (demonstrating that Congress requires for-cause removal of ALJs); *see also PHH Corp.*, 881 F.3d at 90 (discussing the president's ability to exercise removal power in limited circumstances).

[250] *State Farm*, 463 U.S. at 42–43.

[251] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 511, 513–14 (2009).

[252] Encino Motorcars v. Navarro, 136 S. Ct. 2117, 2125–26 (2016).

[253] *See id.* (emphasizing that an agency must consider facts and circumstances in order to arrive at a reasoned decision); *Fox*, 556 U.S. at 513–14 (requiring an agency's decision to be disregarded if the facts demonstrate that the decision is arbitrary or capricious); *State Farm*, 463 U.S. at 42–43 (upholding the arbitrary and capricious standard of review for agency decisions).

[254] *See Encino Motorcars*, 136 S. Ct. at 2125–26 (emphasizing that an agency must engage in a reasoned decision-making process to prevent an arbitrary or capricious decision from being made); *Fox*, 556 U.S. at 513–14 (disregarding agency decisions that are arbitrary or capricious).

[255] *See* PHH Corp. v. CFPB, 881 F.3d 75, 90 (D.C. Cir. 2018) (discussing how for-cause removal ensures that the President can faithfully execute the laws); *see also* Kendall v. United States, 37 U.S. 524, 612–13 (1838) (holding that the President does not have the power to forbid the execution of laws because that would usurp Congress's control over legislation and would paralyze the administration of justice); Metzger, *supra* note 226, at 1878 (expressing that the Take Care Clause requires the President to obey constitutional laws and does not grant a suspension power).

of the most sophisticated businesses in the country. What they always wanted was stability. They wanted known law. They did not want to have a law where they could not find out what the rule was. For things like agencies, they always wanted to know what the guidance document said. They wanted to narrow the range of uncertainty. They wanted some stability. They were always concerned with regulators that had unfettered power and could act in unpredictable ways.

My sense here is that, before moving too fast, we have to remember there is a really vast body of law that is about the regulatory rule of law, and it is worth celebrating.[256] That body of law itself has a virtue with which I want to close: administrative law is a body of constitutional common law.[257] It is a body of law that has been built up over several centuries, and it is pragmatic, sequentially developed, fact-bound, statute-particular, and statute-contemplative.[258] It is, in that sense, a bipartisan, sequentially developed, and handed-off body of law.[259] It has a lot of wisdom in it, and it is filled with compromises.[260] And I think we should all be wary of theories or approaches that allow a sort of leapfrogging backward in time past these compromises and pragmatic solutions that have been worked out. Thank you.

QUESTION AND ANSWER

Hon. Sykes: Thank you, panelists. If members of the audience would all start thinking about the questions you would like to ask the panel, just by way of summarizing the positions that you have just heard: Two of our panelists argued that independent agencies are essentially unconstitutional under the Constitution's enunciation of the executive power, the legislative power, and the judicial power.[261] At the other end, another takes the position that independent agencies are meaningfully constrained and that the congressional choice to insulate them from direct accountability is justified by the need to keep them free to bring their expertise to bear on difficult and complex social and economic problems

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[256] Bremer, *supra* note 227, at 1219, 1254–55 (discussing the enduring and evolving body of administrative law).

[257] *Id.* at 1221 (asserting that administrative law statutes, judicial decisions, and executive directives have created an unwritten constitution to govern independent agencies).

[258] *Id.* at 1221, 1236; *see, e.g.*, Administrative Procedure Act, 5 U.S.C. § 706 (2012) (requiring courts to review a decision for reasoning based on substantial evidence); Ventura Broad. Co. v. FCC, 765 F.2d 184, 189–90 (1985) (requiring the Commission to exercise reasoned decision making); *see also* MASHAW, *supra* note 195, at 287 (addressing that the APA requires substantial levels of transparency and public decision making).

[259] Bremer, *supra* note 227, at 1233.

[260] *Id.*

[261] *See supra* notes 19, 34–35, 38–42, 47, 68–70, 77–78, 88–89, 113–14 and accompanying text.

without partisan influence.[262] Then we have sort of a middle ground, occupied here by Special Counsel Kerner. He has taken the position that regardless of the relative merits of those polar-opposite positions, his agency—the OSC—has only limited independence protection and is, therefore, sort of the Goldilocks of independent agencies with just the right amount of independence protection, in kind and degree.[263] That is a brief summary.

All right. Now, while you are thinking about your questions, let me pose one to the panel from my perspective as a judge watching what the Supreme Court has recently done and may be about to do. As I look at the Supreme Court's recent reentry into this field through *Free Enterprise Fund* and *Lucia*, I am struck by a distinct impulse of minimalism—probably springing from a concern about the consequences of shaking up our modern administrative state, concern for which would follow from anything more than an incremental approach to these problems as they arise and find their way to the Supreme Court. That is especially evident, I think, in Justice Kagan's decision in *Lucia*, which was very narrow,[264] and to a lesser degree in the Chief Justice's decision in *Free Enterprise Fund*.[265] With that in mind, I would like both sides to address whether that is likely to continue or whether we will see an acceleration in the Court's willingness to address these issues in a more theoretical way.

Prof. Eastman: I will start. I think you saw this in *Free Enterprise Fund*, initially.[266] The Court set down a constitutional marker, and the justices cured the problem to stop the hemorrhaging on the consequences while they worked through revisiting some of the core doctrines.[267] I think you are right. I think this is particularly true of Chief Justice Roberts, and to a lesser degree of Justice Alito.[268] This kind of incrementalism to revisit some of these questions, not quite so bold and all at once as Justice

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[262] *See supra* notes 226–27, 229, 232, 234–37, 243–47 and accompanying text.

[263] *See supra* notes 135, 138, 146–47, 164, 166, 172, 176–77, 186, 191–92 and accompanying text.

[264] Lucia v. SEC, 138 S. Ct. 2044, 2051–52 (2018).

[265] Free Enter. Fund v. PCAOB, 561 U.S. 477, 495–98, 508–10 (2010).

[266] *Id.*

[267] *Id.*

[268] *Compare id.* at 508–10 (refusing to make a broad ruling that the Board was unconstitutional and instead opting to sever tenure provisions from the remainder of the statute), *and* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring) (expressing Justice Alito's desire to wait for a case in which the courts' deference to agencies' interpretations of their own regulations can be fully explored), *with* Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring) (appearing to support a complete reversal of precedent over the singling out of one provision).

Thomas has become famous for.[269] But remember, he is laying down markers to force people to reconsider things. So I am not sure he would disagree with that more incremental approach as well.

But I do think there is a problem. I share Professor Buzbee's notion that there are other mechanisms of accountability as well.[270] Statutes can do that.[271] But the problem is that agencies are not complying with statutes.[272] Part of the problem involves deference doctrines that call upon courts to defer fundamental questions not covered by statutes to the interpretation of the same agencies that the courts are supposed to be holding to account.[273] Justice Scalia points this out in *Perez*.[274] You know, we have got the APA, and it says the courts are supposed to be the ones that give the interpretive answer to an ambiguous statute,[275] and yet, we have got doctrines like *Chevron* deference,[276] which, in fact, do the opposite.[277] The various doctrines in conjunction have magnified the separation of powers problems.[278] I am not sure adding more statutes is going to solve the problem. Maybe giving teeth to the statutes we have

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[269] *See, e.g.*, *Perez*, 135 S. Ct. at 1215 (2015) (Thomas, J., concurring) (discussing how the Supreme Court has not been vigilant about protecting the structure of the Constitution); *see also* Gamble v. United States, 139 S. Ct. 1960, 1981, 1984–85 (2019) (Thomas, J., concurring) (expressing Justice Thomas's judicial philosophy on stare decisis and explaining his rationale for why federal courts do not hesitate to overrule erroneous precedent); Brian Lipshutz, *Justice Thomas and the Originalist Turn in Administrative Law*, 125 YALE L.J.F. 94, 94 (2015) (highlighting Justice Thomas's concerns in a series of six opinions during the 2015 term spanning concerns on agency rulemaking, judicial deference to agencies, and certain agency adjudications); *id.* at 96 (invalidating agency-created laws for being an unconstitutional appropriation of Congress's power to make laws).

[270] *See supra* notes 224–26, 228, 238–39 and accompanying text.

[271] *See Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring) (noting the APA's original purpose to guard against excessive rulemaking by administrators).

[272] *Id.* at 1211–12 (showing how the deference doctrines allowed agencies to bypass the APA's requirements).

[273] *See, e.g.*, Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842–43 (1984) (holding that agencies have authority to resolve ambiguities in statutes).

[274] *Perez*, 135 S. Ct. at 1211–12 (Scalia, J., concurring) (addressing how reviewing courts have ignored the directive in the APA to interpret statutory provisions when resolving ambiguities and have instead accorded deference to the agency's review of the statute).

[275] 5 U.S.C. § 706 (2012).

[276] *Chevron*, 467 U.S. at 843–45 (1984).

[277] *Id.*

[278] *See, e.g.*, Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 327–28 (2014) (explaining that allowing agencies to rewrite statutes contradicts the Constitution's separation of powers doctrine); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 617–18 (1996) (arguing that the judiciary's practice of deferring to an agency's own interpretation of its regulations violates the separation of powers doctrine); Illya Somin, *Gorsuch Is Right About* Chevron *Deference*, WASH. POST (Mar. 25, 2017, 10:45 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/25/gorsuch-is-right-about-chevron-deference/ (arguing that *Chevron* deference creates a risk that the Executive Branch will encroach upon the powers of Congress and the judiciary).

and faithfully executing them is a solution. But that solution is not going into the incremental piece about which you ask. That is almost an all-or-nothing, black-and-white rule. It could have some pretty severe consequences.

Prof. Mascott: I do agree that, I think, the Court is likely to continue in the minimalist approach, as Professor Eastman said.[279] I think that is one reason why then-Judge Kavanaugh probably wrote his opinion in *PHH* the way that he did.[280] He was trying to frame the issue so that precedents like *Morrison v. Olson* or *Humphrey's Executor* did not need to be overruled.[281] He was looking for innovative new structures that took things one step too far, and maybe hoping that when he was a judge on the D.C. Circuit that the Court, if it ever got the case, would decide similar to how it did in *Free Enterprise Fund*, which was to say that precedents currently on the books will be kept in place and will not be extended.[282]

In the *Lucia* decision, the Court definitely had a very fact-bound limited decision regarding the ALJs.[283] On remand, the Court did not even want issues such as the placement of a totally new adjudicator to be decided.[284] Maybe in that particular case it did. The Court was not going to require that moving forward, however. It wrote its opinion narrowly to really just talk about the SEC ALJs.[285] I think it is going to be up to the lower courts and the agencies to realize, okay, analogously, what are all the positions that come under *Lucia*? On the removal side, I do think that is a place where litigation is going to head, but even there, the Solicitor General ("SG") actually did not ask the Court to strip the ALJs of tenure protections.[286] The SG asked where the Court could read the issues

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[279] *See supra* notes 267–69 and accompanying text.

[280] PHH Corp. v. CFPB, 881 F.3d 75, 164 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

[281] *Compare PHH Corp.*, 881 F.3d at 164, 167 (Kavanaugh, J., dissenting) (expressing that the separation of powers doctrine exists to restrain the Federal Government and protect liberty and further arguing that the for-cause provision should be severed), *and* Morrison v. Olson, 487 U.S. 654, 692 (1988) (holding that the Attorney General has ample ability to assure that statutory duties are complied with even though independent counsel may only be terminated for good cause), *with* Humphrey's Ex'r v. United States, 295 U.S. 602, 625 (1935) (holding that Congress may create independent agencies that exercise executive power and whose commissioners are only removable by the President for good cause).

[282] *See PHH Corp.*, 881 F.3d at 173–74 (discussing how CFPB is the first independent agency to be headed by a single person); *see also* Free Enter. Fund v. PCAOB, 561 U.S. 477, 483–84 (2010) (identifying that old precedents exist but refusing to apply such precedents to the case before it).

[283] Lucia v. SEC, 138 S. Ct. 2044, 2051, 2053–54 (2018).

[284] *Id.* at 2055.

[285] *Id.*

[286] Brief for Respondent Supporting Petitioners at 39, *Lucia*, 138 S. Ct. 2044 (No. 17-130).

narrowly so that ALJs could be removed for misconduct, failure to follow lawful agency directives, or failure to adequately perform.[287]

The SG was very careful to say it would not be appropriate to have a situation where you are just sort of willy-nilly removing an ALJ or threatening removal based on how one particular case is going to come out.[288] I think in the *Myers* Supreme Court opinion from 1926 there is even language about faithfully executing the laws.[289] We are not talking about threatening people with being fired if they are not going to do a politically charged thing. We are talking about everybody remaining faithful to their constitutional duties, but to the extent that people are not following the agenda set by Congress or the Executive, there needs to be some way to be able to bring supervision and removal.[290]

The other piece the SG asked the Court to revisit is MSPB's role and the petition to narrow such role to just the determination if a removal has factual basis, rather than the multi-level appeals structure.[291] I think now you get your case heard first by an administrative judge within the MSPB, and then it would go up to the board.[292] That could be an incremental way in which litigants who are being strategic will bring these carefully framed, minimalist, fact-bound questions to the Court and enable the Court to sort of reach a decision that is maybe right in its view of the Constitution, but does not necessarily have one hundred immediate implications down the line.

Hon. Sykes: Professor Buzbee, any response?

Prof. Buzbee: One, I agree. I think that you see in these cases, especially in *Lucia*, a very minimalist approach.[293] *Free Enterprise Fund* has some much broader language within it, but in the end what the Court actually does is limit it in scope and carefully say it is not doing something.[294] I think you see it. One way to look at it is that is just how they got to the majorities in those cases.[295] That is limiting the reach and

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[287] *Id.* at 39.

[288] *Id.* at 50.

[289] Myers v. United States, 272 U.S. 52, 135 (1926).

[290] *See supra* notes 65–67, 74–83 and accompanying text.

[291] Brief for Respondent Supporting Petitioners, *supra* note 286, at 39.

[292] Paul M. Secunda, *Whither the* Pickering *Rights of Federal Employees?*, 79 U. COLO. L. REV. 1101, 1103 (2008) (discussing that the process of appeal is first to an administrative judge, then to the MPSB, and lastly to the Federal Circuit Court of Appeals); *see also* 5 U.S.C.A. § 7701(b)(1) (2019) (explaining that appeals are reviewed by an ALJ, a designated employee of the MPSB, or the Board in its entirety).

[293] *Lucia*, 138 S. Ct. at 2051–52.

[294] Free Enter. Fund v. PCAOB, 561 U.S. 477, 495–98, 508–10 (2010).

[295] *See* Richard H. Pildes, Free Enterprise Fund*, Boundary-Enforcing Decisions, and the Unitary Executive Branch Theory of Government Administration*, 6 DUKE J. CONST. L. &

leaving some questions undecided was just strategic.[296] It is a question of where the votes stand. I think there is some truth to that.

But the other is kind of, I think, an interesting big question. We will see Chief Justice Roberts and Justice Kagan analytically approach statutory interpretation in very similar ways.[297] They are both very thorough readers of statutes in their entirety and in their functioning—putting provisions together. [298] For this reason, I think Chief Justice Roberts, who is a key vote here, understands that different choices and statutes matter and should matter. He would be concerned with too readily jettisoning a body of law or embracing an approach that makes all statutes just about arbitrary power.

When you look back at his D.C. Circuit decisions, it appears he is genuinely concerned about the arbitrary wielding of power, and if you allow agencies to be subject to threats, reprisals, or dismissals, or the same thing as other officials subject to that, then there are concerns of arbitrarily wielding power.[299] While there may be issues surrounding the administrative state, there is a respect for the rich choices that Congress makes to structure statutes and a desire not to create overly broad rules.[300]

The other Court-watchers—my friends who are much more day-in-and-day-out watchers of the Court—people view Chief Justice Roberts, who again is a key vote here, as truly being an institutionalist, very concerned about the Supreme Court's integrity.[301] Part of his reason for embracing a more minimal approach is a wariness against radical

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PUB. POL'Y 1, 12–15 (2011) (explaining that Justice Kennedy was the swing vote in many of these cases and that he would likely vote with the majority only if the scope was limited).

[296] *Id.*

[297] *See* Robert A. Katzmann, *Response to Judge Kavanaugh's Review of Judging Statutes*, 129 HARV. L. REV. F. 388, 395–96 (2016) (explaining that both Chief Justice Roberts and Justice Kagan use many of the same tools to interpret statutes, and that both believe that context matters when interpreting statutes).

[298] *See id.* (discussing how both Chief Justice Roberts and Justice Kagan use a full arsenal of statutory interpretation tools when reading statutes).

[299] *See, e.g.,* Ramaprakash v. FAA, 346 F.3d 1121, 1130 (D.C. Cir. 2003) (expressing the concern Justice Roberts has about arbitrary or capricious agency action and rules against the FAA for taking such action).

[300] *See* John A. Cutts, III, *Article 134: Vague or Valid?*, 15 U.S.A.F. JAG L. REV. 129, 135, 138 (1973) (explaining that the Supreme Court will presume rules passed by Congress are constitutionally valid, but will overturn them if they prove to be too vague); *see also* Erwin Chemerinsky, *Chemerinsky: How the Roberts Court Could Alter the Administrative State*, A.B.A J. (Sept. 4, 2019), http://www.abajournal.com/news/article/chemerinsky-the-roberts-court-could-alter-the-administrative-state (noting that in at least one case Chief Justice Roberts was the fifth vote agreeing with the proposition that agencies should be given deference when interpreting statutes and at the same time addressing concerns about the administrative state by emphasizing the limits on such agency deference).

[301] Henry Gass, *Why Chief Justice Roberts Is Moving to the Center of the Court*, CHRISTIAN SCI. MONITOR (Mar. 26, 2019), https://www.csmonitor.com/USA/Justice/2019/0326/Why-Chief-Justice-Roberts-is-moving-to-the-center-of-the-court.

upheavals and jettisoning of whole bodies of law, which would be inconsistent with his view of what the Court must do in order to be respected as a legitimate institution.[302]

Hon. Sykes: I know this is not a panel on agency deference, but Professor Eastman brought up the likelihood that the Court may be ready to embrace a revisitation of agency-deference doctrine because it is more within the Court's comfort zone than some of the more radically consequential structural constitutional questions.[303] I would like to hear the other panelists' responses to that idea and also whether that fits more comfortably within the Court's vision of its own role as an institution that has republican legitimacy.

Mr. Kerner: Who wants to go first?

Prof. Eastman: It exacerbates—I mean, you have got both an Article I problem[304] and an Article III problem.[305] I think Justice Thomas's opinion in *Michigan v. EPA*[306]—I forget which one—points out the Article III problem with these deference doctrines.[307] The agencies are themselves interpreting statutes.[308] That is the role of the courts. [309] It is not just Justice Thomas. There is Bill Eskridge and Cass Sunstein. Both criticize *Chevron* deference on those grounds.[310] But it exacerbates the consolidation of power problem and the lack of accountability problem.[311] You have got the non-delegation on the front end that allows agencies to

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[302] Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825, 826–27, 835–36 (2008); *see also* Gass, *supra* note 301 (explaining that it is important to Chief Justice Roberts that he safeguard the reputation of the Court by rising above polarized politics and taking a more politically neutral and reasoned approach to the law).

[303] *See supra* notes 267–78 and accompanying text; *see also* Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 115 (2018) (stating that the Court may be ready to narrow *Chevron* agency-deference, but it is very unlikely that the Court would abandon it altogether).

[304] Michigan v. EPA, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring).

[305] *Id.* at 2712.

[306] *Id.*

[307] *Id.*

[308] *See id.* at 2712–13 (explaining that when agencies interpret statutes, they are really engaging in policy formulation).

[309] *Id.* at 2714.

[310] William N. Eskridge, Jr., *Vetogates,* Chevron*, Preemption*, 83 NOTRE DAME L. REV. 1441, 1443, 1460 (2008) (pointing out specifically the Article I, Sections 5 and 7 problems that Chevron deference creates); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 188, 245–46 (2006) (criticizing *Chevron* deference for not being rooted in the Constitution).

[311] *See* Eskridge, *supra* note 310, at 1465 (explaining that *Chevron* deference has met academic criticism for being inconsistent with the traditional role of the courts, thus creating a lack of accountability).

make laws.[312] You have got the lack of direct supervision from the elected executive that allows the agencies to force laws maybe contrary to the policy of the administration.[313] Then you have got the deference doctrines that allow them to interpret the laws while they are also adjudicating them.[314] This seems to be just a huge problem from a separation of powers perspective. And that problem deals with an executive agency, quite apart from an independent agency.

Hon. Sykes: Anybody else?

Mr. Kerner: I have one thought, if I may.

Hon. Sykes: Sure.

Mr. Kerner: I know Professor Buzbee was talking about rules and how folks do not like vague rules.[315] So one of the things that is really important in our world is that we try to have as clear rules as we can. So we get very clear rules, and we try to work on, for example, the Hatch Act area.[316] There are regulations promulgated by Office of Personnel Management,[317] but within these, especially with social media and other new developments, how do you get a law from 1939 to apply to Twitter?[318] Right? You come up with these, and to go back to what John Eastman said, at some point when you work out with practitioners who have been

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[312] *See id.* at 1461, 1467 (explaining that non-delegation allows agencies to make laws, but only when Congress gives the agency clear policy standards).

[313] *See* Morton Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193, 246 (1981) (explaining that the President does not have authority to control executive agencies whom Congress has delegated power to, thus allowing those agencies to force any laws they please); *see also* Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1616–17, 1666 (2019) (discussing how *Chevron* may be an invitation for executive agencies to enact interpretative rules notwithstanding contrary interpretation by other Executive Branch actors, the legislature, and the courts).

[314] Rosenberg, *supra* note 313, at 1472; *see also* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211–12 (2015) (Scalia, J., concurring) (explaining that agency deference compels a reviewing court to decide that the text in question means what the agency has interpreted it to mean).

[315] *See supra* note 297 and accompanying text.

[316] Scott J. Bloch, *The Judgment of History: Faction, Political Machines, and the Hatch Act*, 7 U. PA. J. LAB. & EMP. L. 225, 238 (2005).

[317] *Id.* at 237.

[318] Eli Watkins & Devan Cole, *What Is the Hatch Act?*, CNN (March 6, 2018), https://www.cnn.com/2018/03/06/politics/what-is-the-hatch-act/index.html (explaining that the Hatch Act is a law from 1939 that is repeatedly violated by public officials who improperly use social media). The Hatch Act has been amended since the time of its original enactment. *See* Hatch Act of 1993, 5 U.S.C. § 7323(b)(2)(B)(i)(IX) (2012) (incorporating the most recent amendments to the Hatch Act of 1939).

in this field for twenty years, I think they have an expertise that ought to be given some credence because they have been working on this, they have thought this through, they work very hard on this.[319] And when you come up with rules that are clear, then you have robust training, and then you have accountability, you set up sort of a three-legged stool that I think really works. When that gets into the courts and judges at that point are not second-guessing these rules or giving you no deference on them, how can judges have that kind of expertise when you have worked on these? I do think that there is a need for technicians, essentially, and experts to work through difficult problems.[320] Obviously if they run violative of statutes or the Constitution that's one thing, but at least giving them some deference and to appreciate the technical expertise.

Hon. Sykes: All right, let us go—oh, you have a response? Sure. Absolutely.

Prof. Buzbee: A couple things. One is, there is *Chevron* as a kind of toehold, or a claim generally, about excessive agency power,[321] and then there is *Chevron*, the actual case and what it says as it currently stands.[322] There are two issues and people sometimes shift from *Chevron* as sort of a placeholder for the problem with the administrative state and then *Chevron* as it actually stands today.[323] Most importantly, *Chevron* itself has been subject to substantial limitations.[324] The *Mead* case comes in.[325] There is kind of a Swiss-cheese aspect to *Chevron* because very little is left of the *Chevron* doctrine that is more broadly parodied or caricatured when people say it creates kind of

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[319] Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 103 (1992) (describing how agency staff are generally selected on the basis of expertise and experience in the industry that is being regulated and how even entry-level positions within these agencies are staffed by educated professionals with a long-term interest in the industry); *see supra* notes 21–25 and accompanying text.

[320] *See* Macey, *supra* note 319, at 103 (explaining that courts appreciate the experts in these agencies and will consistently give them deference because of the vast knowledge they have regarding their industry).

[321] *See* Sunstein, *supra* note 313, at 1677 (explaining that some people are concerned that *Chevron* gives excessive administrative power and discretion and so the Court is limiting the reach of *Chevron*).

[322] Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984) (concluding that deference should be given to agencies' reasonable interpretations of ambiguous statutes).

[323] *See* Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between the* Chevron *and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921, 943 (2006) (explaining that *Chevron* has been treated by commentators as a major change in prior law that alters normal judicial functioning); *see infra* note 327 and accompanying text.

[324] *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (limiting *Chevron* deference to cases where Congress specifically delegated authority to the agency).

[325] *Id.*

unfettered power.[326] Where *Chevron* stands now is that agencies are effectively rewarded if they use notice-and-comment rulemaking and come up with rules that are promulgated through a transparent and open process subject to reasoned judicial review and responsive to salient criticisms.[327] If an agency does not do that, on any of those fronts, you are not in the world of *Chevron* step two deference.[328]

It is important to remember that *Chevron* does not grant permission for agencies to do whatever they want.[329] It is in fact, a regime that is built on the idea that Congress hands authority to agencies, and agencies, armed with their expertise about the field, the law, and related statutes, come up with regulations.[330] Again, my sense is that business clients do not want to have a statute that makes everyone guess how it should be read.[331] In general, people want greater clarity, and notice-and-comment rulemaking is a source of clarity and legal stability.[332] So I think it needs to be read for what it actually says.

Also, just along those lines, there is a wonderful, famous article for those of you who really want to get some good reading today. Right before the *Chevron* case came out, Henry Monaghan, who is a professor at Columbia wrote an article called *Marbury and the Administrative State*.[333] And he basically thought about the nature of authority conferred on agencies and explained why some degree of deference to agencies is basically a constitutional necessity and logically unavoidable, and kind of worked his way through it.[334] And although the *Chevron* case did not cite that article, the article really anticipated the logic of *Chevron,* and I think

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[326] *See* Sunstein, *supra* note 313, at 1624, 1669 (explaining that there have been so many limitations and exceptions to *Chevron* that much of its significance has been carved out and retained by the courts).

[327] Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1805–06 (2010).

[328] *Id.* at 1736–37.

[329] *See* Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 843–44 (1984) (holding that agencies have authority to interpret statutes, but that their interpretation will only be given deference if it is not arbitrary, capricious, or manifestly contrary to the statute).

[330] *Id.* at 865.

[331] *See* Anne T. Nees, *Making a Case for Business Courts: A Survey of and Proposed Framework to Evaluate Business Courts*, 24 GA. ST. U.L. REV. 477, 478, 488 (2007) (discussing that businesses complain about the inconsistency, incompleteness, and inadequacy of case law and statutory interpretation to inform future business decisions).

[332] James Kim, Comment*, For a Good Cause: Reforming the Good Cause Exception to Notice and Comment Rulemaking Under the Administrative Procedure Act*, 18 GEO. MASON L. REV. 1045, 1048–49 (2011).

[333] Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

[334] *Id.* at 24.

for people trying to understand *Chevron,* it is probably the best article about *Chevron,* even though it was published before it.[335]

Hon. Sykes: All right. Professor Mascott?

Prof. Mascott: Well, I guess just responding to what Professor Eastman just said about stability,[336] I do see your point about stability and notice-and-comment rulemaking. I think ultimately the most stability, of course, would come from clear laws being passed by Congress. I mean, the virtue that we would have if more detail was in congressional legislation as well is—you know, we have got 435 members[337] and 100 Senators[338] who represent interests geographically all over the country—the ability to represent the interests of the people in a way that any agency, whether it is headed by a commission or one person, is just not going to be able to do.[339] I think a lot of the problems that we are seeing here—even talking about people being concerned about the whims of executive branch actors or whatever it may be—could be solved by Congress taking a larger role.[340]

Professor Eastman also earlier talked about the Necessary and Proper Clause and seemed to suggest that, considering the role of Congress and the role of the Executive, if the two politically elected branches reach a compromise under the Necessary and Proper Clause, then we should defer to that compromise.[341] And so not be too quick to have courts or law scholars or whoever else step in and say, "Well, that's an unconstitutional arrangement. That violates the Take Care Clause, or the Appointments Clause, or whatever." I think the one thing to keep in mind, though, with that, is if we see the Constitution as being the document that brings into being this Federal Government, and we still have states that are supposed to be operating in the background, if we

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[335] *Id.*

[336] Claire Tuck, *Policy Formulation at the NLRB: A Viable Alternative to Notice and Comment Rulemaking*, 27 CARDOZO L. REV. 1117, 1127 (2005).

[337] 2 U.S.C. § 2(a) (2012) (reapportioning house seats rather than increasing them, therefore capping the number of representatives at 435); *see also* 2 U.S.C. § 2 (2012) (fixing the number of representatives at 435 members).

[338] U.S. CONST. art. I, § 3, cl. 1.

[339] *Id.* art. I, §§ 1–2.

[340] *See* Susan E. Dudley, *Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future*, 65 CASE W. RES. L. REV. 1027, 1051 (2015) (noting that Congress has not taken full advantage of the tools it has to control agencies' actions, and describing a way for Congress to play a larger role).

[341] *See supra* notes 213–20 and accompanying text; *see also* John Yoo, *Rational Treaties: Article II, Congressional-Executive Agreements, and International Bargaining*, 97 CORNELL L. REV 1, 3, 6–7 (2011) (explaining the scholars' views that congressional-executive agreements find support in the Necessary and Proper Clause and that courts have largely deferred to these agreements).

defer too much to the Necessary and Proper Clause and say that Congress and the Executive can do anything they want, even if it is outside of the text of constitutional restraint, such as the Commerce Clause, then Congress and the Executive might be happier with the arrangement.[342] But I think there are other interests that also need to be looked out for, such as the interests of the people and the states.

Obviously we do not want to be willy-nilly by second guessing the elected branches, but the Constitution does have constraints, one of which fundamentally, of course, is the Commerce Clause and limiting federal power just in general.[343] I think we need to have comfort where the Constitution does speak clearly to things and comes in to say that there is a limitation that needs to be abided by and adhered to, even if that may also mean that we are saying that various governmental actors have gone outside of those constraints.

Hon. Sykes: All right. Thank you. Let us go to your questions. Yes, sir.

Randy May: Thank you to all of you. Randy May from the Free State Foundation. Judge Sykes was inching up and then Professor Eastman came even closer to the question and point I want to make. Why is it that the judicial branch cannot—does not or cannot—impose a less deferential standard in reviewing the actions of the truly independent agencies? I am talking about the FCC and so forth.

I have written several law review articles published in the *Administrative Law Review* suggesting that point.[344] More importantly we have Justice Kagan's presidential administration article.[345] It is in her footnotes, but she basically says that the independent agencies should receive less deference from judges like Judge Sykes and others because they are less accountable than the true executive branch agencies because there is a lack of the termination ability for independent agencies due to the for-cause provisions and because the core of *Chevron*, which Professor Buzbee just talked about, is really based on the notion of political accountability.[346] I know there is a nod to agency expertise, but there is still a need for political accountability. Maybe Professor Eastman

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[342] Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 348, 351 (1994); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U.L. REV. 1463, 1505–06 (2015).

[343] Eisgruber, *supra* note 342, at 348, 355–56.

[344] Randolph J. May, *Defining Deference Down: Independent Agencies and* Chevron *Deference*, 58 ADMIN. L. REV. 429 (2006); Randolph J. May, *Defining Deference Down, Again: Independent Agencies,* Chevron *Deference, and* Fox, 62 ADMIN. L. REV. 433 (2010).

[345] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

[346] *See id.* at 2377 n.506 (stating that the Executive Branch should be given greater deference than independent agencies).

or anyone else could talk about whether you think that might be an incremental step towards holding independent agencies more accountable?

Hon. Sykes: That is a good question that distinguishes between truly independent agencies and other executive agencies for purposes of deference.

Prof. Eastman: At least it is a first step. I am willing to take a cut back on deference wherever I can get it. I think that is a very good step. I think—and I would love to hear from Professor Buzbee on this—the notion is that the statutes themselves provide some level of accountability if we properly enforce them in the judiciary.[347] I think he would share that view.

Prof. Buzbee: The Supreme Court has been confronted with this question.[348] They have declined to approach deference differently for independent agencies and executive agencies.[349] I guess I would say it has been mentioned. It is in the opinions.[350] Has there been a clear majority that has said in recent cases that there should be no deference? But I think for the same reasons Justice Scalia's opinion in *Arlington v. FCC* stated that the difference between a standard question of interpretation and regulation and a jurisdictional question is a hard line to draw.[351] Agencies come in many forms.[352] There are degrees of independence and degrees of executive-ness in agencies,[353] and my sense is that this would be kind of unworkable and could itself become very political. I think it would be a bad idea.

I still think agencies should be scrutinized closely. I think agencies that do not follow the law, that do not offer good reasoning and basis for their decisions, should be quickly rejected by the courts. I just do not think the deference regime should change.

Hon. Sykes: Anybody else at this point? All right, next question.

Paul Kamenar: I am Paul Kamenar, a D.C. lawyer. Just a quick comment and a question with respect to the for-cause removal. That issue

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347 *See supra* note 271–272 and accompanying text.

348 FCC v. Fox Television Stations, Inc., 556 U.S. 502, 523 (2009).

349 *Id.* at 525.

350 *Id.*; Bastian v. United States, No. 8:17CV309, 2018 WL 3345279, at *2 (D. Neb. July 7, 2018).

351 *See* City of Arlington v. FCC, 569 U.S. 290, 299 (2013) (explaining that there is no difference between the question of jurisdiction and the question of interpretation).

352 *Id.* at 313–14.

353 *Id.*

is before the D.C. Circuit regarding the other Special Counsel Mueller.[354] That is a case I argued last week before the D.C. Circuit on whether for-cause removal under the DOJ regulations can be immediately revoked and thereby revert Mueller to an inferior officer.[355] In my argument, I cited Professor Mascott's article to argue that if he is an inferior officer then he should have been appointed by the head of the department, Jeff Sessions.[356] But my question is with respect to the *PHH* case.[357] What would be the minimalist solution or answer to that to reverse the D.C. Circuit case, and how do you do a head count on that knowing that Justice Kavanaugh would recuse himself because he ruled on the issue below? Do we have the five votes up there to reverse the D.C. Circuit case?

Hon. Sykes: Anybody?

Prof. Mascott: One answer to that might be maybe the Court. I have heard some scholars speculate maybe the Court will not take the case as a result. Maybe the Court will wait for some others to come up. Possibly this *Collins* decision from the Fifth Circuit might be a way to get at the idea of tenure protections for single directors.[358] To me it seems like the Court already demonstrated a willingness to cut back some for-cause removal protections in *Free Enterprise Fund*.[359] My sense is that the Court's minimalist approach would be to strike the removal protections for the single director rather than doing something more dramatic, such as making it a multi-member commission, because it seems to me that the alternative requires a lot more rewriting of the statute—as opposed to just severing one portion of it. But who knows? My suspicion is that we might see the Court rule on this, not in a CFPB case, or not at least in a D.C. Circuit case, but in something else within the next couple of years.

Prof. Eastman: I will add one point, and I agree with Special Counsel Kerner. I do not see the constitutional difference on the separation of powers question between a multi-member independent commission and a single member. The theory that the multi-member commission would check each other does not provide the constitutionally-required check.[360] It may create a greater opportunity for

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[354] *In re* Grand Jury Investigation, 916 F.3d 1047, 1049 (D.C. Cir. 2019).

[355] *Id.* at 1049, 1052.

[356] *Id.* at 1050, 1052; Brief of Appellant at 42–43, *In re* Grand Jury Investigation, 916 F.3d 1047 (No. 18-3052); see Jennifer L. Mascott, *supra* note 43, for a discussion on how to distinguish principal officers from inferior officers.

[357] PHH Corp. v. CFPB, 881 F.3d 75 (D.C. Cir. 2018).

[358] Collins v. Mnuchin, 896 F.3d 640, 675–76 (5th Cir. 2018).

[359] Free Enter. Fund v. PCAOB, 561 U.S. 477, 513–14 (2009).

[360] *PHH Corp.*, 881 F.3d at 183 (describing the multi-member structure as a "substitute check" rather than a constitutional one).

mischief than a single member, but I do not think it cures the constitutional problem.[361] So I am agreeing with you that there is no difference. But I disagree with you because I think that they are all unconstitutional rather than all constitutional.[362]

Hon. Sykes: Next question? Yes, sir.

Devin Watkins: My name is Devin Watkins. As an originalist, I look closely at what James Madison and some of the other Founders said. James Madison advocated that the Comptroller of the Treasury should have for-cause protection.[363] I wonder if we should instead be looking at what he meant by for-cause protection. Should the President be able to remove a policy-creating officer for not creating policy that follows the law faithfully? Or, as *Myers* said, should an adjudicatory officer or a quasi-judicial officer be removed after an adjudication due to lack of wisdom or such other reasons that *Myers* talks about?[364]

Hon. Sykes: Anyone want to take that one on? I think you have stumped them. Go ahead, Professor Eastman.

Prof. Eastman: This often comes up in the context of certain government functions that are just too technical for the people to understand, and therefore the constitutional system of accountability to the people through their elected officials just does not work.[365] We need to bring in the experts. I think a hundred years of experience with that progressive doctrine has proved that it does not work very well, in fact, often times it brings about catastrophically much worse results.[366] We, after all, had experts at Fanny Mae and Freddie Mac that gave us the greatest recession since 1929.[367] I guess I would challenge the very basic assumption that if we get unaccountable experts in these technical fields, then we will all be better off. I just do not think that experience has borne that out.[368]

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[361] *Id.*

[362] *See id.* (discussing that multi-member commissions do not constitute the required constitutional check under the separation of powers doctrine).

[363] *Id.* at 91.

[364] Myers v. United States, 272 U.S. 52, 135 (1926).

[365] *See* Hickman & Thomson, *supra* note 74, at 308 (explaining that there are complex policy areas that create a need for expert organizations to step in and help where issues are too complicated for elected officials to handle).

[366] Jeffrey M. Lipshaw, *The Financial Crisis of 2008-2009: Capitalism Didn't Fail, but the Metaphors Got a C*, 95 MINN. L. REV. 1532, 1553 (2011).

[367] *Id.*

[368] *Id.*

Hon. Sykes: Yes, sir.

Mike Daugherty: I am Mike Daugherty. I am the CEO of LabMD and a business owner. I just won in Eleventh Circuit, and I just want to read four sentences to the panel, especially Professor Buzbee. This is about accountability and specificity of accountability.

The court said, "Doesn't that underscore the importance of significance of rulemaking? Otherwise you're regulating data security on a case-by-case basis."

And the FTC said, "We are regulating data security case-by-case basis. And that's exactly what the Supreme Court says in *Bell Atlantic* and *Chenery*."

And then the court says, "It doesn't matter whether the subject has any notice at all?"

And the FTC says, "Correct. Correct."

He says, "Okay, notice becomes irrelevant."

And the FTC says, "You can adopt new rules in adjudication. The Supreme Court's made that very clear."

And the court says—this is Judge Tjoflat—"I appreciate your concessions."[369]

Now, we won.[370] The company is dead.[371] 700,000 cancer patients have to shift medical.[372] There is carnage everywhere, which never comes up in the legal system. How do you hold these people accountable for gun-to-the-head regulatory when they are off-the-chain and they have qualified immunity? How would you specifically hold agencies off-the-chain accountable?

Hon. Sykes: I think that was to you, Professor.

Prof. Buzbee: Honestly, I have not seen the case. Part of what you were reading is part of longstanding constitutional doctrine going back to the *Chenery* case, which states that agencies have procedural choice how to make policy—it is not allowed to make rules--and they can decide whether to act through notice-and-comment rulemaking.[373] They can develop policy on a case-by-case basis, and this discretion—

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[369] Oral Argument at 32:37, LabMD, Inc. v. FTC, 894 F.3d 1221 (11th Cir. 2018) (No. 16-16270), www.ca11.uscourts.gov/oral-argument-recordings?title=16-6270&field_oar_case_name_value=&field_oral_argument_date_value%5Bvalue%5D%5Byear%5D=&field_oral_argument_date_value%5Bvalue%5D%5Bmonth%5D=.

[370] *LabMD, Inc.*, 894 F.3d at 1224.

[371] *Id.*

[372] Reply Brief of Petitioner, *LabMD, Inc.,* 894 F.3d 1221 (No. 9357), 2017 WL 956751 at *2.

[373] SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947).

Mike Daugherty: Well, they will just reject it flat out in that case.

Prof. Buzbee: But in this whole body of longstanding law, which is actually one of the areas of law that the most conservative wing has most ardently adhered to over the decades, the idea is that courts should not be second guessing agencies' choices on how to proceed.[374] I would guess that what you are suggesting is you think there should be more done by notice-and-comment rulemaking.

Mike Daugherty: Well, I think knowing the laws is a really nifty concept.

Prof. Buzbee: I think that you should know that there has been a longstanding notion that more should be done by notice-and-comment rulemaking.[375] That means that more knowable law is better than law that can be wielded and announced for the first time in adjudications.[376] I think, if that is what you are getting at, then—

Mike Daugherty: No, what I am getting at is that there is no accountability when we have an agency parachuting in saying, "This is what you have got to do for cybersecurity." And it has gotten worse for twenty years and there is no accountability.[377] They have completely screwed it up without saying what the law is and that is the fundamental thing.[378] They are not saying what you are supposed to do, which is what you earlier said your clients want to know.

Prof. Buzbee: Right. Again—

Mike Daugherty: How do you hold them accountable if you are for agencies being held accountable? There is mass destruction.

Prof. Buzbee: What is the name of the case?

Mike Daugherty: *LabMD*. It is *LabMD, Inc. v. FTC* in the Eleventh Circuit.[379]

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[374] *See id.* at 203, 207 (explaining that agencies must retain their power to deal with problems and that the Court will not second guess the wisdom of the principles adopted by those agencies).

[375] Tuck, *supra* note 336, at 1121.

[376] *Id.* at 1120–21.

[377] *Id.* at 1126.

[378] *Id.* at 1126–27.

[379] LabMD, Inc. v. FTC, 894 F.3d 1221 (11th Cir. 2018).

Prof. Buzbee: I look forward to reading it.

Hon. Sykes: Thank you, sir. Next?

Stephen Casey: Thank you so much. Stephen Casey from the Austin area. This question will be for Professor Eastman and Professor Buzbee. And this sort of steps forward from the point the previous person brought up. I have been in criminal defense before and also did some mortgage defense, so I have handled civil and criminal issues. The question pertains to laws that are out there. People can go into the books and look at them. But with respect to notice, I represented plenty of mortgage owners for houses being foreclosed upon who had no idea about the protections that were in Regulation Z.[380] There is no ability for them to know how they were protected. When someone buys a house, they have got to sign tons of disclosures.[381] You see them just flying through them. There is a huge body of regulations that they are not made aware of. On the flip side of that, on the criminal side, you want to be able to adjust your behavior so you do not run afoul of the laws.

Stephen Casey: On the criminal side, how does someone know how to protect themselves from not violating one of these massive ten thousand sets of regulations; and on the civil side, what substantive rights are created when it is just experts acting in a notice-and-comment period?

Hon. Sykes: I guess it is a question about the inscrutability of the modern regulatory state and what do consumers do about that?

Prof. Eastman: I think Senator Lee offered a very good answer to that in the opening remarks of this convention: over so many areas we have allowed so much accretion of power to the Federal Government that is not constitutionally enumerated that we have destroyed the subsidiarity principles allowing matters to be resolved in a much more local state level, where there is a greater capacity to keep track of what is going on.[382] It is a much bigger problem than just administrative agencies or deference.[383]

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[380] 12 C.F.R. §§ 226.31–.45 (2019).

[381] Elizabeth C. Yen, *Mortgage Loan Disclosures and Other Pre-closing Regulatory Requirements: Do They Fulfill Their Intended Consumer Protection Purposes?*, 124 BANKING L.J. 131, 132–33 (2007).

[382] Martin H. Redish, New York v. United States *and Constitutional Limitations on Federal Power to Require State Legislation*, 21 HASTINGS CONST. L.Q. 593, 595 (1994).

[383] *See id.* (explaining that the Supreme Court has also been taking away power from the states, which leads to a larger problem than just giving deference to agencies).

Prof. Buzbee: I guess what I would just say is that the complexity of the law is a problem.[384] It means we need lots of lawyers. That's not necessarily a bad thing. But I think the reality is that most people in businesses are more concerned with broad strokes law.[385] Whereas lawyers are really hoping there will be more specific instructions. The downside there is that it does begin to accrete and can be hard to sort out. I do think that finding ways to make sure people know about their key legal rights and their obligations is essential. And I think on that front that is an area where maybe the web will in time help us. But that is a critical need for law to work.

Hon. Sykes: All right. Last one. Go ahead, sir.

Jimmy Conde: I am Jimmy Conde. I am a lawyer here in D.C. And I think my question is really for Professor Eastman and Professor Mascott. My question is, is the Federal Reserve's Federal Open Market Committee constitutional?

Prof. Eastman: My intuition is to say, no, but I do not know enough about the intricacies of that particular authorizing statute to be able to answer definitively. Sorry to duck it. I am going to pass it to Professor Mascott.

Prof. Mascott: I will just say on a closing note, Professor Buzbee recommended this book by Jerry Mashaw which gives a lot of rich history of the first few years in administrative law.[386] And I would recommend that book as we head to winter break. I think pairing that book with Joe Postell's recent *Bureaucracy in America*, which goes over the same history but from a slightly different constitutional view, would be excellent reading for those of you who are interested enough in these issues to come to the panel.[387] And that is my last word.

Hon. Sykes: That is a great way to close, with a reading list. Thank you, distinguished panelists.

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[384] *See* Nees, *supra* note 331, at 488–89 (explaining how private adjudication and alternative dispute resolution in business cases have resulted in complex business laws that are inconsistent and unpredictable).

[385] *Id.* at 478, 488.

[386] MASHAW, *supra* note 195, at 16–17.

[387] JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT 6 (2017).

BETAMAX, THE IPHONE, AND BEYOND: PRIVACY, SECONDARY LIABILITY, AND THE REGULATION OF THE 3-D PRINTED GUN INDUSTRY

"I am looking into 3-D Plastic Guns being sold to the public. Already spoke to NRA, doesn't seem to make much sense!"[1]

INTRODUCTION

The concept of 3-D plastic guns, a relatively new and novel idea that has emerged in the past decade, is an issue that has bewildered a broad section of American lawmakers, policy gurus, academics, and many others.[2] Among many concerns, two of the American public's biggest fears with such weapons is that they would be both untraceable and undetectable.[3] These guns, which theoretically could be produced from home by anyone with a 3-D printer, could then be smuggled into a sporting event, concert, or airplane flight and would be virtually undetectable by current metal detector technology.[4] As a result, many possible solutions have been put forth by lawmakers and academics, who are attempting to curtail what seems to be an inevitable march toward undetectable and untraceable firearms.[5] These various approaches have addressed the issue

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[1] Donald J. Trump (@realDonaldTrump), TWITTER (July 31, 2018, 8:03 AM), https://twitter.com/realDonaldTrump?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor. Donald Trump's cryptic tweet to the nation on July 31, 2018, was in response to a recent lawsuit filed before a federal court in Washington, which was attempting to forestall the release of blueprints for 3-D plastic guns for public consumption on the Internet. Washington v. U.S. Dep't of State, 318 F. Supp. 3d 1247, 1251 (W.D. Wash. 2018).

[2] *See, e.g.*, Jessica Berkowitz, *Computer-Aided Destruction: Regulating 3D-Printed Firearms Without Infringing on Individual Liberties,* 33 BERKELEY TECH. L.J. 53, 53 (2018) (stating that 3-D printing presents novel legal challenges); Gracie E. Holden, *How Far Should the Rights to Post 3D-Printed Handguns Extend: Does the Government Infringe upon Constitutional Rights by Requiring the Removal of 3D-Printable Handgun Blueprints?* 18 FLA. COASTAL L. REV. 279, 279 (2017) (discussing whether the government violates the First, Fourth, and Fifth Amendments by regulating 3-D printed handgun blueprints); Rory K. Little, *Guns Don't Kill People, 3D Printing Does? Why the Technology Is a Distraction from Effective Gun Controls*, 65 HASTINGS L.J. 1505, 1505 (2014) (discussing how 3-D printed guns have policy makers "in a tizzy"); Caitlyn R. McCutcheon, Note, *Deeper than a Paper Cut: Is It Possible to Regulate Three-Dimensionally Printed Weapons or Will Federal Gun Laws Be Obsolete Before the Ink Has Dried?*, 2014 U. ILL. J.L. TECH. & POL'Y 219, 219–20 (explaining how 3-D printing technology has progressed exponentially in the past few years, resulting in widespread attention); John Bowden, *Trump 'Looking Into' 3-D Plastic Guns: 'Doesn't Seem to Make Much Sense'*, HILL (July 31, 2018), https://thehill.com/homenews/administration/399633-trump-public-access-to-3d-printed-guns-doesnt-seem-to-make-much-sense (discussing President Trump's confused reaction to 3-D printed guns).

[3] *Washington*, 318 F. Supp. 3d at 1262–63.

[4] *Id.* at 1261.

[5] *See* 22 U.S.C. § 2778(a)(1) (2012) (strengthening national security by giving the President the authority to control the importation and exportation of defense articles);

from multiple angles either by suggesting amendments to existing laws or by proposing new laws, such as laws to regulate the Internet market, the manufacture of ammunition, or the international export of 3-D printouts.[6] Despite this wide range of efforts and ideas, there is still no viable solution to the problem. Those approaches that attempt to stop the flow of online information will inevitably lose to the vast and expansive reaches of today's Internet.[7] Those approaches that try to expand existing tort principles to cover the realm of firearms and intellectual property ultimately distort law.[8] This Note joins the discussion by proposing an alternate solution: allow the 3-D printing industry to utilize the legal concepts of secondary liability and copyright infringement as a basic framework for regulation. This approach would be a realistic and viable solution—one that can readily be implemented and capable of providing immediate and tangible results, unlike many of the other approaches currently in place.

To best address the emerging threat of 3-D printed plastic guns, the legislature must regulate the method by which 3-D items are printed and used by the general public. Serious thought must be given to altering the design of 3-D printers so that they are only capable of reading encrypted, digitally-keyed files, which should only be sold by authorized resellers for one-time use by buyers. A single file would be loaded on a USB drive that would automatically erase the file after it was loaded into the printer and used to create a 3-D printout. Under such a system, authorized resellers would be able to identify buyers of firearm blueprints, and therefore, they could run standard background checks similar to authorized firearm dealers. The legal mechanism behind this system would be an application of the existing laws of secondary liability, thereby holding manufacturers of 3-D printers contributorily liable for unauthorized, infringing uses of their machines to make illegal 3-D plastic guns. This framework, implemented by analogizing the problem to copyright infringement, will

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Berkowitz *supra* note 2, at 53 (proposing a solution for regulating the ammunition needed for 3-D printed guns); Holden, *supra* note 2, at 279 (discussing that the State Department's existing requirement that guns be pre-approved is necessary to prevent circumvention of gun control laws).

[6] 22 U.S.C. § 2778(a)(1) (2012); Berkowitz, *supra* note 2, at 53; Holden, *supra* note 2, at 280.

[7] *See* Chuck Lindell, *Austin Man Says He's Selling 3D-Printer Gun Plans Despite Court Order,* STATESMAN, https://www.statesman.com/news/20180829/austin-man-says-hes-selling-3d-printer-gun-plans-despite-court-order (last updated Sept. 26, 2018) (discussing that even though instructions for 3-D printed guns were taken down from Defense Distributed's website, the plans continued to be circulated on other websites).

[8] *See* Letter from Andrew M. Cuomo, Governor, State of New York, to Defense Distributed (July 31, 2018) (on file with the State of New York Executive Chamber), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/GAMC_Cease_and_Desist.pdf (seemingly placing 3-D gun blueprints into the category of a public nuisance).

effectively create a safe harbor provision for compliant 3-D printing companies respectful of the hypothetical regulations. If a 3-D plastic gun is used on board an airplane or at a sporting event, and if it can be traced back to a regulated machine, which must only have created the 3-D plastic gun using an authorized USB card, then the machine manufacturer will not be held secondarily liable for the illegal use of the 3-D gun. On the other hand, if the 3-D plastic gun was made with illegal files or with the use of an illicit machine not fitted with the proper encryption software, then the company that manufactured that machine will be found secondarily liable for the illegal use of the gun.

Part I of this Note therefore provides a brief background of the 3-D printing industry, the current legal controversy before the United States District Courts in Washington State, and existing laws and approaches covering 3-D printing. Part II develops the framework for this Note's main assertion by discussing the challenges of balancing personal privacy with governmental regulation, and then introduces the current legal theory of secondary liability based on copyright infringement. Part III applies the concept of secondary liability to the 3-D printing industry, addresses a few of the criticisms and concerns of the proposal, and wraps up with a plan for the road ahead.

I. BACKGROUND AND HISTORY

A. An Overview of 3-D Printers

3-D printing is an emerging technology that has application in a wide spectrum of areas, such as science, technology, medicine, firearms, and countless others.[9] The process involves loading a printer with an additive filament, usually plastic, and the printer then builds the item design from the ground up using the filament.[10] Critical to the production of the item is the computer aided design file ("CAD"), which serves as the digital blueprint for the design.[11]

Recently, the United District Court for the Western District of Washington heard the controversy over 3-D firearm blueprints that were created by Defense Distributed, a Texas-based company founded by Cody Wilson.[12] Prior to the district court's issuance of a preliminary injunction, an individual could visit Defense Distributed's website and download 3-D

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[9] Berkowitz, *supra* note 2, at 55 (describing various 3-D printed items including parts for NASA spacecrafts, dental fillings, orthopedic implants, hearing aids, and prosthetics).

[10] *Id.* at 56; Lisa Harouni, *A Primer on 3D Printing,* TED (Nov. 2011), https://www.ted.com/talks/lisa_harouni_a_primer_on_3d_printing?language=en.

[11] Berkowitz, *supra* note 2, at 57.

[12] Abigail Brooks, *Who Is Cody Wilson, the Man Behind the 3-D Printed Gun?*, CNN BUS. (Aug. 1, 2018, 1:01 PM), https://money.cnn.com/2018/08/01/technology/3d-printed-gun-cody-wilson-defense-distributed/index.html.

firearm blueprints within seconds, without even paying a single dollar for the blueprints.[13] Thus, considering how practically anybody can purchase a 3-D printer, which is available from merchants like Amazon;[14] purchase a 3-D plastic printer filament, which is also available on Amazon;[15] and download the 3-D firearm blueprints, which may be unavailable from Defense Distributed post-preliminary-injunction but are likely still accessible through alternative Internet portals,[16] then it would be very easy to have all the ingredients necessary to produce a custom-made, undetectable, plastic firearm, requiring only a small metal firing pin to become completely operational.[17]

This seemingly only-academic theory quickly became a reality in 2013 with the advent of Wilson's "Liberator", a fully functioning plastic firearm that was was made entirely of 3-D printed parts, except for a small metal firing pin, and a small block of steel that was included in order to comply with the Undetectable Firearms Act of 1988, and which was capable of firing a .380 automatic colt pistol ("ACP") round.[18] It has been reported that the gun does not need the metal block to function.[19] To aggravate the scenario, recently a Pennsylvania man claimed that he was capable of 3-D printing bullets.[20] If innovation progresses toward the printing of bullets made completely from plastic, then the entire weapon and bullet—excluding the gunpowder and the firing pin—could be made from a plastic 3-D printer.[21] While the functionality and durability of 3-D

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[13] Washington v. U.S. Dep't of State, 318 F. Supp. 3d 1247, 1254, 1264 (W.D. Wash. 2018). *But see Membership*, DD LEGIO, https://ddlegio.com/join/ (last visited Nov. 14, 2019). (showing that although blueprints may be downloaded for zero cost, access to Defense Distributed's full website and their blueprints is restricted to site visitors who pay a membership fee).

[14] *FlashForge Finder 3D Printers with Cloud, Wi-Fi, USB Cable and Flash Drive Connectivity,* AMAZON, https://www.amazon.com/FlashForge-Finder-Printers-Cloud-connectivity/dp/B016R9E7J2/ref=sr_1_3?ie=UTF8&qid=1546098958&sr=8-3&keywords=3-d+printers (last visited Dec. 29, 2018).

[15] *3D Pen Filament Refills*, AMAZON, https://www.amazon.com/3D-Pen-Filament-Refills-BOOK/dp/B00S4H3I4Q/ref=sr_1_1_sspa?s=industrial&ie=UTF8&qid=1546099936&sr=1-1-spons&keywords=3d+printer+filament&psc=1 (last visited Dec. 29, 2018).

[16] *See* Def. Distributed v. U.S. Dep't of State, 838 F.3d 451, 456 (5th Cir. 2016) (noting that even though Defense Distributed removed certain firearm files from its website, the plans continue to be shared online by third party sites such as The Pirate Bay).

[17] *Id.* at 475 n.16; *Washington*, 318 F. Supp. 3d at 1261.

[18] *Def. Distributed*, 838 F.3d at 455, 475 n.16; Aaron Steckelberg, *The Challenges of Regulating 3-D-Printed Guns*, WASH. POST (Aug. 20, 2018), https://www.washingtonpost.com/graphics/2018/national/3-d-printed-guns/?noredirect=on&utm_term=.5eddae6422bd.

[19] Steckelberg, *supra* note 18; Marrian Zhou, *3D-Printed Gun Controversy: Everything You Need to Know*, CNET (Sept. 25, 2018, 9:15 AM), https://www.cnet.com/news/the-3d-printed-gun-controversy-everything-you-need-to-know/.

[20] Lance Ulanoff, *Now There Are Bullets That Won't Break Your 3D-Printed Gun*, MASHABLE (Nov. 6, 2014), https://mashable.com/2014/11/06/bullets-3d-printed-gun/.

[21] Ian Urbina, *Inside the World of D.I.Y. Ammunition*, N.Y. TIMES (Oct. 5, 2018), https://www.nytimes.com/2018/10/05/us/3d-printed-guns-homemade-ammunition.html.

guns are admittedly limited at this point,[22] the rate of current technological advances means that it is only a matter of time before guns like the Liberator become more functional but requiring little to no non-plastic parts.

In addition to their other contributions, Wilson and his company have also demonstrated their ability to print a lower receiver with no serial number that can be used for an AR-15-style semi-automatic rifle.[23] The company also released the "Ghost Gunner," a variation of the 3-D printer that goes beyond plastic printing because it is a computer-numerically-controlled (CNC) mill capable of carving out digitally modeled shapes into polymer, wood, or aluminum.[24] Wilson's advances in the field stirred lawmakers and politicians to begin taking action.[25]

B. Current Controversy

The largest legal controversy behind the 3-D printed plastic guns involves the cases between Defense Distributed and the United States Government.[26] To best understand the legal controversy, it is important to identify and examine the precise legal grounds facing Defense Distributed and to understand the larger issue of online 3-D gun blueprints as it is currently being challenged in federal district court. The controversy began in 2013 when the State Department sent Defense Distributed a letter requesting that it stop posting free downloadable files containing blueprints for 3-D printed guns and gun parts.[27] The State Department invoked the language of the Arms Export Control Act ("AECA"), which provides that "the President is authorized to control the import and the export of defense articles and defense services" and also to "promulgate regulations for the import and export of such articles and services."[28] As summarized by the district court, in order for the President to accomplish this task, he delegated his authority to the Secretary of

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[22] *See* ATFHQ, *ATF Test of 3-D Printed Firearm Using VisiJet Material*, YOUTUBE (Nov. 13, 2013), https://www.youtube.com/watch?v=ZL7y3YNUbiY&feature=youtu.be (showing an ATF slow motion video depicting a 3-D printed firearm exploding after firing a round).

[23] Steckelberg, *supra* note 18.

[24] Andy Greenberg, *The $1,200 Machine That Lets Anyone Make a Metal Gun at Home*, WIRED (Oct. 1, 2014, 6:30 AM), https://www.wired.com/2014/10/cody-wilson-ghost-gunner/. The advent of computer-numerically-controlled (CNC) milled parts for the AR-15 is an additional serious and emergent issue that merits further discussion, but it is outside the scope of this Note.

[25] Berkowitz, *supra* note 2, at 61–62.

[26] Def. Distributed v. U.S. Dep't of State, 838 F.3d 451, 458 (5th Cir. 2016); Washington v. U.S. Dep't of State, 318 F. Supp. 3d 1247, 1251 (W.D. Wash. 2018).

[27] *Def. Distributed*, 838 F.3d at 455.

[28] *Id.*

State, who in turn would accomplish the regulation via the International Traffic in Arms Regulation ("ITAR").[29] The regulations from ITAR are then administered under the Directorate of Defense Trade Controls ("DDTC").[30]

To facilitate the regulations in the ITAR, the AECA prescribes the process by which the "President is authorized to control the import and the export of defense articles" by archiving such items on the United States Munitions List ("USML").[31] The term "defense articles" is intentionally vague, as it allows the USML to refer to "categories describing the kinds of items" rather than specifically controlled items.[32] "Defense articles" is kept vague because of the futility of enumerating the exact make and model of every possible item, as such items are continuously changed, modified, and upgraded by new makes and model numbers.[33] Furthermore, and critical to the current controversy, a "defense article" also includes "technical data recorded or stored in any physical form, models, mockups or other items that reveal technical data directly relating to items designated [in the USML]."[34]

The State Department based its action on a definition of the online 3-D blueprints as "technical data" covered by "defense articles," and the State Department alleged that posting such "technical data" on the Internet, on which foreigners can access the information, constituted "export."[35] Defense Distributed initially acceded to the State Department's challenges by taking down the files, and thereafter seeking "commodity jurisdiction," a process by which a party can request that the DDTC make a determination on the status of a particular item as it relates to a "defense article."[36] The company eventually received approval to post some of the non-regulated files, but it did not receive approval for other critical files relating to 3-D printed weapons and parts.[37] As a result, Defense Distributed, along with the Second Amendment Foundation, Inc., brought suit against the State Department and sought to enjoin the State Department's enforcement of the regulations by claiming violation of the company's First, Second, and Fifth Amendment rights.[38] The district court ruled against Defense Distributed and denied the preliminary injunction because the company failed to satisfy the balance of harm and public

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[29] *Id.*

[30] *Id.* (citing 22 C.F.R. § 120.1(b) (2018)).

[31] *Def. Distributed*, 838 F.3d at 455; 22 C.F.R. § 2778(a)(1) (2018).

[32] United States v. Zhen Zhou Wu, 711 F.3d 1, 11–12 (1st Cir. 2013).

[33] United States v. Pulungan, 569 F.3d 326, 328 (7th Cir. 2009).

[34] *Def. Distributed*, 838 F.3d at 455; United States Munitions List, 22 C.F.R. § 120.6 (2018).

[35] *Def. Distributed*, 838 F.3d at 456.

[36] *Id.*; 22 C.F.R. § 120.4 (2018).

[37] *Def. Distributed*, 838 F.3d at 456.

[38] Def. Distributed v. U.S. Dep't of State, 121 F. Supp. 3d 680, 688 (W.D. Tex. 2015).

interest requirements.[39] In so ruling, the court noted that more harm would be done to the nation and national security than would be done to individual constitutional rights if a contrary ruling was issued.[40] The court further noted that the public had a keen interest in restricting the export of "defense articles."[41]

In 2016, Defense Distributed unsuccessfully appealed the verdict to the United States Court of Appeals for the Fifth Circuit, and in 2018, it was denied certiorari by the Supreme Court of the United States.[42] The Fifth Circuit was also extremely concerned with the ability of foreign nationals to obtain technical information on how to produce weapons and thus placed great weight on public interest in its analysis.[43] As a result, Wilson and his company were forced to indefinitely place their operations on hold.

In the spring of 2018, surprising events unfolded for Defense Distributed and Wilson when the Federal Government changed its opinion and agreed to work with Defense Distributed to facilitate the release of the 3-D gun blueprints.[44] Shortly after this information came to light, a second lawsuit was filed in the United States District Court for the Western District of Washington.[45] As part of his opinion in that case, Judge Robert Lasnik commented on this curious turnaround, noting that there were neither findings of fact nor other statements that could explain "the federal government's dramatic change of position" from its previous stance in the 2015 lawsuit.[46] Apparently, based on whatever settlement agreement the two parties reached, the federal government agreed to publish a proposed rulemaking notice to revise the USML, thereby allowing online publication of Defense Distributed's 3-D blueprint CAD files.[47] As a result, on July 27, 2018, the temporary modifications to the USML were published, and Defense Distributed was notified that the restrictions had been lifted.[48]

Three days after the ban was lifted, eight states and the District of Columbia—this eventually increased to nineteen states as shown in an

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[39] *Id.* at 689, 701.

[40] *Id.*

[41] *Id.*

[42] Def. Distributed v. U.S. Dep't of State, 838 F.3d 451, 476 (5th Cir. 2016), *cert. denied*, 138 S. Ct. 638 (2018).

[43] *See id.* at 458. ("Indeed, the State Department's stated interest in preventing foreign nationals—including all manner of enemies of this country—from obtaining technical data on how to produce weapons and weapon parts is not merely tangentially related to national defense and national security; it lies squarely within that interest.").

[44] Washington v. U.S. Dep't of State, 318 F. Supp. 3d 1247, 1253 (W.D. Wash. 2018).

[45] *Id.*

[46] *Id.*

[47] International Traffic in Arms Regulations, 83 Fed. Reg. 24198 (proposed May 24, 2018); *Washington*, 318 F. Supp. 3d at 1253–54.

[48] *Washington*, 318 F. Supp. 3d at 1254.

amended complaint filed on August 2, 2018—sought an immediate temporary restraining order on the publication of the blueprints, which was to be followed by a preliminary injunction.[49] The states' main argument focused on the violations of the Administrative Procedure Act ("APA"), specifically that the State Department did not give the congressional foreign relations committee the proper thirty days' notice of its intent to temporarily modify the USML to accommodate 3-D CAD blueprints.[50] On August 27, 2018, the court granted the preliminary injunction with a heavy focus on the irreparable harm that states would suffer from the release of the blueprints as well as the strong public interest against the blueprints' release.[51] The court voiced its biggest concern: the issue of virtually undetectable plastic firearms in various public forums such as "airports, sporting events, courthouses, music venues, and government buildings."[52]

Judge Lasnik qualified, however, that "[r]egulation under the AECA means that the files cannot be uploaded to the Internet, but they can be emailed, mailed, securely transmitted, or otherwise published within the United States."[53] As a result, the very next day, Wilson announced his intention to offer his company's 3-D blueprints for sale in a manner that complied with the court order, and he claimed that immediately after his announcement he received 392 orders for different plans with offers ranging from $1.00 all the way up to $10.00–$15.00 per blueprint.[54] Since the time that Wilson made his statements, no actions have been taken to expand Judge Lasnik's court order.[55]

On September 21, 2018, however, Defense Distributed suffered a major setback when Wilson resigned from the company.[56] The company continued with Paloma Heindorff, previously the company's director of development and vice president of operations, stepping up as chief executive.[57] It is unclear what specific impact this will have on the future of the company and the furtherance of the online 3-D gun blueprint movement in general, but Wilson's absence will certainly be felt.

It appears that the foremost approach to combat the advancement of 3-D printed guns is the prevention of CAD blueprint publication on the

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[49] *Id.*

[50] *Id.* See 22 C.F.R. § 2778(f)(1) (2018), for the full text of the USML.

[51] *Washington*, 318 F. Supp. 3d at 1264.

[52] *Id.* at 1261.

[53] *Id.* at 1264.

[54] Lindell, *supra* note 7.

[55] Vanessa Romo, *3D Gun Pioneer Cody Wilson Resigned as Head of Defense Distributed*, NPR (Sept. 25, 2018, 4:10 PM), https://www.npr.org/2018/09/25/651529059/3d-gun-pioneer-cody-wilson-resigned-as-head-of-defense-distributed.

[56] *Id.* (discussing Cody Wilson's resignation as a result of charges filed against him alleging that he had sexually assaulted a minor in Austin, Texas).

[57] *Id.*

open source Internet. Yet it is naïve to assume that a federal court's order to stop the publication of 3-D printed blueprints will fix the problem that easily. Both the court and Defense Distributed's lead counsel noted that the files are currently available via other sources on the Internet, regardless of Defense Distributed's fate and the preliminary injunction's issuance.[58] What then is the point of the federal injunction? Does it stop the spread of blueprints at all, and will it lead to an overall effective solution to the plastic 3-D printed gun problem? It appears that the injunction is ineffective and does very little to curb or rectify the problem because gun blueprints are still readily accessible and downloadable.[59]

C. Other Laws and Approaches

Other states and organizations have taken notice of the controversy surrounding Defense Distributed and have sought to thwart the advent of plastic 3-D guns by other methods. Although nineteen states and various interest organizations participated in the lawsuit in Washington State in the hope of resolving this issue,[60] other states and interested parties are trying other approaches. On one side of the argument stands Defense Distributed and the National Rifle Association ("NRA") asserting that the Undetectable Firearms Act of 1988[61] already addresses the issue of 3-D plastic guns, thus no further action is required.[62] More specifically, the NRA's executive director for Legislative Action, Chris Cox, says that there is nothing to worry about regarding 3-D printing plastic guns: "Regardless of what a person may be able to publish on the Internet, undetectable plastic guns have been illegal for 30 years. Federal law passed in 1988, crafted with the NRA's support, makes it unlawful to manufacture, import, sell, ship, deliver, possess, transfer, or receive an undetectable firearm."[63]

In brief, the Undetectable Firearms Act's prohibitions in sections 2(a)(1)(A) and 2(a)(1)(B) ensure that all firearms in the United States can

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[58] *See* Def. Distributed v. U.S. Dep't of State, 838 F.3d 451, 456 (5th Cir. 2016) (noting that despite Defense Distributed's compliance with the State Department's 2013 order to remove its plans from its website, many "[p]ublished files continue to be shared online on third party sites like The Pirate Bay"); Lindell, *supra* note 7 (discussing how company lawyer Josh Blackman advocated that there is no irreparable harm element because "you can't put the genie back in the bottle" and the plans are already out there).

[59] *Def. Distributed*, 838 F.3d at 456.

[60] Washington v. U.S. Dep't of State, 318 F. Supp. 3d 1247, 1251, 1254 (W.D. Wash. 2018).

[61] Undetectable Firearms Act of 1988, Pub. L. No. 100-649, 102 Stat. 3816 (1988).

[62] *Washington*, 318 F. Supp. 3d at 1263; Nick Wing, *The NRA's Convenient Hypocrisy on 3D-Printed Plastic Guns*, HUFFINGTON POST (last updated Aug. 1, 2018, 1:54 PM), https://www.huffingtonpost.com/entry/nra-3d-printed-plastic-guns_us_5b61ce09e4b0b15aba9eeb48.

[63] Wing, *supra* note 62.

be detected by walk-through metal detectors, and that firearms and firearm parts generate an image that accurately depicts their component parts when subjected to inspection by x-ray machines.[64] It is thus a federal crime to "manufacture, import, sell, ship, deliver, possess, transfer, or receive" any firearm that violates those two provisions.[65] In 2013, Representative Steve Israel, a Democrat from New York, introduced a bill in the House of Representatives that attempted to update the Undetectable Firearms Act.[66] The proposed modernized act's main goal was to delay the original Act's repeal date by ten years as well as to provide a minimum level of stainless steel that must be incorporated in the manufacture of guns' lower receivers and ammunition magazines.[67] Concurrently, Senator Bill Nelson, a Democrat from Florida, introduced virtually the same bill in the Senate.[68] Neither bill made it past the respective committees,[69] but industry members saw the provisions of the bills as a direct attack on 3-D printed guns.[70]

In *Washington v. U.S. Department of State*, Judge Lasnik disagreed with Defense Distributed's position that the Undetectable Firearms Act sufficiently addressed the problem.[71] Judge Lasnik recognized that the Act would help prosecute persons guilty of committing a crime accomplished with the use of an undetectable firearm, but he emphasized that the Act does not speak to the larger issue, the "untraceable and undetectable nature of these small firearms" and the unique danger they pose.[72] Even though prevention appears to be a judicial priority, the injunction process appears insufficient to achieve the desired result.

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[64] Undetectable Firearms Act § 2.

[65] *Id.*

[66] Undetectable Firearms Modernization Act, H.R. 1474, 113th Cong. (referred to H. R. Comm. on the Judiciary, Apr. 10, 2013).

[67] *Id.* at §§ 3–5.

[68] Undetectable Firearms Modernization Act, S. 1149, 113th Cong. (2013) (referred to S. Comm. on Judiciary Jun. 12, 2013); *S.1149 – Undetectable Firearms Modernization Act*, CONGRESS.GOV, https://www.congress.gov/bill/113th-congress/senate-bill/1149?s=1&r=85 (last visited Nov. 9, 2019).

[69] *H.R. 1474 – Undetectable Firearms Modernization Act*, CONGRESS.GOV, https://www.congress.gov/bill/113th-congress/house-bill/1474/all-actions (last visited Oct. 2, 2019); *S.1149 – Undetectable Firearms Modernization Act*, CONGRESS.GOV, https://www.congress.gov/bill/113th-congress/senate-bill/1149/actions (last visited Oct. 2, 2019).

[70] *See* DefDist, *On Undetectable Firearms Act Renewal,* TUMBLR http://defdist.tumblr.com/post/67342994298/on-undetectable-firearms-act-renewal (last visited Dec. 29, 2018) (stating that by directly criminalizing 3D printed receivers and magazines, the proposed House bill raises the entry barrier to "do it yourself" gunsmithing).

[71] *See* Washington v. U.S. Dep't of State, 318 F. Supp. 3d 1247, 1251, 1263 (W.D. Wash. 2018) (explaining that "it is of small comfort to know that, once an undetectable firearm has been used to kill a citizen," the Federal Government can prosecute for a weapons charge).

[72] *Id.*

Other governmental regulatory measures that have been implemented as possible solutions to this problem can be seen in the approaches taken by Governor Andrew Cuomo of New York, and by the city of Philadelphia, Pennsylvania. In Philadelphia, city officials passed a law that directly speaks to the manufacturing and creation of 3-D printed guns and components.[73] The city statute attempts to regulate the use of 3-D printers, requiring a federal manufacturing license to produce 3-D printed guns or components.[74] The approach in Philadelphia is comparable to the one suggested in this Note in that it targets the manufacture and production of 3-D guns—not the blueprints themselves. The specifics of this law still have to be worked out as it is unclear how the city will create federal licenses or what the enforcement mechanism will look like. The new ordinance does serve a larger useful purpose, however, in that it is a direct example of city officials and government regulators attempting to find a new approach to a problem that cannot be fixed with traditional gun control laws.

Similarly, Governor Cuomo took a novel approach to the situation by sending a cease and desist letter to Defense Distributed on July 31, 2018, claiming therein that New York has "the strongest gun control laws in the nation" and attempting to apply a public nuisance framework to 3-D printable guns.[75] Citing *Copart Industrial Inc. v. Consolidated Edison Co.*, a 1977 New York Court of Appeals case, the Governor defined public nuisance as:

> [C]onduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all, in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons.[76]

As such, Governor Cuomo equated the gun blueprints to a public nuisance that would put the public's health, safety, and property in jeopardy.[77] New York's approach is interesting in that it attempts to stretch existing laws from a different field of law to cover this new emergent legal issue. Rather than applying existing gun control laws, the New York government is

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[73] PHILA., PA., CODE § 10-2002 (2016).

[74] *Id.*

[75] Letter from Andrew M. Cuomo, Governor, State of New York, to Defense Distributed, *supra* note 8.

[76] Copart Indus., Inc. v. Consol. Edison Co., 362 N.E.2d 968, 971 (N.Y. 1977) (citations omitted).

[77] Letter from Andrew M. Cuomo, Governor, State of New York, to Defense Distributed, *supra* note 8.

attempting to apply principles of tort law to the realm of intellectual property and firearms.

This is noteworthy because the approach is analogous to this Note's methodology in that existing laws from other disciplines can be modified and tailored to fit this newly emergent problem. Such an idea reinforces the concept that sometimes the best approach to complex issues is to identify current and established areas of existing law, and then apply that law in creative ways to find a solution. It is difficult to say whether the Philadelphia's and New York's approaches will be successful, but both are relevant to this discussion because they provide direct examples of cross-applying old laws to new problems. Furthermore, the State of New York and Governor Cuomo's idea shows that government officials and regulators are already attempting to "think outside the box" to find a solution to this novel and complex issue. This Note continues down that vein of innovation by making a proposal that is outside the mainstream approach of traditional gun control laws. If society truly desires to fix this vexing problem, non-traditional ideas may be the best chance for success.

II. THE FRAMEWORK

A. Regulation and Privacy: Striking an Appropriate Balance in Alternative Approaches to Regulation

Before beginning a discussion of the proposed solution, it is important to briefly touch on the privacy concerns that underlie the regulation of Internet content. By leading with this discussion, it will become more apparent why the best solution lies with the machines that manufacture 3-D items and not with the source of technical information available online. Thus, we begin with the hypothetical possibility of a massive crackdown on the Internet and an attempt to police the content that people consume on their phones and computers. This approach proves to be cumbersome for two reasons. First, the sheer computing and personnel power required to maintain effective oversight is a daunting obstacle for a United States Government that is already stretched extremely thin. Second, and nearer and dearer to most Americans' hearts, is the massive intrusion into personal privacy this would create. It is not difficult to find many examples in the past few years of data breaches and privacy intrusions that have sparked intense public debate and have demonstrated how much America values digital privacy. For example, Yahoo, Facebook, and Equifax, just to name a few, have all experienced serious data breaches in the past few years.[78] An incident that is most

[78] U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-559, DATA PROTECTION: ACTIONS TAKEN BY EQUIFAX AND FEDERAL AGENCIES IN RESPONSE TO THE 2017 BREACH 1 (2018); Mike

relevant to the discussion in this Note involves the 2015 shootings in San Bernardino, California, in which an individual's locked Apple iPhone stood at the center of the controversy.[79]

The San Bernardino case is important for this Note to expand on because it provides a salient illustration of the levels American society is willing to reach in order to safeguard privacy above all else. In 2015, after Syed Rizwan Farook's mass shooting rampage at a social services center in San Bernardino, a legal controversy emerged around his Apple iPhone because of the potential probative value of the phone's contents.[80] At the Federal Bureau of Investigation's ("FBI") request,[81] a magistrate judge for the United States District Court for the Central District of California ordered Apple to assist the FBI in creating backdoor access to the sensitive information on Farook's phone.[82] Despite Apple's attempt to fight the order, the incident did not ultimately lead to a court challenge because the FBI was assisted by an unnamed third party to unlock the shooter's phone.[83] Looking to United States Supreme Court precedent on the subject to determine if a court could have compelled a public company to give the government access to an individual's personal phone, *United States v. Jones*[84] and *Riley v. California*[85] both provide some insight into the boundaries of privacy and the ability to use electronic information

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Issac & Sheera Frenkel, *Facebook Security Breach Exposes Accounts of 50 Million Users*, N.Y. TIMES (Sept. 28, 2018), https://www.nytimes.com/2018/09/28/technology/facebook-hack-data-breach.html; Nicole Perlroth, *All 3 Billion Yahoo Accounts Were Affected by 2013 Attack*, N.Y. TIMES (Oct. 3, 2017), https://www.nytimes.com/2017/10/03/technology/yahoo-hack-3-billion-users.html.

[79] *See* Elizabeth Weise, *Apple v. FBI Timeline: 43 Days That Rocked Tech,* USA TODAY (Mar. 15, 2016, 6:26 PM), https://www.usatoday.com/story/tech/news/2016/03/15/apple-v-fbi-timeline/81827400/ (discussing the timeline of the legal controversy surrounding the gunman's iPhone); Krishnadev Calamur, Marina Koren & Matt Ford, *What Happened in the San Bernardino Shooting*, ATLANTIC (Dec. 3, 2015, 3:08 PM), https://www.theatlantic.com/national/archive/2015/12/a-shooter-in-san-bernardino/418497/ (discussing the geographical location and specific place of the San Bernardino attack).

[80] Calamur, Koren & Ford, *supra* note 79.

[81] Govt.'s *Ex Parte* Appl. for Order Compelling Apple Inc. to Assist Agents in Search at 3, *In re* the Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35KGD203, No. 15-0451M, 2016 WL 680288 (C.D. Cal. Feb. 16, 2016).

[82] Order Compelling Apple, Inc. to Assist Agents in Search at *1, *In re* the Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35KGD203, No. 15-0451M, 2016 WL 680288 (C.D. Cal. Feb. 16, 2016).

[83] Julia Edwards, *FBI Paid More than $1.3 Million to Break into San Bernardino iPhone*, REUTERS (Apr. 21, 2016, 2:25 PM), https://www.reuters.com/article/us-apple-encryption-fbi/fbi-paid-more-than-1-3-million-to-break-into-san-bernardino-iphone-idUSKCN0XI2IB.

[84] 565 U.S. 400 (2012).

[85] 573 U.S. 373 (2014).

garnered from global position system tracking and cell phone data.[86] *Riley* is the most helpful when analyzing the San Bernardino case, because there, the Court held that a warrant was required if law enforcement officials desired to search data stored on an individual's cellular phone.[87] Thus, access to an individual's electronic data would be legal if a warrant is first secured, but the Court left unresolved the question whether the government could compel a third party company to provide the electronic key necessary to enter a secure electronic space.

The San Bernardino case illustrates that, in this digital age, the American public displays intense displeasure with intrusions into privacy, no matter what the motive behind the intrusion. Despite the highly probative information stored on Farook's phone, which might even have given the FBI data needed to solve the crime, many companies and individual citizens expressed their desire to safeguard information above all else.[88]

It becomes readily apparent that any approach that attempts to heavily regulate or monitor the Internet activity or personal information of individuals would be (1) difficult if not impossible from a costs and capabilities perspective; and (2) highly opposed and resisted by the majority of the American public. As such, the optimal solution to 3-D plastic guns can neither be the prohibition against 3-D blueprint downloading nor the attempt to curtail the flow of information electronically. Such a plan would be ineffective due to the difficulty and costs of proper oversight, not to mention the massive pushback from the general public given the implicated privacy concerns. Therefore, the next logical step in the production chain is to examine how 3-D printing machines apply the blueprints in order to create the end-product.

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[86] *See* 573 U.S. at 386 (discussing the permissible scope of searches of data on cell phones without a warrant); 565 U.S. at 404–05 (discussing the permissible scope of searches concerning government installation and monitoring of GPS devices on vehicles).

[87] *Riley*, 573 U.S. at 386.

[88] *See* Shannon Lear, Note, *The Fight Over Encryption: Reasons Why Congress Must Block the Government from Compelling Technology Companies to Create Backdoors into Their Devices*, 66 CLEV. ST. L. REV. 443, 446–48 (2018) (advocating that compelling the creation of backdoors would make the government too powerful and would violate constitutional rights even if the information to be obtained via the backdoors is probative to an investigation, and explaining that Apple desired to safeguard the privacy of information on locked iPhones); Arik Hesseldahl, *Snowden Leaks Have Changed How Americans See Their Privacy*, VOX (Mar. 16, 2015, 8:00 AM), https://www.recode.net/2015/3/16/11560290/snowden-leaks-have-changed-how-americans-see-their-privacy (noting a recent Pew Center research poll indicating one-third of Americans have taken digital protective measures against government surveillance); Elizabeth Weise, *Privacy Supporters Rally at Apple Store Over iPhone Order,* USA TODAY (Feb. 18, 2016, 9:23 PM), https://www.usatoday.com/story/tech/2016/02/17/privacy-supporters-rally-san-francisco-support-apple/80527424/ (describing public rallies protesting government-mandated backdoors).

B. Secondary Liability for Primary Offenses

> *"[V]icarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another."*[89]

The modern concept of secondary liability was recognized by the Supreme Court of the United States in the landmark copyright case, *Sony Corp. of America v. Universal City Studios, Inc.*,[90] and then further amplified years later in another copyright case, *MGM Studios, Inc. v. Grokster, Ltd.*[91] In *Sony Corp. of America*, Universal City Studios and Walt Disney Productions sued Sony Corporation ("Sony") for contributory copyright infringement due to the new machine invented by Sony, known at the time as a Betamax video tape recorder ("VTR"), that could record television shows onto videotapes, thereby ushering in the birth of the modern day videocassette recorder ("VCR").[92] Universal City Studios was concerned that its programming was going to be subject to a host of unauthorized recordings due to the creation of the new technology.[93] Sony responded by offering evidence that the primary use of the recorders was "time-shifting," whereby viewers could record programs they would miss real-time so they could watch them on videotape at a later available opportunity.[94] The Court agreed with this theory and went on to evaluate whether Sony could be held contributorily liable for possible unauthorized use by Betamax VTR owners under the staple article of commerce doctrine in patent law.[95] Briefly speaking, the staple article of commerce doctrine examines the item or component in question and asks if that particular item or component is suitable for a substantial noninfringing use.[96] The Court interpreted the doctrine even more broadly, stating that "[the device or item] need merely be *capable* of substantial noninfringing uses."[97]

Applying this broad interpretation of the staple article of commerce doctrine, the Court found that the time-shifting use of the VTR players was a legitimate substantial noninfringing use, and thus Sony was not held contributorily liable.[98] From *Sony Corp. of America*, two categories of secondary liability for copyright infringement emerged: vicarious liability

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89 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 435 (1984).
90 *Id.*
91 545 U.S. 913, 919 (2005).
92 *Sony Corp. of Am.*, 464 U.S. at 419–20.
93 *Id.* at 420.
94 *Id.* at 423.
95 *Id.* at 442.
96 35 U.S.C. § 271(c) (2012).
97 *Sony Corp. of Am.*, 464 U.S. at 442 (emphasis added).
98 *Id.* at 442, 456.

and contributory liability.[99] Vicarious liability for copyright infringement consists of three elements, specifically "(1) direct infringement by a primary party; (2) a direct financial benefit to the defendant; and (3) the right and ability to supervise the infringers."[100] Contributory liability, on the other hand, is also defined by a three element test, involving (1) direct infringement by a primary infringer; (2) knowledge of the infringement; and (3) material contribution to the infringement.[101]

In *MGM Studios, Inc. v. Grokster Ltd.*, the Court was once again faced with the possible application of secondary liability that it faced in *Sony Corp. of America*, albeit this time in the 21st century context of peer-to-peer file-sharing software.[102] In this case, MGM Studios sought to hold Grokster, a software distributor, contributorily and vicariously liable for its users' unauthorized exchanging of music files protected by MGM Studios' copyrights.[103] The Court did not ultimately base its ruling on either theory of liability; rather, it introduced a third distinct concept called inducement theory.[104] Under inducement theory, "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."[105] Thus, in *Grokster*, the Court was able to avoid many of the holdover issues from *Sony Corp. of America* by creating the idea of inducement theory liability, without having to further define "substantial noninfringing uses."[106]

In the aftermath of the *Grokster* decision, other theories and ideas of secondary liability have emerged.[107] In addition to the three types of liabilities discussed, other types such as "consent-style," "policy-style," and "hostage-style" have also emerged.[108] Consent-style secondary liability is a novel approach that bases liability on the fact that a party voluntarily chooses to accept liability by acting in a role similar to that of

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[99] *See* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHTS § 12.04[A] (Matthew Bender, rev. ed. 2019) (describing the legislative history and case law concerning the 1909 Copyright Act and the Act's application of with respect to contributory infringement).

[100] MGM Studios, Inc. v. Grokster Ltd., 380 F.3d 1154, 1164 (9th Cir. 2004), *rev'd*, 545 U.S. 913 (2005).

[101] *Id.* at 1160.

[102] *Grokster*, 545 U.S. 913, 919–20 (2005).

[103] *Id.* at 927–28.

[104] *Id.* at 940.

[105] *Id.* at 919.

[106] Tiffany A. Parcher, Comment, *The Fact and Fiction of* Grokster *and* Sony*: Using Factual Comparisons to Uncover the Legal Rule*, 54 UCLA L. REV. 509, 516–17 (2006).

[107] Thomas C. Folsom, *Toward Non-Neutral First Principles of Private Law: Designing Secondary Liability Rules for New Technological Uses*, 3 AKRON INTELL. PROP. J. 43, 55–56 (2009).

[108] *Id.* at 56.

a surety relationship.[109] In its most basic form, a surety or guarantor is a party who, after a request by a second party, forms a contractual relationship whereby the surety steps in and becomes responsible for that second party's performance, which is then due to a third party.[110] The surety also gains various legal protections by virtue of his status as surety, including, but not limited to, the right of "exoneration, reimbursement, restitution, recourse, and subrogation."[111] Set in the context of copyright infringement, the party that is found secondarily liable is guaranteeing the proper conduct of the potential direct infringer.[112]

Policy-style secondary liability is fairly straightforward in that its basic premise is that a party is found secondary liable for infringement if (1) an infringement by another has occurred and (2) it is considered "just" to hold the infringer accountable for the infringement.[113] Thus, under this method, a public policy judgment must be made as to when justice is served by holding a party secondary liable for infringement, and such a subjective judgment is open to broad interpretation.[114] Lastly, hostage-style liability takes secondary liability a step further because one party forces secondary liability upon another person and effectively makes that person guarantee there will be no offenses of infringement.[115] This type of secondary liability lies at one extreme of the spectrum, opposite that of a suretyship, consensual-style liability, and it occurs solely based on the force and interest of the hostage-taker rather than on any preconceived notices of justice or fairness.[116]

III. THE IDEA

A. The Application of Secondary Liability to 3-D Printing

The idea of applying secondary liability for copyright infringement to the 3-D printer industry allows for a new and useful approach to the current problem with 3-D guns. This way, by applying current, existing law to an emerging problem, Congress and the United States Government will have an immediate solution to a problem they have not yet been able to fix. More specifically, secondary liability will be held at the 3-D printer manufacturer level to encourage new design of the machines and regulate

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[109] *Id.* at 68–69.

[110] *Id.* at 68–69 n.78.

[111] *Id.* at 69.

[112] *Id.* at 70 n.90.

[113] *Id.* at 72.

[114] *See id.* (emphasizing the importance of utilizing fault-based, relationship-based, and consensual-based rationales to limit policy interpretations on the issue of when justice is served).

[115] *Id.* at 75.

[116] *Id.*

the guns where they are manufactured. The ability to regulate, limit, and outlaw the blueprints via the Internet has proved messy and ineffective solution. The sacrifices required for proper monitoring and regulation of online 3-D blueprints is too onerous for our government to undertake and represents a massive intrusion into the privacy that Americans so highly value.[117]

Before going any further, it is important at this juncture to once again point out that this Note is not suggesting that secondary liability law in its current format can be directly applied as a sort of "band-aid" for immediate relief to the emergent problem of plastic guns. Secondary liability is a constantly evolving and growing concept with roots that arguably reach as far back as British common law's hostage-style secondary liability.[118] From its early beginning, secondary liability has been applied to a wide range of issues and problems, from the disputes discussed earlier in *Sony Corp. of America* and *Grokster*, to potential secondary liability in landlord-tenant relationships, dancehall-band relationships, and grocery-store-butcher relationships, just to name a few.[119] Another very recent and important example of secondary liability involves a suit in an Oregon state court concerning the online sale to a straw man of a firearm that was used in the murder of a woman and in which the court held both the online dealer and the intermediary pawn shop liable for the roles they played.[120] This decision extends the umbrella of secondary liability to an online gun seller, despite the existence of the Protection of Lawful Commerce in Arms Act (the "PLCAA") that generally provides immunity from suit for firearm manufacturers and distributers.[121] The outcome is significant to this Note because it demonstrates that (1) secondary liability is an ever-expanding area of law; and (2) gun manufacturers and distributers can be found liable, despite the strength of the PLCAA.

Lastly, it is critical to reiterate that the type of secondary liability discussed in this Note as it relates to intellectual property will be applied by way of analogy and not in the literal meaning of the legal concept. The principles and ideals of secondary liability in intellectual property as they appear in *Sony Corp. of America* and *Grokster* are similar enough to the unique problem of 3-D plastic printers and plastic guns that they can

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[117] *See supra* note 88 and accompanying text.

[118] *See* Folsom, *supra* note 107, at 74 n.102 (discussing instances of rudimentary hostage-style secondary liability in Anglo-American and European law).

[119] MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 918–19 (2005); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 434–35, 438–39 (1984); Folsom, *supra* note 107, at 86.

[120] Englund v. World Pawn Exch., No. 16CV00598, 2017 Ore. Cir. LEXIS 3, at *3–4, *15, *18–20 (Or. Cir. Ct. June 30, 2017).

[121] Protection of Lawful Commerce in Arms Act of 2005, 15 U.S.C. § 7901(b)(1) (2012); *Englund*, No. 16CV00598, 2017 Ore. Cir. LEXIS 3, at *10–11, *20, *24.

conceivably be applied congruently, but the principles of secondary liability law must be willing to continue to grow and evolve to meet emerging threats.

Thus, the best solution to the threat of 3-D printers capable of producing untraceable and undetectable 3-D plastic guns is to apply a secondary liability approach, which should utilize contributory liability theory from the field of copyright infringement directly applied to the 3-D printing industry. Contributory liability in this context can be established when there is "(1) direct infringement by a primary infringer; (2) knowledge of the infringement; and (3) material contribution to the infringement."[122] Furthermore, from *Sony Corp. of America,* we also know that if the component or item in question is capable of a substantial noninfringing use, then the creator of the component cannot be held secondarily liable.[123] That last hurdle proves to be the most difficult in this context, but it can be overcome with a few significant changes to the 3-D printing industry.

As it currently stands, any user can plug in a USB stick and load a CAD file into a 3-D printer and immediately begin producing an item.[124] 3-D printers will have to be remodeled so that a they can only print an item when an encrypted CAD file is utilized with its own unique key code. These files will be sold on USB sticks from authorized dealers, from whom a buyer can specifically choose the item he or she desires to purchase. The stores can be online or in person, but the file must only be used for the production of one item, and then must be automatically erased. Buyers that purchase this "intellectual property" can have their USB sticks "recharged" by the authorized seller for no additional charge, thereby preserving some of the current appeal of the 3-D printing world.

To illustrate, if an individual wished to print a hammer, he or she would purchase the CAD file from an authorized CAD file distributer, and then use that file to produce a hammer on his or her 3-D printer. If he or she wished to print another hammer, he or she would then contact the distributor and get an additional copy of the file. The 3-D blueprints would be available for a one-time use and then automatically erased. Thus, if that same individual wished to print a gun, he or she would request to purchase a gun CAD file and, after passing the appropriate background checks, print a single gun before the file would automatically be erased. Regulators would be free to decide if a person could only print a single gun, or if a USB drive could be re-loaded for subsequent gun printings.

At this point, it is important to bring back the idea of substantial noninfringing use to close the loop on secondary contributory liability. If

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[122] MGM Studios, Inc. v. Grokster Ltd., 380 F.3d 1154, 1160 (9th Cir. 2004).

[123] *Sony Corp. of Am.*, 464 U.S. at 442.

[124] Berkowitz, *supra* note 2, at 57–58.

3-D printers were hypothetically re-designed to only accept properly encrypted and keyed CAD files, then any printer remaining on the market without this ability would be the only printer capable of printing guns from unencrypted CAD files. Further, under the new hypothetical system, no other types of items, such as hammers, would be allowed without properly keyed and encrypted CAD files either. Thus, an individual seeking to print a gun, hammer, or any other item on the "old" 3-D printers that have improper encryption and keying would be using the CAD file and printer for a substantial infringing and offending use. Because the old printers would be incapable of *any* substantial noninfringing use (the creation of both plastic guns and other plastic items would be infringing and offending), the 3-D printer manufacturers could be held contributorily liable. The creation of an item with an illegal CAD file without keys or encryption would mean that (1) there was direct infringement by a primary user; (2) the manufacturer that made the 3-D printer had knowledge of the infringement by continuing to make printers without proper encryption readers; and (3) the manufacturer materially contributed to the infringement by creating machines capable of producing illicit 3-D items.

For such a scheme to work, obvious regulatory measures would have to be imposed upon 3-D printer manufacturers to compel them to change the machine's design to incorporate encryption mechanisms and unique keys for all CAD files. As an incentive, the regulations should also create a safe harbor for the 3-D printing industry. To illustrate, a 3-D printing company would be shielded from any criminal or civil claims if it complies with all the new rules and implements proper procedures, and the company would be shielded from liability even if a plastic gun found its way into an airport or a sporting event to be used in the commission of multiple homicides therein. On the other hand, if a company refuses to comply, then the draconian approach to secondary liability described above should be implemented, and the 3-D printer manufacturer would be held secondarily liable.

Undoubtedly, this approach causes a significant sacrifice in convenience for both the manufacturer of 3-D printers, as well as the end-user, but such a sacrifice is necessary if American society wishes to preserve the privacy it so highly values.[125] Further, although it may currently seem unnecessary to implement such strict regulations on the 3-D printing industry, this proposal would be a proportional response to the large controversy and subsequent lawsuit that ensued when Defense Distributed attempted to make gun blueprints available to all via the Internet.[126] 3-D printers and plastic guns may be in the early stages of

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[125] *See supra* note 88 and accompanying text.

[126] Washington v. U.S. Dep't of State, 318 F. Supp. 3d 1247, 1254 (W.D. Wash. 2018).

development right now, but the rate of technological advance, coupled with the attention the industry has already received, situates this issue to become a serious crisis in a few short years. Acting now and placing the onus on the printing industry creates a real and tangible chokepoint that can be monitored and regulated, vice hoping to somehow control or contain the nebulous structure of the Internet.

Lastly, this is an approach that could become successful once Congress is motivated to act. The other approaches outlined in this article are incapable of producing the desired results because they are focused on the wrong aspects of the problem. It is recognized that this is a complex and constantly evolving issue, and all parties involved are trying to remedy the situation, but the current approaches simply will not work. The injunction issued by the United States District Court of the Western District of Washington[127] is a step in the right direction in that many states have recognized the danger these 3-D blueprints represent, but merely banning Defense Distributed from publishing blueprints on the Internet is not going to solve the problem. The plans are already circulating all over the Internet,[128] and the federal injunction's attempt to whack one mole will only lead to the appearance of three others. Further, even though the City of Philadelphia and the Governor of New York have also set forth novel approaches to the issue,[129] they suffer from the same types of problems. Philadelphia's city ordinance, which requires a federal manufacturing license to produce 3-D printed guns, does little to actually regulate or prevent their creation. Anyone can still make plastic guns via 3-D printers and the city has no control over the items actually printed. Governor Cuomo's attempt to regulate 3-D guns under public nuisance law, on the other hand, is a misapplication of pre-existing law.[130] By the Governor's logic, public nuisance laws become a catch-all for anything that ills society, and such logic creates a dangerous precedent for future problems that a politician wishes to quickly outlaw.

B. Responding to the Critics—Areas of Concern

With the introduction of an innovative and wide-reaching approach to regulate 3-D printed plastic firearms, it is also necessary to address criticisms of the proposal as well as secondary and tertiary order effects.

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[127] *Id.* at 1264.

[128] *See supra* note 58 and accompanying text.

[129] *See* PHILA., PA., CODE § 10-2002 (2016) (creating a restriction on the use of 3D printers to create a firearm or firearm components without a federal license); Letter from Andrew M. Cuomo, Governor, State of New York, to Defense Distributed, *supra* note 8 (creating a system that analyzes unauthorized 3-D printing of firearms under public nuisance law).

[130] Letter from Andrew M. Cuomo, Governor, State of New York, to Defense Distributed, *supra* note 8.

This Note does not pretend to predict and respond to all future consequences, but it does intend to answer a few major concerns.

The first area involves the current laws that are in place to protect gun manufacturers when their weapons are used to commit crimes. The primary mechanism protecting gun manufacturers can be found in the 2005 Protection of Lawful Commerce in Arms Act ("PLCAA").[131] The PLCAA's main purpose is to protect gun manufacturers from liability when the weapons they create are used illegally, but such immunity from suit is not absolute.[132] Essentially, manufacturers are generally immune when their weapons are used for the purpose for which they were intended, i.e., to discharge ammunition, but manufacturers are not immune when a malfunction in the weapon itself caused harm and a few other minor exceptions that will not be discussed in this Note.[133] The outer limits of the law were tested in *Adames v. Sheahan*, in which a boy shot his 13-year-old friend with his dad's Beretta handgun.[134] The victim's family claimed that Beretta U.S.A. Corporation should be liable for failure to make the gun safer by placing more warnings and safeguards, but the Supreme Court of Illinois refused to impose any liability on the gun manufacturer due to the shield of the PLCAA.[135] The law has endured much criticism, most notably during the run-up to the 2016 presidential election when Democratic Candidate for President, Hillary Clinton, voiced her displeasure with the PLCAA and stated her intention to repeal it as part of her gun control agenda.[136] Although the PLCAA would also potentially apply to creators of 3-D firearms, the proposal suggested in this Note attempts to circumvent the PLCAA via a secondary liability and copyright infringement approach. Thus, the PLCAA example serves as but one illustration on how 3-D plastic firearms can be successfully regulated without having to fundamentally alter all existing gun control laws.

There are still many obstacles, unforeseen shortcomings, and secondary problems to overcome to successfully implement this proposal. The point of this Note is not to provide a fail-proof, one-stop-shop solution to a complex and vexing problem; rather, it is to provide a starting point for a workable solution among a host of ineffective plans already in place.

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[131] 15 §§ U.S.C. 7901–03 (2012).

[132] *See* VIVIAN S. CHU, CONG. RES. SERV., THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT: AN OVERVIEW OF LIMITING TORT LIABILITY OF GUN MANUFACTURERS 1 (2012), https://fas.org/sgp/crs/misc/R42871.pdf (describing the PLCAA's ability to shield firearm and ammunition manufacturers, dealers, and sellers from civil liability resulting from an end-user's criminal or unlawful use of a firearm or ammunition, with six limited exceptions).

[133] *Id.* at 3–4.

[134] 909 N.E.2d 742, 745 (Ill. 2009).

[135] *Id.* at 765.

[136] Laura Meckler, *Hillary Clinton's Gun-Control Proposals to Include Executive Action*, WALL ST. J. (last updated Oct. 5, 2015, 10:18 AM), https://www.wsj.com/articles/hillary-clintons-gun-control-proposals-to-include-executive-action-1444017603.

There will undoubtedly be growing pains with the current machines that are already in people's homes and capable of printing 3-D guns without the new proposed technology. Further, similar to the concerns with non-3-D printed guns, issues regarding filed-off serial numbers, illegal arms trade, and a host of other black market problems will still exist. The idea behind regulating 3-D printers at the source of manufacturing is to use an existing legal framework to enact a larger policy initiative that will combat this dangerous and emerging threat. In sum, this approach attempts to (1) recognize the First and Second Amendment concerns of those who wish to exercise their constitutional rights by printing 3-D guns;[137] (2) recognize the shortcomings in the current approaches;[138] and (3) balance individual's rights and privacy concerns with the need for an oversight and regulation mechanism.[139]

CONCLUSION

This Note has attempted to investigate an exciting new technology that has emerged yet is potentially dangerous because it is capable of producing a new kind of weapon. Technological advances in the art of war are not a new concept and such advances have, indeed, both plagued and benefited mankind throughout existence. The cycle follows the predictable path beginning with the birth of a new weapons system, which is shortly followed by issuance of rules and regulations that attempt to ensure safe employment of the new weaponry. The advent of 3-D plastic firearms and the race to regulation is no different as 3-D firearms present a real and present threat to a host of vulnerable situations.[140] As with other weapons that have emerged throughout the course of history, a range of predictable responses have also appeared, from the outright ban on all 3-D plastic firearms,[141] to Cody Wilson and Defense Distributed's envisioned utopia of weapons' access for the masses.[142] Nevertheless, the final outcome likely

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[137] *See* Washington v. U.S. Dep't of State, 318 F. Supp. 3d 1247, 1252 (W.D. Wash. 2018) (summarizing Defense Distributed's argument that a restraint on the publication of its CAD files on the Internet would be in violation of the company's First, Second, and Fifth Amendment rights).

[138] *See supra* Part I.C.

[139] *See supra* Part II.A.

[140] *See Washington*, 318 F. Supp. 3d at 1261–62 (describing the various forms of irreparable harm that citizens of various states may be exposed to due to the lack of comprehensive laws governing 3-D printed firearms).

[141] Letter from Andrew M. Cuomo, Governor, State of New York, to Defense Distributed, *supra* note 8.

[142] *See* Andy Greenberg, *Meet the 'Liberator': Test-Firing the World's First Fully 3D-Printed Gun*, FORBES (May 5, 2013, 5:30 PM), https://www.forbes.com/sites/andygreenberg/2013/05/05/meet-the-liberator-test-firing-the-worlds-first-fully-3d-printed-gun/#3bc36bb752d7 (describing Cody Wilson's intention to create a readily accessible firearm available to anyone with a 3-D printer).

rests somewhere in the middle, although it is still too early to pinpoint such a location.

The point of this Note, therefore, has been to predict a place on the spectrum that as many people as possible can agree upon but still takes into account secondary and tertiary order effects that will arise. 3-D blueprints for plastic firearms already exist and are available on the Internet for download.[143] The 3-D printing industry is also firmly established, and it is capable of producing beneficial items that will further mankind's pursuits in space, in medicine, and in ways yet to be imagined.[144] Further, legitimate First Amendment arguments exist that will justify protection of 3-D plastic firearm production,[145] and these arguments should not be thrown to the wayside in a hasty attempt to eradicate a particularly difficult problem. Indeed, if such constitutional rights were merely "waived" every time Americans felt threatened by a new technology, such rights would only exist as an homage to our storied past when they once stood for something meaningful. This Note recognizes the state of matters and suggests a compromise by balancing the individual's constitutional rights, the individual's right to privacy, and the 3-D printing industry's right to conduct business in an effort to only create 3-D plastic firearms in a realistically regulated environment. By analogizing the legal concept of secondary liability as it relates to copyright infringement to 3-D printing and plastic firearms, this author hopes to create a system that is capable of honoring legitimate privacy concerns while safely monitoring the American public's ability to exercise its constitutional rights through the production of 3-D plastic firearms.

Sean K. Hollowwa[*]

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[143] *See supra* note 58 and accompanying text.

[144] *See* Berkowitz, *supra* note 2, at 55 (describing the various beneficial uses for 3-D printed items including parts for NASA spacecraft, dental fillings, orthopedic implants, hearing aids, and prosthetics).

[145] *See Washington*, 318 F. Supp. 3d at 1263–64 (describing the defendants' argument that a preliminary injunction impairs their First Amendment rights).

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AS VIRGINIA STRIVES FOR A LEAD IN THE AQUACULTURE INDUSTRY, ISSUES BETWEEN PROPERTY OWNERS AND OYSTER FARMERS RISE TO THE SURFACE

INTRODUCTION

On September 25, 2018, local residents of Milford Haven filled the room at the Virginia Marine Resources Commission ("VMRC") meeting, which was open for public comment.[1] During this meeting, the Commission voted on whether to approve one fisher's application to place "up to 700 floating shellfish cages within a 400' x 600' area over his existing oyster planting ground lease"[2] in the Milford Haven. The meeting had an attendance of about fifty locals in opposition to the project.[3]

For property owners on the Milford Bay, a decision to grant water lease permits to a fishing industry was one that would affect their future and the future of their children.[4] One homeowner explained that he and the other residents involved in the dispute support business and progress, "but not businesses that destroy."[5] In 1860, his wife's great-grandfather built his home within the Haven, a historical landmark.[6] "One-third of the water will be gone," he said. "It will look like a cemetery in the water [with] . . . coffins [that] float[] to the top."[7]

The growth of Virginia's aquaculture business and produce has been astounding, catching the attention of neighboring states on the

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[1] Va. Marine Res. Comm'n, Commission Meeting Minutes 18157, 18160, 18163 (Sept. 25, 2018) [hereinafter Commission Meeting Minutes, Sept. 25, 2018], http://www.mrc.virginia.gov/Commission_Minutes/VMRC_final_minutes_09-25-18.pdf; *Public Notice: Proposed Regulations, September 2018*, VA. MARINE RES. COMM'N, https://www.mrc.virginia.gov/notices/2018/PN_09-25-2018.shtm (last visited Nov. 8, 2019).

[2] Commission Meeting Minutes, Sept. 25, 2018, *supra* note 1, at 18160, 18163.

[3] Peter J. Teagle, *VMRC Approves Milford Haven Oyster Cage Proposal*, GLOUCESTER-MATHEWS GAZETTE-JOURNAL (Sept. 26, 2018, 2:30 PM) [hereinafter Teagle, *VMRC Approves Proposal*], https://www.gazettejournal.net/index.php/news/news_article/vmrc_approves_milford_haven_oyster_cage_proposal.

[4] Niko Clemmons, *Proposed Oyster Cages Drive Controversy in Mathews County*, 13 NEWS NOW (Sept. 24, 2018, 6:24 PM), https://www.13newsnow.com/article/news/local/proposed-oyster-cages-drive-controversy-in-mathews-county/291-597713181 ("We want to keep [Milford Bay] this way for our kids and grandkids.").

[5] *Id.*

[6] *Id.*; *see* DAVID BROWN ET AL., MATHEWS COUNTY ARCHITECTURAL RECONNAISSANCE SURVEY REPORT 28 (DATA Investigations, LLC & Commonwealth Pres. Grp., 2014), https://www.dhr.virginia.gov/pdf_files/SpecialCollections/MT-023_Mathews_Co_AH_Recon_Survey_2014_DATA_report.pdf (highlighting the historical significance of the Milford Haven inlet during the end of British rule in the Virginia colony).

[7] *See* Clemmons, *supra* note 4 (describing homeowners' concerns about the impact of oyster farming on property that has been in their families for generations).

Chesapeake Bay.[8] With the improvement of the Bay's water quality and the simplification of the oyster aquaculture lease process,[9] the aquaculture industry in Virginia has boomed.[10] Although Virginia's oyster aquaculture industry has experienced great growth, there have been unforeseen consequences for waterfront property owners on the Chesapeake Bay. Property owners and oyster farmers have become divided,[11] as many VMRC decisions have discouraged changing the lease process and have instead given permits to oyster farmers.[12] The issue has spread throughout the East Coast, as property owners in Virginia, Maryland, and Delaware seek greater restrictions for oyster aquaculture activities.[13]

In many ways, the progress and industry of the Bay has quickly outgrown its previous structure.[14] Virginia officials have recognized the

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[8] Palmer Hilton, et al., *Looking to the Future of Oyster Aquaculture in North Carolina: A Comparison of Regulations Among Mid-Atlantic States*, N.C. COASTAL RES. L., PLAN. & POL'Y CTR.: LEGAL TIDES, Autumn 2016, at 1–4, https://ncseagrant.ncsu.edu/ncseagrant_docs/coastallaw/LT/lt_autumn_2016.pdf (describing Virginia's booming aquaculture industry and other Eastern states' efforts to catch up to its production level). Maryland, for example, hoping to increase its revenue by following Virginia's lead, has simplified its application process for lease applicants. *See* Rona Kobell, et al., *Bay's Oyster Farm Success Overtaking Public Oyster Harvest*, CHESAPEAKE BAY MAG. (Nov. 27, 2017), https://www.chesapeakebaymagazine.com/baybulletin/2017/11/27/bays-oyster-farm-success-overtaking-public-oyster-harvest ("More than a century after the first oysters were planted on a Virginia bar, aquaculture has firmly taken hold in the Chesapeake Bay. The value of Virginia's oyster farms production has eclipsed the public fishery, and many oyster experts believe Maryland is heading in the same direction.").

[9] Hilton et al., *supra* note 8.

[10] Virginia aquaculture industry has blazed ahead of other Eastern States with $18.5 Million in oyster sales in 2016. Kobell et al., *supra* note 8.

[11] *See* James A. Bacon, *Oyster Wars, Viewsheds and Property Rights*, BACON'S REBELLION (May 2, 2017), https://www.baconsrebellion.com/wp/oyster-wars (describing the disconnect between oyster farmers who are trying to expand their businesses and property owners who are losing property rights); *see also* Dave Mayfield, *Virginia Regulators Leave Lynnhaven Oyster Rules Unchanged; Lawmakers Invited to Weigh In*, VIRGINIAN-PILOT (Sept. 27, 2016, 9:15 PM) [hereinafter Mayfield, *Virginia Regulators*], https://pilotonline.com/news/local/environment/article_389aef82-3564-54f8-9fe3-ed7deb710c81.html ("Dozens of hours of public meetings and thousands of pages of reports, emails and letters have been devoted . . . to conflicts over oyster ground leases in Virginia Beach's Lynnhaven River system.").

[12] Mayfield, *Virginia Regulators, supra* note 11.

[13] Bacon, *supra* note 11.

[14] *See* Press Release, Office of the Governor, Secretary of Natural Resources Matthew J. Strickler Convenes Work Group to Promote Sustainable Growth of Virginia's Clam and Oyster Economy (Aug. 16, 2018) (on file with Regent University Law Review) [hereinafter Natural Resources Work Group], https://www.governor.virginia.gov/newsroom/all-releases/2018/august/headline-828653-en.html (describing the formation of the Aquaculture Work Group in order to address the rapid growth of the Bay's aquaculture industry and the increasingly important need to manage the Bay's "competing uses"); *see also* Corey Nealon, *Oyster Aquaculture Thrives, but Consequences Loom*, DAILY PRESS (Apr. 3, 2011), https://www.dailypress.com/news/newport-news/dp-nws-cp-aquaculture-one-20110402-story.html

issues arising in the aquaculture industry. In August of 2018, a work group under the direction of Matthew J. Strickler, the Virginia Secretary of Natural Resources, convened in order to develop recommendations promoting the growth of Virginia's aquaculture industry.[15] At the work group's first meeting, Governor Northam remarked:

> Today's Chesapeake Bay is a new experience to a generation that has known only polluted waters and lost aquatic productivity . . . . With a healthier Bay, we now have the challenge of managing the many competing uses of the Bay and our rivers—whether that's farming oysters and clams, providing access for recreational boaters, rebuilding our underwater grasses, or respecting the rights of waterfront property owners. My Administration is committed to working with all stakeholders to finally resolve user conflicts and to grow the Bay economy.[16]

Though the work group is committed to addressing the concerns of all stakeholders, the underlying problems of the growing industry are vast and complex.[17] This Note seeks to assist the work group by addressing the complexities of the industry and by offering recommendations that will transform the aquaculture industry of the Chesapeake Bay region.[18]

This Note describes the current lease application process that Virginia holds as an example to other Eastern States seeking to follow Virginia's lead in the aquaculture industry. It discusses the areas where change and progress are needed while offering solutions. Part I of this Note discusses the background of the issue, including improvement of Chesapeake Bay's water quality, the benefits of oyster farming, and VMRC's structure and regulatory authority. Part II discusses the negative legal repercussions that the oyster farming industry has had on property

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("From 2005 to 2009 annual seed plantings more than quadrupled. The number of farmed oysters sold reached 12.6 million in 2009, a number expected to grow when 2010 numbers are released later this year.").

[15] Natural Resources Work Group, *supra* note 14.

[16] *Id.*

[17] *Id.*

[18] Although this Note focuses on the issues that need to be resolved in the aquaculture industry, there is another important issue that should be noted. When the VMRC grants oyster leases, it allocates "submerged lands designated as natural oyster beds" to private parties. Keith Warren Davis, *The Role of Virginia Resources Marine Commission in Regulating and Zoning the Water Bodies of the Commonwealth*, 16 WM. & MARY ENV. L. & POL'Y REV. 81, 86 (1992). This action is considered "a taking from the citizens of the Commonwealth and a giving to one specific party, in violation of the Virginia Constitution." *Id.* In addition to the issue of a government taking, if above-the-water cages continue to be placed in areas near waterfront property, and property values decrease because of oyster cages, property owners could sue the Commonwealth for that lost value.

owners, the public, and the market in Virginia, including the viable claims that have arisen because of these issues. Part III discusses solutions and possible recommendations for the current work group. This Note concludes with an overview of Virginia aquaculture industry's success, and also identifies the issues of the industry that need to be addressed by Eastern State legislators.

I. BACKGROUND

A. Chesapeake Bay Improvement

The Chesapeake Bay is one of the "most studied large bod[ies] of water on earth."[19] Over the past forty years, scientists have tried to determine why the Bay has been degraded and how it can be improved.[20] The Federal Government passed the 1972 Clean Water Act to combat pollution and restore these waters.[21] In addition, the Chesapeake Bay was placed on the EPA's dirty waters list and had to follow several guidelines in an effort to improve the Bay.[22] As a result, the Bay's ecosystems have improved dramatically, and the Bay is at its healthiest point in decades.[23]

The Bay's improvement has a substantial effect on the entire East Coast. The Chesapeake Bay Watershed spans 64,000 miles with 11,684 miles of shoreline and "encompass[es] parts of six states—Delaware, Maryland, New York, Pennsylvania, Virginia and West Virginia—and the entire District of Columbia. More than 18 million people live in the Chesapeake Bay watershed."[24] With the improvement of the Bay, oyster

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[19] *The History of Chesapeake Bay Cleanup Efforts*, CHESAPEAKE BAY FOUND. http://www.cbf.org/how-we-save-the-bay/chesapeake-clean-water-blueprint/the-history-of-bay-cleanup-efforts.html (last visited Nov. 24, 2018).

[20] *Id.*

[21] *Id.*

[22] Chesapeake Bay Program, The Chesapeake Bay Agreement of 1983 (Dec. 9, 1983), https://www.chesapeakebay.net/documents/1983_CB_Agreement2.pdf; *The History of Chesapeake Bay Cleanup Efforts, supra* note 19.

[23] Scott Dance, *Scientists Say They're Confident Chesapeake Bay Health Is 'Significantly Improving,'* BALT. SUN (June 15, 2018), http://www.baltimoresun.com/news/maryland/environments/bs-md-chesapeake-bay-improving-20180612-story.html. Not only has the Bay's health affected its water quality, but it has also affected the Bay's ecosystem. *Id.* Scientists have linked the improvement with the recent growth of underwater grasses, which produce a chain effect on the Bay itself by creating healthy habitats for fish, crabs, and other aquatic creatures. *Id.*

[24] *Watershed*, CHESAPEAKE BAY PROGRAM, https://www.chesapeakebay.net/discover/watershed (last visited Sept. 2, 2019).

farming has also increased significantly.[25] In addition to aquaculture industry growth, an increase in property values on the Chesapeake Bay is directly linked to the Bay's improved water quality.[26]

B. Benefits of Oyster Farming in Virginia

With the exciting prospect of a boost to the economy and increased improvement to the Bay's water quality, the Commonwealth has encouraged oyster farming. In an effort to encourage industry growth, the VMRC commented on the many benefits Virginia receives from the aquaculture industry:

> The Virginia Marine Resources Commission strongly encourages gardening and farming of oysters and clams. These shellfish provide important economic and environmental benefits. In fact, a single adult oyster can purge 50 gallons of water a day! And shellfish gardening and farming reduce harvest pressure on wild stocks, while increasing the overall number of shellfish that help clean the water and serve as habitat for fish and crabs. Clam and oyster farming, also known as aquaculture, is a booming, multi-million dollar industry in Virginia.[27]

Although the VMRC's excitement is understandable, the incentive for creating growth in the oyster aquaculture industry should not be sought above the interests and needs of citizens of the Commonwealth. With the power that the VMRC holds to regulate and govern Virginia's waters, the Commission has the responsibility to address issues resulting from the quick growth of the aquaculture industry.

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[25] Sarah Rankin, *Report Finds Improvements in Chesapeake Bay's Overall Health*, PHYS.ORG (Jan. 5, 2017), https://phys.org/news/2017-01-chesapeake-bay-health.html#jCp ("Water clarity in the Chesapeake Bay is the best it's been in decades, and native rockfish, oyster and blue crab populations are rebounding as the overall health of the nation's largest estuary improves . . . .").

[26] Heather Klemick et al., *Explaining Variation in the Value of Chesapeake Bay Water Quality Using Internal Meta-Analysis* (Nat'l Ctr. for Envtl. Econ., Working Paper No. 15-04, 2015), https://www.epa.gov/sites/production/files/2016-03/documents/2015-04.pdf ("We find that the aggregate increase in home values for near-waterfront properties from a ten percent improvement in Bay clarity varies from about $410 million to $750 million, depending on the specification choice and benefit transfer approach.").

[27] *Shellfish Aquaculture, Farming and Gardening*, VA. MARINE RES. COMM'N, http://mrc.virginia.gov/Shellfish_Aquaculture.shtm (last visited Sept. 3, 2019).

C. Virginia Marine Resources Commission's Authority and Regulation

VMRC's authority derives from the Commonwealth and is considered a state police power to "promot[e] [] public convenience, general prosperity, public health, public morals, and public safety."[28] Virginia Code Section 28.2-101 covers the Commission's jurisdictional power over Virginia waters and bottomlands, which includes "the Commonwealth's territorial sea and extend[s] to the fall line of all tidal rivers and streams except in the case of state-owned bottomlands where jurisdiction extends throughout the Commonwealth."[29] Additionally, this title covers the Commission's jurisdiction over marine animals and organisms, which includes "all commercial fishing and all marine fish, marine shellfish, marine organisms, and habitat in such areas."[30] Virginia Sections 28.2-103 to -104 describe the Commission's general power over Virginia's watercourses and the duties of the regulatory body. Among other duties listed in the chapter, the Commission must "enforce the marine fishery and habitat laws and regulations."[31]

The Commission has specific guidelines concerning the duty to enforce and create regulations stipulated in Virginia Code Section 28.2-201.[32] The VMRC, according to this section of the Virginia Code, has the authority to issue licenses and permits to applicants for specific fees issued by the commission.[33]

The Commission oversees fishing licenses, and also enforces the annual lease fees for oyster planting applicants, which is stipulated by Virginia Code Section 28.2-612 and requires an "annual rent of $ 1.50 per acre."[34] The number of permits that the VMRC grants is on the rise. According to the VMRC, in only five years, lease applications more than doubled from 155 in 2010 to 315 in 2015.[35] The VMRC noted its totals of all acreage and leases up until 2016; this total included 122,692 acres of the Chesapeake Bay under lease by oyster planting leaseholders, with 5,517 leases by 2,566 leaseholders.[36] This number will continue to grow as the VMRC grants leases—as will the number of protests against these

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[28] Davis, *supra* note 18, at 86.

[29] VA. CODE ANN. § 28.2-101 (LexisNexis, LEXIS through 2019 Reg. Sess. Gen. Assemb.).

[30] *Id.*

[31] § 28.2-104 (LEXIS).

[32] § 28.2-201 (LEXIS).

[33] *Id.*

[34] § 28.2-612 (LEXIS).

[35] Va. Marine Res. Comm'n, Lynnhaven Oyster Workgroup Presentation (Apr. 15, 2016) [hereinafter Lynnhaven Oyster Workgroup Presentation], http://www.mrc.virginia/Notices/2016/2016-04-15-Lynnhaven-workgroup-presentation.pdf.

[36] *Id.*

leases.[37] Currently (as of December 20, 2018), the Commission is processing 396 applications for leases in the Chesapeake Bay, which includes 21,773 acres of leased bottomland.[38] As the applications for oyster leases continue to rise, the VMRC will have the responsibility to address and remedy issues in the leasing process.

II. ISSUES FOR WATERFRONT PROPERTY OWNERS, THE PUBLIC, AND THE MARKET

In addition to the state statutes that govern the VMRC in its regulatory powers,[39] the VMRC follows Virginia Code Section 28.2-1205, which describes the laws governing "[p]ermits for the use of state-owned bottomlands."[40] Along with the required doctrines and rights that the VMRC is required to consider when granting leases, the last sentence of this chapter strongly instructs that "[n]othing in this subsection shall be construed to deprive a riparian landowner of such rights as he may have under common law."[41] To understand what these rights are, a bit of groundwork must be laid. Additionally, this Note will describe the rights of waterfront property owners and citizens of the Commonwealth that may not be fully realized.

A. Riparian Property Rights Have Been Harmed

Although Virginia boasts an oyster aquaculture industry "that produced more than $17 million in farm-gate value in 2014,"[42] in many cases, property owners have felt they have been left alone to carry the weight of that $17 million benefit.[43]

Although the unprecedented improvement of the Bay is highly celebrated on the East Coast, there are many homeowners on the Bay that have lost tremendous rights due to industries that are now thriving on the

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[37] *Compare id.* (indicating that of the 402 lease applications submitted in 2016, 75 (19%) were protested), *with* Va. Marine Res. Comm'n, *Habitat Management Permits and Applications*, VMRC OYSTER GROUND APPLICATIONS, https://webapps.mrc.virginia.gov/public/oystergrounds/search_applications.php (last visited Nov. 9, 2019) (indicating that of the 324 lease applications submitted in 2018, 85 (26%) were protested).

[38] Va. Marine Res. Comm'n, *supra* note 37.

[39] § 28.2-100 to -111 (LEXIS).

[40] *See* § 28.2-1205 (LEXIS) (describing the role of the Virginia Marine Resources Commission).

[41] *Id.*

[42] Hilton et al., *supra* note 8.

[43] *See* Bacon, *supra* note 11 ("In Virginia, Maryland and Delaware, homeowners are seeking greater restrictions against oystermen activities that offend their sensibilities. But the oystermen aren't rolling over.").

Bay because of its health.[44] The health of the Bay has brought a huge increase in the oyster farming industry.[45] Because oysters act as filters in the Bay, actually decreasing the Bay's pollution, states have welcomed the oyster industry growth.[46] Although growth and a clean Bay are important and valuable to states on the Bay, a host of issues have caused homeowners a loss of rights.[47]

1. Riparian Property Rights of Virginia Waterfront Property Owners

Vast numbers of Virginians enjoy the benefits of living on waterfront property.[48] A recent study reveals that 7.7% of Virginia's surface area is water, thereby ranking Virginia as 19th in the country for highest percentage of water area.[49] Not only is the inland covered with water (lakes, rivers, and streams), but also the Chesapeake Bay and coastal shoreline alone span an astounding 11,684 miles.[50] This abundance of water gives important riparian property rights to many property owners in Virginia.[51]

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[44] James T. Lang, *Waterfront Property Owners: Riparian Rights vs. Oyster Aquaculture Companies*, PENDER & COWARD (June 6, 2018) [hereinafter Lang, *Waterfront Property Owners*], https://www.pendercoward.com/resources/blog-opinions-and-observations/waterfront-property-owners-riparian-rights-vs-oyster-aquaculture-companies ("'Off the bottom' oyster aquaculture, if not carefully controlled, interferes with riparian property rights and reduces the value of waterfront property."); *see* Rankin, *supra* note 25 (reporting that water quality has improved over several decades with a corresponding improvement in aquatic life).

[45] Lynnhaven Oyster Workgroup Presentation*, supra* note 35; Natural Resources Work Group, *supra* note 14 (describing the increased growth in the Virginia oyster industry due to the improved health of the Chesapeake Bay).

[46] *Oyster Fact Sheet*, CHESAPEAKE BAY FOUND., http://www.cbf.org/about-the-bay/more-than-just-the-bay/chesapeake-wildlife/eastern-oysters/oyster-fact-sheet.html (last visited Sept. 17, 2019); Rachel Swick Mavity, *House to Get Oyster Farming Legislation*, CAPE GAZETTE (June 3, 2013), https://www.capegazette.com/article/house-get-oyster-farming-legislation/47460.

[47] Bacon, *supra* note 11.

[48] *See* U.S. CENSUS BUREAU, P25-1139, CURRENT POPULATION REPORTS, COASTLINE POPULATION TRENDS IN THE UNITED STATES: 1960 TO 2008*,* at 4 (2010), https://www.census.gov/prod/2010pubs/p25-1139.pdf (indicating that in 2008, 39.3% of Virginia property owners lived along the coastline).

[49] Caitlin Dempsey, *Which States Have the Highest Percentage of Water Area?*, GEOGRAPHY REALM (Nov. 10, 2015), https://www.geographyrealm.com/which-states-have-the-highest-percentage-of-water-area; UNITED STATES GEOLOGICAL SURVEY*, How Wet is Your State? The Water Area of Each State*, https://www.usgs.gov/special-topic/water-science-school/science/how-wet-your-state-water-area-each-state (last visited Sept. 28, 2019).

[50] Marcia Berman, *How Long is Virginia's Shoreline?*, VA. INST. OF MARINE SCI. (Apr. 2, 2010), http://www.vims.edu/faqs/shoreline_miles.php.

[51] James T. Lang & Hannah Fruh, *Riparian Property Rights at Waterfront Properties in Virginia*, 39 FEE SIMPLE: J. VA. ST. B. REAL PROP. 39, 39 (2018), http://www.vsb.org/docs/sections/realproperty/FeeSimple_Fall2018.pdf.

Properties on the water sell at a premium in comparison with commensurate homes not on the water.[52] A recent study focusing on the value of waterfront property categorized properties into three sections: (1) properties in front of bays and oceans, (2) lakefront properties, and (3) riverfront properties.[53] Among these groups, oceanfront properties had a high premium of 45%, lakefront properties showed a premium of 25%, and riverfront properties a premium of 24% of increased value in comparison with homes off the water in the same ZIP codes.[54]

These property values are one result of riparian property rights.[55] In addition to homeowners receiving value by living "on the water," companies pay extra for waterfront property because riparian property rights add value to the business.[56] "The Virginia Supreme Court wrote recently that '[t]he littoral or riparian nature of property is often a substantial, if not the greatest, element of its value.'"[57]

2. The Benefits of Riparian Property Rights

A majority of states on the East Coast, including Virginia, embrace the law of riparian rights.[58] Similar to other states on the East Coast, "[r]iparian property rights under Virginia law consist of five specific benefits:"[59]

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[52] *Id.* at 40.

[53] Michael Sklarz & Norman Miller, *The Impact of Waterfront Location on Residential Home Values*, COLLATERAL ANALYTICS (Mar. 27, 2018), https://collateralanalytics.com/wp-content/uploads/2018/03/CA-RESEARCH-The-Impact-of-Waterfront-Location-on-Residential-Home-Values_r1.pdf.

[54] *Id.* ("This study limit[ed] the data to a large sample of 5-digit ZIP Codes that include[d] both waterfront and off-water sales. These waterfront properties were categorized into three types: ocean and bay front, lakefront, and riverfront. These classifications were based upon a proprietary database which Collateral Analytics created to identify and analyze waterfront properties across the entire U.S. using advanced GIS techniques.").

[55] Lang & Fruh, *supra* note 51, at 40.

[56] James T. Lang, *What Are Riparian Property Rights?*, WATERFRONT L. (Sept. 1, 2018) [hereinafter Lang, *Riparian Property Rights*], https://www.waterfrontpropertylaw.com/blog/posts/what-are-riparian-property-rights/ ("Companies in Virginia also pay extra to operate 'on the water' because riparian property rights are valuable to the business."). Owners of waterfront property greatly value the scenic view included in the property itself. Lang & Fruh, *supra* note 51, at 41 ("[W]aterfront property owners attach a great deal of value to the scenic view available to them when they look out over the water."). This can prove to be a challenging right to protect. *Id.* ("It is, however, somewhat challenging at times to obtain legal protection that preserves this vista.").

[57] Lang & Fruh, *supra* note 51, at 41 (quoting Lynnhaven Dunes Condo. Ass'n v. City of Virginia Beach, 733 S.E.2d 911, 917 (Va. 2012)).

[58] Mattaponi Indian Tribe v. Commonwealth, 72 Va. Cir. 444, 450 (2007) (quoting Taylor v. Commonwealth, 47 S.E. 875, 880–81 (Va. 1904)).

[59] Lang & Fruh, *supra* note 51, at 41.

1. "The right to be and remain a riparian proprietor and to enjoy the natural advantages thereby conferred upon the land by its adjacency to the water."[60]

2. "The right of access to the water, including a right of way to and from the navigable part."[61]

3. "The right to build a pier out to the navigable part of the water"[62]—a right "controlled by specific parts of the Virginia Code and . . . managed by the Virginia Marine Resources Commission (VMRC)."[63]

4. "The right for the size of [one's] property to expand if the water places additional soil along the shoreline."[64]

5. "The right to make a reasonable use of the water as it flows past or washes upon the land."[65] For example, in early times a Virginian riparian owner would:

> [U]se flowing water in a river as an energy source to drive a water wheel that operated a sawmill or a gristmill. Today water might be withdrawn from a river or stream to irrigate crops or to water cattle. Another modern example is an electric power generating plant, built next to a river, that withdraws river water to cool equipment inside the plant and returns the water (after it has been heated) to the river. The withdrawal of surface water may require a Virginia Water Protection permit from the Virginia Department of Environmental Quality.[66]

The benefits of riparian rights are essential to waterfront property owners because these rights add distinctive value to the property.[67] These rights, though abundant, only exist within a specific area on waterfront property.

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[60] *Mattaponi*, 72 Va. Cir. at 451 (quoting *Taylor*, 47 S.E. at 880).

[61] *Id.* "The riparian area is designed to protect navigation from the shoreline out to the navigable part of the waterway," which begins at the "line of navigation." Lang, *Riparian Property Rights*, *supra* note 56. "Having access from the shore to the line of navigation is an important part of riparian property rights." *Id.*

[62] *Mattaponi*, 72 Va. Cir. at 451 (quoting *Taylor*, 47 S.E. at 880).

[63] Lang, *Riparian Property Rights*, *supra* note 56.

[64] *Id.* Conversely, erosion may cause the size of the waterfront property to shrink. *Id.* These waterfront properties' shifting boundary lines are controlled by specific sections of the Virginia Code. *Id.*; *see* VA. CODE ANN. § 28.2-1201 (LexisNexis, LEXIS through 2019 Reg. Sess. Gen. Assemb.) (describing the process by which sand or other material may be deposited by a public entity but which is not viewed as impairing a landowner's riparian rights).

[65] Lang, *Riparian Property Rights*, *supra* note 56.

[66] *Id.*

[67] *Id.*

3. Riparian Area

Riparian property rights can only apply within the "riparian area," a designated blueprint.[68] Just as property sizes and shapes are unique, riparian areas differ depending on the specific waterfront property.[69] Boundary lines of the riparian area extend "from the shoreline to the line of navigation."[70] Regarding the rights of riparian property owners, Virginia Code Section 28.2-1202 stipulates that the riparian property owner's rights to that land extends to the "mean low-water mark but no farther."[71] Additionally in *Taylor v. Commonwealth*, the Supreme Court of Virginia asserted that although a riparian owner's fee simple ownership ends beyond the low water mark, beyond "that point and the line of navigability the riparian owner has a qualified right," which includes the five benefits of riparian ownership discussed above.[72] The Court went on further to add:

> This riparian right is property, and is valuable; and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary, that it be taken for the public good upon due compensation.[73]

According to Virginia Code Section 28.2-1200, all of the "beds of the bays, rivers, creeks and the shores of the sea within the jurisdiction of the Commonwealth, not conveyed by special grant or compact according to law," will remain property of the Commonwealth and may be used in common by people of the Commonwealth.[74] Therefore, the Commonwealth owns the bottomlands, unless otherwise conveyed.[75]

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[68] Lang & Fruh, *supra* note 51, at 39 (citing Groner v. Foster, 27 S.E. 493, 494 (Va. 1897)).

[69] *Id.*

[70] *Id.*

[71] VA. CODE ANN. § 28.2-1202 (LexisNexis, LEXIS through 2019 Reg. Sess. Gen. Assemb.).

[72] Taylor v. Commonwealth, 47 S.E. 875, 880–81 (Va. 1904); *see supra* notes 59–66 and accompanying text.

[73] *Taylor*, 47 S.E. at 880 (quoting Yates v. Milwaukee, 77 U.S. 497, 504 (1871)).

[74] § 28.2-1200 (LEXIS).

[75] *Id.*

4. Riparian Property Rights and Property Values Have Been Harmed

a. The Right to a Scenic View Has Been Harmed

One benefit of riparian property rights is the right "to be and remain a riparian proprietor and to enjoy the natural advantages thereby conferred upon the land by its adjacency to the water."[76] The scenic view attached to waterfront property gives the property great value.[77] According to Virginia Code Section 28.2-603, if waterfront has not previously been reserved or assigned to a riparian property owner, these waters and bottomlands "may be occupied for the purpose of planting or propagating oysters . . . and may be leased by the Commissioner upon the receipt of a proper application."[78] The fact that the waterfront within an owner's riparian area can be occupied for the purpose of planting oysters creates big issues for riparian owners by greatly impairing their right to a scenic view.[79]

Although some owners of waterfront property have been able to obtain riparian leases from the VMRC, "giving them control of the water in front of their properties as far as 210 feet out from the low-water mark," many other waterfront owners have not been as fortunate.[80] Several bills were written to address residential concerns that oyster farmers planted oyster cages too close to residential shorelines on the Lynnhaven River in Virginia Beach.[81]

In addition to this concern, "'off the bottom' oyster aquaculture, if not carefully controlled, [also] interferes with riparian property rights and reduces the value of waterfront property."[82] Traditionally, leaseholders would "plant shell, cultch, or seed oysters" on the bottom of the water and harvest when the oysters were ready.[83] Recently, the industry has preferred "cage and float aquaculture methods."[84] One economic study

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[76] James T. Lang, *Riparian Rights When You Own Land in Contact with the Water: A Mix of Environmental, Admiralty and State Law*, PENDER & COWARD (June 19, 2013) [hereinafter Lang, *Land in Contact with Water*], https://www.pendercoward.com/resources/blog-opinions-and-observations/riparian-rights-when-you-own-land-in-contact-with-the-water-a-mix-of-environmental-admiralty-and-state-law-june-2013.

[77] *See* Sklarz & Miller, *supra* note 53 (explaining that oceanfront properties have significantly higher premiums than other homes located away from the water).

[78] § 28.2-603 (LEXIS).

[79] *See* Bacon, *supra* note 11 (describing the disconnect between oyster farmers who are trying to expand their businesses and property owners who are losing property rights).

[80] Dave Mayfield, *Bills Would Enable More Virginia Landowners to Lease Water off Their Properties*, VIRGINIAN-PILOT (Jan. 13, 2017), https://pilotonline.com/news/local/environment/article_a850e5a1-3768-571b-b507-003c49468f99.html.

[81] *Id.*

[82] Lang, *Waterfront Property Owners*, *supra* note 44.

[83] Lynnhaven Oyster Workgroup Presentation, *supra* note 35.

[84] *Id.*

reveals that oyster companies believe that they "can fatten their bottom line if they switch from 'on the bottom' oyster aquaculture to the new 'off the bottom' oyster growing equipment."[85]

Current regulations of oyster aquaculture do not fully protect waterfront property owners' riparian property rights. Although "above the water" cages and poles greatly inhibit the view and use of the water for riparian owners, the process of receiving a lease for an "above the water" structure is simple, as it only requires one permit.[86] Because recent trends in oyster aquaculture prefer "above the water" cages to low profile structures on bottomland, a simple permit process could further incentivize oyster farmers to choose "above the water" structures over less invasive ones.

Although the cages above the water are more convenient for oyster farmers and may increase the speed at which the oysters grow,[87] this option creates several problems. First, homeowners have become increasingly upset with the loss of their rights to a view.[88] "Off the bottom" oyster cages, or "floating cage systems," are generally made of "heavy gauge vinyl-coated wire mesh . . . [with] four to six compartments into which . . . mesh bags, containing oysters, are placed."[89] Along with the mesh and wire cage, the float is supported by two plastic, "air-filled pontoons."[90] The floating pontoons, which resemble large black boxes on the water, are more than just an eye-sore.[91] With a length of 105.4 cm long

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[85] Lang, *Waterfront Property Owners*, *supra* note 44 (referencing the Pangea Fish Company's description of oyster growing methods and equipment). For a detailed description of various methods of oyster aquaculture, see Connie Lu, *The Different Methods of Growing Oysters*, PANGEA SHELLFISH CO. (July 3, 2015), https://www.pangeashellfish.com/blog/the-different-methods-of-growing-oysters.

[86] *See* Lynnhaven Oyster Workgroup Presentation, *supra* note 35 ("Cages up to 12-inches in height are allowed (by regulation since 1997) on leases. Any structure above the 12-inch height and/or floats require additional authorizations."). A lease for cages greater than twelve inches requires an additional permit "through [the] Fisheries Management Division (if on a lease)," and a lease for any "floating aquaculture apparatus" requires a permit "through the Joint Permit Application process . . . issued through [the] Habitat Management Division." *Id.*; *see also* Lu, *supra* note 85 (describing why off-bottom methods are preferable to bottom culturing).

[87] *See* Nealon, *supra* note 14 (describing the success farmers have had growing oysters in floating cages).

[88] Lang, *Waterfront Property Owners*, *supra* note 44.

[89] BILL WALTON ET AL., MISS.-ALA. SEA GRANT CONSORTIUM (MASGC), PUB. NO. 12-013-03, GULF COAST OFF-BOTTOM OYSTER FARMING GEAR TYPES 1 (2012) [hereinafter OFF-BOTTOM GEAR TYPES], https://shellfish.ifas.ufl.edu/wp-content/uploads/Off-bottom-Oyster-Culture-Gear-Types.pdf.

[90] *Id.*

[91] Tamara Dietrich, *Gwynn's Island Homeowners Lose the Battle over Floating Oyster Cages in Milford Haven*, DAILY PRESS (Sept. 25, 2018, 7:15 PM), https://www.dailypress.com/news/dp-nws-gwynns-island-oysters-20180918-story.html (describing how homeowners are concerned about the size of the oyster cage sites as well as the unsightly pontoons that serve as floats for the cages).

and a width of 22.9 cm, these structures can present major issues in navigability.[92] Floating pontoons are just one type of "off the bottom" aquaculture that can greatly inhibit a property owner's view and navigability.[93] Other systems like "floating bags" and the "long-line system" can create similar issues.[94]

One example of the effects of "off the bottom" aquaculture appears in an August 2017 VMRC decision to grant permits to a large Virginia oyster company. The company wanted to install 20,000 baskets, supported by long lines and poles, across ten acres of the Watts Bay in Accomack County. Six riparian property owners voiced their concerns that their waterfront view would be destroyed with "unsightly poles."[95] This permit was the first large scale "off the bottom" aquaculture project to receive an approval in Virginia waters.[96] Despite the vehement objections to the proposal, in a unanimous vote, the VMRC approved the Watts Bay project.[97]

Additionally, waterfront property owners in opposition to oyster ground leases have addressed issues to the VMRC regarding "navigation, the shift in silt, loss of seagrass, decrease in property value, and the loss of property due to erosion."[98] Protestors are also concerned that the poles and oyster cages will make their properties less attractive to potential buyers.[99] Another concern for waterfront property owners is the possible duration of these leases. Lease assignments for general oyster-planting grounds according to Virginia Code Section 28.2-613 continue for ten years and can be extended for an additional ten years upon request to the commissioner.[100]

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[92] *See, e.g.*, *Oyster Cage Float GD-OF-66-2C*, GO DEEP SHELLFISH AQUA, http://godeepaquaculture.com/wp-content/uploads/2016/02/GD-OF-66-2C-Specification-Sheet.pdf (last visited Nov. 10, 2019) (indicating that the specifications for at least one brand of oyster cage floats are 105.4 cm long and 22.9 cm wide). Riparian property owners near Wade's Gwynn's Island facility have expressed concerns about water navigability, given the size of many floating oyster farms, which can be as large as five football fields, and may pose a hazard to boaters and kayakers. Dietrich, *supra* note 91.

[93] OFF-BOTTOM GEAR TYPES, *supra* note 89, at 1–6; Teagle, *supra* note 3.

[94] *See* OFF-BOTTOM GEAR TYPES, *supra* note 89 (explaining that floating bag systems typically hold 200 bags with a growing capacity of 150 oysters per bag while the long-line systems are strung in parallel or cross-wise); *see also* Dietrich, *supra* note 91 (explaining the hazards posed by oyster cage sites to both boaters and kayakers).

[95] Lang, *Waterfront Property Owners*, *supra* note 44.

[96] *Id.*

[97] *Id.*

[98] Va. Marine Res. Comm'n, Commission Meeting Minutes 18122–23 (July 24, 2018) [hereinafter Commission Meeting Minutes, July 24, 2018], http://www.mrc.virginia.gov/Commission_Minutes/VMRC_final_minutes_07-24-18.pdf.

[99] *Id.*

[100] VA. CODE ANN. § 28.2-613 (LexisNexis, LEXIS through 2019 Reg. Sess. Gen. Assemb.).

b. The Right of Access to the Water Has Been Harmed

The issue of loss in property value is multi-faceted. If having large, unsightly poles, cages, or bags in one's backyard does not deter a potential buyer of a top-dollar waterfront property, the issue of navigability or trespassing likely will.[101] The right that a riparian owner receives "of access to the water, including a right of way to and from the navigable part" is extremely important to the ownership of waterfront property, and the growing amount of oyster cages in the Bay presents a serious threat to this right.[102] The issue of navigation can occur with all types of oyster cage devices, but navigation is typically inhibited by above the ground cages rather than on the bottom cages.[103] For example, in Milford Haven, many property owners opposed the permits because they would pose navigability problems for boaters trying to enter and exit their own waterfront property.[104] One homeowner explained that sailboats would have a "hard time accessing the water right next to their own property."[105] If cages are placed near an inlet or the shoreline, this placement would put boaters at risk when launching off from their own homes.[106] This navigability problem, in essence, would decrease the properties' value because many boaters buy homes on the water for the benefit of launching their boat.[107]

c. Issues of Trespass

With the loss of property value, there have also been issues of trespassing involved.[108] During a VMRC meeting, one property owner protested a permit for 512 oyster floats at Oyster Shell Point in

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[101] *See infra* notes 108–11 and accompanying text.

[102] Lang, *Land in Contact with Water*, *supra* note 76; *see* Lang, *Waterfront Property Owners*, *supra* note 44 (discussing the increase in property value for waterfront homes and the impact of oyster leasing).

[103] *See* HAMPTON CMTY. DEV. DEP'T & VA. MARINE RES. COMM'N, OYSTER GROUND LEASING PUBLIC INFORMATION SESSION 3 (2014) [hereinafter OYSTER LEASING], https://hampton.gov/DocumentCenter/View/6299/Oyster-Ground-Leasing-Public-Information-questions ("Typically, on bottom shelling of leases has not presented navigation issues.").

[104] Brian Hill, *Homeowners Opposed to Oyster Cages in Mathews County*, WTKR NEWS 3 (Sept. 25, 2018, 5:16 PM), https://wtkr.com/2018/09/25/homeowners-opposed-to-oyster-cages-in-matthews-county/.

[105] *Id.*

[106] *See id.* (discussing the navigation concerns of waterfront property owners in regard to cages that will be placed approximately 500 feet from the shoreline).

[107] *Id.*; Sklarz & Miller, *supra* note 53.

[108] *See* Commission Meeting Minutes, July 24, 2018, *supra* note 98, at 17427–28, (discussing applicant's use of a private, non-commercial pier owned by third party restricted to unloading and loading cages).

Northumberland.[109] One issue addressed by the Commission, in light of the property owner's protest, was the use of a private non-commercial pier for the loading and unloading of oyster cages and the cleaning and sorting oysters on the private pier.[110] Despite this valid claim of trespass, the Commission still granted the permit and allowed the oyster company to use the private pier, provided that the use was limited to loading and unloading oyster cages.[111]

The rights of riparian owners have been infringed upon because of issues caused by oyster cages leases, especially above the ground oyster cage devices.[112] The potential loss in property value, inhibited view, navigability issues, and potential trespass all show that riparian owners' rights "to enjoy the natural advantages conferred upon the land by its adjacency to the water," and to "access to the water, including a right of way to and from the navigable part" have likely been limited by the increased amount of leases given in areas near waterfront homes.[113]

5. Advantages for Riparian Owners in Theory, Not Practice

One source of solace for Virginia riparian rights owners is that Virginia Code Sections 28.2-600 to -602 gives specific rights to riparian property owners, which in theory should support the riparian "right to enjoy the natural advantages conferred upon the land by its adjacency to the water."[114] First, Virginia Code Section 28.2-600, allows property owners with riparian rights to lease oyster-planting ground, within their riparian area, "provided that the ground does not encroach into an existing oyster-planting ground lease assigned under Article 2."[115] Second, Virginia Code Section 28.2-601 explains that this right is exclusive to the riparian owner.[116] Therefore, a landowner with riparian property rights gains "head of the line" advantages to these leases, as stipulated by the Virginia Code.[117]

In order for riparian owners to exercise their rights over riparian waters, and in order for nearby owners to have an opportunity to dispute any lease applications, the Virginia Code stipulates that the applicant and the VMRC must notify owners with riparian rights located near the site

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109 *Id.*

110 *Id.*

111 *Id.*

112 Lang, *Waterfront Property Owners*, *supra* note 44.

113 Teagle, *supra* note 3; Lang, *Riparian Property Rights*, *supra* note 56.

114 VA. CODE ANN. § 28.2-600 to -602 (LexisNexis, LEXIS through 2019 Reg. Sess. Gen. Assemb.); Lang, *Riparian Property Rights*, *supra* note 56.

115 § 28.2-600 (LEXIS).

116 § 28.2-601 (LEXIS).

117 *Id.*; § 28.2-618 (LEXIS); Lang, *Riparian Property Rights*, *supra* note 56.

where the applicant seeks a lease.[118] Notice has several benefits. It allows property owners to protest to an application, and also allows the Commission to first attempt "to assist with resolving such objections."[119] If the VMRC cannot resolve the objections, the "matter is then scheduled for a full hearing at a monthly Commission meeting for final action by the Commission."[120] This hearing gives local property owners the opportunity to air their concerns about the application to the VMRC before the Commission makes a decision on whether to grant the application.[121] Property owners or applicants can appeal the VMRC's decision to a local circuit court.[122] On the other hand, the VMRC explains that after sixty days of notice being posted, if no protests are received, the application will be assigned to a surveyor for a field survey.[123] The area will be marked, surveyed, and approved by the Chief Engineering Department at VMRC.[124] Once approval is complete, the Virginia Code requires an additional thirty days to receive protests.[125] If no protests are received, the application can be assigned.[126]

This requirement also gives local engineers and surveyors the opportunity to object to the applicant's lease area, in case of navigational issues.[127] Although the Code gives land-owners the right to notice, and the VMRC's regulations aim to protect this right, the practical use of notice requirements do not always give riparian owners sufficient notice, or in some cases do not give notice at all.[128] Recently, several Commission members commented that the inadequate notice requirements of the VMRC should be "addressed comprehensively by the Virginia General Assembly."[129] Notice requirements in the Virginia Code stipulate that:

> Notice of the application shall be posted by the Commission for not less than 30 days on its website. The Commission shall provide by registered or certified mail written notice of its receipt of the application to (i) the mailing address of the holder of a

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[118] § 28.2-606(A) (LEXIS); *see also* OYSTER LEASING, *supra* note 103 (discussing the importance of notice provisions and their role in permitting property owners to protect their land interests by enabling local engineers and surveyors to object to the applicant's lease area and by protecting oyster-planting applications in the same area).

[119] OYSTER LEASING, *supra* note 103.

[120] *Id.*

[121] *Id.*

[122] § 28.2-219 (LEXIS); OYSTER LEASING, *supra* note 103.

[123] § 28.2-607 (LEXIS); OYSTER LEASING, *supra* note 103.

[124] § 28.2-607 (LEXIS); OYSTER LEASING, *supra* note 103.

[125] § 28.2-606(A), (C) (LEXIS); § 28.2-607 (LEXIS); OYSTER LEASING, *supra* note 103.

[126] § 28.2-607 (LEXIS); OYSTER LEASING, *supra* note 103.

[127] § 28.2-607 (LEXIS); OYSTER LEASING, *supra* note 103.

[128] *See* Mayfield, *Virginia Regulators*, *supra* note 11 (acknowledging that "an inadequate [notice] system" is among the key problems facing oyster leasing).

[129] *Id.*

> current lease *for any oyster planting ground that is contiguous to the ground applied for*, and (ii) the last known address, as shown on the current real estate tax assessment book or records, of the owner of any riparian property located within 200 feet of the ground applied for.[130]

Proper notice gives owners the ability to protest oyster-planting applications and to apply for a lease to the same area.[131] However, the VMRC often enforces notice requirements according to an alternative "adequate" provision in the code, which allows the commission to provide notice to a "governing board" instead of "provid[ing] . . . registered or certified mail" to residents located "within 200 feet of the ground applied for."[132] This alternative provision can be seen in a publication of the steps for how to apply for oyster ground leases: the VMRC places a notice of the application in a local newspaper once a week for four weeks, posts notices of the application in two publicly accessible areas, and posts a notice of the application at the local courthouse.[133] While this alternative provision is technically "adequate," the Commission's strict adherence to this provision can create issues if riparian owners are not able to access those public locations.[134]

Additionally, although the provisions in the Virginia Code are thus stated, the Commission's administrative code has loopholes for avoiding notice.[135] VMRC's regulations have different notification requirements for "bottom ground" aquaculture as opposed to aquaculture that exceeds 12 inches from the bottom.[136] The Virginia Administrative Code "specif[ies] the criteria for shellfish aquaculture structures that may be employed on privately leased shellfish planting ground," and applies, among other requirements, only to any structures that do not exceed a height greater than "12 inches above the bottom substrate."[137] This regulation does not

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[130] § 28.2-606 (LEXIS) (emphasis added).

[131] *See id.* (explaining that notice invites comments on application, which gives owners the opportunity to voice concerns).

[132] *Id.* ("The provision of notice to the governing board of an association for a common interest community . . . shall be deemed adequate to notify all associated unit owners or lot owners.").

[133] OYSTER LEASING, *supra* note 103.

[134] Mayfield, *Virginia Regulators*, *supra* note 11.

[135] *See* § 28.2-606 (LEXIS) (discussing notification requirements that include notifying specific individuals who may be directly affected by the applications); *see also* OYSTER LEASING, *supra* note 103 (discussing VMRC requirements which only requires posting a notice in public places).

[136] *See* OYSTER LEASING, *supra* note 103 (describing notice requirements for *on the bottom* cages and additional permit requirements for *off the bottom* cages); *see also* 4 VA. ADMIN. CODE § 20-1130-30(B) (2007) (describing notice requirements associated with the permit process for *off the bottom* cages).

[137] ADMIN. §§ 20-335-10, 20-335-30(E) (2013).

include any notice requirements for the leaseholders.[138] Thus, an oyster applicant who wants to avoid the notice requirements could decide to use oyster structures that do not exceed a twelve-inch height—creating an issue for riparian owners who have the right of notice under the Virginia Code.[139]

VMRC's regulation for "temporary protective enclosures" for shellfish that exceed twelve inches off of the bottom have rigorous notice requirements that resemble the requirements in the Virginia Code.[140] The crucial factor of this regulation is the high requirements for notice. First, this regulation requires the applicant to include the "names and addresses of all riparian property owners within 500 feet of the area containing the temporary protective enclosures and shall depict the location of their land on a tax map or other suitable map."[141] Second, the applicant's submission to the Commissioner may include acknowledgment forms for riparian property owners to be signed by the riparian owners, including their comments on the application.[142] If the applicant does not include these forms, the "[C]ommissioner or his designee shall notify the adjacent property owners of the pending notification."[143] Within the application that is sent as a notice, the applicant must, among other required information, give (1) the applicant's contact information, (2) detailed information of the location of the proposed area for the lease, (3) size of the lease, and (4) descriptions of the types of oyster planting devices that will be used.[144]

6. Due Process Requirements

In addition to notice, which should be considered and re-evaluated by the General Assembly, those who might protest an application should be made aware of due process rights that the VMRC must recognize. In the Milford Haven case, discussed previously, property owners were upset with the result of the Commission's decision, not just because it was not in their favor, but also because the owners did not feel that they had the right to due process.[145] After the decision, an owner stated, "I regret the fact that we were limited to discussing our future to only three

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138 *See generally* ADMIN. § 20-335-30.
139 *Id.*; VA. CODE § 28.2-607 (LEXIS).
140 ADMIN. § 20-1130-30(A)–(B); VA. CODE § 28.2-606 (LEXIS).
141 ADMIN. § 20-1130-30(B).
142 *Id.*
143 *Id.*
144 *Id.*
145 *See* Teagle, *supra* note 3.

minutes."[146] The owner said the he or she felt "'gagged' by the comment period, adding that he 'did not expect' the outcome that occurred."[147]

This experience could be avoided by a proper explanation and understanding of due process rights at a Commission hearing, as stipulated by Virginia Code Section 28.2-216 to -217.[148] This section of the Code gives those affected by an action or inaction of the Commission the right to demand a hearing.[149] At a hearing, all parties have the right to be heard before the Commission, and all interested parties should be notified of the hearing.[150] All parties should have the opportunity to present their argument.[151] This code section raises the discrepancy in treatment of the Milford Haven owners.[152] The owners only had three minutes to present an oral argument, while the proponents of the application had ten minutes. Three minutes of oral argument significantly limited these owners and did not allow enough time to present their argument. If parties insist that the VMRC recognize their due process rights under the Virginia Code, this time constraint could be avoided in the future, giving both parties an adequate opportunity to present their case.

Additionally, another very important aspect of the Code is that "the rules of evidence shall apply insofar as possible."[153] Currently, Commission hearings do not include the cross-examination of witnesses or follow evidentiary guidelines.[154] Legal counsel should be made aware that the rules of evidence do apply in these hearings. The General Assembly should require the Commission to give an adequate amount of time for both parties to present arguments.[155]

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[146] *Id.*

[147] *Id.*

[148] *See generally* VA. CODE ANN. § 28.2-216 (LexisNexis, LEXIS through 2019 Reg. Sess. Gen. Assemb.) (explaining that all parties shall have the opportunity to speak before the Commission and be notified of hearings).

[149] § 28.2-216 to -217 (LEXIS).

[150] *Id.*

[151] *Id.*

[152] *Compare* § 28.2-216 (LEXIS) (outlining rights of parties in presenting evidence and duties of the Commission to allow for parties' expression of thoughts), *with* Teagle, *supra* note 3 (discussing the Commission hearing and emphasizing the disparate process used by the Commission to hear complaints).

[153] § 28.2-216 (LEXIS). The Code even allows for depositions to be held. *Id.*

[154] *See* Teagle, *supra* note 3 (indicating that the hearing involved only brief oral testimony from attendees and no cross-examination of witnesses).

[155] *See* § 28.2-216 (LEXIS) (lacking a provision that would ensure that both parties receive ample time to present their arguments before the Commission).

B. Public Trust Doctrine Has Been Overlooked

The Commission uses Virginia Code Section 28.2-1205 to decide whether to grant applications for use of state-owned bottomland.[156] Before listing the crucial factors that the Commission should consider while exercising its authority, this section states that the Commission must

> [C]onsider the public and private benefits of the proposed project and shall exercise its authority under this section consistent with the public trust doctrine as defined by the common law of the Commonwealth adopted pursuant to § 1-200 in order to protect and safeguard the public right to the use and enjoyment of the subaqueous lands of the Commonwealth held in trust by it for the benefit of the people as conferred by the public trust doctrine and the Constitution of Virginia.[157]

There is strong evidence that the Commission has not considered the Public Trust Doctrine. The public use and enjoyment of the bottomland is defeated if public use of that land is eliminated. In the Milford Haven case, the VMRC granted a permit for 700 cages "within a 400' x 600' area."[158] This permit would essentially eliminate the public use of one-third of the Haven's navigable waters.[159] These "water column[s]" would create difficulties in navigation and possibly inhibit business for many property owners on the Bay.[160] Additionally, if the navigational issues prove difficult for boaters to enter the Bay, it could negatively impact tourism, an important economic source for the Bay.[161]

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[156] § 28.2-1205 (LEXIS); *see also* VA. CONST. art. XI, § 1 (charging the Commonwealth with the duty to preserve and protect the public interest in "use and enjoyment for recreation of adequate public lands, waters, and other natural resources").

[157] VA. CODE § 28.2-1205 (LEXIS).

[158] Commission Meeting Minutes, Sept. 25, 2018, *supra* note 1, at 18160, 18163 (explaining that 17 people in opposition to the grant were sworn in to speak at the meeting that took place on September 25, 2018).

[159] Peter J. Teagle, *Oyster Cage Proposal Heads to VMRC*, GLOUCESTER-MATHEWS GAZETTE-JOURNAL (Sept. 19, 2018, 3:35 PM), https://www.gazettejournal.net/index.php/news/news_article/oyster_cage_proposal_heads_to_vmrc.

[160] *Id.*

[161] Rachel Swick Mavity, *House to Get Oyster Farming Legislation*, CAPE GAZETTE (June 3, 2013), https://www.capegazette.com/article/house-get-oyster-farming-legislation/47460. As noted in a petition intended to "stop oyster farms from taking over . . . bays and destroying . . . recreational waterways,"

> Oyster farms constrain[] and restrict[] recreational boating and fishing areas that result in a reduction of tourism. This will have a major impact on . . . local businesses that cater to the public ultimately putting them out of business. Landowners and homeowners are equally affected. Save our bays, businesses and homes.

Id.

"Members of the Save The Haven movement built their case around the public trust doctrine of the Code of Virginia . . . [and] laid out the many components of their 'use and enjoyment' that they said would be undermined."[162] The members listed the

> [U]se of the waterway by paddle craft, sailboats, and jet-skis that often operate outside of the channel, effect on property value as a result of a negatively-altered view, loss of potential historical resources in the form of underwater artifacts from the Battle of Cricket Hill, and the driving away of bay-dwelling dolphins who inhabit and travel through Milford Haven.[163]

Additionally, an adjacent property owner and professional yacht captain affected by the cages commented, "[I]n my professional opinion these [the cages and floats] are a hazard to navigation."[164] The General Assembly needs to address and remedy these issues.

C. Lease Prices Threaten Property Values and Create Market Failure

"The Commonwealth of Virginia has a long history of leasing state-owned submerged land for private shellfish culture and recognizes the potential economic and environmental benefits associated with increased shellfish production."[165] Although the Commonwealth has seen the value in leasing the State-owned submerged lands, it has not properly valued the submerged lands. Excluding upfront costs, the rental amount per acre of leased grounds is $1.50 a year.[166] A local news reporter noted that "[i]t may be one of the best bargains Virginia has to offer—$1.50 an acre per year for the right to lease the bottoms of state-owned waterways for growing oysters and clams."[167] This price is outdated, as it was set in 1960 to incentivize oyster farmers to lease acres of bottomland and grow oysters, even though the environment was not suited to it.[168] Now that the Bay has improved and the oyster business is growing rapidly, this incentive is no longer needed. The Bay is filling with oyster cages, creating

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[162] Teagle, *supra* note 3.

[163] *Id.*

[164] *Id.*

[165] 4 VA. ADMIN. CODE § 20-335-10 pmbl. (2015), https://mrc.virginia.gov/regulations/onbottom.shtm.

[166] VA. CODE ANN. § 28.2-612 (LexisNexis, LEXIS through 2019 Reg. Sess. Gen. Assemb.).

[167] Dave Mayfield, *Virginia Bill Would Dramatically Increase Cost of Oyster, Clam Leases*, VIRGINIAN-PILOT (Jan. 15, 2016) [hereinafter Mayfield, *Virginia Bill*], https://pilotonline.com/news/local/environment/article_82bfbfb0-788c-51a6-8d1d-e5ad4eb74688.html.

[168] Brad Rich, *Growing Oysters Virginia Style*, COASTAL REV. ONLINE (Mar. 8, 2016), https://www.coastalreview.org/2016/03/13357/.

navigational problems and issues with owners.[169] Many have attributed this surge in oyster aquaculture to the low prices.[170] Even some in the oyster business believe that the price of the fee should be increased.[171] Not only do these prices have a negative effect on nearby waterfront property values, but they also have an effect on the market.[172] Setting a price defeats a competitive marketplace, and also decreases incentives for improvement and progress.[173]

To solve this issue, State Senator Bill DeSteph proposed a bill to raise the lease rate to "$5,000 an acre per year for any planting grounds that are within a thousand feet of residential property."[174] The bill was proposed in response to property owners' complaints of the increased amount of oyster cages in the Bay and conflicts of riparian rights.[175] Unsurprisingly, the price increase was strongly opposed by the oyster industry.[176] Although this bill failed, it does bring to light the issue of the antiquated price and the need for reform.[177]

III. SOLUTION TO THE DILEMMA

Solutions to the issues discussed in this Note include: (1) solutions for issues of riparian rights, (2) solutions for issues affecting the public trust doctrine, (3) solutions for establishing proper notice requirements, and (4) solutions for creating a free market.

A. Riparian Rights

Because the riparian rights of owners on the Bay have been damaged, homeowners are concerned that their property values are in jeopardy as

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169 *See* discussion *supra* Section II.A.4.b.

170 Mayfield, *Virginia Bill*, *supra* note 167.

171 *Id.*

172 *Id.*

173 *See* Jonathan H. Adler, *Conservation Through Collusion: Antitrust as an Obstacle to Marine Resource Conservation*, 61 WASH. & LEE L. REV. 3, 20 (2004) (discussing the impacts of industry price-setting on free market and innovations and improvements).

174 Mayfield, *Virginia Bill*, *supra* note 167.

175 *Id.*; *Bill Withdrawn Raising Leases on Oysters*, WESTMORELAND NEWS (Feb. 3, 2016, 11:49 AM), http://www.westmorelandnews.net/bill-withdrawn-raising-leases-oysters/.

176 Mayfield, *Virginia Bill*, *supra* note 167; *Bill Withdrawn Raising Leases on Oysters*, *supra* note 175.

177 *See* Travis Fain, *$5,000-Per-Acre Oyster Lease Bill to Die*, DAILY PRESS (Jan. 27, 2016), https://www.dailypress.com/government/dp-nws-ga-oyster-lease-fee-increase-20160127-8-story.html (discussing Senator DeSteph's statement that the primary purpose of the bill's proposal was to spark discussion on reform).

well.[178] The loss of the right to a scenic view, the issues of navigability, and trespass might be major concerns for potential buyers. Therefore, in order to encourage economic growth in Virginia, the legislative work group or the VMRC need to take action.

One consideration that may remedy the loss of the right to a scenic view for riparian owners[179] would be to require applicants for "above the water" cages to choose locations 500 feet away from the shoreline.[180] In 2016, a work group supervised by the VMRC met to discuss the issues on the Lynnhaven River.[181] They focused their efforts on one major issue: oyster cages.[182] Members of the group "reached a loose consensus on one recommendation: that no new cages be placed closer than 150 feet from shore without waterfront property owners' consent."[183] After this meeting, one member of the group "who oversees the leasing program" checked "15 Lynnhaven leases" with a surveyor "and found at least one violation of the rules on each."[184] Although the group did not reach consensus on this plan, this new requirement would greatly help the loss of riparian owners' right to a view. If "above the water" oyster cages could be placed in areas of low boat traffic and away from waterfront homes, the existing circumstances would greatly improve.

With the number of oyster cages in the Bay on the rise, riparian owners' right "of access to the water"[185] is seriously threatened.[186] Although "above the water cages" are the most invasive type of oyster structure, navigation issues can occur with all types of oyster cage devices.[187] For property owners in Milford Haven, their main concern was waterway access to and from their homes.[188] Because cages were placed

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[178] *See* Lang, *Waterfront Property Owners*, *supra* note 44 ("'Off the bottom' oyster aquaculture, if not carefully controlled, interferes with riparian property rights and reduces the value of waterfront property.").

[179] *See* discussion *supra* Section II.A.4.a.

[180] Hill, *supra* note 104.

[181] Dave Mayfield, *Lynnhaven Group Passes Along Proposals to Ease Oyster Conflicts*, VIRGINIAN-PILOT (July 29, 2016), https://www.pilotonline.com/news/environment/article_f83a1f5e-5c73-5b45-a75f-5877817b2d70.html; Lynnhaven Oyster Workgroup Presentation, *supra* note 35.

[182] Dave Mayfield, *Lynnhaven Oyster Group Still Grapples for Compromise Over Leases*, VIRGINIAN-PILOT (July 1, 2016), https://www.pilotonline.com/news/environment/article_1d89dbfd-5b1d-501c-be47-66a5bf37ba12.html.

[183] *Id.*

[184] *Id.*

[185] *See* discussion *supra* Section II.A.4.b.

[186] *See* Lynnhaven Oyster Workgroup Presentation, *supra* note 35 (describing the conflicts regarding leased oyster grounds).

[187] *See* OYSTER LEASING, *supra* note 103 (noting that on the bottom cages usually do not pose a navigation issue but requiring all oyster ground leases to be marked to reduce potential navigation problems).

[188] *See* Hill, *supra* note 104 (discussing the placement of oyster cages near the shoreline and effect on navigation).

near the shoreline, and 700 cages were placed in water columns near an inlet, the placement of the cages severely limited access to and from their homes.[189] If cages are placed near an inlet or the shoreline, then boaters are at risk when launching off from their homes.[190] In order to solve this issue, in addition to a recommendation of moving oyster cages 500 feet away from the shoreline, the legislative work group and VMRS should require that cages be dispersed in different areas, rather than allowing a large concentration of cages to be placed in a small area. This high concentration of cages in one small area creates issues for riparian owners and for the public.

B. Public Trust Doctrine

Because public use and enjoyment of the bottomland is defeated when public use of that land is eliminated, water columns of oyster cages are problematic.[191] The permit for 700 cages "within a 400' x 600' area" in the Milford Haven[192] eliminated the public use of one-third of the Haven's navigable waters.[193] The VMRC needs to consider public use and avoid creating large water columns that obstruct navigation.

One solution is for the VMRC to require that the space between the columns of cages be made wider, and less concentrated in one area, to avoid complete obstruction of waterways. There should also be strong considerations made for the placement of cages in areas that would least inhibit public use. If the notice requirement process is followed, the surveyors and engineers approving applicant's placement for a lease should also consider whether the placement would inhibit dredging in areas. The VMRC could also require that a minimum number of cages be placed in the same area, to avoid complete inaccessibility to the public. Additionally, the VMRC should regulate current leases to be sure that they are currently in use, and if not, they should be removed.

C. Notice Requirements and Due Process

In addition to suggesting changes on the placement of oyster cages, the Lynnhaven work group focused on the notice requirements that should be in place for leaseholders to "put down new cages."[194] Though the group sent out letters to leaseholders to remind them of the regulations

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189 *Id.*
190 *Id.*
191 *See* discussion *supra* Section II.B.
192 Commission Meeting Minutes, Sept. 25, 2018, *supra* note 1, at 18160.
193 Teagle, *supra* note 159.
194 Mayfield, *supra* note 182.

and that the "state Marine Police could issue citations for violations," the work group mentioned that any changes to the Virginia Code must be done by the General Assembly.[195]

A solution that should be considered by the work group convened by the General Assembly is that the notice requirements for the "above the water" cages as stipulated by the administrative code[196] should also be imposed on cages placed at twelve inches or less from the bottomland. This solution would ensure proper notice to the public and would also give engineers and surveyors the opportunity to object to placing cages in problematic areas.

Last, the General Assembly should enforce judicial proceedings for commission meetings that give adequate and proportional time for each party to present an oral argument. The commission should make parties aware of the Rules of Evidence that will apply to the hearing, in order to preserve due process rights.

D. Free Market

To solve the issue of the statute-set prices of the leases which inhibit a free market, the General Assembly should eliminate a set price altogether and operate on a free market system. Practically, this system could be a bidding process, where potential buyers bid on acres of land at an auction. Additionally, the VMRC should advertise these leases to the public and give the public information about the market in general.

CONCLUSION

With the rapid growth of the aquaculture industry in Virginia, many are experiencing the effects of a booming industry. Although the growth of the industry and the improvement of the Bay is cause for celebration, the sharp conflicts arising between the industry and property owners are not to be treated lightly. State officials have recognized the need for change, and the possibilities of improvement are endless. As many other Eastern States begin to follow Virginia's example, the need for reform has increased.

First, this Note discussed the benefits of oyster farming for Chesapeake Bay, the VMRC's role as regulatory authority for the Bay, and the background of the riparian issue. Second, this Note addressed the negative legal consequences that oyster farming has had on riparian property owners, the pubic, and the market in Virginia. Lastly, this Note discussed solutions and recommendations to these issues for the current

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[195] *Id.*; Mayfield, *Virginia Regulators*, *supra* note 11.

[196] VA. ADMIN. CODE § 20-335-30(A)–(G) (2013).

work group to address. This Author is hopeful that the work group assembled will address these issues and come to a conclusion that will solve the issue for all parties involved.

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AVOIDING DESIGNER BABIES BY REGULATING MITOCHONDRIAL REPLACEMENT THERAPY UNDER A CHILD-ORIENTED POLICY FRAMEWORK

INTRODUCTION

Advances in genetic modification as an answer to hereditary diseases are fast outpacing regulatory mechanisms.[1] Doctors and scientists are exploring methods of altering the genetic qualities of children through germline modification.[2] Germline modification, or gene editing, to create designer babies has been condemned all over the world because of the unknown effects that such procedures may have not just on the particular babies or families involved, but more so the species as a whole.[3] On April 6, 2016, the first child conceived by three biological parents was born through the process of mitochondrial replacement therapy ("MRT").[4] The medical team responsible for the operation flew to Mexico for the express purpose of avoiding restrictions on the treatment in the United States.[5] After the operation in Mexico, at least four other women have become pregnant or given birth to babies through MRT conducted in Ukraine.[6] The clinics in Ukraine allow MRT as an answer even to cases of infertility.[7] It is noteworthy that the Ukrainian clinics actively market

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[1] Press Release, Center for Genetics and Society, FDA Should Preserve International Consensus Against Human Germline Modifications (Feb. 19, 2014) (on file with Regent University Law Review).

[2] *See id.* (discussing the Food and Drug Administration ("FDA") deliberations, which notably disregarded ethical and social issues, that authorized clinical trials for germline modification).

[3] Julie Steenhuysen, *Experts Call for Halt to Gene Editing That Results in "Designer Babies,"* REUTERS (Mar. 13, 2019, 2:04 PM), https://www.reuters.com/article/us-health-geneediting-embryos/experts-call-for-halt-to-gene-editing-that-results-in-designer-babies-idUSKCN1QU2HJ ("Top scientists and ethicists from seven countries . . . called for a global moratorium on gene editing of human eggs, sperm or embryos that would result in genetically-altered babies after a rogue Chinese researcher last year announced the birth of the world's first gene-edited twins.").

[4] Jessica Hamzelou, *Exclusive: World's First Baby Born with New "3 Parent" Technique*, NEW SCIENTIST (Sept. 27, 2016), https://www.newscientist.com/article/2107219-exclusive-worlds-first-baby-born-with-new-3-parent-technique/.

[5] *Id.*

[6] Rob Stein, *Her Son Is One of the Few Children to Have 3 Parents' DNA*, NPR (June 6, 2018, 5:47 PM) [hereinafter Stein, *Her Son Is One*], https://www.npr.org/sections/health-shots/2018/06/06/616334508/her-son-is-one-of-the-few-children-to-have-3-parents.

[7] Rob Stein, *Clinic Claims Success in Making Babies with 3 Parents' DNA*¸ NPR (June 6, 2018, 5:11 AM) [hereinafter Stein, *Clinic Claims Success*], https://www.npr.org/sections/health-shots/2018/06/06/615909572/inside-the-ukrainian-clinic-making-3-parent-babies-for-women-who-are-infertile.

MRT to American citizens—the clinics have gone so far as to partner with the New York-based clinic responsible for the operation in Mexico in 2016.[8] Britain has joined the trend by permitting supervised MRT trials in narrowly limited cases.[9] On December 15, 2016, the United Kingdom allowed British clinics to use MRT to treat patients at risk of mitochondrial disease.[10] As of February 1, 2018, two women were approved for MRT treatment, which means the first United Kingdom babies to have three biological parents may be born this year.[11] Other countries like Singapore and Australia are considering following Britain's example by adopting policies permitting MRT.[12]

Professor Naomi Cahn, an expert in reproductive technology, and Professor Katherine Drabiak, an expert in bioethics and public health, voiceed well-founded concerns that authorizing the use of MRT may lead to a slippery slope of permitting designer babies and children-focused genetic experimentation.[13] These concerns are not without merit because

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[8] Stein, *Her Son is One*, *supra* note 6.

[9] *See* Ian Sample, *UK Doctors Select First Women to Have "Three-Person Babies,"* GUARDIAN (Feb. 1, 2018, 1:48 PM), https://www.theguardian.com/science/2018/feb/01/permission-given-to-create-britains-first-three-person-babies (discussing how doctors at Britain's Newcastle Fertility Centre, under the supervision of Professor Mary Herbert, have been authorized to use MRT to treat two women likely to transmit serious genetic mutations to their children); Stein, *Her Son Is One*, *supra* note 6 ("Britain has just started letting doctors try [MRT] very carefully, one baby at a time, but only to see if this might be a safe way to avoid the genetic disorders.").

[10] Gretchen Vogel, *United Kingdom Gives Green Light for Mitochondrial Replacement Technique*, SCIENCE (Dec. 15, 2016, 11:30 AM), http://www.sciencemag.org/news/2016/12/united-kingdom-gives-green-light-mitochondrial-replacement-technique.

[11] Kate Sheridan, *Three-Parent Babies Permitted in the U.K., Second Country to Allow Controversial Procedure*, NEWSWEEK (Feb. 1, 2018, 4:07 PM) (citing Sample, *supra* note 9), https://www.newsweek.com/three-parent-babies-uk-second-country-controversial-procedure-797679. In the interest of protecting patient confidentiality, the details regarding these babies' births have not been released by Newcastle Upon Tyne Hospitals NHS Foundation Trust. Jessica Hamzelou, *First UK Three-Parent Babies Could Be Born This Year*, NEWSCIENTIST (Feb. 2, 2018), https://www.newscientist.com/article/2160120-first-uk-three-parent-babies-could-be-born-this-year/#ixzz624BVtPAs.

[12] *See* Lin Yangchen, *"Three-Parent" Baby to Avoid Diseases?*, STRAITS TIMES (July 7, 2016, 5:00 AM), https://www.straitstimes.com/singapore/three-parent-baby-to-avoid-diseases (discussing the cautious approach Singapore's Bioethics Advisory Committee ("BAC") has taken in deciding whether to recommend the introduction of MRT); *see also* Sarah Pritchard, *Australian Senate Endorses Mitochondrial Donation*, BIONEWS (July 2, 2018), https://www.bionews.org.uk/page_136808 (announcing the Australian Senate's endorsement of MRT technique despite existence of two laws currently prohibiting MRT in the country).

[13] *See* Katherine Drabiak, *Emerging Governance of Mitochondrial Replacement Therapy: Assessing Coherence Between Scientific Evidence and Policy Outcomes*, 20 DEPAUL J. HEALTH CARE L. 1, 58–59 (2018) ("Rather than prioritizing scientific ingenuity and economic profit, the U.S. and other nations have a duty to enact measures that discourage

human clinical trials involving gene editing have not stopped with MRT. In November 2018, the first genetically edited babies were born in China—a set of twin girls whose genes were altered to make them resistant to H.I.V. infection.[14] In August 2018, two American companies conducted gene editing trials in Germany for the purpose of modifying a gene and attempting to mitigate the effects of sickle cell disease.[15] While the trials involved adults, the experiment is relevant to this research because clinical trials based in the United States were supposed to have run concurrent with the German trials, had the FDA not placed the United States trials on hold.[16]

MRT was developed primarily to prevent "neurological disorders caused by mutant mitochondrial DNA (mtDNA) by replacing [the defective cells] with healthy mtDNA extracted from donated eggs."[17] The therapy is rising in popularity because of its ability to address frequently occurring genetic defects resulting from mtDNA mutations,[18] its potential to combat infertility issues resulting from mtDNA mutations,[19] its

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risky experimentation on future generations through MRT and other forms of germline modifications. I affirm the proposition that future generations have a right to an 'untampered genome.'"); Stein, *Her Son Is One*, *supra* note 6 ("'There are fears that we are moving down the slippery slope towards designer babies,' says Naomi Cahn, a professor of law at the George Washington University School of Law, referring to parents picking and choosing the traits of their children."). The right to an untampered genome refers to an individual's as well as society's right to the protection of the integrity of the human genome. *See* Norberto Nuno Gomes de Andrade, *Human Genetic Manipulation and the Right to Identity: The Contradictions of Human Rights Law in Regulating the Human Genome*, 7 SCRIPTED 429, 444 (2010) ("Bearing in mind the alleged right to an untampered human genome, the recognition of a collective right to the integrity of the human genome belonging to the human species immediately raises the problem of defining humanity as a subject of law.").

[14] Gina Kolata, Sui-Lee Wee & Pam Belluck, *Chinese Scientist Claims to Use Crispr to Make First Genetically Edited Babies*, N.Y. TIMES (Nov. 26, 2018), https://www.nytimes.com/2018/11/26/health/gene-editing-babies-china.html.

[15] Catherine Offord, *US Companies Launch CRISPR Clinical Trial*, SCIENTIST (Sept. 3, 2018), https://www.the-scientist.com/news-opinion/us-companies-launch-crispr-clinical-trial-64746.

[16] Rich Haridy, *FDA Hits Pause on One of the First US Human Clinical Trials to Use CRISPR*, NEW ATLAS (May 31, 2018), https://newatlas.com/us-crispr-human-trial-hold-fda/54862/.

[17] Bob Zhao, *Mitochondrial Replacement Therapy and the Regulation of Reproductive Genetic Technologies in the United States*, 15 DUKE L. & TECH. REV. 121, 122 (2017).

[18] *See* Jill Neimark, *The Mitochondrial Minefield of Three-Parent Babies*, UNDARK (Dec. 23, 2016), https://undark.org/article/three-parent-babies-battle-mitochondria/ (discussing the rapid spread and acceptance of the technique, including the U.K. Human Fertilization and Embryology Authority's official approval of the technique).

[19] Amy B. Leiser, Note, *Parentage Disputes in the Age of Mitochondrial Replacement Therapy*, 104 GEO. L.J. 413, 417–18, 420 (2016).

availability to address infertility resulting from other causes,[20] and its likelihood of affording same-sex couples the chance to become genetic parents to the same child.[21] Despite potentially laudable therapeutic objectives, MRT is fraught with concerns ranging from children's rights and parental rights disputes to long-term genetic consequences and health effects.[22] At present, there are no laws regulating MRT in the United States, except for an appropriations measure passed by Congress prohibiting germline modifications in general.[23] Given the absence of policy, the closest body of law that may regulate the relationship between

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[20] NAT'L ACADS. OF SCI., ENG'G, & MED., MITOCHONDRIAL REPLACEMENT TECHNIQUES: ETHICAL, SOCIAL, AND POLICY CONSIDERATIONS 7 (Anne Claiborne et al. eds., 2016) [hereinafter NAS REPORT]; Marc Walker, *Three Parent Baby Born to "Infertile" Woman Using Controversial New IVF Designed to Tackle Diseases*, MIRROR (Jan. 18, 2017, 9:14 AM), https://www.mirror.co.uk/news/world-news/three-parent-baby-born-infertile-9642855.

[21] Giulia Cavaliere & César Palacios-González, *Lesbian Motherhood and Mitochondrial Replacement Techniques: Reproductive Freedom and Genetic Kinship*, 44 J. MED. ETHICS 835, 835–42 (2018) (arguing that MRT should be available to same-sex couples without regard to mitochondrial disease risks).

[22] *See* Paula Amato et al., *Three-Parent In Vitro Fertilization: Gene Replacement for the Prevention of Inherited Mitochondrial Diseases*, 101 FERTILITY & STERILITY 31, 34 (2014) (raising concerns that negative health consequences may manifest only in future generations who inherit the modified genes); Françoise Baylis, *The Ethics of Creating Children with Three Genetic Parents,* 26 REPROD. BIOMEDICINE ONLINE 531, 531, 534 (2013) (discussing a child's rights to an unmanipulated genetic pool and further noting potential confusion in parental rights because MRT results in a child having three biological parents, namely "a man who contributes nuclear DNA, a woman who contributes nuclear DNA, and a woman who contributes healthy mtDNA"); Mirko Daniel Garasic & Daniel Sperling, *Mitochondrial Replacement Therapy and Parenthood*, 26 GLOBAL BIOETHICS 198, 202–03 (2015) (indicating a child's potential interest in the identity of the mitochondrial donor because of the effect that mtDNA has on a child's identity and suggesting that MRT may affect the health of the surrogate and the child as there are no "sufficient samples from cases evolved over time," which is "particularly important as the modification to the germ-line is structural and irreversible"); Lynne Marie Kohm, *A Hitchhiker's Guide to ART: Implementing Self-Governed Personally Responsible Decision-Making in the Context of Artificial Reproductive Technology,* 39 CAP. U.L. REV. 413, 415, 429–30, 432–33, 439 (2011) (discussing an instance in which a child's best interests were prioritized and suggesting the need to protect those interests in issues arising from the use of artificial reproduction); Leiser, *supra* note 19, at 422 (discussing the need to redefine legal parentage beyond biology, marriage, and adoption); Radhika Viswanathan, *3 Biological Parents, 1 Child, and an International Controversy*, VOX, https://www.vox.com/2018/7/24/17596354/mitochondrial-replacement-therapy-three-parent-baby-controversy (last updated July 28, 2018, 10:00 AM) ("[S]ome scientists believe that [MRT] simply needs more research and proper regulation to become commonplace, perhaps even an IVF option for lesbian couples who want to have children genetically related to both of them.").

[23] Angela Chen, *If Someone Wants to Create Gene-Edited Babies, Who Would Stop Them?: The Legal Framework Around Gene-Editing Babies Is Murky at Best*, VERGE (Nov. 26, 2018, 3:00 PM), https://www.theverge.com/2018/11/26/18112970/crispr-china-babies-embryos-genetic-engineering-bioethics-policy; Viswanathan, *supra* note 22.

parents and children who have undergone MRT is artificial reproductive technology ("ART") law.[24]

This Note addresses concerns that authorizing MRT practice will open the floodgates to a host of germline modification practices and gene editing technology and advocates for preemptive regulation to avoid such a snowball effect. Part I discusses the background science and history of MRT, including current regulation in light of the rights and interests of parents, donors, children, and other descendants. Part II examines and analyzes the various ART approaches—parent-centric, child-focused, and foreign jurisdiction approaches—with an eye toward emerging global trends. Part III gives a rationale for either imposition of strict sanctions against clinics and citizens who practice MRT or for the adoption of uniform legislation to ensure that only the highest and best use of MRT—the protection of the child—is applied going forward. Global recognition of MRT will not spiral downward towards circumvention of germline modification and designer baby prohibitions if the United States enacts strictly construed regulatory policies narrowly focused on the child's best interest.

I. BACKGROUND

Mitochondrial replacement therapy ("MRT") is a technique developed to prevent neurological disorders caused by mtDNA.[25] The therapy is currently not allowed in the United States because it deals with germline modification, which can implicate the welfare not just of the intended child but of future generations as well.[26]

A. Background Science on MRT

MRT may be performed through two processes: maternal spindle transfer or pronuclear transfer.[27] Maternal spindle transfer involves removing nuclear DNA from a target egg's defective mtDNA and placing it within the healthy mtDNA of a donated egg, the nucleus of which has previously been removed and discarded.[28] In this Note, the term "target

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[24] *See infra* notes 58–76 and accompanying text.

[25] Daniel Green, Note, *Assessing Parental Rights for Children with Genetic Material from Three Parents*, 19 MINN. J.L. SCI. & TECH. 251, 256–57 (2018); Zhao, *supra* note 17, at 122.

[26] Viswanathan, *supra* note 22.

[27] Green, *supra* note 25, at 257.

[28] Amato et al., *supra* note 22, at 32.

egg" refers to the intending parent's egg.[29] The resulting fused egg is then fertilized by the father's or a donor's sperm.[30] On the other hand, pronuclear transfer involves fertilization of the target egg followed by its destruction in order to transfer its nucleus to the donated egg's healthy mtDNA.[31] Under pronuclear transfer, an original embryo is first formed and destroyed before the development of a second healthy embryo, which is then carried to full term.[32]

Even though mitochondrial disease is said to be rare—roughly one out of 200 people is born with mtDNA mutations, but only one in 5,000 to 10,000 develops mitochondrial diseases—MRT has attracted much interest.[33] One reason is because genetic diseases associated with mtDNA mutations may be quite severe and potentially affect critical organs such as the brain, heart, liver, and kidneys.[34] Ailments resulting from mtDNA mutations may be slight, such as neuromuscular disorders; serious, such as diabetes and neurodegenerative disease; or even deadly, such as cardiopulmonary failure.[35] Further, the absence of effective treatments for mitochondrial diseases leaves persons born with mtDNA mutations reliant on treatments that only "alleviate symptoms and delay disease progression."[36] Professor Drabiak points out that despite the grave effects of mitochondrial disease, genetic mutations "will not result in dysfunction unless the percent of mutant mitochondria reaches a particular threshold."[37] Interestingly, most instances of mitochondrial disease result either from uninherited DNA mutations or from nDNA mutations, both of which are not addressed by MRT accessibility.[38]

The therapy's main purpose should be the prevention of genetic disorders, but MRT is similarly attractive because of its potential as an

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[29] *See infra* Part III.B (defining "target egg" more specifically to only cover eggs carrying mtDNA indicating that the child may be at risk of developing mitochondrial diseases).

[30] Green, *supra* note 25, at 255; Leiser, *supra* note 19, at 420.

[31] NAS REPORT, *supra* note 20, at 21.

[32] *See id.* (discussing how two eggs are fertilized but only one fertilized egg fully develops because the fertilized target egg is destroyed once the nucleus is removed).

[33] *UMDF Position & Clinical Status of Mitochondrial Replacement Therapy to Prevent Transmission of mtDNA Diseases*, UNITED MITOCHONDRIAL DISEASE FOUND. (Nov. 2017), http://www.umdf.org/mitochondrial-replacement-therapy/; Neimark, *supra* note 18.

[34] Judith Daar, *Multi-Party Parenting in Genetics and Law: A View from Succession*, 49 FAM. L.Q. 71, 73 (2015); Green, *supra* note 25, at 251–52.

[35] Daar, *supra* note 34, at 73; Green, *supra* note 25, at 256.

[36] Leiser, *supra* note 19, at 417–18.

[37] Drabiak, *supra* note 13, at 5.

[38] *Id.* at 6–7.

infertility treatment.[39] In Britain, permitted uses of MRT are limited to the treatment of mtDNA mutations in order to prevent mitochondrial diseases.[40] But in Ukraine, clinics offer their services even if the only purpose of the therapy is to treat infertility.[41]

Despite its laudable goals, MRT approval has met constant resistance in the United States.[42] The pushback may partly be because of past infertility research using cytoplasm injections (including mitochondria) that led to the birth of children with disorders.[43] Another reason may be embryo abortion issues raised against MRT through pronuclear transfer and against destruction of unused fertilized eggs through maternal spindle transfer.[44] These issues notwithstanding, the potential of American children being conceived through MRT is a reality because Americans are not prohibited from accessing treatment available in countries that have authorized MRT use.[45]

B. Background Legal Issues

In the event that MRT is introduced in the United States, there would be sparse regulation, apart from the appropriations proviso introduced by Congress in 2016.[46] When Congress passed the Consolidated

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[39] *Id.* at 4 ("Notably, FDA discussions have not only considered MRT as a potential investigational method for treating mtDNA disease, but also as an option for treating infertility.").

[40] Stein, *Her Son Is One, supra* note 6; Walker, *supra* note 20.

[41] Stein, *Clinic Claims Success*, *supra* note 7; Walker, *supra* note 20.

[42] *See infra* Part I.B.

[43] Rosa J. Castro, *Mitochondrial Replacement Therapy: The UK and US Regulatory Landscapes*, 3 J.L. & BIOSCIENCES 726, 730–31 (2016).

[44] *See* I. Glenn Cohen et al., *Transatlantic Lessons in Regulation of Mitochondrial Replacement Therapy*, SCI., Apr. 10, 2015, at 178, 180, https://science.sciencemag.org/content/348/6231/178/tab-pdf (noting how forms of MRT that involve the destruction of embryos "will be embroiled in the prolife/prochoice divide"); Polly Toynbee, *This Isn't About Three-Parent Babies. It's About Saving Families Needless Misery*, GUARDIAN (Feb. 3, 2015, 1:00 PM), https://www.theguardian.com/commentisfree/2015/feb/03/three-parent-babies-families-religious-mps-vote-mitochondrial-replacement (noting Catholic opposition to MRT because "[it] means destroying embryos which, they say, 'should be respected and protected from the moment of conception'").

[45] *See* Drabiak, *supra* note 13, at 57 ("Restrictions [on MRT] in some countries have led to strategic jurisdictional forum shopping . . . ."); Emily Mullin, *Patient Advocates and Scientists Launch Push to Lift Ban on "Three-Parent IVF,"* STAT (Apr. 16, 2019), https://www.statnews.com/2019/04/16/mitochondrial-replacement-three-parent-ivf-ban/ ("Americans already seem willing to go outside the U.S. to get the [MRT] procedure."); Stein, *Her Son Is One*, *supra* note 6 (discussing how Ukraine is directly advertising its MRT services to American citizens).

[46] Drabiak, *supra* note 13, at 3; Viswanathan, *supra* note 22.

Appropriations Act of 2016,[47] it included a rider that prohibited germline modifications, which is a process that broadly covers any "genetic engineering on eggs, sperm, or early embryos" that could be "passed down beyond a single generation."[48] The alteration of eggs can be said to be germline modification covered under the Act.[49] Professor Cahn astutely observes, however, that only the use of federal funds for research involving gene-editing embryos is prohibited, and the non-federally funded practice of gene-editing embryos is neither prohibited nor regulated.[50]

Other countries, such as Britain, Canada, and Singapore, have dedicated agencies to oversee ART research and trials.[51] The United States, however, has no dedicated agency overseeing research in and licensing of ART in general and MRT in particular.[52] Two potential agencies for MRT oversight are the FDA and the National Institutes of Health ("NIH").[53] At present, the FDA is the regulatory agency overseeing MRT and gene-editing trials in the United States because the agency broadened its description of the term "drug" to justify exercising jurisdiction over MRT regulation.[54] The FDA's oversight is limited, however, to assessing the safety and efficacy of MRT because the agency does not inquire into MRT's effects on the family's home environment or on the child post-birth.[55] By contrast, the NIH's contemplation of the term "health" allows a deeper inquiry into a child's quality of life because physical health is only one factor in a three-part conception of health, with

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47 Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015).

48 Viswanathan, *supra* note 22; § 749, 129 Stat. at 2283.

49 Viswanathan, *supra* note 22; § 749, 129 Stat. at 2283.

50 Chen, *supra* note 23.

51 *See* HEALTH CAN., GUIDANCE DOCUMENT: INTERPRETATION OF THE PROPOSED REGULATIONS UNDER THE ASSISTED HUMAN REPRODUCTION ACT 20 (2018) (designating inspectors from Health Canada "for the purpose of the administration and enforcement of the [Assisted Human Reproduction] Act"); Drabiak, *supra* note 13, at 14 (identifying Britain's Human Fertilisation and Embryology Authority (HFEA) as the agency responsible for overseeing reproductive technologies and licensing of fertility clinics); Yangchen, *supra* note 12 (recognizing the BAC's administrative mandate to study MRT development and potential regulation in Singapore).

52 Zhao, *supra* note 17, at 126.

53 *Id.* (stating that the "only source of federal oversight" comes from the NIH and the FDA because the FDA has asserted jurisdiction over MRT while the NIH considers the "'social and ethical implications' of [MRT]").

54 *Id.* at 129–30.

55 *See* NAS REPORT, *supra* note 20, at 68 (recommending FDA Institutional Review Board oversight, which would entail assessment of risks, benefits, and informed consent); *see also* Zhao, *supra* note 17, at 130 (failing to discuss any FDA mandate in family relations and child wellness post-therapy, provided any experimental trials are approved, with the exception of FDA oversight over the child's health to assess the effectiveness of treatments).

mental health and social well-being comprising the other two factors.[56] Unfortunately, the NIH's present mandate is limited to technologies already known in the 1980s, and it has declined to review proposals involving gamete or embryo modification.[57]

II. LEGAL APPROACHES

While MRT regulation as a gene-editing and germline modification technique is sparse, MRT regulation as a new form of ART may be present through the state-specific treatment of ART cases.[58] Federal and state legislatures have slowly adopted laws concerning parental rights and children's rights "in the context of ART" because the issue is fraught with politically controversial issues.[59] MRT discussions are likewise framed with religious,[60] moral,[61] medical,[62] social,[63] and

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[56] *See* Norman Sartorius, *The Meaning of Health and Its Promotion*, 47 CROATIAN MED. J. 662, 662 (2006) (recognizing the World Health Organization's definition of health as the state of "complete physical, mental and social well-being"); *see also* NAS REPORT, *supra* note 20, at 66 (recommending NIH Institutional Biosafety Committee (IBC) oversight of MRT research); NIEHS Institutional Biosafety Committee, *Charter*, NAT'L INST. OF ENVTL. HEALTH SCI., http://www.niehs.nih.gov/about/assets/docs/ibc_charter_niehs_508.pdf [hereinafter *Charter*] (acknowledging the IBC's broad mandate to "initiate reviews of biosafety issues of particular interest or concern to the Institute and the surrounding community").

[57] Zhao, *supra* note 17, at 126.

[58] *See* Drabiak, *supra* note 13, at 3 (noting the absence of regulations and prohibitions for MRT in the U.S.); Viswanathan, *supra* note 22 (discussing the limited prohibition of federally-funded MRT research); Catherine Weiner, *Mitochondrial Transfer: The Making of Three-parent Babies*, HARV. U. GRADUATE SCH. OF ARTS AND SCI. (Aug. 22, 2018), http://sitn.hms.harvard.edu/flash/2018/mitochondrial-transfer-making-three-parent-babies/ (treating MRT as one form of assisted reproductive technology); Zhao, *supra* note 17, at 26 ("Various aspects of reproductive research are covered by certain state laws.").

[59] Leiser, *supra* note 19, at 422–23.

[60] *See* Castro, *supra* note 43, at 731 (explaining that human embryo research is tied together with abortion discussions); *see also* Cohen et al., *supra* note 44, at 180 (arguing that the embryo destruction involved in MRT means that "approval in the United States will be embroiled in the prolife/prochoice divide"); Toynbee, *supra* note 44 (discussing Catholic opposition to MRT because it could involve the destruction of embryos). These concerns are valid because life begins at the moment of fertilization, and thus life is terminated when unused fertilized eggs are destroyed.

[61] *See* Baylis, *supra* note 22, at 534 (discussing ethical issues about allocating limited research resources to a therapy that will benefit only a few who have other alternatives available to them); *see also* Castro, *supra* note 43, at 732–33 (discussing ethical concerns about genetic modification for genetic engineering or germline modification).

[62] *See* Baylis, *supra* note 22, at 532–33 (discussing health risks to egg providers, such as respiratory difficulty, organ damage, decreased fertility, infertility, hemorrhaging, and cancer as well as unknown health risks to the conceived child and future generations).

[63] *See* Garasic & Sperling, *supra* note 22, at 201 (taking issue with MRT opponents' criticism of the therapy, which is based on a desire to preserve traditional values of reproduction, family life, and parenthood); *see also* Castro, *supra* note 43, at 734 (touching

legal[64] disagreement affecting the possibility of its approval. The lack of a consolidated approach to address the various parental and children's rights issues arising from ART, coupled with the unique genetic manipulation aspect of MRT, makes ART jurisprudence and state law provisions insufficient to address MRT concerns.[65]

To illustrate, Arizona prohibits embryo creation outside the "combining of a human egg with a human sperm,"[66] thereby potentially making MRT use illegal within the state.[67] Louisiana prohibits the use of fertilized eggs for any purpose other than the development of a human and further prohibits fertilization of eggs for research purposes.[68] Pronuclear transfer might be prohibited in Louisiana because one fertilized egg would not develop into an embryo, but maternal spindle transfer might be allowed.[69] The fertilization of eggs for "back up" purposes would also likely be prohibited in Louisiana because there is a possibility that the fertilized eggs will not be implanted.[70] In California, reproductive cloning, which the state defines as "the transfer of a nucleus from a human cell from 'whatever source' into a human oocyte for the purpose of initiating a pregnancy that could result in the birth of a human," is prohibited.[71] This prohibition indicates that MRT might not be allowed in California even if federal regulation allowed its use in the United States.[72] If MRT were allowed in California, the state's ART statutes provide that pre-procedure contracts are valid and contractually-recognized intended parents are deemed the legal parents.[73] Interestingly, California courts are allowed to recognize more than two

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on MRT access by lesbian couples or infertile couples who do not have mitochondrial disease concerns).

64 *See* Amato et al., *supra* note 22, at 35 (discussing the prohibition on federal funding of embryo creation, harm, or destruction for research purposes); *see also* Castro, *supra* note 43, at 731, 735 (explaining the challenge of having no specialized authority in charge of regulating ART).

65 *See* NAS REPORT, *supra* note 20, at 67 (discussing some state approaches to ART and illustrating the lack of clarity on how MRT would be treated under such approaches).

66 *Id.* (quoting ARIZ. REV. STAT. ANN. §§ 36-2311 to -2313 (West, Westlaw through 2019 1st Reg. Sess. of 54th Legis.)).

67 *Id.*

68 *Id.* (citing LA. STAT. ANN. § 9:122 (West, Westlaw through 2018 3d Extraordinary Sess.)).

69 *Id.*

70 *Id.*

71 *Id.* (citing CAL. HEALTH & SAFETY CODE § 24185 (West, Westlaw through ch. 291 of 2019 Reg. Sess.).

72 *Id. See also* Viswanathan, *supra* note 22 (discussing the Congressional prohibition on MRT research and trials).

73 CAL. FAM. CODE § 7962(e) (West, Westlaw through ch. 291 of 2019 Reg. Sess.).

persons as parents when "recognizing only two parents would be detrimental to the child."[74] In Minnesota, despite any biological claim, sperm donors are not treated as parents when the donation is for the benefit of a married couple.[75] Meanwhile, Tennessee's parentage statute does not discuss ART at all.[76]

A. Parent-Centric Approaches

As the intending parties as well as the future primary caregivers of a child who will be conceived through MRT, the concerns of intended parents are often given primacy in the decision-making process.

1. Interest of the Intended Parents

The most frequently applied approach to resolve parental disputes over children conceived through ART is the intended parent test, under which the full array of parental rights is recognized in the person(s) who expressly intended that the child should be born, regardless of biological connection.[77] In *Johnson v. Calvert*, the leading case applying the intended parent test, a surrogate mother lost her claim of parental rights to the couple who had intended to bring about the birth of the child and intended to raise the child as their own.[78] In its reasoning, the court noted that young children's interests are unlikely to be different from the adults raising them, and thus safeguarding "the plans and expectations of adults who will be responsible for a child's welfare" will likely yield the best results for both the adults and the child.[79] Similarly, in the later California case of *K.M. v. E.G.*, an egg donor was recognized as a legal parent because she intended to jointly raise the child with the donee.[80] Applying the intended parent test to MRT may result in the recognition of three legal parents because each participant in the process may

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[74] *Id.* § 7612(c).

[75] MINN. STAT. § 257.56 (West, Westlaw through Jan. 1, 2020 from 2019 Reg. & 1st Spec. Sess.).

[76] TENN. CODE ANN. § 36-2-304 (LexisNexis, LEXIS through 2019 Reg. Sess.).

[77] Kohm, *Hitchhiker's Guide*, *supra* note 22, at 434 & n.150; *see also* Leiser, *supra* note 19, at 416 (discussing that in cases decided before the development of MRT, most disputes regarding the identity of a child's legal parents resolved in favor of the intended parents).

[78] 851 P.2d 776, 778, 782 (Cal. 1993).

[79] *Id.* at 783 (quoting Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 397 (1990)).

[80] 117 P.3d 673, 675–76, 682 (Cal. 2005).

manifest an intention to be a parent.[81] While the intended parent test is a largely parent-centric approach, some jurisdictions appear to be applying the test in a manner similar to a best interest of the child approach.[82] Unfortunately, in situations where a contractual agreement was executed, the child's best interest remains secondary to the parent's intent because contractual manifestations may serve both as a means of identifying the intending parent and as a bar to parental claims for a party who agreed to a waiver of rights.[83]

2. Accommodating Same-Sex Couples

MRT should be primarily therapeutic in nature because it was first developed to prevent mitochondrial diseases, but the treatment certainly has non-therapeutic application and interest, particularly with regard to same-sex parents desiring a mutual biological connection to the same child.[84] It is very likely that two females who are in a relationship will find MRT very attractive even if they have no history of mitochondrial disease and no issues with infertility because MRT is their only option to have

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[81] *See* Leiser, *supra* note 19, at 416 ("[R]elying on intent in the context of MRT could reasonably result in the recognition of three legal parents where all three contributors intended to have the child.").

[82] *See In re* Parentage of Robinson, 890 A.2d 1036, 1042 (N.J. Super. Ct. Ch. Div. 2005) (applying the state's ART statute requiring prioritization of the child's well-being over a participating adult's interest by looking not only at the mere intent of the donors and donees but also looking for a commitment to raise the child after birth); Chatterjee v. King, 280 P.3d 283, 286, 293 (N.M. 2012) (holding that mere intention is insufficient basis for recognition as a legal parent and further requiring a capacity to provide for the child's physical, emotional, and financial needs because only through this manner may the best results for the child be achieved).

[83] *See In re* Christopher YY v. Jessica ZZ, 69 N.Y.S.3d 887, 889, 898–99 (N.Y. App. Div. 2018) (holding that a donor was not a legal parent to a child because he had contractually waived any rights prior to the child's birth, despite the fact that non-recognition of such rights meant that the child would either remain in foster care or be returned to the custody of the contractually-named intending parents, who were facing charges of child neglect); *see also* Leckie & Voorhies, 875 P.2d 521, 521–22 (Or. Ct. App. 1994) (barring a donor's claim of parental rights because of a contractual waiver of those rights prior to the children's birth even though the donor presented evidence of regular visits to the children and gave substantial financial contributions to their needs, and even though the children referred to and recognized the donor as "dad"). *But see* T.F. v. B.L., 813 N.E.2d 1244, 1248 (Mass. 2004) (holding that a former domestic partner's inaction during the intended parent's artificial insemination procedure and resulting pregnancy was an implicit oral promise that trumped any subsequent manifestations of a lack of intent to parent the conceived child, thereby giving the intending parent the right to claim financial support for the child).

[84] Baylis, *supra* note 22, at 532–34 (citing Françoise Baylis & Jason S. Robert, *Radical Rupture: Exploring Biological Sequelea of Volitional Inheritable Genetic Modification*, *in* THE ETHICS OF INHERITABLE GENETIC MODIFICATION 131 (John E. J. Rasko et al. eds., 2006)).

genetically related children.[85] Renowned British bioethicists Cavaliere and Palacios-González argue that non-therapeutic applications of MRT do not place children at risk of harm because "the only other available 'option' for them is not to exist."[86] The danger in this view is that it dismisses concerns that MRT may have long-term, cross-generational effects because the process not only implicates assisted reproduction but more importantly applies gene editing.[87] The limited application of MRT and the handful of children conceived through MRT in the past three years further anchors concerns that no studies on the longitudinal effects of health and well-being have been conducted.[88] Entertaining MRT as an option ignores the number of alternatives available to same-sex couples who wish to have children, such as adoption, embryo or egg donation, prenatal diagnosis, and preimplantation genetic diagnosis ("PGD").[89]

3. Common Good Approach

The common good approach provides a sound balance to non-therapeutic applications of MRT because the common good approach requires a "compelling therapeutic 'need'" to justify MRT development.[90] Bioethicist and Professor Françoise Baylis argues that apart from the adult-centric "want" for genetically related children, there is no compelling therapeutic need to develop and apply MRT.[91] There is no

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[85] Cavaliere & Palacios-González, *supra* note 21, at 836–37.

[86] *Id.* at 839.

[87] Baylis, *supra* note 22, at 533.

[88] Amato et al., *supra* note 22, at 34–35 (pointing out that negative health effects may manifest only in future generations who will inherit the modified genes); *see also* Hamzelou, *supra* note 4 (indicating that the first child conceived through MRT was born within the last three years); Sheridan, *supra* note 11 (discussing that in the U.K., the first woman to conceive a child through MRT succeeded in doing so only in February of 2018); Stein, *Her Son Is One*, *supra* note 6 (reporting that there have only been four cases of pregnancies resulting from MRT in Ukraine).

[89] Baylis, *supra* note 22, at 533.

[90] *See* Françoise Baylis, *Human Nuclear Genome Transfer (So-Called Mitochondrial Replacement): Clearing the Underbrush*, 31 BIOETHICS 7, 7, 19 (2017) (noting that the "common good" consists of a "broader" and more "careful[]" focus on the "natural needs of the many"). Contemporary research "should be directed [at] science that is . . . socially valuable," and should address the "needs that all humans share in common, including . . . food and drink, clothing, shelter, and sleep, as these are essential for staying alive." *Id.*

[91] *Id.* ("At most there is a strong interest in (i.e. 'want' for) this technology . . . ."). Baylis still disagrees with the MRT language default of "mitochondrial replacement," insisting instead on the use of "nuclear genome transfer," which is the "descriptively more accurate term"—largely because that term "makes it clear that the technology involves the transfer of nDNA from one cell to another." *Id.* at 12. Baylis furthers her argument by suggesting that this paves the way for an "uncontentious setting for the refinement of cloning," a topic worthy of discussion but beyond the scope of this article. *Id.*

reproductive need for MRT because other alternatives are available.[92] Given the relatively small number of people genetically affected by mtDNA mutations, MRT is more of a "want" and lower in prioritization than "broader (and diverse) reproductive health needs experienced by women" who would suffer the corresponding opportunity cost if MRT research is prioritized.[93] In fact, most instances of mitochondrial disease result from mutations that are not resolvable by MRT.[94] Baylis points out that the mere desire for biologically related children is confused as a need because people "have been socialized or conditioned to think of [their] wants as needs."[95] Thus, Baylis argues that the common good is not furthered by MRT because the procedure involves the investment of resources that will benefit only a few people who already have alternative options.[96]

B. Child-Focused Approaches

The voice of the child has gained increasing volume in family law and particularly so when genetic family ties are concerned.[97] A child conceived through MRT should have the same —if not greater—protection of his or her best interest as a child facing issues from two genetic parents.[98]

1. Best Interest of the Child

The best interests of the child doctrine originated in American adoption jurisprudence,[99] and it has not only become the gold standard of child custody law, but has been fully integrated into all areas of family law, including ART law.[100] Interestingly, "[t]he best interests approach is

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[92] *Id.* at 14 (contemplating alternatives like adoption, fostering children, remaining childless, or PGD).

[93] *Id.* at 14–15, 19.

[94] Drabiak, *supra* note 13, at 6–7.

[95] Baylis, *supra* note 90, at 13–14.

[96] *Id.* at 14–15, 18–19; Baylis, *supra* note 22, at 534 (citing Françoise Baylis, *"Babies with Some Animal DNA in Them": A Woman's Choice?*, 2 INT'L J. FEMINIST APPROACHES TO BIOETHICS (SPECIAL ISSUE) 75, 90 (2009)).

[97] Kohm, *supra* note 22, at 415–17, 423–26, 429–30.

[98] *See generally* Leiser, *supra* note 19, at 425 n.75 (noting that custody disputes "between two natural parents or adoptive parents" are *nearly always* resolved in light of the child's best interests, but that only a mere 16% of ART disputes consider the "best interests of the child" doctrine).

[99] Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 347–48 (2008).

[100] Kohm, *supra* note 22, at 423–26, 429–30; Kohm, *supra* note 99, at 337. *But see* I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 427, 437 (2011) (concluding that best interest arguments are "problematic" if directed at

commonly applied to resolve parentage disputes where both or neither of the parties" are genetically related to the child, but less frequently applied to ART when one party is typically not genetically related to the child.[101] Unlike other ART, MRT will result in a child who will have three biological parents thus more closely resembling the jurisprudence applying the child's best interest approach in parental disputes involving two biological parents.[102] Regardless of MRT's similarity to parentage disputes involving non-ART conceived children, some states have already used the best interests of the child approach to promote child protection for ART conceived children whenever they are the subject of a parentage and visitation dispute.[103]

Resorting to MRT raises unique concerns regarding the conceived child's health because health risks that may result from DNA modification could manifest only later in life or even further down the generational line.[104] Concerns regarding the child's health justify most ART-conceived children's interests in learning who their genetic parents are.[105] It will

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the best interests of a "*resulting*" child—as opposed to an "*existing*" child—especially in cases where the ultimate issue is "whether or not a *particular* child will come into existence").

[101] Leiser, *supra* note 19, at 425.

[102] Baylis, *supra* note 22, at 531–32; *see also* Leiser, *supra* note 19, at 425 (discussing how the best interest of the child approach is less frequently applied in ART cases because one parent is not biologically related to the child).

[103] *See* L.F. v. Breit, 736 S.E.2d 711, 723 (Va. 2013) (recognizing a child's liberty interest in knowing and having a relationship with both of his or her parents); *see also* Rubano v. DiCenzo, 759 A.2d 959, 961–62, 975–76 (R.I. 2000) (promoting the best interests of the child by granting parentage rights to a biological mother's former same-sex domestic partner, who acted as the child's parent during their period of cohabitation and intended to continue acting as a parent after their separation, because "children have a strong interest in maintaining the ties that connect them to adults who love and provide for them" (quoting V.C. v. M.J.B., 748 A.2d 539, 550 (N.J. 2000))).

[104] Amato et al., *supra* note 22, at 33–34; Baylis, *supra* note 22, at 533 (citing NUFFIELD COUNCIL ON BIOETHICS, NOVEL TECHNIQUES FOR THE PREVENTION OF MITOCHONDRIAL DNA DISORDERS: AN ETHICAL REVIEW, at xv, 65, 67 (2012), http://nuffieldbioethics.org/wp-content/uploads/2014/06/Novel_techniques_for_the_prevention_of_mitochondrial_DNA_disorders_compressed.pdf).

[105] *See Breit,* 736 S.E.2d at 723 (showing the Supreme Court of Virginia's recognition of children's liberty interest in establishing relationships with their parents and holding it "incumbent on courts to see that the best interests of a child prevail" by preserving the parent-child relationship even when a child was conceived through ART); *see also* UNIF. PARENTAGE ACT, prefatory note (UNIF. LAW COMM'N 2017) (noting that the latest amended version of the Act "includes a new article . . . that addresses the right of children born through [ART] to access medical and identifying information regarding any gamete providers"). The Uniform Law Commission felt that it was "increasingly important for states to address the right of children to access information about their gamete donor;" hence, the amended Act requires disclosure of donors' "non-identifying medical history." *Id.* Conversely, there may be instances in which a child has no interest in recognizing the parenthood of his or her mitochondrial donor. *See* Charlotte Pritchard, *The Girl with Three Biological Parents*, BBC

always be in the child's best interest to know the identity of his or her biological parents because knowledge of their genetic medical history is invaluable.[106] Apart from hereditary medical concerns, there is also limited information available regarding embryo development, and recent studies suggest that MRT may affect the health of both the surrogate and the child during pregnancy.[107]

A child's health also includes a good grasp of identity, which is comprised of traits, beliefs, emotions, actions, and experiences that are "informed by . . . personal relationships" of varying degrees of "intimacy and interdependence."[108] Not only will the fact of being conceived through MRT affect a person's identity development,[109] but evidence even suggests that mitochondria influence important qualities that "participate in [a person's] identity."[110] Modification of mitochondrial DNA might have resulting effects on identity formation.[111] Bioethicists, such as Professor Mirko Daniel Garasic, Daniel Sperling, Robert Klitzman, Mark Toynbee, and Mark Sauer, recognize the possibility of difficulties in identity formation because of problematic perceptions that may be directed against children who are identified as having three biological parents.[112] While

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NEWS (Sept. 1, 2014), http://www.bbc.com/news/magazine-28986843 (describing how a child born with a third parent's mitochondrial DNA did not want a "relationship or connection" with her donor because the amount of the donor's DNA the child possessed was "just so small").

[106] *See* Debi McRae, *Evaluating the Effectiveness of the Best Interests Marital Presumption of Paternity: It Is Actually in the Best Interests of Children to Divorce the Current Application of the Best Interests Marital Presumption of Paternity*, 5 WHITTIER J. CHILD & FAM. ADVOC. 345, 374 (2006) (explaining that many medical disorders are genetically linked and may possibly be predicted by examining one's medical history).

[107] John D. Loike & Ruth L. Fischbach, *New Ethical Horizons in Gestational Surrogacy*, 1 J. FERTILIZATION 109, 109 (2013) (summarizing studies finding increased risk of colon cancer and autoimmune disease in surrogates as well as risk of developing juvenile dermatomyositis in the fetus if the surrogate's body does not reject the fetus outright as a foreign tissue).

[108] Françoise Baylis, *The Self* in Situ: *A Relational Account of Personal Identity*, *in* BEING RELATIONAL: REFLECTIONS ON RELATIONAL THEORY AND HEALTH LAW 109 (Jocelyn Downie & Jennifer L. Llewellyn eds., UBC Press 2012).

[109] Baylis, *supra* note 22, at 532.

[110] Garasic & Sperling, *supra* note 22, at 203 (quoting Sheldon Krimsky et al., *Oocyte Modification in Assisted Reproduction for the Prevention of Transmission of Mitochondrial Disease or Treatment of Infertility* 4 (Council for Responsible Genetics, Docket No. FDA-2013-N-001, 2013)).

[111] *See* Anthony Wrigley et al., *Mitochondrial Replacement: Ethics and Identity*, 29 BIOETHICS 631, 632–33 (2015) (analyzing the "connection between genes, biological origins, and identity" in the context of MRT and finding that gene alteration can impact both physical and social properties).

[112] *See* Garasic & Sperling, *supra* note 22, at 202–03 (acknowledging that some may perceive MRT families as unnatural or abnormal); Robert Klitzman et al., *Controversies*

recognizing the genetic basis for identity formation, they provide no direct response as to how the child will be protected from potential MRT risks in this regard.[113]

While all ART necessarily foregoes informed consent from the later-conceived child, Dr. Paula Amato and her colleagues argue that MRT's use of gene editing creates a particular challenge in this area because of risks presented to future generations.[114] Intended parents and donors would thus be giving proxy consent to unknown health risks that must be borne by persons other than themselves: the child and the child's descendants.[115] Baylis insists that these ethical concerns should not be ignored when pushing for the advancement of reproductive and gene manipulation technologies.[116] Baylis argues that hopeful parents are often prone to "overvalu[e] genetic relatedness within families."[117] Intended parents must weigh their desire for genetically related children against health risks that child may have to face.[118]

2. The Three-Parent Dilemma

Modern notions of parenthood may now transcend mere biological ties, but the genetic aspect involved in MRT justifies the use of the term "tri-parental" and a recognition of a new three-parent paradigm.[119] Garasic and Sperling insist that family situations involving more than two parents are not novel because family law has already expanded to cover various multi-parenting situations, such as adoptive family cases in which

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Concerning Mitochondrial Replacement Therapy, 103 FERTILITY & STERILITY 344, 344–45 (2015) (recognizing that MRT offspring may be seen as having "three parents," but doubting that a "child might suffer owing to knowledge of his or her genetic origins").

[113] Garasic & Sperling, *supra* note 22, at 203; Klitzman et al., *supra* note 112, at 334–45.

[114] Amato et al., *supra* note 22, at 34 (emphasizing that "although the [MRT] patient undergoes the intervention, the potential risk is to the offspring" and that "some effects may not manifest for many years").

[115] *Id.*

[116] Baylis, *supra* note 90, at 16–17; *see also id.* at 11 (emphasizing ethical discussions over "potential medical and psychological harms" to children born through MRT, such as "questions of identity, children's rights to an open future, the ethics of germline genetic modification, the ethics of sex selection, legal and genetic parentage, harms to egg providers, harms to specific interest groups, harms to society, and slippery slope concerns").

[117] *Id.* at 12–13.

[118] *See* Baylis, *supra* note 22, at 533–34 (quoting Baylis & Robert, *supra* note 84, at 131, 132) (acknowledging that a parent's desire for genetic relatedness can ultimately violate a child's right to an "un-manipulated genome").

[119] Martin H. Johnson, *Tri-Parenthood—A Simply Misleading Term or an Ethically Misguided Approach?*, 26 REPROD. BIOMEDICINE ONLINE 516, 516 (2013).

there are "four parents (two genetic and two adoptive)."[120] They argue that society's perception of what constitutes a family has already changed.[121] Embryologists Jacques Cohen and Dr. Mina Alikani further argue that viewing MRT as resulting in three biological parents is misleading because permanent biological change in the fetus is unlikely and has not yet been demonstrated.[122]

The presence of three biologically related parents raises the question of whether MRT-conceived children should inherit from all three parental lines.[123] Professor Judith Daar, an expert in reproductive rights, insists that the transmission of wealth on the basis of an ancestor's participation in a reproductive medical procedure is not a sufficient justification for vesting succession rights and points out three significant drawbacks.[124] First, she addresses the concern that future generations will no longer have a genetic connection with the mtDNA donor because the biological basis for connection (and thus for succession) is found only in the mtDNA connection carried by female offspring and would disappear beyond any generation in which there are only male children.[125] Daar maintains that applying a biological basis for succession would result in gender discriminatory inheritance rules.[126] Secondly, she identifies impracticalities in tracing the mtDNA donor, such as when identifying information is withheld from the child or when claims of heirship can only be proven by testing multiple individuals.[127] Finally, Daar recognizes that current succession laws involving "donor-conceived" children usually do not regard donors as parents, including for inheritance purposes.[128]

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[120] Garasic & Sperling, *supra* note 22, at 203 (discussing recent changes in society's understanding of parenthood).

[121] *Id.*

[122] Jacques Cohen & Mina Alikani, *The Biological Basis for Defining Bi-Parental or Tri-Parental Origin of Offspring from Cytoplasmic and Spindle Transfer*, 26 REPROD. BIOMEDICINE ONLINE 535, 537 (2013) (acknowledging that "permanent biological change" in children as well as "permanent sequence change" in mtDNA cannot be demonstrated until there has been a comparative analysis of the mtDNA sequences of MRT-conceived children and of their respective mitochondrial donors).

[123] Daar, *supra* note 34, at 79–80, 79 n.31.

[124] *Id.* at 89–90.

[125] *Id.* at 89.

[126] *Id.*

[127] *Id.*

[128] *Id.* at 90 (explaining that the intended parent test is often applied to cases of "donor-conceived children" and that often no legal or parental relationships are formed between the children and the donor to justify inheritance).

C. Approaches in Foreign Jurisdictions

This dearth of legislation requires a resort to foreign jurisdictions' policy approaches with regard to MRT use and the parental issues that result therefrom.[129] Through its specialized research agency, the United Nations Educational, Scientific and Cultural Organization ("UNESCO"), the United Nations ("UN") has provided that "[r]esearch, treatment, or diagnosis affecting an individual's genome shall be undertaken only after rigorous and prior assessment of the potential risks and benefits."[130] Under this standard, the UN requires both informed consent of and a focus on the best interest of the child.[131] When the individual whose genes are to be modified is incapable of giving informed consent, any intervention should produce a direct health benefit.[132] If a benefit is not expected, then any research performed must pose minimal risk and burden and must be "compatible with the protection of the individual's human rights."[133] Professor Drabiak infers that this UN standard "would likely prohibit germline engineering based both on the risk profile and inability for future generations to consent to modification of their genomes."[134] UNESCO's International Bioethics Committee approaches MRT cautiously because of the "uncertain and highly variable state of the genome and the unpredictable impact of modifications."[135] The Bioethics Committee "discourages avenues of regulatory circumvention," such as reproductive tourism, which is a large concern given the current state of MRT research across nations.[136]

Canada is one jurisdiction that has enacted legislation governing ART: the Assisted Human Reproduction Act ("AHRA") enacted in 2004.[137] Under the AHRA, a state agency was established and mandated to oversee all ART applications.[138] Due to budget constraints, the agency was

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[129] *See supra* notes 58–76 and accompanying text.

[130] U.N. Educ., Sci., and Cultural Org. [UNESCO], General Conference Res. 29/16, *Universal Declaration on the Human Genome and Human Rights* (Nov. 11, 1997), https://unesdoc.unesco.org/ark:/48223/pf0000110220?posInSet=1&queryId=1fdffddc-75a5-437f-961b-de60796fd54a.

[131] *Id.* at art. 5(b).

[132] *Id.* at art. 5(e).

[133] *Id.*

[134] Drabiak, *supra* note 13, at 8–9.

[135] *Id.*

[136] *Id.* (citing Int'l Bioethics Comm., UNESCO, Rep. of the IBC on Updating Its Reflection on the Human Genome and Human Rights, U.N. Doc. SHS/YES/IBC-22/15/2 REV.2 (2015)).

[137] Assisted Human Reproduction Act, S.C. 2004, c 2.

[138] *Id.* §§ 21(1), 41–43 (repealed 2012).

eventually closed down, and the country's health agency assumed the task of overseeing ART and implementing AHRA.[139] AHRA prohibits genetic modification whenever the alteration is "capable of being transmitted to descendants," thus implying a prohibition against MRT in Canada.[140] Apart from Canada, roughly forty countries, including Germany, France, Switzerland, Sweden, and Italy, have legislated prohibitions on germline modification.[141] These countries have even gone so far as to criminalize germline or heritable modifications.[142]

The first child born through MRT was delivered in Guadalajara, Mexico, in 2016 because the U.S.-based team who carried out the operation believed there were no rules prohibiting the operation in that country.[143] This belief was likely based on the wording of Mexico's constitution, which "neither defines a human embryo nor expressly defends human life from the moment of conception or fertilization,"[144] and the language used in Mexico's General Health Law, which arguably "does not specifically regulate assisted reproduction."[145] Dr. Palacios-González and Dr. Medina-Arellano, both bioethics scholars, disagree with these assumptions based on Mexican federal ART regulations, which limit permissible ART research to cases involving infertility.[146]

In 2015, the United Kingdom became one of the first jurisdictions to formally embrace MRT through legislation amending its 1990 Human Fertilisation and Embryology Act ("HFE Act"), which encompassed all ART under a single legislative act and instituted the HFE Act as the regulatory agency for ART practices, including clinical trials for new procedures.[147] The 1990 HFE Act was modified to formally recognize MRT but only "for the purpose of avoiding mitochondrial disease . . . [and] it

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[139] Françoise Baylis, *The Demise of Assisted Human Reproduction Canada*, 34 J. OBSTETRICS & GYNAECOLOGY CAN. 511, 511–12 (2012).

[140] Assisted Human Reproduction Act, *supra* note 137, § 5(1)(f).

[141] Drabiak, *supra* note 13, at 11.

[142] *Id.*

[143] César Palacios-González & María de Jesús Medina-Arellano, *Mitochondrial Replacement Techniques and Mexico's Rule of Law: On the Legality of the First Maternal Spindle Transfer Case,* 4 J. L. & BIOSCIENCES 50, 50–53 (2017).

[144] *Id.* at 59.

[145] *Id.* at 60.

[146] *Id.* at 61–62 (quoting Reglamento de la Ley General de Salud en Materia de Investigación para la Salud, art. 56, Diario Oficial de la Federación [DOF] 06-01-1987, últimas reformas DOF 02-04-2014 (Mex.)); *see also id.* at 64 (suggesting a state law may have been broken because Guadalajara is located in the Mexican state of Jalisco, where life is protected "from the moment of fertilization").

[147] Castro, *supra* note 43, at 728.

does not currently encompass treatment for infertility."[148] To ensure this purpose, the Act requires proof of risk of mtDNA disease transmission prior to any approval of MRT use.[149] The Act addressed parentage issues by denying parental rights to mtDNA donors and precluding courts from recognizing parental rights on the sole basis of mtDNA donation.[150] The HFE Act also addressed children's rights issues by giving MRT-conceived children limited access to non-identifying information about their mtDNA donors, and vice versa.[151] Professor Drabiak studied the United Kingdom Department of Health's characterization of MRT to avoid bright line prohibitions against germline modification and concluded that germline modification terms and MRT processes were misrepresented in order to garner public support.[152] The United Kingdom disregarded the numerous, substantial barriers that the scientific community identified as relevant to MRT permissibility.[153]

Singapore is looking into following the United Kingdom's example of formally recognizing the use of MRT; in April 2018, the country's Bioethics Advisory Committee ("BAC") released a report on the science behind and the ethical, legal, and social implications of MRT.[154] Singapore has monitored the development of MRT in the United Kingdom and its BAC believes that there is a possibility for developing the therapy in the country.[155] While germline modification in clinical settings is prohibited in Singapore, genetic modification for research purposes is allowed.[156]

Australia's Senate has likewise undertaken an extensive study of MRT with the end goal of allowing the procedure to be practiced in Australian clinics, thereby avoiding Australian citizens' resort to seeking

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148 *Id.*; Drabiak, *supra* note 13, at 15.

149 Castro, *supra* note 43, at 734.

150 *Id.*

151 *Id.*

152 Drabiak, *supra* note 13, at 16–17.

153 *Id.* at 17.

154 Bioethics Advisory Comm., Sing., *Ethical, Legal and Social Issues Arising from Mitochondrial Genome Replacement Technology* (Apr. 19, 2018) (Consultation Paper), https://www.bioethics-singapore.org/files/publications/consultation-papers/mitochondrial-genome-replacement-tech.pdf [hereinafter BAC Report]; Sandy Ong, *Singapore Could Become the Second Country to Legalize Mitochondrial Replacement Therapy*, SCIENCE (June 6, 2018), http://www.sciencemag.org/news/2018/06/singapore-could-become-second-country-legalize-mitochondrial-replacement-therapy.

155 BAC Report, *supra* note 154, at 1, 17 (noting that the BAC is "reviewing its position" on the "permissibility of germline modification techniques for [preventing] mitochondrial disorders," and weighing the possible benefits and risks); Ong, *supra* note 154.

156 BAC Report, *supra* note 154, at 14; Ong, *supra* note 154.

MRT in less-regulated countries.[157] In June 2018, a comprehensive Senate report was completed indicating recommendations such as amending prohibitions to genetic modification in current anti-cloning laws,[158] authorizing the agency vested with ART oversight to likewise regulate MRT,[159] introducing MRT first on a research trial basis to gain more evidence on the "safety and efficacy" of the procedure,[160] limiting MRT use to cases preventing mitochondrial disease,[161] and requiring pre-treatment counseling and post-operation follow-up for all MRT procedures.[162] Australia's interest in legalizing MRT is based, in part, on MRT's therapeutic goals and the state's interest in protecting citizens from "medical tourism" dangers.[163]

III. PROPOSAL

One thing is certain: inaction is not a recommended path for the United States given the growing number of nations in which MRT can be performed while the procedure remains unavailable in the United States.[164] Well-known health law and bioethics expert Professor I. Glenn Cohen's discussion on medical tourism demonstrates that the United States' decision to restrict MRT is a situation ripe for circumventing national regulations (or the lack thereof).[165] Medical tourism gives rise to concerns, such as lower medical standards than in the United States, which may result in medical care causing more injury compared to care in the United States.[166] Professor Cohen further notes that the ambiguous overlaps of applicable laws raises questions about the ability of United

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[157] Senate Community Affairs References Committee, Parliament of Australia, *Science of Mitochondrial Donation and Related Matters* (2018) 81, 91, 92.

[158] *Id.* at 4, 93, 95.

[159] *Id.*

[160] *Id.* at 76, 82, 83.

[161] *Id.* at 85–86.

[162] *Id.* at 68, 69, 90, 91.

[163] *Id.* at 71, 75, 91–92, 96.

[164] *See* Stein, *Her Son Is One*, *supra* note 6 (illustrating the international availability of MRT and discussing how a New York clinic has partnered with a Ukrainian clinic to "market [MRT] to U.S. women").

[165] *See* I. Glenn Cohen, *Protecting Patients with Passports: Medical Tourism and the Patient-Protective Argument*, 95 IOWA L. REV. 1467, 1471 (2010) (defining medical tourism as "the travel of patients who are residents of one country, the 'home country,' to another country for treatment, the 'destination country'"); *see* Drabiak, *supra* note 13, at 9 (citing Int'l Bioethics Comm., UNESCO, *supra* note 136, at 3–4) (emphasizing that governments should not act alone and that economic actors should not circumvent national regulations in the context of reproductive tourism).

[166] Cohen, *supra* note 165, at 1489.

States residents to obtain legal recovery in the event of medical injury.[167] Another cause for concern regarding medical tourism is the difficulty that it poses to follow-up research and, as a result, whether long-term risks, if any, can be properly identified and documented.[168]

A. Rationale

This Note affirms a child's right to an untampered genome because "[g]ermline interventions pose significant risk and carry the threat of unintended consequences that are both irreversible and permanent."[169] As observed by Professor Drabiak, there is a strong consensus among the UNESCO, the Council of Europe, and numerous individual nations to stand against germline modification.[170] This is a strong basis for criminalizing MRT use, research, and recruitment through federal prohibitions.[171] While prohibiting recruitment of United States patients for MRT treatments would strongly inhibit medical tourism, imposition of penalties may not be workable against foreign actors.[172] This Note asserts that prohibitions against United States-based patients, clinics, doctors, and scientists may be a more feasible legislative model and would be the most ideal regulatory action in the face of current MRT application in other countries.

Prior to 2016, the White House and the NIH issued statements saying that germline modification was not a research avenue that would be feasible to explore.[173] In 2016, however, the National Academics of Sciences, Engineering, and Medicine ("NAS") concluded that "it is ethically permissible to conduct clinical investigations [of MRT]."[174] Even Professor Drabiak, who is a staunch advocate for a bright line prohibition of germline modification, recognizes that NAS has endorsed therapeutic germline modification through gene editing, which covers MRT.[175] Professor Drabiak acknowledges that the governance climate in the United States appears to now favor MRT and that "any present

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[167] *Id.*

[168] Castro, *supra* note 43, at 734.

[169] Drabiak, *supra* note 13, at 59.

[170] *Id.*

[171] *Id.* at 59–60.

[172] *Cf.* Cohen, *supra* note 165, at 1494 (describing various "obstacles" that U.S. patients must overcome to recover against foreign medical providers whose "medical error . . . causes injury abroad").

[173] Drabiak, *supra* note 13, at 23.

[174] *Id.* (citing NAS REPORT, *supra* note 20).

[175] *Id.*

prohibitions related to federal funding may potentially be lifted in the future."[176] As such, this Note recognizes the need to anticipate MRT acceptance in the United States by suggesting narrow authorization of research, treatment, and recruitment. Adopting uniform legislation[177] that limits MRT to its primary focus of preventing mitochondrial disease and minimizing harm to the future child[178] will best protect the child's interests. An MRT approach in which parents take personal responsibility for the conceived child's interests—as opposed to taking an interest in only the individual parents' personal autonomy—is the optimal path for the best interests of the child approach.[179] Ultimately, anchoring federal legislation in the best interests of the child approach will preserve the primary value of MRT and allow for much-needed assessment of long-term risks.

The first step in appropriately regulating MRT is to mandate a regulatory agency therefor. NIH oversight over MRT may be more appropriate than FDA oversight because the NIH recognizes that MRT is a therapy that affects the health of the donors and the conceived child.[180] This oversight is particularly important when an experimental therapy is still in its infancy because the health of the conceived child will not only pertain to his well-being upon birth but also throughout his lifetime. The NIH has power to exert authority over both the short- and long-term effects of experimental therapies,[181] making it best suited to act as a regulatory agency for MRT. In any case, the regulatory agency should be granted specific authority to review applications for MRT use, to oversee post-operation effects, and to approve further research.

In recognition of MRT's early research phase, uniform legislation in the United States should emulate the United Kingdom's approach, which only allows MRT when a child is at risk of inheriting mitochondrial

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[176] *Id.*

[177] *See* NAS REPORT, *supra* note 20, at 7 ("To this end, the committee concluded that federal regulations would be needed and principled professional society guidelines interpreting the regulations would be helpful to limit the use of MRT to the prevention of transmission of serious, life-threatening mtDNA diseases and to prevent slippage into applications that raise other serious and unresolved ethical issues.").

[178] *Id.* at 9–10.

[179] Kohm, *supra* note 22, at 429–30.

[180] *See* discussion *supra* Part I.B.

[181] *See Charter*, *supra* note 56 (indicating that the NIEHS Institutional Biosafety Committee's role in approving "documents for the use of recombinant DNA, human materials, potentially hazardous biological materials, and regulated select agents" as well as promoting training and institutional oversight over these materials).

disease.[182] Incidentally, incorporating elements of the United Kingdom's legislative approach may also signal a collegial desire to work together internationally.[183] Follow-up consultations with patients and a report of the results of such consultations to the regulatory agency should be required of all clinics applying MRT. Further, interested parties should be required to undergo pre-treatment counseling, during which they will learn about the nature, process, and known risks of MRT, to ensure that informed consent is secured. Limited confidentiality should also be given to parents of the conceived child because the regulatory agency should assess, monitor, and study the health of the child long-term.

Any future legislation should recognize—not amend—the FDA's and the Department of Health and Human Services' prohibition of research involving embryo destruction.[184] This means that only maternal spindle transfer MRT (as opposed to pronuclear transfer MRT) would be permitted because then, "donor oocytes [would not] need [to] be fertilized, which would avoid the creation and destruction of embryos for the sole purpose of medical treatment," effectively protecting human life.[185] Maternal spindle transfer protects against the untimely termination of an embryo's development.[186] To further this point, the fertilization of eggs that will not certainly be used should be avoided, and the destruction of unused fertilized eggs[187] should be prohibited.

B. Sample Legislation

Uniform legislation should be broad enough to encompass developments in MRT but specific enough to address common issues that arise from MRT use. Potential language of uniform legislation may read as follows:

SECTION 1. SHORT TITLE. This Act may be cited as the "Mitochondrial Replacement Therapy Act."

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[182] Drabiak, *supra* note 13, at 15.

[183] *See* Madison Dibble, *The UK Finally Allowed a Sick Baby to Seek Treatment in the US—Now the Baby Is Tumor-Free*, IJR (July 19, 2018), https://ijr.com/2018/07/1110547-uk-allows-baby-treatment-in-us/ (illustrating how international medical cooperation between the United States and the United Kingdom allowed an infant to undergo a successful heart transplant in the United States when the operation was not feasible in the United Kingdom).

[184] NAS REPORT, *supra* note 20, at 11.

[185] Amato et al., *supra* note 22, at 34–35.

[186] *Id.*

[187] *See* NAS REPORT, *supra* note 20, at 11 (implying a government policy in opposition to the unnecessary creation and later destruction of embryos by stating that the FDA and U.S. Department of Health and Human Services are prohibited from discarding embryos).

SEC. 2. FINDINGS. Congress finds the following:

(a) According to the United Mitochondrial Disease Foundation (UMDF), approximately 1 out of 200 people are born with mtDNA mutations and 1 in 5,000 develop mitochondrial diseases.

(b) According to the UMDF, most mtDNA mutations affect children, who suffer organ failure, while adults with mitochondrial disease experience worsening debilitating symptoms as they age, with cell damage found in the brain, heart, liver, skeletal muscles, kidney, endocrine system, and respiratory system.

(c) Mitochondrial replacement therapy explores the possibility of replacing mutant mtDNA with healthy mtDNA.

SEC. 3. DEFINITIONS.

(a) "Mitochondria" are organelles found in the fluid surrounding the nucleus of cells, which are responsible for creating energy, without which cells would not survive.

(b) "Mitochondrial DNA" (mtDNA) is a chain of nucleotides carrying genetic instructions for mitochondria.

(c) A "defective mtDNA" is one that has mutations thereby creating a risk that a person will develop mitochondrial disease.

(d) The "target egg" is an interested party's egg that has defective mtDNA.

(e) The "donated egg" is an egg with healthy mtDNA donated for the purpose of mitochondrial replacement therapy.

(f) The "reconstructed egg" is an egg with the combined nucleus of a target egg and healthy mtDNA of a donated egg.

(g) "Mitochondrial replacement therapy" (MRT) is the assisted reproductive procedure that involves the removal of nuclear DNA from the defective mitochondrial DNA of one egg (the target egg) and placing this removed nucleus into a second egg (the donated egg) with healthy mtDNA, after the nucleus of such donated egg has been removed and discarded. The reconstructed egg is then fertilized with sperm to form a permitted embryo that is then implanted into the prospective mother.

(h) An "interested party" is a person intending to conceive a child through the use of MRT and applies therefor through the proper process.

(i) A "permitted embryo," as referred to in this Act, is an embryo formed through the fertilization of a reconstructed egg by a sperm.

(j) "Mitochondrial diseases," as referred to in this Act, are diseases caused by mutations in the mtDNA, which are inherited through the maternal line through multiple generations.

(k) "Regulatory agency" is the National Institutes of Health, as indicated herein.

SEC. 4. NATIONAL INSTITUTES OF HEALTH. The National Institutes of Health is vested with the authority to implement the provisions of this Act and the jurisdiction to oversee all clinical applications of MRT, including post-operation follow up.

SEC. 5. REQUIREMENTS.

(a) **RISK OF MITOCHONDRIAL DISEASE.** The use and application of MRT shall be limited to assistance of interested parties with mtDNA mutations whose offspring are at risk of developing mitochondrial disease.

(b) **PERMITTED EMBRYO.** All applications of MRT should be exercised with care that no unnecessary fertilization of resulting eggs is performed. At no point shall permitted embryo be destroyed.

(c) **PRE-TREATMENT COUNSELLING.** All clinics and health facilities authorized to conduct MRT shall advise interested parties about the detailed procedure for MRT, the scientific concepts involved, the associated risks and benefits, and alternative options available. Upon completion of pre-treatment counselling, interested parties must indicate that they give informed consent to the procedure.

(d) **FOLLOW UP.** All clinics and health facilities authorized to conduct MRT shall enforce a recorded process of monitoring post-operation effects, including medical follow-up, mandatory reporting of negative effects, such as birth defects or post-birth illnesses, and other adverse events, such as miscarriages or unusual pregnancy difficulties. The purpose of follow-up procedures shall extend beyond the child's health upon birth and may extend throughout the child's lifetime in order to assess the effectiveness of MRT.

SEC. 6. ENSUING DISPUTES REGARDING CHILD'S WELL-BEING. The best interest of the child should be given priority when directing decisions regarding his or her well-being, which includes his or her health, access to donors' identifying information, and issues regarding physical, emotional, and financial support.

SEC. 7. SANCTIONS. The regulating authority shall impose proper sanctions and fines upon medical practitioners for violations of any provisions in this Act.

SEC. 8. AMENDMENT. Provisions in the Consolidated Appropriations Act of 2016 prohibiting germline modifications is hereby amended to a limited extent for the purpose of implementing the provisions of this Act.

CONCLUSION

This Note advocates for the strict prohibition of MRT in the US but recognizes that increasing international interest in and adoption of MRT makes its introduction in the United States a looming possibility. The present legal landscape is incapable of addressing the many issues implicated by MRT use—particularly because the most analogous approach shows that ART situations involving three parents have resulted in inconsistent results with confused policy underpinnings. Further, unlike foreign jurisdictions, the United States has neither a regulatory authority to oversee ART nor uniform legislation to govern ART applications. The closest authority identified in this jurisdiction is the FDA, which is unlike regulatory agencies in foreign jurisdictions whose broader mandates cover health not drug administration. Forming a new regulatory agency will provide wider latitude for the creation of administrative guidelines both for the agency and covered practitioners. Identifying a fixed regulatory authority recognizes the experimental nature of MRT and ensures that each trial is first reviewed then subsequently monitored.

Despite the more controversial political climate surrounding MRT in the United States, there is a need to adopt uniform legislation to anticipate, prepare for, and regulate acceptable applications of the therapy in this jurisdiction. Ignoring the growing international acceptance of MRT may only promote medical tourism, which may expose children conceived through MRT to increased health risks and future ambiguity over legal claims. Most importantly, uniform legislation will allow the United States to address not only the regulatory and procedural

aspect of MRT use, but also to monitor its long-term health, legal, and social implications. The three-parent dilemma need not be addressed after-the-fact, particularly given the wealth of information that can be drawn from ART parallels. The resulting three-biological-parent dilemma in MRT can be addressed by adopting a best-interest-of-the-child approach from the onset.

By adopting the best interest of the child approach, MRT may be narrowly tailored to only address a situation when a future child is at risk for mitochondrial diseases. By applying the best interest of the child approach, there will be full consideration of MRT's long-term effects on health, identity, and family structure of the conceived child. This narrow tailoring of MRT will avoid opening the door to other germline modification technologies whether for the purpose of developing "designer babies" or for generally addressing infertility issues. Mitochondrial replacement therapy must be allowed—if at all—only for the restricted purpose of avoiding risk of future disease.

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WHOLE WOMAN'S HEALTH: NOT THE "WHOLE" STORY

INTRODUCTION

In 2018 alone, several lawsuits challenging state abortion regulations were filed in both state and federal courts.[1] This surge in litigation is part of a national push by abortion clinics and pro-choice activist groups to challenge the pro-life legislation of several states.[2] Increased litigation comes on the heels of the recent Supreme Court decision, *Whole Woman's Health v. Hellerstedt*, a case in which the Supreme Court re-established the "undue burden" test it first introduced in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[3]

At first, abortion providers focused on posing piecemeal, incremental challenges to long-standing, state-enacted statutes.[4] Now, however, litigants are following the example set by Planned Parenthood and other

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[1] *See, e.g.*, Complaint ¶ 1, Whole Woman's Health All. v. Hill, 377 F. Supp. 3d 924 (S.D. Ind. 2019) (No.1:18-cv-1904) [hereinafter Compl., Whole Woman's Health Alliance] (challenging an Indiana abortion law); Complaint at 2, Whole Woman's Health All. v. Paxto n, No. 1:18-CV-00500 (W.D. Tex. June 14, 2018) [hereinafter Compl., Paxton] (challenging a Texas abortion law); Amended Complaint at 4, Jackson Women's Health Org. v. Currier, 349 F. Supp. 3d 536 (S.D. Miss. 2018) (No. 3:18-cv-00171-CWR-FKB) [hereinafter Am. Compl., Jackson Women's Health Org.] (challenging a Mississippi abortion law).

[2] See Alison Durkee, *Texas Abortion Providers Challenge Restrictive State Laws in New Lawsuit*, MIC (June 15, 2018), https://mic.com/articles/189841/texas-abortion-providers-challenge-restrictive-state-laws-in-new-lawsuit#.IGAEgF6Ah, for a consideration that "the Texas challenge comes amid a nationwide push by abortion advocates to fight back against restrictive laws;" see also *The Undue Burden Standard After* Whole Woman's Health v. Hellersted, CENTER FOR REPRODUCTIVE RIGHTS, https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/WWH-Undue-Burden-Report.pdf (last visited Sept. 2, 2019), for a discussion that

> [Whole Woman's Health v. Hellerstedt] applies to a broad range of abortion restrictions and is not limited to those that were challenged in Texas or similar types of laws. Its wide applicability will help advocates push back on the surge of laws that legislatures enacted in the years leading up to *Whole Woman's Health* when the undue burden standard's meaning was less clear;

and see *TRAP Laws*, NARAL PRO-CHOICE AMERICA, https://www.prochoiceamerica.org/issue/trap-laws/ (last visited Sept. 2, 2019), for an analysis that

> The [*Whole Woman's Health*] ruling reaffirmed a woman's constitutional right and ability to access pre-viability abortion care, but did not automatically invalidate the other [Targeted Regulation of Abortion Providers (TRAP)] laws still on the books across the nation. Pro-choice litigators and organizations are working to apply this reiterated standard to restrictions across the country.

[3] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992)).

[4] *See* Durkee, *supra* note 2 (quoting Amy Hagstrom, founder and CEO of Whole Woman's Health, who indicated that prior to the Court's decision in *Whole Woman's Health*, abortion proponents would not have challenged such a large number of state abortion restrictions at once).

abortion activist groups, taking a haphazard approach to challenging pro-life legislation by grouping all state regulatory statutes into massive lawsuits in hopes of obtaining an outcome favorable to their purposes.[5] Under the guise of improving women's healthcare, proponents have positioned themselves to challenge several statutes upheld by *Casey*, as well as statutes that have been challenged and declared constitutional by other state supreme courts and federal circuit courts of appeals.[6]

This Note explores how the undue burden standard imposed by the Supreme Court in *Whole Woman's Health* negatively and disproportionately subjects women to lower healthcare and safety standards when, in an attempt to promote women's rights, abortion proponents continue to challenge time-tested state statutes. Part I traces the Supreme Court's abortion jurisprudence from *Roe* to *Whole Woman's Health* and outlines the undue burden test to which the Court currently adheres. Part II focuses on two widely-challenged statutes in particular: (1) licensed-physician, or physician-only, statutes and (2) telemedicine abortion statutes. Part III discusses the recent successes and failures of the litigation challenges against these two statutes and analyzes how these statutes differ from the statutes at issue in *Whole Woman's Health*. Part IV explores how state legislatures might better position themselves to combat abortion proponents' recent challenges by preserving their interest in protecting women's health and safety and the lives of the

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[5] *See* Kate Fetrow, Note, *Taking Abortion Rights Seriously: Toward a Holistic Undue Burden Jurisprudence,* 70 STAN. L. REV. 319, 362 (2018) ("Instead of assessing whether one particular statute or regulation imposes a burden, the test should assess whether, overall, women seeking abortions experience the same burdens as do patients seeking analogous medical procedures.").

[6] Among the challenged regulations are ultrasound regulations, parental consent requirements, and licensed-physician statutes. *See Casey*, 505 U.S. at 833, 881–87, 899 (describing the components of the Pennsylvania statute and upholding the informed consent, waiting period, and parental consent provisions); Thomas Molony, *Fulfilling the Promise of Roe: A Pathway for Meaningful Pre-Abortion Consultation*, 65 CATH. U.L. REV. 713, 733–34 (2016) (discussing how the Supreme Court's silence in *Whole Woman's Health* regarding *Casey*'s treatment of Pennsylvania's informed consent and waiting period provisions indicate that certain types of statutes may now not require a balancing analysis under the undue burden test). Additionally, Federal District Courts' rulings on the constitutionality of statutory ultrasound requirements are varied. *Compare* Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health, 273 F. Supp. 3d 1013, 1043 (S.D. Ind. 2017) (holding that Indiana's ultrasound requirement was unduly burdensome because it required low-income women to increase their travel distance to attend mandatory informed consent appointments and did not further the State's interest in promoting fetal life and women's mental health), *with* Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 804, 807 (7th Cir. 2013) (Manion, J., concurring) (noting that, while the preliminary injunction barring the enforcement of the recently-enacted Admitting Privileges statute was upheld, Wisconsin's ultrasound requirement did not impose an undue burden on a woman seeking to obtain an abortion, but was "reasonably relat[ed] to the preservation and protection of maternal health" (quoting City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 430–31 (1983))).

unborn. Part V concludes by considering how, in the name of progress, abortion proponents' tactics to reduce regulations are harming women and eroding their faith in both the legal and healthcare systems. Ultimately, this Note argues that the Surgical-Center Requirement that the Supreme Court declared unconstitutional in *Whole Woman's Health* is wholly different from the licensed-physician requirement or telemedicine abortion restrictions at issue in the litigation stream because the latter restrictions, rather than subjecting women to lower health and safety standards, act as safeguards for the protection of women's health and dignity.

I. THE SUPREME COURT'S ABORTION JURISPRUDENCE: ESTABLISHING THE UNDUE BURDEN STANDARD

While the Supreme Court currently adheres to the "undue burden" standard in assessing whether an individual state's statutory abortion restrictions are unconstitutional, this was not always the Court's position. In order to understand how the Court arrived at the standard it applies today, it is necessary to consider several Supreme Court landmark decisions, from *Casey* to *Whole Woman's Health*.

A. Planned Parenthood of Southeastern Pennsylvania v. Casey

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court replaced *Roe*'s trimester system with the "balancing test."[7] The Court held that, while states may enact laws and regulations to "further the health or safety of a woman seeking an abortion," they may only enact laws that do not have the "purpose or effect of presenting a substantial obstacle to a woman seeking an abortion."[8] If certain laws did have that purpose or effect, and if those laws were, in fact, designed "to strike at the right itself," then those laws would constitute an "undue burden" on a woman's right to an abortion and would be declared unconstitutional.[9] A law that merely had the "incidental effect of making [a woman's attempt to obtain an abortion] more difficult or more

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[7] 505 U.S. 833, 878 (1992). Under the trimester system, the state could not intervene in a woman's decision to pursue an abortion during the first trimester of pregnancy, but the state had a limited power to intervene during the second trimester of pregnancy, and the state had almost complete power to intervene during the third trimester of pregnancy. Roe v. Wade, 410 U.S. 113, 165–66 (1972). While the trimester system is no longer in effect today, *Roe* was the first case to establish a state's interest in protecting the life of the unborn—an interest that has survived the entirety of the Court's abortion jurisprudence. *Id.* at 162.

[8] *Casey*, 505 U.S. at 877–78.

[9] *Id.* at 874, 877–78.

expensive," however, did not violate this undue burden standard.[10] Moreover, *Casey* made clear that so long as the State attempted through legislation to inform women about their options and did not attempt to hinder their "free choice," then it could enact regulations that attempted to "persuade [women] to choose childbirth over abortion."[11] The Court's holding in *Casey* has since become the law of the land.

B. Mazurek v. Armstrong

In *Mazurek v. Armstrong*,[12] the Supreme Court upheld a Montana statute restricting the performance of abortions to licensed physicians.[13] In its decision, the Court stated that "the Constitution gives the States broad latitude to decide that particular functions may be performed only by [physicians], even if an objective assessment might suggest that those same tasks could be performed by others."[14]

Some abortion proponents have indicated that the holding in *Mazurek* was based on the lack of data that appellant provided at the district court level.[15] These proponents argue that the Court left open the possibility that state statutes requiring that only licensed physicians perform abortions could be an issue in the future:

> [P]laintiffs in the Ninth Circuit seeking to challenge those States' laws may well be able to meet the threshold "fair chance of success" requirement for a preliminary injunction merely by alleging an *improper purpose* for the physician-only rule, since, as noted above, the Court of Appeals did not appear to rely on any evidence suggesting an unlawful motive on the part of the Montana Legislature.[16]

Although it is true that the lower courts did not consider Montana's legislative purpose in enacting the law, the Supreme Court nonetheless upheld the licensed-physician requirement.[17] State courts' recent citations

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[10] *Id.* at 874.

[11] *Id.* at 877–78.

[12] 520 U.S. 968 (1997) (emphasis omitted).

[13] *Id.* at 969–70, 975–76.

[14] *Id.* at 973 (quoting *Casey*, 505 U.S. at 885).

[15] *See, e.g.*, Cathren Cohen, *"Beyond Rational Belief": Evaluating Health-Justified Abortion Restrictions After Whole Woman's Health*, 42 N.Y.U. REV. L. & SOC. CHANGE 173, 219 (2018) ("Now that *Whole Woman's Health* has clarified that courts should inquire into the evidentiary support for laws regulating medical practices, challenges to the constitutionality of physician-only law could be successful despite *Mazurek*.").

[16] *Mazurek*, 520 U.S. at 975–76 (emphasis added).

[17] *Id.* at 976.

to *Mazurek* also indicate that the Court's ruling upholding the licensed-physician statute still holds an important place in abortion jurisprudence today.[18] The Court's cautionary statement about an "improper purpose," however, should alert state legislatures to the fact that they should proceed with caution as they consider how best to protect the women within their borders while still complying with precedent.

C. Whole Woman's Health v. Hellerstedt

Prior to the Supreme Court's decision in *Whole Woman's Health v. Hellerstedt*,[19] many states, previously disheartened by the Supreme Court's decision to legalize abortion in *Roe v. Wade*, saw *Casey* and its progeny as an opportunity to enact pro-life legislation that would give advocates of those yet unborn a fighting chance against pro-choice women's activist groups.[20] Many abortion organizations claimed that these newly-enacted laws were unconstitutional, but the Supreme Court traditionally deferred to the federal district and circuit courts for matters regarding the constitutionality of these state laws.[21] Consequently, by 2016, a split of authority developed among some federal circuit courts: some circuits interpreted *Casey* as imposing a rule that required courts to balance both the benefits and burdens of the legislation, while other circuits avoided the balancing act altogether and focused primarily on whether the "legitimate purpose promoted by the law create[d] a substantial obstacle to women seeking an abortion."[22] Thus, conflicting opinions developed about whether the undue burden test required a rational basis standard of review or a heightened scrutiny standard of review.[23]

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[18] *See, e.g.*, Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists, 257 P.3d 181, 195 (Ariz. Ct. App. 2011) (holding that a physician-only requirement does not in itself violate state or federal privacy rights)*; see also infra* notes 102–04 and accompanying text (suggesting that state legislatures should consider how comments made during the legislative enactment process may impact the litigation stream).

[19] 136 S. Ct. 2292 (2016).

[20] Michael J. New, *Casey at 25: Pro-Life Progress Despite a Judicial Setback*, NAT'L REV. (June 28, 2017, 6:15 PM), https://www.nationalreview.com/2017/06/planned-parenthood-v-casey-1992-pro-life-incremental-approach-decline-abortion/ ("The constitutional protection that *Casey* granted these [pro-life] laws, coupled with pro-life gains in numerous state legislatures since the 1990s, has led to a substantial increase in the number of state-level pro-life laws.").

[21] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016).

[22] Megan Harper, *Making Sense of* Whole Woman's Health v. Hellerstedt*: The Development of a New Approach to the Undue Burden Standard*, 65 KAN. L. REV. 757, 766–67 (2017).

[23] *Id.* at 766.

In *Whole Woman's Health*, the Supreme Court affirmed the use of the heightened scrutiny standard and required lower courts to consider the evidence and arguments presented at trial, rather than relying solely on the legislature's intent.[24] Similar to its later holdings in both *Casey* and *Roe*, the Court declared that "the 'State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient,'" and required lower courts to consider "the burdens a law imposes on abortion access together with the benefits those laws confer."[25]

In this way, the Court upheld the balancing test that several circuits had already adopted post-*Casey*.[26] The Court also clarified that the proper standard under the undue burden test is the heightened scrutiny test, not the rational basis test, and held that, in determining the constitutionality of an abortion-regulating law, lower courts must "place considerable weight upon evidence and argument presented in judicial proceedings."[27] Ultimately, however, the Court held that it "retains an independent constitutional duty to review factual findings where constitutional rights are at stake."[28]

In its analysis, the Court also considered how effective the regulation at issue—the "Surgical-Center Requirement"—would have been to deter a wrongdoer from engaging in criminal behavior.[29] Furthermore, while the Court acknowledged that increased driving distances alone did not constitute an undue burden, when the Court also considered the added burden of potential clinic closures "viewed in light of the virtual absence

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[24] *See Whole Woman's Health*, 136 S. Ct. at 2310 (requiring courts not only to determine that a law further a valid state interest, but also to balance the benefits and burdens of such law with the use of evidence presented at trial, not merely legislative findings).

[25] *Id.* at 2309 (quoting Roe v. Wade, 410 U.S. 113, 150 (1973)).

[26] *See id.* at 2309–10 (explaining that balancing the benefits and burdens is the correct legal standard).

[27] *See id.* at 2310 (discussing the importance of evidence given at trial); *id.* at 2325–26 (Thomas, J., dissenting) (indicating that rational basis scrutiny is an insufficient level of scrutiny for abortion laws).

[28] *Id.* at 2310 (quoting Gonzales v. Carhart, 550 U.S. 124, 165 (2007)).

[29] *Id.* at 2313–15. The Court discusses the story of Kermit Gosnell—who is well-known by abortion proponents and pro-life advocates alike for taking the life of three infants born alive after attempted abortions. The recent film, *Gosnell: The Trial of America's Biggest Serial Killer*, portrays his horrific story. The fact that the Supreme Court now considers this story as a valid comparison may also be of extreme importance to pro-life advocates when considering how to effectively present the balancing test before a court. *See, e.g.*, *id.* at 2343 (Alito, J., dissenting) (affirming that the challenged statutes were likely enacted in response to the Kermit Gosnell scandal and were passed with the "inten[t] to force unsafe facilities to shut down"); Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 803 (7th Cir. 2013) (considering how the Kermit Gosnell scandal affected the Wisconsin legislature's decision to implement additional restrictions necessary for the protection and safety of women obtaining abortions).

of any health benefit," the Court concluded that the Texas regulation imposed an undue burden on a woman's right to obtain an abortion.[30]

II. LICENSED PHYSICIAN REQUIREMENTS AND TELEMEDICINE ABORTION STATUTES

While abortion proponents are currently challenging a wide variety of statutes,[31] this Note focuses on two challenged statutes in particular: (1) the licensed-physician, or physician-only, requirement and (2) telemedicine abortion statutes.

A. Licensed-Physician Requirement

Licensed-Physician statutes are prevalent throughout the United States: forty states currently provide that an abortion may be performed only by a licensed physician,[32] and thirty-four states require that clinicians who perform medically-induced abortions must be licensed physicians.[33]

The statutory language used by some states is extremely specific. For example, Alabama law provides that "[o]nly a physician may perform an abortion,"[34] and Arizona law provides that "[a]n individual who is not a physician shall not perform a surgical abortion."[35] Texas law currently provides that an abortion must be performed by "a physician licensed to practice medicine in [the] state,"[36] and Indiana law makes abortions illegal unless "the abortion is performed by the physician."[37]

Other states have tailored their statutory language to proscribe the administration of medically-induced abortions by anyone other than a licensed physician. Arkansas law provides that "[w]hen . . . [a] drug or

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[30] *Whole Woman's Health*, 136 S. Ct. at 2313 (indicating that a burden is "'undue' when the requirement" or regulation at issue "places [a] 'substantial obstacle to a woman's choice' in 'a large fraction of the cases in which' it 'is relevant'" (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992))).

[31] *See supra* note 6 and accompanying text.

[32] *See An Overview of Abortion Laws*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/overview-abortion-laws (last updated Nov. 1, 2019) (surveying various abortion laws).

[33] *See Medication Abortion*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/medication-abortion (last updated Nov. 1, 2019) (providing an overview of medication abortion laws).

[34] ALA. CODE § 26-23A-7 (West, Westlaw through Act 2019-540).

[35] ARIZ. REV. STAT. ANN. § 36-2155(A) (West, Westlaw through 2019 Reg. Sess.).

[36] TEX. HEALTH & SAFETY CODE ANN. § 171.003 (West, Westlaw through end of 2019 Reg. Sess. of 86th Leg.).

[37] IND. CODE § 16-34-2-1(a)(1)(A) (West, Westlaw through 2019 First Reg. Sess.); 410 IND. ADMIN. CODE 26-13-2(b) (West, Westlaw through Indiana Weekly Collection, Sept. 4, 2019).

chemical regimen is used to induce an abortion, the initial administration of the drug or chemical shall occur in the same room and in the physical presence of the physician . . . ."[38] Similarly, North Carolina law punishes the "willful" administration of drugs or instruments to destroy an unborn child as a Class H felony,[39] but the state permits licensed physicians to perform abortions prior to twenty weeks' gestation as long as the procedure is done "in a hospital or clinic [determined] by the Department of Health and Human Services to be a suitable facility for the performance of abortions."[40]

In litigation, these physician-only statutes are typically grouped together under the broader category of Targeted Regulation of Abortion Providers (TRAP) laws.[41] TRAP laws are being challenged for "impos[ing] medically unnecessary requirements" that do not "reasonably relate[]" to the preservation of women's health.[42] These statutes have also been challenged on the grounds of being unduly burdensome because of the shortage of licensed physicians who are willing and able to perform abortions on women within state boundaries.[43]

B. Telemedicine Abortion Statutes

As technological advancements within the medical field continue to develop, it is no surprise that telemedicine use continues to grow as well, especially in connection with abortion.[44] In response to this growth,

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[38] ARK. CODE ANN. § 20-16-603(b)(1) (LexisNexis, LEXIS through 2019 Reg. Sess.).

[39] N.C. GEN. STAT. § 14-44 (LexisNexis, LEXIS through Sess. Laws 2018-146 of 2018 Reg. Sess.).

[40] *Id.* § 14-45.1.

[41] Abortion proponents assert that TRAP laws "impose medically unnecessary requirements that are not based on differences between abortion and other medical procedures that are reasonably related to preserving patient health" and "do little or nothing for patient health," but "[i]nstead, . . . impose unnecessary and burdensome impediments to abortion that harm patients." Compl., Whole Woman's Health Alliance, *supra* note 1, ¶¶ 68–69.

[42] *Id.*

[43] *See* Jennifer Templeton Schirmer, Note, *Physician Assistant as Abortion Provider: Lessons from Vermont, New York, and Montana*, 49 HASTINGS L.J. 253, 264–67, 270, 273 (1997) (detailing how doctors are reluctant to support allowing non-licensed physicians and clinicians to perform abortions for financial and political reasons and examining several barriers to abortion access, including a "diminishing provider pool" and "scheduling barriers," among others).

[44] Office of the Nat'l Coordinator for Health Inf. Tech., *Telemedicine and Telehealth*, HEALTHIT, https://www.healthit.gov/topic/health-it-initiatives/telemedicine-and-telehealth (last updated Sept. 28, 2017) (defining "telehealth," also known as "telemedicine," "as the use of electronic information and telecommunication technologies to support and promote long-distance clinical health care" via videoconferencing and other wireless communications); *see also* Mohana Ravindranath & Renuka Rayasam, *How Technology Could Preserve Abortion Rights*, POLITICO (July 29, 2018, 9:36 AM), https://www.

eighteen states have enacted statutes that govern the practice of telemedicine abortions.[45] Although only a handful of states have enacted laws regulating telemedicine abortions, a brief overview of the specific statutory language that some states have chosen to adopt may assist state legislators in identifying challenges that could arise in the future.

Some state statutes prohibit telemedicine abortions by inference. Kansas law, for example, mandates that "[n]o abortion . . . be performed or induced by any person other than a physician licensed to practice medicine in [that] state . . . ."[46] Such laws ensure that a state is able to properly care for its citizens by subjecting its healthcare professionals to heightened safety requirements and by monitoring the level of care its citizens receive from its own in-state physicians. Other states have expressly prohibited telemedicine abortions by requiring the performance of abortion procedures "in person."[47] In a similar vein, and in light of the risks associated with ectopic pregnancies,[48] Arkansas's, Oklahoma's, and Mississippi's laws require a physician to physically examine a patient before prescribing or administering abortion-inducing drugs[49] and to physically be present to administer those drugs to the patient.[50]

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politico.com/story/2018/07/29/abortion-rights-technology-telemedicine-prescriptions-693328 (outlining the current status of telemedicine abortion regulations across the United States).

[45] *Medication Abortion*, *supra* note 33.

[46] KAN. STAT. ANN. § 65-4a10(a) (West, Westlaw through 2019 Reg. Sess.).

[47] *See* IND. CODE § 16-34-2-1(a)(1) (West, Westlaw through 2019 First Reg. Sess.) (indicating that within the context of the statute, the phrase "'in person' does not include the use of telehealth or telemedicine services"). For a detailed analysis of each of the nineteen state statutes that prohibit telemedicine abortions, see AMANDA STIRONE, ON POINT: STATE REGULATION OF TELEMEDICINE ABORTION AND COURT CHALLENGES TO THOSE REGULATIONS 2–8 (Charlotte Lozier Institute July 2018), https://s27589.pcdn.co/wp-content/uploads/2018/07/State-Regulation-of-Telemedicine-Abortion-and-Court-Challenges-to-Those-Regulations.pdf.

[48] *See generally*, *What is an Ectopic Pregnancy and How do You Know You Have One?*, WOMEN ON WEB, https://www.womenonweb.org/en/page/525/what-is-an-ectopic-pregnancy-and-how-do-you-know-you-have-one (last visited Sept. 2, 2019) (defining an ectopic pregnancy as a "life[-]threatening" "pregnancy that grows outside the womb" and indicating that such pregnancies must be properly diagnosed via ultrasound before the woman may be prescribed an abortion-inducing drug).

[49] ARK. CODE ANN. § 20-16-1504(b) (LexisNexis, LEXIS through 2019 Reg. Sess.) (requiring a physician to perform an in-person examination to document a woman's gestational age and the intrauterine location of her pregnancy before providing, selling, or prescribing abortion-inducing drugs because of the risks associated with medical abortions performed on women with advanced gestational ages and women who have ectopic pregnancies); MISS. CODE ANN. § 41-41-107(3) (LexisNexis, LEXIS through 2019 Reg. Sess.); OKLA. STAT. ANN. tit. 63 § 1-729.1 (West, Westlaw through 2019 First Reg. Sess.).

[50] ARK. CODE. ANN. § 20-16-603(b)(1) (LEXIS); MISS. CODE ANN. § 41-41-107(3) (LEXIS); OKLA. STAT. ANN. § 1-729.1 (Westlaw).

Still other state laws regulate telemedicine abortions by focusing on the physician-patient relationship.[51] South Dakota law, for example, requires an in-person scheduling meeting during which the licensed physician must obtain the woman's written consent, assess whether the woman has been unduly influenced or coerced to obtain an abortion, and advise her of any pre-existing risk factors, especially those associated with "adverse psychological outcomes following an abortion."[52] The South Dakota statute also currently requires the physician to provide the woman with the contact information of pregnancy help centers that are registered with the South Dakota Department of Health.[53] Moreover, before the woman can proceed with an abortion, she must complete a consultation at a pregnancy help center where she may obtain education, counseling, or other assistance necessary to properly inform her decision to obtain an abortion.[54] Overall, states have taken a varied approach to regulating telemedicine abortions.

III. STATE STATUTES AND THE UNDUE BURDEN TEST

The Court in *Whole Woman's Health* looked at many details provided by the lower courts when it balanced a woman's right to obtain an abortion with the state's interest in protecting the life of the unborn. For example, it found that the provisions the Texas statute—specifically the surgical-center requirement—imposed restrictions on the facilities that did not apply to other medical centers that performed procedures associated with statistically-higher mortality rates.[55] The Court considered the medical benefits of the challenged Texas statute to be outweighed by the burdens imposed on women seeking to have an abortion.[56] The following sections detail some specifics of the Court's analysis and compares the Surgical-Center Requirement with the licensed-physician, or physician-only, and telemedicine requirements.

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[51] *See*, *e.g.*, W. VA. CODE ANN. § 30-3-13a(c)–(d) (LexisNexis, LEXIS through 2019 Reg. and First Extraordinary Sess. legis.) (requiring a physician-patient relationship for the use of telemedicine practice).

[52] S.D. CODIFIED LAWS § 34-23A-56 (West, Westlaw through 2019 Sess. Laws).

[53] *Id.* This portion of South Dakota's statute is currently barred by a preliminary injunction, but the language has been amended several times in an attempt to comply with the Court's order. *See* Planned Parenthood Minn. v. Daugaard, 836 F. Supp. 2d 933, 936, 943 (D.S.D. 2011) (holding that the pregnancy centers had standing to intervene); Planned Parenthood Minn. v. Daugaard, 946 F. Supp. 2d 913, 917 (D.S.D. 2013) (granting a preliminary injunction against four of the provisions).

[54] S.D. CODIFIED LAWS § 34-23A-56(3) (West, Westlaw through 2019 Sess. Laws).

[55] *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2315 (2016) (explaining that the mortality rate of childbirth is ten times higher than the mortality rate of abortion).

[56] *See id.* at 2316, 2318 (holding that the "surgical-center requirement" not only was unnecessary, but also imposed an obstacle in the path to abortion).

A. Licensed-Physician Requirement

1. Recent Litigation

The Supreme Court has given states the freedom to adopt licensed-physician requirements.[57] In *Mazurek v. Armstrong*, the Court recognized a state's right to regulate licensing requirements for the purpose of protecting women who obtain services from medical professionals.[58] A recent lawsuit filed in Mississippi by Jackson Women's Health Organization, the only abortion provider in the state of Mississippi, challenges a number of state-wide abortion regulations.[59] In addition to assailing the recently-enacted statute banning abortions beyond fifteen weeks' gestation,[60] plaintiffs to that lawsuit also challenge Mississippi's physician-only requirement, which was originally passed in 1996.[61] The relevant statutes provide that "[a]bortions shall only be performed by physicians licensed to practice in the State of Mississippi,"[62] and further provides that only physicians may "dispense[], administer[], or otherwise provide[] or prescribe[] the abortion-inducing drug."[63]

In subsection two, the statute acknowledges the dangers of inducing a medical abortion during an ectopic pregnancy and, as a safeguard, requires that in-person medical consultations occur prior to the administration of the abortion-inducing drug:

> Because the failure and complications from medical abortion increase with increasing gestational age, because the physical symptoms of medical abortion can be identical to the symptoms of ectopic pregnancy, and because abortion-inducing drugs do not treat ectopic pregnancies but rather are contraindicated in ectopic pregnancies, the physician giving, selling, dispensing, administering or otherwise providing or prescribing the abortion-inducing drug must first physically examine the woman and document in the woman's medical chart the gestational age and intrauterine location of the pregnancy before

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[57] Mazurek v. Armstrong, 520 U.S. 968, 974 (1997).

[58] *Id.* at 974–75.

[59] Am. Compl., Jackson Women's Health Org., *supra* note 1, ¶¶ 10, 28.

[60] *See* MISS. CODE ANN. § 41-41-191(4)(b) (LexisNexis, LEXIS through 2019 Reg. Sess.) (prohibiting abortion after fifteen weeks except in cases of emergency).

[61] Am. Compl., Jackson Women's Health Org., *supra* note 1, ¶¶ 107, 115.

[62] MISS. CODE ANN. § 41-75-1(f) (LexisNexis, LEXIS through 2019 Reg. Sess.), *invalidated by* Jackson Women's Health Org. v. Currier, 320 F. Supp. 3d 828, 842 (S.D. Miss. 2018).

[63] MISS. CODE ANN. § 41-41-107(1) (LexisNexis, LEXIS through 2019 Reg. Sess.).

> giving, selling, dispensing, administering or otherwise providing or prescribing the abortion-inducing drug.[64]

By requiring that only licensed physicians perform abortions, Mississippi's statute consequently prohibits advanced practice clinicians (APCs) from performing abortions and pre-abortion procedures.[65] Plaintiffs thereby assert that "[t]here is no medical benefit or other reason to prevent APCs from providing [abortions or pre-abortion] care" because APCs regularly participate in patient care "that is comparable to first trimester abortions and that carries similar or greater risks of complications."[66] Much of plaintiffs' argument is also based on the fact that "Certified Nurse Practitioners and Certified Nurse Midwives may also provide a wide range of women's health care, including treatment related to pregnancy, childbirth, family planning . . . , sexually transmitted infections, and other gynecological care."[67] Plaintiffs further allude to the fact that there is "a shortage of abortion providers" who are willing and able to provide abortions.[68] They claim that this shortage contributes to scheduling conflicts with would-be patients, causing the patients to miss appointments or altogether forego abortion within the state of Mississippi.[69] Abortion proponents argue that by getting rid of the physician-only requirement, the state will better serve and care for women in Mississippi.[70]

In another recent case, *Planned Parenthood Arizona v. American Association of Pro-Life Obstetricians & Gynecologists*, the Arizona Court of Appeals specifically addressed the plaintiffs' challenge against the physician-only requirement: "We agree with *Menillo* that no privacy rights, state or federal, are implicated by requiring that a surgical procedure be performed by a physician. And as in *Mazurek*, we hold that such a requirement does not violate Arizona's constitution absent a showing of improper purpose."[71] The Arizona Court of Appeals' sparse analysis on the issue of the licensed-physician requirement further

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[64] *Id.* at § 41-41-107(2) (LEXIS).

[65] Am. Compl., Jackson Women's Health Org., *supra* note 1, ¶¶ 10, 110; *see* MISS. CODE ANN. § 41-41-107(1)–(2) (LexisNexis, LEXIS through 2019 Reg. Sess.) (requiring that only physicians can perform abortions).

[66] Am. Compl., Jackson Women's Health Org., *supra* note 1, ¶ 111. Plaintiffs claim that because midwives are not subject to "laws requiring a license to practice medicine," "[t]he [p]hysician [o]nly [r]equirement creates a substantial obstacle to access to abortion care." *Id.* ¶¶ 112–13.

[67] *Id.* ¶ 111.

[68] *Id.* ¶ 113.

[69] *Id.* ¶ 114.

[70] *See id.* ¶¶ 107–15 (arguing that the statute, among others, unfairly singles out abortion providers and constitutes a barrier to abortion access).

[71] 257 P.3d 181, 195 (Ariz. Ct. App. 2011).

indicates that such statutes do not impose an unwarranted or unfounded burden on women's health and safety standards. Ultimately, the Court of Appeals overturned the trial court's decision to grant plaintiffs a preliminary injunction that barred the portions of the Arizona Revised Statutes pertaining to the regulation of abortion procedures. The Court held that "[t]he legislature could . . . reasonably conclude that consultation with a physician was superior to consultation with a nonphysician."[72]

2. Comparative Analysis

The current lawsuits challenging licensed-physician statutes are distinct from the challenged admitting privileges and ambulatory-surgical-center requirements in *Whole Woman's Health* for several reasons. First, the Court's analysis was fact specific: it focused on the details of the bill that provided explicit specifications on how each ambulatory surgical center was to be run.[73] The Court acknowledged that the "facts [provided by plaintiff] indicate[d] that the surgical-center provision impose[d] 'a requirement that simply [was] not based on differences' between abortion and other surgical procedures 'that [were] reasonably related to' preserving women's health, the asserted 'purpos[e] of the Act in which it [was] found.'"[74] Thus, each challenged regulation requires a fact-specific analysis. For a regulation to be undue, the Court must find no relation to the preservation of a woman's health. Because the licensed physician or physician-only statutes are foundational regulations with a clear tie to protecting women's health, it is unlikely that they will be considered unduly burdensome in light of the decision in *Whole Woman's Health*.

Second, while the Court acknowledged the factual support provided by the parties, it repeatedly indicated that the additional surgical requirements provided by the regulation were "not necessary."[75] The licensed-

physician statutes, by contrast, add nothing to pre-existing licensing statutes; instead, they are fundamental, stand-alone statutes, many of which were enacted decades ago.[76] Thus, statutory physician licensing

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[72] *Id.* at 194.

[73] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2315–16 (2016).

[74] *Id.* at 2315 (quoting Doe v. Bolton, 410 U.S. 179, 194 (1973) (sixth alteration in original)).

[75] *Id*. at 2316.

[76] *See* Jacob Gershman, *Lawsuits Challenge Rules Limiting Who Can Perform Abortions*, WALL STREET J. (Jan. 15, 2019, 3:32 PM), https://www.wsj.com/articles/new-challenges-to-state-abortion-laws-11547571601 (discussing how abortion-rights advocates are questioning decades-old licensed-physician statutes). See MISS. CODE ANN. § 41-75-1(f)(2019) (LexisNexis, LEXIS through 2019 Reg. Sess.), MD. CODE ANN., HEALTH-GENERAL

requirements are not superfluous statutes intended to impede women's access to abortion. Rather, they have a clear and apparent purpose that is necessary for the protection of women who seek to obtain abortions.

Third, in its reasoning, the Court gave great credence to the horrific Kermit Gosnell scandal.[77] It determined that "there [was] no reason to believe that an extra layer of regulation would have affected [Gosnell's deplorable] behavior," and that "[d]etermined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced to adopt safe practices by a new overlay of regulations."[78] Once again, the licensed-physician requirement is not a "new overlay of regulations," but a well-established, Court-supported precedent that should continue to be upheld. Despite the fact that wrongdoers, as the Court acknowledged, are predisposed to surpass regulations altogether in an effort to accomplish their evil purposes, certain regulations, when properly enforced, will permit states to catch such wrongdoers in the act without subjecting numerous women to similar atrocities. The licensed-physician statutes, when properly maintained, will serve that very purpose.

Opening up the pool of abortion providers to include non-licensed physicians provides a greater opportunity for wrongdoers to slip through the cracks of the system, potentially permitting them to go undetected for months, and thereby subjecting women to medical malpractice and greater health and safety risks.[79] For these reasons, the licensed-physician, or physician-only statutes, clearly reinforce states' interests in promoting the health and safety of the women within their jurisdictions.

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§ 20-208 (LexisNexis, LEXIS through 2019 Reg. Sess.), and KY. REV. STAT. ANN. § 311.750 (West, Westlaw through 2019 Reg. Sess.), for examples of licensed-physician statutes that were enacted beginning in 1974.

[77] *Whole Woman's Health*, 136 S. Ct. at 2313–14.

[78] *Id.*

[79] *See, e.g.*, Roslyn Y. Bazzelle, Mazurek v. Armstrong*: Should States be Allowed to Restrict the Performance of Abortions to Licensed Physicians Only?*, 24 T. MARSHALL L. REV. 149, 172–73 (1998) (acknowledging a state's interest in restricting the performance of abortion procedures to licensed physicians and identifying "the classic justification for medical practice acts [as] the need to protect the public from 'quacks' who might take a person's money while either providing no service at all or threatening injury through incompetence").

B. Telemedicine Abortion Statues

1. Recent Litigation

Telemedicine is still an emerging advancement within the medical field.[80] While there are certainly benefits to providing individuals who live in rural areas with remote access to medical care, telemedicine as applied to abortion is wholly different from telemedicine as applied to traditional medical procedures. This is primarily because abortion, unlike any other medical procedure, is an elective procedure: except in specific circumstances, i.e. ectopic pregnancies, abortion is not a necessity.[81]

Plaintiffs to the lawsuit filed by Jackson Women's Health Organization[82] also challenge the ban on telemedicine abortions.[83] The Mississippi Code defines "telemedicine" as "the practice of medicine using electronic communication, information technology or other means between a physician in one location and a patient in another location."[84] Mississippi has expressly restricted the practice of telemedicine as it relates to abortion.[85] Plaintiffs in that case claim that the fact that "Mississippi leads the nation in telemedicine and is one of only seven states to receive an 'A' rating from the American Telemedicine Association," and the fact that Mississippi uses telemedicine to diagnose problems in other areas of the medical field, indicates that the Mississippi legislature is unfairly discriminating against abortion providers by precluding them from utilizing telemedicine resources.[86]

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[80] The American Telemedicine Association defines "telemedicine" as "the remote delivery of health care services and clinical information using telecommunications technology[,] . . . includ[ing] a wide array of clinical services using internet, wireless, satellite and telephone media." *About Telemedicine*, AM. TELEMEDICINE ASS'N, http://www.americantelemed.org/main/about/telehealth-faqs- (last visited Sept. 8, 2019). See Patricia C. Kuszler, *Telemedicine & Integrated Health Care Delivery: Compounding Malpractice Liability*, 25 AM. J.L. & MED. 297, 299–305 (1999), for a detailed history of how telemedicine has developed over the past several decades. See also Sam Draper, *How Telemedicine Could Benefit America's Abortion Care*, WEARABLE TECHS. (Aug. 10, 2018), https://www.wearable-technologies.com/2018/08/how-telemedicine-could-benefit-americans-abortion-care/, for a discussion on how "[t]he first US telemedicine abortion program began ten years ago, in Iowa."

[81] *See* Dawn Stacey, *Why Do Women Have Abortions?*, VERY WELL HEALTH (July 16, 2019), https://www.verywellhealth.com/reasons-for-abortion-906589 (citing numerous social, economic, and personal reasons for why a woman might *choose* to obtain an abortion); *see also* Clarke D. Forsythe, *A Draft Opinion Overruling* Roe v. Wade, 16 GEO. J.L. & PUB. POL'Y 445, 481 (2018) (indicating that 90% of abortions are elective procedures).

[82] *See* discussion *supra* Part III.A.

[83] Am. Compl., Jackson Women's Health Org., *supra* note 1, ¶¶ 123–27.

[84] 2635-1 MISS. CODE R. § 30-026-2635 (LexisNexis, LEXIS through Oct. 3, 2019).

[85] MISS. CODE ANN. §§ 41-41-33, -107 (LexisNexis, LEXIS through 2019 Reg. Sess.).

[86] Am. Compl., Jackson Women's Health Org., *supra* note 1, ¶¶ 118–21.

Telemedicine abortions are, however, still hotly contested among individual states. Kentucky, for instance, began to allow abortion providers to complete consultations via telemedical services,[87] while still restricting other aspects of the abortion procedure. The fact that Kentucky began to allow the use of telemedicine for the initial consultation meeting does not mean, however, that it is right for all states and should, therefore, be nationally mandated. For states that decide to permit telemedicine to be utilized for pre-abortion consultation or counseling, it is likely that the benefits of completing the consultation, regardless of whether they take place in-person or via telemedicine services, likely outweigh the burdens that would be borne by requiring the woman seeking the abortion to forego the abortion altogether or to travel to another state to obtain the abortion.[88]

2. Comparative Analysis

Telemedicine abortion regulations are different from the admitting privileges and surgical-center requirements discussed in *Whole Woman's Health*. First, telemedicine is still an emerging development within the medical field as a whole.[89] For abortion proponents to claim that states that do not implement these new medical advancements are intentionally burdening women's access to abortion is to make an unreasonable requirement of state legislatures. Moreover, the decision to hold some states liable for their refusal to proactively mandate a service that has not yet been nationally recognized as safe or preferred, especially as it relates to abortion, is a reckless policy decision that undermines each individual state's legislative process.[90]

Second, because telemedicine poses no substantive medical benefit to women but merely operates as a facet of medical convenience, a state's

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[87] Eric Wicklund, *Telemedicine Used by Both Sides in Abortion Debate*, MHEALTH INTELLIGENCE (Feb. 3, 2016), https://mhealthintelligence.com/news/telemedicine-used-by-both-sides-in-abortion-debate.

[88] *See, e.g.*, *id.* (discussing how supporters of Kentucky's telemedicine bill view it as a necessary compromise to "help woman [sic] who can't easily visit a doctor in person or who would have been forced to make more than one appointment"); Molony, *supra* note 6, at 723–26 (discussing the benefits of pre-abortion consultations and counseling services).

[89] *See supra* note 80 and accompanying text; *see also* Diane Hoffmann & Virginia Rowthorn, *Legal Impediments to Telemedicine: Legal Impediments to the Diffusion of Telemedicine*, 14 J. HEALTH CARE L. & POL'Y 1, 1–2, 9 (2011) (discussing how telemedicine challenges the traditional physician licensure laws by allowing out-of-state practitioners to treat and/or consult patients without being subject to the laws of the state in which the patient resides).

[90] *See* Ken Abrams, et al., *What can Health Systems do to Encourage Physicians to Embrace Virtual Care? Deloitte 2018 Survey of US Physicians*, DELOITTE TOUCHE TOHMATSU LIMITED, 2, 4, 6, 9–11 (2018) (indicating that many physicians have significant concerns about telemedicine and are not yet ready to utilize the new technology in their practices).

decision to regulate telemedicine abortions does not unduly burden women's access to abortion. For example, the Supreme Court has already acknowledged "that increased driving distances do not always constitute an 'undue burden.'"[91] Thus, the fact that a woman would be required to drive to the nearest available clinic to obtain an abortion, absent other negative factors, does not, by itself, mean that the state should thereby be required to make telemedicine services available for the purpose of avoiding driving long distances to obtain an abortion.

Additionally, because telemedicine services require someone to be present with the patient when the ultrasound checking against ectopic pregnancy is being performed, the telemedicine statutes effectually seek to circumvent the licensed-physician requirements by allowing a clinician to perform procedures that the state has mandated only a licensed physician should be able to perform.[92] This circumvention, while arguably convenient, is unsafe for women and contrary to the state's interest in ensuring that women are cared for by licensed physicians.[93] Furthermore, valid concerns exist regarding "the [I]nternet's existing medication black market" for the abortion pill.[94] It is therefore important to recognize that lessening the regulation of telemedicine abortions may temporarily address some aspects of this issue, but it will not solve the problem of black-market, abortion-pill purchases altogether, as women who desire to obtain abortions without any sort of medical assistance do so independently and at their own risk.[95] What's more, reimbursement, misdiagnosis, and privacy issues were among the top concerns indicated in a recent survey of generalist physicians who chose not to employ telemedicine services as a regular part of their practice.[96] For this reason,

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[91] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2313 (2016) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 885–87 (1992)).

[92] Draper, *supra* note 80 (describing the telemedicine abortion procedure and indicating that a patient who elects to obtain a telemedicine abortion must meet with a clinician while the licensed physician reviews the patient's report and medical history and administers the abortion pill remotely); *see also* Hoffman & Rowthorn, *supra* note 89, at 9–10 ("[In-state licensure] ensured that the state had control over all the physicians practicing within state boundaries . . . .").

[93] *See* discussion *supra* Part III.A.2.

[94] Draper, *supra* note 80.

[95] *Id.* ("[W]hile obstacles to clinic access were a common reason people sought medications for abortion online, some respondents said they explicitly preferred doing their own abortions at home.").

[96] Ramona Socher, *Virtual Care Supported by Consumers and Physicians Not Adopted Due to Privacy, Reimbursement Concerns*, WEARABLE TECHS. (July 24, 2018), https://www.wearable-technologies.com/2018/07/virtual-care-supported-by-consumers-and-physicians-not-adopted-due-to-privacy-reimbursement-concerns/ ("While [a] majority of the consumers (57%) favor[ed] video-based visits, only 14% [of] physicians ha[d] the capability" to implement telemedical services into their healthcare practice). The physicians cited "lack of reimbursement, along with complex licensing requirements and high cost technologies,"

states that choose to regulate such technological developments as they pertain to women's reproductive health and safety, especially as such protections relate to abortion, are clearly within their means to do so.

And third, restricting telemedicine abortions does not unfairly prejudice women; it protects them. Recent studies have shown that many victims of sex trafficking and violence tend to frequent abortion clinics either out of necessity or out of coercion.[97] These women typically arrive at abortion clinics displaying one or several symptoms classified as "warning signs" that should clearly indicate to the staff that they have been victims of sex trafficking.[98] These "warning signs," however, are not always readily observable, and many of these women may choose not to disclose the reasons for their decision to obtain an abortion.[99] Unfortunately, these detection and prevention problems may be further exacerbated by the convenience and remote access afforded by telemedicine.[100] By mandating that all states permit telemedicine abortions without taking time to consider additional safety precautions for the victims of sex trafficking and violence, abortion proponents are refusing to allow states the option to carefully consider how to balance these new advancements with considerations of how to best protect some of the most vulnerable women who reside within those states' borders.[101]

For the foregoing reasons, restrictions on telemedicine abortions are not superfluous restrictions that add unreasonable and unnecessary obligations for abortion providers to comply with on top of pre-existing

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as well as "medical errors and . . . data security and privacy [issues] associated with virtual care," as reasons to "lose their enthusiasm." *Id.*

97 Megan Helton, *Human Trafficking: How a Joint Task Force Between Health Care Providers and Law Enforcement can Assist with Identifying Victims and Prosecuting Traffickers*, 26 HEALTH MATRIX: J. L.-MED. 433, 452 (2016) ("Forced abortions are . . . highly prevalent among sex trafficking victims."); Laura J. Lederer & Christopher A. Wetzel, *The Health Consequences of Sex Trafficking and Their Implications for Identifying Victims in Healthcare Facilities*, 23 LOY. U. HEALTH POL'Y & L. REV. 61, 72–73 (2014).

98 Lederer & Wetzel, *supra* note 97, at 81 (indicating that such "warning signs" may be indications of physical violence or psychological symptoms).

99 *See id.* at 80–82 (discussing psychological symptoms, such as depression, "anxiety, irritability, nightmares, low self-esteem, and feelings of shame/guilt," the presence of sexually transmitted diseases, and other factors that could indicate coercion, such as multiple abortions or "the presence of a significantly older or controlling 'boyfriend'").

100 *See id.* at 82–83 (asserting that the "[i]nteraction between medical care providers and victims is an extraordinarily delicate situation" and indicating that while "[b]uilding trust with trafficking victims may be a slow process [that] requires patience and determination[,] [t]aking the time to build rapport is critical"). While it is possible that this rapport can be built via telemedicine, the fact that telemedicine is primarily used for convenience undermines the importance of the patient/physician relationship and only further frustrates the state's ability to identify the woman as a victim. *Id.* at 80–83; Abrams et al., *supra* note 90, at 2, 6.

101 See Lederer & Wetzel, *supra* note 97, at 84–86 (providing several potential legislative solutions to states who desire to assist victims of sex trafficking).

regulations. They are beneficial and essential to women's health and protection.

IV. PRESERVING A STATE'S INTEREST

Now that courts may consider expert testimony and measurable data to determine the benefits and burdens of each challenged statute,[102] state legislatures should prepare to prove that the statutes they are attempting to enact do, in fact, support the state's purpose and interest in preserving the life of the unborn *and* that the regulations do, in fact, benefit women in some measurable way. They must also prove that they are not being enacted with the sole purpose of prohibiting access to abortion.[103] Although it is impossible to ascertain the true thoughts of state legislators and lobbyists who are working to enact stricter abortion regulations, it is important to note that many plaintiffs currently involved in litigation have pointed to specific language used by lobbyists and legislators—Senators, Representatives, and State Government Officials—who have clearly indicated that their purpose in enacting such regulations is "to end all abortions in [the state]."[104]

In addition, while the Supreme Court has granted women the constitutional right to obtain an abortion, it has not gone so far as to equate abortion with routine medical procedures. To the contrary, the Supreme Court has recognized countless times that "an abortion has . . . profound and lasting meaning" and is both "an important, and often a stressful [decision]" that should "be made with full knowledge of its nature and consequences."[105] Abortion proponents can attempt to diminish the seriousness of abortions by attempting to normalize abortion as a mere "routine procedure,"[106] but other recently-enacted state laws

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[102] *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016) (holding that the district court applied the proper legal standard when it considered "expert evidence[] presented in stipulations, depositions, and testimony" and did not defer exclusively to legislative findings).

[103] *Cf. id.* at 2310 (explaining that because no legislative findings were presented to support the disputed statutes, the Court was left to "infer that the legislature sought to further a constitutionally acceptable objective (namely, protecting women's health)").

[104] Am. Compl., Jackson Women's Health Org., *supra* note 1, ¶ 39 (quoting Faith Eischen, *Mississippi's Last Abortion Clinic to Remain Open, For Now*, INDEP. VOTER NEWS (July 11, 2012), https://ivn.us/2012/07/11/mississippi-last-abortion-clinic-to-stay-open/).

[105] Molony, *supra* note 6, at 718 n.29 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 873 (1992) and Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 67 (1976)) (listing numerous examples of the emotionally charged language the Supreme Court has used to reflect the seriousness of a woman's choice to undergo an abortion).

[106] *See, e.g.*, *Pregnancy: Unplanned Pregnancy – About Abortion*, CENT. FOR YOUNG WOMEN'S HEALTH, https://youngwomenshealth.org/2014/09/05/pregnancy-abortion/ (last updated June 27, 2019) ("An abortion performed by a medical doctor or clinical nurse specialist today is typically a safe and routine procedure."); Bazzelle, *supra* note 79, at 176

concerning feticide,[107] in addition to the progress continually being made within the medical field,[108] prove that an abortion is more than just a routine procedure. Abortion has substantial effects on a woman's body, mind, and emotions,[109] and its impact has huge repercussions that last far beyond those of any routine procedure. Furthermore, the medical field as a whole has distanced itself from abortion by creating a separate, specialized area of practice for those physicians who are willing to perform abortions.[110] This industry-wide distancing is further evidence of the fact that abortions are not routine procedures, but are distinct from other medical practices and procedures.[111] Even the Supreme Court has recognized that a woman who obtains an abortion but does not receive "individualized attention, serious conversation, and emotional support"[112] may "discover later, with devastating psychological consequences, that her decision was not fully informed."[113] As fundamental regulatory statutes, the licensed-physician, or physician-only, and telemedicine statutes currently employed by many states help to ensure that women obtain the attention and support they need to make such a decision.

These facts should spur to action activists on both sides of the aisle; but more than that, all parties must recognize that, just like men, women are capable of experiencing strong emotions in the face of significant

("[F]irst trimester abortions are simple procedures routinely performed in outpatient clinics."). *But see* Steven Ertlet, *Court Rules Nurse Fired for Refusing to Assist Abortions Must Do Abortions to Keep Her Job*, LIFENEWS.COM (Apr. 27, 2017, 12:27 PM), https://www.lifenews.com/2017/04/12/court-rules-nurse-fired-for-refusing-to-assist-abortions-must-do-abortions-to-keep-her-job-2/ (describing the firing of a Swedish nurse for refusing to contribute to abortion procedures and a court's subsequent affirmation of her dismissal); Monica Hesse, *The Long Five Minutes: Abortion Doulas Bring Comfort During a Complicated Time*, WASH. POST (Nov. 28, 2017), https://www.washingtonpost.com/lifestyle/style/the-long-five-minutes-abortion-doulas-bring-comfort-during-a-complicated-time/2017/11/27/c63f179c-9f04-11e7-8ea1-ed975285475e_story.html?noredirect=on&utm_term=.c9a0cdf90fc1 (indicating that abortion doulas provide emotional support to women while they undergo an abortion and describing the procedure as "one of the most intimate emotional experiences of [a woman's] life").

[107] *See, e.g.*, Lawrence J. Nelson, *A Crisis for Women's Rights? Surveying Feticide Statutes for Content, Coverage, and Constitutionality*, 6 U. DENV. CRIM. L. REV. 63, 67–72 (2016) (providing a comprehensive survey of feticide statutes across jurisdictions).

[108] *See* Forsythe, *supra* note 81, at 480 (describing the impact of medical advancements on the abortion debate).

[109] *See* Hesse, *supra* note 106 (describing the range of emotions women may experience before, during, and after an abortion).

[110] *See* Forsythe, *supra* note 81, at 481–82 ("Most abortions today are not performed by doctors from the Mayo Clinic or by a woman's 'own doctor.' . . . A small percentage of doctors do abortions. American medicine has largely abandoned abortion.").

[111] *See id.* ("Abortion is largely separated from the rest of obstetrical and gynecological care and practice. . . . In more than 90% of cases, abortion is not a medically-indicated procedure; it is an elective procedure chosen for social reasons.").

[112] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2318 (2016).

[113] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992).

undertakings. While studies surrounding long-term post-abortion psychological effects are varied,[114] it is vital that pro-life advocates and abortion proponents do not conflate or dismiss the existence of emotions in an effort to further their arguments.[115] Instead, state legislatures should honestly acknowledge how their existence should impact the state's regulation of abortion.

The emotional impact of an abortion procedure should also greatly impact the way telemedicine legislation is proposed and considered. If a woman who obtains an abortion does not consult with her doctor face-to-face or does not take the opportunity to be candid about the emotional impact of her decision simply because abortion proponents have dwindled the process down to matters of sheer convenience or efficiency, then the whole woman is not being cared for. Whether or not we can trust abortion providers to provide the kind of emotional care that a woman needs in order to make an informed decision is also an issue worthy of discussion. The South Dakota Legislature clearly believed that, compared to abortion providers, third-party crisis pregnancy centers would do a better job of providing women with information that would most effectively and appropriately suit their needs, especially in instances of coercion or abuse.[116] It is essential that each state legislature is afforded an opportunity to honestly weigh all interests at stake.

There is also a greater likelihood that the women who argue that they require better access to abortion via telemedicine likely do not have the proper resources available to them to be able to address the emotional issues they face. If, as Planned Parenthood's website suggests, women in minority communities lack the sexual education and training they should

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[114] *See* Clarke Forsythe, *The Medical Assumption at the Foundation of* Roe v. Wade *& Its Implications for Women's Health*, 29 ISSUES L. & MED. 183, 208–09, 223–28 (2014) (providing an extensive appendix containing various sources that discuss the long-term mental health effects of undergoing an abortion).

[115] *See* Jody Lynee Madeira, *Aborted Emotions: Regret, Rationality, and Regulation*, 21 MICH. J. GENDER & L. 1, 9–11 (2014) ("Politicizing abortion and its associated emotions encourages 'the minimization or exaggeration' of women's experience of painful emotions and distress.").

[116] *See* Planned Parenthood Minn., N.D., S.D. v. Daugaard, 836 F. Supp. 2d 933799 F. Supp. 2d 1048, 1052, 1060–63 (D.S.D. 2011) (declaring the first draft of the statute requiring the mandatory 72--hour wait period and third-party crisis pregnancy center consultation requirement "degrad[ing]" and " an unduely burdennsome" in light of *Casey*'s undue burden standard). The language of the statute has since been amended to better comply with the concerns that issues the U.S. District Court for the District of South Dakota U.S. District Court raised in this case. Planned Parenthood Minn., N.D., S.D. v. Daugaard, 946 F. Supp. 2d 913, 917 (D.S.D. 2013) (acknowledging that several of plaintiffs' original claims became moot once the language "at issue" was changed); *see also* S.D. CODIFIED LAWS § 34-23A-56 (2018 West, Westlaw through 2019 Sess. Laws) (outlining the amendments made between 2012 and 2015).

be obtaining from their parents,[117] how much more might they be lacking the emotional and mental resources to tackle the issue of abortion head-on, especially since most communities pushing for access to telemedicine abortions are in rural or impoverished areas?

By permitting pre-abortion consultations to take place via telemedicine, the state may be able to better protect its interest in controlling the rest of the process to ensure that women's health—both mental and physical—is being safeguarded. State legislators may consider the possibility of allowing women to satisfy the initial consultation requirement via telemedicine in order to gain footing in other areas of abortion legislation later on.

V. IN THE NAME OF PROGRESS

By opening the door to allow non-licensed physicians to perform abortions, states may be opening the door to *require* non-licensed physicians to perform abortions—something that medical professionals should remain free to refuse.[118] Thus, not only to protect women's health and access to proper medical care, but also to protect our nation's medical professionals from being forced to adhere to new laws and regulations that infringe on their freedoms of speech and of conscience, states must be able to regulate the standards by which abortions are performed. That is, states must be able to regulate who can perform abortion procedures, regardless if it is a medically-induced abortion during the pre-viability stage or a surgical abortion during the later stages of the first trimester.

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[117] *See Share Your Story: Shireen*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/get-involved/share-your-story/shireen (last visited Nov. 23, 2018) (explaining the experience of a young woman who sought proper information about sex education, birth control, and other resources available to her from Planned Parenthood when her parents did not provide that information).

[118] This practice of permitting non-licensed physicians to perform abortions is already taking place internationally. *See* Sohrab Ahmari, *Sweden Blacklists an Antiabortion Midwife*, WALL STREET J. (Apr. 10, 2017, 2:33 AM), https://www.wsj.com/articles/sweden-blacklists-an-antiabortion-midwife-1491768904. Moreover, NARAL, a pro-choice campaign-organizing movement, identifies a California "refusal" law as a strong-impact, anti-choice measure that is currently in full effect. *State Government: California*, NARAL: PRO-CHOICE AMERICA, https://www.prochoiceamerica.org/state/california/ (last visited Dec. 30, 2018). This "refusal" law "[a]llows physicians, registered nurses, licensed vocational nurses, or persons with staff privileges at or employed by a hospital or facility, who objects in writing on moral, ethical, or religious grounds, to refuse to participate directly in abortion care." *State Laws: California, Refusals & Guarantees*, NARAL: PRO-CHOICE AM., https://www.prochoiceamerica.org/state-law/california/#refusals-guarantees (last visited Dec. 28, 2018).

While women are clearly divided on the issue of abortion,[119] it is important for women at such a vulnerable time in their lives to feel supported and protected. Rather than attacking women who obtain abortions by calling them murderers or by shaming or guilting them into feeling helpless, bitter, and unworthy of care, states should attempt to help such women by providing additional resources to them as early and as quickly as possible.[120]

A state may use this opportunity, especially in light of the recent Supreme Court case *NIFLA v. Becerra*,[121] to issue additional information via state-mandated materials, specifically including information about the costs of adoption compared with the costs of abortion.[122] This consideration is of special importance because financial burdens appear to be at issue in several cases currently being litigated.[123] Although some abortion proponents may argue that the information contained in these materials is inaccurate or redundant, state legislatures must consider what information will be most beneficial to women at this stage, whether it be alternatives to abortion, financial information, or counseling

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[119] According to a 2018 study conducted by the Pew Research Center, 60% of women believe that abortion "should be *legal* in all or most cases," while 38% of women believe that abortion should be *illegal* in all or most cases. *Public Opinion on Abortion*, PEW RES. CTR. (Aug. 19, 2019) (emphasis added), http://www.pewforum.org/fact-sheet/public-opinion-on-abortion/.

[120] *See* David C. Reardon, *Abortion Decisions and the Duty to Screen: Clinical, Ethical, and Legal Implications of Predictive Risk Factors of Post-Abortion Maladjustment*, 20 J. CONTEMP. HEALTH L. & POL'Y 33, 33–36 (2003) (acknowledging "the intense, internal battles [] between conflicting beliefs, desires, uncertainties, and fears [] actually faced by women who are confronted with an unintended pregnancy and the prospect of abortion" and indicating that women's "differences in expectations, interests, and views about abortion have a direct bearing on . . . the inadequate screening and counseling of women considering abortion").

[121] 138 S. Ct. 2361, 2374–75 (2018) (declining to recognize "professional speech as a unique category that is exempt from ordinary First Amendment principles" and thereby holding that California's FACT Act, which required crisis pregnancy centers to disseminate materials that "provid[ed] . . . women with information about state-sponsored [family planning] services" such as abortion, was unconstitutional because it violated the centers' First Amendment right to free speech).

[122] *Id.* at 2374 (indicating that medical professionals have a constitutional interest in ensuring that their controversial speech receives First Amendment protection because "governments have [historically] 'manipulat[ed] the content of doctor-patient discourse' to increase state power and suppress minorities" (quoting Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201, 201 (1994))); Wollschlaeger v. Governor of Florida, 848 F.3d 1293, 1328 (11th Cir. 2017) ("Doctors help patients make deeply personal decisions, and their candor is crucial."); *see also NIFLA*, 138 S. Ct. at 2383–85 (Breyer, J., dissenting) (acknowledging that a state is constitutionally permitted to "require a doctor to tell a woman seeking an abortion about adoption services").

[123] *See, e.g.*, Compl., Paxton, *supra* note 1, ¶¶ 56, 65–67 (arguing that the overall affordability of abortion care is among the top concerns, especially for low-income women).

resources.[124] State legislatures also have a Court-mandated right to protect and uphold their interest in preserving the life of the unborn and educating would-be mothers about the options available to them should they choose a course of action other than abortion.[125]

Furthermore, by lowering the bar and challenging long-standing regulations, specifically licensed-physician statutes, abortion proponents are intentionally discriminating against women in the name of progress and are refusing to care for the "whole" woman. The fact that women are the only ones who can be physically harmed by abortion procedures, and the fact that only women are either physically benefitted or harmed by the addition or removal of such regulations, is an important reality that both sides must address.[126] While abortion proponents claim that they are helping women by lowering the obstacles that stand in the way of providing women with proper reproductive care, abortion proponents are really undermining a woman's ability to be an advocate for herself in the abortion debate.[127] Women want to be heard; women want to be understood; and women want to be taken seriously, especially by professionals in the medical field.[128] By lowering the regulatory standards

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[124] *See* Reardon, *supra* note 120, at 90–92 ("In the abortion context, the duty of disclosure is measured by the pregnant woman's need for information that is material in order to decide whether or not to undergo the abortion because the right to abortion is based on the right of the woman to self-determination.").

[125] *See NIFLA*, 138 S. Ct. at 2369, 2375–76 (discussing the state's interest in ensuring women have essential information about abortion and other medical provisions); Roe v. Wade, 410 U.S. 113, 158–59, 162–64 (1973) (discussing the state's interest in protecting both mother and unborn child).

[126] Biologically, only women are physically equipped to support a pregnancy; therefore, it is primarily a woman's physical safety that is at risk when statutory regulations are either enacted or overturned. This does not mean, however, that men are never responsible for or unaffected by a woman's decision to obtain an abortion. For a thought-provoking discussion about a man's responsibility in the abortion debate, compare *Hey Guys, Man Up—Abortion Is Your Issue Too*, SAVE STORKS (Feb. 16, 2018), https://savethestorks.com/2018/02/hey-guys-man-abortion-issue/, discussing how men should assume a more proactive position in caring for women in the abortion debate, with Gabrielle Blair, *Men Cause 100% of Unwanted Pregnancies*, MEDIUM (Sept. 24, 2018), https://medium.com/s/can-we-talk/men-cause-100-of-unwanted-pregnancies-eb0e8288a7e5, which criticizes men who fail to utilize safe and efficient birth control methods.

[127] *See* Ashley Fetters, *The Doctor Doesn't Listen to Her. But the Media Is Starting To.*, ATLANTIC (Aug. 10, 2018), https://www.theatlantic.com/family/archive/2018/08/womens-health-care-gaslighting/567149/?utm_source=newsletter&utm_medium=email&utm_campaign=family-weekly-newsletter&utm_content=20180811&silverid-ref=MzM0NTk3MzAxOTg2S0 (quoting Sasha Ottey, the founder of The National Polycystic Ovary Syndrome Association, who indicated that the medical field is "at a critical juncture in women's health, where women are now feeling more empowered to speak up[] [b]ecause . . . [they]'re frustrated . . . with the type of care that [they]'ve gotten").

[128] *See id.* (describing how some women feel ignored by medical professionals). While the #MeToo movement is beyond the scope of this Note, it is important to consider that women do not feel believed, understood, or heard by their general or reproductive care

as they pertain to licensed physicians, abortion proponents are diminishing women's value and worth for the sake of efficiency.

From a biblical standpoint, Christians must also be willing to proclaim biblical truth to both proponents and opponents of abortion legislation: not only that God created each person's "inmost being" and that God "knit[ted]" each person "together in [their] mother's womb,"[129] but also that "[c]hildren are a heritage from the Lord,"[130] not a burden or an inconvenience. While timing plays a significant role in many women's decisions to choose abortion over birth or adoption, it is important to emphasize that this decision should not be taken lightly. Moreover, it is encouraging that many pro-life activist groups also appear to be taking a biblically-minded approach to abortion regulations—an approach quite contrary to the approach many pro-life activists took in the past.[131]

If abortion proponents truly stand for women's health, why is it such a burden to care for and provide additional services in-person both before and after a woman obtains an abortion? If these follow-up practices are standard, and if abortion providers truly provide more than just abortion services, but also provide for the woman's health in its entirety, why wouldn't it make sense to require that women and licensed physicians take the time to meet together in person?

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physicians. For this reason, it is arguably even more important to keep regulations in place that will hold physicians accountable and require them to listen to their patients, rather than to reduce regulations for the sake of efficiency in an effort to get as many women through the door as possible. See Lynne Marie Kohm, *A Christian Perspective on Gender Equality*, 15 DUKE J. GENDER L. & POL'Y 339, 352–54 (2008), for a Christian perspective on feminism, and Lynne Marie Kohm, Diane J. Chandler & Doris Gomez, *Christianity, Feminism, and the Paradox of Female Happiness*, 17 TRINITY L. REV. 191, 240 (2011), for a discussion of the proper origin and resolution of equality.

[129] *Psalm* 139:13–16 (NIV).

[130] *Psalm* 127:3–5 (NIV).

[131] *Compare* Scott Klusendorf, *Expressing Pro-Life Views in Winsome Ways (Part 1 of 2)*, FOCUS ON THE FAMILY, https://www.focusonthefamily.com/media/daily-broadcast/expressing-pro-life-views-in-winsome-ways-pt1 (last visited Dec. 23, 2018), *and* Scott Klusendorf, *Expressing Pro-Life Views in Winsome Ways (Part 2 of 2)*, FOCUS ON THE FAMILY, https://www.focusonthefamily.com/media/daily-broadcast/expressing-pro-life-views-in-winsome-ways-pt2 (discussing strategies that pro-life activists may employ to engage in conversation with abortion proponents both honestly and respectfully), *with* Terry Gross, *Once Militantly Anti-Abortion, Evangelical Minister Now Lives "With Regret,"* NPR (July 11, 2018, 2:35 PM), https://www.npr.org/2018/07/11/628000131/once-militantly-anti-abortion-evangelical-minister-now-lives-with-regret (outlining how Rob Schenck, "once a militant leader of the anti-abortion movement," now takes issue with the harsh and violent tactics he formerly employed to persuade women not to terminate their pregnancies).

CONCLUSION

Ultimately, abortion proponents' recent attempts to invalidate licensed-physician, or physician-only, and telemedicine abortion statutes are eroding our legal system and harming women in the name of progress. States' interests in regulating the licensure of physicians who perform abortions and the way that telemedicine is utilized in relation to abortion are valid and independently supported state interests that do not harm women's health or unduly burden women's access to abortion.

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