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"We Don't Know What We Want": The Tug Between Rights and Public Health Online

*Jonathan Zittrain**

Twitter and Facebook boast billions of subscribers, many of whom are real people. The companies are also roundly hated, particularly by tech experts—at least those who follow them for something other than their stock performance.[1] Objections to platforms' behavior are commonly expressed as amazement that they could be so obviously and consistently wrong in failing to police awful content their users post. There is also amazement about unobjectionable posts and comments from users that they take down.[2] That, in turn, has led to pressure for regulatory initiatives to push the companies into doing what they so clearly ought to be doing in the first place.

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* Jonathan Zittrain is the George Bemis Professor of International Law at Harvard Law School, Professor of Public Policy at the Harvard Kennedy School of Government, Professor of Computer Science at the Harvard School of Engineering and Applied Sciences, Director of the Harvard Law School Library, and Co-Founder of the Berkman Klein Center for Internet & Society. He is the recipient of the 2023 Duquesne Kline Law School John and Liz Murray Excellence in Scholarship Award. This article is adapted from a book-in-progress on the future of digital governance, with permission from Penguin Press.

1. 64% of Americans say social media has a mostly negative effect on the way things are going in the country today. Only 10% said mostly positive effect; 25% said neither negative nor positive effect. Study also shows people think social media has a mostly negative effect (misinformation was the most cited reason, cited by 28% of the 64% who said there was a negative effect). Brooke Auxier, *64% of Americans say social media have a mostly negative effect on the way things are going in the U.S. today*, PEW RSCH. CTR. (Oct. 15, 2020), https://www.pewresearch.org/fact-tank/2020/10/15/64-of-americans-say-social-media-have-a-mostly-negative-effect-on-the-way-things-are-going-in-the-u-s-today/ [https://perma.cc/UB7J-XMMN]. A 2019 WSJ/NBC poll showed US adults across different age groups and political ideologies held a negative view of the effects of social media (even though 70% continue to use these services at least once a day). "[T]hey regard services such as Facebook to be divisive and a threat to privacy . . . ." Survey results show a majority of US adults think social media does more to: divide us, waste our time, spread lies/falsehoods, and spread unfair attacks/rumors. Results also showed low trust in tech companies, particularly Facebook (FB) (trusted less to protect people's personal information than Amazon, Google, and even the federal government!). John D. McKinnon and Danny Dougherty, *Americans Hate Social Media but Can't Give It Up, WSJ/NBC News Poll Finds*, WALL ST. J. (Apr. 5, 2019), https://www.wsj.com/articles/americans-agree-social-media-is-divisive-but-we-keep-using-it-1155445660 [https://perma.cc/9MRY-MSLS].

2. Andrew Marantz, *Why Facebook Can't Fix Itself*, THE NEW YORKER (Oct. 19, 2020), https://www.newyorker.com/magazine/2020/10/19/why-facebook-cant-fix-itself [https://perma.cc/AWR5-FGD5]; Haydn Watters, *Facebook bans photographer for posting photos of nude models with mannequin*, CBC (Mar. 20, 2017, 10:08 PM), https://www.cbc.ca/news/entertainment/mannequin-facebook-naked-models-1.4033371 [https://perma.cc/9G6E-KHKS].

If there is to be a shot at understanding what social media is doing for us—and to us—and what boundaries there should be on how they act, we need to more closely examine what we believe is so "obviously" wrong with them. This turns out to be more elusive than you would think. Not only is consensus about platform problems absent among us—perhaps not entirely surprising in an era in which basic facts are in deep dispute—it is also quite commonly absent *within* us.

For a pretty simple example of a lack of consensus, consider how you might feel upon learning that photos of animal abuse are circulating on Facebook. At first you or I might condemn the platform's irresponsible abdication of responsibility by leaving them up, or worse, amplifying them. But the same photos shared for the purpose of highlighting the depravities of trained dogfighting can evoke a view on platform censorship and amplification opposite from that of the very same picture shared for the purpose of valorizing dogfighting—as can a photo for the purpose of placing a dog with a new adoptive home, versus selling that dog. For years, Facebook has had controversial policies on just this sort of thing that try to respond to context, along with reproof for failing to well enforce them.[3] (One account from 2019 claims 136,000 photos are uploaded to Facebook every minute; this could make such subtle policies difficult to apply consistently.[4])

Or consider Clearview AI, a startup that scraped more than three billion images of people across the Internet, such as Facebook and LinkedIn profile pictures, along with names.[5] The company then used a machine learning technique so that it could retrieve any matching photos (and, often, names) when presented with a new one. As I wrote in a 2020 *Washington Post* essay inveighing against Clearview's activities and very existence:

> The upshot? The fundamental comfort—and liberty—of being able to walk down a street or enter a supermarket or stadium without the authorities, or fellow strangers, immediately knowing who you are is about to evaporate

3. *Facebook Breaks Its Own Rules on Animal Cruelty and Trading*, ALL. TO COUNTER CRIME ONLINE (Apr. 3, 2021), https://www.counteringcrime.org/our-issues/facebook-breaks-its-own-rules-on-animal-cruelty-and-trading [https://perma.cc/C8MK-W9W4].

4. Jeff Schultz, *How Much Data is Created on the Internet Each Day?*, MICRO FOCUS BLOG (Aug. 6, 2019), https://blog.microfocus.com/how-much-data-is-created-on-the-internet-each-day/ [https://perma.cc/3A7M-6FS3].

5. Jonathan Zittrain & John Bowers, *A Start-up is Using Photos to ID You. Big Tech Can Stop it From Happening Again*, WASH. POST (Apr. 14, 2020), https://www.washingtonpost.com/outlook/2020/04/14/tech-start-up-is-using-photos-id-you-big-tech-could-have-stopped-them/ [https://perma.cc/US9S-Q6K2].

> without any public debate about whether that's okay. It's as if someone invented eyeglasses that could see through walls, sold them to a select few, and everyone else inexplicably shrugged.[6]

I think what Clearview did was reprehensible and likely illegal. I am not alone; there is a reason its massive database was compiled by an unknown company rather than by a sedate stalwart like Microsoft or Oracle or even Palantir. I think Clearview's database should be destroyed and the earth under it salted, with legal and technical measures taken not to permit its private or public recreation.

But that does not mean they are not useful, whether for something as straightforward as solving a crime, or for more novel applications. For the latter, Clearview is said to have been used to help identify Russian soldiers killed in Ukraine whose relatives are unaware of their fates.[7] For the former, in January 2021, a mob of Trump supporters, some peaceful and many not, pushed and beat its way through light Capitol Police cordons to break into the Capitol itself, some in search of members of Congress to attack. Law enforcement reinforcements were slow enough in coming, and the situation volatile enough, that efforts to regain control of the Capitol complex entailed simply gently ushering people out rather than arresting them, even as Congressional demonstrators in earlier contexts had been arrested for as little as laughing during a hearing.[8]

After the insurrection, authorities were left with the daunting puzzle of identifying hundreds of rioters who had converged in Washington from around the country, largely on the basis of photos and video taken during the riots—most by the rioters themselves. Among the tools used: Clearview AI.[9] In those cases in which Clearview AI might be the only way to make an identification, and instantly at that, is it a good thing that my and others' calls against Clearview were not heeded? For our purposes here, the practical case study is susceptible to a Tolkienesque challenge: those who

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6. *Id.*

7. Drew Harwell, *Ukraine is Scanning Faces of Dead Russians, then Contacting the Mothers*, WASH. POST (Apr. 15, 2022, 5:00 AM), https://www.washingtonpost.com/technology/2022/04/15/ukraine-facial-recognition-warfare/ [https://perma.cc/BTM2-RQR8].

8. Kalhan Rosenblatt, *Activist Faces Jail Time for Laughing During Sessions Hearing*, NBC NEWS (May 3, 2017, 1:45 PM), https://www.nbcnews.com/news/us-news/activist-faces-jail-time-laughing-during-sessions-hearing-n754326 [https://perma.cc/DK4Z-38AG].

9. Kashmir Hill, *The Facial-Recognition App Clearview Sees a Spike in Use After Capitol Attack*, N.Y. TIMES, https://www.nytimes.com/2021/01/09/technology/facial-recognition-clearview-capitol.html (last updated Jan. 31, 2021) [https://perma.cc/Y6W3-LCCH].

push technology to its ethical and legal limits forge artifacts of unprecedented power, and experience a temptation to use them as deep as their potential for corruption and misuse.

With respect to content moderation, the core confusion within a shell of certitude can be explained by a number of factors: the distinct (and now absent) context of American beliefs about the primacy of free speech in the 1990s, during which the Internet went mainstream; our tendency to generalize too much from our own singular experiences; the ways in which social media has newly and vastly empowered intermediaries in ways both users and platforms have not dealt with before; an interregnum of about twenty years in which American law largely took a pass on considering, much less making, new demands of platforms; and most important, the fact that ethically speaking, there is good reason to be tugged in competing directions when thinking through what a healthy public sphere looks like.

Among those many directions in which to be tugged, two stand out. The first is a *rights* framework—specifically around the right to free speech as developed in late twentieth century American law and culture. The second framework is that of *public health*, both by metaphor and, more recently in the wake of a pandemic, quite literally.

"FREE SPEECH MUST BE DEMANDED FOR ALL": THE RIGHTS ERA, 1995-2010

The rights framework dominated the conventional discourse—and corresponding law—about internet responsibilities from the 1990s to at least 2010. It has innate appeal, pushing for individual rights and free speech online above all else, irrespective of whether it appears to some or most observers not to have much benefit for anyone. To see it in a recent snapshot, consider the case of Lasse Gustavson. Forty years ago, he was a newly minted firefighter in Sweden. During his first week on duty, Gustavson responded to the scene of a gas leak and was severely injured when twenty tons of propane exploded. After spending a few months in a coma, he recovered, but lost his ears, hair, and fingers, and had extensive burns and scarring. Wanting to share his journey, he became a motivational speaker.[10] A few years ago, on the occasion of his sixtieth

10. *Lasse Gustavson, Sweden*, 8TH WORLD CONG. ON MIND TRAINING FOR EXCELLENCE IN SPORT & LIFE, https://www.wcecongress.com/speaker/lasse-gustavson/ (last visited Sept. 29, 2021) [https://perma.cc/RK3N-F8X9].

birthday, a friend posted a photo of Gustavson on Facebook.[11] Within an hour Facebook removed the photo, without explanation. The friend posted it again, and it was removed again. The friend began publicly agitating with a new post sans photo—on Facebook, of course—over the removals, while lodging an appeal with Facebook by using the "report a problem" box on the site. This post garnered more than thirty thousand shares, and the friend then received a note from Facebook that a "member of our team accidentally removed something you posted on Facebook. This was a mistake, and we sincerely apologize for this error. We've since restored the content, and you should now be able to see it."[12]

Many burn survivors had similar experiences with removal of their photos; apparently Facebook's actions were company policy.[13] "Apparently" because the rules for acceptable posting were at the time expressed only at a general level. More detailed policies existed—after all, Facebook's own content moderators needed concrete guidance on what to allow and what to take down—but they were not publicly released until after some internal slides documenting them leaked in 2017.[14]

It's hard to imagine a persuasive defense of Facebook's decision to—and apparent policy of—removing photos of people who happen to be scarred. Certainly, Facebook never offered one; instead, once there was some measure of outcry, it claimed an accidental removal and apologized. More broadly, many might ask what business Facebook has at all in judging the speech of its users. To remove these photos was not, by these lights, a misapplication of an otherwise-noble content restriction policy. Rather, short of moderating illegal content, which offers its own set of puzzles, the thought goes, Facebook should not be judging speech at all. We would be horrified if a telephone company were to enforce an "acceptable content policy" on telephone calls—including conference calls—nor would we want to hold the telephone company responsible for paper posters that agitators might staple to its physical telephone poles.

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11. Rob Thubron, *Facebook Apologizes for Removing Birthday Photo of Burn Victim*, TECHSPOT (Nov. 14, 2016, 6:15 AM), https://www.techspot.com/news/67028-facebook-apologizes-removing-birthday-photo-burn-victim.html [https://perma.cc/SL85-V57Z].

12. *Id.*

13. *E.g.*, Nicole Smith Dahmen, *Facebook is Censoring Photos of Burn Survivors Like Me*, QUARTZ (Nov. 15, 2016), https://qz.com/836716/facebook-could-be-helping-burn-survivors-like-me-heal-by-censoring-our-photos-its-actively-hurting-us [https://perma.cc/6U6B-SLRZ].

14. Nick Hopkins, *Revealed: Facebook's Internal Rulebook on Sex, Terrorism and Violence*, GUARDIAN (May 21, 2017), https://www.theguardian.com/news/2017/ may/21/revealed-facebook-internal-rulebook-sex-terrorism-violence [https://perma.cc/KC8Q-BGAM].

To invite that kind of moderation is to ask for a suffocating form of censorship, even if it is "merely" censorship by a private company rather than the government. I described it in 2020 this way:

> Although we don't have consensus about what we want, no one would ask for what we currently have: a world in which two unelected entrepreneurs are in a position to monitor billions of expressions a day, serve as arbiters of truth, and decide what messages are amplified or demoted. This is the power that Twitter's Jack Dorsey and Facebook's Mark Zuckerberg have.[15]

Facebook's business model has generally reflected a distaste for content moderation. It is simpler to simply emphasize connecting users to one another, ricocheting their posts around in proportion to how engaging others would find them, and exposing everyone to tailored advertising while on and off the site. Facebook found itself following this philosophy in the heart of the online rights era, when people were still learning how to share content from family events to homemade meals, and it was yet unclear how that content might be used for harm. But abstention also has a philosophical basis in individual speech rights that is in turn reinforced by American law. Before turning, then, to the public health framework for regulating online activities, I want to offer an account of the spread of free-speech-oriented thinking from its pre-Internet mainstream legal incarnations to broader popular culture, through to the architecture and law of online discourse.

THE SKOKIE MARCH

Play word association with Skokie, Illinois, with many Americans over 50 and the reaction is instantaneous: Nazis. For those under 50, a blank stare. So, a quick review of the Skokie-Nazi episode is a fitting introduction to the Rights Era, as it near-perfectly encapsulates the free speech marinade that had been so thoroughly absorbed by the early Internet. It provides a bookend to new questions around the censorship of neo-Nazi activity in the wake of a "Unite the Right" march in Charlottesville, Virginia, in 2017,[16] and the attack by Trump supporters on the Capitol in January of 2021.

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15. Jonathan Zittrain, *Twitter's Least-Bad Option for Dealing with Donald Trump*, ATLANTIC (June 26, 2020), https://www.theatlantic.com/technology/archive/2020/06/twitter-trump-least-bad-option/613558/ [https://perma.cc/8JMU-AMZL].

16. Debbie Elliot, *The Charlottesville Rally 5 Years Later: 'It's What You're Still Trying to Forget',* NPR (Aug. 12, 2022, 5:00 AM), https://www.npr.org/2022/08/12/1116942725/the-

In 1977, a group of neo-Nazis announced plans to picket on the sidewalks in front of the town hall of Skokie, Illinois, wearing World War II-era German Nazi storm trooper uniforms with swastika armbands.[17] More than half of Skokie's residents at the time were Jewish, and several thousand were survivors of the Holocaust.[18] The town went to court asking for the march to be banned, offering testimony of Jewish residents that the march would likely incite them to violence against the marchers.[19] On the other side, the American Civil Liberties Union (ACLU) represented the Nazis, arguing that the First Amendment compelled the government to allow the march.[20]

The trial court sided with the town, sparking appeals that worked their way to the United States Supreme Court[21] and then back to the Illinois Supreme Court.[22] There, the ACLU's free speech arguments prevailed, although after winning the right to protest, the Nazis ultimately decided to make their march in nearby downtown Chicago, rather than Skokie.

The ACLU's national director, Aryeh Neier, was himself a Jewish refugee of Nazi Germany.[23] His defense of free speech rings across the decades:

> Did Jehovah's Witnesses or birth control advocates have a right to pass out leaflets in Catholic neighborhoods? . . . Did Martin Luther King Jr. have a right to march in Selma, Alabama, or in Cicero, Illinois? To all of these questions, the A.C.L.U.'s answer is 'Yes.'[24]

As a *New York Times* editorial put it at the time, echoing Neier's arguments, "if his organization is not faithful to the principle that

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charlottesville-rally-5-years-later-its-what-youre-still-trying-to-forget [https://perma.cc/KAP3-G5Z8].

17. *American Nazi Leader's Application for Assembly in Skokie, IL, June 22, 1977*, ACLU, https://www.aclu.org/letter/american-nazi-leaders-application-assembly-skokie-il-june-22-1977 (last Visited Oct. 6, 2021) [https://perma.cc/7T7W-FD9V].

18. Village of Skokie v. Nat'l Socialist Party of Am., 366 N.E.2d 347, 349 (Ill. App. Ct. 1977).

19. *Id.* at 350–51.

20. *ACLU History: Taking a Stand for Free Speech in Skokie*, ACLU, https://www.aclu.org/other/aclu-history-taking-stand-free-speech-skokie (last visited Mar. 3, 2023) [https://perma.cc/8QV5-BLTR].

21. Nat'l Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977).

22. Village of Skokie v. Nat'l Socialist Party of America, 373 N.E.2d 21 (Ill. 1978).

23. Aryeh Neier, *Engagement and the German-Jewish Legacy*, 2 AM. JEWISH ARCHIVES J. 303, 303–06 (1988).

24. New York Times Editorial Board, *Nazis, Skokie, and the ACLU*, N.Y. TIMES (Jan. 1, 1978) https://timesmachine.nytimes.com/timesmachine/1978/ 01/01/110744339.html?pageNumber=96 [https://perma.cc/2Y2V-85D4].

free speech must be demanded for all, then it does not deserve the words 'civil liberties' in its name."[25]

The Illinois Supreme Court, in ultimately supporting the Nazis' right to march, rounded up high-minded quotations from a number of U.S. Supreme Court decisions in First Amendment cases:

> It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers . . . .
>
> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. . . .
>
> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. "[S]o long as the means are peaceful, the communication need not meet standards of acceptability . . . ."[26]

There were plenty of people who condemned this defense of free speech. Tens of thousands of ACLU members resigned over its decision to take up the Skokie case, and for years after, the observation that someone was a "card-carrying member of the ACLU" was intended as an insult—a claim of radicalism. George H.W. Bush

25. *Id.*

26. *Village of Skokie*, 373 N.E.2d at 23–24 (citing Bachellar v. Maryland, 379 U.S. 564, 567 (1970)).

used it in his stump speech when running for President against Michael Dukakis. But Dukakis had already proudly described himself that way, and he did not back down. (To be sure, he lost his Presidential race.) The ACLU seized on the issue to successfully raise money, producing a public service announcement including famed actor Burt Lancaster. "You know the kind of people who support the ACLU," Lancaster says: "Radicals' like Douglas MacArthur, Dwight Eisenhower, Harry Truman."[27]

The Skokie case was a near-perfect encapsulation of mainstream late twentieth century characterization of the right to free speech in America. The courts and the ACLU couched this case, and others like it, as a grand principle of free speech versus the parochial Puritanism of those who might be scandalized, perhaps enough to themselves be incited to violence, and allow that offense to translate into an inappropriate use of state power against citizens on the basis of their (concededly awful) views. In the Skokie case, no one argued that the handful of Nazi marchers could turn violent in ways that the police could not handle. Nor was Nazism deemed in danger of spreading as a result of publicity from a peaceful march. *New York Times* columnist William Safire drew from the argument of the town of Skokie itself when he identified any threat of violence as instead coming from among the thousands of counter-protesters who would appear: "The American Nazis' object was, and is, to trigger a violent counterdemonstration, thereby making themselves martyrs at the hands of Jews shouting, 'Never again!'"[28]

And that threat of violence could not be the basis for banning the original march. The heckler's veto should not triumph. As the Illinois Supreme Court put it: "We accordingly, albeit reluctantly, conclude that the display of the swastika cannot be enjoined under the fighting-words exception to free speech, nor can anticipation of a hostile audience justify the prior restraint."[29]

Instead, suggested Safire, the citizens of Skokie should see the wisdom of allowing the Nazis to march. He thought it would demonstrate a commitment to civil liberties that would, ironically for the marchers, undermine the Nazi cause and others like it. "Grumbling all the way, I have to agree: There can be no greater affirmation of freedom than ostentatiously to respect the rights of those who

27. Burt Lancaster, Jill Eikenberry, & Michael Tucker, ACLU PSAS, Card-Carrying Members, Sept. 1988, American Civil Liberties Union Records: Subgroup 2, Audiovisual Materials Series, MC001-02-06, Public Policy Papers, Department of Special Collections, Princeton University Library, Princeton, NJ.

28. New York Times Editorial Board, *supra* note 24.

29. *Village of Skokie*, 373 N.E.2d at 26.

would destroy that freedom."[30] As the ACLU's Neier put it in a symposium ten years later:

> It was a twist of fate that placed me in a spot where I was engaged at one stage in my life as the defender of civil liberties for Nazis. But I do not believe that I was deceiving myself when I asserted then, as I would assert today, that the defense of rights for all, even Nazis, is just what is needed to ensure that Nazism never again prevails.[31]

Cases like Skokie were perfect vehicles for civil libertarians to extol higher values over knee-jerk instincts, in part because no one would reasonably think their support of Nazis' rights to march arose because they shared the Nazis' views. Hence the Illinois court's "reluctant" conclusion, and Safire's "grumbling" agreement with it.

The Skokie episode tells us a lot about the origins of digital governance, because the ethos of American civil libertarianism that reached apogee in the 1960s and 70s political and legal establishments in turn infused the mainstream use of the Internet.[32]

AN ENSHRINEMENT OF ONLINE SPEECH RIGHTS

Indeed, the free speech values of the Skokie case were echoed by many of those promoting and celebrating the widespread adoption of the Internet beginning in the 1990s. John Perry Barlow might have been sent by Central Casting for this purpose. Barlow was a sometime Wyoming cattle rancher, a lyricist for the Grateful Dead, and a co-founder of the Electronic Frontier Foundation (EFF), a digital rights non-profit organization on whose board I've served.[33] In 1996, a time of deep interest around what kind of revolution the Internet portended, a slightly tipsy Barlow penned "A Declaration of the Independence of Cyberspace."[34] It is well known among

30. William Safire, *Marching Through Skokie*, N.Y. TIMES (Mar. 27, 1978), https://www.nytimes.com/1978/03/27/archives/marching-through-skokie-essay.html [https://perma.cc/ULW8-NAUD].

31. Neier, *supra* note 23, at 306.

32. JOHN MARKOFF, WHAT THE DORMOUSE SAID: HOW THE 60S COUNTERCULTURE SHAPED THE PERSONAL COMPUTER INDUSTRY (2005).

33. Shawn Miklaucic, *John Perry Barlow*, BRITANNICA, https://www.britannica.com/biography/John-Perry-Barlow (last updated Feb. 3, 2023) [https://perma.cc/N4RR-P22U].

34. Cindy Cohn, *Inventing the Future: Barlow and Beyond*, 18 DUKE L. & TECH. REV. 69–77 (2019). ("In talking about the Declaration at Electronic Frontier Foundation (EFF) many years later, Barlow admitted that when he stepped out of a party at Davos to write it, he was both a little drunk and trying desperately to channel Thomas Jefferson.") *Id.* at 70.

Internet history aficionados, not so much with the public at large. It says:

> Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.
>
> We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear . . . .
>
> We are creating a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity . . . . In our world, all the sentiments and expressions of humanity, from the debasing to the angelic, are parts of a seamless whole, the global conversation of bits. We cannot separate the air that chokes from the air upon which wings beat . . . .
>
> We will create a civilization of the Mind in Cyberspace. May it be more humane and fair than the world your governments have made before. [35]

Barlow's argument's power in part relied on aptly characterizing the digital space as being one of speech rather than action—host to a "global conversation of bits" and a home of "Mind"—just as Skokie rightly characterized marches as expressive activities offering a range of ideas, none of which should be judged by the governments in a position to license them. Indeed, if Skokie's expression was to be allowed even at the risk of violence by those physically counter-protesting, how could there be objection to speech lobbed into one another's screens at an even safer distance?

By this reckoning, the Internet stood to allow for a vast expansion of available sidewalk space, a realization of a vision that discussion and expression should not be confined to—or by—the powerful, nor,

35. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, EFF (Feb. 6, 1996), https://www.eff.org/cyberspace-independence [https://perma.cc/G5XY-BF8Z].

as much as possible, by the physical constraints of who happens to be nearby to experience it. Thanks to the Internet, people could choose to see the equivalent of a lone zealot's sandwich board as readily as they could tune in to Walter Cronkite's national evening newscast. The distasteful or debasing was simply a (perhaps reluctant and grumbling) price to be paid for this freedom, inextricable from its exercise.

Barlow was no outlier in praising this arrangement; the Supreme Court itself championed a First Amendment rights discourse for online activities. On the very day in 1996 that Barlow published his Declaration of the Independence of Cyberspace, a new Federal law called the Communications Decency Act (CDA), part of a broader Telecommunications Reform Act,[36] went into effect. The CDA primarily concerned itself with the unhappy fact that kids could newly gain access to pornographic content online that would have previously been much more difficult for them to get.

That the first grand legal battle over online speech rights would concern pornography might not be surprising. A 1994 *New York Times* article entitled "Porn, the Low-Slung Engine of Progress," declared that "In the history of communications technology, sex seems to be the most enduring killer app . . . . Sometimes the erotic has been a force driving technological innovation; virtually always, from Stone Age sculpture to computer bulletin boards, it has been one of the first uses for a new medium."[37] That online free speech would first be prominently fought on those grounds reinforced the narrative of prim provincialists trying to fan moral panic over the natural progression of loosening societal norms—and failing that, trying to hold everyone else to their blinkered views. Uptightness and taking offense were weak counters to the soaring ideals of free speech, and they would fail as surely as the attempts of archetypical parents of a 1950's Pleasantville to stop their kids' embrace of rock and roll did.

But the CDA would try. Its most powerful intervention was to criminalize the posting of such content, even when legal for adults to consume, if the poster failed to ensure that kids could not get to it—as represented by checking to see if an Internet user had a functioning credit card before granting access.[38] (There was no need to charge anything to the card, but merely to validate that it worked,

36. Telecommunications Act of 1996, 47 U.S.C. § 609 (1996).

37. John Tierny, *Porn, The Low-Slung Engine of Progress*, N.Y. TIMES (Jan. 9, 1994), https://www.nytimes.com/1994/01/09/arts/porn-the-low-slung-engine-of-progress.html [https://perma.cc/9MQD-3C5H].

38. 47 U.S.C. § 231(c).

on the then-credible hypothesis that most kids under 18 did not have credit cards.) The CDA's core provisions seemed entirely at odds with Barlow's Declaration. After all, the CDA was a form of censorship by a "Government of the Industrial World." Barlow certainly saw it that way, and his contemporaneous release of the Declaration was no coincidence. He wrote:

> In the United States, you have today created a law, the Telecommunications Reform Act, which repudiates your own Constitution and insults the dreams of Jefferson, Washington, Mill, Madison, De Tocqueville, and Brandeis. These dreams must now be born anew in us.
>
> You are terrified of your own children, since they are natives in a world where you will always be immigrants. Because you fear them, you entrust your bureaucracies with the parental responsibilities you are too cowardly to confront yourselves.[39]

While Barlow lyricized free speech, the ACLU, the EFF, the American Library Association, Human Rights Watch, and others put his lyrics to lawyerly music in filing suit to block the CDA.[40] Their arguments echoed those of the Skokie case and Barlow's Declaration, and focused on the fact that the online pornography criminalized by the CDA had already been deemed by the Supreme Court to be protected by the First Amendment with respect to adults consuming it. It was only with respect to kids that the authorities could seek to ban it, and then only in ways not unduly burdensome to adults.[41]

To be sure, that kind of harmful-to-minors pornography in question is not to be confused with entirely obscene materials, which the Supreme Court had found to be not protected at all by the First Amendment.[42] Obscene content, the Court had said, was a narrow category of work which depicts sexual conduct in a "patently offensive way" that appeals to the "prurient interest" and that "lacks serious literary, artistic, political, or scientific value."[43] (This

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39. Barlow, *supra* note 35.

40. Complaint at ¶ 1, ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996) (No. 96-963); *Reno v. ACLU—Challenge to Censorship Provisions in the Communications Decency Act*, ACLU (last updated June 20, 2017), https://www.aclu.org/cases/reno-v-aclu-challenge-censorship-provisions-communications-decency-act?document=reno-v-aclu-complaint [https://perma.cc/S3MU-PKRR].

41. Ginsberg v. New York, 390 U.S. 629, 643 (1968).

42. Miller v. California, 413 U.S. 15, 36 (1973).

43. *Id.* at 24–25.

standard eclipsed Justice Potter Stewart's concurring formulation that "I know it when I see it."[44]) So *Playboy* or *Penthouse* magazines could be banned from carrying obscene content, and adults could be punished in many instances for possessing it, but those magazines still had lots of legal pornography they could offer, so long as there were efforts made by distributors to keep it away from kids. Stores could sell *Playboy* magazines, and states could insist that they be placed on a high rack in the store and the shopkeepers verify that someone was an adult before allowing them to purchase it.[45]

The CDA's censorship was viewed skeptically by the special three-judge lower court that first weighed in on it. "Cutting through the acronyms and argot that littered the hearing testimony, the Internet may fairly be regarded as a never-ending worldwide conversation," wrote one concurring judge hearing the case along its way to the Supreme Court.[46] "[J]ust as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects," he added.[47] "For these reasons, I without hesitation hold that the CDA is unconstitutional on its face."[48]

The Supreme Court also agreed with the civil liberties organizations that the CDA's core provisions, those criminalizing harmful-to-minors pornography in the absence of something like a credit card check, were too restrictive.[49] Under those provisions, too much content would be swept behind gates online or eliminated entirely, whether through overly-cautious responses to the law—for example, restricting access to materials about breast cancer—or through withholding of legal pornography itself. "As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it," wrote Justice John Paul Stevens for the Court.[50] "The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."[51] The

44. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
45. *Ginsberg*, 390 U.S. at 629.
46. ACLU v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996) (Dalzell, J., concurring).
47. *Id.*
48. *Id.*; *see also* James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 UNIV. OF CIN. L. REV. 177, 189 n.29 (1997).
49. Reno v. ACLU, 521 U.S. 844, 879 (1997).
50. *Id.* at 885.
51. *Id.*

Court struck down the CDA's core provisions before they came into effect.[52]

Team Cyberspace Free Speech spiked the football. "The case is likely to be the *Brown v. Board of Education* of cyberspace[,]" said the ACLU's Barry Steinhardt, grandiosely invoking the unanimous landmark 1954 Court decision striking down legally-mandated racial segregation in schools.[53]

> The Supreme Court set an extraordinarily high barrier against further attempts to limit online expression in the United States. The decision has had an impact around the world. I have had the opportunity to discuss it with jurists from Bulgaria to South Africa and they view it as an important precedent for their own countries.[54]

Realspace revelers turned out in San Francisco shortly after the decision came down. "Let today be the first day of a new American Revolution—a Digital American Revolution!" declared EFF attorney Mike Godwin.[55]

Thus, as the Internet found mass public adoption—or, perhaps in more recent parlance, solidified its grip upon the public's consciousness—the values and rhetoric of rights exemplified in Skokie, then further articulated by Barlow and his contemporaries, and finally embraced in *Reno v. ACLU,* became the standard frame in which to argue about Internet freedom and governance.

Whether or not private companies providing Internet access or other web services should themselves adopt this kind of Rights attitude, that is declining to moderate the speech they facilitated, was another question that could become muddied, since a private party's voluntary act of censorship of others could itself be defended as a choice that should be free from government interference. But the overall ethos was for intermediaries to butt out, apart from specifically family-friendly and therefore minor corners of the Internet. Should a private company enforce moderation, it was fine; there were innumerable alternatives online. And many were at the time all too happy to abdicate, as their business models thrived on volume of bits moved rather than on careful curation, whether that of

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52. *Id.*

53. Carl S. Kaplan, *The Year Saw Many Milestones in Cyberlaw*, N.Y. TIMES (Jan. 1, 1998), https://archive.nytimes.com/www.nytimes.com/library/cyber/law/010198law.html [https://perma.cc/Q9AK-RWW6].

54. *Id.*

55. Joshua Quittner, *Unshackling Net Speech*, ALLPOLITICS (July 7, 1997), https://www.cnn.com/ALLPOLITICS/1997/06/30/time/cda.html [https://perma.cc/N5U6-UX4P].

an ISP offering broadband service, of search engines rapidly indexing the Web for search rather than presenting carefully taxonomized top-down directories, or of the early days of social media like Twitter and Facebook. Twitter's general counsel in 2014 described the company as the "free speech wing of the free speech party."[56] And there was not just a convenience to that, but an allure of the sort a private university might offer when it chooses to allow free speech under its umbrella as expansively as the First Amendment does for a citizen at a public one: the values of Skokie upheld.

So, the Rights era thrived—for a while.

FROM THE RIGHTS ERA TO THE PUBLIC HEALTH ERA

Of course, just as many citizens of Skokie were profoundly emotionally disturbed at the prospect of neo-Nazis marching through their neighborhoods in 1977, so too were many people disturbed at what they were exposed to from the earliest days of the Internet. Hate, doxxing, harassment—all were present from the start.

Whitney Phillips, a scholar of rhetoric, reflects on those times as ones that perhaps today elicit too much nostalgia in the mainstream.

> I used to believe that the internet used to be fun. Obviously the internet isn't fun now. Now, keywords in internet studies—certainly, keywords in my own internet studies—include far-right extremism, media manipulation, information pollution, deep state conspiracy theorizing, and a range of vexations stemming from the ethics of amplification . . . .
>
> The more jagged, trollish edges of "internet culture" may have been sanded off for family-friendly consumption, but the overall category and its distinctive aesthetic—one that hinges on irony, remix, and absurd juxtaposition—has in many ways fused with mainstream popular culture . . . .
>
> It was hard to take Nazi memes all that seriously when they were sandwiched between sassy cats and golf course enforcement bears, and so, fun and ugly, ugly and fun, all were flattened into morally equivalent images in a flip book. Others selectively ignored the most upsetting

56. Josh Halliday, *Twitter's Tony Wang: 'We Are the Free Speech Wing of the Free Speech Party'*, GUARDIAN (Mar. 22, 2012, 11:57 AM), https://www.theguardian.com/media/2012/mar/22/twitter-tony-wang-free-speech [https://perma.cc/253V-KMWD].

> images, or at least found ways to cordon them off as being "just" a joke, or more frequently, "just" trolling, on "just" the internet.
>
> For those whose identities were targeted and corroded by all that ironic, arm's length laughter, or whose personal and professional lives were under constant threat, often for the sin of not being a white man in public, the ugliness of the forest wasn't so easily obscured by the fun of the trees. People tend to see the things that have the potential to harm them. [57]

The Rights framework acknowledges those phenomena as readily as it did the discomfort of Skokie and offered the same small solace: that's the price of free speech. What dimmed the star of Rights—or at least produced a competing one—was the prospect that the real world could be affected, even infected, by what happened online.

THE RIGHTS ERA SHARES SPACE WITH A PUBLIC HEALTH ONE

Consider the comparatively recent case of Earthley, a natural health products affiliate marketing company whose founding story entails a claim of doctors misprescribing antibiotics for an infant—inspiring the search to discover, and market, natural remedies.[58] As Caroline Haskins reported in BuzzFeed in early 2020, the company ran targeted ads on Facebook offering a free guide for pertussis, also known as whooping cough.[59] Pertussis is a highly contagious respiratory tract infection that can in rare cases be fatal, especially in infants.[60] Haskins writes about one of the Earthley store's online pamphlets:

> The document falsely claims that the whooping cough vaccine contains levels of the element aluminum that could cause neurological damage, and it offers Earthley

57. Whitney Phillips, *It Wasn't Just the Trolls: Early Internet Culture, "Fun," and the Fires of Exclusionary Laughter*, SOC. MEDIA + SOC'Y, https://journals.sagepub.com/doi/full/10.1177/2056305119849493 (last visited Nov. 11, 2021) [https://perma.cc/YCJ4-6NT3].

58. *About Us*, EARTHLEY WELLNESS, https://www.earthley.com/about-us/ (last visited Nov. 11, 2021) [https://perma.cc/J2AB-4BYZ].

59. Caroline Haskins, *Facebook Is Running Anti-Vax Ads, Despite Its Ban on Vaccine Misinformation*, BUZZFEED (Jan. 8, 2020, 11:30 PM), https://www.buzzfeednews.com/article/carolinehaskins1/facebook-running-anti-vax-ads-despite-ban-anti [https://perma.cc/9G8P-VU8D].

60. *Whooping Cough*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/whooping-cough/symptoms-causes/syc-20378973 (last visited Nov. 11, 2021) [https://perma.cc/S47L-QC52].

> products—like elderberry elixir, vitamin C powder, and a mixture of herbs—as an alternative.[61]

Haskins goes on to quote a pediatrician and senior scholar of tropical medicine who describes this marketing—discouraging vaccines and selling unproven remedies in their stead—as "dangerous."[62]

Facebook's policies at the time did not prohibit user-posted misinformation about vaccines, though its policies did ban advertisements containing vaccine misinformation as judged by "global health organizations including the World Health Organization."[63] When asked whether the pointer to the quoted pamphlet in an Earthley advertisement violated that policy, the company said it did not, since the misinformation was in the linked brochure rather than in the advertisement itself. (For its part, the Earthley cofounder told BuzzFeed that it "is up to Facebook to properly review ad[vertisements] and choose to reject the ones it does not want on its platform."[64])

By March of 2020 the worldwide COVID pandemic was in full swing, and by that December Facebook announced tightened policies against misinformation specifically around the COVID vaccines that had been approved a few weeks earlier. Misinformation, said Facebook, would not be allowed, whether in advertisements or posted organically by users or on companies' Facebook pages.[65] Facebook said that it would "start removing false claims about these vaccines that have been debunked by public health experts on Facebook and Instagram."[66]

The new policy notwithstanding, Earthley posted a message on its Facebook home page that simply substituted a new word (well, non-word) for "vaccine" to tout its remedies, explicitly noted as a way to avoid detection by Facebook (who, the company argues, is trying to "shadow ban" its account): "It's v@ccyne Injury Awareness Month. (We spelled it that way to beat the censors...they're trying to hide this from you!)" (alternative detection-avoidance ways of spelling include "va))ines" and "v@66ine"). [67]

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61. Haskins, *supra* note 59.
62. *Id.*
63. *Id.*
64. *Id.*
65. Ryan Browne, *Facebook to Remove Misinformation About Covid Vaccines*, CNBC (Dec. 3, 2020), https://www.cnbc.com/2020/12/03/facebook-to-remove-misinformation-about-coronavirus-vaccines.html [https://perma.cc/SQG8-L536].
66. Kang-Xing Jin, *Keeping People Safe and Informed About the Coronavirus*, META (Dec. 18, 2020), https://about.fb.com/news/2020/12/coronavirus/ [perma.cc/4W3Y-R4EE].
67. Earthley, FACEBOOK, https://www.facebook.com/photo/?fbid=2107405526061687&set=a.749202208548699 (last visited Jan. 2,

Now it's entirely possible that your assessment of Facebook's moral responsibility with respect to vaccine denialism is in exactly the same category as that of Facebook's allowing portraits of people who happen to have scars: the company should not be in the business of judging otherwise-legal content. If so, the Rights framework runs strong in you.

But beginning in the 2010s and accelerating in the 2020s, both before and during the Covid pandemic of 2020, most commentators weighing in on vaccine denialism excoriated Facebook for not doing more to rein it in, particularly that which was grounded in manifestly incorrect claims.[68] Facebook itself did not attempt to defend inaction as it might have years ago, say by borrowing from Twitter's earlier identification as the free speech wing of the free speech party. Instead, the company simply first parried by parsing its existing policies in a narrow way to continue to allow links to misinformation rather than the outright repeating of it. And by this time Twitter itself had repudiated its free speech stance.[69] In 2013 it introduced a "report abuse" button. In 2015 Twitter made reference to the need to "keep Twitter safe." As Sarah Jeong wrote in 2016 after another revision of rules to tighten what was permitted there:

> The new Rules are radical because they rewrite Twitter's story of what it is and what it stands for. The old Twitter fetishized anti-censorship; the new Twitter puts user safety first . . . .

2023) [https://perma.cc/NCF6-TU6N]; Earthley, FACEBOOK, https://www.facebook.com/photo/?fbid=2108562209279352&set=a.749202208548699 (last visited Jan. 2, 2023) [https://perma.cc/RHU3-YQ5F]; Earthley, FACEBOOK, https://www.facebook.com/photo/?fbid=2109469095855330&set=a.749202208548699 (last visited Jan. 2, 2023) [https://perma.cc/DB9D-2RNY]; Earthley, FACEBOOK, https://www.facebook.com/photo/?fbid=2125718814230358&set=a.749202208548699 (last visited Jan. 2, 2023) [https://perma.cc/8LSX-XJ68].

68. *See, e.g.*, Barbara Ortutay & Amanda Seitz, *Defying Rules, Anti-vaccine Accounts Thrive on Social Media*, AP NEWS (Mar. 12, 2021), https://apnews.com/article/anti-vaccine-accounts-thrive-social-media-e796aaf1ce32d02e215d3b2021a33599 [https://perma.cc/VT68-M22J]; Letter from Adam B. Schiff, Member of Congress, to Mark Zuckerberg, Facebook (Feb. 14, 2019), https://schiff.house.gov/imo/media/doc/Vaccine%20Letter_Zuckerberg.pdf [https://perma.cc/LLC6-8MXP]; Julia Carrie Wong, *How Facebook and YouTube Help Spread Anti-vaxxer Propaganda*, GUARDIAN (Feb. 1, 2019, 5:20 EST), https://www.theguardian.com/media/2019/feb/01/facebook-youtube-anti-vaccination-misinformation-social-media [https://perma.cc/4D8T-YM27]; Nathan Crabbe, *Social Media Lies About COVID-19 Are Killing People*, GAINESVILLE SUN (Sept. 23, 2021, 6:00 AM EST), https://www.gainesville.com/story/opinion/2021/09/23/nathan-crabbe-facebook-allowing-lies-covid-19-spread/5800485001/ [https://perma.cc/YS24-XCGJ].

69. Sarah Jeong, *The History of Twitter's Rules*, VICE (Jan. 14, 2016, 10:00 AM), https://www.vice.com/en/article/z43xw3/the-history-of-twitters-rules [https://perma.cc/TF6W-GTP8].

> "Freedom of expression means little as our underlying philosophy if we allow voices to be silenced because they are afraid to speak up," said a Twitter spokesperson in response to a request for comment . . . . Striking the right balance will inevitably create tension, but user safety is critical to our mission at Twitter and our unwavering support for freedom of expression.[70]

The argument against abdication and for more intervention, Rights rhetoric notwithstanding, is powerful. The way social networks had developed since the resolution of the CDA case was not towards deep and elaborate debate—Barlow's aspiration for a Civilization of Mind—but rather, perhaps, something less humane and fair than what might be encountered in an exchange of letters to the editor in a Twentieth Century hometown newspaper. When online activities result in persistent harassment, that amplifies the true costs of speech—at least for some—in the Rights framework. And material harms can be documented when this discourse results in viral disinformation tied directly to physical health. Many people were going online, absorbing propaganda of unknown provenance from uncredentialed sources confidently holding themselves out to be in the know, and taking that information to heart, informing decisions about their own lives and those of their loved ones, including their children.

The Rights framework might have some subtleties intended to account for that—the First Amendment does not protect outright false advertising, for example—but the very presumption of a free flow of speech, subject to specific exceptions, itself less and less fits the circumstances of modern social media. For one thing, modern social media was already shaping people's news feeds and recommendations in ways that differed from just providing the sidewalks on which anyone could digitally march. And for another, it simply turned out that people shared misinformation very, very readily, adding a community momentum to disinformation that far exceeded the analog world's old rumor mill.

Whether the topic is vaccine denialism or violent extremism, the precision with which information's movement can be tracked, alongside people's coming to believe it, is also new. In 1977 there was no easy way short of prohibitively expensive (and dubiously accurate) polling to see how many people might be persuaded by a march of neo-Nazis to the Nazi cause. So, a Supreme Court Justice,

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70. *Id.*

or *New York Times* columnist, could breezily declare that no one would be persuaded by nonsense—or that the display of nonsense would in fact actively repel people. Roughly forty years later, Facebook can trace exactly the flow of links and memes across its services, and the resulting spike in membership of neo-Nazi private groups—even as the company would have no incentive to, say, issue a press release with its findings. (To this day, it has not—and academics and journalists must make guesses about such cause and effect.)

Not long after the Skokie decision was handed down, alumni of Saturday Night Live starred in a feature film build-out of one of the show's sketches. *The Blues Brothers* were musicians embarking on a romp around Chicago as they pulled together a benefit to save an orphanage. The comedy included a scene in which the Brothers encounter a neo-Nazi rally clearly modeled on the proposed march of the well-known Skokie case. A friendly cop leans into the heroes' car, stopped in a line of traffic as the Nazis are gathered on a small bridge ahead: "Those bums won their court case, so they're marching today."

As police hold back hundreds of counter-protesters, the heroes rev the engine, drive around the line, and make straight for the bridge. The Nazis jump off and into the stream below just in time to avoid being hit, wet, and humiliated but unharmed. It was a scene that came and went from pop cultural consciousness, a comeuppance fantasy in a fictional movie where all the variables and consequences could be consummately controlled.

Forty years later, and with the aid of online organizing, neo-Nazis from across the country converged in Charlottesville, Virginia—an open carry jurisdiction—for a rally nominally in defense of Confederate statues. Police appeared reluctant to referee fist fights that broke out, lest they spark shooting.[71] A neo-Nazi drove his car into a crowd of counter-protesters, killing one of them. This grim inversion of the *Blues Brothers* scene gained its own macabre online momentum after protests for racial justice sprang up in American cities and towns in the summer of 2020. Persistent calls remain online for attacks against protesters blocking streets or highways, and

71. A 220-page independent review of the events by Hunton & Williams LLP concluded that law enforcement had "failed to maintain order and protect citizens from harm, injury and death." *Independent Review of the 2017 Protest Events in Charlottesville, Virginia*, HUNTON & WILLIAMS (Nov. 24, 2017) https://www.policefoundation.org/wp-content/uploads/2017/12/Charlottesville-Critical-Incident-Review-2017.pdf [https://perma.cc/Q5Z3-E4VZ].

lawmakers in some states proposed, and some passed, laws lessening the penalties for such attacks.[72]

At the Capitol incursion three years later, the fear of contagious domestic radical extremism hit a peak. Incitement in its pre-Internet First Amendment form was about a specific speech leading in direct and immediate sequence to mob violence by those inspired by the speech. With materials of radicalization available a click away—or offered up as recommendations with no click at all—incitement could take place over a period of months, leading to "stochastic terrorism" in which individuals might be moved to violence in unpredictable places and at unpredictable times.

These circumstances have made a Public Health framework a meaningful counterpart and competitor to the Rights framework. Each responds to a distinct set of problems. The Rights framework anticipates a threat from the government. The familiar argument is that states have a monopoly on the use of force; they are distinctly powerful, and the potential for abuse of that power requires setting limits and fixing them beyond easy revision—including, in a democracy, beyond mere majority preferences. "Congress shall make no law . . . abridging the freedom of speech" is subject only to the near-impossible hurdle of Constitutional amendment, and of narrowing interpretations by the judiciary, which has often staked out deeply unpopular free-speech positions, such as not permitting the criminalization of private American flag burning.[73] The Rights framework defends not only against abuse by those with power, but offers support for the idea that they should not be entrusted, even in good faith, to make many speech-related tough judgments. Only when there is a truly compelling interest, and no less-restrictive alternatives, are government impingements on speech for its content or viewpoint to be entertained. The spirit of the Rights framework, if not its First Amendment letter, flowed naturally towards an unwillingness to have large corporate intermediaries, including social media platforms, make decisions around speech, once scarcity of speech distribution was no longer a constraint.

The Public Health framework, by contrast, sees threats from many more sources. For some of these threats, the state can be helpful, even necessary, in marshaling a common defense against risky behavior by fellow citizens. Literal public health strategies

72. Aila Slisco, *GOP Lawmakers in Missouri Propose Bills Making It Legal to Hit Protesters With Cars*, NEWSWEEK (Dec. 22, 2020, 6:47 PM), https://www.newsweek.com/gop-lawmakers-missouri-propose-bills-making-it-legal-hit-protesters-cars-1554280 [https://perma.cc/H8WD-Y5YS].

73. Texas v. Johnson, 491 U.S. 397, 418 (1989).

emphasize education of the public, collection and use of personal information by authorities to track and deploy resources against health threats, and at times large-scale environmental modifications to deal with an infectious disease. When used as a metaphor, then, a public health-style framework can lend itself to diagnosing the overall health of, say, an online community, and thinking through interventions to make it better—a vastly different focus than the idea of hypothesizing some kind of neutral, level playing field on which people act and interact and then otherwise getting out of the way.

The Public Health framework, focusing on group rather than individual behaviors and movements, thus entails balancing the costs and benefits for given interventions, without particularly privileging free speech independent of its impact. Its arrival outside the digital world can be tracked from declarations of rights at the United Nations (UN).[74] In 1948, the UN adopted the Universal Declaration of Human Rights, a statement of guidance to states worldwide. Article 19 of the declaration is a sibling to the American First Amendment, and even seems to anticipate the Supreme Court's thinking in the CDA case:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[75]

Compare that with Article 19 of the International Covenant on Civil and Political Rights, adopted by the UN in 1966 and entering into force as a formal treaty in 1976:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

74. General Assembly, Universal Declaration of Human Rights, Article 19 (Dec. 10, 1948), https://www.un.org/en/universal-declaration-human-rights/ [https://perma.cc/2HEX-Z2WA].

75. *Id.*

> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (order public), or of public health or morals.[76]

As the third-numbered point above indicates, by the time the aspirational rights of 1948 had been translated into a more binding form, broad exceptions had been elevated as well, balancing the unambiguous statement of rights in the first two clauses with a decidedly nebulous set of special-case exceptions for national security, public health, or morals.

DO WE KNOW WHAT WE WANT?

These exceptions emphasize our central problems with digital governance: we don't know what we want. Or put another way, we want it all: free speech for all (rights), along with restrictions against dangerous toxicities (public health). Governments have had a hard enough time figuring out the right balance over the years; private companies, lacking public servants' claim to legitimacy, are even harder put to know what to do.

Our confusion, whether as a group or within ourselves, is broad. It extends to whether to draw a line on speech at all, and when it is drawn, where exceptions should lie. It includes who should enforce the line, at a time when more and more options for enforcement present themselves. And it includes how clear private parties need to be about what they are doing, and what avenues of appeal to offer, when they enforce the rules they choose to set.

It may be that with enough thought, and some kind of Manhattan Project of subsidy to philosophers and political scientists, we will experience a collective breakthrough about how best to strike these difficult balances. I am all for trying. But we cannot wait on that. While we try to sort out the fundamental trade-offs in values and in real-world effects, the fact remains that digital intermediaries are becoming more and more powerful. They are more powerful in the contingent sense that they appear to have consolidated into just

76. General Assembly, International Covenant on Civil and Political Rights, Article 19, (Dec. 16, 1966), https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx [https://perma.cc/9SNR-HY6A].

a few of them. That consolidation will be tested as they apply tighter and tighter rules around content, driving some users to other services to better express what has been forbidden in the mainstream. But they are also more powerful in their ability to identify trends in speech and points of intervention even amidst billions of comments and other speech acts each day.

This is how we get to the point of describing companies like Facebook and Twitter both as far too powerful and far too hands off. Clearview AI shouldn't exist—and we should also use it to find the bad guys.

There are real and painful consequences for failing to resolve the discord between rights and public health. Those who incline to purity around individual freedom of expression must contend with the fact that neo-Nazis and their counterparts are real, that their ideology is growing, facilitated, and cultivated by technologies that didn't exist in the 1970s, and that the linkages between words and violence—and more specifically between easy, private communication and violence— are plausible. (There is a reason that the law specifically recognizes conspiracy—an agreement among two or more people to commit a crime in which steps have been taken to do it—as a crime unto itself. People are stronger together.)

And those who see First Amendment legalisms and culture as a vestige of privilege for the already-strong, behind which obviously bad acts can hide and thrive, should grapple with the dilemma of how anyone but the already-strong could be empowered to judge speech and censor it from the public sphere. (There is a reason that censorship is so often associated with hollow orthodoxies and authoritarian impulses.)

To reconcile rights and public health, and indeed to see how much to ask intermediaries to act in the public interest rather than simply to pursue profit, we must explore the growth of companies' power—and their newly ascendent desire to strategically shed that power in order to avoid being forced to confront some of these hard questions. Then we can put on the table ways to channel and use that power that might accrue more legitimacy than simply versioning up a new terms of service every few months.

My account thus far describes a Rights-centric era from 1995–2010, followed by a Public Health era from 2010 through today. While emphasizing distinctly different, at times incommensurable, values, each has compelling elements. What lies ahead may be a third era—one of Process, or legitimacy-seeking—particularly for companies at the center of, and whether they like it or not, active participants in the construction and operation of our public spheres.

"Process" helps a polity answer questions where consensus around what we want substantively is elusive. It helps us observe, for example, that we might disagree with a new law, while understanding and respecting at some level that, so long as it was passed in accordance with the right procedures, including ones that incorporate elements of democratic governance, it was "right" for it to be enacted.

We are seeing new experiments in the online environment to help the "forum fit the fuss," in the memorable words of scholars of alternative dispute resolution.[77] Shaping speech and discourse has an impact and gravity that goes beyond a mere customer-service issue, both for those speaking and for those potentially listening and reacting. Given the scale of online discourse, not every utterance or platform's moderation of same can be litigated in a federal case. An external review board such as the one Facebook has stood up to review its content moderation decisions against its stated community guidelines, represent a process innovation in this area—indeed, a novel form of binding arbitration on the company.[78] And elsewhere I've suggested novel forms of incorporating outside judgments—such as those of sortitioned high school students—that might prove more acceptable as means of judging truth in political advertisements than having the company that hosts the advertising decide.[79]

It may prove less vital to get things right when we truly lack even rough society-wide consensus on these issues, than it is to get the process by which we – not just platforms, and not simply governments – examine these issues, come to closure, and revisit and reexamine on a regular and sufficiently structured basis.[80]

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77. Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOTIATION J. 49 (1994), https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1571-9979.1994.tb00005.x/ [https://perma.cc/L3CX-6BBE].

78. Oversight Board Charter, FACEBOOK, https://about.fb.com/wp-content/uploads/2019/09/oversight_board_charter.pdf (last visited Mar. 7, 2023) [https://perma.cc/YU2T-8R9Q]; *see also* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech* 131 HARV. L. REV. 1598 (2018).

79. Jonathan Zittrain, *A Jury of Random People Can Do Wonders for Facebook*, ATLANTIC (Nov. 14, 2019), https://www.theatlantic.com/ideas/archive/2019/11/let-juries-review-facebook-ads/601996/ [https://perma.cc/S57Y-WTB2].

80. John Bowers & Jonathan Zittrain, *Answering Impossible Questions: Content Governance in An Age of Disinformation*, HARV. KENNEDY SCHOOL (HKS) MISINFORMATION REV. 2020, https://misinforeview.hks.harvard.edu/article/content-governance-in-an-age-of-disinformation/ [https://perma.cc/C8UK-RX8T].

The Tug Between Private and Public Power Online

Evelyn Douek[*]

I. INTRODUCTION

Professor Zittrain's article describes, in his characteristically vivid and engaging way, one of the most consequential tugs of war of the internet age: the battle over the rules for what can and cannot be said online. The legal centerpiece of Zittrain's story is the Skokie case from the late 1970s, which held that Nazis had a First Amendment right to march in a Chicago suburb with a large population of Holocaust survivors.[1] Zittrain calls the case "a near-perfect encapsulation of mainstream late twentieth century characterization of the right to free speech in America."[2] And he's right—there is perhaps no more iconic decision in the First Amendment canon.[3] It is considered by many to be one of the "truly great victories for the First Amendment."[4] And the Skokie case matters to the tug of war over online speech because "the ethos of American civil libertarianism that reached apogee in the 1960s and 70s political and legal establishments in turn infused the mainstream use of the Internet."[5] No other case so neatly encapsulates the spirit of the early internet era.

Except, perhaps, one. Because there is another case—equally famous (or infamous)—that exemplifies the way American law approached speech regulation during the internet's formative era and was the legal backdrop against which social media platforms grew

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* Assistant Professor, Stanford Law School. Thanks to Genevieve Lakier for helpful comments, and to the editors of the Duquesne Law Review for their work on my piece. But thanks most especially to JZ, from whom I have learnt so much—about the internet, of course, but also, more importantly, about being a scholar, mentor, and friend.

1. *See* Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43, 43–44 (1977); *see also* Smith v. Collin, 436 U.S. 953, 953 (1978) (denying certiorari).

2. Jonathan Zittrain, *"We Don't Know What We Want": The Tug Between Rights and Public Health Online*, 61 DUQ. L. REV. 183, 191 (2023).

3. Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1537 (2003) ("If one case [came] to symbolize the contemporary political and constitutional response to hate speech in the United States, it is the Skokie case . . . .").

4. Geoffrey R. Stone, *Remembering the Nazis in Skokie*, HUFFPOST, https://www.huffingtonpost.com/geoffrey-r-stone/remembering-the-nazis-in_b_188739.html (last updated May 25, 2011).

5. Zittrain, *supra* note 2, at 192.

up: *Citizens United v. FEC*.[6] *Citizens United* is another icon of First Amendment law; "arguably the most important First Amendment case of the new millennium."[7] *Citizens United* post-dates the early internet, but it is a neat encapsulation of a First Amendment values system that gave us the internet we have today. That is because when the Court in *Citizens United* struck down restrictions on political campaign spending by corporations, it reaffirmed the protection that American law provides for corporate power, including over quintessential democratic public discourse.

Citizens United is the apotheosis of a free speech jurisprudence that is not cautious about corporate power over speech—far from it. It is highly solicitous of such power. If the Skokie case is about the idea that bad ideas should be defeated in the marketplace of ideas, *Citizens United* really emphasizes the *marketplace* part of that ethos. It makes evident that the "Rights Era" that Zittrain identifies was not only an era defined by protection of individual speech rights—it was also an era defined by the protection of corporate power over speech. Our internet is a product of both tenets: corporations got a lot of protection from the law for how *they* protect, promote, or select speech, and those corporations tended to think that the best way to wield that power was in the manner Zittrain describes—that is, by being relatively hands-off.

But the two positions carved out in these cases have recently been on a collision course when it comes to online speech. Because, as Zittrain recounts, our corporate overlords started to retrench from the view that "The Tweets Must Flow."[8] As a result, civil libertarianism and "the *laissez-faire* regime which the First Amendment sanctions"[9] no longer necessarily point in the same direction when it comes to online speech governance. And just as First Amendment culture infused the approach of private actors to content moderation, now the way those corporations have exercised that power is reverberating back into the First Amendment firmament. Zittrain's essay describes the most visible part of today's debates about content moderation—that is, the turn against the civil libertarianism that the early internet's speech rules embodied. But

6. Citizens United v. FEC, 558 U.S. 310 (2010).

7. Jonathan Macey & Leo E. Strine, Jr., Citizens United *as Bad Corporate Law*, 2019 WIS. L. REV. 451, 451 (2019).

8. Biz Stone, *The Tweets Must Flow*, TWITTER BLOG (Jan. 28, 2011), https://blog.twitter.com/en_us/a/2011/the-tweets-must-flow.

9. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 161 (1973).

there is also an iceberg underneath those debates—a shifting understanding of the role of law in deciding those rules.[10]

In this short essay, I therefore hope to supplement the important story that Zittrain tells of the tug between rights and public health understandings of online speech governance with a story of how law, including American constitutional law, has sanctioned, and now perhaps is turning against, the corporations that are the agents of Zittrain's story. Where Zittrain focuses on those actors, this essay focuses on the scenery that set the stage for the drama they have been embroiled in. Part II will describe *Citizens United* and its place in the First Amendment canon. I will show how the ethos the case represents was also a pillar of the legal architecture under which platforms operated in their formative years. Part III will describe how this pillar is also being destabilized as platforms are changing their own approaches to speech governance. The relationship between private and public power over online speech is dialogic and dynamic—they influence each other and are constantly changing. As Zittrain shows, First Amendment law influenced private actors' content moderation; and now the effects of private actors' content moderation are ricocheting back onto the First Amendment. This dynamism means nothing is stable—not content moderation, nor the legal environment it operates in. The story of the tug of war between rights and public health is also a story of the struggle over public and private power online. Both stories will determine the future of online speech, and both are still being written.

II. CORPORATE OVERLORDS

As Zittrain observes:

> Although we don't have consensus about what we want, no one would ask for what we currently have: a world in which two unelected entrepreneurs are in a position to monitor billions of expressions a day, serve as arbiters of truth, and decide what messages are amplified or demoted. This is the power that

10. This paper draws on, and is heavily indebted to, the following blog post and its co-author: Evelyn Douek & Genevieve Lakier, *First Amendment Politics Gets Weird: Public and Private Platform Reform and the Breakdown of the Laissez-Faire Free Speech Consensus*, UNIV. OF CHI. L. REV. ONLINE (June 6, 2022), https://lawreviewblog.uchicago.edu/2022/06/06/douek-lakier-first-amendment/.

> Twitter's Jack Dorsey and Facebook's Mark Zuckerberg have.[11]

And it is hard to argue with the fact that this is not the ideal way to run a public sphere. But it is, in fact, the choice that has been repeatedly made by those writing First Amendment doctrine. Private actors have been gifted all sorts of expansive control over public discourse. Jack and Mark (or Elon, for that matter) were not the first such corporate overlords, and *Citizens United* is the poster child of how the First Amendment created a world where corporations hold so much power.

A. The Other Emblematic Case

Citizens United probably needs little introduction, and its particulars are not important for the argument of this essay. When the Court struck down limits on corporate campaign expenditures, it did so by explicitly overruling the idea that the government had a compelling interest in preventing the distorting effects extreme corporate wealth (and therefore power) could have on public discourse.[12] Justice Kennedy's opinion for the Court was surprisingly preoccupied with potential effects on media corporations—that is, speech intermediaries. Although the challenged provisions in the case *exempted* media corporations, Kennedy argued that upholding a principle that the government had an interest in preventing corporate wealth from distorting public debate "would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations."[13] It is anathema to the First Amendment, he argued, that the government could regulate speech intermediaries and publishers, and this was so regardless of their immense aggregations of wealth.

No one thinks about *Citizens United* as an internet regulation case (because it's not!). But it applies to internet platform corporations just as it does any other. Indeed, future technological development was an explicit justification for refusing to permit the government to draw lines between different kinds of speakers. Kennedy was not blind to the effects the ruling would have on online public discourse. He noted that "[r]apid changes in technology—and the creative dynamic inherent in the concept of free expression—

11. Zittrain, *supra* note 2, at 188 (citing Jonathan Zittrain, *Twitter's Least-Bad Option for Dealing with Donald Trump*, ATLANTIC (June 26, 2020), https://www.theatlantic.com/technology/archive/2020/06/twitter-trump-least-bad-option/613558/.

12. Citizens United v. FEC, 558 U.S. 310, 348 (2010).

13. *Id.* at 351.

counsel against upholding a law that restricts political speech in certain media or by certain speakers."[14] And that while television ads may have been the core medium of political campaigning in 2010, soon "it may be that Internet sources, such as . . . social networking Web sites, will provide citizens with significant information about political candidates and issues."[15] That is, the decision was explicitly written so as to ensure that the protection for corporate rights that it was articulating would apply to future speech intermediaries like the internet platforms of today.

Just as the Skokie case is the most famous case symbolizing American free speech absolutism, *Citizens United* is the most famous case symbolizing the way the First Amendment has protected corporate power in political debates. But it is far from the only one, and when it comes to content moderation, the corporate solicitude of *Citizens United* should be read alongside long-standing string of Supreme Court precedents that firmly establish that editorial discretion, like campaign spending, is a protected form of expression under the First Amendment.[16] The most famous of these cases is *Tornillo*, in which the Court held that newspapers could not be forced to publish replies to critical editorial content from political candidates.[17] The Court held that decisions about what to publish, fair or unfair, constitute protected editorial control.[18] Again, the Court rejected any appeals to the idea that the government should be permitted to regulate the media even if the result of market consolidation had been "to place in a few hands the power to inform the American people and shape public opinion."[19] That is, *Tornillo* and like cases also explicitly upheld corporate autonomy regardless of their vast and perhaps disproportionate power over the public sphere.

The most recent affirmation by the Supreme Court of private actors' control over the public sphere was the 2019 case *Halleck*,[20] about the rights of private cable operators to exclude certain film producers' access to their channels. Justice Kavanaugh's majority opinion was clearly concerned about the threat to "private enterprise" by any finding that such corporations' discretion in their

14. *Id.* at 364.
15. *Id.*
16. Evelyn Douek & Genevieve Lakier, *Rereading "Editorial Discretion,"* KNIGHT FIRST AMEND. INST. AT COLUM. UNIV. (Oct. 24, 2022), http://knightcolumbia.org/blog/rereading-editorial-discretion.
17. Miami Herald Publ'g. Co. v. Tornillo, 418 U.S. 241, 254–58 (1974).
18. *Id.* at 258.
19. *Id.* at 250.
20. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019).

editorial choices could be at all constrained. As Professor Genevieve Lakier put it, the case protected "the liberty of the property owner to make whatever use of its property it desires, rather than the liberty of the speaker to participate in public debate."[21] This appeared to be a decisive rejection of the idea that social media platforms' content moderation decisions could be subject to constraints, despite their centrality to democratic discourse.[22] That question had been in the air since Justice Kennedy had called platforms "the modern public square," a few years earlier.[23] But *Halleck* said no—the fact that platforms are powerful does not justify any restrictions on their power to control the speech of others. The Court has therefore affirmed again and again that corporate power over public speech is a fixture of the world the First Amendment has created.

Of course, this was not the only possible world. The pro-corporate free speech project was a political project, and one to which there were many alternatives. *Citizens United* itself is indicative: the elevation of corporate speech rights was a victory for the conservative wing of the Court, over loud liberal dissent. The victory has been decisive and has appeared relatively entrenched for decades.

B. Private Power and Online Expression

For a while the ethos of these cases happily co-existed with the First Amendment precedents that Zittrain identifies as reflecting the Rights framework. Both created the architecture of early internet regulation. The principle of protection for corporate power upheld in *Citizens United*, if not its letter, allowed platforms to bring the vision of free speech represented by the Skokie case to their online domains. The formative legal battles about how the First Amendment applied to the internet illustrate this co-existence.

Zittrain tells the story of the Communications Decency Act (CDA) and the Court's declaration of its invalidity in *Reno*[24] as a story of the "enshrinement of online speech rights."[25] But the story of the CDA is also a story about the enshrinement of *corporate power* over online speech rights. When the American Civil Liberties Union (ACLU) challenged the provisions of the CDA that sought to censor

21. Genevieve Lakier, *Manhattan Community Access Corp. v. Halleck: Property Wins Out Over Speech on the Supposedly Free-Speech Court*, ACS, https://www.acslaw.org/analysis/acs-supreme-court-review/manhattan-community-access-corp-v-halleck-property-wins-out-over-speech-on-the-supposedly-free-speech-court/ (last visited Feb. 9, 2023).

22. Douek & Lakier, *supra* note 10, at 4.

23. Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

24. Reno v. ACLU, 521 U.S. 844, 896–97 (1997).

25. Zittrain, *supra* note 2, at 192.

indecent material, it did not challenge what is now the only provision of the CDA to remain standing: the famous section 230. Section 230 is mostly famous for the immunity from liability it gives platforms for the content that users post on their services.[26] But it has another, equally important, effect, which is to protect platforms' content moderation choices to restrict access to users' posts.[27] As Judge Wilkinson noted in the first decision interpreting section 230, one clear purpose of the provision was to immunize providers to ensure they did not over-restrict users' posts, but "[a]nother important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services."[28] That is: section 230 was intended to empower platforms, not just to immunize them.

Section 230 is undoubtedly an important provision for the protection of individual expression online. Without it, platforms would be far more risk averse, and users would bear the cost of platforms' over-removal. But even if section 230's most important role is not the protection of corporate power but the protection of individual speech, it remains true that the fundamental way the law works is to empower private corporations to decide their own rules, guided by their own business incentives, in the belief that this is the best way to defend free speech. In this way, section 230 is also an expression of faith in corporate power and the market to manage the public sphere. As Professor Anupam Chander put it, "Law Made Silicon Valley" by intentionally giving platforms a wide berth in how they treated content on their website.[29]

III. THE TUG BETWEEN PRIVATE POWER, PUBLIC POWER, AND POLITICS

And thus, like a fairytale, during the period that Zittrain describes as the Rights Era, the civil libertarianism of the Skokie case happily lived alongside the corporate solicitude of *Citizens United*. The corporations in charge of the online public sphere were staffed by "American lawyers trained and acculturated in American free speech norms and First Amendment law [who] oversaw the development of company content-moderation policy."[30] Following the

26. 47 U.S.C. § 230(c)(1).

27. § 230(c)(2)(A).

28. *Zeran* v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

29. Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639 (2014).

30. Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1621 (2018); *see also* Marvin Ammori, *The "New" New York*

American free speech tradition, platforms exercised their power in the spirit of the Skokie case. Constitutional law infused the private law that platforms created, and those platforms were—as Zittrain says—all too happy to "butt out."

But the story does not end there and is not happily ever after. As Zittrain recounts, the Rights Era has been followed by a Public Health Era, when our corporate overlords have become more attentive to the harms that can come from completely unconstrained expression and that "Rights" do not have to only mean the rights of speakers.[31] The major platforms have all developed new rules, including against hateful conduct, pandemic misinformation, and false claims about elections, that are intended to promote public health rather than let the marketplace of ideas operate unencumbered.[32] There is perhaps no greater indicator of this shift than Facebook's move, after years of pressure and after the other major platforms had also done so, to ban Holocaust denial.[33] This was a direct repudiation of the holding and ethos of the Skokie case. The message was clear: the Skokie case was overruled in platforms' jurisdictions. With their users and advertisers no longer so happy for them to keep butting out, platforms started butting in, and their rulebooks expanded from short webpages to substantial textbooks for moderators to study.

This is where Zittrain's story leaves us: at the inflection point as tech giants struggle to determine how to balance competing rights and interests. But chapter two of this story will be even messier than Zittrain suggests. It's not just that "we don't know what we want" when it comes to content moderation.[34] It's also that there is no "we," and the First Amendment floor on which content moderation stands may not survive the destabilization caused by many platforms' new philosophies. The conservatives that championed the pro-corporate free speech project now find themselves unsure if that project still suits their goals: platforms' increased content moderation has been widely understood on the Right (without evidence) to be motivated by anti-conservative bias. Elon Musk's takeover

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Times: Free Speech Lawyering in the Age of Google and Twitter, 127 HARV. L. REV. 2259, 2283 (2014) ("[T]he First Amendment—and American free speech doctrine—still influences top tech lawyers . . . .").

31. I have also discussed this trend in Evelyn Douek, *Governing Online Speech: From "Posts-As-Trumps" to Proportionality and Probability*, 121 COLUM. L. REV. 759 (2021).

32. *See, e.g.*, Evelyn Douek, *The Year That Changed the Internet*, ATLANTIC (Dec. 28, 2020), https://www.theatlantic.com/ideas/archive/2020/12/how-2020-forced-facebook-and-twitter-step/617493/.

33. Douek, *supra* note 31, at 780.

34. Zittrain, *supra* note 2.

and reformation of Twitter could have been seen as "ironic vindication of the free-market thesis that has undergirded the traditional conservative interpretation of the First Amendment."[35] Instead, it seems to have only fueled conservative fears that Silicon Valley elites have abused their power and need to be reined in.[36]

The lesson is that the relationship between public law and private power is dialogic. Law is not static and what the law giveth, the law can taketh away. While platforms have been losing faith in the ethos of the Skokie case, civil libertarians have been losing faith that corporations will uphold their vision of free speech. The corporate power bestowed by the *Citizens United* vision of the First Amendment is not an inevitable and fixed truth about the world, and there are rustlings in the conservative legal establishment that suggest change is afoot.

Conservative legislatures are passing laws aimed at curbing platforms' power. Republican politicians are now saying that the need for such laws "has been apparent for years, as our country's public square has become increasingly controlled by a few powerful companies that have proved to be flawed arbiters of constructive dialogue."[37] Legal reform is a necessary response to the "tyrannical behavior" of "Big Tech censors."[38] Conservative members of the Supreme Court, including two who signed on to Kennedy's opinion in *Citizens United,* have called one-such reform "ground-breaking" in the way it "addresses the power of dominant social media corporations to shape public discussion."[39] Justice Thomas has expressed concern about and called "unprecedented" the "concentrated control of so much speech in the hands of a few private parties."[40] The constituency that protected corporate power in *Citizens United* is now worried that that power is being wielded *against them*.

In this climate, the authors of our current free speech regime may not sit idly by while "we" work out what we want. On some readings

35. Evelyn Douek & Genevieve Lakier, *First Amendment Politics Gets Weird: Public and Private Platform Reform and the Breakdown of the Laissez-Faire Free Speech Consensus*, U. CHI. L. REV. ONLINE (June 6, 2022), https://lawreviewblog.uchicago.edu/2022/06/06/douek-lakier-first-amendment/.

36. Cat Zakrzewski & Cristiano Lima, *GOP Lawmakers Allege Big Tech Conspiracy, Even as Ex-Twitter Employees Rebut Them*, WASH. POST (Feb. 8, 2023), http://www.washingtonpost.com/technology/2023/02/08/house-republicans-twitter-files-collusion/.

37. Greg Abbott, *A New Texas Law Fights Big Tech Censorship. Last Week Showed Why We Need It.*, WASH. POST (Sept. 22, 2021), http://www.washingtonpost.com/opinions/2021/09/22/greg-abbott-social-media-censorship-texas-law/.

38. *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, RON DESANTIS (May 24, 2021), https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech/.

39. Netchoice, LLC v. Paxton, 142 S. Ct. 1715, 1717 (2022).

40. Biden v. Knight First Amend. Inst., 141 S. Ct. 1220, 1221 (2021).

of what these laws or the Supreme Court might do, the Skokie case's role in online speech governance could be resurgent, and platforms will have no choice but to reinstate a more libertarian approach to free speech—and the Nazi accounts they suspended along with it. Even if this maximalist version does not come about, law may still set other constraints on how private companies get to decide on the rules that govern speech online.

These rumblings are an important reminder that there is no "ideal" or static understanding of free speech to be discovered after a careful balancing of all the relevant interests. How free speech is understood and realized is an ongoing struggle between law, politics, and private power, each of which will assert itself in different ways at different times. Even if we could decide what we want, you can't always get it. Zittrain's illuminating account of the shift from the Rights Era to the Public Health Era in online governance is one of the most important stories for free speech in the internet age. But focusing on this shift should not obscure the political and legal arrangements that made it possible—and may ultimately forestall or reverse it.

Platform Governance's Legitimate Dilemmas

Alicia Solow-Niederman[*]

I. INTRODUCTION

How can we govern if "we don't know what we want?"[1] In characteristically engaging and thought-provoking fashion, Jonathan Zittrain's Essay interrogates our ongoing struggle to answer this thorny question.[2] As Professor Zittrain exposes, governing social media firms like Twitter and Facebook is no easy feat.[3] Part of the challenge is defining the problem itself: it's hard to diagnose what, exactly, "is so 'obviously' wrong" with social media today.[4] Naturally, without a consensus on what is wrong, it is difficult, if not impossible, to make it right.

Professor Zittrain asserts that we can chart a better course by focusing on two competing directions that might define a "healthy public sphere."[5] The first is a *rights* framework, dominant from approximately 1995 to 2010, that builds from a highly individualistic vision of free speech, is comparatively absolutist in its stances, and situates the state as the salient threat.[6] The second is a *public health* framework, ascendant in the 2010s and continuing today, that accounts for collective as well as individual interests, contemplates balancing costs and benefits when it comes to regulating freedom of expression, and recognizes threats from public and private actors alike.[7] What we want, Professor Zittrain suggests, is an

* Associate Professor, University of Iowa College of Law; Affiliated Fellow, Yale Law School Information Society Project; Faculty Associate, Berkman Klein Center for Internet & Society at Harvard University; Non-Resident Affiliate, Northeastern University School of Law Center for Law, Innovation and Creativity. Thank you to Danielle Keats Citron and Rebecca Crootof for their feedback and support. I am grateful to the Duquesne Law Review student editors, especially Taylor Riedel, for their assistance in preparing this piece for publication. Any remaining errors or omissions are my own.

1. Jonathan Zittrain, *"We Don't Know What We Want": The Tug Between Rights and Public Health Online*, 61 DUQ. L. REV. 183 (2023).
2. *Id.*
3. *Id.*
4. *Id.* at 184.
5. *Id.* at 186.
6. *Id.* at 186, 192.
7. *Id.* at 186, 198.

impossible mix of both frames: we want "free speech for all (rights), along with restrictions against dangerous toxicities (public health)."[8] Because we cannot afford to wait to act while we try to "strike these difficult balances," Professor Zittrain contends that we must "reconcile" the two approaches, squarely confront companies' growing power, and "put on the table ways to channel and use that power that might accrue more legitimacy than simply versioning up a new terms of service every few months."[9]

Reconciliation of these competing frameworks is a noble goal—but what if it, too, is impossible? The foundational problem is the one that Professor Zittrain identifies in his final sentence: it is one of legitimacy.[10] By beginning with legitimacy as a grounding principle, I offer that we might trace the roots of the problem a bit differently and, in so doing, tease out what (not) to do as we seek to cultivate and sustain a healthy public sphere, online and off.

II. LEGITIMACY AND ITS CHALLENGES

Starting with legitimacy and proceeding from there has its own challenges, however. Legitimacy defies easy definition. How it is understood varies across disciplines.[11] Moreover, even within a single discipline like philosophy, legitimacy comes in descriptive, normative, and mixed varieties.[12] Legal scholars writing in the jurisprudential tradition emphasize the different forms of legitimacy, too; for instance, Richard Fallon's work on constitutional law and

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8. *Id.* at 206.

9. *Id.* at 207.

10. *Id.* at 208. Legitimacy is a recurring actor in studies of platform governance. *See, e.g.*, Robert Gorwa, *The Platform Governance Triangle: Conceptualising the Informal Regulation of Online Content*, 8 INTERNET POL'Y REV. 1, 12–13 (2019) (discussing the "legitimation politics" of platform governance); Hannah Bloch-Wehba, *Global Platform Governance: Private Power in the Shadow of the State*, 72 SMU L. REV. 27, 68 (2019) (arguing that, when it comes to platforms' power, "the right question is whether the exercise of that power is legitimate, or worthy of recognition"); Nicolas Suzor, Tess Van Geelen, & Sarah Meyers West, *Evaluating the Legitimacy of Platform Governance: A Review of Research and a Shared Research Agenda*, 80 INT'L COMMC'N. GAZETTE 385, 387 (2018) (assessing "human rights values" and developing "an index of legitimacy of the governance of online intermediaries"). As this Response explores, legitimacy is a slippery concept to pin down. *See* discussion *infra* Part II. Building from Mark Suchman's analysis of moral legitimacy and Professor Zittrain's analysis of eras of platform governance, I offer that we can better understand how contemporary questions of legitimacy are bound up with questions that have haunted us since the earliest days of the internet, and thereby better evaluate which problems the interventions presently on the table can and cannot solve.

11. *See* Fabienne Peter, *Political Legitimacy*, STAN. ENCYCLOPEDIA PHIL., https://plato.stanford.edu/entries/legitimacy/ (last updated Apr. 24, 2017) (discussing different disciplinary approaches).

12. *Id.*; Ari Ezra Waldman, *Power, Process, and Automated Decision-Making*, 88 FORDHAM L. REV. 613, 614 n.12 (2019).

on the Supreme Court distinguishes between sociological, moral, and legal forms of legitimacy.[13] Other legal scholars foreground process, often drawing on Tom Tyler's work on procedural justice and focusing on individuals' "assessments of the fairness of the processes by which legal authorities make decisions."[14] Still others take a more sociological approach. Ari Ezra Waldman, for instance, rejects Professor Tyler's emphasis on public authorities and procedures as too narrow to capture the nuances of algorithmic legitimacy.[15]

There is no simple, one-size-fits all definition of legitimacy. Even so, because platform governance can be understood as a set of relationships among individuals, firms, and the government, organizational legitimacy provides a helpful lens. The next Part draws from sociologist Mark Suchman's work on organizational legitimacy in general and moral legitimacy in particular to critically assess the pros and cons of different governance frameworks and to position the role of law with respect to proposed interventions.[16]

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13. RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 21 (Thomas LeBien ed., 2018); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1790–91 (2005).

14. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 284 (2003) (connecting "procedural elements" to "process-based judgments" that can contribute to "supportive values" such as legitimacy). I have relied on this understanding in past work focused on public actors' use of algorithmic tools, a domain in which process and public perceptions of government officials may be especially important. *See* Alicia Solow-Niederman, *Algorithmic Grey Holes*, 5 J.L. & INNOVATION 116, 123 (2023).

15. Waldman, *supra* note 12, at 614 & n.12 (contending that procedural legitimacy offers too narrow a frame because algorithmic legitimacy "can be based on the legitimacy of the authority, private or public, using it or on the legitimacy of the decision-making process or on the decision itself").

16. Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571, 579 (1995). *See* Waldman, *supra* note 12, at 614 & n.12 (embracing Professor Suchman's definition of legitimacy in his analysis of algorithmic accountability). Notably, Professor Suchman's taxonomy is a sociological one that develops "moral legitimacy" as a component of organizational legitimacy and draws connections to Max Weber's influential account of legitimate authority. Suchman, *supra*, at 578 n.2 (tracing relationship between components of moral legitimacy and Weber's typology of legal-rational, traditional, and charismatic authority). Professor Fallon also traces the roots of sociological legitimacy to Weber. FALLON, *supra* note 13, at 1795. However, Professor Fallon sets off moral legitimacy as a distinct category, focusing on constitutional law and public law regimes and decisions. *Id.* at 1796. Other platform governance scholars have defined legitimacy by reference to Professor Fallon's typology. *See, e.g.*, Chinmayi Arun, *Facebook's Faces*, 135 HARV. L. REV. F. 236, 245 (2022) (mining taxonomy to critically assess Facebook's Oversight Board). Because this Response considers organizational dynamics more broadly and is not specifically focused on legal determinations, binding decisions, or any one institutional form, I take a different tack and build from Professor Suchman's taxonomy to position platform governance and legitimacy in relational terms.

III. LEGITIMACY THROUGH THE ERAS

Under the surface, the dawn of the popular internet is bound up in questions of organizational legitimacy: internet governance is all about how individuals, firms, and governments ought to engage with one another as part of complex sociotechnical configurations. Looking back to the emergence of the popular internet in the mid-1990s, Professor Zittrain persuasively traces the rights era of internet governance in part to John Perry Barlow, a cyberlibertarian political activist, and his contemporaries. In Barlow's vision, eschewing government "sovereignty" in "Cyberspace, the new home of Mind" and permitting unlimited free expression is instrumental to realizing a "more humane and fair" world.[17] Tabling critiques of this vision,[18] Barlow's manifesto is noteworthy for the way in which it embeds a normative perspective. To be sure, when Barlow, a lyricist for the Grateful Dead, wrote "A Declaration of the Independence of Cyberspace," perhaps he was merely trying to "channel Thomas Jefferson."[19] Still, the fact remains that he pitched his appeal in terms of who—the state, or decentralized individuals—has the "moral right" to rule.[20]

Wittingly or not, Barlow's invocation of moral rights taps into what Professor Suchman identifies as a fundamental component of organizational legitimacy: "moral legitimacy."[21] Moral legitimacy

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17. Zittrain, *supra* note 1, at 193–94. Notably, the original vision of a world free from government sovereignty does not engage with the question of *which* governments matter—although the question is an especially pressing one in a globalized era. *See, e.g.*, Arun, *supra* note 16, at 246–47 (emphasizing that the goals of any one social media company are not as "consonant or as easily identified as one might think," and that a platform's engagement with states is not "uniform and consistent," but rather varies both across and within different states).

18. Barlow did not account, for instance, for the lived experiences of historically marginalized populations, nor for those whose voices were less traditionally well-received. Moreover, Mary Anne Franks has noted Barlow's failure to attend to the politics of gender. *See* Mary Anne Franks, *Censoring Women*, 95 B.U. L. REV. 61, 62 (2015) ("It is perhaps telling that Barlow . . . did not name gender as one of the categories of privilege or prejudice to be discarded in cyberspace."). For a summary of other scholarship more generally questioning Barlow's vision of internet exceptionalism, see Bloch-Wehba, *supra* note 10, at 35–36. For further discussion of what Barlow's vision omits, see discussion *infra* text accompanying notes 29–31 and sources cited *infra* note 30.

19. Zittrain, *supra* note 1, at 193 & n.37 (citing Cindy Cohn, *Inventing the Future: Barlow and Beyond*, 18 DUKE L. & TECH. REV. 69–77 (2019)).

20. *Id.* at 193 (quoting John Perry Barlow, *A Declaration of the Independence of Cyberspace*, EFF (Feb. 6, 1996), https://www.eff.org/cyberspace-independence).

21. Suchman, *supra* note 16, at 579. Professor Suchman's typology of "organizational legitimacy" also identifies "pragmatic legitimacy," defined as "self-interested calculations of an organization's most immediate audiences" and "cognitive legitimacy," which refers to "affirmative backing for an organization or mere acceptance of the organization as necessary or inevitable based on some taken-for-granted cultural account." *Id.* at 578, 582 (emphasis removed). As Professor Suchman explains, "[a]ll three types involve a generalized perception

is normative and reflects assessments that an organization's activities are "the right thing to do."[22] This concept provides a helpful way to think about the early days of internet governance: Barlow's message represents a particular understanding of what kinds of "organizational activities are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions."[23] "A Declaration of the Independence of Cyberspace" is the product of a particular "normative evaluation" of how the organizational form of the internet should operate. Specifically, Barlow's normative vision casts aspersion on conventional government's moral right to rule the internet and, in so doing, promotes a world of near-infinite First Amendment activity.[24] His pronouncements about which actors do and do not have a moral right to regulate online speech implicitly reflect "beliefs about" what kinds of "activit[ies] effectively promote[] societal welfare, as defined by the audience's socially constructed value system."[25]

In appealing to moral legitimacy in this way, Barlow's declaration implicitly defines what makes organizational interactions right and wrong. From the cyberlibertarian perspective, it is illegitimate to regulate online speech because doing so would undermine societal welfare within the accepted value system. Governance frameworks and associated organizational relationships that keep the state out of the business of individual freedom are seen as the key to a healthy online public sphere. And this implicit understanding, over time, entrenched itself in the dominant legal and regulatory understanding of the rights era.[26]

This cyberlibertarian, rights-oriented framework, however, both reflects a particular socially constructed value system and assumes a working consensus that it's an acceptable one. And therein lies the rub. As Professor Zittrain argues, the rights framework relies in part on a dichotomy between online and offline life,[27] drawing from an underlying belief that "the digital space [is] . . . one of

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or assumption that organizational activities are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions." *Id.* at 577. Because I take the central question for platform governance to be what is right and wrong for the public sphere, and because such normative assessments are the province of "moral legitimacy," *id.* at 577 n.1, I focus on Professor Suchman's concept of moral legitimacy in this Response.

22. *Id.* at 579.
23. *Id.* at 577.
24. Zittrain, *supra* note 1, at 193–94.
25. Suchman, *supra* note 16, at 579.
26. Zittrain, *supra* note 1, at 186–88.
27. *Id.* at 199.

speech rather than action."[28] That is certainly no longer true today.[29] Moreover, the belief that speech was ever "just" speech, easily cabined to less-"real" cyber contexts, has always reflected the perspectives of the privileged few and not the voices of historically marginalized or more vulnerable populations.[30] That's not to say free speech does not matter. But it is to suggest that a rights framing works best, if ever, in the context of a narrow understanding about how far speech on the internet reaches,[31] which in turn limits the range of norms and values that are affected by online determinations.

One response is to try to move from the realm of individual rights and negative liberty to speak without interference, and toward collective interests and positive liberty for all to thrive without interference. The public health framework that Professor Zittrain identifies[32] can be understood as an effort to reconfigure online and offline networks of relationships and responsibilities to cure the "dangerous toxicities" in the public sphere.[33] It can also be understood as an effort to update the basis for platform governance's moral legitimacy, attempting to shift the "socially constructed system of norms, values, beliefs, and definitions"[34] away from rights and toward broader social responsibility for public and private actors alike.

Moving from the individual to the collective is tricky, though. The problem is not merely that online and offline worlds are blurring. A strong free speech stance has long affected people in the

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28. *Id.* at 193.

29. *Id.* at 199. On the metaphor of cyberspace and its relationship to physical space as well as questions of power, see Julie E. Cohen, *Cyberspace As/And Space*, 107 COLUM. L. REV. 210 (2007). On the onl*i*fe world, a "domain "situated beyond the increasingly artificial distinction between online and offline," see MIREILLE HILDEBRANDT, SMART TECHNOLOGIES AND THE END(S) OF LAW 8 (2015).

30. For a small sampling of many relevant works, see, for instance, CYBERGHETTO OR CYBERTOPIA?: RACE, CLASS, AND GENDER ON THE INTERNET (Bosah Ebo ed., 1998); RACE IN CYBERSPACE (Beth E. Kolko et al. eds., 2000); DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2010); RACE AFTER THE INTERNET (Lisa Nakamura & Peter A. Chow-White eds., 2012); VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR (2017); SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM (2018); MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION 160–65 (2019). *See also* Zittrain, *supra* note 1, at 202 ("When online activities result in persistent harassment, that amplifies the true costs of speech—at least for some—in the Rights framework.").

31. *Cf.* Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 237 (2011) (arguing that the stance of "cyberspace idealists" such as Barlow "necessarily ignores the fact that cyberspace's very legitimacy is grounded in a highly legalistic conception of free speech").

32. Zittrain, *supra* note 1, at 198–99.

33. *Id.* at 206.

34. Suchman, *supra* note 16, at 577.

offline, "real" world; indeed, as Professor Zittrain recounts, there is a fairly direct thread between the prospect of Nazis marching in front of Holocaust survivors in Skokie, Illinois, and calls to maximize free speech online.[35] Nor is the problem only that the cyberlibertarian vision disregarded the felt impact of wholly online activities, as experienced by many individuals since the early days of the internet.[36] There is also an antecedent problem: if we are trying to protect collective interests, who are "we"? The two interact, moreover: if the impact of online activities reaches offline, and far more people are affected (for good and for bad) by actions taken online, then the relevant we is far more complex and multifaceted than the rights framework contemplated. A bigger we, however, makes it even harder to craft an acceptable working consensus around how to govern our sociotechnical system.

The best we may be able to do, then, is to lean into the complexity of moral legitimacy itself and carefully consider the factors that affect evaluations of legitimacy, rather than judging legitimacy as a single output. Indeed, part of why it is so hard to ascertain "what we want" in platform governance stems from the complexity of moral legitimacy. Moral legitimacy, in Professor Suchman's framing, is multifaceted. It generally "takes one of three forms: evaluations of outputs and consequences," or consequential legitimacy; "evaluations of techniques and procedures," or procedural legitimacy, and "evaluations of categories and structures," or structural legitimacy; and at times also includes "evaluations of leaders and representatives."[37] Moreover, perceptions of legitimacy can change and evolve over time.[38]

To make this point more concrete, consider Twitter. When Elon Musk purchases the company formerly known as "the free speech wing of the free speech party,"[39] why should we care? It's not just a

35. Zittrain, *supra* note 1, at 188–92.

36. *See id.* at 198 (noting that hate, doxing, and harassment were present "from the earliest days of the Internet" and quoting Whitney Phillips' work on early internet culture). *See also* Mutale Nkonde, *Elon Musk Says He Wants Free Speech on Twitter. But for Whom?*, SLATE (Apr. 27, 2022, 3:39 PM), https://slate.com/technology/2022/04/elon-musk-free-speech-twitter-for-whom.html (discussing how marginalized groups disproportionately suffer from online abuse and predicting that Musk's acquisition of Twitter would worsen the outlook for Black women and other minorities).

37. Suchman, *supra* note 16, at 579. As Professor Suchman notes, "[t]hese four types of moral legitimacy roughly parallel Weber's (1978) discussion of legitimate authority." *Id.* at 579 n.2.

38. *Id.* at 583–84 (contemplating the "temporal texture" of legitimation and presenting a figure that classifies different types as episodic or continual).

39. Zittrain, *supra* note 1, at 198 (quoting Josh Halliday, *Twitter's Tony Wang: 'We Are the Free Speech Wing of the Free Speech Party,'* GUARDIAN (Mar. 22, 2012, 11:57 AM), https://www.theguardian.com/media/2012/mar/22/twitter-tony-wang-free-speech).

matter of whether one thinks Musk is a business genius or a boor. Nor is it merely a matter of political preferences. It's also about the ways in which Musk's specific choices change the organizational dynamics of the platform in ways that ripple out into the broader public sphere.

Musk's acquisition of the platform implicates multiple forms of moral legitimacy. Perhaps most obvious are the personal and consequential effects. Musk has a strong personality, appealing to some and not to others, such that evaluations of him are inevitably bound up in evaluations of the company. Furthermore, Musk's free speech absolutist stance will likely make the firm less able to achieve results that eliminate dangerous toxicities and thereby accord with Professor Zittrain's articulated public health framework.[40] Musk's actions affect moral legitimacy in more subtle ways, too. Take Musk's elimination of the firm's "ethical AI" team shortly after his acquisition of the platform. This decision affects consequential legitimacy because it will make it harder to study fairness or bias on Twitter.[41] This single action also affects procedural and structural legitimacy because it removes the staff necessary to support the "discrete routines" (procedures) and "organizational features" (structures) that might have made users feel confident that the platform is one capable of determining the range of speech "activities [that] are desirable, proper, or appropriate," with an eye to protecting all users.[42] Seeing each platform as a complex, networked organization and critically evaluating how specific choices implicate aspects of moral legitimacy thus helps us to identify how and why particular moves may be more or less in line with what we want for the public sphere.

To be sure, all of this analysis ducks the underlying, antecedent question: who is the we that Twitter, or any other, platform is meant to serve? There is no easy answer; still, thinking in terms of

40. There is evidence that this bad outcome has already been realized. *See* Shera Frenkel & Kate Conger, *Hate Speech's Rise on Twitter Is Unprecedented, Researchers Find*, N.Y. TIMES (Dec. 2, 2022), https://www.nytimes.com/2022/12/02/technology/twitter-hate-speech.html (reporting that, in the weeks after Musk's acquisition of Twitter, the average number of daily slurs against Black Americans on the platform increased from 1,282 to 3,876 and the average number of daily slurs against gay men on the platform increased from 2,506 to 3,964, and further reporting that anti-Semitic posts increased over 61% in the two weeks following the acquisition).

41. Will Knight, *Elon Musk Has Fired Twitter's 'Ethical AI' Team*, WIRED (Nov. 4, 2022, 12:20 PM), https://www.wired.com/story/twitter-ethical-ai-team/.

42. Lawmakers have questioned, for instance, how Musk plans to address Spanish-language misinformation after cutting the company's safety team. *See* Cristiano Lima, *Lawmakers Want to Know Musk's Plan to Fight Misinformation in Spanish*, WASH. POST (Nov. 23, 2022, 9:05 AM) https://www.washingtonpost.com/politics/2022/11/23/lawmakers-want-know-musks-plan-fight-misinformation-spanish/.

moral legitimacy is clarifying. Musk's moves exemplify a rights era framing: to obtain moral legitimacy, all that matters is that we craft an environment that maximizes freedom to speak, even if that perspective requires assuming a less diverse body of interests and limited reach for online speech. From that point of view, his changes bolster moral legitimacy, leveraging his personality while enhancing consequential legitimacy by increasing free speech and eliminating unhelpful "woke" procedures and structures that do nothing but inject liberal bias at the expense of hardcore work.[43] This vision appeals to a particular we.[44] I personally don't subscribe to that vision, and I find such a narrow definition of which we matters to be problematic. But you do not have to agree with me to see the broader point: whether one sees these changes as good or bad is bound up in an underlying assessment of how legitimate the organization is, with an eye to all the forms of moral legitimacy affected by a particular individual or action and mediated by whose voice gets what weight in the assessment.

IV. LOOKING TO THE FUTURE: ON LEGITIMACY AND LAW

The idea that platform governance is inevitably contextual, relative, and tied to questions of moral legitimacy does not itself help us to decide what to do. If anything, it might get in the way of direct interventions, especially insofar as this complexity makes it harder to figure out the role of law. If legitimacy is a single, simple thing—say, a legal stance that cashes out in free speech maximalism—then the role of law is much more clear-cut. But if legitimacy is multifaceted and variable, then the role of law is not self-evident. There are in fact incentives for the legal system to attempt to flatten and simplify legitimacy—to, say, understand it in only formal First Amendment terms, or to equate it with a normative vision that excludes certain perspectives and interests. Doing so will make law easier to apply and may make law seem like a more potent force.

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43. *See* Matt Binder, *Elon Musk Mocks '#StayWoke' Shirts at Twitter HQ*, MASHABLE (Nov. 23, 2022), https://mashable.com/article/elon-musk-stay-woke-twitter-shirts-black-lives-matter (describing and linking to video in which Elon Musk discovers, and mocks, "#stay woke" t-shirts left in closet at Twitter); John Lopez, *Elon Musk Tweets 'Stay at Work' Twitter Merch Day After Finding 'Stay Woke' Shirts at HQ*, TECH TIMES (Nov. 24, 2022, 8:11 AM), https://www.techtimes.com/articles/283911/20221124/elon-musk-tweets-stay-work-twitter-merch-day-finding-woke.htm (describing and linking to Tweet in which Elon Musk reveals "new Twitter merch:" t-shirts that read "#stay @ work").

44. There are clear connections back to the early days of cyberspace. *See, e.g.*, FRANKS, *supra* note 30, at 161 (labelling Barlow and other early "cyberspace pioneers" as "white men who felt entitled themselves to speak for the collective 'we'"); Cohen, *supra* note 29, at 216–17 (identifying Barlow as a cyberspace utopian and analyzing how "the cyberspace utopians sought to use intellectual affinity to construct a sense of place" (internal citations omitted)).

However, such moves reflect only a limited understanding of moral legitimacy. Attempting to paper over underlying complexity will not eliminate it.

Accordingly, in crafting platform governance interventions, I echo Professor Zittrain's call to move past relying on private actors to deliver improved terms of service. Yet efforts to think creatively about interventions must take care not to privilege one form of moral legitimacy at the expense of others. For instance, many proposed reforms touch on particular aspects of moral legitimacy. Two especially common ones are procedural moves that foreground transparency or structural moves that implement institutional forms, such as a review board. These measures may be undertaken in good faith. The problem arises when any one tactic is understood as exhausting what legitimacy requires or foreclosing contestation concerning what we believe, particularly because there is no one we. The solution, then, is to create legal forms that offer guidance, but do not lock in just one understanding of legitimacy. We do not have to be able to determine what we want. It is unlikely that we'll ever know, at least if knowing requires a one-shot, firm answer. What we do need is to embrace legitimacy's essentially contested nature. Only then can we consider how different potential interventions empower us to navigate platform governance's legitimate dilemmas, over time.

Whose Ledger is Really Red? Confidential Arbitration Killed the Black Widow

Daniel Charles Smolsky[*]

"I've got red in my ledger. I'd like to wipe it out."
— Natasha Romanoff[1]

ABSTRACT

After filing a complaint against the Walt Disney Company in July 2021, Scarlett Johansson ensured that she would follow through with litigation to protect other Hollywood talent. Despite that assurance, Johansson settled her suit with Disney only sixty-three days after filing her complaint. This Article explores what Johansson's shockingly swift settlement reveals about not only the entertainment industry, but the majority of modern employment disputes. Did Disney abuse its power and intentionally sacrifice box-office profits at Johansson's expense, or did Johansson leverage her public influence to compel an unwarranted settlement? Whose ledger is really red—and perhaps more importantly—why is that ledger red?

This Article concludes that one of the largest problems with modern employment contracts is binding predispute arbitration, a practice that has become so ubiquitous that such clauses are practically non-negotiable. The strength of binding arbitration has only been reinforced by the U.S. Supreme Court, which has consistently refused to allow states to pass laws which interfere with the fundamental attributes of arbitration under the Federal Arbitration Act (FAA). Because the Court has recognized that arbitration agreements may absolutely preclude judicial remedies, this Article proposes two solutions that aim to address arbitration's biggest problems without violating federal law.

First, Congress should enact the Forced Arbitration Injustice Repeal Act to ban predispute arbitration. This change would not only protect Hollywood talent, but also provide additional safeguards to the vast majority of American employees that are subject to such agreements. Second, the California General Assembly—and other state legislatures—could minimize the disadvantages of predispute arbitration by requiring arbiters to publish their findings unless mutually agreed upon by both parties after a dispute arises. This change would serve to quell some of arbitration's largest problems without infringing on its "fundamental attributes" as recognized by the U.S. Supreme Court.

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* J.D. Candidate, Duquesne University Thomas R. Kline School of Law, 2023; B.S. Business Administration, Duquesne University Palumbo-Donahue School of Business, *summa cum laude*, 2020. In addition to his family and friends for their constant love and support, Daniel would like to thank Professor Jan M. Levine for his invaluable guidance and encouragement throughout law school.

1. THE AVENGERS, at 01:05:19 (Marvel Studios 2012).

TABLE OF CONTENTS

I. INTRODUCTION

Scarlett Johansson is one of the most recognized actresses in Hollywood. A bonafide movie star for nearly twenty years, Johansson has largely maintained her immense celebrity status by portraying Natasha Romanoff, better known under the alias Black Widow, in the Marvel Cinematic Universe (MCU).[2] The MCU is the largest film franchise of all time; it has grossed more than $25 billion dollars since its inaugural film: *Iron Man*.[3] Following the commercial

2. *See Scarlett Johansson*, BIOGRAPHY.COM, https://www.biography.com/actor/scarlett-johansson (last visited Sept. 12, 2021) [hereinafter *Johansson Biography*].

3. IRON MAN (Marvel Studios 2008). The film grossed $585.8 million dollars. *See* Travis Clark, *All 26 Marvel Cinematic Universe Movies, Ranked by How Much Money They Made at the Global Box Office*, INSIDER, https://www.businessinsider.com/marvel-movies-ranked-how-much-money-at-global-box-office-2021-11 (last updated May 16, 2022, 10:40 AM).

success of *Iron Man*, the Walt Disney Company (Disney) acquired Marvel Entertainment (Marvel) in 2009 to broaden Marvel's brand and expand the MCU.[4] One of Disney's first orders of business after acquiring Marvel was casting Johansson in *Iron Man 2*.[5]

The success of *Iron Man 2* solidified Johansson's role within the MCU as she subsequently appeared in eight blockbuster films for the franchise over the following decade.[6] Her MCU tenure was slated to end in April 2020 following the release of *Black Widow*,[7] the first and only Marvel film in which Johansson would portray the film's titular character.[8] The film was highly anticipated to serve as Johansson's well-deserved send-off from the MCU,[9] but last minute alterations to the film's release soured her departure and resulted in one of the "most high-profile example[s] of a debate [that had] been boiling under the surface in the entertainment industry."[10]

On July 29, 2021, Johansson filed a lawsuit against Disney, alleging that the multimedia conglomerate had violated the terms of her contract and cheated her out of pay by shifting *Black Widow*'s release to their subscription video on-demand streaming service, Disney+, amidst the COVID-19 pandemic.[11] Several early commenters speculated that her lawsuit could have an "immortal legacy" in the entertainment industry by helping establish precedent for future disputes between Hollywood talent and studios.[12] When

4. Daniel Indiviglio, *Disney Buys Marvel*, ATLANTIC (Aug. 31, 2009), https://www.theatlantic.com/business/archive/2009/08/disney-buys-marvel/24119/.

5. *See* Nikki Finke, *Another 'Iron Man 2' Deal: Scarlett Johannson* [sic] *to Replace Emily Blunt as Black Widow For Lousy Lowball Money*, DEADLINE HOLLYWOOD (Mar. 11, 2009, 3:31 PM), https://deadline.com/2009/03/another-iron-man-2-exclusive-scarlett-johannson-will-replace-emily-blunt-in-iron-man-2-8763/. *Iron Man 2* was slightly more successful than its predecessor, grossing $623.9 million dollars. *See* Clark, *supra* note 3.

6. *Johansson Biography*, *supra* note 2. The other films she appeared in, along with their global box office sales, were: *The Avengers* (2012) ($1.5 billion), *Captain America: The Winter Soldier* (2014) ($714.4 million), *Avengers: Age of Ultron* (2015) ($1.4 billion), *Captain America: Civil War* (2016) ($1.15 billion), *Avengers: Infinity War* (2018) ($2.05 billion), *Captain Marvel* (2019) ($ 1.128 billion), *Avengers: Endgame* (2019) ($2.8 billion), and *Black Widow* (2021) ($379.6 million). Clark, *supra* note 3.

7. *Johansson Biography*, *supra* note 2.

8. *See Movies*, MARVEL, https://www.marvel.com/movies (last visited Sept. 12, 2021) (providing a list of the 23 MCU films released prior to *Black Widow*).

9. *See* Michael Canva, *Black Widow Finally Gets Her Own Movie, One That Poses the Question: Who is She, Really?*, WASH. POST (July 1, 2021, 6:00 AM), https://www.washingtonpost.com/arts-entertainment/2021/07/01/who-is-black-widow/.

10. *See* Ryan Faughnder & Anousha Sakoui, *Forget ScarJo vs. Disney. Hollywood's Streaming Fight is Just Beginning*, L.A. TIMES (Aug. 16, 2021, 5:00 AM), https://www.latimes.com/entertainment-arts/business/story/2021-08-16/forget-scarjo-vs-disney-streaming -pay-is-a-much-larger-hollywood-issue.

11. *Id.*

12. *Id.* In fact, this Article began as a speculative article aiming to predict how the California courts would analyze Johansson's claim and Disney's defenses.

Disney sought private arbitration via court order, Johansson's representatives criticized Disney for trying to "hide" its misconduct and asked, "[w]hy is Disney so afraid of litigating this case in public?"[13] As Johansson garnered mass support in Hollywood, she became "an emblem of a major battle between talent and studios in a transformative moment for the entertainment industry."[14] Her lawsuit had the potential to change Hollywood "forever."[15]

Unfortunately, forever only lasted sixty-three days. On September 30, 2021, the Black Widow settled her suit behind closed doors.[16] This Article explores what Johansson's shockingly swift settlement reveals about not only the entertainment industry but also employment disputes across the country. Did Disney abuse its power and intentionally sacrifice *Black Widow*'s box-office profits at Johansson's expense, or did Johansson simply leverage her public influence to compel an unwarranted settlement? Whose ledger is really red—and perhaps more importantly—why is that ledger red?[17]

Part II.A of this Article serves as a Hollywood History lesson.[18] It traces the origins of the entertainment industry and natural power imbalance between Hollywood studios and "talent."[19] Part II.B defines profit-participation—the compensation scheme that gave rise to Johansson's suit—and explores the vertically-integrated nature of Hollywood.[20] Part II.C explains that, despite the rise in celebrity status, history is repeating itself as the now vertically-integrated Hollywood studios shift to simultaneous streaming releases.[21] Part III criticizes the death of litigation in Hollywood and the cause of Hollywood's red ledger: mandatory predispute arbitration.[22] Part IV proposes legislative solutions that aim to mitigate that power

13. Sarah Whitten, *Disney Wants to Move Scarlett Johansson's Lawsuit Behind Closed Doors. Her Lawyers Want an Open Court*, CNBC, https://www.cnbc.com/2021/08/23/disney-wants-to-move-scarlett-johansson-lawsuit-to-private-arbitration.html (last updated Aug. 23, 2021, 3:56 PM) [hereinafter *Disney's Closed Doors*].

14. Maureen Lee Lenker, *Before Scarlett Johansson, Olivia de Havilland Took on an All-powerful Studio — and Won*, YAHOO! NEWS (Aug. 27, 2021), https://ca.news.yahoo.com/news/scarlett-johansson-olivia-havilland-took-205414771.html.

15. Clémence Michallon, *Scarlett Johansson's Lawsuit Against Disney Could Change Hollywood Forever*, THE INDEP. (July 30, 2021, 7:23 AM), https://www.independent.co.uk/voices/scarlett-johansson-disney-lawsuit-black-widow-b1893366.html.

16. Sarah Whitten, *Scarlett Johansson and Disney Settle 'Black Widow' Lawsuit*, CNBC, https://www.cnbc.com/2021/09/30/scarlett-johansson-and-disney-settle-black-widow-lawsuit.html (last updated Oct. 1, 2021, 2:24 PM).

17. *See* THE AVENGERS, *supra* note 1, at 01:05:19.

18. *See infra* pp. 233–38.

19. Hereinafter, "talent" will be used to represent Hollywood employees on the creative side of film and television production, such as actors, producers, and writers.

20. *See infra* pp. 238–41.

21. *See infra* pp. 241–43.

22. *See infra* pp. 243–53.

discrepancy by either banning predispute arbitration agreements or making arbitration proceedings more transparent.[23] Part V provides concluding remarks.[24]

II. BACKGROUND

A. Hollywood History Lesson

1. The Golden Age

The entertainment industry and Hollywood have been synonymous for more than a century.[25] These terms will be used interchangeably for purposes of this Article, but the industry's story begins in the original locations of United States film production: New York, New Jersey, and other cities along the Eastern Seaboard.[26] As the art of producing motion pictures grew in popularity between 1900 and 1906, the industry's exploitative business practices developed in turn.[27] Thomas Edison, who owned a vast majority of the patents on motion picture cameras, established the Motion Picture Patents Company with other patent holders in 1908 to monopolize the equipment necessary for film production.[28] The group used law enforcement, or sometimes "hired thugs," to enforce their patents on independent filmmakers, which in turn stifled creativity and the growth of the entertainment industry.[29] In response, independent filmmakers fled west to a small neighborhood in Los Angeles where Edison's patents were harder to enforce: Hollywood.[30]

In Hollywood, actors were rarely credited for their work as the industry developed during the "silent era."[31] Studio heads worried that crediting actors for their performances would result in actors "gain[ing] a level of notoriety that would allow the performers to demand higher wages."[32] Carl Laemmle revolutionized the

23. *See infra* pp. 253–59.
24. *See infra* pp. 259–60.
25. *See* Chad Upton, *How Hollywood Became the Center of the Film Industry*, INSIDER (Nov. 18, 2011, 10:41 AM), https://www.businessinsider.com/how-hollywood-became-the-center-of-the-film-industry-2011-11.
26. *See id.*
27. *See id.*; *see also The Silent Era — History of Silent Black and White Movies*, HIST. OF FILM, http://www.historyoffilm.net/movie-eras/silent-black-and-white-movies/ (last visited Oct. 24, 2021).
28. *See* Upton, *supra* note 25.
29. *Id.*
30. *Id.*
31. Andrew Tavin, *How Have Movie Stars' Salaries Changed Over Time?*, OPPU, https://www.opploans.com/oppu/articles/how-have-movie-stars-salaries-changed-over-time/ (last updated July 8, 2022).
32. *Id.*

industry in 1909 when he founded the Independent Moving Pictures Company and ditched the practice of forcing entertainers to work anonymously.[33] In 1910, Laemmle concocted an elaborate marketing scheme to garner media attention for his film, *The Broken Oath*, and its leading lady, Florence Lawrence.[34] Lawrence would inevitably become the "original Hollywood star" and first actor to receive an American film credit for her starring role.[35] Laemmle had effectively created the Hollywood "star system," which allowed the industry to flourish as "the cult of film celebrity [took] root in the global psyche."[36] When the industry continued to develop and silent films were replaced by "talking pictures," talent notoriety developed in turn and "Hollywood increased its reputation as the land of affluence and fame."[37]

Although the United States and world economies collapsed during the Great Depression, the decade of the 1930s was the "height of Hollywood's Golden Age" as an estimated eighty million Americans went to the movies every week to distract themselves from the hardships of the Great Depression.[38] During that time, the entertainment industry operated under the "studio system"[39] as five major studios—Warner Bros., RKO, Fox, MGM, and Paramount—dominated the means of production and distribution for major motion pictures.[40] The following characteristics, which will be explored in further depth,[41] have been cited as some of the most significant aspects of Hollywood's studio system: (1) studios owned their own movie theaters (which played their own movies), (2) studios offered independent theaters a block set of films which mixed

33. *See* Julia Hitz, *Carl Laemmle, The German Who Invented Hollywood*, DW.COM (Jan. 17, 2017), https://www.dw.com/en/carl-laemmle-the-german-who-invented-hollywood/ a-36 733079. Laemmle's first film production company was one of several independent companies that challenged the Motion Picture Patents Company's monopoly over the entertainment industry. *Id.* In 1912, the company merged with several other production companies to become the media conglomerate now known as Universal Studios. *Id.* Laemmle moved the studio to California two years later and set up the Universal City Studios near Los Angeles, thus laying the groundwork for the motion picture industry in Hollywood. *Id.*

34. Tavin, *supra* note 31.

35. *See id.*; *see also* Margaret Heidenry, *Introducing Florence Lawrence, Hollywood's Forgotten First Movie Star*, VANITY FAIR (May 25, 2018), https://www.vanityfair.com/hollywood/2018/05/florence-lawrence-first-movie-star-old-hollywood.

36. Heidenry, *supra* note 35.

37. *See Hollywood*, HISTORY.COM, https://www.history.com/topics/roaring-twenties/hollywood (last updated Aug. 21, 2018) [hereinafter *Hollywood History*].

38. *Id.*

39. *The Studio System*, CLASSIC HOLLYWOOD CENT., https://www.classichollywoodcentral.com/background/the-studio-system/ (last updated Dec. 3, 2019). The "Star System" was an "infamous" product of the "studio system." *Id.*

40. *Id.*

41. *See infra* text accompany notes 58–64.

their own desirable films with other unwanted films, and (3) studios paid talent a set salary and bound them to long-term employment contracts.[42]

Hollywood's Golden Age brought tremendous growth and recognition to the entertainment industry, but the studio system also cultivated incredibly exploitative business practices and employment structures.[43] At the time, major film studios considered this "justified" exploitation because their fiscal success was largely driven by their ability to capitalize on the fame of their biggest stars, or "commodit[ies]."[44] Despite the California legislature's attempt to minimize such exploitation,[45] Hollywood executives maintained those practices for nearly three decades until Olivia de Havilland[46] challenged the studio system through the California courts.[47]

In 1943, de Havilland filed suit against Warner Bros. in an attempt to declare her lengthy employment contract unenforceable.[48] Despite the societal pressure to settle, de Havilland maintained her suit and was eventually freed from her contract by the California Court of Appeals.[49] Her victory effectively ended "Hollywood's version of indentured servitude" and marked the beginning of the end to both the star system and the studio system that enabled it.[50]

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42. *See* Rafael Abreu, *What is the Studio System — Hollywood's Studio Era Explained*, STUDIOBINDER (May 2, 2021), https://www.studiobinder.com/blog/what-is-the-studio-system-in-hollywood/.

43. *See The Star System*, CLASSIC HOLLYWOOD CENT., https://www.classichollywoodcentral.com/background/the-star-system/ (last updated Dec. 3, 2019).

44. *Id.* Howard Suber, professor emeritus of film history at the University of California, Los Angeles, additionally wrote that that Hollywood employment "was essentially a form of indentured servitude . . . . These contracts gave all of the advantages to the studio and made it nearly impossible for stars to have a say in their careers." Brett Lang, *How Olivia de Havilland Took on the Studio System and Won*, YAHOO! (July 27, 2020), https://www.yahoo.com/video/olivia-havilland-took-studio-system-195944941.html.

45. *See* CAL. LAB. CODE § 2855 (1937). Enacted in 1937, this statute limited personal service employees' contracts to seven-year terms. *Id.*

46. Olivia de Havilland was Warner Bros. ingénue—one of the studio's brightest stars that appeared in several romantic action films. *See* Thomas Stipanowich, Opinion, *Olivia de Havilland: The Actress Who Took on the Studio System and Won*, L.A. TIMES (July 1, 2016, 5:00 AM), https://www.latimes.com/opinion/op-ed/la-oe-stipanowich-de-havilland--20160701-snap-story.html.

47. Suzelle M. Smith & Don Howarth, *Hollywood Grande Dame's Legal Legacy*, 44 L.A. LAW., May 2021, at 23, 24.

48. *Id.*

49. De Haviland v. Warner Bros. Pictures, 153 P.2d 983, 989 (Cal. Ct. App. 1944) (finding that film studios could not compel actors to waive certain employment protections in private agreements). The author has not been able to determine why Olivia de Havilland's last name was misspelled in the official reporter.

50. Stipanowich, *supra* note 46.

2. The Collapse of the Studio System

While de Havilland's lawsuit was instrumental in prompting change within the entertainment industry, the studio system was not entirely dismantled until a few years after her lawsuit when the Supreme Court separately declared that the vertically-integrated studios[51] had violated anti-trust laws.[52] Although several major film studios were found to have been violating federal antitrust laws as early as 1930,[53] President Herbert Hoover permitted studios to maintain monopoly practices under the guise of the National Industrial Recovery Act.[54] The government quickly reversed that stance following the Great Depression, but once again compromised with the film studios in an eleventh-hour consent decree in 1940.[55] That consent decree provided that the major studios would limit their monopolistic business practices in good-faith, but that any violations would be shielded from the public via private arbitration.[56] The consent decree was neither strictly enforced nor challenged in the courts until several prominent independent producers, ironically including Walt Disney, formed the Society of Independent Motion Picture Producers and entered the industry's antitrust battle.[57]

In *United States v. Paramount Pictures*,[58] the United States sought to prevent and restrain Hollywood studio violations of the first two sections of the Sherman Act.[59] The suit specifically alleged that the major studios had monopolized the film industry by vertically combining and controlling film production, distribution, and exhibition.[60] The Supreme Court analyzed various trade practices

51. *See infra* text accompanying notes 96–101.

52. *See* United States v. Paramount Pictures, 334 U.S. 131, 174 (1948).

53. *See* Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 44 (1930).

54. The National Industrial Recovery Act of June 16, 1933, ch. 90, 48 Stat. 195, "declared a national emergency and laid down policy objectives for the industrial recovery." 15 U.S.C. § 701. The Act was held unconstitutional in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935).

55. *See U.S. Supreme Court Decides Paramount Antitrust Case*, HISTORY.COM, https://www.history.com/this-day-in-history/u-s-supreme-court-decides-paramount-anti-trust-case (last updated Apr. 30, 2020) [hereinafter *Hollywood Antitrust Cases*]; *see also* Vassiliki Malouchou, *A Century in Exhibition – The 1940s: Conflict and Consent Decrees,* BOXOFFICE PRO (Mar. 24, 2020), https://www.boxofficepro.com/century-in-exhibition-1940s-boxoffice-paramount-consent-decrees/.

56. Malouchou, *supra* note 55.

57. *See Hollywood Antitrust Cases*, *supra* note 55.

58. United States v. Paramount Pictures, 334 U.S. 131, 140 (1948).

59. *See* 15 U.S.C. §§ 1–2. Congress passed the first antitrust law, the Sherman Act, which "was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on premise that unrestrained interaction of competitive forces will yield the best allocation of economic resources." N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

60. *See Paramount Pictures*, 334 U.S. at 140.

addressed by the consent decree: (1) clearance and runs, (2) pooling agreements, (3) formula deals, (4) block-booking, and (5) discrimination.[61] The Court supported the decree's strict restriction on "block-booking,"[62] writing that it was illegal to refuse to license "one or more copyrights unless another copyright is accepted" and rejected the studio's argument that the manipulative practice was necessary to secure profits.[63] The Supreme Court's decision effectively required studios to divest themselves of their own theater chains, and thus limited vertical integration and triggered Hollywood's transition to its modern practices.[64]

Because studio moguls could neither exploit talent for pennies nor maintain persistent profits after losing their "iron grip" on film distribution,[65] major studios produced fewer films during the 1950s.[66] The rapid development of television also saw post World War II audiences dwindle as Hollywood's movie-stars gravitated towards television for more lucrative opportunities.[67] These developments further led to the narrowing of the power discrepancy between the once "unstoppable" Hollywood studios and talent today.[68]

3. Modern Major Film Franchises

In 1975, an up-and-coming director named Steven Spielberg brought a story about a small beach town and a terrifying great white shark to the big screen.[69] *Jaws* immediately became a cult phenomenon and "paved the way for the massive tentpole features that now dominate the summer season [in Hollywood]."[70] *Jaws* reinvented Hollywood's marketing scheme by using several primetime network commercials to tease the film's release using thirty-second advertising blocks,[71] which enabled Universal Pictures to capitalize on its popularity "with an explosion of marketing tie-ins,

61. *Id.* at 144–61.

62. *Id.* at 156. The Court defined block-booking as the "licensing . . . [of] one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors." *Id.*

63. *Id.* at 158–59.

64. *See id.* at 152, 159; *see also Hollywood Antitrust Cases*, *supra* note 55.

65. *See* Erin Blakemore, *How TV Killed Hollywood's Golden Age*, HISTORY.COM, https://www.history.com/news/how-tv-killed-hollywoods-golden-age (last updated Sept. 1, 2018).

66. *See Hollywood History*, *supra* note 37.

67. *See* Blakemore, *supra* note 65.

68. *See id.*

69. JAWS (Zanuck/Brown Company & Universal Pictures 1975).

70. Kate Erbland, *How 'Jaws' Forever Changed the Modern Day Blockbuster—And What Today's Examples Could Learn From It*, INDIEWIRE (June 20, 2017, 3:53 PM), https://www.indiewire.com/2017/06/jaws-modern-blockbuster-steven-spielberg-1201844390/.

71. *See id.*

[by] selling everything from the soundtrack to action figures and clothing."[72] The *Jaws* distribution model was an easily repeatable formula for success, and studios quickly adapted film releases to include similar "massive marketing blitzes" to enhance film popularity. In 1977, George Lucas and 20th Century Fox showed just how powerful that distribution model could be when they took the *Jaws* "marketing and merchandise campaign to the nth degree"[73] in a galaxy far, far away.[74]

The release of *Star Wars* further pushed studio heads to build expanded fictional universes and promote ancillary revenue streams.[75] The film "reorient[ed] the entire industry around visual spectacle and event films with mass cultural—and mass commercial—appeal."[76] Because massive film franchises[77] tend to have cult followings that continuously draw loyal fans back to theaters, celebrity culture and influence has also grown exponentially since the 1980s.[78] Modern celebrity status has provided Hollywood talent—like Scarlett Johansson—with significantly more leverage during contract negotiations, which in turn has shifted Hollywood compensation structures towards profit participation.[79]

B. Money Talks: Taking Points Off the Back End

1. What is Profit Participation?

Profit participation, sometimes referred to as "back-end compensation," is the right of an actor to tie some of their compensation to

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72. Michelle Coffey, *How 'Jaws' Went Viral in the 1970s*, MARKETWATCH (June 11, 2015, 11:15 AM), https://www.marketwatch.com/story/how-jaws-went-viral-in-the-1970s-2015-06-11.

73. Chris Heckmann, *What is New Hollywood? The Revolution of 1960s and '70s Hollywood*, STUDIOBINDER (May 17, 2020), https://www.studiobinder.com/blog/what-is-new-hollywood/.

74. STAR WARS, at 00:21 (Lucasfilm Ltd. 1977). The film was retroactively titled, *Star Wars: Episode IV—A New Hope*.

75. Peter Suderman, *How Star Wars Redefined the Notion of What a Movie Could Be*, VOX (Dec. 15, 2015, 9:20 AM), https://www.vox.com/2015/12/15/10119474/how-star-wars-changed-hollywood. Other major film franchises (and their global revenues) that followed *Star Wars* were: the Marvel Cinematic Universe ($22.59 Billion) and The Wizarding World of Harry Potter ($9.18 Billion). *See* Sarah Whitten, *The 13 Highest-grossing Film Franchises at the Box Office*, CNBC, https://www.cnbc.com/2021/01/31/the-13-highest-grossing-film-franchises-at-the-box-office.html (last updated Jan. 31, 2021, 9:54 AM).

76. Suderman, *supra* note 75.

77. A film franchise is generally defined "as a film series, or a collection of films, that share the same fictional universe or have been marketed as a series." Whitten, *supra* note 82.

78. Eric Strum, Note, *Hollywood Accounting: Profit Participation and the Use of Mediation as a Mode of Resolving These Disputes*, 18 CARDOZO J. CONFLICT RESOL. 457, 463 (2017).

79. *Id.*

the profits of a film or television show.[80] The right to back-end profits typically manifests in one of two different ways: (1) the right to receive a portion of the net or gross receipts of the film; or, (2) the right to a lump sum payable when the film's receipts reach a predetermined level, or "deferment."[81] In theory, profit participation agreements benefit both contracting parties; production companies and film studios can lessen their upfront financial burden while actors can bet on themselves to maximize their potential earnings.

While some variations of profit participation can be traced back to Hollywood's Golden Age,[82] the development of major blockbusters and film franchises saw major talent tie more of their compensation to box-office performance because "moviegoers [flocked] to theaters and made . . . [movie talent] larger-than-life."[83] In 1989, Jack Nicholson's representatives negotiated one of the most noteworthy back-end deals when they sacrificed forty percent of his standard fee in exchange for a cut of the box-office profits and merchandise sales for Tim Burton's *Batman*.[84] Nicholson went on to earn roughly six times his standard fee for his portrayal of the Joker,[85] and paved the way for decades of successful back-end deals, although some celebrities have notably been unable to recoup purported losses on the back-end.[86]

Today, profit participation is not the flashy gamble that it once was, but an unavoidable industry standard given the massive potential for long-term financial gains.[87] Prominent Hollywood talent understand that stable, significant profits stem from nearly all film franchises or syndicated television shows, and thus ensure that their contracts guarantee compensation on the back-end.[88] Of course, major studios foresaw that inevitable shift in compensation

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80. Joe Sisto, *Profit Participation in the Motion Picture Industry*, 21 ENT. & SPORTS LAW. 1, 21 (2003).

81. *Id.* at 22.

82. *See* Strum, *supra* note 78, at 462.

83. *Hollywood History*, *supra* note 37.

84. Tavin, *supra* note 31.

85. *Id.*

86. *See* Robert Yaniz Jr., *How John Travolta Lost $10 Million Betting on 'Battlefield Earth,'* SHOWBIZ CHEAT SHEET (Aug. 18, 2021), https://www.cheatsheet.com/entertainment/how-john-travolta-lost-million-battlefield-earth.html/. Travolta took a $10 million dollar pay cut to star in *Battlefield Earth*. *Id.* He was slated to earn $15 million on the back-end if the film met a modest contingency, but the film fell well-short and was labeled one of the "worst sci-fi movies ever." *Id.* (citing Morgan Korn*, The Top Hollywood Deals Negotiated by Actors*, YAHOO! FIN. (Apr. 22, 2014), https://www.yahoo.com/lifestyle/tagged/travel/blogs/daily-ticker/the-10-best-deals-ever-struck-by-hollywood-actors-141916181.html).

87. Strum, *supra* note 78, at 463.

88. *See Star Salaries: The Back-End Deal*, HOLLYWOOD.COM (June 3, 2014), https://www.hollywood.com/general/star-salariesthe-backend-deal-57162216.

structure and mitigated their potential losses on the back-end through "Hollywood accounting."[89]

2. Hollywood Accounting and Vertical Integration

Although Hollywood's opaque accounting methods "would be considered ruinous in any other industry," they have successfully enabled several studios to make elaborate deductions from successful projects to ensure that profit participants make little to nothing on the back-end.[90] While some major celebrities have successfully reached settlements after challenging such "improbable accountings," challenging them through litigation is often costly and difficult[91]:

> Hollywood contracts generally are as incoherent as the tax code . . . . As a result, contracts typically are a mélange of vague terms, conflicting references, and provisions that have been copied from other contracts, resulting in documents that are needlessly long, disjointed, and unintelligible, and that require years of costly litigation to interpret.[92]

While most major talent guarantee compensation on the back-end, employment contracts have been left intentionally broad to minimize back-end payments, dissuade potential lawsuits, and protect studio interests.[93] The inability to judicially oppose Hollywood accounting also stems from the studios' modern ability to vertically integrate, despite aforementioned attempts to dissuade Hollywood monopolies.[94]

In 1970, the Federal Communications Commission (FCC) adopted the financial syndication rules (fin-syn rules) to "enhance competition by prohibiting television networks from engaging in the

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89. Roman M. Silberfeld & Bernice Conn, *The Red and the Black: Studios Have Suffered Recent Court Setbacks in Their Efforts to Defend Hollywood Accounting*, 34 L.A. LAW., May 2011, at 36, 37.

90. *Id.* at 36–37.

91. Strum, *supra* note 78, at 473. In 1999, David Duchovny alleged that Fox Broadcasting Company "cheated him out of millions of dollars from [*The X-Files*] . . . [by] [selling] various rights to the [series] to its own or affiliated companies at below-market prices and engag[ing] in other actions that reduced the apparent profits generated by the series." Janet Shprintz, *Duchovny Sues Fox over TV Rights Sales,* VARIETY (Aug. 13, 1999, 12:00 AM), https://variety.com/1999/biz/news/duchovny-sues-fox-over-tv-rights-sales-1117750376/.

92. Silberfeld & Conn, *supra* note 89, at 37–38.

93. *Id.* at 38.

94. *See supra* text accompanying notes 58–64 (discussing the Supreme Court's limiting of vertical integration in *Paramount Pictures*).

syndication business."[95] The FCC promulgated the fin-syn rules to lessen the dominance of three television networks, ABC, NBC, and CBS. The rules were enacted to prevent production studios from consolidating their power and monopolizing television production but were repealed in 1995 when the FTC stated that a more competitive industry had emerged.[96]

The repeal of the fin-syn rules effectively gave entertainment studios the green light to reintroduce vertical integration and expand into all aspects production, such as broadcasting, distribution, production, program development, and developing new methods of off-network distribution.[97] Major studios grew to become "media empires [that] virtually eliminated . . . small, independent production compan[ies],"[98] and their vertically-integrated nature enabled them to engage in profit-participation manipulation by lowering licensing fees for their major projects—and thus the project's residual profits—and "hiding" those profits in affiliate distributors.[99] By making successful projects "look" less profitable on the balance sheet, the studio can retain more profits and pay talent less on the back-end. While there is plenty of legal scholarship that evaluates both vertical integration and profit participation in Hollywood,[100] the recent rise in digital streaming—accelerated by the COVID-19 pandemic—has seen swift changes within the industry that has rendered these issues more difficult to challenge, evaluate, and litigate given the lack of transparency, precedent, and an overwhelming fear of a Hollywood public relations disaster.

C. Hollywood is Changing, History is Repeating Itself

Five major media conglomerates—Disney, Sony Pictures, NBC Universal, Viacom CBS, and Warner Media—"still hold dominance

95. Marc H. Simon, *Vertical Integration and Self-Dealing in the Television Industry: Should Profit Participants Be Owed a Fiduciary Duty?*, 19 CARDOZO ARTS & ENT. L.J. 433, 437 (2001).

96. *Id.* at 439. The FTC was also persuaded because ABC, NBC, and CBS had promised they would refrain from "affiliate favoritism." *Id.* That promise was unsurprisingly short lived. *Id.* ("While there was no persuasive evidence indicating network 'affiliate favoritism' when the fin-syn rules were repealed, it is clearly corporate practice now. This is not surprising since the [entertainment] industry studios are no longer prohibited from owning and syndicating their own television programs.") (internal citations omitted).

97. Barbara M. Rubin, *Combating Vertical Integration in Television Deal Making*, 28 L.A. LAW., May 2005, at 24, 24.

98. *Id.* at 25.

99. *See* Strum, *supra* note 78, at 465.

100. *See, e.g.*, Silberfeld & Conn, *supra* note 89; Simon, *supra* note 95; Hillary Bibicoff, Comment, *Net Profit Participations in the Motion Picture Industry*, 11 LOY. L.A. ENT. L. REV. 23 (1991).

through their worldwide presence."[101] While these five conglomerates often simultaneously play the "role" of creator, producer, retailer, and distributor; the development of Netflix—and the ever-increasing number of streaming services over the last several years—has complicated entertainment disputes even further.[102]

Traditional revenue within the industry primarily stemmed from commercial advertising (for television shows) and box-office ticket sales (for films).[103] Although major studios often maintain in-house research teams to analyze both viewership and distribution trends, third party research firms also independently assess those primary sources of revenue. Independent theater chains[104] can verify box office reports, and independent ratings firms, such as Nielsen,[105] can provide oversight and protection to potential advertisers by analyzing viewership trends.[106] Those independent audits have drastically decreased over the last decade—following in Netflix's footsteps have been Disney (which operates both Hulu and Disney+), WarnerMedia (which operates HBO Max), NBCUniversal (which operates Peacock), and several other companies[107]—because the studios are not as frequently audited by independent organizations; thus, their viewership numbers often remain isolated from the public-eye and unverifiable to profit-participants.[108] Netflix and Disney+ have have occasionally offered "rare glimpse[s]" into the

101. James Murphy, *The "Big Five" Film Studios and Their Worldwide Presence*, MOVIEVIRAL (June 10, 2021) https://www.movieviral.com/2021/06/10/the-big-five-film-studios-and-their-worldwide-presence/. In fact, the "[o]dds are that the latest movie you've watched was filmed, produced, or in some way backed by one of these studios and their subsidiaries." *Id.*

102. *See* Faughnder & Sakoui, *supra* note 10.

103. *See* Frank Pallotta, *The Problem with Netflix's Viewership Numbers*, CNN BUS., https://www.cnn.com/2019/01/18/media/netflix-viewership-numbers/index.html (last updated Jan. 18, 2019, 2:36 PM).

104. *See supra* text accompanying notes 58–64.

105. "Nielsen ratings tell media participants who was exposed to content and advertising. [Nielsen] use[s] multiple metrics such as reach, frequency, averages and the well-known [sic] ratings—the percentage of a specific population that was exposed to content and ads—to determine exposure. TV ratings provide insight into who's watching which programs—valuable information for networks, content distributors, brands, . . . [and advertisers.]" *Nielsen TV Ratings*, NIELSEN, https://www.nielsen.com/us/en/solutions/measurement/television/ (last visited Jan. 12, 2022).

106. Pallotta, *supra* note 104.

107. *See* Alex Sherman & Samantha Subin, *Disney Makes the Trend Clear: Growth is Slowing for Streaming Services*, CNBC, https://www.cnbc.com/2021/11/10/disney-netflix-and-other-streaming-services-subs-arpu-q3-2021.html (last updated Nov. 10, 2021, 8:55 PM).

108. *See* Julia Alexander, *Disney Won't Share Ratings for Original Disney+ Titles Despite Industry Push to do So*, VERGE (Nov. 12, 2019, 3:01 AM), https://www.theverge.com/2019/11/12/20956700/disney-plus-ratings-original-shows-streaming-mandalorian-efficiency-metric-cancelation (writing that streaming services do not run advertisements and thus have "no pressure to partner with a . . . ratings agency[] to show advertisers how well a show or movie is performing").

success of specific projects,[109] but those claims are often unsubstantiated and have been criticized as "silly" given the lack of transparency in the industry.[110] The recent shift to streaming has offended both actor and non-actor talent over the last several years,[111] and Hollywood's rather turbulent history is poised to repeat itself unless effective precedence emerges through new caselaw or statutory changes that address these problems.

III. ANALYSIS

When Johansson publicly announced her lawsuit against Disney, commentators were quick to acknowledge that she was the "latest in a long line of major talent who [had] chosen legal fights with studios . . . over money."[112] Despite that "long line" of dissatisfied talent, almost all Hollywood claims settle out of court for undisclosed amounts.[113] While Hollywood talent have seemingly been satisfied with settling, those often-confidential settlements have neither protected other talent nor prevented further manipulation in the industry.

Johansson was supposed to establish precedent; she was not going to settle and allow Disney to take advantage of her—or any other Hollywood talent—in the future.[114] Her resilience drew comparisons to Olivia de Havilland, as one commentator wrote: "Olivia de Havilland may be best remembered for portraying Melanie Hamilton in *Gone With the Wind*, but her landmark legal victory could permanently link her to another Scarlett."[115] That link was ultimately short-lived, but it might not have been entirely Johansson's fault.

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109. Pallotta, *supra* note 103.

110. Brian Tallerico (@Brian_Tallerico), TWITTER (Jan. 17, 2019, 4:24 PM), https://twitter.com/Brian_Tallerico/status/1086011328182059014. Tallerico is the president of the Chicago Films Critics Association. *See* Pallotta, *supra* note 104.

111. In late 2020, Warner Bros. announced that its 2021 film slate would be released in a hybrid fashion with films simultaneously debuting in theaters and on their HBO Max streaming service. Christopher Nolan, the famous director that had been with the studio for nearly twenty years, stated that he was in "disbelief" over the decision because of the lack of transparency from Warner Bros., who was using film projects as "a loss-leader for . . . the fledgling streaming service . . . without any consultation." *See generally* Zack Sharf, Christopher Nolan Exits Warner Bros. After Nearly Two Decades, New Film Set Up at Universal, VERGE (Sept. 14, 2021, 11:19 AM), https://www.indiewire.com/2021/09/christopher-nolan-exits-warner-bros-new-film-universal-1234664679/.

112. *See* Kali Hays, *Scarlett Johansson Isn't the First Actor to Sue a Studio—and She Won't Be the Last*, L.A. MAG. (July 30, 2021), https://www.lamag.com/culturefiles/scarlett-johansson-lawsuit-disney/.

113. Some influential Hollywood talent that settled out-of-court include Elizabeth Taylor, Kevin Costner, and Sylvester Stallone. *See id.*

114. *See Disney's Closed Doors, supra* note 13.

115. *See* Lenker, *supra* note 14.

A. Whose Ledger is Really Red?

1. Black Widow's Day-and-Date Release

The COVID-19 pandemic upended the entertainment industry, and Disney had already postponed *Black Widow's* release for more than a year when it announced that the film would be simultaneously released in theaters and on Disney+.[116] *Black Widow's* release was expected to pave the way for Marvel's "massive slate of other MCU [projects] waiting in the wings,"[117] but Disney's last-minute alterations prompted Johansson's public filing against the corporation in the California courts.[118] It is important to recognize that Disney was "keenly aware of how . . . devastating [film] piracy can be to potential earnings" when they announced the partial streaming release, a method that is inherently easier to pirate.[119]

To partially offset those potential losses, *Black Widow* was sold as Disney's third "premier access" film on Disney+, meaning subscribers paid an additional $30 fee to stream the film on its release.[120] In her complaint, Johansson stipulated that her compensation for starring in the film was largely based on its back-end box-office receipts.[121] Therefore, Johansson alleged that she had extracted a promise from Marvel to ensure that *Black Widow* would receive a "theatrical release" to maximize her box-office receipts and "protect her financial interests."[122] Even though "Disney, Marvel, and most everyone else in Hollywood [knew that] a 'theatrical release' is . . . *exclusive* to movie [theaters]," Johansson alleged that Disney forced Marvel to violate its promise to attract millions of Marvel fans to Disney+.[123]

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116. Sarah Whitten, *Movie Theater Group Blasts Disney for Releasing 'Black Widow' in Theaters and Streaming at Same Time*, CNBC, https://www.cnbc.com/2021/07/19/movie-theaters-blast-disney-for-releasing-black-widow-in-theaters-and-streaming-.html (last updated July 19, 2021, 6:05 PM) [hereinafter *Black Widow's Simultaneous Release*].

117. *Id.*

118. *See* Complaint at 2, Periwinkle Ent., Inc., F/S/O Scarlett Johansson v. Walt Disney Co., No. 21STCV27831 (Cal. App. Dep't Super. Ct. July 29, 2021).

119. *Black Widow's Simultaneous Release*, *supra* note 116. Disney had previously ensured that its most profitable MCU film of all time, *Avengers: Endgame*, was simultaneously released in both North America and China—Disney's largest markets—to minimize the risk of piracy and thus maximize box-office profits. *Id.*

120. Steven Cohen, *Disney Plus Premier Access Lets Subscribers Buy New Movies While They're Still in Theaters*, INSIDER, https://www.businessinsider.com/guides/streaming/ disney-plus-premiere-access (last updated Sept. 22, 2021, 4:56 PM). *Black Widow* was a "premier access" film for three months before subscribers could watch the film without paying an additional fee. *Id.*

121. Complaint, *supra* note 118, at 2.

122. *Id.*

123. *Id.* (emphasis added).

According to Johansson's complaint, *Black Widow's* day-and-date release "cannibalized" the film's box-office receipts while simultaneously strengthening Disney's financial interests.[124] Johansson therefore accused Disney of intentionally inducing Marvel's breach to prevent her "from realizing the full benefit of her bargain[.]"[125] In response, Disney criticized Johansson's public filing, stating that it was both meritless and "especially sad and distressing in its callous disregard for the horrific and prolonged global effects of the COVID-19 pandemic."[126] The studio also asserted that it had technically complied with its contractual obligations, and that *Black Widow's* release enhanced Johansson's ability "to earn additional compensation on top of the $20 [million]" she had already received.[127]

Bryan Lourd, managing director and co-chairman of the Creative Artists Agency that represents Johansson, criticized Disney for revealing Johansson's salary—which had not been shared with the public—as a potential tactic to make her appear less sympathetic.[128] Lourd also condemned Disney's direct attack regarding the COVID-19 pandemic, writing that it was clearly "an attempt to make [Johansson] appear to be someone they . . . know she isn't."[129] The public nature of the dispute led to several people publicly stating both support for Johansson's lawsuit and concern over Disney's actions.[130] As the dispute garnered recognition in the court of public

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124. *Id.* at 5. Three days after the release of *Black Widow*, Disney shared that the film grossed over $60 million through Disney+ Premier Access, which accounted for just under 28% of the film's $215 million global revenue. *See Marvel Studios' 'Black Widow' Surpasses $215 Million Between Box Office and Disney+ Premier Access*, WALT DISNEY CO. (July 12, 2021), https://thewaltdisneycompany.com/marvel-studios-black-widow-surpasses-215-million-between-box-office-and-disney-premier-access/. Disney's stock also rose by more than 4% in response to film's successful concurrent release. *See* Adelia Cellini Linecker, *Disney Rallies on Big Premiere, Streaming Sales But 'Black Widow' May Be Unique Case*, INVESTORS.COM (July 12, 2021, 4:20 PM), https://www.investors.com/news/disney-stock-black-widow-eyes-biggest-movie-premiere-since-pandemic-began/.

125. Complaint, *supra* note 118, at 6.

126. Sarah Whitten, *Disney Blasts Scarlett Johansson over Black Widow Streaming Lawsuit*, CNBC, https://www.cnbc.com/2021/07/29/disney-blasts-scarlett-johansson-over-black-widow-streaming-lawsuit.html (last updated July 29, 2021, 8:18 PM).

127. *Id.*

128. *See* Sarah Whitten, *Scarlett Johansson's Agent Slams Disney for Accusing 'Black Widow' Star of Disregarding Public Covid Risks*, CNBC, https://www.cnbc.com/2021/07/30/scarlett-johanssons-agent-slams-disney-for-lawsuit-response.html (last updated July 30, 2021, 4:32 PM).

129. *Id.*

130. *See, e.g.*, Matt Grobar, *'WandaVision's Elizabeth Olsen Sides With Scarlett Johansson In Lawsuit Against Disney*, DEADLINE (Aug. 23, 2021, 2:28 PM), https://deadline.com/2021/08/elizabeth-olsen-declares-support-scarlett-johansson-disney-suit-12348204 29/ (noting that both Elizabeth Olsen and Jason Sudeikis supported Johansson's decision to challenge Disney); Katie Kilkenny, *SAG-AFTRA President: Disney Using "Gender-Shaming and Bullying" Tactics Over Scarlett Johansson Lawsuit*, HOLLYWOOD REP. (Aug. 5, 2021,

opinion, both parties submitted documents to the Los Angeles County Superior Court in anticipation of the lawsuit that "could change Hollywood forever."[131]

2. Purported Party Arguments

In relevant part, Johansson's agreement with Marvel provided that:

> [Periwinkle Entertainment, Inc.] shall furnish [Marvel] the services of [Johansson] to perform the role of 'Black Widow' / 'Natasha Romanova' in the theatrical motion picture currently entitled 'Black Widow' ('Picture'). For the avoidance of doubt, if [Marvel] in its sole discretion determines to release the Picture, then such release shall be a ***wide theatrical release*** of the Picture (i.e., no less than 1,500 screens).[132]

Johansson alleged that every prior Marvel film in which she had appeared employed similar contractual language and received an exclusive theatrical window of at least ninety-six days.[133] After Marvel's Chief Counsel, Dave Galuzzi, promised Johansson that Disney+ would not impact her agreement,[134] Kevin Feige, Marvel's President, allegedly revealed that Disney was "calling the shots" and planned *Black Widow*'s simultaneous release to procure additional Disney+ subscriptions.[135] Although Johansson had agreed to settle all claims arising out of her contract with Marvel through arbitration—a non-negotiable industry standard—she argued that her suit was not subject to that agreement because it was only brought against Disney.[136]

In Disney's response, the company stated Johansson's lawsuit was a "futile effort to evade . . . unavoidable [arbitration] (and

4:37 PM), https://www.hollywoodreporter.com/business/business-news/sag-aftra-president-slams-disney-tactics-scarlett-johansson-lawsuit-1234994218/ (sharing that "Disney should be ashamed of themselves for resorting to tired tactics of gender-shaming and bullying"); Jamie Lee Curtis, *The 100 Most Influential People of 2021: Scarlett Johansson*, TIME (Sept. 15, 2021, 7:15 AM), https://time.com/collection/100-most-influential-people-2021/6095932/scarlett-johansson/ (supporting Johansson's "brilliant response to a real-life manipulation . . . [by filing] a breach-of-contract lawsuit").

131. Michallon, *supra* note 15.

132. Complaint, *supra* note 118, at 8 (emphasis in original). The author reached out to Johansson's attorneys for information regarding the complete employment contract but received no response. *Id.*

133. *Id.*

134. *Id.* at 10.

135. *See id.* at 11.

136. *Id.* at 12, 13.

generate publicity through a public filing)."[137] Disney also contested that Johansson's contract with Marvel promised neither theatrical nor exclusive distribution of *Black Widow* and that—because the film debuted on roughly 9,600 domestic screens—Johansson's claim was "as indefensible as it sounds" under the plain language of the contract,[138] which guaranteed only 1,500 screens.[139] According to Disney, *Black Widow*'s simultaneous release was nothing more than an "attempt to capture the broadest possible audience," and Johansson's lawsuit was an ill-intended attempt to garner support and solicit additional compensation that Disney had already provided in good-faith.[140]

3. What if . . . ?[141]

It is difficult to adequately address potential court interpretations of Johansson's claim because party submissions—which are inherently crafted to fit specific narratives—naturally skew third-party perception and analysis.[142] Nevertheless, a California court would have utilized "traditional rules of contract interpretation" to address the merits of Johansson's claim.[143] Although the court's initial inquiry would have been "confined to the writing alone,"[144] the contractual language would have been interpreted in its "ordinary and popular sense, rather than . . . [its] strict legal meaning; unless used by the parties in a technical sense[] or . . . [other] special meaning is given to them by usage."[145] California law also enables parties to permit a "contract [to] be explained by reference to the

137. *See* Notice of Motion and Motion to Compel Arbitration and Stay Court Proceedings at 6, Periwinkle Ent., Inc., F/S/O Scarlett Johansson v. Walt Disney Co., No. 21STCV27831 (Cal. App. Dep't Super. Ct. Aug. 20, 2021) [hereinafter Motion to Compel Arbitration]. Disney alleged that the California Court of Appeal had clearly provided that compelled arbitration was proper. *Id.* (citing Boucher v. Alliance Title Co., Inc., 127 Cal. App. 4th 262, 269 (Cal. Ct. App. 2005)).

138. *See* Motion to Compel Arbitration, *supra* note 137, at 6–7.

139. Complaint, *supra* note 118, at 8.

140. *See* Motion to Compel Arbitration, *supra* note 137, at 10.

141. *See What if . . . ?*: *What If . . . Captain Carter Were the First Avenger*? (Marvel Studios Aug. 11, 2021). As one of the MCU television series that followed in the footsteps of *Black Widow*, *What if . . . ?* introduced Marvel audiences to Uatu the Watcher, a being who exists outside the planes of space and sees time as "a prism of endless possibility, where a single choice can branch out into infinite realities." *Id.* at 01:02. In the opening credits, Uatu invites audiences to "follow [him] and ponder the question . . . What if?" *Id.* at 01:31. Perhaps his question is better suited to predict the outcome of Johansson's claim in an alternate universe that did not bind actresses to confidential arbitration.

142. The author was unable to obtain additional information from either party prior to the settlement agreement.

143. Mountain Air Enter., LLC v. Sundowner Towers, LLC, 398 P.3d 556, 561 (Cal. 2017).

144. *Id.*

145. CAL. CIV. CODE § 1644 (1872).

circumstances under which it was made, and the matter to which it relates."[146]

The plain language of the alleged agreement, "no less than 1,500 screens,"[147] seems to support Disney's defense that it had technically satisfied its obligations. Johansson, however, provides compelling evidence that such a restrictive definition of "wide theatrical release" had never been utilized in previous Marvel films.[148] A California court would have likely attempted to "give effect to the mutual intention of the parties as it existed *at the time* of contracting,"[149] and thus interpreted "wide theatrical release" in its broad "popular sense" within the entertainment industry because it was not used in an overtly "technical sense."[150]

The California Court of Appeal has also recognized that sophisticated parties "may . . . elect to have [an] arbitrator, rather than the court, decide which grievances are arbitrable."[151] Because Johansson's mandatory arbitration clause required that all disputes be submitted to a JAMS[152] arbitrator,[153] a court would have deferred to that arbitrator "to determine issues of arbitrability."[154] Had the court attempted to determine the issue of arbitrability, it would have still "liberally construed"[155] the arbitration clause and found that "the Federal Arbitration Act . . . favor[s the] enforcement of valid arbitration agreements."[156]

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146. CAL. CIV. CODE § 1647 (1872).

147. Complaint, *supra* note 118, at 8.

148. *Id.* at 10. Johansson's complaint also included an email from Marvel's Chief Counsel, which acknowledged that it was "100% [Marvel's] plan to do a typical wide release" and acknowledging that Johansson's "whole deal [was] based on the premise that the film would be widely theatrically released like our other pictures." *Id.* (emphasis omitted).

149. CAL. CIV. CODE § 1636 (1872) (emphasis added).

150. CAL. CIV. CODE § 1644.

151. Rodriguez v. Am. Techs., Inc., 136 Cal. App. 4th 1110, 1123 (Cal. Ct. App. 2006).

152. "Founded in 1979, JAMS is the world's largest private alternative dispute resolution (ADR) provider." *About Us*, JAMS, https://www.jamsadr.com/about/ (last visited Sept. 12, 2021). JAMS settles the vast majority of Hollywood disputes. *See* Ronald J. Nessim & Scott Goldman, *Mandatory Arbitration Provisions Involving Talent and Studios and Proposed Areas for Improvement,* 22 UCLA ENT. L. REV. 233, 233 (2015).

153. *See* Motion to Compel Arbitration, *supra* note 137, at 12.

154. *Rodriguez*, 136 Cal. App. 4th at 1123.

155. EFund Cap. Partners v. Pless, 150 Cal. App. 4th 1311, 1329 (Cal. Ct. App. 2007).

156. Alvarez v. Altamed Health Servs. Corp., 60 Cal. App. 5th 572, 580 (Cal. Ct. App. 2021). This prediction is further supported by previous Hollywood disputes, as Charlie Sheen similarly believed that suing a non-signatory to a contract would enable him to circumvent binding arbitration. *See* Matthew Belloni, *Charlie Sheen Denied in Effort to Stop Arbitration*, HOLLYWOOD REP. (Mar. 23, 2011, 10:04 AM), https://www.hollywoodreporter.com/ business/business-news/charlie-sheen-denied-effort-stop-170459/. The Court rejected that argument, *see id.*, and Sheen unsurprisingly settled before JAMS arbitrated his case. *See* Matthew Belloni, *Official: Charlie Sheen Settles Lawsuit with Warner Bros., Chuck Lorre*, HOLLYWOOD REP. (Sept. 26, 2011, 3:18 PM), https://www.hollywoodreporter.com/business/business-news/official-charlie-sheen-settles-lawsuit-240214/.

The alleged facts in Johansson's complaint and Disney's response do not indicate that a clear winner would have emerged had Johansson's lawsuit proceeded; California's traditional rules of contract interpretation partially support both arguments. Comprehensive legal analysis by the California judiciary would have been incredibly informative because it would have both established precedent and enabled Hollywood talent—and their attorneys—to adequately evaluate, negotiate, and sign future contracts that incorporate potential day-and-date releases. While Johansson's settlement technically prevented that insightful analysis, it would have nevertheless been shielded from the public—regardless of whether the suit was settled—because of her contract's mandatory arbitration agreement, which would have almost certainly been enforced given previous precedent.

B. Hollywood's Red Room: Forced Arbitration[157]

Marvel is not the only studio that requires talent to arbitrate; nearly all Hollywood studios require binding arbitration.[158] In fact, arbitration has become so ubiquitous in the entertainment industry that contractual terms are practically non-negotiable; Hollywood "talent's real world choice is limited to agreeing to [arbitration] provisions or not working for a major studio."[159]

Arbitration has long been recognized as a valid form of alternative dispute resolution, tracing back to 1925 and the enactment the Federal Arbitration Act (FAA),[160] which ensured the validity and enforcement of arbitration agreements "in any maritime transaction or . . . contract evidencing a transaction involving commerce."[161] The Supreme Court has recognized that the FAA is a Congressional "policy favoring arbitration [that] withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[162] While some states have attempted to place restrictions on

157. In the MCU, the Red Room is a secret government facility where Black Widow assassins, like Natasha Romanoff, are trained. *See* Caitlin Tasker, *All About the Red Room in Marvel's "Black Widow,"* INSIDE THE MAGIC (June 8, 2021), https://insidethemagic.net/2021/06/ black-widow-red-room-marvel-ct1mmb/. Like mandatory arbitration in the entertainment industry, the Red Room was entirely confidential in nature—not even its visitors were certain of its exact location.

158. Nessim & Goldman, *supra* note 152, at 233.

159. *Id.*

160. Federal Arbitration Act, 9 U.S.C. §§ 1–14.

161. 9 U.S.C. § 2.

162. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

the enforcement of mandatory arbitration proceedings,[163] the Supreme Court has routinely recognized that the FAA supersedes state requirements that try to limit the enforceability of binding arbitration.[164] The broad protections conferred by the Court under the FAA have therefore prompted near exponential growth in the use of binding arbitration agreements by powerful corporations in all employment settings.[165]

For these reasons, "[a] lot of sophisticated lawyers on the talent side believe that arbitration is the devil."[166] In fact, Hollywood arbitration seems to result in undisclosed settlements so frequently that it appears the entertainment industry is uniquely geared towards forcing settlement all the time.[167] Rather than airing out Hollywood's vast problems in the court of public opinion, disputes can be arbitrated in privacy.[168] While an ultra-wealthy Hollywood celebrity does not fit the traditional mold of a disenfranchised employee, there is a panoply of scholarship discussing the various problems affiliated with binding arbitration in all employment contexts, such as the repeat player/provider bias, the inability to appeal decisions, and the general lack of transparency throughout the arbitration process.[169]

The repeat player/provider bias suggests that disputant companies choosing an arbitrator, such as film studios, can readily switch arbitration providers should they constantly lose their cases.[170] Arbitrators could have biases—both subconscious and conscious—that slant their decisions in favor of their most lucrative clients.[171] In

163. *See* Brian Farkas, *The Continuing Voice of Dissent: Justice Thomas and the Federal Arbitration Act*, 22 HARV. NEGOT. L. REV. 33, 41–43 (2016).

164. *See, e.g.*, Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1428–29 (2017); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 357 (2011); Preston v. Ferrer, 552 U.S. 346, 359 (2008).

165. Ashley M. Sergeant, *The Corporation's New Lethal Weapon: Mandatory Binding Arbitration Clauses*, 57 S.D. L. REV. 149, 157 (2012).

166. Dale Kinsella & Nick Soltman, *When Stars Sue Studios: The Truth About Profit Participation Cases*, HOLLYWOOD REP. (Sept. 18, 2021, 6:30 AM), https://www.hollywoodreporter.com/business/business-news/hollywood-profit-participation-misconceptions-1235015051/.

167. Hays, *supra* note 112.

168. *See generally* Nicole Sperling, *Hollywood Loses $10 Billion a Year Due to Lack of Diversity, Study Finds*, N.Y. TIMES (Mar. 11, 2021), https://www.nytimes.com/2021/03/11/movies/hollywood-black-representation.html; Amanda Hess, *Hollywood Uses the Very Women It Exploited to Change the Subject*, N.Y. TIMES (Jan. 24, 2018), https://www.nytimes.com/2018/01/24/arts/can-hollywood-fix-its-harassment-problem-while-celebrating-itself.html.

169. *See, e.g.*, Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L.J. 289, 312–13 (2012); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1650–51 (2005).

170. *See* Sternlight, *supra* note 169, at 1650.

171. *Id.*

addition, companies often have greater experience and exposure to the process as repeat players, which provides them with an inherent advantage against first-time opponents.[172] Put simply, "powerful corporations have more resources and . . . money than the average [opponent]. Therefore, corporations often have the ability to buy time and delay the process . . . [and cause] the employee or consumer to forego pursuing their claims."[173]

Mandatory arbitration has also been criticized because of the "few legal protections [that] exist to guarantee that an arbitrator is neutral and competent."[174] While arbitration is often heralded as a judicially comparable form of dispute resolution, its inherent biases are often "exacerbated because it is difficult for employees to know the track record of arbitrators and to ascertain their reasoning . . . [because] arbitrators are not required to explain their decisions in writing."[175] Further, the Supreme Court has noted that only arbitration decisions in "manifest disregard" of the law would be subject to secondary judicial review.[176] Because the Supreme Court has not clearly defined that standard,[177] the majority of circuit courts have applied a limited reading of "manifest disregard of the law" that does not encompass mere legal errors such as misunderstanding or misapplication of the law.[178] Therefore, binding predispute arbitration allows for potentially unfair—and unappealable—decisions, and the confidential nature of most arbitration agreements only aggravates these issues.[179]

In *Cole v. Burns International Security Services*, a federal court recognized that the "lack of public disclosure may [also]

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172. *Id.* at 1651.

173. Sergeant, *supra* note 165, at 167. Although this might not be as relevant in the entertainment industry, it is indicative of the widespread problem that any predispute arbitration agreement poses for employees.

174. Elizabeth A. Roma, *Mandatory Arbitration Clauses in Employment Contracts and the Need for Meaningful Judicial Review*, 12 AM. U. J. GENDER SOC. POL'Y & L. 519, 530 (2004).

175. *Id.* (citing Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1068 (1998)).

176. *See* Wilko v. Swan, 346 U.S. 427, 436–37 (1953). That statement was not overruled, but the Court's holding in *Wilko* was overruled by *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, which held that predispute agreements to arbitrate—like Johansson's agreement—are enforceable. *See* 490 U.S. 477, 485–86 (1989).

177. Williams v. Cigna Fin. Advisors Inc., 197 F.3d 752, 761 (5th Cir. 1999) (noting that "[t]he concept of "manifest disregard of the law" has not been defined by the Supreme Court).

178. *See, e.g.*, Sheldon v. Vermonty, 269 F.3d 1202, 1206 (10th Cir. 2001) (holding that misinterpreting the law and errors in fact finding are not enough to overturn arbitration decision); Hoffman v. Cargill, Inc., 236 F.3d 458, 462 (8th Cir. 2001) (writing that a court cannot set aside an arbitration decision just because an arbitrator errs in either legal interpretation or factual determination).

179. Alexia Fernández Campbell, *Google Employees Fought for their Right to Sue the Company—and Won*, VOX (Feb. 22, 2019, 4:10 PM), https://www.vox.com/technology/2019/2/22/18236172/mandatory-forced-arbitration-google-employees.

systematically favor companies over individuals" in compelled arbitration.[180] The court reasoned that:

> Judicial decisions create binding precedent that prevents a recurrence of . . . violations; it is not clear that arbitral decisions have any such preventive effect. The unavailability of arbitral decisions also may prevent potential plaintiffs from locating the information necessary to build a case of intentional misconduct or to establish a pattern or practice of discrimination by particular companies.[181]

This is important to recognize because, assuming Johansson had arbitrated her suit, there would have been no public inquiry into the release of *Black Widow* given the confidential nature of Hollywood arbitration. As it stands, the arbitration process would prevent talent from ascertaining how Disney calculates and distributes revenue from Disney+ to profit-participants, which is particularly damning given the general lack of transparency in the industry.[182] In fact, the only reason some information regarding Disney+ "accounting" was provided at all was because of Johansson's public filing.[183] Had Johansson not forced Disney's hand, critical information could have been shielded behind private arbitration altogether.

To play devil's advocate, it is also important to acknowledge that Johansson might not have planned to actually continue her suit, but instead use her celebrity status to compel settlement in a case that she had no business winning. The resulting settlement, however, prevented any semblance of progression in the entertainment industry for other Hollywood talent. While Johansson had the star-power necessary to compel settlement, other up-and-coming, less influential talent do not have that luxury. Often times, "[t]he short-lived nature of entertainment careers makes it imperative for the artist to maximize available public exposure" and deal with unfavorable contractual agreements or terms to avoid potential costly, and often unsuccessful, arbitration proceedings.[184]

This Article is not advocating for mandatory litigation in all Hollywood disputes, but it is certainly criticizing industry complacency

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180. Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1477 (D.C. Cir. 1997).

181. *Id.* (citing Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration,* 74 WASH. U. L. Q. 637, 686 (1996)).

182. *See generally* Alexander, *supra* note 108.

183. *See* Motion to Compel Arbitration, *supra* note 137, at 10.

184. Jonathan Blaufarb, *The Seven-Year Itch: California Labor Code Section 2855*, 6 HASTINGS COMM. & ENT. L.J. 653, 655 (1984).

and insistence on binding, confidential arbitration that fails to establish precedence to protect all Hollywood talent—not just the industry's brightest stars—from contract manipulation or coercion. As it stands, major studios can settle out-of-court with major Hollywood talent,[185] even those adamant about maintaining their claim,[186] because the industry's major players *should* be better off in the long-run. Manipulation and misconduct are effectively swept under the rug so long as industry elite can maintain profits. Importantly, this problem is not unique to Hollywood, as predispute arbitration agreements have increasingly become nonnegotiable terms of employment across America.[187]

IV. SOLUTION

Johansson's dispute with Disney highlights a problem that has plagued Hollywood for more than a century: the inherent power imbalance between studios and talent renders the vast majority of talent unprotected in the instance of wrongdoing. What is even more concerning is the notion that studios—to a certain degree—understand that their actions have been coercive. When Warner Bros. announced a day-and-date release for *Wonder Woman 1984*,[188] the studio renegotiated the back-end deals for the film's lead actress, Gail Gadot, and director, Patty Jenkins.[189] Perhaps the studio's voluntary renegotiations were instigated in good-faith, or maybe Warner Bros. was cautious in the wake of Johansson's public suit after having previously lost one of Hollywood's few litigated cases.[190]

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185. *See* Joe Flint, *Scarlett Johansson Lawsuit Stirs Debate Over Streaming-Era Movie Compensation*, WALL ST. J., (last updated Aug. 12, 2021, 6:20 AM) (recognizing that lawsuits are not a realistic option for settling modern entertainment disputes).

186. *See generally Disney's Closed Doors, supra* note 13.

187. *See generally,* Katherine V.W. Stone and Alexander J.S. Colvin, *The Arbitration Epidemic*, ECON. POL'Y INST. (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/. And in 2020, plaintiffs only won recovery in a shocking 1.6% of cases that were subject to mandatory arbitration agreements. *See* Abha Bhattarai, *As closed-door arbitration soared last year, workers won cases against employers just 1.6 percent of the time*, WASH. POST (Oct. 27, 2021, 7:00 AM), https://www.washingtonpost.com/business/2021/10/27/mandatory-arbitration-family-dollar/27/mandatory-arbitration-family-dollar/.

188. WONDER WOMAN 1984 (Warner Bros. Pictures 2020).

189. Brooks Barns & Nicole Sperling, *Trading Box Office for Streaming, but Stars Still Want Their Money*, N.Y. TIMES, https://www.nytimes.com/2020/12/07/business/media/warner-bros-hbo-max-movies-pay.html (last updated Sept. 5, 2021).

190. *See supra* text accompanying notes 47–50 (outlining Olivia de Havilland's legal victory over Warner Bros.).

When Scarlett Johansson, one of Hollywood's highest paid actresses,[191] has neither the ability nor desire to push back against manipulative studios or mandatory arbitration, the question becomes whether *any* individual has the ability to prompt the same kind of systemic change that Olivia de Havilland procured roughly seventy-five years ago?[192] Hollywood history reveals that the court of public opinion prompts change in the entertainment industry, but that "court" has largely been silenced in the wake of mandatory arbitration. There are tactics that both Congress and the California State Legislature could take, however, to resolve modern disputes that would ensure that history does not repeat itself as Hollywood shifts to streaming.

A. Banning Mandatory Arbitration

1. The Supreme Court & FAA

"California has a long history of animosity towards the arbitration, rather than litigation, of disputes arising in . . . the employment . . . context."[193] In 2015, the California State Legislature attempted to prohibit mandatory arbitration claims in employment agreements arising under the California Labor Code.[194] The bill was vetoed by then California Governor, Jerry Brown, who recognized that a "blanket ban on mandatory arbitration . . . has been struck down in other states as violating the Federal Arbitration Act."[195] A similar attempt was vetoed two years later, with Governor Brown recognizing that "states must follow the Federal Arbitration Act . . . and the Supreme Court's interpretation of the Act."[196]

Undeterred, the California State Legislature passed A.B. 51 in 2020 to require "voluntary agreement," as opposed to unilateral

191. *See* Madeline Berg, *The Highest-Paid Actresses 2019: Scarlett Johansson Leads With $56 Million*, FORBES (Aug. 23, 2019, 3:04 PM), https://www.forbes.com/sites/maddieberg/2019/08/23/highest-paid-actresses-scarlett-johansson/?sh=6c5084344b4d.

192. *See supra* text accompanying notes 47–50.

193. William Hayden, *California Again Attempts to Outlaw the Mandatory Arbitration of Employment Disputes*, SNELL & WILMER (Sept. 23, 2021), https://www.swlaw.com/publications/legal-alerts/3008.

194. Edward Lozowicki, *Governor Brown Vetoes California Bill Prohibiting Arbitration of Employment Claims*, A.B.A. (Jan. 15, 2016), https://www.americanbar.org/groups/ litigation/committees/alternative-dispute-resolution/practice/2016/gvr-brown-vetoes-ca-bill-prohibiting-arbitration-employment-claims/; *see also* A.B. 465, 2015 Assemb. (Cal. 2015).

195. Governor's Veto Message of A.B. 465, 2015 Assemb. (Cal. 2015).

196. Governor's Veto Message of A.B. 3080, 2018 Assemb. (Cal. 2018) (citing DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 468 (2015) (overruling a California court's refusal to enforce an arbitration provision in a consumer contract because it disregarded the Court's prior decision in *Concepcion*)).

implementation via industry-wide contracts.[197] After a federal district court granted an injunction and stated that the bill was preempted by the FAA, a split Ninth Circuit reversed the injunction and found that requiring arbitration to be agreeable was not an "obstacle to the purposes and objectives of the FAA," and thus not preempted by federal law.[198] Following that decision, the plaintiffs-appellees filed a petition for rehearing *en banc*,[199] arguing that A.B. 51 discouraged arbitration and thus served as an obstacle to the FAA's pro-arbitration objectives.[200] In February 2022, the Ninth Circuit ordered hearings on the matter to be deferred until the Supreme Court ruled in *Viking River Cruises, Inc. v. Moriana*.[201] On June 15, 2022, the Supreme Court ruled, in *Viking River Cruises,* that a separate California law[202] was preempted by the FAA because it did not allow individuals to arbitrate certain kinds of "representative" claims.[203]

On February 15, 2023, the Ninth Circuit formally struck down A.B. 51 as preempted by the FAA and held that the California law "burden[ed] the defining feature of arbitration agreements" by categorically deterring employers from including non-negotiable arbitration agreements in employment contracts.[204] After considering whether the statute served as an "unacceptable obstacle" to the FAA,[205] the court found that the statute was "antithetical to the FAA's 'liberal federal policy favoring arbitration agreements.'"[206] The court's holding demonstrates the judicial tendency to favor of arbitration in light of the FAA, and highlights several Supreme Court cases in which the Court has further explored those principles.

In *Lamps Plus, Inc. v. Varela*, the Supreme Court reaffirmed another one of those "foundational arbitration principle[s]"[207] when it

197. *See* Hayden, *supra* note 193.

198. Chamber of Com. of U.S. v. Bonta, 13 F.4th 766, 780 (9th Cir. 2021).

199. Scott Jang, *Challengers to California's Ban on Mandatory Arbitration Contracts Hint Rehearing Petition Coming*, JD SUPRA (Sept. 24, 2021), https://www.jdsupra.com/legalnews/challengers-to-california-s-ban-on-5505146/.

200. *See, e.g.*, Saturn Distrib. Corp. v. Williams, 905 F.2d 719, 724 (4th Cir. 1990); Sec. Indus. Ass'n v. Connolly, 883 F.2d 1114, 1123–24 (1st Cir. 1989).

201. Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906 (2022).

202. Labor Code Private Attorneys General Act, CAL. LAB. CODE § 2698 (2004).

203. *Viking River Cruises*, 142 S. Ct. at 1924.

204. Chamber of Com. of U.S., No. 20-15291, 2023 WL 2013326 at *9 (9th Cir. Feb. 15, 2023).

205. *Id.* (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

206. *Id.* (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

207. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1415 (2019) (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010)).

held that arbitration "is strictly a matter of consent."[208] Although subjecting talent to arbitration agreements as a condition of employment[209] would seemingly violate that foundational principle, the Supreme Court's interpretation of "consent" does not factor in the potential negotiability of arbitration agreements and instead turns on whether arbitration agreements are unambiguously communicated in contractual agreements.[210] Therefore, the late Justice Ginsburg criticized the Court's analysis of consent as "ironic" because it justifies the "imposi[tion] [of] individual arbitration on employees who surely would not choose to proceed solo."[211] Nevertheless, California would likely be unable to justify A.B. 51 as prevention of "nonconsensual" arbitration because the Supreme Court has decreed that "[a]rbitration clauses . . . may preclude judicial remedies even when submission to arbitration is made a take-it-or-leave-it condition of employment."[212] Because the Supreme Court's interpretation of the FAA is rather clear and A.B. 51 has been reversed,[213] the most effective way to combat the problems of binding arbitration is for Congress to enact the Forced Arbitration Injustice Repeal (FAIR) Act.[214]

2. The Forced Arbitration Injustice Repeal Act

On November 3, 2021, Congressman Hank Johnson announced that the bipartisan FAIR Act had passed the House Judiciary Committee.[215] The Act's stated purpose is to "restore fairness to the American justice system by reasserting individuals' right to access the court system" by "ensur[ing] that men and women contracting with more powerful entities aren't forced into private arbitration, where the bigger party often has the advantage of choosing the arbitrator in an unappealable decision."[216] While previous iterations

208. *Id.* at 1415 (quoting Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 299 (2010)) (alteration in original).

209. Nessim & Goldman, *supra* note 152, at 233 (writing that "talent's real world choice is limited to agreeing to [arbitration] provisions or not working").

210. *See Lamps Plus, Inc.*, 139 S. Ct. at 1416–17.

211. *Id.* at 1421 (Ginsburg J., dissenting).

212. *Id.* at 1420.

213. Chamber of Com. of U.S., No. 20-15291, 2023 WL 2013326 at *9 (9th Cir. Feb. 15, 2023).

214. Forced Arbitration Injustice Repeal Act, H.R. 963, 117th Cong. (2021).

215. Press Release, Hank Johnson, Rep. Johnson's Bipartisan FAIR Act That Ends Forced Arbitration & Restores Accountability, Passes Judiciary Committee (Nov. 3, 2021) (on file with author).

216. *Id.*

of the FAIR Act have failed during the proposal process,[217] Congress's consistent attempt to quell mandatory arbitration's inherent disadvantages shows that the problem plaguing Hollywood disputes is not unique to the entertainment industry.[218]

The most effective solution to prevent other Hollywood talent from the clutches of the all-powerful production studios would be for Congress to enact the FAIR Act.[219] In doing so, Congress would protect employees from the detriments of compelled arbitration by recognizing that the Supreme Court's interpretations[220] of the FAA have perverted the original meaning of the Act, which was "intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power."[221] In February 2022—after a lengthy five year process—both the House and the Senate overwhelmingly approved a bill[222] to amend the FAA and ban mandatory arbitration in sexual harassment and assault cases brought by employees.[223] The amendment, which was introduced after the #MeToo movement rose to prominence, constitutes a limited but important furtherance of protections for employees against powerful corporations.[224] While Representative Kirsten Gillibrand hopes that the bill is "step one in a much longer journey" that expands protections to all employment contracts,[225] opposing representatives and corporate lobbyists have expressed concerns over the nullification of existing agreements, regardless of the intention

217. *See, e.g.*, FAIR Act, H.R. 1423, 116th Cong. (2019); Arbitration Fairness Act, S. 2591, 115th Cong. (2018); Mandatory Arbitration Transparency Act, H.R. 4130, 115th Cong. (2017); Arbitration Fairness Act, H.R. 3010, 110th Cong. (2007).

218. *See, e.g.*, Paige Smith, *House Approves #MeToo Bill Aimed at Workplace Sexual Harassment*, BLOOMBERG LAW (Feb. 7, 2022, 7:31 PM), https://news.bloomberglaw.com/daily-labor-report/house-approves-metoo-bill-aimed-at-workplace-sexual-harassment (enacting legislation to prevent binding arbitration for employees alleging sexual harassment or assault); Alexia Fernández Campbell, *Google Employees Fought for their Right to Sue the Company—and Won*, VOX (Feb. 22, 2019, 4:10 PM), https://www.vox.com/technology/2019/2/22/18236172/mandatory-forced-arbitration-google-employees (noting that Google removed arbitration requirements from all employment contracts in light of rising public pressure). Unfortunately, there are no signs of a similar departure from mandatory arbitration in the entertainment industry.

219. H.R. 963. On March 17, 2022, the bill was passed in the House along party lines in a 222-209 vote (only one Republican voted for the Act, while no Democrat voted against it). The Act was most recently referred to the United States Senate Committee on the Judiciary on March 21, 2022.

220. *See supra* text accompanying notes 193–214.

221. H.R. 3010.

222. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, H.R. 4445, 117th Cong. (2021). President Biden signed the bill into law on March 3, 2022.

223. Annie Karni, *House Passes Bill to Nullify Forced Arbitration in Sex Abuse Cases*, N.Y. TIMES (Feb. 7, 2022), https://www.nytimes.com/2022/02/07/us/politics/house-bill-forced-arbitration.html.

224. *Id.*

225. *Id.*

behind mandatory arbitration.[226] Until Congress enacts more comprehensive legislation that protects all employees—including non-traditional "victims" like Hollywood talent—powerful companies will continue to bind employees to their favorite "lethal weapon," binding arbitration.[227] In the interim, however, the California State Legislature, and other legislatures alike, may enact limited legislation that resolves the problems in Hollywood (and other industries) without violating the "fundamental attributes" of arbitration currently recognized by the Supreme Court.[228]

B. Limiting Confidentiality

In *AT&T Mobility v. Concepcion*, the Supreme Court recognized the fundamental elements of arbitration: informality, lower costs, greater efficiency and speed, and increased expertise.[229] One element is notably absent from that list: confidentiality. Therefore, the California State Legislature should be able to avoid preemption challenges by only limiting predispute arbitration's confidentiality requirements.[230] While consenting parties could agree to confidentiality prior to a hearing's commencement, the legislature should not be preempted from preventing the underlying arbitration process—the arbitrator's factual analysis, decision-making process, and ultimate finding and award—from *automatically* being shielded from the public as a condition of employment. While JAMS rules require that arbitrators "maintain the confidential nature of [an] Arbitration proceeding and the Award[,]" they do not inherently require opposing parties to maintain confidentiality as a fundamental attribute of the process.[231]

Banning the confidential nature of mandatory arbitration would enable the California State Legislature to protect Hollywood talent and other employees while surviving preemption challenges. While the Court has recognized that informality, costs, efficiency, and expertise are fundamental to the process, it has not conclusively stated that prohibiting confidentiality necessarily interferes with

226. *Id.*
227. *See* Sergeant, *supra* note 165, at 149.
228. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011).
229. *See id.* at 348; *see also* Arpan A. Sura & Robert A. DeRise, *Conceptualizing Concepcion: The Continuing Viability of Arbitration Regulations*, 62 U. KAN. L. REV. 403, 404 (2013).
230. The National Labor Relations Board (NLRB) recently solicited comments and requested parties to address whether forced confidentiality is permissible in predispute arbitration. *See* Press Release, National Labor Relations Board, NLRB Invites Briefs on Mandatory Arbitration Clauses (Jan. 18, 2022) (on file with author).
231. *See JAMS Comprehensive Arbitration Rules & Procedures*, JAMS (June 1, 2021), https://www.jamsadr.com/rules-comprehensive-arbitration/#Rule-26.

arbitration's fundamental attributes.[232] In fact, barring confidentiality would arguably put arbitration on par with other judicial proceedings without diminishing its fundamental attributes; it would liken the process to other judicial matters of public record and better protect Hollywood talent from their vertically-integrated employers.

Although California could enact temporary solutions, Congress should still enact the FAIR Act because the "red" in Hollywood's ledger is indicative of a widespread problem that does not stop at Hollywood's city limits.

V. CONCLUSION

Since the entertainment industry's inception, Hollywood studios have maintained immense power over talent. While Hollywood's brightest stars have balanced that power and guaranteed themselves higher profits on the back-end of major projects, Hollywood studios have continued to engage in business practices which minimize talent returns. Those business practices have not been fully analyzed—let alone prevented—despite the rise in Hollywood disputes over the last decade because of the industry's strict requirement of confidential, mandatory arbitration. That confidentiality has enabled the vertically-integrated studios to maintain significant control over the vast majority of Hollywood talent as the industry undergoes a rapid shift to streaming.[233]

As arbitration continues to expand as a staple in not only the entertainment industry, but also all employment contracts, it has become more important for potential plaintiffs to understand the decisions governing their employment contracts. Arbitration is most analogous to the judicial system when *both* parties voluntarily consent to the process. Therefore, Congress should enact the FAIR Act to prevent predispute arbitration and restore the original purpose of the FAA[234] to protect not only Hollywood talent, but all employees subject to the nonnegotiable judicial waiver of effective precedent.[235] At the very least, the California General Assembly—and other state legislatures—should seek to minimize the disadvantages of mandatory arbitration by requiring studios to report

232. *See Concepcion*, 563 U.S. at 348; *see* also Ting v. AT&T, 319 F.3d 1126, 1152 (9th Cir. 2003) (writing that bilateral confidentiality provisions may unconscionably favor large companies in arbitration disputes).

233. *See* Faughnder & Sakoui, *supra* note 10.

234. *See* Arbitration Fairness Act, H.R. 3010, 110th Cong. (2007).

235. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1420 (2019) (Ginsburg J., dissenting).

any critical findings underlying arbitration disputes unless mutually agreed upon by both parties *after* a dispute arises.

Like any other alternative dispute resolution process, arbitration should not stand apart from the law, but the confidential nature of arbitration seeks to hide violations from the public eye. As long as confidential predispute arbitration continues to plague the entertainment industry (and most employment contracts), the ledger will forever remain red for many potential plaintiffs moving forward.

The Pricelessness of Life vs. Profiting from Illness: A Call for Change to the Pricing Model for Lifesaving Drugs in the United States

*Aubri L. Swank**

"Prescription drug corporations are profiteering off of the pocketbooks of sick individuals—it's wrong. It's time to stand up to this abuse of power . . . ."

– President Joe Biden[1]

ABSTRACT

Pharmaceutical drug prices in the United States are at the highest costs yet seen, and it looks like these prices are still continuing to climb. While people in the United States are struggling to pay for necessary medications, the prices of those same medications are drastically lower in other countries.

This Article directly analyzes the issue of pharmaceutical pricing in the United States through two specific lifesaving drugs, insulin and epinephrine. Both drugs are prescriptions required to keep some people alive, and both are related to manufacturing companies with questionable, overwhelming control of the markets. While there has been recent movement in both the federal and state governments to address the issue of price, affordability continues to be in question. However, other countries manage to keep the costs of pharmaceutical drugs far below the prices of those in the United States. The United Kingdom, Canada, and Germany each has a different strategy that involves government intervention to keep prices down, using models that focus, respectively, on product price control, reference pricing, and profit control. By implementing aspects of each of these other countries' pricing models, particularly a system for reference pricing and a pharmaceutical review board, the United States can hope to make it affordable to live.

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* Duquesne University Thomas R. Kline School of Law, J.D. 2023; Case Western Reserve University, B.A. Anthropology, B.A. International Studies, 2020. Thank you to Professor Jan M. Levine for your invaluable guidance on this article and for introducing me to the world of legal writing, and thanks to the staff of the Duquesne Law Review, Volume 61, for helping throughout the editing process. Most importantly, thank you to my parents and sisters. I cannot imagine surviving law school and my T1D diagnosis without your immense love and unwavering support.

1. Joe Biden (@JoeBiden), TWITTER (Nov. 26, 2019, 6:34 PM), https://twitter.com/joebiden/status/1199471394612023303.

TABLE OF CONTENTS

I. INTRODUCTION

When he could no longer be covered by his mother's insurance at 26 years old, restaurant manager Alec Raeshawn Smith faced more than a financial problem.[2] Living with type 1 diabetes, Alec was well aware of his daily need for insulin.[3] However, he could not afford the monthly $1,300 cost of supplies without insurance or the deductible for a health insurance plan.[4] Instead, he tried to ration his insulin until he could make it to his next payday.[5] He died from diabetic ketoacidosis[6] three days before he would have gotten his pay.[7]

Another person was surprised by the need for her medication. Eating the same coconut cashew snack she had had for years

2. Bram Sable-Smith, *Insulin's High Cost Leads to Lethal Rationing*, NPR (Sept. 1, 2018, 8:35 AM), https://www.npr.org/sections/health-shots/2018/09/01/641615877/insulins-high-cost-leads-to-lethal-rationing.

3. *Id.*

4. *Id.*

5. *Id.*

6. When people with type 1 diabetes skip injections or take less insulin than they need, it "can lead to diabetic ketoacidosis, which occurs when your blood sugar gets so high that your blood becomes acidic, your cells dehydrate, and your body stops functioning." *The Deadly Consequences of Insulin Rationing*, PASADENA HEALTH CTR. (Nov. 16, 2018), https://www.pasadenahealthcenter.com/blog/community-healthcare/deadly-consequences-insulin-rationing/.

7. *Id.*

without issue, Denise Ure was not expecting to taste peanuts.[8] Knowing that consuming the food she was allergic to could cause serious symptoms, Denise tried to spit out the food and watch herself for signs of anaphylaxis.[9] But instead of immediately using her EpiPen to quell any reaction, she drove herself to the hospital in hopes that her symptoms would not get severe enough to "justify" the use of her expensive medication.[10] On her blog, Denise explained the dilemma, claiming that, "[t]here is psychological resistance to using an EpiPen. You don't want to waste a very expensive auto-injector on a false alarm."[11]

Denise was lucky that she safely made it to the hospital,[12] but that is not always the case.[13] Many patients in the United States who rely on some type of prescription medication to live are struggling to afford it.[14] Instead, people are gambling with their lives because they have to choose whether to pay the outrageous prices for their medication or pay for food for their family.[15] For people struggling with conditions like type 1 diabetes or severe allergies, foregoing medication is not an option.

Although health insurance plans may cover some of the costs, copays continue to be substantial,[16] and some people, like Alec Smith, will not always be able to be insured. The full retail price of a drug can be even costlier than a home mortgage,[17] and prescription drug

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8. Elizabeth Pratt, *Rising Cost of EpiPens Forcing Some Allergy Sufferers to Switch to Syringes*, HEALTHLINE, https://www.healthline.com/health-news/cost-of-epipens-forcing-allergy-sufferers-to-syringes#EpiPens-vs.-syringes (last visited Nov. 18, 2022).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. Severe allergic reactions require immediate medical attention because symptoms, which can include swelling in the throat and difficulty breathing, typically occur within minutes of exposure to an allergen and worsen quickly. *See Anaphylaxis*, BETTER HEALTH CHANNEL, https://www.betterhealth.vic.gov.au/health/conditionsandtreatments/anaphylaxis (last visited Nov. 18, 2022).

14. *See* Steven Reinberg, *18 Million Americans Can't Pay for Needed Meds*, U.S. NEWS & WORLD REP. (Sept. 22, 2021, 11:52 AM), https://www.usnews.com/news/health-news/articles/2021-09-22/18-million-americans-cant-pay-for-needed-meds.

15. *See* Irl B. Hirsch, *Insulin in America: A Right or a Privilege?*, 29 AM. DIABETES ASS'N 130, 131 (2016).

16. For one type of insulin, Lantus SoloStar, the full retail price is approximately $457 for one vial. *Lantus SoloStar Prices, Coupons and Patient Assistance Programs*, DRUGS.COM, https://www.drugs.com/price-guide/lantus-solostar (last visited Nov. 18, 2022). Insurance coverage differs depending on the brand of medication, the insurance carrier, and the insurance plan. A copay for the same amount of Lantus SoloStar can range from $4 to over $400. *Lantus Medicare Coverage and Co-Pay Details*, GOODRX, https://www.goodrx.com/lantus/medicare-coverage?dosage=3ml-of-100-units-ml&form=solostar-pen&label_override=Lantus&quantity=5&sort_type=popularity (last visited Nov. 18, 2022).

17. Hirsch, *supra* note 15.

prices continue to increase.[18] A person who cannot afford insurance often will not be able to afford the out-of-pocket costs of medication.[19] Rationing medication is not a realistic option for those living with type 1 diabetes,[20] and expired epinephrine is not effective in stopping an allergic reaction.[21]

This Article directly analyzes the issue of pharmaceutical pricing in the United States through two specific lifesaving drugs: insulin, a widely-used drug in the United States predicted to increase in use;[22] and epinephrine, a medication associated with one of the highest drug price hikes in the United States.[23] Section II provides background on the history of these drugs and their current status in the United States. Section III introduces pharmaceutical pricing models used by other countries. Section IV argues that Germany's reference pricing model for drug pricing should be implemented in the United States in order to address this drug pricing crisis.

II. LIFESAVING DRUGS AND THE UNITED STATES

The pharmaceutical industry is almost unfettered in the United States when it comes to pricing,[24] with companies continuing to

18. *See* Alex Keown, *Drug Price Increases for 460 Drugs in 2022*, BIOSPACE (Jan. 4, 2022), https://www.biospace.com/article/a-new-year-means-price-increases-for-many-prescription-drugs/.

19. Alec Smith, for example, was deterred from getting insurance when he realized he would have to pay $7,600 before insurance would kick in; but then he could not afford the $1,300 costs of his medical supplies per month. Sable-Smith, *supra* note 2.

20. *See supra* note 6 and accompanying text.

21. Although expired epinephrine may be somewhat effective and better than no epinephrine at all, the drug "deteriorates over time and relying on an outdated one . . . can leave [a person with severe allergies] with an auto-injector that's less effective, or not effective at all, when [he or she] most need[s] it." Ginger Skinner, *What You Need to Know About Expired EpiPens*, CONSUMER REPS. (Aug. 26, 2016), https://www.consumerreports.org/drugs/expired-epipens-what-you-need-to-know/.

22. *See generally* Tara O'Neill Hayes & Margaret Barnhorst, *Understanding the Insulin Market*, AM. ACTION F. (Mar. 30, 2020), https://www.americanactionforum.org/research/understanding-the-insulin-market/ ("Soon, nearly 10 million Americans will need to take insulin every day to live.").

23. Epinephrine is available through Viatris, formerly named Mylan, a corporation which raised the price over 400% since acquiring the drug's delivery device. Emily Willingham, *Why Did Mylan Hike EpiPen Prices 400%? Because They Could*, FORBES (Aug. 21, 2016, 9:00 AM), https://www.forbes.com/sites/emilywillingham/2016/08/21/why-did-mylan-hike-epipen-prices-400-because-they-could/?sh=7339d742280c.

24. Unlike other countries, "the U.S. lets manufacturers of drugs and biologics set whatever price they choose." Paul B. Ginsburg & Steven M. Lieberman, *Government Regulated or Negotiated Drug Prices: Key Design Considerations*, BROOKINGS INST. (Aug. 30, 2021), https://www.brookings.edu/essay/government-regulated-or-negotiated-drug-prices-key-design-considerations/.

raise prices on older drugs.[25] Because of the sheer number of pharmaceutical lobbyists in D.C.,[26] the lack of restrictions on corporate "donations" to politicians,[27] and the nature of our capitalist society,[28] public outcry for federal price negotiation has been successfully squelched up to this point, keeping drug prices far higher in the United States than comparable countries.[29] According to a 2019 study by the U.S. House Committee on Ways and Means, the international average cost of a pharmaceutical, excluding United States prices, is $124.45.[30] In comparison, the average cost in the United States is $466.15, and the most expensive drug in the United States is a staggering $12,000 more than its counterpart in Germany, the country with the next highest-priced drug.[31] This staggering price gap cannot be explained by gross domestic product levels alone.[32] Despite promises for change, President Biden has yet to make headway in closing the gap.[33] The United States "continue[s] to be an outlier among wealthy, Western nations with such a scant

25. *See generally* PHARMA BRO (Amazon Prime Video 2021) (documenting the story of Martin Shrekli, a convicted felon, who raised the price of a dated, lifesaving, antiparasitic medication by 5500% overnight).

26. In 2021, there were approximately 1,780 pharmaceutical lobbyists, spending over $350 million lobbying for pharmaceuticals and health products. *Industry Profile: Pharmaceuticals / Health Products*, OPEN SECRETS, https://www.opensecrets.org/federal-lobbying/industries/summary?cycle=2021&id=H04 (last visited Nov. 18, 2022).

27. Politicians continue to accept campaign donations from "drugmakers" including insulin-manufacturers Sanofi, Eli Lilly, and Novo Nordisk. *See* Victoria Knight et al., *Pharma Campaign Cash Delivered to Key Lawmakers with Surgical Precision*, KHN (Oct. 25, 2021), https://khn.org/news/article/pharma-campaign-cash-delivered-to-key-lawmakers-with-surgical-precision/.

28. *See generally* Mark S. Levy, Comment, *Big Pharma Monopoly: Why Consumers Keep Landing on "Park Place" and How the Game is Rigged*, 66 AM. U. L. REV. 247 (2016).

29. *See* Dan Diamond & Amy Goldstein, *A Bitter Pill: Biden Suffers Familiar Defeat on Prescription Drug Prices*, WASH. POST (Oct. 29, 2021, 12:43 PM), https://www.washingtonpost.com/health/2021/10/29/biden-medicare-drug-negotiation/.

30. COMM. ON WAYS AND MEANS, A PAINFUL PILL TO SWALLOW: U.S. VS. INTERNATIONAL PRESCRIPTION DRUG PRICES 15 (2019) [hereinafter A PAINFUL PILL TO SWALLOW].

31. *Id.*

32. *See id.* at 16 (noting that: "If per capita GDP is positively associated with drug prices in a given country, we would expect the 11 non-U.S. countries in our analysis to have drug prices at about 80 percent of those in the U.S. . . . this was not the case: [f]or the drugs included in this analysis, the combined average drug prices were 26.8 percent . . . of average U.S. drug prices.").

33. A 2,000-page omnibus piece of potential legislation called the Build Back Better Act is currently making its way through Congress in an attempt to solve multiple issues in the United States, including drug pricing. If adopted, the act "would empower Medicare to negotiate prices for a relatively small number of the priciest prescription drugs, require rebates when drug prices rise faster than inflation and cap out-of-pocket costs for many Americans purchasing insulin." *See* Jeff Overley & Adam Lidgett, *Buckle Up: Wild Ride Awaits Health, Life Sci Policy in 2022*, LAW360 (Jan. 3, 2022, 12:03 PM), https://plus.lexis.com/newsstand#/article/1449226. Though the act has made its way to the Senate, it is not expected to pass in its current iteration due to its bipartisan nature. *Id.* If it did, the act will only affect the pricing problems concerning a few drugs, such as insulin. *Id.*

government role in determining the prices consumers pay for the medicines they need."[34]

Even for those citizens covered by health insurance plans in the United States, many patients cannot afford the medications they require,[35] instead having to choose between their own health and lives and providing food for their families.[36] Two of these lifesaving drugs, in particular, show the extent of this issue: insulin, a medication with pricing issues affecting a growing number of people,[37] and epinephrine, a medication that has had one of the highest price hikes permitted in the United States.[38]

A. Insulin

Insulin is a biologic drug required by people with type 1 diabetes[39] because their pancreas makes little to no natural insulin and cannot break down sugar by itself, letting more sugar than necessary into the blood stream and making the blood too acidic.[40] The patient either injects the medicine prior to each meal and before nighttime, or he or she receives a constant distribution of insulin to the blood stream through a pump.[41] Type 1 diabetes is a genetic autoimmune disorder that currently cannot be prevented; without treatment, the resulting high blood sugar and diabetic ketoacidosis will lead to a coma and eventual death.[42]

For many decades there were no effective treatments for diabetes.[43] Patients tried to stick to simple diets with very low amounts

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34. Diamond & Goldstein, *supra* note 29.

35. Copays range widely. *See supra* note 16 and accompanying text. Even then, not all insurances and plans cover the exact types of medications that people need or that is effective, including common emergency medications like the EpiPen. *See* Patti Neighmond, *When Insurance Won't Cover Drugs, Americans Make 'Tough Choices' About Their Health*, NPR (Jan. 27, 2020, 5:05 AM), https://www.npr.org/sections/health-shots/2020/01/27/799019013/when-insurance-wont-cover-drugs-americans-make-tough-choices-about-their-health.

36. Hirsch, *supra* note 15.

37. *See supra* note 22 and accompanying text.

38. *See supra* note 23 and accompanying text.

39. Insulin is also required in treatment for other types of diabetes, such as more severe cases of Type 2 Diabetes. Approximately 26.9 million people in the United States are diagnosed with diabetes, while millions of others are potentially undiagnosed. Around 11% of these people began using insulin in their care within a year of diagnosis, and the numbers are increasing. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL DIABETES STATISTIC REPORT 4 (2020), https://www.cdc.gov/diabetes/pdfs/data/statistics/national-diabetes-statistics-report.pdf.

40. *What is Diabetes?*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/diabetes/basics/diabetes.html (last visited Nov. 18, 2022).

41. *See* Daphne E. Smith-Marsh, *Insulin Delivery*, ENDOCRINEWEB (May 16, 2019), https://www.endocrineweb.com/guides/insulin/insulin-delivery.

42. *What is Diabetes?*, *supra* note 40.

43. *See generally* MICHAEL BLISS, THE DISCOVERY OF INSULIN (1982).

of carbohydrates and sugars, rarely living to adulthood if diagnosed as a child.[44] Frederick Banting and Charles Best first discovered the only extant treatment when they isolated insulin from the pancreas of an animal in 1921.[45] Banting and Best sold the insulin patent two years later to the University of Toronto for $1 to each inventor, intending that the drug be distributed as widely and quickly as possible, and insisting on affordability and accessibility for every diabetic.[46] Yet one hundred years later, diabetics are still struggling without the lifesaving medication that they need, unsuccessfully rationing medication because of the drug's current unaffordability.[47] Between the cost of care and the exorbitant price of the drug, diabetics must pay up to thousands of dollars a month to manage their health.[48]

There have been substantial changes to diabetic care since the discovery of the insulin drug, but insulin continues to be necessary for those living with type 1 diabetes. Banting and Best's first iteration was animal insulin;[49] however, human insulin[50] was later introduced in 1982 and analog insulin[51] was developed in 1996.[52] Though animal and human insulin may still be used in some cases, these iterations are suboptimal because the drugs are less predictable and do not work the same way as natural insulin does in the body.[53] Analog insulins can keep the body regulated over a longer period of time and are less likely to cause dangerous spikes and falls in glucose levels in human blood.[54] Each iteration, with notably nominal changes from the last variety, came with a request for a new patent, along with the increased reliability.[55]

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44. *The History of a Wonderful Thing We Call Insulin*, AM. DIABETES ASS'N (July 1, 2019), https://diabetes.org/blog/history-wonderful-thing-we-call-insulin.

45. *Id.*

46. Amy Moran-Thomas, *One Hundred Years of Insulin for Some*, 385 NEW ENG. J. MED. 293, 293 (2021).

47. *Id.* at 294.

48. *See, e.g.*, Sable-Smith, *supra* note 2.

49. Animal insulin is taken from the pancreases of cows and pigs. Daniel Yetman, *What to Know About Human Insulin and How It Works*, HEALTHLINE (Oct. 27, 2021), https://www.healthline.com/health/diabetes/human-insulin.

50. Human insulin, first introduced in the 1980s, is synthetically created in a lab "by growing insulin proteins inside *E. coli* bacteria." *Id.*

51. Insulin analogs "are made in the same way as human insulin but are genetically altered to change the way they act in your body," and are quicker to lower blood sugar. *Id.*

52. Hirsch, *supra* note 15, at 130.

53. Unlike human and animal insulins, analogs tend to clump less under the skin and "are absorbed more predictably." Yetman, *supra* note 49.

54. Jessica Zelitt, *Pay or Die: Evaluating the United States Insulin Pricing Crisis and Realistic Solutions to End It*, 50 STETSON L. REV. 453, 459 (2021).

55. *See* S. Vincent Rajkumar, MD, *The High Cost of Insulin in the United States: An Urgent Call to Action*, MAYO CLIN. PROC., Jan. 2020, at 23.

Currently, three companies—Sanofi, Eli Lilly, and Novo Nordisk—practically dominate the market for insulin, manufacturing approximately 90% of the global market of the drug.[56] These companies maintain their monopolies through "filing and securing multiple patents on the same drug" to extend patent protection, and they have virtually no competition.[57] The way these companies tend to hike their prices for insulin at the same time[58] alone shows the cooperation agreement created amongst themselves to ensure keeping the market's profits to themselves.[59] Other companies may not have room to get involved and create cheaper alternatives because of the actions of these insulin manufacturers.[60]

Consequently, prices have climbed exponentially in the last 15 years, even adjusting for inflation.[61] While in the early 2000s a vial of analog insulin would cost around $60 out-of-pocket, the cost of the same amount of the drug climbed 116% by 2012.[62] As of 2019,

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56. Zelitt, *supra* note 54, at 460.

57. Rajkumar, *supra* note 55. *See also infra* notes 93-97 and accompanying text (explaining how filing patents in this manner is legal).

58. A government study shows that these insulin manufacturers engaged in these agreed-on price hikes with each other, a process known as "shadow pricing":

> Internal documents show that the three largest insulin manufacturers raised their prices in lockstep in order to maintain "pricing parity," and that senior executives encouraged this practice. Eli Lilly and Novo Nordisk have raised prices in lockstep on their rapid-acting insulin products, Humalog and NovoLog, while Sanofi and Novo Nordisk have raised prices in lockstep on their long-acting insulin products, Lantus and Levemir. In a discussion among Novo Nordisk employees about an Eli Lilly price increase for a different diabetes product on December 24, 2015, a Novo Nordisk pricing analyst remarked, "[M]aybe Sanofi will wait until tomorrow morning to announce their price increase . . . that's all I want for Christmas."

U.S. HOUSE OF REPRESENTATIVES' COMM. ON OVERSIGHT AND REFORM, DRUG PRICING INVESTIGATION xii (2021) [hereinafter DRUG PRICING INVESTIGATION].

59. Zelitt, *supra* note 54, at 460.

60. *See generally* Ryan Knox, *Insulin Insulated: Barriers to Competition and Affordability in the United States Insulin Market*, J. L. BIOSCI. 1, 17 (2020). Civica Rx, a not-for-profit generic drug company and consortium of numerous hospital systems and philanthropic groups, is attempting the feat of entering the market and selling insulin vials for no more than $30, but the company is awaiting approval from the Food and Drug Administration, construction of its own pharmaceutical plant, and more funding. *See* Christopher Rowland, *A Group of Hospitals Has a Plan to Get Around Congress's Refusal to Lower the Cost of Insulin*, WASH. POST (Mar. 3, 2022, 7:00 AM), https://www.washingtonpost.com/business/2022/03/03/cheaper-insulin-plan/; *see also* Carolyn Y. Johnson, *Hospitals Are Fed Up With Drug Companies, So They're Starting Their Own*, WASH. POST (Sept. 6, 2018, 12:01 AM), https://www.washingtonpost.com/national/health-science/hospitals-are-fed-up-with-drug-companies-so-theyre-starting-their-own/2018/09/05/61c27ec4-b111-11e8-9a6a-565d92a3585d_story.html.

61. For example, according to the U.S. Bureau of Labor Statistics' CPI Inflation Calculator, Humalog, which cost $21 in 1999 would only cost $32.85 in December 2019 if inflation was the only consideration. U.S. BUREAU OF LAB. & STAT., https://www.bls.gov/data/inflation_calculator.htm (last visited Nov. 18, 2022).

62. Hirsch, *supra* note 15, at 130.

one fast-acting brand, Humalog, cost $332 per vial when it previously cost $21 in 1999.[63] While some of the increase may be accounted for by slight changes in manufacturing[64] and by inflation over the years, this is not reflected to the same degree in other countries where these same pharmaceutical drugs are sold.[65] For example, in the United States, Lantus SoloStar insulin costs 170% more than it does in other countries, on average.[66] Depending on how many vials or pens of insulin are needed, a diabetic may have to pay thousands of dollars a month to obtain the drug.[67]

B. Epinephrine

Epinephrine is another lifesaving drug with a pricing structure that causes serious problems for those who may need it. Epinephrine, or adrenaline, is the main treatment used for anaphylaxis, a severe allergic reaction—and another issue for which there is not a cure.[68] Allergic reactions can be the result of a multitude of occurrences, including anything from accidently eating peanuts to getting stung by a bee to coming in contact with grass, but when these reactions do occur, immediate action is needed.[69] Approximately 32 million Americans have food allergies alone.[70] A person who experiences a severe allergic reaction has mere minutes to inject epinephrine into their outer thigh to stop the reaction, keep airways from further swelling so the patient is able to breathe, and provide time to get to a hospital if needed.[71] Without the medication, these reactions may be life-threatening.[72]

The Food and Drug Administration ("FDA") initially approved the drug in 1987.[73] Now, the primary form of the drug available outside of a hospital setting, commonly referred to as the EpiPen,

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63. Rajkumar, *supra* note 55, at 22.

64. Typically, in business, slight changes are made in the manufacturing process of products to create more efficient products with cheaper costs and quicker methods of manufacturing. *Change Management in Manufacturing*, FORCAM, https://forcam.com/en/change-management-in-manufacturing/ (last updated Apr. 19, 2021).

65. *See generally* A PAINFUL PILL TO SWALLOW, *supra* note 30, at 4.

66. *Id.* at 20.

67. Moran-Thomas, *supra* note 46.

68. Ismael Carrillo-Martin et al., *Self-injectable Epinephrine: Doctors' Attitude and Patients' Adherence in Real-life*, 20 WOLTERS KLUWER HEALTH 474, 474 (2020).

69. *See id.*

70. *Facts and Statistics: The Food Allergy Epidemic*, FARE, https://www.foodalergy.org/resources/facts-and-statistics (last visited Nov. 18, 2022).

71. Carrillo-Martin et al., *supra* note 68.

72. *Id.*

73. Rose Rimler, *The Long, Strange History of the EpiPen*, HEALTHLINE, https://www.healthline.com/health-news/strange-history-of-epipen (last updated April 9, 2020).

is manufactured by the drug company Viatris (formerly Mylan), and it is administered through a self-injectable device.[74]

Viatris—who only bought the rights to the drug from another company in 2007 to sell it as a package deal with the delivery system Viatris manufactured—has been increasing the price of epinephrine for years.[75] At that time, two EpiPens cost less than $100, and the drug manufacturer, King Pharmaceuticals, provided epinephrine exclusively for Viatris.[76] When Pfizer took over the drug manufacturing process from King Pharmaceuticals in 2010, the former president and CEO, Heather Bresch, made a deal with Pfizer to create a monopoly by agreeing that Pfizer would disinvest in Viatris's main competitor to eliminate the competition.[77] Soon after, and with few obstacles, Viatris began hiking the price of the EpiPen by more than $600 in five years.[78]

Viatris also began selling EpiPens in pairs, forcing patients to buy two at any time of purchase regardless of need.[79] The drug expires after one year, so it technically needs to be replaced annually even if it is not used.[80] It is also recommended that people with allergies carry more than one EpiPen at a time because one dose may not be enough to counter severe reactions, and people, especially children, may need to keep multiple EpiPens on hand at different locations, such as their homes and schools.[81] However, many EpiPen users are instead incentivized to keep their expired pens rather than pay exorbitant prices which they cannot afford. Now,

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74. *Id.*

75. Ryan Grim, *Heather Bresch, Joe Manchin's Daughter, Played Direct Part in EpiPen Price Inflation Scandal*, INTERCEPT (Sept. 7, 2021, 12:48 PM), https://theintercept.com/2021/09/07/joe-manchin-epipen-price-heather-bresch/.

76. *Id.*

77. *See id.* The generic branch of Pfizer, Upjohn, later joined with Mylan in 2021 to form the company Viatris. Kevin Dunleavy, *Viatris Inks $264M Deal to Resolve Long-Running EpiPen Pay-for-Delay Case*, FIERCE PHARMA (Feb. 28, 2022, 10:05 AM), https://www.fiercepharma.com/pharma/viatris-agrees-settle-264-million-without-admitting-liability-epipen-pay-delay-scheme-teva.

78. Grim, *supra* note 75. After this price hike, the company CEO blamed the concerns over the changes on "a lack of transparency in the pharmaceutical pricing system" and claimed that the profits were going toward investments "'to create access and awareness and improve the product.'" Ed Silverman, *Mylan CEO Accepts Full Responsibility for Price Hikes, But Offers Little Explanation*, PHARMALOT (Dec. 1, 2016), https://www.statnews.com/pharmalot/2016/12/01/mylan-ceo-responsibility-epipen-price/.

79. *Id.*

80. Daniel More, MD, *Be Prepared for an Allergy with the Right Number of EpiPens*, VERYWELL HEALTH, https://www.verywellhealth.com/how-many-epipens-do-you-need-82914?print (last updated Mar. 29, 2021).

81. *Id.*

a two-pack of EpiPens costs upwards of $650.[82] Although people with allergies typically do their best to avoid these life-threatening reactions, there is always a chance that a person could accidently come in contact with whatever they are allergic to, like by ordering food at a restaurant and not being aware it was cooked in the same pan previously used for peanuts. Still, it may be difficult to justify spending that type of money when a person may not use the drug before it expires, even if his or her life depends on it.[83]

As for generic versions of epinephrine, there are not many to date that would alleviate the pricing problem.[84] Viatris released its own generic version, but it was still triple the price that the EpiPen had been only a few years before.[85] The FDA did not approve a generic brand from a competitor company until 2018.[86] However, this brand still costed more than Viatris's authorized generic pen.[87] Now, more generics are starting to enter the market, enabling some cash customers to pay $110 for two pens.[88] Still, without assistance from outside companies, such as additional insurances and prescription savings cards, affording the drug is a difficulty.[89]

C. General Pharmaceutical Pricing Problems in the United States

Not much has been done to change the current pricing system in the United States as most federal legislation introduced on the matter have been thus far rejected.[90] Pharmaceutical companies have

82. Tori Marsh, MPH, *Generic EpiPen is Still Expensive – Here's How You Can Save*, GOODRX (Oct. 30, 2019, 2:13 PM), https://www.goodrx.com/blog/generic-epipen-is-still-expensive-heres-how-you-can-save/.

83. *See* Frank David, *Calculating the Value of an EpiPen*, FORBES (Aug. 29, 2016, 6:00 AM), https://www.forbes.com/sites/frankdavid/2016/08/29/epipen/?sh=219239714f30.

84. Peter Atwater, *The Wild EpiPen Price Hike Points to a Looming Pharmaceutical Crisis*, TIME MAG., Sept. 2016, at 32.

85. *Id.*

86. Maggie Fox, *FDA Approves First Generic Competitor to EpiPen*, NBC NEWS (Aug. 16, 2018, 1:14 PM) https://www.nbcnews.com/health/health-news/fda-approves-first-generic-competitor-epipens-n896171.

87. *Id.*

88. *See A More Affordable EpiPen Alternative*, CVS PHARMACY, https://www.cvs.com/content/epipen-alternative (last visited Nov. 18, 2022).

89. *See* Neighmond, *supra* note 35.

90. *See, e.g.*, Ginsburg & Lieberman, *supra* note 24 (discussing the Elijah E. Cummings Lower Drug Costs Now Act, 116 H.R. 3, which would have "sharply expanded the boundaries of drug pricing reform discussions by authorizing the Secretary of Health and Human Services (HHS) to set drug prices for both government and commercial payers through a combination of formulas and negotiation and imposed prohibitive tax penalties on pharmaceutical manufacturers that did not accept the government price"); Halper & Romm, *Republicans Block Cap on Insulin Costs for Millions of Patients*, WASH. POST (Aug. 7, 2022, 10:57 AM) https://www.washingtonpost.com/nation/2022/08/07/insulin-cap-budget-congress/

been able to raise prices, partly under their own intended strategies of "[protecting] free-market competition-based pricing for Medicare and commercial insurance."[91] The U.S. House of Representatives' Committee on Oversight and Reform recognized drug pricing as a major issue after an intensive three-year study, describing the existing pricing strategies as "unsustainable, unjustified, and unfair to patients and taxpayers."[92] According to this study, there are three main problems with pricing; pharmaceutical companies have: (1) "manipulated the patent system"; (2) actively worked to stop competition, such as by blocking other similar drugs from the market; and (3) "raised prices with abandon . . . to meet ever-increasing revenue targets" that are not balanced by competition.[93]

A continuous renewal of patents is one of the drivers of the pricing crisis.[94] Known as patent evergreening, renewal of patents on the same drug for the smallest changes ensures that the drug is kept under patent protection for a longer period of time.[95] One company has filed over seventy patents on the long-acting insulin, Lantus SoloStar, to "technically provide more than 30 additional years of monopoly protection."[96] Patent evergreening continues to defeat competition in an already controlled field.[97]

Lately, there has been movement in the United States to address the insulin pricing crisis through encouraging biosimilars.[98] Biosimilars are drugs that are biologically similar to the current drugs so that they produce the same reaction in the body, yet they are cheaper to produce.[99] The FDA recently announced permission for interchangeable biosimilars, which promises safe and effective medications at lower costs, including Semglee for glycemic control.[100] However, forming biosimilars is a difficult process, and patent protections continue to block them from being on the market.[101]

(discussing how lawmakers stripped an insulin price cap from the Inflation Reduction Act before passing it).

91. DRUG PRICING INVESTIGATION, *supra* note 58, at viii.

92. *Id.* at iii.

93. *Id.* at i–ii.

94. *See id.* at i.

95. Rajkumar, *supra* note 55.

96. *Id.*

97. *See id.*

98. *See* Dave Simpson, *'Momentous Day' as FDA Oks 1st Interchangeable Biosimilar*, LAW 360 (July 28, 2021, 8:58 PM), https://plus.lexis.com/newsstand#/article/1407739; *see also* Rowland, *supra* note 60 (noting that the required "'biosimilar' regulatory framework from the [FDA] was not fully established until 2020").

99. *Biosimilar and Interchangeable Products*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/drugs/biosimilars/biosimilar-and-interchangeable-products#biosimilar (last visited Nov. 18, 2022).

100. Simpson, *supra* note 98.

101. *See id.*

The three insulin companies have also been engaging in "shadow pricing," raising prices at the same time as each other to fix the competition problem.[102]

Patent evergreening and difficulties with biosimilars have created obstacles by not allowing incentives for price decreases. Competition typically prevents price gouging, but companies like Viatris and Eli Lilly are acting as monopolies, controlling the drug markets and increasing prices without much consequence.[103] People are willing to pay almost anything to be able to live, and drug companies use lobbying to ensure their ability to take advantage of that pricelessness.[104] These companies are intentionally targeting deficiencies in our system, such as those keeping the federal insurance Medicare Part D from negotiating prices.[105] As "[a]n internal Novo Nordisk slide deck from October 2013 emphasized, 'Part D is the most profitable market for the Novo Nordisk insulin portfolio,' and . . . insulin volume for the Part D market was growing three times faster than for the commercial market."[106] This shows that companies conduct business mainly for profit. For a change in position, the federal government must intervene so that any overcharge in the cost of individual medical care is not merely spread among its citizens.

D. State-Level and Federal-Level Responses

While the federal government has rejected most drug negotiation schemes,[107] there are other structures in the United States aiming to control pharmaceutical prices. Some states, including Colorado, have started to move in the right direction by implementing price

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102. DRUG PRICING INVESTIGATION, *supra* note 58, at v.

103. Both companies have recently been involved in lawsuits that have yet to result in accountability over Big Pharma for the price hikes. *See* In re EpiPen Epinephrine Injection, Mktg., Sales Pracs. & Antitrust Litig., No. 2785, 2022 U.S. Dist. LEXIS 122137 (D. Kan. July 11, 2022); In re Insulin Pricing Litig., No. 3:17-CV-699-BRM-LHG, 2020 U.S. Dist. LEXIS 29345 (D.N.J. Feb. 20, 2020).

104. *See supra* note 26 and accompanying text.

105. *See* DRUG PRICING INVESTIGATION, *supra* note 58, at ix.

106. *Id.*

107. *See generally* Diamond & Goldstein, *supra* note 29. In April 2021, the Ending Pricey Insulin Act was also introduced in a federal attempt to limit insulin copays to $50 a month no matter the amount of insulin needed, but it has a low chance of moving forward. Ending Pricey Insulin Act, S. 1132, 117th Cong. §1 (2021). Two other acts, the INSULIN Act and the Affordable Insulin Now Act, have also been introduced to limit insulin prices, but they face low approval rates and, even if one did pass, it would not cover uninsured people. Rachel Tillman, *Senators Introduce Bipartisan Bill to Cap Cost of Insulin*, SPECTRUM NEWS NY1 (June 22, 2022, 1:20 PM) https://www.ny1.com/nyc/all-boroughs/news/2022/06/22/jeanne-shaheen-susan-collins-senate-insulin-monthly-price-cap.

cap statutes.[108] Colorado's statute implements price caps of $100 on monthly copays for insulin, no matter the amount of insulin needed by a diabetic per month.[109] Similar statutes have been adopted in Illinois, Maine, New Mexico, New York, Utah, Washington, and West Virginia, with others being considered throughout the United States.[110]

However, these statutes will only affect people who are covered by certain health insurance plans.[111] Insulin is only one of many lifesaving drugs that needs to have a regulated price, and those people who cannot afford health insurance will not be able to afford lifesaving drugs with or without it.[112] Although this is a start, the pricing problem is too broad, due to the issues discussed above, to be solved only by state caps for copays with certain health insurances. Companies will only begin to change if there is serious negotiation at the federal level. A general comparison of the United States pharmaceutical prices to global levels shows that drugs are far more expensive in the United States than in almost any other country.[113] The Committee on Oversight and Reform has even claimed that these pharmaceutical companies have "specifically targeted the U.S. market for higher prices, even while cutting prices in other countries, because weaknesses in our health care system have allowed them to get away with outrageous prices and anticompetitive conduct."[114]

III. GLOBAL PRICING MODELS

Developed Western countries spend much less than the United States on pharmaceuticals per capita[115] through combinations of

108. *See* COLO. REV. STAT. § 10-16-151 (2020).

109. *Id.*

110. Karena Yan, *Eight States Pass Legislation to Place Caps on Insulin Price; Five More Await Ruling*, DIATRIBE FOUND., https://diatribe.org/foundation/about-us/dialogue/eight-states-pass-legislation-place-caps-insulin-price-five-more-await-ruling (last visited Nov. 18, 2022).

111. *Id.* (noting, in reference to COLO. REV. STAT. § 10-16-151, that "[s]ome health plans fell into an exemption in the legislation, leaving the people on those health plans ineligible for the insulin price cap when purchasing their monthly insulin").

112. *See supra* notes 16, 19 and accompanying text. Sanofi has announced a plan to lower the prices of its insulin for people without insurance. *See* Kevin Dunleavy, *With Congress Weighing Insulin Cost Cap, Sanofi Slashes Price for Uninsured in US*, Fierce Pharma (Jun. 29, 2022, 11:17 AM) https://www.fiercepharma.com/pharma/us-close-capping-insulin-costs-some-sanofi-slashes-price-uninsured-us. The author was not able to confirm whether these price changes have been implemented. However, this change could cause price increases at pharmacies for insured options.

113. *See generally* A PAINFUL PILL TO SWALLOW, *supra* note 30.

114. DRUG PRICING INVESTIGATION, *supra* note 58, at i.

115. *See generally* A PAINFUL PILL TO SWALLOW, *supra* note 30, at 4.

health insurance and governmental regulations.[116] This section analyzes three types of these pricing models based on product price control, reference pricing, and profit control. The drug pricing problem in the United States needs to be addressed by a combination of these methods. Ultimately, this combination, along with a focus on reference pricing, will be most beneficial.

A. Product Price Control

Product price control is one option for regulating pharmaceutical drug prices by focusing on the drugs themselves. Canada has used this type of regulation through its Patented Medicine Prices Review Board ("PMPRB") since 1987.[117] The purpose of this board is to "ensur[e] that the prices of patented medicines sold in Canada are not excessive,"[118] which is done through "monitor[ing] the prices charged by patentees for patented drugs on an ongoing basis."[119] The PMPRB reviews pharmaceuticals, taking into consideration affordability before approving prices of pharmaceuticals in order to ensure prices are reasonable for patients[120] based on a predetermined set of guidelines.[121] According to the PMPRB website, this process includes a scientific review of the "level of therapeutic improvement" of a new drug, a price review of involving comparable drugs and countries, and later investigations to determine whether or not certain product prices are too high.[122]

Manufacturers may not exceed set maximum price limits because the companies voluntarily agree to comply with the PMPRB's guidelines when the patent for the drug is filed.[123] If a company is found to have exceeded the permitted maximum price, the board has the ability to hold a public hearing and subsequently "issue an order to reduce the price and to offset revenues received as a result

116. While different types of health insurance around the globe will likely play a part in pricing differences, this article will mainly address governmental regulations of pharmaceutical companies. It is beyond the scope of this article to fully analyze the issue and benefits of universal health care.

117. Zelitt, *supra* note 54, at 484.

118. *About the PMPRB*, GOV'T OF CANADA, http://pmprb-cepmb.gc.ca/home (last visited Nov. 18, 2022).

119. *Regulatory Process*, GOV'T OF CANADA, https://www.canada.ca/en/ patented-medicine-prices-review/services/regulatory-process.html (last updated Sept. 7, 2021).

120. Zelitt, *supra* note 54, at 484.

121. *See* COMPENDIUM OF POLICIES, GUIDELINES AND PROCEDURES, PATENTED MEDICINE PRICES REVIEW BOARD (2017).

122. *Regulatory Process*, *supra* note 119.

123. *Id.*

of the excessive price," subject to judicial review in the Federal Court of Canada.[124]

B. Reference Pricing

Another method of regulation, which is used in Germany, is reference pricing.[125] Governments reference price by comparing groups of similar medications, then set limits on reimbursement for the price of each group of medications.[126] Unlike with product price control, reference pricing does not require approval by the government at the time that a product is launched.[127] However, in Germany, reference pricing is used to cover all medications.[128] The process consists of "two phases, starting with a health technology assessment conducted by Germany's Federal Joint Committee, followed by the reimbursement price negotiations between the Association of Statutory Health Insurance Funds and the respective pharmaceutical company."[129] Introduced in 1989,[130] reference pricing is used for "noninnovative drugs with therapeutically similar alternatives," such as insulin and epinephrine, forcing manufacturers of similar drugs to charge no more than its competitor and "compete for market share with lower prices."[131] Innovative drugs, on the other hand, are medications which are determined to have an "incremental benefit" over existing versions of a drug used for the same purpose.[132] These drugs are also given a standard for prices based on comparable products but are granted higher prices than those that are noninnovative.[133]

During the reference pricing process, drugs are "allocated to specific 'reference price groups'" established on the basis of having the same or similar active pharmaceutical ingredients or comparable

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124. *Id.*

125. *See* Ulrich Reese & Carolin Kemmner, *Pricing & Reimbursement Laws and Regulations 2021*, GLOB. LEGAL INSIGHTS, https://www.globallegalinsights.com/practice-areas/pricing-and-reimbursement-laws-and-regulations/germany.

126. *See* Shefali Luthra, *Postcard from Germany: Moved for School, Stayed for Insulin*, TIME MAG. (Oct. 24, 2019, 8:00 AM), https://time.com/5706668/insulin-pricing-us-germany/.

127. Reese & Kemmner, *supra* note 125.

128. Karl Lauterbach et al., *The German Model for Regulating Drug Prices*, HEALTHAFFAIRS (Dec. 29, 2016), https://www.healthaffairs.org/do/10.1377/forefront.20161229.058150/full/.

129. Reese & Kemmner, *supra* note 125.

130. *Id.*

131. James C. Robinson et al., *Drug Price Moderation in Germany: Lessons for U.S. Reform Efforts*, COMMONWEALTH FUND (Jan. 23, 2020), https://www.commonwealthfund.org/publications/issue-briefs/2020/jan/drug-price-moderation-germany-lessons-us-reform-efforts.

132. *See id.*

133. *Id.*

effects.[134] Generics and biosimilars can be in the same groups as drugs that are patented.[135] Germany's Federal Joint Committee then sets the group's price "at a level ensuring a sufficient, cost-effective, quality-assured and appropriate treatment of patients."[136] The reference price represents the amount a pharmacist can be reimbursed, leaving a patient to subsequently have to pay the difference between it and the actual price of the drug.[137] Because patients, in order to not pay a co-pay, ask for a drug from the same reference group that does follow the price standard, pharmaceutical companies typically lower their prices to fit the standard and escape being passed up in favor of the competition.[138]

C. Profit Control

The United Kingdom has historically used a more indirect method of controlling prices; this pricing model is based off of profit control.[139] Under this method, manufacturers are able to "freely set its launch price at any level, as long as company profits do not exceed a negotiated target."[140] This method relies on a mutual, voluntary agreement between the government and the pharmaceutical industry for the companies to follow these targets.[141] This target and process is centered around negotiations made by its National Health Service, the national health insurer that funds the "vast majority of medicines prescribed to patients" in the United Kingdom.[142] After the initial introduction of a new drug into the United Kingdom, manufacturers may only increase prices if the change is approved by the government.[143] By allowing negotiations to be conducted primarily by the National Health Service rather than any

134. Reese & Kemmner, *supra* note 125.
135. *Id.*
136. *Id.*
137. *Id.*
138. *See id.*
139. *See* David J. Gross et al., *International Pharmaceutical Spending Controls: France, Germany, Sweden, and the United Kingdom*, 15 HEALTH CARE FIN. REV. 127, 131 (1994).
140. *Id.*
141. DRUG PRICING, HOUSES OF PARLIAMENT: PARLIAMENTARY OFFICE OF SCI. & TECH. (Oct. 2010), https://www.parliament.uk/globalassets/documents/post/postpn_364_Drug_Pricing.pdf.
142. Grant Castle et al., *Pricing & Reimbursement Laws and Regulations 2021, United Kingdom*, GLOB. LEGAL INSIGHTS, https://www.globallegalinsights.com/practice-areas/pricing-and-reimbursement-laws-and-regulations/united-kingdom.
143. Gross et al., *supra* note 139.

health insurance companies, the administration can negotiate the most cost-effective prices.[144]

The United Kingdom also keeps a focus on what is most affected by drug pricing regulations: the lives of those who are sick. To do this, additional strategies involve reducing out-of-pocket costs for chronically ill people,[145] so that medications are "mostly free to patients at the point of need."[146] The United Kingdom's addition of such strategies shows that further considerations may need to be made when considering a plan for the United States, specifically implying that one of these methods may not be enough on its own.

IV. A COMBINATION OF REFERENCE PRICING AND PRODUCT PRICE CONTROL IS NECESSARY FOR THE MOST EFFECTIVE RESULTS

While each of these pricing models have strengths that may be potentially helpful in addressing the pharmaceutical drug problem, no single model would be effective in the United States because of existing problems within the nation's pharmaceutical industry.[147]

Studies have shown that people are dying because of an inability to afford essential lifesaving medications.[148] Meanwhile, pharmaceutical companies are acting as monopolies, blocking competition from ruining their profits, and the United States government is not effectively moving to protect the American people who need these medications to live.[149] This is not a question of profit but a question of life or death. And survival is not a partisan issue. Other countries manage to keep drug prices at substantially lower prices than those in the United States,[150] so there is hope that this change is possible.

Employing a federal system to regulate by product price control would be a step in the right direction. Canada's system, in particular, could offer a solution for patent evergreening. Because

144. *See* Marc A. Rodwin, *How the United Kingdom Controls Pharmaceutical Prices and Spending: Learning from its Experience*, 51 INT'L J. OF HEALTH SERVS. 229, 229 (2021); *see also* Castle et al., *supra* note 142.

145. *See* Zelitt, *supra* note 54.

146. Castle et al., *supra* note 142.

147. *See supra* Part I, Section C.

148. *See, e.g.*, Dan Witters, *Millions in U.S. Lost Someone Who Couldn't Afford Treatment*, GALLUP (Nov. 12, 2019), https://news.gallup.com/poll/268094/millions-lost-someone-couldn-afford-treatment.aspx (citing a study by Gallup and West Health which stated "about 34 million [American adults] report knowing of at least one friend or family member in the past five years who died after not receiving needed medical treatment because they were unable to pay for it" and further acknowledging a "rising percentage of adults who report not having had enough money in the past 12 months to 'pay for needed medicine or drugs that a doctor prescribed' to them").

149. *See* Rowland, *supra* note 60.

150. *See generally* A PAINFUL PILL TO SWALLOW, *supra* note 30, at 4.

Canada's Patent Act[151] requires patentees to file price and sales information both when the drug is patented and twice a year thereafter, the review continues on an ongoing basis.[152] As part of the review includes an analysis of the "level of therapeutic improvement" to determine a comparative price, manufacturers would likely be unable to increase prices when filing patents for nominally different drugs.[153] However, such a review board would need further instruction and power to stop companies from the repeated use of patent evergreening in order to block competition.

While the addition of a review board to determine drug prices seeks to address the core of the issue, implementing a review board, by itself, will not solve the drug-pricing problem in the United States. Pharmaceutical companies may not be disincentivized by the board's decisions, if receptive to it at all, because there are practically no legal consequences.[154] Furthermore, it is not uncommon for companies to pay their way out of any judgments imposed by the court system.[155]

Potential standards also need to be taken into consideration. While Canada's review board uses the drug prices from other countries in its comparison to judge reasonable maximum limits for prices, companies like Sanofi, Eli Lilly, and Novo Nordisk would likely adjust prices in their own favor. These companies, in particular, dominate approximately 90% of the global insulin market.[156] Controlling the global market could mean control of the review board's ability to make these comparisons. Moreover, to base decisions off our own existing prices would be impractical.

Another concern with this approach is determining how much of the industry a review board could practically oversee. Incorporating a review board, possibly under the requirements of the FDA, would enable immediate access, but there are many drugs that would need to be reviewed. Beginning only with new drugs and grandfathering others would defeat the purpose of finding a way to make current drugs like insulin and epinephrine available to people that require them. However, the process of including all

151. R.S.C., 1985, c. P-4.
152. *Regulatory Process*, *supra* note 119.
153. *Id.*
154. Past litigation concerning this matter, particularly when class actions arose between patients reliant on the medication and the companies alleged to have unaffordable drug prices, have typically resulted in favor of the corporations. *See, e.g.*, *In re EpiPen Epinephrine Injection, Mktg., Sales Pracs. & Antitrust Litig.*, 2022 U.S. Dist. LEXIS 122137; *In re Insulin Pricing Litig.*, 2020 U.S. Dist. LEXIS 29345.
155. *See id.*
156. *See* Zelitt, *supra* note 54, at 460.

pharmaceutical drugs sold in the United States would be extensive and cost valuable time, which many people who need these medications do not have.

Canada continues to experience problems with its pricing model as well; it even recognizes that further drug reform is needed.[157] Although plans to implement new guidelines for the PMPRB have been delayed, the reformation tactics include having the review board drop the United States' prices from the drug price comparison, because the prices are so far outside the average of those of the rest of the world, as well as having the board consider the cost-effectiveness of new drugs.[158] If such a board were to be implemented in the United States, it alone would not be as effective as quickly as it needs to be.

Profit control and the drug pricing methods are also not the most efficient choice for the United States to effectively address the pharmaceutical pricing crisis. In the United Kingdom, prices are not universally regulated; "significant price control mechanisms only really exist for branded products and not generics (whose prices are broadly controlled by market forces)."[159] Enforcing the pricing model of the United Kingdom in the United States would not improve the anti-competition issue in the pharmaceutical industry. The pricing structures in the United Kingdom are also set for significant reform, showing that they too ultimately require more regulation on drug pricing.[160]

Reference pricing, however, may better address the pharmaceutical pricing problem in the United States. Germany's system of drug pricing may have the most promising results for people who are living with type 1 diabetes or severe allergies[161] as prices of drugs, and health insurance co-pays for those drugs, are substantially lower in Germany than they are in the United States.[162] Reference pricing could be used to give competitors a chance against the monopolies of Viatris, Sanofi, Eli Lilly, and Novo Nordisk. The introduction of biosimilars, medications that are cheaper to produce but create the same biological reactions as other drugs, could potentially force price reductions by providing competition if given an

157. *See Canada to Delay Drug Price Reforms by Six Months, Cites Pandemic*, REUTERS (Dec. 23, 2021, 3:06 PM), https://www.reuters.com/business/healthcare-pharmaceuticals/canada-delay-drug-price-reforms-by-six-months-cites-pandemic-2021-12-23/.

158. *Id.*

159. Castle et al., *supra* note 142.

160. *Id.*

161. *See* Luthra, *supra* note 126.

162. *See* A PAINFUL PILL TO SWALLOW, *supra* note 30, at 4.

opportunity and space to compete, or at least present a cheaper alternative.[163] Government regulations in this manner would not only provide this space and force competition back into these pharmaceutical industries, but also incentivize these large companies to think about the consumer and their choices.

While people may voice concerns that any regulations forced on pharmaceutical companies will negatively affect drug production, research, and development,[164] strong limits on drug pricing will not disrupt the development of vital new medications, and, in any case, "[s]ky-high drug prices are not justified by the need to innovate."[165] Currently, most of the money flowing through these pharmaceutical companies goes to the pockets of their investors,[166] and any research and development is typically applied on the slight changes made to enable patent evergreening.[167] Instead, Germany's pricing model could be used to change incentives for pharmaceutical companies. Innovative drugs "that offer an incremental benefit" over existing medications could be permitted to sell at "higher [] prices proportional to their greater benefit over comparable products" in the United States and other markets.[168]

If the federal government were to implement a reference pricing system, it may become part of the duties under the Secretary of Health and Human Services, as previously suggested in proposed bills on new forms of drug pricing regulation,[169] to research, compare, and set prices. The prices then may be established through a process of notice and comment rulemaking, allowing for additional discussion and understanding between this underlying administrative agency and pharmaceutical manufacturers. This would permit the agency to balance the concerns of the industry with those of the people receiving the medications.

V. CONCLUSION

Many Americans are having difficulties paying for the lifesaving prescription drugs that they need[170] due to the exponential price

163. *See* Simpson, *supra* note 98.
164. *See* Ginsburg & Lieberman, *supra* note 24.
165. DRUG PRICING INVESTIGATION, *supra* note 58, at ii.
166. *See id.* (noting in the study that "[t]he largest drug companies spend more on payouts for investors and executives than on research and development").
167. *See id.*
168. Robinson et al., *supra* note 131.
169. *See* Ginsburg & Lieberman, *supra* note 23.
170. Reinberg, *supra* note 14.

increases over the last few years that are not seen to the same extent in other countries.[171]

The United States cannot continue on its current path—letting pharmaceutical companies continue to raise prices on sick people just to reap more profits. The House of Representatives Committee on Oversight and Reform agreed, calling for reform and price caps.[172]

A combination of the drug pricing models from Canada, Germany, and the United Kingdom is necessary for the United States to finally and fully address the pharmaceutical pricing crisis. By implementing reference pricing and a pharmaceutical review board, pharmaceutical companies will have more incentives to decrease prices, permit biosimilars into the market, and stop patent evergreening.

Rather than profiting from sick individuals who do not have a choice on whether or not they need to buy medication, companies can adhere to regulations set by the federal government, but legislation needs to be accepted by both parties as soon as possible. As it was for Alec Smith and Denise Ure, time is of the essence.

171. *See generally* A PAINFUL PILL TO SWALLOW, *supra* note 30.
172. *See generally* DRUG PRICING INVESTIGATION, *supra* note 58.

COVID-19 and Broadband Internet: Historic Government Funding in the Wake of a Global Pandemic Poised to Bridge the Digital Divide

Kaitlin M. Kroll[*]

ABSTRACT

The COVID-19 pandemic impacted how Americans live, work, and learn. As the country returns to normalcy, reliable, fast internet connection is critical for Americans—it is no longer a luxury, it is a necessity. While many Americans do not think twice about having internet connectivity, there are still many Americans who are unable to access or afford the internet, especially in rural communities and low-income households. In the wake of the pandemic, Congress allocated historic amounts of funding for broadband initiatives. The most substantial of which are the broadband allocations under the Infrastructure Investment and Jobs Act ("IIJA"). While the government charged the National Telecommunications and Information Administration ("NTIA") with administering the funding to the states, the Federal Communications Commission ("FCC") is the agency traditionally tasked with this job. Between the two agencies, there are different frameworks on how to administer the funds. The FCC has championed a reverse auction framework, while the NTIA uses a bidding application and grant process to distribute the funds directly to state and local governments.

Through review of two previous initiatives for broadband development, this Article argues that the implementation of the auction framework traditionally employed by the FCC is more effective than the NTIA's grant process for the IIJA funding. The Article also reviews shortcomings of the auction framework but proposes potential solutions to those challenges in order to deploy broadband initiatives while still generating excess revenue. While the NTIA does employ the grant process, it may still be possible to implement a powerful tool—the auction—moving forward. IIJA provides throughout that the NTIA should act in consultation with the FCC. The FCC has experience in deployment of government funding of this magnitude and can provide invaluable guidance not only to the NTIA but even to the states as they begin to spend the government dollars. As the agencies move forward with their various broadband projects, learning from past successes and mistakes is crucial for future success.

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* J.D. Candidate, Duquesne University Thomas R. Kline School of Law, 2023; B.A., Duquesne University, summa cum laude, 2009. The author extends her sincerest gratitude to her family, especially to her parents, Joe and Lisa, and her husband, Danny, for their constant love and support. She thanks Professor Ann L. Schiavone for her guidance and encouragement throughout law school. Most importantly, she thanks her daughter, Siena Rose, for bringing joy and meaning into every aspect of her life.

TABLE OF CONTENTS

I. INTRODUCTION

In the span of two years, the COVID-19 pandemic has forever changed the way Americans live, work, and learn. With many Americans forced to work and attend school from home, the pandemic put a spotlight on the importance of high-speed broadband internet access.[1] While the problem of the "digital divide" is not new, the pandemic shifted the lack of internet service "from inconvenient to emergency" for many people.[2] Even those with existing high-speed internet connections report problems with latency,

1. Colleen McClain et al., *The Internet and the Pandemic,* PEW RSCH. CTR. (Sept. 1, 2021), https://www.pewresearch.org/internet/2021/09/01/the-internet-and-the-pandemic/.

2. John Lai & Nicole O. Widmar, *Revisiting the Digital Divide in the COVID-19 Era*, APPLIED ECON. PERSP. & POL'Y 458, 458 (2020). Initially, the term "digital divide" meant the natural separation between those who could afford a computer and those who could not afford one due to the high costs. Today, as the cost of computers has dropped, the "digital divide now encompasses the ability, both technical and financial, to make full use of the technology available, taking into consideration access, or lack of access, to the internet." *What is the Digital Divide?*, SAN DIEGO FOUND. (Sept. 19, 2020), https://www.sdfoundation.org/news-events/sdf-news/what-is-the-digital-divide/.

reliability, and quality of the connection, as well as concerns about their ability to pay for the internet services in light of the lingering economic impact of the pandemic.[3] Children in rural communities and in low-income households are disproportionately impacted by the so-called "Homework Gap"—a term coined to describe the difficulty millions of students faced getting internet access at home during the height of the pandemic.[4]

The importance of secure broadband and telecommunication infrastructure networks, including those with 5G capacities, is at the forefront of the issues addressed in legislation for COVID-19 relief funding.[5] For example, in March 2020, Congress passed a COVID-19 relief bill known as the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), including approximately $100 million dollars for a grant program to serve rural areas without sufficient access to broadband internet.[6] In December 2020, Congress advanced the Consolidated Appropriations Act, 2021, establishing a $1 billion grant to support broadband connectivity on tribal land in the United States and a $300 million broadband deployment grant to promote broadband infrastructure in underserved areas.[7] In March 2021, Congress passed the American Rescue Plan Act of 2021, allocating $350 billion for eligible state and local governments to respond to COVID-19 and to fund various local needs including improvements to broadband infrastructure.[8] While the purpose of this legislation is not solely broadband deployment, the inclusion of funding for that purpose underscores how important reliable high-speed internet is in this country now more than ever.[9]

In the wake of the COVID-19 pandemic, and as the country moves closer to normalcy, Congress passed the $1 trillion dollar Infrastructure Investment and Jobs Act ("Infrastructure Bill") which

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3. McClain et al., *supra* note 1.

4. Alyson Klein, *Acting FCC Chair: The 'Homework Gap' Is an 'Especially Cruel' Reality During the Pandemic,* EDUC. WEEK (Mar. 10, 2021), https://www.edweek.org/technology/acting-fcc-chair-the-homework-gap-is-an-especially-cruel-reality-during-the-pandemic/2021/03.

5. *See* Kevin Taglang, *Show Us the Money: Federal Broadband Support During the COVID-19 Pandemic,* BENTON INST. FOR BROADBAND & SOC'Y (Apr. 23, 2021), https://www.benton.org/blog/show-us-money-federal-broadband-support-during-covid-19-pandemic [hereinafter *Show Us the Money*].

6. Coronavirus Aid, Relief, and Economic Security Act of 2020, H.R. 748, 116th Cong. (2020). The CARES Act also gave the FCC $200 million in funding to provide support to health care providers for telehealth during the COVID-19 pandemic. *Id.*

7. Consolidated Appropriations Act, 2021, H.R. 133, 116th Cong. (2020).

8. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9901, 135 Stat. 5, 223–26 (2021).

9. *See generally Show Us the Money*, *supra* note 5.

garnered bipartisan support.[10] In addition to the money allocated for broadband initiatives within the various COVID-19 relief bills mentioned above, a historic $65 billion of the $1 trillion was allocated for improving broadband infrastructure in the United States.[11] While the funding under this new legislation is aimed at bridging the digital divide following the pandemic, the administration and allocation of the funding has been assigned to the National Telecommunications and Information Administration ("NTIA"), rather than the Federal Communications Commission ("FCC"), which is the federal agency typically charged with that responsibility.[12] There are differing opinions within the communications industry about whether the NTIA or the FCC is better suited to handle the distribution of government funding based upon the framework employed by each agency.[13] Despite significant money spent toward bridging the digital divide over the years, the pandemic has made clear that there is still a need for reliable internet connection in this country.[14] With the current Infrastructure Bill, there is an opportunity for the FCC and the NTIA to implement an effective framework to ensure that the funding connects all Americans to speedy internet.

This Article explores the most substantial broadband initiative within the Infrastructure Bill and proposes that the FCC auction framework, rather than the NTIA grant process, would be more effective at administering the government funding. Part II provides a brief definition of broadband and spectrum then continues with a background of the FCC and the NTIA, along with their respective frameworks for administering governmental subsidies to promote and deploy broadband infrastructure.[15] The FCC has championed a reverse auction method, while the NTIA uses a bidding

10. Tony Romm, *Senate Approves Bipartisan, $1 Trillion Infrastructure Bill, Bringing Major Biden Goal One Step Closer,* WASH. POST (Aug. 10, 2021, 6:32 PM), https://www.washingtonpost.com/us-policy/2021/08/10/senate-infrastructure-bill-vote-biden/.

11. Infrastructure Investment and Jobs Act of 2021, H.R. 3684, 117th Cong. (2021).

12. Blair Levin, *Seven Steps the FCC Should Take on Broadband in Response to the Infrastructure Bill*, BROOKINGS INST. (Aug. 16, 2021), https://www.brookings.edu/blog/the-avenue/2021/08/16/seven-steps-the-fcc-should-take-on-broadband-in-response-to-the-infrastructure-bill/.

13. *See generally* Ziggy Rivkin-Fish, *Is the FCC's Reverse Auction Fatally Wounded or Just Bloodied?*, BENTON INST. FOR BROADBAND & SOC'Y (Apr. 29, 2021), https://www.benton.org/blog/fcc%E2%80%99s-reverse-auction-fatally-wounded-or-just-bloodied; Gregory L. Rosston & Scott Wallsten, *How Not to Waste $45 Billion in Broadband Subsidies*, HILL (Aug. 7, 2021, 9:30 AM), https://thehill.com/opinion/finance/566772-how-not-to-waste-45-billion-in-broadband-subsidies.

14. *See* T. Randolph Beard et al., *Bridging the Digital Divide: What Has Not Worked but What Just Might*, 56 PHX. CTR. POL'Y PAPER SERIES 3–4 (2020).

15. *See infra* Part I.

application and grant process to distribute the funds directly to state and local governments.[16] Further, Part II briefly considers the role and impact of politics at each federal organization.[17]

Part III analyzes successes and challenges of the methodologies by reviewing previous initiatives for broadband deployment implemented by the FCC and the NTIA.[18] Part III also argues that implementation of an auction framework traditionally employed by the FCC may be more effective for the Infrastructure Bill, as it is a well-established process that has proven to raise revenue and promote internet connectivity.[19]

Finally, Part IV introduces the main portion of the Infrastructure Bill that focuses on broadband infrastructure deployment—the Broadband Equity, Access, and Deployment Program ("BEAD Program").[20] With billions of dollars currently poised to help bridge the digital divide, Part IV considers whether the traditional grant process outlined in the legislation can successfully distribute the funds or whether certain changes should be made to avoid waste.

II. BROADBAND INTERNET AND THE ROLE OF FEDERAL AGENCIES

A. Broadband and Spectrum Defined

"Broadband" is generally defined as the transmission of wide bandwidth data over a high-speed internet connection, which can be accessed through a number of wired and wireless technologies including fiber optic networks, wireless signals, coaxial cables, digital subscriber line ("DSL"), and satellite.[21] In 2009, Congress charged the FCC with developing a national plan to ensure that all Americans have access to affordable broadband internet and to maximize the use of broadband for public purposes.[22] In response,

16. *See* Rivkin-Fish, *supra* note 13.
17. *See infra* Part I.
18. *See infra* Part II.
19. *Id.*
20. *See infra* Part III.
21. *Broadband,* VERIZON, https://www.verizon.com/info/definitions/broadband/ (last visited Oct. 14, 2021).
22. FED. COMMC'N COMM'N, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (2010) [hereinafter CONNECTING AMERICA]. The National Broadband plan requires the FCC to "include a detailed strategy for achieving affordability and maximizing use of broadband to advance 'consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, employee training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes.'" American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2)(D), 123 Stat. 115, 516 (2009) (Recovery Act).

the FCC released the National Broadband Plan in 2010, which now serves as a foundation for various broadband initiatives aimed at stimulating economic growth, supporting job creation, and boosting online capabilities in education, healthcare, and homeland security.[23] The National Broadband Plan sets forth a long-term goal of providing American homes with actual download speeds of at least 100 megabits per second and actual upload speeds of at least 50 megabits per second.[24] However, the FCC currently defines standard broadband as having notably slower download speeds of up to 25 megabits per second and upload speeds of up to 3 megabits per second.[25] In March 2021, four United States senators sent a bipartisan letter to the acting chairwoman of the FCC and the chairpersons of three other federal agencies urging the agencies to update federal broadband speed requirements to download and upload speeds of 100 megabits per second.[26] The senators cite to the COVID-19 pandemic as a major factor in an increased reliance on high-speed broadband internet in the United States.[27] In order for these federal agencies to reach their broadband goals of faster speeds and widespread service through infrastructure improvement, they must also consider one of the most critical factors underlying broadband policy: the use of spectrum.[28]

"Spectrum" refers to the invisible electromagnetic frequencies over which communications signals travel including wireless, radio, and television signals.[29] Depending on their wavelengths, portions of the electromagnetic spectrum are grouped into a range of "bands."[30] The full spectrum ranges from 3 Hz to 300 EHz; however, the spectrum range commonly used for wireless communications is between 20 KHz and 300 GHz.[31] This spectrum range encompasses many familiar uses including radio and communication signals, cellular phones, satellite television, and air traffic control.[32] For wireless communications use, there are three main categories of

23. *Id.*
24. *Id.*
25. Letter from Sens. Bennet, King, Portman, and Manchin to Sec'y Vilsack, Sec'y Raimondo, Acting Chairwoman Rosenworcel, and Dir. Deese (Mar. 4, 2021), https://www.bennet.senate.gov/public/_cache/files/c/7/c76028fb-488d-498e-8506-7d8a2dce3172/05DDC9148CC7F12A9F09235F77BB7A0D.bipartisan-broadband-speed-letter.pdf.
26. *Id.*
27. *Id.*
28. *See* CONNECTING AMERICA, *supra* note 22, at 9–10.
29. Riley Davis, *What is Spectrum? A Brief Explainer,* CTIA (June 5, 2018), https://www.ctia.org/news/what-is-spectrum-a-brief-explainer.
30. *Id.*
31. *Id.*
32. *Id.*

spectrum which each provide different coverage and capacity: low-band, mid-band, and high-band spectrum.[33]

Spectrum, especially within the low- and mid-bands, is a valuable yet finite resource.[34] When one user, like a government entity or a commercial mobile service provider, owns a license to use a specific band of spectrum, another user cannot use the same spectrum without causing interference.[35] New digital technology may allow multiple users to share the same spectrum; however, a federal administration policy on multiple users using the same spectrum must be developed before this may become a solution to the spectrum shortage.[36] In fact, the current Infrastructure Bill addresses this interference issue by allocating $50 million to the Department of Defense to conduct research and planning required to reallocate spectrum for shared federal and non-federal licensed users through an auction conducted by the FCC.[37] Regulatory oversight for the use of spectrum in the United States is divided between the FCC and the NTIA.[38] The FCC administers spectrum for non-federal, commercial use, while the NTIA administers spectrum for federal, non-commercial use.[39] The FCC and NTIA control the use of spectrum in the United States due to the scarcity of this valuable resource and the potential for harmful interference between users.[40] Spectrum

33. *Id.* Low-band spectrum (under 3 GHz) has primarily been used by the wireless industry to build high-speed wireless networks. *Id.* High-band spectrum (over 24 GHz) travels shorter distances compared to low-band spectrum but provides fast speeds and high capacity. *Id.* Mid-band spectrum (between 3 and 24 GHz) provides a mix of coverage and capacity between the two other bands. *Id.*

34. Jeffrey Reed et al., *The Role of New Technologies in Solving the Spectrum Shortage*, 104 PROC. IEEE 1163 (2016).

35. Tom Wheeler, *Is Spectrum Shortage a Thing of the Past?,* BROOKINGS INST. (Oct. 5, 2020), https://www.brookings.edu/blog/techtank/2020/10/05/is-spectrum-shortage-a-thing-of-the-past/.

36. *Id.*

37. *See* Bevin Fletcher, *What the Latest Infrastructure Bill Says About 3.1-3.45 GHz,* FIERCE WIRELESS (Aug. 2, 2021, 8:28 PM), https://www.fiercewireless.com/regulatory/what-latest-infrastructure-bill-says-about-3-1-3-45-ghz; Bevin Fletcher, *NTIA: 3.45-3.55 GHz 'Good Candidate' for Mid-Band Sharing*, FIERCE WIRELESS (July 9, 2020, 4:42 PM), https://www.fiercewireless.com/wireless/ntia-3-45-3-55-ghz-good-candidate-for-mid-band-sharing [hereinafter *Good Candidate*] (explaining that the Department of Defense occupies this coveted band mainly for radar systems).

38. *Radio Spectrum Allocation,* FED. COMMC'N COMM'N, https://www.fcc.gov/engineering-technology/policy-and-rules-division/general/radio-spectrum-allocation (last visited Oct. 15, 2021).

39. *Id.* Examples of non-Federal use are for state and local governments, commercial entities, private internal businesses, and other personal uses. *Id.* Examples of Federal use are for the United States Army, the Federal Aviation Administration, and the Federal Bureau of Investigation. *Id.*

40. Michael Selkirk, *Voluntary Incentive Auctions and the Benefits of Full Relinquishment*, 91 TEX. L. REV. 1561, 1563 (2013); *see also* CONNECTING AMERICA, *supra* note 22, at 78 (explaining that the federal government, on behalf of the American people and under the auspices of the FCC and NTIA, retains all property rights to spectrum).

license auctions have netted billions of dollars in revenue globally and continue to be the FCC's mechanism for administering spectrum licenses.[41] While spectrum availability is not the sole focus of the current legislation, it is a critical piece of the puzzle as substantial infrastructure investments are made.[42]

B. The Federal Communications Commission

The Federal Communications Commission ("FCC") is an independent regulatory agency of the United States government that is overseen by Congress.[43] As an independent agency, the FCC was created by the executive branch and acts as a regulatory and rulemaking body for the federal government.[44] While the FCC is within the executive branch, it is insulated from presidential control.[45] The FCC is "the primary authority for communications law, regulation[,] and technological innovation," which includes the promotion and investment in broadband services and facilities, encouragement of the best use of domestic and international spectrum, review of media regulations, and defense of the communications infrastructure in the United States.[46]

In 1993, Congress passed the Omnibus Budget Reconciliation Act giving the FCC permission to conduct competitive bidding auctions for use of spectrum.[47] Due to the limited amount of spectrum available for licensing, flexibility in its use is critical for technological advances and future broadband initiatives.[48] The FCC has found that the use of auctions has resulted in awards to users who will use the licenses most effectively and that there is financial benefit to the public in the quick timeline for license awards.[49] For example, in 2016, the FCC commenced an incentive auction to repurpose low-band spectrum for new uses such as wireless broadband.[50] The

41. Reed et al., *supra* note 34.

42. Jeff Quinn, *The Relationship of Spectrum and Infrastructure Investments in 5G Networking*, NORTHRIDGE GRP., https://www.northridgegroup.com/blog/the-relationship-of-spectrum-and-infrastructure-investments-in-5g-networking/ (last visited Oct. 14, 2021).

43. *What We Do,* FED. COMMC'N COMM'N, https://www.fcc.gov/about-fcc/what-we-do (last visited Oct. 14, 2021) [hereinafter *What We Do*].

44. *Branches of Government*, U.S. GOV., https://www.usa.gov/branches-of-government (last visited Oct. 14, 2021).

45. Marshall J. Breger & Gary J. Edles, INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS 6 (2015).

46. *See What We Do*, *supra* note 43.

47. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387–88 (1993).

48. *See* CONNECTING AMERICA, *supra* note 22, at 79.

49. *Id.* at 81.

50. *Broadcast Incentive Auction and Post-Auction Transition,* FED. COMMC'N COMM'N, https://www.fcc.gov/about-fcc/fcc-initiatives/incentive-auctions#block-menu-block-4#block-

auction process itself was comprised of two separate but interdependent processes: the reverse auction and the forward auction.[51] The reverse auction determined the lowest amount of money a broadcaster, or current licensee, would accept in exchange for relinquishment of its existing spectrum license.[52] Licensees voluntarily determined their selling price and submitted confidential bids to the FCC for review.[53] In the forward auction, the FCC accepted bids from current market participants, often broadband providers, for flexible licenses for the spectrum that was relinquished by the broadcasters.[54] The bids had to meet the reserve price as set by the FCC to ensure that the forward auction bids covered the costs incurred in the reverse auction to repurchase the spectrum licenses.[55] Any excess revenue beyond covering the costs from the reverse auction was shared with the United States Treasury.[56] The "repacking" process was critical to joining the two interdependent auctions.[57] "Repacking" allowed the FCC to determine what spectrum is available and at what cost following the reverse auction in order to maximize the continuity and flexible use of that spectrum by new licensees.[58] The FCC, as well as other international government agencies, continue to utilize forms of a reverse auction to administer the use of spectrum, to deploy infrastructure build-outs, and to fund other broadband initiatives for the benefit of the public.[59]

C. The National Telecommunications and Information Administration

The National Telecommunications and Information Administration ("NTIA") is an executive branch agency located within the

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menu-block-4 (last visited Oct. 14, 2021) [hereinafter *Broadcast Incentive]*. In Auction 1001 (reverse auction) broadcasters relinquished broadcast spectrum usage rights and in Auction 1002 (forward auction) the FCC granted new 600 MHz band flexible-use licenses to new licensees. *Id.*

51. *How it Works: The Incentive Auction Explained*, FED. COMMC'N COMM'N, https://www.fcc.gov/about-fcc/fcc-initiatives/incentive-auctions/how-it-works (last visited Oct. 14, 2021) [hereinafter *How it Works*].

52. Selkirk, *supra* note 40, at 1573.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Broadcast Incentive*, *supra* note 50. The incentive auction yielded $19.8 billion in revenue with more than $7 billion deposited to the U.S. Treasury for deficit reduction. *Id.*

57. *How it Works*, *supra* note 51.

58. Selkirk, *supra* note 40, at 1573. "Repacking involves reorganizing and assigning channels to the remaining broadcast television stations in order to create contiguous blocks of cleared spectrum suitable for flexible use." *Id.*

59. Reed et al., *supra* note 34; *Auctions Summary*, FED. COMMC'N COMM'N, https://www.fcc.gov/auctions-summary (last visited Nov. 29, 2021).

Department of Commerce.[60] The Department of Commerce is one of the main agencies of the federal government and is led by members of the president's cabinet.[61] The NTIA is comprised of a number of offices that report to the Office of the Assistant Secretary including the Office of Spectrum Management and the Office of Internet Connectivity and Growth.[62] The agency is responsible for advising the president on telecommunications and information policy considerations.[63] It largely focuses on policies that manage federal use of spectrum and identification of additional spectrum for commercial use, and that manage grant programs for broadband access and digital inclusion.[64] The NTIA administers grant programs that further the deployment and use of broadband across the country.[65] In compliance with the Department of Commerce Grants and Cooperative Agreements Manual, the NTIA must conduct merit-based application reviews for awards of discretionary funds whenever possible.[66] Each program administered by the NTIA utilizes a Notice of Funding Opportunity ("NOFO")—sometimes called Notice of Funds Availability ("NOFA")—which details the specific criteria for applicants to the respective program.[67] As an example, the NTIA recently released a NOFO for grant awards authorized by the Consolidated Appropriations Act, 2021, for the deployment of broadband infrastructure.[68] The NOFO for this particular program provides an overview of the broadband initiative, applicable definitions, funding availability, eligibility information, and application information.[69] The criteria for eligible applicants is reviewed by "Merit Reviewers" using a point system to select awardees from the pool of applications.[70] At least two objective "Merit Reviewers" who have demonstrated expertise in the "programmatic aspects" of the program, and who may be either federal or non-federal employees,

60. *About NTIA*, NAT'L TELECOMM. & INFO. ADMIN., https://www.ntia.doc.gov/about (last visited Nov. 29, 2021) (hereinafter *About NTIA*).

61. U.S. GOV'T, *supra* note 44.

62. *See About Nita*, *supra* note 60; *Office of Internet Connectivity and Growth*, NAT'L TELECOMM. AND INFO. ADMIN., https://www.ntia.doc.gov/office/OICG (last visited Nov. 29, 2021).

63. *About Nita*, *supra* note 60.

64. *Id.*; *Spectrum Management*, NAT'L TELECOMM. & INFO. ADMIN., https://www.ntia.doc.gov/category/spectrum-management (last visited Nov. 29, 2021).

65. *Grants*, NAT'L TELECOMM. & INFO. ADMIN., https://www.ntia.doc.gov/category/grants (last visited Nov. 29, 2021).

66. NAT'L TELECOMM. & INFO. ADMIN., DEPT. OF COM., NTIA GRANT PROGRAM MERIT REVIEWERS FREQUENTLY ASKED QUESTIONS 1 (2021).

67. *Id.*

68. *See generally* NAT'L TELECOMM. & INFO. ADMIN., DEPT. OF COM., NOTICE OF FUNDING OPPORTUNITY, BROADBAND INFRASTRUCTURE PROGRAM, EXECUTIVE SUMMARY (2021).

69. *Id.* at 3.

70. *Id.* at 29.

evaluate the applications.[71] Finally, the NOFO provides an anticipated timeline for award decisions as well as reporting requirements for each recipient to follow once they receive the award.[72] It follows that the NTIA will implement a similar process for the Infrastructure Bill and release a NOFO for the funding in the coming year.

D. Politics at the FCC and NTIA

Bringing high-speed, reliable internet to all Americans is not a political issue. But the way the government administers and funds broadband initiatives is a topic for political debate.[73] The leaders of the FCC and NTIA may change depending on both the political party in the White House and the majority in Congress, which inevitably injects politics into policy. At the head of the FCC, there are five commissioners—one of which serves as chairperson—all appointed by the president and confirmed by the United States Senate.[74] At any given time, there may be at most three commissioners of the same political party.[75] Democrat Jessica Rosenworcel, appointed as interim chair by President Joe Biden following his inauguration, was recently confirmed to another five-year term by the Senate, avoiding a majority vote for the Republicans upon expiration of her term at the end of 2021.[76] Prior to this appointment, the Democratic Party was concerned about the lack of nominations and long delay from the Biden administration and the implications the delay may have on the broadband expansion proposed in the Infrastructure Bill.[77] The confirmation of Rosenworcel resulted in an even 2-2 political split in commissioners; the confirmation vote of President Biden's nominee to fill the final vacancy, Gigi Sohn, is on hold due to Republican opposition to the nomination.[78] Although it

71. *Id.* at 32.
72. *Id.* at 36.
73. *See generally* Fish & Rosston, *supra* note 13.
74. *What We Do*, *supra* note 43.
75. *Id.*
76. Lauren Feiner, *Senate Confirms FCC Chair Rosenworcel to Another Term, Narrowly Avoiding a Republican Majority,* CNBC (Dec. 7, 2021, 2:34 PM), https://www.cnbc.com/2021/12/07/senate-confirms-fcc-chair-rosenworcel-to-another-term.html.
77. *See generally* Brian Naylor, *Biden Hasn't Named Picks for Posts to the FCC, and That's Frustrating Democrats*, NPR (Sept. 29, 2021, 4:08 PM), https://www.npr.org/2021/09/29/1041490468/biden-fcc-nomination-senate-democrats-republicans; Tara Lachapelle, *FCC Vacancies Stunt Biden's Internet Ambitions,* WASH. POST (Sept. 30, 2021, 2:53 PM), https://www.washingtonpost.com/business/fcc-vacancies-stunt-bidens-internet-ambitions/2021/09/30/5637dcc4-21f3-11ec-a8d9-0827a2a4b915_story.html.
78. *See generally* Editorial Board, *Gigi Sohn's Strange Bedfellows*, WALL. ST. J. (Dec. 6, 2021, 6:57 PM), https://www.wsj.com/articles/gigi-sohns-strange-bedfellows-newsmax-media-oan-fox-confirmation-censorship-net-neutraility-11638722334; Matthew Whitacker,

is an independent agency, the FCC is no stranger to political polarization.[79] A prime example of the impact politics may have on an independent agency is the net-neutrality debate at the FCC.[80] In 2005, under a Republican administration, the FCC made a determination on how internet services should be classified which, in turn, impacted how the services were regulated.[81] The United States Supreme Court upheld this determination, but it was later changed by the FCC in 2015 under a Democratic administration, then reverted back again by the FCC in 2017 under a Republican administration.[82] Although independent agencies, like the FCC, should be free from political influence, the ever-changing politics of the president and Congress may affect them nonetheless.[83]

As the NTIA is a part of the Department of Commerce and run by members of the presidential cabinet, it is no surprise that there may be political influence in how the agency operates. Despite the president's ability to nominate a leader, the NTIA has not had a politically-appointed and Senate-confirmed leader since May 2019; rather, it has had only interim appointees.[84] Along with President Biden's nominations at the FCC, Alan Davidson was nominated by the President to lead the NTIA and is pending Senate confirmation.[85] Davidson will be tasked with the important distribution of

Hyperpartisan Gigi Sohn Doesn't Belong at the FCC, WALL ST. J. (Nov. 20, 2021, 6:24 PM), https://www.wsj.com/articles/hyperpartisan-gigi-sohn-doesnt-belong-at-the-fcc-politicization-tweets-11638309404?mod=Searchresults_pos1&page=1.

79. Brendan Sasso & National Journal, *The Increasing Politicization of the FCC* (Feb. 26, 2015), https://www.theatlantic.com/politics/archive/2015/02/the-increasing-politicization-of-the-fcc/456579/. Democratic and Republican commissioners disagree on the Democratic majority approval of net neutrality regulations and striking of two state laws regarding internet service. *Id.*

80. Randolph J. May, *Chevron and Net Neutrality at the FCC,* REGUL. REV. (Feb. 14, 2018), https://www.theregreview.org/2018/02/14/may-chevron-net-neutrality-fcc/.

81. *Id.*

82. *Id.* The United States Supreme Court upheld the FCC's determination of internet access services as "information services" in *National Cable & Telecommunications Association v. Brand X Internet Services* primarily due to the *Chevron* deference which compels courts to defer to independent agency actions so long as they are reasonable. *Id.* (citing *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)). The FCC reversed its determination in 2015 and it was subsequently affirmed in *United States Telecom Association v. FCC* relying again on the *Chevron* deference. *Id.* (citing *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 825 F.3d 674 (D.C. Cir. 2016). The FCC reverted back to its original position on the classification of internet services again in 2017. *Id.* This back-and-forth shows how politics impact policy and the heavy reliance upon the *Chevron* deference in decisions made by independent agencies. *Id.*

83. *See* Paul Stephan, *Are Independent Agencies Really Independent?* REGUL. REV. (Dec. 14, 2016), https://www.theregreview.org/2016/12/14/stephan-independent-agencies-really-independent/.

84. *See* Linda Hardesty, *Alan Davison, an Unknown in Telecom, Could Become Extremely Influential,* FIERCE WIRELESS (Nov. 16, 2021, 11:35 AM), https://www.fiercewireless.com/wireless/alan-davidson-unknown-telecom-could-become-extremely-influential.

85. *Id.*

the $42 billion in infrastructure funds for broadband deployment under the BEAD Program—the most significant allocation in NTIA history.[86] The distribution of this historic funding will require scaling of internal NTIA resources and increasing staff so that the agency is able to properly assist the state governments in spending the broadband dollars.[87] Additionally, Davidson, as head of the NTIA, may be drawn into an ongoing debate with the Federal Aviation Administration ("FAA"), which claims that commercial use of "C-band" spectrum may interfere with aviation safety.[88] It is interesting to note that FCC auction for the "C-band" spectrum currently at issue with the FAA generated more than $81 billion in revenue, $67 billion of which is marked as a "pay-for" for the broadband funding under the Infrastructure Bill.[89] Davidson may be placed in the position of resolving a spectrum dispute involving an important federal agency, the FAA, and use of an historic amount of revenue born from an auction of that same spectrum.

III. ANALYSIS OF THE METHODOLOGIES: FCC AUCTIONS VS. NTIA GRANTS

A. Revenue Through Competitive Bidding

The FCC employs an auction framework for the use of spectrum licenses which yields significant revenue for the Department of Treasury. Indeed, a significant portion of the broadband funding under the Infrastructure Bill is due to the success of an FCC spectrum auction.[90] It follows that an auction should also be used for broadband infrastructure deployment initiatives to obtain the maximum benefit from subsidy dollars. In the infrastructure context, the reverse auction identifies the lowest amount of money that a broadband provider would accept in exchange for providing the network service or completing the infrastructure build-out project.[91] The buyer, in this case either the FCC or NTIA, could specify its broadband objective through public notice with the project details,

86. *Id.*

87. Issie Lapowsky, *5 Things to Know About NTIA Nominee Alan Davidson*, PROTOCOL (Dec. 1, 2021), https://www.protocol.com/policy/alan-davidson-ntia.

88. Hardesty, *supra* note 84; *see also* Drew Fitzgerald et al., *Fight over 5G and Aviation Safety Clouds Big Investments by AT&T, Verizon*, WALL ST. J., (Nov. 14, 2021), https://www.wsj.com/articles/fight-over-5g-and-aviation-safety-clouds-big-outlays-made-by-at-t-verizon-11636894800.

89. *Good Candidate*, *supra* note 37. Revenue from the "C-band" spectrum auction is set to fund portions of the Infrastructure Bill. *Id.*

90. *Id.*

91. Letter from Jonathan B. Baker, et al., to the Nat'l Telecomm. Info. Agency & Rural Util. Serv. (Apr. 13, 2009), https://works.bepress.com/jonathan_baker/95/.

and request that providers submit bids to meet that objective.[92] This allows the federal agency to establish the parameters of the project and ensure that its goals are being met within or under budget. An auction does not require the government to unilaterally determine the amount of money needed to complete the particular infrastructure project as the providers estimate their own costs of completion and submit competitive bids.[93] By granting the lowest amount of subsidy funds required to complete the broadband objective, the government is avoiding waste and freeing up funds for additional projects.[94]

For example, the most recent FCC auction was the Rural Digital Opportunity Fund ("RDOF") in October of 2020 as the agency's next step in bridging the digital divide through efficient deployment of broadband networks in rural America.[95] The Phase I auction, with allocated funding of $16 billion, targeted homes and businesses in census blocks that are wholly unserved by broadband internet.[96] The auction resulted in significant savings as the bidding to deploy high-speed broadband to almost 99% of the locations available in the auction yielded an allocation of $9.2 billion out of the $16 billion set aside for Phase I.[97] The savings of $6.8 billion in support for Phase I that was not allocated in the auction will be rolled over to the future Phase II auction, which now has a budget of $11.2 billion.[98] The RDOF Phase II reverse auction, originally budgeted with only $4.4 billion, is poised to target partially-served census blocks and any unserved areas remaining from Phase I, but it has yet to be scheduled.[99]

While the FCC may specifically allocate some excess revenue to additional projects like those under RDOF, it sends most of the excess revenue following an auction to the Treasury for deficit reduction.[100] However, it may be more advantageous to redirect the revenue toward other broadband initiatives rather than attempting to drive down the deficit. The FCC has estimated that fiber and/or

92. *Id.*
93. *Id.* at 4.
94. *Id.*
95. *Implementing the Rural Digital Opportunity Fund (RDOF) Auction,* FED. COMMC'N COMM'N, https://www.fcc.gov/implementing-rural-digital-opportunity-fund-rdof-auction (last visited Nov. 29, 2021) [hereinafter *Implementing RDOF*].
96. *Id.*
97. Press Release, Federal Communications Commission, Successful Rural Digital Opportunity Fund Auction to Expand Broadband to Over 10 Million Rural Americans (Dec. 7, 2020) [hereinafter FCC Press Release] (on file with author).
98. *Id.*
99. *Implementing RDOF*, *supra* note 95.
100. *Broadcast Incentive*, *supra* note 50.

cable connectivity to the entire country would cost approximately $80 billion.[101] While this number may vary in actuality, allocating the excess revenue realized from reverse auctions back to broadband initiatives rather than the Federal deficit would likely make a substantial impact in the bipartisan goal of connecting the entire country with high-speed, affordable broadband internet access.[102]

Aside from the availability gap in infrastructure networks, another issue in bridging the digital divide is an adoption gap, meaning that people in certain locations where there is broadband access choose not to adopt it, mainly due to affordability.[103] Federal programs addressing this issue, like the Lifeline Assistance Program and the Universal Service Fund, have been criticized for insufficient administration and subsidization.[104] The significant revenue derived from an auction could be redirected to subsidize affordable broadband connectivity in households that are unable to pay for the service.[105] Even a portion of the millions of dollars raised from an auction could make a substantial impact on both the availability and affordability gaps.[106] There is great value to be had through an auction framework, perhaps most importantly the revenue generated and cost savings through competitive bidding.

B. Achieving Federal Broadband Objectives And Focusing on the Future

The main objective of the federal broadband funding is to bring high-speed internet to all Americans, especially those in rural and underserved communities, through infrastructure deployment. As such, this goal should remain the focus through administration of the funds. The auction framework has shown that it is generally more efficient at extending broadband than systems that may only

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101. Hal Singer, *The Do's and Don'ts of Bringing Broadband to Unserved and Underserved America,* FORBES (Jul. 3, 2020, 7:17 AM), https://www.forbes.com/sites/washingtonbytes/2020/07/03/the-dos-and-donts-of-bringing-broadband-to-unserved-and-underserved-america/?sh=3c1f90463b96 (citing to 2017 data from the FCC).

102. *See generally* Mark Lowenstein, *Do Something Useful with Spectrum Auction Proceeds*, FIERCE WIRELESS (Feb. 11, 2021, 4:40 PM), https://www.fiercewireless.com/regulatory/do-something-useful-spectrum-auction-proceeds-lowenstein; *Deficit Tracker*, BIPARTISAN POL'Y CTR. (July 22, 2022), https://bipartisanpolicy.org/report/deficit-tracker/. The federal government ran a deficit of $2.8 trillion in fiscal year 2021. *Id.*

103. Blair Levin, *Trump's FCC Failed on Broadband Access. Now, Biden's FCC Has to Clean Up the Mess*, BROOKINGS INST. (Feb. 2, 2021), https://www.brookings.edu/blog/the-avenue/2021/02/02/trumps-fcc-failed-on-broadband-access-now-bidens-fcc-has-to-clean-up-the-mess/.

104. *See id.*; Lowenstein, *supra* note 102.

105. Lowenstein, *supra* note 102.

106. *Id.*

provide support to local providers.[107] For instance, the two-phase auction framework for RDOF was built upon the success of an earlier FCC auction—the Connect America Fund II ("CAF II")—which helped to deploy voice and broadband service in high-cost areas.[108] Analysis of the CAF II auction shows that, through competitive bidding, a wide variety of service providers are willing to provide broadband service in high-cost rural areas and would do so at significantly higher broadband speeds than that required of existing local carriers.[109] The winning bidders of the CAF II auction were new providers bringing new technologies to the markets in the auction.[110] Similarly, one of the significant results of the RDOF auction is that over 400 non-traditional entities pursued support to build out rural broadband networks.[111] This indicates that the auction framework is successful at bringing more broadband at faster speeds to more locations as they attract new or non-traditional service providers to compete in different market locations.[112]

This framework also ensures that the government objective remains at the forefront as the government agency sets forth project specifics in advance of the auction, thereby alleviating a lengthy review process to determine the "most worthy" project.[113] The RDOF auction allowed the FCC to choose from multiple broadband service providers to find the lowest government subsidy needed to build out the infrastructure network.[114] In designing the auction, the FCC sought to support development of broadband networks by accepting bids in different performance tiers giving preference to bidders that offer higher speeds, greater usage allowances, and lower latency—all of which are desirable attributes.[115] The bidding system took each of these factors into account and weighted each differently as the bidders competed for support in the same areas.[116] This was

107. Joseph Gillan, *Lessons from the CAF II Auction and the Implications for Rural Broadband Deployment and the IP Transition*, NRRI INSIGHTS, 1, 2 (Apr. 2019), https://pubs.naruc.org/pub/9F958420-E885-F843-1AEC-4D290DC9A28E.

108. *Connect America Fund Phase II Auction (Auction 903),* FED. COMMC'N COMM'N, https://www.fcc.gov/auction/903 (last visited Nov. 29, 2021).

109. Gillan, *supra* note 107, at 4.

110. *Id.* at 5.

111. Jon Wilkins, *Seizing the Moment: Scaling Up State Broadband Strategies*, QUADRA PARTNERS LLC 1, 14 (July 2021), https://7ddd15de-336c-4505-ba73-97d9a7d50f89.filesusr.com/ugd/259809_ec79b13584af41448a532b8f97fb487b.pdf.

112. Gillan, *supra* note 107, at 6.

113. Baker, *supra* note 91, at 7–8.

114. Kevin Taglang, *What is the Rural Digital Opportunity Fund?*, BENTON INST. FOR BROADBAND & SOC'Y (Feb. 14, 2020), https://www.benton.org/blog/what-rural-digital-opportunity-fund [hereinafter *What is RDOF?*].

115. *Id.* The bidders committed to different performance levels based on speed, usage allowance, and latency, and the bids were weighted using the FCC prescribed point system. *Id.*

116. *Id.*

done to ensure that broadband network build-outs are not only capable of service supporting current needs, such as minimum speeds required for interactive videoconferencing, but also for future technological advancements.[117] According to the FCC, 99.7% of the locations in the RDOF auction will receive broadband with download speeds of at least 100 megabits per second and upload speeds of at least 20 megabits with a majority of the bids, over 85%, to receive gigabit-speed.[118] Future infrastructure build-outs, like those to be completed following the RDOF auction or those supported directly by states through the traditional grant process, should be scalable and future-proof to ensure that the network service remains robust enough to support usage over the years.[119]

C. Lessons Learned from BTOP

Looking at the traditional grant process, there are a number of lessons to be learned from the last NTIA broadband initiative that further support the use of an auction framework. In 2009, the United States government passed the American Recovery and Reinvestment Act ("ARRA") to make appropriations for "job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization . . . ."[120] Among its various initiatives, the ARRA set forth the Broadband Technology Opportunities Program ("BTOP"), which appropriated approximately $4.7 billion dollars to the NTIA to implement long-term broadband infrastructure goals.[121] A recent study reviewed the NTIA's allocation of the BTOP funds and compared the outcomes with those that a reverse auction would have yielded.[122] The study ran an analysis on the expected costs from the projects selected under the BTOP grant review process against the projects that could have been selected with a reverse auction.[123] Empirical data about the grant proposals and the simulated auction was collected from public sources to run the analysis.[124] The simulation results showed that, if the NTIA had utilized a reverse auction in BTOP, there may have been a yield of nearly twice as many

117. *Id.*
118. FCC Press Release, *supra* note 97.
119. *See generally What is RDOF*?, *supra* note 114; Wilkins, *supra* note 111.
120. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).
121. *Id.*
122. Sarah Oh, *Using Reverse Auctions to Stretch Broadband Subsidy Dollars: Lessons from the Recovery Act of 2009*, TECHNOLOGY POL'Y INST., Jan. 2021, at 4.
123. *Id.*
124. *Id.* at 9–10.

buildings with broadband connectivity for the same total budget.[125] Further, the study showed that the traditional grant review process only slightly outperformed a random lottery framework for the project selection.[126] These results seem to suggest that, without a well-defined formula, the time and resources spent in a grant review process could be saved, and projects could be selected at random yielding results somewhat similar to the BTOP process.

The study assessed the recommendations referenced in a letter written by concerned economists in support of the reverse auction framework prior to the BTOP distribution.[127] In April of the same year, a group of seventy-one economists sent a letter to the NTIA encouraging the agency to adopt the use of auctions to allocate broadband funds that were part of the ARRA.[128] The letter cites to a number of propositions, similar to those outlined above, addressing why the auction framework is more advantageous than the traditional grant process.[129] Despite the plea, the NTIA awarded the BTOP funds using the traditional grant review process.[130] Although this letter was written twelve years ago, the message could still apply today in anticipation of the NTIA administration of federal funding under the BEAD Program. Specifically, the economists explained why auctions are a more efficient and consistent means to allocate government funds as opposed to a traditional grant review process.[131] They cited to three general problems with using the standard NTIA approach.[132]

First, the traditional grant review process is time-consuming because it requires the state and local governments to create and submit complex proposals for broadband projects that the NTIA must then expend time reviewing prior to awarding the funds.[133] Timely applications for the grant funds were required to show a number of

125. *Id.* at 11–13. Charts showing the results from the BTOP grant review as compared to the projected numbers of a simulated reverse auction. *Id.*

126. *Id.* at 15. "The grant review process performed only somewhat better than a lottery would have, connecting 30,000 more buildings than a random selection of projects. The simulation suggests that a lottery could have connected 182,282 with an average cost-per-building of $18,652, compared to 211,617 buildings at average cost-per-building of $16,067 for the grant review process." *Id.*

127. *Id.* at 8–9.

128. *See* Baker, supra note 91.

129. *Id.*

130. Oh, *supra* note 122, at 5.

131. *Id.* at 8–9.

132. Baker, *supra* note 91.

133. *Id.*; *see also* TODD J. ZINSER, U.S. DEP'T OF COM., OFF. OF INSPECTOR GEN., FINAL REPORT NO. ARR-19842-1, NTIA MUST CONTINUE TO IMPROVE ITS PROGRAM MANAGEMENT AND PRE-AWARD PROCESS FOR ITS BROADBAND GRANT PROGRAM (2010). The NTIA experienced significant delays in the grant process in the administration of the ARRA funds. *Id.*

factors prior to selection including: (i) whether the funding would go toward eligible expenses, (ii) proof of funding match or waiver of the same, and (iii) evidence that the project could move forward without the federal funding.[134] Criteria including the project's public benefit, viability, sustainability, timeliness, and other factors were used in evaluating the grants.[135] These factors and criteria are all important in the selection of applications; however, due to staffing issues only a small number of volunteer reviewers read through thousands of applications with some trouble due to the NTIA's unfamiliarity with a grant program of BTOP's size and complexity.[136] The application review process is only the first step in the process and it is to award the funding to the state government. Once the funding is awarded, there is an additional step for the states of determining which providers are able to complete the broadband project.

Second, the qualitative nature of the numerous applications makes it challenging to compare projects and leads to inconsistent award results.[137] As an example, it would be difficult to choose between "a fiber project in Texas and a wireless project in North Dakota."[138] It is not clear that there were objective metrics for comparing grant applications.[139] Although there was likely some guidelines for scoring and comparing grants, they were not made public.[140] Given the large number of applications and the limited number of volunteer reviewers, it is not surprising that inconsistent or arbitrary decisions may result.[141]

Lastly, it is difficult to determine the minimum amount of grant funds that are necessary to complete the project as outlined in the application.[142] Either the NTIA must determine the appropriate amount of funding for the project, which would require more review time and resources, or the NTIA would rely on the estimate submitted by the applicant who has little incentive to request the minimum amount required for the project.[143] While allocating funds through the grant process may put dollars in the hands of the state

134. Gregory L. Rosston & Scott J. Wallsten, *Symposium: Competition & Innovation in the Broadband Age: The Broadband Stimulus: A Rural Boondoggle and Missed Opportunity*, 9 I/S 453, 462.
135. *Id.* at 462–63.
136. Oh, *supra* note 122, at 5.
137. Baker, *supra* note 91, at 6.
138. *Id.*
139. Rosston, *supra* note 134, at 465.
140. *Id.* at 465–66.
141. Baker, *supra* note 91, at 6.
142. *Id.*
143. *Id.*

governments with knowledge and understanding of their area's broadband needs and challenges, the state's existing grant programs for administration of the funding may not easily scale to accommodate the much higher funding level available under the Infrastructure Bill.[144] In addition to the study outlined above, other models run by economists found that the BTOP grant awards did not significantly increase broadband adoption.[145] Notwithstanding these challenges of the grant review process, there is something to be said for states and local governments having the ability to submit proposals for funding awards. As of 2021, forty-eight states, the District of Columbia, and Puerto Rico, all had pending legislation to address broadband issues including infrastructure concerns and lack of internet in rural and underserved communities.[146] If properly allocated, the states could use the broadband funding under the Infrastructure Bill to help implement initiatives within their proposed legislative bills that are directly aimed at serving their citizens.

D. Auction Challenges and Potential Solutions

Although the auction framework has many benefits, it is not without challenges. Following the success of the Phase I RDOF auction, there are some that doubt whether the winning bidders will be able to deliver on their commitments to begin building out the broadband infrastructure.[147] To illustrate, the FCC recently denied the request of LTD Broadband, a winning bidder of $311 million in support from in the RDOF auction, for more time to prove its funding eligibility which calls into question the providers' ability to meet their obligations.[148] According to the FCC, there are a number of defaulting bidders who may be subject to forfeiture of the RDOF funds.[149] This potential shortfall in a reverse auction framework

144. Wilkins, *supra* note 111, at 21.

145. *See* Beard, *supra* note 14; Janice A. Hauge & James E. Prieger, *Evaluating the Impact of the American Recovery and Reinvestment Act's BTOP Program on Broadband Adoption* (Apr. 8, 2015), https://ssrn.com/abstract=2591771.

146. *See* Heather Morton, *Broadband 2021 Legislation*, National Conference of State Legislatures (Jan. 7, 2022) https://www.ncsl.org/research/telecommunications-and-information-technology/broadband-2021-legislation.aspx.

147. *See* Ziggy Rivkin-Fish, *FCC's Rural Digital Opportunity Fund Auction Was Supposed to Significantly Reduce America's Rural Broadband Gap*, BENTON INST. FOR BROADBAND & SOC'Y (Dec. 21, 2021), https://www.benton.org/blog/fccs-rural-digital-opportunity-fund-auction-was-supposed-significantly-reduce-americas-rural; Levin, *supra* note 103.

148. Diana Goovaerts, *LTD Broadband Dealt Blow as FCC Prepares to Issue $311M in RDOF Funds*, FIERCE TELECOM (July 26, 2021, 3:47 PM), https://www.fiercetelecom.com/regulatory/ltd-broadband-dealt-blow-as-fcc-prepares-to-issue-311m-rdof-funds.

149. *Id.*

could be addressed through measures that ensure bidder accountability.[150] If a bidder is unable to complete the objective or provide the promised service, implementation of a penalty could protect the government's investment and incentivize providers to adhere to their timeline.[151] Further, members of Congress have encouraged the FCC to ensure proper due diligence is completed by redoubling its efforts to review the long-form applications of the RDOF bidders.[152] Validation that each bidder has the "technical, financial, managerial, operational skills, capabilities, and resources to deliver the services" is a valuable step in ensuring that they can honor their pledge to supply broadband internet.[153] The members of Congress also strongly encouraged the FCC to make as public as possible the status of the long-form application review process in order to remain transparent and accountable as the program moves forward.[154]

Another potential issue under the auction framework is the lack of robust coverage maps showing which locations in the country have the greatest need for broadband service. As the funding for the RDOF auction is set to be distributed, the Competitive Carriers Association ("CCA") advised the FCC that the funding may be allocated to locations where broadband coverage is not actually needed or where there is partial coverage due to faulty maps.[155] In an effort to avoid redundancy and waste, the FCC has placed winning bidders on notice of their obligation to ensure that broadband coverage should be built where it is needed and encouraged waiver of support in locations that have existing coverage.[156] The mapping process is not perfect and in the real world, there may be unserved and served locations intermingled in the same geographic area thus contributing to this issue.[157] Comprehensive and accurate knowledge of coverage areas can be achieved through analysis and thorough mapping.[158] As set forth in the Infrastructure Bill, the FCC is charged with completing a mapping process to determine where

150. *Id.*; Rosston, *supra* note 13.
151. *Id.*
152. Bicameral Letter from the Congress of the United States to FCC Chairman Ajit Pai (Jan. 19, 2021), https://www.ntca.org/sites/default/files/documents/2021-01/Bicameral%20Letter%20on%20RDOF%20(Clyburn%2C%20Walberg%2C%20Klobuchar%2C%20Thune).pdf.
153. *Id.*
154. *Id.*
155. Diana Goovaerts, *CCA Warns Up to $1B in RDOF Funds Could be Wasted*, FIERCE TELECOM (May 6, 2001), https://www.fiercetelecom.com/financial/cca-warns-up-to-1b-rdof-funds-could-be-wasted#.
156. Goovaerts, *supra* note 148.
157. Wilkins, *supra* note 111, at 27.
158. Rosston, *supra* note 13.

broadband infrastructure exists and the areas in need of connectivity.[159] Prior to the commencement of the RDOF Phase II auction, the FCC should ensure that it utilizes an updated and comprehensive coverage map to avoid waste.[160] Future auctions designed for the purpose of connecting unserved and underserved areas with broadband service would benefit from an updated and accurate map of existing infrastructure.[161] Indeed, the NTIA would likewise benefit from such an updated map which would provide valuable data for project selection under the traditional grant review process.

IV. SUCCESS UNDER THE CURRENT LEGISLATION

A. Memorandum of Understanding

On June 25, 2021, the FCC, the NTIA, and the United States Department of Agriculture ("USDA") announced an interagency agreement "to share information and coordinate the distribution of Federal broadband deployment funds" as set forth in the Consolidated Appropriations Act, 2021.[162] The interagency agreement follows the historic allocation of Federal funding for broadband deployment in response to the COVID-19 pandemic.[163] The agreement generally provides that the agencies will cooperate with each other as they move forward with implementation of their respective broadband initiatives.[164] Notably, the agreement requires that (i) the agencies share information with each other about existing or planned projects that involve funding for new broadband deployment; (ii) upon request from one agency, another agency must share information regarding the broadband project area including existing broadband entity information, level and speed of existing broadband service, geographic scope of the broadband service, and future broadband entity information; and (iii) the agencies shall consider the distribution of funds for broadband deployment on standardized

159. Levin, *supra* note 12.

160. *Id.*

161. *Id.*; s*ee also* Press Release, U.S. Senate Committee on Commerce, Science, & Transportation, Bill to Improve Broadband Data Maps Signed Into Law (Mar. 23, 2020) (on file with author).

162. Press Release, FCC, NTIA and USDA Announce Interagency Agreement to Coordinate Broadband Funding Deployment (June 25, 2021) (on file with author).

163. *Id.* "The last fifteen months demonstrated like never before that broadband is no longer a luxury, but a necessity. Congress rightfully funded broadband deployment at levels we've seldom seen in recent years in response to the pandemic." *Id.*

164. Interagency Agreement from the Fed. Commc'n Comm'n, U.S. Dep't of Agric., and the Nat'l Telecomm. and Info. Admin. of the U.S. Dep't of Com. (June 25, 2021) (on file with author).

data regarding broadband coverage.[165] While this agreement is a positive step toward coordination between the agencies for broadband deployment, it stops short of requiring consistency between the agencies on the framework for the administration and distribution of federal broadband funding.[166]

Collaboration between the agencies is important as many of their objectives and goals overlap. For example, the United States Government Accountability Office ("GAO") issued a report recommending that the FCC and NTIA update and clarify their processes related to spectrum management.[167] The GAO recommends that the agencies coordinate better to resolve matters related to interference among proposed uses of spectrum.[168] It would not be unreasonable for the FCC and NTIA to implement a similar agreement for the administration of broadband funding and infrastructure deployment. With the substantial amount of federal funds available for broadband initiatives due to the COVID-19 pandemic, there is an opportunity for the FCC and NTIA to work together to come up with a consistent framework that avoids waste and promotes broadband connectivity.[169]

B. The Infrastructure Investment and Jobs Act

In August 2021, the United States Senate passed the $1 trillion-dollar Infrastructure Bill to "authorize funds for Federal-aid highways, highway safety programs, and transit programs, and for other purposes."[170] In November 2021, the United States House of Representatives passed the Infrastructure Bill with a bipartisan vote of 228-206, and President Biden quickly signed it into law thereafter.[171] The Infrastructure Bill provides $65 billion dollars in Federal funding for broadband internet initiatives.[172] Of the $65

165. *Id.*

166. *Id.*

167. U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-105319, SPECTRUM MANAGEMENT: AGENCIES SHOULD STRENGTHEN COLLABORATIVE MECHANISMS AND PROCESSES TO ADDRESS POTENTIAL INTERFERENCE (2021).

168. *Id.*

169. With the amount of available funding through the Infrastructure Bill, there is a real opportunity to bring internet connectivity to the entire country. The idea is that the two federal agencies can work in tandem and learn from the respective frameworks. The FCC has more experience with the administration of federal funding and can guide the NTIA on ways to incorporate the auction framework which has proven to be successful.

170. H.R. 3684.

171. *Actions Overview*, U.S. CONG., https://www.congress.gov/bill/117th-congress/house-bill/3684/actions (last visited Dec. 9, 2021).

172. Blair Levin, *The Senate Infrastructure Bill's Four Interconnected Broadband Components,* BROOKINGS INST. (Aug. 13, 2021), https://www.brookings.edu/blog/the-avenue/2021/08/13/the-senate-infrastructure-bills-four-interconnected-broadband-components/.

billion, approximately $42 billion is allocated to bringing broadband internet to unserved and underserved areas of the country, nearly $14 billion is allocated as a direct subsidy for qualified low-income broadband users, approximately $2 billion for rural broadband programs, around $2 billion for broadband connectivity in Tribal areas, and the remainder for various other programs.[173]

The vast majority of the funding—approximately $42 billion—is appropriated to the BEAD Program, under which the NTIA makes grants to eligible entities to bridge the digital divide.[174] An eligible entity includes a state or group of states, a unit of local government or a group of local governments, and a political subdivision of a state or local government.[175] Within 180 days of enactment of the Infrastructure Bill, the NTIA shall issue a notice of funding opportunity to the eligible entities for the BEAD Program which establishes a process through which funding is provided for planning and predeployment activities.[176] This section of the Infrastructure Bill further provides that the NTIA shall, in consultation with the FCC, establish standards for how eligible entities "assess the capabilities and capacities of a prospective subgrantee" for the construction and deployment of broadband infrastructure.[177] Each state shall receive a minimum allocation of $100 million and the remaining amounts shall be disbursed in accordance with a formula that considers the number of unserved locations in the state compared to unserved locations throughout the United States.[178]

While the NTIA is the agency designed to administer the BEAD Program funding through the grant review process, the FCC may still be able to contribute to the success of the program. Based on the reasons outlined above, the auction framework can raise revenue and efficiently utilize government subsidies. As the NTIA begins to review grant applications submitted by states and other eligible entities, the FCC can provide guidance based on its experience with the auctions. States without experience in awarding broadband funding to subgrantees may benefit from implementing an auction framework using the funds received through the grant process.[179] The states are in a position to leverage large amounts of

173. Roslyn Layton, *What's in the Broadband Component of the Infrastructure Bill,* FORBES (Sept. 2, 2021), https://www.forbes.com/sites/roslynlayton/2021/09/02/whats-in-the-broadband-component-of-the-infrastructure-bill/?sh=77f300fe2362.
174. Infrastructure Investment and Jobs Act, H.R. 3684, 117th Cong. (2021).
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. Levin, *supra* note 12.

government subsidies to achieve broadband goals and an effective strategy will be critical to the success of their programs.[180]

Additionally, prior to the administration of the billions of dollars under the Infrastructure Bill, the NTIA should set specific standards and qualifications for the application reviewers to ensure consistent and objective scoring for the applications. The NTIA will also need to increase the number of reviewers in anticipation of the large number of applications to avoid personnel shortage issues experienced in the BTOP auction which administered significantly less government funding.[181]

V. CONCLUSION

While there are many lessons to learn in the aftermath of the COVID-19 pandemic, one important lesson is that a reliable, fast internet connection is critical for Americans. It is no longer "nice-to-have," rather, it is a necessity. Many of us do not think twice about having internet connectivity, yet there are many Americans who are unable to access or afford the internet.[182] Congress has made clear, through historic allocation of government funding, that this issue is critical. There is a real opportunity to make a difference in bridging the digital divide across the country. While the NTIA has already been identified as the agency for the administration of the most significant portion of the Infrastructure Bill, it may still be possible to implement a powerful tool—the auction—moving forward. The Infrastructure Bill provides throughout that the NTIA should act in consultation with the FCC. As the agencies move forward with the various broadband projects, learning from past successes and mistakes is crucial for future success. While neither the auction nor the grant process is a perfect solution, there is history to support the suggestion that use of the auction would prove to be a more efficient use of this historic funding.

180. *See* Wilkins, *supra* note 111.

181. Oh, *supra* note 122, at 5.

182. *See* Emily A. Vogels, *Digital Divide Persists Even as Americans With Lower Incomes Make Gains in Tech Adoption*, PEW RSCH. CTR. (June 22, 2021), https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/.

Running a Red Light: How Pennsylvania Rushed to its Destination and Failed to Define "Exigent Circumstances" in *Commonwealth v. Alexander*

*Josephine L. Mlakar**

ABSTRACT

The United States Supreme Court and the Pennsylvania Supreme Court both recognize an "automobile exception" to the warrant requirement pursuant to their respective constitutions. In 2014, the Pennsylvania Supreme Court adopted the federal automobile exception. Under the federal automobile exception, police can search a vehicle without a warrant where probable cause exists. In 2020, the Pennsylvania Supreme Court overruled its 2014 decision, and announced its official departure from federal standard. Now, police can search a vehicle without a warrant only upon a showing of both probable cause and exigent circumstances.

Adding an exigency component to the warrantless search requirement is not the problem. Rather, the problem is that the Pennsylvania Supreme Court does not provide a definition, standard, or even slight guidance for defining exigency. Instead, the Pennsylvania Supreme Court defaults to a case-by-case assessment for determining whether the facts of a case rise to the level of exigency.

Under a case-by-case assessment, what rises to a level of exigency is in the eye of the beholder. Motorists, police officers, and trial judges will face the consequences of the Pennsylvania Supreme Court's decision to omit a bright-line standard for determining whether a situation permits a police officer to conduct a lawful, warrantless search. The current case-by-case assessment will increase speculation of police officers' decision making, and trial courts will render inconsistent rulings. The Pennsylvania Supreme Court should take its next opportunity to establish a bright-line rule but, at the very least, provide specific guidance on defining exigent circumstances.

* J.D. Candidate, Thomas R. Kline School of Law of Duquesne University, 2023. The author received her Bachelor of Science with a double major in Economics and Psychology from the University of Pittsburgh in 2019. She thanks her parents and brother for their constant support and Professor John T. Rago for his invaluable guidance and encouragement.

TABLE OF CONTENTS

I. INTRODUCTION

One fundamental debate that has challenged courts for decades is whether search and seizure cases should be decided on a case-by-case method of adjudication or by the application of bright-line rules.[1] The Pennsylvania Supreme Court recently added to that conversation with its 2020 decision, *Commonwealth v. Alexander*.[2]

The federal automobile exception to the Fourth Amendment's warrant requirement states that nothing more than probable cause is required for police to conduct a warrantless search of a car.[3] In

1. *See* Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 228 (1984) (discussing the merits and consequences of bright-line rules); Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 320–33 (1982) (discussing both the desirability and impracticability of bright-line rules); David M. Silk, Comment, *When Bright Lines Break Down: Limiting* New York v. Belton, 136 U. PA. L. REV. 281, 281–82 (1987) (providing an overview of the two approaches of the Court).

2. Commonwealth v. Alexander, 243 A.3d 177 (Pa. 2020).

3. U.S. CONST. amend. IV.

2014, the Pennsylvania Supreme Court held, in *Commonwealth v. Gary*, that this exception applies in Pennsylvania.[4] But, under the notion that Article I, Section 8 of the Pennsylvania Constitution affords greater privacy protections to its citizens than the Fourth Amendment of the United States Constitution, the Pennsylvania Supreme Court overruled *Gary* in 2020.[5] In *Alexander*, the Pennsylvania Supreme Court announced the Commonwealth's departure from the federal model of warrantless searches.[6] Because the federal automobile exception no longer stands in Pennsylvania, law enforcement must establish both probable cause *and* exigent circumstances[7] to justify a warrantless search of a vehicle.[8]

By including an exigency requirement as part of the warrantless search protocol, the Pennsylvania Supreme Court moved away from a bright-line standard and toward a case-by-case assessment.[9] While deciding *Alexander*, the Court had an opportunity to, once and for all, provide long-awaited guidance on what it means to encounter a situation of "exigency." However, the Court merely noted that it is up to a reviewing court to "assess the totality of the circumstances presented to the officer before the entry in order to determine if exigent circumstances relieved the officer of the duty to secure a warrant."[10] Using a case-by-case assessment to determine exigency, with little to no guidance from the Court, drastically expands law enforcement's discretion to determine what is an exigent circumstance.[11] This is the third time in the past three decades that Pennsylvania has overruled its precedent in this context.[12] This type of constant change is more representative of a pendulum swing than it is of an articulate and widely applicable common law standard.

Questioning the wisdom of the court for recognizing greater privacy protections pursuant to the Pennsylvania Constitution is beyond the scope of this Article. This Article does not dispute that the

4. Commonwealth v. Gary, 91 A.3d 102, 104 (Pa. 2014).

5. *Alexander*, 243 A.3d at 207.

6. *Id.* at 207–08.

7. *Id.* The Pennsylvania Supreme Court briefly explained that "exigent circumstances" may arise when there is a potential danger to the police or public, however, a mere assertion of danger may not be sufficient. *Id.* at 187.

8. *Id.* at 207.

9. *Id.* at 208 (stating that "the long history of Article I, Section 8 and its heightened privacy protections do not permit us to carry forward a bright-line rule . . .").

10. *Id.*

11. *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 64 (1999) (holding that an ordinance that does not establish minimal guidelines to help police officers determine what activities constitute "loitering" affords "too much discretion to the police").

12. *See Alexander*, 243 A.3d at 207; Commonwealth v. Gary, 91 A.3d 102, 104 (Pa. 2014); Commonwealth v. Holzer, 389 A.2d 101, 106 (Pa. 1978).

Alexander decision aligns with Article I, Section 8 of the Pennsylvania Constitution which grants greater privacy protections than the Fourth Amendment. The court's efforts in imposing an exigency requirement to serve as an additional barrier between law enforcement and groundless searches should not be diminished. However, this Article questions the functionality of *Alexander* given the current police-citizen climate and highlights the danger of the court's lack of guidance in defining "exigency" and defaulting to a case-by-case assessment.

The most common type of interaction between police and civilians is a traffic stop, and the relationship between the American public and law enforcement, particularly its violent nature, has been under continual re-examination.[13] Under *Alexander,* exigent circumstances are in the eye of the beholder. The court based its decision on an *ideal* of privacy under the Pennsylvania Constitution and ignored the amount of discretion it left to police to determine their own parameters of exigency. This Article argues that the Pennsylvania Supreme Court would benefit the police, public, and trial judges if it would adopt a clear bright-line rule or, short of that, specific guidance that is workable and that will be applied consistently regardless of any factual variances.[14]

Accordingly, this Article proceeds in four sections. Section II discusses the history of uncertainty surrounding the automobile exception in Pennsylvania.[15] Pennsylvania's checkered history results largely from the Pennsylvania Supreme Court's struggle with distinguishing its standard from the Fourth Amendment model. In many earlier cases, the Pennsylvania Supreme Court wove federal case law into its discussion of the exigency requirement without clearly distinguishing the Pennsylvania standard from the federal standard.[16] Section II also examines the development of tension between the public and police and analyzes how bright-line rules emerged from those conflicts to serve as a tool to render fair rulings while also preserving the integrity of our courts.[17] Section III describes the two landmark cases in this Commonwealth for vehicle

13. Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1475 (2021). In 2018, the police contacted 61.5 million people, and of that, 25 million were drivers or passengers in a traffic stop. Bob Harrison, *Stop, Start, or Continue? A National Survey of the Police About Traffic Stops*, RAND BLOG (June 30, 2021), https://www.rand.org/blog/2021/06/stop-start-or-continue-a-national-survey-of-the-police.html.

14. *See, e.g.*, California v. Acevedo, 500 U.S. 565, 577 (1991) (noting "the virtue of providing clear and unequivocal guidelines to the law enforcement profession").

15. *See infra* notes 21–95 and accompanying text.

16. See *infra* notes 63–107 and accompanying text.

17. See *infra* notes 108–54 and accompanying text.

searches, *Gary* and *Alexander*.[18] The section highlights the greater protections afforded to individuals from unreasonable searches and seizures because of *Alexander* and analyzes the foreseeable effects resulting from the Court's lack of guidance in defining "exigency."[19] The section concludes by discussing how Pennsylvania jurisprudence has already recognized the value of eliminating a case-by-case exigency assessment and the need to stick to a clear bright-line rule or standardized procedure for vehicle searches.[20] Despite this Article's reluctance to fully embrace the decision, it celebrates that *Alexander* recognized that the real danger to citizens is a compromised right to be free from unreasonable searches and seizures.

II. BACKGROUND

A. The History of the Automobile Exception

The power of the states to interpret their constitutions to offer broader protection of individual rights than that required by the United States Constitution is undisputed.[21] As Justice Byron White has explained, "individual states may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."[22] However, this principle had little practical application prior to the 1970s when litigators and courts began to narrowly focus on federal constitutional claims and often disregarded similar state constitutional provisions that may provide clients with relief.[23] Chief Justice Warren Burger used the term "new judicial federalism" to describe the 1970s and 1980s as a period in American legal history where the United States Supreme Court Justices had to remind states of their power to interpret their constitutions more broadly than it interpreted the United States Constitution.[24] Many state supreme courts that exercised this power largely did so in the area of criminal law.[25]

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18. *See infra* notes 155–81 and accompanying text.
19. *See infra* notes 182–224 and accompanying text.
20. *See infra* notes 225–38 and accompanying text.
21. Hon. Thomas M. Hardiman, *New Judicial Federalism and the Pennsylvania Experience: Reflections on the* Edmunds *Decision*, 47 DUQ. L. REV. 503, 506 (2009).
22. California v. Greenwood, 486 U.S. 35, 39 (1988).
23. Loretta H. Rush & Marie Forney Miller, *A Constellation of Constitutions: Discovering & Embracing State Constitutions as Guardians of Civil Liberties*, 82 ALB. L. REV. 1353, 1353–54 (2018).
24. *See* Hardiman, supra note 21, at 505. Justice William Brennan, Jr., reintroduced the principle of independent state constitutional interpretation as "new judicial federalism" at a lecture given at Harvard Law School in 1977. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489, 491 (1977).
25. *See* Hardiman, supra note 21, at 505.

1. Federal Law: The Fourth Amendment

A search or seizure under the federal Constitution occurs when the government invades the privacy of an individual.[26] The Fourth Amendment protects individuals against unreasonable searches and seizures.[27] Generally, all warrantless searches under the Fourth Amendment are presumptively unreasonable[28] unless the search falls within an established exception to the warrant requirement.[29]

The Fourth Amendment only protects an individual's "*subjective* expectation of privacy . . . that society is prepared to recognize as 'reasonable.'"[30] The United States Supreme Court has held that such an expectation of privacy exists in movable vessels, including automobiles.[31] However, when compared to a home, society has acknowledged that individuals have a reduced exception of privacy with regard to their automobile.[32] Therefore, the U.S. Supreme Court has historically treated automobiles differently than permanent premises for Fourth Amendment purposes.[33]

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26. Elkins v. United States, 364 U.S. 206, 213 (1960).

27. *Id.* at 209. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

28. *See, e.g.*, Agnello v. United States, 269 U.S. 20, 32 (1925); *see also* McDonald v. United States, 335 U.S. 451, 453 (1948) (stating that the protection of the Fourth Amendment "extends to the innocent and guilty alike . . . and . . . with few exceptions, stays the hands of the police unless they have a search warrant").

29. *See* Missouri v. McNeely, 569 U.S. 141, 148 (2013). There are six common exceptions to the warrant requirement involving an automobile stop. The first exception is a search incident to lawful arrest. Carroll v. United States, 267 U.S. 132, 158 (1925). The second exception is a plain view seizure. Horton v. California, 496 U.S. 128, 133 (1990). The third exception is during a "stop and frisk." Terry v. Ohio, 392 U.S. 1, 20–21 (1968). The fourth exception is during an inventory search. Chambers v. Maroney, 399 U.S. 42, 51–52 (1970). The fifth exception is where the officer had a "reasonable belief" that the car contained a weapon, and the officer conducted a limited protective search of the car. Michigan v. Long, 463 U.S. 1032, 1049–50 (1983). The sixth exception is during a consent search. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). The seventh exception is if there is an exigent circumstance. *McDonald*, 335 U.S. at 456.

30. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

31. *See* Carroll v. United States, 267 U.S. 132, 151 (1925).

32. South Dakota v. Opperman, 428 U.S. 364, 368 (1976); *see also* New York v. Class, 475 U.S. 106, 112–13 (1986) (recognizing a lesser expectation of privacy in a vehicle because its function is transportation and rarely a "repository of personal effects").

33. *Carroll*, 267 U.S. at 147; *see also Opperman*, 428 U.S. at 368. "Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements." *Id.*

This distinct treatment contributed to the formation of a federal automobile exception to the warrant requirement.[34] The federal automobile exception originated in *Carroll v. United States*.[35] The U.S. Supreme Court held that, if law enforcement has probable cause to believe that a vehicle has evidence of a crime or contraband located in it, a search of the vehicle may be conducted without first obtaining a warrant.[36] In *Carroll*, federal agents suspected two individuals of bootlegging.[37] After the agents unexpectedly encountered the suspects driving a vehicle, the agents stopped and ordered the suspects to exit the vehicle.[38] At first, the agents examined the backseat upholstery, and, even though there was no alcohol in plain view, they observed that the backseat looked different from typical vehicle upholstery.[39] One of the agents ripped open the seat, thereby exposing sixty-eight bottles of gin and whiskey.[40] The defendants claimed that the agents participated in an unconstitutional search of the vehicle due to the lack of a warrant; however, Chief Justice William H. Taft rejected the defendants' argument, and announced what would ultimately become known as the "Carroll Doctrine."[41] Chief Justice Taft stated:

> [T]he true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid.[42]

Therefore, under this automobile exception, police can search a vehicle without a warrant where (1) probable cause exists,[43] and (2)

34. *Chambers*, 399 U.S. at 51–52; *Carroll*, 267 U.S. at 147–56.
35. *Carroll*, 267 U.S. at 147.
36. *Id.* at 149. The Court held that the officers had justification for the warrantless search and seizure, meaning that "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched." *Id.* at 162.
37. *Id.* at 160.
38. *Id.*
39. *Id.* at 174 (McReynolds, J., dissenting).
40. *Id.*
41. *Id.* at 149, 160 (majority opinion).
42. *Id.*
43. The United States Supreme Court has found probable cause to exist "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." Ornelas v. United States, 517 U.S. 690, 696 (1996). Examples of probable cause to search a vehicle may be personally observing evidence or contraband in plain view inside a vehicle, *see* Horton v. California, 496 U.S. 128, 128 (1990); receiving a tip provided to the officer by a reliable confidential

the vehicle that is subject to search must be capable of ready movement, or is "readily mobile."[44] The Court reasoned that the inherent mobility of automobiles create circumstances of such exigency that rigorous enforcement of the warrant requirement is impossible.[45] Additionally, an individual's reduced expectation of privacy in a vehicle supports permitting a warrantless search based on probable cause.[46]

The U.S. Supreme Court further articulated the federal automobile exception in *Chambers v. Maroney*, when it announced that exigent circumstances need not be present at the time of the actual search.[47] In *Chambers*, the police had probable cause to believe the defendant committed a robbery.[48] The police located a car that matched the description of the car used in the commission of the robbery.[49] When the police located and stopped the car, one of the passengers was wearing a sweater matching the description of a sweater worn by one of the robbers.[50] Because the police suspected that the driver was the robber, they arrested him and immobilized the vehicle.[51] The police searched the car at the station and found a .38 caliber pistol and items belonging to the robbery victim.[52] The defendant filed a petition for habeas corpus arguing that the warrantless search violated his Fourth Amendment right against unreasonable searches and seizures.[53] Although the U.S. Supreme Court recognized that police had the choice of either searching the car while at the scene or at the impound lot, the Court stated:

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a

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informant, *see* Maryland v. Dyson, 527 U.S. 465, 467 (1999); or based upon the officer's sense of smell of contraband, *see* United States v. Miller, 812 F.2d 1206, 1209 (9th Cir. 1987).

44. California v. Carney, 471 U.S. 386, 390 (1985).

45. See *Carroll*, 267 U.S. at 153; *see also* South Dakota v. Opperman, 428 U.S. 364, 368 (1976).

46. *Opperman*, 428 U.S. at 368. "Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements." *Id.*

47. Chambers v. Maroney, 399 U.S. 42, 50 (1970).

48. *Id.* at 44.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 44–45.

53. *Id.* at 45–46.

> warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.[54]

The U.S. Supreme Court continued to uphold the ruling and applied it in subsequent vehicle search cases. In *United States v. Ross*, for example, the U.S. Supreme Court held that "if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."[55] The U.S. Supreme Court, in *Pennsylvania v. Labron*, reaffirmed this principal when it reversed the Pennsylvania Supreme Court's ruling in *Commonwealth v. Labron*.[56] In *Labron*, police officers in Philadelphia saw the defendant participating in multiple drug transactions.[57] The police arrested the defendant, searched the trunk of his car, and found cocaine.[58] Before reaching the U.S. Supreme Court, the Pennsylvania Supreme Court held that the evidence discovered in the defendant's car should be suppressed because the police violated the Fourth Amendment when they did not have probable cause and exigent circumstances to justify a warrantless search.[59] However, the U.S. Supreme Court determined that the Pennsylvania Supreme Court was incorrect in its holding, and held that the Philadelphia police did not violate the Fourth Amendment because probable cause was present.[60] *Labron* further confirmed that exigent circumstances are not required to satisfy the automobile exception under the Fourth Amendment.[61] At this point, Fourth Amendment jurisprudence is abundantly clear that the automobile exception, under the U.S. Constitution requires only: (1) a readily mobile vehicle and (2) probable cause to suspect contraband within the vehicle.[62]

2. Pennsylvania Law: Article 1, Section 8

Article I, Section 8 of the Pennsylvania Constitution[63] is the analogous provision to search and seizure protections under the Fourth

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54. *Id.* at 52.
55. United States v. Ross, 456 U.S. 798, 825 (1982).
56. Commonwealth v. Labron, 669 A.2d 917, 924 (Pa. 1995), *overruled by,* Pennsylvania v. Labron, 518 U.S. 938, 941 (1996).
57. Labron, 518 U.S. at 939, 941.
58. *Id.* at 939.
59. *Labron*, 669 A.2d at 924. In rendering its decision, the Pennsylvania Supreme Court analyzed relevant state cases that incorporated analyses from federal cases. *Id.*
60. *Labron*, 518 U.S. at 941.
61. *Id.* at 938–39.
62. *Id.*
63. Article I, Section 8 reads:

Amendment.[64] Both the U.S. Supreme Court and the Pennsylvania Supreme Court acknowledge that individuals have a reduced expectation of privacy inside their vehicles.[65] According to the Pennsylvania Supreme Court, "it is too great a leap of logic to conclude that the automobile is entitled to the same sanctity as a person's body."[66] While the vast majority of jurisdictions followed the U.S. Supreme Court's lead and recognized some form of the federal automobile exception,[67] Pennsylvania did not.

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

PA. CONST. art. I, § 8; *see also* Louis A. Smith II, *Pennsylvania's Constitutional Right to Privacy: A Survey of its Interpretation in the Context of Search and Seizure and Electronic Surveillance*, 31 DUQ. L. REV. 557, 562 (1993) (discussing Pennsylvania's history of increasing rights against governmental intrusion).

64. Dennis Whitaker, *One of These Constitutions (in More Respects than you Realize) is Not Like the Other*, PA. APP. ADVOC. (Sept. 22, 2017), https://paablog.com/con-week-finale/.

65. Commonwealth v. McCree, 924 A.2d 621, 629 (Pa. 2007) (plurality opinion) (citing United States v. Chadwick, 433 U.S. 1, 12 (1977)).

66. *Id.* at 630; *see also* Commonwealth v. Kubis, 978 A.2d 391, 394 (Pa. Super. Ct. 2009) (recognizing that a citizen has a lesser expectation of privacy with respect to his vehicle); In Re O.J., 958 A.2d 561, 565 (Pa. Super. Ct. 2008) (same); Commonwealth v. Holzer, 389 A.2d 101, 106 (Pa. 1978) (recognizing a lesser expectation of privacy in a vehicle than in a home or office).

67. Christian A. Fisanick, *We're on the Road to Nowhere: The Automobile Exception to the Warrant Requirement under the Pennsylvania Constitution*, 8 WIDENER J. PUB. L. 1, 9 (1998). Professor at John Jay College of Criminal Justice of the City University of New York, Barry Latzer's, has conducted research identifying five jurisdictional categories that state vehicle search exceptions can fit into:

> (1) jurisdictions that follow the United States Supreme Court's jurisprudence after a detailed state constitutional analysis. The paradigm of this group is Wisconsin, where that state's high court extensively analyzed the competing interests of the constitutional requirement and the need for effective law enforcement. *See* State v. Tompkins, 423 N.W.2d 823 (Wis. 1988);
> (2) jurisdictions that accept the United States Supreme Court's jurisprudence with little or no individualized state constitutional analysis. Nebraska serves as an example, where that state's high court simply stated that the United States Constitution and the Nebraska Constitution are coextensive on the automobile exception. *See* State v. Vermuele, 453 N.W.2d 441 (Neb. 1990);
> (3) jurisdictions such as New Hampshire that categorically reject an automobile exception on state constitutional grounds. *See* State v. Sterndale, 656 A.2d 409 (N.H. 1995);
> (4) jurisdictions taking an idiosyncratic approach to the issues, such as Vermont, which rejects the container rule of Ross. These jurisdictions reject the automobile exception for parked, immobile, and unoccupied vehicles. *See* State v. Savva, 616 A.2d 774 (Vt. 1991) and State v. Krock, 725 P.2d 1285 (Oreg. 1985); and
> (5) jurisdictions which have not reached the issue. Hall v. State, 766 P.2d 1002 (Okla. Crim. 1988).

Id. at 9–10 n.58. Commentators and scholars have concluded that Pennsylvania fits within the third group. *See id.*

Pennsylvania was one of the early states to exercise its power to expand individual rights beyond the minimum requirements of the U.S. Constitution.[68] Though similarly worded to the U.S. Constitution, the Pennsylvania Constitution has historically been interpreted to guarantee broader rights under the law of search and seizure than the Fourth Amendment.[69] One significant case in this regard is *Commonwealth v. Sell*.[70] The issue in *Sell* was whether the Pennsylvania Supreme Court, in interpreting Article I, Section 8, should retain the "automatic standing" principle as a matter of state constitutional law, *or*, to embrace the reasoning and conclusions of the U.S. Supreme Court's interpretation of the Fourth Amendment and eliminate that concept.[71] Writing for the majority, Justice Robert N. C. Nix, Jr., recognized that "[w]hile minimum federal constitutional guarantees are 'equally applicable to the [analogous] state constitutional provision[s],' the state has the power to provide broader standards than those mandated by the federal Constitution."[72] He noted that "constitutional protection against unreasonable searches and seizures existed in Pennsylvania more than a decade before the adoption of the federal Constitution, and fifteen years prior to the promulgation of the Fourth Amendment[.]"[73] Where the U.S. Supreme Court had abolished "automatic standing" under the U.S. Constitution,[74] Justice Nix concluded that individuals charged with possessory offenses have "automatic standing" to bring a suppression motion under the Pennsylvania Constitution to challenge the admissibility of evidence alleged to be the fruit of an illegal search or seizure.[75] *Sell* also recognized that "Article I, [S]ection 8 of the Pennsylvania Constitution

68. *See* Hardiman, supra note 21, at 507.

69. *Id.* at 512–13 (citing Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991)); *see also* Barasch v. Pa. Pub. Util. Comm'n, 576 A.2d 79, 88 (Pa. Commw. Ct. 1990).

70. Commonwealth v. Sell, 470 A.2d 457 (Pa. 1983). In *Sell*, the Allentown, Pennsylvania Police Department executed a search warrant, which included firearms stolen in a recent burglary, at an amusement arcade. As a result of the search, the police retrieved several firearms that were located on open shelves beneath the counter in an area to which all of the employees had access. *Id.* at 458.

71. *Id.* at 458. The rule of "standing" determines whether a party was the appropriate person to move to suppress allegedly illegal evidence. *Id.* Further, the rule known as "*automatic* standing," provides that the *mere charge* of a defendant with a possessory offense automatically confers standing to assert an alleged search and seizure violation. *Id.* at 462.

72. *Id.* at 466–67 (internal citations omitted) (relying on Commonwealth v. Dejohn, 403 A.2d 1283, 1291 (Pa. 1979) (recognizing an expectation of privacy in bank records under Article I, Section 8 of the Pennsylvania Constitution, notwithstanding the Supreme Court's refusal to recognize any expectation of privacy in bank records under the Fourth Amendment)).

73. *Sell*, 470 A.2d at 466.

74. The U.S. Supreme Court abolished "automatic standing" under the Fourth Amendment to the federal Constitution. United States v. Salvucci, 448 U.S. 83, 85 (1980).

75. *Sell*, 470 A.2d at 468–69.

. . . mandates greater recognition of the need for protection from illegal governmental conduct offensive to the right of privacy."[76] Consequently, *Sell* made clear that the Pennsylvania Supreme Court would accord as much weight to the U.S. Supreme Court's interpretations of the U.S. Constitution as it accorded to the decisions of sister state courts or lower federal courts, depending upon the persuasiveness of the opinion.[77]

3. Confusion in the 1990s

Despite *Sell's* formal departure from Fourth Amendment jurisprudence, the Pennsylvania Supreme Court had difficulties applying this concept in automobile cases.[78] The confusion around whether Pennsylvania followed the federal automobile exception stemmed from Pennsylvania's use of *federal* case law in *state* law cases, without clearly distinguishing the Pennsylvania standard exigency requirement from the federal standard. In the late 1980s and 1990s, the Pennsylvania Supreme Court decided a line of cases, illustrating the Court's inconsistent application and approach to automobile searches.[79] The U.S. Supreme Court noted the Pennsylvania Supreme Court's incorrect reading of the federal automobile exception in *Pennsylvania v. Labron*, where it reversed the Pennsylvania Supreme Court's decisions in *Commonwealth v. Labron.*[80] The U.S. Supreme Court stated that "[t]he law of the Commonwealth thus appears to us 'interwoven with the federal law, and . . . the adequacy and independence of any possible state law ground is not clear from the face of the opinion.'"[81] The U.S. Supreme Court stated that, although the Pennsylvania Supreme Court discussed Pennsylvania cases in *Labron*, the cases it cited relied on Fourth Amendment analyses rather than specific Article I, Section 8 analyses.[82]

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76. *Id.* at 468.

77. *Id.* at 467–68.

78. Several scholars note that Pennsylvania did not fully reject the federal automobile exception until 1995. *See* Fisanick, supra note 67, at 10.

79. *See* Commonwealth v. White, 669 A.2d 896, 899–900 (Pa. 1995); Commonwealth v. Kilgore, 677 A.2d 311, 312–13 (Pa. 1955), *overruled by*, Pennsylvania v. Labron, 518 U.S. 938, 940 (1996); Commonwealth v. Labron, 669 A.2d 917, 924 (Pa. 1995), *overruled by, Labron*, 518 U.S. at 941.

80. *Labron*, 518 U.S. at 939. In *Labron*, police officers saw the defendant participating in multiple drug transactions, and later arrested the defendant, searched the trunk of his car without a warrant, and found cocaine. *Id.* at 939.

81. *Labron*, 518 U.S. at 941 (citing Michigan v. Long, 463 U.S. 1032, 1040–41 (1983)).

82. *Id.* at 941; *Labron*, 669 A.2d at 924 (citing *White*, 669 A.2d at 900 (resting on Pennsylvania Supreme Court's analysis of Chambers v. Maroney, 399 U.S. 42 (1970))).

When adjudicating Article I, Section 8 issues, the Pennsylvania Supreme Court continually cited to cases that were decided on Fourth Amendment grounds. For example, in *Commonwealth v. Milyak*, the defendant based his claim on the Fourth Amendment, and the Pennsylvania Supreme Court decided the case on Fourth Amendment reasoning.[83] The facts in *Milyak* involved a tip provided to the police that a van was used in a burglary.[84] Once the police located the van, they arrested the van's occupants and searched the van without a warrant.[85] Justice Stephen Zappala Sr., concurring, explained that a state constitutional issue was not before the Court and a Fourth Amendment analysis was proper.[86] The Pennsylvania Supreme Court reviewed the case under Fourth Amendment principles, but in a unanimous decision, ultimately found that no violation had occurred.[87] The Court's struggle to consistently interpret the boundaries of Article I, Section 8 is not apparent from the face of *Milyak*. Rather, the struggle can be found where the Pennsylvania Supreme Court cited *Milyak* (a case with a Fourth Amendment claim) in cases where claims were brought under Article I, Section 8, not the Fourth Amendment, and did so without delineating how *Milyak* was distinguishable from Article I, Section 8 cases.[88] In *Commonwealth v. Luv*, for example, the Pennsylvania Supreme Court discussed *Milyak* along with Article I, Section 8 cases and stated "[t]he determining factors in all of these cases are the existence of probable cause and the presence of exigent circumstances."[89] The Court did so even though *Milyak* was not dependent on the exigent circumstance component at all.[90]

Three years after *Milyak*, the Pennsylvania Supreme Court decided *Commonwealth v. Baker* and turned away from the *Milyak* federal analysis, outlining the requirement of exigencies in an

83. *See* Commonwealth v. Milyak, 493 A.2d 1346, 1348 (Pa. 1985).
84. *Id.* at 1347.
85. *Id.* at 1348.
86. *Id.* at 1351 (Zappala, J., concurring).
87. *Id.* at 1349 (majority opinion).
88. *See, e.g.*, Commonwealth v. Luv, 735 A.2d 87, 93 (Pa. 1999) (discussing *Milyak*, along with *Rodriguez*, *Baker*, and *White*, stating that "[t]he determining factors in all of these cases are the existence of probable cause and the presence of exigent circumstances."); Commonwealth v. White, 669 A.2d 896, 900 (Pa. 1995) (holding that no unforeseen circumstances would justify a warrantless search); Commonwealth v. Rodriguez, 585 A.2d 988, 990 (Pa. 1991) (holding that the existing unforeseen circumstances gave police insufficient opportunity to secure a warrant and therefore justified the warrantless search); Commonwealth v. Ionata, 544 A.2d 917, 919 (Pa. 1988) (finding that a brown box with bags protruding from it on the passenger seat was not sufficient to support probable cause, and thus, the warrantless search was improper).
89. *Luv*, 735 A.2d at 93.
90. *See Milyak*, 493 A.2d at 1351.

automobile search.[91] The court stated, "[i]t is well established that automobiles are not per se unprotected by the warrant requirements of the Fourth Amendment, and of [Article I, Section 8]. Nevertheless, certain exigencies may render the obtaining of a warrant not reasonably practicable."[92] Accordingly, the Pennsylvania Supreme Court in *Baker* drifted away from the U.S. Supreme Court's interpretation of the automobile exception by reasoning that exigencies must exist at the time of the warrantless search, which was demonstrated by the mobility of the vehicle and inadequate time for law enforcement to obtain a warrant.[93]

The Pennsylvania Supreme Court, however, started to obscure its reasons again in several cases when it cited to *Milyak* as requiring exigent circumstances when the case did not actually support this proposition.[94] In 1991, the Pennsylvania Supreme Court cited to both *Milyak* and *Baker*, cases that represent opposite ends of the spectrum.[95] *Milyak* supports an automobile exception that only requires a mobile vehicle and probable cause as prerequisites, and *Baker* requires an exigency element. The Pennsylvania Supreme Court's struggle to properly and consistently apply one standard illustrates the court's long history of confusion regarding the exigent circumstance requirement, and perhaps, broadens the line between the Fourth Amendment and Article I, Section 8. These conflicting standards raised the question of whether Pennsylvania is actually committed to a rigorous body of independent search and seizure law.

4. Efforts at a Solution

In 1991, Justice Ralph Cappy sought to enhance judicial uniformity in cases that require distinguishing the Pennsylvania Constitution from the Federal Constitution and designed a four-part framework in *Commonwealth v. Edmunds*.[96] In *Edmunds*, the Pennsylvania Supreme Court reversed the judgment of the Superior Court, holding that the "good faith" exception to the exclusionary rule established in *United States v. Leon* does not apply to Article I, Section 8 of the Pennsylvania Constitution.[97] Although

91. Commonwealth v. Baker, 541 A.2d 1381, 1383 (Pa. 1988).
92. *Id.*
93. *Id.*
94. *Id.* (citing Commonwealth v. Milyak, 493 A.2d 1346, 1348 (Pa. 1985)).
95. Fisanick, supra note 67, at 14.
96. *See* Hardiman, supra note 21, at 512.
97. Commonwealth v. Edmunds, 586 A.2d 887, 888 (Pa. 1991). In *Edmunds*, the police searched the defendant's residence for drugs using a search warrant that was not supported by probable cause. *Id.* The police discovered marijuana during the search and arrested the

Edmunds illustrated a clear departure from the federal standard's "good faith" exception for warrantless searches, Justice Cappy's efforts to create a clear framework for state courts to apply in interpreting their respective constitutions reduced the need for state courts to rely on U.S. Supreme Court analyses.[98] In light of the U.S. Supreme Court's requirement that state courts make a "plain statement" of any adequate and independent state grounds upon which their decisions rest, Justice Cappy wrote:

> [A]s a general rule it is important that litigants brief and analyze at least the following four factors:
> (1) text of the Pennsylvania constitutional provision;
> (2) history of the provision, including Pennsylvania caselaw;
> (3) related case-law from other states;
> (4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.[99]

Using this framework, the court declined to adopt the "good faith" exception to the exclusionary rule, explaining: (1) neither identical language nor similarity between the federal and state constitutions requires the Pennsylvania courts to follow federal precedent;[100] (2) the Pennsylvania Constitution was adopted ten years prior to the ratification of the United States Constitution, and the Pennsylvania Supreme Court refuted the "misconception that state constitutions are somehow patterned after the United States Constitution;"[101] (3) the historical record "indicate[d] that the purpose underlying the exclusionary rule in this Commonwealth is quite distinct from the purpose underlying the exclusionary rule under the [Fourth] Amendment" and thus warranted independent analysis and judgment;[102] and (4) to adopt a "good faith" exception to the

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defendant for several offenses, including criminal conspiracy, simple possession, possession with intent to deliver, possession with intent to manufacture, and manufacture of a controlled substance. *Id.* at 889. The trial court granted the Defendant's motion to suppress the seized marijuana because the warrant was defective, and the appellate court reversed. *Id.* at 888-90. The Defendant appealed the reversal to the Supreme Court of Pennsylvania. *Id.*

98. *See* Hardiman, supra note 21, at 515.
99. *Edmunds*, 586 A.2d at 895.
100. *Id.* at 896.
101. *Id.*
102. *Id.* at 897.

exclusionary rule would contradict certain Pennsylvania Rules of Criminal Procedure.[103]

The *Edmunds* opinion was Pennsylvania's first attempt to establish a formulaic approach to interpreting the Pennsylvania Constitution.[104] Interestingly, however, *Edmunds* has not been applied uniformly to every case triggering issues of state constitutional interpretation. For example, a few years after *Edmunds,* the Pennsylvania Supreme Court stated, in *Commonwealth v. White*, that the *Edmunds* analysis is not a mandatory test, rather, it is a rule for litigants to follow and a guidepost for courts in interpreting state constitutional provisions.[105] Conversely, there are Pennsylvania cases that *have* relied on *Edmunds* and have shown a clear departure from the federal automobile exception.[106] This inconsistent application of *Edmunds* has raised eyebrows among judges and legal scholars. Chief Justice Ronald Castille criticized these decisions for not following a coherent *Edmunds-style* state constitutional analysis stating "[t]his area of the law has not represented the Court's finest jurisprudential hour."[107] The less than uniform treatment of *Edmunds* certainly contributed to the doctrinal confusion of applying Article I, Section 8.

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103. *Id.* at 901–05 (stating that "such a rule would effectively negate the judicially created mandate reflected in the Pennsylvania Rules of Criminal Procedure, in Rules [203], [205], and [206]."). PA. R. CRIM. P. 203 states, in pertinent part:

> (B) No search warrant shall issue but upon probable cause supported by one or more affidavits sworn to before the issuing authority. The issuing authority, in determining whether probable cause has been established, may not consider any evidence outside the affidavits;
>
> . . .
>
> (D) At any hearing on a motion for the return or suppression of evidence, or for suppression of the fruits of evidence, obtained pursuant to a search warrant, no evidence shall be admissible to establish probable cause other than the affidavits provided for in paragraph (B).

104. *See* Hardiman, supra note 21, at 523.

105. *See, e.g.*, Hardiman, supra note 21, at 518; Commonwealth v. Strader, 931 A.2d 630, 633 (Pa. 2007) (analyzing under the Fourth Amendment of the United States Constitution and declining to perform *Edmunds* analysis where appellant failed to cite the *Edmunds* factors); Commonwealth v. White, 669 A.2d 896, 899 (Pa. 1995) (explaining that the *Edmunds* analysis is not mandatory, and that a party's claim should not be dismissed for failing to follow the precise format set in *Edmunds*).

106. Commonwealth v. Luv, 735 A.2d 87, 93 (Pa. 1999) (relying on *White*, 669 A.2d at 899); *see also* Commonwealth v. McCree, 924 A.2d 621, 626–27 (Pa. 2007).

107. *Hernandez*, 935 A.2d at 1286–87 (Castille, J., concurring).

B. Development of Society & The Police

1. Cycle of Distrust

The outrage surrounding George Floyd's death in 2020 and repeated police brutality against people of color led to a cultural reckoning around what it means to police.[108] Modern policing techniques use broken windows tactics[109] that employ an intensive, aggressive, and restrictive form of policing that targets low-level infractions, and emphasizes arrests.[110] At least seventy people died in law enforcement custody after uttering "I can't breathe," showing that his tragic death was not an isolated incident.[111] During the summer of 2020, citizens demonstrated across the country demanding divestment from police departments, reinvestment into the life-affirming services that help communities thrive, and elimination of unrestrained police brutality.[112]

The movement, however, was about more than police brutality. Rather, it was about institutional racism in the legal system and in policing tactics[113] that originated from the institution of slavery and the oppression of people of color in the United States.[114] Organized policing systems began as slave patrols in the South, starting in the colony of South Carolina in 1704.[115] These armed slave patrols were

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108. Gillian Ganesan, *Black Communities Cannot Wait Any Longer. The Time to Divest Is Now*., AM. C.L. UNION (June 22, 2020), https://www.aclu.org/news/criminal-law-reform/black-communities-can-not-wait-any-longer-the-time-to-divest-is-now/.

109. "Broken windows" strategies are theories that focus not only on how criminal conduct presents a danger to society but more so how poverty- and inequity-induced low-level crimes, such as property crimes, homelessness, prostitution, and drug offenses, present a threat. *See generally*, George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/.

110. Seattle Police Case Study, CTR. FOR EVIDENCE-BASED CRIME POL'Y, https://cebcp.org/evidence-based-policing/what-works-in-policing/seattle-police-case-study/ (last visited Mar. 8, 2022).

111. Mike Baker et al., *Three Words. 70 Cases. The Tragic History of 'I Can't Breathe.,'* N.Y. TIMES (June 29, 2020, 4:28 PM), https://www.nytimes.com/interactive/2020/06/28/us/i-cant-breathe-police-arrest.html.

112. Doug Brown, *A Constitutional Crisis in Portland*, AM. C.L. UNION (July 18, 2020), https://www.aclu.org/news/criminal-law-reform/a-constitutional-crisis-in-portland/.

113. Patrisse Cullors, *'Black Lives Matter' Is About More than the Police*, AM. C.L. UNION (June 23, 2020), https://www.aclu.org/news/criminal-law-reform/black-lives-matter-is-about-more-than-the-police/.

114. Victor E. Kappeler, *A Brief History of Slavery and the Origins of American Policing*, E. KY. U. (Jan. 7, 2014), https://plsonline.eku.edu/insidelook/brief-history-slavery-and-origins-american-policing.

115. *Id.* The slave patrol extended its way to the North as well. The Northern colonies also created night watch patrols in the 1630s, the first of which was founded in Boston in 1636, with New York following suit in 1658. Frank Olito, *Photos Show How Policing Has Evolved in the US Since Its Beginnings In the 1600s,* INSIDER, https://www.insider.com/history-of-police-in-the-us-photos-2020-6 (Apr. 26, 2021, 4:00 PM).

typically tasked with searching for, arresting, and detaining slaves who escaped as well as guarding against rebellions.[116]

Although formal police departments were not instituted until the 1800s, slave patrols usually formed the police force in many jurisdictions.[117] Population growth, inequality spurred by the Industrial Revolution, and the rise in crimes, such as burglary and prostitution, all contributed to the emergence of urban policing.[118]

In the South and the East, the legacy of slave patrols and the mistreatment of people of color continued even after the Civil War in the form of vigilante groups.[119] The goals of these groups were to control freed slaves who were now working in the agricultural caste system and to enforce Jim Crow segregation laws.[120] In the West, U.S. Marshals enforced federal law and vigilante groups, especially likely to kill indigenous people and people of color, emerged.[121] Between 1840 and the 1920s, mobs, vigilantes, and law enforcement officers lynched over five hundred innocent Mexicans as they cleared the way for westward expansion and killed thousands more innocent people in Texas, California, Arizona, Nevada, Utah, Colorado, and New Mexico.[122]

Modern policing began in 1909 when August Vollmer became chief of police in Berkeley, California.[123] Vollmer introduced military tactics into policing, framing the objective as "we're conducting a war, a war against the enemies of society."[124] Policing subsequently grew harsher, and the number of police expanded as states developed their own police forces.[125]

The 1960s marked a turning point in policing as law enforcement responded to protests against the treatment of people of color and racial profiling in the United States.[126] The civil rights movement gained momentum, and the public gathered to demonstrate against

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. Jill Lepore, *The Invention of the Police*, NEW YORKER (July 13, 2020), https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. Frank Olito, *Protests Against Police Have Broken Out Across the Country. Here's How Policing Has Evolved in the US Since Its Beginnings in the 1600s*, INSIDER (June 2, 2020, 1:34 PM), https://www.insider.com/history-of-police-in-the-us-photos-2020-6.

racial discrimination and injustice.[127] The police would often respond to protestors with physical brutality through tear gas, a high-pressure water hose, or attack dogs.[128] In 1965, President Lyndon Johnson declared a "war on crime" and encouraged Congress to pass the Law Enforcement Assistance Act which supplied local police with military-grade weapons.[129] The Los Angeles Police Chief described fighting protesters as "very much like fighting the Viet Cong," illustrating just how militarized the police culture was.[130] President Johnson even told an audience of police and policymakers in 1966 that "if we wish to rid this country of crime, if we wish to stop hacking at its branches only, we must cut its roots and drain its swampy breeding ground, the slum."[131]

The constitutional rights to a fair trial, due process, and equal protection are meant to protect people from the government when it attempts to deprive them of their freedom. However, the over-policing of hot-spot communities of color—combined with a chronic over-reliance on police to fix issues like homelessness, substance abuse, and mental health crises—leads to dangerous racialized policing techniques and undue use of force.[132] Racialized policing has been deeply ingrained in American police culture from the days of slave patrols through the war on drugs, that the players in the criminal legal system, policy makers, and municipal leaders have treated it as normal.

According to a Gallup poll released on August 12, 2020, for the first time in twenty-seven years, a majority of adults in the United States do not trust law enforcement.[133] While 56% of white adults said they were confident in the police, only 19% of black adults shared that same confidence.[134] Social media and news outlets, sources that shape society's perceptions and opinions, also fuel a general distrust of the police. Too often we hear police defend unjustified killings by saying, "I was in fear for my life" but later see the opposite in personal body camera footage.[135] Other times, we

127. *See* JRANK, *Police: History, The Police-Citizen Crisis of the 1960s*, https://law.jrank.org/pages/1644/Police-History-police-citizen-crisis-1960s.html (last visited Feb. 11, 2022).

128. *Id.*

129. *See* 89 P.L. 197, 79 Stat. 828; *see also* Lepore, *supra* note 120.

130. Lepore, *supra* note 120.

131. *Id.*

132. *See* ALEX S. VITALE, THE END OF POLICING 28 (2017).

133. Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds,* N.Y. TIMES (Aug. 12, 2020), https://www.nytimes.com/2020/08/12/us/gallup-poll-police.html.

134. *Id.*

135. David J. Thomas, *Law Enforcement Must Regain the Public's Trust*, NAT'L POLICE FOUND. (Oct. 27, 2016), https://www.policinginstitute.org/onpolicing/law-enforcement-must-regain-the-publics-trust/.

see body camera footage revealing law enforcement failing to know the law and asserting their claimed authority to the absolute limits.[136] Other viral videos show officers failing to establish probable cause or unlawfully detaining and arresting targeted populations.[137]

Existing scholarship largely focuses on civilians as the target of police violence,[138] but the idea that routine traffic stops also pose an incredible and unpredictable amount of danger to the police has been longstanding.[139] The most recent annual data from the Federal Bureau of Investigation's Law Enforcement Officers Killed & Assaulted Program reported that six out of the forty-eight law-enforcement officers who were feloniously killed in the line of duty in 2019 were conducting traffic violation stops.[140] Beyond statistics, routine traffic stops are commonly described within law-enforcement circles as especially dangerous encounters for police.[141] For instance, during officer training, police academies use videos of extreme cases of officers being randomly shot during traffic stops that otherwise appear entirely routine.[142] These videos are designed to stress the importance of not becoming complacent on the scene or hesitating to use force.[143]

The Community Relations Service (CRS) of the U.S. Department of Justice has assisted police departments and communities all over the country in coming to grips with the difficult task of maintaining

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136. Jeffrey Bellin & Shevarma Pemberton, *Policing the Admissibility of Body Camera Evidence*, 87 FORDHAM L. REV. 1425, 1427 (2019).

137. *Id.*

138. Illya Lichtenberg, *The Dangers of Warrant Execution in a Suspect's Home: Does an Empirical Justification Exist for the Protective Sweep Doctrine?*, 54 SANTA CLARA L. REV. 623, 630 (2014) ("[T]he application of research toward the violent victimization of the police in a context specific to the Fourth Amendment has only recently been examined."). Several criminological studies in the past three decades have broadly examined violence against police officers, especially with regard to the felonious killings of officers. *See generally, e.g.*, Jodi M. Brown & Patrick A. Langan, *1976–98: Justifiable Homicide by Police, Police Officers Murdered by Felons*, U.S. DEPT. OF JUST. (2001), https://bjs.ojp.gov/content/pub/pdf/ph98.pdf; Jordan Blair Woods, *Police Escalation and the Motor Vehicle*, 24 NEW CRIM. L. REV. 115 (2021); Rebecca Reviere & Vernetta D. Young, *Mortality of Police Officers: Comparisons by Length of Time on the Force*, 13 AM. J. POLICE 51 (1994); William Wilbanks, *Cops Killed and Cop-Killers: An Historical Perspective*, 13 AM. J. POLICE 31 (1994).

139. *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1048 (1983) (recognizing the Court's view "of the danger presented to police officers in 'traffic stop' and automobile situations").

140. *Table 24: Law Enforcement Officers Feloniously Killed—Circumstance Encountered by Victim Officer upon Arrival at Scene of Incident*, 2015–2019, FED. BUREAU INVESTIGATION: UNIFORM CRIME REPORTING, https://ucr.fbi.gov/leoka/2019/topic-pages/tables/table-24.xls (last visited Sept. 8, 2022).

141. Jordan Blair Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635, 638 (2019).

142. *Id.*

143. *Id.*

law and order in a complex and changing multicultural society.[144] Police-citizen conflict accounts for a major portion of the disputes to which CRS responds,[145] and traffic stops account for over one-third of those police-citizen conflicts.[146] Currently, the public does not trust the police, and this relationship must change before courts add a potentially dangerous layer to this already fragile dynamic.

2. Bright-Line Rules

Search and seizure jurisprudence is a tension between the privacy rights of individuals and the ability of police officers to enforce the law.[147] This tension led to two methods of adjudicating disputes. One method is to determine the reasonableness of every search on a "case-by-case" basis, paying particular attention to the facts of each case.[148] The second method is to create "bright lines" by which police officers, trial courts, and individuals know exactly what may or may not be searched in any given situation.[149]

Bright-line rules are not unique to search and seizure laws.[150] Commentators have found clear-cut rules of adjudication necessary for the following reasons. First, in a system that affords great discretion to law enforcement, bright line rules, created by and for police, would reduce the speculation of discriminatory treatment towards historically racially profiled citizens.[151] Second, bright line rules present specific and articulable criteria for law enforcement to use when faced with determining if their scope of authority permits a search.[152] Finally, bright line rules aid lower courts in defining what is reasonable conduct without having to solely defer to the arresting officers' judgment at the time of the search.[153]

Accordingly, implementing bright line rules in judicial proceedings has been viewed as effectuating significant results. Not only can bright line rules set parameters of what is unacceptable police

144. DEP'T. JUST., *PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN POLICE AND CITIZENS*, (Sept. 2003), https://www.justice.gov/archive/crs/pubs/principlesofgoodpolicingfinal092003.htm. The CRS works to prevent or resolve community conflicts and tensions arising from policies and practices. *Id.*

145. *Id.*

146. Harrison, *supra* note 13. In 2018, the police contacted 61.5 million people, and of that, 25 million were drivers or passengers in a traffic stop. *Id.*

147. *See* Silk, *supra* note 1.

148. *Id.*

149. *Id.*

150. *Id.* at 282.

151. *Id.* at 286.

152. *Id.*

153. *Id.* (arguing that "fact-style" adjudication provides the lower courts with little guidance).

conduct, but trial judges can more easily apply bright line rules in deciding cases, which may result in appellate courts seeking less clarification on search and seizure law.[154]

III. ANALYSIS

A. The Pennsylvania Supreme Court

1. Commonwealth v. Gary *(2014)*

In April of 2014, the Pennsylvania Supreme Court decided *Gary* to determine whether probable cause, alone, was enough to allow law enforcement to search an individual's vehicle.[155] In *Gary*, two police officers pulled over the defendant, Sheim Gary, believing that the level of tint on his car windows violated Pennsylvania's Motor Vehicle Code.[156] During the stop, the officers noticed the smell of marijuana emanating from the passenger and driver sides of the vehicle; however, the defendant conceded that there was marijuana in the vehicle, and attempted to flee the scene.[157] The officers apprehended him and returned him to the police cruiser.[158] The officers conducted a warrantless search and found a bag with approximately two pounds of marijuana under the front hood.[159] The defendant was found guilty of possession of a controlled substance and possession with intent to deliver.[160]

The defendant appealed to the Superior Court and, ultimately, to the Pennsylvania Supreme Court, contending that the warrantless search of the vehicle was unlawful because police conducted the search in the absence of any recognized exception to the warrant requirement.[161] The defendant argued that he was entitled to the greater privacy protections afforded by Pennsylvania's constitution.[162] Pennsylvania argued that because the police did not have the opportunity to obtain a search warrant prior to stopping the vehicle, they were permitted, under the exception, to conduct an immediate, warrantless search.[163] In essence, Pennsylvania argued

154. *Id.* at 285.
155. Commonwealth v. Gary, 91 A.3d 102, 104 (Pa. 2014).
156. *Id.* at 104–05; 75 Pa.C.S.A. § 4702(a) (requiring a registered vehicle undergo a once yearly inspection).
157. *Gary*, 91 A.3d at 104–05.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* at 108.
163. *Id.*

for the adoption of the limited automobile exception, and cited to *Commonwealth v. McCree*, where a three-justice majority held that a "limited automobile exception" under Article I, Section 8 provided police with the lawful right to access and seize incriminating evidence in plain view in an automobile without a warrant.[164] The Pennsylvania Supreme Court, in *McCree,* explained that the increased privacy concerns with respect to the seizure of one's person are not present when an object is seized from one's vehicle.[165] However, when deciding *Gary*, the Pennsylvania Supreme Court examined textual, historical, precedential, and policy considerations and turned to cases where it affirmed Article I, Section 8 and the Fourth Amendment as providing comparable protections.[166] After a discussion of the aforementioned considerations, the Court came to the following conclusion:

> [O]ur review reveals no compelling reason to interpret Article I, Section 8 of the Pennsylvania Constitution as providing greater protection with regard to warrantless searches of motor vehicles than does the Fourth Amendment. Therefore, we hold that, in this Commonwealth, the law governing warrantless searches of motor vehicles is coextensive with federal law under the Fourth Amendment. The prerequisite for a warrantless search of a motor vehicle is probable cause to search; no exigency beyond the inherent mobility of a motor vehicle is required.[167]

The Court reasoned that "firm requirement for probable cause is a strong and sufficient safeguard against illegal searches of motor vehicles," and that the inherent mobility and the endless factual circumstances that such mobility engenders constitute a per se exigency.[168]

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164. *Id.* at 122 (citing Commonwealth v. McCree, 924 A.2d 621, 630 (Pa. 2007)). The lead opinion in *McCree* explained:

> [We] have allowed warrantless searches 'where police do not have advance knowledge that 'a particular vehicle carrying evidence of crime would be parked in a particular locale, . . . the exigencies of the mobility of the vehicle and of there having been inadequate time and opportunity to obtain a warrant rendered the search [without a warrant] *proper*.'

McCree, 924 A.2d at 630 (emphasis added). In contrast, an *improper* warrantless search under the automobile exception is "when the police have ample advance information that a search of an automobile is likely to occur in conjunction with apprehension of a suspect[.]" *Id.*

165. *McCree*, 924 A.2d at 630.

166. *See Gary*, 91 A.3d at 126 (citing cases interpreting and applying Article I, Section 8).

167. *Id.* at 138 (not a majority decision but rather an "Opinion Announcing the Judgment of the Court").

168. *Id.*

As a result of *Gary*, Pennsylvania followed the bright-line federal automobile exception: the prerequisite for a warrantless search of a motor vehicle is probable cause to search, and no exigency beyond the inherent mobility of a motor vehicle is required."[169]

2. Commonwealth v. Alexander (2020)

After six years of applying the narrowed, bright-line rule under *Gary*, the Pennsylvania Supreme Court decided to re-examine the issue.[170] On May 11, 2016, at approximately 2:30 a.m., Philadelphia police officer Joshua Godfrey and his partner stopped a vehicle driven by Keith Alexander.[171] The officers smelled marijuana, and upon confessing that he and his female passenger had just smoked marijuana, Alexander was arrested and placed inside the officer's vehicle while the officers searched his car.[172] Alexander had a key around his neck which opened a locked metal box that the officers found a behind the driver's seat, containing bundles of heroin.[173] The Commonwealth charged Alexander with possession of heroin with intent to distribute.[174] Alexander filed a motion to suppress the search of the vehicle.[175] The Superior Court denied his motion, finding that the officers had probable cause to search the vehicle and the box.[176] The denial was grounded in *Gary*'s application of the narrow federal automobile exception.[177]

Alexander appealed to the Pennsylvania Supreme Court, contending that it should overrule or limit *Gary* because Article I, Section 8 of the Pennsylvania Constitution requires a showing of exigency in addition to probable cause.[178] The Court agreed, and explained that it is "the role of this Court to interpret the Constitution and to say what it means. *Gary* did not do so."[179] The majority stated that "[the Pennsylvania Constitution's] heightened privacy protections do not permit us to carry forward a bright-line rule that gives short shrift to citizen's privacy rights."[180] As of December 2020, the Pennsylvania Supreme Court declared, "we return to the

169. *Id.*
170. Commonwealth v. Alexander, 243 A.3d 177, 181 (Pa. 2020).
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 181–82.
177. *Id.*
178. *Id.* at 182.
179. *Id.* at 199.
180. *Id.* at 208.

pre-*Gary* application of our limited automobile exception . . . pursuant to which warrantless vehicle searches require both probable cause and exigent circumstances," either alone is insufficient.[181] Because of *Alexander*, the federal automobile exception no longer stands in Pennsylvania.

B. Analysis of Alexander

1. Expanding the Scope of Privacy

Alexander assured drivers in Pennsylvania that the rights of privacy and protection embodied in Article I, Section 8 do, in fact, extend beyond their own driveways. Article I, Section 8 defends an individual's privacy against governmental intrusion in many situations that are no longer recognized on the federal level.[182] Over the past several decades, the U.S. Supreme Court has restricted Fourth Amendment privacy protections where the Pennsylvania Supreme Court has resisted doing so through interpretations of Article 1, Section 8.[183] For example, the Fourth Amendment allows for a "good faith exception,"[184] while the Pennsylvania Constitution does not.[185] Additionally, in the stop and frisk context, the Pennsylvania Supreme Court has held that an anonymous tip that a man of a particular description at a particular location carrying a gun was not sufficient justification for police to conduct a stop and frisk,[186]

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181. *Id.* at 207.

182. *See* Commonwealth v. Berkheimer, 57 A.3d 171, 187 (Pa. Super. Ct. 2012) (declining to follow the inevitable discovery rule in Pennsylvania); Commonwealth v. Edmunds, 586 A.2d 887, 900–03 (Pa. 1991) (declining to adopt a "good faith" exception to the exclusionary rule); Commonwealth v. Sell, 470 A.2d 457, 468 (Pa. 1983) (granting automatic standing to those charged with possessory offenses); Commonwealth v. DeJohn, 403 A.2d 1283, 1287–88 (Pa. 1979) (limiting the third party exception and requiring police to seek a warrant for bank records); *but see* Commonwealth v. McCree, 924 A.2d 621, 630 (Pa. 2007) (acknowledging that Pennsylvania has adopted a "limited automobile exception").

183. *See, e.g.*, Theodore v. Delaware Valley Sch. Dist., 836 A.2d 76, 89 (Pa. 2003); Commonwealth v. White, 669 A.2d 896, 902 (Pa. 1995); Commonwealth v. Tarbert, 535 A.2d 1035, 1038 (Pa. 1987).

184. The good faith exception to the exclusionary rule under the Fourth Amendment originated in United States v. Leon, 468 U.S. 897 (1984), and suspends operation of the exclusionary rule where police act in good faith reliance on a facially valid warrant issued by a neutral and detached magistrate, which warrant later proves defective for lack of probable cause.

185. *Edmunds*, 586 A.2d at 899. *Edmunds* concerned the search of a building and seizure of marijuana based upon a warrant which was defective due to a magistrate's erroneous determination of probable cause. *Id. at* 889. While such a search would have been admissible under the Fourth Amendment given the "good faith exception" to the exclusionary rule, the Pennsylvania Supreme Court looked to the state constitution and found therein a right of privacy sufficient to preclude the application of such an exception as a matter of state law. *Id.* at 887.

186. Commonwealth v. Hawkins, 692 A.2d 1068, 1069 n.1 (Pa. 1997).

rejecting federal precedent.[187] In the suppression context, the Pennsylvania Supreme Court rejected the U.S. Supreme Court's Fourth Amendment-based reasoning that a fleeing suspect is not "seized" unless the pursuing officers apply physical force to the suspect or the suspect heeds demands to halt.[188] The reluctance of Pennsylvania courts to adopt the same exceptions that the Federal courts have adopted shows a clear divergence of interests in which the drafters of each constitution sought to advance.[189] This divergence of interests is evident in both Pennsylvania[190] and federal jurisprudence.[191]

The textual similarities of Article I, Section 8 and the Fourth Amendment[192] do not suggest that they require identical interpretations, or that both must follow the same standard.[193] Unlike other states that have also rejected the federal automobile exception but rely on "the unique language of [their] own constitution,"[194] Pennsylvania courts have placed a much heavier emphasis on the historical application of Article I, Section 8.[195]

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187. Terry v. Ohio, 392 U.S. 1 (1968).

188. *See* Commonwealth v. Matos, 672 A.2d 769 (Pa. 1996); California v. Hodari D, 499 U.S. 621 (1991).

189. *See* Smith, *supra* note 63.

190. *See, e.g.*, Commonwealth v. Tarbert, 535 A.2d 1035, 1037 (Pa. 1987) (stating that the Court has not hesitated to interpret Pennsylvania Constitution as affording greater protections than federal Constitution provides); *Sell*, 470 A.2d at 466 (stating that the Court frequently has recognized Pennsylvania Constitution as an alternative and independent source of individual rights); Commonwealth v. Tate, 432 A.2d 1382, 1387 (Pa. 1981) (finding that states may provide through their constitutions bases for rights and liberties independent from those provided by federal Constitution); Commonwealth v. Harris, 239 A.2d 290, 292 n.2 (Pa. 1968) (stating court has power to impose standards on searches and seizures higher than those required by Fourth Amendment); Commonwealth v. Jones, 378 A.2d 835, 839–40 (Pa. 1977); Commonwealth v. Jeffries, 311 A.2d 914, 918 (Pa. 1973).

191. *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (holding that states may provide more expansive liberties than those the federal Constitution provides); Oregon v. Hass, 420 U.S. 714, 719 (1975) (finding "a State is free as matter of state law to impose greater restrictions on police activity than those Court holds to be necessary based on federal constitutional standards.").

192. *See, e.g.*, Commonwealth v. Matos, 672 A.2d 769, 771 (Pa. 1996) (noting textual similarities between Article I, Section 8 and the Fourth Amendment, and also acknowledged that the court was not bound to interpret each provision identically); Commonwealth v. Chase, 960 A.2d 108, 117 (Pa. 2008) (noting "the textual similarity between the Fourth Amendment and Article I, § 8").

193. Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991) (recognizing the textual similarities between Article I, Section 8, but looking to Pennsylvania's history to interpret the provision to reflect a strong concern for privacy).

194. State v. Patterson, 774 P.2d 10, 12 (Wash. 1989).

195. *See* Smith, *supra* note 63 (discussing the emphasis that Pennsylvania courts have placed on this interest and the importance of raising privacy concerns when challenging a search and seizure issue); *see also Edmunds*, 586 A.2d at 896 (creating a test to allow for areas not covered under federal law to be recognized as private in Pennsylvania).

2. Protecting or Endangering a Constitutional Guarantee

The constitutional right of privacy is significant, but it is not unqualified.[196] Though an individual's right to privacy is a fundamental right, courts have held that in certain situations, it can be abridged.[197] These situations exist where a government interest is so compelling that it warrants the diminishment of one's right to privacy in order to achieve some greater societal objective.[198]

The Court's eagerness to trust officers' discretion in *Alexander* is admirable, but given the current climate of police encounters, bright-line rule advocates believe that it provides more deference to law enforcement than it should. The result may provide too much discretion to law enforcement and intrude unnecessarily upon the privacy of less powerful members of society. While police are sworn to uphold the Constitution, they are still "engaged in the often-competitive enterprise of ferreting out crime."[199] Therefore, it is not surprising that, in the course of intervening in drug traffic, the police have been so relentless in pushing their claimed authority relating to traffic stops to the absolute limits.[200]

The Pennsylvania Supreme Court in *Alexander* touched on this and defended its holding by explaining that it is not entitled to ignore the Pennsylvania Constitution just because adhering to it would make law enforcement policies and procedures more difficult.[201] However, modern policing in the United States, as a result of its troubled history, is full of institutional flaws and systematic and inequitable distribution of resources, power, and opportunity.[202] Currently, the public does not trust the police, and increasing officer discretion will raise the temperature of car stops significantly. Courts are called on to "protect against abuses by all branches of government . . . protect minorities of all types from the majority, and protect the rights of people who can't protect

196. Stenger v. Lehigh Valley Hosp. Center, 609 A.2d 796, 800 (Pa. 1992).

197. Pa. Soc. Servs. Union, Local 688 v. Commonwealth, 59 A.3d 1136, 1144 (Pa. Commw. Ct. 2012) (citing *Stenger*, 609 A.2d at 800).

198. *Id.*

199. Johnson v. United States, 333 U.S. 10, 14 (1948).

200. As Justice Robert Jackson noted in his dissent in *Brinegar v. United States*, "the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit." 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

201. Commonwealth v. Alexander, 243 A.3d 177, 198 (Pa. 2020). The Court stated that "we are not a policy branch, and we cannot ignore constitutional commands even if they make the work of police or prosecutors harder." *Id.*

202. Claire Lechtenberg, *Defining Racial Justice Terms: Institutional Racism*, YOUNG WOMEN'S CHRISTIAN ASS'N CENT. CAROLINAS (Aug. 11, 2020), https://ywcacentralcarolinas.org/defining-racial-justice-terms-institutional-racism/.

themselves."[203] The current political climate, and its violent nature, warrant courts to consider factors outside its precedent.

Many scholars have advocated for courts to make greater use of empirical data regarding the danger of car stops when deciding cases involving regulating police conduct.[204] For example, out of 1,036 police officers, only 6% strongly agree that they have received adequate training for traffic stops involving noncompliant drivers.[205] Studies looking at racial profiling in policing analyzed police traffic stop data and found Black drivers are more likely to be stopped, and stopped more frequently, in any given year.[206] Furthermore, after an investigatory stop happens, the police are five times more likely to search the vehicle if the driver is Black than if the driver is White, even though the "hit rate," the rate at which contraband is found, for Blacks is less than half of what it is for Whites.[207] Given these facts, the government should have an interest in ensuring law enforcement officers are properly trained to handle all situations and are equipped with the necessary techniques to deescalate potentially dangerous situations. The data reflect the need for greater and more specific instructions in policing, and a societal interest in crafting functional rules because, as Justice Sonia Sotomayor noted, court decisions do not exist in a vacuum and have real and significant consequences on people's daily lives.[208] Improving how courts regulate the police requires new forms of partnerships to equip the judiciary with the type of empirical expertise that can inform their decisions.[209]

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203. *How Courts Work*, A.B.A.: DIV. FOR PUB. EDUC. (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/court_role/.

204. *See, e.g.*, Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2068–69 (2016); Tracey L. Meares, *Empirical and Experimental Methods of Law: Three Objections to the Use of Empiricism in Criminal Law and Procedure—And Three Answers*, 2002 U. ILL. L. REV. 851, 873.

205. Harrison, *supra* note 13. From April 22, 2021, to May 4, 2021, a total of 1,036 police officers completed an online survey that addresses several important issues police leaders should consider. "Only 6% strongly agree that they have received adequate training for traffic stops involving noncompliant drivers; 46% disagree or strongly disagree[,]" and 83% agree. *Id.* "Since January 2019, 75% report they have not received any hands-on training about removing a noncompliant driver from a vehicle; 35% say they have received simulator or hands-on training on the use of less lethal tools with a noncompliant driver." *Id.* "About 42% said their department has never provided traffic stop training; 50% more said it occurs yearly. The remaining 8% noted they received weekly or more frequent training." *Id.*

206. LYNN LANGTON & MATTHEW DUROSE, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 242937, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011, at 10 (2013).

207. Bianca Velez, *Do the Police Protect and Serve All People in the United States?: A Survey of the Problems Within Modern Policing and Solutions to Ensure the Police Protect and Serve Us All*, 55 U.S.F. L. REV. 421, 427 (2021).

208. Utah v. Strieff, 579 U.S. 232, 251–52 (2016) (Sotomayor, J., dissenting).

209. Velez, *supra* note 207.

3. Efficiency of Bright-Line Rules

In *Alexander*, the Pennsylvania Supreme Court had two choices: (1) keep *Gary's* bright-line rule by confining a valid warrantless search to where probable cause alone is sufficient, or (2) risk blurring it by requiring law enforcement to establish a vague form of exigency on a case-by-case assessment. By choosing the latter, the court left the question of exigency unanswered and provided little guidance on how to go about answering the question. The court may better serve law enforcement by adopting a clear bright-line rule, one which will respond to any situational variances.[210] Short of that, more specific guidance will be helpful.

In deciding cases, courts have an opportunity to inform and shape behaviors.[211] The language of *Alexander* is hardly informative. To the extent that exigency is defined in the *Alexander*, the court cited to *Mincey v. Arizona:* "the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment."[212] The Pennsylvania Supreme Court admits that the definition of exigency "has unquestionably been difficult for the courts of this Commonwealth."[213] Despite the ongoing challenge to define exigency, the Pennsylvania Supreme Court in *Alexander* stated,"[b]ut so what?"[214] If the justices of this court—all of whom are extensively trained in the law and have legal resources at their fingertips—have difficulty determining what constitutes sufficient exigencies that permit the warrantless search of a vehicle, how can officers in the field be expected to make on-the-spot decisions in this regard and consistently reach the correct results?

The Pennsylvania courts' struggle to interpret the permissible boundaries of a warrantless automobile search under Article I, Section 8 can serve as a prediction to how trial courts will continue to

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210. *See, e.g.*, California v. Acevedo, 500 U.S. 565, 577 (1991) (noting "the virtue of providing 'clear and unequivocal guidelines to the law enforcement profession'") (quoting Minnick v. Mississippi, 498 U.S. 146, 151 (1990)).

211. One commentator argues that the "case-by-case due process approach" is defective because the approach "provided the Court with scant opportunity to shape and direct the behavior of law enforcement officers." Charles J. Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826 (1987); Caperton v. A. T. Massy Coal Co., 556 U.S. 868, 891 (2009) (Roberts, J., dissenting) ("The Court's new 'rule' provides no guidance to judges and litigants about when recusal will be constitutionally required," because "a 'probability of bias' cannot be defined in any limited way.").

212. Commonwealth v. Alexander, 243 A.3d 177, 209 (Pa. 2020) (citing Mincey v. Arizona, 437 U.S. 385, 393 (1978)).

213. Commonwealth v. Gary, 29 A.3d 804, 807 (Pa. 2014).

214. *Alexander*, 243 A.3d at 208.

render inconsistent rulings, absent specific guidance.[215] This problem was particularly evident in *Commonwealth v. White* and *Commonwealth v. Rodriguez*, two cases with very similar facts but entirely opposite holdings.[216] Both cases involved informants supplying police with information that the defendants were in possession of illegal narcotics and would be using vehicles to transport the contraband.[217] In both cases, the police could not fully describe the particular vehicle being driven in the crime and tried to justify their warrantless searches of the vehicle based on unforeseen circumstances.[218] In *Rodriguez*, the court upheld the search because the police did not know until they saw the defendant that she would be driving that particular vehicle, and therefore, a search warrant could not have been obtained.[219] In *White*, the court did not uphold the search and stated that the police could have requested a search warrant "as particular as reasonably possible."[220] The inconsistent holdings in *Rodriguez and White,* two cases that are based on nearly identical facts, undermines the integrity of our criminal justice system by exposing the inability of a court to announce a consistent standard for law enforcement to follow.

Where there is a risk for inconsistent applications of a rule, courts opt for a workable bright-line rule that is both easy for officers to apply and for citizens to understand.[221] In the context of search and seizure law, providing standardized bright-line rules that can be readily understood and implemented by the police is generally more effective in protecting constitutional rights.[222] Moreover, drivers must also be given the opportunity to know in advance what conduct may subject them to a warrantless search. Bright-line rules satisfy this objective by providing detailed notice to the public on how to conduct themselves in potentially unlawful situations.[223]

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215. *See supra* notes 19–25 and accompanying text.

216. Commonwealth v. White, 669 A.2d 896, 898 (Pa. 1995); Commonwealth v. Rodriguez, 585 A.2d 988, 990 (Pa. 1991).

217. White, 669 A.2d at 899; Rodriguez, 585 A.2d at 989.

218. White, 669 A.2d at 898; Rodriguez, 585 A.2d at 990.

219. *Rodriguez*, 585 A.2d at 990–91. The Court also upheld the search as valid because the police did not know exactly where in the county defendant would be traveling on the date in question, therefore did not know which magistrate would have proper jurisdiction to issue a search warrant. *Id.* at 991.

220. *White*, 669 A.2d at 901, n.3.

221. *See, e.g.*, Chimel v. California, 395 U.S. 752, 760 (1969) (citing numerous inconsistent decisions indicating that precedent cannot be rationally and consistently applied, creating the need for a more precise rule); New York v. Belton, 453 U.S. 454, 459 (1981) (citing numerous vehicle-search cases with similar facts and inconsistent holdings to show that this confusion led the Court to opt for a workable bright line rule).

222. Wayne R. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma,* 1974 SUP. CT. REV. 127, 141–43 (1974).

223. Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L. J. 1137, 1141 (2016).

However, for a bright-line rule to be effective, law enforcement must be able to comprehend the rule, such that police can refer to the rule in every search and seizure encounter. Rulings that are impossible to apply by the police have been deemed "useless rulings," no matter how sophisticated and intricate they may sound to lawyers and judges.[224]

Pennsylvania courts have repeatedly noted that "rules governing law enforcement conduct must be easily discernible and capable of clear and consistent application."[225] Pennsylvania courts have articulated the value that eliminating a case-by-case exigency assessment brings to officers at automobile stops,[226] several of which are recognized by Justice Castille.[227] Common law adjudication "stands ready" to convert a case-by-case assessment into "a far more specific patchwork of rules."[228] Scholars have observed and noted conscious decisions by courts to "inject rule-like languages" into the interstices that standards leave open.[229] Further observations reveal that courts engage in what has been called the "'rulification' of standards, developing sub-principles that guide their application of standards."[230]

The need for a bright-line rule is not a novel idea. When Pennsylvania departed from the federal standard in the 1990s, dissenting judges and scholars urged the Pennsylvania Supreme Court to adopt the federal standard for some of the same reasons this Article

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224. *Id.* (viewing highly sophisticated set of rules, "qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions," may be impossible for officers in the field to apply, despite being preferred by lawyers and judges).

225. Commonwealth v. Romero, 183 A.3d 364, 403 n.20 (Pa. 2018).

226. Commonwealth v. Perry, 798 A.2d 697, 716–17 (Pa. 2002) (Castille, J., concurring) (explaining that the multiple potential exigent circumstances, each with multiple governing "tests" outlined in Commonwealth v. White 669 A.2d 896 (Pa. 1995) is impractical in the extreme).

227. Commonwealth v. Luv, 735 A.2d 87, 95 (Pa. 1999) (Castille, J., concurring) (advocating for bright line rules to prevent police officers from having to choose between taking the time to obtain a warrant and risk flight of the car, or, not obtain a warrant and risk suppression of the evidence obtained from the search); *White*, 669 A.2d at 909 (Castille, J., dissenting) ("This Court has previously adopted bright line rules where 'experience proved it to be difficult for law enforcement officials to administer' more flexible rules based on the totality of the circumstances.").

228. Michael Coenen, *Rules Against Rulification*, 124 YALE L. J. 644, 654 (2014).

229. *See* Frederick Schauer, *New Perspectives on Statutory Interpretation: The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 805 (2005) ("Whether it be by importing rules from elsewhere, or imposing rules of some sort on their own otherwise unconstrained decision-making, or filling decisional voids with three- and four-part tests, interpreters and enforcers of standards have tried to convert those standards into rules to a surprising degree . . . ."); *see also* Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CALIF. L. REV. 1582, 1586 (explaining that an individual approach may result in too frequent error, and higher litigation costs).

230. Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology*, 96 GEO. L.J. 1863, 1904 (2008).

argues.[231] Justice James McDermott dissented sharply to *Sell* majority's departure from Fourth Amendment jurisprudence, claiming that this departure was unwarranted and dangerous.[232] According to the dissent, when there is no discernible textual distinction between the Pennsylvania and United States constitutions, the Pennsylvania Supreme Court should adopt the reasoning of the U.S. Supreme Court. Justice McDermott opined that "absent compelling reason, textual or otherwise . . . the interests of this nation are best served by maintaining common standards of constitutional law throughout its separate jurisdictions."[233]

The divergent opinions in *Sell* exemplify the contrasting positions in an ongoing national debate concerning new judicial federalism: proponents champion the notion of the states as laboratories of justice and the need for independent interpretation of state constitutions to secure liberty, while critics believe that federal standards should be respected because disparate state standards will lead to unpredictable and chaotic results.

In 1998, former Chief Deputy District Attorney, Christian Fisanick, reacted to the Pennsylvania Supreme Court's rejection of the federal automobile exception in *Commonwealth v. White* and *Commonwealth v. Labron*.[234] Fisanick described hypothetical situations, based, in part on real cases, to illustrate some of the many difficulties and dangers associated with roadside searches.[235] He offers a hypothetical scenario which he describes as "The Lone Police Officer," to illustrate a realistic scenario where the Pennsylvania standard fails to adequately protect law enforcement.[236] However, this scenario can also be used to illustrate the types of questions officers need to have answered in order to determine whether the threshold for the exigency requirement has been met. The scenario is as follows:

> A lone police officer in a rural jurisdiction pulls over a carload of individuals for speeding. He identifies a large bag of drugs on the front seat through an open window. With the officer outnumbered by the suspects and with no backup readily available, should the Pennsylvania Constitution require impoundment of the vehicle and acquisition

231. Fisanick, *supra* note 67, at 20.
232. Commonwealth v. Sell, 470 A.2d 457, 469 (Pa. 1983)
233. *Id.* at 470.
234. Fisanick, *supra* note 67, at 15.
235. *Id.* at 17.
236. *Id.*

> of a warrant in order for the officer to protect himself from drug dealers and their hidden weapons?[237]

Is an encounter with a drug dealer one of exigency? How outnumbered must the officer be before there are exigent circumstances? How far away is his protective backup? How long must the officer wait for the warrant? These questions prompt the need for a sharp, bright-line rule with a straightforward application.[238]

VI. CONCLUSION

It is undisputed that Pennsylvania citizens are entitled to the greater privacy protections under Article I, Section 8 than the Fourth Amendment. However, the Pennsylvania Supreme Court's approach in *Alexander* is unworkable. The court's rejection of the federal automobile exception and failure to provide a working definition of exigency is counterproductive to its ultimate goal of protecting the privacy of its citizens. The federal automobile exception is functional for police officers in the field and judges in the courtroom to apply. It would ensure that defendants are treated the same in all contexts. The court should take this opportunity to establish a bright-line rule but, at the very least, provide specific guidance on defining "exigent circumstances," recognizing its practical benefits to trial courts and officers in the field.

237. *Id.* Fisanick explains the answer to this question should be "no" because the officer's safety would be jeopardized while waiting with the suspect until another officer arrives with a warrant and requiring the officer to obtain a warrant seems impractical. *Id.*

238. *Id.*

Increasing Representation: Expanding Intersectional Claims in Employment Discrimination

Anna Maria Sicenica[*]

"The way we imagine discrimination or disempowerment often is more complicated for people who are subjected to multiple forms of exclusion. The good news is that intersectionality provides us a way to see it."

– Kimberlé Williams Crenshaw[1]

ABSTRACT

The trend of globalization has only continued to bring workers from different races, religions, and countries to the United States. Moreover, in a country where women continue to become a larger part of the workforce every year, and as the age of retirement continues to grow, there will inevitably be more women who will face discrimination on multiple grounds: specifically, for their age and sex. Thus, it is no wonder that "intersectional claimants," or claimants that belong to least two or more protected classes under the law, now make up the majority of the workforce.

However, despite the fact that intersectional claimants represent the majority of the population, many courts do not recognize an employment discrimination claim based on multiple protected characteristics. Circuit courts are split on whether a claimant can bring a claim based on sex (under Title VII) plus another protected Title VII characteristic. Further, even fewer circuits recognize claims based on sex (under Title VII) plus age under the Age Discrimination in Employment Act of 1967. Consequently, these types of "intersectional" claimants face varying burdens of proof based on the jurisdiction they reside in and the claim they decide to bring forward. This type of division is exactly what a leading scholar of critical race theory, Kimberlé W. Crenshaw, warns can lead to identity erasure. Identity erasure occurs when the law does not recognize individuals who belong to multiple protected classes wholistically.

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* J.D. Candidate, Duquesne University Thomas R. Kline School of Law, 2023; B.A., Political Science, Chatham University, 2018. Anna Maria wishes to thank Professor Rona Kaufman and Professor John Rice for all of their ideas and guidance. She also thanks her parents and partner for their continuous support.

1. Kimberlé Crenshaw, Address at the annual Netroots Nation Conference in Atlanta (Aug. 11, 2017).

Indeed, different legal causation standards exist based on the type of claim workers bringing forward: the "motivating factor" standard for ADEA discrimination claims, and the "but-for" standard for age discrimination claims. Because this "but-for" standard has a higher burden of proof for plaintiffs, this causes individuals who belong to multiple protected classes to bisect their identity and often choose sex before their other traits within a sex-plus jurisdiction.

This Article discusses these circuit splits in detail as well as the different legal causation standards. In addition, it discusses recent case law such as the United States Supreme Court's Bostock v. Clayton County *ruling, which has opened the door for future intersectional claims. This Article argues for statutory changes and highlights the need for courts to embrace a new understanding of intersectionality.*

TABLE OF CONTENTS

I. INTRODUCTION

In 1954, a decade after the United States Supreme Court's landmark decision in *Brown v. Board of Education*, President Lyndon B. Johnson signed the first significant civil rights law since Reconstruction: the Civil Rights Act of 1964 ("Civil Rights Act").[2] Yet, this ten-year path to the Civil Rights Act's inception was fraught

2. PLC Lab. & Emp't, *Title VII History*, PLC US L. DEP'T (Jan. 15, 2013), https://1.next.westlaw.com/Document/Ib6d121250e5a11e38578f7ccc38dcbee/View/FullText.html?originationContext=KnowledgeGraph&transitionType=Default&contextData=(sc.Default) (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

with hardship. In the wake of the Court's momentous *Brown* decision and series of southern state laws disenfranchising Black voters, the Civil Rights Movement was reinvigorated and continued to grow throughout the late 1950s and 1960s.[3] Then, in the early 1960s, after "a number of catalytic events that marked the early history of the modern civil rights movement," Congress passed the Civil Rights Act.[4]

Some of these catalytic events include the brutal murder of a Black 14-year-old, Emmett Till, in 1955 by white supremacists and the photo of Till's mutilated corpse shared with media across the country; Black students staging a sit-in at a Woolworth's in Greensboro, North Carolina in February 1960; Black veteran, James Meredith's, fight to attend the University of Mississippi in 1962; the civil rights protests in Birmingham, Alabama (including the 1963 Children's Crusade where police used batons, dogs, and firehoses against demonstrators); the murders of three young civil rights workers—James Chaney, Andrew Goodman, and Michael Schwerner—in Mississippi in June 1964; and the monumental March on Washington, D.C., showing support of President John F. Kennedy's Civil Rights Bill.[5] At the end of the March on Washington, more than 200,000 demonstrators gathered in front of the Lincoln Memorial where Dr. Martin Luther King, Jr. delivered his iconic "I Have a Dream" speech.[6] Immediately following the March, Dr. King and other civil rights leaders met with President Kennedy and Vice President Lyndon B. Johnson at the White House to discuss civil rights legislation and the bipartisan support that would be needed to pass it.[7]

During this time, civil rights groups argued that the problem of discrimination in employment was not simply a problem of business practices that reinforced "blatant exclusion," but instead, a far-reaching "complicated, deeply rooted, and structural" issue.[8]

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3. *Id.*

4. Maurice Wexler et al., *The Law of Employment Discrimination from 1985 to 2010*, 25 A.B.A. J. LAB. & EMP. L. 349, 349 (2010).

5. *Id.* at 349–50; Brad Bennett, *Honoring Emmett Till: 65 Years After Brutal Murder That Galvanized Civil Rights Movement, Family Still Seeking Justice*, SPL CTR. (Aug. 28, 2020), https://www.splcenter.org/news/2020/08/28/honoring-emmett-till-65-years-after-brutal-murder-galvanized-civil-rights-movement-family; EQUAL JUST. INITIATIVE, *Segregation in America*, 37–47 (2018), https://eji.org/wp-content/uploads/2019/10/segregation-in-america.pdf.

6. STAN. U. THE MARTIN LUTHER KING, JR. RSCH. AND EDUC. INST., *March on Washington for Jobs and Freedom*, https://kinginstitute.stanford.edu/encyclopedia/march-washington-jobs-and-freedom (last visited January 2, 2022).

7. *Id.*

8. Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 286 (2011) (citing PAUL D. MORENO, FROM DIRECT ACTION TO

Indeed, this novel understanding of discrimination in employment as a multi-faceted problem was not limited to civil rights groups.[9] At both the federal and state administrative levels, "*structural approaches* to solving the problem of racial employment subordination were well entrenched in the relevant public actor's discourse."[10]

Thus, it was amid this societal push and with a new structural understanding of employment discrimination that the Senate and House of Representatives enacted the most comprehensive federal statute governing employment discrimination. Title VII of the Civil Rights Act of 1964 ("Title VII") not only made it unlawful for employers to discriminate based on race or color, but also made discrimination based on religion, sex, and national origin illegal.[11] Moreover, the Civil Rights Act established the United States Equal Employment Opportunity Commission ("EEOC") to administer and enforce civil rights laws against workplace discrimination.[12]

Yet, despite creating and enforcing the most comprehensive employment discrimination statute, there were still gaps in coverage under Title VII. This led to a series of unpopular decisions by the Supreme Court in 1989 which fueled the creation of the Civil Rights Act of 1991.[13] One of these decisions by the Court included *Wards Cove Packing Co. v. Atonio*, where the Court held that non-white cannery workers were unable to produce evidence of a legitimate business justification for the hiring practices that created the disparity.[14] The Court's decision in *Wards Cove* not only diminished the scope of the Civil Rights Act of 1964 but also severely weakened it and exacerbated the remaining gaps in Title VII.[15] Indeed, in Section 2 of the Civil Rights Act of 1991, Congress acknowledged that the *Wards Cove* decision was a catalyst for the needed reform, stating that "the decision of the Supreme Court in *Wards Cove*

AFFIRMATIVE ACTION: FAIR EMPLOYMENT LAW AND POLICY IN AMERICA, 1933–1972, 199–200 (1997)).

9. *Id.*

10. *Id.* (emphasis added).

11. Civil Rights Act of 1964 § 7.

12. *Id.*

13. Michael J. Khouri, *The Civil Rights Act of 1991, U.S. Equal Employment*, KHOURI L. (Jan. 19, 2021), https://khourilaw.com/civil-rights-act-of-1991/; Donald R. Livingston, *The Civil Rights Act of 1991 and EEOC Enforcement*, 23 STETSON L. REV. 53, 54–55 (1993) (emphasizing that the Civil Rights Act of 1991 responds to eight Supreme Court decisions: (1) Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); (2) Patterson v. McLean Credit Union, 491 U.S. 164 (1989); (3) Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); (4) Martin v. Wilks, 490 U.S. 755 (1989); (5) EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227 (1991); (6) Lorance v. AT&T Tech., Inc., 490 U.S. 900 (1989); (7) Library of Cong. v. Shaw, 478 U.S. 310 (1986); and (8) W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83 (1991)).

14. *Wards Cove*, 490 U.S. at 643.

15. Khouri, *supra* note 13.

Packing Co. v. Atonio has weakened the scope and effectiveness of Federal civil rights protections."[16] Ultimately, the Court's *Wards Cove* decision, along with "each of the other landmark cases[,] left its own footprint on the law of employment discrimination."[17]

Thus, in 1991, Congress amended Title VII and the Civil Rights Act at large to create wider coverage with the support of civil rights groups.[18] Congress found that additional legislation was necessary to prevent unlawful harassment and intentional discrimination in the workplace.[19] However, it is important to note that when President George H. W. Bush signed this Act into law, he acknowledged that even this action was insufficient, stating that it "would not have done enough to advance the American dream of equal opportunity for all."[20] Although the Act was insufficient, it was nonetheless a necessary step to start to address America's deeply rooted history of inequality. The purpose of this Act is outlined in section 3, which states that the Act is necessary:

> (1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;
> (2) to codify the concepts of "business necessity" and "job relatedness" enunciated by the Supreme Court in Griggs and in the other Supreme Court decisions prior to Wards Cove;
> (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII . . . ; and
> (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.[21]

To achieve these ambitious goals, Congress first amended the statutory language in Title VII § 703(m) to state that violations occur when "the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other [non-discriminatory] factors also motivated the practice."[22] Thus, proof of a motivating factor

16. Civil Rights Act of 1991 § 2.
17. Wexler et al., *supra* note 4, at 352.
18. Civil Rights Act of 1991.
19. Robert Belton, *The Civil Rights Act of 1991 and the Future of Affirmative Action: A Preliminary Assessment*, 41 DEPAUL L. REV. 1085, 1089 (1992).
20. *Id.*
21. Civil Rights Act of 1991 § 3.
22. Civil Rights Act of 1964 § 7.

became sufficient to establish a violation. Further, the amendments explained that employers could no longer avail themselves of an affirmative defense to be absolved of liability; but instead, this defense would only restrict the remedies available to plaintiff.[23] And to have this defense, employers must "demonstrate that [it] would have taken the same action in the absence of the impermissible motivating factor."[24] Adding to this lower burden of proof, in *Desert Palace v. Costa*, the Supreme Court held that circumstantial evidence is sufficient in Title VII cases to obtain a mixed motive instruction and shift the burden to the defendant.[25]

Today, while Title VII allows employees to assert disparate treatment claims for intentional discrimination and disparate impact claims for unintentional discrimination, there are different prima facie elements that must be met for each type of claim. The elements for disparate treatment were set forth in *McDonnell Douglas Corp. v. Green*: (i) belonging to a protected class; (ii) that they were qualified for a job for which the employer was seeking applicants; (iii) despite being qualified, plaintiff suffered an adverse employment action; and (iv) after the adverse employment action, the plaintiff was treated less favorably than a similarly-situated individual outside the protected class.[26] After the plaintiff establishes a prima facie case, the burden then shifts to the employer, who must articulate some "legitimate, non-discriminatory" reason for the employee's rejection.[27] Then, if the employer articulates such a reason, the plaintiff has the opportunity to prove pretext.[28]

In the alternative, "a plaintiff can allege disparate impact and argue that a facially neutral and objective employment practice . . . has a statistically significant adverse effect on members of a protected class, and as such is discriminatory absent a legitimate business justification."[29] However, as disparate impact cases have a higher evidentiary burden, plaintiffs more often bring forth disparate treatment claims.[30] Yet, in contrast to both disparate treatment and impact claims brought under Title VII, claims brought under

23. *Id.*
24. *Id.*
25. Desert Palace v. Costa, 539 U.S. 90, 99–101 (2003).
26. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
27. *Id.*
28. *Id.* at 804.
29. Anita M. Alessandra, *When Doctrines Collide: Disparate Treatment, Disparate Impact, and* Watson v. Fort Worth Bank & Trust, 137 U. PA. L. REV. 1755, 1756 (1989).
30. *Id.*

the Age Discrimination in Employment Act of 1967 ("ADEA") generally do not utilize a "mixed-motives" theory.[31]

Concurrently with Title VII's inception, in 1967, President Lyndon B. Johnson signed the ADEA into law to forbid employment discrimination against anyone at least forty years of age in the United States.[32] In the 2009 case of *Gross v. FBL Financial Services*, the Supreme Court held that a plaintiff asserting an ADEA claim must prove their protected characteristic was the determinative factor for the employer's adverse action instead of just a motivating factor under a "mixed-motives" theory.[33] Thus, a plaintiff claiming discrimination under the ADEA could only succeed where the discriminatory reason was the "but-for" cause for their adverse employment action, while a Title VII plaintiff could succeed by merely showing the discriminatory motive was a motivating factor in the employer's decision. Due to these differing standards, plaintiffs now potentially face two different legal causation standards based on the type of claim they are bringing forward: the "motivating factor" standard for Title VII discrimination claims, and the "but-for" standard for age discrimination claims. By analyzing existing protections under Title VII and the ADEA as well as examining current circuit splits regarding the way claimants who belong to two or more protected groups should bring their employment discrimination claim forward, it is possible to see that certain groups such as older women are falling through the cracks by facing a higher burden of proof.

II. BACKGROUND

A. Existing Protections

As discussed, Title VII protects against race, color, religion, sex, and national origin while the ADEA protects against age.[34] Other

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31. Age Discrimination in Employment Act, 29 U.S.C. § 621 (1967); *Mixed Motive Case*, PRAC. LAW GLOSSARY, Item 5-521-1274, https://www.westlaw.com/5-521-1274?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 (stating that in "[a]n employment discrimination case in which there is evidence that the defendant employer had both lawful and discriminatory reasons for taking a particular adverse employment action. In a mixed motive case, once a plaintiff establishes that discrimination was a motivating factor in the employment decision, the burden shifts to the employer to prove that it would have made the same decision even without the unlawful factor. Unlike the after-acquired evidence defense, the employer must prove that the lawful reason was a motivating factor in the employment decision").

32. 29 U.S.C. § 621.

33. Gross v. FBL Fin. Serv., 557 U.S. 167, 180 (2009).

34. Civil Rights Act of 1964 § 7; Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34 (1967).

federal statues which protect against discrimination in employment include physical or mental disability, veteran status, genetic information, and citizenship.[35] Indeed, of these numerous protected classes, it is not difficult to imagine someone that falls into two, three, or even more of these characteristics. For example, a fifty-three-year-old Muslim woman could be discriminated against based on her national origin, sex, religion, or age. As she is protected under multiple statutes, she could be considered an intersectional claimant—or a claimant who suffers multiple forms of discrimination.

Although there are other federal statutes besides Title VII and the ADEA that protect against employment discrimination, for the purposes of this Article, the focus will be on how courts have addressed Title VII claims combined with age. If courts would allow intersectional claimants to base their claim in either the same statute or multiple statutes, this would not only remedy forms of intersectional discrimination that the courts are not aware of, but it would also provide a voice to those that have suffered from multiple and complex forms of discrimination.

B. History of Intersectionality

The idea of intersectional claims and the idea of intersectionality was first coined by a leading scholar of critical race theory, Kimberlé W. Crenshaw. In 1989, Crenshaw proposed that individuals may face discrimination on multiple levels, which ultimately leads to a very specific type of oppression.[36] However, historically, the law only provides a "single-axis framework" for viewing discrimination claims, thus minimizing and "eras[ing] Black women in the conceptualization, identification and remediation of race and sex discrimination."[37] Later, African American feminist scholar Moya Bailey coined the specific term "misogynoir," to help unravel one of the most pervasive forms of intersectional discrimination—the idea that Black women not only experience sexism and racism, but

35. *See, e.g.*, 29 U.S.C. §§ 621–34 (1967)); Uniformed Services Employment and Reemployment Rights Act (USERRA), Pub. L. No. 103-353, 108 Stat. 3150 (1994) (codified at 38 U.S.C. § 4301 et seq.); Genetic Information Nondiscrimination Act of 2008 (GINA), Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified as amended in scattered sections of 26, 29, and 42 U.S.C.); Immigration and Nationality Act's (INA) anti-discrimination provision, 8 U.S.C. § 1324B.

36. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139–40 (1989).

37. *Id.* at 140.

indeed, racialized sexism or sexualized racism.[38] It is important to note that while Crenshaw first put the term of "intersectionality" into the public vernacular, this idea "predates the Civil Rights Act itself," and in fact, "what we now call intersectionality crucially shaped Title VII from its inception."[39]

Crenshaw and other legal scholars have also emphasized that intersectionality is nuanced and individualized and, as such, intersectional claims are not additive.[40] Instead of various classifications compounding on individuals equally, the true nature of intersectionality is "reconstitutive" as it has the "potential to constantly complicate known narratives and expose completely new ways of being."[41] Moreover, "intersectionality embraces the importance of Black women as a cohesive marginalized group, but it also intentionally rejects prescribing the reality of a few Black women as applicable to all Black women."[42] Thus, it has not been easy for courts to recognize the existence of intersectional experience when identities are so nuanced, and when it is much easier to classify people solely based on one trait—namely, the single-axis perspective.[43]

C. Circuit Splits

1. Sex-plus Claims

The federal courts of appeals are split as to whether a plaintiff can succeed with their intersectional claim. Some circuit courts require a plaintiff to pursue only one claim, while others allow the merger of their claims into one, such as a sex-plus-race claim.[44] In fact, the Second, Third, and Tenth Circuits have recognized sex-plus-race and/or race-plus sex claims; the Fifth and Eleventh Circuits recognize that intersectional claims involving Black women fall into a protected category; the Sixth and Ninth Circuits recognize intersectional claims in an "aggregate" or "totality" framework; the First and D.C. Circuits are inconsistent and undecided; and

38. Moya Bailey, Race, Region, and Gender in Early Emory School of Medicine Yearbooks (2013) (Ph.D. dissertation, Emory University) (on file with Emory Theses and Dissertations).

39. Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 1586 FAC. SCHOLARSHIP U. PA. L. REV. 713, 714 (2015). https://scholarship.law.upenn.edu/faculty_scholarship/1586.

40. Trust Kupupika, *Shaping Our Freedom Dreams: Reclaiming Intersectionality Through Black Feminist Legal Theory*, 107 VA. L. REV. ONLINE 27, 38 (2021).

41. *Id.*

42. *Id.*

43. *Id.* at 34.

44. *Id.*

finally, the Fourth and Eighth Circuits analyze protected traits separately.[45]

2. Age-plus Claims

This clear lack of uniformity among the circuit courts to recognize sex-plus-race claims is similarly reflected in age-plus discrimination claims. Notably, even fewer courts recognize these types of intersectional claims. The majority view is that age-plus discrimination claims are invalid, since at least eight federal district courts have rejected attempts to claim age-plus discrimination under the ADEA.[46] The primary reason that courts are reluctant to acknowledge age-plus discrimination claims is that the ADEA uses a separate statutory scheme than Title VII to analyze claims, and thus, the ADEA's general prohibition of mixed-motive claims cannot be reconciled.[47] Moreover, courts fear that authorizing these types of claims would amount to "judicial legislation" as Congress deliberately chose to pass entirely separate legislation and provide an entirely different basis for relief to persons.[48]

The Supreme Court first established the mixed-motive framework in the 1989 case *Price Waterhouse v. Hopkins*.[49] In a plurality decision, the Court held that a plaintiff could succeed on a Title VII claim by showing that an impermissible reason was a motivating

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45. Jamillah B. Williams, *Beyond Sex-Plus: Acknowledging Black Women in Employment Law and Policy*, 2407 GEO. EMP. RTS. & EMP. POL'Y J. 1, 16–22 (2021) (noting that: "[t]he Second, Third, and Tenth Circuits all recognize some variant of the sex-plus framework, but have not adopted a race-plus framework, though some district courts within these circuits have evaluated or discussed it;" in Jefferies v. Harris Cnty. Cmty. Action Ass'n, 615 F.2d 1025, 1034 (5th Cir. 1980), Williams v. City of Tupelo, 414 F. App'x 689, 694 (5th Cir. 2011), and Mosley v. Ala. Unified Judicial Sys., 562 F. App'x 862, 867 (11th Cir. 2014), the Fifth and Eleventh Circuits recognize that intersectional claims involving Black women fall into a protected category; in the Sixth Circuit case of Shazor v. Pro. Transit Mgmt., 744 F.3d 948, 958 (6th Cir. 2014) and the Ninth Circuit case of Lam v. Univ. of Haw., 40 F.3d 1551, 1562 (9th Cir. 1994) have applied a "aggregate" framework).

46. Marc C. McAllister, *Extending the Sex-Plus Discrimination Doctrine to Age Discrimination Claims Involving Multiple Discriminatory Motives*, 60 B.C.L. REV. 469, 493 (2019) (noting that eight federal district courts have rejected attempts to claim age-plus discrimination under the ADEA, including, *inter alia*: Bauers-Toy v. Clarence Cent. Sch. Dist., No. 10-CV-845, 2015 WL 13574291, at *7–8 (W.D.N.Y. Sept. 30, 2015), Thompson v. City of Columbus, No. 2:12-cv-01054, 2014 WL 1814069, at *10 (S.D. Ohio May 7, 2014), Johnson v. Napolitano, No. 10 Civ. 8545(ALC), 2013 WL 1285164, at *8–10 (S.D.N.Y. Mar. 28, 2013), Cartee, 2010 WL 1052082, at *3–4, McKinney v. City of Hawthorne, No. CV08-07-GW(Ex), 2008 WL 11338236, at *1 n.2 (C.D. Cal. Nov. 17, 2008), Kelly v. Drexel Univ., 907 F. Supp. 864, 875 n.8 (E.D. Pa. 1995), and Smith v. Bd. of Cty. Comm'rs of Johnson Cty., 96 F. Supp. 2d 1177, 1187 (D. Kan. 2000)).

47. *Id.* at 495.

48. *Id.*

49. Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989).

factor in the employment decision.[50] Ultimately, this decision lowered the burden of proof and made it easier for plaintiffs to bring a mixed-motive claim; it meant that even if the defendant had a legitimate reason for the employment action, the plaintiff could still succeed in their claim by proving that the defendant also considered an impermissible factor at the time the employment decision.[51]

Justice Sandra Day O'Connor's opinion from *Price Waterhouse*, she stated that a plaintiff must present direct evidence that an illegitimate factor was a substantial factor in the decision, after which the burden shifts to the defendant.[52] Accordingly, the defendant must "prove by a preponderance of the evidence that it would have made the same decision even if it had not taken the impermissible factor into account. If the defendant succeeds, this showing acts as an affirmative defense and relieves the defendant of liability."[53] Moreover, while Title VII's sex-plus doctrine allows for employees to claim discrimination "because of" a protected characteristic despite the potential for defendants to have multiple motives so long as the protected characteristic proved decisive to the employer's decision, lower courts have tended to read this doctrine more narrowly.[54]

Historically, lower courts have tended to limit mixed-motive cases to those concerning fundamental rights, "such as marriage or child-rearing [among] other immutable characteristics protected by Title VII."[55] As age is protected under the ADEA—and not under Title VII—courts have reasoned that "sex-plus-age" claims go beyond the contours of the "sex-plus" doctrine as both sex and age play into the employer's decision.[56] In *Gross v. FBL Financial Services, Inc.*, Justice Clarence Thomas clarified that the *Price Waterhouse* "motivating tactor" test was codified independently from the "but-for cause" standard, and as such, ADEA cases could not apply a mixed-motive analysis.[57] Historically, many lower courts have interpreted Justice Thomas' language to require that without the

50. *Price Waterhouse*, 490 U.S. at 228; *see also* Kaitlin Picco, *The Mixed-Motive Mess: Defining and Applying a Mixed-Motive Framework*, 26 A.B.A. J. LAB. & EMP. L. 461, 463 (2011).

51. *Price Waterhouse*, 490 U.S. at 228.

52. *Id.*

53. *Id.*

54. Maxwell Ulin, *Bostock's Surprise Winner: Intersectional Age Claims*, ON LAB. (Feb. 24, 2021), https://onlabor.org/intersectional-age-claims-after-bostock/.

55. *Id.*

56. *Id.*

57. *Id.* (citing Gross v. FBL Fin. Serv., 557 U.S. 167 (2009)).

motivating factor test, age must be *the* "but-for cause" of an employment discrimination claim.[58]

However, in the last decade, courts have started to be more permissive, and at least five federal courts have embraced the minority view which authorizes age-plus discrimination claims under the ADEA.[59] Further, "other courts have recognized a combined sex and age discrimination claim without clearly specifying whether the claim is cognizable under Title VII or the ADEA, and still, other courts have refused to decide the issue where such a decision was unnecessary."[60] One justification for this validation of age-plus discrimination claims under the ADEA is a broader reading of the *Gross* "but-for causation" requirement by the Fourth, Fifth, and Tenth Circuits.[61] These circuits have suggested that age does not need to be the only motivating factor.[62] Moreover, other courts and legal scholars have underscored the idea that sex-plus-age claims have an "obvious analogy" to other forms of sex-plus discrimination.[63] Like sex-plus claims, recognizing age-plus claims would have a greater impact on women, for studies show that there is a greater differential treatment against older women and the role of appearance than for men.[64] Additionally, there is evidence to suggest that while the ADEA has improved the labor market outcomes for older men, it has had a far less favorable effect on older women.[65] This indicates that the original goal of the ADEA to forbid employment discrimination against *anyone* at least forty years of age in the United States is not being met.[66]

In the recent 2020 case of *Frappied v. Affinity Gaming Black Hawk, LLC*, terminated female employees, each over forty years old, brought "sex-plus-age" disparate impact and disparate treatment claims under Title VII, as well as separate age-based claims under the ADEA.[67] Although the Tenth Circuit affirmed the dismissal of the Title VII disparate treatment claims, the court reversed and remanded the other claims.[68] Most notably, the court

58. *Id.* (emphasis added).
59. McAllister, *supra* note 46, at 497.
60. *Id.* at 497–98.
61. *Id.* at 498–500 (citing *Gross*, 557 U.S. at 167).
62. *Id.*
63. McAllister, *supra* note 46, at 498.
64. Joanne S. McLaughlin, *Falling Between the Cracks: Discrimination Laws and Older Women*, 34 LABOUR 215, 217 (2020).
65. *Id.* at 228.
66. Age Discrimination in Employment Act, 29 U.S.C. § 621 (1964) (emphasis added).
67. Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1045 (10th Cir. 2020).
68. *Id.* at 1061.

held, as a matter of first impression, that a sex-plus-age claim "[is] cognizable under Title VII."[69]

Scholars have argued that, when the court in *Frappied* weighed in on the debate regarding sex-plus-age claims under Title VII, the decision was not only grounded in sound policy, but also logically followed the *Bostock v. Clayton County* ruling.[70] In *Bostock*, the United States Supreme Court issued its opinion on a trio of consolidated cases, all of which were rooted in similar LGBTQ+ discrimination issues.[71] In all three cases, the Court was presented with the same question: whether Title VII's ban on discrimination "because of sex" covered sexual orientation and gender identity.[72] In a historic 6–3 decision covering all three cases, the Court held that discrimination on the basis of sexual orientation or gender identity is necessarily also discrimination "because of sex," which Title VII prohibits.[73] Justice Neil Gorsuch's majority opinion in *Bostock* stated that "'but for' causation is a 'sweeping standard' and that the protected characteristic does not have to be the 'primary' cause of the decision for liability to attach."[74] In fact, the Court noted that events can have multiple "but-for" causes, and therefore, it is irrelevant if other factors influenced the defendant's decision—as long as sex is a "but-for cause."[75] Moreover, the Court noted that the statute's focus has, and always has been on the individual, thus eliminating the need for a plaintiff to prove that the employer treated both sexes equally.[76]

D. Bostock*'s Legacy*

Due to this broad standard, there have been reverberating consequences following *Bostock* that have helped "beneficiaries . . . far different from those first expected," which will implicate how the Court will address intersectional age claims in the future.[77] For the Court has long been averse to these kinds of claims, primarily due to "disagreement over whether and to what extent

69. *Id.* at 1048.

70. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738–54 (2020) (holding that an employer who fires an individual employee merely for being gay or transgender violates Title VII of the Civil Rights Act of 1964); Ulin, *supra* note 54.

71. *Bostock*, 140 S. Ct. at 1737.

72. *Id.* at 1753.

73. *Id.* at 1754.

74. Ann C. McGinley et al., *Feminist Perspectives on* Bostock v. Clayton County, 53 CONN. L. REV. 1, 16 (2020), https://connecticutlawreview.law.uconn.edu/wpcontent/uploads/sites/2747/2021/03/Feminist-Perspectives-on-Bostock-v.-Clayton-County.pdf.

75. *Id.* at 4.

76. *Id.* at 4–5.

77. Ulin, *supra* note 54.

discrimination law's "but-for-cause" standard enables so-called "mixed-motive" claims, in which multiple considerations—both permissible and impermissible—lead an employer to discriminate."[78]

In the same year as the *Bostock* decision, the Court, in *Babb v. Wilkie* rejected the "but-for" test in a federal worker's ADEA claims, and instead, allowed a mixed motive analysis for an age discrimination claims against the federal government.[79] While working as a pharmacist for the Veterans Affairs ("VA"), Noris Babb ("Babb") helped develop the Geriatric Pharmacotherapy Clinic ("GPC"), which was dedicated to serving older veterans with diseases or disabilities related to their advanced age and military service.[80] Years later, the VA created a nationwide treatment initiative akin to Babb's GPC, which rejected applications by current module pharmacists over the age of fifty but granted applications of pharmacists under forty—going against recommendations by Human Resources and requests from doctors.[81] After Babb provided statements and testified in support of their EEOC claims, she later alleged that she was a victim of gender-plus-age discrimination and that the VA retaliated against her for participating in protected EEOC.[82]

The central issue in this case was whether § 633a(a) of the ADEA imposes liability only when age is the "but-for cause" of the personnel action.[83] The Court held that under the ADEA, which applies to federal employees, the "plain meaning of the critical statutory language ('made free from any discrimination based on age') demands that personnel actions be untainted by any consideration of age."[84] The Court further emphasized that "under § 633a(a), age must be the but-for cause of *differential-treatment*, not that age must be a but-for cause of *the ultimate decision*."[85] Thus, the *Babb* interpretation has made it easier for plaintiffs to prove age discrimination claims against the federal government, although the Court refused to expand this standard to private employers and state and local governments.[86]

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78. *Id.*
79. Babb v. Wilkie, 140 S. Ct. 1168, 1172–78 (2020).
80. *Id.* at 1171.
81. *Id.*; *see also* Babb v. McDonald, No. 8:14-cv-1732-T-33TBM, 2016 WL 4441652n (M.D. Fla. Aug. 23, 2016) (affirmed in part, reversed in part and remanded).
82. Babb v. Wilkie, 140 S. Ct. at 1171.
83. *Id.*
84. *Id.*
85. Michael Foreman, Babb v. Wilkie*, Continues to Muddy the Waters*, A.B.A. (July 23, 2021), https://www.americanbar.org/groups/crsj/publications/crsj-featured-articles/babb-v--wilkie--continues-to-muddy-the-waters/ (citing Babb v. Wilkie, 140 S. Ct. at 1168).
86. William R. Corbett, *Intolerable Asymmetry and Uncertainty: Congress Should Right the Wrongs of the Civil Rights Act of 1991*, 73 OKLA. L. REV. 419, 445–46 (2021).

While *Frappied*, *Bostock*, and *Babb* were all decided in 2020, it is notable that prior to this recent trend of expanding sex-plus and age-plus claims, the District of Columbia proposed an Intersectional Discrimination Protection Amendment Act in 2019, which would allow a plaintiff to combine some or all of the twenty-one protected classes under the D.C. Human Rights Act of 1977 ("DCHRA").[87] These DCHRA protected traits would apply to all D.C. employers, and include: race; color; religion; national origin; sex; age; marital status; personal appearance; sexual orientation; gender identity or expression; family responsibilities; political affiliation; disability; matriculation; familial status; genetic information; source of income; place of residence or business; status as a victim of an intrafamily offense; credit information; and status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking.[88] These twenty-one protected classes under the DCHRA are similar to many federal protections, and as such, can serve as a parallel microcosm of the federal level.

Indeed, the main idea behind the DCHRA is simple but potentially broad reaching, for "[t]he legislation makes straightforward changes to the language of the DCHRA, [and] [s]pecifically, in each section where the DCHRA lists the protected traits, the bill would add the phrase, 'or any combination of the foregoing traits.'"[89] Yet, prior to *Bostock*, critics argued that these seven words alone would create a windfall of causes, stating that "[c]ombining some or all of the 21 traits would, of course, lead to an exponentially larger list of protected classes, from 'crazy old Russians' (disability, age, and ethnicity combined) to divorced Republican Hispanic trans workers in graduate school."[90] Of course, this criticism is overly simplistic and crude, and with the recent *Frappied*, *Bostock*, and *Babb* rulings, this "windfall" or "Pandora's Box" of potential cases has already been opened. Now the question is not whether intersectional claims can be based on multiple statutes, but rather, what the burden of proof is for a plaintiff when their intersectional claim is based on multiple statutes.

87. Donn Meindertsma, *The Proposed Ban on Intersectional Discrimination*, CONNER & WINTERS, LLP (Oct. 28, 2019), https://www.cwlaw.com/newsletters-78 (citing D.C. Council "Intersectional Discrimination Protection Amendment Act of 2019," B23-0498).

88. *Protected Traits in DC*, OFF. OF HUM. RTS., https://ohr.dc.gov/protectedtraits (last visited Jan. 3, 2022).

89. Meindertsma, *supra* note 87.

90. *Id.*

E. D.C. Intersectional Discrimination Protection Amendment Act

While ultimately the legislature never enacted the Intersectional Discrimination Protection Amendment Act of 2019, the idea is laudable, as it would have prohibited discrimination wholly or partially because of any combination of statutorily protected characteristics.[91] This Act was ahead of its time, and now there is renewed optimism that state and federal agencies will "clarif[y] that intersectional discrimination is a viable cause of action" and provide examples of "what analytical framework may be best suited for the unique types of harassment intersectional plaintiffs face."[92] Whether the Intersectional Discrimination Protection Amendment Act in 2019 will be revisited by District of Columbia Council is currently unknown, but with the recent holdings of district courts and the Supreme Court, it is clear that some kind of intersectional framework will be needed.

III. ARGUMENT

This Article proposes a two-fold solution to create uniformity across the country by eliminating the current circuit court split regarding intersectional employment discrimination claims at the federal level. First, courts should consider a broader "totality" approach in addition to a sex-plus (race, color, religion, sex, and national origin) discrimination claim under Title VII. To do this, courts should consider claims on a combination of two or more protected categories rather than on whether an employer discriminates based on one category or another. Second, courts should also approach the analogous sex-plus-age claims this way. Likewise, courts should follow *Babb v. Wilkie* when intersectional claims are comprised of a discrimination claim under the ADEA along with one or more Title VII protected categories. It follows then that these age-plus claims can also be analyzed using mixed-motive approach. The reason for this more inclusive standard and potentially lower burden of proof comes from the fact that individuals who possess a combination of statutorily protected traits are unable to bring intersectional claims forward, instead, they are forced into a "single-axis framework," which erases an immutable part of their identity

91. D.C. Council "Intersectional Discrimination Protection Amendment Act of 2019," B23-0498.

92. Williams, *supra* note 45, at 31.

in the process.[93] And intersectional claims are particularly important for Black women and women over forty-years-old.[94]

A. Criticism

Although some critics argue that Crenshaw's intersectional discrimination "will open a 'Pandora's Box' of identity," and thus, lead to "an indefinite proliferation of identity categories," this expansion is in line with Title VII's original goal—to protect as many unique identities as possible.[95] For "persons subject to [T]itle VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes of Title VII."[96] The original purpose of allowing for "flexibility" and "modifying employment systems" should allow for new social understandings and generally accepted research to guide legislation.[97]

Further, as other intersectional scholars have suggested, to minimize inconsistencies across different jurisdictions, it is not enough that the EEOC simply states that intersectional discrimination is a viable cause of action.[98] The EEOC needs to give concrete examples of what intersectional claims look like and specify what analytical framework may be best suited for the unique types of harassment intersectional plaintiffs face.[99] Another solution is to take the tenants of the District of Columbia's proposed Intersectional Discrimination Protection Amendment Act of 2019 and have Congress amend Title VII to "prohibit discrimination wholly or partially because of any combination of statutorily protected traits" or at least "include the words 'or any combination thereof' at the end of the listed protected categories" within Title VII.[100] Finally, because both Title VII and the ADEA generally allow for compensatory damages, if courts consider the specific harms that come from being discriminated against due to the intersection of multiple identities in

93. Crenshaw, *supra* note 36, at 140.

94. Jamie Bishop et al., *Sex Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, 22 GEO. J. GENDER & L. 369, 409 (2021).

95. Ben Smith, *Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective*, 16 EQUAL RTS. REV. 73, 83 (2016) (noting that "an indefinite proliferation of identity categories" is "the process [Judith] Butler refers to as 'the illimitable process of signification.").

96. Civil Rights Act of 1964, 29 C.F.R. § 1608.1(2002).

97. *Id.*

98. Williams, *supra* note 45, at 31.

99. *Id.* at 10.

100. D.C. Council "Intersectional Discrimination Protection Amendment Act of 2019," B23-0498; Yvette N.A. Pappoe, *The Shortcomings of Title VII for the Black Female Plaintiff*, 22 U. PENN. J. L. & SOC. CHANGE 1, 23 (2019) (citing Rosalio Castro & Lucia Corral, *Women of Color and Employment Discrimination: Race and Gender Combined in Title VII Claims*, 6 BERKELEY LA RAZA L.J. 159, 162 (1993)).

their assessment of damages, this "can be a powerful tool for changing employers' incentives and prompting organizational change."[101]

Once courts start to recognize sex-plus claims, then sex-plus-age claims will follow suit. Indeed, the Court noted in *Trans World Airlines v. Thurston* that interpretations of Title VII generally "appl[y] with equal force in the context of age discrimination" when the text of two statutes is the same.[102] For Justice Gorsuch "gleans [that] *Bostock's* but-for-cause standard from language that appears identically in both Title VII and the ADEA."[103] As such, Justice Gorsuch's interpretation of the these two employment discrimination statutes, coupled with a broader reading of *Gross*'s "but-for causation" standard established by the Fourth, Fifth, and Tenth Circuits, would create uniformity between the circuit courts.[104]

B. The Totality Approach

Starting with sex-plus claims and the intersection of race and sex, post-*Bostock*, Black women should now be able to bring a claim forward based on both their sex and race in any court. The injustice perpetuated against this intersectional group stems back to the 1977 case of *DeGraffenreid v. General Motors*, when five Black women sued General Motors, alleging that their employer's seniority system perpetuated the effects of prior discrimination against Black women.[105] Yet, the Eighth Circuit ultimately ruled that there was no sex discrimination because while General Motors did not hire Black women before to 1964, it hired white women.[106]

Since this 1977 case, courts have slowly started to recognize the intersection of multiple sources of discriminatory animus when considering Title VII claims by women of color—but not uniformly. In her work, legal scholar Dr. Jamillah Williams analyzed how courts of appeals have unevenly addressed these types of intersectional claims.[107] Dr. Williams found five different approaches across the First through Eleventh Circuit Courts of Appeals and the D.C.

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101. Alice Abrokwa, *"When They Enter, We All Enter": Opening the Door to Intersectional Discrimination Claims Based on Race and Disability*, 24 MICH. J. RACE & L. 15, 71 (2018).

102. Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1985); Ulin, *supra* note 54.

103. Ulin, *supra* note 54.

104. McAllister, *supra* note 46, at 498–500.

105. Bishop et al., *supra* note 94 (citing DeGraffenreid v. Gen. Motors Assembly Div., 558 F.2d 480, 483 (8th Cir. 1977)).

106. *Id.*

107. *See generally* Williams, *supra* note 45 (using both quantitative and qualitative methods to research the efficiency of legal interventions and various organizational "debiasing" strategies, Dr. Williams' research enhances equity and inclusion).

Court of Appeals when analyzing the intersectional claims of Black and colored women.[108] Of these approaches, Williams noted that the "aggregate" or "totality" framework adopted by the Sixth and Ninth Circuits may be a better way to analyze an intersectional claim.[109]

Using the Ninth Circuit case of *Lam v. University of Hawaii* and the Sixth Circuit case of *Shazor v. Pro. Transit Mgmt.* Williams illustrates how various circuits have applied an "aggregate approach."[110] For example, in *Lam*, the court held "that it is necessary for courts to consider a plaintiff's claim of discrimination based on a combination of two or more protected categories rather than focus solely on whether an employer discriminates based on one category or another." [111] In turn, the Sixth Circuit adopted this same rationale in *Shazor* when "specifying that Title VII is meant to protect plaintiffs who 'fall between two stools' when claims involve multiple protected characteristics."[112]

Specifically, in *Lam*, the Ninth Circuit reviewed a case in which a Vietnamese woman applied for a directorship position at the University of Hawaii School of Law, and despite being a finalist, was rejected after an alternate candidate declined the offer and the position was canceled.[113] Lam filed suit against the University, the Dean of the Law School, and the President of the University, alleging discrimination on the basis of race, sex, and national origin with regard to their initial job search, as well as subsequent retaliation.[114] Ultimately, the district court granted summary judgment to the University, reasoning that the University favorably considered an Asian man and White woman as candidates for the position.[115] However, upon review, the Ninth Circuit criticized the lower court:

> In assessing the significance of these candidates, the court seemed to view racism and sexism as separate and distinct elements amenable to almost mathematical treatment, so that evaluating discrimination against an Asian woman became a simple matter of performing two separate tasks:

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108. *Id.*
109. *Id.* at 20.
110. *Id.* at 18–19 (citing Lam v. Univ. of Haw., 40 F.3d 1551, 1561–62 (9th Cir. 1994); Shazor v. Pro. Transit Mgmt., 744 F.3d 948, 957–58 (6th Cir. 2015)).
111. *Id.* at 18–19 (citing *Lam*, 40 F.3d at 1561–62).
112. *Id.* at 18–19 (citing Shazor v. Pro. Transit Mgmt., 744 F.3d 948, 957–58 (6th Cir. 2015)).
113. *Lam*, 40 F.3d at 1557.
114. *Id.* at 1558.
115. *Id.*

> looking for racism "alone" and looking for sexism "alone," with Asian men and white women as the corresponding model victims. The court questioned Lam's claim of racism in light of the fact that the Dean had been interested in the late application of an Asian male. Similarly, it concluded that the faculty's subsequent offer of employment to a white woman indicated a lack of gender bias. We conclude that in relying on these facts as a basis for its summary judgment decision, the district court misconceived important legal principles.[116]

By underscoring the "mathematical treatment" of compartmentalizing Lam's identity, the Ninth Circuit echoes the same nuances in Crenshaw's writing which warns against the erasure of identity by placing institutional and inappropriate nonintersectional contexts on the minority woman.[117] It is also important to distinguish what Williams labels an "aggregate" or "totality" framework is distinct from an additive, or single-axis approach that Crenshaw warns against. A key component of an intersectional analysis regards oppression as multiplicative—not additive—for "oppressions combine in complex and interwoven ways to create novel interaction effects."[118] An additive approach also "treats marginalized identities separately, causing one to be viewed as primary, while the others are treated as secondary."[119] This type of view implies that people experience their positionalities independently from one another, which can lead to the erasure of lived experiences as well as the minimization of the power of privilege and oppression.[120] Instead, intersectionality advances the idea that "experiences at an intersection are co-constituted and must be considered jointly."[121]

C. Sex-Plus-Race & Race-Plus Sex Claims

As an alternative to the "totality" framework used to analyze intersectional claims, Williams also discussed that the Second, Third,

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116. *Id.* at 1561.

117. *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1251 (1991).

118. AMY E. ANSELL, RACE AND ETHNICITY: THE KEY CONCEPTS 92 (2012).

119. Ericka Roland, *Understanding Intersectionality to Promote Social Justice in Educational Leadership: Review of JCEL Cases*, 2 INTERSECTIONS: CRITICAL ISSUES IN EDUC. 3, 9 (2018).

120. *Id.*

121. Greta R. Bauer et al., *Intersectionality in Quantitative Research: A Systematic Review of its Emergence and Applications of Theory and Methods*, 14 SSM – POPULATION HEALTH (2021).

and Tenth Circuits have recognized sex-plus-race and less commonly, race-plus sex claims.[122] This sex-plus framework was first established in the 1971 case of *Phillips v. Martin Marietta Corp.*, when a female plaintiff bought a Title VII sex discrimination action after the defendant refused to accept job applications from women with preschool aged children.[123] Phillips not only experienced discrimination based on her sex, but also "because of her sex plus the additional trait of her having preschool aged children."[124] Although the Court ended up applying a disparate treatment theory and Phillips won her case, the Court acknowledged that sex-plus discrimination was nevertheless discrimination for the first time.[125]

While recently a sex-plus analysis has become more prevalent post-*Frappied* and is better than analyzing claims separately, nonetheless, there are problems with this type of framework.[126] One primary issue is that in sex-plus claims "sex discrimination is still the heart of the claim which de-centers racial identity and experiences."[127] As a result, this causes women of color to divide their identity and choose sex as before their other traits within a sex-plus jurisdiction.[128] Although race-plus claims also exist, although less frequently, this model still places one trait above others.[129] Therefore, Crenshaw's goal of avoiding identity erasure is unresolved with this kind of analysis alone.

In line with Williams and Crenshaw's reasoning, intersectional claims cannot be fully accounted for through any kind of trait-plus claim. To fully encompass an intersectional approach would not relegate any one trait, as co-constituted traits must be considered jointly.[130] However, this framework has also helped women over forty-years-old, or sex-plus-age claims that have recently been brought by lowering the burden of proof on the plaintiff.[131] Thus,

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122. Williams, *supra* note 45, at 13 (noting that various courts of appeals have approached intersectional claims by: analyzing protected traits separately; recognizing intersectional claims as sex-plus race and/or race-plus sex; recognizing intersectional claims and finding Black woman to be a protected category; recognizing intersectional claims though an "aggregate" or "totality" framework; and finally, being inconsistent/undecided).

123. *Id.* (citing Phillips v. Martin Marietta Corp., 400 U.S. 542, 543 (1971)).

124. *Id.*

125. Martha Chamallas, *Mothers and Disparate Treatment: The Ghost of Martin Marietta*, 44 VILL. L. REV. 337, 342 (1999) (noting that, under a disparate treatment theory, the Court in *Phillips v. Martin Marietta Corp.* ruled that Title VII did not permit an employer to have two different hiring policies, one for men and one for women).

126. Williams, *supra* note 45, at 16.

127. *Id.*

128. *Id.*

129. *Id.* at 13.

130. *Id.*

131. *See* Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038 (10th Cir. 2020).

the sex-plus and race-plus frameworks should not be abandoned in its entirety until the *Babb* precedent which allows for a mixed motive ADEA claim is similarly incorporated into an alternative framework.[132]

D. Proposed Statutory Changes

Ideally, if the added language proposed by the D.C. Council was applied to Title VII and the ADEA instead of the proposed DCHRA, then this added statutory language would mean that more than one trait could be used in an employment discrimination claim. Another solution would be to take provisions from the "Justice for All Act," which did not receive enough votes in October 2020, and add them into another bill.[133] The original Act's purpose was to "to amend the Civil Rights Act of 1964 to clarify that disparate impacts on certain populations constitute a sufficient basis for rights of action under such Act, and for other purposes."[134] This bill is expansive and would amend Title VII and the Civil Rights Act of 1964 by stating that more than one trait could be used in an employment discrimination or harassment claim.[135]

In addition to these changes, judges should take plaintiffs' multiple identities into account in their assessment of damages for emotional harm and economic losses.[136] Monetary damages would incentivize employers to create institutional changes in their future hiring and employment policies for both compensatory and punitive damages.[137] And, although the EEOC does authorize these types of damages, the list is neither comprehensive nor exhaustive.[138] Moreover, while the EEOC has acknowledged intersectional discrimination as a viable cause of action, to date, the EEOC has "offered no guidance to courts in interpreting Title VII to allow for an actionable intersectional claim."[139] Indeed, only identifying intersectional claims and providing one example, without providing how a court or the Commission might approach and analyze an intersectional claim under Title VII, is insufficient.[140]

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132. *See* Babb v. Wilkie, 140 S. Ct. 1168 (2020).
133. Justice for All Act of 2020, H.R. 8698, 116th Cong. (2020).
134. *Id.*
135. *Id.*
136. Abrokwa, *supra* note 101, at 71–72.
137. *Id.*
138. *Id.* (citing EEOC, *Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991* (1992), https://www.eeoc.gov/policy/docs/damages.html.).
139. Pappoe, *supra* note 100, at 17.
140. *Id.*

Another way the EEOC can further educate the courts is to incorporate "the sociopolitical history of Black women in its guidelines to provide a reference point for courts to accurately conceptualize Black women as their whole selves when analyzing their claims."[141] Finally, the EEOC should emphasize the original purpose of Title VII and the Civil Rights Act which were hard-won during the 1960s by reiterating that Title VII's goal is to protect employees from discrimination based on any of the listed protected categories, regardless of whether it is based on one or all of the categories. Now in a post-*Bostock* landscape, reintroducing provisions from the Justice for All Act and having the EEOC provide additional guidance seems like a less remote possibility.

Recently, news of Justice Stephen Breyer's retirement and departure from the Supreme Court has pushed Moya Bailey's terminology of "misogynoir" into the common discourse across media outlets. One of the primary reasons that neologism is growing in popularity is its frequent usage regarding President Biden's Supreme Court Justice nomination. Biden's choice of a Black woman on the Supreme Court, Ketanji Brown Jackson, has sparked debate on both sides of the aisle.[142] For example, journalist Kali Holloway noted that Fox News' Tucker Carlson "mockingly suggest[ed] that Bridget Floyd—sister of George Floyd, who was murdered by police—should be nominated[;] . . . she is not a judge or a lawyer or whatever, but in this case, who cares?" [143] Holloway opined that this criticism is unfounded:

> This is all fueled by *misogynoir*, pure and simple . . . We're actually likely to see Biden choose a candidate whose talents, expertise, and skill are unassailable, because she will have already been scrutinized in ways her White and male peers never had to face. To have arrived at the point of being picked for a SCOTUS seat is to have already navigated a racist and sexist career minefield for any Black woman. The problem isn't that we're going to have a Black woman nominated to the Supreme Court, it's that it took

141. *Id.* at 18.

142. Amy Howe, *In Historic First, Ketanji Brown Jackson is Confirmed to Supreme Court*, SCOTUSBLOG (Apr. 7, 2022, 3:43 PM), https://www.scotusblog.com/2022/04/in-historic-first-ketanji-brown-jackson-is-confirmed-to-supreme-court/.

143. Alex Henderson, *How Republican Racism and Misogyny Could be on Full Display for Biden's Supreme Court Nomination*, SALON (Jan. 31, 2022), https://www.salon.com/2022/01/31/how-and-misogyny-could-be-on-full-display-for-bidens-nomination_partner/.

> this long for us to get here, and people are still effectively claiming it shouldn't happen.[144]

This type of public rhetoric that surrounds highly educated Black women who are in contention for the highest court in the United States is evidence of how our judicial system separates and marginalizes Black woman. With this kind of pervasive rhetoric throughout the country, is it not difficult to imagine how other kinds of plaintiffs belonging to other protected classes may be treated by a judicial system that has yet to address intersectional persons a within employment discrimination law.

IV. CONCLUSION

In conclusion, it has long been this country's policy to protect all classes of people equally, regardless of the possible legal hurdles. The proposed ban by the Council of the District of Columbia and the Supreme Court's recent *Bostock* and *Frappied* decisions offer hope that other councils, circuit courts, and even the Supreme Court, will continue to follow the research on and ideas about intersectionality, as proposed by Crenshaw.[145] Only if we embrace intersectionality and the inclusive language offered in *Gross,* as well as the more lenient burden of proof if brought under Title VII sex-plus-age claims, will we achieve Congress' original goal of antidiscrimination law to remedy the harms of those most at risk.[146]

144. *Id.*; *see also* Renée Graham, *A Black Woman Will be the Next Supreme Court Justice. It's About Time*, BOS. GLOBE (Feb. 1, 2022, 3:40 PM), https://www.bostonglobe.com/2022/02/01/opinion/black-woman-will-be-next-supreme-court-justice-its-about-time/ ("It's misogynoir, that distinct hatred of Black women that has been an American pastime since long before Moya Bailey, a Northwestern University professor, coined that term."); Natasha Ishak, *The Possibility of First Black Woman SCOTUS Nominee Prompts Misogynoirist Pushback,* PRISM (Feb. 2, 2022), https://prismreports.org/2022/02/02/the-possibility-of-first-black-woman-scotus-nominee-prompts-misogynoirist-pushback/ (quoting Dr. Niambi Carter, an associate professor of political science at Howard University, who described the Supreme Court furor as disingenuous and a "textbook misogynoir").

145. D.C. Council "Intersectional Discrimination Protection Amendment Act of 2019," B23-0498; Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020); Frappied v. Affinity Gaming Black Hawk, 966 F.3d 1038 (10th Cir. 2020).

146. Gross v. FBL Fin. Serv., 557 U.S. 167 (2009).

DUQUESNE UNIVERSITY

THOMAS R. KLINE
SCHOOL OF LAW

PITTSBURGH, PENNSYLVANIA | WWW.DUQ.EDU/LAW

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