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Toward a Merger Enforcement Policy That Enforces the Law: The Original Meaning and Purpose of Section 7 of the Clayton Act

Basel J. Musharbash & Daniel A. Hanley[*]

ABSTRACT

The corporate merger has been the single most important vehicle for the consolidation of economic power and control in America since the late-nineteenth century. In response, Congress has repeatedly sought to restrain the role of corporate mergers in American economic life, passing sweeping anti-merger laws three separate times between 1890 and 1950. Since the 1980s, however, the full force of these laws has not been felt in our economy. It has been crippled by administrative fiat and judicial acquiescence. From Reagan and Clinton through Obama and Trump, the federal agencies and courts tasked with enforcing the nation's antitrust laws have embraced antitextualist interpretations and ignored the original meaning and purpose of the laws Congress passed to constrain mergers.

Today, the consequences have become all too clear. The concentration of economic power has reached extremes unsurpassed in living memory. Oligopolies have become entrenched across our economy. Dominant firms have increased mark-ups for consumers, depressed wages for workers, and squeezed farmers and other suppliers. What the FTC once called the "dead hand of corporate control" has all but eliminated the "unseen hand of competition" in many of the nation's basic industries, while roll-ups and other monopolistic acquisition strategies are fast displacing competition in the industries where it remains a vital force.

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This Article seeks to point judges and enforcers back to the text and purpose of the core antitrust law governing mergers—Section 7 of the Clayton Act.

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> The public policy of the Government is to be found in its *statutes*, and when they have not directly spoken, *then* in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute *enacts*. If the law prohibit any contract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the *courts* to have been the public policy of the country on that subject.
>
> — Chief Justice Peckham, writing for the Court, in *United States v. Trans-Missouri Freight Association*[1]

I. INTRODUCTION

The corporate merger has been the single most important vehicle for the consolidation of economic power in America since the late-nineteenth century.[2] Almost immediately after state legislatures began liberalizing their laws to allow corporations to be formed and restructured at will in the 1880s,[3] mergers and acquisitions became a "favorite and common method[] of promoting monopoly."[4] Their use has enabled successive groups of financiers and captains of industry to leverage their size and privileged access to capital to seize control of markets, disempower workers and farmers, and undermine democratic government itself.[5] In response, Congress has repeatedly sought to restrain the role of corporate mergers in American economic life, passing sweeping anti-merger legislation three

1. 166 U.S. 290, 340–41 (1897) (emphasis added).

2. *See, e.g.*, Eugene V. Rostow, *Monopoly Under the Sherman Act: Power or Purpose?*, 43 ILL. L. REV. 745, 749 (1949) [hereinafter Rostow I] (describing "corporate growth by merger" as "perhaps the most important single force in the modern concentration of economic power" in the United States).

3. HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 83 (1954); Harwell Wells, *The Modernization of Corporation Law, 1920-1940*, 11 U. PA. J. BUS. L. 573, 583–85 (2009).

4. H.R. REP. NO. 63-627, pt. 1, at 17 (1914). The House Judiciary Committee's report on the Clayton Act bill referred to corporate mergers forming holding companies as a "common and favorite method of promoting monopoly[,]" and described holding companies as "an abomination and in our judgment [] a mere incorporated form of the old-fashioned trust." *Id.*

5. *See infra* Part III.B.i.c; *see generally* BURTON J. HENDRICK, THE AGE OF BIG BUSINESS: A CHRONICLE OF THE CAPTAINS OF INDUSTRY 1–57 (1919).

separate times between 1890 and 1950.[6] The "full force" of these enactments—the Sherman Act of 1890, the Clayton Act of 1914, and the Celler-Kefauver Act of 1950—"has not been felt in our economy," however.[7] It has been purposely "deflected."[8] For over four decades now, judges and enforcers alike have ignored the letter and spirit of the antitrust laws to let capital freely consolidate power over the nation's markets—leaving us with the greatest degree of economic concentration the American public has seen in living memory.[9]

The antitrust provision with the most direct bearing on corporate mergers is Section 7 of the Clayton Act. The original version of Section 7 was enacted in 1914, as part of a far-reaching legislative package targeting the business methods most frequently used for the development and maintenance of monopoly power.[10] After judicial interpretation effectively neutered the original Section 7 in the 1920s and 1930s,[11] Congress passed the Celler-Kefauver Act of 1950, also known as the Anti-Merger Act, to revive and strengthen the provision—with the express purpose of "call[ing] a halt to the merger movement . . . in this country."[12] As amended, the law prohibited mergers wherever their effect "in any line of commerce in any section of the country . . . may be substantially to lessen competition, or to tend to create a monopoly."[13]

Initially, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) took up the task of enforcing the new provision with the intention of giving it the effect on the nation's markets that Congress intended.[14] Between 1951 and 1977, the two agencies

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6. Sherman Antitrust Act, ch. 647, §§ 1–2, 26 Stat. 209, 209 (1890) (codified as amended at 15 U.S.C. §§ 1–2); Clayton Antitrust Act, ch. 323, § 7, 38 Stat. 730, 731–32 (1914) (current version at 15 U.S.C. § 18); Celler-Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950) (codified at 15 U.S.C. § 18).

7. Standard Oil Co. v. United States (*Standard Stations*), 337 U.S. 293, 316 (1949) (Douglas, J., dissenting).

8. *Id.*

9. Gustavo Grullon et al., *Are US Industries Becoming More Concentrated?*, 23 REV. FIN. 697, 697 (2019); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 235–37 (2017).

10. Clayton Antitrust Act § 7; *see also* Brown Shoe Co. v. United States, 370 U.S. 294, 346 (1962) ("We cannot avoid the mandate of Congress that tendencies toward concentration in industry are to be curbed in their incipiency, particularly when those tendencies are being accelerated through giant steps striding across a hundred cities at a time.").

11. DAVID DALE MARTIN, MERGERS AND THE CLAYTON ACT 104–48 (1959).

12. 95 CONG. REC. 11485 (1950) (statement of Rep. Celler); Celler-Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950) (codified at 15 U.S.C. § 18).

13. Celler-Kefauver Act § 7, 64 Stat. at 1126.

14. Concerning the DOJ, after Congress amended the Celler-Kefauver Amendment in 1950, the agency opened a special taskforce to investigate worthwhile test cases. THEODORE PHILIP KOVALEFF, BUSINESS AND GOVERNMENT DURING THE EISENHOWER ADMINISTRATION:

issued 437 complaints that challenged over 1,400 acquisitions.[15] At the same time, the judiciary—especially the Supreme Court—deferred to democratic control over the economy and facilitated effective implementation of the Act by interpreting its provisions in rough alignment with their legislative purpose.[16] Both at the Supreme Court and at the DOJ and FTC,[17] it was understood that, although Congress had not given "specific definitions and directions" for their implementation, it had passed the antitrust laws with "a fairly consistent set of value premises," and a rough consensus around "broad political and economic objectives."[18] The role of judges and enforcers, in turn, was to resolve statutory uncertainties and formulate decision rules in a way that created a "workable system" for the available judicial and administrative institutions to carry out Congress' intent.[19]

A STUDY OF THE ANTITRUST POLICY OF THE ANTITRUST DIVISION OF THE JUSTICE DEPARTMENT 72–73 (1980).

15. SUBCOMM. ON MONOPOLIES AND COM. L. OF THE COMM. ON THE JUDICIARY, 95TH CONG., THE CELLER-KEFAUVER ACT: THE FIRST 27 YEARS 7 (Comm. Print 1978) (prepared by Willard F. Mueller).

16. *See* Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2551 (2013); Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J. F. 960, 968 (2018) [hereinafter *Ideological Roots*]. Notably, between the enactment of the 1950 Amendments and the 1970s, there were only a few notable losses concerning Section 7 litigation which included: United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974); United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974); United States v. Trans Tex. Bancorporation, Inc., 1972 WL 644 (W.D. Tex. Nov. 13, 1972), *aff'd*, 412 U.S. 946 (1973); United States v. First Nat'l Bancorporation, Inc., 329 F. Supp. 1003 (Colo. 1971), *aff'd per curiam*, 410 U.S. 577 (1973).

17. *See* Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1151 (1981) [hereinafter *Modernization of Antitrust: A New Equilibrium*]; Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 942–43 (1987).

18. See Derek C. Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 HARV. L. REV. 226, 305 & n.246 (1960).

19. *See id.* at 257. *See also, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962) (developing a "usable frame of reference within which to evaluate any given merger" from the legislative history of the Celler-Kefauver Act); Standard Oil Co. v. United States (*Standard Stations*), 337 U.S. 293, 311 & n.13 (1949) (rejecting various tests of liability under Section 3 of the Clayton Act propounded by defendants on the ground that they offered "standard[s] . . . most ill-suited for ascertainment by courts[,]" and noting that "the dual system of enforcement provided for by the Clayton Act must have contemplated standards of proof capable of administration by the courts as well as by the [FTC,]" and that "[o]ur interpretation of the Act, therefore, should recognize that an appraisal of economic data which might be practicable if only the latter were faced with the task may be quite otherwise for judges unequipped for it either by experience or by the availability of skilled assistance"). The Supreme Court's decision in *United States v. Philadelphia National Bank* provides a good example of this approach at work. 374 U.S. 321 (1963). The Court grounded its decision in "the intense congressional concern with the trend toward concentration" evident from the legislative history of the Celler-Kefauver Amendment. *Id.* at 363. Because Congress sought to *prevent* concentration, the Court instructed that judges should, "in the interest of sound and practical administration of justice[,]" seek to "simplify the test of illegality" under Section 7 of the Clayton Act "in any case in which it is possible." *Id.* at 362–63. The Court also

In this sense, midcentury antitrust was "guided by principles."[20] The law was "for diversity and access to markets; it was against high concentration and abuses of power."[21] Carrying this prophylactic orientation into practice, interpretation and enforcement adopted bright-line rules and structural presumptions designed to thwart the consolidation of economic power "in its incipiency."[22] Among other things, the Court's decisions established that mergers are outlawed where they eliminate an actual or potential competitor, give a party control over a distribution channel or a source of supplies for its rivals, contribute to a trend toward concentration in any market, or serve to entrench a dominant incumbent.[23]

This period of vigorous enforcement was not to last, however. By the 1980s, the new Section 7 enacted in 1950 had met the same fate as the old Section 7 from 1914. Although the Supreme Court never overturned its merger precedents from the midcentury period, in 1979 it introduced into the current of antitrust jurisprudence the idea that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[24] It is widely acknowledged today that this statement—which the Court drew from Robert Bork's influential work, *The Antitrust Paradox*—flatly contradicted the actual purposes of the antitrust laws.[25] Nonetheless, Bork's ideas took hold. In 1982, the Reagan Administration issued new merger enforcement guidelines that, in the spirit of Bork's consumer welfare framework,

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recognized that "economic data are both complex and elusive" and that, in the context of judicial proceedings, "permitting a too-broad economic investigation" risks "subverting congressional intent." *Id.* at 362. Accordingly, the Court held that a merger consolidating 30% of a relevant market—and potentially as little as 20%—was presumptively illegal and may be enjoined without "elaborate proof of market structure, market behavior, or probable anticompetitive effects." *Id.* at 363–64, 364 n.41.

20. *See* Eleanor M. Fox, *Against Goals*, 81 FORDHAM L. REV. 2157, 2158 (2013).

21. *Id.* (emphasis added).

22. *See Ideological Roots*, *supra* note 16, at 968 (quoting *Brown Shoe Co.*, 370 U.S. at 317).

23. *See, e.g.*, *Brown Shoe Co.*, 370 U.S. at 315, 317, 332–33, 344–45 (1962); United States v. Phila. Nat'l Bank, 374 U.S. 321, 346, 363, 338, 346, 365 n.42, 367 (1963).

24. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66 (1978)).

25. *See generally* John J. Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259, 265–88 (1988); James Boyle, *A Process of Denial: Bork and Post-Modern Conservatism*, 3 YALE J.L. & HUMAN. 263, 280–81 (1991); Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359 *passim* (1993); David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1228–35, 1263, 1282, 1288 (1988); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 67–68, 68 n.2, 84–88, 109, 123, 125–26 (1982); John J. Flynn & James F. Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. REV. 1125, 1135 & n.42, 1140 (1987).

restricted the application of Section 7 to transactions that "create or enhance . . . the ability of one or more firms profitably to maintain [consumer] prices above competitive levels[.]"[26] Subsequent administrations went along.[27] And the rest was history. Since predictions about a merger's future effect on consumer prices are inherently contestable and indeterminate,[28] this shift turned Section 7 into mostly a dead letter. Today, in all but the most egregious mergers to monopoly or near-monopoly—and sometimes even then—Section 7 "prohibit[s] almost nothing at all."[29]

Thousands of large corporate mergers worth trillions of dollars now occur every year without facing any real threat of challenge. In 2021, the number of mergers reported to the FTC under the Hart-Scott-Rodino Act reached a twenty-year high of over 3,500, while the value of corporate transactions reached over $2.5 trillion.[30] Corporations are exploiting a "once-in-a-generation opportunity to make acquisitions and consolidate power," according to a 2021 Harvard Business Review article,[31] fueling what commentators have dubbed the "seventh great [merger] wave" in American economic history.[32] Indeed, mergers have become so frequent that the DOJ and FTC are drowning in them, with nowhere near the capacity to probe their potential effects, let alone challenge them all.[33]

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26. DEP'T OF JUST., 1982 MERGER GUIDELINES 2 (1992), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11248.pdf.

27. DEP'T OF JUST. & FED. TRADE COMM'N, 1992 MERGER GUIDELINES (1997), https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/hmg.pdf; DEP'T OF JUST. & FED. TRADE COMM'N, 1997 MERGER GUIDELINES (1997), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11251.pdf; DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), https://www.justice.gov/atr/file/810276/dl; DEP'T OF JUST. & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES (2020), https://www.ftc.gov/system/files/documents/public_statements/1580003/vertical_merger_guidelines_6-30-20.pdf.

28. *See generally* Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, 64 ANTITRUST BULL. 479, 491–93 (2019) [hereinafter *Profound Nonsense of Consumer Welfare Antitrust*].

29. *See Modernization of Antitrust: A New Equilibrium*, *supra* note 17, at 1153 n.71.

30. Niket Nishant, *Global M&A Volumes Hit Record High in 2021, Breach $5 Trillion for First Time*, REUTERS (Dec. 31, 2021, 12:44 AM), https://www.reuters.com/markets/us/global-ma-volumes-hit-record-high-2021-breach-5-trillion-first-time-2021-12-31/; Peter Rudegeair & David Benoit, *Deals Spree Puts Banks on Track for Busiest-Ever Year*, WALL ST. J. (Sept. 7, 2021, 5:30 AM), https://www.wsj.com/articles/deals-deals-deals-banks-feast-on-merger-bonanza-11631007002; Kristin Broughton, *M&A Likely to Remain Strong in 2022 as Covid-19 Looms Over Business Plans*, WALL ST. J. (Dec. 23, 2021, 5:30 AM), https://www.wsj.com/articles/m-a-likely-to-remain-strong-in-2022-as-covid-19-looms-over-business-plans-11640255406.

31. Nuno Fernandes, *How to Capitalize on the Coming M&A Wave*, HARV. BUS. REV. (Feb. 12, 2021), https://hbr.org/2021/02/how-to-capitalize-on-the-coming-ma-wave.

32. Fraser Tennant, *Boom Time: Riding the Seventh Great 'M&A Wave*,*'* FINANCIER WORLDWIDE (Nov. 2021), https://www.financierworldwide.com/boom-time-riding-the-seventh-great-ma-wave.

33. For example, in 2021, the FTC received almost 3,500 merger filings, on track to be the highest in twenty years, and was able to challenge only six of them. *See* Statement of

This crippling of Section 7 by administrative fiat has, according to economist John Kwoka, "contributed directly to [a] wave of consolidation in many U.S. industries" over the past four decades.[34] A careful study conducted by Chicago School scholar Sam Pelzman in 2014 reported that "concentration, which had been unchanged all of the twentieth century, began rising at the same time that merger policy changed"—namely, with the adoption of the consumer-welfare framework in the early 1980s.[35] Today, oligopolies are entrenched across our economy.[36] The economic fates of citizens and whole communities are routinely being decided by financiers and executives in distant headquarters, "with only balance sheets and profit and loss statements in their hands."[37] Among a cascade of

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Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter Regarding the FY 2020 Hart-Scott-Rodino Annual Report for Transmittal to Congress (Nov. 8, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598131/statement_of_chair_lina_m_khan_joined_by_rks_regarding_fy_2020_hsr_rep_p110014_-_20211101_final_0.pdf. In a report released by Dechert LLP, the law firm stated, "By the end of Q2 2022, the FTC and [the Department of Justice] had only concluded 18 significant investigations into the nearly 5,500 HSR filings made between January 2021 and June 2022." *DAMITT Q2 2022: Is Merger Enforcement Taking a Conservative Turn?*, DECHERT LLP (July 26, 2022), https://www.dechert.com/knowledge/publication/2022/7/damitt-q2-2022--is-merger-enforcement-taking-a-conservative-turn.html.

34. *See* John Kwoka, *Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice*, at 23 (Am. Antitrust Inst., White Paper, Oct. 9, 2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/10/Kwoka-Reviving-Merger-Control-October-2018.pdf.

35. *See* Sam Pelzman, *Industrial Concentration Under the Rule of Reason*, 57 J.L. & ECON. S101, S101 (2014).

36. *See* Lina Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1671 (2020) [hereinafter *End of Antitrust History Revisited*] (collecting studies "reveal[ing] high concentration to now be a systemic, rather than isolated feature of our economy").

37. United States v. Falstaff Brewing Corp., 410 U.S. 526, 542 (1973) (Douglas, J., concurring in part). *See generally* Marc Edelman, *Hollowed Out Heartland, USA: How Capital Sacrificed Communities and Paved the Way for Authoritarian Populism*, 82 J. RURAL STUD. 505, 510–13 (2019). For the effects of banking consolidation on self-determination and other aspects of community well-being in rural communities, see Farm Action and e2 Entrepreneurial Ecosystems, Basel Musharbash, Comment Letter on DOJ Request for Public Comment on the 1995 Bank Merger Guidelines (Feb. 15, 2022), https://www.justice.gov/atr/page/file/1474301/dl?inline (Comment ID: 2022-BGR-11). For the effects of grocery and retail consolidation on social capital, civic capacity, and other aspects of community wellbeing, see STACY MITCHELL, BIG-BOX SWINDLE: THE TRUE COST OF MEGA-RETAILERS AND THE FIGHT FOR AMERICA'S INDEPENDENT BUSINESSES 73–127 (2006). For the effects of agricultural consolidation, see Farm Action, Sarah Carden, Basel Musharbash & Sonia Pauwee, Comment Letter on FTC/DOJ Request for Information on Merger Enforcement, at 14–24 (Apr. 20, 2022), https://www.regulations.gov/comment/FTC-2022-0003-0724 (Comment ID: FTC-2022-0003-0724); *The Economics of Food and Corporate Consolidation*, FOODPRINT, https://foodprint.org/issues/the-economics-of-food-and-corporate-consolidation/#easy-footnote-bottom-1-1778 (Feb. 28, 2024). For a broader discussion of the effect of corporate delocalization on social capital in American communities, see Charles H. Heying, *Civic Elites and Corporate Delocalization: An Alternative Explanation for Declining Civic Engagement*, 40 AM. BEHAV. SCIENTIST 657 (1997).

harms, dominant firms have increased markups for consumers,[38] depressed wages for workers,[39] and squeezed farmers and other small suppliers.[40] Markets have become closed and sclerotic, with investment "kill zones" spreading and new business formation plummeting.[41] One analysis showed that since 2000, at least 100,000 jobs have been eliminated directly as a result of mergers.[42] What the FTC once called the "dead hand of corporate control" has all but eliminated the "unseen hand of competition" in a broad range of the nation's basic industries, while roll-ups and other monopolistic acquisition strategies are fast displacing competition in the small-business and emerging industries where it remains a vital force.[43]

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38. *See* Germán Gutiérrez & Thomas Philippon, *Investmentless Growth: An Empirical Investigation*, BROOKINGS PAPER ON ECON. ACTIVITY, Fall 2017, at 89, 95–97; Germán Gutiérrez & Thomas Philippon, *Ownership, Concentration, and Investment*, 108 AEA PAPERS & PROCEEDINGS 432, 432 (2018); Germán Gutiérrez & Thomas Philippon, *Declining Competition and Investment in the U.S.* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23583, 2017). *See also* Orley Ashenfelter, Daniel Hosken & Matthew Weinberg, *Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers*, 57 J.L. & ECON. S67, S78 (2014) ("The empirical evidence that mergers can cause economically significant increases in price is overwhelming. Of the [forty-nine] studies surveyed, [thirty-six] find evidence of merged-induced price increases. All of the airline merger studies find evidence of price increases[.] Similarly most of the banking (six of seven), hospital (five of seven), and 'other industry' (thirteen of eighteen) studies find evidence that mergers have resulted in price increases.") (citations omitted).

39. Jose A. Azar et al., *Concentration in US Labor Markets: Evidence from Online Vacancy Data* 13 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24395, 2018). Jose A. Azar et al., *Labor Market Concentration* 12 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24147, 2017). Simcha Barkai, *Declining Labor and Capital Shares*, 75 J. FIN. (Oct. 2020) (manuscript at 2, 23–26).

40. *See, e.g.*, Farm Action, Basel Musharbash, Comment Letter on FTC/DOJ Request for Public Comment on Draft Merger Guidelines, at 42–65 (Sept. 18, 2023), https://farmaction.us/wp-content/uploads/2023/09/Farm-Action-Merger-Guidelines-Comment-9.18.23.pdf (Comment ID: FTC-2023-0043-1515); Farm Action, Sarah Carden, Basel Musharbash & Sonia Pauwee, *supra* note 37, at 14–24 (Comment Letter).

41. *See* Stacy Mitchell, *The View from the Shop—Antitrust and the Decline of America's Independent Businesses*, 61 ANTITRUST BULL. 498, 502 (2016) (noting growth in the political power of large businesses and the decrease in small business formation); IAN HATHAWAY & ROBERT E. LITAN, WHAT'S DRIVING THE DECLINE IN THE FIRM FORMATION RATE? A PARTIAL EXPLANATION 9 (Brookings Inst., 2014); *see also* SUBCOMM. ON ANTITRUST, COM. & ADMIN. L. OF THE H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 35–39 (Majority Staff Rep. & Recommendations 2020).

42. JOHN N. DROBAK, RETHINKING MARKET REGULATION: HELPING LABOR BY OVERCOMING ECONOMIC MYTHS 46, 48 (2021).

43. The quoted language is from: Fed. Trade Comm'n, *The Merger Movement: A Summary Report* (1948), *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3436, 3456 (Earl W. Kintner ed., 1978). For example, a comprehensive analysis of food system industries published in September 2024 found declining competition and accumulations of monopolistic power in crop seeds, crop-protection chemicals, fertilizers, farm machinery, fruit and vegetable production, egg production, dairy processing, meat processing, grocery retail, foodservice distribution, crop insurance, and agricultural finance industries. *See* BASEL MUSHARBASH, FARM ACTION "KINGS OVER THE NECESSARIES OF LIFE": MONOPOLIZATION AND THE ELIMINATION OF COMPETITION IN AMERICA'S AGRICULTURE

This state of affairs reflects a brazen defiance of the rule of law in this country. As multiple scholars have argued, judicial interpretation and agency practice over the past four decades have "watered down" Section 7 to "textually unrecognizable levels,"[44] and have become "so far removed from the legislative purposes that animated [the Celler-Kefauver Act] that it is hard to see the connection between the statute and current interpretation."[45] More troublingly, as Professor Daniel Crane has observed, the courts have "not merely abandoned statutory textualism or other modes of faithful interpretation" in the context of antitrust, but have "departed from text and original meaning in one consistent direction—toward reading down the antitrust statutes in favor of their own personal beliefs in favor of big business."[46]

This Article seeks to point the way back from the "personal beliefs" of judges and enforcers to an interpretation of Section 7 based on its original meaning and purpose as legislated by Congress. Toward that end, Part II of the Article describes textualist paradigm shift that has swept the federal courts over the past three decades and summarizes the key precepts of current statutory interpretation doctrine as they have been defined by the Supreme Court.[47] Using these precepts, Part III endeavors to interpret Section 7 of the Clayton Act like a normal statute would be interpreted under today's predominant interpretive doctrine.[48] Subpart III.A. provides a rigorous textualist analysis of the key terms of Section 7 to identify its plain meaning. Subpart III.B delves into the legislative history of the Sherman, the Clayton, and the Celler-Kefauver Acts to confirm that this plain meaning is consistent with legislative intent, and to show that it is not absurd. Finally, Subpart III.C. brings it all together in a comprehensive statement of the test of illegality under Section 7 and provides a typology of the types of mergers it necessarily prohibits and necessarily permits. The Article concludes

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SYSTEM (2024), https://farmaction.us/wp-content/uploads/2024/09/Kings-Over-the-Necessaries-of-Life-Monopolization-and-the-Elimination-of-Competition-in-Americas-Agriculture-System_Farm-Action.pdf. For analysis of the role of serial acquisition strategies in consolidating a variety of nascent and competitive industries in recent years, see Denise Hearn et al., *The Roll-Up Economy: The Business of Consolidating Industries with Serial Acquisitions* 14–26 (Am. Econ. Liberties Project, Working Paper Series on Corporate Power No. 10, Dec. 15, 2022).

44. Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205, 1207 (2021); *see also* First & Waller, *supra* note 16, at 2551; *End of Antitrust History Revisited*, *supra* note 36, at 1678–79.

45. First & Waller, *supra* note 16, at 2551; *see also End of Antitrust History Revisited*, *supra* note 36, at 1678–79.

46. Crane, *supra* note 44, at 1207.

47. *See infra* Part II.

48. *See infra* Part III.

with Part IV, which rebuts certain counterarguments, and gestures toward a future where the Anti-Merger Act of 1950 is faithfully enforced.[49]

II. ANALYTICAL FRAMEWORK: STATUTORY INTERPRETATION DOCTRINE AFTER THE TEXTUALIST TURN

In recent decades, debate over merger enforcement policy has often proceeded as if the antitrust laws were "blank checks" that judges and enforcers could use to underwrite any economic ideology they want and pursue any set of policy objectives they prefer.[50] As substantial scholarship has recently documented, however, that is not the case.[51] The statutory text and legislative history of the antitrust laws—particularly the 1950 Celler-Kefauver Act—bracket the plain meaning of their provisions with concrete conceptions of the kind of "competition" they are intended to preserve and the kind of "monopoly" they are intended to prevent, and, in doing so, reveal a consistent set of congressional policy objectives to guide enforcement.[52] As the Supreme Court[53] has held, and many enforcers[54] and

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49. *See infra* Part IV.

50. *See* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 181 (2021) [hereinafter Paul I] (quoting Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1702 (1986)). *See also* Andrew S. Oldham, *Sherman's March (In)to the Sea*, 74 TENN. L. REV. 319, 324 (2007); Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CAL. L. REV. 263, 270 (1986); *End of Antitrust History Revisited*, *supra* note 36, at 1678–79.

51. This conventional wisdom is increasingly being challenged. *See* Paul I, *supra* note 50, at 175; Crane, *supra* note 44, at 1205; *End of Antitrust History Revisited*, *supra* note 36, at 1678–79. Dissenting voices have also existed all along. *See, e.g.*, Daniel A. Farber & Brett H. McDonnell, *"Is There a Text in this Class?" The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619 (2004); Harry S. Gerla, *Restoring Rivalry as a Central Concept in Antitrust Law*, 75 NEB. L. REV. 209 (1996).

52. *See infra* Part III.A.

53. *See, e.g.*, Standard Oil Co. v. United States, 221 U.S. 1, 6–8, 50 (1911) (engaging with the common-law tradition at length, discussing its roots in traditional market regulation, identifying the legislative purpose of the Sherman Act as curbing the concentrated power of business trusts and corporations, and deriving decision rules thereof); Standard Oil Co. v. United States (*Standard Stations*), 337 U.S. 293, 304, 311 (1949) (applying Section 3 of the Clayton Act based on whether it restrains a "not . . . insubstantial" amount of commerce because "Congress has authoritatively determined that those practices [tying arrangements and other proscribed methods under the Clayton Act] are detrimental where their effect may be to lessen competition" and "has not left at large for determination in each case the ultimate demands of the 'public interest'").

54. *See, e.g.*, Joseph E. Sheehy, *The Test of Illegality Under Section 7 of the Clayton Act*, 3 ANTITRUST BULL. 491 493–95 (1958) (explaining adoption of test for illegality of mergers based on whether it forecloses competition for a "substantial" amount of commerce based on the fact that "the legislative history of both the original statute [the Clayton Act] and its amendment [the Celler-Kefauver Act] establish[ ] clearly the intent of Congress[,]" not to "place the [FTC] or the courts in the position of maintaining a nice balance between [different] factors[,]" but to "reaffirm[ ] the basic principle of our antitrust law which is that the economic well-being of this country is best served through competition").

scholars[55] have argued over the years, these normative guideposts can and should direct the interpretation of the antitrust laws and their application to the nation's economy.

Judicial interpretation of the antitrust laws, however, has followed a very different trajectory. As Professor Daniel Crane has explained, the federal courts have "not merely abandoned statutory textualism or other modes of faithful interpretation" in the context of antitrust, but have "departed from text and original meaning in one consistent direction—toward reading down the antitrust statutes in favor of their own personal beliefs in favor of big business."[56] This "antitrust antitextualism," to use Professor Crane's term, is markedly out of step with the broader trend toward textualist analysis in American jurisprudence—not to mention wholly inconsistent with current statutory interpretation doctrine.

A. The Textualist Paradigm Shift

Although debate over the merits of competing theories of statutory interpretation rages on in academia,[57] federal court practice has moved decidedly in a textualist direction.[58] Before the 1990s, the default paradigm for statutory interpretation was the one famously articulated by the Supreme Court in *Holy Trinity Church v. United States*—that the text of a statute (its "letter") must yield when it conflicts with its purpose (or its "spirit").[59] Over the past

55. *See, e.g.*, Bok, *supra* note 18, at 308 (arguing that uncertainties in merger policy should be resolved consistently with basic value premises and broad political and economic objectives of Congress; and that the "burdens of our ignorance [should] fall upon the merging firms and not upon the public interest in maintaining competition and restraining monopoly power"); Farber & McDonnell, *supra* note 51, at 623.

56. *See* Crane, *supra* note 44, at 1207.

57. *See, e.g.*, Mark Seidenfeld, *Textualism's Theoretical Bankruptcy and Its Implication for Statutory Interpretation*, 100 B.U. L. REV. 1817 (2020).

58. *See* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 793 & n.11 (2018) (citing JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 60 (2d ed. 2013) ("Over the last quarter-century, textualism has had an extraordinary influence on how federal courts approach questions of statutory interpretation. When the Court finds the text to be clear in context, it now routinely enforces the statute as written.")) (underscoring the influence of textualism in the courts). *See also* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3, 32–34 (2006) (noting that "textualism has so succeeded in discrediting strong purposivism that it has led even nonadherents to give great weight to statutory text" and citing empirical and anecdotal evidence in support); Abbe Gluck, *Symposium: The Grant in* King*—Obamacare Subsidies as Textualism's Big Test*, SCOTUSBLOG (Nov. 7, 2014, 12:48 PM), https://www.scotusblog.com/2014/11/symposium-the-grant-in-king-obamacare-subsidies-as-textualisms-big-test/ ("Textualists have spent three decades convincing judges of all political stripes to come along for the ride, and have had enormous success in establishing 'text-first' interpretation as the general norm."); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L. Q. 351, 353–57 (1994).

59. 143 U.S. 457, 458–59 (1892).

three decades, however, the Supreme Court's decisions have advanced a new interpretive paradigm[60]—instructing judges not only to start with the statutory text, but also to follow a structured process for determining whether the statute's text is plain or ambiguous, whether it leads to "absurd results," and whether—and how—to resort to legislative history.[61]

Under this framework, "[s]tatutory texts are not just common law principles or aspirations to be shaped and applied as judges think reasonable."[62] Judges are "bound, not only by the ultimate purposes Congress selected" for a statute, but also "by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes" in the statutory text.[63] This elevation of the text as the touchstone of statutory meaning cuts against both expansive and crabbed interpretations of statutes. On the one hand, the Court has emphasized that "the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone" in the statutory text.[64] On the other hand, the Court has recognized "that the reach of a statute often exceeds the precise evil to be eliminated," and accordingly, that judges may not "restrict the unqualified language of a statute to the particular evil [they believe] Congress was trying to remedy[.]"[65]

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60. There are a number of studies corroborating the trends of reduced reliance on legislative history and enhanced reliance on textual cues. *See, e.g.*, James J. Brudney & Corey Distlear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 222 (2006) (documenting that in workplace law cases, "the Court's reliance on legislative history declined from 51[%] during the Burger years to 29[%] in the Rehnquist era"); Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 386 (1999) (reporting that in the six years before Justice Scalia's appointment, the Court averaged 3.47 citations of legislative history per opinion and that the average in the twelve years after his appointment dropped to 1.87).

61. For simplicity of exposition and consistency with current statutory interpretation doctrine, we describe textualism as a structured process. That is not to say, however, that we believe textualist interpretation has been a mechanical exercise in practice or that judges do not use textualist methods strategically.

62. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2135 (2016) ("Under the structure of our Constitution, Congress and the President — not the courts — together possess the authority and responsibility to legislate. As a result, clear statutes are to be followed. Statutory texts are not just common law principles or aspirations to be shaped and applied as judges think reasonable.") (footnotes omitted).

63. *See* John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287, 1316 (2010) (quoting MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 n.4 (1994) (Scalia, J.)).

64. *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98 (1991).

65. *See* Brogan v. United States, 522 U.S. 398, 403 (1998) (Scalia, J.). *See also* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (Scalia, J.) ("[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

Whether this doctrinal shift should be praised or condemned is outside the scope of this Article. What matters for our purposes is that it has occurred. In Justice Kagan's words, "[We are] all textualists now[.]"[66] In other areas of law, this textualist turn has in recent years spurred the Supreme Court to adopt novel statutory interpretations,[67] to reject long-established statutory implementation rules among the circuit courts,[68] and even to overturn its own controlling (and often long-standing) statutory precedents.[69]

Not yet in antitrust. Here, antitextualism still reigns. The notion that the antitrust laws are "unbounded delegation[s] of common-law powers" to the courts is entrenched.[70] Outside the work of a few scholars, *bona fide* construction of the governing statutes is practically nonexistent.[71] The action is all in dynamic, policy-driven interpretation that regards the antitrust laws as mere "enabling legislation," empowering judges and enforcers to develop and pursue their own ideas for how to make "businesses and markets . . . work in socially efficient ways."[72]

B. Current Statutory Interpretation Doctrine

In the wake of the Supreme Court's textualist turn over the past two decades, current statutory interpretation doctrine offers a stark rejoinder to the antitextualism that prevails in antitrust

66. *See* Richard M. Re, *Justice Kagan on Textualism's Success*, PRAWFSBLAWG (Dec. 7, 2015, 8:00 AM), http://prawfsblawg.blogs.com/prawfsblawg/2015/12/justice-kagan-on-textualisms-victory.html.

67. *See* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 279 & n.118 (2020) (explaining that the majority's textualist interpretation of Title VII to prohibit discrimination based on sexual orientation in *Bostock v. Clayton County* "disregard[ed] over 50 years of uniform judicial interpretation of Title VII," including the unanimous holdings of all ten circuit courts that had previously considered the issue) (citing Bostock v. Clayton Cnty, 590 U.S. 644, 799 (2020) (Kavanaugh, J., dissenting) ("In the first 10 Courts of Appeals to consider the issue, all 30 federal judges agreed that Title VII does not prohibit sexual orientation discrimination. 30 out of 30 judges.")).

68. *See* Romag Fasteners, Inc. v. Fossil, Inc., 590 U.S. 212, 213 (2020) (Gorsuch, J.) (overturning a longstanding "willfulness" requirement adopted by several circuits in implementing the Lanham Act because it could not "be reconciled with the statute's plain meaning").

69. *See* Margaret L. Moses, *The Pretext of Textualism: Disregarding Stare Decisis in* 14 Penn Plaza v. Pyett, 14 LEWIS & CLARK L. REV. 825 (2010) (examining the Supreme Court's decision in *14 Penn Plaza LLC v. Pyett*, which overturned *Alexander v. Gardner-Denver Co.* and reinterpreted the Federal Arbitration Act on textualist grounds to permit employers to enforce forced-arbitration clauses in collective bargaining agreements). *See also* Richard M. Brunell, *Overruling Dr. Miles: The Supreme Trade Commission in Action*, 52 ANTITRUST BULL. 475 (2007).

70. Crane, *supra* note 44, at 1207.

71. *See, e.g.*, Paul I, *supra* note 50; Robert H. Lande & Richard O. Zerbe, *The Sherman Act Is a No-Fault Monopolization Statute: A Textualist Demonstration*, 70 AM. U. L. REV. 497 (2020); Arthur, *supra* note 50; Gerla, *supra* note 51.

72. *See* Paul I, *supra* note 50, at 181, 223 (quoting HERBERT HOVENKAMP, ECONOMIC AND FEDERAL ANTITRUST LAW 53 (1985)); First & Waller, *supra* note 16, at 2549.

jurisprudence. In *Connecticut National Bank v. Germain*,[73] the Court offered what commentators have called the best encapsulation of statutory interpretation doctrine[74] in the era of Chief Justice Roberts:

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then this first canon is also the last: judicial inquiry is complete.[75]

Under this "cardinal" rule, the proper starting point for judges to interpret a statutory provision is the plain meaning of its text.[76] A court may look beyond a statute's words to legislative history only if the statute's words are ambiguous or if their plain meaning leads to absurd results.[77] Otherwise, a court must enforce the provision as written.[78]

A provision is ambiguous if its text is "susceptible to more than one reasonable interpretation."[79] Properly understood, an ambiguity is "[a]n uncertainty of meaning based not on the *scope* of a word or phrase but on a *semantic dichotomy* that gives rise to any of two or more quite different but almost equally plausible interpretations."[80] This distinction is significant. When words are simply uncertain in breadth—that is, vague[81]—they still have core meanings that are free of ambiguity and plain in their application to some

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73. 503 U.S. 249 (1992).

74. *See* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 126–27 (suggesting that "the Court's new approach" to statutory interpretation "is perhaps best captured by the Court's oft-cited opinion in *Connecticut National Bank v. Germain*").

75. *Germain*, 503 U.S. at 253–54. *See also* Food Mktg. Inst. v. Argus Leader Media, 588 U.S. 427, 436 (2019) ("In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself. Where, as here, that examination yields a clear answer, judges must stop. Even those of us who sometimes consult legislative history will never allow it to be used to 'muddy' the meaning of 'clear statutory language.'") (internal citations omitted).

76. *E.g.*, Permanent Mission of India to the U.N. v. City of New York, 551 U.S. 193, 197–99 (2007); Lamie v. U.S. Tr., 540 U.S. 526, 534 (2004); Barnhardt v. Sigmon Coal Co., Inc., 534 U.S. 438, 450 (2002).

77. *See, e.g.*, *Germain*, 503 U.S. at 253.

78. Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000).

79. *E.g.*, United States v. Kaluza, 780 F.3d 647, 658 (5th Cir. 2015); *accord* Caminetti v. United States, 242 U.S. 470, 485 (1917) (collecting cases).

80. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 425 (2012) (emphasis added) (defining "ambiguity").

81. *Id.* at 441 (defining "vagueness").

core set of circumstances.[82] In this area of core meaning, a vague term has a plain meaning that courts are obliged to respect; it is not a "portmanteau" that we may "put anything we like into."[83] For the use of a vague term in a statute is often a deliberate legislative choice, intended to reflect a legislative compromise, or to give the statute the flexibility to reach unforeseen circumstances.[84] As such, only in its application to uncertain fringe cases does a vague term give rise to an "ambiguity" that justifies ignoring the plain text and resorting to legislative history.[85]

To determine if a statutory provision's meaning is plain or ambiguous, a court is supposed to examine the provision's words, the specific grammatical context in which those words are used, and the broader context of the statute as a whole.[86] First, unless a statute provides legal definitions or uses specific terms of art, the court must define the provision's words in accordance with their "ordinary public meaning" around the time of the provision's enactment.[87] Then, using the standard rules of English grammar, syntax, and punctuation, the court must construe the provision's words in a manner that comports with their syntactic surroundings.[88] Finally, the court must examine the provision's words in the context of the statute's general structure and its textual amendment

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82. *See* Reed Dickerson, *Statutory Interpretation: Core Meaning and Marginal Uncertainty*, 29 MO. L. REV. 1, 1–2 (1964).

83. *See id.* at 1–2, 1 n.2 (quoting Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 866 (1930)).

84. Sturgeon v. Frost, 587 U.S. 28, 51, 58 (2019) (detailing that law is often the result of legislative "settlement," and rejecting that recognition would "undermine" a statute's "grand bargain"); *Cf.* Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 656–57 (2017) [hereinafter *Latent Power*] (detailing the reasons that Congress deliberately chose to use the vague phrase "unfair methods of competition" for practices that should be prohibited under the Federal Trade Commission Act).

85. *Cf.* Lamie v. U.S. Tr., 540 U.S. 526, 534 (2004) (holding that, unless a statute is "ambiguous on the point at issue," a court should not resort to legislative history in interpreting it).

86. *E.g.*, Yates v. United States, 574 U.S. 528, 537 (2015) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)).

87. *See, e.g.*, Bostock v. Clayton Cnty., 590 U.S. 644, 654 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."); FDIC v. Meyer, 510 U.S. 471, 476 (1994) ("[In the absence of statutory definitions or terms of art,] we construe a statutory term in accordance with its ordinary or natural meaning.").

88. *See, e.g.*, Arizona v. Inter-Tribal Council of Ariz., 570 U.S. 1, 10 (2013) ("Words that can have more than one meaning are given content, however, by their surroundings."); Flores-Figueroa v. United States, 556 U.S. 646, 650–53 (2009); *Meyer*, 510 U.S. at 476. *See also* 82 C.J.S. STATUTES § 410 (2024) (citing Flora v. U.S., 362 U.S. 145 (1960)) ("Courts apply the ordinary rules of grammar and common usage to ascertain the meaning of a statute."); SCALIA & GARNER, *supra* note 80, at 140 ("Words are to be given the meaning that proper grammar and usage would assign them.").

history—to interpret them in a manner that is "coherent and consistent" with the statute's overall scheme.[89] After completing this textual examination, the court must enforce the text's plain meaning unless it finds that the text has more than one reasonable meaning, or leads to absurd results.[90]

When interpreting a statutory term that is "obviously transplanted from another legal source," a court must presume that "it brings its soil with it."[91] In borrowing terms from jurisprudence, Congress is presumed to "know[] and adopt[] the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken."[92] This presumption is not inviolable, however. Its strength varies "with the similarity of the language, the established character of the decisions . . . from which the language was adopted, and [the] presence or lack of other indicia of intention."[93] Accordingly, the presumption applies most rigidly when the words being interpreted are "terms of art," with an "established" and "specialized" legal meaning in their original body of jurisprudence.[94] In those cases, "the general practice is to give that term its [established] meaning."[95] Where "no fixed usage" exists for the borrowed term, however, the term's jurisprudential roots should inform its interpretation in a manner that "best accords" with the statutory context.[96]

If a court finds ambiguities in a provision's text, the court may resort to the legislative history of the provision only to resolve those specific ambiguities.[97] The task of the judge in this context is not to

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89. *See, e.g.*, Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 222 (2008) (Thomas, J.).

90. *See, e.g.*, *Lamie*, 540 U.S. at 534, 536–38.

91. Moskal v. United States, 498 U.S. 103, 121 (1990) (Scalia, J., dissenting) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)).

92. Morissette v. United States, 342 U.S. 246, 263 (1952). *See also* Air Wis. Airlines Corp. v. Hoeper, 571 U.S. 237, 248 (2014) (quoting FAA v. Cooper, 566 U.S. 284, 292 (2012) (quoting Molzof v. United States, 502 U.S. 301, 307 (1992) (quoting *Morissette*, 342 U.S. at 263))).

93. Carolene Prods. Co. v. United States, 323 U.S. 18, 26 (1944).

94. *See Moskal*, 498 U.S. at 114 ("Where a . . . statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning."); Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 615 (2001) (Scalia, J., concurring) ("Words that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning.").

95. United States v. Turley, 352 U.S. 407, 411 (1957).

96. *See Moskal*, 498 U.S. at 116 ("Where . . . no fixed usage existed at common law [for a statutory term borrowed from common law], we think it more appropriate to inquire which of the common-law readings of the term best accords with the overall purposes of the statute . . . .").

97. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) ("[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous

go on a freewheeling search for the unexpressed intentions of legislators and imaginatively reconstruct the text's semantic import to capture those background intentions—it is simply to "find the meaning of the words used."[98] Accordingly, a court may examine and rely upon legislative history in interpreting a statutory text only to the extent that it "shed[s] a reliable light on the enacting legislature's understanding of otherwise ambiguous terms."[99] In conducting this examination, reviewing courts should give special weight to committee reports on the bill[100] and floor statements by the bill's sponsors,[101] but generally eschew reliance on the comments of any one legislator,[102] or on passing statements by lawmakers during floor debates or committee proceedings.[103]

Formally, a provision's plain meaning leads to "absurd results" if it produces results that "no reasonable person could intend"[104] or, at a minimum, results that "are demonstrably at odds with the intentions of [the provision's] drafters."[105] In recent decades, however, the Supreme Court has endorsed progressively narrower interpretations of this doctrine. On the one hand, it has made clear that the absurdity doctrine does not permit the courts to "soften the import of Congress' chosen words" simply because those "words lead to a harsh outcome"[106]—much less because they lead to outcomes that are merely counterintuitive, "anomalous," or "odd."[107] On the other

terms."); *cf.* Lamie v. U.S. Tr., 540 U.S. 526, 534 (2004) (holding that a court should not resort to legislative history in interpreting a statute unless it is "ambiguous on the point at issue").

98. *See* SCALIA & GARNER, *supra* note 80, at 391–96 (2012) (covering Section 67 on "the false notion that the purpose of interpretation is to discover intent"); *see also Lamie*, 540 U.S. at 538 (declining to "read an absent word into the statute" where the statute evinces a "plain, nonabsurd meaning").

99. *Exxon*, 545 U.S. at 568–69 ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic materials. Extrinsic materials have a role to play in statutory construction only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms.").

100. *E.g.*, Garcia v. United States, 469 U.S. 70, 76 (1984) (quoting Zuber v. Allen, 396 U.S. 168, 186 (1969)).

101. *See, e.g.*, Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976).

102. *E.g.*, Weinberger v. Rossi, 456 U.S. 25, 35 (1982).

103. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 385 (1968).

104. *See* SCALIA & GARNER, *supra* note 80, at 235–37. *See also* Sebelius v. Cloer, 569 U.S. 369, 381 (2013); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527–28 (1989) (Scalia, J., concurring).

105. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242–43 (1989); *see* Lamie v. U.S. Tr., 540 U.S. 526, 536–38 (2004).

106. *Lamie*, 540 U.S. at 538 ("Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding.") (citing United States v. Locke, 471 U.S. 84, 95 (1985)).

107. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 565–66 (2005); *see also* Reiter v. Sonotone Corp., 442 U.S. 330, 344–45 (1979) (finding that potentially "ruinous" effect on small businesses "cannot govern our reading of the plain language [of antitrust provision]").

hand, the Court has refused to apply the absurdity doctrine where a plain meaning's effect was flagged or anticipated in the legislative process, and even where contemporaneously enacted statutes simply show that Congress was "thinking about" the implications embedded in the statutory text.[108] All in all, the Court has described the absurdity doctrine as one of last resort—"rarely" to be invoked "to override unambiguous legislation."[109]

Fundamentally, under today's interpretive doctrine, the language of a statute, absent ambiguity in its words or absurdity in its results, is Congress' "authoritative statement" of its intent for that statute.[110] Against this principle, "even the most formidable policy arguments cannot overcome a clear statutory directive."[111] For the task of a judge is "to discern and apply the law's plain meaning as faithfully as [they] can, not 'to assess the consequences of each approach and adopt the one that produces the least mischief.'"[112]

III. INTERPRETING SECTION 7 OF THE CLAYTON ACT LIKE A NORMAL STATUTE

Construed under current statutory interpretation doctrine, in plain language, Section 7 prohibits mergers and acquisitions that could possibly, in one or more realistic ways, either diminish the amount, scope, or intensity of competitive activity, or conduce to a course of action or behavior that can eventually bring monopoly about, in any line of business carried out in any distinct segment of the nation's government, geography, or population. For a merger to generate the required possibility, its concrete features must give it the potential to cause an anticompetitive or monopolistic effect, and that potential must not be foreclosed by prohibitive conditions in

108. *See* Demarest v. Manspeaker, 498 U.S. 184, 188 (1991); *see also Exxon*, 545 U.S. at 571.

109. *See* Barnhart v. Sigmon Coal Co., 534 U.S. 438, 459 (2002).

110. *See* Chamber of Com. v. Whiting, 563 U.S. 582, 599 (2011) (quoting *Exxon*, 545 U.S. at 568).

111. BP P.L.C. v. Mayor & City Council of Balt., 593 U.S. 230, 245 (2021) (quoting Kloeckner v. Solis, 568 U.S. 41, 55 n.4 (2012). *See also* Niz-Chavez v. Garland, 593 U.S. 155, 171–72 (2021) ("[N]o amount of policy-talk can overcome a plain statutory command. Our only job today is to give the law's terms their ordinary meaning . . . . [W]ords are how the law constrains power.").

112. *See BP P.L.C.*, 593 U.S. at 246 (quoting Lewis v. Chicago, 560 U.S. 205, 217 (2010)); *see also* Romag Fasteners, Inc. v. Fossil, Inc., 590 U.S. 212, 219 (2020) ("[T]he place for reconciling competing and incommensurable policy goals like [the ones advanced by the parties] is before policymakers. This Court's limited role is to read and apply the law those policymakers have ordained[.]"); United States v. Rodgers, 466 U.S. 475, 484 (1984) ("Even if we were more persuaded than we are by these policy arguments, the result in this case would be unchanged. Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress.").

the merger's concrete environment. Where the required possibility exists, the fact that alternative possibilities also exist cannot stay the application of the statute. Nor can any defense rest on future circumstances that do not yet subsist in reality. The statute—as the appellants argued, and the majority of justices agreed, in the first Supreme Court case interpreting the Clayton Act—does not give "license to the imagination."[113]

The following subsections first demonstrate the basis for this interpretation of Section 7 by applying "traditional tools of statutory construction" to discern the plain meaning of its text.[114] Then, this section turns to the legislative history of the relevant enactments—the Sherman Act, the Clayton Act, and the Celler-Kefauver Act—to confirm that the plain meaning of Section 7 is consistent with congressional intent and not absurd. Finally, this section culminates in a discussion of the types of mergers that clearly fall within the scope of Section 7's prohibition.

A. Starting With the Text

As the Court did in *Bostock v. Clayton County*,[115] we begin our interpretive analysis "by examining the key statutory terms in turn."[116] Section 7 of the Clayton Act provides in relevant part:

> No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital[,] and no person subject to the jurisdiction of the [FTC] shall acquire the whole or any part of the assets[,] of one or more person engaged in commerce or in any activity affecting commerce, *where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition,* of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, *may be substantially to lessen competition, or to tend to create a monopoly*.[117]

In other words, the statute prohibits any "person"[118] from obtaining possession or control[119] of the stock or assets of another "person"

113. *See* Argument for Petitioner at 348, Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922) (preceding opinion in U.S. Reports).
114. *See* Epic Sys. Corp. v. Lewis, 584 U.S. 497, 521 (2018).
115. 590 U.S. 644 (2020).
116. *Id.* at 655.
117. 15 U.S.C. § 18 (emphasis added).
118. *See id.* § 12(a) (defining "person" for the purposes of the Clayton Act).
119. See, for example, *Acquire*, WEBSTER'S NEW INTERNATIONAL DICTIONARY 20 (W.T. Harris & F. Sturges Allen, eds., 1923) for a contemporaneous synonym to "obtaining possession or control."

if doing so "may" result in certain proscribed "effects." As has often been said, the statutory language defining these "effects" establishes broad standards rather than precise rules.[120] Broad as they are, however, these standards are not "empty vessels," into which judges and enforcers are "free to pour a vintage [they] think better suits present-day tastes."[121] Although the scope of Section 7's provisions shades outward into a "margin of uncertainty," its provisions also have "core meanings" that delineate clear guideposts for "circumstances . . . plainly covered by the[ir] terms."[122]

To properly identify and analyze the key terms defining the scope of Section 7's prohibition, the grammatical structure of the relevant text must first be examined. The critical language in Section 7 is introduced by the relative adverb "where," which is used to indicate the case or situation in which Section 7's prohibition applies.[123] That case or situation is then defined by an adverbial clause ("the effect of such acquisition . . . may be substantially to lessen competition, or to tend to create a monopoly") and a relative clause that modifies the adverbial clause ("in any line of commerce or in any activity affecting commerce in any section of the country").

The critical adverbial clause begins with the noun-phrase "the effect of such acquisition." That noun-phrase is the subject of the clause. It is followed by the predicate, "may be," which consists of the main verb "be" aided by the modal auxiliary verb "may." Used as a copula, this compound verb then re-identifies the subject of the clause—"the effect of such acquisition"—with two infinitive phrases

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120. *See* Bok, *supra* note 18, at 305.

121. United States v. Sisson, 399 U.S. 267, 297 (1970) (rejecting appellant's argument that "radical reinterpretations of the phrase 'decision arresting a judgment' [in the Criminal Appeals Act] are . . . necessary in order to effectuate a broad policy . . . underlying the [Act]" on the ground that "the statutory phrase 'decision arresting a judgement' is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes").

122. Dickerson, *supra* note 82, at 2.

> [Professor H. L. A.] Hart's thesis is that communication is possible only because the general words through which it is conducted have a core meaning or 'standard instance in which no doubts are felt about its application.' Around each vague word there is a margin of uncertainty called the 'penumbra.' The distinction between core and penumbra is important to Hart's larger thesis that the core is the stronghold of the 'isness' of the law, whereas the penumbra is the arena to which issues of the nature and role of 'oughtness' in resolving uncertainties resulting from imprecision of legislative meaning are confined.

Id. (internal citation omitted); *cf. Sisson*, 399 U.S. at 297–98 ("The axiom that courts should endeavor to give statutory language that meaning that nurtures the policies underlying legislation is one that guides us when circumstances *not* plainly covered by the terms of a statute are *subsumed* by the underlying policies to which Congress was committed.") (emphasis added).

123. *See, e.g.*, *Where*, 12 OXFORD ENGLISH DICTIONARY 27 (1st ed. 1933) (defining "where" as a compound relative to mean "[i]n a or the case in which (often nearly = WHEN []); in the circumstances, position, or condition in which; in that respect or particular in which").

functioning as nominative complements: "to lessen competition" and "to tend to create a monopoly." Finally, the adverb "substantially" is placed in-between the copula ("may be") and its complements ("to lessen competition, or to tend to create a monopoly"). This placement, as explained more fully below, precludes the adverb "substantially" from grammatically modifying the complements that follow it, and instead requires the word to function as a sentence adverb, which modifies the clause's predication as a whole. Because of this, the following subsection III.A.i. examines the meaning of the term "substantially" in conjunction with the term "may be."

Additionally, Section 7's syntax makes clear that its two proscribed effects are independent of each other and must be given different meanings. Section 7 provides that an acquisition is prohibited where "the effect of such acquisition may be substantially *to* lessen competition*, or to* tend to create a monopoly."[124] In this text, the compound verb "may be" expresses the possible conditions that can form the required "effect" by linking the noun phrase "the effect of such acquisition" with two distinct infinitive phrases. The first—"to lessen competition"—follows "may be" first and is connected to that predicate through an introductory preposition ("to"). After a comma and the conjunction "or," the second phrase—"to tend to create a monopoly"—begins, and it is also connected to the antecedent verb through its own introductory preposition.

This parallel construction of the effect-defining clause of Section 7—which makes the two operative phrases into standalone complements of the predicate "may be" separated by "or"—is unique in the context of the Clayton Act. Although Sections 2 and 3 of the Clayton Act use similar "effects" language to that used in Section 7 to prohibit commercial discrimination and exclusive dealing, respectively, neither the original locution of Section 2 nor that of Section 3 separated the two operative phrases by a comma or gave the second phrase its own introductory "to".[125] Notably, however, legislators *did* place a comma and a separate introductory "to" before the distinct proscribed effect added to Section 2 by the Robinson-Patman Act of 1936.[126] As a result, Section 2 prohibits discriminations whose "effect . . . may be substantially *to* lessen competition or tend to create a monopoly in any line of commerce*,*

124. 15 U.S.C. § 18 (emphasis added).

125. *Compare* Clayton Antitrust Act, ch. 323, §§ 2–3, 38 Stat. 730, 730–31 (1914), *with* § 7, 38 Stat. at 731.

126. Robinson-Patman Act, ch. 592, 49 Stat. 1526 (1936) (codified as amended at 15 U.S.C. §§ 13(a)–(f)).

or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination . . . ."[127]

These minor but deliberate syntactical choices imply that Congress "act[ed] intentionally and purposely" in hardening the distinction between the two "effects"-defining phrases of Section 7.[128] In this context, to read the two operative phrases as somehow referring to the same thing while using different words would be "to disregard what 'or' customarily means."[129] As the Supreme Court has repeatedly emphasized, the "ordinary use of ['or'] is almost always disjunctive," and requires "the words it connects . . . to be given separate meanings."[130]

To be sure, in rare cases, courts have been willing to read "or" as "interpretative or expository" rather than disjunctive.[131] But those cases have been limited to statutory provisions where reading "or" in its ordinary sense would lead to unworkable or paradoxical results. Section 7 is not such a provision. Giving independent meanings to the effect-defining phrases of Section 7—"to lessen competition" and "to tend to create a monopoly"—would not conflict with other provisions of the Clayton Act, or otherwise lead to unworkable results. On the contrary, as detailed more fully below, a proper textual interpretation of these two phrases shows that they are distinct and complementary. Although the creation of a monopoly necessarily involves a person or group consolidating power to exclude competition, it does not require that power actually be used. Similarly, although a lessening of competition may pave the way toward the creation of a monopoly, it does not necessarily require an increment in the exclusionary power of any specific person or group. Thus, despite some overlap, the two phrases plainly reach different

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127. 15 U.S.C. § 13(a) (emphasis added).

128. Gozlon–Peretz v. United States, 498 U.S. 395, 404 (1991) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting Russello v. United States, 464 U.S. 16, 23 (1983))). *See also* S. REP. NO. 81-1775, at 5 (1950), *as reprinted in* 1950 U.S.C.C.A.N. 4293, 4297 ("To make clearer the intent to give the bill broad application to acquisitions that are economically significant, its wording has been broadened in certain respects.").

129. Loughrin v. United States, 573 U.S. 351, 357 (2014) (citing United States v. Woods, 571 U.S. 31, 45 (2013)); *see also* Encino Motorcars LLC v. Navarro, 584 U.S. 79, 87 (2018) (also citing *Woods*, 571 U.S. at 31, 45).

130. *Loughrin*, 573 U.S. at 357 (quoting *Woods*, 571 U.S. at 45); *see also Encino Motorcars*, 584 U.S. at 87 (also quoting *Woods*, 571 U.S. at 45).

131. *See* Schumacher v. Cargill Meat Sols. Corp., 515 F.3d 867, 872 (8th Cir. 2008) ("While the use of 'or' generally connotes a disjunctive interpretation, this is not always the case. Indeed, sometimes 'or' is interpretative or expository of the preceding word." (citing Bowles v. Weiner, 6 F.R.D. 540, 542 (E.D. Mich. 1947))).

sets of circumstances. They must be given separate meanings, not only to vindicate Congress' syntactical choices, but also to abide by a "cardinal principal" of statutory interpretation: "That courts must give effect, if possible, to every clause and word of a statute."[132]

Based on the foregoing, this Article proceeds by examining the text and structure of Section 7 to determine the plain meaning of the following key statutory phrases: (i) "may be substantially"; (ii) "to lessen competition"; (iii) "to tend to create a monopoly"; and (iv) "in any line of commerce . . . in any section of the country."

i. "May Be Substantially"

As the Supreme Court has recognized, "Section 7 itself creates a relatively expansive definition of antitrust liability."[133] It prohibits any merger whose "effect . . . '*may be substantially* to lessen competition[,]' or to tend to create a monopoly."[134] These three words express the core predication of Section 7's where-clause, extending its prohibition to all mergers that create a substantial—that is, a real and actual—possibility of anticompetitive or monopolistic effects.

Since the Supreme Court had interpreted these terms in various provisions of the Clayton Act before Congress re-enacted Section 7 in 1950, its interpretation may be presumed to control if it was fixed and authoritative when the Celler-Kefauver Act was enacted.[135] Accordingly, this section proceeds by first examining the pre-1950 judicial construction of the terms "may be" and "substantially" in the Clayton Act, before undertaking a *de novo* analysis of the relevant text and its statutory context.

a. Judicial Construction of "May Be" and "Substantially" in the Clayton Act Before 1950

In *Magrane-Houston*, the Court held that, despite using the auxiliary verb "may" in Section 3 of the Clayton Act, Congress did not intend to prohibit exclusive dealing arrangements based on "the mere possibility of the consequences described."[136] Rather, the Court said, Congress intended to prohibit only "such agreements as

132. *Loughrin*, 573 U.S. at 358 (quoting Williams v. Taylor, 529 U.S. 362, 404 (2000)).

133. *See* U.S. DEP'T OF JUSTICE & THE FED. TRADE COMM'N, MERGER GUIDELINES 1 (2023) (quoting California v. Am. Stores Co., 495 U.S. 271, 284 (1990) (quoting 15 U.S.C. § 18) (citing Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962))), https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf.

134. 15 U.S.C. § 18 (emphasis added).

135. SCALIA & GARNER, *supra* note 80, at 322 (detailing the Prior Construction Canon).

136. Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356–57 (1922).

would under the circumstances disclosed *probably* lessen competition[.]"[137] "That [Section 3] was not intended to reach every remote lessening of competition," the Court said, was "shown in the requirement that such lessening must be *substantial*."[138] In *International Shoe*, the Court extended this decision to Section 7, holding that the use of "may be" in Section 7 likewise "deal[t] only with such acquisitions as probably will result in [a] lessening [of] competition . . . ."[139] At the same time, however, the Court seemed to give the term "substantially" a new role in Section 7 compared to Section 3. A prohibited acquisition under Section 7, the Court said, must lessen or probably lessen competition "to a *substantial degree*, that is to say, to such a degree as will injuriously affect the public."[140]

These two decisions seemed to settle the interpretation of "may be" and "substantially" in the Clayton Act through the end of the 1930s. Then, however, came a succession of decisions that upended the settled understandings of both terms. Those decisions were *Corn Products* and *Morton Salt*,[141] with respect to Section 2 of the Clayton Act proscribing price discrimination, and *International Salt* and *Standard Stations*, with respect to Section 3 of the Clayton Act proscribing exclusive deals and tyings of commodities.[142]

In *Corn Products* and *Morton Salt*, the Court interpreted Section 2 of the Clayton Act as amended by the Robinson-Patman Act of 1936.[143] It concluded that Section 2 "does not require that [price] discriminations must in fact have harmed competition, but only that there is a *reasonable possibility* that they 'may' have such an effect."[144] In addition, the Court revised the kind of "substantiality" required to bring a claim under the amended Section 2. Instead of requiring plaintiffs to show that a challenged discrimination threatened to lessen competition or injure the competitive position of rivals to a "substantial degree," the *Morton Salt* and *Corn Products* Court found that it was enough to show that "respondent's quantity discounts did [in fact] result in price differentials between competing purchasers sufficient in amount to influence their resale prices

137. *Id.* at 357 (emphasis added).
138. *Id.* (emphasis added).
139. Int'l Shoe Co. v. FTC, 280 U.S. 291, 298 (1930) (citing *Magrane-Houston*, 258 U.S. at 357).
140. *Id.* (internal citations omitted) (emphasis added).
141. Corn Prods. Refin. Co. v. FTC, 324 U.S. 726 (1945); FTC v. Morton Salt Co., 334 U.S. 37 (1948).
142. Int'l Salt Co. v. United States, 332 U.S. 392 (1947); Standard Oil Co. v. United States (*Standard Stations*), 337 U.S. 293 (1949).
143. *See Corn Prods.*, 324 U.S. at 729–45; *Morton Salt*, 334 U.S. at 39–40; 42–55.
144. *Morton Salt*, 334 U.S. at 46 (emphasis added) (quoting *Corn Prods.*, 324 U.S. at 742).

of [the discounted product]."[145] This showing of injury to "the competitive opportunities of certain merchants," the Court emphasized, was adequate not only to prove that a discount "may" have lessened or injured competition, but also to prove that "such injuries *had [in fact] resulted* from respondent's discounts."[146] In sum, *Morton Salt* and *Corn Products* read the Robinson-Patman Act to prohibit price discrimination where it was reasonably possible for such discrimination—in a real and actual but not necessarily great or significant way—to "lessen competition or tend to create a monopoly in any line of commerce or to injure, destroy, or prevent competition with any person[.]"[147]

All of this being said, the Court's decisions in these two cases relied on the specific language and purpose of the Robinson-Patman Act, so their significance is arguably restricted to the provisions of that Act. This was not the case with *International Salt* and *Standard Stations*, however. Those cases dealt with Section 3 of the Clayton Act, whose provisions had not been amended since its original enactment in 1914.[148] In contrast to *Corn Products* and *Morton Salt*, the Section 3 cases re-shaped the "reasonable probability" and "substantial degree" requirements of earlier precedents to conform to the competition-focused framework developed in *Apex Hosiery*, *Socony-Vacuum*, *Fashion Originators'*, and other decisions of the early 1940s.[149]

In *Standard Stations* and *International Salt*, the Court discharged the notion, initially adopted in *International Shoe*, that the Clayton Act only prohibited practices that threatened to lessen competition "to such a [substantial] degree as will injuriously affect the public."[150] Instead, the Court held that a challenged practice satisfies the substantiality requirement of Section 3 where it threatens to lessen competition, or to tend to the creation of a monopoly, by a measure that is "not insignificant or insubstantial" in the context of "the line of commerce affected."[151] Since Congress "ha[d] authoritatively determined that practices [covered by the Clayton Act] [we]re detrimental where their effect may be to lessen competition," the Court emphasized that judges were not at liberty to weigh "the

145. *Id.* at 47; *Corn Prods.*, 324 U.S. at 738.
146. *Morton Salt*, 334 U.S. at 46 (emphasis added).
147. 15 U.S.C. § 13(a). For the Court's reading of the Robinson-Patman Act, see *Morton Salt*, 334 U.S. at 46, and *Corn Prods.*, 324 U.S. at 742.
148. Int'l Salt Co. v. United States, 332 U.S. 392, 393 (1947); Standard Oil Co. v. United States (*Standard Stations*), 337 U.S. 293, 294, 297 (1949).
149. *See infra* Part III.A.iii.
150. Int'l Shoe Co. v. FTC, 280 U.S. 291, 298 (1930).
151. *Standard Stations*, 337 U.S. at 304, 314.

ultimate demands of the 'public interest,'" or "the choice between greater efficiency and freer competition," in each case.[152]

Further, although the Court retained the "reasonable probability" requirement in so many words, it reconfigured that requirement in two critical ways. On the one hand, the Court clarified what was *not* required to demonstrate a "reasonable probability" of proscribed effects under Section 3 of the Clayton Act. Proof that "competitive activity has actually diminished or probably will diminish" was not required.[153] Neither was "evidence as to what would have happened but for the adoption of the [challenged] practice . . . ."[154] Nor, for that matter, was a "firm prediction of an increase of competition as a probable result of ordering the abandonment of the [challenged] practice[.]"[155] On the other hand, the Court clarified what *was* required—which was only sufficient evidence to support a "*bare inference*" that "competition has been or probably will be" lessened as a result of the challenged conduct.[156] "To insist upon" further "economic investigation" into market dynamics once sufficient evidence has been adduced to support a reasonable inference that a proscribed effect "has actually" resulted or "probably will" result from an exclusive dealing practice, the Court concluded, would "stultify the force of Congress' declaration that [such practices] are to be prohibited wherever their effect '*may be*' to substantially lessen competition."[157]

Thus, in *Standard Stations*, the Court held that Section 3's standard for prohibiting exclusive deals could be "satisfied" simply through "proof that competition has been foreclosed in a substantial share of the line of commerce affected."[158] Based on this test, the Court found that Standard Oil of California's use of requirement contracts with independent gas stations was unlawful based on two pieces of evidence: (1) first, that these contracts had "effectively foreclose[d]" rivals from competing for the business of Standard-contracted stations; and (2) second, that the volume of the business so foreclosed amounted to a "substantial share" of the relevant market, namely, $58 million or 6.7% of the total gasoline sales made annually in the region of the country in which Standard was active.[159]

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152. *Id.* at 311–12.
153. *Id.* at 299, 314.
154. *Id.* at 309–10.
155. *Id.* at 310.
156. *Id.* at 305, 309–10 (emphasis added).
157. *Id.* at 299, 313 (emphasis added).
158. *Id.* at 314.
159. *Id.*

Since this evidence "[went] far toward supporting the inference" that a proscribed effect "has actually" resulted or "probably will" result from the requirement contracts, the Court concluded that no further "economic investigation" was necessary for the Government's challenge to succeed.[160] Simultaneously, the Court found that the evidence presented by Standard Oil to rebut the Government's case—namely, that the requirement contracts were economically beneficial to the industry, that "competition ha[d] flourished" despite their use, and that Standard's own competitive position had not improved in the fifteen years it had used them—was immaterial.[161] This was not because Standard's evidence was thin or unreasonable. Rather, it was because Standard's evidence did not "conclusively" disprove the "potential" of Standard's requirement contracts to have had the effect of "imped[ing] a substantial amount of competitive activity."[162]

Whatever may be the exact meaning and weight that should be given to these four cases—*Corn Products*, *Morton Salt*, *International Salt*, and *Standard Stations*—as precedent with respect to the kind of possibility, probability, or substantiality that was required to prohibit conduct under the Clayton Act on the eve of the Celler-Kefauver Amendment's passage, their interpretation of the terms "may be" and "substantially" in Sections 2 and 3 is well-aligned with the ordinary meaning of those words in the context of Section 7.

b. Ordinary Meaning of "May Be"

The ordinary meaning of the auxiliary verb "may" around the time of the Celler-Kefauver Act's passage in 1950 was to indicate that whatever action or state is expressed by the main verb is "possible."[163] The ordinary meaning of the verb "be" when used as a

160. *Id.* at 305, 313.
161. *Id.* at 308.
162. *Id.* at 314.
163. Major English dictionaries we have reviewed published between 1930 and 1961 defined the auxiliary verb "may" to indicate a possibility. *See, e.g.*, *May*, 6 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 256–59 (defining "may," at sense 14.b., "With reference to the present or future (*may* with infinitive [such as 'be']) = 'would possibly be' or 'do'" or, at sense 7.a., "In relation to the future and in general predictions (I *may be* or *do* = 'it is possible that I will be' or 'do')"); *May*, WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 1517 (1936) (defining "may" as "[l]iberty; opportunity; permission; possibility; as, he *may* go; you *may* be right."); *May*, 2 CHARLES EARLE FUNK, FUNK & WAGNALLS NEW PRACTICAL DICTIONARY 825 (1948) [hereinafter 2 FUNK] (defining "may" as "[t]o be contingently possible"; as, it *may* be; you *may* get off"); *May*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 1396 (G. & C. Merriam Co. ed. 1966) (3d. 1961) [hereinafter WEBSTER'S 1961] (defining the phrase "may be" to mean "possibly but not surely: not certainly: PERHAPS"; and the word "may" as "2 . . . . b. : in some degree likely áyou ~ be rightñ

copula is likewise determinate, indicating that a subject "exist[s] as," or "coincides in identity with," one or more specified objects.[164] Thus, when the copula "be" is aided by the auxiliary "may" to form the compound verb "may be," the compound's function is necessarily to indicate what a subject possibly is or could be.[165] To our knowledge, since 1890, every federal court that has interpreted the phrase "may be" in a statute (other than the Clayton Act) has agreed with this possibilistic understanding of the term.[166]

A "possible" state or action is one that is "potentially realizable" and "not negated by necessity."[167] Thus, the Oxford English Dictionary of 1933 defines the auxiliary "may" to imply that what is qualified is either (1) not foreclosed by "prohibitive conditions" in an objective sense, or (2) "admissible [as] a supposition" in light of a given agent's subjective knowledge about the world.[168] Similarly, in a corpus linguistics analysis of modal expressions in the 1950s and 1960s, linguistics scholar Madeline E. Ehrman found that the "basic meaning" of the auxiliary "may" in common midcentury

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áthey ~ get here in time after allñ á~easily be the best play of the seasonñ . . . ; compare MIGHT"). So did leading grammar and usage treatises from the era. *See, e.g.*, 3 F. TH. VISSER, AN HISTORICAL SYNTAX OF THE ENGLISH LANGUAGE 1754–80 (1969) [hereinafter 3 VISSER]; MICHAEL R. PERKINS, MODAL EXPRESSIONS IN ENGLISH 37–41 (1983). Indeed, the denotation of the auxiliary "may" was so tied up with the idea of possibility that the Oxford English Dictionary of 1933 defined the adjective "possible" to mean that something "may be" or that it "may or can exist, be done, or happen[.]" *Possible*, 7 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 1158.

164. *See Be*, 1 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 718. *See also* 1 F. TH. VISSER, AN HISTORICAL SYNTAX OF THE ENGLISH LANGUAGE 189–90 (1963) [hereinafter 1 VISSER]; 2 F. TH. VISSER, AN HISTORICAL SYNTAX OF THE ENGLISH LANGUAGE 971 (1972) [hereinafter 2 VISSER] ("as a rule, the copula *to be* expresses the semantic identity of the parts of the sentence joined by it").

165. *See Possible*, 7 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 1158–59.

166. *See, inter alia*, United States v. Lexington Mill & Elevator Co., 232 U.S. 399, 411 (1914); Colautti v. Franklin, 439 U.S. 379, 393 (1979); United States v. Halloran, 821 F.3d 321, 332 (2d Cir. 2016); Monaco v. WV Parkways Auth., 57 F.4th 185, 188–89 (4th Cir. 2023); United States v. Griego, No. 10-2311, 2011 WL 13289833, at *6, *8 (D.N.M. Mar. 25, 2011); Orgulf Transp. Co. v. United States, 711 F. Supp. 344, 347 (W.D. Ky. 1989); Gov't Benefits Analysts, Inc. v. Gradient Ins. Brokerage, Inc., No. 10-2558-KHV, 2012 WL 3292850, at *2, *7 (D. Kan. Aug. 13, 2012).

167. *See Possible*, 7 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 1158–59; *see generally* Ruud van der Helm, *Towards a Clarification of Probability, Possibility and Plausibility*, 8 FORESIGHT 17 (2006) [hereinafter *Towards a Clarification*]; *see generally* Ruud van der Helm, *Defining the Future: Concepts and Definitions as Linguistic Fundamentals of Foresight*, *in* RECENT DEVELOPMENTS IN FORESIGHT METHODOLOGIES (Maria Giaoutzi & Bartolomeo Sapio eds., 2013) [hereinafter *Defining the Future*]; *see* Elena Herburger, *Gradable Possibility and Epistemic Comparison*, 36 J. SEMANTICS 165, 167–68, 185 (2019); Daniel Lassiter, Measurement and Modality: The Scalar Basis of Modal Semantics (Sept. 2011) (Ph.D. dissertation, New York University), https://semanticsarchive.net/Archive/WMzOWU2O/Lassiter-diss-Measurement-Modality.pdf.

168. *May*, 6 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 257.

writing was "something like 'nothing in the environment prevents the predication, and there is no assurance that it will not occur.'"[169]

Because the auxiliary verb "may" is so intimately tied up with the notion of possibility, the text of Section 7 does not permit an interpretation that requires any specific "probability" of anticompetitive or monopolistic effects. These two concepts—possibility and probability—"belong to different categories and cannot be used interchangeably."[170] "Probability" refers to estimative claims about the chance or likelihood that a state of affairs has been or will be realized.[171] Thus, probability is an inherently comparative and gradable qualifier: identifying an outcome as "probable" necessarily entails identifying certain alternative outcomes as "improbable" and placing them ordinally on some scale or gradient of likelihood.[172] "Possibility," in contrast, refers to ontological claims about whether a state of affairs *could* be realized in the first place.[173] Thus, whether an outcome is "possible" hinges, not on a comparison to alternative outcomes, but on whether it satisfies a single, fixed condition—that of being "not negated by necessity" under a given set of rules and circumstances.[174]

This plain meaning of "may be" in Section 7 is, as suggested above, consistent with the judicial interpretations of the phrase in the Clayton Act that were authoritative when the Celler-Kefauver Act was passed in 1950. Within the five years prior, two Supreme Court cases—*Corn Products* and *Morton Salt*—had interpreted the use of "may be" in Section 2 of the Clayton Act to prohibit all

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169. Madeline E. Ehrman, *The Meaning of the Modals in Present-Day American English*, 4 LINGUISTICS 46, 50 (1966). *See also* PERKINS, *supra* note 163, at 36–45.

170. *Towards a Clarification*, *supra* note 167, at 17. *Compare Possibility*, 7 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 1158, *with Probability*, 8 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 1400, *Possible*, 7 OXFORD ENGLISH DICTIONARY, *supra* at 1158–59, *and Probable*, 8 OXFORD ENGLISH DICTIONARY, *supra* at 1400–01.

171. *Probability*, 8 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 1400; *see Towards a Clarification*, *supra* note 167, at 17; *see generally Defining the Future*, *supra* note 167.

172. *Probability*, 8 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 1400; *see generally Defining the Future*, *supra* note 167.

173. *See Possibility*, 7 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 1158; *see Towards a Clarification*, *supra* note 167, at 17; *see generally Defining the Future*, *supra* note 167.

174. *Possible*, 7 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 1158–59; *see generally Defining the Future*, *supra* note 167. This distinction between the possible and the probable has often been illustrated by analogy to casting a die:

> Probability is closely linked with the die: we can be sure that when someone throws a die, the result will be either one, two, three, four, five or six, but we could never claim with certainty that the next throw will be a six . . . . [Indeed,] [w]e are all familiar with the fact that throwing a six is not very probable: there is an 83[%] chance of *not* throwing a six. But we also know that throwing a six is certainly not impossible, because else there would be no meaning in rolling the dice.

Towards a Clarification, *supra* note 167, at 19, 22 (emphasis added).

commercial discriminations that create a "reasonable possibility" of proscribed effects.[175] A year after *Morton Salt*, the Court's decision in *Standard Stations* noted that the framers of the Clayton Act in 1914 had understood the phrase "where the effect may be" to mean "where it is possible for the effect to be."[176] Then, to avoid "stultify[ing] the force of Congress' declaration that [exclusive deals are] prohibited wherever their effect 'may be' to substantially lessen competition," the Court went on to hold that Section 3's prohibition applies if two conditions are met.[177] First, the plaintiff introduces sufficient evidence to support a "bare inference" that "competition has been or probably will be lessened" in a relevant market as a result of an exclusive dealing contract.[178] Second, the defendant fails to "conclusively" disprove the contract's "potential" to "impede [or to have impeded] a substantial amount of competitive activity" in the relevant market.[179]

This, as demonstrated more fully below, is functionally identical to the plain meaning of "may be" as modified by "substantially"—which operates as a sentence adverb in Section 7 and modifies the predication of the where-clause to prohibit mergers wherever: (a) their concrete features give them the potential to cause proscribed effects, and (b) the manifestation of that potential is not foreclosed by prohibitive conditions in the merger's real and actual environment.

c. Ordinary Meaning of "Substantially"

The adverb "substantially" is a "chameleon[-hued] word."[180] Its meaning "depends on the context in and purpose for which it is used."[181] During the midcentury period when the Celler-Kefauver Act was passed, it was frequently used in at least three senses relevant to the purpose of this Article. First, it was used to describe a state or action as being that which is specified "[i]n all essential

175. *See* Corn Prods. Refin. Co. v. FTC, 324 U.S. 726 (1945); FTC v. Morton Salt Co., 334 U.S. 37 (1948).

176. *See* Standard Oil Co. v. United States (*Standard Stations*), 337 U.S. 293, 312 n.15 (1949).

177. *Id.* at 313–14.

178. *Id.* at 305, 314.

179. *Id.* at 314.

180. *See* Wachovia Bank v. Schmidt, 546 U.S. 303, 318 (2006) ("To summarize, 'located,' as its appearances in the banking laws reveal is a chameleon word; its meaning depends on the context in and purpose for which it is used.") (citation omitted); FAA v. Cooper, 566 U.S. 284, 294 (2012) ("Because the term 'actual damages' has this chameleon-like quality, we cannot rely on any all-purpose definition but must consider the particular context in which the term appears.") (footnote omitted).

181. *Wachovia Bank*, 546 U.S. at 318; *Cooper*, 566 U.S. at 294.

characters or features; in regard to everything material; in essentials; to all intents and purposes; in the main."[182] Second, it was used to indicate that the action or state expressed by a verb has a "substantial nature or existence," that is, a nature or existence that "ha[s] substance in reality; [is] not imaginary, unreal, or apparent only; [is] true, solid, [or] real."[183] Finally, it was used to describe an action or state as being "ample or considerable" in its degree or extent.[184] Thus, to determine the sense in which "substantially" was used in Section 7, its role in the statutory text must be examined.

1. Grammatical Analysis: What Does "Substantially" Modify in Section 7?

In drafting the Celler-Kefauver Act, legislators placed the word "substantially" in a grammatically restricted position—immediately after the compound verb in the where-clause ("may be") and immediately before the subject-defining complements introduced by that verb ("to lessen competition" and "to tend to create a monopoly"). That position is a common, and grammatically correct, placement for sentence adverbs—adverbs that modify the entire predication of their clause or sentence—and for adverbs that modify "be" as a main verb.[185] It is not, however, a position from

182. *Substantial*, 10 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 55; *see also Substantially*, 10 OXFORD ENGLISH DICTIONARY, *supra* at 56.

183. *Substantial*, 10 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 55.

184. *Id.*

185. As the leading grammar treatise of the era, George Curme's *A Grammar of the English Language*, explained in 1935, a sentence adverb is "usually place[d] after or before the copula." 2 GEORGE O. CURME, A GRAMMAR OF THE ENGLISH LANGUAGE 131 (1935) [hereinafter SYNTAX]. Where an infinitive phrase is used as a predicate noun or adjective, however, "the sentence adverb always precedes the *to*." *Id.* at 466–67 ("There is one case where the sentence adverb *always* precedes the *to*, namely, when the infinitive clause follows the copula with the force of a predicate adjective or noun . . . . As the infinitive clause in each of these sentences has the function of a predicate and thus is felt as a unit, the sentence adverb, which belongs to the sentence as a whole, cannot enter it."). *See also* ERIC PARTRIDGE, USAGE AND ABUSAGE 225 (1942) (quoting SYNTAX *supra*) ("[I]t is also pointed out that sometimes the adverb (or adverbial phrase) modifies, not the verb alone but the sentence as a whole. 'In this case, the adverbial element usually precedes the verb, verbal phrase, or predicate noun or adjective' (*i.e.*, the object or the complement) . . . ."). More broadly, Curme's treatise instructs that an "[a]n adverb that modifies a verb precedes the verb if it itself has a weaker stress but follows the verb if it itself has the stronger stress . . . ." 1 GEORGE O. CURME, A GRAMMAR OF THE ENGLISH LANGUAGE 72 (1935) [hereinafter PARTS OF SPEECH]*; see also* GEORGE O. CURME, PRINCIPLE AND PRACTICE OF ENGLISH GRAMMAR 147 (1947) [hereinafter CURME, PRINCIPLE AND PRACTICE] ("An adverbial element is often more heavily stressed than a verb and then usually follows it: He *àcted prómptly*."). Since "copulas and auxiliaries are usually unstressed[,]" it continues, "an adverb [that modifies a copula or an auxiliary should] follow[] them." PARTS OF SPEECH, *supra* at 72; *see also* GEORGE O. CURME, COLLEGE ENGLISH GRAMMAR 154 (1925) [hereinafter CURME, COLLEGE GRAMMAR] ("An adverbial element is often more heavily stressed than a verb and then usually follows it: He *àcted prómptly*."). In

which "substantially" can grammatically modify the infinitive stems "lessen" and "tend" in the subsequent effect-defining phrases.

The syntax of Section 7 precludes "substantially" from modifying those terms because of basic grammar rules: the infinitive phrases function as nouns in the relevant text, and a noun cannot be modified by a preceding adverb.[186] The noun-behavior of the infinitive phrases derives from the nature of the main verb in the relevant clause—"be." In its context, "be" functions as a copula: it has "little meaning" of itself and operates primarily to link the subject and the complements.[187] Aided by the auxiliary "may," it indicates that the subject of the clause ("the [proscribed] effect of such acquisition") could possibly be identified with one or both of the infinitive phrases "to lessen competition" and "to tend to create a monopoly." As a result, these phrases function as alternative possible nominatives for "the [proscribed] effect."[188]

When, as here, an infinitive phrase is used in the nominative case after a copula, it is "parsed as a single element" and given "the effect of [a] noun."[189] The initial "to" loses its prepositional sense and operates conjunctively to introduce the infinitive stem that, in turn, functions purely as a verbal noun re-identifying the subject of the clause.[190] This noun—like all nouns—may be modified by an adverb

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the same vein, prominent English usage dictionaries of the era state that the "normal" or "natural" placement for an adverb that modifies the verb "to be" as a copula is between "be" and its subject complement. H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 449 (1926); MARGARET NICHOLSON, A DICTIONARY OF AMERICAN-ENGLISH USAGE 11, 436 (1957); *Adverbs and Adverb Phrases: Position*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/grammar/british-grammar/adverbs-and-adverb-phrases-position (last visited Oct. 16., 2024); CORNELIA EVANS & BERGEN EVANS, A DICTIONARY OF CONTEMPORARY AMERICAN USAGE 277–79 (1957).

186. *See* Nielsen v. Preap, 586 U.S. 392, 407–08 (2019) ("Because words are to be given the meaning that proper grammar and usage would assign them, the rules of grammar govern statutory interpretation unless they contradict legislative intent or purpose.") (quoting SCALIA & GARNER, *supra* note 80, at 140) (internal citations and quotation marks omitted); *see also id.* at 406 ("[A]n adverb cannot modify a noun . . . .").

187. *See, e.g.*, PARTS OF SPEECH, *supra* note 185, at 66 ("The copula . . . performs . . . the function of announcing the predicate."); CURME, COLLEGE GRAMMAR, *supra* note 185, at 105; RANDOLPH QUIRK, GRAMMAR OF CONTEMPORARY ENGLISH 820 (1972) ("The verb in sentences with subject complement is a 'copula' (or linking verb), which of itself has little meaning but functions as a link between the complement and subject.").

188. *See* Robert D. Williams, *Usage, Logic, and Predicate Noun*, 35 ENGLISH J. 155, 155–57 (1946).

189. JAMES C. FERNALD, ENGLISH GRAMMAR SIMPLIFIED: ITS STUDY MADE EASY 83 (2d ed. 1916); JAMES C. FERNALD, ENGLISH GRAMMAR SIMPLIFIED: ITS STUDY MADE EASY 82–84 (Funk & Wagnalls Co. rev. ed. 1957); JAMES C. FERNALD, ENGLISH GRAMMAR SIMPLIFIED 85–87 (Cedric Gale ed., Funk & Wagnalls Co. rev. ed. 1963); *see also* SYNTAX, *supra* note 185, at 466–67 (where infinitive clause "follows the copula with the force of a predicate adjective or noun . . . [it] is felt as a unit").

190. *See* CURME, PRINCIPLE AND PRACTICE, *supra* note 185, at 267–76. This is different from grammatical contexts where an infinitive phrase is used as an object of a full verb (as in, "they wished utterly to forget their past") or as part of an adverbial phrase (as in, "she

within its grammatical phrase (as in, "she is a profoundly good person") or, if a more descriptive approach to English grammar is adopted, it arguably may be modified by a subsequent adverb (as in, "she is a famous person globally").[191] But there is no grammatical way for a preceding adverb—particularly one of degree or manner with an *-ly* suffix like "substantially"—to modify a subsequent noun.[192]

Given this context, the placement of "substantially" in Section 7 precludes it from modifying the verbal nouns "lessen" and "tend" in the subsequent effect-defining phrases. It can, however, function as a predicate adverb, modifying the compound verb it follows ("may be"), or as a sentence adverb, modifying the predication of the where-clause as a whole. Since "may be" is the only verbal element in the clause and its predication is only copular in nature, either reading would lead to the same result: "Substantially" necessarily modifies the manner in which a possible-identity relationship must exist between the subject ("the effect of such acquisition") and one or both of its complements ("to lessen competition" and "to tend to create a monopoly") in order for Section 7's prohibition to apply.

2. Definitional Analysis: What Does "Substantially" Mean in Section 7?

Having figured out what "substantially" does in the grammatical syntax of the text of Section 7, we can finally turn to determining what "substantially" means. At a minimum, "substantially" must

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wrote so as effectively to communicate"). In those contexts, *to* functions as a real preposition and governs the subsequent infinitive stem to indicate the purpose, manner, direction, or result of the action specified by the preceding verb. *See* SYNTAX, *supra* note 185, at 459. That an adverb can modify such a prepositional phrase from a precedent position is well-established, even though such placement often leads to clunky or ambiguous results (as in the last two examples, which would have been easier to read if *utterly* and *effectively* were placed after *to*). *See id.*; EVANS & EVANS, *supra* note 185, at 277–79; THEODORE M. BERNSTEIN, THE CAREFUL WRITER: A MODERN GUIDE TO ENGLISH USAGE 26–27 (1965). When a *to*-infinitive phrase is used as a nominative complement, however, it functions as an integrated noun phrase to rename the subject of the sentence. And whether one takes a prescriptive or descriptive approach to English grammar, a noun-behaving phrase cannot be modified by a preceding adverb. *See infra* notes 184–85 and accompanying text.

191. Put another way, there is no grammatical (or, for that matter, semantic) difference between saying, "the effect of the merger was to lessen competition," and saying, "the effect of the merger was a lessening of competition." In both examples, the subject complements are noun phrases in the nominative case, and they are governed by the same rules of English grammar and syntax that govern all nouns. *See* CURME, PRINCIPLE AND PRACTICE, *supra* note 185, at 267–76, 278, 280–81 (comparing "Seeing is believing" and "To see is to be believe" as synonymous); 2 VISSER, *supra* note 164, at 971 (noting that "the infinitive after a copula [is] replaceable by form *-ing* or *-end* [i.e., a gerund]").

192. John Payne et al., *The Distribution and Category Status of Adjectives and Adverbs*, 3 WORD STRUCTURE 31, 45 (2010).

mean something that is reasonably compatible with the predication it modifies—that is, the predication that a corporate acquisition is prohibited under Section 7 "where . . . the effect of such acquisition may be . . . to lessen competition, or to tend to create a monopoly." Since that predication expresses the possibility required to trigger Section 7's prohibition, "substantially" must be read in a way that reasonably modifies that possibility. This need for congruity with the possibilistic modality expressed by "may be" in the where-clause forecloses two of the three senses in which "substantially" was commonly used around 1950—leaving only the sense that the predication has "substance in reality" as a viable option.

As explained above, "possibility" is an inherently binary qualifier. An outcome is either "not negated by necessity" and therefore possible, or "negated by necessity" and therefore impossible—there is no intelligible scale in-between. Since the possibility of an outcome indicates only that it satisfies this threshold value—being "potentially realizable" under a set of circumstances—it has no scalar content that can be measured or graded. An outcome cannot be "more" or "less" possible, "very" possible or only "somewhat" possible, or the like. As a result, it has long been established—in both prescriptive grammar and empirical studies of ordinary usage—that the auxiliary "may" is a "non-gradable" verb that is not susceptible to modification by adverbs of degree or extent.[193]

This precludes "substantially" from operating either to raise or reduce the degree to which the effect of an acquisition "may [possibly] be"—or, to use the definition of what is "possible" from the 1933 Oxford English Dictionary again, the degree to which the effect of an acquisition "may or can exist"[194] as—"to lessen competition" or "to tend to create a monopoly." Thus, "substantially" cannot be read to say that a merger is prohibited where the possibility that it will cause a proscribed effect is "great," "ample," or "considerable" in degree. Nor, by the same token, can "substantially" be read to imply that a merger is prohibited where a proscribed effect is possible merely "in the main" or "in essential features." Since the quality of possibility that "may" imparts is a yes-or-no attribute pegged to a single threshold feature—that of

193. Herburger, *supra* note 167, at 185; ANGELIKA KRATZER, MODALS AND CONDITIONALS: NEW AND REVISED PERSPECTIVES 42 (2012); *see generally* Peter Klecha, Bridging the Divide: Scalarity and Modality (2014) (Ph.D. dissertation, University of Chicago) (describing the differences between gradable and non-gradable modals), http://www.peterklecha.com/work/klecha.diss.pdf; *see* Lassiter, *supra* note 167; *cf.* F. R. PALMER, MODALITY AND THE ENGLISH MODALS 57 (1st ed. 1979, 2d. ed. 1990) ("In general, epistemic modals [like *may*] cannot be modified by adverbs[.]").

194. *Possible*, 7 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 1158–59.

being "permitted," or "not negated," within a given environment—a possibility has no non-essential features it could shed while still remaining a possibility "in the main."

Luckily, there is no need to "[do] violence to the English language" by adopting either of these senses of "substantially" in the context of Section 7.[195] The last remaining sense of the word can felicitously serve as a specifier of the nature of the possibility required to prohibit a merger under the Clayton Act. Although the modal predicate "may be" is not susceptible to modification in its "degree" or "force," it is susceptible to modification in the *type* (or "flavor," to use the technical term) of the possibility it expresses.[196] The "modal flavor" of "may" refers to the set of conditions and circumstances—what linguists call the "conversational background"—within which the asserted possibility is anchored.[197]

Commonly, the use of "may" as an auxiliary indicates only an epistemic possibility.[198] An epistemic possibility is a subjective possibility. It is anchored in what a particular agent, in light of their own knowledge and beliefs, can and cannot rule out as a supposition about the truth of a proposition or the occurrence of an event.[199] Sometimes, however, the auxiliary "may" is used to express an objective possibility.[200] In that case, it indicates that a proposition or event is not only "admissible as a [mental] supposition" because an agent lacks knowledge of its negation, but also that it has the potential to be true or to occur within the constraints of "some real aspect of the world."[201] Just what that real aspect is can vary, but it is often indicated by an adverb—like "substantially."

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195. *In re* Patterson, 825 F.2d 1140, 1147 (7th Cir. 1987); Reno v. Bossier Par. Sch. Bd., 528 U.S. 320, 332 n.1 (2000).

196. *See* KRATZER, *supra* note 193, at 46–49, 59; Klecha, *supra* note 193, at 15–18; Lassiter, *supra* note 167, at 17.

197. *See* KRATZER, *supra* note 193, at 20–26, 32–43; Klecha, *supra* note 193, at 13–15; Lassiter, *supra* note 167, at 200; PERKINS, *supra* note 163, at 37–41.

198. *See* LEO HOYE, ADVERBS AND MODALITY IN ENGLISH 94–101 (1997); *see also* Martin Hilpert, *Change in Modal Meanings: Another Look At the Shifting Collocates of* May, 8 CONSTRUCTIONS & FRAMES 66, 75–76 (2016) (finding that "over the past 150 years, may has become more epistemic . . . and at the same time more attached to informational types of text"); Neil Millar, *Modal Verbs in* TIME*: Frequency Changes 1923-2006*, 14 INT'L J. CORPUS LINGUISTICS 191, 203–04 (2009).

199. *See* PERKINS, *supra* note 163, at 37–41 (explaining that the "core meaning" of the "epistemic use of MAY" is that the "evidence available to [an agent] is such that the proposition expressed by the sentence cannot be inferred to be true, but nor can it currently be inferred to be false").

200. *See* HOYE, *supra* note 198, at 94–101; PERKINS, *supra* note 163, at 37–41.

201. *See* A.S. Rumberg, Transitions Toward a Semantics for Real Possibility 21 (2016) (Ph.D. dissertation, Utrecht University), https://dspace.library.uu.nl/handle/1874/341140; PERKINS, *supra* note 163, at 37–41.

Against this background, we can naturally read "substantially" to indicate that an acquisition is prohibited under Section 7 where the possibility that "the effect of [said] acquisition may be . . . to lessen competition, or to tend to create a monopoly," has "substance in reality" and is "not imaginary, unreal, [or] apparent only."[202] In this vein, a "real" possibility has been defined as a "genuine alternative" for how "actuality [could] unfold" from "the concrete momentary circumstances at hand."[203] As such, a real possibility cannot be grounded in the mere "lack of knowledge,"[204] like an epistemic possibility, but must be a potentiality that "can, in fact, be actualized" by an object from within the concrete circumstances of "some local standpoint in time."[205]

Reading "substantially" in this way gives the word independent effect in a manner that is grammatically and semantically congruent with its surroundings. Had legislators used "may be" alone in the Celler-Kefauver Act, the plain meaning of the text would have been that a merger is prohibited where there is even an *epistemic possibility* of anticompetitive or monopolistic effects. Since an epistemic possibility exists whenever the knowledge available to a given agent is insufficient to rule out its realization, the use of a bare "may be" in Section 7 would have obliged courts—the agents in the context of a law enforced through the judicial system—to find a merger unlawful wherever the evidence fails to affirmatively negate the possibility of proscribed effects in every relevant line of commerce.[206] By predicating Section 7's prohibition on what the effect of a merger "may be substantially," however,

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202. *See Substantially*, 10 OXFORD ENGLISH DICTIONARY *supra* note 123, at 56; *Substantial*, 10 OXFORD ENGLISH DICTIONARY *supra* at 54–55.

203. Rumberg, *supra* note 201, at 21. *See also* Thomas Müller, Antje Rumberg & Verena Wagner, *An Introduction to Real Possibilities, Indeterminism, and Free Will*, 196 SYNTHESE 1, 3 (2018) ("Real possibilities are possibilities for the future. They are indexically anchored in concrete situations in time, and they are closely tied up with the world. What is really possible in a given situation is what can temporally evolve from that situation against the background of what the world is like."); Harry Deutsch, *Real Possibility*, 24 NOÛS 751, 751 (1990) (defining a "real possibility" as "a possibility for the actual world").

204. Rumberg, *supra* note 201, at 8, 18. *See also* Müller, Rumberg & Wagner, *supra* note 203, at 4 (explaining that "real possibilities" are "not to be understood as mere epistemic possibilities that reflect our epistemic uncertainty with respect to what the future will bring"); Deutsch, *supra* note 203, at 751 (comparing "real possibility" with other kinds of possibility, including epistemic possibility); Keith DeRose, Knowledge, Epistemic Possibility, and Scepticism 120 (1990) (Ph.D. dissertation, UCLA) (explaining that an "epistemic possibility" as a "relativist" possibility that "depen[d] entirely upon what is known or could be known in certain ways by the speaker and . . . by other members of the relevant community"), https://campuspress.yale.edu/keithderose/knowledge-epistemic-possibility-and-scepticism/.

205. Rumberg, *supra* note 201, at 19–20, 42.

206. Thomas K. McElroy, *Section 7 of the Clayton Act and the Oil Industry*, 5 BAYLOR L. REV. 121, 132–33 (1953).

legislators made clear that a sufficient possibility only exists where a merger has the potential to cause a proscribed effect in the real world, and where that potential is not foreclosed by prohibitive conditions in the merger's concrete environment.

Thus, the use of "substantially" in Section 7 means that the Clayton Act prohibits mergers where a possibility of anticompetitive or monopolistic effects is proven to exist in concrete reality. This creates "a fundamental asymmetry between the past and the future" for the purposes of determining whether a merger poses a threat of proscribed effects that warrants prohibition.[207] On the one hand, the past necessarily exists and consists of the concrete circumstances of each historical moment leading up to and including the present. On the other hand, the future that will flow out of the present necessarily does *not* exist. We can certainly imagine what that future might be like. Based on how it appears to us in the present, we can even try to predict it. Neither imagining nor predicting the future, however, can change the fact that its circumstances are not yet *real* circumstances. And therein lies the rub. As modified by "substantially," Section 7 prohibits mergers that have a possibility of causing proscribed effects from the standpoint of their real and actual environments—not from the standpoint of every conceivable environment that might exist in the future. The statute, to use the words of the appellant's argument in *Magrane-Houston*, does not give "license to the imagination."[208]

To summarize, the use of "may be" in Section 7 extends its prohibition to mergers that could possibly either lessen competition or tend to the creation of a monopoly in any line of commerce in any section of the country. Since this possibility-based prohibition is qualified by the adverb "substantially," a possibility of anticompetitive or monopolistic effects under Section 7 must have "substance in reality" and exist in the context of what is "true, solid, [or] real," as opposed to what is "imaginary, unreal, [or] apparent only."[209] This qualification carries two necessary implications. The first is that a merger is only prohibited if its concrete features give it the potential to cause a proscribed effect, and this potential has an opportunity to manifest in the merger's concrete environment. The second is that a merger may be prohibited even if litigants can

207. Rumberg, *supra* note 201, at 19. *See also* Müller, Rumberg & Wagner, *supra* note 203, at 3–4 ("At the core of the notion of real possibility, there is the idea that—unlike the present and the past—the future is not actual yet. The future is yet to come, and real possibilities represent alternatives for that future to unfold.").

208. *See* Argument for Petitioner at 348, Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922) (preceding opinion in U.S. Reports).

209. *See Substantial*, 10 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 55.

conceive of non-existent circumstances—such as future ones—that might foreclose its opportunity to cause proscribed effects.

d. Amendment History and Statutory Context

Where a particular reading is "mandated by the grammatical structure of [a] statute," that structure may not be ignored unless "overcome by other textual indications of meaning."[210] As the Supreme Court recently noted, "the rules of grammar govern statutory interpretation unless they contradict legislative intent or purpose[.]"[211] Here, neither textual indicia nor legislative intentions[212] contradict the grammatical sense of Section 7's text. Indeed, they affirm it.

1. The Placement of "Substantially" Reflected a Deliberate Legislative Choice

The placement of "substantially" in the Celler-Kefauver Act is different from its placement in the original version of Section 7. When Congress enacted the Clayton Act in 1914, "substantially" was placed within the *to*-infinitive phrase following "may be"—so that Section 7 prohibited corporate acquisitions "where [their] effect . . . may be [1] *to substantially lessen competition* between the corporation [acquired] and the corporation making the acquisition, or [2] to restrain commerce in any section or community, or [3] to tend to create a monopoly in any line of commerce."[213] In 1950, Congress moved "substantially" out of that original position, where it plainly modified the subject complement and could not grammatically modify "may be" or the sentence as a whole, and into its current position, where it plainly modifies "may be" or the sentence as a whole and

210. *See* SCALIA & GARNER, *supra* note 80, at 140–41 (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241–42 (1989)). While a court need not review "congressional enactments as a panel of grammarians," it may not ignore "ordinary principles of English prose" in the "construction of those enactments." *See* Flora v. United States, 362 U.S. 145, 150 (1960). Legislators "are presumed to be grammatical in their compositions[,]" and to understand things like "subject–verb agreement, noun–pronoun concord, the difference between the nominative and accusative cases, and the principles of correct English word-choice." *See* SCALIA & GARNER, *supra* at 140. They "are *not* presumed to be unlettered." *See id.*

211. *See* Nielsen v. Preap, 586 U.S. 392, 408 (2019) (quoting SCALIA & GARNER, *supra* note 80, at 140) ("Because words are to be given the meaning that proper grammar and usage would assign them, the rules of grammar govern statutory interpretation unless they contradict legislative intent or purpose[.]") (internal citations and quotation marks omitted).

212. *See* discussion *infra* Part II.B.

213. Clayton Antitrust Act, ch. 323, § 7, 38 Stat. 730, 731–32 (1914) (emphasis added).

cannot grammatically modify the subject complement.[214] Such a "significant change in language" is ordinarily "presumed to entail a change in meaning."[215] That presumption applies even when the significant change is made through a subtle revision, and regardless of whether the legislative history of the amending enactment expresses an intent to make no change.[216] "The new text is the law, and where it clearly makes a change, that governs."[217]

Ignoring an amendatory change of the statutory text like the 1950 movement of "substantially" in Section 7 is "particularly inappropriate" where, as here, Congress has shown that "it knows how to adopt the omitted language or provision" in related statutory provisions.[218] As enacted in 1914, the original texts of Sections 2 and 3 of the Clayton Act placed "substantially" after the word "to" and within the subject complement. Thus, in the original Clayton Act, Section 2 and Section 3 prohibited commercial discrimination and exclusive dealing, respectively, "where the effect of such [discrimination or exclusive dealing] may be *to substantially lessen* competition or *tend* to create a monopoly in any line of commerce."[219]

This uniform placement made clear that "substantially" belonged to the subject complement in the effect-defining clauses of Sections 2 and 3 and could not grammatically modify anything else in those clauses. Moreover, coupled with the lack of a comma and the lack of a separate introductory "to" before the second phrase in the complement ("tend to create a monopoly"), the placement of "substantially" in the original syntax of Sections 2 and 3 made it unambiguous that

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214. *See* Celler-Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125, 1126 (1950) (codified at 15 U.S.C. § 18).

215. *See* SCALIA & GARNER, *supra* note 80, at 256–60; United States v. Wells, 519 U.S. 482, 497 (1997); Crawford v. Burke, 195 U.S. 176, 190 (1904).

216. *See Wells*, 519 U.S. at 496–97 (declining to rely on the "Reviser's Note" accompanying change in statutory text made through codification enactment, which stated that the codifying amendments to the statute "[were] without change of substance," because the "indication" that those "who prepared the legislation either overlooked or chose to say nothing" about removing a term from three of thirteen consolidated statutes "does nothing to muddy the ostensibly unambiguous provision of the statute as enacted by Congress," and because, "[i]n any event, the revisers' assumption that the consolidation made no substantive change was simply wrong") (citations omitted); Kaye v. Blue Bell Creameries, Inc. (*In re* BFW Liquidation, LLC), 899 F.3d 1178, 1192 (11th Cir. 2018) ("Nonetheless, in light of the unambiguous statutory language, we would reach the same conclusion even if it could be shown that Congress did not intend a substantive change in the meaning of the statute when it replaced § 60(c)'s 'remaining unpaid' language with § 547(c)(4)(B)'s requirement that the debtor 'not make an otherwise unavoidable transfer to or for the benefit of' the creditor who gave new value.").

217. Benjamin v. United States (*In re* Benjamin), 932 F.3d 293, 298 (5th Cir. 2019) (quoting SCALIA & GARNER, *supra* note 80, at 257).

218. *See* Rotkiske v. Klemm, 589 U.S. 8, 14 (2019); Nichols v. United States, 578 U.S. 104, 109–10 (2016).

219. Clayton Antitrust Act, ch. 323, §§ 2–3, 38 Stat. 730, 730–31 (1914) (emphasis added).

"substantially" modified *both* complementary phrases. If Congress had desired to restrict its prohibition in the Celler-Kefauver Act to mergers whose effect may be "to substantially lessen competition or tend to create a monopoly," it could have simply copied that phrasing from the original provisions of the Clayton Act. Instead, Congress chose to abandon that locution—both when it enacted the Robinson-Patman Act amending Section 2 in 1936, and when it subsequently enacted the Celler-Kefauver Act amending Section 7 in 1950.

In the Robinson-Patman Act, Congress moved "substantially" out of the subject complement, behind "to," and next to "may be," so that the amended Section 2 prohibited commercial discrimination "where the effect of such discrimination *may be substantially* to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person[.]"[220] This new phrasing of Section 2 was authoritatively interpreted by the Supreme Court in *Corn Products* and *Morton Salt*. The Court found that, as amended, Section 2 prohibited sellers from discriminating among purchasers of the same product in ways that had a "reasonable possibility" of causing disfavored purchasers to be "handicapped in competing with the more favored . . . purchasers" on resales of the at-issue product.[221] Thus, where the evidence showed that a discriminatory discount had, in fact, "result[ed] in price differentials between competing purchasers sufficient in amount to influence their resale prices" of the at-issue product, the Court held that the discount was forbidden regardless of whether the at-issue product was "a major or minor portion of [purchasers'] stock," whether the discount was large or small "in proportion to [the product's] price," and whether the disfavored purchasers accounted for a high or low percentage of the market.[222] What mattered, the Court made clear, was "that the competitive opportunities of certain merchants were [in fact] injured" by the challenged discrimination—not the degree or extent of that injury.[223]

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220. 15 U.S.C. § 13(a) (emphasis added).

221. *See* FTC v. Morton Salt Co., 334 U.S. 37, 50 (1948). *See also* Corn Prods. Refin. Co. v. FTC, 324 U.S. 726, 742 (1945).

222. *See Morton Salt*, 334 U.S. at 49. *See also Corn Prods.*, 324 U.S. at 738–39, 742.

223. *See Morton Salt*, 334 U.S. at 46–47, 49, 60; *see also Corn Prods.*, 324 U.S. at 732, 738–39 (finding that basing point system resulting in higher glucose prices for disfavored candy manufacturers compared to favored ones had the requisite adverse effect on competition where evidence showed that "payment of [the] increased prices imposed by the basing point system 'may [have] diminish[ed]' the [disfavored] manufacturers' ability to compete with [favored] buyers").

A year after it interpreted the Robinson-Patman Act's prohibition on price discriminations whose effect "*may be substantially* to lessen competition or tend to create a monopoly,"[224] the Court handed down its *Standard Stations* decision interpreting Section 3's prohibition on exclusive deals whose effect "may be *to substantially* lessen competition or tend to create a monopoly."[225] In *Standard Stations*, the Court took a different approach with respect to substantiality. It held that the degree or extent to which competition "may" have been lessened by Standard Oil of California's requirement contracts with independent gas stations *did* matter.[226] Specifically, the Court held that Section 3 prohibited exclusive deals that had the "potential" to "impede a *substantial amount* of competitive activity."[227] The burden of demonstrating such potential could be "satisfied," the Court continued, by proof that an exclusive deal "foreclosed" rivals from competing for a "volume of business" that is "not insignificant or insubstantial" as a "share of the line of commerce affected."[228]

Thus, when legislators drafted the Celler-Kefauver Act in 1950, they had a real choice with respect to the placement of "substantially" in the new Section 7. On the one hand, they could have adopted the placement of "substantially" in Section 3 and embraced the degree-based interpretation given to the term by the Supreme Court in *Standard Stations*. On the other hand, they could have adopted the placement of "substantially" in the Robinson-Patman Act and embraced the materiality-based interpretation given to the term in *Morton Salt*. They decided on the latter—aligning the syntax of Section 7 with that of the Robinson-Patman Act while leaving Section 3 in its original 1914 form. When Congress opts for different language in different parts of the same statute in this manner, courts "normally presume that Congress did so to convey different meaning."[229]

2. Rebutting the "Split Infinitive" Hypothesis

Since the 1980s, some commentators have taken to dismissing the Celler-Kefauver Act's movement of "substantially" as merely "a

224. 15 U.S.C. § 13(a) (emphasis added).
225. 15 U.S.C. § 14 (emphasis added); *see* Standard Oil Co. v. United States (*Standard Stations*), 337 U.S. 293 (1949).
226. *See Standard Stations*, 337 U.S. at 306–08 (emphasis added).
227. *Id.* at 314 (emphasis added).
228. *See id.* at 304, 314.
229. *See* Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, 578 U.S. 374, 398 (2016) (Thomas, J., concurring).

halfhearted attempt to correct the split infinitive" in the original locution of Section 7 by "language purists in Congress."[230] These dismissive claims have never been supported by much, if anything, in the way of textual analysis or legislative history.[231] These claims would also have made little sense to any "language purists" involved in drafting the Celler-Kefauver Act because, as English usage and grammar treatises and instruction guides have made clear since at least the turn of the twentieth century, there is no actual rule of English usage or grammar against splitting the infinitive.[232]

As Sterling Leonard found after conducting his magisterial survey of the "usage and punctuation practice of educated people" throughout the English-speaking world for the National Council of Teachers of English in 1932, "[t]he evidence in favor of the judiciously split infinitive is sufficiently clear to make it obvious that teachers who condemn it arbitrarily are wasting their time and that of their pupils."[233] Similarly, in his influential 1926 treatise on English usage, *Modern English Usage*, H.W. Fowler not only explains how split infinitives should be used, but also "points out the danger of 'real ambiguity and patent artificiality' when needful use [of the

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230. *See, e.g.*, Terrell McSweeney, Comm'r, FTC, Keynote Remarks at the American Bar Association Clayton Act 100th Anniversary Symposium 2 n.9 (December 4, 2014) ("The phrase 'to substantially lessen' appears five times in the text of the original Clayton Act (once in § 2, once in § 3, and three times in [§ 7]). The 1950 Celler-Kefauver Act, in a halfhearted attempt to correct the split infinitive, revised three of the five instances of this phrase to 'substantially to lessen.'"), https://www.ftc.gov/system/files/documents/public_statements/603341/mcsweeny_-_aba_clayton_act_100th_keynote_12-04-14.pdf; Bill Baer, Assist. Att'y Gen., DOJ, Remarks at the American Bar Association Clayton Act 100th Anniversary Symposium (December 4, 2014) ("Important to language purists in Congress, it unsplit an infinitive in the original act, correcting "may be to substantially lessen competition" to "may be substantially to lessen competition.") (transcript available at https://www.justice.gov/opa/speech/remarks-assistant-attorney-general-bill-baer-american-bar-association-clayton-act-100th); David McGowan, *Innovation, Uncertainty, and Stability in Antitrust Law*, 16 BERKELEY TECH. L.J. 729, 750 (2001) ("The [Celler-Kefauver] amendment cured the split infinitive in the original and prohibited mergers where 'the effect of such acquisition may be substantially to lessen competition, or [sic] tend to create a monopoly."). Interestingly, it appears that no one ever suggested that "cur[ing] the split infinitive" was merely a stylistic choice until the late 1970s. *See, e.g.*, SUBCOMM. ON MONOPOLIES AND COM. L. OF THE COMM. ON THE JUDICIARY, 95TH CONG., *supra* note 15, at 18. Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 24 (1982) ("The [Celler-Kefauver] amendment merely cured a split infinitive in the old statute, extended coverage to corporate asset acquisitions as well as stock acquisitions, and through a small wording change actually seemed to increase the possibility of lawful mergers between competitors.").

231. *See Manning*, 578 U.S. at 398.

232. *See* FOWLER, *supra* note 185, at 449; NICHOLSON, *supra* note 185, at 11, 436; EVANS & EVANS, *supra* note 185, at 277–79. *See also* GEORGE O. CURME, ENGLISH GRAMMAR 148 (1947) ("[T]he split infinitive is in full accord with the spirit of modern English and is now widely used by our best writers."); NORMAN LEWIS, BETTER ENGLISH 287 (Dell rev. ed. 1961) ("To deliberately split an infinitive . . . is correct and acceptable English.").

233. *See* STERLING A. LEONARD, NATIONAL COUNCIL OF TEACHERS OF ENGLISH, CURRENT ENGLISH USAGE xiii, 124 (1932).

split infinitive] is forbidden[.]"[234] Fowler "adds that there is no sacrosanctity about it, sets forth as a superstition and fetish for the bogey-haunted the whole prohibition [on the split infinitive], and proves that fear of splitting infinitives entails worse writing than any use of it."[235] By the 1940s, splitting the infinitive was so normal and mainstream that an English professor wrote about it as follows in a Current English Forum conducted by the National Council of Teachers in 1946:

> One cannot blame the split infinitive on hasty journalism, for among the users we list poets and prose writers, including Wyclif (who made possible the first English translation of the Bible in 1384), Sir Thomas Brown, Swift, Fanny Burney, Byron, Keats, Macaulay, Trollope, Dickens, Thackeray, George Eliot, Browning, and Matthew Arnold. Lists of writers using this construction may be found in T.R. Lounsbury, J. Lesslie Hall, H. Poutsma, and George Oliver Curme [four preeminent grammar treatises of the time] . . . . *In fact, no reputable authority on usage today will object to the separation of* to *from the infinitive*.[236]

Indeed, not only did the strictures of English grammar and usage permit the drafters of the Celler-Kefauver Act to keep "substantially" where it was in the original Section 7, those strictures *required* the drafters to do so if what they intended was for the adverb to modify the predicate nouns of Section 7's where-clause ("to lessen competition" and "to tend to create a monopoly") rather than its copular predicate ("may be"). As the leading grammar treatise of the era, George O. Curme's *A Grammar of the English Language*, explained in 1935, a sentence adverb was "usually place[d] . . . after or before the copula[.]"[237] Where an infinitive phrase was used as a predicate noun for a copula, however, "the sentence adverb always precede[d] the *to*."[238] More broadly, Curme's treatise instructed that

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234. *See* Wallace Rice, *Usage Counsel: The Split Infinitive*, 26 ENG. J. 238, 240 (1937) (citing and quoting FOWLER, *supra* note 185, at 449).

235. *Id.* (citing and quoting FOWLER, *supra* note 185, at 449).

236. M. M. Bryant, *Current English Forum: The Split Infinitive*, 35 ENG. J. 403, 403–04 (1946) (emphasis added).

237. *See* SYNTAX, *supra* note 185, at 131.

238. *See id.* at 466–67 ("There is one case where the sentence adverb always precedes the to, namely, when the infinitive clause follows the copula with the force of a predicate adjective or noun[.] . . . As the infinitive clause in each of these sentences has the function of a predicate and thus is felt as a unit, the sentence adverb, which belongs to the sentence as a whole, cannot enter it.") (first emphasis added). *See also* PARTRIDGE, *supra* note 185, at 225 (quoting SYNTAX, *supra* note 185, at 130) ("[I]t is also pointed out that sometimes the adverb (or adverbial phrase) modifies, not the verb alone but the sentence as a whole. 'In this case, the

an "[a]n adverb that modifies a verb *precedes* the verb if it itself has a *weaker* stress but *follows* the verb if it itself has the *stronger* stress[.]"[239] Since "copulas and auxiliaries are usually *unstressed*," Curme continued, "an adverb [that modifies a copula or an auxiliary] *should follow them*."[240] In the same vein, prominent English usage dictionaries of the era (1900–1960) uniformly state that the "normal" or "natural" placement for an adverb that modifies the verb "to be" as a copula is between "be" and its subject complement.[241]

Thus, by moving "substantially" from its original position in the 1914 statute to its position in the Celler-Kefauver Act, legislators abandoned one meaning for the adverb and adopted another. As R.G. Ralph explained in his well-respected 1952 usage guide, *Put It Plainly*: "[a] split infinitive will sometimes give a meaning that is destroyed if the intruding word is moved."[242] Such a change in the meaning of a statute is not to be ignored merely because some commentators have conjectured—without evidence—that legislators expected the change in language that accomplished the change in meaning to be merely stylistic.[243]

e. Conclusion

In light of the foregoing, the plain implication of Congress' use of the phrase "may be substantially" in Section 7 is to extend its prohibition to all mergers and acquisitions that could possibly, in one or more realistic ways, lessen competition or tend to the creation of a monopoly in any line of commerce in any section of the country. For a merger to have a real possibility of causing anticompetitive or monopolistic effects, its concrete features must give it the potential to cause such effects, and that potential must not be foreclosed by prohibitive conditions in the merger's concrete environment. Where

adverbial element usually precedes the verb, verbal phrase, or predicate noun or adjective' (i.e., the object or the complement)[.]") (emphasis added).

239. *See* PARTS OF SPEECH, *supra* note 185, at 71–72, 74; *see also* CURME, PRINCIPLE AND PRACTICE *supra* note 185, at 147 ("An adverbial element is often more heavily stressed than a verb and then usually follows it: He àcted prómptly.").

240. *See* PARTS OF SPEECH, *supra* note 185, at 71–72, 74; *see also* CURME, COLLEGE GRAMMAR, *supra* note 185, at 154 ("An adverbial element is often more heavily stressed than a verb and then usually follows it: He àcted prómptly.").

241. *See* FOWLER, *supra* note 185, at 449; NICHOLSON, *supra* note 185, at 11, 436; EVANS & EVANS, *supra* note 185, at 277–79; *see also Adverbs and Adverb Phrases: Position*, *supra* note 185.

242. *See* Bryan A. Garner, *Garner's Usage Tip of the Day: Split Infinitives (1)*, LAWPROSE (Jan. 14, 2013), https://lawprose.org/garners-usage-tip-of-the-day-split-infinitives-1/ ("A split infinitive will sometimes give a meaning that is destroyed if the intruding word is moved.") (quoting R.G. RALPH, PUT IT PLAINLY 41 (1952)).

243. *See* sources cited *supra* note 206.

the requisite possibility exists, the fact that alternative possibilities also exist—such as the possibility that a merger may somehow strengthen competition—cannot stay the application of the statute. Nor can any defense to enforcement rest on future circumstances—such as induced entry into the relevant field of competition—that do not yet subsist in reality. In short, the statute does not give "license to the imagination."[244]

ii. "To Lessen Competition"

Neither the phrase "lessen competition" nor any variants thereof existed in federal legislation when Congress enacted the Clayton Act in 1914, but they were widely used in state antitrust provisions. At least twenty-seven state antitrust laws contained prohibitions on restraints of "competition" as distinguished from restraints of "trade."[245] Some of these states prohibited arrangements and combinations that "prevented" or "destroyed" competition.[246] Others—including Georgia, Indiana, Kansas, Missouri, South Carolina, Tennessee, and Texas—had statutes that specifically barred arrangements or combinations that "lessened" competition.[247] These statutes were exemplified by that of Tennessee, which prohibited all combinations "made with a view to lessen, or which tend to lessen[,] full and free competition in" the importation, manufacture, or sale of any "article of commerce."[248] When construing this statute in a leading antitrust case of the time, *Standard Oil Co. v. Tennessee*,[249] the Tennessee Supreme Court explained that the relevant text meant the following:

> The statute was not only intended to prohibit contracts and combination between those engaged in the same business, made for the purpose, or which had a tendency, to destroy *all* competition, and which are injurious to the *whole* public, but those made and formed by any and all persons with a view, or

244. *See* Argument for Petitioner at 348, Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922) (preceding opinion in U.S. Reports).

245. *See* JOSEPH E. DAVIES, DEP'T OF COM., TRUST LAWS AND UNFAIR COMPETITION 159–64 (1916) (Although published in 1916, the actual date of this report was March 15, 1915). *See generally* H. COMM. ON THE JUDICIARY, 63RD CONG., LAWS ON TRUSTS AND MONOPOLIES: DOMESTIC AND FOREIGN (Comm. Print 1913) [hereinafter LAWS ON TRUSTS AND MONOPOLIES] (report compiled under the direction of J. J. Speight, Clerk of the Committee on the Judiciary of the House of Representatives, by Nathan B. Williams of the Arkansas Bar, and printed for the use of the committee detailing the provisions of state antitrust laws).

246. *See, e.g.*, LAWS ON TRUSTS AND MONOPOLIES, *supra* note 245, at 40, 84, 161.

247. *See generally* DAVIES, *supra* note 245.

248. LAWS ON TRUSTS AND MONOPOLIES, *supra* note 245, at 289.

249. 100 S.W. 705 (1907).

> which in their nature tend, to lessen competition to *any material extent*, to the injury of *any part* of the people of the State.[250]

As this passage suggests, the courts of the time interpreted statutes prohibiting arrangements that "tend to . . . lessen competition" mostly in their ordinary sense. By reading the Tennessee statute to ban all combinations that tended "to lessen competition to any material extent," the court made clear that only the minimal degree of materiality—that is, concreteness or actuality—was required to trigger the statute's prohibition. However, it was common for the courts to read an additional requirement of public injury into state antitrust statutes; in the case of the Tennessee Supreme Court, it was a requirement of injury not to "the whole public," but only to "any part of the people of the State."[251]

When Congress adapted the phrase "lessen competition" for use in the Clayton Act, however, it placed the words in a different context than was common in state laws. The original Section 7 prohibited mergers wherever their effect "may be to substantially lessen competition *between the corporation [acquired] and the corporation making the acquisition*[.]"[252] Since this phrasing did not entail a lessening of competition in an entire field of business, as the state locution did, or in a "line of commerce," as the locution in other provisions of the Clayton Act did, its literal implication was to restrict the test of illegality to whether a merger "may . . . lessen" whatever competition subsisted between the acquiring and acquired companies before their merger. But that was not how the Supreme Court initially interpreted the original language of Section 7.

The first, and last, Supreme Court case to interpret Section 7's effect-defining clause before 1950 was *International Shoe*.[253] In that decision, the Court held that, in prohibiting mergers where they threatened to "substantially" lessen competition between the acquired and acquiring firm, Congress intended the Clayton Act to deal "only with such acquisitions as probably will result in lessening competition to a substantial degree[.]"[254] Moreover, since the "great

250. *Id.* at 715 (emphasis added).
251. *Id.*
252. *See* Clayton Antitrust Act, ch. 323, § 7, 38 Stat. 730, 731–32 (1914) (current version at 15 U.S.C. § 18) (emphasis added).
253. *See* Int'l Shoe Co. v. FTC, 280 U.S. 291 (1930).
254. *Id.* at 298 (citing Standard Fashion Co. v. Magrane-Houston Co., 258 U. S. 346, 357 (1922)).

purpose" of the Clayton Act "was to advance the public interest by securing fair opportunity for the play of contending forces" in industry, the Court decided that the "substantial degree" of lessening in competition required by Section 7 was "such a degree as will injuriously affect the public."[255]

Whatever may have been the textual merit of *International Shoe*'s analysis as a general matter, the critical factor for the purposes of interpreting the phrase "to lessen competition" in the Celler-Kefauver Act is that *International Shoe*'s analysis was focused on the meaning of a different term—"substantially."[256] Unlike the high court of Tennessee, the majority in *International Shoe* did not simply read a requirement of public injury into the words "lessen competition," but grounded that requirement in its interpretation of the role Congress intended for the word "substantially" in the statutory text.[257] Since, as discussed above in Part III.A.i., the Celler-Kefauver Act significantly changed the placement and role of "substantially" in Section 7, and adopted a phrasing of the requisite effect on competition comparable to that used in the Robinson-Patman Act as opposed to that used in the original Clayton Act, it cannot be said that Congress intended to incorporate *International Shoe*'s interpretation of the word into the Celler-Kefauver Act.[258]

No other pre-1950 decision by the Court gave a definite, independent construction to the phrase "to lessen competition" in the Clayton Act. Accordingly, the phrase as a whole was not a "term of art" with a "specialized legal meaning" in antitrust jurisprudence when the Celler-Kefauver Act was passed.[259] The word "competition," however, arguably was such a term. In some cases, the Supreme Court had defined "competition" as the activity of competing—of "striving for something which another is actively seeking and wishes to gain"—in which market participants engage as "honorable opponents."[260] In other cases, "competition" was

255. *Id.* (quoting FTC v. Sinclair Refin. Co., 261 U.S. 463, 476 (1923)).

256. *See id.* at 298, 302–03.

257. *Id.* at 302–03.

258. *See supra* Part III.A.i.

259. *Cf.* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 615 (2001) (Scalia, J., concurring) ("Words that have acquired a specialized meaning in the legal context must be accorded their legal meaning."). *See* Moskal v. United States, 498 U.S. 103, 114 (1990) ("[W]here a . . . statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning.") (quoting United States v. Turley, 352 U.S. 407, 411 (1957)).

260. *See* United States v. Union Pac. R.R. Co., 226 U.S. 61, 87 (1912) ("To compete is to strive for something which another is actively seeking and wishes to gain."); FTC v. Raladam Co., 283 U.S. 643, 649 (1931) ("It is obvious that the word 'competition' imports the existence of present or potential competitors[.]"); FTC v. Gratz, 253 U.S. 421, 427–28 (1920) ("The

defined more abstractly, as an ideal market condition in which a "fair opportunity" exists for "the play of the contending forces ordinarily engendered by an honest desire for gain."[261]

The concept of "competition" as the real-world rivalry in which business competitors are engaged was typically used by the Court in the course of analyzing the effect of assailed conduct on commerce to determine its legality. For example, in *Standard Stations*, the Court explained that the test of illegality under Section 3 of the Clayton Act was whether the effect of an exclusive dealing arrangement "may be" to "impede a substantial amount of competitive activity," or otherwise substantially diminish "competitive activity," in any line of commerce.[262] Similarly, in *Morton Salt*, the Court upheld the FTC's finding that "competition" may have been "lessened," or "injured," within the meaning of Section 2 of the Clayton Act as amended by the Robinson-Patman Act where the defendant's discriminatory wholesale prices for table salt had "handicapped" small grocers "in competing with the more favored [large] purchasers" for resales of table salt to consumers.[263] Likewise, in *Columbia Steel*, the Court explained that a corporate acquisition "unreasonably lessens competition" in violation of the Sherman Act where (1) it eliminates competitive activity between the merging parties for inputs or customers, or an opportunity for rivals to compete for the same; and (2) the eliminated competitive activity, or opportunity for such activity, is "substantial" when considered in light of "the percentage of [the] business controlled [by the combined firm], the strength of the remaining competition, . . . the probable development of the industry, consumer demands, and other characteristics of the market."[264]

In contrast, the Court primarily employed the concept of "competition" as a sort of ideal market condition when speaking about the purposes of the antitrust laws in general. For example, in *International Shoe*, the Court stated that the "great purpose of [the Clayton and FTC Acts] was to advance the public interest by securing fair opportunity for the play of the contending forces

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[FTC] Act was . . . not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.").

261. *See, e.g.*, United States v. Am. Linseed Oil Co., 262 U.S. 371, 388 (1923); *Int'l Shoe*, 280 U.S. at 298 ("The great purpose of both statutes [the Federal Trade Commission Act and the Clayton Act] was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain." (quoting FTC v. Sinclair Refin. Co., 261 U.S. 463, 476 (1923))).

262. Standard Oil Co. v. United States (*Standard Stations*), 337 U.S. 293, 299, 314 (1949).

263. FTC v. Morton Salt Co., 334 U.S. 37, 50 (1948).

264. United States v. Columbia Steel Co., 334 U.S. 495, 527 (1948).

ordinarily engendered by an honest desire for gain."[265] Similarly, in *Paramount Famous*, the Court explained that "[t]he Sherman Act was intended to secure equality of opportunity, and to protect the public against evils commonly incident to monopolies, and those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called competition—the play of the contending forces ordinarily engendered by an honest desire for gain."[266]

Since the common legal usage of the word "competition" in the context of determining whether "competition" has been "lessened" for the purposes of the Sherman and Clayton Acts referred to the real-world activity of competing, that definition should control. In any event, that definition of "competition" is more consistent with the ordinary sense of the word. Authoritative English dictionaries from the era of the Celler-Kefauver Act define the main sense of "competition" using some variant of the following from Webster's Second International Dictionary (1934): "[a]ct of competing, esp. of seeking, or endeavoring to gain, what another is endeavoring to gain at the same time[.]"[267] Its usage in commercial and economic contexts merely applied this general sense to trade, and was consistently defined to refer to some variant on "[t]he effort of two or more parties, acting independently, to secure the custom of a third party by the offer of the most favorable terms[.]"[268] Indeed, this is exactly how lower courts read the term "competition" in the Celler-Kefauver Act in the years shortly after its enactment.[269]

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265. *Int'l Shoe*, 280 U.S. at 298 (quoting *Sinclair Refin.*, 261 U.S. at 475–76).

266. Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 42–43 (1930) (quoting *Am. Linseed Oil*, 262 U.S. at 388).

267. *See Competition*, WEBSTER'S NEW INTERNATIONAL DICTIONARY 545 (2d ed. 1934) [hereinafter WEBSTER'S 1934]; *see also, e.g.*, *Competition*, WEBSTER'S 1961, *supra* note 163, at 464 ("1: the act or action of seeking to gain what another is seeking to gain at the same time and usu. under or as if under fair or equitable rules and circumstances: a common struggle for the same object esp. among individuals of relatively equal standing: RIVALRY áto prevent the realization that cooperation, not ~, is the road to happiness—Bertrand Russellñ 2: a contest between rivals: a match or trial between contestants áa ~ in essay writingñ áa high-diving ~ñ 3: RIVAL, COMPETITOR 4 a: the effort of two or more parties to secure the custom of a third party by the offer of the most favorable terms b: a market condition in which a large number of independent buyers and sellers compete for identical commodities, deal freely with each other, and retain the right of entry and exit from the market 5: more or less active demand by two or more organisms or kinds of organism or kinds of organisms at the same time for some environmental resource in excess of the supply available . . . .").

268. *See Competition*, WEBSTER'S 1934, *supra* note 267, at 545.

269. *See, e.g.*, United States v. Koppers Co., 202 F. Supp. 437, 447 (W.D. Pa. 1962) (reviewing contemporary dictionaries and concluding that "[c]ompetition implies a struggle or contest between two or more persons for the same object" and, as used in the Celler-Kefauver Amendment, "embraces the everyday strife and struggle between and among competitors for business"); United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 592 (S.D.N.Y. 1958) ("Competition is not just rivalry among sellers. It is rivalry for the custom of buyers. Also in

When used in this sense, "competition" referred not just to rivalry, but to a specific type of rivalry: competing.[270] "Not every conflict of temporal interest can be regarded as competition."[271] To "compete" is to "contend emulously," or to "strive for the same thing . . . for which another is striving" with an "ardent ambition or desire to equal or excel."[272] Whereas "rivalry" carried a "depreciative" connotation and commonly implied a "hostile" struggle "for selfish ends," according to early- and mid-twentieth century dictionaries, "competition" implied an "honorable" and "praiseworthy" contest.[273] As such, competition "usually" referred to the activity of striving for the same object as another when that activity was waged against "equal or stronger adversar[ies]," and under "fair or equitable rules and circumstances."[274]

Understanding "competition" in this way—as the activity in which "relatively equal" business rivals "honorabl[y]" engage in order to gain the business of third parties[275]—would be consistent, not only with midcentury legal and ordinary understandings of the term, but also with the meaning of "lessen" and with the broader statutory context. Where, as here, "lessen" is used as a transitive verb with an object, it means to "diminish," "decrease," "reduce," "shrink," or "make [that object] less" in quantity, scope, or degree.[276] As such, "competition" must be given a definition that makes it a gradable object, which can be reduced or increased on an intelligible scale. In this vein, whether the size, quantity, or degree of the competitive activity being waged by rivals in some line of commerce in some section of the country has been, or could be, "lessened" by a merger is a coherent factual question susceptible to a definite

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many instances . . . it is . . . strongly present as rivalry among buyers for sources of supply. Thus competitive forces may move in a number of directions—buyer against buyer; seller against seller; buyer against seller. But however competition is defined and whatever its form or intensity, it always involves interplay among and between both buyers and sellers.").

270. *See Competing*, WEBSTER'S 1961, *supra* note 163, at 464; *Competing*, WEBSTER'S 1934, *supra* note 267, at 545.

271. 1 BENJAMIN W. POPE, LEGAL DEFINITIONS 250 (1919).

272. *See, e.g.*, *Compete*, 1 FUNK, FUNK & WAGNALLS NEW PRACTICAL DICTIONARY 276 (1948) [hereinafter 1 FUNK]; *Compete*, WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 455 (W.T. Harris & F. Sturges Allen, eds., 1911); *Compete*, WEBSTER'S 1934, *supra* note 267, at 545.

273. *See Rivalry*, WEBSTER'S 1934, *supra* note 267, at 1839; *see Rivalry*, 2 FUNK, *supra* note 163, at 1131.

274. *Competition*, WEBSTER'S 1961, *supra* note 163, at 464; *Competition*, WEBSTER'S 1934, *supra* note 267, at 545.

275. *Competition*, WEBSTER'S 1961, *supra* note 163, at 464; *Competition*, WEBSTER'S 1934, *supra* note 267, at 545; FTC v. Gratz, 253 U.S. 421, 428 (1920).

276. *See, e.g.*, *Lessen*, WEBSTER'S 1934, *supra* note 267, at 1418; *Lessen*, 6 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 209; *Lessen*, 5 THE CENTURY DICTIONARY AND CYCLOPEDIA 3418 (1911); *Lessen*, 1 FUNK, *supra* note 272, at 267.

answer. That is not the case with the question of whether a benchmark condition of "fair opportunity for the play of contending forces" exists or does not exist in such line.

To begin with, it is unclear how "competition" as an ideal or benchmark condition can be "lessened." While the scope or amount of opportunity for competition that is available in a given market can itself be lessened or enhanced from "more" to "less" or from "less" to "more," whether a "*fair* opportunity" for competition exists in such market or not is a binary question. If the market demonstrates the threshold level of "fairness," then "competition" may be said to exist as a condition therein. If the market does not demonstrate the threshold level of fairness, "competition" may be said to not exist. But there is no scale in between existence and non-existence on which this threshold condition of "fair opportunity" can be "lessened."

More broadly, defining "competition" by reference to the play of contending forces *ordinarily* engendered in a given market would imply that Section 7 only prohibits mergers that "lessen" the play of such forces in a way that is *not* ordinary—that is "abnormal," to use the Court's term in *Paramount Famous*, or somehow contrary to the customary or expected course of events.[277] Such an interpretation would necessarily invite a court in a merger proceeding to examine the characteristics of the relevant market, make a policy determination about the "ordinary" or "fair" scope of "play" for competition in that market, and ultimately decide whether the merger lessens that scope in a way that is improper. This would, in effect, duplicate the Sherman Act test for the illegality of mergers announced in *Columbia Steel*—two years before the passage of the Celler-Kefauver Act—which required courts to determine whether a merger will "*unreasonably* lessen competition" in light of the nature of the market in which the parties compete.[278] Congress, however, predicated the prohibition of the Celler-Kefauver Act exclusively on whether a merger's effect "may be . . . to *lessen* competition"—leaving the element of unreasonableness out of the statutory text.[279] When Congress borrows words from jurisprudence in this manner, it is presumed to

277. *See Ordinary*, 7 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 187–88; Paramount Famous Corp. v. United States, 282 U.S. 30, 43 (1930).

278. United States v. Columbia Steel Co., 334 U.S. 495, 508 (1948).

279. 15 U.S.C. § 18 (emphasis added).

"know . . . the cluster of ideas that were attached" to the borrowed words and to make its choices consciously.[280]

Importantly, where Congress has found that Section 7's standard is too stringent for specific industries, it has provided an exception for those industries through express legislation—typically authorizing a regulatory agency to approve or block mergers in such industries based on a less-restrictive, rule-of-reason-like "public interest" standard.[281] Since Congress "has shown that it knows how to adopt" exceptions to Section 7 where it deems them necessary, it would be "particularly inappropriate" to create an atextual exception out of whole cloth for mergers that may, in fact, lessen competition, but that would not extinguish what judges or enforcers deem a "fair opportunity for the play of contending forces."[282]

Against this backdrop, it is plain that a merger runs afoul of the "lessen-competition" prong of Section 7 wherever its effect "may be" to diminish the amount, scope, intensity, or other gradable quality of the competitive activity—the actual "striving" of businesses against "equal or stronger adversar[ies]" in "emulous contest" for the custom of third parties[283]—being waged in any line of commerce in any section of the country.

iii. "To Tend to Create a Monopoly"

The roots of the phrase "tend to create a monopoly" lie in the early jurisprudence of the Sherman Act. For the first two decades after its enactment, the caselaw interpreting that Sherman Act—as

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280. Morissette v. United States, 342 U.S. 246, 263 (1952). *See also* Air Wis. Airlines Corp. v. Hoeper, 571 U.S. 237, 248 (2014) (quoting FAA v. Cooper, 566 U.S. 284, 292 (2012) (quoting Molzof v. United States, 502 U.S. 301, 307 (1992) (quoting *Morissette*, 342 U.S. at 263 (1952)))).

281. *See* H. R. REP. NO. 81-1191, at 6–7 (1949); *see also* Daniel A. Hanley, *Administrative Antimonopoly*, OPEN MKTS. INST. (Feb. 25, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4044077 (detailing the merger authority of several federal administrative agencies).

282. *See* Rotkiske v. Klemm, 589 U.S. 8, 14 (2019) ("Atextual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision."); Iselin v. United States, 270 U.S. 245, 251 (1926) (Brandeis, J.) ("To supply omissions transcends the judicial function."); Ebert v. Poston, 266 U.S. 548, 554 (1924) (Brandeis, J.) ("A casus omissus does not justify judicial legislation."). *See also* Petteys v. Butler, 367 F.2d 528, 538 (8th Cir. 1967) (Blackmun, J., dissenting) ("My [view] is that either the statute means what it literally says or . . . it does not; that if the Congress intended to provide additional exceptions, it would have done so in clear language; and that the recognized purpose and aim of the statute are more consistently and protectively to be served if the statute is construed literally and objectively rather than non-literally and subjectively on a case-by-case application. The latter inevitably is a weakening process.").

283. *See Competition*, 2 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 720.

distilled in *E.C. Knight*,[284] *Addyston Pipe*,[285] and *Northern Securities*,[286] among other decisions[287]—held that it prohibited three main categories of "contract, combination, or conspiracy . . . ."[288] First, it prohibited those combinations which, "in fact, result[] or will result in a total suppression of trade or in a complete monopoly."[289] Second, it barred those which, "by [their] necessary operation[,] . . . tend[] to restrain interstate or international trade or commerce."[290] Finally, where neither of these tests of illegality were met, the Court held that a contract or combination could still violate the Act if it "tends to create a monopoly in such trade or commerce and . . . deprive[s] the public of the advantages that flow from free competition[.]"[291]

Careful examination of the Supreme Court's pre-1950 antitrust caselaw yields no expressed or settled definition for the phrase "tend to create a monopoly" under the Sherman Act or the Clayton Act. From the passage of the Sherman Act until *Standard Oil* was decided in 1911, the Court consistently used the phrase as it was used in the *Northern Securities* passage quoted above—to identify one of the two elements necessary to render a combination unlawful even though it does not "result" in "a complete monopoly," or "restrain . . . commerce" by "its necessary operation" (the other element being an adverse effect on the public).[292] But the Court never defined the substance of that element, or made an independent finding about whether it was satisfied, or not satisfied, in any given case.[293]

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284. United States v. E.C. Knight Co., 156 U.S. 1, 16–17 (1895).

285. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 228 (1899).

286. N. Sec. Co. v. United States, 193 U.S. 197, 331 (1904).

287. *See, e.g.*, E. States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 609 (1914).

288. *N. Sec. Co.*, 193 U.S. at 331.

289. *Id.* at 332.

290. *Id.*

291. *See id.* ("[T]o vitiate a combination [under the Sherman Act], it need not be shown that the combination, in fact, results or will result, in a total suppression of trade or in a complete monopoly, but it is only essential to show that[,] by its necessary operation[,] it tends to restrain interstate or international trade or commerce[,] or *tends to create a monopoly* in such trade or commerce and to deprive the public of the advantages that flow from free competition[.]") (emphasis added); *see also* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 237 (1899) (quoting United States v. E.C. Knight Co., 156 U.S. 1, 16 (1895)).

292. *N. Sec. Co.*, 193 U.S. at 332.

293. Indeed, an examination of the legislative history of the Clayton Act of 1914 reveals that the phrase was likely chosen due to legislative compromise. *See* A.D. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES: A STUDY OF COMPETITION ENFORCED BY LAW 179–80 (2d ed. 1970); *see also* 51 CONG. REC. 16002, 16317–18 (1914).

After *Standard Oil* replaced earlier interpretations of the Sherman Act's scope with its Rule of Reason framework,[294] the phrase "tend to create a monopoly" essentially disappeared from the Supreme Court's decisions under that Act. When Congress incorporated the phrase into the Clayton Act in 1914, its recitation became commonplace in decisions under *that* Act's provisions. Still, at no time before 1950 did the Court give the Clayton Act's prohibitions on conduct that "tends to create a monopoly" a definite construction that was independent of the Act's prohibitions on conduct that "lessens competition."

Ultimately, the Court revived usage of the phrase in reference to the Sherman Act by way of its decision in *Fashion Originators' Guild*, which defined the FTC's authority to suppress business combinations that "run[] counter to the public policy declared in the Sherman and Clayton Acts" as unfair methods of competition.[295] Quoting *E.C. Knight*, the Court held that a combination may be prohibited under "the policy of the Sherman Act," not only if it "achieve[s] a complete monopoly," but also "if it really *tends* to that end[,] and to deprive the public of the advantages which flow from free competition."[296] Four years later in *Associated Press*, the Court quoted this selfsame passage from *Fashion Originators' Guild* to reinsert the phrase back into the Sherman Act's jurisprudence proper—using it to support the proposition that "an agreement to restrain trade" violates the Sherman Act even if it "does not inhibit competition in all of the objects of that trade[.]"[297] Like the Court's pre-*Standard Oil* decisions, however, neither of these cases gave the first element of "tend[ing] to create a monopoly" a meaning separate from the second element of "[tending] to deprive the public of the benefits which flow from free competition."

Against this backdrop, the Supreme Court's usage of the phrase "tend to create a monopoly" in its jurisprudence—both before 1914 and before 1950—is too imprecise for the phrase, in and of itself, to

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294. Standard Oil Co. v. United States, 221 U.S. 1, 61–62 (1911); *see also* United States v. Am. Tobacco Co., 221 U.S. 106, 179 (1911). The Rule of Reason was more refined in *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918). For a general history of the Rule of Reason, see Daniel A. Hanley, *In Praise of Rules-Based Antitrust*, COMPETITION POL'Y INT'L: ANTITRUST CHRON., Jan. 29, 2024, https://ssrn.com/abstract=4710387.

295. Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 463 (1941).

296. *Id.* at 466 (citing United States v. E.C. Knight Co., 156 U.S. 1, 16 (1895) and Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 237 (1899)).

297. Associated Press v. United States, 326 U.S. 1, 17 n.16 (1945) (quoting *Fashion Originators'*, 312 U.S. at 463).

constitute a "term of art" with a "specialized [legal] meaning."[298] Examining the Court's decisions, however, does yield two discrete insights into the phrase's signification that can reliably bracket inquiry into the meaning of its words.

The first insight is that a business combination can "tend to create a monopoly" for the purposes of Section 7—and thereby fall within its prohibition—without also "[tending] to deprive the public of the advantages that *flow from* free competition."[299] In defining the outer limits of liability under the Sherman Act in its pre-*Standard Oil* and post-*Associated Press* decisions, the Court consistently held that a combination which "[has] not as yet resulted in restraint [of trade]" must, at a minimum, demonstrate *both* of these tendencies to fall within the Act's prohibition.[300] In drafting the language of Section 7, however, Congress made the tendency of a merger to create a monopoly independently sufficient to prohibit a merger under the Clayton Act. The inference that this drafting choice was intended to truncate the effect requirements of the Sherman Act is confirmed by another choice Congress made. In the original Section 7, Congress distinguished between—and proscribed both—the effect of "tend[ing] to create a monopoly" and the effect of "restrain[ing] commerce."[301] Since the latter phrase echoed the language of the Sherman Act, it clearly reached mergers that "may" have demonstrated the twin minimum tendencies required for a combination to violate the Sherman Act—that is, a tendency to create a monopoly *and* a tendency to harm the public. When Congress followed that phrase in the original Section 7 with a separate prohibition on mergers that "tend to create a monopoly," it presumably did not intend to simply repeat itself.[302]

The second insight that can be derived from the Court's jurisprudence is with respect to the meaning of the word "tend" in connection with "creating a monopoly." In *Waters-Pierce Oil Company*, the Court stated that the meaning of "tend" in its precedents under the Sherman Act was comparable to that of the phrase "reasonably

298. *Cf.* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 615 (2001) (Scalia, J., concurring) ("Words that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning.").

299. N. Sec. Co. v. United States, 193 U.S. 197, 332 (1904).

300. *Associated Press*, 326 U.S. at 12.

301. *See* Clayton Antitrust Act, ch. 323, § 7, 38 Stat. 730, 732 (1914).

302. It is, of course, a basic principle of statutory interpretation that "differences in language . . . convey differences in meaning." Wis. Cent. Ltd. v. United States, 585 U.S. 274, 279 (2018) (quoting Henson v. Santander Consumer USA Inc., 582 U.S. 79, 86 (2017)). That canon applies with even greater force when applied to provisions that are parallel and enacted "in the same provision of the same Act." United States v. Granderson, 511 U.S. 39, 63 (1988) (Kennedy, J., concurring).

calculated" in a Texas antitrust statute.[303] In that context, the Court explained, the usage of "tend" brought within the scope of the Sherman Act's prohibition all "acts" which (1) "attempt to bring about the prohibited result" and (2) create a "high[]" or "dangerous" probability "that the given result will be accomplished."[304]

In the Clayton Act context, however, the Court gave Congress' use of "tend" in the statutory text a more expansive meaning. The Court construed that specific term in three decisions before the enactment of the Celler-Kefauver Act in 1950: *Magrane-Houston*, *IBM*, and *International Salt*. All three emphasized a contributory sense of "tend" rather than a purposive or completive sense. In *Magrane-Houston*, the Court held that the usage of the phrase in Section 3 of the Clayton Act prohibited exclusive deals where they demonstrate "an actual tendency to monopoly."[305] The Court clarified what it meant by an "actual tendency" in its subsequent decisions. In *IBM*, the Court held that a tying arrangement "tend[ed] to create a monopoly" within the meaning of the Clayton Act where it functioned as "an important and effective step in the creation of monopoly."[306] A decade later in *International Salt*, the Court went further. "[T]he tendency of [an] arrangement" to create a monopoly, the Court held, arises from "the direction of the movement" it effectuates, and "it is immaterial that the [movement] is a creeping one rather than one that proceeds at full gallop[.]"[307] In prohibiting arrangements that effectuate a "tendency to accomplishment of monopoly," the Court said, the Act did not "await arrival at the goal before condemning" steps along the way.[308]

Within these jurisprudential brackets, the words of the phrase "tend to create a monopoly" may be construed using traditional methods of statutory interpretation. Since none of the key words in the phrase—with the possible exception of "monopoly," as discussed below—are terms of art, they can be given "their ordinary, contemporary, common meaning."[309]

303. Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 109 (1909).
304. *Id.* at 109–10.
305. Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 357 (1922).
306. Int'l Bus. Machs. Corp. v. United States, 298 U.S. 131, 136 (1936).
307. Int'l Salt Co. v. United States, 332 U.S. 392, 396 (1947).
308. *Id.*
309. Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 388 (1993) (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)).

a. Legal and Ordinary Meaning of "Tend to Create"

We start with "tend to." Where the verb "tend" is followed by "to" and is used to express a relationship between an impersonal subject and some type of action—as it is in Section 7—the Oxford English Dictionary of 1933 defines the term as "[t]o lead or conduce to some action."[310] Similarly, in comparable grammatical contexts, Webster's Third New International Dictionary of 1961 defines "tend" as "to exert activity or influence in a particular direction; serve as a means: CONDUCE[.]"[311] Relatedly, according to the Oxford English Dictionary of 1933, the phrasal verb "conduce to" means "to lead or tend towards (a result); to aid in bringing about, contribute to, make for, further, promote, subserve."[312] Other authoritative English dictionaries from the time agree.[313] Notably, when Black's Law Dictionary provided a legal definition of "tend" other than its archaic sense in "old English law" as "[t]o tender or offer [something]" for the first time in 1968,[314] it described its meaning in precisely those terms—"[t]o have a leaning; *serve, contribute, or conduce in some degree or way*, or have a more or less direct bearing or effect; to be

310. *Tend*, 11 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 177 (defining the verb "tend" when used as an intransitive verb with "to" as "to lead or conduce to some state or condition," and when used as intransitive verb with "to" and a "noun of action" as "to lead or conduce to some action.").

311. *Tend*, WEBSTER'S 1961, *supra* note 163, at 2354.

312. *Conduce*, 2 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 789.

313. *See Tend*, WEBSTER'S 1934, *supra* note 267, at 2599–600 (defining the verb "tend" when used as an intransitive verb with *to* or *toward* to mean: "1. To move or direct one's course in a certain direction; . . . 2. To be directed or have a tendency, conscious or unconscious, to any end, object, or purpose; to exert activity or influence in a particular direction; to serve as a means; conduce"); *Tend*, 2 FUNK, *supra* note 163, at 1342 (defining "tend, intr. verb" when followed by "to" and a noun or by an infinitive to mean: "1. To exert an influence in a certain direction; have a bent, aptitude, or tendency; to be directed toward an end; serve as a means; conduce . . . 2. To move in a certain direction"); *Tend*, 9 THE CENTURY DICTIONARY AND CYCLOPEDIA, *supra* note 276, at 6228 (defining "tend" when used as an intransitive verb to mean: "1. To move or be directed, literally or figuratively; hold a course . . . 2. To have a tendency to operate in some particular direction or way; have a bent or inclination to effective action in some particular direction; aim or serve more or less effectively and directly; commonly followed by an infinitive: as, exercise *tends* to strengthen the muscles . . . 3. To serve, contribute, or conduce in some degree or way; be influential in some direction, or in promoting some purpose or interest; have a more or less direct bearing or effect (upon something).").

314. *See Tend*, BLACK'S LAW DICTIONARY 1637 (4th rev. ed. 1968) [hereinafter BLACK'S LAW 1968]. Until the Fourth Edition was published in 1968, Black's Law Dictionary defined "tend" according to its meaning in "old English law" as "[t]o tender or offer [something]." BLACK'S LAW DICTIONARY 1637 (4th ed. 1951) [hereinafter BLACK'S LAW 1951]. This is an example of "[d]ictionaries tend[ing] to lag behind linguistic realities[.]" *See* SCALIA & GARNER, *supra* note 80, at 419. Since "a term now known to have first occurred in print in 1900 might not [make] its way into a dictionary until 1950 or even 2000," it is "generally quite permissible" when "seeking to ascertain the meaning of a term in [for example] an 1819 statute . . . to consult an 1828 dictionary." *Id.*

directed as to any end, object, or purpose; to have a tendency, conscious or unconscious, to any end, object or purpose."[315]

All of these definitions suggest that the Supreme Court's pre-1950 interpretation of "tend" under the Clayton Act was textually sound. As explained above, in *IBM* and *International Salt*, the Court made the "direction of the movement" effected by an arrangement—as opposed to its purpose, magnitude, or immediate likelihood of creating a monopoly—the touchstone for the existence of the proscribed tendency.[316] This construction is plainly consistent with the contributory sense of "tend" as to "conduce," to "serve, contribute, or conduce in some degree or way," or "[t]o exert an influence in a certain direction [or] toward a [certain] end," which is described in the dictionaries.[317]

In contrast, the construction given to the term in Sherman Act cases—requiring intent or a dangerous probability of monopolization—would be practically atextual if applied in the context of Section 7 for at least two reasons. First, to restrict the proscribed effect to an imminent likelihood of monopoly would be to effectively substitute "lead" in place of "tend"—which, again, means "to lead *or conduce* to" some result. Second, the word "tend" cannot denote a specific intent in Section 7 because it is situated in a phrase that is supposed to identify an "effect." An "effect," according to Webster's Second International Dictionary, is "[t]hat which is *produced* by an agent or cause[,]" or as the Century Dictionary and Cyclopedia puts it, "the *result* of any kind of cause[.]"[318] It does not countenance the nature of the "agent or cause" behind it, let alone the intent that motivates it.

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315. *Tend*, BLACK'S LAW 1968, *supra* note 314, at 1637 (emphasis added).

316. Int'l Salt Co. v. United States, 332 U.S. 392, 396 (1947); Int'l Bus. Machs. Corp. v. United States, 298 U.S. 131, 135–36 (1936).

317. *Tend*, BLACK'S LAW 1968, *supra* note 314, at 1637 (defining "tend" to mean: "to have a leaning; *serve, contribute, or conduce in some degree or way*, or have a more or less direct bearing or effect; to be directed as to any end, object or purpose; to have a tendency, conscious or unconscious, to any end, object or purpose") (emphasis added); *Tend*, 2 FUNK, *supra* note 163, at 1342 (defining "tend, intr. verb" when followed by "to" and a noun or by an infinitive to mean: "1[.] To exert an influence in a certain direction; to have a bent, aptitude, or tendency; to be directed toward an end; serve as a means; conduce . . . 2. To move in a certain direction); *Tend*, WEBSTER'S 1934, *supra* note 267, at 2599–2600 (defining the verb "tend" when used as an intransitive verb with *to* or *toward* to mean: "1. To move or direct one's course in a certain direction; . . . 2. To be directed or have a tendency, conscious or unconscious, to any end, object, or purpose; to exert activity or influence in a particular direction; to serve as a means; conduce").

318. *See Effect*, WEBSTER'S 1934, *supra* note 267, at 818 (emphasis added); *Effect*, 3 THE CENTURY DICTIONARY AND CYCLOPEDIA, *supra* note 276, at 1847 (emphasis added); *see also Effect*, 1 FUNK, *supra* note 272, at 419 (defining "effect, n." to mean "1. A result or product of some efficient cause or agency; a consequence[]").

Notably, the contributory interpretation given to the operative phrase in *IBM* and *International Salt* is also consistent with the meaning of the immediate object of "tend" in the statutory text—"to *create* a monopoly." Although in certain profound contexts (*e.g.*, "God *created* the heaven and earth"), the word "create" means "to bring [something] into existence" or "make [something] out of nothing and for the first time[,]" the more accepted meaning of the term in non-divine contexts (*e.g.*, "[to create] a demand for a product by advertising") is "to bring [something] about by a course of action or behavior[.]"[319] Since the word "create" is used in this ordinary sense in Section 7, it plainly suggests that the phrase proscribes mergers that effectuate a tendency, not just to monopoly itself, but also to a course of action or behavior that eventually brings a monopoly about. The Supreme Court's decision in *International Salt*—finding that the Clayton Act proscribes all "movements" toward the accomplishment of monopoly, and does not "await arrival at the goal before condemning the direction of [such] movement[s]"[320]—is in clear alignment with this plain meaning of the words "tend to create" in Section 7.

b. Legal and Ordinary Meaning of "Monopoly"

This brings us to the core question posed by the phrase "tend to create a monopoly" in Section 7: What *is* a "monopoly," anyway? The first edition of Black's Law Dictionary—published in 1891, just after the Sherman Act was passed—defined "monopoly" as "[a] privilege or peculiar advantage vested in one or more persons or companies, consisting in the exclusive right (or power) to carry on a particular business or trade, manufacture a particular article, or control the sale of the whole supply of a particular commodity."[321] The Second (1910), Third (1933) and Fourth (1968) editions of Black's Law Dictionary all contained the same definition, but added that a "monopoly" may also "consist[] in the ownership or control of so

319. *See Create*, WEBSTER'S 1961, *supra* note 163, at 532; *see also Create*, 2 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 1151–52 (defining "create, v." as: "1. *trans.* Said of a divine agent: To bring into being, cause to exist; *esp.* to produce where nothing was before . . . 2. *gen.* [of a human agent]. To make, form, constitute, or bring into legal existence . . . 4. To cause, occasion, produce, [or] give rise to (a condition or set of circumstances."); *Create*, WEBSTER'S 1934, *supra* note 267, at 621.

320. *Int'l Salt Co.*, 332 U.S. at 396.

321. *Monopoly*, HENRY CAMPBELL BLACK, A DICTIONARY OF LAW 786–87 (1891) [hereinafter BLACK'S LAW 1891]; *Monopoly*, WHARTON'S LAW-LEXICON: FORMING AN EPITOME OF THE LAW OF ENGLAND AS EXISTING IN STATUTE LAW AND DECIDED CASES 574 (W. H. Aggs., 11th ed. 1911) (defining "monopoly" simply as "the exclusive privilege of selling any commodity"); *see Monopoly*, WALTER A. SHUMAKER & GEORGE FOSTER LONGSDORF, THE CYCLOPEDIC DICTIONARY OF LAW 603–04 (1901).

large a part of the market-supply or output of a given commodity as to stifle competition, restrict the freedom of commerce, and give the monopolist control over prices."[322]

While this consistent definition in legal dictionaries might suggest that "monopoly" is a legal term of art, in reality it shows the continuity of the legal definition of the term with its ordinary meaning. For example, Webster's Third (1961) defines "monopoly" as:

> [O]wnership or control that permits domination of the means of production or the market in a business or occupation . . . that is achieved through an exclusive legal privilege (as a governmental grant, charter, patent, or copyright) or by control of the source of supply (as ownership of a mine) or by engrossing a particular article or commodity (as in cornering a market) or by combination or concert of action[.][323]

Other English dictionaries from the era define "monopoly" in essentially the same way—as the power of a person or group to control a business or trade.[324]

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322. *Monopoly*, HENRY CAMPBELL BLACK, A LAW DICTIONARY 790 (2d ed. 1910) [hereinafter BLACK'S LAW 1910]; *Monopoly*, BLACK'S LAW DICTIONARY 1202 (3d ed. 1933) [hereinafter BLACK'S LAW 1933]; *Monopoly*, BLACK'S LAW 1968, *supra* note 314, at 1158.

323. *Monopoly*, WEBSTER'S 1961, *supra* note 163, at 1463.

324. For example, the Oxford English Dictionary First (1933) defines "monopoly" as: "Exclusive possession of the trade in some article of merchandise; the condition of having no competitor in the sale of some commodity, or in the exercise of some trade or business." *Monopoly*, 6 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 624. Webster's Second (1934) defines "monopoly" as "1. a. Exclusive possession of the trade in some article or exercise of some business. b. The exclusive right, privilege, or power of selling or purchasing a given commodity or service in a given market; exclusive control of the supply of any commodity or service in a given market . . . ." *Monopoly*, WEBSTER'S 1934, *supra* note 267, at 1587. It also adds that: "Exclusive control of traffic constitutes a monopoly in the economic sense, whether acquired by state grant (as in case of patents or copyrights . . .), by control of sources of supply (as in case of mines), by engrossing . . . an article (as in case of cornering the market)[,] by combination or concert of action, or by any other means." *Id.* Similarly, Funk & Wagnalls (1948) provides that "monopoly" ordinarily means "[t]he exclusive right or privilege of engaging in a particular traffic; or the resulting absolute possession or control." *Monopoly*, 2 FUNK, *supra* note 163, at 861. Finally, The Century Dictionary & Cyclopedia (1911) defines "monopoly" as "1. An exclusive privilege to carry on a traffic . . . 2. Specifically, in *Eng. Constitutional hist.*, and hence sometimes in *Amer. law*, such an exclusive privilege when granted by the crown or state . . . 3. In *polit. econ.*, control of the production, purchase, or sale of a commodity or service, so unified as to render possible the manipulation of prices in the interest of the person or persons in control." *Monopoly*, 6 THE CENTURY DICTIONARY AND CYCLOPEDIA, *supra* note 276, at 3843. Notably, this no-fault understanding of monopoly is consistent with the sole definition of the verb "to monopolize" cited during the legislative debates of the Sherman Act, where Senator Edmunds, one of the main drafters and sponsors of the bill, explained that the verb was intended in accordance with its definition in "Webster's Dictionary" as:

> 1. To purchase or obtain possession of the whole of, as a commodity or goods in market, with the view to appropriate or control the exclusive sale of; as, to monopolize sugar or tea. Like the sugar trust. One man, if he had capital enough, could do it just as well as two. 2. To engross or obtain by any means the exclusive right of, especially the right of

To be sure, these generic legal and ordinary definitions of "monopoly" are not necessarily controlling. If the word's usage in the antitrust laws had received authoritative construction in the courts by the time Congress enacted the Celler-Kefauver Act in 1950, that construction should take precedence. Per Bryan Garner and Antonin Scalia, in their seminal treatise *Reading Law*, "[t]he clearest application of the prior-construction canon occurs with reenactments: If a word or phrase [in a statute] has been authoritatively interpreted by the highest court in a jurisdiction . . . a later version of that act perpetuating the wording [should be] presumed to carry forward that interpretation."[325]

In this vein, by the time Congress enacted the Celler-Kefauver Act in 1950, the Supreme Court's antitrust jurisprudence contained arguably the most crystalline definition of "monopoly" it ever had. In a series of Sherman Act cases leading up to the passage of the Act in 1950—*Alcoa*,[326] *American Tobacco*,[327] *Paramount*,[328] *Griffith*,[329] and *Schine Theatres*[330]—the Court consistently defined "monopoly" as "the power . . . to exclude competition" from an "appreciable part of interstate . . . commerce" to a "substantial extent."[331] There is little daylight between this late-1940s jurisprudential definition of monopoly as power to suppress competition in a segment of trade and the generic one in period dictionaries.[332]

In adopting this conception of monopoly, however, the Court did break sharply from another understanding of the term—the one

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trading to any place, or with any country or district; as, to monopolize the India or Levant trade.

21 CONG. REC. 3151–52 (1890) (statements of Sen. Kenna and Sen. Edmunds); *see also* Lande & Zerbe, *supra* note 71, at 507–08 (analyzing references to the meaning of the verb "to monopolize" in the legislative debates on the Sherman Act).

325. SCALIA & GARNER, *supra* note 80, at 322 (quoting Shapiro v. United States, 335 U.S. 1, 16 (1948) and Bragdon v. Abbott, 524 U.S. 624, 645 (1998)). *See also* CALEB E. NELSON, STATUTORY INTERPRETATION 479 (2011) (noting that the canon applies when "[t]he Supreme Court (or a critical mass of lower courts, or an agency that Congress has put in charge of administering the statute) adopt[s] a prominent interpretation of one of the statute's provisions"); Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239–40 (2009) (applying the canon to a statute that the Supreme Court had previously interpreted and that Congress had subsequently reenacted without material change); Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.") (collecting cases).

326. United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416 (1945).

327. Am. Tobacco Co. v. United States, 328 U.S. 781 (1946).

328. United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

329. United States v. Griffith, 334 U.S. 100 (1948).

330. Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948).

331. *See Am. Tobacco*, 328 U.S. at 809, 811; *Paramount Pictures*, 334 U.S. at 173; *Griffith*, 334 U.S. at 107 n.10 ("[S]ize is of course an earmark of monopoly power.").

332. *See infra* Part III.A.iii.b.3.

that had prevailed in its caselaw since its decision in *Standard Oil*. That understanding identified a "monopoly," not by the existence of dominating power itself, but by the obtainment and use of such power for "wrongful purposes," with "brutal methods," or to "oppressive" ends.[333] On the eve of Congress' enactment of the Celler-Kefauver Act, these two conceptions of monopoly under the Sherman Act came to a head before Judge Learned Hand in *Alcoa*.[334] Judge Hand chose the former—and that choice was ratified as the authoritative interpretation of monopoly under the Sherman Act by the Supreme Court in *American Tobacco*.[335]

If, as argued below, these decisions in the late 1940s dispatched earlier jurisprudential ideas and truly "settled the meaning" of references to "monopoly" in the antitrust laws, then it must be presumed that Congress intended to "incorporate" them into Section 7 when it used the word in the Celler-Kefauver Act.[336] If these decisions conflicted with the Court's earlier views but did not authoritatively discard them, then judicial construction of the word was not actually settled in 1950, and the prior-construction canon does not apply.[337] In that case, the word must simply be given its fair reading in the statutory context. But that road, as implied above, ultimately leads to the same place as following the *American Tobacco* line of cases—monopoly in Section 7 means the power to exclude competition.[338]

1. What Monopoly Meant to the Post-War Supreme Court

The Second Circuit sat in *Alcoa* under unique circumstances. Seven years earlier, the Justice Department had brought a sprawling monopolization case against the Aluminum Company of America (commonly known as "Alcoa"),a firm which at that point had controlled the production of aluminum in North America for a

333. *See infra* Part III.A.iii.b.2.
334. *See generally* United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416 (1945).
335. *See Am. Tobacco*, 328 U.S. at 809, 813–15; *see also infra* Part III.A.iii.b.3.
336. *See* Shapiro v. United States, 335 U.S. 1, 16 (1948) ("In adopting the language used in the earlier act, Congress 'must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment."); Bragdon v. Abbott, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, [the] intent to incorporate its administrative and judicial interpretations as well.").
337. SCALIA & GARNER, *supra* note 80, at 322 (defining the Prior Construction Canon).
338. *See infra* Part III.A.iii.b.3.

generation.[339] After a trial that went on for over two years, the district court handed the Government a stinging defeat.[340] Finding that Alcoa had not acted with a "specific" intent to monopolize, had not engaged in abusive exclusionary practices, and had been restrained from raising prices by competition from recycled aluminum and from foreign imports, the district judge dismissed all of the Government's charges.[341] The Justice Department appealed that loss directly to the Supreme Court, as permitted by then-existing law, but the Court lacked a quorum of six justices to hear the case.[342] The case languished in this appellate no-man's land for the next two years. Finally, Congress stepped in and enacted a law designating the Second Circuit to render a final decision in the case in lieu of the Supreme Court.[343]

The resulting opinion—signed unanimously by a distinguished panel consisting of Learned Hand, his cousin Augustus Hand, and Thomas Swan—created "landmark precedent on what constitutes a monopoly, [and on] when a monopolist's actions in the market violate the antitrust law[.]"[344] If there were any doubts about *Alcoa*'s "weight as precedent," the Supreme Court put them to rest the next year by explicitly writing *Alcoa*'s critical passages into *American Tobacco*.[345] Building on these two cases as a foundation, between 1945 and 1950 the Court systematically clarified monopolization doctrine in a purposeful series of decisions. Specifically, the decisions in *Alcoa*, *American Tobacco*, and their progeny crystallized three core aspects of the concept of "monopoly" under the Sherman Act.

First, the Court established that a monopoly consists in possessing substantial—not complete—power over competition.[346] To possess a monopoly, an enterprise was required to have the power to "control," "dominate," or "regiment" competition in an "appreciable part" of interstate commerce."[347] It was not required that an

339. Spencer Webber Waller, *The Story of* Alcoa*: The Enduring Questions of Market Power, Conduct, and Remedy in Monopolization Cases*, *in* ANTITRUST STORIES 121, 122, 129 (Daniel A. Crane & Eleanor M. Fox ed., 2007).

340. *Id.* at 128–29.

341. *See id.*; *see also* United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 421 (1945).

342. *See* Waller, *supra* note 339, at 129; *see also Alcoa*, 148 F.2d at 421.

343. *See* Waller, *supra* note 339, at 121, 129; *see also Alcoa*, 148 F.2d at 421 ("[T]he Supreme Court . . . referred the appeal to this court under [15 U.S.C. § 29.]"); Am. Tobacco Co. v. United States, 328 U.S. 781, 811–12 (1946).

344. *See* Waller, *supra* note 339, at 129.

345. *See Am. Tobacco*, 328 U.S. at 811–13.

346. *See id.*

347. *See Alcoa*, 148 F.2d at 429; *Am. Tobacco*, 328 U.S. at 785, 811; United States v. Paramount Pictures, Inc., 334 U.S. 131, 142–43 (1948) (citing United States v. Masonite Corp.,

enterprise control *all* of the competition that restrains its ability to raise prices.[348]

Judge Hand, for example, found that Alcoa had a "monopoly" on the domestic "aluminum ingot" market because it made and sold or fabricated over 90% of the nation's supply of virgin aluminum in the five years before the Government filed suit.[349] Alcoa had expressly argued that, whatever its size may suggest, it could not be deemed a monopoly because its prices were restrained by competition from "a practically unlimited supply" of imported aluminum, from substitute metals, and from new producers who might be attracted into the market by high prices.[350] Judge Hand, however, summarily rejected this argument—not because the price competition Alcoa faced was ineffective; indeed, he found that Alcoa had "at all times" faced competition that applied a "ceiling" on Alcoa's prices—but because a monopoly always faced these types of "limits to [its] power."[351] Even "when a single producer occupies the whole market[,]" the Judge explained, "[its] hold will depend upon [its] moderation in exerting [its] immediate power."[352] That fact would not make that producer any less of a monopoly, however, and so it was with Alcoa. Its control of over 90% of the nation's virgin aluminum supply gave the company, within the normal limits imposed by substitute products and the risk of potential entrants, a substantially "complete and exclusive hold" on actual competition within its field—and that was sufficient to make it a monopoly.[353]

Similarly, in *American Tobacco*, the Court affirmed a jury finding that the Big Three cigarette manufacturers—American, Reynolds, and Liggett, acting in conspiracy with one another—had acquired a "substantial monopoly" over the "domestic field of cigarettes" by combining between 68% and 90% of cigarette sales in the decade before trial.[354] The Court noted that the Big Three—which sold over 90% of domestic cigarettes in 1931—had lost nearly ten percentage points of market share immediately after implementing a

316 U.S. 265, 275 (1942), and United States v. U.S. Gypsum Co., 333 U.S. 364, 401–02 (1948)). *See also* Associated Press v. United States, 326 U.S. 1, 17 n.17 (1945) ("Most monopolies, like most patents, give control over only some means of production for which there is a substitute; the possessor enjoys an advantage over his competitors, but he can seldom shut them out altogether; his monopoly is measured by the handicap he can impose . . . . And yet that advantage alone may make a monopoly unlawful.") (quoting United States v. Associated Press, 52 F. Supp. 362, 371 (1943) (Hand, J.)).

348. *See Alcoa*, 148 F.2d at 429; *Am. Tobacco*, 328 U.S. at 813–14.
349. *See Alcoa*, 148 F.2d at 429.
350. *Id.* at 426.
351. *Id.* at 424–26.
352. *Id.* at 426.
353. *Id.* at 432.
354. Am. Tobacco Co. v. United States, 328 U.S. 781, 797–98 (1946).

simultaneous 7% price increase in June of that year (raising wholesale prices from $6.40 to $6.85 per thousand cigarettes).[355] Not only that, but the Court also found that independent capacity had poured into the production of so-called "ten-cent" cigarettes—a cheaper-grade substitute to the Big Three's burley-tobacco cigarettes—in response to the price hike, expanding the discount producers' share of total cigarette sales from 0.28% to 22.7% within sixteen months.[356]

Thrown on the back-foot by the ten-cent producers, the Big Three quickly reversed course. In early 1933, they cut the wholesale price of their leading brands to $5.50 per thousand cigarettes—some 14% under the pre-hike level of $6.40 per thousand.[357] To sell at this price, American and Reynolds had to move Lucky Strikes and Camels at a loss, while Liggett was forced to "curtail all of its normal business activities and cut its advertising to the bone."[358] Ultimately, the Big Three's price war on the "ten-cent" brands was victorious—the upstarts' market share fell and many soon "pass[ed] out of the picture"—but it was a pyrrhic victory.[359] It took the Big Three until 1940 to raise their wholesale price back to 1931 levels, and they hemorrhaged market share throughout the decade.[360] By 1939, the Big Three had lost nearly a third of their market share, apparently for good, leaving them with only 68% of American cigarette production. These facts, however, did not dissuade the Court from finding that the Big Three possessed a monopoly.[361]

"To support the verdicts" of monopolization in the case, the Court emphasized, "it was not necessary to show" that the Big Three had the "power . . . to exclude *all* competitors," only that they had the power to exclude competitors from "any *part* of the trade or commerce among the several States."[362] The Court was satisfied that the Big Three possessed such power based on the following facts: (1) that, between 1931 and 1939, the Big Three "accounted at all times for more than 68%, and usually for more than 75%, of the national production" of cigarettes, and for "over 80%" of cigarettes of "comparable-grade" to the burley-tobacco cigarettes sold by the Big Three; (2) that, during the same period, the smallest of the Big Three "at all times showed over twice the production of the largest

355. *Id.* at 805.
356. *Id.* at 806–08.
357. *Id.* at 806.
358. *Id.* at 807.
359. *Id.*
360. *Id.*
361. *Id.* at 815.
362. *Id.* at 789 (emphasis added).

outsider"; and, finally, (3) that, in 1939, the Big Three possessed a "net worth" of $551 million and "net annual earnings" of $75 million.[363]

"[C]omparative size on this great scale," the Court said, "inevitably increased the power of [the Big Three] to dominate all phases of their industry."[364] In particular, it enabled them to expend "tremendous" sums on national advertising, large inventories of tobacco leaf, and other "offensive and defensive weapon[s] against new competition."[365] Against this background, the Court found that the Big Three's ultimate victory over the "ten-cent" brands—even though it came at great cost, and even though it showed that the Big Three were vulnerable to price rivalry from substitute products and potential competitors—was evidence that they had the power to substantially "control and dominate" the "field of cigarettes."[366] That was sufficient to give them a "substantial monopoly."[367]

Second, the Court held that a monopoly consists in possessing the required power, not in exercising it.[368] The "material consideration in determining whether a monopoly exists," the Court repeatedly emphasized, is whether the requisite power to control competition "exists," not whether "prices are [actually] raised" or "competition actually is excluded."[369]

In *Alcoa*, the company argued that it was not a "monopoly within the meaning of [the Sherman Act]" because it did not "extract from the consumer more than a 'fair' profit."[370] Judge Hand agreed that Alcoa's annual profit rate—averaging 10% over invested capital during its half-century of existence—"could hardly be considered extortionate."[371] However, he decided "the whole issue [of profits] was irrelevant" under the Sherman Act.[372] "Congress did not condone 'good trusts' and condemn 'bad' ones," he explained, "it forbad all."[373] Moreover, questions such as whether Alcoa's profit rate was "fair" or its prices could have been lower, he said, required determinations that "courts are unable to provide."[374]

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363. *Id.* at 795–97.
364. *Id.* at 796.
365. *Id.* at 797.
366. *Id.* at 785, 796, 804–05.
367. *Id.* at 797.
368. *Id.* at 809.
369. *Id.* at 811; *see also* United States v. Paramount Pictures, Inc., 334 U.S. 131, 173 (1948); United States v. Griffith, 334 U.S. 100, 107 (1948).
370. United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 427 (1945).
371. *Id.* at 426–27.
372. *Id.* at 427.
373. *Id.*
374. *Id.*

This was not a technical point. It was settled law at the time—ever since the Court decided *International Harvester Co. v. Kentucky* in 1914—that antitrust statutes which prohibit combinations based on whether the prices they set are higher or lower than some "hypothetical" value that might prevail in some "imaginary" competitive market "offer[] no standard of conduct that it is possible to know[,]" and are therefore unconstitutional.[375] After *Kentucky* was decided, the Court consistently interpreted Section 1 of the Sherman Act so that it "deal[t] with the actual," and did not peg the illegality of conduct to a comparison of actual prices with "an imaginary condition other than the facts."[376] In *Alcoa*, Judge Hand effectively extended this reasoning to the definition of monopoly under Section 2 of the Act.[377]

Following Judge Hand's lead, none of the Supreme Court decisions that followed *Alcoa* in the 1940s took the issue of whether prices have been raised, or could be raised, into account in determining whether a defendant possessed a monopoly. Instead, the analysis in post-*Alcoa* decisions focused solely on "the existence of power to exclude competition when it is desired to do so."[378] For example, in *Griffith* and *Schine Theatres*—and, indeed, even in the pre-*Alcoa* case of *Crescent Amusement*—the Court held that the defendants possessed monopolies simply because they owned or controlled all of the movie theaters in certain towns.[379] Likewise, in *Mandeville Island Farms*, the Court found that the defendants—a conspiracy of three sugar refiners—had a monopoly on sugar-beet seeds because they controlled the whole supply of such seeds available to farmers in Northern California, and a monopsony on sugar beets because they were "the only practical market for beets grown in [the same area]."[380] None of these cases analyzed whether the monopoly actually raised or reduced prices, except for *Schine Theatres*—which noted that the defendant, a movie theater chain, had a habit of cutting ticket prices.[381] That did not save it from

375. Int'l Harvester Co. of Am. v. Kentucky, 234 U.S. 216, 221–23 (1914).

376. *Id.* at 223; *see also* United States v. L. Cohen Grocery Co., 255 U.S. 81, 90 (1921); Cline v. Frink Dairy Co., 274 U.S. 446, 454 (1927).

377. *See* United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 427 (1945) (citing United States v. Corn Prods. Refin. Co., 234 F. 964, 1014, 1015 (1916)).

378. United States v. Griffith, 334 U.S. 100, 107 (1948).

379. *See Griffith*, 334 U.S. at 106–09; *see also* United States v. Crescent Amusement Co., 323 U.S. 173, 178–79, 183–84 (1944); Schine Chain Theatres v. United States, 334 U.S. 110, 117–18 (1948), *overruled by* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984).

380. Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219, 222–23, 239–40 (1948).

381. *Schine Theatres*, 334 U.S. at 120–21.

constituting a monopoly in the towns where it owned or controlled all the theaters, however.

Third, and finally, the Court established that monopoly is a functional condition. If a combination has gained "effective market control" in an appreciable part of interstate commerce,[382] the Court held, then the "form of the combination[,]" the specific intent behind it, and the "particular means [it] used" to acquire or retain its monopoly were immaterial.[383] Where a single firm possessed exclusive control of a market without direct competitors—as in *Alcoa*, *Griffith*, or *Paramount*—that firm was held to possess a monopoly regardless of how or why it acquired that control.[384] Correspondingly, where a group of firms wielded the power to exclude competition in their field "collectively" by engaging in parallel, mutually beneficial conduct—as in *American Tobacco* and *Mandeville Island Farms*—a monopoly was held to exist just as if the group were a single firm.[385]

As the Court explained in *Griffith*, "[a]nyone who owns and operates the single theatre in a town, or who acquires the exclusive right to exhibit a film, has a monopoly in the popular sense."[386] While a defendant's mere possession of such a monopoly "[would not] usually . . . violate Section 2 of the Sherman Act," the Court made clear that it was still a legally cognizable monopoly under the antitrust laws—holding that such a defendant *would* violate the Sherman Act if they took action to "acquire," maintain," or "expand his monopoly[.]"[387] To render this point in sharper relief, the Court's decision in *Paramount* directly instructed the district judge that, on remand, the possession of exclusive control over the movie theaters in any single town should be considered a "monopoly" for the purposes of deciding monopoly-leveraging claims and shaping appropriate relief—*regardless* of whether said control was "unlawfully acquired" or was merely the result of "the inertness of competitors, their lack of financial ability to build theaters[,]" or even "the preference of the public for the best-equipped theaters."[388]

382. *See Griffith*, 334 U.S. at 107 (citing *Alcoa*, 148 F.2d at 416, 428–29); United States v. Columbia Steel Co., 334 U.S. 495, 525 (1948) (citing *Griffith*, 334 U.S. at 107).

383. *See* Am. Tobacco Co. v. United States, 328 U.S. 781, 809, 811 (1946); United States v. Paramount Pictures, Inc., 334 U.S. 131, 174 (1948); *Griffith*, 334 U.S. at 107.

384. *See, e.g.*, *Griffith*, 334 U.S. at 107.

385. *See Am. Tobacco*, 328 U.S. at 810; Rostow I, *supra* note 2, at 762–63.

386. *Griffith*, 334 U.S. at 106.

387. *Id.*

388. *Paramount Pictures*, 334 U.S. at 168–69.

2. What Monopoly Meant to the Supreme Court Before the New Deal

By adopting this conception of "monopoly" focused on the possession of exclusive power or control, the New Deal Court of the 1940s broke from the understanding of "monopoly" that had prevailed in antitrust jurisprudence since *Standard Oil*—and harkened back to earlier Sherman Act jurisprudence. As the legal scholar Eugene Rostow put it in 1949, the Court effectively "discarded one set of its ancestors in favor of another."[389]

Three decades before *Alcoa*, the Court's landmark decision in *Standard Oil* subsumed the concept of "monopoly" within the common-law concept of "restraint of trade."[390] For the purposes of the Sherman Act, the *Standard Oil* majority said, "monopoly and the acts which produced the same result as monopoly" were "synonymous" with the types of combinations and actions that were prohibited as "restraints of trade" under the common law.[391] Since the common law did not prohibit the acquisition of a "monopoly in the concrete," the Court reasoned, it followed that simply obtaining unified control over a product did not constitute "monopolizing" or "restraining trade" in violation of the Sherman Act. Rather, for a combination with such unified control to rise to the level of a "monopoly" under the law, it had to demonstrate some additional "undue" or "injurious" quality.[392]

In general, the *Standard Oil* majority held that an enterprise could constitute a monopoly-*qua*-restraint-of-trade if a court determines that the enterprise is "*unreasonably* restrictive of competitive conditions."[393] Beyond that, an enterprise—regardless of what it is "in the concrete"—could only be a "monopoly" or have a "monopolistic tendency" prohibited under the Sherman Act if: (1) it was created "with the intent to do wrong to the general public [or] limit the right of individuals," rather than "the legitimate purpose of reasonably forwarding personal interest and developing trade"; and (2) it is likely to result in one of three "evils" that supposedly "led to the public outcry against monopolies"—higher prices, lower production, or deterioration in the quality of the monopolized product.[394] Essentially, in *Standard Oil*'s telling, the existence of a monopoly turned, not on the power or control a person or group possessed over the

389. Rostow I, *supra* note 2, at 746.
390. Standard Oil Co. v. United States, 221 U.S. 1, 61 (1911).
391. *Id.*
392. *Id.* at 56, 60–62.
393. *Id.* at 58 (emphasis added).
394. *Id.* at 52, 58.

market, but on whether that power was reasonably justified (in the judgment of a court), whether it was legitimately obtained (also in the judgment of a court), and what consequences it has had, or might in the future have, for consumers (again, in the judgment of a court).

After the First World War, this legalistic conception of monopoly embraced in *Standard Oil* offered a convenient vehicle for a reactionary bench to read its "big business philosophy" into the Sherman Act.[395] In a trio of monopolization cases over the 1920s—*United Shoe Machinery*,[396] *U.S. Steel*,[397] and *International Harvester*[398]—the Court developed ideas of "monopolizing" and "monopoly" that hinged almost exclusively on the intentions and abuses of the monopolist rather than its power.[399]

First, in 1918, the Court examined the United Shoe Machinery Company. By that year, United Shoe had sold all or nearly all of the machinery used to bottom shoes in America for the better part of two decades.[400] Nonetheless, the Court's new majority held that United Shoe had not "monopolize[d]" any part of the shoemaking trade, resting its decision on the grounds that United Shoe had obtained its "magnitude" through mergers and acquisitions motivated by the pursuit of "greater economies" rather than an "avowal . . . of monopoly," and had refrained from using its power "oppressively" against customers.[401]

Similarly, by the time the Court examined the U.S. Steel Corporation in 1920, U.S. Steel had been "greater in size and productive power than any of its competitors"[402] in the steel industry—and had possessed the "effective power" to "control and restrain competition"—for nearly twenty years,[403] ever since its formation in 1901 as a J.P. Morgan-financed roll-up of between 80% and 95% of the nation's steel capacity. Since U.S. Steel had not used "brutal" methods to "drive others from the field," however, and had employed

395. Standard Oil Co. v. United States (*Standard Stations*), 337 U.S. 293, 315 (1949) (Douglas, J., dissenting) ("The economic theories which the Court has read into the Anti-Trust Laws have favored rather than discouraged monopoly. As a result of the big business philosophy underlying *United States* v. *United Shoe Machinery Co.*, *United States* v. *United States Steel Corp.*, [and] *United States* v. *International Harvester Co.*, big business has become bigger and bigger. Monopoly has flourished. Cartels have increased their hold on the nation. The trusts wax strong. There is less and less place for the independent.").

396. United States v. United Shoe Mach. Co. of N.J., 247 U.S. 32 (1918).

397. United States v. U.S. Steel Corp., 251 U.S. 417 (1920).

398. United States v. Int'l Harvester Co., 274 U.S. 693 (1927).

399. Rostow I, *supra* note 2, at 758–61.

400. *United Shoe*, 247 U.S. at 38–39, 49.

401. *Id.* at 37, 43, 56, 66–67

402. United States v. U.S. Steel Corp., 251 U.S. 417, 445 (1920).

403. *Id.* at 464.

"persuasion" in the form of "pools, associations, [and] trade meetings" to control the prices of its competitors rather than sheer compulsion, the Court's majority resolved that "the power attained" by U.S. Steel did not make it a monopoly.[404]

When the Court finally decided *International Harvester* in 1927, this intentions-and-abuses test for monopoly reached its apogee. In that decision, the Court explicitly stated that "the law . . . does not make the mere size of a corporation, however impressive, or the existence of unexerted power on its part, an offense[.]"[405] Rather, for a corporation to constitute a monopoly in restraint of trade, the Court emphasized, it must "exercise" its power, either to "eliminate competition" through "unlawful conduct," or to "dominate [its] industry by the *compulsory* regulation of prices."[406] To underscore the point that a monopoly must actively exercise its power through "overt [bad] acts," the Court specifically added the proviso that "[whether] competitors may see proper, in the exercise of their own judgment, to follow the prices [of a dominant firm] does not establish *any* suppression of competition or show *any* sinister domination."[407]

By consigning the meaning of "monopoly" under the Sherman Act to the bounds of what a common-law court, in its discretion, might have deemed an "unreasonable" restraint of trade, *Standard Oil* and its progeny effectively unmoored the concept from its ordinary sense. In the words of the Government's argument in *U.S. Steel*, it made the Sherman Act's prohibitions turn, not on whether "a combination prevents the existence of *effective competition* or constitutes a *virtual monopoly*," but on whether a judge decides that the combination's "monopoly would not be, on the whole, a better policy than competition."[408] None of the Court's earlier decisions conceived of monopoly in this *ad hoc*, policy-driven way. Quite the opposite, they read the Sherman Act's plain terms to reach "*all* monopolies [and] attempt[s] to monopolize '*any* part' of [interstate] trade or commerce."[409]

In its first case interpreting the Sherman Act, *E.C. Knight*, the Court defined "monopolizing" under Section 2 of the Act to include

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404. *Id.* at 444–45, 455.

405. United States v. Int'l Harvester Co., 274 U.S. 693, 708 (1927).

406. *Id.* at 689, 708 (emphasis added).

407. *Id.* at 708–09 (emphasis added); United States v. U.S. Steel Corp., 251 U.S. 417, 451 (1920).

408. Argument for Appellant at 427, *U.S. Steel*, 251 U.S. 417 (preceding opinion in U.S. Reports).

409. *See* Standard Oil Co. v. United States, 221 U.S. 1, 94–95 (1911) (Harlan, J., concurring in part and dissenting in part) (collecting cases).

"engrossing . . . and cover[] controlling the market by contracts securing the advantage of selling alone or exclusively all, or some considerable portion, of a particular kind of merchandise or commodity[.]"[410] The following year, in *Pearsall*, the Court identified a positive example of such a monopoly—noting that a challenged "consolidation" of two railroad companies operating the only "parallel and competing lines across the continent . . . between the Great Lakes and the Pacific" would "unavoidably result in . . . a monopoly of all traffic in the northern half of the state of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific[.]"[411] A decade later in *Northern Securities*, the Court agreed with the Government's contention that a subsequent roll-up of the same two transcontinental railroad systems together with a third system serving the Midwest into a holding company did, in fact, "establish" a "monopoly" of the "commerce formerly carried on by the [three] systems as independent competitors[.]"[412]

Summing up the meaning of "monopoly" as the term was used "by modern legislators and judges" at the time, the Government's argument in *Northern Securities* said it referred to "the combining or bringing together, in the hands of one person or set of persons, of the control, or the *power* of control, over a particular business or employment, so that competition therein may be suppressed."[413] A

410. United States v. E.C. Knight Co., 156 U.S. 1, 10 (1895). Notably, this definition of the verb "to monopolize" was closely aligned with the only definition of the verb cited during the floor debates on the Sherman Act, which was brought up by Senator Edmunds in response to a question by Senator Kenna as to whether Section 2 of the Sherman Act would "make [a] man a culprit" if he gains a monopoly "by virtue of his superior skill." 21 CONG. REC. 3151–52 (1890) (statements of Sen. Kenna and Sen. Edmunds). In providing his final answer to Senator Kenna's queries, Senator Edmunds said as follows:

> I have only to say . . . that this subject was not lightly considered in the committee, and that we studied it with whatever little ability we had, and the best answer I can make to both my friends is to read from Webster's Dictionary the definition of the verb "to monopolize": 1. To purchase or obtain possession of the whole of, as a commodity or goods in market, with the view to appropriate or control the exclusive sale of; as, to monopolize sugar or tea. Like the sugar trust. One man, if he had capital enough, could do it just as well as two. 2. To engross or obtain by any means the exclusive right of, especially the right of trading to any place, or with any country or district; as, to monopolize the India or Levant trade . . . . [W]e were not blind to the very suggestions which have been made, and we thought we had done the right thing in providing, in the very phrase we did, that if one person instead of two, by a combination, of one person alone, as we have heard about the wheat market in Chicago, for instance, did it, it was just as offensive and injurious to the public interest as if two had combined to do it.

Id. at 3152; *see also* Lande & Zerbe, *supra* note 71, at 507–08.

411. Pearsall v. Great N. R. Co., 161 U.S. 646, 674 (1896); N. Sec. Co. v. United States, 193 U.S. 197, 320, 330 (1904).

412. *N. Sec. Co.*, 193 U.S. at 322.

413. Argument for Appellee at 446, *N. Sec. Co.*, 193 U.S. 197, 24 S. Ct. 436 (1904) (preceding opinion in Supreme Court Reporter). *See also* Herriman v. Menzies, 115 Cal. 16, 20–21

year later, in *National Cotton Oil*, the Court echoed the Government's argument, stating that the "dominant thought" of "the idea of monopoly" at the time was "'the notion of exclusiveness or unity;' in other words, the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action."[414]

3. Which Concept of Monopoly Won Out?

Ultimately, these two dichotomous understandings of monopoly in the Supreme Court's pre-1950 jurisprudence—a fairly natural understanding based on power, on the one hand, and a legalistic understanding based on how and why power is acquired and used, on the other—came to a head in *Alcoa*. The Government argued that Alcoa's position as "the single producer of 'virgin' ingot in the United States" for over twenty-eight years was enough, "without more," to make it "an unlawful monopoly."[415] Alcoa asserted the opposite—that being the sole producer of "'virgin' ingot in this country did not, and does not, give [the Company] a monopoly of the market," and that even if it did, the Company was not a monopoly of the kind covered by the Sherman Act because it had no "specific intent" to "monopolize," and had acquired its position through "skill, energy[,] and initiative," not "unlawful means[.]"[416]

Judge Hand sided with the Government. "Alcoa," he decided, "meant to keep, and did keep," the substantially "complete and exclusive hold" on the aluminum ingot market with which it started after the expiration of its aluminum patent in 1909.[417] "That was to 'monopolize' that market, however innocently it otherwise proceeded."[418] To read the word to require more than that, he said, would be to "emasculate the Act," and "permit just such consolidations as it was designed to prevent."[419]

Over the rest of the 1940s, the Supreme Court methodically built on Judge Hand's landmark opinion. In a series of forceful decisions, it provided a comprehensive "restatement of the conception of monopoly [under the Sherman Act], giving the law new and far-

(1896) ("A monopoly exists where all, or nearly all, of an article of trade or commerce within a community or district is brought within the hands of one man or set of men, as to practically bring the handling or production of the commodity or thing within such single control to the exclusion of competition or free traffic therein.").

414. Nat'l Cotton Oil Co. v. Texas, 197 U.S. 115, 129 (1905).

415. United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 423 (2d. Cir. 1945).

416. *Id.* at 423, 428–29.

417. *Id.* at 432.

418. *Id.*

419. *Id.* at 431.

reaching scope."[420] The intimations of *U.S. Steel* and *International Harvester* that "the law does not make mere size an offense" were not only disapproved, but deemed overridden by the Court's 1932 decision in *United States v. Swift & Company*, which stated that "mere size" *can* be an offense where it is "magnified to the point at which it amounts to a monopoly[.]"[421] That ultimate "point"—the point at which a monopoly exists—was then given independent and consistent definition in case after case. Whatever the word may have signified before, by 1950 the Court had hammered home a distinct factual definition for "monopoly" under the Sherman Act: the possession by a person or group of the power to exclude competition from an appreciable part of interstate commerce to a substantial extent.

This definition represented the culmination of a holistic repudiation, not only of the "reasoning and spirit" of *United Shoe*, *U.S. Steel*, and *International Harvester*, but of "the basic attitudes which prevailed [in the Court's jurisprudence] during the [1920s]."[422] In a series of cases starting in the later years of the New Deal, the Supreme Court had gradually cabined the seemingly open-ended "reasonableness" framework announced in *Standard Oil* within the "recognized purpose of the Sherman [Act] itself."[423] When Congress "took over" the "common law concept of illegal restraints of trade" in Section 1 of the Act, the Court explained in *Apex Hosiery*, it did so as a means to a specific end: the "preservation of business competition" as a bulwark against the various "evils" that flowed from the "concentrated commercial power of 'trusts' and 'combinations.'"[424] The term "restraint of trade" was chosen because it had a "technical and well-understood meaning in the law."[425] It referred to contracts that were illegal *per se* at common law because of their tendency to subject the market to private control and manipulation, a category which included contracts to restrict or suppress competition, divide territories, fix prices, or otherwise deprive the public of "the advantages which accrue to them from free competition[.]"[426] Legislators, the Court said, adapted this concept to their end by

420. Eugene V. Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567, 580 (1947) [hereinafter Rostow II].

421. United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 430 (2d. Cir. 1945) (citing United States v. Swift & Co., 286 U.S. 106, 116 (1932)).

422. Rostow I, *supra* note 2, at 746.

423. United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927); *see* Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457 (1941).

424. *Apex Hosiery*, 310 U.S. at 490 n.11, 497–98.

425. *Id.* at 489 n.10.

426. *Id.* at 497.

"extend[ing]" its condemnation beyond contracts—to combinations and conspiracies that had comparable "effects on the competitive system" as restraints deemed illegal at common law "whereever [sic] they occur[.]"[427] Accordingly, while *Apex Hosiery* reaffirmed *Standard Oil* in "grounding the 'rule of reason' upon the analogy [to] the common law[,]" it clarified that this analogy was to "the sense" of the term "restraint of trade" at common law as a "restriction or suppression of commercial competition."[428]

Thus reinterpreted by the New Deal Court, Section 1 of the Sherman Act was neither an open-ended delegation nor a mere codification of the "common law prohibitions and sanctions" of the nineteenth century.[429] It was a directive to "suppress and penalize restraints on the competitive system"[430] effected by "any combination . . . or conspiracy, as well as by contract or agreement[.]"[431] Based on that directive, combinations that actually "result[ed]" in "the elimination of [a] form of competition"[432] among businesses were declared unlawful under the Sherman Act without regard for "the reasonableness of the methods"[433] used to "accomplish [their] unlawful object[.]"[434] Simultaneously, the proper relationship between prices and competition was clarified. Price rivalry, the Court said, was "one form of competition."[435] Since agreements to fix prices necessarily eliminated that form of competition, they were illegal *per se*; conversely, where price rivalry had disappeared, its absence could be evidence of illegal restraint.[436] But prices in and of themselves—whether they are raised or lowered, reasonable or unreasonable, healthy or destructive—had no independent significance.[437] For the Sherman Act did not simply prohibit "the infliction of a particular type of public injury[,]" the Court said.[438] It prohibited all

427. *Id.* at 498.
428. *Id.* at 500.
429. *See, e.g.*, *id.* at 494–95; United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 467–68 (1941).
430. *Apex Hosiery*, 310 U.S. at 495.
431. *Id.* at 498.
432. *Socony-Vacuum*, 310 U.S. at 213.
433. *Fashion Originators'*, 312 U.S. at 468.
434. *Id.*; *see also* Associated Press v. United States, 326 U.S. 1, 12–13 (1945); Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 450, 458, 461 (1940); Int'l Salt Co. v. United States, 332 U.S. 392, 396 (1947); William Goldman Theatres, Inc. v. Loew's, Inc., 150 F.2d 738, 743 (3d Cir. 1945).
435. *Socony-Vacuum*, 310 U.S. at 213.
436. *See id.* at 213, 218; United States v. Line Material Co., 333 U.S. 287, 309 (1948).
437. *Socony-Vacuum*, 310 U.S. at 224 n.59; *Fashion Originators'*, 312 U.S. at 468; *Associated Press*, 326 U.S. at 12–14; Apex Hosiery Co. v. Leader, 310 U.S. 469, 497, 499, 502 (1940).
438. *Ethyl Gasoline*, 309 U.S. at 458.

"monopolies, contracts, and combinations"[439] that "directly interfere[d]"[440] with the "free play of competitive forces."[441] And Congress did not authorize judges to "create[] . . . any special exception[s]"[442] to that prohibition based on their own choices "between competing business and economic theories[,]"[443] or their own assessment that "some good result"[444] might come from "restraints [on] free competition in business[.]"[445]

Against this backdrop, by 1945, the dissent in *Associated Press* felt compelled to ask, "[i]s not this to reestablish the harsh and sweeping effect attributed to the [Sherman Act] in [*Missouri Freight Association* and *Joint Traffic Association*], which was abandoned more than thirty years ago . . . ?"[446] In essence, it was.[447] And a return to a concept of monopoly akin to that which prevailed in the Supreme Court's pre-*Standard Oil* jurisprudence necessarily followed. A "monopoly under [Section] 2," after all, "is a species of restraint of trade under [Section] 1."[448] Since the Court had held that contracts, combinations, and conspiracies which "directly interfere[d]"[449] with competition in the market were "in restraint of trade" regardless of their reasonableness, the Court's understanding of "monopoly" had to follow suit. By definition, the fact that a person or group possesses exclusive control—or power of control—over a line of business entails a near-complete restriction or suppression of competition.[450] For the Court to have maintained that *more* than such restriction was required to demonstrate a monopoly—which is supposed to be a restraint of trade in and of itself—

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439. *Associated Press*, 326 U.S. at 14 n.12; *see also Apex Hosiery*, 310 U.S. at 519 (Hughes, C.J., dissenting) ("[T]he original design of the Act to suppress trusts and monopolies created by contract or combination in the form of trust[.]").

440. *Socony-Vacuum*, 310 U.S. at 221.

441. United States v. Se. Underwriters Ass'n, 322 U.S. 533, 536 (1944).

442. *Socony-Vacuum*, 310 U.S. at 222.

443. United States v. Crescent Amusement Co., 323 U.S. 173, 187 (1944).

444. Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912).

445. Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940).

446. Associated Press v. United States, 326 U.S. 1, 37 (1945) (Roberts, J. dissenting in part) (internal citations omitted).

447. For comparison, this is how the Government's argument in the original *United States v. American Tobacco* described the governing interpretation of Section 1 of the Sherman Act before *Standard Oil*: "Contracts, combinations, or conspiracies which give power materially to restrain commerce and indicate a dangerous probability of its exercise and those which necessarily tend to monopoly are unlawful without more." Argument for Appellant at 116, United States v. Am. Tobacco Co., 221 U.S. 106 (1911) (preceding opinion in U.S. Reports).

448. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940); William Goldman Theatres, Inc. v. Loew's, Inc., 150 F.2d 738, 740 (3d Cir. 1945).

449. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 234 (1899).

450. *Cf.* United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 428 (2d. Cir. 1945) ("[T]here can be no doubt that the vice of restrictive contracts and of monopoly is really one, it is the denial to commerce of the supposed protection of competition.").

when *only* such restriction was required to demonstrate other restraints of trade, would have been a contradiction in terms.[451]

Luckily, the Court did not so maintain. Over the course of its opinions in *Alcoa*, *American Tobacco*, *Griffith*, *Paramount*, and *Schine Theaters*, among others, it discarded all the pieties of the old order. The paradigm shift was decisive. By 1950, when the trial judge presiding in *Alcoa* on remand reviewed "the change in substantive emphasis from abuse to power" declared in "the[se] recent authoritative precedents," he flatly concluded that *International Harvester* and its companion cases "must be relegated to a now discarded stage of legal development."[452]

4. Monopoly in the Celler-Kefauver Act

At long last, we return to Section 7 itself. The foregoing discussion demonstrates that "monopoly," as a discrete term, was given a definite construction by the Supreme Court shortly before the Celler-Kefauver Act was enacted. This was not an obscure development. Congress could have chosen a different word to say what it meant. It could have provided a statutory definition of monopoly if it wanted to. Indeed, since the words "tend to create a monopoly" in the original Section 7 were not, in themselves, modified by the Celler-Kefauver Act, there was an even easier way for Congress to avoid adopting the Supreme Court's definition—it could have simply made in-line amendments and left the phrase alone.[453] Congress did none of these things. It made a deliberate choice to amend and re-enact Section 7 *as a whole*. This is a straightforward case for the application of the Prior Construction Canon.[454] The definition of "monopoly" authoritatively fixed by the Supreme Court in *American Tobacco* and its progeny before 1950 should be presumed to have been incorporated into the Celler-Kefauver Act.

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451. *Id.*

452. United States v. Aluminum Co. of Am., 91 F. Supp. 333, 342 (S.D.N.Y. 1950).

453. That Congress knew how to do this is apparent from other targeted amendments to the Clayton Act it has enacted over the years. *See, e.g.*, The Hart–Scott–Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383; Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 6, 94 Stat. 1154, 1157–58 (codified at 15 U.S.C. § 18); *cf.* Whitfield v. United States, 543 U.S. 209, 216 (2005) ("Congress has included an express overt-act requirement in at least [twenty-two] other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so."); Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 176–77 (1994) (reasoning that, although "Congress knew how to impose aiding and abetting liability when it chose to do so," it did not use the words "aid" and "abet" in the statute at issue, and hence did not impose aiding and abetting liability).

454. SCALIA & GARNER, *supra* note 80, at 322.

But what if it were not so incorporated? The alternative would be to give "monopoly" in Section 7 either its ordinary meaning or its technical meaning in legal dictionaries. But those roads lead, in practically every detail, to the same place as following the Court's precedents. As noted above, every edition of Black's Law Dictionary published between 1910 and 1968 defined "monopoly" to encompass both: (1) "the exclusive right (or power) to carry on a particular business or trade, manufacture a particular article, or control the sale of the whole supply of a particular commodity"; and (2) "the ownership or control of so large a part of the market-supply or output of a given commodity as to stifle competition, restrict the freedom of commerce, and give the monopolist control over prices."[455] The gist of this definition is that a monopoly exists when a person or group has exclusive power to control a product. Such power, it says, can come from directly controlling the entire supply of that product—in which case it would exist by default—or from controlling a large enough portion of that supply so as to give the monopolist substantially comparable influence over the whole. This is just a longer way of saying that monopoly consists in having the power to exclude competition.

When the verb "to exclude" is used with an immaterial object like "competition," it means not only to "shut out" or expel that object, but also to "leave no room for [it]" and to "prevent [its] existence, occurrence, or use[.]"[456] If a person or group were to accumulate the power to shut out or prevent the existence, occurrence, or use of competition in a market, they would necessarily possess a monopoly under the requirements of Black's definition. Competition would be stifled because it would exist at their sufferance. The freedom of commerce would be restricted because it would be subjected to their permission. They would have control over prices—a form of competition—by default. Conversely, if a person or group were to directly control the whole supply of a product, they would necessarily "exclude" competition from commerce in that product by leaving no place for it.

The two definitions are also consistent in their particulars. Black's definition speaks in terms of exclusive power or control over a "*particular* business or trade," the manufacture of "a *particular* article," or the supply of "a *particular* commodity."[457] Likewise, the

455. *Monopoly*, BLACK'S LAW 1910, *supra* note 322, at 790; *Monopoly*, BLACK'S LAW 1933, *supra* note 322, at 1202; *Monopoly*, BLACK'S LAW DICTIONARY 1951, supra note 314, at 1158; *Monopoly*, BLACK'S LAW 1968, *supra* note 314, at 1158.

456. *See Exclude*, 3 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 382–83.

457. *Monopoly*, BLACK'S LAW 1910, *supra* note 322, at 790.

Court's decisions found monopolies based on the defendants' possession of exclusive power in the trade, manufacture, or sale of specific products—*e.g.*, aluminum ingot in *Alcoa*, burley-tobacco cigarettes in *American Tobacco*, local movie theaters in *Griffith* and *Schine Theaters*, and so forth—without regard for their power vis-à-vis substitutes. Moreover, Black's definition describes monopoly as a type of "power" or "control" without specifying how that power or control is created, how it is used, the form it takes, or the intentions of those who possess it. The Court's decisions agree that these things—methods and forms, specific intents, and whether power is exercised to evil ends—are irrelevant to determining whether a monopoly exists.

The fact that Black's definition refers to prices creates no daylight between its conception of monopoly and that of the New Deal Court—because it refers to "*control* over prices."[458] Having control over the price of a particular commodity does not necessarily entail having the power to raise that price for consumers. "Control," per the Oxford English Dictionary of 1933, denotes "the fact . . . of checking and directing action; the function or power of directing and regulating[.]"[459] Thus, a person or group that "directs" or "regulates" the prices charged by sellers of all or substantially all of a product's supply necessarily "controls" the price of that product. How they, in turn, use that control—and, indeed, whether they manage to use it profitably—are derivative questions that have no bearing on whether that person or group does, in fact, have the requisite control. "The unintelligent exercise of monopoly power," as the legal scholar Eugene Rostow remarked in 1949, "[is] no proof that it [does] not exist[.]"[460]

This distinction between the power to control prices and the power to raise them was amply illustrated in *American Tobacco*.[461] The defendants in that case—American, Reynolds, and Liggett—produced around 80% of the burley-tobacco cigarettes (then-known as "standard" cigarettes in the industry) consumed in America

458. *Id.* (emphasis added).

459. *See Control*, 2 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 927.

460. Rostow II, *supra* note 420, at 585. Consistent with this analysis, the Century Dictionary and Cyclopedia (1911) suggests control over prices entails being able to "manipulat[e] prices in the interest of the person or persons in control," not necessarily to raise them for consumers. *See Monopoly*, 6 THE CENTURY DICTIONARY AND CYCLOPEDIA, *supra* note 276, at 3843 (defining monopoly "in *polit. econ.*" as "control of the production, purchase, or sale of a commodity or service, so unified as to render possible the manipulation of prices in the interest of the person or persons in control. Monopoly does not necessarily imply the absolute control of the entire supply of a commodity or service; most frequently it consists merely in a dominant position which gives substantial price-making power.").

461. Am. Tobacco Co. v. United States, 328 U.S. 781 (1946).

every year between 1931 and 1939.[462] By following a scheme of price leadership and parallel conduct, they regulated the price of all the burley-tobacco cigarettes that they directly produced, and their power obliged the smaller manufacturers of comparable-grade cigarettes to follow their direction.[463] Notwithstanding this overwhelming control over industry prices—which extended beyond burley-tobacco cigarettes to other tobacco products—the Big Three still could not *raise* prices.

As the Court's opinion in *American Tobacco* recounted, when the Big Three initiated a 7% wholesale price hike on burley-tobacco cigarettes in 1931 (from $6.40 to $6.85 per thousand cigarettes), they promptly lost 10% of the market to new entrants producing cheaper-grade substitutes known as "10 cent" cigarettes.[464] By early 1933, the Big Three had been forced to reverse course.[465] They initiated a price reduction, cutting the wholesale price of "standard" cigarettes down to $5.50 per thousand (14% under the pre-hike level of $6.40 per thousand), and applied pressure on retailers to peg the consumer price of a "standard" cigarette pack to only $0.03 higher than a discount pack.[466] Together, these steps ultimately led to a strategic victory for the Big Three—many discounters soon "pass[ed] out of the picture" and the Big Three's control over the industry was reasserted—but not a pricing one.[467] The Big Three were unable to raise the wholesale price of burley-tobacco cigarettes back to 1931 levels until the 1940s.[468] In both directions, however—toward lower or higher prices—the Big Three controlled the price of substantially all burley-tobacco cigarettes produced in America.[469] Thus, they met Black's definition of a monopoly, just as they met the Court's definition in *American Tobacco*.[470]

As venerable as Black's Law Dictionary might be, sometimes it does not have the last word. In this case, however, Pope's Legal Definitions (1919), Wharton's Law Lexicon (1910), and Shumaker & Longsdorf's Cyclopedic Dictionary of Law (1901), all generally agree with its definition.[471] So do the authoritative English dictionaries of

462. *Id.* at 794.
463. *Id.* at 798, 806–08.
464. *Id.* at 795–96, 806.
465. *Id.* at 806–07.
466. *Id.* at 807–08.
467. *Id.* at 807.
468. *Id.*
469. *Id.* at 807–08.
470. *See id.* at 814.
471. Pope's Legal Definitions (1919) gives two primary definitions of monopoly. *Monopoly*, 2 BENJAMIN W. POPE, LEGAL DEFINITIONS 981 (1920). The first is drawn from a 1908 circuit

the era.[472] But Bouvier's Law Dictionary (1940) takes a contrarian approach. Where a monopoly is not "an institution or allowance by a grant from the sovereign power," Bouvier's Dictionary defines monopoly as "[t]he abuse of free commerce by which one or more individuals have procured the advantage of selling alone all of a particular kind of merchandise, to the detriment of the public[.]"[473] Interestingly, this same definition appears in every edition of Bouvier's Law Dictionary going back to its first—published in 1839.[474] Setting aside whatever questions this raises about how up-to-date Bouvier's definition was in 1950, it does echo key features of the Supreme Court's pre-New Deal conception of monopoly, which we may presume for the sake of argument had not been wholly discarded by the late 1940s. Specifically, Bouvier's definition suggests that some form of "abuse" must be involved, and that a "detriment to the public" beyond the fact that a person or group "have procured the advantage of selling alone all of a particular kind of merchandise" is necessary to constitute a monopoly.

While this divergence between the two legal dictionaries might suggest some ambiguity about the meaning of "monopoly" in the abstract, that ambiguity is readily resolved by the statutory context of Section 7. To begin with, reading the word "monopoly" in Section 7 to imply that, in addition to possessing exclusive power or control over a line of business, a monopoly must demonstrate some other

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court opinion by Judge Noyes, which was issued in the first monopolization suit brought against The American Tobacco Company. *Id.* According to that definition,

> [a] monopoly, in the modern sense, is created when, as a result of efforts to that end, previously competing businesses are so concentrated in the hands of a single person or corporation, or a few persons or corporations acting together, that they have power to practically control the prices of commodities and thus to practically suppress competition."

Id. The second definition is from an 1896 California Supreme Court decision, *Herriman v. Menzies*, which concerned a combination of longshoremen in San Francisco. *Id.* "A monopoly exists," Chief Justice Van Fleet wrote in that case,

> where all, or nearly all, of an article of trade or commerce within a community or district is brought within the hands of one man or set of men, as to practically bring the handling or production of the commodity or thing within such single control to the exclusion of competition or free traffic therein.

Id.

472. *See supra* note 321.

473. BOUVIER'S LAW DICTIONARY 815–16 (1940); BOUVIER'S LAW DICTIONARY 816–17 (1934). The 1928 edition of Bouvier's Law Dictionary also says that "monopoly" can refer to "any combination among merchants to raise the price of merchandise to the injury of the public." *Monopoly*, BOUVIER'S LAW DICTIONARY 815–16 (William Edward Baldwin, ed., Banks Law Publ'g Library ed. 1928). A similar definition is provided in Pope's Legal Definitions, which cites *Chi., Wilmington & Vermillion Coal Co. v. Illinois*, 114 Ill. App. 75, 107 (1904) for the proposition that "a combination of persons or corporations for the purpose of raising or controlling the prices of merchandise or any of the necessaries of life" is a monopoly. POPE, *supra* note 471, at 981. *See also* United States v. E.C. Knight Co., 156 U.S. 1, 10, 16 (1895).

474. *See also Monopoly*, 2 JOHN BOUVIER, A LAW DICTIONARY 148 (1839).

"abusive" or "detrimental" characteristic, is foreclosed by the statutory and jurisprudential history of the phrase in which the word is situated—"tend to create a monopoly." As explained above, that phrase was derived from a test of illegality for Section 1 of the Sherman Act developed in the Supreme Court's pre-*Standard Oil* jurisprudence.[475] In cases involving combinations that do not "restrain trade . . . by [their] necessary operation" or "result" in a "complete monopoly," the Court had held that a combination may still violate the Sherman Act if it "tended" to both (1) "create a monopoly" and (2) "deprive the public of the advantages that flow from free competition."[476] Although this test of illegality for the Sherman Act disappeared from the caselaw for over three decades after *Standard Oil*, it was formally restored to defining the scope of Section 1's prohibition in *Associated Press*.[477]

Thus, in defining the outer limits of liability under the Sherman Act, both in its pre-*Standard Oil* and post-*Associated Press* jurisprudence, the Court consistently held that a combination which "ha[s] not as yet resulted in restraint [of trade]"[478] must demonstrate *two* minimum tendencies to fall within the Act's prohibition: (1) a tendency to create a monopoly *and* (2) a tendency to harm the public. Yet when Congress drafted the Clayton Act in 1914 and the Celler-Kefauver Act in 1950, it consistently chose to borrow only the *first* element of that test—the tendency to create a monopoly—and to exclude the second element entirely.[479]

It would nullify this legislative choice for us to interpret the word "monopoly" to refer only to exclusive control or power that is obtained "abusively" or that causes some other "detriment to the public," as suggested by Bouvier's definition. In reviewing a merger under such an interpretation, a court applying Section 7 would not be able to determine the legality of a merger simply by evaluating whether it conduces to a course of action or behavior that leads toward exclusivity of control or power in a line of commerce or section of the country. The court would have to go further.

Since the monopoly to be avoided under Bouvier's definition is a monopoly that harms the public in some way *beyond* its exclusion

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475. *See supra* Part III.A.iii.

476. N. Sec. Co. v. United States, 193 U.S. 197, 332, 337 (1904); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 237–38 (1899) (quoting *E.C. Knight Co.*, 156 U.S. at 16).

477. Associated Press v. United States, 326 U.S. 1, 17 n.16 (1945) (quoting Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 463 (1941)).

478. *Id.* at 12.

479. Clayton Antitrust Act, ch. 323, §§ 2–3, 7, 38 Stat. 730, 731–32 (1914) (current version at 15 U.S.C. § 18); Celler-Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125, 1126 (1950) (codified at 15 U.S.C. § 18).

of competition, the court would also have to determine whether the merger will aid in bringing about a kind of competitive exclusion that is likely to result in public harms downstream from competition—such as price increases, output reductions, or quality deteriorations. Moreover, the court would have to examine whether the merger will conduce to "abusive" methods of competitive exclusion. But abuse is a relative concept. It shifts depending on the benchmark. Since Bouvier's definition makes competitive exclusion "monopolistic" only to the extent it leads to downstream public detriments, the court's benchmark for identifying "abusive" conduct that leads to monopoly would have to follow suit. If the merger conduces to actions or behaviors that lead to the exclusion of competitors but are unlikely to detriment—or, on some ultimate reckoning, might somehow benefit—the public in the court's judgment, then the court would be obliged to conclude that such actions or behaviors are not truly abusive.

Put more succinctly, the court would have to decide, not only whether the merger "tends to create a monopoly," but also whether it "tends . . . to deprive the public of the *advantages* that flow from free competition[.]"[480] Thus, adopting Bouvier's definition of monopoly—or any conception of the term that makes proscription under this prong turn on a finding of public harms downstream from competition—would read into the statute an element that Congress conspicuously excluded from Section 7. When Congress borrows terms from jurisprudence, it is presumed to know what it is doing.[481] Here, the statutory context confirms that it did.

In enacting the original Section 7 in 1914, Congress prohibited mergers based on three distinct effects. The first was "to lessen competition" between the merging parties. That effect was clear. It reached mergers that threatened to diminish the existing competition between acquiring and acquired firms. The second effect was "to restrain commerce in any section or community." This one was also straightforward. The phrase "restrain commerce" echoed Section 1 of the Sherman Act. Three years earlier, in *Standard Oil* and *American Tobacco*, the Supreme Court had held that a contract, combination, or conspiracy "restrained trade" under that Section if it "operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade[.]"[482] Thus, the second proscribed effect in the original Section 7 reached mergers whose effect "may be" to prejudice the public

480. *See N. Sec. Co.*, 193 U.S. at 332 (emphasis added).
481. Morissette v. United States, 342 U.S. 246, 362–63 (1952).
482. *See, e.g.*, United States v. Am. Tobacco Co., 221 U.S. 106, 179 (1911).

interest by unduly restricting competition or unduly obstructing trade "in any section or community."

When Congress followed this provision in the original Section 7 by proscribing a third effect—"tend[ing] to create a monopoly in any line of commerce"—it presumably did not intend to say the same thing twice.[483] As demonstrated above, however, that is exactly what reading the word "monopoly" according to Bouvier's definition would imply it did, because it would make evaluation of the latter effect turn on an identical assessment of the "public interest" as was outlined in *Standard Oil* and *American Tobacco*.

To be sure, in the Celler-Kefauver Act, Congress took out the proscribed effect of "restraining commerce," and left only the effects of "lessen[ing] competition" and "tend[ing] to create a monopoly." But that change reflected the shift that had occurred in the Court's interpretation of Sections 1 and 2 of the Sherman Act between 1914 and 1950. When Congress enacted the Clayton Act in 1914, the leading Sherman Act precedents were *Standard Oil* and *American Tobacco*. Those cases had replaced the framework developed for application of the Act in earlier caselaw with an open-ended "rule of reason" that turned, as explained above, on what courts determine to be "undue," "unreasonable," or "prejudicial to the public interest."[484] In that context, the second-enumerated effect in the original Section 7—"may . . . restrain commerce in any section or community"—added two significant restrictions on the discretion of the courts in applying the Sherman Act to corporate mergers.

First, the provision clarified that restraints of interstate commerce effected through corporate mergers are prohibited even if their scope is local or sectional rather than national. The Court had held as much in *W.W. Montague & Co. v. Lowry*,[485] but the introduction of the Rule of Reason in 1911 potentially gave the courts discretion to ignore such restraints if their effect was limited to specific communities or regions. The original Section 7 eliminated that discretion. Second, the provision established that a corporate merger is prohibited even if it has not actually restricted competition to an "undue" extent, as long as it *may* do so, and even if it has not actually "operated to prejudice the public interests,"[486] as long as it *may* so operate. This was, in essence, a codification of the holding of *Northern Securities*, the leading decision governing mergers and holding companies before 1911, which held that the "the mere

483. *See generally* discussion *supra* Part I.A.
484. *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 339 (1897).
485. 193 U.S. 38 (1904).
486. *Am. Tobacco*, 221 U.S. at 179.

existence" of the "power acquired by [a] holding company" to "extinguish competition" constitutes "a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect[.]"[487]

By the time Congress amended Section 7 in 1950, however, the original "restraining commerce" language had become superfluous. The Court had already affirmed that restraints of interstate commerce were prohibited by the Sherman Act even where they are relatively local in scope or concern only a small amount of interstate trade.[488] It had already held that mergers to monopoly—that is, to exclusive control or power without regard for reasonableness—were illegal *per se*.[489] The Court had also already established that exclusive control of a local or sectional market qualified as a monopoly under the Sherman Act, and that nationwide control is not required.[490]

Finally, the Court had clarified that, even where a merger does not result in a monopoly and is not accompanied by a specific intent to monopolize or restrain trade, it could still constitute an "unreasonable restraint of trade" under Section 1 of the Sherman Act if: (1) it "unreasonably lessens competition" in a relevant market by eliminating head-to-head rivalry that is "substantial" in light of "the strength of the remaining competition, . . . the probable development of the industry, consumer demands, and other characteristics of the market";[491] or (2) it "unreasonably restrict[s] the opportunities of competitors to market their product[s]" in light of "the nature of the market to be served" and the "leverage" which the merger "creates or makes possible" in the hands of the combined firm;[492] or (3) it otherwise "tend[s] to create a monopoly and to deprive the public of the advantages that flow from free competition."[493]

In this jurisprudential context, the Celler-Kefauver Amendment removed the Clayton Act's prohibition on mergers whose effect "may be . . . to restrain commerce in any section or community," the import of which had been subsumed into the Sherman Act by the Court. At the same time, the Amendment updated the Clayton Act's

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487. N. Sec. Co. v. United States, 193 U.S. 197, 327, 331 (1904).

488. *See* United States v. Yellow Cab Co., 332 U.S. 218, 226 (1947).

489. Am. Tobacco Co. v. United States, 328 U.S. 781, 811–14 (1946) (discussing United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416 (2d Cir. 1945)).

490. Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219, 238–42 (1948).

491. United States v. Columbia Steel Co., 334 U.S. 495, 508, 527 (1948).

492. *Id.* at 524.

493. Associated Press v. United States, 326 U.S. 1, 16 n.1 (1945); *Alcoa*, 148 F.2d at 428–29.

prohibition on mergers that "may . . . tend to create a monopoly" so that it reflected the Court's new sectional understanding of monopoly—extending its reach to mergers that may have the required effect "in any line of commerce *in any section of the country*[.]"[494] Thus, from the face of Section 7's text, it is clear that Congress acted deliberately in borrowing from, and responding to, the Court's evolving antitrust jurisprudence over the course of Section 7's history.

In sum, both the ordinary and technical meanings of "monopoly," as well as the statutory context in which the word is found, all lead to the conclusion that it means what the Court said it means in *American Tobacco*: "[T]he power . . . to exclude competition" from an "appreciable part of interstate commerce" to a "substantial extent."[495] Reading anything more into the word—a specific intent, or abusive methods, or public harms beyond the exclusion of competition—"makes nonsense of it."[496]

c. Conclusion

To summarize, the word "tend" in Section 7 means to conduce to an object in some degree or way. The word "create" means to bring an object about by a course of action or behavior. And the word "monopoly," according to both its ordinary and its legal usage at the time of the Celler-Kefauver Act's drafting, means the possession by one person or group of exclusive power or control over competition in a particular business or product. Taken altogether, the phrase "tend to create a monopoly" in Section 7 extends its prohibition to mergers whose effect "may be substantially" to conduce, in some degree or way, to a course of action or behavior that can eventually bring about a monopoly—a condition where a single person or group either: (1) controls all or nearly all trade in a particular business or product to the exclusion of competition; or (2) has the power to exclude such competition and exercise comparable control over trade when they desire to do so.

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494. Celler-Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125, 1126 (1950) (codified at 15 U.S.C. § 18).

495. *Cf.* Taniguchi v. Kan Pac. Saipan, Ltd., 566 U.S. 560, 572 (2012) ("In sum, both the ordinary and technical meanings of 'interpreter,' as well as the statutory context in which the word is found, lead to the conclusion that § 1920(6) does not apply to translators of written materials.").

496. *Alcoa*, 148 F.2d at 432.

iv. "In Any Line Of Commerce . . . In Any Section Of the Country"

Section 7 prohibits mergers that "may" produce the proscribed effects "in any line of commerce or in any activity affecting commerce in any section of the country."[497] This clause can be divided into three operative phrases. The first two ("in any line of commerce" and "in any activity affecting commerce") are prepositional phrases, which function adverbially to define "where" the proscribed "effect" of a merger "may" occur in order to trigger prohibition. The last phrase ("in any section of the country") is also a prepositional one, but it functions as an adjective for the preceding phrases, indicating the segment of the nation within which the aforementioned "line of commerce" or "activity affecting commerce" may be situated.[498] Since Author Hanley has partially examined the meaning of the phrase "in any activity affecting commerce" in other works and the phrase did not exist at the time of the enactment of the 1950 amendments,[499] the discussion in this Article is limited to the two other phrases of this clause—"in any line of commerce . . . in any section of the country[.]"[500]

Both of these phrases start with the words "in" and "any." The word "in" is an "elastic preposition."[501] It indicates the "presence, existence, situation, inclusion, [or] action" of its subject within its object.[502] By contrast, the natural reading of the word "any" is

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497. 15 U.S.C. § 18 (emphasis added).

498. SCALIA & GARNER, *supra* note 80, at 147 (defining series qualifier cannon).

499. The phrase "in any activity affecting commerce" was incorporated into Section 7 for the first time in 1980. *See* Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 6, 94 Stat. 1154, 1157–58 (codified at 15 U.S.C. § 18). By that point, the phrase had become a term of art in federal legislation and jurisprudence. Specifically, the phrase was (and is) used to refer to any activity within the scope of Congress' constitutional power to regulate interstate commerce. Accordingly, it encompasses both "activities in the flow of interstate commerce" and "intrastate activities that," by themselves or as part of an aggregated class, "substantially affect interstate commerce." *See, e.g.*, United States v. Am. Bldg. Maint. Indus., 422 U.S. 271, 279–81 (1975). In other works, Author Hanley has argued the phrase should be given a different meaning from the phrase "line of commerce" in Section 7. *See* Daniel A. Hanley, *Redefining the Relevant Market: Abandonment or Return to* Brown Shoe, 129 DICK. L. REV. (forthcoming 2024) [hereinafter *Redefining the Relevant Market*] (manuscript at 38–41), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4404081.

500. 15 U.S.C. § 18.

501. *See In*, BLACK'S LAW 1933, *supra* note 322, at 928; *In*, BLACK'S LAW 1951, *supra* note 314, at 891; *In*, BLACK'S LAW DICTIONARY 1968, *supra* note 314, at 891.

502. *See In*, BLACK'S LAW 1933, *supra* note 322, at 928; *In*, BLACK'S LAW 1951, *supra* note 314, at 891; *In,* BLACK'S LAW DICTIONARY 1968, *supra* note 314, at 891. *See also In*, WEBSTER'S 1961, *supra* note 163, at 1139 (defining "in" as "1.a. (1) — used as a function word to indicate location or position in space or in some materially bounded object áput the key ~ the lockñ átravel ~ Italyñ áplay ~ the streetñ áwounded ~ the legñ áread ~ bedñ álook up a quotation ~ a bookñ . . . b. (1) — used as a function word to indicate position or location in

categorical—meaning "one or some indiscriminately of whatever kind."[503] The use of "any" as a modifier without more restrictive language "le[aves] no basis in the text for limiting the phrase" it modifies.[504] Accordingly, at a minimum, it is plain that Section 7 does not limit the range of "lines of commerce" that can trigger a merger's prohibition. Nor does it limit the "sections of the country" within which such lines may be situated. Rather, Section 7 prohibits all mergers that produce a proscribed effect in "one or some" lines of commerce situated in "one or some" sections of the country "indiscriminately of whatever kind."[505]

a. The Legal and Ordinary Meaning of "Line of Commerce"

The first phrase refers to "commerce," which is a term that the statute defines as "trade or commerce" among the states and territories and with foreign nations.[506] When the words "trade" and "commerce" are "used in juxtaposition," as they are in this statutory definition, they "impart to each other enlarged signification, so as to include practically every business occupation carried on for subsistence or profit, and into which the elements of bargain and sale, barter, exchange, or traffic, enter."[507] That leaves one term to be defined in the phrase—a "line" of such business occupations.

Around the time Section 7 was amended and re-enacted in 1950, the term *line* was commonly used in commercial parlance, but it

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something immaterial or intangible ásaw him ~ my dreams> áthe position of the artisan ~ societyñ").

503. Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 219 (2008) (Thomas, J.) (collecting cases supporting proposition that, where the legislature uses the modifier "any" without more restrictive language, Congress "l[eaves] no basis in the text" for limiting the scope of the phrase modified thereby).

504. *See, e.g.*, *id.* at 218–19 (holding that Federal Tort Claims Act provision, which barred claims arising from "detention of any goods . . . by any officer of customs or excise or *any* other law enforcement officer," barred claims arising from detention of goods by *all* federal officers, whether or not they enforced customs or excise laws) (emphasis added); United States v. Gonzales, 520 U.S. 1, 5 (1997) (similar reliance on use of "any" in interpreting use-of-firearm sentence enhancement provision); United States v. Alvarez–Sanchez, 511 U.S. 350, 358 (1994) (same, interpreting statute governing admissibility of confessions); Harrison v. PPG Indus., Inc., 446 U.S. 578, 588–89 (1980) (same, interpreting Clean Air Act); Collector v. Hubbard, 79 U.S. 1, 15 (1871) (same, interpreting statute barring tax claims in federal court before administrative remedies are exhausted).

505. *Ali*, 552 U.S. at 219 (Thomas, J.); *see also* George Van Camp & Sons Co. v. Am. Can Co., 278 U.S. 245, 253 (1929) (holding that the phrase "in any line of commerce" in Section 2 of the Clayton Act is "clear" and "means that if the forbidden effect or tendency is produced in one out of all the various lines of commerce, the words 'in any line of commerce' literally are satisfied").

506. 15 U.S.C. § 12.

507. *Trade,* BLACK'S LAW 1933, *supra* note 322, at 1744; *Trade,* BLACK'S LAW 1951, *supra* note 314, at 1665; *Trade,* BLACK'S LAW 1968, *supra* note 314, at 1665.

had no specialized meaning in law or economics.[508] In business contexts, the term was used in two primary senses. In the day-to-day work of running a business, "line" was a concrete term—referring to "goods of a particular design," "the stock on hand" of such goods, or the "order[s] received" for them.[509] Outside of that practical context, however, "line" was primarily used to refer to a "department of activity; a kind or branch of business or occupation."[510] Since Section 7 is not concerned with day-to-day business operations and refers to lines of commerce in general, the latter sense of "line" has a natural congruence with the word's immediate context. This gives the phrase "any line of commerce" a broad, but determinate, meaning that encompasses any kind, branch, or department of business occupation carried on for subsistence or profit in interstate or international commerce.

All three of those subsidiary terms in the definition of "line"—"kind," "branch," and "department"—point in the same direction. Fundamentally, they all imply that a "line of commerce" is a category of business occupation which is defined by characteristics that separate or distinguish it from other categories of business occupation.[511] Under this definition, the fact that a group of business

508. From the enactment of the Sherman Act in 1890 to the enactment of the 1950 Amendments, the Supreme Court showed little interest in having litigants define a highly specific market. Instead, the Supreme Court interpreted the words of the Sherman Act and the Clayton Act broadly by adhering to the plain meaning of the actual words of the statutes. For purposes of Section 1 of the Sherman Act, "Every" meant every. For purposes of Section 2 of the Sherman Act and the Clayton Act, "any" in the phrases "any part of the trade or commerce" and "any line of commerce" meant "any" in its broadest sense. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 10 (1895); Standard Oil Co. v. United States, 221 U.S. 1, 61 (1911); *George Van Camp & Sons*, 278 U.S. at 253; Standard Oil Co. v. United States (*Standard Stations*), 337 U.S. 293, 299 n.5 (1949). For a more detailed analysis on how the Supreme Court created the process to define relevant markets and how the relevant statutory phrases have been interpreted over time, see *Redefining the Relevant Market*, *supra* note 499, at 10–25.

509. *Line*, 6 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 308.

510. *Id.*; *see also Line*, 1 FUNK, *supra* note 272, at 777 (defining "line, n." as used in "commerce" to mean: "(1) A branch of mercantile business; as, a man in the hardware *line*. (2) An order received by a travelling agent for goods, or the goods so ordered. (3) A particular class or stock of goods; as, a heavy *line* of ribbons."); *Line*, WEBSTER'S 1934, *supra* note 267, at 1436 (defining "line, n.," as used in "trade" to mean: "a. A supply or stock of various qualities and values of the same general class of articles; as, a full *line* of hosiery; a *line* of socks; a *line* of merinos. b. An order for goods given to a commercial traveler or agent; also, the good for which the order is given."); *Line*, 5 THE CENTURY DICTIONARY AND CYCLOPEDIA, *supra* note 276, at 3463 (defining "line, n." to mean: "11. In *com.*: *(a)* An order given to an agent or commercial traveler for goods. *(b)* The goods received upon such order. *(c)* The stock on hand of any particular class of goods . . . .15. The course in which anything proceeds or which any one takes; direction given or assumed: as, a *line* of policy or of argument; to market out a *line* of travel or of conduct; to pursue a certain *line* of business or of art.").

511. Consider *Department*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/department_n?tab=meaning_and_use (last visited Oct. 18, 2024); *Kind*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/kind_n#eid (last visited Oct. 18, 2024); *Branch*,

occupations offer substitute products from the perspective of consumers certainly could, at least in theory, qualify them as a "line" of commerce, but nothing in the phrase signifies that such substitutability is the *only* permissible basis for identifying a line of commerce. Indeed, using other characteristics that reasonably distinguish one business occupation from another—such as distinct products or services, peculiar know-how and operations, or divergent supply chains and distribution channels—to identify a line of commerce would be more consistent with the phrase's textual import. For the word "line" was ordinarily used to identify, with varying degrees of generality, the type of business a party was engaged in, not the markets it sold to or participated in.[512]

Authoritative dictionaries from around the time of Section 7's enactment in 1914 and re-enactment in 1950 define a "market" as a "[p]lace of commercial activity in which articles are bought and sold[,]" or alternatively, as "the geographical or economic extent of commercial demand [for something]."[513] Although these definitions diverge in some ways, they are fundamentally entangled. When buyers seek to fill a need by going to buy things from "a place of commercial activity," they inevitably encounter sellers of different products that could serve their need to varying degrees of satisfaction. As they choose among those substitutes, their choices determine the "geographical or economic extent of demand" for each kind of product. Since products are not usually "bought and sold" outside of the geographic and economic extents in which there is demand for them, the shape of that demand necessarily drives the evolution of the "place of commercial activity" in which it is satisfied.

A "market," therefore, was identified with the area in which customers could find and choose among sellers and products. A "line," by contrast, was identified with practical distinctions between business occupations, or groups of business occupations, based on their qualitative characteristics. Thus, in *Standard Stations*, the Court defined the relevant line of commerce simply as the production and sale of gasoline.[514] It did not examine "where the purchasers" of gasoline could "turn" for "suppliers" of their fuel needs—that is, define

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OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/branch_n#eid (last visited Oct. 18, 2024).

512. *See, e.g.*, *Line*, EVANS & EVANS, *supra* note 185, at 277 ("[L]ine. One meaning of *line* is business, profession, trade, sphere of economic activity. It probably developed from the *line* of goods that a salesman carried or sold (*Hardware, that's a good line. He's been in that line of work for thirty years*)[.]").

513. *Market*, BLACK'S LAW 1933, *supra* note 322, at 1162; *Market*, BLACK'S LAW 1951, *supra* note 314, at 1122; *Market*, BLACK'S LAW 1968, *supra* note 314, at 1122.

514. Standard Oil Co. v. United States (*Standard Stations*), 337 U.S. 293, 314 (1949).

markets—to identify this line of commerce.[515] It only made such an examination when it came to assessing the effect of the at-issue exclusive contracts on competition *within* that line of commerce. There, the Court said, an exclusive contract need not threaten a lessening of competition among suppliers of gasoline "nationwide" or in "the industry as a whole" to fall within the prohibitions of Section 3 of the Clayton Act.[516] Rather, where purchasers could not, as a practical matter, turn to suppliers of gasoline outside of their "own area," an anticompetitive effect within that distinguishable "area of effective competition"—that specific regional market—was sufficient.[517] Since Standard Oil's exclusive requirements contracts with independent gas stations foreclosed competition for 6.4% of wholesale gasoline sales in that market, the Court found that "the effect of [Standard's] requirements contracts" was substantially "to lessen competition in both interstate and intrastate commerce."[518]

Another decision from the era, *International Shoe*, demonstrated this relationship between "lines of commerce" and "markets" as well. In that case, the Court first agreed with the Government that two merging firms, International Shoe and McElwain Company, were engaged in the same line of business: "selling dress shoes to customers for resale[.]"[519] When the Court examined the competition between the two firms within that line, however, it determined that "the [constituent] markets reached by the two companies . . . were not the same."[520] It was estimated that about 95% of McElwain's sales were in towns and cities having a population of 10,000 or more, while about 95% of International's sales were in towns having a population of 6,000 or less.[521] Moreover, the "bulk of the trade of each company was in different sections of the country"—McElwain's was north of the Ohio river and east of Illinois, while International's was in the South and West.[522] As a result, in the year before the merger, International had sold less than fifty-three dozen pairs of shoes—less than one-fourth of International's shoe output in a single day—to nineteen customers that also bought shoes from McElwain directly.[523] Since the Government had only challenged the International Shoe-McElwain merger under the

515. *Id.* at 299 n.5.
516. *Id.*
517. *Id.*
518. *Id.* at 314–15.
519. Int'l Shoe Co. v. FTC, 280 U.S. 291, 295 (1930).
520. *Id.*
521. *Id.* at 296.
522. *Id.*
523. *Id.*

original Section 7 for "substantially lessen[ing] competition between the two companies" and "restrain[ing] commerce in the shoe business in the localities where both were engaged in business[,]" the Court dismissed the case.[524]

Although other pre-1950 Supreme Court cases under the Clayton Act generally did not break lines of commerce down into separated geographic markets like *Standard Stations* and *International Shoe* did, essentially all of them likewise found the relevant "line of commerce" was simply a line of business that either a defendant or a party affected by the defendant's conduct was engaged in. For example, in *Fashion Originators' Guild*, the Court used "line of business" interchangeably with "line of commerce," and defined the relevant line for the purposes of deciding a Section 3 exclusive-dealing claim as simply the manufacture and sale of women's dresses.[525] Likewise in *Van Camp Sons*, the relevant lines of commerce for deciding a price-discrimination claim under Section 2 of the Clayton Act were the manufacturing and sale of tin cans, in which the defendant American Can Company was engaged, and the packing and sale of food products in tin cans, in which the plaintiff George Van Camp Sons Company was engaged.[526] In patent-tying cases, the relevant line of commerce repeatedly consisted of a single product line—a variant of a line of business—sold by the defendant, such as tabulating cards in *IBM*,[527] or motion picture films in *Motion Picture Company*.[528] In other cases, the line of commerce ranged from a single product line, such as automobile loans in *Ford Motor Company*,[529] to an entire industry, such as the manufacture and sale of candy in *Corn Products Company*,[530] or the manufacture, sale, and distribution of cement in *Cement Institute*.[531]

This variability did not spring from simplicity or lack of rigor on the part of practitioners of the era, but from the ordinary usage of "line" or "line of business" by people in business. It was not a mysterious concept. It essentially referred to some distinguishable and articulable class of business activity—a product line, a particular trade or specialty, an industry, or some other reasonable division based on the qualitative features of the business, like the processes

524. *Id.* at 294. The Government did not press, and the Court did not consider, the "tend to create a monopoly" prong of Section 7. *See id.*
525. Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 461–62, 464 (1941).
526. George Van Camp & Sons Co. v. Am. Can Co., 278 U.S. 245, 252 (1929).
527. Int'l Bus. Machs. Corp. v. United States, 298 U.S. 131, 132–33 (1936).
528. Motion Picture Pats. Co. v. Universal Film Mfg. Co., 243 U.S. 502, 505 (1917).
529. Ford Motor Co. v. United States, 335 U.S. 303, 327 (1948).
530. Corn Prods. Refin. Co. v. FTC, 324 U.S. 726, 731–32 (1945).
531. FTC v. Cement Inst., 333 U.S. 683, 687 (1948).

involved, the materials used, the products sold, or the class of customer served.[532] Leading books on business management used the term in this way.[533] Businessmen writing about their business used it this way.[534] Indeed, the FTC used it this way in its own reports to Congress, such as its 1947 report on the merger movement, which urged the passage of what became the Celler-Kefauver Act.[535] For illustration, here is a passage from a 1938 article in *The Journal of Business of the University of Chicago*, by J.D.A. Morrow, then-president of the Pittsburgh Coal Company:

> From my experience it is evident to me that many advantages would accrue from . . . voluntary concert of action among members of many, possibly of all, industries, though the extent and character of such benefit would vary with the conditions in *different lines of business or industry*.
>
> . . . .
>
> At first thought it may seem that this program presents a picture of industry and business crystallizing into rigid forms without competition. This gives me no cause for worry. . . . [T]here is greater degree of *competition between products of different lines of industry* than is generally understood. For instance, even if the several thousand bituminous-coal producers

532. For a detailed description of how the Supreme Court defined relevant markets prior to 1962, see *Redefining the Relevant Market*, *supra* note 499, at 9–23.

533. *See, e.g.*, WILLIAM B. CORNELL & JOHN H. MACDONALD, FUNDAMENTALS OF BUSINESS ORGANIZATION AND MANAGEMENT 204 (Frederick G. Nichols ed., 1927) ("It is recognized that the efficient buyer must be a keen student of general business conditions . . . . He must be able to see his own company not only in relation to the *line of business of which it is a part*, but also in relation to *allied lines* and to general business conditions.") (emphasis added); WEBSTER ROBINSON, FUNDAMENTALS OF BUSINESS ORGANIZATION 16–17 (1925) ("In every well-organized, successful business the consensus of opinion seems to be that the fundamental general policy is not to be changed so long as that firm remains in the same line of business[.]").

534. For example, in Samuel Crowther's widely read collection of essays by businessmen published in 1920, *The Book of Business*, the term "line" was used variably to refer to the laundry business, the hotel business, the car dealing business, and so forth. In one passage, "shoes, clothing, stoves, harness, paint, implements, vehicles, and food products" were each described as a "line." Robert Thorne, *The Mail-Order Business*, *in* 5 THE BOOK OF BUSINESS 32 (Samuel Crowther ed., 1920). In another essay from *The Book of Business*, the petroleum industry was said to include several "general lines" ranging "from the producing of oil from the well through the transportation and refining to its final sale and delivery to the consumer." Walter C. Teagle, *Training for Selling Foreign in Countries*, *in* 5 THE BOOK OF BUSINESS, *supra* at 86.

535. *See, e.g.*, FED. TRADE COMM'N, THE PRESENT TREND OF CORPORATE MERGERS AND ACQUISITIONS 15 (Mar. 4, 1947) ("[A]mong the beverage groups, brewers and soft drink manufacturers acquired other firms, mostly in *their own lines*. There was, however, some *crossing of lines* as a ginger-ale producer purchased a distillery at the same time that another distiller acquired a carbonated water firm.") (emphasis added).

> were miraculously organized into a few producing and selling combinations, they could not go far in raising the price of coal anywhere in the United States without immediately opening the way for greatly increased sales of oil, natural gas, and other competitive fuels. If copper gets too high in price, aluminum can take its place in surprising fashion. Cotton, silk, wool, and rayon compete against one another, and whenever the attempt is made to combine industries, interests, and products that are diverse, . . . effective combination becomes impossible.[536]

What this passage makes clear is that, in both common and legal usage before 1950, the fact that two or more distinct lines of business or industry—that is, two or more lines of commerce—competed with each other did not transform them into one line. Since the language of Section 7 prohibits mergers whose effect "may be" to lessen competition or tend to the creation of a monopoly in "any line of commerce," it follows that a merger's effect must be assessed within the confines of any reasonably derived category of interstate business activity, including any discrete product line, trade or business, or industry. As the Court held in *Van Camp Sons*, "the phrase ['in any line of commerce'] is comprehensive and means that if the forbidden effect or tendency is produced in *one* out of *all* the various lines of commerce, the words 'in any line of commerce' literally are satisfied."[537]

b. The Legal and Ordinary Meaning of "Section of the Country"

At the time of the Celler-Kefauver Act's passage, a "section" of an object typically referred to a "part separated or divided off from the remainder" of that object.[538] Around the same time, the word "country" was used "in common parlance, in historical and geographical writings, in diplomacy, legislation, treaties, and international codes" to denote, not only "the territory or dominions occupied by a community[,]" but also "the population, the nation, the state, or the government, having possession and dominion over [that] territory."[539] Thus, taken on its own, the phrase "any section

536. J. D. A. Morrow, *Industry Organization and the Role of Government*, 11 J. BUS. U. CHI. 125, 126, 128–29 (1938) (emphasis added).

537. George Van Camp & Sons Co. v. Am. Can Co., 278 U.S. 245, 253 (1929) (emphasis added).

538. *See, e.g.*, *Section*, 9 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 363; *Section*, WEBSTER'S 1934, *supra* note 267, at 2262.

539. *See, e.g.*, *Country*, BLACK'S LAW 1933, *supra* note 322, at 453; *Country*, BLACK'S LAW 1951, *supra* note 314, at 421; *Country*, BLACK'S LAW 1968, *supra* note 314, at 421.

of the country" could be any part of the geography, population, government, or other aspect of the national community that is distinguishable from the whole based on some characteristic.[540] The textual context and statutory history of Section 7, however, apply some brackets to the meaning of this phrase.

Prior to the Celler-Kefauver Act, Section 7 prohibited mergers whose effects may be to "restrain . . . commerce in any section or community, or to tend to create a monopoly in any line of commerce[.]"[541] In the Celler-Kefauver Act, Congress dropped the word "community" from Section 7 and specified that the relevant "section" must be a "section *of the country*."[542] At the time, use of the phrase "any community" would have encompassed any "body of individuals" living in the same locality or sharing some other attribute in common.[543] In contrast, when used in political or legislative contexts, the word "section" implied "[a] district or portion of a town or country exhibiting uniform characteristics or considered as divided from the rest on account of such characteristics."[544] Since non-stylistic amendments are "presumed to entail a change in meaning,"[545] it stands to reason that Congress intended the phrase "any section of the country" to mean something different from the phrase "any community." Thus, a "section of the country" must mean a district or portion of the nation's territory, population, or government that is characterized, not only by an internally shared attribute (such as a common interest among a group of individuals), or by the attribute of locality alone (such as

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540. *See Section*, 9 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 362–64 (defining "section, n.," as "2. A part separated or divided off from the remainder; one of the portions in which a thing is cut or divided. . . . e. . . . *(c)* Chiefly *U.S.* A district or portion of a town or country exhibiting uniform characteristics or considered as divided from the rest on account of such characteristics").

541. Clayton Antitrust Act, ch. 323, § 7, 38 Stat. 731, 732 (1914) (current version at 15 U.S.C. § 18).

542. Celler-Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125, 1126 (1950) (codified at 15 U.S.C. § 18).

543. *See Community*, 2 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 702.

544. *See Section*, 9 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 362–64 (defining "section, n.," as "2. A part separated or divided off from the remainder; one of the portions in which a thing is cut or divided. . . . e. . . . *(c)* Chiefly *U.S.* A district or portion of a town or country exhibiting uniform characteristics or considered as divided from the rest on account of such characteristics"). *See also Section*, JOHN RUSSELL BARTLETT, DICTIONARY OF AMERICANISMS: A GLOSSARY OF WORDS AND PHRASES 289 (1848) ("SECTION. A distinct part of a city, town, country or people; a part of a territory separated by geographical lines, or of a people considered as distinct. Thus we say, the Northern and Eastern *section* of the United States, the Middle *section*, the Southern or Western *section*.").

545. SCALIA & GARNER, *supra* note 80, at 256–58 (quoting United States v. Wells, 519 U.S. 482 496–97 (1997)).

the fact of being a town in itself), but by an attribute that materially divides or separates the "section" from the rest of "the country."

Examining this sense of a "section of the country" in the textual context of Section 7 sheds additional light on its meaning. The phrase "in any section of the country" functions adjectivally in Section 7 to modify the noun-phrase that immediately precedes it—"any line of commerce." At the time that the Celler-Kefauver Act was passed, a line of commerce (as discussed above in Part II.A.iv.) had been interpreted to mean a line of interstate business activity, which could be examined for anticompetitive or monopolistic effects either "as a [nationwide] whole" or as undertaken in discrete geographic markets.[546] Thus, it was already established that a line of commerce—in and of itself—could be sectionalized based on the geographic boundaries of "area[s] of effective competition."[547] Indeed, as discussed above in Part II.A.iv., it is in the nature of the term "line" to permit the segmentation of business activities based on the qualitative characteristics of participating enterprises—such as the geographic area that they can feasibly serve.[548] When Congress amended Section 7 to modify the term "line of commerce" with the adjectival phrase "in any section of the country"—a phrase it excluded from all other provisions of the Clayton Act—it should be assumed that the amendment was not intended to simply repeat what was already understood from the pre-existing language.[549]

On the flipside, the adjectival relationship between the phrase "line of commerce" and the phrase "in any section of the country" limits cognizable sections of the country to those in which a merger-affected line of commerce is actually present. Since the prohibition of Section 7 applies where a merger threatens proscribed effects "in any line of commerce . . . *in* any section of the country," the presence

546. Standard Oil Co. v. United States (*Standard Stations*), 337 U.S. 293, 299 n.5 (1949); Int'l Salt Co. v. United States, 332 U.S. 392, 396 (1947); Int'l Shoe Co. v. Washington, 326 U.S. 310, 315–16 (1945).

547. *Standard Stations*, 337 U.S. at 299 n.5.

548. *See* discussion *supra* Part II.A.iv.

549. *See, e.g.*, Kungys v. United States, 485 U.S. 759, 778 (1988) (Scalia, J., plurality opinion) (calling it a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant"); Lower v. SEC, 472 U.S. 181, 207 n.53 (1985) ("[W]e must give effect to every word that Congress used in the statute."); Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."); SCALIA & GARNER, *supra* note 80, at 174 ("If possible, every word and every provision is to be given effect . . . None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence."). *See also*, *e.g.*, United States v. Wells, 519 U.S. 482, 496–97 (1997); Gozlon–Peretz v. United States, 498 U.S. 395, 404 (1991) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting Russello v. United States, 464 U.S. 16, 23 (1983))).

of a line of commerce is necessary to give significance to any segment of the country under the statute. That is not to say, however, that a segment must contain the entirety of a line of commerce or coincide with the areas of trade within a line of commerce. When the preposition "in" is used to express something "[w]ithin the limits or bounds of" a given space, it does not imply that said space is the *only* space where that thing is situated.[550] It just implies that said thing is "*not out of*" that particular space.[551]

Granted, there are some cases where the nature of the subject, or the circumstances, might foreclose the subject from being situated "in" more than one space at the same time. For example, if someone were to say that "John is in the pool," the implication for most of us would be that John is not simultaneously in his room. But the nature of a "line of commerce" raises no such implication. It is, as explained above, simply a line of business activity carried on "among the several states and with foreign nations."[552] That one set of enterprises can be engaged in a particular line of business in one section of the country while another set of enterprises is engaged in the same line of business in another section of the country seems rather obvious. Beyond that, it is important to remember that a "line of commerce" under Section 7 is a line of *interstate* commerce. It is a line of business activity carried on within the "practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer" across state lines.[553] As the Court explained in *American Building Maintenance Industries*, to be engaged in a line of this kind, an enterprise must "directly" participate in the "production, distribution, or acquisition of goods or services in interstate commerce."[554] Given this, an enterprise's line-of-commerce activities are bound to be carried on in multiple *bona fide* sections of the country—the different States and their various economic configurations—by default. Plainly, then, the nature of a "line of commerce" does not require us to interpret the word "in" to imply that a "section of the country" must contain a whole "line of commerce" or a complete geographic market thereof.

What the text of Section 7 does require, however, is actuality—a proper section must contain a concrete amount of business activity

550. *See, e.g.*, *In*, 5 OXFORD ENGLISH DICTIONARY, *supra* note 123, at 125–26.
551. *Id.*
552. "Commerce," as defined by Section 1 of the Clayton Antitrust Act, means "trade or commerce among the several States and with foreign nations[.]" ch. 323, §1, 7, 38 Stat. 730, 730 (1914).
553. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195 (1974).
554. *See* United States v. Am. Bldg. Maint. Indus., 422 U.S. 271, 283 (1975).

affected by a merger. The *extent* of that existence in a cognizable section (as in, the size of the affected commerce in the section) is not given significance in the statutory text. Indeed, by prohibiting mergers that produce a proscribed effect "in *any* line of commerce in *any* section of the country," Congress has plainly foreclosed the courts from making distinctions between any given line of interstate business activity that substantially exists in one section of the country and any other line of interstate business activity that substantially exists in the same or another section of the country—whether those distinctions are based on the magnitude of the activity or otherwise.[555]

In summary, a "section of the country" is a segment of the nation's geography, population, or government that can be divided or separated from the rest of the country by some material characteristic. A section of the country may be identified by a dividing characteristic other than being an "area of effective competition" for a line of business, but the mere fact that a particular segment is a town or other local community, or constitutes a group of people who share an attribute or circumstance, is not sufficient to demonstrate a cognizable dividing characteristic. Above this floor, any factual characteristic that divides, separates, or isolates a segment of the country from the rest is adequate as long as the segment identified contains a definite amount of interstate commerce affected by a merger subject to Section 7.

* * * * *

In conclusion, the plain meaning of Section 7's text can be distilled as follows. Section 7 prohibits mergers and acquisitions that could possibly, in some realistic way, either lessen competition, or tend to the creation of a monopoly, in any line of business carried on within any distinct segment of the nation's territory, population, or government. For a merger to have a realistic possibility of causing anticompetitive or monopolistic effects, its concrete, then-present features must give it the potential to cause such effects, and that potential must not be foreclosed by prohibitive conditions in the merger's concrete, then-present environment. To demonstrate anticompetitive potential, a merger's features must threaten to diminish the scope, amount, or quantity of competitive activity

555. *Cf.* United States v. Standard Oil Co., 78 F. Supp. 850, 864 (S.D. Cal. 1948) ("The amount of the commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication.").

being waged by or among rivals in a line of a business in a segment of the country. To demonstrate monopolistic potential, a merger's features must be conducive to a course of action or behavior that can bring a monopoly about—a condition where a single person or group controls, or has the power to control, all or nearly all trade in a line of business in a segment of the country. Where a merger's potential to cause such an effect is proven and the merger's concrete environment does not foreclose its manifestation, the application of Section 7 cannot be escaped.[556]

From this area of core meaning, the range of practical features that could give a merger the potential to cause a proscribed effect spreads outward into a margin of uncertainty, but at least a few of those features are directly implied by the plain meaning of the statutory text. As demonstrated more fully in Part II.C. below, mergers can "tend to create a monopoly" within the meaning of Section 7 where they concretely: (1) expand the volume of trade under a party's direct control; (2) expand the arsenal of power a party could use to suppress, handicap, or defeat its business adversaries in rivalry; or (3) further a course of behavior in any line of business in any segment of the country that leads toward the consolidation of monopoly control or power therein.[557]

Conversely, mergers can "lessen competition" where they: (1) eliminate competitive activity between the merging parties, or between one of the merging parties and its unique rivals; (2) give a party control over a supplier or customer whose business it previously engaged in competitive activity to gain; (3) enhance the relative economic power of a party to such a point that it possesses a decisive advantage over some or all of its rivals in competition; or (4) create tangible incentives for rivals not to engage in some or all

556. As a general matter, a possibility can only be foreclosed by a necessity—something that really exists or must exist—and cannot be foreclosed by other possibilities. *See supra* Part III.A.i. This can be illustrated by an example. Imagine you are Jane at the airport. Jane just made it through security and has ten minutes to reach gate A5 before her flight is closed. Gate A5 is about 0.6 miles away and there is nothing blocking the way (except an unsupervised Roomba vacuuming the floors). Jane is a professional soccer player who can easily run a six-minute mile on the field, but right now she is carrying a purse, rolling a twenty-pound carry-on, and wearing a suit with heels (she has a big meeting right after landing). In this concrete environment, Jane certainly has a real possibility of making her flight, but a host of other real possibilities also exist that could prevent her from reaching her gate. Jane could trip on the unsupervised Roomba. Jane could roll her ankle while running. One of the carry-on's wheels could give out, forcing Jane to lug the bag by hand. All of these possibilities are permitted by Jane's actual situation, and there is no insurance that they will not occur. None of them, however, forecloses the possibility that Jane may, in fact, make a flawless run to her gate in less than ten minutes. If Jane's run to Gate A5 were a merger and Gate A5 were lessening competition or tending to create a monopoly, Jane would be prohibited from running to Gate A5 under Section 7.

557. *See* discussion *infra* Part II.C.

of their pre-existing competitive activities. In most circumstances, however, the plain text of Section 7 does not prohibit mergers between small businesses, absorptions of small businesses by larger enterprises, or acquisitions of failing companies.[558]

B. Turning to the Legislative History

Having analyzed the text and structure of Section 7 to determine its plain meaning, this section turns to its legislative history. Consistent with current statutory interpretation doctrine, this section examines the legislative history in pursuit of two targeted objectives.

First, this section seeks to confirm that the plain meaning of Section 7 is consistent with legislative intent "since that approach respects the words of Congress."[559] In this vein, this section reviews the legislative history of the antitrust enactments governing mergers—the Sherman Act, the Clayton Act, and the Celler-Kefauver Act—and compares the statutory purposes disclosed therein with the practical effect that would result from implementing Section 7 in accordance with its plain meaning. This review demonstrates that Congress knew what it was doing when it framed Section 7's text, intending to produce a statutory provision that would deeply curtail mergers and acquisitions involving large or otherwise competitively significant firms, but refrain from impinging on the freedom of small and failing businesses.

Second, this section examines the specific aspects of Section 7's plain meaning that are likely to be controversial—specifically, the fact that the text only requires a "real possibility" of forbidden effects; does not require those effects to be "substantial" in their degree or extent; does not require product or geographic markets to be defined as presently understood; and is not concerned with economic theories of competition or monopoly—to determine whether they were anticipated by legislators in framing the Celler-Kefauver Act. In each case, this section shows that legislators were well-aware of the implications of Section 7's text, and that the plain meaning of the statute's words cannot be set aside on absurdity grounds.

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558. *See* discussion *infra* Part II.C.ii.
559. Lamie v. U.S. Tr., 540 U.S. 526, 536 (2004).

i. The Plain Meaning of Section 7 Is Consistent With Legislative Intent

Congress enacted the antitrust laws governing corporate mergers with "a strong prophylactic orientation against the concentration of private economic power."[560] "Distrust of power[,]" as the legal scholar Eleanor Fox has written, "is the one central and common ground that over time has unified [congressional] support for antitrust statutes."[561] Enacted to stand against the concentration of power, the central purpose of the antitrust laws is to perpetuate and preserve an organization of markets characterized by fair competition and fair dealing among numerous, independent participants, both for its own sake and as a way to achieve a variety of antimonopoly policy objectives. The most salient of these objectives are: (1) to protect the liberty of citizens to govern their lives and communities; (2) to prevent large corporations from extorting wealth from consumers, farmers, workers, small producers, and local merchants; and (3) to preserve open and equitable market opportunities for entrepreneurs and small businesses.[562]

The first federal antitrust law, the Sherman Act of 1890, was enacted in response to a pervasive national fear of the rapid assimilation of power by groups of financiers and "captains of industry" who had succeeded in consolidating many basic industries into trusts or holding companies.[563] Bare-minimum enforcement and unworkable judicial interpretation quickly emasculated the Act, however, and another consolidation wave soon ensued.[564] The so-called "Great Merger Movement," which took place between 1897 and 1907, saw "[m]ore than 1,800 firms disappea[r] into horizontal combinations, at least a third of which

560. *See Ideological Roots*, *supra* note 16, at 966.

561. *Modernization of Antitrust: A New Equilibrium*, *supra* note 17, at 1153.

562. The legislative history of the antitrust laws taken as a whole is carefully mapped in: Flynn, *supra* note 25, at 304–05; *Modernization of Antitrust: A New Equilibrium*, *supra* note 17, at 1182; Lande, *supra* note 25, at 83, 95; Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 560–62 (2012); Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. 766, 774–75 (2019) [hereinafter *Accommodating Capital*]; Khan & Vaheesan, *supra* note 9, at 265–66.

563. *See* Harlan Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555, 575 (1973). *See also Accommodating Capital*, *supra* note 562, at 771–79; Fox & Sullivan, *supra* note 17, at 940; James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 283–84 (1989).

564. For documentation of the roots of the Clayton Act in congressional concern over the Sherman Act's failure to stop industry consolidation, see James C. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 507–14 (1968); MARTIN, *supra* note 11, at 4–8, 13–19.

controlled more than 70% of the markets in which they operated."[565] The last straw fell in 1911 when the Supreme Court held that the Sherman Act's prohibitions on restraints of trade and monopolization only apply when a judge decides that a defendant's actions have "operated to prejudice the public interests."[566] The reaction in Congress was swift and decisive.

Fearing that the Court's interpretation of the Sherman Act had substituted "the court[s] in the place of Congress," and permitted judges to "test each restraint of trade by the economic standard which [they] happen to approve [of],"[567] in 1914, Congress enacted the Clayton Act to establish a "legislative rule" for the proscription of business methods that legislators had determined were "common and favorite method[s] of promoting monopoly"—corporate mergers, exclusive dealing, and commercial discrimination.[568] Learning its lesson from the Sherman Act's lackluster implementation, Congress also created an independent agency, the FTC, to administer the Clayton Act in accordance with congressional intent and to proscribe new and unanticipated methods of unfair competition as they arise.[569]

As originally enacted, Section 7 of the Clayton Act prohibited corporate acquisitions "where [their] effect . . . may be [1] to substantially lessen competition between the corporation [acquired] and the corporation making the acquisition, or [2] to restrain commerce in any section or community, or [3] to tend to create a monopoly in any line of commerce." Almost immediately after it was enacted, however, the courts began ignoring Section 7's language

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565. NAOMI R. LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904, at i (1985).

566. United States v. Am. Tobacco Co., 221 U.S. 106, 179 (1911).

567. S. REP. NO. 62-1326, at 10 (1913).

568. The congressional desire to fashion a "legislative rule" for the proscription of monopolistic methods in the Clayton Act is exemplified by the report of the Senate Interstate Commerce Committee on its investigation, authorized by Senate resolution in response to the *Standard Oil* decision, into "the control of corporations, persons, and firms engaged in interstate commerce." S. REP. NO. 62-1326. The House Judiciary Committee's report on the Clayton Act bill, H.R. REP. NO. 63-627 (1914), refers to corporate mergers forming holding companies as a "common and favorite method of promoting monopoly" and describes holding companies as "an abomination and in our judgement [] a mere incorporated form of the old-fashioned trust." *Id.* at 17.

569. *See* Thomas, *supra* note 564, at 511–12. We note it was unambiguously indicated in the floor debates on the Clayton Act that the Federal Trade Commission would translate the broad prohibitions of Sections 2, 3, and 7 into administrable rules. *See, e.g.*, 51 CONG. REC. 16317-18 (1914) (statement by Rep. Floyd, a House conferee and a framer of the original Clayton bill, indicating that Sections 2, 3, and 7, were restored in the conference committee on the Clayton Act at the insistence of the House conferees primarily in order to ensure that the Federal Trade Commission had the constitutional authority to enforce rules against contractual restraints of trade).

and diluting its restrictions on corporate mergers. The first blow from the Supreme Court came in 1926, when the Court held that Section 7 applied only to stock—not asset—mergers.[570] The provision was immediately considered a dead letter.[571] A wave of asset-based mergers took off the very next year.[572] Within five years, over 4,800 mergers were consummated—a record pace at the time.[573] In 1930, the Court added insult to injury by holding that Section 7 only prohibited mergers which "injuriously affect the public"—practically nullifying the distinction between the Clayton Act and the Sherman Act.[574] Although the Great Depression soon brought merger activity to a temporary halt, another consolidation wave began in 1940 and accelerated after the end of World War II.[575] Fearing the key role of corporate mergers in the processes of monopoly and concentration, in 1950, Congress enacted the Celler-Kefauver Act to establish a "new statutory formula for the legality of mergers"[576]—one that, according to the Act's proponents, would finally "call a halt to the merger movement . . . in this country."[577]

In the following subsections, this Article explores the legislative histories of these three antitrust laws in greater detail before comparing the statutory purposes disclosed to the plain meaning of Section 7.

a. The Sherman Act: Structuring Markets in the Moral Economy Tradition

The drift away from statutory direction in antitrust over the past four decades has been underwritten by a conventional wisdom among practitioners that antitrust is a "quasi-common law realm," where statutes are simply "enabling legislation" that empowers judges and enforcers to develop and pursue their own ideas of how to make "businesses and markets . . . work in socially efficient ways."[578] This wisdom, such as it is, has primarily rested on the notion that, in adopting the phrase "restraint of trade" in the Sherman Act, Congress "invoke[d] the common law itself" and "authorize[d] courts to create new lines of [it]" without providing normative

570. *See* FTC v. W. Meat Co., 272 U.S. 554, 556 (1926).
571. *See* Bok, *supra* note 18, at 229–30.
572. *See id.*
573. *Id.*
574. *See* Int'l Shoe Co. v. FTC, 280 U.S. 291, 298 (1930).
575. *See* Bok, *supra* note 18, at 230–31.
576. *Id.* at 306; *see also id.* at 230–31.
577. 95 CONG. REC. 11484, 11485 (1949) (statement of Rep. Celler).
578. *See* Paul I, *supra* note 50, at 181, 223 n.216 (internal citations omitted); First & Waller, *supra* note 16, at 2549.

criteria to guide judicial decision-making.[579] However, as a growing number of scholars from across the ideological spectrum have shown in recent years, this notion is at odds with both the text and the legislative history of the Sherman Act.[580]

The Sherman Act was passed during a time of profound social, political, and economic tumult. Railroads and telegraph lines had stitched the nation together. Unprecedented combinations of capital had been formed to finance these continent-spanning projects. The financial sector that resulted had amassed immense power and wealth and was soon deploying them with alacrity. Roll-ups were orchestrated in industry after industry to centralize control over production—first in the "trusts," which made decisions on behalf of component firms by delegation, and after those came under challenge, in holding companies that simply absorbed predecessor firms as subsidiaries. The national scale and power of these combinations made it impossible for the States, acting alone, to regulate their internal commerce and direct their economic development.[581] As the power of these combinations increasingly subjected the people's trade to private control, they were widely felt to be "dangerous to the whole country."[582]

In response to this danger, a broad antimonopoly coalition of farmers, workers, small producers, and local merchants mobilized, pressuring Congress to curtail and disperse the concentrated power of commercial trusts and combinations through national "antitrust" legislation.[583] Farmers, acting through cooperative organizations such as the National Grange and the Farmers' Alliance, were at the heart of this coalition.[584] Seeing discriminating railroads and monopolistic processors exploit the atomization of farmers to impose unjust prices, the farmers' movement sought to challenge the monopolists' centralization of power, on the one hand, and to rally cooperation among farmers, workers, and small producers, on the

579. Paul I, *supra* note 50, at 181 (first quoting Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 732 (1988); and then quoting Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983)).

580. *See, e.g.*, Paul I, *supra* note 50, at 243; Crane, *supra* note 44, at 1207; Arthur, *supra* note 50, at 275; Gerla, *supra* note 51, at 212–13; Lande & Zerbe, *supra* note 71, at 506–07.

581. *See generally* WILLIAM G. ROY, SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA (1997).

582. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 319 (1897); *see also* Standard Oil Co. v. United States, 221 U.S. 1, 83–84 (1911) (Harlan, J., concurring in judgment but dissenting from the opinion).

583. *See* Paul I, *supra* note 50, at 181–82.

584. *See id.* at 198–204; *see also Accommodating Capital*, *supra* note 562, at 774–75 (citing Gary D. Libecap, *The Rise of the Chicago Packers and the Origins of Meat Inspection and Antitrust*, 30 ECON. INQUIRY 242 (1992), and WILLIAM CRONON, NATURE'S METROPOLIS: CHICAGO AND THE GREAT WEST 343 (1991)); Fox & Sullivan, *supra* note 17, at 940.

other.[585] In developing and sharing its vision, the antimonopoly coalition marshaled the "moral economy" traditions of local English and American markets.[586] These "old notions of right" were the moral values familiar to the people in the day-to-day commercial life of the time, and embodied in the common law on restraints of trade.[587] Broadly, they encouraged market participants to cooperate in the maintenance of just prices and fair conduct in business, on the one hand, and frowned upon schemes by individuals or groups to subject markets to private control or manipulation, on the other.[588]

Congress drafted the Sherman Act in conscious response to this antimonopoly vision. Specifically, as the legal scholar Sanjukta Paul has shown in her cogent review of the Sherman Act's legislative history, Congress adopted the "restraint of trade" phrasing in Section 1 of the Act to invoke the set of common-law principles rooted in the moral-economy traditions expounded by the farmer-labor coalition.[589] While initial versions of the Sherman Act prohibited contracts, combinations, and conspiracies designed to raise prices, those versions of the Act were discarded in response to concerns from legislators that they would penalize cooperation among farmers, workers, and small producers.[590] Instead, seeking to use the law to structure markets in alignment with the antimonopoly coalition's vision of decentralized, cooperatively-governed markets, legislators "took over" the "common law concept of illegal restraints of trade" and "extend[ed]" the reach of its normative principles beyond contractual restraints to all combinations and conspiracies that have comparable "effects on the competitive system."[591] As Senator Platt indicated in a floor speech that was pivotal to Congress' adoption of the restraint-of-trade language, the legislative objective of the Sherman Act was to preserve a dispersion of power that would enable coordination and bargaining among market participants for "prices [that are] just and reasonable and fair . . . [and that] render a fair return to all persons engaged in its production."[592]

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585. *See* Paul I, *supra* note 50, at 198–204.
586. *See id.* at 183–90; *see also* Harlan Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960); WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 40–41 (1965).
587. *See generally* Paul I, *supra* note 50.
588. *See id.* at 183–90; *see also* Blake, *supra* note 586, at 637; LETWIN, *supra* note 586.
589. *See* Paul I, *supra* note 50, at 204–22.
590. *See id.*; *see also Accommodating Capital*, *supra* note 562, at 771–79.
591. Apex Hosiery Co. v. Leader, 310 U.S. 469, 498 (1940).
592. Paul I, *supra* note 50, at 216–20.

This fundamentally moral vision of fair and open markets, in which trade is governed by the coordination of many competing centers of property ownership and decision-making, has little—if anything—to do with the economic ideas of "perfect competition" or "allocative efficiency" that dominated the merger enforcement landscape from the 1980s until the late 2010s.[593] None of these economic concepts—or, indeed, economists in general—had an appreciable influence on the legislative process that framed the Sherman Act.[594] What mattered in the political process of legislating the Sherman Act was, unsurprisingly, politics: Congress structured the Sherman Act to carry out the antimonopoly vision of the popular coalition that was lobbying for its enactment.[595]

The moral-economy notions also extended to Section 2 of the Sherman Act. As court decisions have recognized[596] and scholars have documented[597], "monopoly" as understood by the framers of

593. Any ideal of markets selected by enforcers from economic theory would be arbitrary because there has never been consensus on such ideals among economists. *See* Bok, *supra* note 18, at 238–49; *see also* Thomas, *supra* note 564, at 473–74 (discussing "consequences of letting any economist formulate general rules under which the congressional standard in Section 7 will be enforced" by contrasting the normative economic understandings of different antitrust economists). But more fundamentally, there is no such thing as an "economic" ideal of markets at all because markets are always constructed by a variety of moral, political, and social choices and never by value-neutral, impersonal market forces independent of those choices. *See, e.g.*, Sanjukta Paul, *Charting the Reform Path*, 120 MICH. L. REV. 1265, 1270–80 (2022) [hereinafter Paul II] (examining "the very idea of competitive markets"); *Profound Nonsense of Consumer Welfare Antitrust*, *supra* note 28, at 484–88; Millon, *supra* note 25, at 1227 ("Antimonopoly sentiment grew out of concerns far more profound than the perceived impact on individual fortune. The trusts' enormous wealth and economic dominance presented the specter of uncontrollable, selfishly exercised power, immune from regulation by the market or the modest powers of government.").

594. *See* Blake, *supra* note 586, at 576–77 (citing LETWIN, *supra* note 586 ("Economists, we know, had very little to do with the passage of the Sherman Act . . . . *Thus, no attention was given to the possibility of formulating legal standards based upon economic performance*.") (emphasis added). The fact that economics and economists had little influence or interest in the development of the Sherman Act (and subsequent antitrust laws) has long been recognized. *See, e.g.*, THORELLI, *supra* note 3, at 120–21; *Modernization of Antitrust: A New Equilibrium*, *supra* note 17, at 1153 n.71; Flynn & Ponsoldt, *supra* note 25, at 1137; Anne Mayhew, *How American Economists Came to Love the Sherman Antitrust Act*, 30 HIST. POL. ECON. 179, 181 (Supp. 1998); Lande, *supra* note 25, at 88–89; Khan & Vaheesan, *supra* note 9, at 277; Millon, *supra* note 25, at 1233 ("It did not occur to any legislator—any more than it had to any academic economist—that efficiency might somehow legitimate uncontrolled monopoly power. Instead, Congress turned to conventional concepts and language in order to understand the trusts' impact on social life.").

595. *See* Paul I, *supra* note 50, at 204–22.

596. *See, e.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 322–24 (1897); Standard Oil Co. v. United States, 221 U.S. 1, 50 (1911). The understanding of monopoly power embodied in Supreme Court decisions under the Sherman Act through the middle of the twentieth century is carefully mapped in, Blake, *supra* note 563, at 580–84; Paul I, *supra* note 50, at 235–39.

597. *See, e.g.*, THORELLI, *supra* note 3, at 201; LETWIN, *supra* note 586 at 59; Blake, *supra* note 563, at 575–79; *Accommodating Capital*, *supra* note 562, at 771–79; Paul I, *supra* note 50, at 212–15; *Modernization of Antitrust: A New Equilibrium*, *supra* note 17, at 1146–48.

the Sherman Act was, essentially, the flipside of this vision of decentralized, democratically-coordinated markets. A "monopoly" was a combination of capital—however organized—which had either consolidated exclusive control over an article of commerce or which had otherwise accumulated the power to "prevent other[s] from engaging in fair competition" with it.[598] Against this background, Sections 1 and 2 of the Sherman Act are distinct but complementary provisions. Whereas Section 1 established the normative values for identifying and penalizing improper consolidations of private power in economic life, Section 2 established a "far-reaching"[599] prohibition on "monopolizing" that proscribed all conduct seeking to acquire or maintain such illegitimate power in the first place.[600] In this sense, the Sherman Act was, indeed, a "charter of economic liberty," designed to preserve "social balance through separation of economic power among many units of roughly equal force."[601]

This central congressional intent underlying the Sherman Act—to maintain decentralized markets governed by fair competition and fair dealing among numerous, independent participants—underlies all of the antitrust laws that followed the Sherman Act as well, not to mention their "interlacing" statutes in agriculture, labor, procurement, and other areas of federal law.[602] As Judge Learned Hand aptly stated in *Alcoa*, all of the antitrust laws carried an irreducible intent to "perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small

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598. *See* LETWIN, *supra* note 586, at 59; Lande & Zerbe, *supra* note 71, at 506–09. The understanding of "monopoly" among the framers of the Sherman Act is also carefully discussed in, Blake, *supra* note 563, at 575–79; *Accommodating Capital*, *supra* note 562, at 771–79; Paul I, *supra* note 50, at 212–15.

599. 21 CONG. REC. 4090 (1890) (statement of Sen. Culberson).

600. *See* Blake, *supra* note 563, at 575–76 (explaining the relationship between Sections 1 and 2 of the Sherman Act and noting that "[i]t was not economic monopoly which was prohibited by the Sherman Act, but 'monopolizing'—a course of conduct intended to consolidate or sustain power inconsistent with the competitive system and likely to be attained or preserved through economic power.").

601. Millon, *supra* note 25, at 1282.

602. In *United States v. Hutcheson*, 312 U.S. 219, 232 (1941), the Supreme Court described the Sherman, Clayton, and Norris-LaGuardia Acts as "interlacing statutes" and interpreted the former to accord with the policies expressed in the latter. Many other laws "interlace" similarly with the Sherman Act and the Clayton Act, both reflecting and enhancing the congressional policies favoring economic decentralization and democratic coordination. *See, e.g.*, United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416 (2d Cir. 1945) (Learned Hand, J.) (interpreting the Sherman Act in light of the Small Business Mobilization Act of 1942 and the Surplus Property Act of 1944). For a discussion that situates the core antitrust laws as allocators of coordination rights in the context of interlacing statutes across labor (the Wagner and Norris-LaGuardia Acts), agriculture (the Capper-Volstead Act and the Fishermen's Collective Marketing Act), and other fields, see Sanjukta Paul & Sandeep Vaheesan, *American Antitrust Exceptionalism*, *in* CAMBRIDGE HANDBOOK OF LABOR IN COMPETITION LAW 141–57 (Paul, McCrystal & McGaughey, eds., 2022).

units which can effectively compete with each other."[603] Indeed, in the years following the Sherman Act's passage, Congress would respond to judicial hostility to its decentralizing vision by making this vision successively more explicit in its later antitrust enactments—particularly in the Clayton Act and the Celler-Kefauver Act.

b. The Clayton Act: Responding to Consolidation After the Sherman Act Falls Short

Congress enacted the Clayton Act and the Federal Trade Commission Act in 1914 to preserve the dispersion of market coordination rights and prevent the concentration of private power over the nation's commerce after the Sherman Act proved insufficient.[604] The primary reason for the Sherman Act's lackluster implementation between 1890 and 1914 was judicial solicitude for the very monopolies it was intended to attack.[605] In the Supreme Court's first decision interpreting the Act, *E.C. Knight*, the Court held that the production of goods, whether for in-state sale or out-of-state export, was intrastate economic activity outside the scope of both the Sherman Act and Congress' power under the Commerce Clause of the U.S. Constitution—radically restricting the reach of the statute.[606]

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603. *See Alcoa*, 148 F.2d at 429.

604. The economic background and legislative history of the Clayton Act and the Federal Trade Commission Act are carefully mapped in, Thomas, *supra* note 564, at 507–14; *Modernization of Antitrust: A New Equilibrium*, *supra* note 17, at 1147–49; Earl W. Kintner, *Introduction: The Clayton Act of 1914*, *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 989–96 (1978). Importantly, the understanding of the legislative background of the Clayton Act recounted in this article is the one reflected in the committee reports, sponsor statements, and other important documents (such as the FTC's 1947 and 1948 merger reports to Congress) in the legislative history of the Celler-Kefauver Amendment. *See, e.g.*, S. REP. NO. 81-1775 (1950) (Report of the Senate Judiciary Committee on H.R. 2734); H.R. REP. NO. 81-1191 (1949) (Report of the House Judiciary Committee on H.R. 2734); *The Merger Movement: A Summary Report*, *supra* note 43, at 3437–39; *see also* Earl W. Kintner, *Introduction: The Celler-Kefauver Amendment of 1950*, *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES, *supra*, at 3387–89.

605. Less relevant from a statutory interpretation standpoint but significant as a matter of policy, the Sherman Act's implementation at the turn of the twentieth century was also hampered by Congress' failure to allocate specific funds for antitrust enforcement. *See* William Letwin, *The First Decade of the Sherman Act: Early Administration*, 68 YALE L.J. 464, 466 (1959); BRUCE BRINGHURST, ANTITRUST AND THE OIL MONOPOLY: THE STANDARD OIL CASES 1890–1911, at 117 (1979). The lack of dedicated allocations facilitated administrative apathy, particularly during the Harrison, Cleveland, and McKinley administrations. *See* Letwin, *supra*, at 466; BRINGHURST, *supra*, at 117. Notably, even in this restricted funding environment—or perhaps because of it—the Department of Justice directed its limited enforcement resources at labor during this period, which was also against the intent of Congress. *See generally Accommodating Capital*, *supra* note 562.

606. Donald J. Smythe, *The Supreme Court and the Trusts: Antitrust and the Foundations of Modern American Business Regulation from* Knight *to* Swift, 39 U.C. DAVIS L. REV. 85, 100 (2005) ("*E.C. Knight* drew a sharp line between manufacturing and commerce, and held that manufacturing was not interstate commerce[.]").

Two years later, in 1897, another consolidation wave, the "Great Merger Movement," took off and lasted for more than a decade. Thousands of firms were absorbed into horizontal combinations, "at least a third of which controlled more than 70% of the markets in which they operated."[607] The Court did not change its permissive stance until 1905, when it reinterpreted the reach of Congress' commerce power and finally held that corporate mergers combining direct rivals may run afoul of the Sherman Act.[608] Together with the Panic of 1907, these decisions finally brought the Great Merger Movement to an end.

The straw that broke the camel's back fell in 1911, when the Supreme Court held in *Standard Oil* and *American Tobacco* that the Sherman Act only prohibited "unreasonable" restraints of trade that "operated to prejudice the public interest."[609] A charitable view of this holding is that it was designed to enable the courts to balance the multiple values of the Sherman Act—an aversion to centralized power, on the one hand, and an accommodation of democratic coordination around fair and just practices, on the other—in cases arising thereunder.[610] Whatever the exact import the Court intended its decisions in those two cases to convey, however, they were perceived by members of Congress as a judicial hijacking of the substantive prohibitions of the Act, which allowed judges to test the legality of business conduct, not by statutory standards, but by whatever "economic standard [they] happen to approve."[611]

In response, Congress enacted the Clayton Act in 1914 to establish a "legislative rule" for prohibiting corporate mergers, tying arrangements, commercial discrimination and other "common and favorite method[s] of promoting monopoly."[612] Seeking to give the

607. LAMOREAUX, *supra* note 565, at i.

608. Smythe, *supra* note 606, at 126–30 (discussing the impact of the *Swift* case).

609. Standard Oil Co. v. United States, 221 U.S. 1, 64, 87, 94–100 (1911).

610. *See id.* at 50; *see also* Paul I, *supra* note 50, at 212–15, 235 ("Chief Justice White's opinion in that decision [*Standard Oil*] in fact took the substantive content of the common law of restraint of trade quite seriously. Chief Justice White's opinion engaged with the common-law tradition at length, discussing its roots in traditional market regulation and in doctrines like forestalling and engrossing—and identifying the legislative purpose as curbing the concentrated power of business trusts and corporations, and the relatively few individuals who controlled them.").

611. *See* S. REP. NO. 62-1326, at 10–12 (1913) ("Cummins Report"); *Standard Oil*, 221 U.S. at 50.

612. H.R. REP. NO. 63-627, at 17 (1914). The House Judiciary Committee's report on the Clayton Act bill refers to corporate mergers forming holding companies as a "common and favorite method of promoting monopoly" and describes holding companies as "an abomination and in our judgement . . . a mere incorporated form of the old-fashioned trust." *Id.* The congressional desire to fashion a "legislative rule" for the proscription of monopolistic methods in the Clayton Act is exemplified by the report of the Senate Interstate Commerce Committee on its investigation (authorized by Senate resolution in response to the *Standard Oil*

Clayton Act's prohibitions "more explicit legislative definition" than that given to the prohibitions of the Sherman Act, Congress singled out several business methods that had proven integral to the processes of monopolization for prohibition based exclusively on one factor—the risk they posed of lessening competition or tending to the creation of a monopoly.[613] Congress specifically targeted corporate mergers, exclusive dealing, and commercial discrimination based on what it had learned from a series of groundbreaking investigations over the previous quarter-century into the "actual processes and methods of monopoly."[614]

The investigations that formed the basis of the Clayton Act revealed that dominant corporations used a fairly consistent pattern of monopolistic tactics to control markets and subjugate the public to private ordering.[615] Specifically, Congress found that, typically, the process of monopolization began with mergers.[616] Using aggregated capital or privileged access to financing, a monopolist would merge with direct competitors until they consolidated a significant portion of their initial market.[617] The resultant market power would enable them to generate higher profits and mobilize even greater financial power—which the monopolist would then plow into yet more strategic mergers, extending their reach across their industrial ecosystem into a wide range of adjacent products, separated geographic markets, and vertically related lines of business.[618] As they became a significant operator in multiple markets, a monopolist would develop inherent advantages over their single-market competitors—including, critically, the power to exploit customer dependencies with tying arrangements and to subsidize predatory

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decision) into "the control of corporations, persons, and firms engaged in interstate commerce." S. REP. NO. 62-1326, at 1, 11.

613. William Kolasky, *George Rublee and the Origins of the Federal Trade Commission*, ANTITRUST, Fall 2011, at 106 (quoting President Woodrow Wilson, Address to a Joint Session of Congress on Trusts and Monopolies (Jan. 20, 1914)); s*ee* MARTIN, *supra* note 11, at 43–44.

614. Everette MacIntyre, *Small Business and the Antitrust Laws*, 39 UNIV. DET. L.J. 169, 174–75 (1961); MARTIN, *supra* note 11, at 43–45; *Introduction: The Clayton Act of 1914*, *supra* note 604, at 989–1023; *see also* President Woodrow Wilson, Address to a Joint Session of Congress on Trusts and Monopolies (Jan. 20, 1914) ("We are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade . . . [which] can be explicitly and item by item forbidden by statute[.]").

615. *See* MacIntyre, *supra* note 614, at 171–75; *Introduction: The Clayton Act of 1914*, *supra* note 604 (describing "Other Pressures for Extension of the Sherman Act" including "the powerlessness of labor organizations[,]" the "money trust[s] and the power [they] gained through control over the issuance of currency" as detailed in the history of the Pujo Committee investigations in 1912).

616. *See* MacIntyre, *supra* note 614, at 171–75.

617. *See id*. at 171–75; Blake, *supra* note 563, at 580–81; *The Merger Movement: A Summary Report*, *supra* note 43, at 3454–55.

618. *See* MacIntyre, *supra* note 614, at 171–75; Blake, *supra* note 563, at 580–81.

pricing in one market with profits in another.[619] Simultaneously, the growing scale and diversity of the monopolist's business would enable them to extract progressively more favorable treatment from their suppliers—and by the same token induce discriminatory treatment for its competitors.[620]

The development of monopoly, therefore, was understood as a dynamic process of accretion, in which mergers, exclusive deals, and price discrimination were the principal instruments for the progressive conversion of financial power into market power and market power into more financial power.[621] These methods were "monopolistic" because they inherently deployed financial or market power to "get competitors out of the way" by buying, excluding, or suppressing them—all without requiring the monopolist to compete on the merits or "do the thing better."[622] Their role in the process of monopolizing was not to "singly and in themselves" create a monopoly, but to cumulatively, over time, displace competition and accrete power toward centers of aggregated wealth or existing dominance.[623]

The centripetal nature of these methods and their integral function to the creation, expansion, and entrenchment of monopolies meant they were largely incompatible with the democratic coordination of markets. Thus, there was no justification for keeping the prohibition of these methods dependent upon a careful, multi-directional, fact-intensive, case-by-case balancing of their potential benefits and potential harms to competition under the Rule of Reason.[624] Seeking to prophylactically prevent these methods from facilitating the "creation of trusts, monopolies, and conspiracies in their incipiency," Congress prohibited corporate mergers, exclusive arrangements, and commercial discriminations wherever their effect "may be" to displace competition or contribute to the power-creation processes of monopoly—exclusive of other

619. *See* MacIntyre, *supra* note 614, at 174–75; Blake, *supra* note 563, at 580–81; *see also* Christopher R. Leslie, *Revisiting the Revisionist History of* Standard Oil, 85 S. CAL. L. REV. 573, 575–76 (2012); GERALD BERK, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900–1932, at 43 (2009); Louis D. Brandeis, *Cutthroat Prices: The Competition That Kills*, HARPER'S WKLY., Nov. 15, 1913. The legislative history makes plain that Section 2 of the Clayton Act "was born of a desire to curb the use by financially powerful corporations of localized price-cutting tactics which had gravely impaired the competitive positions of other sellers." FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 543 (1959).

620. *See* MacIntyre, *supra* note 614, at 171–75.

621. *See id.* at 171–75; Blake, *supra* note 563, at 580–81.

622. MacIntyre, *supra* note 614, at 171–75; Blake, *supra* note 563, at 580–81.

623. S. REP. NO. 63-698, at 1 (1914).

624. For details on the Rule of Reason framework, see *supra* sources cited in note 294.

considerations.[625] Specifically, as enacted in 1914, Section 7 of the Clayton Act prohibited any corporation from acquiring any other "where the effect of such acquisition may be [1] to substantially lessen competition between the corporation [acquired] and the corporation making the acquisition, or [2] to restrain commerce in any section or community, or [3] to tend to create a monopoly in any line of commerce."[626]

But Congress' vision for the Clayton Act was not just of a statute designed to specifically proscribe routinely used unfair methods of competition. Congress also sought for the Clayton Act to codify its vision of democratic coordination among laborers and farmers after a hostile judiciary had undermined its intentions with the Sherman Act. As explained above, Congress consciously framed the Sherman Act so that it would restrain the power of dominant combinations without impinging on the rights of workers and farmers to freely coordinate for just prices and fair practices in the marketplace.[627] Indeed, even a cursory review of the legislative history of the Sherman Act reveals that the *protection* of labor was one of the avowed goals of its drafters.[628]

Nonetheless, in the years before the passage of the Clayton Act, federal enforcers and the Supreme Court turned the Sherman Act into a weapon against labor organizing, using antitrust lawsuits to enjoin and crush labor strikes and unionization drives.[629] Somehow, from 1893 to 1914, federal enforcers and the judiciary transformed a statute designed to protect labor by controlling capital into a tool for capital to control labor.[630] In the Clayton Act, Congress sought to overturn this absurd application of the Sherman Act by identifying the specific rights of democratic coordination it wanted to preserve—those of farmers and workers—and recognizing them explicitly as beyond antitrust scrutiny.[631] In Section 6 of the Clayton Act, legislators declared that "the labor of a human being is not a commodity or article of commerce."[632] "Nothing contained in the

625. *See* Raymond P. Hernacki, *Mergerism and Section 7 of the Clayton Act*, 20 GEO. WASH. L. REV. 659, 659–61 (1952).

626. Clayton Act, ch. 323, § 7, 38 Stat. 730, 731–32 (1914).

627. *See id.*; *see also Accommodating Capital*, *supra* note 562, at 782–83.

628. EDWARD BERMAN, LABOR AND THE SHERMAN ACT 52 (1930) ("There is no evidence available in the records of the [Sherman Act] debates to show that [Congress] . . . believed that the [law] would apply to labor[.]").

629. United States v. Workingmen's Amalgamated Council of New Orleans, 54 F. 994 (C.C.E.D. La.), *aff'd sub nom.*, 57 F. 85 (5th Cir. 1893); Loewe v. Lawlor, 208 U.S. 274 (1908).

630. *See Accommodating Capital*, *supra* note 562; Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. UNIV. CHI. L.J. 969 (2016) [hereinafter Paul III].

631. *See Accommodating Capital*, *supra* note 562, at 782–83.

632. *See* 15 U.S.C. § 17.

antitrust laws," they continued, "shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conduct for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof[.]"[633] In this way, Section 6 made clear that collective action among farmers and laborers is not to be subject to proscription under the antitrust laws.

Unfortunately, almost immediately after the Clayton Act was enacted, problems in Section 7's drafting allowed the courts to weaken its prohibition on mergers. The first important setback came in 1926, when the Supreme Court held that Section 7 applied only to stock—not asset—mergers.[634] Another came in 1930, when the Court held that the Clayton Act only prohibited a merger if it "injuriously affect[ed] the public,"[635] sidelining the "legislative rule" that Congress had expressly established for the illegality of mergers in favor of authorizing judges to evaluate mergers under the Sherman Act test. After this decision, Section 7 became only a "minor inconvenience"—if that—"to those who seek to buy up competition or impose control upon competitors."[636]

As a result of these holdings, a wave of asset-based mergers took off in 1927.[637] Over the following five years, 4,800 mergers were consummated.[638] Although merger activity slowed down with the onset of the Great Depression in the 1930s, another consolidation wave began in 1940 and accelerated in the wake of World War II.[639] The Supreme Court's holdings so fully vitiated Section 7 that almost no merger cases were brought by the Federal Trade Commission and the Department of Justice between 1930 and 1950.[640]

Fearing the role of corporate mergers in creating and entrenching monopoly power, facilitating market concentration, and undermining the vitality of democracy and small business, Congress enacted the Celler-Kefauver Act in 1950 to establish a "new statutory

633. *Id.*
634. *See* FTC v. W. Meat Co., 272 U.S. 554, 561 (1926).
635. Int'l Shoe Co. v. FTC, 280 U.S. 291, 298 (1930) (The court stated that a merger is only illegal when it "injuriously affect[ed] the public").
636. Bok, *supra* note 18, at 229–30; TEMP. NAT'L ECON. COMM., FINAL REPORT AND RECOMMENDATIONS OF THE TEMPORARY NATIONAL ECONOMIC COMMITTEE, S. DOC. NO. 77-35, at 23 (1st Sess. 1941).
637. *See* Bok, *supra* note 18, at 229–30.
638. *See id.* at 229–30.
639. *See id.* at 230–31.
640. Samuel R. Reid, *Antitrust and the Merger-Wave Phenomenon: A Failure of Public Policy*, 3 ANTITRUST L. & ECON. REV. 25 (1969).

formula for the legality of mergers"[641]—a formula which, according to the Act's proponents, would "call a halt to the merger movement that is going on in this country."[642]

c. The Celler-Kefauver Act: Finally Formulating an Effective Anti-Merger Policy

The Celler-Kefauver Act of 1950 provided a comprehensive overhaul of Section 7. Unlike subsequent amendments to the Clayton Act, which made minor in-line and procedural changes, the Celler-Kefauver Act replaced and reenacted Section 7 as a whole. Lawmakers viewed it as a capstone enactment in their decades-long effort to address the social, political, and economic hazards of corporate mergers, establishing a new substantive standard of illegality and "creating for the first time an effective anti-merger policy."[643]

1. The Legislative Context

The legislative process leading up to the Celler-Kefauver Amendment reveals a clear embrace of an antimonopoly vision of markets by lawmakers and their "reliance upon a structural theory of competition which stresses the advantages of a large number of small-sized firms."[644] The Amendment stemmed directly from the Temporary National Economic Committee's (the "TNEC") landmark three-year investigation into the causes and effects of concentration in the nation's economy between 1939 and 1941.[645] Following the conclusion of its investigation in 1941, the TNEC called for a legislative program of "economic restructuring" that would "stop the processes of concentration" and secure a "permanent decentralization" of economic power in American society.[646] Finding that mergers had "hastened the growth of the concentration of economic power and had contributed in major part

641. *See* Bok, *supra* note 18, at 230–31, 306.

642. *See* 95 CONG. REC. 11484, 11485 (1949) (statement of Rep. Celler).

643. Bok, *supra* note 18, at 306. Congress' procedural reforms would take place in the 1960s and 1970s. For example, Congress gave the Department of Justice the power to issue civil investigative demands during the Kennedy-Johnson years. *See* Antitrust Civil Process Act, Pub. L. No. 87-664, § 3, 76 Stat. 548 (1962). The Hart-Scott-Rodino act was enacted in the 1970s to bolster the procedural aspects of Section 7. *See* Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, 90 Stat. 1383 (1976).

644. Bok, *supra* note 18, at 247; Thomas, *supra* note 564, at 537–51. The legislative history of the Celler-Kefauver Act is carefully mapped in, Note, *Section 7 of the Clayton Act: A Legislative History*, 52 COLUM. L. REV. 766, 766–67 (1952).

645. *See* Thomas, *supra* note 564, at 536–40; *Section 7 of the Clayton Act: A Legislative History*, *supra* note 644, at 766–67.

646. TEMP. NAT'L ECON. COMM., FINAL REPORT AND RECOMMENDATIONS OF THE TEMPORARY NATIONAL ECONOMIC COMMITTEE, S. DOC. NO. 77-35, at 4, 9 (1st Sess. 1941).

toward the elimination of competition," the TNEC recommended the passage of a law that would "halt the merger process in its inception."[647]

Senator Joseph O'Mahoney, who had served as the TNEC's chair, immediately introduced the anti-merger legislation recommended by the committee.[648] Each subsequent Congress considered similar bills from Senator O'Mahoney and others in the House and Senate until 1950.[649] Meanwhile, Congress acted vigorously—through legislation, select committees, and investigations—to strengthen small business and attack consolidated industries.[650] In 1941, the House of Representatives approved a resolution by Rep. Wright Patman creating the Select Committee on Small Business to "study and investigate the National Defense Program in its relationship to small business in the United States."[651] Before this time, the term "small business" had no practical meaning in federal law and policy.[652] The Small Business Committee's investigations stirred Congress to change that—in 1942, it passed the Small Business Mobilization Act.[653]

Consistent with the antimonopoly vision animating the antitrust laws, the Small Business Mobilization Act authorized small businesses to cooperate in war production without fear of violating the antitrust laws and established the Smaller War Plants Corporation to finance that cooperation.[654] Relying on this Act, small, independent businesses (each with fewer than 500 employees) freely coordinated their resources to create productive capacities that rivaled the efficiency of the largest manufacturers.[655] Congress would not soon forget these achievements. By war's end, it would make reversing the processes

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647. *Id.* at 38.

648. Thomas, *supra* note 564, at 537.

649. For a list of the bills proposed prior to the 1950 Amendments, see *Introduction: The Celler-Kefauver Amendment of 1950*, *supra* note 604, at 3387–89.

650. For a fuller history of the congressional effort to restructure the economy and rebuild a yeomanry of small, local, independent business during the 1940s and 1950s, see MacIntyre, *supra* note 614, at 173–79. For a discussion of how the Small Business Mobilization Act of 1942 and the Surplus Property Act of 1944 interlace with the antitrust statutes, see Louis B. Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PENN. L. REV. 1076, 1077 (1979).

651. MacIntyre, *supra* note 614, at 169.

652. *See id.*

653. *See* Small Business Mobilization Act, ch. 404, §§ 1101–1112, 56 Stat. 351 (1942); MacIntyre, *supra* note 614, at 169.

654. *See* Small Business Mobilization Act §§ 1101–1112; MacIntyre, *supra* note 614, at 169.

655. MacIntyre, *supra* note 614, at 169; Jonathan J. Bean, *World War II and the "Crisis" of Small Business: The Smaller War Plants Corporation, 1942–1946*, 6 J. POL'Y HIST. 215, 234 (1994).

of concentration and securing a permanent decentralization of economic power its explicit policy in the Surplus Property Act of 1944, as well as in other statutes designed to shape the nation's postwar economy.[656]

In the Surplus Property Act, federal agencies were instructed to distribute the government's enormous wartime industrial capacity with unequivocal objectives to "discourage monopolistic practices," to "strengthen and preserve the competitive position of small business concerns," to "foster the development of new independent enterprises," and to "develop the maximum of independent operators in trade, industry, and agriculture."[657] Simultaneously, through the Contract Settlement Act and the War Mobilization and Reconversion Act, programs were established to "make loans to small plants pending settlement of their government contracts" and "give [them] other contract settlement assistance," to "assist small businesses and veterans in obtaining surplus property," to make loans to small businesses for this purpose," and to ensure "that small businesses obtained a fair share of scarce materials as they were released to civilian production."[658]

These statutes interlaced directly with federal antitrust policy and were considered to be *in pari materia* with the antitrust laws by judges, legislators, and practitioners alike.[659] From the 1930s through the 1950s, it was the avowed policy of the federal government to "advanc[e] on many fronts to free small business from domination by big business."[660] Congress set the tone for this advance as early as 1936, when it enacted the Robinson-Patman Act.[661] Intended to ensure "equal rights to all and special privileges to none" in the marketing of products for resale, the Robinson-Patman Act prohibited dominant buyers from extracting preferential terms

656. *See* Small Business Mobilization Act §§ 1101–1112; Louis Cain & George Neumann, *Planning for Peace: The Surplus Property Act*, 41 J. ECON. HIST. 129, 129–31 (1981). In 1944, Congress passed two other statutes—the War Mobilization and Reconversion Act and the Contract Settlement Act—to supplement the Surplus Property Act and to pursue the same antimonopoly policies. *See* Wendell Barnes, *What Government Efforts Are Being Made to Assist Small Business*, 24 LAW & CONTEMP. PROBS. 3, 4 (1959).

657. Surplus Property Act, ch. 479, 58 Stat. 765 § 2(b), (d), (p) (1944).

658. Barnes, *supra* note 656, at 5.

659. *See* United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 429 (2d Cir. 1945); *see generally* H. REP. NO. 82-2513 (1952) (Final Report on the Select Committee on Small Business); S. REP. NO. 82-1068 (1952); *see also* Herbert F. Sturdy, *Federal Aids to Small Business*, 11 BUS. LAW. 39 (1956); Philip F. Zeidman, *The Small Business Administration and Private Antitrust Litigation*, 36 ANTITRUST L.J. 188, 188 (1967) (Zeidman was the General Counsel of the Small Business Administration).

660. Sturdy, *supra* note 659, at 39.

661. Robinson-Patman Act, ch. 592, 49 Stat. 1526 (1936) (codified as amended at 15 U.S.C. §§ 13 et seq.).

from suppliers that could injure the competitive opportunities of their smaller rivals.[662]

Taking their cue from Congress, from the late 1930s through the 1950s, the antitrust agencies initiated a prodigious stream of enforcement actions to eliminate the various practices and schemes—from basing-point and preferential-pricing systems to patent-leveraging and exclusive-contracting schemes—that dominant incumbents had used to regiment competition in their fields and suppress rivalry by small businesses and new entrants.[663] Following the antimonopoly policy laid out by Congress in the Surplus Property Act and other enactments at the time, enforcers consistently sought—and received—remedial orders in their antitrust cases that enjoined defendants, not only to end the specific practices challenged, but also to affirmatively "furnish technical information and know-how to their small competitors," and "divest themselves from a portion of their own business if they had not built up the capacity of their competitors within a prescribed time."[664]

2. The Legislative Process

In this context, legislators viewed the accelerating merger wave of the post-war era as a profound threat to their vision "of a peacetime economy of free independent private enterprise."[665] In 1947

662. *See, e.g.*, *To Amend the Clayton Act: Hearing Before the H.R. Comm. on the Judiciary*, 74th Cong. 4 (1935); 80 CONG. REC. 7761 (1936) (statement of Representative Patman); 80 CONG. REC. 9422 (1936) (statement of Representative Patman) ("This bill grants each and every one the opportunity to do an honest, legitimate business, and protects him from cheaters and racketeers. It is not going to hurt any manufacturer or producer who is doing an honest business and treating all of his customers in the same fair, square way that he should treat all of them."); 79 CONG. REC. 12658 (1935) (statement of Representative Boileau). For extensive details on the history of the Robinson-Patman Act, see Daniel A. Hanley, *Controlling Buyer and Seller Power: Reviving Enforcement of the Robinson-Patman Act*, 52 HOFSTRA L. REV. 313 (2024), and Brian Callaci, Daniel A. Hanley & Sandeep Vaheesan, *The Robinson-Patman Act as a Fair Competition Measure*, 97 TEMPLE L. REV. (forthcoming 2025).

663. *See* Sturdy, *supra* note 659, at 39–41.

664. *Id.* at 39–40 (describing how "in more than eighty instances since 1940," decrees in antitrust cases "provide[d] affirmative aid to small business in many ways," including requiring "the defendants … to grant patent licenses to all applicants, either royalty free or with a reasonable royalty," "to furnish technical information and known-how to their small competitors," and "to divest themselves from a portion of their own business if they had not built up the capacity of their competitors within a prescribed time").

665. Surplus Property Act, ch. 479, 58 Stat. 765 § 1(b) (1944). For discussions of the kind of postwar economy legislators desired to build and the threat which mergers posed to their vision in the committee reports and the floor debates on the Celler-Kefauver Act, see, for example, H.R. REP. NO. 81-1191, at 8-9, 11 (1949); S. REP. NO. 81-1775, at 4295 (1950); 95 CONG. REC. 11485 (1949) (statement of Rep. Celler); *id.* at 11489 (statement of Rep. Keating); *id.* at 11492–93 (statement of Rep. Carroll); *id.* at 11493–94 (statement of Rep. Yates); *id.* at 11494–95 (statement of Rep. Bryson); *id.* at 11496–98 (statement of Rep. Boggs); *id.* at 11499 (statement of Rep. Evins); *id.* at 11502–03 (statement of Rep. Biemiller); *id.* at 11503–04 (statement of Rep. Doyle); *id.* at 11506 (statement of Rep. Bennett); 96 CONG. REC. 16444

and 1948, the FTC delivered comprehensive 6(f) reports to Congress on the role of corporate mergers in promoting "the growth of giant corporations," "the disappearance of small business," and "a general increase in concentration and monopoly."[666] Centrally, these reports highlighted for Congress that: (a) the Great Merger Movement of 1897-1907 was the original cause of "American industry['s] characteristic twentieth-century concentration of control"; and that (b) corporate mergers had ever since served as the primary vehicle for "the growth of giant corporations, by accretion, at the expense of small, independent firms" in the remaining "small business industries."[667] The two FTC reports—and the TNEC report—provided the core factual and intellectual premises on which legislators relied in passing the Celler-Kefauver Act and were thoroughly interwoven into its legislative history.[668]

This decade-long legislative process culminated in extensive Senate and House hearings on the nature and effect of corporate mergers that spanned the 79th, 80th, and 81st Congresses, the results of which were ultimately distilled into the committee reports, sponsor statements, and floor debates leading to the

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(1950) (statement of Sen. O'Mahoney) (citing study from the Department of Commerce); *id.* at 16450, 16452 (statement of Sen. Kefauver); *id.* at 16503–04 (statement of Sen. Aiken); 95 CONG. REC. 11501 (1949) (statement of Rep. Douglas); *see also Amending Sections 7 and 11 of the Clayton Act: Hearing on H.R. 988, H.R. 1240, H.R. 2006, and H.R. 2734 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 81st Cong. 12 (1949) (statement of Sen. Kefauver) ("When the destiny of people over the land is dependent upon the decision of two or three people in a central office somewhere, then the people are going to demand that the Government do something about it."); *see also Modernization of Antitrust: A New Equilibrium*, *supra* note 17, at 1149–50.

666. FTC, THE PRESENT TREND OF CORPORATION MERGERS AND ACQUISITIONS, S.DOC. NO. 80-17 (1st Sess. 1947), *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES, *supra* note 43, at 3421.

667. *Id.* at 3421 ("As a result of this anomaly [the loophole in Section 7 for asset mergers], a powerful impetus was given to the growth of giant corporations, by accretion, at the expense of small, independent firms."); *The Merger Movement: A Summary Report*, *supra* note 43, at 3452 ("It is often forgotten that many of the Nation's largest corporations were originally created as giant consolidations of numerous existing small firms . . . . [I]t was the consolidation movement at the turn of the century that 'gave to American industry its characteristic twentieth century concentration of control.'").

668. *See* Bok, *supra* note 18, at 229–30, 233–34. For direct references to the FTC reports during the floor debates, see, for example, H.R. REP. NO. 81-1191, at 2 (1949); 95 CONG. REC. 11485 (1949) (statement of Rep. Celler); *id.* at 11492 (statement of Rep. Carroll); *id.* at 11496 (statement of Rep. Boggs); *id.* at 11499 (statement of Rep. Evins); 96 CONG. REC. 16443 (1950) (statements of Sens. O'Mahoney and Donnell). For direct references to the TNEC reports during the floor debates, see, for example, 95 CONG. REC. 11489 (1949) (statement of Rep. Keating); 96 CONG. REC. 16436 (1950) (statement of Sen. O'Conor); 95 CONG. REC. 11486–87 (1949) (statement of Rep. Celler). Beyond floor debates, the FTC reports are heavily quoted in the Senate committee reports in both support and opposition of the Act. *See* S. REP. NO. 81-1775, at 6, 13, 14 (1950).

Amendment's passage.[669] Throughout this process, the central theme of the Amendment's proponents was the historic, continuing, and primary role of corporate mergers in the centralization of economic power within large corporations.[670] All who spoke in favor of the bill—and the committee reports—emphasized that the concentration of asset-ownership and market-control within large corporations (both in the economy as a whole and in specific industries) was both dangerously high and still increasing.[671] The role of corporate mergers as vehicles of economic concentration was invariably highlighted through examples of: (1) large corporations combining with each other; (2) new, large corporations being created out of multiple smaller ones; or (3) small businesses being absorbed into large corporations.[672]

Significantly, proponents unanimously argued that the 1940s merger wave had to be checked through the passage of the Amendment precisely because it was pervaded by large corporations buying out small, independent businesses in traditionally unconcentrated industries.[673] Drawing on the FTC

669. *See* Bok, *supra* note 18, at 306 ("It [the Celler-Kefauver Act] was enacted after very extensive hearings on the nature and effects of mergers, and was treated in the reports and debates as creating for the first time an effective antimerger policy."); *see also, e.g.*, 96 CONG. REC. 16436 (1950) (statement of Sen. O'Conor) ("As would be expected from this lengthy legislative history, the record on this bill is voluminous, consisting of three printed volumes of hearings before subcommittees of the House Judiciary Committee in the Seventy-Ninth, Eightieth and Eighty-first Congresses; approximately 700 typewritten pages of transcript of hearings before the subcommittee of the Senate Judiciary Committee of the Eightieth Congress; a printed volume of hearings before the subcommittee of the Senate Judiciary Committee of the Eighty-first Congress . . .").

670. *See, e.g.*, 96 CONG. REC. 16436 (1950) (statement of Sen. O'Conor); 95 CONG. REC. 11499 (1949) (statement of Rep. Patman); *id.* at 11502 (statement of Rep. Biemiller); *id.* at 11505 (statement of Rep. Byrne); 96 CONG. REC. 16437 (1950) (statement of Sen. O'Mahoney).

671. *See, e.g.*, H.R. REP. NO. 81-1191, at 2 (1949); 95 CONG. REC. 11485–86 (1949) (statement of Rep. Celler); *id.* at 11492–94 (statement of Rep. Carroll); *id.* at 11497–98 (statement of Rep. Boggs); *id.* at 11498 (statement of Rep. Patman); *id.* at 11500 (statement of Rep. Douglas); S. REP. NO. 81-1775, at 3 (1950); 96 CONG. REC. 16433, 16435 (1950) (statement of Sen. O'Conor); *id.* at 16444–47 (statement of Sen. O'Mahoney); *id.* at 16450 (statement of Sen. Kefauver); *id.* at 16506–07 (statement of Sen. Aiken).

672. *See, e.g.*, H.R. REP. NO. 81-1191, at 2–3 (1949); 95 CONG. REC. 11485, 11487 (1949) (statement of Rep. Celler); *id.* at 11493 (statement of Rep. Yates); *id.* at 11494–95 (statement of Rep. Bryson); *id.* at 11496 (statement of Rep. Boggs); *id.* at 11501 (statement of Rep. Douglas); *id.* at 11503 (statement of Rep. Biemiller); *id.* at 11504 (statement of Rep. Doyle); *see id.* at 11505 (statement of Rep. Byrne); 96 CONG. REC. 16433 (1950) (statement of Sen. O'Conor); *id.* at 16449 (statement of Sen. O'Mahoney); *id.* at 16451 (statement of Sen. Kefauver); 95 CONG. REC. 11489 (1949) (statement of Rep. Keating); *id.* at 11494–95 (statement of Rep. Boggs).

673. *See, e.g.*, 96 CONG. REC. 16433 (1950) (statement of Sen. O'Connor) ("The evidence thus points to the conclusion that, insofar as its impact on concentration is concerned, the outstanding characteristic of the current merger movement has been the absorption of smaller independent enterprises by larger concerns."); *id.* at 16443 (referring to charts showing increase in acquisitions in grocery and food products, distilleries, wineries, farm-machinery, chemical, and steel companies); *id.* at 16450 (statement of Sen. O'Mahoney); 95 CONG.

reports, legislators repeatedly hammered home their alarm that 93% of the firms acquired between 1940 and 1947 had less than $1 million in assets;[674] that more of these acquisitions occurred in "small business" industries such as textiles and food than in any other industries;[675] that these acquisitions had taken 2,500 independent firms out of business; and that they were gradually transforming "open and free" industries into oligopolies.[676] Almost none of these mergers had, on its own, significantly consolidated markets or harmed market performance. That was the point.

In tandem with this unambiguous condemnation of the concentrative mergers and acquisitions that had pervaded then-contemporary and historical merger waves, "none of the justifications for mergers by big companies were accorded any significance by Congress."[677] Instead, "[e]fficiency, expansion, and the like were ignored or simply brushed aside in the deliberations."[678] This was not an accident. It reflected the considered economic policy of Congress after a decade of congressional investigations into the nature and effect of corporate mergers in our economy.[679]

The basic economic conclusions that many legislators had derived from this decade of congressional study were that corporate mergers: (1) did not generate productive efficiencies; (2) produced little, if any, social or economic value for the public; and (3) functioned mainly as vehicles for large corporations to consolidate economic power at the expense of small, independent business.[680]

REC. 11489 (1949) (statement of Rep. Keating); *id.* at 11484 (statement of Rep. Bryson) (discussing impact of merger movement on southern communities and loss of control of textile industry); *id.* at 11496–97 (statement of Rep. Boggs) (naming predominantly small-business fields such as food, textiles, apparel, and non-electrical machinery as those most impacted by merger movement).

674. *See, e.g.*, 96 CONG. REC. 16433 (1950) (statement of Sen. O'Conor); 95 CONG. REC. 11505 (1949) (statement of Rep. Byrne).

675. *See, e.g.*, 96 CONG. REC. 16404, 16433 (1950) (statement of Sen. O'Conor); 95 CONG. REC. 11484 at 11497–98 (1949) (statement of Rep. Boggs).

676. *See, e.g.*, 96 CONG. REC. 16404, 16434 (1950) (statement of Sen. O'Conor); 95 CONG. REC. 11506 (1949) (statement of Rep. Byrne).

677. *See* Bok, *supra* note 18, at 307 n.252.

678. *Id.*

679. *See Introduction: The Celler-Kefauver Act of 1950*, *supra* note 604 (mentioning the justifications of the Celler-Kefauver Act which included the findings found in the Temporary National Economic Committee in the 1940s and Federal Trade Commission's 1947 study of mergers in the United States); *see also* Thomas, *supra* note 564, at 506–49; TEMP. NAT'L ECON. COMM., INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER, S. DOC. NO. 77-35, at 3 (1st Sess. 1941).

680. 95 CONG. REC. 11499 (1949) (statement of Rep. Patman) (stating "the body of evidence which has been presented to Congress in support of the bill is voluminous"). *See, e.g.*, *id.* at 11496–98 (statement of Rep. Boggs):

Since consolidation slackened competitive pressures and diverted investment from the creation of new productive capacities and enterprises, mergers were also found to have their own negative economic effects.[681] Meanwhile, other methods for achieving economies of scale—such as internal expansion or cooperation

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> Question: Will not the passage of this bill prevent American industry from improving its efficiency?
> Answer: In all of the hearings before the House and Senate Judiciary Subcommittees on this bill, going back to 1945, officials of a number of large corporations have been asked specifically whether the recent mergers made by their companies had resulted in increased efficiency. It is rather interesting to note that, universally, these representatives of big business did not know whether efficiency had been increased; they were unable to present any evidence whatever showing that mergers have brought about greater efficiency; and this is not surprising when it is remembered that the Temporary National Economic Committee Monograph No. 13 found that there was no definite relationship between size and efficiency.
> Question: If an increase in efficiency is not the purpose behind these acquisitions, why were they made?
> Answer: Acquisitions of competing companies take place as a result of many causes. In the first place, there is the desire to monopolize, to control the market, to eliminate competition. This, of course, is the basic factor which underlies most acquisitions.
> Then, too, the large corporations have emerged from the war with immense amounts of funds; as of June 1947 the [seventy-eight] largest corporations possessed $10 [billion] of net working capital, which is sufficient to purchase the assets of nearly 90[%] of the number of all manufacturing corporations. Moreover, this working capital is largely in the highly liquid form of cash and Government securities. In other words, giant corporations are merely putting their money to work by buying up independent companies.
> A third reason behind the acquisition drive is the desire of companies with established sales and distribution organizations to round out their lines with additional products.
> Fourth, huge corporations, like General Electric, fabricating all kinds of products have been buying out producers of raw materials in order to get hold of critical materials which have been in short supply during most of the prewar period.
> Fifth, at the same time producers of raw materials, like United States Steel, have been extending forward into the production of fabricated products in order to secure the higher profit margins of the fabricating industries.
> Sixth, some large companies have purchased small firms in order to obtain valuable stocks of commodities. An example of this is the big liquor firms, who have used mergers as a means of obtaining stocks of aged whisky. The Big Four distillers own 75[%] of all the whisky stocks [four] years old and over in the country — enough to prevent any newcomer from entering the business with any chance of success.

681. *See, e.g.*, 95 CONG. REC. 11493 (1949) (statement of Rep. Yates) ("When three or four producers take the places of [twenty] or [thirty], the chances are great that price competition will be crippled, that declining markets will be dealt with by restriction of output instead of by price reduction, that the big concerns will adopt a live-and-let-live policy toward each other at the sacrifice of their efficiency and their progress, and that the remaining small competitors will be either bought out or reduced to vassals who meekly follow the large enterprises."); *id.* at 11495 (statement of Rep. Bryson) ("Not only is this growing trend toward outside control of local enterprise damaging to civic welfare, but also it is harmful to the general welfare, as the heads of large concentrated organizations tend to follow the suicidal policy of maintaining prices and cutting production, rather than lowering prices and maintaining production."); *id.* at 11500 (statement of Rep. Evins) (discussing common practice among large corporations – particularly in steel industry – to channel supplies into own integrated corporations, denying smaller businesses essential inputs). H.R. REP. NO. 82-2513, at 249–50 (1952); *see generally* S. REP. NO. 82-1068, at 193–201, 241 (1952).

between small businesses—were found to deliver all of the alleged benefits of corporate mergers without the adverse effects of excessive concentration.[682] Based on this policy judgment about the relative social and economic value of corporate mergers compared to other business methods, legislators found such mergers were "methods of monopoly" whose operation was "the antithesis of meritorious competitive development"—to be discouraged among all but small, independent businesses.[683]

Throughout the legislative history of the Celler-Kefauver Amendment, only three categories of mergers and acquisitions were identified as potentially innocuous and not inconsistent with the antimonopoly policy of the bill: (1) transactions involving individuals and partnerships, (2) acquisitions of failing companies, and (3) mergers or acquisitions of small business.[684] By 1950, these categories were not amorphous in the kinds of firms they encompassed.

On the one hand, an acquisition of a "failing company" that did not offend the antitrust laws had been defined by the Supreme Court as early as 1930. In *International Shoe*, the Court had held

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682. *See, e.g.*, 96 CONG. REC. 16449 (1950) (statement of Sen. Kefauver) (discussing positive impact of small business cooperation on defense production during World War II); 95 CONG. REC. 11493 (1949) (statement of Rep. Carroll); *id.* at 11494–95 (statement of Rep. Bryson). Representative Yates cogently summarized the economic demerits of corporate mergers in comparison to other methods of business growth as follows during the House floor debates:

> A corporation may grow big in several ways. One is to make money and use the profits to expand its operations. When this happens the expansion is an evidence of the concern's success, a result of a kind of vote of confidence which consumers have given the enterprise by trading with it. Another way is to float new security issues in the market and expand with the proceeds. A concern which does this has exposed its prospects to the judgment of investment bankers and investors in competition with other companies which wish to expand . . . The third method of expanding, however, is inherently dangerous to competition. It consists in buying out going concerns. A desire to get rid of inconvenient competitors is one of the most probable motives for this type of expansion. And even where the motive does not exist, elimination of one competitor after another and a consequent weakening of competition is the almost inevitable result. When a concern expands by reinvesting profits or floating security issues, nothing in its action prevents others from trying to expand too. When a concern expands by acquiring its competitors, its growth and a reduction of the number and strength of competitors are two aspects of the same transaction. Hence we do well to look with suspicion upon the buying out of competitors . . .

Id. at 11493.

683. 96 CONG. REC. 16452 (1950) (statement of Sen. O'Mahoney).

684. *See* Thomas, *supra* note 564, at 547–51. For representative discussions of failing-firm acquisitions, see H.R. REP. NO. 81-1191, at 6–7 (1949); 95 CONG. REC. 11486-87, 11488–99 (1949) (statement of Rep. Celler); *id.* at 11503–04 (statement of Rep. Doyle); 96 CONG. REC. 16435, 16441 (1950) (statement of Sen. O'Conor). For representative discussions of mergers between small business, see, for example, H.R. Rep. No. 81-1191, at 6–7; 95 CONG. REC. 11486–87, 11488–99 (1949) (statement of Rep. Celler); 95 CONG. REC. 11503–04 (1949) (statement of Rep. Doyle); 96 CONG. REC. 16441 (1950) (statement of Sen. O'Conor).

that "a corporation with resources so depleted and the prospect of rehabilitation so remote that it face[s] the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants [are] operated" may have its stock acquired by a competitor without violating the antitrust laws as long as "no other prospective purchaser" exists and the buyer has no anticompetitive or monopolistic purpose.[685] Both the House and Senate reports reviewed the Supreme Court's opinion in *International Shoe* and adopted this definition of a "failing company" transaction.[686]

On the other hand, the term "small business" had likewise become a definite one in federal regulatory and legislative practice by 1950. Specifically, it was primarily identified with firms that are not dominant in their field of operation, that are owned and operated independently of the dominant firms in that field, and that possess a "small" number of employees and volume of business in comparison to other enterprises in their field.[687] For example, the War Mobilization and Reconversion Act of 1944 defined a small business as either "employing 250 wage earners or less," or having "sales volumes, quantities of materials consumed, capital investments, or by other criteria which are reasonably attributable to small plants rather than medium- or large-sized plants."[688] Similarly, the Selective Service Act of 1948 classified a business as small for military procurement purposes if "(1) its position in the trade or industry of which it is part is not dominant, (2) the number of its employees does not exceed 500, and (3) it is independently owned and operated."[689] Indeed, shortly after enacting the Celler-Kefauver Amendment, Congress eliminated any confusion about this category by enacting a government-wide definition of "small business" that paralleled these terms in the Small Business Act of 1953[690]—a statute which, like the Surplus Property Act of 1944, was

685. Int'l Shoe Co. v. FTC, 280 U.S. 291, 302 (1930).

686. *See* H.R. REP. NO. 81-1191, at 6 (1949); S. REP. NO. 81-1775, at 8 (1950).

687. *See* MacIntyre, *supra* note 614, at 169–71; Cain & Neumann, *supra* note 656, at 132–35; *see also* Barnes, *supra* note 656, at 4; Sturdy, *supra* note 659, at 39 ("The federal government is advancing on many fronts to free small business from domination by big business.").

688. H. REP. NO. 82-2513, at 2 (1952); *see also* S. REP. NO. 82-1068, at 161, 256 (1952).

689. H. REP. NO. 82-2513, at 134; *see also* S. REP. NO. 82-1068, at 99, 178–79; H. REP. NO. 80-2438, at 24 (1948).

690. *See* Small Business Act of 1953, Pub. L. No. 83–163, § 202, 67 Stat. 232, 232 (1953) ("For the purposes of this [Act], a small-business concern shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation. In addition to the foregoing criteria the [Small Business] Administration, in making a detailed definition, may use these criteria, among others: Number of employees and dollar volume of business."). This standard in the Small Business Act was adopted upon the recommendation of a comprehensive review, conducted by the House Select Committee on Small Business in

expressly intended by Congress to secure "[t]he preservation and expansion of . . . competition," and therefore considered to be *in pari materia* with the antitrust laws.[691]

In summary, the legislative history of the Celler-Kefauver Amendment reveals a plain congressional intent to establish a far-reaching prohibition on mergers that concentrate economic power in large corporations while avoiding undue interference with the freedom of small and failing businesses.[692] Toward that end, the framers of the Amendment indicated that its text was carefully drafted "to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."[693] Considering that lawmakers demonstrated a keen understanding of the Sherman Act's jurisprudence during the deliberations on the Celler-Kefauver Act,[694] their intent to establish a *more* far-reaching standard sheds

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1952, of methods for defining small businesses used in federal statutes, executive branch directives, and academic literature. *See* H. REP. NO. 82-2513, at 2 (1952).

691. Small Business Act of 1953, Pub. L. No. 83–163, § 202, 67 Stat. 232, 232 (1953) ("The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect insofar as is possible the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts for supplies and services for the Government be placed with small-business enterprises, and to maintain and strengthen the overall economy of the Nation."); *see also* H. REP. NO. 82-2513, at 5, 13, 14, 78, 136 (1952) (asserting that defining and assisting "small business" was necessary to enhance economic competition, combat monopoly formation, inhibit the concentration of economic power, and maintain "the integrity of independent enterprise"); ROBERT JAY DILGER ET AL., CONG. RSCH. SERV., R40860, SMALL BUSINESS SIZE STANDARDS: A HISTORICAL ANALYSIS OF CONTEMPORARY ISSUES 1 (June 15, 2022); Sturdy, *supra* note 659, at 39. *Cf. generally* Zeidman, *supra* note 659, at 188 ("A violation of the antitrust laws is, in effect, a plundering raid into the market place. As is the case with all predatory excursions, the strong and powerful enjoy the advantages while the weak and small suffer loss, ruin and destruction. We at the Small Business Administration have been assigned the mission of protecting the small and fostering their growth.").

691. Sturdy, *supra* note 659.

692. S. REP. NO. 81-1775, at 2–3 (1950); Khan & Vaheesan, *supra* note 9, at 272; Thomas, *supra* note 564, at 552–53.

693. S. REP. NO. 81-1775, at 5 (Report of the Senate Judiciary Committee on H.R. 2734) ("The committee wish to make it clear that the bill is not intended to revert to the Sherman Act test. The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.").

694. *See, e.g.*, S. REP. NO. 81-1775, at 15 (1950) (Report of the Senate Judiciary Committee on H.R. 2734) (Minority Views of Sen. Donnell) (reviewing the contemporary state of Sherman Act jurisprudence in detail to argue that the proposed bill is unnecessary); H.R. REP. NO. 81-1191, at 9–10 (1949); 96 CONG. REC. 16438–39 (1950) (statement of Sen. O'Connor); *id.* at 16452 (1950) (statement of Sen. Kefauver). Concerning the ineffectiveness of the

an important light on the scope of the prohibition Congress sought to establish in the Celler-Kefauver Act.

Over the course of the decade before the Celler-Kefauver Act was passed, the Supreme Court had re-interpreted the Sherman Act to "giv[e] the law new and far-reaching scope."[695] Among other things, the Court's decisions over the 1940s had imposed definite restrictions on the use of corporate mergers by dominant firms. Specifically, they had made clear that a merger justifies a Sherman Act proceeding where it: (1) results in an actual monopoly;[696] (2) entrenches or extends an actual monopoly;[697] (3) "unreasonably lessens competition" in a line of business by eliminating head-to-head rivalry that is "substantial" in light of "the strength of the remaining competition, . . . the probable development of the industry, consumer demands, and other characteristics of the market";[698] (4) "unreasonably restricts the opportunities of competitors to market their products" in light of "the nature of the market to be served" and the "leverage" that the merger "creates or makes possible" in the hands of the merged firm;[699] or (5) otherwise "tend[s] to create a monopoly and to deprive the public of the advantages that flow from free competition."[700]

Against this already restrictive Sherman Act background, the legislative history makes clear that the Amendment's test of illegality—prohibiting mergers where their "effect . . . in any line of commerce in any section of the country, may be substantially to lessen competition, or to tend to create a monopoly"—was intended to "reach far beyond the Sherman Act" and its pre-existing restrictions on mergers.[701] Thus, in committee reports and sponsor

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Sherman Act, see H.R. REP. NO. 81-1191, at 10; 95 CONG. REC. 11492 (1949) (statement of Rep. Carroll); *id.* at 11493 (statement of Rep. Yates); 96 CONG. REC. 16439 (1950) (statement of Sen. O'Connor); *id.* at 16501–02 (1950) (statement of Sen. Kefauver); *see also* 95 CONG. REC. 11486 (1949) (statement of Rep. Celler).

695. Rostow II, *supra* note 420, at 580.

696. United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 424–26 (2d Cir. 1945); United States v. Paramount Pictures, 334 U.S. 131, 149–57 (1948); United States v. Griffith, 334 U.S. 100, 106–10 (1948); United States v. Columbia Steel Co., 334 U.S. 495, 519–34 (1948).

697. *Columbia Steel Co.*, 334 U.S. at 519–34; *Paramount Pictures*, 334 U.S. at 167–75; *Griffith*, 334 U.S. at 105–10.

698. *Columbia Steel Co.*, 334 U.S. at 508, 527.

699. *Id.* at 524.

700. Associated Press v. United States, 326 U.S. 1, 17 n.1 (1945); *Alcoa*, 148 F.2d at 428–29.

701. S. REP. NO. 81-1775, at 5 (June 2, 1950) (Report of the Senate Judiciary Committee on H.R. 2734) ("The committee wish to make it clear that the bill is not intended to revert to the Sherman Act test. The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.").

statements, the Amendment's proponents explained that the new Section 7 would not require enforcers to "speculate as to what is in the 'back of the mind' of those who promote a merger"; prove that the merging parties had engaged in, or will engage in, "unethical or predatory" behavior; or show that the merged firm will "posses[s] the power to destroy or exclude competitors or fix prices."[702]

Moreover, where the Court's *Columbia Steel* decision had established that a merger's legality under the Sherman Act ought to be tested in the context of the "market in which the [merging parties] compete,"[703] the committee reports on the Act stated that its "section-of-the-country" language was intended to extend Section 7's reach to mergers that threaten proscribed effects in more granular segments of the country's population, geography, or economy.[704] Specifically, the Senate Report suggested that, as amended, Section 7 would prohibit mergers that threaten a proscribed effect in any "appreciable segment" of any "area of effective competition" for businesses in a particular line of commerce.[705] Further, the Senate Report flatly stated that the merging parties do not have to be head-to-head competitors for their merger to trigger Section 7's prohibition, and need not even do business in the "section of the country" where the proscribed effect is shown.[706]

To fortify this expansive standard embodied in the Amendment against "the tendency of the courts in cases under [the original Section 7] to revert to the Sherman Act test," legislators made further modifications to the original provision to remove the main justification that courts had used to ignore Section 7's original text in the past—its potential to prohibit mergers between small, local businesses.[707] As noted above, the original Section 7 prohibited mergers that, among other things, (1) lessened competition between the acquiring and acquired firm, or (2) restrained commerce in "any section or community."[708] Lawmakers believed the reason this text was abandoned by the courts was that, construed literally, it might

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702. *See, e.g.*, H.R. Rep. No. 81-1191, at 8 (1949) (Report of the House Judiciary Committee on H.R. 2734).

703. Columbia Steel Co., 334 U.S. at 512.

704. *See* S. REP. NO. 81-1775, at 10 (Report of the Senate Judiciary Committee on H.R. 2734); H.R. Rep. No. 81-1191, at 11; *see also* Thomas K. McElroy, *Section 7 of the Clayton Act and the Oil Industry*, 5 BAYLOR L. REV. 121, 129–32, 140–41 (1953).

705. S. REP. NO. 81-1775, at 10; H.R. Rep. No. 81-1191, at 11; *see also* McElroy, *supra* note 704, at 129–32, 140–41.

706. S. REP. NO. 81-1775, at 10; H.R. Rep. No. 81-1191, at 11; *see also* McElroy, *supra* note 704, at 129–32, 140–41.

707. S. REP. NO. 81-1775, at 4.

708. *See, e.g.*, *id.* at 4–6.

have prohibited "any local enterprise in a small town from buying up another local enterprise in the same town."[709] The Amendment sought to correct this defect by removing the "acquiring-acquired" and "community" phrasing from Section 7, and instead prohibiting mergers based on their potential to lessen competition, or to tend to create a monopoly, "in any line of commerce in any *section* of the country."[710] As committee reports and sponsor statements reveal, the central purpose of these changes was to avoid prohibiting mergers between small businesses that were "inconsequential" or "economically insignificant," or "would [make] no perceptible change" in competition.[711] By dropping these provisions that had previously led courts to abandon the text of Section 7, lawmakers sought to "assure a broader construction of its more fundamental provisions . . . than had been given in the past."[712]

In this way, Congress structured the Celler-Kefauver Act so that it would "stop the process of accretion by which monopoly power is attained"[713] without impinging on the freedom of small and failing businesses. Legislators viewed concentrative corporate mergers as a "road to monopoly"—some even called them a "highway to monopoly"—that Congress thought it had blocked back in 1914.[714] The "paradox" for legislators was that, because of the "loophole" in Section 7, the antitrust laws were prohibiting the "weaker, less effective, cooperative methods of eliminating competition"[715]—while permitting the "permanent and more effective method of consolidation under a single management."[716] By reshaping Section 7 to prohibit all mergers whose effect "may be" to lessen competitive activity, or to conduce to the creation of a monopoly, in any line of commerce in any section of the country, lawmakers fashioned a

709. S. REP. NO. 81-1775, at 4; *see also* 96 CONG. REC. 16446 (1950) (statement of Sen. O'Mahoney).

710. S. REP. NO. 81-1775, at 6 (emphasis added).

711. H.R. REP. NO. 81-1191, at 8; S. REP. NO. 81-1775, at 4–6.

712. S. REP. NO. 81-1775, at 4–6; H.R. REP. NO. 81-1191, at 8. On the Celler-Kefauver Amendment being specifically intended to impose broader and more stringent restrictions on corporate mergers than the original Section 7, see, for example, H.R. REP. NO. 81-1191, at 6; 95 CONG. REC. 11488 (1949) (statement of Rep. Celler); *id.* at 11493–94 (statement of Rep. Yates); *id.* at 11498 (statement of Rep. Patman); *id.* at 11501 (statement of Rep. Douglas); 96 CONG. REC. 16433–35 (1950) (statement of Sen. O'Conor); *id.* at 16456 (1950) (statement of Sen. Kefauver).

713. 95 CONG. REC. 11493–94 (1949) (statement of Rep. Yates); *see also* S. Rep. No. 81-1775, at 6 (1950) (Report of the Senate Judiciary Committee on H.R. 2734).

714. *See, e.g.*, 95 CONG. REC. 11504 (1949) (statement of Rep. Hobbs); *see also* 96 CONG. REC. 16506 (1950) (statement of Sen. Aiken) (called mergers a "road to monopoly"); 96 CONG. REC. 16436 (1950); *The Merger Movement: A Summary Report*, *supra* note 43, at 3456; YALE BROZEN, MERGERS IN PROSPECTIVE 13 (1982).

715. *See, e.g.*, 96 CONG. REC. 16436 (1950) (statement of Sen. O'Conor).

716. *Id.* at 16435.

single, broad standard that reached all corporate mergers regardless of whether they were horizontal, vertical, or conglomerate—but left small, local businesses free to coordinate and cooperate.[717]

In this sense, the Celler-Kefauver Amendment truly was designed, in the words of the Senate Report, to "limit the further growth of monopoly and thereby aid in preserving small business as an important competitive factor in the American economy."[718]

* * * * *

In light of the foregoing review of the relevant legislative history, no serious argument can be made that the plain meaning of Section 7 contradicts the purposes of the antitrust laws—least of all those of the Celler-Kefauver Amendment. Legislators viewed corporate mergers and acquisitions that served to concentrate economic power in large corporations, or to diminish competition by and between independent businesses, as methods of monopoly. In enacting the Sherman, Clayton and Celler-Kefauver Acts, they sought to safeguard our "economic way of life" from the corrosive effects of such mergers by prohibiting them.[719] The statutory text is plainly fit for that purpose. On the one hand, it reaches all mergers that conduce to the concentration of exclusionary power or control within a single person or group. On the other hand, it reaches all acquisitions that diminish the scope, amount, or degree of competitive activity waged by rivals in any line of business in any section of the country. These standards, as this Article demonstrates more fully in Part III.C. below, reach exactly the kinds of mergers that legislators wanted to intercept, but leave small and failing businesses largely undisturbed.

ii. The Plain Meaning of Section 7 Is Not Otherwise Absurd

To be sure, at least four aspects of Section 7's plain meaning identified above run contrary to the conventional wisdom of the antitrust bar. These include: (1) that Section 7 only requires a "real possibility," as opposed to a "reasonable probability," of anticompetitive or monopolistic effects; (2) that Section 7 does not require these effects to be "substantial" in their extent or degree; (3) that

717. S. REP. NO. 81-1775, at 5–6 (1950); Khan & Vaheesan, *supra* note 9, at 272; Thomas, *supra* note 564, at 552–53.

718. S. REP. NO. 81-1775, at 2.

719. Brown Shoe Co. v. United States, 370 U.S. 294, 333 (1962).

"competition" in Section 7 means the real-life competitive activity waged by businesses against equal or stronger adversaries in emulous contest for the custom of third parties, as opposed to economic competition; and, finally, (4) that Section 7 does not require market definition. The reality, however, is that all of these implications of Section 7's text were clearly anticipated—or, indeed, expressly intended—by legislators in the congressional proceedings leading up to the passage of the Celler-Kefauver Act.

a. "May Be": Possibility vs. Probability

With respect to whether Section 7 requires a "possibility" or a "probability" of forbidden effects, legislators were well-aware that "may be" ordinarily indicated a possibility and that the Supreme Court had recently interpreted "may be" in accordance with its ordinary meaning in Section 2 of the Clayton Act.[720] Moreover, although the Senate Report suggested that the phrase "may be" in the Amendment referred to a "reasonable probability" of proscribed effects, the House Report was mostly silent on the matter, and the opponents of the Amendment repeatedly pointed out during the consideration of the bill that the Amendment could be read to require only "a mere possibility" of such effects.[721] In any event, as discussed above, by the time Congress enacted the Celler-Kefauver Act in 1950, the Supreme Court had redefined the "reasonable probability" requirement in *Standard Stations* to make the burden of proving a "reasonable probability" of forbidden effects functionally similar to the burden of proving a "real possibility" of such effects consistent with the plain meaning of Section 7.[722]

b. "Substantially": Large Effect vs. Real Effect

As for the meaning of "substantially," the legislative histories of the Clayton Act and the Celler-Kefauver Act reveal an unambiguous intent for Section 7 to reach all mergers that threaten a "perceptible" anticompetitive or monopolistic effect, regardless of whether said effect is large or significant. None of the mergers that proponents of the Amendment urged its passage to counteract—93% of which involved firms with less than $1 million in assets ($12.6 million in 2023 dollars)—had, on its own, significantly

720. 96 CONG. REC. 16454 (1950) (statements of Sen. O'Mahoney and Sen. Donnell); S. REP. NO. 81-1775, at 5. *See generally* FTC v. Morton Salt Co., 334 U.S. 37 (1948).

721. 96 CONG. REC. 16454 (1950) (statements of Sen. O'Mahoney and Sen. Donnell); S. REP. NO. 81-1775, at 6, 21; H.R. REP. NO. 81-1191, at 8 (1949).

722. *See supra* Part III.A.

consolidated markets or harmed market performance.[723] Accordingly, in the committee reports and floor debates on the Amendment, legislators made it plain that the Amendment was framed to extend "far beyond the Sherman Act"—which already prohibited mergers that "substantially" and "unreasonably" lessened competition[724]—and reach all mergers that simply "produce[d] the specified effect."[725] The "specified effect," it was further emphasized, did not need to be so significant as to enable the merging parties to "fix prices," to "exclude competitors," or to otherwise engage in "unethical or predatory" conduct.[726]

Conversely, when identifying mergers that *could* pass muster under Section 7, legislators did not refer to mergers that threatened to lessen competition, or to tend to the creation of a monopoly, by a little as opposed to a lot; they referred to mergers that were wholly "inconsequential," and that "[could] not produce" a "perceptible" anticompetitive or monopolistic effect at all.[727] Notably, the three types of mergers within this *de minimis* category identified in the legislative history—transactions involving individuals and partnerships, mergers and acquisitions of small businesses, and acquisitions of failing companies—were all structurally excluded from the sweep of the Celler-Kefauver Amendment by its express terms.

Since the Amendment only applied to transactions between corporations, it could not reach transactions involving individuals or partnerships.[728] Since the Amendment only applied to corporations "engaged in the flow of interstate commerce"—rather than any activity affecting interstate commerce—the Amendment also could not reach small, locally-oriented businesses.[729] Finally, as discussed above, the express purpose of legislators in limiting the

723. H.R. REP. NO. 81-1191, at 3.

724. *See* S. REP. NO. 81-1775, at 3 ("The committee wish to make it clear that the bill is not intended to revert to the Sherman Act test. The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.").

725. H.R. REP. NO. 81-1191, at 8.

726. *Id.*

727. *See id.* at 7–8; S. REP. NO. 81-1775, at 5–6; Thomas, *supra* note 564, at 548–49, 558–59.

728. Thomas, *supra* note 564, at 552.

729. United States v. Am. Bldg. Maint. Indus., 422 U.S. 271, 283 (1975) ("[W]e hold that the phrase 'engaged in commerce' as used in [Section] 7 of the Clayton Act means engaged in the flow of interstate commerce, and was not intended to reach all corporations engaged in activities subject to the federal commerce power."). A targeted, in-line amendment was made to Section 7 in 1980 to expand its scope to all "persons" engaged in interstate commerce or in any activity affecting interstate commerce. *See* Antitrust Procedural Improvement Acts of 1980, Pub. L. No. 96-349, § 6, 94 Stat. 1154, 1157–58 (codified at 15 U.S.C. § 18); H.R. REP. NO. 96-871, at 2–5 (1980).

Amendment's prohibition solely to transactions that could lessen competition or tend to create a monopoly in a "section of the country" was to "remove any possibility of an interpretation that would prohibit" mergers between companies that are "so small," and whose "other competitors [are] so numerous," that their merger could not produce a "perceptible" anticompetitive or monopolistic effect on the scale of any "section of the country."[730] It follows that, where a merger *is* between corporations, and those corporations *are* engaged in interstate commerce, and the forbidden effect threatened by their merger *is* perceptible in a section of the country, then such a merger does, in fact, fall within the scope of Section 7's prohibition.

Indeed, the history of anti-merger bills leading up to the one that became the Celler-Kefauver Amendment suggests that legislators deliberately chose the placement of "substantially" to avoid implying a requirement of large or significant anticompetitive or monopolistic effects. Before *Morton Salt* was decided in 1948,[731] every anti-merger bill used the locution "may be *to substantially* lessen competition," which paralleled Section 3 of the Clayton Act.[732] However, after *Morton Salt* decided that Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, prohibited all price discriminations that threatened a real—but not necessarily large or significant—injury to competition, the placement of "substantially" in anti-merger bills shifted to parallel the placement of the word in Section 2.[733]

Setting aside the Celler-Kefauver Act, as the Court in *Standard Stations* explained with respect to the Clayton Act at large, legislators did not incorporate the word "substantially" into its original provisions in 1914 "to augment the burden of proof" required to "establis[h] a violation."[734] In each of Sections 2, 3, and 7, the where-clause that qualifies the prohibitory clause "was not added until after the House and Senate bills reached Conference."[735] In subsequent floor debates, "the conferees responsible for adding that language" went to great "pains" to answer "protestations that the qualifying clause[s] seriously weakened the section[s]"—explaining that the use of the word "substantially" was solely intended to require the minimum effect

730. S. REP. NO. 81-1775, at 3 (1950); H.R. REP. NO. 81-1191, at 8 (1949).
731. *See* FTC v. Morton Salt Co., 334 U.S. 37 (1948).
732. *Introduction: The Celler-Kefauver Act of 1950*, supra note 604, at 3388–89 (citing session bills).
733. *See id.*
734. Standard Oil Co. v. United States (*Standard Stations*), 337 U.S. 293, 312 (1949).
735. *Id.*

on a "line of [interstate] commerce" necessary to bring the challenged conduct within the scope of Congress' commerce power.[736]

At the time, prevailing interpretations of the Commerce Clause limited Congress' power to activities that had a real and direct effect on interstate commerce.[737] However, Congress' exercise of its power under the Commerce Clause was "never . . . thought to be constitutionally restricted" on the ground that the *size* of the regulated activity's effect on interstate commerce "may be small."[738] To the contrary, the economic magnitude of the regulated activity was "of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication."[739] Here, as explained above, both the express provision and fair implication of Section 7 is that Congress did *not* intend any exceptions for mergers that threaten concrete anticompetitive or monopolistic effects.

In summary, the legislative history reveals that lawmakers not only anticipated, but affirmatively intended, a reading of "substantially" that would extend Section 7's prohibition not only to mergers that threaten *large* or *significant* anticompetitive or monopolistic effects, but to all mergers that threaten such effects in a realistic, perceptible way.

c. "Competition": Economic Usage vs. Ordinary and Legal Usage

Without exception, over the course of the legislative proceedings on the Sherman, Clayton, and Celler-Kefauver Acts, lawmakers invariably used the word "competition" in its ordinary sense. One would search the legislative histories of these laws in vain for a

736. *See id.* at 314 n.15 ("Representative Floyd of Arkansas, one of the managers on the part of the House, explained the use of the word 'substantially' as deriving from the opinion of this Court in [Addyston Pipe Steel Co. v. United States, 175 U.S. 211 (1899)], and quoted the passage from [Addyston Pipe] in which it is said that 'the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the States.' Senator Chilton, one of the managers on the part of the Senate, denying that the clause weakened the bill, stated that the words 'where the effect may be' mean 'where it is possible for the effect to be.' Senator Overman, also a Senate conferee, argued that even the elimination of competition in a single town would substantially lessen competition.") (internal citations to Congressional Record omitted).

737. *See Addyston Pipe*, 175 U.S. at 228.

738. NLRB v. Fainblatt, 306 U. S. 601, 606 (1939).

739. *Id.*

single reference to the various economic theories of competition contained in the academic literature. More to the point, not a single committee report, floor statement, or passing remark during the legislative proceedings on the antitrust laws avers that their words should be given the specialized meanings ascribed to them by economists.[740] This, without more, should be sufficient to render the idea of giving the word "competition" in Section 7 a definition from economic theory absurd.

The absurdity of the idea, however, has not kept many antitrust scholars from embracing it. The most prominent of these scholars have been Robert Bork and Herbert Hovenkamp, each of whom has argued that "competition" should be interpreted to mean what his preferred school of economists says it means.[741] Since the lack of merit in these arguments has already been comprehensively demonstrated by others, we do not stop to consider them in further detail. Suffice to say, in the words of Professor Harry S. Gerla, that "[neither] legislative history, [nor] economic usage, [nor] logic . . . support overturning dictionary meaning, common usage, and eight decades of court precedent, all of which define competition [in the antitrust laws] as rivalry."[742]

In contrast, ample evidence shows that legislators did, in fact, intend for "competition" in Section 7 to refer to the real-world competitive activity waged by relatively equal business rivals in pursuit of the custom of third parties under fair and equitable conditions.[743] For example, the House Report on the Celler-Kefauver Act states that a merger's effect "may be substantially to lessen competition" within the meaning of Section 7 if it threatens to: (1) "eliminat[e] the *competitive activity* of an enterprise which has been a substantial factor in competition"; (2) "increas[e] the *relative size* of the enterprise making the acquisition to such a point that its advantage over its competitors threatens *to be decisive*"; or (3) "establis[h] relationships between buyers and sellers which deprive their rivals of a *fair opportunity to compete*."[744] A merger can only be understood to "lessen competition" through these three mechanisms if "competition" is defined to mean, not any and all rivalry, but the specific kind of rivalry—competition—that is waged among relatively equal competitors under fair conditions.

740. Lande, *supra* note 25, at 88–89.

741. *See, e.g.*, HOVENKAMP, *supra* note 72, at 52; BORK, *supra* note 24, at 107–10; *see also* Herbert J. Hovenkamp, *The Looming Crisis in Antitrust Economics*, 101 B.U. L. REV. 489, 492–506 (2021).

742. Gerla, *supra* note 51, at 222.

743. *See supra* Part III.A.ii.

744. H. REP. NO. 81-1191, at 8 (1949) (emphasis added).

While a merger that eliminates the competitive activity of a substantial enterprise would fall within the reach of Section 7 even if "competition" were read to refer simply to "rivalry," that is not the case with respect to the two other kinds of proscribed mergers described in the House Report. The fact that a merger will give an enterprise a "decisive" size-based advantage over its smaller business adversaries does not, in itself, mean that the merger will necessarily eliminate any pre-existing rivalrous activity. Neither does the fact that a merger establishes a relationship between a party and a customer or supplier that unfairly disadvantages the party's rivals in vying for the business of that customer or supplier. They do mean, however, that the merger-benefited party will no longer need to truly *compete*, either for that specific opportunity or against a particular set of adversaries; and that at least some of the merger-benefited party's rivals will no longer be able to truly *compete* against it, either in general or in reference to a specific opportunity at issue.

Many other passages from the legislative history of the Celler-Kefauver Act can be cited to show that legislators understood "competition" in Section 7 to refer—as it ordinarily does—to the activity of seeking to gain what an equal or stronger adversary is seeking to gain on the merits and under fair conditions.[745] Ultimately, however, what matters is that reading "competition" in its fulsome ordinary sense gives Section 7 exactly the practical reach that legislators wanted Section 7 to have—and certainly does not lead to consequences that "no reasonable person could [have] intend[ed]."[746]

d. "Line of Commerce" and "Section of the Country": Market Definition?

Finally, when it comes to the meaning of the phrase "in any line of commerce . . . in any section of the country," nothing in the legislative history of the antitrust laws suggests that it was intended to require plaintiffs under Section 7 to define a "product market" or a "geographic market" as now conventionally understood. Indeed, the committee reports on the Celler-Kefauver Amendment make plain that "[t]his language was used to gain the broadest application of the statute without bringing in the small

745. *See supra* Part III.B.i.
746. SCALIA & GARNER, *supra* note 80, at 237.

local community business."[747] Consistent with the plain meaning of the statutory text, the phrases "line of commerce" and "line of business" were used interchangeably in both the committee reports and the floor debates on the Amendment.[748] As for the phrase "section of the country," the House Report emphasized that the phrase was intended to have a different meaning from the phrase "any community" in the original Section 7, while the Senate Report suggested that it could be any "appreciable segment" of an "area of effective competition" for a line of business.[749] None of this contradicts the ordinary meaning of the relevant text.

More broadly, there were repeated admonishments from opponents of the Amendment that the phrase "in any section of the country" is "new phraseology" that had never been used "before in any antitrust legislation or in any Federal Trade Commission [regulation]," and that had never "been passed upon by the courts," either.[750] In response, the Amendment's proponents functionally agreed, acknowledging that it is "impossible to define rigidly what constitutes a 'section of the country,'" and that the phrase left substantial flexibility for "the Commission and the courts in their interpretation."[751]

In this vein, it bears noting that, as enacted in 1950, the Celler-Kefauver Amendment vested the FTC with exclusive jurisdiction to enforce Section 7, and provided that FTC findings in any enforcement action under Section 7 were to be upheld by the courts "if supported by substantial evidence."[752] Since fact findings and applications of law are to be upheld under a substantial-evidence standard if supported by "such evidence as a reasonable mind might accept as adequate,"[753] the upshot of the legislative history is that cognizable "sections of the country" under Section 7 include any reasonably identified segment of the country where enforcers

747. Thomas, *supra* note 564, at 558 n.522; *see also* S. REP. NO. 81-1775, at 10 (1950) (Report of the Senate Judiciary Committee on H.R. 2734); H.R. REP. NO. 81-1191, at 11 (1949) (Report of the House Judiciary Committee on H.R. 2734); McElroy, *supra* note 704, at 129–32, 140–41.

748. H.R. REP. NO. 81-1191, at 5–6; 95 CONG. REC. 11490 (1949) (statement of Rep. Jennings); S. REP. NO. 81-1775, at 4; 96 CONG. REC. 16435 (1950) (statement of Sen. O'Conor).

749. S. REP. NO. 81-1775, at 4; H.R. REP. NO. 81-1191, at 6.

750. S. REP. NO. 81-1775, at 20–21 (Minority Views of Sen. Donnell).

751. *Id.* at 5.

752. *Id.* at 8, 19; H.R. REP. No. 81-1191, at 15.

753. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) ("[S]ubstantial evidence . . . means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."); *see also* E. Blythe Stason, *"Substantial Evidence" in Administrative Law*, 1941 U. PENN. L. REV. 1026 (1941); Louis L. Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record,"* 64 HARV. L. REV. 1233, 1235 (1951) (citing Consol. Edison Co. v. NLRB, 305 U.S. 197, 299 (1938)).

demonstrate that a merger could realistically lessen competitive activity, or tend to the creation of a monopoly, in some line of business.[754] The plain meaning of Section 7's text comports with this understanding, giving the phrase "section of the country" a functional sense to be elucidated in the course of the statute's implementation by the FTC.

C. Bringing It All Together

Having rigorously analyzed the text, structure, and legislative history of Section 7 in accordance with current statutory interpretation doctrine, this Article can finally provide a definite statement of the statutory framework Congress intended to govern the legality of corporate mergers and acquisitions under the Clayton Act.

i. What Are the Elements of a Section 7 Claim?

Section 7 prohibits all mergers and acquisitions that could possibly, in some realistic way, either lessen competition, or tend to the creation of a monopoly, in any line of business in any appreciable segment of the nation's government, territory or population. For a merger to demonstrate a real possibility of anticompetitive or monopolistic effects, its concrete features at time of suit must give it the potential to cause such effects, and that potential must not be foreclosed by prohibitive conditions in the merger's concrete, then-present environment.

To have the potential to cause an anticompetitive effect, a merger's features must threaten to diminish the amount, scope, or intensity of the competitive activity waged by rivals in any line of business in any segment of the country. To have the potential to cause a monopolistic effect, a merger's features must be conducive to a course of action or behavior that eventually brings about a condition where a single person or group controls—or has the power to control—all or nearly all trade in any line of business in any segment of the country.

Where the required possibility of anticompetitive or monopolistic effects exists, the fact that alternative possibilities also exist cannot stay the application of the statute. Nor can any defense to, or

754. *Cf.* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024) (providing that, where a statute "delegate[s]" to an executive agency "the authority [1] to give meaning to a particular statutory term . . . [2] to fill up the details of a statutory scheme . . . or [3] to regulate subject to the limits imposed by a term or phrase that leaves [the agency] with flexibility," courts should defer to reasonable actions by the agency within the boundaries of its delegated authority).

rebuttal of, liability rest on future circumstances that do not yet subsist in reality. The statute does not give "license to the imagination."[755]

In this vein, the universe of relevant evidence that may be used to demonstrate, or rebut, the existence of these elements is restricted to the concrete momentary circumstances that actually exist at the time of suit. Whether a merger has the concrete potential to cause an anticompetitive or monopolistic effect may be determined by reference to then-present features of the merging firms—for example, how they are organized, managed, and operated, their size, assets, and role in the relevant lines of business and sections of the country, their competitive activities, and so forth—and other facts about the deal, such as its terms and financing. Similarly, whether the manifestation of that potential is foreclosed by the merger's concrete environment may be determined by reference to then-present features of the lines of business and sections of the country affected by the merger. These may include, for example, the number, size, and other features of the non-merging firms in those lines and sections, the rate at which new firms are entering them, and the features of those new entrants in comparison to the firms being acquired or merged.

In circumscribing the universe of relevant evidence in this way, the plain meaning of Section 7 leaves ample room for fact-based arguments about whether it is really possible for a given merger to lessen competitive activity or contribute to the concentration of power or control in a given field. It does not, however, leave room for prognostications or thought experiments about the future.

From this "best and fairest reading"[756] of the statutory text, we can derive several practical classes of mergers that necessarily will, or realistically could, lessen competition or tend to the creation of a monopoly. We can also derive several categories of mergers whose features make them incapable of causing—or whose environments foreclose them from causing—the proscribed effects.

ii. What Types of Mergers Are Clearly Prohibited Under Section 7?

Absent unusual circumstances in their concrete environments, mergers with the following characteristics would clearly generate a possibility of anticompetitive or monopolistic effects that trigger

755. *See* Argument for Petitioner at 348, Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922) (preceding opinion in U.S. Reports).

756. Kisor v. Wilkie, 588 U.S. 558, 600 (2019) (Gorsuch, J., concurring).

Section 7's prohibition. On the one hand, mergers can "lessen competition" where they: (1) eliminate pre-existing competitive activity between the merging parties, or between one of the merging parties and its unique pre-merger competitors; (2) give a party control over a supplier or customer whose business it previously engaged in competitive activity to gain; (3) enhance the relative economic power of a party to such a point that it possesses a decisive advantage over its competitors; or (4) create tangible incentives for rivals to diminish the amount, scope, or intensity of the competitive activity in which they are engaged. On the other hand, mergers can "tend to create a monopoly" where they: (1) expand the volume of trade under a party's direct control; (2) expand the arsenal of economic power a party could use to suppress, handicap, or compete against adversaries in business; or (3) contribute to a course of behavior in any line of business in any segment of the country that is leading toward the consolidation of monopoly power or control therein.

a. Mergers That May Lessen Competition

"The disappearance from the market of a competitor," said FTC Bureau of Litigation Director Joseph Sheehy in a 1958 speech on the test of illegality under Section 7, "necessarily means that whatever competition was waged by that concern has been eliminated."[757] If that competitor was an established midsized or large firm whose competitive activity is not readily replaceable by the pre-existing pipeline of new entrants into the relevant field of business, then the immediate consequence of the competitor's disappearance will necessarily be a concrete lessening of competitive activity in the relevant field. To be sure, guesswork may be indulged about whether consolidation might "induce" new entry in the future—or about whether the merger might somehow result in "more vigorous" competition—and both potentialities may well be possible. The statute, however, is not concerned with *all* possibilities.

It is concerned *only* with the possibility that "competition may be . . . *lessened*." Accordingly, "it is not material whether in a particular case it may appear that the public interest would be better served, either in the short or long range, by something other than" the preservation of existing competitive activity.[758] When a merger threatens to eliminate pre-existing rivalry between two competitors

757. *See* Sheehy, *supra* note 54, at 499.
758. *See id.* at 495.

and that rivalry will not certainly be replaced by the pre-existing pipeline of new entrants into the relevant field, it is prohibited regardless of what the merger's effect might be *after* this immediate lessening of competition—and certainly regardless of whether this lessening might be remedied by "sky-darkening swarms"[759] of induced entrants at some point in the future.

Mergers that give a party control over a commercial opportunity for which it previously had to compete have a similar immediate effect on competition. When a party absorbs a supplier or customer whose business it previously had to compete against others to get, the acquisition necessarily operates to eliminate some or all of the competitive activity that the absorbing party previously undertook to get that supplier's or customer's business. Simultaneously, the acquisition gives the absorbing party the power to foreclose its rivals from competing for that supplier or customer on fair and equitable terms. If the concrete environment does not eliminate the potential for this power to be exercised, then there is a real possibility that the competitive activity of the acquirer's rivals will be diminished as well. Thus, where an acquisition operates to eliminate a commercial opportunity for which rivals in a field of business had until then actually competed, it falls within the prohibition of Section 7 regardless of what the merging parties intend—or are incentivized—to do with their newfound control, or what alternative future possibilities might exist for how the acquisition's effect might unfold.

Finally, mergers can also directly lessen competition by enhancing the relative economic power of a party to such a point that it possesses a decisive advantage over some or all of its rivals in some line of business in some segment of the country. As explained above, while competition is rivalry, not all rivalry is competition. For rivalrous activity to constitute competition, it must be waged under fair conditions against equal or stronger adversaries. Accordingly, where a merger gives a party a decisive advantage over some or all of its rivals, the merger necessarily eliminates whatever competitive activity was waged by and between that party and those rivals. The exact point at which a party attains such a decisive advantage will necessarily vary with

759. *See* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 734 (2017) [hereinafter *Amazon's Antitrust Paradox*] (quoting BORK, *supra* note 24, at 234). A similar logic applies to mergers that eliminate potential rivals. If an acquisition eliminates a potential entrant which participants in a relevant field have engaged in competitive activity to countermand, then the necessary effect of the acquisition is to eliminate some or all of that reactive competitive activity.

each line of business and section of the country, but its minimum level will nearly always coincide with the point at which a party's economic power exceeds the upper threshold for a "small business concern" under the Small Business Act of 1953.

As discussed above, the Small Business Act defined a small-business concern as an enterprise that is not dominant in its field, is independently owned and operated, and is otherwise small in comparison to other enterprises in its field.[760] In light of "the fundamental purpose of [the Small Business Act] to preserve free competitive enterprise," the Small Business Administration (SBA) has interpreted the statutory term "small-business concern" to refer to enterprises that, "by reason of their size," are "struggling to become or remain competitive" against each other and against the larger concerns in their field.[761] Further, the SBA has defined "middle-sized" and "large concerns" as those which, "because of their size," enjoy "undue competitive strength" against small business concerns.[762] It follows that, when a merger turns an enterprise from a small business into a middle- or large-sized business, the merger by definition gives that party size-based advantages against the remaining small businesses in its field and thereby eliminates—in whole or in part—the "struggl[e] to become or remain competitive" in which it formerly engaged.

In this vein, an acquisition of a small business by a large or midsized business would likewise necessarily eliminate whatever "struggle to become or remain competitive" was waged by that small business against its peers. Where the acquired small business is so small, its peer competitors are so numerous, and the entry of comparable firms into the relevant field is plentiful, the acquisition will necessarily lack the capacity to "lessen competition" within the meaning of Section 7. On the flipside, if the acquisition affects a section of the country where the number of small businesses has dwindled and new entrants are rare, the loss of one more small business to absorption may well result in a real decrement in competitive activity within that section of the country. Moreover, since the prohibition of Section 7 applies both to individual acquisitions and to series of acquisitions, a firm can violate the statute by acquiring multiple small businesses if, taken cumulatively, its acquisitions threaten a concrete lessening of competitive activity.

760. Small Business Act of 1953, Pub. L. No. 83–163, 67 Stat. 232, 233.

761. 13 C.F.R. § 121.3-1(b)(2)(i) (1974) (subsequently revised); Small Bus. Admin, Part 103—Small Business Size Standards, 21 Fed. Reg. 9709, 9710 (Dec. 7, 1956).

762. 13 C.F.R. § 121.3-1(b)(2)(iii).

Finally, a merger could fall within the prohibition of Section 7's lessen-competition prong by creating incentives for rivals to cease or diminish their competitive activity. If a merger creates a tangible incentive for a rival, or group of rivals, to limit or discontinue their pre-existing competitive activities, then it necessarily has the potential to lessen the competition waged by or among those rivals. If nothing in the commercial environment forecloses one or more of said rivals from acting on that incentive, then one of the realistically possible effects of the merger is necessarily to lessen competition. Whether the relevant firms will, in fact, act on the incentive created by the merger is beside the point. The operative question is whether the anticompetitive incentive created by the merger is sufficient to make it a "genuine alternative" for one or more of the affected rivals to diminish their competitive activity in a concrete way. If it is sufficient to create this alternative, then the words of the statute prohibiting corporate acquisition "where . . . the effect of such acquisition *may be* substantially to lessen competition" are literally satisfied.

b. Mergers That May Tend to Create a Monopoly

Every merger that gives a party control over a volume of trade in a particular product which it did not previously control brings that party an actual—not speculative—step closer to controlling the whole of that trade. This, without more, makes such mergers conducive to the prohibited end. Indeed, they are conducive to the oldest monopolistic course of action in the book: using a series of "contracts [to] secur[e] the advantage of selling alone or exclusively all, or some considerable portion, of a particular kind of merchandise or commodity," as *E.C. Knight* put it back in 1895.[763] It was likewise well-established in 1950 that progressive "absorption, in non-predatory fashion, of all . . . competitors" until "sole possession of the field" is acquired necessarily creates a monopoly, as the district judge in *Alcoa* found on remand.[764] When a merger conducts a party along such a course by expanding the volume of trade under its control, it tends to the creation of a monopoly by default.

Likewise, a merger necessarily conduces to the creation of a monopoly where it gives a party an increment in power that the party could use to exclude competitors. A monopoly within the meaning of Section 7 arises whenever a party accumulates sufficient power

763. United States v. E. C. Knight Co., 156 U.S. 1, 10 (1895).

764. United States v. Aluminum Co. of Am., 91 F. Supp. 333, 341 (S.D.N.Y. 1950); United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 432, 427–28 (2d Cir. 1945).

to exclude all or nearly all competitors from trade in a particular product or business.[765] If a merger facilitates such accumulation by contributing to a party's exclusionary power, it conduces to the accomplishment of that monopolistic end by default.

But what constitutes "exclusionary power"? Since the concept of *monopoly* in Section 7 is a functional one, and is agnostic about means and intents, any type of power can qualify as "exclusionary power" as long as it can be used by a party to achieve the end of excluding competition when the party desires to do so. The specific way that a party might deploy such power to that end—whether that way is predatory or honestly industrial, abusive or fair, in the eyes of a court—is immaterial. A monopoly within the meaning of Section 7 may exclude competitors through an ordinary course of business conduct (as in *Alcoa*[766] and *Griffith*[767]) just as well as through a deliberate course to handicap and suppress competition (as in *American Tobacco*[768] and *Paramount*[769]). Since power can be used to exclude competition through both predatory and ordinary methods, it follows that "exclusionary power" includes not only the power to handicap or suppress business adversaries, but also the power to defeat them in rivalry. Thus, if a merger increases a party's power to handicap, destroy, or defeat its rivals, it directly facilitates that party's accumulation of exclusionary power—and inevitably tends to the creation of a monopoly.

When a party acquires a supplier or a distribution channel used by its rivals, that acquisition inherently grows whatever power that party already had to handicap its rivals in competition.[770] Similarly, when a merger gives a party a secondary product line that the party could use in tying arrangements, or to cross-subsidize below-cost pricing schemes, the merger obviously increases whatever ability that party already had to eliminate rivals through these predatory methods. These, however, are not the only ways that a merger can add to a party's arsenal of exclusionary power. Indeed, as Judge Hand found in *Alcoa*, no course of action leads to "more effective exclusion" than deploying accumulated capital of various kinds through "a great organization" to "face every newcomer,"

765. *See* discussion *supra* Part III.A.iii.
766. *Alcoa*, 148 F.2d at 432.
767. United States v. Griffith, 334 U.S. 100, 105, 108 (1948).
768. Am. Tobacco Co. v. United States, 328 U.S. 781, 810–15 (1946).
769. United States v. Paramount Pictures, 334 U.S. 131, 174 (1948).
770. *Cf.* Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457, 464–65 (1941) (affirming FTC finding that exclusive dealing arrangements of textile and clothes manufacturers had actually "tended to create in themselves a monopoly" by "narrowing the outlets to which garment and textile manufacturers can sell and the sources from which retailers can buy").

"anticipate [every] demand," and "progressively . . . embrace each new opportunity as it open[s]."[771]

Similarly in *American Tobacco*, the Court made clear that, while the Big Three had used momentary below-cost pricing to suppress the "ten-cent" brands that had defied their regime, it was the *power* behind that abuse, not the manner of its exercise, that made the Big Three a monopoly.[772] That power consisted in their accumulation of sufficient capital of various kinds—including net worth and net annual earnings, stocks of tobacco leaf, personnel and salesmen, and trade connections with dealers—to enable them to "dominate" competitors in "all phases of their industry" beyond their direct control. Thus, it is not only mergers that aid a party in accumulating structural leverage or other "unfair" forms of power that clearly "tend to create a monopoly" within the meaning of Section 7, but also mergers that facilitate a party's accumulation of all kinds of economic power—including capital itself.

In both cases—that of power-enhancing mergers and that of trade-expanding ones—neither the original position of the party benefiting from the merger, nor the extent of the additional power or control it acquires, is strictly determinative of the merger's tendency. Whether a merger tends to the creation of a monopoly under the Clayton Act must, as the Court held in *International Salt*, be determined by "the direction of the movement" it effectuates—even if that movement is "a creeping one"—and not whether "it proceeds at full gallop" or threatens "arrival at the goal" of monopoly.[773] This, as discussed in Section II.B.1.i. above, is consistent with the ordinary meaning of the word "tend" in the context of Section 7, where it means "to serve, contribute, or conduct in *some* degree or way" to the creation of monopoly.

It is also irrelevant what the parties to a merger intend to do—or are likely to do—with the increment of trade control or exclusionary power that they gain. Section 7 forbids mergers from conducing toward a functional state of monopoly that arises when a party *comes into possession* of the requisite degree of exclusionary power or control—regardless of how that possession comes about and whether, or to what end, that power or control is actually exercised. When a merger gives a party a concrete increment in power or control, it necessarily helps that party move, in some degree or way, toward possessing the level of power or control required to constitute a monopoly. This inherent tendency "cannot be evaded by good motives,"

771. *Alcoa*, 148 F.2d at 427, 431.
772. *Am. Tobacco Co.*, 328 U.S. at 793, 810–15.
773. Int'l Salt Co. v. United States, 332 U.S. 392, 396 (1947).

nor may Section 7's prohibition on mergers that effectuate such a tendency be ignored based on the "judgment of the courts" that "some good result" may flow from doing so in any given case.[774]

To be sure, however, a merger can only "tend to create a monopoly" if it threatens to make a real, not merely an imaginary or nominal, contribution to a party's control over trade or power to exclude competitors. Thus, a merger between small business concerns—which, by definition, lack economic power and are "struggling to become or remain competitive"[775]—that does not create a middle- or large-sized business, generally would not "tend to create a monopoly" within the meaning of Section 7. Neither would the acquisition of a small business by a large firm, so long as the small business does not possess some competitively significant ability, resource, or other attribute that would tangibly enhance the acquiring firm's exclusionary power. However, since Section 7 applies not only to acquisitions of a single firm, but also to acquisitions of "one or more" firms,[776] a series of small-business acquisitions may "tend to create a monopoly" within the meaning of Section 7 if it cumulatively results in a real increment in the power or control held by the acquiring party.

Finally, extending the reach of the "tend-to-create-a-monopoly" prong of Section 7 to mergers that "may" have the proscribed effect brings at least one further class of mergers under its prohibition—mergers that contribute to a course of behavior leading toward the consolidation of monopoly control or power in any line of business in any section of the country. If a merger contributes to an ongoing behavioral trend in a line of a business or a section of the country by which power or control are being concentrated, and nothing in the environment prohibits that trend from continuing, then a realistically possible effect of the merger may well be to contribute to the creation of a monopoly. That in itself is a violation of Section 7.

iii. What Types of Mergers Are Clearly Permitted Under Section 7?

The plain meaning of Section 7 ensures that at least two types of corporate transactions rarely fall within the scope of its prohibitions—namely, transactions involving "small businesses" and

774. Associated Press v. United States, 326 U.S. 1, 16 n.15 (1945) (quoting Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912)).

775. 13 C.F.R. § 121.3-1(b)(2)(ii) (1974) (subsequently revised); Small Bus. Admin, Part 103—Small Business Size Standards, 21 Fed. Reg. 9709–14 (Dec. 7, 1956).

776. 15 U.S.C. § 18.

"failing companies," as those categories are defined in the legislative history of the Celler-Kefauver Act and in interlacing statutes.

a. Small-Business Transactions

To the lawmakers who passed the Celler-Kefauver Act, "small business" meant an enterprise that is not dominant in its field of operation, that is independent in fact and not subject to third-party control, and that is relatively small in its number of employees, volume of business, and other aspects of economic size compared to the middle- and large-sized enterprises in its field.[777] Further, a small business was an enterprise that did not derive "competitive strength" from its economic size and was "struggling to become or remain competitive" against both peer and larger enterprises in its field.[778] In addition to size and industry position, a small business was characterized by specific management, financing, and operational attributes. A small business was supervised and managed directly by a close group of owners, who maintained direct contact with the labor force, and strived for and expected mutual loyalty.[779] Its equity capital was held within that inner-circle of owner-managers. It relied on "commercial credit, bank credit, and plowed-in profits to meet its financial requirements," rather than sales of securities on capital markets. Finally, a small business was "local in character," finding "its chief market in and around its own community," and having "a direct tie with the growth and well-being of [that] community."[780]

If a firm meets these characteristics of a "small business," its acquisition by a middle- or large-sized corporation will almost always lack the potential to cause a monopolistic effect within the meaning of Section 7. To begin with, since a small business' economic size is, by definition, insufficient to confer competitive strength, its acquisition would not expand a large company's economic size sufficiently to enhance its power to exclude competition. Similarly, the acquisition would not expand the volume of trade under the acquiring firm's control because a small business—again by definition—

777. *See, e.g.*, H.R. REP. NO. 81-1191, at 6–7 (1949); 95 CONG. REC. 11486–87, 11488–99 (1949) (statement of Rep. Celler); *see also* Part III.B. *supra*.

778. *Size Standards for Small Businesses: Hearing Before the Sub. Comm. on General Oversight and Minority Enterprise of the Committee on Small Bus.,* 96th Cong. 9 (1979); *see also* Part III.B., *supra*.

779. *See* H.R. REP. NO. 82-2513, at 5, 13, 14, 78, 136 (1952) (providing a comprehensive review of the definition of "small business" in legislative and administrative practice in the 1940s); ABRAHAM D.H. KAPLAN, SMALL BUSINESS: ITS PLACE AND PROBLEMS 10–22 (1948) (cited in H. REP. NO. 82-2513); *see also* DILGER ET AL., *supra* note 691.

780. *See* sources *supra* note 779.

does not control any volume of trade. On the contrary, it struggles to compete for sales or supplies, and its success in winning and retaining the same is closely tied to the leadership of its owner-managers. Therefore, unless the acquisition of an individual small business gives a larger company control over a special capability or resource that it could use to handicap, destroy, or defeat its competitors in rivalry, such acquisition will generally not violate the tend-to-create-a-monopoly prong of Section 7.

In contrast, the absorption of a small business by a large or midsized business will almost always have the potential to cause an anticompetitive effect. After all, such absorptions necessarily eliminate whatever competitive struggle was waged by the small business against its peers. However, the environment of a small-business acquisition will often prevent such a transaction from causing an actual decrease in the amount, scope, or intensity of competitive activity. This is particularly the case for small business acquisitions whose effects are felt in lines of business or sections of the country where numerous comparable small businesses operate and there is a pre-existing stream of new entrants with similar features. In those cases, the numerosity of the persisting small businesses would operate to minimize the lessening of competition that the absorption has the potential to cause, while the stream of new entrants would ensure that aggregate competitive activity does not actually decrease upon the consummation of the acquisition.

For similar reasons, a merger between small businesses will almost always lack the potential to cause a monopolistic effect, and its potential to cause an anticompetitive effect will often be foreclosed by the features of its environment. As long as a small-business merger does not create a mid- or large-sized enterprise, it will never consolidate any exclusionary power in the merged firm, nor will it give the merged firm actual control over any volume of trade. Further, while a small-business merger between direct competitors would always have the potential to lessen competition, the manifestation of that potential will typically be foreclosed wherever numerous comparable firms persist and new comparable firms are continually entering the field.

b. Failing-Company Transactions

A "failing company" within the meaning of the Celler-Kefauver Act's legislative history (and, for that matter, within the meaning

of the relevant caselaw)[781] is not merely a company that is losing money or that has fallen on hard times.[782] It is a company that has "depleted" its "resources," that lacks any realistic "prospects of rehabilitation," and that, as a result, is faced with "the grave probability of a business failure" in which its operations will cease, its stockholders will lose their investment, and the communities where it operates will be injured.[783] More to the point, a failing company must be in such a rump condition that only a single prospective purchaser can be found to buy it, and even "the prospects of reorganization" through bankruptcy are "dim or nonexistent."[784] In effect, the concrete features of a failing-company acquisition must make it so that the acquiree has only two genuine alternatives for the future—either to consummate the proposed acquisition, or to suffer a catastrophic business failure and go to liquidation.

Where a company's ability to subsist independently has become so degraded that the only real possibilities for its future are selling out or liquidating, then its existence as a competitor has become merely nominal. Obviously, the acquisition of such a company—which has lost its capacity to compete—cannot lessen competition within the meaning of Section 7. It is not so clear, however, that acquisitions of failing companies will always escape prohibition under the tend-to-create-a monopoly prong of Section 7. To be sure, since a failing company is one that can no longer compete, it cannot be said to "control" a volume of trade, which its acquisition would confer upon another firm. Further, the acquisition of a failing small business—much like the acquisition of a non-failing small business—would practically never contribute meaningful economic power to the buyer's exclusionary arsenal.

But an acquisition of all or substantially all of the assets of a midsize or large enterprise, regardless of its condition, very much *could* expand the acquiring party's exclusionary power. Luckily, in the real world, large and mid-size companies can always find more than one reasonable potential buyer for their assets, and at least some of those potential buyers are typically willing to acquire less than all of those assets. In the unlikely event that a large or mid-sized company truly cannot find more than one reasonable potential buyer and can only sell its assets to that buyer in a manner that

781. *See, e.g.*, Int'l Shoe Co. v. FTC, 280 U.S. 291 (1930); Citizen Publ'g Co. v. United States, 394 U.S. 131, 138 (1969).

782. *See* U.S. DEP'T OF JUSTICE & THE FED. TRADE COMM'N, MERGER GUIDELINES 30–31 (2023).

783. H.R. REP. NO. 81-1191, at 6 (1949).

784. *Citizen Publ'g*, 394 U.S. at 138.

will grow the buyer's exclusionary power in violation of Section 7, then the company may well have grounds to challenge the constitutionality of Section 7's application to its transaction as a regulatory taking. While this situation may be interesting to ponder as an intellectual exercise, its practical relevance is likely to be nil.

IV. CONCLUSION

As the foregoing analysis demonstrates, the text of Section 7—through its plain and unambiguous original meaning—gives fulsome, yet carefully tailored, effect to the intent of legislators. Throughout the deliberations on the Celler-Kefauver Act, lawmakers emphasized that the purpose of the bill was to "clamp down with vigor"[785] on mergers and acquisitions by and between large corporations in interstate commerce without imposing undue restrictions on small businesses and failing companies. Section 7 does just that.

Through its tend-to-create a monopoly prong, Section 7 prohibits almost all mergers between large and mid-size corporations. Through its lessen-competition prong, it prohibits roll-ups of small businesses and strategic acquisitions of nascent enterprises with competitively significant capabilities or resources. By and large, however, it leaves small businesses alone. As lawmakers wished, the plain words of Section 7 have no application where the enterprises being merged or acquired are "so small," and "their other competitors [are] so numerous," that their union or absorption would "make no perceptible change" in competition or concentration in any "section of the country."[786] It also mostly leaves failing companies to dispose of their assets as they must, while rightly allowing enforcers to scrutinize arrangements for the liquidation of large and mid-sized companies to ensure that they do not contribute to the creation of monopolies.

Some may think this interpretation of Section 7 makes things all too simple. Indeed, as FTC Litigation Director Joseph Sheehy once observed, the antitrust bar has a long history of "refus[ing] to believe that an antitrust law . . . can have . . . a simple explanation."[787] Historically, the opening move in the complexification play has been to "emphasize certain words found in [Section 7] or its [legislative] history in an effort to show the necessity of an explicit demonstration . . . of actual effects upon market behavior."[788] In this

785. United States v. Von's Grocery Co., 384 U.S. 270, 276 (1966).
786. 96 CONG. REC. 16435 (1950) (statement of Sen. O'Connor).
787. Sheehy, *supra* note 54, at 499.
788. Bok, *supra* note 18, at 254.

vein, some stock-in-trade arguments have been that Section 7 "requires the courts to reckon future *probabilities*,"[789] or can only be satisfied by proof of "concrete measurable *effects*,"[790] or—the most recent favorite—requires proof that a merger "is *likely* to lead to *substantial* competitive harm in the *relevant* market."[791] Where judges have accepted these premises, defendants have sought to move the goal posts even further: A merger cannot lessen competition "to a *substantial* degree," defendants have argued, unless enforcers present a "forward-looking analysis" establishing that, after the merger, the defendants "*likely* will be able to *unilaterally* force customers to pay *substantially* higher prices[.]"[792] While no appellate court has accepted this argument, it has served defendants well in shrouding Section 7 proceedings in "chronic epistemological doubt and uncertainty."[793]

The reason this line of arguments has served defendants so well in Section 7 cases is that predicting a merger's effect on prices or output—or on more nebulous concepts like product quality or innovation—is an inherently speculative exercise.[794] It requires enforcers to (attempt to) measure and balance incommensurate and largely unknowable quantities based on ever-contestable assumptions about the future behavior of complex ecosystems.[795] When microeconomic analysis is applied to help solve this inherent uncertainty, it just gets worse. As ample scholarship has recently documented, the foundations of microeconomic theory are empirically

789. *Id.* at 253 (quoting Trial Memorandum for Defendant at 8, United States v. Brown Shoe Co., 179 F. Supp. 721 (E.D. Mo. 1959), *prob. juris. noted*, 363 U.S. 825 (1960).

790. *Id.* (quoting Brief for Respondent in Support of Proposed Findings of Fact at 3, Scott Paper Co., TRADE REG. REP. (1959–60 FTC Cas.) (Feb. 1, 1960) (emphasis added)).

791. Defendants' Post-Trial Brief at 32, United States v. U.S. Sugar Corp., No. 21-1644 (D. Del. Sep. 28, 2022) ("Plaintiff's burden is not to just show that the parties compete today, but that the loss of this head-to-head competition is likely to lead to substantial competitive harm in the relevant market—not simply cause a few customers to potentially have to solicit bids from new suppliers.") (emphasis in original).

792. *Id.* ("Plaintiff's burden is not to just show that the parties compete today, but that the loss of this head-to-head competition is likely to lead to substantial competitive harm in the relevant market—not simply cause a few customers to potentially have to solicit bids from new suppliers.") (emphasis in original). Alternatively, defendants will generally concede that a merger may also be blocked where enforcers prove that "it is likely to result in anticompetitive coordination" between rivals. *See id.* at 37–38. To do so, however, enforcers must (purportedly) prove that the transaction "creates or increases the likelihood" of such coordination between rivals to "restrict output and achieve profits above competitive levels." *See id.*

793. *Ideological Roots*, *supra* note 16, at 975.

794. *See, e.g.*, Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1385–86 (2009); *Amazon's Antitrust Paradox*, *supra* note 759, at 971; Khan & Vahessan, *supra* note 9, at 280.

795. *See, e.g.*, Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 17–22 (2016); Stucke, *supra* note 794, at 1442.

flawed, core microeconomic concepts—including "efficiency" and "incentives"—are subjective and value-laden, and microeconomic analysis itself tends to be highly idiosyncratic and assumption-driven.[796]

Since a merger's effects are indeterminate and economic analysis is malleable, sophisticated "dynamic competition models" can almost always be used to defensibly rebut a prediction of negative welfare effects even in extremely concentrated markets.[797] When the antitrust agencies respond with their own competition models, technocratic disputes among opposing economists about assumptions, methods, data sources and so forth become practically unavoidable—leading a merger's evaluation inevitably down a rabbit hole of complex and interminable inquiries into market dynamics.[798] Ultimately, because "[e]conomics is incapable of providing . . . definitive answers" as to which specific mergers will cause prices to rise or output to decline,[799] the econometric decisional framework propounded by defendants winds up turning Section 7 on its head.[800] It requires enforcers to produce rigorous predictions of inherently speculative effects and then gives mergers a free pass when such prediction proves (predictably) impossible with respect to the vast majority of mergers.

As smooth as this classic progression of interpretive bravado might sound in a trial brief, it is a "grotesque distortion" of the law Congress passed.[801] The text, structure, and legislative history of Section 7 all make clear that the Clayton Act predicates liability in merger cases on the existence of a limited set of concrete facts—not on "prophecy, stargazing, or crystal-balling" about the future performance of markets or the behavior of their participants.[802] Courts

796. *See* Simon Torracinta, *Bad Economics*, BOS. REV. (Mar. 9, 2022), https://www.bostonreview.net/articles/bad-economics/.

797. *See* Steven C. Salop, *The Evolution and Validity of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L.J. 269, 276 (2015); Allen P. Grunes & Maurice E. Stucke, *Antitrust Review of the AT&T/T-Mobile Transaction*, 64 FED. COMM. L.J. 47, 56 (2011); Stucke, *supra* note 794, at 1454–56; Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 2008 UTAH L. REV. 159, 166.

798. *See* Rebecca Haw, *Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of the Experts*, 106 NW. U. L. REV. 1261 (2015); First & Waller, *supra* note 16, at 2551 ("Ever more sophisticated economic theories have now led merger analysis down the rabbit hole in to a world where the government is forced to vigorously litigate mergers at very high levels of concentration.").

799. *See* Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75, 83 (2010).

800. *See Amazon's Antitrust Paradox*, *supra* note 759, at 974–76.

801. *See id.*

802. Sheehy, supra note 54, at 499 (quoting In re Union Carbide Corp., 59 F.T.C. 614, 1961 WL 65409 (1961) (motion to dismiss found in Docket No. 6826)).

are not, in fact, required to "set sail on a sea of doubt,"[803] or "ramble through the wilds of economic theory,"[804] in order to resolve a merger case. They are required to answer three straightforward questions of fact based on a preponderance of the evidence presented about the concrete circumstances that exist at the time of suit:

- First, does the merger have the potential to diminish the amount, scope, or intensity of the competitive activity being waged by or among rivals in any line of business in any section of the country?

- Second, does the merger have the potential to expand the exclusionary power of any party or the volume of trade under any party's direct control?

- Third, if the answer to either of the first two questions is *yes*, does some feature of the merger's concrete environment make it impossible for the merger's anticompetitive or monopolistic potential to manifest?

If a court finds that, with respect to a merger before it, the answer to one of the first two questions is *yes* and the answer to the third question is *no*, then the merger is unlawful. These are not easy questions to answer. We do not doubt that, in many Section 7 cases, deciding these three questions would require a court to conduct a searching inquiry into the real-world facts surrounding a merger. In no case, however, would answering these questions require a court to predict the future, weigh the probability of various possible outcomes, or indulge prognostications about how different market actors might behave after the merger is consummated—and certainly not about how their behaviors might conspire to affect prices, output, quality, or innovation.

That, in brief, is the law that Congress passed, and it is a law—like all laws—that executive agencies are constitutionally bound to faithfully enforce. Seventy years ago, the FTC urged Congress to enact the anti-merger legislation that became the Celler-Kefauver Act with a stark warning: "Either this country is going down the road toward collectivism, or it must stand and fight for competition as the protector of all that is embodied in free enterprise."[805] Until recently, this warning had been forgotten in high places. For over

803. United States v. Addyston Pipe & Steel Co., 85 F. 271, 283–84 (6th Cir. 1898) (Taft, J.), *aff'd*, 175 U.S. 211 (1899).
804. United States v. Topco Assocs., Inc., 405 U.S. 596, 609 (1972).
805. *See The Merger Movement: A Summary Report*, *supra* note 43, at 3456–57.

four decades, administration after administration—Democratic and Republican alike—had ignored the letter of the nation's antitrust laws in favor of "letting giant corporations accumulate more and more power" through mergers and acquisitions.[806]

The winds of change are blowing, however. In 2021, President Biden signed the landmark Executive Order on Promoting Competition in the American Economy, launching what observers have called "the most ambitious effort in generations to reduce the stranglehold of monopolies and concentrated markets in major industries."[807] In response to the President's directive, the DOJ and FTC have sought to turn the page on the decades-long, bipartisan dereliction of duty in the enforcement of our anti-merger laws—signaling their intent to "ensure fidelity to statutory text and precedent."[808] In recent statements to the Senate Judiciary Committee, President Trump's appointee to lead the DOJ's Antitrust Division has similarly pledged to enforce the "original meaning of [Section 7] as interpreted by the binding rules of the courts."[809]

The authors' intentions are for this Article to help the antitrust agencies—and the courts—do just that. As a senator remarked in a floor speech while Congress was considering the Celler-Kefauver Act: "Reluctant, apologetic administration does not inspire public confidence, and it does not get the job done."[810] If the freedom of enterprise is to be restored in our economy, if communities large and small are to control their destinies again, if our democracy is to persevere—then enforcers and judges must be neither reluctant nor apologetic in applying the letter of our antitrust laws to halt the concentration of corporate power. The tools are there if they are willing to use them.

806. Joseph Biden, President, U.S., Remarks at the Signing of an Executive Order Promoting Competition in the American Economy (July 9, 2021).

807. Leah Nylen, *Biden Launches Assault on Monopolies*, POLITICO, https://www.politico.com/news/2021/07/08/biden-assault-monopolies-498876 (July 9, 2021, 5:45 PM).

808. *Justice Department and Federal Trade Commission Release 2023 Merger Guidelines*, JUSTICE.GOV (Dec. 18, 2023), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-2023-merger-guidelines.

809. Abigail Slater, Responses to Written Questions of Senator Peter Welch for Hearing on "Nominations," (Feb. 12, 2025), https://www.judiciary.senate.gov/imo/media/doc/2025-02-12_-_qfr_responses_-_slater.pdf.

810. 96 CONG. REC. 16460 (1950) (statement of Sen. Johnson).

How Did the Vice President Come to Be the Presiding Officer of the Electoral Vote Count? The Evolution of the Original Electoral College Clauses at the Convention

Michael L. Rosin[*]

ABSTRACT

An incumbent Vice President is often an office-seeker in the next presidential election. How did the Vice President come to be the first choice to preside at a meeting of the two houses of Congress assembled concurrently to count the electoral votes for President and Vice President in that election? Given the events of January 6, 2021, an answer to that question is more relevant than ever. This Article provides an answer, and more generally, an account of the evolution of the Electoral College clauses. It concludes that the Convention did not give the Vice President the unilateral power to count or reject electoral votes, nor did it intend to.

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I. INTRODUCTION

The second sentence of the Twelfth Amendment (Twelfth Amendment Counting Clause) states that "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives,

open all the certificates and the votes shall then be counted."[1] John Eastman's two-page and six-page memoranda interpreted this text as giving the President of the Senate the unilateral power to accept or reject electoral votes.[2] Of course, Vice President Mike Pence was the President of the Senate on January 6, 2021, and Eastman's contention was that Pence, as the President of the Senate, had the unilateral power to accept or reject electoral votes.[3]

In late 2021, Matthew Seligman disputed Eastman's claims.[4] So have many others.[5] In 2022, Robert J. Delahunty and John Yoo published an article responding to Seligman's rebuttal.[6]

Of course, the Eighth Congress copied the Twelfth Amendment Counting Clause *word for word*[7] from *the Original Counting Clause* in Article II, which stated that "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."[8] The Original Counting Clause, of course, is the work of the Convention.

Commenting on the claim that, as the President of the Senate, Mike Pence had the unilateral power to accept or reject electoral votes, Derek Muller has powerfully argued that using the terms "'Vice President' and 'President of the Senate' interchangeably [as

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1. U.S. CONST. amend. XII. This is the version presented in 2 DEP'T OF STATE, BUREAU OF ROLLS AND LIBRARY, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870, at 409 (Washington, Dep't of State 1894). It is also the version presented in the 1878 edition of the *Revised Statutes of 1873-'74*. *See* REVISED STATUTES OF THE UNITED STATES, PASSED AT THE FIRST SESSION OF THE FORTY-THIRD CONGRESS, 1873-'74, at 30 (Washington, Gov. Prtg. Office 2d ed. 1878). Volume 1 of the *Statutes at Large* of 1845 presents this provision with a COMMA preceding "and the votes shall then be counted" (and terminated by just a SEMI-COLON).

> the President of the Senate, shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted;

1 THE PUBLIC STATUTES AT LARGE OF THE UNITED STATES 22 (Richard Peters, ed., Boston, Charles C. Little & James Brown 1845).

2. *See* Matthew A. Seligman, *The Vice-President's Non-Existent Unilateral Power to Reject Electoral Votes* 8 (Const. L. Ctr., Stanford L. Sch., Working Paper, Jan. 6, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3939020.

3. January 2nd Memorandum from John Eastman on the January 6 Scenario 2 (Jan. 2, 2021), https://cdn.cnn.com/cnn/2021/images/09/20/eastman.memo.pdf. January 4th Memorandum from John Eastman on the January 6 Scenario 4, 6 (Jan. 4, 2021), https://cdn.cnn.com/cnn/2021/images/09/21/privileged.and.confidential.--.jan.3.memo.on.jan.6.scenario.pdf.

4. *See* Seligman, *supra* note 2.

5. *See, e.g.*, Joel K. Goldstein, *The Ministerial Role of the President of the Senate in Counting Electoral Votes: A Post-January 6 Perspective*, 21 U.N.H. L. REV. 369 (2023); Derek T. Muller, *The President of the Senate, the Original Public Meaning of the Twelfth Amendment, and the Electoral Count Reform Act*, 73 CASE W. RSRV. L. REV. 1023 (2023).

6. Robert J. Delahunty & John Yoo, *Who Counts?: The Twelfth Amendment, the Vice President, and the Electoral Count*, 73 CASE W. RSRV. L. REV. 27 (2022).

7. For the presence or absence of the COMMA preceding "and the votes shall then be counted" in the Twelfth Amendment Counting Clause, see *supra* note 1.

8. U.S. CONST. art. II, § 1, cl. 3, *amended by* U.S. CONST. amend. XII.

Delahunty and Yoo do] . . . is a categorical error . . . that affects the heart of the structural argument."[9]

This Article steps back and asks the following question: What was the Convention's rationale for having the Vice President be the person most likely to preside over the opening of the electoral vote certificates and the counting of the electors' votes?

Although there could be no Vice President to preside over the first electoral vote count, there would be one in office for many, if not most, subsequent electoral vote counts.[10] Prior to ratification of the Twenty-Fifth Amendment,[11] the Vice President would have attained office via the electoral vote count four years earlier[12] and would be the default person to preside over the next electoral vote count in an election in which he might well be a presidential or vice presidential candidate. Indeed, prior to ratification of the Twelfth Amendment, the Vice Presidency was a consolation prize in the presidential election.[13] Although the Twelfth Amendment formally separated the process for electing the Vice President from the process for electing the President, these processes remain as closely entwined as the two chains of a DNA helix. Their trajectories only separate if the electoral vote count shows that the Electoral College has failed to make a choice for one or the other or both offices.[14] Any Vice President presiding over the electoral vote count has a deeply vested *political* interest in the results of the count, just as any and every member of Congress does. However, to put it mildly, an incumbent Vice President running for reelection or for the Presidency has a deeply vested *personal* interest in holding one of the offices to

9. Muller, *supra* note 5, at 1038.

10. *See* Goldstein, *supra* note 5, at 412–17.

11. U.S. CONST. amend. XXV, § 2 ("Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress."). Nelson Rockefeller, one of two persons to become Vice President thanks to the Twenty-Fifth Amendment, presided over the electoral vote count at which Gerald Ford, the other such person, officially lost his bid for election to the Presidency. *See* 123 CONG. REC. 319–20 (1977).

12. Prior to ratification of the Twenty-Fifth Amendment, Martin Van Buren's 1836 running mate Richard Mentor Johnson was the only Vice President not elected by the Electoral College. *See* Michael L. Rosin, *A History of Elector Discretion*, 41 N. ILL. U. L. REV. 125, 192–93 (2020).

13. U.S. CONST. art. II, § 1, cl. 3, *amended by* U.S. CONST. amend. XII ("In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.").

14. U.S. CONST. amend. XII.

be filled by the results of the electoral vote count.[15] In that scenario, the Vice President is an "office-*seeker*."[16]

Perhaps there was no rationale. After all, the Convention gave us at least one indefensible "stupidity" involving the Vice President—according to the text, the Vice President presides at his own impeachment trial in the Senate.[17] How did that happen?

The Committee on Postponed Matters, commissioned at the end of the Convention's August 31 session and chaired by New Jersey's

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15. There have been fifty-nine electoral vote counts (through January 6, 2025) following the first, necessarily-Vice-President-less count in 1789. The incumbent Vice President was a candidate for one of the two highest offices in twenty-five of them. In three cases the sitting Vice President presided over his own election to be President (Adams 1797, Jefferson 1801, Bush 1989). In four of them the sitting Vice President presided over his or her defeat in a presidential election (Breckinridge 1861, Nixon 1961, Gore 2001, Harris 2025). In ten cases the sitting Vice President presided over his own reelection to that office (Adams 1793, Calhoun 1829, Marshall 1917, Garner 1937, Nixon 1957, Agnew 1973, Bush 1985, Gore 1997, Cheney 2005, Biden 2013). In five of them the sitting Vice President presided over his own reelection defeat (Johnson 1841, Curtis 1933, Mondale 1981, Quayle 1993, Pence 2021). Martin Van Buren did not preside over his own election to the Presidency in 1837. Hubert Humphrey did not preside over his own defeat in a presidential election in 1969. In 1809, George Clinton did not preside over his own reelection to the Vice Presidency, nor did Daniel Tompkins in 1821. Vice President James Sherman died just before Election Day 1912. *See* Goldstein, *supra* note 5, at 418–20; 171 CONG. REC. H46 (2025).

16. Blassingame v. Trump, 87 F.4th 1, 4 (D.C. Cir. 2023).

17. Michael Stokes Paulsen, *Someone Should Have Told Spiro Agnew*, *in* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 75 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998). This volume contains twenty-one other notes on topics under the heading "Constitutional Stupidities" and sixteen under the heading "Constitutional Tragedies". *Id.* Whether these twenty-one other "stupidities" are actually stupid rather than tragic is left to each reader to judge. Surely having the Vice President preside at his own impeachment trial in the Senate is the only one that is utterly indefensible. There is more, although it may not be quite so utterly indefensible.

> In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

U.S. CONST. art. II, § 1, cl. 6, *amended in part by* U.S. CONST. amend. XXV, § 1.

Surely the following provision should have been extended to the Vice President so that he could not be manipulated while acting as President.

> The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

U.S. CONST. art. II, § 1, cl. 7.

Ratification of the Twenty-Fifth Amendment has mooted this concern in case a Vice President *becomes* President following the "removal . . . from office, . . . death or resignation" of the President. U.S. CONST. amend. XXV, § 1. However, the concern is certainly not mooted for a Vice President who "assume[s] the powers and duties of the office as Acting President" when a (living) "[President] is unable to discharge the powers and duties of his office." U.S. CONST. amend. XXV, §§ 3, 4. What better way would there be for Congress or any of the states to sweeten the pot for a Vice President to lead a Twenty-Fifth Amendment coup d'etat (or punish a Vice President for not leading such a coup!).

David Brearley,[18] created the Vice Presidency no later than the morning of September 4 when it reported its proposal for the election of the President and Vice President, and made the Vice President the President of the Senate—the officer presiding over the electoral vote count.[19]

The absurdity of the Vice President presiding over his own impeachment trial leads to the question of whether the Convention and Brearley's Committee intended for the Vice President to be the first choice to preside over the counting of the electoral votes.

The Convention's records provide a crystal-clear reason why the *President of the Senate*, and not specifically the Vice President, presides over the electoral vote count.[20] On September 4, Brearley's Committee reported a proposal in which the Senate elected one or both of the President and the Vice President if the Electoral College failed to elect both of them. In this initial proposal, the President of the Senate opened all the certificates "in that House."[21] In this scheme, there was no need for the House of Representatives to be present for the counting of the electoral votes. To be sure, the House had nothing to do if the Electoral College failed to elect one or both of the Union's two top officers.[22] Of course, this would soon change when the Convention shifted the contingent election of the President from the Senate to the House.[23] Upon that shift, the President of the Senate would preside at the counting of the electoral vote in the presence of the two houses assembled concurrently.[24]

Clearly, the delegates devoted a great deal of attention to amending the Brearley Committee's proposal for the election of the President and Vice President. However, no one at the Convention said a

18. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 474 (Max Farrand ed., Yale Univ. Press rev. ed. 1937) [hereinafter 2 CONVENTION RECORDS] (Journal); *id.* at 481 (Madison). The committee chose New Jersey delegate and State Supreme Court Chief Justice David Brearley to be its chairman. DONALD SCARINCI, DAVID BREARLEY AND THE MAKING OF THE UNITED STATES CONSTITUTION 196 (2005). This Article often refers to this committee as "the Brearley Committee."

19. *See* 2 CONVENTION RECORDS, *supra* note 18, at 494–95 (Journal); *id.* at 497–98 (Madison).

20. *See infra* Part III.D and Part V.B.

21. 2 CONVENTION RECORDS, *supra* note 18, at 494 (Journal); *id.* at 497–98 (Madison). *See infra* Part III.D.

22. *See* Derek Muller, *Michael L. Rosin, "Why the Framers Gave *That* Responsibility to the President of the Senate and to the House and Senate"*, ELECTION L. BLOG (Aug. 17, 2022, 7:02 PM), https://electionlawblog.org/?p=131408. This portion of the Committee's initial proposal stated, "[t]he President of the Senate shall in that House open all the certificates, and the votes shall be then and there counted . . . ." 2 CONVENTION RECORDS, *supra* note 18, at 494 (Journal); *id.* at 497–98 (Madison).

23. 2 CONVENTION RECORDS, *supra* note 18, at 519 (Journal); *id.* at 527 (Madison).

24. *See infra* text accompanying note 198.

word about the Vice President being the first choice to preside over the counting of the electoral votes.[25]

That debate might have taken place in Brearley's Committee. This Article doubts that it did. Instead, this Article asserts that Brearley's Committee had no intention of putting the Vice President in the chair for the electoral vote count. In its haste, the Committee, and then the Convention, simply overlooked the possible conflicts of interest with the Vice President serving as the presiding officer for his own impeachment trial and (re)election. Notably, making the incumbent Vice President the first choice to preside over the counting of the electoral votes does not rise to the same level of absurdity as having the Vice President preside over his own impeachment trial. In fact, having the Vice President preside over the electoral vote count is no more than an oversight if the President of the Senate does no more than perform ceremonial, ministerial tasks when the electoral votes are counted.

Unfortunately for scholars, Brearley's Committee and its members left hardly any paper trail to pursue.[26] Here is a list of the few surviving records.

- A 1787 note written by South Carolina delegate Pierce Butler listing several items of interest to Brearley's Committee but outside the scope of this Article.[27]

- A 1788 letter from Pierce Butler to his son's schoolmaster, Weedon Butler, in which the South Carolinian claimed to have proposed the Electoral College scheme to the Committee.[28]

- An 1802 letter from Delaware delegate John Dickinson to his daughter's father-in-law in which Dickinson claimed

25. Nor does anyone appear to have said a word about this during the ratification year. A search on the phrase "President of the Senate" between the dates of September 18, 1787 and March 31, 1789 (inclusive) in *The Documentary History of the Ratification of the Constitution – Digital Edition* returned thirty-eight entries relevant to the newly created office. (There are additional entries referring to the President of a state senate.) None of them mention the electoral vote count. *The Documentary History of the Ratification of the Constitution – Digital Edition*, ROTUNDA, https://rotunda.upress.virginia.edu/founders/RNCN.html (click "Enter"; click "Search"; search for "'President of the Senate'") (last visited Dec. 5, 2024).

26. SCARINCI, *supra* note 18, at 197.

27. SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 252–53 (James H. Hutson ed., Supp. 1985) [hereinafter FARRAND SUPPLEMENT]. Hutson writes "[t]hese notes appear to have been produced in the Committee on Postponed Parts, appointed on August 31, of which Butler was a member. They are in his hand." *Id.* at 252 n.4.

28. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 377–79 (Max Farrand ed., 1911) [hereinafter 3 CONVENTION RECORDS].

> that he, Dickinson, was the committee member who instigated the Electoral College scheme when he saw a draft of Madison's calling for Congress to elect the President.[29]

The second and third of these records will play a role in this Article's analysis. However, the bulk of the analysis is derived from the Convention's records that Brearley's Committee presented to the Convention and from a reconstruction of how the work of the Brearley Committee might have unfolded.

The remainder of this Article proceeds as follows. Part II recounts the history leading up to the creation of Brearley's Committee. Counting the electoral votes is merely one step in the process of presidential and vice-presidential selection. "No other constitutional provision gave [the Convention] so much difficulty in its formulation."[30] Presidential succession and the Vice Presidency were closely intertwined with resolving the problem of presidential election. In providing the first complete resolution to the problem of presidential election, Brearley's Committee created the Vice Presidency and thereby provided the primary solution to the problem of presidential succession.[31] Part 0 provides a brief overview of presidential selection proposals prior to the creation of Brearley's Committee. Part II.B recounts the early history of presidential succession—the pre-history of the Vice Presidency. Part II.C recounts the early history of two topics to which Brearley's Committee and the Convention should have paid more attention: the Impeachment Clauses and the Oaths Clause. Brearley's Committee worked on the Impeachment Clauses.[32] This Article proposes that it should have also worked on the Oaths Clause since there is no constitutional text requiring presidential electors, one of the Committee's creations, to take an oath to support the Constitution.[33] Nor is there any

29. FARRAND SUPPLEMENT, *supra* note 27, at 300–02. For Dickinson's scant impact, see William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901, 1001 n.293 (2009), and text accompanying note 251 *infra*.

30. Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 J. AM. HIST. 35, 35 (1986).

31. 2 CONVENTION RECORDS, *supra* note 18, at 494.

32. *See infra* Part III.C.

33. U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States."). Note, in contrast, that sections 2 and 3 of the Fourteenth Amendment explicitly include presidential electors. U.S. CONST. amend. XIV, §§ 2, 3 ("Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial

explicit constitutional text concerning what oath, if any, the Vice President takes.[34] This Part also presents the early history of the Full Faith and Credit Clause, another clause revised by the Committee, which ultimately subsumed a small piece of the Committee's initial presidential election proposal.[35]

Part III presents the Committee's proposals as initially reported. Part III.D presents the Committee's proposal for the presidential selection process as reported on September 4. Part III.A presents a catalog of other proposals reported by the Committee. Although the content of these proposals is not of inherent interest to this Article, the timetable of their delivery is. The delivery dates of these items, especially the ones reported *before* the Electoral College plan was reported, imposed significant constraints on work regarding the issues that are the central focus of this Article. Part III.B briefly discusses the proposals made on September 1, three days before the report on presidential selection. Part III.C briefly discusses the Committee's impeachment proposal presented on September 4, prior to the Committee's proposal for the presidential selection process.

Part IV of this Article reviews the evolution of constitutional provisions related to presidential selection *after* they were initially reported by Brearley's Committee. The debates during these episodes provided an opportunity for the Convention's delegates to comment on the role of the actors involved in the presidential election process.

While Part II through Part IV of this Article recount documented history, Part V attempts to reconstruct history for which there is

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officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state." "No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability."). A presidential elector may not be a Member of Congress nor may she "hold[] an office of profit or trust under the United States." U.S. CONST. art. II, § 1, cl. 2. A presidential elector may have taken the Article VI oath as a prerequisite to holding a state office but she does not serve as a presidential elector by virtue of holding that state office. Vasan Kesavan has noticed the omission of presidential electors from the Oaths Clause. Vasan Kesavan, *The Very Faithless Elector?*, 104 W. VA. L. REV. 123, 128 (2001).

34. *See supra* note 33.

35. *See infra* text accompanying notes 231–234.

little to no documentary evidence. It attempts to reconstruct the Committee's work sequence and answer the question of when it created the Vice Presidency, most significantly in relation to when it would have had a completed version of a presidential selection process matching the one reported to the Convention, at least with respect to election of a President.

Part VI summarizes the analysis. It notes that the Convention unanimously rejected giving a *Senator* serving as the President of the Senate an extra vote to break a tie in a scheme calling for congressional election of the President. This Part casts doubt on the suggestion that the Convention would have given a Senator serving as President of the Senate the power to decide *unilaterally* which electoral votes *from a state* to count, if any, and doubts even more that it intended to give that power to the Vice-President-*acting-as*-President-of-the-Senate, someone likely to have a vested personal interest in the outcome of the electoral vote. The Article concludes by arguing that the Convention either forgot to take the Vice President out of the electoral vote counting process or that the Convention did not intend to give the President of the Senate any power to decide which electoral votes to count. After all, it forgot to take the Vice President out of the chair for his own impeachment.

II. A HISTORY OF RELEVANT PARTS POSTPONED

The Committee on Postponed Parts did much good work. This Part reviews the topics of interest to this Article related to the presidential selection scheme reported by the Committee.[36]

A. Presidential Selection

The author of the leading article on the emergence of the Electoral College has written, "[n]o other constitutional provision gave [the Convention] so much difficulty in its formulation."[37] While there were many proposals for presidential selection,[38] the three

36. For very brief accounts of the Committee work items not covered here, see *infra* Part III.A.

37. Slonim, *supra* note 30, at 35.

38. Lesser-known proposals included: John Rutledge's June 1 proposal that the upper house alone select the President. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 69 (Max Farrand ed., 1911) [hereinafter 1 CONVENTION RECORDS]. Elbridge Gerry's June 9 proposal for election by state governors. *Id.* at 174–75. James Wilson's July 24 proposal that the President be chosen by twenty-five members of Congress chosen by lot. 2 CONVENTION RECORDS, *supra* note 18, at 99. Gerry's July 24 proposal that the state legislatures cast electoral votes in the same numbers being proposed for electors but without the intervention of electors. *Id.* at 101. Oliver Ellsworth's July 25 proposal that a non-incumbent be chosen by a joint session of Congress while an incumbent be chosen by electors selected by the state

best known proposals were: (1) popular election;[39] (2) joint election by both houses of Congress;[40] and (3) selection by an electoral college-like body composed of electors whose only responsibility was to choose the President.

Proposals for an electoral college-like body appeared as early as June 2, a day after the Convention heard proposals for selection by a joint session of Congress,[41] by popular vote,[42] and by the Senate alone.[43] James Wilson of Pennsylvania proposed

> that the Executive Magistracy shall be <elected> in the following manner: <That> the States be divided into ___ districts: <& that> the persons qualified <to vote in each> district for members of the first branch of the national Legislature elect___ members for their respective districts to be electors of the Executive magistracy. That [sic] the said Electors of the Executive magistracy meet at___ and they or any___ of them so met shall proceed to elect by ballot, but not out of their own body___ person___ in whom the Executive authority of the national Government shall be vested.[44]

On July 17, Luther Martin of Maryland revived the proposal "that the Executive be chosen by Electors appointed by the <several> Legislature<s of the individual States.>".[45] At the same debate, the Convention also considered election of the President by popular vote.[46] Hugh Williamson voiced one of the several standard criticisms of this mode of selection in that "[t]he people will be sure

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legislatures. *Id.* at 108–09. Jonathan Dayton's August 24 proposal that the President be elected by a joint vote of Congress with each state having one vote. *Id.* at 403.

39. *See* James Wilson's proposal of June 1, 1 CONVENTION RECORDS, *supra* note 38, at 69; an unattributed proposal made on July 17, 2 CONVENTION RECORDS, *supra* note 18, at 32; and Daniel Carroll's proposal made on August 24, *id.* at 402.

40. See the original Virginia Plan presented on June 1, 1 CONVENTION RECORDS, *supra* note 38, at 62–64; an unattributed proposal made on July 17, 2 CONVENTION RECORDS, *supra* note 18, at 32; Nathaniel Gorham's proposal of August 24, *id.* at 402–03; and finally, a proposal from an unrecorded source made on September 5, *after Brearley's committee reported*, *id.* at 507.

41. 1 CONVENTION RECORDS, *supra* note 38, at 64, 68.

42. *Id.* at 68–69.

43. *Id.* at 69.

44. *Id.* at 80. The angle brackets (i.e. "<. . .>") enclose changes Madison made to his notes following the Convention. *See id.* at xviii–xix. This Article preserves the sometimes antique spelling or abbreviation of words in original sources. For *Best Practices for Transcription* recommended by the National Archives, see *Transcription Tips*, NAT'L ARCHIVES, https://www.archives.gov/citizen-archivist/transcribe/tips (last visited Dec. 3, 2024).

45. 2 CONVENTION RECORDS, *supra* note 18, at 32.

46. *Id.* at 22.

to vote for some man in their own State, and the largest State will be sure to succede [sic]."[47]

James Madison and Oliver Ellsworth reiterated Williamson's *native son* concern a week later when the Convention once again considered direct election before turning its attention to presidential selection by a college of electors on July 25.[48] It was during this day's debate that the Convention first heard proposals that each elector have more than one vote, well before there had even been a suggestion of a Vice President. Concerned that direct popular election of the president would put the small states at a disadvantage, Williamson "suggested as a cure for this difficulty, that each man should vote for 3 candidates. One of these he observed would be probably of his own State, the other 2. [sic] of some other States; and as probably of a small as a large one."[49] Williamson's proposal that each elector have *three* votes might assuage the concerns of the small states, but it might not. Notably, it contained nothing to prevent an elector from casting all three votes for someone from his own state. Gouverneur Morris saw what else was needed. He "liked the idea, suggesting as an amendment that each man should vote for two persons one of whom at least should not be of his own State."[50] Madison concurred:

> Mr <Madison> also thought something valuable might be made of the suggestion with the proposed amendment of it. The second best man in this case would probably be the first, in fact. *The only objection* which occurred was that each Citizen after havg. [sic] given his vote for his favorite fellow Citizen *wd.* [sic] *throw away his second on some obscure Citizen of another State, in order to ensure the object of his first choice*. But it could hardly be supposed that the Citizens of many States would be so sanguine of having their favorite elected, as not to give their second vote with sincerity to the next object of their choice.[51]

47. *Id.* at 32. Madison's notes continue with the following additional standard criticism of direct election of the President by popular vote: "This will not be Virga. however. Her slaves will have no suffrage." *Id.*

48. *Id.* at 111. Madison records himself as saying "[t]he first arose from the disposition in the people to prefer a Citizen of their own State, and the disadvantage this wd. [sic] throw on the smaller States." *Id.* He records Ellsworth as saying "[t]he objection drawn from the different sizes of the States, is unanswerable. The Citizens of the largest States would invariably prefer the Candidate within the State; and the largest States wd. [sic] invariably have the man." *Id.*

49. *Id.* at 113.

50. *Id.*

51. *Id.* at 114 (emphasis added).

Williamson, Morris, and Madison would all serve on the Committee on Postponed Parts.

On July 26, the Convention agreed: "The <proceedings since monday [sic] last [July 23] were referred unanimously to the> Come. of detail, <and the Convention then unamously> [sic] Adjourned till Monday. Augst. 6. that <the> Come. of detail <might> have time to prepare & report the Constitution[.]"[52] The Committee of Detail's final report, presented by John Rutledge on August 6, proposed that the President "shall be elected by ballot by the Legislature" for a single seven-year term.[53] With so much content delivered by the Committee of Detail,[54] the Convention would not return to the vexing question of presidential selection until August 24.

On August 24, the Convention once again cycled through the leading contenders (and a few other proposals).[55] During this day's debate, Roger Sherman of Connecticut and Jonathan Dayton of New Jersey, resurrected the small states' dogged opposition to the prospect of large state domination in case the President were to be selected by a joint ballot of Congress: "Mr. Sherman objected to [presidential election by joint Congressional ballot] as depriving the States represented in the Senate of the negative intended them in that house[.]"[56] Dayton added:

> If the amendment should be agreed to, *a joint ballot would in fact give the appointment to one House*; He could never agree to the clause with such an amendment. There could be no <doubt> of the two Houses separately concurring in the same person for president. The importance & necessity of the case would ensure <a concurrence>.[57]

In response, Madison commented that

> [i]f the amendment be agreed to the rule of voting will give to the largest State, compared with the smallest, *an influence as 4 to 1 only, altho* [sic] *the population is as 10 to 1.* This surely cannot be unreasonable as the President is to act for the people not for the States.[58]

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52. *Id.* at 128.
53. *Id.* at 185.
54. For a review of the work of the Committee of Detail, see William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197 (2012).
55. *See* 2 CONVENTION RECORDS, *supra* note 18, at 402–04.
56. *Id.* at 401.
57. *Id.* at 402 (emphasis added).
58. *Id.* at 403 (emphasis added).

Sherman, like Madison, would serve on Brearley's Committee.[59]

For the purposes of this Article, one particular proposal during this debate deserves special attention. Mr. George Read of Delaware moved "that in case the numbers for the two highest in votes should be equal, then the President of the Senate shall have an additional casting vote."[60] His proposal was unanimously rejected.[61]

B. Presidential Succession: The President of the Senate Prior to the Committee on Postponed Parts

When the Convention met, the state constitutions in Massachusetts, New York, Pennsylvania, and South Carolina created the Office of Lieutenant Governor. Its occupant would perform the duties of the Governor as needed.[62] Connecticut and Rhode Island each had a Lieutenant Governor as well, although they lacked a state constitution.[63] The other seven states lacked a Lieutenant

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59. *Id.* at 473.

60. *Id.* at 403 (emphasis added). This was the model in Read's home state of Delaware in which the Speaker of the Council (the upper house) had a tie-breaking vote. *See* DEL. CONST. of 1776, art. 7, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 563 (Francis Newton Thorpe ed., 1909) [hereinafter 1 FEDERAL AND STATE CONSTITUTIONS]. It was also the model in New Jersey. *See* N.J. CONST. of 1776, art. VII, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2596 (Francis Newton Thorpe ed., 1909) [hereinafter 5 FEDERAL AND STATE CONSTITUTIONS]. The Convention Journal records Read's proposal as "[o]n the question to agree to the following clause and in case the numbers for the two highest in votes should be equal, then the President of the Senate shall have an additional casting voice[;] it passed in the negative." 2 CONVENTION RECORDS, *supra* note 18, at 397 (internal quotation marks omitted). Kesavan appears to be the only scholar who has noticed Read's proposal. Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1710 n.246 (2002) (arguing that neither textual nor structural reasons suggest that the President of the Senate's tie-breaking vote in the Article I business of the Senate applies to any Article II business of the Senate in counting electoral votes).

61. *See* 2 CONVENTION RECORDS, *supra* note 18, at 403.

62. MASS. CONST. of 1780, ch. II, art. II, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1904 (Francis Newton Thorpe ed., 1909) [hereinafter 3 FEDERAL AND STATE CONSTITUTIONS]; N.Y. CONST. of 1777, arts. XX–XXII, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 60, at 2633; PA. CONST. of 1776, § 20, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 60, at 3087; S.C. CONST. of 1778, art. VIII, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3249 (Francis Newton Thorpe ed., 1909) [hereinafter 6 FEDERAL AND STATE CONSTITUTIONS]. In South Carolina the Lieutenant Governor "succeed[ed] to [the] office." *Id.*

63. For Connecticut's 1787 election for Lieutenant Governor, see *Connecticut 1787 Lieutenant Governor*, A NEW NATION VOTES (Jan. 11, 2012), https://elections.lib.tufts.edu/catalog/th83m032g. For Rhode Island's 1787 election for Deputy Governor, see *Rhode Island 1787*

Governor, and in those states, the duties of the state's chief executive fell on the presiding officer of the upper chamber of the state legislature.[64]

Before there was a Vice President, there was a President of the Senate.[65] The report from the Committee of Detail made it clear that, like the Office of Speaker of the House, the Office of President of the Senate would be filled at least whenever the Senate was in session.[66]

The delegates to the Convention first heard the term "President of the Senate" no later than June 18 when Alexander Hamilton, who "had been hitherto silent," presented his plan.[67] His notes proposed that "[o]n the death[,] resignation or removal of the Governor his authorit[y] [is] to be exercised by the President of the Senate."[68] The Committee of Detail incorporated this proposal in its report:

> In Case of his [the President's] Impeachment, (Dismission) *Removal*, Death, Resignation or Disability to discharge the Powers and Duties of his (Department) *Office*; the President of the Senate shall exercise those Powers and Duties, until another President of the United States be chosen, or until the President

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Deputy Governor, A NEW NATION VOTES (Jan. 11, 2012), https://elections.lib.tufts.edu/catalog/cn69m448n.

64. DEL. CONST. of 1776, art. 7, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 60, at 563; GA. CONST. of 1777, art. XXIX, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 782 (Francis Newton Thorpe ed., 1909) [hereinafter 2 FEDERAL AND STATE CONSTITUTIONS]; MD. CONST. of 1776, art. XXXII, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 62, at 1696; N.H. CONST. of 1784, *reprinted in* 4 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2465 (Francis Newton Thorpe ed., 1909); N.J. CONST. of 1776, art. VII, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 60, at 2596; N.C. CONST. of 1776, art. XIX, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 60, at 2792; VA. CONST. of 1776, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3816 (Francis Newton Thorpe ed., 1909) [hereinafter 7 FEDERAL AND STATE CONSTITUTIONS].

65. 2 CONVENTION RECORDS, *supra* note 18, at 172; *see also infra* note 68.

66. *Id.* at 165 (Committee of Detail IX) ("The Senate shall (be comp) chuse its own President and other Officers.").

67. *See* 1 CONVENTION RECORDS, *supra* note 38, at 282.

68. Constitutional Convention, Plan of Government, (June 18, 1787), *in* 4 THE PAPERS OF ALEXANDER HAMILTON 208 (Harold C. Syrett ed., 1962). Hamilton's notes also contain a proposal "that [if] an election" of the Governor or President by a College of Electors "be not made within a limit⟨ed⟩ time the President of the Senate shall ⟨–⟩ be the Governor." *Id.* The Pinckney Plan also called for the President of the Senate to act as President in case of a vacancy. *See* 3 CONVENTION RECORDS, *supra* note 28, at 741. In a paper not presented to the Convention, Hamilton suggested that the President of the Senate administer the oath of office to the President. *See id.* at 757, 761.

> impeached or disabled be acquitted, or his Disability be removed.[69]

Madison added "till a Successor be appointed" in his notes.[70] On August 27, Gouverneur Morris suggested that the Chief Justice be the "provisional successor to the President."[71] Aside from that, no one suggested anyone other than the President of the Senate.[72]

Delegates proposed several other functions for the President of the Senate as August unfolded. The Committee of Detail proposed that disputes and controversies between two or more states be resolved by courts composed of Senators and that the judgments of these courts be sent to the President of the Senate rather than the President of the United States, as originally suggested.[73] Oliver Ellsworth proposed that the President of the Senate (and others) serve on the President's Privy Council.[74] Charles Pinckney proposed that, in the absence of the President, the President of the Senate would be the keeper of the Great Seal that would be affixed to all laws.[75] None of these proposals ever came to a vote.[76]

C. Other Topics of Interest

There are three other topics of interest to this Article: the Impeachment Clauses, the Oaths Clause, and the Full Faith and Credit Clause.[77] The Committee on Postponed Parts touched only on the first and last of these.[78]

1. Impeachment

On August 6, the Committee of Detail reported an impeachment scheme that included the following provisions:

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69. 2 CONVENTION RECORDS, *supra* note 18, at 172 (emphases in original). For Madison's rendition, see *id.* at 186.

70. 1 CONVENTION RECORDS, *supra* note 38, at 292. So did Yates, who recorded the proposal as, "[o]n his death or removal, the president of the senate to officiate, with the same powers, until another is elected." *Id.* at 300.

71. 2 CONVENTION RECORDS, *supra* note 18, at 427.

72. *Id.* at 402, 427.

73. *Id.* at 162, 170, 184; *accord* William Ewald & Lorianne Updike Toler, *Committee of Detail Documents*, PA. MAG. HIST. & BIOGRAPHY, July 2011, at 239, 318–19, 350–51.

74. 2 CONVENTION RECORDS, *supra* note 18, at 329, 367.

75. *See id.* at 335, 340 n.4, 342.

76. *Id.* at 340, 369. There is no record of debate on any of these proposals.

77. *See infra* text accompanying notes 116–119.

78. *See supra* note 33 and *infra* note 148.

> The Jurisdiction of the Supreme (National) Court shall extend . . . to the Trial of Impeachments of Officers of the United States;[79]
>
> <Judgmts. in Cases of Impeachmt. shall not extend further than to removal from Office & disqualifn. to hold & enjoy any place of Honr. Trust or Profit under the U. S. But the party convicted shall nevertheless be liable & subject to Judl. Trial Judt & Punishment according to (the) Law of (the Land)>[.][80]

Madison recorded the impeachment provision with special reference to the President: "He shall be removed from his office on impeachment by the House of Representatives, and conviction in the supreme Court, of treason, bribery, or corruption."[81]

But by August 22, someone recognized that the Supreme Court would not be a suitable forum for the trial of one of its members. On that day, someone proposed that "[t]he Judges of the Supreme Court shall be triable by the Senate, on impeachment by the House of representatives."[82]

Whether to have a single forum or multiple forums to try impeachments was an open issue presented to Brearley's Committee that it would resolve in favor of a single forum.[83]

2. Oaths

Edmund Randolph's Virginia Plan contained a provision that "the Legislative Executive & Judiciary powers within the several States ought to be bound by oath to support the articles of Union."[84] Two months later, Elbridge Gerry moved to "insert as an amendmt. that the oath of the Officers of the National Government also should extend to the support of the Natl. Govt. which was agreed to nem. con."[85]

The Committee of Detail reported a formal statement of the Oaths Clause: "The members of the Legislatures, and the Executive and Judicial officers of the United States, and of the several States,

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79. 2 CONVENTION RECORDS, *supra* note 18, at 172–73.

80. *Id.* at 173.

81. *Id.* at 185–86. Madison used whole words as he spelled out the second provision concerning judgments. *Id.* at 187.

82. *Id.* at 367.

83. *See infra* Part III.C.

84. 1 CONVENTION RECORDS, *supra* note 38, at 22.

85. 2 CONVENTION RECORDS, *supra* note 18, at 87. Four decades after the Framing Webster defined *nem. con* as, "No one contradicting or opposing, that is, unanimously; without opposition." NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 554 (New York, S. Converse 1832), https://books.google.com/books?id=1UU-AAAAYAAJ.

shall be bound by oath to support this Constitution."[86] On August 30, the Convention added "or affirmation" after "oath."[87]

This provision was not at issue when the Convention commissioned the Committee on Postponed Parts and the Committee did not touch it, although it should have extended the Oaths Clause to include presidential electors.[88]

3. The Full Faith and Credit Clause

On August 6, Madison recorded the Committee of Detail reporting the *Full Faith* Clause, which reads: "Full faith *shall* be given in each State to the acts *of the Legislatures*, and to the records and judicial proceedings of the Courts and Magistrates of every other State."[89]

On August 29, the Convention agreed to somewhat different language proposed by Gouverneur Morris that both expanded and weakened the proposal made by the Committee of Detail. It read: "Full faith *ought* to be given in each State to the *public acts*, records, and judicial proceedings of every other State; and the Legislature shall by general laws determine the Proof and effect of such acts, records, and proceedings[.]"[90] This proposal expanded the clause's scope to include all of a state's public acts and records in addition to its judicial proceedings. However, it reduced the mandatory "shall" to a recommendatory "ought."[91]

Just before this sequence of events, the Convention had approved the following proposition made by Edmund Randolph:

> Whensoever the act of any State, whether legislative executive or judiciary shall be attested and exemplified under the seal thereof, such attestation and exemplification shall be deemed in other State as full proof of the existence of that act — and it's [sic] operation shall be binding in every other State, in all cases to which it may relate, and which are within the cognizance and jurisdiction of the State, wherein the said act was done[.][92]

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86. 2 CONVENTION RECORDS, *supra* note 18, at 174.
87. *Id.* at 461.
88. *See supra* note 33; *see also infra* note 148.
89. 2 CONVENTION RECORDS, *supra* note 18, at 188 (emphases added). The final draft of the Committee of Detail simply states, "Full Faith & Credit &c>." *Id.* at 174.
90. *Id.* at 445 (emphasis added) (Journal); *see also id.* at 448 (Madison).
91. *See infra* text accompanying notes 116–119.
92. 2 CONVENTION RECORDS, *supra* note 18, at 445 (emphasis added) (Journal); *see also id.* at 448 (Madison).

Brearley's Committee would significantly reshape this language.[93]

III. THE POSTPONED PARTS REPORTED

A. The Other Postponed Parts Reported

The Committee on Postponed Parts created or enhanced texts on many topics in addition to the Vice Presidency, presidential and vice-presidential election, and presidential succession. The other topics touched by the Committee in the order first reported to the Convention are: (1) Incompatibility;[94] (2) Bankruptcy;[95] (3) the Full Faith and Credit Clause;[96] (4) Taxing and Spending Powers;[97] (5) Indian Commerce;[98] (6) Presidential Eligibility;[99] (7) Treaties;[100] (8)

93. *See infra* text accompanying notes 116–119.

94. *See infra* Part III.B.

95. *See infra* Part III.B.

96. *See infra* Part III.B.

97. The Committee provided distinct text stating (1) Congress has the power to enact revenue laws, (2) requiring such laws to originate in the House, and (3) making it clear that no money is to be drawn from the treasury "but in consequence of appropriations made by law." 2 CONVENTION RECORDS, *supra* note 18, at 505. The Committee also removed a provision requiring governmental salary laws to originate in the House. *Id.* at 282. For the last statements prior to the Committee on August 15, see *id.* at 294, 382 (Journal). For the text as delivered by the Committee on September 4 and 5, see *id.* at 493, 505 (Journal). For the final text, see U.S. CONST. art. I, § 8, cl. 1; art. I, § 7, cl. 1; art. I, § 9, cl. 7.

98. The Committee reduced congressional power from a general power "to regulate affairs with the Indians" to a power to regulate commerce with the Indian tribes. *See* Lorianne Updike Toler, *The Missing Indian Affairs Clause*, 88 U. CHI. L. REV. 413 (2021). For the last statement of the Indian Affairs clause prior to the Committee on August 18, see 2 CONVENTION RECORDS, *supra* note 18, at 321 (Journal). For the last statement of the Indian Commerce Clause (as an appendage of the Commerce Clause), see *id.* at 367 (Journal). For the text as delivered by the Committee on September 4, see *id.* at 493 (Journal). For the final text, see U.S. CONST. art. I, § 8, cl. 3. After addressing the Indian Commerce Clause, the Convention turned its attention to the forum for impeachment and then presidential selection. *See infra* Part III.C and Part III.D, respectively.

99. The Committee reduced the inhabitancy criterion from twenty-one to fourteen years and stated the clause in terms of eligibility and election. For the last statement prior to the Committee on August 22, see 2 CONVENTION RECORDS, *supra* note 18, at 367 (Journal). For the text as delivered by the Committee on September 4, see *id.* at 494 (Journal). For the final text, see U.S. CONST. art. II, § 1, cl. 5.

100. The Committee shifted the power to make treaties from the Senate to the President and left the Senate with the power to ratify treaties. For the last statement prior to the Committee, see 2 CONVENTION RECORDS, *supra* note 18, at 169 (Committee of Detail). For the text as delivered by the Committee on September 4, see *id.* at 495 (Journal). For the final text, see U.S. CONST. art. II, § 2, cl. 2.

Appointments;[101] (9) Opinions;[102] (10) Army Funding;[103] (11) Federal Enclaves;[104] and (12) Patents and Copyrights.[105] That is certainly a daunting list—twelve topics *in addition to* the topics of principle interest to this Article.[106]

The first three topics were reported on September 1.[107] Part III.B reviews the Committee's proposals. Understanding the history of these items' passage through Brearley's committee sheds light on the evolution of the items of primary interest to this Article. The next six items were reported on September 4 along with the items of primary interest to this Article.[108] The last three items were reported a day later on September 5.[109]

B. The Committee's Initial Report on September 1

On September 1, "Mr Brearley . . . informed the House that the Committee were prepared to report partially."[110] The proposals included important steps leading to: (1) the Incompatibility Clause; (2) the Bankruptcy Clause; (3) and the Full Faith and Credit Clause.

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101. The Committee shifted the power to appoint officers from the Senate to the President with the Senate having the power to confirm appointments. For the last statement prior to the Committee, see 2 CONVENTION RECORDS, *supra* note 18, at 171 (Committee of Detail). For the text as delivered by the Committee on September 4, see *id.* at 495 (Journal). For the final text, see U.S. CONST. art. II, § 2, cl. 2.

102. The Committee eliminated a proposed Privy Council and replaced it with what we recognize as a Cabinet composed of the heads of the executive departments who may be required to provide written opinions to the President. For the last statement prior to the Committee on August 22, see 2 CONVENTION RECORDS, *supra* note 18, at 367 (Journal). For the text as delivered by the Committee on September 4, see *id.* at 495 (Journal). For the final text, see U.S. CONST. art. II, § 2, cl. 1.

103. The Committee limited military funding to no more than two years. For the last statement prior to the Committee on August 6, see 2 CONVENTION RECORDS, *supra* note 18, at 168 (Committee of Detail). For the text as delivered by the Committee on September 5, see *id.* at 505 (Journal). For the final text, see U.S. CONST. art. I, § 8, cl. 12.

104. The Committee set a ten-mile square as the maximum size of the seat of government. It also provided uniform language for the jurisdiction of the government of the Union over the federal district and places purchased from the states. For the last statement prior to the Committee on August 18, see 2 CONVENTION RECORDS, *supra* note 18, at 321 (Journal). For the text as delivered by the Committee on September 5, see *id.* at 505 (Journal). For the final text, see U.S. CONST. art. I, § 8, cl. 17.

105. The Committee formalized proposals made by Madison and Pinckney on August 18. *See* 2 CONVENTION RECORDS, *supra* note 18, at 325 (Madison). For the text as delivered by the Committee on September 5, see *id.* at 505 (Journal). For the final text, see U.S. CONST. art. I, § 8, cl. 8.

106. The Committee appears to have failed to deliver a proposal on one topic assigned to it: Supreme Court jurisdiction. *See* WILLIAM MONTGOMERY MEIGS, THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787, at 246 (1900).

107. 2 CONVENTION RECORDS, *supra* note 18, at 483–84.

108. *Id.* at 493–96.

109. *Id.* at 505–07.

110. *Id.* at 483.

The Committee of Detail had reported an Incompatibility Clause that also prohibited a Senator from holding an office under the United States for one year after leaving office:

> The [m]embers of each House shall be ineligible to, and incapable of holding[,] any [o]ffice under the [a]uthority of the United States, during the [t]ime for which they shall respectively be elected: [*a*]*nd the* [*m*]*embers of the Senate shall be ineligible to, and incapable of holding*[,] *any such office for one* [*y*]*ear afterwards.*[111]

Brearley's Committee deleted this provision and added text making it clear that someone holding an office under the United States could not also be a Member of Congress:

> The [m]embers of each House shall be ineligible to any civil [o]ffice under the authority of the United States[,] during the time for which they shall respectively be elected[;] [a]nd no person holding any office under the United States shall be a [m]ember of either House during his continuance in office.[112]

On August 29, Charles Pinckney proposed giving Congress the power "[t]o establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange."[113] Brearley's Committee responded with text preserving the first part, but not the second part, of Pinckney's proposal, "to establish uniform laws on the subject of bankruptcies."[114]

Recall that on August 29, the Convention had approved the following proposition made by Edmund Randolph:

> Whensoever the act of any State, whether legislative executive or judiciary shall be attested and exemplified under the seal thereof, such attestation and exemplification shall be deemed in other State as full proof of the existence of that act — and it's [sic] operation shall be binding in every other State, in all cases to which it may relate, and which are within the cognizance and jurisdiction of the State, wherein the said act was done[.][115]

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111. *Id.* at 166 (emphasis added). This was last debated on August 14. *See id.* at 283 (Madison).

112. *Compare id.* at 483 (Journal), *with* U.S. CONST. art. I, § 6, cl. 2.

113. 2 CONVENTION RECORDS, *supra* note 18, at 447 (Journal).

114. *Id.* at 483 (Journal). For the final text, see U.S. CONST. art. I, § 8, cl. 4. The Constitution contains no text specific to foreign bills of exchange.

115. *Id.* at 445 (Journal); *id.* at 448 (Madison).

Brearley's Committee wisely omitted Randolph's proposition, leaving it to the First Congress to enact those details into law.[116]

Brearley's Committee also reported text that restored the words "and credit" to the phrase "full faith and credit" and brought the text significantly closer to its final form:

> Full faith and credit ought to be given in each State to the public Acts, Records, and Judicial proceedings of every other State, and the Legislature shall by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect which judgments obtained in one State shall have in another.[117]

On September 3, Madison restored the word "shall" in place of "ought to,"[118] thereby making full faith and credit binding on the states. With that change in place the Convention approved the following text: "Full faith and credit *shall* be given in each State to the public Acts, records, and judicial proceedings of every other State, and the Legislature may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof."[119] There was much more work for Brearley's Committee to report, which occurred on September 4 and 5.[120]

C. The Forum for Impeachment

The Convention's September 4 debate reached *the forum* for impeachment before it reached presidential selection.[121] Recall that the Convention had initially proposed that the Supreme Court try all impeachments and then shifted the impeachment of a Supreme Court Justice to the Senate.[122] But Brearley's Committee went even further and gave the Senate the power to try all impeachments,

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116. Act of May 26, 1790, ch. 11, 1 Stat. 122 ("An Act to prescribe the mode in which the public Acts, Records, and judicial Proceedings in each State, shall be authenticated so as to take effect in every other State.").

117. *Compare* 2 CONVENTION RECORDS, *supra* note 18, at 483–84, *with* U.S. CONST. art. IV, § 1, cl. 1.

118. 2 CONVENTION RECORDS, *supra* note 18, at 489 (Madison).

119. *Id.* at 486 (Journal); *id.* at 489 (Madison). The Committee of Style and Arrangement made only small changes to this text as it arrived at the final version. In addition to breaking the text into two sentences, the Committee of Style and Arrangement (1) changed "Legislature" to "Congress," (2) rolled "State" to lower case in "every other state," (3) added a COMMA at the end of "shall be proved" and (4) added a final DOT at the end of the text. *Compare* 2 CONVENTION RECORDS, *supra* note 18, at 577–78, *with id.* at 601, *and* U.S. CONST. art. IV, § 1, cl. 1.

120. For a list of topics not covered below, see *supra* text accompanying notes 98–105.

121. *See infra* Part III.D.

122. *See supra* Part II.C.1.

writing: "The Senate of the United States shall have power to try all impeachments; but no person shall be convicted without the concurrence of two thirds of the Members present."[123] Madison's notes place the explanation for this total shift of power in the mouth of committee member, Gouverneur Morris, who explained the shift with particular reference to the President: "[a] conclusive reason for making the Senate instead of the Supreme Court the judge of impeachments, was that the latter was to try the President after the trial of the impeachment."[124] Nevertheless, the Committee left the Court a small role. "[W]hen [the Senate] sit[s] to try the impeachment of the President, . . . the Chief Justice shall preside."[125]

D. Presidential Selection

The Convention next considered the Committee's report on the presidential selection process.[126] The proposal begins with the familiar text of the Electors Clause: "Each State shall appoint in such manner as it's [sic] Legislature may direct, a number of Electors equal to the whole number of Senators, and Members of the House of representatives to which the State may be entitled in the legislature."[127] James Wilson made an initial suggestion of an Electoral College-like body that implicitly included a suggestion that all of the electors convene together as one body.[128] But Brearley's Committee proposed something different:

> The Electors shall meet in their respective States, and vote by ballot for two Persons, of whom one at least shall not be an inhabitant of the same State with themselves. — and they shall make a list of all the Persons voted for, and of the number of votes for each . . . .[129]

If the Electoral College had convened together as a single body, that single body could have transmitted the results of its vote to

123. 2 CONVENTION RECORDS, *supra* note 18, at 493. For Madison's rendition in his notes, see *id.* at 497.

124. *Id.* at 500.

125. *Id.* at 495 (Journal); *id.* at 498 (Madison).

126. The Committee also reported a revised proposal regarding presidential eligibility, *see supra* note 99, and three proposals regarding presidential powers, *see supra* text accompanying notes 100–101.

127. 2 CONVENTION RECORDS, *supra* note 18, at 493–94. For Madison's rendition in his notes, see *id.* at 497.

128. *See supra* text accompanying note 44.

129. 2 CONVENTION RECORDS, *supra* note 18, at 494. For Madison's rendition in his notes, see *id.* at 497.

Congress or some other central authority.[130] With the Electoral College *acting* in a distributed manner, the acts of each state's College of Electors would need to be sent to some central repository where they would be collected and counted.[131] The proposal's second paragraph continues, "which list they shall sign and certify, and transmit sealed to the seat of the general Government, directed to the President of the Senate." [132] It is followed by a third and fourth paragraph:

> The President of the Senate shall in that House open all the certificates, and the votes shall be then and there counted — The Person having the greatest number of votes shall be the President, if such number be a majority of [that] of the Electors and if there be more than One, who have such [a] Majority, and have an equal number of votes, then the Senate shall choose by ballot one of them for President: but if no Person have a majority, then from the five highest on the list, the Senate shall choose by ballot the President — and in every case after the choice of the President, the Person having the greatest number of votes shall be Vice President: but if there should remain two or more, who have equal votes, the Senate shall choose from them the Vice President. The Legislature may determine the time of chusing and assembling the Electors, and the manner of certifying and transmitting their votes.[133]

Table 1 assigns names and identifies Article II, Section 1 endpoints for these four paragraphs.

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130. The Maryland Constitution of 1776 called for a College of Electors to convene in Annapolis to elect the entire State Senate. The Constitution continued, "which proceedings of the electors shall be certified under their hands, and returned to the Chancellor." MD. CONST. of 1776, art. XV, XVI, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS *supra* note 62, at 1693–94. Kentucky's 1792 Constitution expanded the role of its College of Electors to include election of the Governor as well as the State Senate. The Kentucky Electoral College met together in one place and made return of its proceedings to the Secretary [of State]. KY. CONST. of 1792, art. I, § 12, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 62, at 1265–66, 1268; *id.* art. II, § 2.

131. 2 CONVENTION RECORDS, *supra* note 18, at 494.

132. *Id.*

133. *Id.* Farrand noted that the Journal entry has "that" crossed out and replaced by "the whole number" changing "a majority of ~~that~~ of the Electors" to "a majority of the whole number of the Electors." *See id.* at 494 n.2. The Journal also omits "a" in "who have such [a] Majority," which appears in Madison's rendition. There are additional differences in spelling, punctuation, capitalization, and abbreviation between the two renditions. For Madison's rendition in his notes, see *id.* at 497–98.

Paragraph	Article II, § 1 Clause	Name
1	2	Electors Clause
2	3	Elector Responsibilities Clause
3	3	Counting Clause
4	4	Congressional Electoral College Powers Clause

Table 1 – Brearley's Committee's Presidential Election Proposal Parts, Ultimate Endpoints, and Names

Outlining the text of the second and third paragraphs of the Electoral College Clause will help in understanding its evolution in Brearley's Committee and beyond. Here are the second and third paragraphs again, this time in outline form.

1. Elector Responsibilities

a. Elector meeting places

"The Electors shall meet in their respective States," [134]

b. Elector voting rules

"and vote by ballot for two Persons, of whom one at least shall not be an inhabitant of the same State with themselves. —"[135]

c. Electoral vote certification

"and they shall make a list of all the Persons voted for, and of the number of votes for each, which list they shall sign and certify,"[136]

d. Electoral vote transmission

"and transmit sealed to the seat of the general Government, directed to the President of the Senate."[137]

2. Electoral Vote Counting

a. "The President of the Senate shall in that House open all the certificates, and the votes shall be then and there counted —"[138]

134. *Id.* at 494.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*

3. Presidential Election Rules

a. Unique first place majority

"The Person having the greatest number of votes shall be the President, if such number be a majority of that of the Electors"[139]

b. First place tie with majority

"and if there be more than One, who have such [a] Majority, and have an equal number of votes, then the Senate shall choose by ballot one of them for President:"[140]

c. No majority

"but if no Person have a majority, then from the five highest on the list, the Senate shall choose by ballot the President —"[141]

4. Vice Presidential Election Rules

a. General case

"and in every case after the choice of the President, the Person having the greatest number of votes shall be Vice President:"[142]

b. Special case

"but if there should remain two or more, who have equal votes, the Senate shall choose from them the Vice President."[143]

This proposal placed the contingent presidential election in the hands of the Senate (Outline Rules 3.b, and 3.c). With that being the case, there was no need for the House of Representatives to be present when the electoral votes were counted. Thus, whatever the outcome of the electoral vote, the House played no role in the counting process.

The Convention later modified the texts of Outline Rules 3.b, and 3.c[144] as well as Outline Rule 2.[145] Having created the Vice Presidency and made its holder (1) the President of the Senate and (2) the successor to the President, the Committee wisely removed the

139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *See infra* text accompanying notes 206–207.
145. *See infra* text accompanying note 204.

Vice President's authority in the Senate in the event of a presidential impeachment as it reported in the *Trial of Impeachment* Clause: "The Vice President shall be ex officio, President of the Senate, except when they sit to try the impeachment of the President, in which case the Chief Justice shall preside[.]"[146] Confusingly, the Committee neglected to do the same in the case of the Vice President's impeachment or the determination of his compensation.[147]

The Committee also failed to extend the Oaths Clause to encompass presidential electors—a set of constitutional actors that it had created—and conspicuously, did not include any text relating to the Vice President's oath.[148]

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146. 2 CONVENTION RECORDS, *supra* note 18, at 495. For Madison's rendition in his notes, see *id.* at 498. The following text made the Vice President *Acting* President "in case of his removal as aforesaid, death, absence, resignation or inability to discharge the powers or duties of his office the Vice President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed." *Id.* at 495. For Madison's rendition in his notes, see *id.* at 499.

147. *See supra* note 17.

148. 2 CONVENTION RECORDS, *supra* note 18, at 174. The text of the Oaths Clause as reported by the Committee of Detail reads: "The [m]embers of the Legislatures, and the [E]xecutive and [J]udicial officers of the United States, and of the several States, shall be bound by [o]ath to support this Constitution." *Id.* If Brearley's Committee or the Convention understood the Vice President to be an executive officer of the United States (or a member of Congress) then he would have been covered by this text and the final constitutional text. *See* U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution;").

The First Congress attacked this issue differently when it composed the Oaths Act of 1789. That Act stated: "The said oath or affirmation shall be administered within three days after the passing of this act, by any one member of the Senate, to the President of the Senate . . . ." Oaths Act of 1789, ch. 1, § 1, 1 Stat. 23. Section 4 of that Act "*further enacted*, That all officers appointed, or hereafter to be appointed under the authority of the United States, shall, before they act in their respective offices, take the same oath or affirmation . . . ." *Id.* § 4. If the First Congress did not consider the President and Vice President to be *officers of the United States*, what need was there to limit this provision to just *appointed officers*?

Clearly, the Thirty-Seventh Congress considered both the President and Vice President to be elected officers. The Ironclad Oath Act of 1862 required an oath or affirmation of "every person *elected or appointed to any office of honor or profit* under the government of the United States, either in the civil, military or naval departments of the public service, *excepting the President of the United States* . . . ." Ironclad Oath Act of 1862, ch. 128, 12 Stat. 502 (emphasis added).

As originally introduced, the bill, H.R. 371, 37th Cong., 2d Sess. (1862), https://www.congress.gov/37/llhb/H.R.371.pdf, did not exclude the President. On June 21, 1862, Illinois Republican Senator Lyman Trumbull moved to insert "the words, 'and for whom the form of the oath of office is not prescribed by the Constitution' . . . As the form of oath is prescribed for the President of the United States, of course it will not embrace him." CONG. GLOBE, 37th Cong., 2d Sess. 2861 (1862).

For a much more detailed analysis of Vice Presidents and oaths from the Framing to the 1860s, see Michael L. Rosin, The Thirty-Ninth Congress Understood the Presidency and Vice Presidency to Be Subject to the Jurisdictional and Disqualification Elements of Section 3 of the Fourteenth Amendment 5–28 (Jan. 25, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4706833.

IV. EVOLUTION OF PRESIDENTIAL SELECTION AFTER THE COMMITTEE'S INITIAL REPORT

The major modifications to the Committee's presidential election proposal came during the Convention's exquisite debates of September 4–7,[149] as it reengineered the Committee's contingent presidential election procedure in real time. The Convention's modifications emphatically demonstrated the delegates' continuing concern over the balance of power between large and small states.

A. The Rationale for Making the Changes

On September 4, Charles Pinckney of South Carolina objected that the Committee's proposal made "the same body of men which will in fact elect the President [be] his Judges in case of an impeachment."[150] Later that day, James Wilson, who on August 24 had "urged the reasonableness of giving the larger States a larger share of the appointment,"[151] once again succumbed to the lure of the obvious back-up plan and proposed that the contingent presidential election be held by a joint ballot of the Senate and House.[152]

1. The September 5 Debate

When the delegates reconvened on September 5, Madison refocused the Convention on the bigger picture.

> [Madison] considered it as a *primary object to render an eventual resort to any part of the Legislature improbable*. He was apprehensive that the proposed alteration would turn the attention of the large States too much to the appointment of candidates, instead of aiming at an effectual appointment of the officer, as the large States would predominate in the Legislature which would have the final choice out of the Candidates. Whereas if the Senate in which the small States predominate should have the final choice, the concerted effort of the large States would be to make the appointment in the first instance [i.e. the Electoral College] conclusive.[153]

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149. 2 CONVENTION RECORDS, *supra* note 18, at 493–543. The disinterested, and no doubt exhausted, James McHenry noted on September 5 that "[t]he greatest part of the day spent in desultory conversation on that part of the report respecting the mode of chusing the President – adjourned without coming to a conclusion[.]" *Id.* at 516.

150. *Id.* at 501.

151. *Id.* at 402.

152. *Id.* at 502.

153. *Id.* at 513 (emphasis added).

Madison's argument was persuasive. By a vote of three delegations for, seven against, and one state's delegation divided (i.e. not voting), the Convention rejected James Wilson's proposal that the contingent presidential election be by a joint ballot of Congress.[154] Madison was deadly serious that it was "a primary object to render an eventual resort to *any part of the Legislature* improbable."[155] Later that day, Madison and Hugh Williamson "moved to strike out the word 'majority' and insert 'one third' so that the eventual power might not be exercised if less than a majority, but not less than 1/3 of the Electors should vote for the same person[.]"[156]

Elbridge Gerry immediately objected to their motion and argued that allowing the President to be chosen by as little as one-third of the Electoral College "would put it in the power of three or four States to put in whom they pleased."[157] The Convention rejected Madison and Williamson's proposal by a vote of two delegations for and nine against.[158] Gerry then "suggested that the eventual election should be made by six Senators and seven Representatives chosen by joint ballot of both Houses."[159]

Surely the delegates must have realized that, without further restrictions, the large states would dominate the choice of these seven Representatives. And just as surely, the delegates must have despaired that they might never produce a satisfactory plan for selecting the Chief Magistrate. Madison records that at the end of the day, George Mason commented that

> [a]s the mode of appointment is now regulated, he could not forbear expressing his opinion that it is utterly inadmissible. He would prefer the Government of Prussia to one which will put all power into the hands of seven or eight men, and fix an Aristocracy worse than absolute monarchy.[160]

But if the Senate had any role in the election of the President, an additional problem arose. The Senate already had the power to confirm presidential appointments and ratify treaties and it had just become the forum to hear all impeachment trials—including the President's.[161] Earlier in the day, Hugh Williamson had expressed

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154. *Id.*
155. *Id.*
156. *Id.* at 514. This may well have been a high stakes bluff on the part of Madison designed to force the Convention's hand.
157. *Id.*
158. *Id.* at 507.
159. *Id.* at 514.
160. *Id.* at 515.
161. *See supra* text accompanying notes 100–101; *see also supra* Part III.C.

concern that "[r]eferring the appointment to the Senate lays a certain foundation for corruption & aristocracy."[162] Edmund Randolph was even more emphatic.

> We have in some revolutions of this plan made a bold stroke for Monarchy. We are now doing the same for an aristocracy. He dwelt on the tendency of such an influence in the Senate over the election of the President *in addition to its other powers*, to convert that body into a real & dangerous Aristocracy[.][163]

We can only speculate on the topics of conversation among the delegates that evening at the Indian Queen Tavern.[164] But one point was becoming clear by the end of the September 5 session: the Senate would not have the contingent election of the President by itself.

2. The September 6 Debate

The resourceful Elbridge Gerry opened the debate on September 6 by proposing yet another hybrid solution that he thought would alleviate concerns about an incumbent President becoming too dependent on the Senate. Gerry proposed that if the Electoral College failed to produce a clear-cut winner when an incumbent President stood for reelection, then the contingent election should fall to both houses of Congress voting per capita.[165] If the incumbent were not running, then the contingent election would fall to just the Senate.[166] Rufus King and Gouverneur Morris, both Brearley Committee members, expressed support for this plan.[167] Roger Sherman, another Committee member, opposed it:

> He thought he said that if the Legislature were to have the eventual appointment instead of the Senate, it ought to vote in the case by States, in favor of the s[m]all States, as the large States would have so great an advantage in nominating the candidates [when the Electoral College voted][.][168]

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162. 2 CONVENTION RECORDS, *supra* note 18, at 512.
163. *Id.* at 513 (emphasis added).
164. RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 305 (Random House 2009).
165. 2 CONVENTION RECORDS, *supra* note 18, at 522.
166. *Id.*
167. *Id.* Shortly after that Morris proposed that an incumbent President could only be reelected by the Electoral College and not included in the list of candidates in a contingent election. "(This was another expedient for rendering the President independent of the Legislative body for his continuance in office)[.]" *Id.* at 527.
168. *Id.* at 522.

On this issue, the Convention started another decision-making loop. James Wilson, who two days earlier had favored the proposal now put forward by Gerry in the case of an incumbent seeking reelection,[169] now returned to Charles Pinckney's concern that doing so would give the Senate too much power and reiterated George Mason's concern about the dangerous tendency to aristocracy.[170] He summed up his position by stating that,

> [a]ccording to the plan as it now stands, the President will not be the man of the people as he ought to be, but the Minion of the Senate. He cannot even appoint a tide-waiter without the Senate . . . . Upon the whole, he thought the new mode of appointing the President, with some amendments, a valuable improvement; but he could never agree to purchase it at the price of the ensuing parts of the Report, nor befriend a system of Which they make a part[.][171]

Going halfway to meet the concerns about balancing the large state–small state divide, Hugh Williamson "suggested as better than an eventual choice by the Senate, that this choice should be made by the Legislature, voting by States and not per capita."[172]

Roger Sherman must have been gratified to hear Williamson reiterate his proposal from earlier in the day.[173] However, Sherman must have realized that leaving the Senate in the picture would not assuage the concerns of the likes of Charles Pinckney, George Mason, and Edmund Randolph. Sherman closed the other half of the gap when he moved

> [t]o strike out the words "The Senate shall immediately choose &c." and insert "The House of Representatives shall immediately choose by ballot one of them for President, the members from each State having one vote."[174]

George Mason immediately expressed his approval of this measure, which "lessen[ed] the aristocratic influence of the Senate."[175]

169. *See supra* text accompanying note 152.
170. 2 CONVENTION RECORDS, *supra* note 18, at 522.
171. *Id.* at 523.
172. *Id.* at 527.
173. *See supra* text accompanying note 172.
174. 2 CONVENTION RECORDS, *supra* note 18, at 527.
175. *Id.*

B. The Changes to the Texts During the First Week of September

With the Convention having decided to shift the contingent election of the President (but not the Vice President), it could switch its attention to amending the texts of the presidential selection provisions.

The Convention's Journal presents four preliminary textual changes prior to the Convention shifting the contingent presidential election from the Senate to the House in this order:

> "But no Person shall be appointed an Elector who is a Member of the Legislature of the United States or who holds any office of profit or trust under the United States" which passed in the affirmative[.][176]

> It was moved and seconded to *insert* the words "in presence of the *Senate and House of representatives*" after the word "counted" . . . which passed in the affirmative[.][177]

> It was moved and seconded to insert the word "immediately" before the word "choose" which passed in the affirmative[.][178]

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176. *Id.* at 517. Madison identified Rufus King and Elbridge Gerry as the movants. *Id.* at 521. This untallied vote is not included in the table of the day's votes. *Id.* at 520.

177. *Id.* at 518 (emphasis added). Madison combines the second and third proposals and ascribes their origin to "several motions." *Id.* at 526. This untallied vote is not included in the table of the day's votes. *Id.* at 520. As noted, both the Journal and Madison's notes record that "[i]t was moved and seconded to *insert* the words 'in presence of the Senate and House of representatives' *after* the word 'counted'." *Id.* Something seems amiss with the placement of the insertion *following* the word "counted." The last previous statement of this text reads as follows,

> The President of the Senate shall in that House open all the certificates, and the votes shall be then and there counted —

Id. at 494; *see also supra* text accompanying note 133. Interpreting the insertion comment literally yields the following text:

> The President of the Senate shall in that House open all the certificates, and the votes shall be then and there counted in presence of the Senate and House of representatives[.]

At a minimum, this would have the House enter the Senate chamber *after* the certificates were all opened but *before* any of them were counted. Perhaps a more likely interpretation was that the movant intended to delete the phrase "in that House," yielding

> The President of the Senate shall open all the certificates, and the votes shall be then and there counted in presence of the Senate and House of representatives —

Even if this was the movant's intention, this word order lived for only a few hours at most before "in presence of the Senate and House of representatives" was moved in front of "open."

> The President of the Senate shall in the presence of the Senate and House of representatives open all the certificates and the votes shall then be counted.

Id. at 521.

178. 2 CONVENTION RECORDS, *supra* note 18, at 518. This nine-to-two vote is included in the table of the day's votes. Farrand identified it as vote 470. *Id.* at 520.

> [A]nd that not less than 2/3 of the whole number of Senators be present – (*In presence of the S & Ho of representatives*)[.][179]

Shortly thereafter the Journal states: "It was moved and seconded to strike out the words '[t]he Senate shall immediately choose by ballot' &ca and to insert the words '[t]he House of representatives shall immediately choose by ballot one of them for President, the Members from each State having one vote[.]'"[180]

The table of the day's votes shows that this proposition was approved by a vote of ten delegations for and one against.[181] Four rows below, the table shows an eight to three vote on the question of "Ho[use] of representatives. [sic] to elect[.]"[182] Farrand interpolated "Ho[use] of representatives. [sic] to elect" in his presentation of the Journal with no further description.[183] Madison provided a description prefatory to his presentation of the vote: "On a motion that the eventual election of Presidt. in case of an *equality* of the votes of the electors be referred to the House of Reps."[184]

Farrand and Madison each place the four preliminary changes[185] *before* the shift(s) of the contingent election from the Senate to the House. But how can "the presence of the Senate and the House" in the second and fourth changes prior to the shift be explained?

In a note between the first and second of the four preliminary changes just presented from the Journal, Farrand commented:

> From this point on in this day's records it seems hopeless to determine the order of questions and votes. The editor has tried simply to remove some of the confusion by assigning votes from

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179. *Id.* at 518 (emphasis added). Madison noted himself as the movant. *Id.* at 526. This six-to-four vote is included in the table of the day's votes; Farrand identified it as vote 464. *Id.* at 520. In his Introduction, Farrand noted that

> [t]he detail of ayes and noes offers the greatest difficulty, for no dates are given and to about one tenth of the votes no questions are attached. For convenience of reference, in the present edition a number in square brackets is prefixed to each vote, and the editor has taken the liberty of dividing the detail of ayes and noes into what are, according to his best judgment, the sections for each day's records. The sections are retained intact, and a summary of each vote in square brackets is appended to that question in the Journal to which, in the light of all the evidence, it seems to belong.

1 CONVENTION RECORDS, *supra* note 38, at xiii.

180. 2 CONVENTION RECORDS, *supra* note 18, at 518–19.

181. *Id.* at 520. Farrand identified this as vote 465. *Id.* Madison's notes concur. *Id.* at 527. Only tiny Delaware opposed the shift of the contingent presidential election from the Senate to the House. *Id.* at 520. Could its delegates have been concerned that a single Representative from Delaware might be absent?

182. *Id.* at 520. Farrand identified this as vote 469. *Id.* Delaware, Maryland, and New Jersey voted no. *Id.*

183. *Id.* at 519.

184. *Id.* at 527.

185. *See supra* text accompanying notes 176–179.

> Detail of Ayes and Noes to their respective questions, and distributing the balance as seems probable.[186]

Citing the just-quoted note of Farrand's, Mary Sarah Bilder wrote:

> Beginning with September 6, Madison had particular difficulty integrating his rough notes with the Journal Copy. The committee reports had proposed language and, in turn, the language had been altered by the delegates. Indeed, Madison seems to have had difficulty at the place where historian Max Farrand declared, with the advantage of examining all known records[.][187]

Perhaps the sequence of events is not the one presented in the Journal and Madison's notes. Perhaps, but simply assuming that in order to explain how the presence of the House at the electoral vote count prior to the House making the contingent presidential election would have "the advantages of theft over honest toil."[188] We can do better with honest toil.

The first of the preliminary changes barring a Member of Congress or anyone holding an office of profit or trust under the United States from serving as an elector poses no problem. It appears in the Electors Clause[189] that is, procedurally and textually, prior to the Electoral College Clause.[190]

Nor is the addition of the House in the Counting Clause before the shift of the contingent presidential election to the House a problem to explain. The Counting Clause is Electoral College Outline Rule 2.[191] The contingent presidential election comes later in Outline Rules 3.b, and 3.c.[192]

So far, the sequence of events relative to the shift of the contingent presidential election can be explained as no more than the Convention following the order of the text. This explanation begins to break down with the third of the preliminary changes, namely

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186. 2 CONVENTION RECORDS, *supra* note 18, at 517 n.3. As reconstructed by Farrand, the vote numbers in the table of the day's votes are in this order: 459–461, 462, 463, 470, 464, 467, 458, 468, 465, 471, 469, 472, 466. *See id.* at 518–19, nn. 4–16.

187. MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION 187 (2015).

188. BERTRAND RUSSELL, INTRODUCTION TO MATHEMATICAL PHILOSOPHY 71 (Macmillan Co. 2d ed. 1920).

189. U.S. CONST. art. II, § 1, cl. 2.

190. U.S. CONST. art. II, § 1, cl. 3, *amended by* U.S. CONST. amend. XII.

191. *See supra* text accompanying note 138.

192. *See supra* text accompanying notes 140–141.

the insertion of "immediately" in Outline Rule 3.b—"the Senate shall immediately choose."[193]

The sequence of events breaks down further with the fourth of the preliminary changes, requiring two-thirds of the Senators to be present to constitute a quorum.[194] This quorum rule becomes Outline Rule 3.d and is both logically and textually posterior to Outline Rule 3.b.[195]

Clearly, the Convention was not initially addressing the architecture of presidential selection in a top-down fashion on September 6. Instead, it first addressed the issues in a bottom-up fashion, considering the parts before considering the entire structure, and shifting the contingent presidential election from the Senate to the House.[196] Only after finishing that bottom-up exercise did the Convention shift to a top-down approach.

Once it adopted the higher-level change, shifting the contingent presidential election from the Senate to the House voting by delegation, the Convention revisited the change it had made to the one part needing revision following the shift. "It was moved and seconded to agree to the following amendment[:] 'But a quorum for this purpose shall consist of a Member or Members from two thirds of the States' . . . which passed in the affirmative[.]"[197] The Convention made no change to vice presidential selection on September 6. The day's Journal entry concludes:

> The several amendments being agreed to, on separate questions,
> The first sect. of the report is as follows.
>
> Each State shall appoint, in such manner as it's legislature may direct, a number of Electors equal to the whole number of Senators and Members of the House of representatives to which the State may be entitled in the Legislature.
>
> <u>But no Person shall be appointed an Elector who is a member of the Legislature of the United States, or who holds any office of profit or trust under the United States.</u>

193. *See supra* text accompanying note 178.
194. *See supra* text accompanying note 179.
195. *See infra* text following note 199.
196. *See supra* text accompanying note 185.
197. 2 CONVENTION RECORDS, *supra* note 18, at 519. An additional requirement that "a Majority of the whole number of the House of representatives" be required for a quorum was voted down with five delegations in favor and six against. *Id.* Madison names Rufus King as the movant. *Id.* at 527–28.

> The Electors shall meet in their respective States and vote by ballot for two Persons of whom one at least shall not be an inhabitant of the same State with themselves. and they shall make a list of all the Persons voted for, and of the number of votes for each, which list they shall sign and certify, and transmit sealed to the seat of the general Government, directed to the President of the Senate.
>
> The President of the Senate shall in the presence of ~~that House~~ the Senate and House of representatives open all the certificates and the votes shall ~~be then and there~~ then be counted.
>
> The Person having the greatest number of votes shall be the President (if such number be a majority of ~~that~~ the whole number of the Electors appointed) and if there be more than one who have such majority, and have an equal number of votes, then the ~~Senate~~ House of representatives shall immediately choose by ballot one of them for President, the representation from each State having one vote – But if no Person have a majority, then from the five highest on the list, the ~~Senate~~ House of representatives shall, in like manner, choose by ballot the President – In the choice of a President by the House of representatives a quorum shall consist of a Member or Members from two thirds of the States. and the concurrence of a majority of all the States, shall be necessary to such choice. – and, in every case after the choice of the President, the Person having the greatest number of votes of the Electors shall be the vice-President: But, if there should remain two or more who have equal votes, the Senate shall choose from them the Vice President The Legislature may determine the time of chusing ~~and assembling~~ the Electors and of their giving their votes: and the manner of certifying and transmitting their votes – But the election shall be on the same day throughout the United States[.][198]

A day later the Convention made one more change to the text governing the House election of the President. It added the verb "make" as follows: "the concurrence of a majority of all the States, shall be necessary to make such choice[.]"[199]

198. *Id.* at 519, 521. Changes in wording shown with additions underlined and deletions shown in ~~strikethrough~~. The many changes in punctuation and capitalization are not highlighted. For Madison's rendition, see *id.* at 528–29.

199. *Id.* at 532. For Madison's rendition, see *id.* at 536.

With the hard work of the first week in September accomplished, the Electoral College Clause took the following outline form (with the newly added *rules* underlined).

1. Elector Responsibilities

a. Elector meeting places

"The Electors shall meet in their respective States"[200]

b. Elector voting rules

"and vote by ballot for two Persons of whom one at least shall not be an inhabitant of the same State with themselves."[201]

c. Electoral vote certification

"and they shall make a list of all the Persons voted for, and of the number of votes for each, which list they shall sign and certify,"[202]

d. Electoral vote transmission

"and transmit sealed to the seat of the general Government, directed to the President of the Senate."[203]

2. Electoral Vote Counting

"The President of the Senate shall in the presence of the Senate and House of representatives open all the certificates and the votes shall then be counted."[204]

3. Presidential Election Rules

a. Unique first place majority

"The Person having the greatest number of votes shall be the President (if such number be a majority of the whole number of the Electors appointed)"[205]

b. First place tie with majority

"and if there be more than one who have such majority, and have an equal number of votes, then the House of representatives shall immediately choose by ballot one of them for President, the representation from each State having one vote –"[206]

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200. *Id.* at 519.
201. *Id.*
202. *Id.* at 519, 521.
203. *Id.* at 521.
204. *Id.* at 519.
205. *Id.* at 519.
206. *Id.* at 519.

c. No majority

"But if no Person have a majority, then from the five highest on the list, the House of representatives shall, in like manner, choose by ballot the President —"[207]

d. Quorum rule

"In the choice of a President by the House of representatives a quorum shall consist of a Member or Members from two thirds of the States."[208]

e. Absolute majority rule

"and the concurrence of a majority of all the States, shall be necessary to such choice. —"[209]

4. Vice Presidential Election Rules

a. General case

"and in every case after the choice of the President, the Person having the greatest number of votes shall be Vice President:"[210]

b. Special case

"but if there should remain two or more, who have equal votes, the Senate shall choose from them the Vice President."[211]

Although the Convention made no changes to the vice-presidential selection process, it did not completely lose sight of that office. On Friday, September 7, the Convention considered the question: "shall the vice President be ex officio President of the Senate?"[212] No one is recorded expressing great enthusiasm for this proposal. Brearley Committee member Roger Sherman of Connecticut "saw no danger in the case. If the vice-President were not to be President of the Senate, he would be without employment[.]"[213] Pennsylvania's Gouverneur Morris, also a committee member, quipped, "[t]he vice president then will be the first heir apparent that ever loved his father."[214]

Several delegates forcefully opposed the proposal. North Carolina's Hugh Williamson, a member of Brearley's Committee,

207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.* at 536 (Madison).
213. *Id.* at 537 (Madison).
214. *Id.*

opposed the creation of the office altogether. Williamson "observed that such an officer as vice-President was not wanted. He was introduced only for the sake of a valuable mode of election which required two to be chosen at the same time."[215] Ironically, Williamson was perhaps the first delegate to propose multiple votes per elector.[216] In his opposition to the office, Elbridge Gerry of Massachusetts focused on the blending of the executive and legislative branches: "We might as well put the President himself at the head of the Legislature. The close intimacy that must subsist between the President & vice-president makes it absolutely improper. He was agst. having any vice President."[217]

At the end of the brief debate, the Convention adopted the proposal by a vote of eight delegations for, two against, and one divided with New Jersey joining Gerry's Massachusetts in opposition. The North Carolina delegation divided evenly, hence it cast no vote.[218]

The day after making the Vice President the President of the Senate, the Convention extended the impeachment process to cover "the Vice President and other civil Officers of the United States."[219] As it did this, it neglected to take the Vice President out of the chair during his own impeachment.[220]

The Convention worked on many other topics during the first week of September.[221] Notably, the Convention did not think to extend the Oaths Clause to encompass presidential electors—a piece of constitutional architecture it had just created.

C. The Changes to the Texts During the Second Week of September

At the end of its September 8 session, the Convention commissioned a five-member committee "to revise the style of and arrange the articles agreed to by the House."[222] This committee has come to be known as the Committee of Style and Arrangement, a name given to it by Max Farrand.[223] Its members were William Johnson,

215. *Id.*
216. *Id.* at 113. *See also supra* text accompanying note 49.
217. 2 CONVENTION RECORDS, *supra* note 18, at 536–37 (Madison). Virginia's George Mason took a similar view. He "thought the office of vice-President an encroachment on the rights of the Senate; and that it mixed too much the Legislative & Executive, which as well as the Judiciary departments, ought to be kept as separate as possible." *Id.* at 537.
218. *Id.* at 532 (Journal); *id.* at 538 (Madison).
219. *Id.* at 545. For Madison's rendition, see *id.* at 553.
220. *See* Paulsen, *supra* note 17.
221. *See supra* notes 94–104 and accompanying text; *see also supra* Parts III.B and III.C.
222. 2 CONVENTION RECORDS, *supra* note 18, at 547. For Madison's rendition, see *id.* at 553.
223. *Id.* at 565 n.1.

Alexander Hamilton, Gouverneur Morris, James Madison, and Rufus King.[224]

As "compiled by" Farrand "from the proceedings of the Convention,"[225] the Committee's input differs from the text as reported at the end of the September 8 session[226] in three substantive cases. First, the indefinite article, "a" was inserted into the phrase "and if there be more than one who have such a majority, and have an equal number of votes[.]"[227] Second, the verb, "make," that had been added on September 7, was deleted from the phrase "the concurrence of a majority of all the States, shall be necessary to ~~make~~ such choice[.]"[228] Third, the phrase, "and the manner of certifying and transmitting their votes" was deleted from the Congressional Electoral College Power Clause.[229] These differences are undoubtedly due to Farrand.[230] If they had appeared in the proceedings, he would have published them.

Farrand's editorial zeal need not trouble us. The first two of these changes are trivial. The third and final change—deleting text from the Congressional Electoral College Powers Clause—was in fact, made by the Committee of Style and Arrangement.[231]

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224. *Id.* at 547.

225. *Id.* at 565 n.1 ("Compiled by the editor from the proceedings of the Convention.").

226. *See supra* text accompanying notes 198–199.

227. 2 CONVENTION RECORDS, *supra* note 18, at 573.

228. *Compare id.* at 532 (journal account), *with id.* at 573 (input to committee).

229. *Compare id.* at 521 (journal account), *with id.* at 573 (input to committee).

230. Farrand's compilation of the Impeachment, Oaths, and Full Faith and Credit Clauses contain no changes of wording from their last reported versions. *Compare id.* at 547, 461, 521 (journal account), *with id.* at 574, 578, 579 (input to committee).

231. Here is the full text relevant to presidential selection as reported back by the Committee of Style and Arrangement:

> <(a)> Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in Congress: but no senator or representative shall be appointed an elector, nor any person holding an office of trust or profit under the United States.
>
> <(b)> The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the general government, directed to the president of the senate. The president of the senate shall in the presence of the senate and house of representatives open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately chuse by ballot one of them for president; and if no person have a majority, then from the five highest on the list the said house shall in like manner choose the president. But in choosing the president, the votes shall be taken by states, and not per capita, the representation from each state having one vote. A quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states

David Currie has described this deletion as "embarrassing."[232] But there is a better explanation, suggested on December 8, 1886, by South Carolina Democrat Rep. Samuel Dibble during a debate on what would become the Electoral Count Act of 1887:

> As a matter of course under Article IV, section 1, of the Constitution, Congress has the right to regulate by law the manner and form in which any State shall certify its official public acts, its official public records, and any of the proceedings of its government. That is one of the powers vested in Congress, and it has the right to prescribe in what manner the action of the State in this, as in everything else, shall be transmitted[.][233]

Surely one of the worthies on the Committee of Style and Arrangement recognized that the phrase "and the manner of certifying and transmitting their votes" in the Congressional Electoral College Powers Clause was surplusage, a special case of Congress' generic power "by general laws [to] prescribe the manner in which such acts, records and proceedings shall be proved[.]"[234] There were no further changes to the Full Faith and Credit Clause.[235]

Nor were there any changes to the content of the Impeachment Clause[236] or the Oaths Clause[237] during the Convention's final eight days. As a result, the Convention concluded (1) with the Vice President presiding at his own impeachment trial and (2) without constitutional text requiring presidential electors to take an oath to support the Constitution.

> shall be necessary to a choice. In every case, after the choice of the president by the representatives, the person having the greatest number of votes of the electors shall be the vice-president. But if there should remain two or more who have equal votes, the senate shall choose from them by ballot the vice-president.

Id. at 597–98.

232. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 137 (1997).

233. 18 CONG. REC. 45 (1886) (emphasis added).

234. 2 CONVENTION RECORDS, *supra* note 18, at 601; U.S. CONST. art. IV, § 1, cl. 1. In *Powell v. McCormack*, the Court explained that "the Committee of Style . . . was appointed only 'to revise the stile of and arrange the articles which had been agreed to . . . .'" 395 U.S. 486, 538 (1969) (internal citation omitted). This rule of interpretation validates the proposition that the Full Faith and Credit Clause subsumed the deleted text on the manner of certifying and transmitting electoral votes.

235. U.S. CONST. art. IV, § 1, cl. 1 ("Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.").

236. *Compare* 2 CONVENTION RECORDS, *supra* note 18, at 572, 574–76 (input to committee), *with id.* at 592, 600 (committee output).

237. *Compare id.* at 579 (input to committee), *with id.* at 603 (committee output).

V. WHEN WAS THE VICE PRESIDENCY CREATED? — RECONSTRUCTING THE WORK OF BREARLEY'S COMMITTEE

Part III.D and Part IV recounted the creation of the Vice Presidency from the Convention records compiled by Farrand. Of course, Brearley's Committee created the Vice Presidency and no records survive from that committee. In the absence of any such records, this Part reconstructs the Committee's work relevant to the Vice Presidency.

The Convention chartered Brearley's Committee as it closed its session on Friday August 31.[238] The next day, the Committee made a "partial report" of three items that would be debated during the session of Monday, September 3.[239]

A. The Issues Needing Resolution in Order to Formulate a Presidential Selection Proposal

When it chartered Brearley's Committee, the Convention had already been presented with a formal statement for congressional election of the President[240]—a proposal it had last debated in earnest on August 24.[241] Although there had been much debate about presidential selection by a college of electors, there had been no formal proposal. Many issues needed to be resolved before there could be a formal proposal. This Article identifies six: (1) How many electors would there be per state? (2) How would the electors be appointed? (3) Where would the electors meet? (4) How would the electors' votes be reported? (5) What would constitute election by the electors? (6) What if the electors failed to elect a President?

One piece of the solution architecture was in place. To address the *native son* concern,[242] each elector would have multiple votes so that at least one vote must be cast for someone outside the elector's own state. The three Convention stalwarts who had originally suggested this piece of the architecture were each on Brearley's Committee: Hugh Williamson, Gouverneur Morris, and James Madison.[243] Their proposal that each elector have multiple electoral votes[244] would complicate the resolution of the recently aforementioned issues (5) and (6).

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238. *Id.* at 473.
239. *See supra* Part III.B.
240. 2 CONVENTION RECORDS, *supra* note 18, at 171 (Committee of Detail IX) ("He shall be elected by Ballot by the Legislature.").
241. *See id.* at 397–98 (Journal); *see also id.* at 401–04 (Madison).
242. *See supra* text accompanying note 48.
243. *See supra* text accompanying note 49.
244. *See supra* text accompanying notes 49–51.

In reconstructing the work of the Committee, comments made by any of the delegates prior to the creation of the Committee as well as comments made by Committee members on the Convention floor *after* the Committee reported its work are considered. The latter would have potentially been made *during* debate in the Committee.

1. How Many Electors Would There Be Per State?

The Convention had heard many proposals for the apportionment of electors among the states. On July 19, William Paterson, Oliver Ellsworth, and Elbridge Gerry proposed *Lycian* models in which each state would have one, two, or three electors depending on its size.[245] A day later, Committee member Hugh Williamson proposed a purely *national* model with each state having as many electors as it had seats in the House of Representatives.[246] Committee member Pierce Butler went to the opposite end of the spectrum when he proposed a purely *federal* model with an equal number per state on July 25.[247]

None of these proposals carried the day. The congressional model did.[248] As Madison had noted during the Convention's last serious debate on congressional election of the President, this model dampened, but did not eliminate, the influence of the larger states.[249]

2. How Would the Electors Be Appointed?

There were differing ideas as to how the electors would be selected. Pierce Butler preferred appointment by the state legislature.[250] Committee member John Dickinson "had long leaned

245. 2 CONVENTION RECORDS, *supra* note 18, at 56–58. The term Lycian comes from *The Federalist No. 9* in which Hamilton wrote: "In the Lycian confederacy, which consisted of twenty-three CITIES or republics, the largest were entitled to THREE votes in the COMMON COUNCIL, those of the middle class to TWO, and the smallest to ONE." Alexander Hamilton, *The Federalist No. 9*, *reprinted in* THE FEDERALIST PAPERS, 122 (Isaac Kramnick ed., Penguin Books 1987) (1788).

246. 2 CONVENTION RECORDS, *supra* note 18, at 64 (Madison). The terms *national* and *federal* come from *The Federalist No. 39*. *See* James Madison, *The Federalist No. 39*, *reprinted in* THE FEDERALIST PAPERS, *supra* note 245, at 255.

247. 2 CONVENTION RECORDS, *supra* note 18, at 112 (Madison).

248. *See supra* text accompanying note 198.

249. *See supra* text accompanying note 58.

250. 2 CONVENTION RECORDS, *supra* note 18, at 112 (Madison). In a 1788 letter, Butler claimed he "had the honor of proposing" the mode of presidential election. 3 CONVENTION RECORDS, *supra* note 28, at 302. Butler may have *proposed* an electoral college scheme at some point during the committee's tenure, but his preferred implementation certainly did not carry the day.

towards an election by the people."[251] James Wilson preferred that electors be elected by district.[252]

The Committee's proposal allowed electors to be appointed by any of these modes as well as others.[253]

3. Where Would the Electors Meet?

James Wilson's proposal that the electors "meet at ___ and . . . proceed to elect by ballot, *but not out of their own body*" suggested that the electors would all convene together.[254] Speaking of an Electoral College-like scheme, on July 25, Madison mused, "[a]s a further precaution, it might be required that they should meet at some place, distinct from the seat of Govt. and even that no person within a certain distance of the place at the time shd. be eligible."[255] Two days earlier, William Houston of Georgia[256] "urged the extreme inconveniency & the considerable expense, of drawing together men from all the States for the single purpose of electing the Chief Magistrate."[257]

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251. 2 CONVENTION RECORDS, *supra* note 18, at 114 (Madison). One commentator has identified this as one of Dickinson's scant remarks on the Presidency. Ewald, *supra* note 29, at 1001 n.293.

252. *See supra* text accompanying note 44.

253. For example, in the first presidential election, each Massachusetts voter could cast ballots for two candidates in his House district and then the legislature chose one of the top two vote winners as the elector for the district. There was a total of eight districts. The legislature also appointed the remaining two electors itself. *See* Resolve for Organizing the Federal Government, *reprinted in* ACTS AND RESOLVES OF MASSACHUSETTS, 1788–1789, 256, 258 (Boston, Adams & Nourse 1894), https://babel.hathitrust.org/cgi/pt?id=mdp.39015074205306;view=1up;seq=7.

254. 1 CONVENTION RECORDS, *supra* note 38, at 77, 80.

255. 2 CONVENTION RECORDS, *supra* note 18, at 111 (Madison).

256. There was also a delegate named William Churchill Houston from New Jersey. The Convention *Journal* records him present for the first session on May 14, 1787. *See* 1 CONVENTION RECORDS, *supra* note 38, at 1. Farrand's compilation of Convention delegate attendance only says that this Houston "attended as early as May 25." 3 CONVENTION RECORDS, *supra* note 28, at 588. The general index to the *Convention Records* contains no entries for this Houston's participation in any debate. Georgia Convention delegate William Pierce thought this Houston so inconsequential that he omitted him from his notes on the Convention first published in 1898. *See* William Pierce, *Notes of Major William Pierce on the Federal Convention of 1787*, 3 AM. HIST. REV. 310, 327 n.2 (1898). The Convention *Journal* records the appearance of "[t]he honorable William Houstoun, Esq a Deputy of the State of Georgia" on June 1, 1787. 1 CONVENTION RECORDS, *supra* note 38, at 62. This is the only reference to *Houstoun*. Madison uniformly names this Georgia delegate as *Houston* when he first appears, *id.* at 64, and on three occasions making arguments specifically mentioning Georgia. *Id.* at 568, 2 CONVENTION RECORDS, *supra* note 18, at 48, 64. Undoubtedly, the Houston making this comment is the one from Georgia, who would have been much more concerned about distance than his namesake from New Jersey.

257. *Id.* at 95 (Madison). A day later, Houston and Spaight expressed concern "that capable men would undertake the service of Electors from the more distant States." *Id.* at 99 (Madison).

Ultimately, the Committee proposed that the electors convene in their own states rather than centrally.[258] This proposal must have been met with at least some opposition from Hugh Williamson. When the Convention considered this particular aspect of the Committee's proposal, Williamson seconded a motion made by his fellow North Carolinian Richard Dobbs Spaight "that the Electors meet at the seat of the General Government."[259]

4. How Would the Electors' Votes Be Reported?

The Convention had not reached this question before it chartered Brearley's Committee. Before the inauguration of the first President there could be no one in either the Executive or Judicial branch to receive the votes. The recipient would have to be someone in Congress.

Of the two chambers' presiding officers, the President of the Senate was always considered more senior than the Speaker of the House.[260] The Convention had proposed that the President of the

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258. *See supra* text accompanying note 198.

259. 2 CONVENTION RECORDS, *supra* note 18, at 526 (Madison).

260. The Presidential Election and Succession Act of 1792 recognized this seniority by placing the President *pro tempore* of the Senate first in line to act as President followed by the Speaker of the House. *See* Presidential Election and Succession Act of 1792, ch. 8, § 9, 1 Stat. 239, 240. The Presidential Succession Act of 1886 removed these congressional officers from the line of succession and replaced them with Cabinet officers. *See* 24 Stat. 1. In 1948 Congress reinserted these congressional officers ahead of the Cabinet in the line of succession with the Speaker coming first and the President *pro tempore* second. *See* 61 Stat. 380 (now codified as 3 U.S.C. § 19(a)(1)-(b)). Nebraska Republican Senator Kenneth Wherry explained the change in order in a committee hearing.

> The reason for this is: obvious in that the Speaker of the House is elected as a Member of the House every 2 years from his district, and in turn elected by the House of Representatives as Speaker. Thus, next to the President and Vice President he is closer, I think, to the people than any other elected officer.

HEARINGS BEFORE THE COMMITTEE ON RULES AND ADMINISTRATION UNITED STATES SENATE EIGHTIETH CONGRESS FIRST SESSION ON S. CON. RES. 1, S. 139, S. 536, S. 564, at 43 (GPO 1947).

Note that the President *pro tempore* of the Senate appears before the Speaker of the House in the three constitutional provisions referring to both of them. *See* U.S. CONST. amend. XXV, §§ 3, 4 ("Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President." "Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President." "Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or

Senate, rather than the Speaker, act as President when necessary.[261] Thus, the President of the Senate was the natural choice to be the recipient of the electoral vote certificates. When the Committee decided to give both contingent elections to the Senate, it eliminated any rational grounds for making the Speaker the recipient.

5. What Would Constitute Election by the Electors?

At the Framing, the legislatures of eight states chose the Governor. Only two of them required election by a majority vote.[262] Each of them gave the presiding office of the upper chamber a tie-breaking vote.[263] Of the other six that did not require a majority, only Maryland's constitution prescribed a tie-breaking procedure.[264] The constitutions in the other five states did not specify a tie-breaking procedure.[265]

Congressional election of the President by majority vote most likely was the predominant sentiment of the Convention during its first three months, but no one actually proposed a majority requirement until Committee member Charles Pinckney did on August 24.[266] Likewise, majority election of the President by the electors may have been the prevailing sentiment of the Committee as it met. Nevertheless, in the full Convention, Madison and Williamson would at least suggest that the threshold be set at a mere one-third the number of electors appointed in order to keep the election out of Congress.[267]

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of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representative s their written declaration that the President is unable to discharge the powers and duties of his office.").

261. *See supra* text accompanying note 69.

262. DEL. CONST. of 1776, art. 7, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 60, at 563; N.J. CONST. of 1776, art. VII, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 60, at 2596.

263. *See supra* text accompanying note 60.

264. MD. CONST. of 1776, art. XXV, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS *supra* note 62, at 1695. If there were a first-place tie after the first round (of a joint ballot) then the legislature would go to a second round (voting jointly) in which they could only vote for one of the persons in the first-place tie. *Id.* This procedure continued until the first-place tie was broken. *Id.*

265. *See* GA. CONST. of 1777, art. II, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 64, at 778; N.C. CONST. of 1776, art. XV, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 60, at 2791; PA. CONST. of 1776, § 19, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 60, at 3087; S.C. CONST. of 1778, art. III, *reprinted in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 62, at 3249; VA. CONST. of 1776, *reprinted in* 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 64, at 3816.

266. *See* 2 CONVENTION RECORDS, *supra* note 18, at 397 (Journal); *id.* at 403 (Madison).

267. *See supra* text accompanying note 157.

6. What If the Electors Failed to Elect a President?

If the electors had convened centrally, as had been suggested during debate in July,[268] and would be suggested in September,[269] the electors would likely have continued to vote for at least several rounds if they failed to elect a President. That was the process in Maryland where a college of electors convened at the state capital and elected the entire state senate.[270] On the other hand, if the electors did not convene centrally, then a failed election either would have to be returned to them for an additional round of voting or else some sort of congressional solution would have been necessary.

Given the distances involved, it is unlikely that a failed election would be returned to the electors for additional voting.[271] Some congressional solution would be needed. Many had been proposed.[272]

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268. *See supra* text accompanying note 255.

269. *See supra* text accompanying note 259.

270. MD. CONST. of 1776, art. XV, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 62, at 1693–94. The Maryland Constitution required nine Senators to be residents on the western shore and six on the eastern shore. *Id.*

> [T]he Senators shall be balloted for, at one and the same time, and out of the gentlemen residents of the western shore, who shall be proposed as Senators, the nine who shall, on striking the ballots, appear to have the greatest numbers in their favour, shall be accordingly declared and returned duly elected: and out of the gentlemen residents of the eastern shore, who shall be proposed as Senators, the six who shall, on striking the ballots, appear to have the greatest number in their favour, shall be accordingly declared and returned duly elected: *and if two or more on the same shore shall have an equal number of ballots in their favour, by which the choice shall not be determined on the first ballot, then the electors shall again ballot*, before they separate; in which they shall be confined to the persons who on the first ballot shall have an equal number: and they who shall have the greatest number in their favour on the second ballot, shall be accordingly declared and returned duly elected: *and if the whole number should not thus be made* up, because of an equal number, on the second ballot, still being in favour of two or more persons, then *the election shall be determined by lot*, between those who have equal numbers . . . .

Id. at 1694 (emphasis added).

271. In 1800, it took about two weeks to travel from New York City to Savannah, Georgia, the most distant state capital. *See* CLIFFORD L. LORD & ELIZABETH H. LORD, HISTORICAL ATLAS OF THE UNITED STATES 79 (Henry Holt and Co. rev. ed. 1953). Given the need to round up the electors and let them deliberate, a second round of election by the electors would have taken at least two months at the very best. On the final day of Senate debate on the Twelfth Amendment, Connecticut Federalist James Hillhouse made an offhand remark suggesting that if a presidential election fell to the House its choice would "remain only until such period as the Electors could be called again." 13 ANNALS OF CONG. 132 (1803). As the election of 1824 approached there would be a spate of interest in returning the election back to electors in case no one received a majority in the first round. *See* 41 ANNALS OF CONG. 41, 45, 74, 864–66, 1179–81 (1823, 1824).

272. *See supra* Part II.A.

B. A Constitution Without a Vice Presidency

Here is the Committee's September 4 report to the Convention with respect to just *presidential* selection.

> The Electors shall meet in their respective States, and vote by ballot for two Persons, of whom one at least shall not be an inhabitant of the same State with themselves. — and they shall make a list of all the Persons voted for, and of the number of votes for each, which list they shall sign and certify, and transmit sealed to the seat of the general Government, directed to the *President of the Senate*.
>
> The *President of the Senate* shall in that House open all the certificates, and the votes shall be then and there counted — The Person having the greatest number of votes shall be the President, if such number be a majority of that of the Electors and if there be *more than One,* who have such Majority, and have an equal number of votes, then the Senate shall choose by ballot one of them for President: but if no Person have a majority, then from the five highest on the list, the Senate shall choose by ballot the President[.][273]

This proposal is logically independent of the creation of the Vice Presidency whose selection is specified in the text immediately following: ". . . and in every case after the choice of the President, the Person having the greatest number of votes shall be Vice President: but if there should remain *two or more*, who have equal votes, the Senate shall choose from them the Vice President."[274] Notice that this *vice presidential* selection text can be appended to the presidential selection text just presented[275] with neither addition nor subtraction. The presidential selection text constitutes Outline Rules 1–3.[276] The vice presidential selection text constitutes Outline Rule 4.[277] Of course, the *vice presidential* selection text is logically dependent on the *presidential* selection text.

What would other aspects of the Brearley Committee report have looked like if the Committee had not created the Vice Presidency?

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273. 2 CONVENTION RECORDS, *supra* note 18, at 493–94 (Journal) (emphases added). For Madison's slightly different rendition, see *id.* at 497–98. The differences are insignificant for the purposes of this Article.

274. *Id.* at 494.

275. *See supra* text accompanying note 273.

276. *See supra* notes 134–141.

277. *See supra* notes 142–143.

- The Senate would have chosen its (permanent) President.[278]
- The (permanent) President of the Senate would have been the recipient of electoral vote certificate transmittals and would open all of them.[279]
- In contrast to the impeachment trial of a Vice President, Senate rules rather than the Constitution would have determined who was in the chair if the (permanent) President of the Senate were subject to expulsion proceedings.[280]
- The President of the Senate would "exercise those Powers and Duties" of the Presidency in case of a vacancy in that office.[281]

The Committee of Detail had proposed that "[t]he Senate shall . . . chuse its own President and other Officers."[282] If the Vice Presidency had not been created, that text should have been augmented to parallel the text creating the Senate President *pro tempore*.

> The Senate shall chuse its own President and other Officers, and also a President pro tempore, in the absence of the President of the Senate or when he shall exercise the office of President of the United States.[283]

Logically, one other change should have been made even if Brearley's Committee had reported the presidential selection text without the vice-presidential selection text. The Oaths Clause, which the Convention had just tweaked on August 30 to reference "oath(s) *or affirmation(s)*,"[284] should have been extended to encompass presidential electors.

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278. *See supra* note 66.

279. *See supra* text accompanying note 273.

280. *See* U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the [r]ules of its [p]roceedings, punish its [m]embers for disorderly [b]ehaviour, and, with the concurrence of two thirds, expel a [m]ember."). Note that the Convention did not extend impeachment to "the Vice President and other civil Officers of the United States" until September 8. *See* 2 CONVENTION RECORDS, *supra* note 18, at 545 (Journal); *id.* at 552 (Madison).

281. *See supra* text accompanying notes 68–70. Note that there would have been no need to change the text making the Chief Justice the presiding officer "when [the Senate] sit to try the impeachment of the President." *See supra* text accompanying note 125.

282. *See supra* note 66.

283. U.S. CONST. art. I, § 3, cl. 5.

284. 2 CONVENTION RECORDS, *supra* note 18, at 461 (Journal); *id.* at 468 (Madison). For the earlier history of the Oaths Clause, see *supra* Part II.C.2.

C. When Was the Vice Presidency Created?

In an 1802 letter to George Logan, Brearley Committee Member John Dickinson explained:

> I was the Member from Delaware. *One Morning* the Committee met in the Library Room of the State House, and went upon the Business. I was much indisposed during the whole Time of the Convention. *I did not come into the Committee till late*, and found the members upon their Feet.
>
> *When I came in*, they were pleased to read to Me their Minutes, containing a Report to this purpose, if I remember rightly—that *the President should be chosen by the Legislature*. The particulars I forget.
>
> I observed, that the Powers which we had agreed to vest in the President, were so many and so great, that I did not think, the people would be willing to deposit them with him, *unless they themselves would be more immediately concerned in his Election* . . . besides, that an Election by the Legislature, would form an improper Dependence and Connection.
>
> Having thus expressed my sentiments, Governieur Morris immediately said—"Come, Gentlemen, let us sit down again, and converse further on this subject" We then all sat down, and after some conference, James Maddison took a Pen and Paper, and sketched out a Mode for Electing the President agreeable to the present provision. To this we assented and reported accordingly. These two Gentlemen, I dare say, recollect these Circumstances.[285]

In his history of the Convention, David O. Stewart places this exchange late in the day on Monday, September 3.[286] Stewart argues:

> Dickinson describes the committee members as adjourning as he arrived, with their report complete. Having been constituted on Friday, August 31, it is unlikely that the committee had a completed report by the next day (Saturday, September 1) or that it had a morning meeting on a Sunday. Placing the event

285. FARRAND SUPPLEMENT, *supra* note 27, at 300–01 (emphases added). Dickinson's daughter Maria married Logan's son Albanus Charles. *See* DEBORAH NORRIS LOGAN, MEMOIR OF DR. GEORGE LOGAN OF STENTON 127 (Frances A. Logan ed., Phila., Hist. Soc'y of Pa. 1899).

286. DAVID O. STEWART, THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION 212 (Simon & Schuster Paperbacks 2007).

> on Monday the third would allow the committee to reach the consensus that Dickinson reports, and also would allow time for the change of direction described by Dickinson before Brearley presented his report on Tuesday the fourth.[287]

Stewart's elimination of Sunday, September 2, a day of worship, as the date of the Dickinson episode seems well-reasoned. His choice of Monday, September 3, rather than Saturday, September 1, does not.

The Convention proper met on both Saturday, September 1 and Monday, September 3. However, whether measured by line count or word count (shown in Table 2) the Saturday session was much shorter than the Monday session.[288]

Date	Line Count		Word Count	
	Journal	Madison	Journal	Madison
Sept 1	11	8	271	231
Sept 3	26	42	445	1,287

Table 2 – Measures of Session Length for September 1 and September 3

Moreover, Committee members accounted for roughly 40% of the debate on September 3 when measured by word count.[289]

Members		Non-Members	
Who	Words	Who	Words
Baldwin	38	Gerry	29
King	39	Gorham	62
Madison	23	Johnson	23
Morris	132	Mason	30
Sherman	86	Pinckney	187

287. *Id.* at 325.

288. *See* 2 CONVENTION RECORDS, *supra* note 18, at 483–92. *Words* are separated by one or more SPACEs. Only lines with one or more *word*s are counted. Lines presenting editorial notes are not counted. Figure 1 and Figure 2 in APPENDIX A present convention session lengths as measured by line count and word count in *Farrand* between Tuesday, August 7, the day after the Convention received the report from the Committee of Detail, and September 10, when, at the end of the day, the Convention delivered its input to the Committee of Style and Arrangement.

289. *Id.* at 488–92.

Williamson	26	Randolph	70
		Wilson	95
Total	344	Total	496

Table 3 - Contributions to September 3 Debate by Word Count in Madison's Notes

The duration of the September 3 session seems to leave little time for Brearley's Committee to have met in the morning, the Convention to have met for its session, and then Dickinson to have arrived late at the Committee's meeting room, and "Madison [to have taken] a Pen and Paper, and sketched out a Mode for Electing the President agreeable to the present provision"[290] that would have been ready to be reported to the whole Convention on September 4—the next day.

September 1 seems a much better candidate for that sequence of events. With the above described events occurring on September 1, there would have been time for Madison to compose a framework for an electoral college scheme that could be filled out in pieces such as those enumerated in Part V.A as the Committee resolved the issues needing resolution in order to formulate a proposal ready to be reported to the whole Convention.[291] Given the participation of Committee members in the September 3 debate, this work could have begun on the evening of September 1 and continued into the afternoon and evening of September 2. This chronology also allows for a longer interval over which the *presidential selection* process could have been perfected with the *vice-presidential selection* process added later in the interval.

The different mathematical expressions in the *presidential* and *vice-presidential selection* processes argue for the latter being added later in the interval *and by another author*. Here are the mathematical expressions.

> (P) "if there be *more than One,* who have such Majority, and have an equal number of votes, then the Senate shall choose by ballot one of them for President[.]"[292]

290. *See supra* text accompanying note 285.
291. *See supra* Part V.A.
292. 2 CONVENTION RECORDS, *supra* note 18, at 494.

> (VP) "if there should remain *two or more*, who have equal votes, the Senate shall choose from them the Vice President[.]"[293]

In the context of *counting* the expressions, "more than one" and "two or more" are equivalent. In the context of *measuring*, these expressions are not equivalent.[294]

The expression "more than" appears only one other time in the original Constitution: "Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days . . . ."[295] This is best understood as a measuring context. Suppose one house adjourned at 11 A.M. on Monday and then reconvened at 1 P.M. on Thursday, seventy-four hours later. Was the consent of the other house needed?[296]

In contrast, the expression "two or more" appears two other times in the original document: (1) "The judicial power shall extend to . . . controversies between two or more states"[297] and (2) "nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned . . . ."[298]

Admittedly, neither of these counting statements sounds quite right with "two or more" replaced by "more than one" (and "states" changed to "state"): (1) "The judicial power shall extend to . . . controversies [concerning] more than one state" and (2) "nor any state be formed by the junction of more than one state, or parts of states, without the consent of the legislatures of the states concerned . . . ." Nevertheless, the meaning of these statements would remain unchanged even after the awkward substitution of "more than one" for "two or more." If anything, this demonstrates that "two or more" was the more common expression than its counting context equivalent "more than one."

Why then was "more than one" adopted in the presidential selection provision? The best answer is that Hugh Williamson was the

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293. *Id.*

294. "More than one whole clove" is equivalent to "two or more whole cloves." "More than one teaspoon of ground cloves" is not equivalent to "two or more teaspoons of ground cloves" (if you have a ½ teaspoon measuring spoon).

295. U.S. CONST. art. I, § 5, cl. 4.

296. This question becomes more visible in the context of an earlier formulation of this provision. The expression "[t]he house shall not adjourn . . . for *more than one week*" is not equivalent to "[t]he house shall not adjourn . . . for *two weeks or more*" if a ten-day adjournment is possible. For the earlier formulation, see 2 CONVENTION RECORDS, *supra* note 18, at 140 (emphases added).

297. U.S. CONST. art. III, § 2.

298. U.S. CONST. art. IV, § 3.

author of the "more than one" portion of the presidential selection text and not the author of the vice-presidential selection text.[299]

Having two votes per elector would complicate the statement of what would constitute election by the electors. With one vote per elector, only one candidate could receive a majority. With two votes per elector, two can tie for first place with a majority—as Jefferson and Burr did in 1800.[300] *So can three!*

Sixty-nine electors cast votes in the first presidential election. All of them cast votes for George Washington, which gave him a total of sixty-nine votes. That left another sixty-nine votes scattered among a field of eleven.[301] Table 4 shows how sixty-nine electors could have cast their votes to result in a three-way first-place tie with a majority.[302]

Elector Group	Number	Votes for		
		ALPHA	BETA	GAMMA
I	23	23	23	
II	23	23		23
III	23		23	23
Total	69	46	46	46

Table 4 - Three Way First Place Electoral Vote Tie With a Majority

Many modern commentators fail to recognize that there can be a three-way first-place tie with a majority if each elector has two votes.[303] Undoubtedly, at least some of the Committee members

299. *See supra* text accompanying notes 292–293.

300. For two aptly titled accounts, see EDWARD J. LARSON, A MAGNIFICENT CATASTROPHE (Free Press 2007), and JAMES ROGERS SHARP, THE DEADLOCKED ELECTION OF 1800: JEFFERSON, BURR, AND THE UNION IN THE BALANCE (Univ. Press of Kan. 2010).

301. S. JOURNAL, 1st Cong., 1st Sess. 8 (1789).

302. With sixty-nine electors appointed, only thirty-five electoral votes are needed for a majority of the electors appointed. Thus, a three-way first-place tie could be achieved by having three groups of eighteen each cast their votes for pairs of ALPHA, BETA, and GAMMA in just the same fashion, while none of the other fifteen electors (69 = 3*18 + 15) cast any of their votes for any of ALPHA, BETA, or GAMMA.

303. *See, e.g.*, JOSEPH M. BESSETTE & GARY J. SCHMITT, COUNTING ELECTORAL VOTES: HOW THE CONSTITUTION EMPOWERS CONGRESS—AND NOT THE VICE PRESIDENT—TO RESOLVE ELECTORAL DISPUTES 28, 30 (Am. Enter. Inst. 2023), https://www.aei.org/wp-content/uploads/2023/04/Counting-Electoral-Votes-How-the-Constitution-Empowers-Congress-and-Not-the-Vice-President-to-Resolve-Electoral-Disputes.pdf; Delahunty & Yoo, *supra* note 6, at 72; Luis Fuentes-Rohwer & Guy-Uriel Charles, *The Electoral College, The Right to Vote, and Our Federalism: A Comment on a Lasting Institution*, 29 FLA. ST. U. L. REV. 878, 887 (2001); TARA ROSS, ENLIGHTENED DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE 129

would have made the same mistake.[304] Surely, anyone making this mistake would have initially written the presidential selection non-unique majority provision as follows:

> If there be *Two,* who have such Majority, and have an equal number of votes, then the Senate shall choose by ballot one of them for President.

Upon being informed of his error, this Article's hypothetical *Two*-author could have most easily made a correction by adding "*or more*."

> If there be *Two or more,* who have such Majority, and have an equal number of votes, then the Senate shall choose by ballot one of them for President.

But that is not the text as delivered by the Committee. The text is: "if there be *more than One,* who have such Majority, and have an equal number of votes, then the Senate shall choose by ballot one of them for President[.]"[305] As previously discussed, Committee member Hugh Williamson is the most likely candidate to have composed this text.

David Hosack, an early biographer, wrote that Williamson, born in 1735, "discovered very early in life, a strong attachment to mathematical reasoning, and to that order and precision, which the

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(World Ahead Publ'g Inc. 2d ed. 2012); MARK WESTON, THE RUNNER-UP PRESIDENT: THE ELECTIONS THAT DEFIED AMERICA'S POPULAR WILL 63 (Lyons Press 2016).

304. On October 21, 1803, early on during the Twelfth Amendment debates in the Eighth Congress, New York Senator DeWitt Clinton introduced a designation proposal that preserved the "more than one" text.

> The electors shall meet in their respective states and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves; *they shall name in distinct ballots the person voted for as President, and the person voted for as Vice President:* and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes for President shall be President, if such number be a majority of the whole number of electors appointed, and *if there be more than one who have such majority, and have an equal number of votes,* then the House of Representatives shall immediately choose by ballot one of them for President;

S. JOURNAL, 8th Cong., 1st Sess. 301 (1803) (emphasis added). Much later in the Senate debate, Timothy Pickering of Massachusetts recognized that it was "a palpable absurdity, in supposing that on the designating principle, when each elector would vote for one candidate by name, to be the President, that two candidates could each have a majority of all the votes." 13 ANNALS OF CONG. 196 (1803). John Clopton of Virginia made a similar comment in the House. *Id.* at 376.

305. *See supra* text accompanying note 133.

science of mathematics; impresses upon the mind[.]"[306] Williamson received his Bachelor of Arts from the College of Philadelphia (now known as the University of Pennsylvania) in 1757.[307] Hosack explains that after receiving his Master of Arts in 1760, Williamson

> was immediately after appointed the professor of mathematics in that institution. He accepted the professorship, regarding it a most honourable appointment, but without any intention of neglecting his medical studies. It had been observed of him very early in life, that he had a strong natural fondness for mathematical investigation, and it was remarked, that while he was a student in college, all his public exercises and disputations partook so much of the mathematical form of reasoning, that he was considered by his fellow students as an adroit and obstinate antagonist.[308]

Williamson resigned his professorship in 1763 and a year later left Philadelphia to pursue medical studies in Edinburgh.[309]

Williamson had been one of the first proponents of each elector having multiple electoral votes.[310] He also opposed the creation of the Vice Presidency.[311] Thus, he had both the mathematical sophistication to compose the presidential selection multiple majority provision with *more than one* rather than just *two* and a reason not to compose any part of the vice-presidential selection text.

If these pieces of Article II, Section 1, Clause 3 had different authors, then they may well have been written separately. Of course, that also means that the presidential selection provision had to be composed earlier since it is logically independent of the vice-presidential selection provision while the latter logically depends on the former.

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306. DAVID HOSACK, A BIOGRAPHICAL MEMOIR OF HUGH WILLIAMSON, M.D. LL.D. 10, 17 (New York, C. S. Van Winkle 1820). For a modern account of Williamson's life, see Louis W. Potts, *Hugh Williamson: The Poor Man's Franklin and the National Domain*, 64 N.C. HIST. REV. 371 (1987). Potts notes that "Williamson also designed the important system and procedures required of national surveyors," and that "[o]ne might even claim that Williamson was responsible for the square shapes that many American farms came to have as farmers settled in Ohio and elsewhere in the old northwest." *Id.* at 384–85.

307. HOSACK, *supra* note 306, at 18.

308. *Id.* at 22. A centennial history of the Penn Mathematics Department places Williamson's appointment in 1761. *Department History*, PENN ARTS & SCIS. (1999), https://www.math.upenn.edu/about/department-history.

309. *See* HOSACK, *supra* note 306, at 22–23. For a recent account of Williamson's medical career, see Mary Jane Kagarise & George F. Sheldon, *Hugh Williamson, M.D., LL.D. (1735–1819): Soldier, Surgeon, and Founding Father*, 29 WORLD J. SURGERY S80 (2005).

310. *See supra* text accompanying note 49.

311. *See supra* text accompanying note 215.

D. Adding the Vice Presidency to the Architecture

When Brearley's Committee began its work, the President of the Senate had long been designated as the person who would act as President when necessary.[312] Whenever the Vice Presidency was created and awarded to the "the person having the greatest number of [electoral] votes" other than the President-elect,[313] the Vice President became the obvious choice to act as President when necessary. Ultimately, the Committee made the following proposal:

> The Vice President shall be ex officio, President of the Senate, except when they sit to try the impeachment of the President, in which case the Chief Justice shall preside, and excepting also when he shall exercise the powers and duties of President, in which case, and in case of his absence, the Senate shall chuse a President pro tempore — The Vice President when *acting* as President of the Senate shall not have a vote unless the House be equally divided[.][314]

Suppose there had been an interval of approximately twenty-four hours in which there was no Vice Presidency. Suppose that the changes suggested above in Part V.B had been made. What additional change(s) would need to be made with respect to the interim proposals suggested above in Part V.B?

Obviously, the proposal to have the Senate choose its (permanent) President[315] would need to have been changed to something like the Committee's actual proposal creating the Presidency *pro tempore* of the Senate.[316] The Committee should have also taken the Vice-President-*acting-as*-President-of-the-Senate out of any role regarding the receipt, opening, or counting of electoral votes.[317]

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312. *See supra* text accompanying notes 69–71.

313. U.S. CONST. art. II, § 1, cl. 3, *amended by* U.S. CONST. amend. XII.

314. 2 CONVENTION RECORDS, *supra* note 18, at 495 (Journal) (emphasis added). Notice that in this text the Vice President, although "ex officio, President of the Senate," "*act*[*s*] as President of the Senate." *Id.* This text ultimately becomes three clauses in Article I, Section 3:

> The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.
>
> The Senate shall choose their other officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the office of President of the United States.
>
> The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside . . . .

U.S. CONST. art. I, § 3, cl. 4–6.

315. *See supra* text accompanying note 278.

316. *See supra* text accompanying note 314.

317. *See supra* text accompanying note 279.

Moreover, the Committee should have taken the Vice-President-*acting-as*-President-of-the-Senate out of the chair for his own impeachment.[318]

Of course, neither the Committee nor the Convention did the latter[319]—the resulting conflict of interest is indefensible. On the other hand, leaving the Vice-President-*acting-as*-President-of-the-Senate in the process for the receipt, opening, and counting of electoral votes is more innocuous. It is entirely plausible that no one thought this role encompassed anything more than purely ministerial acts—undeserving of more scrutiny.

VI. CONCLUSION

What is indefensible is the suggestion made by Eastman[320] and Delahunty and Yoo[321] that the Convention *intended* the Vice-President-*acting-as*-President-of-the-Senate to have the unilateral power to accept or reject electoral votes.

Derek Muller has argued that giving such a unilateral power to a *single* Senator acting as President of the Senate violates the most basic separation-of-powers principle.[322] A Senator acting as President of the Senate would have been chosen by that chamber alone.[323]

When the full Convention received the presidential selection proposal from Brearley's Committee, it clearly and consciously shifted the contingent presidential election from the Senate to the House so that the upper chamber would not have too much power.[324] Before shifting the contingent presidential election from the Senate to the House, the Convention considered a proposal that would have given that election to a committee of six Senators and seven Representatives chosen by joint ballot of both Houses.[325] Upon hearing that proposal, George Mason immediately commented that he "would prefer the Government of Prussia to one which will put all power into the hands of seven or eight men."[326]

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318. *See supra* note 17 and accompanying text.

319. And, of course, neither the Committee nor the Convention made any pronouncement on what oath the Vice President should take. *See supra* note 33 and note 148.

320. *See supra* text accompanying note 3.

321. *See supra* text accompanying note 6.

322. Muller, *supra* note 5, at 1040.

323. U.S. CONST. art. I, § 3, cl. 5.

324. *See supra* text accompanying notes 161–175.

325. *See supra* text accompanying note 159.

326. *See* 2 CONVENTION RECORDS, *supra* note 18, at 515 (Madison); *see also supra* text accompanying note 160.

When faced with an issue concerning presidential selection, the Convention avoided concentrating power and diffused it instead.[327] In the end, the Convention gave the contingent presidential election to the House—the larger of the two chambers of Congress.[328] It beggars the imagination to presume that the Convention gave a unilateral power to accept or reject electoral votes to a single person—a person who was either the choice of the smaller house of Congress or who had been a candidate in the previous election and who might well be a candidate in the present election.

Could a Convention, that *unanimously* rejected a proposal that *a Senator* serving as the President of the Senate have the power to cast an extra, tie-breaking vote in one very narrow case of a congressional election of a President,[329] have intended to give even *a Senator* serving as the President of the Senate the power to decide *unilaterally* which electoral votes *from a state* to count, if any? This seems highly doubtful. Could it have intended to give that power to the Vice-President-*acting-as*-President-of-the-Senate, someone likely to have a vested personal interest in the outcome of the electoral vote? That seems even more doubtful. It seems much more likely that the Convention intended that no actor have the power to

327. *See supra* Part IV.A.2.

328. The Convention apportioned sixty-five Representatives among the thirteen states and two Senators per state for a total of twenty-six. *See* U.S. CONST. art. I, § 2, cl. 3 and art. I, § 3, cl. 1.

329. *See supra* text accompanying note 60.

decide which electoral votes *from a state* to count, if any.[330] That power was left to the states.[331]

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330. In the wake of *Bush v. Gore*, John Harrison wrote, "in order to know which certificates to open, the President of the Senate must know which of competing slates of electors were validly appointed." John Harrison, *Nobody for President*, 16 J.L. & POL. 699, 702–03 (2000). Delahunty and Yoo read Harrison as "suggest[ing] that the Vice President must have the power to judge electoral votes, because in order to decide which certificates to open, she must first judge which electors were validly appointed." Delahunty & Yoo, *supra* note 6, at 58. There is good reason to infer that the Framers did not intend any actor to review electoral votes received from the states. Consider the word choice in the sentence preceding the familiar Counting Clause.

> [The electors] shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted.

U.S. CONST., art. II, § 1, cl. 3, *amended by* U.S. CONST. amend. XII. The Framers chose *transmit* not *submit* in this text. The Eighth Congress made the same choice in the Twelfth Amendment. *Id.* ("and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;"). Noah Webster presented the following definitions in his Dictionary four decades after the Convention.

> TRANSMIT, v. t. [L. transmitto.] 1. *To send from one person or place to another.* 2. To suffer to pass through.
>
> SUBMIT, v. t. [L. submitto; Fr. soumettre.] 1. To let down; to cause to sink or lower; [obs.] Dryden. 2. *To yield, resign or surrender to the power, will or authority of another.* 3. *To refer; to leave or commit to the discretion or judgment of another.*

WEBSTER, *supra* note 85, at 803, 851.

If the Framers had chosen *submit* rather than *transmit* the relevant text would be

> [The electors] shall sign and certify, and *submit* sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted.

The choice of *submit* would have indicated that the Framers intended electoral votes from a state to be "le[ft] or commit[ted] to the discretion or judgment of another." They did not choose the word *submit*. They chose *transmit*. Electoral votes are simply "sen[t] from one [college of] person[s] . . . to another [person]."

331. Judge Luttig's amicus brief in *Trump v. Anderson* does a masterful job explaining this:

> The phrase "shall then be counted" contrasts sharply with the express power to "Judge" given by Article I, Section 5 to Congress but concerning *only congressional* elections and qualifications. "[S]hall then be counted" also contrasts with the broader word "determine" that Article II, Section 1, Clause 4 employed to give Congress other powers concerning a state's conducting of a presidential election. Clause 4 provides: "The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes . . . ." Article II, Section 1, Clause 3, would not have used, and the Twelfth Amendment would not have repeated, the very different and narrower word "counted" to give Congress judicial powers to act as a substitute court for, or override, state courts or this Court concerning disputed presidential election results and qualifications.
>
> The Court should ensure that nothing in its decision uses the Twelfth Amendment, or 3 U.S.C. § 15, to undermine the authority of each State, through its courts and election officials, to resolve disputes arising in connection with a presidential election, subject to review by this Court, rather than Congress.

Brief for Michael Luttig et al. as Amici Curiae Supporting Respondents at 14, Trump v. Anderson, 600 U.S. 100 (2024) (No. 23-719).

Or perhaps the Convention just forgot to take the Vice President out of the electoral vote process altogether. After all, it forgot to take the Vice President out of the chair for his own impeachment.[332]

332. *See* Paulsen, *supra* note 17.

APPENDIX A.

CONVENTION SESSION LENGTHS AS MEASURED BY LINE COUNT AND WORD COUNT

Figure 1 and Figure 2 present Convention session lengths as measured by line count and word count in *Farrand* between Tuesday, August 7, the day after the Convention received the report from the Committee of Detail,[333] and September 10, when, at the end of the day, the Convention delivered its input to the Committee of Style and Arrangement.[334]

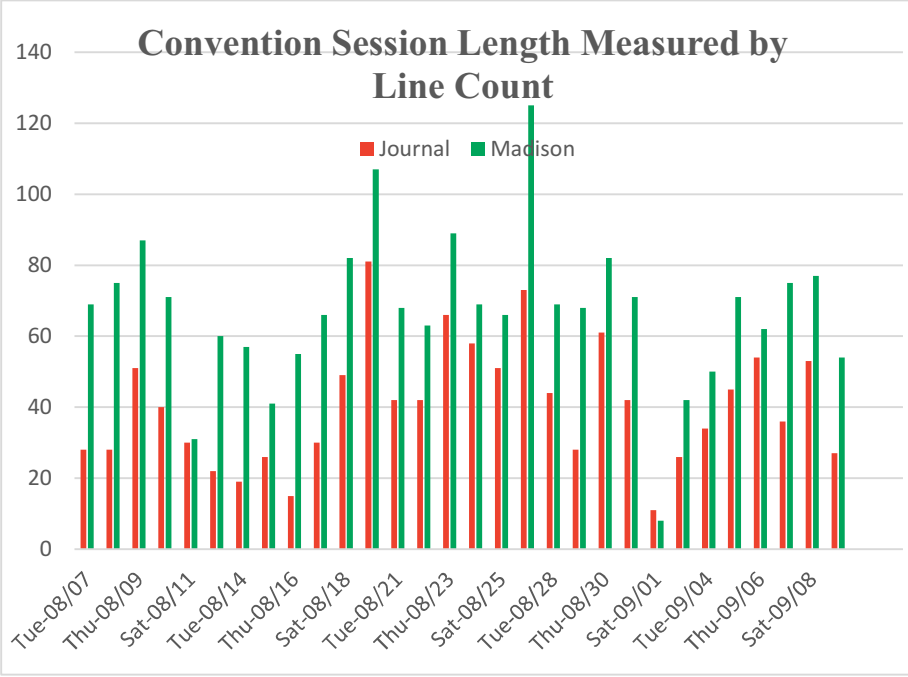

Figure 1

333. 2 CONVENTION RECORDS, *supra* note 18, at 193–95.
334. *Id.* at 564.

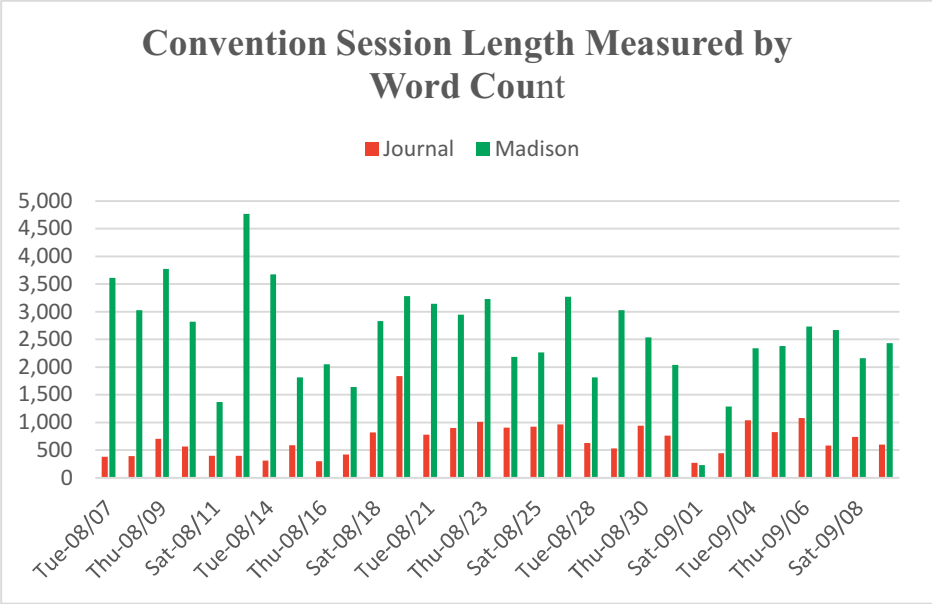
Convention Session Length Measured by Word Count
Journal
Madison
5,000
4,500
4,000
3,500
3,000
2,500
2,000
1,500
1,000
500
0
Tue-08/07
Thu-08/09
Sat-08/11
Tue-08/14
Thu-08/16
Sat-08/18
Tue-08/21
Thu-08/23
Sat-08/25
Tue-08/28
Thu-08/30
Sat-09/01
Tue-09/04
Thu-09/06
Sat-09/08

Figure 2

Copyright in the Age of AI: Re-Thinking the Human Authorship Requirement

Rachel Barr

TABLE OF CONTENTS

I. INTRODUCTION

On August 30, 2023, the United States Copyright Office (USCO) issued a notice of inquiry and request for public comment on artificial intelligence (AI) and copyright.[1] This notice was issued pursuant to the USCO's statutory mandate to "[c]onduct studies" and "[a]dvise Congress on . . . issues relating to copyright."[2]

The Notice commented that in 1965, the USCO's annual report suggested that "developments in computer technology had begun to raise 'difficult questions of authorship,'" specifically of works "'written' by computers."[3] Barbara Ringer, the then-head of the USCO's Examining Division, warned that the Office could not categorically deny registration "merely because a computer may have been used in some manner in creating the work."[4] She noted that, for example, "a typewriter is a machine that is used in the creation of a manuscript[,] but this does not result in the manuscript being uncopyrightable."[5] A decade later, the National Commission on New Technological Uses of Copyrighted Works, another federal agency, agreed with the USCO, but refused to discuss the issue further because "[t]he development of this capacity for 'artificial intelligence' ha[d] not yet come to pass[.]"[6]

Now, as the modern age of artificial intelligence dawns, Congressional and public interest in this issue has substantially increased.[7] In response, the USCO launched an AI initiative through which it identified four broad policy issues regarding copyright and AI.[8] These included: (1) AI models trained using copyrighted works; (2) copyrightability of AI-generated works; (3) potential liability for infringing AI-generated works; and (4) AI-generated works that imitate human artists' style or identity.[9]

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1. Artificial Intelligence and Copyright, 88 Fed. Reg. 59942, 59942 (Aug. 30, 2023).
2. *Id.* at 59945 (quoting 17 U.S.C.A. § 701(b)(1), (4) (Westlaw through Pub. L. No. 118-30)).
3. *Id.* at 59943 (quoting U.S. COPYRIGHT OFF., SIXTY-EIGHTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1965, at 5 (1966) [hereinafter SIXTY-EIGHTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS]).
4. *Id.* (quoting U.S. Copyright Off., *Annual Report of the Examining Division, Copyright Off., for the Fiscal Year 1965*, at 4 (1965) [hereinafter *Annual Report of the Examining Division*]).
5. *Id.* (quoting *Annual Report of the Examining Division*, *supra* note 4, at 4).
6. *Id.* (quoting CONTU, FINAL REPORT OF THE NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS 44 (1978)).
7. *Id.* at 59944.
8. *Id.* at 59945.
9. *Id.*

The USCO then sought public comment on these issues.[10] Regarding the second issue, the USCO asked "where and how to draw the line between human creation and AI-generated content."[11] It also asked whether there are circumstances where a human can sufficiently control a generative AI system such that the resulting output is copyrightable.[12]

This Article answers that question affirmatively: AI-generated works can be copyright-eligible.[13] Part II(A) introduces how generative AI models work.[14] Part II(B) introduces relevant portions of the Copyright Act (the Act).[15] Part II(C) discusses the history of the Act's "human authorship" requirement as it was developed through statute, case law, and federal agency policy.[16] Part III(A) explains the application of copyright law to AI-generated works through recent USCO decisions and policy guidance.[17] Parts III(B)(i) and III(B)(ii) explain that the two prongs of the authorship requirement are originality and creativity, and clarify that AI-generated works can satisfy the two prongs.[18] Part III(B)(iii) explains that human involvement in a work is a prerequisite for copyrightability.[19] Part III(B)(iv) sets forth a "sufficient creative control" test for determining whether an AI-generated work is copyright-eligible and demonstrates the test as a sliding scale using recent USCO decisions.[20] Finally, Part IV concludes that AI-generated works can be eligible for copyright protection.[21]

II. BACKGROUND

A. How Generative AI Models Work

The field of AI technology utilizes a machine learning process to "learn, reason, and act as humans do."[22] In the broadest sense, the machine learning process uses data to answer questions.[23] There

10. *Id.*
11. *Id.*
12. *See id.*
13. *See* discussion *infra* Part III(B).
14. *See* discussion *infra* Part II(A).
15. *See* discussion *infra* Part II(B).
16. *See* discussion *infra* Part II(C).
17. *See* discussion *infra* Part III(A).
18. *See* discussion *infra* Parts III(B)(i)–(ii).
19. *See* discussion *infra* Part III(B)(iii).
20. *See* discussion *infra* Part III(B)(iv).
21. *See* discussion *infra* Part IV.
22. Jenny Quang, Note, *Does Training AI Violate Copyright Law?*, 36 BERKELEY TECH. L.J. 1407, 1410 (2021).
23. *Id.*

are generally two ways in which machine learning answers questions: inference and generation.[24] An AI inference program uses a trained model to "make predictions or decisions based on new . . . data," but it does not output new works.[25] Conversely, a generative AI program uses a trained model to "creat[e] *new* content, data, or outputs."[26] Generative AI is designed to complete tasks such as "natural language processing, image synthesis, or music composition."[27]

Generative AI is a machine learning tool consisting of two phases: input and output.[28] During the input phase, computer algorithms are used to train an AI model.[29] During the output phase, the trained model is applied by the AI to generate and output new data, like text, pictures, or computer code.[30] Once the model is trained, generative AI uses the trained model to output new content of the same type as its input.[31] For example, an application trained on text generates new text, whether it be a few sentences or full articles.[32]

Generative AI models are trained on datasets that include copyrighted material.[33] To input these datasets, developers first mine massive amounts of data from the internet, such as photographs, videos, or text, that may be copyrighted.[34] The justification for data mining in the AI context is that it improves "future decisions by finding patterns in data collected from past events."[35] The downloaded data that is mined for AI training are copies "stored via hard drives, cloud storage, or other data repositories."[36]

There are four basic steps that AI technology uses to train a model: "receive an example [the input phase]; predict the relationship between the different elements of the example; check the result, and adjust to improve future predictions."[37] Similar to the human brain, a machine learning model has a logical "brain" or "architecture" that can receive and process data.[38] Inputs are

24. Van Lindberg, *Building and Using Generative Models Under US Copyright Law*, 18 RUTGERS BUS. L. REV. 1, 19 (2023).
25. *Id.*
26. *Id.*
27. *Id.*
28. *See id.* at 4.
29. *Id.*
30. *Id.*
31. *Id.* at 19.
32. *Id.*
33. Quang, *supra* note 22, at 1407.
34. *Id.*
35. *Id.* at 1409.
36. *Id.* at 1413.
37. Lindberg, *supra* note 24, at 7–8 (emphasis omitted).
38. *Id.* at 9.

processed by structures called "neural networks," which are similar to the connections between brain cells.[39] These networks are made up of interconnected structures called "nodes," where information is temporarily stored.[40] The nodes in the input layer have a "memory designed to receive a single element of the input data."[41] For example, in a natural language processing model, each node receives a value that corresponds to a word.[42] However, unlike whole works being downloaded for use in AI model training, here, each node only contains a value equivalent to one piece of the whole work (i.e., a value that represents one word of a book chapter).[43]

A second "hidden layer" of nodes uses the inputs to calculate or "predict" how the inputs should be used.[44] Based on these predictions, the hidden nodes pass some or all of the input values to the output layer, where the model outputs a final result.[45] During training, this process is repeated while the AI application builds a set of statistical predictions about inputted data from which it will generate outputted data.[46]

Finally, the trained model generates and outputs new content based on its understanding of the original data.[47] The newly generated content is used for many applications, such as information extraction or question answering.[48]

One example of a generative AI application is Midjourney, a subscription service that offers AI technology that generates images in response to a user's text prompts.[49] Users enter texts describing what they want Midjourney to generate, including URLs to images meant to influence the output, or parameters meant to provide functional directions.[50] In response, Midjourney will generate four

39. *Id.*
40. *Id.*
41. *Id.* at 10.
42. *Id.* at 10–11.
43. *Id.*
44. *Id.* at 11.
45. *Id.* at 14.
46. *Id.* at 15.
47. Quang, *supra* note 22, at 1410.
48. *Id.*; *see, e.g.*, Ema Lukan, *50 Useful Generative AI Examples in 2024*, SYNTHESIA (Sept. 27, 2023), https://www.synthesia.io/post/generative-ai-examples#generative-ai-examples-in-education (explaining that RAD AI analyzes past marketing performance to suggest more effective marketing strategies, while Hyro is a "conversational AI" tool used in healthcare systems for patients to engage with).
49. *See Fast, Relax, and Turbo Modes*, MIDJOURNEY, https://docs.midjourney.com/docs/fast-relax (last visited Feb. 9, 2024).
50. *See Quick Start*, MIDJOURNEY, https://docs.midjourney.com/docs/quick-start (last visited Feb. 9, 2024); *see also Prompts*, MIDJOURNEY, https://docs.midjourney.com/docs/prompts (last visited Feb. 9, 2024).

images.[51] Users may then request that Midjourney generate variations of one of the images, or they may request four entirely new images.[52] Midjourney responds to these prompts by converting words and phrases "into smaller pieces . . . that [can be] compared to its training data and then used to generate an image."[53]

A second example of a generative AI tool is the RAGHAV Artificial Intelligence Painting App, which uses machine learning to apply the style of a specific picture to the content of a specific image, thereby generating a new image.[54] The user inputs an image of their chosen style, a second image to apply that style to, and a numerical value indicating how much style to apply.[55] RAGHAV then outputs a new image based on how it interprets the user inputs.[56]

Most AI applications use predictive machine learning algorithms to find patterns from data sets.[57] The algorithms then output a new machine learning model that is trained using the data set patterns.[58] Generative AI technology uses the trained model to predict and output new data.[59] This Article explains that the machine learning process, as well as the use of AI generally, substantially intersects with copyright law.[60]

B. The Copyright Act

The Intellectual Property Clause of the United States Constitution grants Congress the authority to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]"[61]

To implement these rights, Congress passed the Copyright Act, which serves the dual purpose of incentivizing authors and artists to create expressive works while advancing public welfare by providing access to those expressive works.[62] This balance is

51. *Quick Start*, *supra* note 50.
52. *Id.*
53. *Prompts*, *supra* note 50.
54. Decision Affirming Refusal of Registration of SURYAST at 5, U.S. COPYRIGHT OFF. REV. BD. (Dec. 11, 2023) [hereinafter SURYAST], https://www.copyright.gov/rulings-filings/review-board/docs/SURYAST.pdf; *see also* Golnaz Ghiasi et al., *Exploring the Structure of a Real-Time, Arbitrary Neural Artistic Stylization Network* 3 (British Machine Vision Conf., Conference Paper) (revised Aug. 24, 2017), https://arxiv.org/abs/1705.06830.
55. SURYAST, *supra* note 54, at 5–6.
56. *Id.* at 6.
57. Quang, *supra* note 22, at 1410.
58. *Id.*
59. *Id.*
60. *Id.* at 1413.
61. U.S. CONST. art. I, § 8, cl. 8.
62. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03 (2024).

achieved by granting certain exclusive rights (reproduction, preparation of derivative works, and distribution) to authors and artists for a limited time period, in exchange for the creation of their works.[63] Copyright owners enforce these rights by suing alleged copyright infringers for monetary damages.[64]

The Copyright Act grants copyright to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or *with the aid of a machine or device*."[65] Works of authorship include literary works, musical works, pictures, audiovisual works, and sound recordings, and other similar categories.[66]

Additionally, a work must be sufficiently fixed in a tangible medium to be considered an expressive copy.[67] Sufficient fixation occurs when the work's "embodiment in a copy . . . is sufficiently permanent or stable to permit it to be . . . reproduced . . . for a period of more than transitory duration."[68] Further, "[i]n no case does copyright protection . . . extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is . . . embodied."[69]

An author may also register the work with the USCO.[70] Valid copyright protection attaches immediately "upon a qualifying work's creation and 'apart' from registration," and the registration "merely confirms that the copyright has existed all along."[71] If the Register of Copyrights correctly denies a copyright registration for "lack of copyrightable subject matter[,]" then the work "was never subject to copyright protection at all."[72] If the Register concludes that the work is copyrightable, it will issue a registration certificate, which allows the copyright holder to exercise his or her exclusive rights, including filing infringement claims.[73]

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63. 17 U.S.C.A. § 106 (Westlaw through Pub. L. No. 118-19).
64. 17 U.S.C.A. § 504 (Westlaw through Pub. L. No. 118-30).
65. 17 U.S.C.A. § 102(a) (Westlaw through Pub. L. No. 118-30) (emphasis added).
66. *Id.*
67. 17 U.S.C.A. § 101 (Westlaw through Pub. L. No. 118-13).
68. *Id.*
69. 17 U.S.C.A. § 102(b) (Westlaw).
70. Thaler v. Perlmutter, 687 F. Supp. 3d 140, 145 (D.C. Cir. 2023).
71. *Id.* (quoting Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC, 586 U.S. 296, 300–01 (2019)).
72. *Id.*
73. *Id.* (citing 17 U.S.C. §§ 410(a), 411(a); Unicolors, Inc. v. H&M Hennes & Mauritz, L.P., 595 U.S. 178, 181 (2022)).

C. History of the "Human Authorship" Requirement

i. Statute

Today's Copyright Act (the Act) protects "original works of authorship" that are "fixed in a tangible medium of expression."[74] The previous Copyright Act of 1909 protected "all the writings of an author."[75] The statement "all the writings of an author" led to confusion about whether the scope of the Act was "coextensive" with the scope of protection available under the Constitution.[76]

When the Act was amended in 1976, Congress chose the phrase "original works of authorship" to explain that the scope of material protected by the Act is narrower than the broad scope of material that the Constitution authorized Congress to protect.[77] This decision created a gap between the scope of the Act and the scope of the Constitution that left room for "other areas of existing subject matter that this bill d[id] not propose to protect but that future Congresses may want to."[78] Further, Congress "purposely left undefined" the phrase to "incorporate without change the standard of originality established by the courts under the . . . [1909] copyright statute."[79] This idea is also reflected in judicial precedent.[80]

ii. Case Law

In the *Trade-Mark Cases* of 1879, the Supreme Court interpreted the Constitution's intellectual property clause as authorizing Congress to protect "only such [works] as are original, and are founded in the creative powers of the mind," or are "the fruits of intellectual labor[.]"[81]

A few years later, in *Burrow-Giles Lithographic Co. v. Sarony*, the Court defined the "authors" referenced in the Constitution as "persons."[82] Further, the Court implied that authors must be human when it described copyright as "the exclusive right of a man to the production of his own genius or intellect[.]"[83]

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74. 17 U.S.C.A. § 102(a) (Westlaw).
75. Copyright Act of 1909, Pub. L. No. 60-349, § 4, 35 Stat. 1075, 1076.
76. H.R. REP. NO. 94-1476, at 51 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5664 (stating that "a recurring question [in the courts] has been whether the statutory and the constitutional provisions are coextensive").
77. *Id.*
78. *Id.* at 52.
79. *Id.* at 51.
80. *See infra* text accompanying notes 81–90.
81. 100 U.S. 82, 94 (1879) (emphasis omitted).
82. 111 U.S. 53, 56 (1884).
83. *Id.* at 58.

Circuit courts have interpreted this Supreme Court precedent to mean that copyright protection does not "extend . . . to non-human creations."[84] In *Urantia Found. v. Maaherra*, the United States Court of Appeals for the Ninth Circuit held that books "'authored' by non-human spiritual beings" require "human selection and arrangement of the revelations" to be copyrightable material.[85] The circuit court explained that "some element of human creativity must have occurred" because "it is not creations of divine beings that the copyright laws were intended to protect[.]"[86] The circuit court concluded that the book at issue was copyrightable because it was "at least partially the product of human creativity[,]" since humans "chose and formulated the specific questions" asked of celestial beings and "select[ed] and arrange[d]" the "revelations."[87]

Further, the United States Court of Appeals for the Seventh Circuit rejected a copyright claim for a "living garden" because "authorship is an entirely human endeavor."[88] The circuit court explained that "a garden owes most of its form and appearance to natural forces" rather than to human creativity.[89] Finally, in *Satava v. Lowry*, the United States Court of Appeals for the Ninth Circuit held that depictions of jellyfish were not copyrightable because material "first expressed by nature[] are the common heritage of humankind, and no artist may use copyright law to prevent others from depicting them."[90] This case law is consistently followed by federal agencies.[91]

iii. USCO Policy

The USCO is a federal agency responsible for advising the judiciary, Congress, and other agencies on copyright matters.[92] Additionally, the USCO administers the copyright registration system.[93]

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84. Decision Affirming Refusal of Registration of a Recent Entrance to Paradise at 4, U.S. COPYRIGHT OFF. REV. BD. (Feb. 14, 2022) [hereinafter A Recent Entrance to Paradise], https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf; *see also* Naruto v. Slater, 888 F.3d 418, 426 (9th Cir. 2018) (holding that a monkey cannot author a photograph that it took because the Copyright Act refers to an author's "children," "widow," "grandchildren," and "widower," which are terms that "all imply humanity and necessarily exclude animals").

85. 114 F.3d 955, 957, 959 (9th Cir. 1997).

86. *Id.* at 958.

87. *Id.* at 959.

88. Kelley v. Chi. Park Dist., 635 F.3d 290, 304 (7th Cir. 2011).

89. *Id.*

90. 323 F.3d 805, 813 (9th Cir. 2003).

91. *See infra* text accompanying notes 92–107.

92. 17 U.S.C.A. § 701(b) (Westlaw through Pub. L. No. 118-30).

93. *See* 17 U.S.C.A. §§ 408, 701(a) (Westlaw through Pub. L. No. 118-82); *see also supra* text accompanying notes 70–73 (explaining how the copyright registration system works).

The Review Board hears administrative appeals of copyright registration decisions.[94] Review Board decisions are final agency actions subject to judicial review.[95]

According to the USCO, the Copyright Act requires that "a work must be created by a human being."[96] Prior to the 1976 Copyright Act, the USCO explained that the "crucial question . . . is basically one of human authorship" and turns on whether a machine is "merely being an assisting instrument" or whether the "traditional elements of authorship in the work (literary, artistic, or musical expression or elements of selection, arrangements, etc.) were actually conceived and executed not by man but by a machine."[97]

After the 1976 Copyright Act was enacted, the second edition *Compendium of U.S. Copyright Office Practices* was updated to show that human authorship was required by statute.[98] The *Compendium* stated that "'authorship' implies that, for a work to be copyrightable, it must owe its origin to a human being."[99] Additionally, works created "solely by nature, by plants, or by animals are not copyrightable."[100] This statement remains unchanged in the current third edition of the *Compendium*, with additional guidance in cases of potential non-human expression.[101]

The USCO has stated that courts "have uniformly" interpreted the Copyright Act to "limit[] copyright protection to creations of human authors."[102] It claimed that "[t]he Office is compelled to follow Supreme Court precedent, which makes human authorship an essential element of copyright protection."[103] The USCO's guidance reflects circuit case law in its *Compendium*, where it explains that "[a] photograph taken by a monkey" and "[a]n application for a song naming the Holy Spirit as the author" are examples of works that are noncopyrightable because they lack human authorship.[104]

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94. *See* 37 C.F.R. § 202.5(c) (2024).

95. *See id.* § 202.5(g); *see also* 5 U.S.C.A. § 704 (Westlaw through Pub. L. No. 118-30).

96. U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.2 (3d ed. 2021) [hereinafter COMPENDIUM (THIRD)].

97. *Id.* (quoting SIXTY-EIGHTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS, *supra* note 3, at 5).

98. A Recent Entrance to Paradise, *supra* note 84, at 6.

99. U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 202.02(b) (2d ed. 1984).

100. *Id.*

101. *See* COMPENDIUM (THIRD), *supra* note 96, §§ 313.2, 709.1, 803.6(B), 906.8, 1006.1(A) (stating that works not created by a human are not copyrightable, and discussing automated computer translations, derivative sound recordings made by mechanical processes, machine produced expression in visual arts works, and hypertext markup language).

102. A Recent Entrance to Paradise, *supra* note 84, at 4.

103. *Id.*

104. COMPENDIUM (THIRD), *supra* note 96, § 313.2.

Therefore, the current USCO policies state that courts "have been consistent in finding that non-human expression is ineligible for copyright protection."[105]

Based on this guidance, the USCO Review Board concluded that "Office policy and practice makes human authorship a prerequisite for copyright protection."[106] Therefore, the USCO declines to register works "produced by a machine or mere mechanical process" that functions "without any creative input or intervention from a human author."[107]

iv. Other Agency Policy

Other federal agencies have commented on this issue.[108] The National Commission on New Technological Uses of Copyrighted Works (CONTU) was created in the 1970s to study "the creation of new works by the application or intervention of . . . automatic systems of machine reproduction."[109] CONTU concluded that the judicial interpretation of the Copyright Act requiring human authorship was "sufficient to enable protection for works created with the use of computers" and that "no amendment [to copyright law was] needed."[110] Further, CONTU stated that copyright protection eligibility "depends not upon the device or devices used in its creation, but rather upon the presence of at least minimal human creative effort at the time the work is produced."[111] CONTU's conclusions "mirror[] the views" of the USCO regarding whether works created with a computer are copyrightable.[112]

Additionally, the USCO's position is further supported by the United States Patent and Trademark Office (USPTO).[113] The USPTO recently requested public comment on whether "a work produced by an AI algorithm or process, without the involvement of a natural person . . . qualif[ies] as a work of authorship."[114] After receiving responses, the USPTO stated that "the vast majority of commenters acknowledged that existing law does not permit a non-

105. A Recent Entrance to Paradise, *supra* note 84, at 5.
106. *Id.* at 6.
107. COMPENDIUM (THIRD), *supra* note 96, § 313.2.
108. A Recent Entrance to Paradise, *supra* note 84, at 5.
109. Act of Dec. 31, 1974, Pub. L. 93-573, § 201(b)(2), 88 Stat. 1873, 1874 (establishing CONTU).
110. A Recent Entrance to Paradise, *supra* note 84, at 5 (quoting CONTU, *supra* note 6, at 1).
111. CONTU, *supra* note 6, at 45.
112. A Recent Entrance to Paradise, *supra* note 84, at 5.
113. *Id.* at 6.
114. USPTO, PUBLIC VIEWS ON ARTIFICIAL INTELLIGENCE AND INTELLECTUAL PROPERTY POLICY 19 (2020).

human to be an author . . . [and] this should remain the law."[115] It is therefore clear that, under the Copyright Act, judicial precedent, and federal agency policies, human authorship of copyrighted works is a requirement.[116]

III. DISCUSSION

A. The Application of Copyright Law to AI-Generated Works

i. Zarya of the Dawn

On September 15, 2022, Kristina Kashtanova filed an application with the USCO to register a copyright claim in a comic book titled *Zarya of the Dawn*.[117] Kashtanova did not disclose that she used AI to create part of the work.[118] After becoming aware that she used the AI platform Midjourney to create the comic book, the USCO notified Kashtanova that her application was "incorrect, or at a minimum, substantively incomplete" because she had not disclosed her use of Midjourney.[119] The USCO asked Kashtanova to provide additional information to show that her copyright registration should not be cancelled.[120]

On November 21, 2022, Kashtanova responded with three arguments.[121] First, Kashtanova claimed that she authored "every aspect of the work" and that Midjourney was "merely . . . an assistive tool[.]"[122] Second, she argued that portions of the comic book were copyrightable because she authored the text.[123] Finally, she argued that the comic book was copyrightable as a compilation "due to her creative selection, coordination, and arrangement of the text and images."[124]

The USCO agreed that the comic book text was copyrightable because the text was written by Kashtanova "without the help of any

115. *Id.* at 20–21.
116. *See supra* text accompanying notes 74–115.
117. Registration Reissuance of *Zarya of the Dawn* at 1–2, U.S. COPYRIGHT OFF. (Feb. 21, 2023) [hereinafter *Zarya of the Dawn*], https://www.copyright.gov/docs/zarya-of-the-dawn.pdf.
118. *Id.* at 2.
119. *Id.* at 2–3.
120. *Id.* at 3.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*

other source or tool, including any generative AI program."[125] The USCO explained that the text was "the product of human authorship" because it contained more than a "modicum of creativity[.]"[126]

The USCO further agreed that the "selection and arrangement of the images and text" in the comic book were a copyrightable compilation.[127] The USCO concluded that the compilation met both the human authorship and "modicum of creativity" requirements because Kashtanova "selected, refined, cropped, positioned, framed, and arranged" the images within the comic book to tell its story.[128] Additionally, the USCO explained that the comic book was "the product of creative choices" made by Kashtanova.[129] Therefore, the USCO found that the overall "selection, coordination, and arrangement" of the images and text was protected by copyright.[130]

However, the USCO concluded that the actual images in the comic book that were generated by Midjourney were not protected by copyright because Midjourney, and not Kashtanova, satisfied the elements of authorship for each image.[131] The USCO explained that the process of image generation in Midjourney "is not controlled by the user because it is not possible to predict what Midjourney will create ahead of time."[132] According to the USCO, Midjourney users cannot be authors of AI-generated images because Midjourney "generates images in an unpredictable way" rather than functioning as "a tool that [is] controlled and guided [by the user] to reach [the] desired image."[133] The USCO found that, although the information provided to Midjourney by a user may influence the AI, it does not "dictate a specific result."[134] Therefore, the USCO concluded that, due to the "significant distance between what a user may direct Midjourney to create and the visual material Midjourney actually produces," users "lack sufficient control" over AI-generated images to be considered their author.[135]

Further, the USCO stated that the AI image generation process is "not the same as that of a human artist, writer, or

125. *Id.* at 4 (quoting Letter from Van Lindberg to U.S. Copyright Off. at 2 (Nov. 21, 2022) [hereinafter Letter from Van Lindberg], https://www.copyright.gov/docs/zarya-of-the-dawn.pdf).

126. *Id.* (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991)); *see infra* text accompanying notes 170–77.

127. *Id.* at 5.

128. *Id.* (quoting Letter from Van Lindberg, *supra* note 125, at 13).

129. *Id.*

130. *Id.*

131. *Id.* at 8.

132. *Id.*

133. *Id.* at 9.

134. *Id.*

135. *Id.*

photographer."[136] Like photographers, artists who use tools to assist them select their material, choose their tools and what changes to make, and take "specific steps to control the final image" such that the work as a whole is the artist's "own original mental conception, to which [they] gave visible form."[137] However, unlike photographers, Midjourney users lack "comparable control over the initial image generated, or any final image."[138]

The USCO ultimately granted Kashtanova a new registration for *Zarya of the Dawn* that covered the text, and the "selection, coordination, and arrangement" of the text with the AI-generated images.[139] However, the registration "explicitly exclude[d]" any AI-generated artwork.[140]

ii. USCO Guidance

Shortly after the Kashtanova decision, in March 2023, the USCO issued public guidance on the registration of works that contain AI-generated material.[141] The guidance declared that "[m]ost fundamentally, the term 'author,' which is used in both the Constitution and the Copyright Act, excludes non-humans."[142] The USCO again pointed to the case law discussed above.[143]

The guidance stated that the USCO will ask "whether the 'work' is basically one of human authorship" where the AI system is "merely . . . an assisting instrument," or whether the "traditional elements of authorship in the work (literary, artistic, or musical expression or elements of selection, arrangement, etc.) were actually conceived and executed not by man but by a machine."[144] Further, the USCO will consider whether an AI's "contributions" are due to "mechanical reproduction" or to an author's "original mental conception, to which [the author] gave visible form."[145]

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136. *Id.* at 8.
137. *Id.* at 9 (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884)).
138. *Id.*
139. *Id.* at 12.
140. *Id.*
141. *See* Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190, 16190 (Mar. 16, 2023) (to be codified at 37 C.F.R. pt. 202).
142. *Id.* at 16191.
143. *See id.* at 16191–92.
144. *Id.* at 16192 (quoting SIXTY-EIGHTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS, *supra* note 3, at 5).
145. *Id.* (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884)).

To initiate this analysis, applicants must disclose "more than *de minimis*" AI-generated material.[146] The USCO will then analyze registration applications on a case-by-case basis, because its decisions will "depend on the circumstances, particularly how the AI tool operates and how it was used to create the final work."[147]

For example, when an AI system receives "solely a prompt from a human and produces complex written, visual, or musical works in response," authorship is "executed by the technology" rather than the human.[148] The USCO concluded that, when authors use generative AI technology, they "do not exercise ultimate creative control" over how the AI "interpret[s] prompts and generate[s] material."[149] The guidance stated that when AI "determines the expressive elements of its output," the generated work "is not the product of human authorship."[150] Therefore, that work is not copyrightable.[151]

However, "some prompts may be sufficiently creative to be protected by copyright[.]"[152] The guidance explained that works containing AI-generated material "will also contain sufficient human authorship to support a copyright claim" if the human selects, arranges, or modifies the material with a sufficient level of creativity.[153] The guidance makes clear that in such cases, only the "human-authored" parts of a work are copyrightable, and are "independent of" the copyrightability of any AI-generated material.[154] The guidance explains that "what matters is the extent to which the human had creative control over the work's expression" and the traditional elements of authorship.[155]

Therefore, copyright applicants "have a duty to disclose" whether a work submitted for registration includes AI-generated material and must briefly explain the portions of the work created by a human author.[156] If the "traditional elements of authorship" in a work

146. *Id.* at 16193; *see* COMPENDIUM (THIRD), *supra* note 96, at Glossary 5 (defining authorship as *de minimis* when a work "does not contain the minimal degree of original, creative expression required to satisfy the test for originality in copyright"); *see also* COMPENDIUM (THIRD), *supra* note 96, § 503.5 (explaining that "brief quotes" and "short phrases" of works are types of *de minimis* uses that need not be disclosed to the USCO).

147. Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. at 16192; *see infra* Part (III)(B)(iv) (discussing the two USCO registration decisions that have been made since the USCO Guidance was issued).

148. Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. at 16192 (footnote omitted).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 16192 n.27.

153. *Id.* at 16192–93.

154. *Id.* at 16193 (quoting 17 U.S.C.A. § 103(b) (Westlaw through Pub. L. No. 118-30)).

155. *Id.*

156. *Id.*

were created by AI alone, the USCO will not register it for lack of human authorship.[157] Conversely, if a work that contains AI-generated material also has human authorship sufficient to satisfy a copyright claim, then the portions of the work created by a human will be registered.[158]

B. AI-Generated Works Are Eligible for Copyright Protection

i. The Two Prongs of Authorship: Originality and Creativity

The Supreme Court has consistently interpreted constitutional "authorship" to include two prongs: originality and creativity.[159] In the *Trade-Mark Cases* of 1879, the Supreme Court interpreted the Constitution's intellectual property clause as authorizing Congress to protect "only such [works] as are *original*, and are founded in the creative powers of the mind[,]" or are "*the fruits of intellectual labor*[.]"[160]

In *Burrow-Giles Lithographic Co. v. Sarony*, the Supreme Court held that photographs were copyrightable even though the image was generated using a mechanical device (i.e., a camera).[161] The defendant in the case argued that photographs were not copyrightable because "a photograph is not a writing nor the production of an author[,]" but rather "a reproduction, on paper, of the exact features of some natural object, or of some person" that is made by a machine.[162] The Court disagreed, and explained that photographs are "representatives of original intellectual conceptions of [an] author" and are thus copyrightable.[163]

The Court broadly explained that an "author" is "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature."[164] The Court stated that if photography was "merely mechanical . . . with no place for novelty, invention, or originality[,]" then no copyright would be granted.[165] The Court

157. *Id.* at 16192.
158. *Id.* at 16192–93.
159. *See infra* text accompanying notes 160–76.
160. 100 U.S. 82, 94 (1879).
161. Thaler v. Perlmutter, 687 F. Supp. 3d 140, 146 (D.C. Cir. 2023) (citing Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884)).
162. *Burrow-Giles*, 111 U.S. at 56.
163. *Id.* at 58.
164. *Id.* at 57–58.
165. *Id.* at 59.

reaffirmed this idea in *Mazer v. Stein*, and held that a work "must be original, that is, the author's tangible expression of his ideas."[166]

In *Goldstein v. California*, the Court held that "[w]hile an 'author' may be viewed as an individual who writes an original composition, the term, in its constitutional sense, has been construed to mean an 'originator,' 'he to whom anything owes its origin.'"[167] The Court explained that the scope of Congress' authority to "protect the 'Writings' of 'Authors'" is "broad," and that "writings" is not "limited to script or printed material" but includes "any physical rendering of the fruits of creative intellectual or aesthetic labor."[168] Therefore, the "authorship" requirement for copyrightability does not consider in what medium a final work is expressed, but rather that the work is an original and creative expression.[169]

This decision was later reflected in *Feist Publications*, where the Court interpreted the term "original" to have two prongs: "independent[] creat[ion]" and "[sufficient] creativity."[170] First, the Court stated, an author must independently create a work for it to be copyrightable, "as opposed to copied from other works."[171] Importantly, the Court noted that "originality does not signify novelty; a work may be original even though it closely resembles other works" as long as the work is "not the result of copying."[172]

Second, the work itself must be sufficiently creative.[173] The Court explained that "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity."[174] The Court held that a work "in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent" is not copyrightable.[175] Only "a modicum of creativity" is required for copyrightability.[176] Therefore, a work that is the expression of a sufficiently original and creative author is copyrightable.[177]

166. 347 U.S. 201, 214 (1954).
167. 412 U.S. 546, 561 (1973).
168. *Id.*
169. *See* 17 U.S.C.A. § 102 (Westlaw through Pub. L. No. 118-30).
170. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 363.
175. *Id.* at 359.
176. *Id.* at 362.
177. *See id.* at 345 (stating that the "*sine qua non*" of copyright is originality).

ii. AI-Generated Works Can Satisfy the Authorship Requirement.

In *Thaler v. Perlmutter*, the United States District Court for the District of Columbia recognized this Supreme Court precedent while also suggesting that the concept of authorship can apply to works containing AI-generated material.[178] The court stated that "throughout its long history, copyright law has proven malleable enough to cover works created with or involving technologies developed long after traditional media of writings memorialized on paper."[179] Further, the court stated, this flexibility is "explicitly baked" into the Copyright Act, because the Act protects "original works of authorship fixed in any tangible medium of expression, *now known or later developed*."[180] In the context of *Thaler*, the "later developed" technology is generative AI technology.[181]

The *Thaler* court also to cited to *Burrow-Giles*, in which the Supreme Court explained that a photograph is only a "mechanical reproduction" of a scene, but that it is also a result of the photographer's "mental conception" that reaches its final form through the photographer's decision-making process.[182] This process includes "posing the [subject] in front of the camera, selecting and arranging the costume, draperies, and other various accessories . . . , arranging the subject . . . the light and shade, [and] suggesting and evoking the desired expression," therefore expressing the overall image.[183] Like the photographer's use of a camera and decision-making process, the AI user's process to generate an image may contribute the requisite originality and creativity over the final work to be found copyrightable.[184]

The court noted that the increase in the use of AI to generate a "final work will prompt challenging questions" about the level of human involvement necessary to "qualify the user of an AI system

178. *See infra* text accompanying notes 182–86.

179. Thaler v. Perlmutter, 687 F. Supp. 3d 140, 146 (D.C. Cir. 2023) (citing Goldstein v. California, 412 U.S. 546, 561 (1973); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884)).

180. *Id.* (quoting 17 U.S.C.A. § 102(a) (Westlaw through Pub. L. No. 118-30) (emphasis added)).

181. *See supra* text accompanying note 78 (stating that Congress left room in the Copyright Act to expand the scope of "original works of authorship" to include "other areas of subject matter").

182. *Burrow-Giles*, 111 U.S. at 59–60.

183. *Id.* at 60.

184. *See* Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190, 16192 (Mar. 16, 2023) (to be codified at 37 C.F.R. pt. 202).

as an 'author' of a generated work[.]"[185] Although these questions were not at issue in *Thaler*, the court clearly suggested that Congress left room to expand the scope of "authorship," under which a work created using generative AI with a sufficient level of human involvement could be copyrightable.[186]

iii. "Human Involvement" Is a Prerequisite for Copyrightability.

In *Thaler*, Steven Thaler filed suit against the USCO for denying to register his copyright claim in a two-dimensional artwork titled "A Recent Entrance to Paradise."[187] In his application, Thaler identified the work's author not as himself, but rather, as the "Creativity Machine."[188] The "Creativity Machine" is an AI computer program developed by Thaler that he described as "capable of generating original pieces of visual art, akin to the output of a human artist."[189] Thaler stated in the application that the work was "autonomously created by a computer algorithm running on a machine[.]"[190] The USCO Review Board concluded, based on "statutory text, judicial precedent, and longstanding Copyright Office practice" that human authorship is required for copyright protection.[191]

Both parties filed motions for summary judgment on the sole issue of "whether a work autonomously generated by an AI system is copyrightable."[192] The court further clarified that the precise issue was whether a valid copyright *ever existed* in a work that was created without human involvement.[193] The court affirmed the USCO Review Board's decision because copyright law "protects only works of *human* creation."[194] The consistent underlying copyright principle identified by the court and woven throughout this Article is that human creativity "is a bedrock requirement of copyright . . . even as [it] is channeled through new tools or into new media."[195]

According to the *Thaler* court, the Copyright Act's "presumptively human" authorship requirement is based in the Constitution, as

185. *Thaler*, 687 F. Supp. 3d at 149.
186. *See id.* at 146 (stating that copyright is "designed to adapt with the times" and that the key to copyrightability is human involvement).
187. *Id.* at 144.
188. A Recent Entrance to Paradise, *supra* note 84, at 2.
189. *Thaler*, 687 F. Supp. 3d at 142.
190. *Id.* at 143 (quoting A Recent Entrance to Paradise, *supra* note 84, at 2).
191. A Recent Entrance to Paradise, *supra* note 84, at 3.
192. *Thaler*, 687 F. Supp. 3d at 143.
193. *Id.* at 145.
194. *Id.* at 146 (emphasis added).
195. *Id.*

well as its statutory and judicial interpretations.[196] At the nation's founding, copyright was considered a type of property to be protected by the government.[197] To further the public good, the government incentivized individuals to create "useful arts" by recognizing "exclusive rights in that property."[198] Therefore, human creativity was "central to American copyright from its very inception."[199] Conversely, non-human entities are not incentivized by a government promising them exclusive rights; thus, copyright was never intended to cover them.[200]

This central constitutional idea was also written into the Copyright Act by Congress.[201] The 1909 Copyright Act "explicitly provided that only a 'person' could 'secure copyright for his work[.]'"[202] Further, the congressional report for the current 1976 Copyright Act indicates that "Congress intended to incorporate the . . . authorship standard 'without change'" from the 1909 Act.[203]

Moreover, the human authorship requirement has been "consistently recognized by the Supreme Court," and lower courts have "uniformly declined to recognize copyright in works" that had no human involvement.[204]

In the USCO administrative record, Thaler stated that "A Recent Entrance to Paradise" was created solely by his AI with no human involvement.[205] The *Thaler* court clarified that "[c]opyright has never stretched so far" to encompass works "generated by new forms of technology operating absent any guiding human hand[.]"[206] The court held that because a work "generated autonomously by a computer system" without any human involvement is not eligible for copyright, the USCO correctly denied Thaler's copyright registration.[207] Therefore, based on the Constitution, and its statutory and judicial interpretations, human involvement is a prerequisite to every work's copyrightability.[208]

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196. *Id.* at 147.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *See id.*
202. *Id.* (quoting Copyright Act of 1909, Pub. L. No. 60-349, § 9, 35 Stat. 1075, 1076).
203. *Id.* at 147–48 (quoting H.R. REP. NO. 94-1476, at 51 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5664).
204. *Id.* at 148.
205. *Id.* at 149.
206. *Id.* at 146.
207. *Id.* at 149–50.
208. *Id.* at 146–47.

iv. The "Sufficient Creative Control" Test: A Sliding Scale

The *Thaler* court concluded that, in *Burrow-Giles*, "human involvement" and "ultimate creative control" were the keys to finding that a "new type of work" qualified for copyright protection.[209] It should be noted that Thaler asserted new facts at trial that he directed and instructed his AI to create "A Recent Entrance to Paradise."[210] However, as the court pointed out, judicial review of a final agency action is confined to the administrative record, which in Thaler's case, was limited to statements that his work was created solely by his AI with no human involvement.[211] Despite the court's procedural decision, and although AI technology can generate a final work without *substantial* human involvement, some level of human involvement is required.[212]

AI systems cannot act independently or creatively.[213] A trained model is simply "a set of numbers and equations that encode statistical probabilities about the inputs that have been processed during training."[214] While generative AI uses "context and randomness" to complete its process, it lacks intelligence and creativity.[215] Like the camera in *Burrow-Giles* that only produces a photograph when prompted, AI only begins working to generate an output when prompted.[216]

Therefore, since human involvement is required from the outset, and the prerequisite is met, the deciding factor for copyrightability of a work containing AI-generated material is creative control.[217] The USCO and courts must implement a test based on the "authorship" requirements of originality and creativity.[218] Under the test, copyright applicants must show that they exhibited sufficient creative control over their final work.[219]

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209. *Id.* at 146.
210. *Id.* at 149.
211. *Id.*
212. *See, e.g.*, Lindberg, *supra* note 24, at 19–20 (discussing how a generative AI system can output an image if a user has textually described the image to it).
213. *Id.* at 20.
214. *Id.* at 16.
215. *Id.* at 20.
216. *See, e.g.*, *Prompts*, *supra* note 50 (explaining that Midjourney needs a prompt such as a phrase to produce an image).
217. *See Zarya of the Dawn*, *supra* note 117, at 5 (finding that Kashtanova's work was sufficiently creative under *Feist* because it was "the product of [her] creative choices").
218. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) (stating that a work must be original with at least a *de minimis* degree of creativity to be copyrightable).
219. *See* Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190, 16193 (Mar. 16, 2023) (to be codified at 37 C.F.R. pt. 202) (stating that in cases of AI-generated works, "what matters is the extent [of] creative control" the human had over a work's expression).

Under the Copyright Act, the "fix[ing] [of an original work] in any tangible medium" must be done "by or *under the authority of* the author."[220] The dictionary definition of "authority" is "a power to influence or command thought, opinion, or behavior," or "to direct or control."[221] The Act therefore permits authors to copy expressive works by directing or controlling something other than themselves.[222] To "control" is to "exercise restraining or directing influence over."[223] As explained above in Part II(A), users direct and influence AI technology's behavior using prompts.[224]

Consider three works containing AI-generated material for which the USCO has issued registration decisions: (1) "SURYAST," (2) "Théâtre D' opéra Spatial," and (3) Kashtanova's *Zarya of the Dawn*.[225] Comparing these three works in light of this Article provides a type of sliding scale that both the USCO and courts should use to determine what level of prompting and manipulation of AI-generated material constitutes sufficient creative control, such that the work is copyrightable.[226]

A work that has minimal human involvement will fall on the lowest end of the sliding scale, and is likely to be found uncopyrightable.[227] For example, Ankit Sahni filed an application with the USCO to register a copyright claim in a two-dimensional artwork titled "SURYAST."[228] This is an example of an author exerting "insufficient creative control" over an AI tool such that the final work would not be copyrightable under the proposed test.[229]

Sahni listed both himself and "RAGHAV Artificial Intelligence Painting App" as the authors of this work.[230] Further, he explained that he authored an original photograph, input that photograph into RAGHAV, input a copy of Vincent Van Gogh's *The Starry Night*

220. 17 U.S.C.A. § 102(a) (Westlaw through Pub. L. No. 118-30); 17 U.S.C.A. § 101 (Westlaw through Pub. L. No. 118-13) (emphasis added).

221. *Authority*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/authority (last visited Feb. 11, 2024); *Authority*, BRITANNICA DICTIONARY, https://www.britannica.com/dictionary/authority (last visited Feb. 11, 2024).

222. *See* 17 U.S.C.A. § 101 (Westlaw) (stating that a work is fixed "under the authority of" an author).

223. *Control*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/control (last visited Feb. 11, 2024).

224. *See supra* text accompanying notes 49–53.

225. *See supra* text accompanying notes 117–40; *see also infra* text accompanying notes 228–29, 245–47.

226. *See infra* text accompanying notes 227–68.

227. *See infra* text accompanying notes 228–44.

228. SURYAST, *supra* note 54, at 1–2.

229. *Id.* at 8.

230. *Id.* at 2.

into RAGHAV as the style he wished to apply, and chose a variable that determined how much style to apply to the work.[231]

The USCO denied Sahni's claim for two reasons: (1) because the work was a derivative work that did not show sufficient original human authorship to receive copyright protection,[232] and (2) the "expressive elements of pictorial authorship" were not made by Sahni, but rather RAGHAV.[233]

The Review Board stated that the work was "a separate work of authorship because [the original photograph] was fixed separately from the [final] [w]ork" and was therefore derivative.[234] Further, a digital adaptation of a photograph is regularly cited as an example of derivative authorship.[235]

The Review Board also found that the "expressive elements of pictorial authorship" were not made by Sahni, but rather RAGHAV.[236] To create "SURYAST," Sahni only input three items into RAGHAV: an original image, a copy of a second image, and one numerical style variable.[237] RAGHAV determined how to combine those inputs to generate the final work.[238] Therefore, RAGHAV, not Sahni, controlled where the elements of the original photograph would be placed, and how they would appear stylistically in the final work.[239] Further, Sahni did not manipulate or modify the output, making the image generated by RAGHAV the final work.[240]

"[S]electing a single number for a style filter is the kind of *de minimis* authorship not protected by copyright" because it lacks the "modicum of creativity" required by *Feist*.[241] Because the new parts of "SURYAST" were generated solely by the RAGHAV app, the derivative authorship was not sufficiently human and not copyrightable.[242] Ultimately, the Review Board found that Sahni's input choices "only constitute [the] unprotectable idea . . . [of] an altered

231. *Id.*
232. *Id.* at 2.
233. *Id.* at 7.
234. *Id.* at 5 (citing 17 U.S.C.A. § 101 (Westlaw through Pub. L. No. 118-13) (stating that a work is created "when it is fixed in a copy . . . for the first time")).
235. *Id.* at 2 (citing COMPENDIUM (THIRD), *supra* note 96, § 909.3(A) (stating that using "digital editing software to produce a derivative photograph" constitutes derivative authorship)).
236. *Id.* at 7.
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.* at 6.
241. *Id.* at 8; Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991).
242. SURYAST, *supra* note 54, at 3.

version of his photograph."[243] Therefore, the Review Board concluded that Sahni could not register copyright in the work, because he did not show sufficient creative control over RAGHAV's creation of it.[244]

A work that has more substantial human involvement, but in which AI involvement is more than *de minimis*, will fall on the middle of the sliding scale, and may or may not be found to be copyrightable.[245] For example, Jason Allen filed an application with the USCO to register a copyright claim in a two-dimensional artwork titled "Théâtre D' opéra Spatial."[246] Here, because Allen's creative involvement was less than that of Midjourney's, the USCO denied registration of the work.[247]

Allen used Midjourney to generate the initial version of the image, Adobe Photoshop to create new content, and Gigapixel AI to increase the image's size and resolution.[248] The USCO stated that it could not register the work unless Allen excluded, as a product of non-human authorship, the material that was generated by Midjourney and Gigapixel AI.[249] The USCO permitted Allen's claim that his edits made using Adobe Photoshop "contained a sufficient amount of original authorship" to allow registration.[250]

Allen submitted a second request for reconsideration and refused to disclaim the AI-generated material.[251] However, the image generated by Midjourney, "which remain[ed] in substantial form in the final Work," did not contain sufficient human authorship for registrability.[252] The Review Board explained that Allen's claimed creative input was not sufficient to meet the human authorship requirement because "his sole contribution to the Midjourney Image was inputting the text prompt that produced it."[253] Because Midjourney "does not interpret prompts as specific instructions to create a particular expressive result," the final image was dependent on

243. *Id.* at 8; *see also* Mazer v. Stein, 347 U.S. 201, 217 (1954) (stating that "protection is given only to the expression of the idea—not the idea itself").

244. SURYAST, *supra* note 54, at 8.

245. Decision Affirming Refusal of Registration of Théâtre D' opéra Spatial at 1, U.S. COPYRIGHT OFF. REV. BD. (Sept. 5, 2023), https://www.copyright.gov/rulings-filings/review-board/docs/Theatre-Dopera-Spatial.pdf (stating that "more than a *de minimis* amount" of AI-generated content must be disclaimed in a copyright application).

246. *Id.* at 1–2.

247. *Id.* at 7, 9 (stating that providing prompts to Midjourney is not enough because prompting is not what forms the generated images).

248. *Id.* at 2.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 5.

253. *Id.* at 6.

Midjourney's process, rather than Allen's text prompts.[254] Therefore, because the work contained "more than a *de minimis* amount of AI-generated content," and because Allen refused to disclaim that content, the work was not copyrightable.[255]

Finally, a work over which the author exhibits sufficient creative control will fall on the high end of the sliding scale, and will be found to be copyrightable.[256] For example, to create the images in *Zarya of the Dawn*, Kashtanova entered prompts into Midjourney.[257] The AI manipulated those images based on her prompts.[258] The more prompts Kashtanova input, the more precisely Midjourney's algorithm generated Kashtanova's vision.[259] As the algorithm became more precise, Kashtanova's control over Midjourney increased.[260] She "consciously chose[]" the "visual structure of each image, the selection of the poses and points of view, and the juxtaposition of the various visual elements within each picture[.]"[261]

This is more than the mere "modicum of creativity" required by *Feist*.[262] Here, "[t]he evolution of the image[s]" through Kashtanova's "selection, arrangement, compositing, and visual juxtaposition" show that she creatively directed Midjourney to generate her specific vision.[263] Further, Kashtanova manipulated the AI-generated images by "cropp[ing], fram[ing]," sequencing, and arranging each image in her final work.[264] The images are a tangible expression of her ideas, not the AI's ideas.[265] The AI is merely an aid or a tool used in creating that expression.[266] Kashtanova's vision, together with her intellectual labor and the aid of Midjourney,

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254. *Id.* at 6–7 (quoting *Zarya of the Dawn*, *supra* note 117, at 7).
255. *Id.* at 3.
256. *See supra* text accompanying notes 217–24.
257. *See* Letter from Van Lindberg, *supra* note 125, at 7 (explaining how Kashtanova's text prompts resulted in generated images).
258. *See id.* at 8 (describing how Midjourney responded to Kashtanova's prompts).
259. *See* Lindberg, *supra* note 24, at 15–16 (explaining that as more examples are input into a generative AI model, the model processes and inputs "better" results).
260. *See* Letter from Van Lindberg, *supra* note 125, at 8–9 (showing that each intermediate image was prompted by Kashtanova's inputs, until the final image matched her "artistic vision").
261. *Id.* at 4.
262. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991).
263. Letter from Van Lindberg, *supra* note 125, at 7.
264. *Id.* at 10.
265. *See id.* (explaining that the images in *Zarya of the Dawn* are merely "representations" provided to Midjourney by the author); *see also* Lindberg, *supra* note 24, at 20 (stating that machine learning models are neither intelligent nor creative).
266. *See* Letter from Van Lindberg, *supra* note 125, at 7 (explaining that inputs are merely tools that guide an AI system in generating output that matches the author's "creative vision").

was expressed with more than a modicum of creativity in a final tangible work.[267]

Therefore, despite the USCO's decision, under the sufficient creative control test, a court could find that Kashtanova's sufficient control over the AI technology and her sufficient level of creativity resulted in an expression of her vision in a final tangible work that is copyrightable.[268]

This Article's examination of the USCO's recent decisions and guidance show that a work containing AI-generated material must pass the "sufficient creative control" test to be found copyrightable.[269] The test includes a type of sliding scale that both the USCO and courts should use to determine what level of prompting and manipulation of AI-generated material constitutes sufficient creative control.[270] At the lowest end of the scale are works that have minimal human involvement, where the AI is responsible for the expressive elements of authorship.[271] A work in which AI involvement is more than *de minimis* will fall on the middle of the sliding scale, and may or may not be found to be copyrightable, depending on whether the level of human involvement is less than, equal to, or greater than the level of AI involvement.[272] Finally, a work over which the author exhibits sufficient creative control will fall at the highest end of the sliding scale, and will be found to be copyrightable.[273]

IV. CONCLUSION

The use of and interest in generative AI has exponentially increased in recent years, and will continue to develop.[274] Users of this technology are also increasingly seeking copyright for works containing AI-generated material.[275] Historically, the Copyright Act has been interpreted by Congress, the judiciary, and federal

267. *See id.* at 12–13 (concluding that the entire work was "guided by her creative input and reflects her authorship"); *see also* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 61 (1884) (stating that an author is the one who "really represents, creates, or gives effect to [an] idea").

268. *See supra* text accompanying notes 217–26.

269. *See* Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190, 16193 (Mar. 16, 2023) (to be codified at 37 C.F.R. pt. 202) (stating that in cases of AI-generated works, "what matters is the extent [of] creative control" the human had over a work's expression).

270. *See supra* text accompanying note 226.

271. *See supra* text accompanying notes 236–44.

272. *See supra* text accompanying notes 245–55.

273. *See supra* text accompanying notes 256–68.

274. *See* discussion *supra* Part I.

275. *See* discussion *supra* Parts III(A), III(B)(iv).

agencies as requiring a copyrightable work to have human authorship, originality, and creativity.[276] The *Thaler* court made clear that AI-generated works can be copyrightable, but did not provide any further guidance.[277] Therefore, the USCO and judiciary should implement a new test based on the long-standing authorship requirements.[278] Under the test, works containing AI-generated content should be copyrightable if authors show that they exerted sufficient creative control over the final work.[279]

276. *See* discussion *supra* Parts II(C), III(B)(i)–(iii).
277. *See* discussion *supra* Part III(B)(ii).
278. *See* discussion *supra* Part III(B)(iv).
279. *See* discussion *supra* Part III(B)(iv).

The Present Fundamental Right Analysis That Hinges on the Past: Can *Dobbs v. Jackson Women's Health Organization* and *New York Rifle and Pistol Association v. Bruen* be Reconciled With Supreme Court Precedent?

Levi James Keys

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I. INTRODUCTION

While the 2020–21 Supreme Court term barely altered constitutional analysis, the 2021–22 term has been said by some to be "one of the most significant in the history of the Court" due to the "significant changes in constitutional rules and legal analysis on First

Amendment rights, guns, abortion, and the power of the federal government to act[.]"[1] Of these significant cases, *Dobbs v. Jackson Women's Health Organization*[2] and *New York Rifle and Pistol Association v. Bruen*[3] proved to be two "larger-than-life" decisions that stirred both America's legal world and media.[4]

These divisive decisions were so influential because the Supreme Court's majority entrenched a requisite showing of history and tradition when assessing fundamental rights.[5] This Article analyzes the history and tradition framework utilized by the Supreme Court in both *Dobbs* and *Bruen* and will demonstrate two things: (1) that these two decisions are mirror images of one another; and (2) instead of novel applications of new judicial tests cut from whole cloth, the framework applied in *Dobbs* and *Bruen* is built squarely upon the Court's well-established precedent.[6] Even setting aside the political and moral questions implicated by the rights adjudicated in *Dobbs* and *Bruen*, this analytical shift has remained so polarizing because of the concern over a judge's ability to accurately assess history[7] and because of the seemingly disparate outcomes produced—*Dobbs* overturned fifty years of precedent that had recognized a constitutional right to abortion, while *Bruen* expanded Second Amendment protections and overturned a New York gun control law that had been in place for a century.[8] However, by differentiating the alleged rights before the Court and examining how the Court applied the history and tradition framework in response, the disparity between the outcomes of these two cases disappears.[9] By focusing solely on the Court's application of the history and tradition framework, this Article will demonstrate that *Dobbs* and *Bruen* do not mark a sea change in the Court's application of the history and tradition framework but are instead a refreshed iteration of

1. Kevin R. Eberle, *A Review of Significant Supreme Court Decisions of the 2021-2022 Term*, S.C. LAW., Sept. 2022, at 31; *see also* Howard Schweber, *Seven Days in June: The U.S. Supreme Court and a Constitutional Counterrevolution*, WISC. LAW., Feb. 2023, at 26, 27; Michael L. Smith, *Abandoning Original Meaning*, 86 ALB. L. REV. 43, 109 (2023).

2. 597 U.S. 215 (2022).

3. 597 U.S. 1 (2022).

4. Emily Erickson & Matthew D. Bunker, *The Jurisprudence of Tradition: Constitutional Gaslighting and the Future of the First Amendment Free Speech Doctrine*, 29 WIDENER L. REV. 139, 140 (2023).

5. R. George Wright, *On the Logic of History and Tradition in Constitutional Rights Cases*, 32 S. CAL. INTERDISC. L.J. 1, 1–2 (2022).

6. The Court's decision in *Dobbs* largely reinstates *Washington v. Glucksberg*, 521 U.S. 702 (1997) by applying history and tradition as a limiting framework to substantive due process, while the Court's decision in *Bruen* mirrors cases such as *Printz v. United States*, 521 U.S. 898 (1997) by choosing not to balance anti-constitutional government conduct.

7. Amir H. Ali, *An Appeal to Books*, 121 MICH. L. REV. 871, 873–74 (2023).

8. Erickson & Bunker, *supra* note 4, at 140; Smith, *supra* note 1, at 109.

9. *See* discussion *infra* Section VII.

existing judicial precedent.[10] Neither *Dobbs* nor *Bruen* signal the end of all unenumerated rights or the states' ability to protect their citizens.[11]

II. BACKGROUND ON THE HISTORY AND TRADITION FRAMEWORK

Though the history and tradition framework has only recently been thrust into the limelight for its role in the *Dobbs* and *Bruen* decisions, it has been applied in cases involving fundamental constitutional rights, including those identified through substantive due process, for nearly a century.[12]

Although "[s]ubstantive due process may be broadly defined as the constitutional guaranty that no person shall be arbitrarily deprived of his life, liberty, or property,"[13] its role regarding fundamental rights is narrower in scope.[14] The Court employs substantive due process to identify and protect rights that are not specifically enumerated in the text of the Constitution but are instead anchored in the original public understanding of the Constitution, evidenced by history and tradition.[15] These rights are then read into the Constitution through the Fourteenth Amendment's Due Process Clause, particularly its contemplation of "liberty."[16] However, the "guideposts for responsible decision making in [the realm of substantive due process] . . . are scarce and open-ended."[17] This lack of definite guideposts is due to the fact that the single word, "liberty," provides the Court little guidance and bears no fixed and transcendent definition; thus, there is a risk that substantive due

10. *See* discussion *infra* Sections II.A, VI.

11. *See* discussion *infra* Sections IV, VI.

12. *See* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); Michael H. v. Gerald D., 491 U.S. 110, 122 (1989).

13. Boudreaux v. Larpenter, 110 So. 3d 159, 170 (La. Ct. App. 2012).

14. Substantive due process most often refers to the process used to identify unenumerated fundamental rights that are entitled to constitutional protection. *See* Dep't of State v. Muñoz, 602 U.S. 899, 910 (2024) ("Identifying unenumerated rights carries a serious risk of judicial overreach . . . [t]o that end, *Glucksberg*'s two-step analysis disciplines the substantive due process analysis.") (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)) (internal quotation marks omitted); *see also Glucksberg*, 521 U.S. at 755–56 (Ginsburg, J., concurring) ("Thus, we are dealing with a claim to one of those rights sometimes described as rights of substantive due process and sometimes as unenumerated rights.").

15. *See generally* Moore v. City of E. Cleveland, 431 U.S. 494, 502–03 (1977) (plurality opinion).

16. *See Glucksberg*, 521 U.S. at 722.

17. Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).

process could provide an open door for an activist judiciary to circumvent the separation of powers and aggrandize its power.[18]

When utilizing substantive due process to evaluate a claimed right, or to identify a constitutionally protected, unenumerated right, the Court has noted that:

> [t]here are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights . . . . [Therefore,] [a]ppropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.'[19]

In other words, the Court has recognized that no clear legal standard exists to ascertain the definition of liberty, and, therefore, the utmost care must be exercised so that the "liberty" of the Fourteenth Amendment's Due Process Clause does not become a fount of the judiciary's policy preferences.[20] To avoid this potential perverse outcome, the Court has turned to history and tradition to anchor its interpretation of the Fourteenth Amendment's contemplation of "liberty" to the Constitution, going so far as to begin all due process cases by examining the nation's history, legal traditions, and practices.[21]

A. History and Tradition as a Limiting Framework

The history and tradition framework has often been used as a limitation upon the Court's discretion in substantive due process cases—two such cases, *Moore v. East Cleveland* and *Washington v. Glucksberg*, epitomize this limitation.[22]

In the plurality decision of *Moore v. East Cleveland*, the Supreme Court employed substantive due process, cabined by the nation's history and tradition, to strike down East Cleveland's housing

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18. Abraham Lincoln once said: "We all declare for Liberty; but in using the same word we do not all mean the same thing." Abraham Lincoln, 16th President of the U.S.: 1861–65, Address at Sanitary Fair in Baltimore: A Lecture on Liberty (Apr. 18, 1864) (transcript available at https://www.presidency.ucsb.edu/documents/address-sanitary-fair-baltimore-lecture-liberty).

19. *Moore*, 431 U.S. at 502–03 (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)).

20. *See Collins*, 503 U.S. at 125; *Moore*, 431 U.S. at 502; *Glucksberg*, 521 U.S. at 720.

21. *Glucksberg*, 521 U.S. at 710 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849–50 (1992); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269–79 (1990); *Moore*, 431 U.S. at 503).

22. *See* discussion *infra* Section II.A (text accompanying notes 23–50).

ordinance that limited occupancy of a dwelling unit to members of a single family.[23] Mrs. Moore received a notice from the city that she was in violation of the ordinance in question.[24] After failing to remove her grandson from her home, she was criminally charged and sentenced to five days in jail.[25]

In adjudicating this case, the Court examined whether substantive due process and the "liberty" contemplated within the Fourteenth Amendment protected Mrs. Moore from this action, as neither the Constitution nor precedent explicitly accorded grandmothers any fundamental constitutional rights with respect to their grandsons.[26] The Court turned to history and tradition in order to adhere to "appropriate limits on substantive due process."[27] In doing so, the Court noted that history and tradition impose limits that are "more meaningful than any based on [an] abstract formula [such as the one] taken from *Palko v. Connecticut*."[28] Relying upon well-established precedent, the Court recognized "that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this [n]ation's history and tradition."[29] The Court then found that child rearing, also precedentially recognized as a constitutional right, had historically been shared with grandparents or other relatives who occupy the same house, particularly in times of adversity.[30] Thus, the Court utilized the limiting lens of history and tradition to conclude that the "liberty" contemplated within the Fourteenth Amendment prohibited East Cleveland from restricting the occupancy of a dwelling to a single family.[31]

In *Washington v. Glucksberg*, the Court addressed a Washington law that provides that: "[a] person is guilty of promoting a suicide attempt when he [or she] knowingly causes or aids another person

23. *Moore*, 431 U.S. at 495, 503 n.12, 506.
24. *Id.* at 497.
25. *Id.*
26. *Id.* at 501.
27. *Id.* at 503.
28. *Id.* at 503 n.12; *see also* Palko v. Connecticut, 302 U.S. 319, 325 (1937) (holding that only if a right is "of the very essence of a scheme of ordered liberty" may the Court find that it is contemplated within the Due Process Clause of the Fourteenth Amendment).
29. *Moore*, 431 U.S. at 503. The Court recognized that the Constitutional protections upon the family were rooted in more than one explicitly granted right and that the familial institution is as old and as fundamental as our civilization. *Id.* at 503 n.12 (citing Wisconsin v. Yoder, 406, U.S. 205, 232 (1972); Ginsberg v. New York, 390 U.S. 629, 639 (1968); Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring); Poe v. Ullman, 367 U.S. 497, 551–52 (1961) (Harlan, J., dissenting)).
30. *Id.* at 505. The grandson whom Mrs. Moore refused to remove from her house to remain in compliance with the regulation had come to live with her after his mother passed away. *Id.* at 496–97.
31. *See id.* at 502, 506.

to attempt suicide."[32] The respondents, a group of physicians who practiced in the state of Washington and occasionally treated terminally ill patients, challenged the regulation as unconstitutional because it prevented them from assisting their patients in ending their lives.[33] The respondents argued that the liberty interests protected by the Fourteenth Amendment extended to a personal choice made by a mentally competent, terminally ill adult to commit suicide with the assistance of a physician.[34] Utilizing the history and tradition framework to guide its approach to the Due Process Clause of the Fourteenth Amendment, the Court disagreed.[35]

The Court's "established method of substantive-due-process analysis has two primary features:" (1) determining whether the right in question is deeply rooted in the nation's history and tradition; and (2) requiring a careful description of the asserted fundamental liberty interest.[36] The use of history and tradition in the Court's substantive due process jurisprudence is "a process whereby the outlines of the liberty specially protected by the Fourteenth Amendment—[although] . . . perhaps not capable of being fully clarified—have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition."[37] By employing this limiting framework, the Court is able to rein in the subjective elements that are, by necessity, present in substantive due process judicial review.[38]

The *Glucksberg* Court began with an examination of the nation's history, legal traditions, and practices[39] and concluded that "for over [seven hundred] years, the Anglo-American common-law tradition ha[d] punished or otherwise disapproved of both suicide and assisting suicide."[40] Under the common-law, when an individual committed suicide, his or her goods were subject to forfeiture; thus, even the family members of those who committed suicide

32. Washington v. Glucksberg, 521 U.S. 702, 707 (1997) (quoting WASH. REV. CODE § 9A.36.060(1) (1994)).

33. *Id.*

34. *Id.* at 708.

35. *Id.* at 710, 735.

36. *Id.* at 720–21. "*Michael H. v. Gerald D.* is perhaps the clearest expl[ana]tion of this principle." Schweber, *supra* note 1, at 28. In *Michael H. v. Gerald D.*, the Court held that the right being asserted was not the alleged right of a biological father to exercise parental rights over his daughter, but whether "the natural father [is entitled] to assert parental rights over a child born into a woman's existing marriage with another man." 491 U.S. 110, 125 (1989).

37. *Glucksberg*, 702 U.S. at 722 (internal quotation marks omitted).

38. *Id.*

39. *Id.* at 710.

40. *Id.* at 711 (citing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 294–95 (1990) (Scalia, J., concurring)).

experienced the effects of the common-law's harsh sanctions.[41] The Court noted that while sanctions, such as forfeiture, were later done away with and attitudes toward suicide have changed since the founding, the nation's laws at the time of the founding, at the time of the ratification of the Fourteenth Amendment, and today have consistently condemned and prohibited assisting suicide.[42]

The Court concluded that the right to assisted suicide is not deeply rooted in the nation's history and tradition.[43] As such, the Court turned to address the respondents' alternative contention that, even if the asserted right is not consistent with the nation's history and tradition, the liberty interest asserted is consistent with the Court's substantive due process cases as a basic and intimate exercise of personal autonomy.[44] The Court, however, required that the individual right asserted be carefully described rather than generally characterized as an expression of other unenumerated rights identified through substantive due process[45]—for example, the Court found that the right in question here was the "right to commit suicide with another's assistance" rather than a general exercise of personal autonomy.[46] In this way, the Court did not permit respondents to rephrase the right in question in order to more closely tie it to other unenumerated rights identified through substantive due process; instead, the Court implicitly demonstrated that each asserted right requires an individualized analysis under the history and tradition framework before it may be recognized as an unenumerated, fundamental right protected through substantive due process.[47] On these grounds, the Supreme Court held that Washington's regulation did not violate the Fourteenth Amendment on its face or as applied to competent, terminally ill adults who wished to commit suicide by obtaining physician proscribed medication.[48]

The evolution of the history and tradition framework as a limitation upon the Court's discretion in employing substantive due process is demonstrated through its use in both *Moore* and *Glucksberg*.[49] *Moore* represents the Court's initial turn to history and tradition as a more objective approach to identifying unenumerated

41. *Id.* at 712–13.
42. *Id.* at 713, 715, 719.
43. *Id.* at 723.
44. *See id.* at 723–24.
45. *Id.*
46. *Id.* at 724.
47. *See id.* at 720–21, 723–24.
48. *Id.*
49. *See* discussion *supra* Section II.A.

rights than that offered by *Palko*, while *Glucksberg* served to codify the history and tradition framework as a two-part test.[50]

B. Alternative Use of the History and Tradition Framework

Although the history and tradition framework has been thoroughly entrenched in Supreme Court precedent as essential to the identification of unenumerated rights through the Fourteenth Amendment, it has not always been employed by the Supreme Court with the same demanding authority.[51]

In *Obergefell v. Hodges*, fourteen same-sex couples and two men whose same-sex partners were deceased brought suit claiming that states violated the Fourteenth Amendment when they either prohibited the marriage of same-sex couples or refused to recognize same-sex marriage ceremonies lawfully performed in another state.[52] Prior to addressing the parties' arguments, the Court "note[d] the history of the subject" before it and recognized that the historical understanding was "that marriage is a union between two persons of the opposite sex."[53] However, unlike in cases such as *Moore* and *Glucksberg*, the Court in *Obergefell* found that "history and tradition guide and discipline [(i.e., the identification and protection of fundamental rights)] . . . but do not set . . . [the] outer boundaries."[54] Thus, the Court recognized that the history and tradition framework requires respect for the nation's history and tradition but permits the Court to learn from it without requiring the past to rule the present.[55] The Court opined that those who ratified the Bill of Rights and the Fourteenth Amendment did not know, nor did they presume to know, the extent of freedom in its entirety, permitting future generations "a charter protecting the right of all persons to enjoy liberty as we learn its meaning."[56] Because of this, the Court echoed Justice Harlan, stating that the identification and protection of fundamental rights "ha[d] not been reduced to any formula."[57] Thus, the *Obergefell* Court held that its interpretation of the Fourteenth Amendment's Due Process Clause was not limited by the nation's history and tradition but may also rise "from a better

50. *Id.*
51. *See* Obergefell v. Hodges, 576 U.S. 644, 663–64 (2015).
52. *Id.* at 654–55.
53. *Id.* at 656–57.
54. *Id.* at 663–64.
55. *Id.* at 664.
56. *Id.*
57. *Id.* at 663–64 (citing Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[58]

The *Obergefell* Court explicitly distinguished its holding from *Glucksberg* regarding the "careful" description of the fundamental right in question.[59] The *Obergefell* Court found that while a careful description of the fundamental right asserted and a circumscribed reading of the Fourteenth Amendment's protected liberty may have been appropriate in *Glucksberg*, *Obergefell* demanded a comprehensive inquiry regarding the overarching right and a subsequent determination as to whether sufficient justification existed for excluding the relevant class from the right.[60] As such, the Court recognized the right to marriage based upon precedent as well as history.[61] It subsequently found that the Due Process and Equal Protection Clauses of the Fourteenth Amendment protect that right for same-sex couples.[62]

Although strict reliance upon the history and tradition framework has not remained constant across time or the Court's ideological splits, it stands entrenched in the Court's substantive due process jurisprudence.[63] Still, the history and tradition framework has not been relegated to exist solely as a lens for interpreting the Fourteenth Amendment.[64] Instead, it has been utilized by the Court in various circumstances, including striking down what has been titled by some as "anti-constitutional government conduct" without employing a balancing test.[65]

Since the Reconstruction era, the Supreme Court has traditionally employed means-end scrutiny, a type of balancing test, in adjudicating governmental regulation that limits or restricts

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58. *Id.* at 671–72.
59. *Id.* at 671.
60. *Id.*
61. *Id.* at 665–68.
62. *Id.* at 675–76.
63. *Compare* Washington v. Glucksberg, 521 U.S. 702, 710 (1997) ("We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices."), *with Obergefell*, 576 U.S. at 664 ("History and tradition guide and discipline this inquiry but do not set its outer boundaries.").
64. *See* discussion *infra* Section II.B (text accompanying notes 66–86).
65. *See* Printz v. United States, 521 U.S. 898, 905, 918, 932 (1997). Anti-constitutional government conduct differs from unconstitutional government conduct in the methodology the Supreme Court employs in its adjudication. While the Court balances the government's interest with the constitutional right when examining potential unconstitutional government conduct, it declines to employ any means-end scrutiny—or balancing—when examining anti-constitutional government conduct. This distinction may not be directly apparent on the conduct's face, but the Court's treatment of the conduct distinguishes the two. *See generally* Bruce Ledewitz, *No Balancing for Anti-Constitutional Government Conduct*, 2023 U. ILL. L. REV. ONLINE 80, 80–81.

constitutional rights.[66] Such a balancing test weighs governmental interests against the constitutional right in question.[67] Despite the import of such tests in the realm of constitutional rights, the Supreme Court does not always apply means-end scrutiny, but instead refuses to engage in such a balancing when confronting certain kinds of unlawful government action, going so far as to affirm that it "do[es] not try to balance the arguments for and against" such conduct.[68] Although the Court generally begins with the presumption that legislation is constitutional, the presumption of constitutionality is narrowed "when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten [a]mendments . . . ."[69] In such instances, the Court may employ the history and tradition framework to determine whether the governmental conduct or regulation is permissible.[70]

In *Printz v. United States*, the Supreme Court evaluated whether certain interim provisions of the Brady Handgun Violence Prevention Act (Brady Act) violated the Constitution.[71] The Brady Act amended the Gun Control Act of 1968 and required the Attorney General to establish a national instant background check system for the purchase of firearms.[72] Additionally, the Brady Act required state and local law enforcement officers to conduct background checks on prospective handgun purchasers and perform related tasks until the stated deadline for instituting the national instant background check system came to pass.[73] Because there is no constitutional provision that empowers the federal government to direct state law enforcement officers to participate in the administration of a federal regulatory scheme, the Court looked to "historical understanding and practice," "the structure of the Constitution," and its own precedent to guide its decision.[74]

In its analysis, the Court identified statutes enacted by the first Congress that demonstrated that the Constitution was originally understood to permit the imposition of an obligation on state judges to enforce federal prescriptions but not necessarily upon state

66. Eric Segall, *Text, History, and Tradition in the 2021-2022 Term: A Response to Professors Barnett and Solum*, DORF ON L. (Feb. 1, 2023), https://www.dorfonlaw.org/2023/02/text-history-and-tradition-in-2021-2022.html.

67. Ledewitz, *supra* note 65, at 80–81.

68. *Id.* at 82 (quoting Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986)); *see also id.* at 80.

69. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

70. *See Printz*, 521 U.S. at 905, 918.

71. *Id.* at 902.

72. *Id.*

73. *Id.*

74. *Id.* at 904–05.

executive officers.[75] In contrast to impositions upon state judges,[76] only one example of federal law was identified that imposed duties on state executive officers—the Extradition Act of 1793.[77] The Extradition Act of 1793 required a state's executive branch to arrest and deliver a fugitive upon the request of the executive authority of the state from which the fugitive fled.[78] The Extradition Act, however, was a "direct implementation" of the Extradition Clause in Article IV, Section 2 of the Constitution and therefore differed from the Brady Act.[79] Thus, the Court found that the historical record of statutes in early Congress did not support the federal government commandeering state executive branches absent a constitutional provision.[80] The Court differentiated the historical record from recent examples that did support such an action, and stated that the recent examples, assuming they represented the same congressional power challenged in *Printz*, were "of such recent vintage that they [we]re no more probative than the statute before [the Court] of a constitutional tradition that lends meaning to the text."[81]

Although history and tradition appeared to negate the existence of such congressional power, the Court did not find it conclusive.[82] Had the historical record been conclusive, the Court would have decided the case solely upon the history and tradition of the nation.[83] However, the Court turned to the structure of the Constitution and found that the structural framework of dual sovereignty within the Constitution prevented Congress from such an enactment, regardless of the supporting governmental interests.[84] Thus, the Court held that "a balancing analysis [wa]s inappropriate."[85] As such, *Printz* demonstrated that when federal legislation is fundamentally

75. *Id.* at 905–07. Such statutes required state courts to perform functions regarding naturalization, resolve controversies between a captain and his crew, hear claims of individuals who had apprehended individuals who had been held in slavery and deemed to be fugitives, and take proof of claims of Canadian refugees who had assisted the United States during the Revolutionary War. *Id.*

76. The Court noted that this unique treatment of state judges was understandable, as "unlike legislatures and executives, they applied the law of other sovereigns all the time," and it was supported by the Supremacy Clause of art. VI, cl. 2 and the Full Faith and Credit Clause of art. IV, § 1. *Id.* at 907.

77. *Id.* at 908–09.

78. *Id.*

79. *Id.* at 909.

80. *Id.* at 916, 918.

81. *Id.* at 918.

82. *Id.* at 918.

83. *See generally id.*

84. *Id.* at 932.

85. *Id.* (internal quotation marks omitted).

incompatible with our Constitution or our constitutional system, means-end scrutiny is inappropriate.[86]

III. DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION

In *Dobbs*, the Jackson Women's Health Organization challenged Mississippi's Gestational Age Act as a violation of Supreme Court precedent that established a constitutional right to abortion.[87] The Act provides that:

> [e]xcept in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform . . . or induce an abortion of the unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.[88]

The Supreme Court granted certiorari to determine "whether 'all pre-viability prohibitions on elective abortions [were] unconstitutional[.]'"[89]

The Court began its analysis by considering whether the Constitution protected a right to obtain an abortion.[90] In doing so, the Court distinguished between two types of fundamental constitutional rights historically recognized: those guaranteed by the first eight amendments to the Constitution and those not enumerated in, but contemplated by, the Constitution—namely, by the "liberty" of the Fourteenth Amendment's Due Process Clause.[91] The determinative factor as to whether any right, enumerated or unenumerated, is fundamental is whether the right is "objectively, deeply rooted in this [n]ation's history and tradition."[92] However, when identifying an unenumerated fundamental right through the "liberty" contemplated by the Fourteenth Amendment's Due Process Clause, such a historical inquiry is particularly crucial because "the term liberty alone provides little guidance."[93] The *Dobbs* Court observed that by utilizing the utmost care in observing these "'[a]ppropriate limits' imposed by [a] 'respect for teachings of history,'" the

86. *See generally id.* at 935.
87. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 233 (2022).
88. *Id.* at 232 (quoting MISS. CODE ANN. § 41-41-191 (2018)).
89. *Id.* at 234 (quoting Petition for a Writ of Certiorari at i, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392)).
90. *Id.*
91. *Id.* at 237.
92. *Id.* at 239 (citing Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)); *see also id.* at 237.
93. *Id.* at 239 (internal quotation marks omitted).

Court could avoid falling prey to "the freewheeling judicial policymaking that characterized discredited decisions . . . ."[94]

The Court held that, because the Constitution makes no express reference to a right to obtain an abortion, those asserting the unenumerated right bore the burden of proof to demonstrate that the right was implicit in the constitutional text.[95] With that lens, the Court examined its prior decisions of *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[96] While the Court in *Roe* was less committal in pinpointing a specific provision in the Constitution that recognized the right to obtain an abortion, the *Casey* Court set forth that the right to obtain an abortion was an aspect of "liberty" contemplated by the Fourteenth Amendment and protected through substantive due process.[97]

The *Dobbs* Court applied the history and tradition framework and held that the Jackson Women's Health Organization had not met its burden of demonstrating that a positive constitutional right to an abortion was established when the Fourteenth Amendment was adopted, let alone at any time prior to the latter part of the twentieth century.[98] The Court emphasized the nation's "unbroken tradition of prohibiting abortion on pain of criminal punishment"[99] and the fact that there was no support for such a positive right until shortly before *Roe* was decided.[100] As such, the *Dobbs* Court determined that *Roe* should have arrived at the same outcome that *Glucksberg* later did, holding that, though popular opinion towards abortion had changed, "our laws have consistently condemned, and continue to prohibit, that practice."[101] In doing so, *Dobbs* implicitly rejected the notion that substantive due process may be governed by "a better informed understanding of . . . liberty . . . in our own era."[102] Instead, the *Dobbs* Court held that it must utilize the lens of history and tradition, which maps the essential components of the nation's concept of ordered liberty, to ascertain what the Fourteenth Amendment contemplated in its usage of the term "liberty."[103] After undergoing this guided inquiry, the *Dobbs* Court

94. *Id.* at 239–40 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)); *see also Glucksberg*, 521 U.S. at 720.
95. *Id.* at 235.
96. *Id.* at 234.
97. *Id.* at 235–36.
98. *Id.* at 251.
99. *Id.* at 250.
100. *Id.* at 241.
101. *Id.* at 250 (internal brackets removed).
102. *See* Obergefell v. Hodges, 576 U.S. 644, 671–72 (2015).
103. *Dobbs*, 597 U.S. at 240.

found that the Fourteenth Amendment clearly does not protect the right to an abortion.[104]

In determining that the right to an abortion was not deeply rooted in the nation's history and tradition, the *Dobbs* Court mirrored the framework established in *Glucksberg*, likewise requiring a careful description of the asserted fundamental liberty interest.[105] The Court held that the "attempts to justify abortion through appeals to a broader right to autonomy and to define one's 'concept of existence' prove[d] too much."[106] Just as in *Glucksberg*, the Court declined to reframe the right in question to more closely resemble other substantive due process rights and instead insisted on a narrow characterization of the right to an abortion.[107] Rather than characterize the right as a general exercise of personal autonomy rooted in other substantive due process rights, the Court held that the right to abortion was inapposite to other recognized rights because "abortion destroys . . . 'potential life' . . . ."[108] Thus, because the Court held that the right to abortion was "not a fundamental constitutional right . . . [and had] no basis in the Constitution's text or in our [n]ation's history[,]" the Mississippi law in question was subject only to a rational basis review, which it easily satisfied.[109] Through its application of history and tradition, the *Dobbs* Court overturned *Roe* and *Casey*.[110]

IV. THE POTENTIAL IMPACT OF *DOBBS* ON FUNDAMENTAL RIGHTS AND THE HISTORY AND TRADITION FRAMEWORK

In the wake of *Dobbs*, some individuals argued that unenumerated rights, including access to contraceptives, some aspects of privacy, and same-sex marriage were in immediate danger because they were not enumerated in the Constitution but instead deemed fundamental through substantive due process.[111] This argument was in response to Justice Thomas' concurrence in *Dobbs* where he suggested both that substantive due process "is an oxymoron that 'lack[s] any basis in the [C]onstitution'" and that the Court should, in the future, "reconsider all of [its] substantive due process

104. *See id.*
105. *Id.* at 256–57; *cf.* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).
106. *Dobbs*, 597 U.S. at 257 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).
107. *Id.* at 256–57.
108. *Id.* at 257 (quoting *Roe v. Wade*, 410 U.S. 113, 150 (1973); *Casey*, 505 U.S. at 852).
109. *Id.* at 300, 301.
110. *Id.* at 301.
111. *See* James G. Hodge, Jr. et al., *Curbing Reversals of Non-Textual Constitutional Rights*, 22 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 167, 167 (2022).

precedents . . . [b]ecause any substantive due process decision is demonstrably erroneous[.]"[112] This concerning spark for some was fanned into a flame when Justice Breyer dissented in *Dobbs* and argued that if the Fourteenth Amendment did not enshrine a right to abortion, then the rights of same-sex intimacy and marriage, interracial marriage, contraceptive use, and the right to not be sterilized without consent were not protected by the Fourteenth Amendment either.[113] However, concerns that the history and tradition framework will result in the withdrawal of all unenumerated rights or the death of substantive due process altogether are unfounded.[114]

In assessing the history and tradition framework, some legal scholars contend that the Supreme Court's modern application of the framework seen in *Dobbs* is a natural outgrowth of the

112. *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring) (quoting Johnson v. United States, 576 U.S. 591, 607-08 (2015) (Thomas. J., concurring)). Justice Thomas has consistently, either explicitly or implicitly, articulated his position that the Court's "substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision." Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring in judgment). However, Justice Thomas has still maintained that the Fourteenth Amendment provides substantive protection for fundamental rights, but he believes the vehicle by which that protection should come is the Privileges or Immunities Clause rather than the Due Process Clause. Timbs v. Indiana, 586 U.S. 146, 157–58 (2019) (Thomas, J., concurring in judgment).

> I agree with the Court that the Fourteenth Amendment makes the Eighth Amendment's prohibition on excessive fines fully applicable to the States. But I cannot agree with the route the Court takes to reach that conclusion. Instead of reading the Fourteenth Amendment's Due Process Clause to encompass a substantive right that has nothing to do with 'process,' I would hold that the right to be free from excessive fines is one of the 'privileges or immunities of citizens of the United States' protected by the Fourteenth Amendment.

Id.

It appears that, in his concurrence in *Dobbs*, Justice Thomas is simply reiterating his long-held position that substantive due process is an oxymoron, rather than a constitutional right, *see* United States v. Carlton, 512 U.S. 26, 39 (1994) (Scalia, J., with whom Thomas, J., joined concurring in the judgment), and that the Court should address that oxymoron by recognizing the Privileges or Immunities Clause as the proper vehicle for protecting fundamental rights—not that the Court should remove all judicially sanctioned protections for unenumerated rights. *See* Saenz v. Roe, 526 U.S. 489, 527 (1999) ("[The Court] should also consider whether the [Privileges or Immunities] Clause should displace, rather than augment, portions of [the Court's] equal protection and substantive due process jurisprudence.") (Thomas, J., dissenting). It remains unclear how such a shift in jurisprudence would alter the current protections extended to those unenumerated fundamental rights, beyond correcting the vehicle by which protection is offered—and it likely will remain unclear as it is unlikely a majority of the Justices would assent to such a change—as Justice Thomas has articulated that history would still cabin the meaning of the Privileges or Immunities Clause in the same manner it currently cabins the Due Process Clause alongside tradition. *Id.* at 522 ("Unlike the majority, I would look to history to ascertain the original meaning of the [Privileges or Immunities] Clause.") (Thomas, J., dissenting). Thus, Justice Thomas' concurrence in *Dobbs* cannot be said to cast a greater shadow of doubt on the future protection of fundamental rights beyond the narrowly tailored shadow already cast by the majority decision in *Dobbs*. *See* discussion *infra* Section IV.

113. *Dobbs*, 597 U.S. at 384–85 (Breyer, J., dissenting).

114. *See* discussion *infra* Section IV (text accompanying notes 115–40).

constitutional interpretation known as originalism.[115] Originalism initially focused on the intentions of the framers and ratifiers, but eventually gave way to an emphasis on original public meaning of the constitutional text.[116] When this shift in focus occurred, the scope of inquiry broadened to include a wider range of texts such as framing-era dictionaries, written works of the period's most revered thinkers, state court opinions, and the understanding of the common law set forth by thinkers such as Blackstone.[117] Though the history and tradition framework still takes into account the public meaning of the Constitution's text, it is, in fact, "a judicial inquiry that opens up an even wider swath of historical evidence for judges to consider."[118]

Some believe that, despite the framework's potential to limit previously existing rights such as abortion and currently recognized unenumerated rights such as same-sex marriage, the Court will be empowered to identify a greater number of unenumerated fundamental rights as a result of this wider judicial inquiry.[119] Though the framework applied in *Dobbs* does cast doubt on whether some specific substantive due process rights are constitutional, the *Dobbs* decision only directly impacted abortion rights, not substantive due process as a whole.[120] Any further challenges to substantive due process rights utilizing *Dobbs*' framework would necessitate an analysis tailored to the right in question and would only pose a risk to that right's existence if, once carefully defined, the right cannot be said to be deeply rooted in the nation's history and tradition.[121]

The *Dobbs* Court reassured those holding the same concern as Justice Breyer that "nothing in [its] opinion should be understood to *cast doubt* on precedents that do not concern abortion."[122] While, as mentioned above, the decision in *Dobbs* does not cast doubt on substantive due process as a whole, such reassurances against any shadow of doubt as to specific precedents ring hollow to any who

115. Erickson & Bunker, *supra* note 4, at 141–42.
116. *Id.* at 141.
117. *Id.* at 141–42.
118. *Id.* at 142 (internal quotation marks omitted).
119. *See generally* William R. Blanchette, *Sufficiently Fundamental: Searching for a Constitutional Right to Literacy Education*, 64 B.C. L. REV. 377, 402, 408–09 (2023).
120. *See generally* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 295 (2022) ("[W]e have stated unequivocally that [n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion . . . [because] [e]ach precedent is subject to its own *stare decisis* analysis . . . .") (internal quotation omitted). As such, only those rights which are not supported by text, history, and precedent are in danger. *See id.* at 270; *see also* discussion *infra* Section IV and note 127.
121. *See Dobbs*, 597 U.S. at 295.
122. *Id.* at 290 (emphasis added).

take the time to read the majority's opinion.[123] Though the Court accepted for arguments' sake "*Casey*'s claim . . . that 'the specific practices of the [s]tates at the time of the adoption of the Fourteenth Amendment' do not 'mar[k] the outer limits of the substantive sphere of [L]iberty which the Fourteenth Amendment protects[,]"[124] it founded the entirety of its analysis in *Dobbs* on the requirement that any substantive due process right be (1) carefully described; and (2) "deeply rooted in this [n]ation's history and tradition and implicit in the concept of ordered liberty."[125] In this way, the Court in *Dobbs* reiterated *Glucksberg*'s history and tradition framework for the same policy considerations as those laid out in *Moore*.[126] A tension thus exists between the *Dobbs* decision and substantive due process decisions such as *Obergefell*, as the latter held that interpretation of the Fourteenth Amendment's Due Process Clause was not limited by the nation's history and tradition and may also be interpreted through the lens of "a better informed understanding of how constitutional imperatives define . . . liberty . . . in our own era."[127]

Should the Supreme Court hear a challenge to *Obergefell* in the future and apply the history and tradition framework seen in its *Dobbs* decision, it is likely that *Obergefell* would be overturned.[128] The *Dobbs* Court expressly overturned *Roe* on the ground that it "failed to ground its decision in text, history, or precedent" and the lengthy survey of history it did include was irrelevant.[129] As such, it is likely that the Court, based on *Dobbs*, would say the same regarding *Obergefell* since the *Obergefell* Court explicitly rejected the requirement set forth in *Glucksberg* that the right in question be carefully described[130] and did not even attempt to ground the

123. *Id.* at 385 (Breyer, J., dissenting) (writing "it is impossible to understand (as a matter of logic and principle) how the majority can say that its opinion today does not threaten—does not even 'undermine'—any number of other constitutional rights.").

124. *Id.* at 257–58 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848 (1992)).

125. *Id.* at 298 (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)); *see also id.* at 256–57; *cf. Glucksberg*, 521 U.S. at 720–21.

126. *Dobbs*, 597 U.S. at 239 (reasoning that "[i]n interpreting what is meant by the Fourteenth Amendment's reference to 'liberty,' we must guard against the natural human tendency to confuse what that amendment protects with our own ardent views about the liberty that Americans should enjoy").

127. Obergefell v. Hodges, 576 U.S. 644, 671–72 (2015).

128. It must be noted that the Court may reconcile these two decisions in an unexpected manner not related to the history and tradition of the right in question. However, from the standpoint of the history and tradition framework, the two decisions are incompatible. The Court's decision in *Dobbs* would require its usage of the history and tradition framework in *Obergefell* to be overturned.

129. *Dobbs*, 597 U.S. at 270, 271–72.

130. *Obergefell*, 576 U.S. at 671.

carefully described right to homosexual marriage in the nation's history and tradition.[131] Instead, the *Obergefell* Court focused on the right to marriage generally and applied that fundamental right to homosexual couples through the Equal Protection Clause,[132] and held that its process of identifying fundamental rights "respects our history" without allowing the past to rule the present.[133] Thus, the *Obergefell* Court's use of the history and tradition framework and its rejection of the careful description requirement enumerated in *Glucksberg* is directly at odds with the Court's methodology in *Dobbs*.[134] Unless new arguments are presented that ground the right to same-sex marriage in the history and tradition of the nation, an application of *Dobbs* would make it likely that the Court would overturn *Obergefell* should such a challenge arise.[135] Accordingly, though *Dobbs*' history and tradition framework may overturn specific substantive due process precedent such as *Obergefell*, *Dobbs* is not a death blow to any and all substantive due process rights, but only to those the Court determines are not deeply rooted in the nation's history and tradition.[136]

The history and tradition framework can be used to either uphold or strike down a law, but, importantly, the burden of proof may be different depending upon the claim before the Court.[137] The *Dobbs* Court identified two types of historically recognized fundamental constitutional rights and demonstrated the application of the history and tradition framework to alleged rights that are not

131. The Court noted that "by the time of the [n]ation's founding [marriage] was understood to be a valid contract between a man and a woman." *Id.* at 659–60. "Until the [mid-twentieth] century, same-sex intimacy had long been condemned as immoral by the state itself in most western nations, a belief often embodied in criminal law." *Id.* at 660. In this way, the *Dobbs* opinion casts doubt on the decision in *Obergefell* for the same reasons *Roe* was overturned, namely, that the *Dobbs* Court would likely say that the *Obergefell* Court "failed to ground its decision in text, history, or precedent[,]" *Dobbs*, 597 U.S. at 270, and that the support offered was "of such recent vintage that" it was of no probative value since its "persuasive force is far outweighed by almost tw[enty] centuries of" condemnation. *See* Printz v. United States, 521 U.S. 898, 918 (1997).

132. *Obergefell*, 576 U.S. at 671–72.

133. *Id.* at 664.

134. *Compare Dobbs*, 597 U.S. at 256–57 (requiring that the carefully described right to abortion be analyzed in and of itself rather than through tethering it to a "broader right to autonomy"), *with Obergefell*, 576 U.S. at 671 (holding that despite the Court's requirement in *Glucksberg* that the right asserted be "defined in a most circumscribed manner," the facts of *Obergefell* required an inquiry into the "right to marry in its comprehensive sense" rather than the right to homosexual marriage specifically). *See also* discussion *supra* Sections II.B, IV.

135. *See supra* notes 126–29 and accompanying text.

136. *Compare supra* notes 118–19 and accompanying text, *with supra* notes 126–29 and accompanying text.

137. *See* Erickson & Bunker, *supra* note 4, at 143.

enumerated in, but contemplated by, the Constitution.[138] In such cases, the burden of proof resides with the party asserting the unenumerated right to demonstrate that the right is deeply rooted in the nation's history and tradition.[139] While the decision in *Dobbs* demonstrated the current Court's application of the history and tradition framework to unenumerated rights, the decision in *Bruen* demonstrates the shift in the burden of proof, as well as the occasion when the history and tradition framework might be applied to the second type of fundamental constitutional right identified by the *Dobbs* Court—those explicitly guaranteed by the first eight amendments to the Constitution.[140]

V. NEW YORK STATE RIFLE AND PISTOL ASSOC., INC. V. BRUEN

While the *Dobbs* decision demonstrated the application of the history and tradition framework as a limitation upon the Court regarding unenumerated rights,[141] the decision in *Bruen* demonstrates the history and tradition framework as a limitation upon state regulation in the context of an enumerated right.[142] In *Bruen*, the Supreme Court evaluated New York's regulation of the public carry of handguns and traced its roots back to 1905.[143] The regulation made it a crime in New York to "possess 'any firearm' without a license, whether inside or outside the home, punishable by up to four years in prison or a $5,000 fine for a felony offense, and one year in prison or a $1,000 fine for a misdemeanor."[144] In order to obtain a license, individuals had to meet certain criteria.[145] To be issued a license to possess a firearm at home or in one's place of business, an individual was required to convince a licensing officer that he or she "[wa]s of good moral character, [had] no history of crime or mental illness, and that 'no good cause exist[ed] for the denial of the license.'"[146] However, for an individual to be issued an unrestricted license,

138. *Dobbs*, 597 U.S. at 237.

139. *Id.* at 235; *see also* Michael H. v. Gerald D., 491 U.S. 110, 125 (1989) (noting that the burden of proof lay with the plaintiff asserting a claim under a non-enumerated right "to establish that such a [right] . . . is so deeply embedded within our traditions as to be a fundamental right . . .").

140. *Compare Dobbs*, 597 U.S. at 231 (noting that the "Constitution makes no reference to abortion"), *with* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 32 (2022) (recognizing that "the plain text of the Second Amendment protects . . . carrying handguns publicly for self-defense").

141. *Dobbs*, 597 U.S. at 231.

142. *Bruen*, 597 U.S. at 32.

143. *Id.* at 11.

144. *Id.* at 11–12 (internal citation omitted).

145. *Id.* at 12.

146. *Id.* (internal citation omitted).

which would permit the licensee to carry a firearm outside his or her home or place of business for self-defense, the individual would need to prove that proper cause existed.[147] After Koch and Nash, two members of the New York State Rifle & Pistol Association, Inc., were each denied an unrestricted license, the public interest group brought suit on their behalf.[148]

The Court began by explaining its recent applicable holdings and their relationship to the framework employed by the circuit courts.[149] After the Supreme Court recognized in *Heller* and *McDonald* that the Second Amendment protects an individual's right to keep and bear arms for self-defense and that the right was made applicable against the states by the Fourteenth Amendment, the circuit courts developed a two-step test to assess Second Amendment claims.[150] First, the government was permitted to "justify its regulation by 'establish[ing] that the challenged law regulate[d] activity [that fell] outside the scope of the right as originally understood."[151] Only if the government was unable to conclusively prove that the regulated conduct fell beyond the amendment's original scope would the analysis move to the second step; at that point, before applying either intermediate or strict scrutiny, the court would analyze: (1) how close the law came to the core of the Second Amendment right and (2) the severity of the law's burden on that right.[152] However, the Supreme Court found that the two-step approach was "one step too many."[153] Instead, it held that when conduct is covered by the text of the Second Amendment, the conduct is presumptively protected and the state regulation must be held unconstitutional except where the government can demonstrate that the regulation is consistent with the nation's historical tradition of firearm regulation.[154] In this way, when the conduct is a right protected by the Second Amendment, the government bears the burden of proof to demonstrate that history and tradition establish its authority to limit the right in the manner challenged.[155]

147. *Id.*
148. *Id.* at 15–16.
149. *Id.* at 17–19, 19 n.4 (identifying cases decided by every circuit court except the Eighth and Twelfth Circuits that employed the two-step test).
150. *Id.* at 18–19.
151. *Id.* at 18 (quoting Kanter v. Barr, 919 F.3d 437, 441 (7th Cir. 2019)).
152. *Id.*
153. *Id.* at 19.
154. *Id.*
155. *See id.* at 33–34 (finding that "the burden f[ell] on respondents to show that New York's proper-cause requirement [wa]s consistent with this Nation's historical tradition of firearm regulation" to support the claim that the Second Amendment permits a State to condition handgun carrying in public areas despite its guarantee of a general right to public carry).

The Court conducted its single-step analysis and concluded with "little difficulty" that the text of the Second Amendment protects the right to carry handguns publicly for self-defense.[156] The Court relied upon its prior ruling in *Heller* in which it held that the Second Amendment right to "bear arms" "refers to the right to wear, bear, or carry . . . upon the person or in the clothing or in a pocket" a firearm for the purpose of self-defense.[157] Accordingly, the Court found that the Second Amendment maintained no "home/public distinction," as such a distinction would "nullify half of the Second Amendment's operative protections."[158] Because "self-defense is 'the *central component* of the Second Amendment right itself,'"[159] the Court held that the right naturally extended outside the home.[160] And because the Second Amendment protected the conduct of Koch and Nash, New York bore the burden to demonstrate that its proper-cause requirement was consistent with the nation's historical tradition of firearm regulation.[161]

Under the history and tradition framework, "not all history is created equal."[162] The purpose of appealing to the nation's history and tradition is to comprehend the scope that the constitutional rights were understood to have when the people adopted them.[163] Thus, the Court gave history of the time period in which the Second and Fourteenth Amendments were adopted greater weight as it more fully illuminated the scope of the right.[164] Still, should post-ratification regulation or the history of the prioritized timeframe contradict the text, the text combined with the original meaning of the text cannot be overcome or altered.[165]

Through a weighted analysis of the history that New York offered in support of its regulation, the Court noted that while "the right to keep and bear arms in public ha[d] traditionally been subject to well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms[,]" the historical record did not demonstrate a tradition of broadly prohibiting the public carry of firearms for self-defense or of limiting public carry only to law

156. *Id.* at 32.
157. *Id.* (citing District of Columbia v. Heller, 554 U.S. 570, 592 (2008)).
158. *Id.*
159. *Id.* (quoting *Heller*, 554 U.S. at 599) (internal brackets omitted).
160. *Id.* at 33.
161. *Id.* at 33–34.
162. *Id.* at 34. *See* Jenny Hua, *The Supreme Court Rejects Abortion Rights and Gun License Restrictions*, ORANGE CNTY. LAW., Oct. 2022, at 27.
163. *See Bruen*, 597 U.S. at 34 (quoting *Heller*, 554 U.S. at 634–35).
164. *Id.*; *see also id.* at 35–37.
165. *See id.* at 36.

abiding citizens who were able to demonstrate a special need for such defense.[166] The Court elaborated upon this by examining nineteenth-century state regulations that prohibited concealed weapons and subsequent state court decisions that upheld the regulations as lawful.[167] The Georgia Supreme Court's decision in *Nunn v. State*[168] proved instructive, as it demonstrated that state courts were prone to permit concealed-carry prohibitions in the event that the state did not similarly prohibit open carry.[169] In this way, antebellum state-court decisions displayed the consensus among the states at the pertinent time in history that state legislatures "could not altogether prohibit the public carry of arms protected by the Second Amendment . . . ."[170] Thus, while "the historical evidence from antebellum America d[id] demonstrate that *the manner* of public carry was subject to reasonable regulation[,]"[171] the nation's historical tradition of firearm regulation d[id] not support New York's presumption that "individuals have *no* public carry right without a showing of heightened need."[172] Because New York failed to meet its burden to prove that its regulation was in accordance with the nation's historical tradition of firearm regulation, the century-old law was struck down.[173]

VI. *BRUEN* ACTS AS AN EXAMPLE OF THE HISTORY AND TRADITION FRAMEWORK APPLIED TO ANTI-CONSTITUTIONAL REGULATION

Concerns loom large in light of *Bruen* regarding the effect that the Court's application of the history and tradition framework will have upon other fundamental rights.[174] Yet, while paranoia remains as to whether another sea change regarding fundamental rights will crash ashore in the wake of *Bruen*, such paranoia is unfounded.[175]

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166. *Id.* at 38.
167. *Id.* at 52–53.
168. 1 Ga. 243 (1846).
169. *Bruen*, 597 U.S. at 54. Georgia's 1837 statute, which broadly prohibited wearing or carrying pistols, without distinguishing between concealed and open carry, was valid regarding concealed carry but was in conflict with the Constitution and void in relation to open carry. *See Nunn*, 1 Ga. at 251.
170. *Bruen*, 597 U.S. at 55 (internal quotation marks omitted).
171. *Id.* at 59.
172. *Id.* at 5 (emphasis added).
173. *Id.* at 71.
174. Regarding the First Amendment's protection of free-speech, individuals have opined that "[i]f the [Court] plans to reconfigure free-speech law in *Bruen's* image, the future of free expression in the United States looks grim." Erickson & Bunker, *supra* note 4, at 140.
175. *See infra* Section VI (text accompanying notes 181–86).

The Court has historically chosen not to employ means-end scrutiny when adjudicating governmental regulation of a constitutional right that is anti-constitutional rather than unconstitutional.[176] The Court in *Carolene Products* explained, and the *Bruen* Court echoed the notion, that it generally begins with the presumption that legislation is constitutional, but that presumption of constitutionality is narrowed "when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten [a]mendments . . . ."[177] It is in such instances where the Court might employ the history and tradition framework rather than a means-end balancing test to determine whether the governmental conduct or regulation is permissible.[178] Applying the history and tradition framework rather than means-end scrutiny corresponds to the shift of the burden of proof upon the government to demonstrate that its action does not violate the Constitution but rather adheres to the original or historic understanding of the government's constitutional authority and the outer limits of the fundamental right at issue.[179]

The Court's application of the history and tradition framework in *Bruen* largely resembles that which was employed in *Printz*.[180] In *Printz*, the Court required the federal government to demonstrate that the nation's history and tradition supported requiring state executive officers to carry out federal policy, as no express constitutional provision granted it such authority.[181] In *Bruen*, the Court required New York to demonstrate that the nation's history and tradition supported its regulation of conduct protected by the Second Amendment of the Constitution.[182] In this way, *Bruen* continued the Court's application of the history and tradition framework to both governmental regulation and conduct that is not specifically

176. Ledewitz, *supra* note 65, at 80.

177. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *see also Bruen*, 597 U.S. at 18–19.

178. *See* Printz v. United States, 521 U.S. 898, 905 (1997).

179. The Supreme Court refuses to apply means-end scrutiny when confronting certain kinds of unlawful government action, going so far as to affirm that it "do[es] not try to balance the arguments for and against" such conduct. *See* Ledewitz, *supra* note 65, at 82 (quoting Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986)). Here, "the Second Amendment guarantees a general right to public carry[.]" N.Y State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 33–34 (2022). As such, the Court in *Bruen* did not employ means end scrutiny because "the burden f[ell] on respondents to show that New York's proper-cause requirement [wa]s consistent with this Nation's historical tradition of firearm regulation" to support the claim that the Second Amendment permits a State to condition handgun carrying in public areas despite its guarantee of a general right to public carry. *Id.*

180. *See supra* note 179 and *infra* Section VI (text accompanying notes 181–86).

181. *Printz*, 521 U.S. at 904–05.

182. *Bruen*, 597 U.S. at 19, 33–34.

authorized by the Constitution or that appears on its face to fall within the specific prohibition of the Constitution.[183] Rather than setting forth an additional hurdle that the government must clear in order to limit any fundamental rights, *Bruen* simply reiterated *Printz*: when a governmental regulation is, on its face, within a specific prohibition of the Constitution, and such a regulation does not derive authority from a different Constitutional provision, the government must demonstrate, through the nation's history and tradition, that the regulation comports with the original public understanding of the right in question.[184] Thus, *Bruen* acts as another instance in which the Court has found a governmental regulation to be anti-constitutional rather than unconstitutional and has chosen to apply the history and tradition framework rather than means-end scrutiny.[185] Therefore, *Bruen* does not threaten to alter the use of means-end scrutiny in other fundamental rights contexts.[186]

VII. RECONCILING THE HISTORY AND TRADITION FRAMEWORK APPLIED IN *DOBBS* AND *BRUEN*

On first blush, the decisions of *Dobbs* and *Bruen* appear to be in tension with one another as the questions asked and the weight given to history varied in the two cases—*Dobbs* asked whether the right to obtain an abortion was contemplated by the Fourteenth Amendment's usage of "liberty" and *Bruen* asked if New York's firearm regulation was consistent with the nation's historic tradition of firearm regulation.[187] While both cases adjudicated an ambiguous provision of the Constitution—whether a fundamental right may be found in the Fourteenth Amendment's Due Process Clause or implicit in the plain text of the Second Amendment[188]—the text of the Constitution and the burden of proof dictated the different lens that the Court applied in each case.

183. *See Printz*, 521 U.S. at 905; *Bruen*, 597 U.S. at 33–34; *see generally* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)

184. *See Printz*, 521 U.S. at 905; *see generally Bruen*, 597 U.S. at 24, 38–39.

185. *See* Ledewitz, *supra* note 65 at 80.

186. *See* discussion *supra* Section VI and note 178. The Court noted in *Bruen* that the standard applied "accords with how [the Court] protect[s] other constitutional rights." 597 U.S. at 24–25. For example, in the context of free-speech, when the government restricts speech, it bears the burden of proving its actions were constitutional—it does not automatically receive means-end scrutiny. *See id.*

187. *See generally* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 237 (2022); *Bruen*, 597 U.S. at 33–34.

188. *See generally Dobbs*, 597 U.S. at 237; *Bruen*, 597 U.S. at 32.

In *Dobbs*, the Court evaluated a challenge to a Mississippi law that was predicated on the existence of an unenumerated right alleged to be contemplated within the Fourteenth Amendment's notion of "liberty" while, in *Bruen*, the Court evaluated a challenge to a New York law that was predicated on the extension of an enumerated constitutional right.[189] Relatedly, those asserting the right in *Dobbs* bore the burden of proof to establish a positive constitutional right to obtain an abortion based upon the nation's history and tradition, while those asserting the right to publicly carry firearms for self-defense in *Bruen* did not bear the burden of proof; instead, New York bore the burden of demonstrating that its regulation comported with the nation's historic tradition of firearm regulation.[190] Thus, it is clear from *Dobbs* and *Bruen* that the burden of proof in these types of cases lies with the party asserting a right or prohibiting constitutionally protected conduct.[191]

Because the single word "liberty" did not offer the Court much guidance in *Dobbs* to determine if the original public understanding of the Fourteenth Amendment encompassed a right to obtain an abortion, and because New York's regulation appeared on its face to be within the specific prohibition of the Second Amendment, both the Jackson Women's Health Organization and New York State bore the burden of anchoring the asserted right and authority to regulate within the text of the Constitution.[192] Because no clear support could be found in the express text of the Constitution, the parties were required to meet their burden by demonstrating, through the nation's history and tradition, that such a right or such authority was within the original public understanding of the constitutional provision in question.[193] Thus, while the burden of proof and the related application of the history and tradition framework varied in *Dobbs* and *Bruen*, these cases remain flip sides of the same coin, demonstrating the Court's application of the history and tradition framework to unenumerated and enumerated rights respectively.[194]

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189. *See Dobbs*, 597 U.S. at 230–31; *Bruen*, 597 U.S. at 17.

190. *See generally Dobbs*, 597 U.S. at 235; *Bruen*, 597 U.S. at 33–34.

191. *See Dobbs*, 597 U.S. at 235 (explaining that "[t]he Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text"); *Bruen*, 597 U.S. at 33–34 (setting forth that "the burden [was] on respondents to show that New York's proper-cause requirement [wa]s consistent with this Nation's historical tradition of firearm regulation" to support the claim that the Second Amendment permits a State to condition handgun carrying in public areas despite its guarantee of a general right to public carry).

192. *See supra* note 190.

193. *See Dobbs*, 597 U.S. at 237–39; *Bruen*, 597 U.S. at 33–34.

194. *See* discussion *supra* Section VII.

VIII. CONCLUSION

If the highly charged, political, and moral nature of the rights analyzed in *Dobbs* and *Bruen* are set aside, the usage of the history and tradition framework and its potential future repercussions are clarified.[195] Though this framework has limited, and will continue to limit, fundamental rights identified through substantive due process, it does not signal the end of substantive due process rights as a whole—only the end of those rights that the Court may find are not rooted in the nation's history and tradition.[196] Neither has the history and tradition framework taken the place of means-end scrutiny in the field of fundamental constitutional rights.[197] The Court is likely to continue applying the history and tradition framework instead of means-end scrutiny only where the alleged right is unenumerated or the governmental prohibition of enumerated rights falls within the specific prohibitions of the Constitution, embodying anti-constitutional government conduct.[198]

Together, *Dobbs* and *Bruen* stand for the notion that the history and tradition framework exists as a limitation that provides a means of anchoring unenumerated fundamental rights and implicit governmental authority to the Constitution through original public understanding.[199] While the Court's knowledge of history or its treatment of *stare decisis* in *Dobbs* and *Bruen* may invite further discussion, its use of the history and tradition framework is directly in step with well-established Supreme Court precedent.[200] Not only can *Dobbs* and *Bruen* be reconciled with precedent, but the two decisions are mirror images that demonstrate how the history and tradition framework may apply to both unenumerated and enumerated rights.[201]

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195. *See* discussion *supra* Sections III, IV, V, VI.
196. *See* discussion *supra* Section IV.
197. *See* discussion *supra* Sections II.B (text accompanying notes 70–86) and VI (text accompanying notes 176–86).
198. *Id.*
199. *See* discussion *supra* Section VII.
200. *See* discussion *supra* Section II.A.
201. *See* discussion *supra* Section VII.

Pennsylvania Password Protection Now: Enacting Legislation to Protect Employee Private Social Media Accounts From Prying Employer Eyes

Reilly E. Wagner

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I. INTRODUCTION

In March of 2012, the news of employer requests for employee private social media password information made major headlines.[1] The Associated Press reported that when Robert Collins, a Maryland Department of Corrections Officer, returned to work following a leave of absence taken due to the death of a family member, his employer requested access to the username and password of his private Facebook account to check for gang affiliations.[2] Mr. Collins was shocked but felt he had no choice but to provide his password because he needed the job to feed his family.[3] Other reports of similar employer requests, such as a New York City statistician's experience facing a request for his private Facebook profile's username and password during a job interview, quickly hit the news.[4] These stories sparked public outcry from employees and the American Civil Liberties Union (ACLU), who claimed that these employer password requests were an invasion of privacy.[5] The ACLU published comments that it gathered in response to the stories on Facebook, examples of which included, "[v]ile and outrageous, this should no more be legal than requiring you allow an employer into your home to go through your mail, closets and photos" and "[w]ill the next step be to request a key to my house?"[6]

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1. Robert P. Davis et al., *United States: The Backlash to Employers Requesting Applicants' Facebook Passwords*, MAYER BROWN (Apr. 26, 2012), https://www.mondaq.com/united-states/employee-benefits-compensation/175024/the-backlash-to-employers-requesting-applicants-facebook-passwords.

2. Notably, no reports address why the Maryland Department of Corrections suspected Mr. Collins of gang affiliations nor why it took sudden interest in Mr. Collins's Facebook profile. *Your Facebook Password Should Be None of Your Boss' Business*, AM. C.L. UNION (Mar. 20, 2012), https://www.aclu.org/news/privacy-technology/your-facebook-password-should-be-none-your-boss-business; *see also Revealed: How Colleges and Employers Ask for Candidates' Facebook and Email Passwords During Job Interviews*, DAILY MAIL, https://www.dailymail.co.uk/news/article-2111059/Colleges-jobs-asking-Facebook-email-passwords-job-interviews.html?ito=feeds-newsxml (Mar. 6, 2012, 12:14 PM); Jeffrey Stinson, *Password Protected: States Pass Anti-Snooping Laws*, USA TODAY, https://www.usatoday.com/story/news/nation/2014/07/08/stateline-password-online-privacy-laws/12353181/ (July 8, 2014, 10:43 AM).

3. *Your Facebook Password Should Be None of Your Boss' Business*, *supra* note 2.

4. Davis et al., *supra* note 1.

5. *Id.*

6. *Your Facebook Password Should Be None of Your Boss' Business*, *supra* note 2.

Following the public outcry, on May 12, 2012, Maryland Governor Martin O'Malley signed legislation prohibiting employers from requesting and requiring the disclosure of employee and job applicant private social media account passwords.[7] This act made Maryland the first state to enact legislation commonly referred to as "password protection legislation" and its enactment subsequently sparked conversation regarding similar legislation in other states.[8] By October of 2013, thirty-six states had either pending or enacted legislation on this issue.[9] Over a decade later, password protection legislation remains a topic of conversation within state legislatures, as demonstrated by New York's password protection legislation, which recently took effect on March 12, 2024.[10]

As of May 2024, twenty-seven states plus the District of Columbia and Guam have enacted password protection legislation.[11] Notably, Pennsylvania has not yet done so.[12] This means that Pennsylvania-based employers may request employee and applicant social media passwords and employees could easily end up in the same situation as Mr. Collins. Nearly a decade has passed since the majority of states enacted password protection legislation, but as New York recognized, the present need for legislation is greater than ever.[13] The Covid-19 pandemic and the rise of remote work

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7. Alexander Borman, Comment, *Maryland's Social Networking Law: No "Friend" to Employers and Employees*, 9 J. BUS. & TECH. L. 127, 127 (2014).

8. *Id.*

9. *Id.*

10. Alonzo Martinez, *New York Restricts Employer Access to Employee Social Media Accounts*, FORBES, https://www.forbes.com/sites/alonzomartinez/2024/02/20/new-york-restricts-employer-access-to-employee-social-media-accounts/ (Feb. 21, 2024, 11:55 AM).

11. States with password protection legislation include: Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Louisiana, Maine, Maryland, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. *Privacy of Employee and Student Social Media Accounts*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/technology-and-communication/privacy-of-employee-and-student-social-media-accounts (Aug. 8, 2022); *see also* Martinez, *supra* note 10.

12. *Privacy of Employee and Student Social Media Accounts*, *supra* note 11.

13. New York Assembly Member and sponsor of the state's password protection bill, Jeffrey Dinowitz, stated in the fall of 2023:

> The explosion in the use of social media such as Instagram, TikTok, and Threads has made for a greater availability of information than ever before. However, some employers make hiring and disciplinary decisions far beyond information that prospective and current employees share publicly. This includes requesting and demanding the username and password information for social media sites from their prospective and current employees and the login information to email accounts and other extremely personal accounts. Requesting and demanding this information constitutes a serious invasion of privacy on behalf of the employer and may lead to issues of unfair and discriminatory hiring and admissions practices. Employees have the right to make this information either public or private. They should have every right to maintain this privacy when it comes to their workplace or during an interview or admissions process

arrangements have created increasingly blurred boundaries between home and work.[14] Pennsylvania must enact password protection legislation to unblur the boundaries between one's private life and one's work life. Moreso, this issue must be addressed promptly. Usage of social media platforms is predicted only to increase over the next decade, indicating that the issue will grow rather than disappear with time.[15]

This Article urges the Pennsylvania General Assembly to learn from other states' experience and enact an even more effective password protection law. Part II explores the operative background, beginning with the history of social media, continuing with the arguments cited by both proponents and opponents of password protection legislation, and concluding with the current status of both federal and state password protection legislation.[16] Part III proposes revisions to House Bill 1130, Pennsylvania's only attempted password legislation bill, and explains the urgent need for password protection legislation.[17] Part IV provides a brief conclusion.[18]

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and should not have to submit to this request for fear they will lose their job or not be hired otherwise.

Governor Hochul Signs Legislation to Strengthen Workers' Rights in New York State, N.Y. STATE GOV'T (Sept. 14, 2023), https://www.governor.ny.gov/news/governor-hochul-signs-legislation-strengthen-workers-rights-new-york-state. *See also* Amal Tlaige, *Employee Password Privacy Bill Goes into Effect in New York*, ROCHESTER FIRST (Sept. 21, 2023, 7:18 AM), https://www.rochesterfirst.com/news/employee-password-privacy-bill-goes-into-effect-in-new-york/.

14. *See* discussion *infra* Part III(B)(1).

15. Stacy Jo Dixon, *Number of Social Media Users in the United States from 2020 to 2029*, STATISTA (Aug. 20, 2024), https://www.statista.com/statistics/278409/number-of-social-network-users-in-the-united-states/.

16. *See* discussion *infra* Part II.

17. *See* discussion *infra* Part III. Password protection implicates issues related to First and Fourth Amendment constitutional protections and violations of major social media platforms' Terms of Agreement; however, this article does not analyze those issues. *See, e.g.*, Kathleen Carlson, Note, *Social Media and the Workplace: How I Learned to Stop Worrying and Love Privacy Settings and the NLRB*, 66 FLA. L. REV. 479, 485–86 (2014); Elana Handelman, Comment, *The Expansion of Traditional Background Checks to Social Media Screening: How to Ensure Adequate Privacy Protection in Current Employment Hiring Practices*, 23 U. PA. J. CONST. L. 661, 682 (2021); Melissa Coretz Goemann, *Maryland Passes Nation's First Social Media Privacy Protection Bill*, AM. C.L. UNION (May 4, 2012), https://www.aclu.org/news/national-security/maryland-passes-nations-first-social-media-privacy-protection-bill.

18. *See* discussion *infra* Part IV.

II. BACKGROUND

A. The Rise of Social Media

Six Degrees, the first recognized social media site, was founded in 1997.[19] Similar social media sites quickly emerged and began dominating the internet—MySpace in 2003, Facebook in 2004, YouTube in 2005, and Twitter in 2006.[20]

Today, 4.9 billion people world-wide have at least one social media account, a figure estimated to increase to 5.85 billion by 2027.[21] Currently, there are 300.86 million American social media users[22] who spend an average of 127 minutes a day on an average of 7.1 different accounts.[23] Frequently-used social media sites in the United States include Facebook, Instagram, Tik Tok, Twitter, Pinterest, Snapchat, LinkedIn, WhatsApp, and Reddit.[24]

The rise of social media has created many legal questions in the contexts of privacy, evidence, and employment.[25] One of these questions asks whether employers should be legally permitted to access private employee and applicant social media passwords.[26]

B. Arguments in Support of Password Protection Legislation

There are two arguments that support the enactment of password protection legislation. First, such legislation is supported by underlying constitutional protections, which Americans value.[27] Second, social media privacy benefits employers by shielding them from discrimination claims, focusing on job relatedness, and reducing confusion.[28] These arguments are each further explained below.

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19. Irfan Ahmad, *The History of Social Media [Infographic]*, SOCIAL MEDIA TODAY (Apr. 27, 2018), https://www.socialmediatoday.com/news/the-history-of-social-media-infographic-1/522285/.

20. *Id.*

21. Belle Wong, *Top Social Media Statistics and Trends of 2024*, FORBES ADVISOR, https://www.forbes.com/advisor/business/social-media-statistics/ (May 18, 2023, 2:09 PM).

22. Dixon, supra note 15.

23. Wong, *supra* note 21.

24. Rohit Shewale, *Social Media Users and Statistics in 2024*, DEMANDSAGE (Jan. 9, 2024), https://www.demandsage.com/social-media-users/ [https://perma.cc/96BR-ZGLW].

25. *See* discussion *infra* Parts II.B.1, II.B.2, II.C.1, II.C.2.

26. *See* discussion *infra* Parts II.B.2, II.C.2.

27. *See* discussion *infra* Part II.B.1.

28. *See* discussion *infra* Part II.B.2.

1. Constitutional Protections and the Value of Privacy

The ideals behind the First and Fourth Amendments underscore the implications and importance of social media password protections and demonstrate that privacy is important to Americans generally.[29]

The First Amendment provides freedom of speech protection to public employees.[30] In *Connick v. Myers*, the Supreme Court of the United States addressed the requirements for First Amendment protected speech and set forth the two-prong *Pickering-Connick* test.[31] Under this test, suppressed employee speech is protected speech if the employee demonstrates two things: (1) that their suppressed speech addressed a matter of public concern, and (2) their free speech interest outweighed the public employer's efficiency interest.[32] Under the *Pickering-Connick* test, employees have been afforded First Amendment protection over speech posted to social media platforms.[33] Further, the United States Court of Appeals for the Fourth Circuit has held that even the simple action of "liking" a page on Facebook equates to protected speech.[34]

Additionally, the Fourth Amendment provides that individuals have a reasonable expectation of privacy from unreasonable intrusion by government actors.[35] In *United States v. Katz*, the Supreme Court of the United States held that an individual has a right to privacy from government actors if the individual has a subjective expectation of privacy and if society has recognized that expectation as objectively reasonable.[36] Traditionally, the Fourth Amendment is asserted in the criminal context, but it is also applicable to public employees, and protects against intrusions by the government as

29. The First Amendment protects freedom of speech, the press, assembly, and the right to petition the Government for a redress of grievances. U.S. CONST. amend. I. The Fourth Amendment protects individuals from unreasonable searches and seizures by the government. U.S. CONST. amend. IV.

30. U.S. CONST. amend. I.

31. 461 U.S. 138, 169 (1983).

32. *Id.*

33. Carlson, *supra* note 17, at 485–86. For example, in *Mattingly v. Milligan*, the United States District Court for the Eastern District of Arkansas held that a Facebook post criticizing a County Circuit Clerk for actions taken within his official capacity is a matter of public concern and thus qualifies as First Amendment protected speech. No. 11CV00215, 2011 WL 5184283, at 4 (E.D. Ark. Nov. 1, 2011).

34. Bland v. Roberts, 730 F.3d 368, 386 (4th Cir. 2013).

35. United States v. Katz, 389 U.S. 347, 350 (1967) ("[T]he Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all.").

36. *Id.* at 360–61 (Harlan, J., concurring).

an employer.[37] Courts have recognized that there is no objectively reasonable expectation of privacy when one posts information on social media platforms.[38] Despite this, it is possible that when an individual opts into privacy settings on social media platforms, they do not lose—but rather reinforce—their expectation of privacy.[39]

These First and Fourth Amendment constitutional protections demonstrate that privacy, even on social media, is valued. However, a significant number of Americans believe that their valued social media privacy is not adequately protected.[40] A Pew Research Center study reported that 66% of Americans stated that "current laws are not good enough [to] protect[] people's privacy . . . ."[41] Protecting employee and applicant social media passwords through password protection legislation honors the principles upon which these constitutional protections stand and increases social media privacy protections.[42]

2. Win-Win: Employee Social Media Privacy Benefits Employers

Password protection legislation benefits both employees and employers. Employees benefit from having increased social media privacy while employers benefit from avoiding reliance on protected information and instead focusing on job relatedness in hiring.

a. Prevents Employers from Using Protected Information During Hiring

The risk of making a hiring decision based upon protected information is eliminated when employers refrain from requesting and

37. Alexander Naito, Comment, *A Fourth Amendment Status Update: Applying Constitutional Privacy Protection to Employees' Social Media Use*, 14 U. PA. J. CONST. L. 849, 856 (2012).

38. Handelman, *supra* note 17, at 684. *See* United States v. Meregildo, 883 F. Supp. 2d 523, 526 (S.D.N.Y. 2012) (holding that an individual who posted a picture to Facebook had no expectation of privacy due to the possibility of "friends" who have access to the post sharing the post with the public); Chaney v. Fayette Cnty. Pub. Sch. Dist., 977 F. Supp. 2d 1308, 1315–16 (N.D. Ga. 2013) (finding that individuals had no expectation of privacy when they posted pictures to Facebook, specifically when the individual selected to share their pictures with their "friends" and their "friends' friends").

39. Handelman, *supra* note 17, at 685–86.

40. Lee Rainie, *Americans' Complicated Feelings About Social Media in an Era of Privacy Concerns*, PEW RSCH. CTR. (Mar. 27, 2018), https://www.pewresearch.org/short-reads/2018/03/27/americans-complicated-feelings-about-social-media-in-an-era-of-privacy-concerns/.

41. *Id.*

42. *Id.*

accessing applicant social media.[43] Social media accounts can reveal otherwise not readily available applicant characteristics, which can lead to discrimination.[44] The potential for discrimination is demonstrated by the Journal of Applied Psychology's 2020 study, which focused on 266 applicant Facebook profiles.[45] In the study, some information on the profiles related to job qualifications like education, work experience, and extra-curricular activities.[46] However, the profiles also contained applicant characteristics that employers are legally prohibited from considering while hiring.[47] For example, 100% of the profiles included gender, race, and ethnicity information, 59% demonstrated sexual orientation, 41% included religious affiliation, 7% indicated disability status, and 3% exemplified pregnancy status.[48] If an employer were to discover protected information on social media—such as race, religion, or gender—and then subsequently rely on that information when making a hiring decision, the employer may face a Title VII discrimination claim.[49]

Permitting uncontrolled employer access to applicant social media inherently increases the risk that an employer will rely on legally protected characteristics while hiring.[50] Some employers may intentionally rely on this information, while others may do so inadvertently, due to an unconscious or implicit bias.[51] Unconscious or

43. *See* Rose Wong, *Stop Screening Job Candidates' Social Media*, HARV. BUS. REV., Sept.–Oct. 2021 [hereinafter *Stop Screening Social Media*], https://hbr.org/2021/09/stop-screening-job-candidates-social-media.

44. Tess Traylor-Notaro, Note, *Workplace Privacy in the Age of Social Media*, 7 GLOB. BUS. L. REV. 133, 153 (2018) (stating that social media screening in the hiring process can reveal information that may constitute illicit discriminatory grounds unrelated to the job qualifications); *see also* Timothy J. Buckley, Note, *Password Protection Now: An Elaboration on the Need for Federal Password Protection Legislation and Suggestions on How to Draft It*, 31 CARDOZO ARTS & ENT. L.J. 875, 883 (2013). The author is indebted for part of the title to this article to Timothy Buckley.

45. Zhang et al., *What's on Job Seekers' Social Media Sites? A Content Analysis and Effects of Structure on Recruiter Judgements and Predictive Validity*, 105 J. APPLIED PSYCH. 1530, 1530–31 (2020), https://pubmed.ncbi.nlm.nih.gov/32162953/.

46. *Id.*; *see also Stop Screening Social Media*, *supra* note 43 (stating that by screening an applicant's social media, hiring managers can discover information which they are not allowed to ask about during an interview).

47. *Stop Screening Social Media*, *supra* note 43.

48. *Id.*

49. Title VII of the Civil Rights Act of 1964 made it illegal for employers to refuse to hire, fire, take adverse action against, or otherwise discriminate against individuals because of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2; *see also* Traylor-Notaro, *supra* note 44, at 153 (framing the situation in which an employer screens an applicant's social media, discovers the applicant is pregnant, and then takes adverse action against the applicant, and stating that the applicant may file a discrimination suit claiming that adverse action was taken due to her pregnancy).

50. Buckley, *supra* note 44, at 883.

51. *See, e.g.*, Samia E. McCall, *Risks of Using Social Media to Screen Job Candidates*, ADVOC., May 2017, at 42 (illustrating implicit bias in a study where two applicants had the same qualifications but one applicant's Facebook profile indicated that they were Christian

implicit bias is the mental process that causes individuals to behave in ways that reinforce stereotypes, even when that individual may consciously not approve of the behavior.[52]

Password protection legislation eliminates the risk of discrimination by restricting employer access to protected information altogether and thus deters employers from using it in employment decisions.[53] Additionally, password protection legislation can reserve possible employer defenses against discrimination claims and thus protect employers against Title VII discrimination claims.[54]

b. Supports Hiring Based on Job Relatedness

In addition to being protected, information on social media can also lack job relatedness.[55] Turnover and hiring new employees is costly and time consuming for employers.[56] Therefore, it is important that employers hire employees who are the right fit for the role and company.[57] To hire the "right fit," employer hiring decisions should focus on an applicant's qualifications rather than their lifestyle choices, which the employer may or may not agree with.[58] For example, employers should focus on factors like long-term potential, ability to produce results, enthusiasm and passion, putting skills to action, fit within the work environment, teamwork abilities, ambition, and responsiveness.[59] But it is proven that when employers

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and another applicant's profile indicated they were Muslim, the Christian applicant received callback interviews 17% of the time while the Muslim applicant received callback interviews 2% of the time).

52. Becca Carnahan & Christopher Moore, *Actively Addressing Unconscious Bias in Recruiting*, HARV. BUS. SCH. (June 16, 2023), https://www.hbs.edu/recruiting/insights-and-advice/blog/post/actively-addressing-unconscious-bias-in-recruiting.

53. Buckley, *supra* note 44, at 883.

54. *See* Sidd Rao, *The Complex Web of Social Media and Employment Law*, HOUS. LAW., Sept.–Oct. 2019, at 34 (providing that "[t]he use of social media screening may remove some defenses the employer may otherwise have had to a potential discrimination claim").

55. Emma White, *The Impact of Social Media Screening on Hiring Decisions*, BCHEX (June 5, 2024), https://blog.bib.com/blog/the-impact-of-social-media-screening-on-hiring-decisions.

56. John Hall, *The Cost of Turnover Can Kill Your Business and Make Things Less Fun*, FORBES, https://www.forbes.com/sites/johnhall/2019/05/09/the-cost-of-turnover-can-kill-your-business-and-make-things-less-fun/ (May 9, 2017, 7:00 AM).

57. *How Managers Should Select New Hires and What it Takes to Keep Them*, CRADLEFIN CONSULTANTS (June 15, 2022), https://cradlefinconsultants.com/how-managers-should-select-new-hires-and-what-it-takes-to-keep-them/ ("When interviewing a candidate, . . . consider their fit for the position . . . [and] measure their fit for the organization . . . .").

58. Rao, *supra* note 54, at 34 (framing the situation where an applicant complains that they were discriminated against in the hiring process for their race and the employer cannot claim ignorance of the applicant's race due to the performance of a social media screening which revealed the applicant's race); *see also* Handelman, *supra* note 17, at 678.

59. *How Managers Should Select New Hires and What it Takes to Keep Them*, *supra* note 57.

use applicant social media screenings, they are influenced by factors such as relationship status and age.[60] These factors lack job relatedness because neither the status of one's relationship nor their age affects their ability to perform their job.[61] Despite the lack of job relatedness, employers often still consider the protected qualities that they have knowledge of in hiring decisions.[62] Employers even unintentionally consider protected characteristics due to unconscious biases.[63] Unconscious biases present themselves in recruitment as a preference for one applicant over another because of "culture fit," meaning that one applicant is selected because that applicant shares qualities that the employer implicitly agrees with.[64] Restricting employer access to these unrelated factors would support employers in hiring the most qualified applicants.

c. Avoids Employer Social Media Policy Confusion

Developing workplace social media policies can be confusing for employers due to the variety of forms they can take and the topics they can cover.[65] This confusion is compounded by the fact that some states have password protection legislation while others do not.[66] Employers that operate and maintain employees in multiple states must address and abide by the protections of each individual state, adding complexity and confusion.[67] By enacting straight-forward state legislation, Pennsylvania can provide clear instruction to employers within the state on how they may and may not access employee and applicant social media accounts.[68]

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60. *Stop Screening Social Media*, *supra* note 43.

61. *See Pre-Employment Inquiries and Marital Status or Number of Children*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/pre-employment-inquiries-and-marital-status-or-number-children (last visited Nov. 16, 2024) ("Generally, employers should not use non job-related questions involving marital status, number and/or ages of children or dependents, or names of spouses or children of the applicant."); *see also Hiring Decisions Based on Age*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/employers/small-business/hiring-decisions-based-age (last visited Nov. 16, 2024) ("In general, you may not consider an applicant's age when making hiring decisions.").

62. *Stop Screening Social Media*, *supra* note 43.

63. Carnahan & Moore, *supra* note 52. "Unconscious bias" is the term for the mental process that causes an individual to act in ways that reinforce stereotypes even when that behavior would be deemed counter to conscious personal values. *Id.*

64. *Id.*

65. Saul Ewing LLP, *What Handbook Changes Will 2015 Bring?*, 25 PA. EMP. L. LETTER 4 (2015).

66. *Id.*

67. *Id.*

68. *See* Brittany Dancel, Comment, *The Password Requirement: State Legislation and Social Media Access*, 9 FIU L. REV. 119, 131 (2013) (stating that the lack of uniformity among existing statutes causes difficulty for employers with workers in multiple states).

C. Arguments Against Password Protection Legislation

Opponents of password protection legislation have often raised three arguments against such legislation. First, opponents and employers argue that social media is a forum of public information that can and should be freely accessed.[69] Second, opponents and employers oppose legislation because social media access is useful for screening applicants and monitoring current employees.[70] Third, opponents and employers believe legislation is unnecessary.[71]

1. Social Media Posts Are Public Information

Joshua Hawkins, a technology journalist and commentator, believes that once information is placed on social media, it is publicly available, no matter the privacy settings used.[72] Even if one employs privacy settings and restricts viewership to certain individuals, those entrusted individuals may further share the information.[73] This view has some support. For example, cyber security expert Greg Scott stated, "[t]here is no such thing as social media privacy, no matter what privacy settings are available, even if the social media company is trustworthy[.]"[74] Due to this perceived lack of privacy, those opposing password protection legislation argue that employers should be able to access and utilize this publicly accessible information.[75] Further, they argue that applicants and employees should not place information on social media that they would prefer an employer not see.[76]

2. Social Media Screening Is Advantageous to Employers

Social media screening is a valuable tool to employers because it supports hiring decisions and helps monitor employee behavior.[77]

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69. Joshua Hawkins, *Why Social Media Will Never Offer True User Privacy*, LIFEWIRE, https://www.lifewire.com/why-social-media-will-never-offer-true-user-privacy-5192229 (July 12, 2021, 3:33 PM).

70. Handelman, *supra* note 17, at 674.

71. PHILIP GORDON ET AL., SOCIAL MEDIA PASSWORD PROTECTION AND PRIVACY: THE PATCHWORK OF STATE LAWS AND HOW IT AFFECTS EMPLOYERS 3 (2013), http://www.littler.com/files/press/pdf/WPI-Social-Media-Password-Protection-Privacy-May-2013.pdf.

72. Hawkins, *supra* note 69.

73. *Id.*

74. *Id.*

75. *Id.*

76. *See, e.g.*, Hillary Gunther, Note, *Employment, College Students, & Social Media, a Recipe for Disaster: Why the Proposed Social Networking Online Protection Act Is Not Your Best Facebook "Friend*,*"* 24 ALB. L.J. SCI. & TECH. 515, 540 (2014).

77. *See* discussion *infra* Parts II.C.2.a, II.C.2.b.

a. Social Media Screening Supports Hiring Decisions

Many employers believe that screening applicants through social media is practical and provides liability protections.[78] Specifically, employers believe that inquiring into applicant social media profiles reveals information about a candidate's personality and interests that are not apparent in a resume or interview.[79] Knowing more about an applicant's personality and interests can help an employer assess their behavior, communication skills, and potential cultural fit.[80] Employers value social media screening so much that 20% of surveyed hiring managers stated that they were unlikely to consider a candidate without a social media presence.[81]

Social media can allow employers to look into an applicant's personal preferences and personality—information not typically accessible in the traditional hiring process through resumes, interviews, and references.[82] Specifically, employers can use social media screening to discern (and avoid)[83] undesirable applicant qualities like exaggeration of qualifications, poor work ethic, proof of violence and unlawful activities, sexually explicit content, and discriminatory tendencies.[84] Reviewing an applicant's social media can help an employer make a hiring decision that positively impacts the entire workplace's safety, productivity, and culture.[85]

Additionally, many employers believe that social media screening helps avoid liability for negligent hiring.[86] Along with the rise of social media, there has been a rise in negligent hiring claims

78. Seventy percent of employers believe that every hiring manager should screen the social media of applicants. *Surprising Social Media Recruiting Statistics*, APOLLO TECH. (Sept. 22, 2023), https://www.apollotechnical.com/social-media-recruiting-statistics/ [https://perma.cc/24S9-3B3V] (citing Express Emp. Pros., *71% of Hiring Decision-Makers Agree Social Media Is Effective for Screening Applicants*, CISION NEWSWIRE (Oct. 14, 2020, 8:50 AM), https://www.prweb.com/releases/71-of-hiring-decision-makers-agree-social-media-is-effective-for-screening-applicants-815808007.html).

79. *Should Employers Use Social Media to Screen Job Candidates?*, WORKBRIGHT, https://workbright.com/should-employers-use-social-media/ (last visited Nov. 16, 2024).

80. *Id.*

81. *Surprising Social Media Recruiting Statistics*, *supra* note 78.

82. *See* Handelman, *supra* note 17, at 674; *Stop Screening Social Media*, *supra* note 43 (stating that by screening an applicant's social media, a hiring manager can discover information which they are not allowed to ask about during an interview).

83. Fifty-four percent of surveyed hiring managers stated that they had ruled out an applicant following a social media screening due to discovering undesirable information on the applicant's profiles. *Surprising Social Media Recruiting Statistics*, *supra* note 78.

84. Melissa A. Salimbene & Lindsay Dischley, *Things to 'Like' and 'Unlike' About Social Media*[:] *What Every Employer Needs to Know*, N.J. LAW., Apr. 2019, at 50.

85. *Id.*

86. Negligent hiring is an agency theory under which employers can be held liable to an injured party for hiring employees "who posed a reasonably foreseeable risk of inflicting personal harm on others." Handelman, *supra* note 17, at 663 (citing RESTATEMENT (SECOND) OF AGENCY § 213(b) (1958)).

resulting from employee harassment on social media platforms.[87] Employers can avoid these negligent hiring claims by conducting a reasonable investigation or background check.[88] A reasonable investigation into the dangers or unproductivity of an applicant can be conducted by employers through applicant social media screening.[89] In contrast to outsourcing background checks to an agency, social media screening is a fast and cost effective way for employers to avoid liability.[90]

b. Social Media Screening Monitors Employee Behavior

Employers also use social media to monitor current employees to protect four aspects of the workplace: (1) safety, (2) reputation, (3) systems and information, and (4) honesty.[91] First, some employers use social media monitoring as a tool to protect the workplace.[92] Social media monitoring can reveal employee hate speech, harassment, and threats of violence that allow the employer to quickly address unsafe workplace behavior.[93] Second, some employers monitor social media to help protect the positive reputation of the workplace.[94] Third, some employers report monitoring social media to prevent the unintended disclosure of confidential information as well as scams and viruses that can harm the workplace's computer network system.[95] Fourth, social media monitoring can be used to

87. *See* Salimbene & Dischley, *supra* note 84, at 51 (stating that employers can possibly be held liable for failing to conduct applicant social media screening in the situation where a newly hired employee sexually harasses a co-worker, and a screening would have revealed sexually explicit posts).

88. *See* Handelman, *supra* note 17, at 664. The requirements for reasonable investigations and background checks differ between states; however, "factors such as 'habitual drinking and drug use, habitual carelessness, forgetfulness, inexperience, mental and physical defects, and a propensity for recklessness or viciousness' can show unfitness to perform a job." *Id.*

89. *Id.* at 664–65.

90. Colin Gordon, *Social Media Screening: Pros, Cons, and Tips*, RECRUITERS LINEUP (Aug. 18, 2024), https://www.recruiterslineup.com/social-media-screening-pros-cons-and-tips/.

91. *See* Ryan Howard, *The History of Employment Background Screening*, VERIFIRST (Jan. 26, 2018), https://blog.verifirst.com/the-history-of-employment-background-screening; Anthony Smith, Note, *Freedom of Expression and Social Media: How Employers and Employees Can Benefit from Speech Policies Rooted in International Human Rights Law*, 32 IND. INT'L & COMPAR. L. REV. 629, 650 (2022); Salimbene & Dischley, *supra* note 84, at 51.

92. Howard, *supra* note 91.

93. Smith, *supra* note 91, at 650.

94. *Id.* (stating that employers have a legitimate interest in preventing speech which would result in scrutiny or sanctions); *see also* Handelman, *supra* note 17, at 662.

95. Salimbene & Dischley, *supra* note 84, at 51; *see also* Naito, *supra* note 39, at 883 (arguing that some employers, especially public employers, have an even greater interest in

instill honesty in the workplace.[96] For example, a survey by Career Builder found that 43% of employers caught untruthful employees posting on social media while feigning an illness to the employer to receive time off work.[97]

3. Password Protection Legislation Is Unnecessary

Password protection legislation is also commonly characterized as unnecessary.[98] Specifically, opponents argue that social media privacy is not a prominent issue because employers do not commonly request employee and applicant social media passwords.[99] In 2014, during the height of password protection legislation, there were only seven documented complaints from employees.[100] Jared Cook, a New York attorney commenting on New York's recent password protection legislation, stated his belief that "the practice of asking for personal passwords may be more common among smaller employers."[101] Further, opponents of password protection legislation argue that enough protection is provided through the employee's ability to pursue a common law right to privacy claim.[102] Also, opponents state that employees select their workplace and thus can leave if they do not want to provide their social media passwords.[103]

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monitoring employee social media due to public employees' access to sensitive and confidential information).

96. *See* Salimbene & Dischley, *supra* note 84, at 51 (citing *Increased Number of Workers Calling in Sick When They Aren't, Finds CareerBuilder's Annual Survey*, CAREERBUILDER (Nov. 16, 2017), https://press.careerbuilder.com/2017-11-16-Increased-Number-of-Workers-Calling-In-Sick-When-They-Arent-Finds-CareerBuilders-Annual-Survey).

97. *Id.*

98. GORDON ET AL., *supra* note 71; *see also* Robert Sprague, Comment, *No Surfing Allowed: A Review & Analysis of Legislation Prohibiting Employers from Demanding Access to Employees' & Job Applicants' Social Media Accounts*, 24 ALB. L.J. SCI. & TECH. 481, 513 (2014).

99. GORDON ET AL., *supra* note 71; *see also* Sprague, *supra* note 98.

100. Sprague, *supra* note 98, at 495.

101. Tlaige, *supra* note 13.

102. Sprague, *supra* note 98, at 501. *See, e.g.*, Ehling v. Monmouth-Ocean Hosp. Serv. Corp., 872 F. Supp. 2d 369, 374 (D.N.J. 2012) (refusing to dismiss an employee's right of privacy claim because the employee may have had "a reasonable expectation that her Facebook posting would remain private, considering that she actively took steps to protect her Facebook page from public viewing"); Pure Power Boot Camp v. Warrior Fitness Boot Camp, 587 F. Supp. 2d 548, 562–63 (S.D.N.Y. 2008) (holding that a former employee had a reasonable expectation of privacy in his personal email accounts, stored on third-party computer systems, that were password protected). *But see* Pietrylo v. Hillstone Rest. Grp., No. 06-5754, 2009 WL 3128420, at *6 (D.N.J. Sept. 25, 2009) (denying an employer's motion for judgment as a matter of law under FED. R. CIV. P. 50(b) following the finding that the employer violated the Stored Communications Act but did not violate the employee's common law right of privacy when managers accessed the employee's MySpace chatgroup without permission).

103. Dancel, *supra* note 68, at 155 (arguing that talented applicants and employees would have no interest in working for an employer that requests log-in information to access

D. The Current Status of Password Protection Legislation in the United States

Currently, there is no federal password protection legislation in the United States, but over half of the states have enacted legislation.[104]

1. Existing and Failed Federal Legislation[105]

While there is no existing federal password protection legislation, there is an existing connected federal law.[106]

a. Existing but Inadequate: The Stored Communications Act

The Stored Communications Act (SCA)[107] was enacted in 1986 as Title II of the Electronic Communications Privacy Act.[108] The SCA protects against unauthorized access to stored communications by protecting the privacy of complex electronic communication services (ECS) and remote computing services (RCS).[109] With the SCA, Congress intended to protect modern concepts of privacy that arise with continuing technological developments.[110] Further, in *Konop v. Hawaiian Airlines, Inc.*, the United States Court of Appeals for the Ninth Circuit interpreted the SCA's legislative history and

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employee social media accounts and would be able to leave that workplace due to a variety of employment choices).

104. *Social Media Privacy Laws in Employment: 50-State Survey*, JUSTIA, https://www.justia.com/employment/employment-laws-50-state-surveys/social-media-privacy-laws-in-the-workplace-50-state-survey/ (Sept. 2022).

105. This article advocates for the Pennsylvania General Assembly to enact employee and job applicant social media password protection legislation to protect employees and applicants in Pennsylvania; however, some scholars believe that the best way to address this issue is through the enactment of federal legislation. *See* Buckley, *supra* note 44, at 890 (stating that federal password protection legislation would provide uniform protections to employers and applicants throughout the United States while promoting a public forum for discussion on the issue of social media privacy in the workplace).

106. *See* 18 U.S.C. § 2701(a).

107. The operative language of the SCA provides:

> Except as provided in subsection (c) of this section, whoever (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section.

Id.

108. Traylor-Notaro, *supra* note 44, at 137.

109. *Id.*; *see also* Brittanee L. Friedman, Note, *#PasswordProtection: Uncovering the Inefficiencies of, and Not-So-Urgent Need for, State Password-Protection Legislation*, 48 SUFFOLK U. L. REV. 461, 467–68 (2015).

110. Friedman, *supra* note 109, at 467–68.

determined that Congress intended to protect electronic communications that were configured to be private, such as postings on a private electronic bulletin board.[111]

Courts have addressed whether employer access to private employee and applicant social media accounts constitutes a violation of the SCA.[112] First, the United States District Court for the Central District of California in *Crispin v. Christian Audigier, Inc.* addressed whether private communications through social media sites were covered under the SCA.[113] In *Crispin*, the court held that social media sites, specifically Facebook and MySpace, constituted both ECS and RCS and therefore were covered under the SCA.[114] In this instance, however, the *Crispin* court's application of SCA protection to social media did not provide total protection to employee and applicant private social media accounts.[115] Under 18 U.S.C.A. § 2701(c), the protections of Section 2701(a) do not apply to conduct authorized by the individual providing the communication service or by the user of that service.[116] Thus, if an employer requests the password to, or access to, an employee's or applicant's social media account and the employee or applicant complies, the employee has likely given the employer authorization to access the social media account and the protections of the SCA do not apply.[117] Therefore, while the SCA *can* protect employee and applicant social media privacy in some circumstances, the SCA does not prevent an employer from requesting access to social media accounts.[118] Due to this gap in SCA protections, specific password protection legislation is necessary.

b. Unfinished Business: The Password Protection Act and the Social Networking Online Protection Act

There have been two attempts by Congress to pass specific password protection legislation. First, Congress attempted to enact the Password Protection Act of 2012 (PPA),[119] which was introduced in

111. 302 F.3d 868, 875 (9th Cir. 2002). In *Konop*, an airline pilot who ran a private bulletin website where he posted critiques of his employer brought suit against his employer alleging that when the Vice President of the company used false pretenses to gain access to the bulletin, the employer violated the Stored Communications Act. *Id.* at 873.

112. Traylor-Notaro, *supra* note 44, at 137.

113. 717 F. Supp. 2d 965, 971–72 (C.D. Cal. 2010).

114. *Id.* at 991.

115. Traylor-Notaro, *supra* note 44, at 141.

116. *Id.* at 142.

117. *Id.*

118. *See id.*

119. Password Protection Act of 2012, S. 3074, 112th Cong. (2012); Password Protection Act of 2012, H.R. 5684, 112th Cong. (2012).

the Senate by Senator Richard Blumenthal (D-CT) and in the House by Representative Martin Heinrich (D-NM).[120] The PPA was designed to prohibit employers from compelling or coercing employees and job applicants to authorize access to protected computers and to protect employees and applicants from discrimination and retaliation for failing to comply with such requests.[121] The PPA focused on where the information was stored, i.e., on protected computers, and did not specifically focus on social media platforms.[122] The PPA was referred to the House Committee on the Judiciary and subsequently the Subcommittee on Crime, Terrorism, and Homeland Security, but never received a vote, and thus died in Congress.[123]

Second, Congress attempted to enact the Social Networking Online Protection Act (SNOPA), which was sponsored by Representative Eliot Engel (D-NY) and introduced in the House of Representatives in 2013.[124] The SNOPA was drafted to prevent employers, higher education institutions, and public schools from requiring employees, applicants, or students to provide passwords to social media accounts.[125] The SNOPA was referred to the House Committee on Education and the Workforce and subsequently the Subcommittees on Early Childhood, Elementary, and Secondary Education, Higher Education and Workforce Training, and Workforce Protections, but was never brought up for a vote, and also died in Congress.[126]

2. Existing State Legislation

While Congress has been unsuccessful at passing federal password protection legislation, over half of the states have passed their own legislation protecting employee and applicant social media privacy.[127] Specifically, twenty-seven states plus the District of

120. Jordan M. Blanke, *The Legislative Response to Employers' Requests for Password Disclosure*, 14 J. HIGH TECH. L. 42, 78 (2014).

121. S. 3074; H.R. 5684.

122. Blanke, *supra* note 120.

123. *H.R. 5684 (112th): Password Protection Act of 2012*, GOVTRACK, https://www.govtrack.us/congress/bills/112/hr5684 (last visited Nov. 16, 2024).

124. Social Networking Online Protection Act, H.R. 537, 113th Cong. § 2(a) (2013).

125. Gunther, *supra* note 76, at 525.

126. *H.R. 537 – Social Networking Online Protection Act*, CONGRESS.GOV, https://www.congress.gov/bill/113th-congress/house-bill/537/all-actions (last visited Nov. 16, 2024).

127. *Social Media Privacy Laws in Employment: 50-State Survey*, *supra* note 104. This legislation comes in two basic forms: (1) where the employee has a right to pursue civil action in court, and (2) where the legislation is enforced by a designated administrative agency. *See* discussion *infra* note 174; *see also* Sprague, *supra* note 98, at 493.

Columbia and Guam have enacted password protection legislation.[128] Despite state-by-state enactment of legislation, all of the legislation shares three distinct features: (1) a definition of social media, (2) a general protection for employees and applicants against employer social media password requests, and (3) a set of exceptions that permit employers to request social media passwords under specific circumstances.[129] Each of these features is further explained below.

a. Defining "Social Media"

An important component of password protection legislation is the scope of protection.[130] Password protection legislation typically begins with a definition of "social media" and state legislatures have crafted differing definitions that encompass a variety of electronic mediums.[131] Arkansas and California, for example, use the term "social media" and define it as "an electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, e-mail, online services or accounts, or Internet website profiles or locations."[132] Illinois, New Jersey, and New Mexico use the term "social networking website" defined as:

> [i]nternet-based service that allows individuals to: [(1)] construct a public or semi-public profile within a bounded system, created by the service; [(2)] create a list of other users with whom they share a connection within the system; and [(3)] view and navigate their list of connections and those made by others within the system.[133]

Michigan uses "personal internet account" and defines the term as an "account created via a bounded system established by an internet-based service that requires a user to input or store access information via an electronic device to view, create, utilize, or edit the user's account information, profile, display, communications, or

128. *Privacy of Employee and Student Social Media Accounts*, *supra* note 11; *see also* N.Y. LAB. LAW § 201-i (Consol. 2024).

129. *See* Dancel, *supra* note 68 at 126 (reasoning that these "statutes have four basic sections: [1] Prohibitions or Restrictions; [2] Definitions; [3] Exceptions and Exemptions; and [4] Enforcement Mechanisms").

130. Sprague, *supra* note 98, at 488.

131. Dancel, *supra* note 68, at 131.

132. ARK. CODE ANN. § 11-2-124(a)(3) (West 2014); CAL. LAB. CODE § 980(a) (West 2014). *See also* Sprague, *supra* note 98, at 489.

133. 820 ILL. COMP. STAT. ANN. 55/10(6)(a) (West 2017); N.M. STAT. ANN. § 50-4-34(E) (West 2023). *See also* Sprague, *supra* note 98, at 489.

stored data."[134] Most recently, New York used "personal account" and defined it as:

> an account or profile on an electronic medium where users may create, share, and view user-generated content, including uploading or downloading videos or still photographs, blogs, video blogs, podcasts, instant messages, or internet website profiles or locations that is used by an employee or an applicant exclusively for personal purposes.[135]

The difference in state definitions can likely be attributed to the fact that, because social media cannot be defined by any specific scope, format, topic, or audience, providing a single definition that covers all of the varying technologies associated with social media is difficult.[136] Further, differences were created due to the legislation being drafted and enacted at different times over the course of the last decade as social media itself and the understanding of it has simultaneously evolved.[137]

b. General Social Media Password Protections

Another component of password protection legislation is the statement of general protections.[138] Generally, password protection legislation protects employees and applicants from employer requests for private social media passwords.[139] This legislation prevents employers from retaliating against those who do not provide access to their private social media accounts.[140] Uniquely, New Mexico only extends protection to job applicants and not employees.[141]

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134. MICH. COMP. LAWS ANN. § 37.272(d) (West 2012).

135. N.Y. LAB. LAW § 201-i(1)(d) (Consol. 2024).

136. Jeffrey W. Treem et al., *What We Are Talking About When We Talk About Social Media: A Framework For Study*, 10 SOCIO. COMPASS 768, 768–69 (2016), https://deepblue.lib.umich.edu/bitstream/handle/2027.42/134199/soc412404_am.pdf.

137. Dalvin Brown, *Remember Vine? These Social Networking Sites Defined the Past Decade*, USA TODAY, https://www.usatoday.com/story/tech/2019/12/19/end-decade-heres-how-social-media-has-evolved-over-10-years/4227619002/ (Dec. 30, 2019, 12:22 PM) (stating that within a decade social media has greatly evolved).

138. Dancel, *supra* note 68, at 126–27.

139. *Id.*

140. In Maryland, for example, an employer may not "discharge, discipline, or otherwise penalize or threaten to discharge, discipline, or otherwise penalize an employee for an employee's refusal to disclose [or] . . . fail or refuse to hire any applicant as a result of the applicant's refusal to disclose any information . . . ." MD. CODE ANN., LAB. & EMPL. § 3-712(c)(1)–(2) (West 2013).

141. New Mexico's general protection declares:

> It is unlawful for an employer to request or require a prospective employee to provide a password in order to gain access to the prospective employee's account or profile on

Many state legislatures, recognizing common ways for employers to bypass the prohibition on requesting passwords, included provisions preventing employers from accessing social media through other means. Some states have taken a broad approach and use general language. For example, New Mexico mandates that employers may not "demand access *in any manner* to an employee's or prospective employee's account or profile on a social networking website."[142] Other states use concise language and specifically ban certain actions. For example, California, Connecticut, Hawaii, Illinois, Michigan, Oklahoma, Vermont, Washington, West Virginia, Wisconsin, and other states ban the practice of "shoulder surfing," which occurs when an employer demands that an employee or applicant access their social media account in the employer's presence.[143] Arkansas, Colorado, Connecticut, Delaware, Illinois, Oregon, Virginia, Washington, and other states prohibit employers from requesting that employees and applicants "friend" another employee, thereby providing the employer access to the social media account.[144] Colorado, Delaware, Hawaii, Vermont, Washington, and other states prevent employers from asking their employees or applicants to change their social media account privacy settings.[145]

c. Exceptions Permitting Employer Requests

Following the statement of general protection, most password protection legislation includes a set of exceptions that focus on special circumstances during which an employer may request password information.[146] Since these exceptions allow employers to request password information, they function as a loophole to the protections.[147] Although some exceptions are critical because they allow employers to maintain important functions, exceptions must be limited and not misused in order to ensure employees and

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a social networking web site or to demand access in any manner to a prospective employee's account or profile on a social networking web site.

N.M. STAT. ANN. § 50-4-34(A) (West 2023).

142. *Id.* (emphasis added); *see also* NEV. REV. STAT. ANN. § 613.135(1)(a) (West 2013) (prohibiting an employer from "[d]irectly or indirectly, requir[ing], request[ing], suggest[ing] or caus[ing] any employee or prospective employee to disclose the user name, password or any other information that provides access to his or her personal social media account").

143. *See infra* Appendix A; *see also* Samuel A. Thumma, *When You Cannot "Just Say No": Protecting the Online Privacy of Employees and Students*, 69 S.C. L. REV. 1, 7 (2017).

144. *See infra* Appendix B; *see also* Thumma, *supra* note 143, at 7.

145. *See infra* Appendix C; *see also* Thumma, *supra* note 143, at 7.

146. Sprague, *supra* note 98, at 491 (noting that many password protection statutes provide more exemptions than prohibitions on requesting employee and applicant social media passwords).

147. *See* Dancel, *supra* note 68, at 132–33.

applicants are actually protected.[148] There are four common exceptions that permit employers to request employee and applicant social media passwords: (1) when necessary for complying with federal, state, or local laws,[149] (2) when the employee's social media is reasonably believed to be relevant to an investigation,[150] (3) to access an employer-issued account or electronic device,[151] and (4) when the employee is being investigated and disciplined for transferring the employer's confidential or financial information to the employee's personal social media account.[152] Additionally, there are three instances in which an employer is able to utilize information otherwise found on a private social media account: (1) when the information is already available in the public domain,[153] (2) when employers inadvertently receive employee and applicant passwords,[154] and (3) when the employer is a department of corrections[155] or state and local law enforcement agency.[156]

Though certain states provide stronger employee and applicant protections, all twenty-seven forms of password protection legislation serve the important purpose of protecting employee and applicant privacy. These states can and should serve as a model for the

148. *Id.* at 133–34.

149. *See infra* Appendix D.

150. *See infra* Appendix E.

151. *See infra* Appendix F.

152. *See* COLO. REV. STAT. ANN. § 8-2-127(4)(b) (West 2023) (requiring that the general provisions do not prevent an employer from "[i]nvestigating an employee's electronic communications based on the receipt of information about the unauthorized downloading of an employer's proprietary information or financial data to a personal website, internet website, web-based account, or similar account by an employee").

153. *See infra* Appendix G.

154. *See* OR. REV. STAT. ANN. § 659A.330(6) (West 2022).

> If an employer inadvertently receives the user name and password, password or other means of authentication that provides access to a personal social media account of an employee through the use of an electronic device or program that monitors usage of the employer's network or employer-provided devices, the employer is not liable for having the information but may not use the information to access the personal social media account of the employee.

Id.

155. *See* COLO. REV. STAT. ANN. § 8-2-127(1)(c) (West 2023) (ordering that for the purposes of this section, the definition of employer and thus the restrictions do "not include the department of corrections, county corrections departments, or any state or local law enforcement agency"); N.Y. LAB. LAW § 201-i(6) (Consol. 2024) (mandating that nothing in this section applies "to any law enforcement agency, a fire department or a department of corrections and community supervision").

156. *See* OR. REV. STAT. ANN. § 659A.330(7) (West 2022) (ordering that "[t]his section does not apply to an employer that is a law enforcement unit . . . ."); N.M. STAT. ANN. § 50-4-34(D) (West 2023) (stating "[n]othing in this section shall apply to a federal, state or local law enforcement agency"); N.Y. LAB. LAW § 201-i(6) (Consol. 2024) (mandating that nothing in this section applies "to any law enforcement agency, a fire department or a department of corrections and community supervision").

twenty-three states, like Pennsylvania, that have not enacted any form of password protection legislation.

III. PENNSYLVANIA NEEDS PASSWORD PROTECTION LEGISLATION NOW

It has been over a decade since Maryland enacted the first form of password protection legislation.[157] Many states quickly followed, but since, the enactment of new legislation and the conversation surrounding the issue have stagnated.[158] In Pennsylvania, the Pennsylvania General Assembly has not made any movement on the topic since the introduction of House Bill 1130 in June of 2013.[159]

However, New York's recent enactment of legislation in March of 2024 has revived this conversation.[160] Now, password protection legislation is needed more than ever due to the blurred boundaries between home and work caused by the Covid-19 pandemic combined with the increasing use of social media.[161]

A. Proposed Pennsylvania Password Protection Legislation

Pennsylvania's prior password protection bill, House Bill 1130, should be used as a model for a new bill. In addition to the provisions of House Bill 1130, further provisions modeled upon other states' successful password protection legislation should be added to strengthen the new bill.

1. Pennsylvania's Previous Attempt: House Bill 1130

On June 18, 2012, the Pennsylvania House of Representatives introduced House Bill 2332, the Social Media Privacy Protection Act.[162] The Bill sat in the House until January 3, 2013, when Representative Jesse White (D) re-introduced the Social Media Privacy

157. Borman, *supra* note 7, at 127.

158. *Id.*

159. *Bill Information (History) – House Bill 1130; Regular Session 2013-2014*, PA. GEN. ASSEMBLY, https://www.legis.state.pa.us/cfdocs/legis/home/bills/index.cfm (choose "2013-2014 Regular Session from the "Find Bills For" dropdown; then type "HB1130" in the "Bill Number" search box and click "SEARCH"; then click "[History]") (last visited Nov. 16, 2024).

160. Martinez, *supra* note 10. While the topic has recently gained more attention in New York, legislators never stopped the pursuit of password protection legislation. Specifically, bill sponsor and Assembly Member, Jeffrey Dinowitz, pushed for password legislation in New York for twelve years. Tlaige, *supra* note 13. Upon the enactment of legislation in New York, Dinowitz stated that he was inspired by the stories of situations where individuals' privacy was invaded "really inappropriately." *Id.*

161. *See* discussion *infra* Part III.B.

162. H.R. 2332, 2012 Gen. Assemb., Reg. Sess. (Pa. 2012).

Protection Act as House Bill 1130.[163] House Bill 1130 was amended and laid on the table on April 16, 2013, and again laid on the table on June 11, 2013.[164] There was no further action taken and the bill became inactive upon the conclusion of the two-year legislative session in 2014.[165] Since House Bill 1130 is inactive, a new bill must be introduced in the Pennsylvania House of Representatives or Senate.

Generally, the provisions of House Bill 1130 were similar to those of other states' successful password protection legislation.[166] House Bill 1130 contained a definition of social media, a general privacy protection, exceptions, and a method of enforcement.[167] Specifically, House Bill 1130 defined social media as "[i]nclud[ing], but . . . not limited to, social networking internet websites and any other forms of media that involve any means of creating, sharing and viewing user-generated information through an account, service or internet website."[168] The Bill provided protection to employee and applicant accounts that fell within this definition and stated that "[a]n employer may not request or require that an employee or prospective employee disclose any user name, password or other means for accessing a private or personal social media account, service or internet website."[169] Further, the Bill protected employees from discharge, discipline, threats of discharge and discipline, and any other penalties resulting from an employee's refusal to disclose protected information.[170] The Bill also prohibited an employer from refusing to hire an applicant on the basis that the applicant would not disclose protected information.[171] The exceptions built into House Bill 1130 did not restrain an employer from maintaining workplace policies governing accounts without privacy configurations such as the use of an employer's electronic communication device, the right to monitor the usage of employer-issued electronic communication devices, and the right to view and obtain employee and applicant social media information existing in the public domain.[172] Lastly, House Bill 1130 provided a remedy for violations of the general

163. *Bill Information (History) – House Bill 1130; Regular Session 2013-2014*, *supra* note 159.
164. *Id.*
165. *Id.*; *see also* PA. CONST. art. II, § 4 (providing that any bill that does not receive a vote within the two-year legislative session becomes inactive).
166. *See* Dancel, *supra* note 68, at 126.
167. H.R. 1130, 2013 Gen. Assemb., Reg. Sess. § 2 (Pa. 2013).
168. *Id.*
169. *Id.* § 3(A).
170. *Id.* § 3(B)(1).
171. *Id.* § 3(B)(2).
172. *Id.* § 3(C)(1)–(3).

prohibitions.[173] Specifically, the Bill stated that "[a]n employer who violates subsection (A) or (B) shall be subject to a civil penalty of up to $5,000 in addition to reimbursement for reasonable attorney fees."[174]

2. A New and Improved Bill

Although inactive, House Bill 1130 can serve as a model for a new password protection bill. Over a decade has elapsed since House Bill 1130 was crafted and other state laws have been tested. In response to the passage of time and commentary on existing legislation, three modifications to House Bill 1130 should be made to strengthen the new bill: (1) the addition of increased protections reserved for employers, (2) the inclusion of a definition for the term "other means" within the bill, and (3) the incorporation of a declaration of purpose.[175]

a. Maintaining Safety and Employer Function Through Increased Employer Protections

First, the drafter of the new bill in Pennsylvania should include increased employer protections in the new bill. Specifically, using Arkansas, California, Maine, Montana, and Oklahoma as models, the new bill should include an exception for employers to request usernames or passwords in connection with a workplace investigation based on a reasonable belief that an employee has violated a workplace policy.[176]

This exception should be added because it supports employers in providing a safe workplace and addresses the fear of those opposed to such legislation that employers will be impaired in conducting workplace investigations.[177] The United States Department of Labor mandates that all employers provide a safe workplace under the Occupational Safety and Hazard Act, meaning that employers must provide their employees with a workplace that does not have

173. *Id.* § 3(D).

174. *Id.* About half of the states with password protection legislation included express remedies, many in the form of fines imposed upon the violating employer. Sprague, *supra* note 98, at 493. For example, Michigan's statute provides: "[a]n individual who is the subject of a violation of this act may bring a civil action to enjoin a violation of section 3 or 4 and may recover not more than $1,000.00 in damages plus reasonable attorney fees and court costs." MICH. COMP. LAWS ANN. § 37.278(2) (West 2012).

175. *See* discussion *infra* Part III.A.2.

176. ARK. CODE ANN. § 11-2-124(e)(2)(A) (West 2014); CAL. LAB. CODE § 980(c) (West 2014); ME. REV. STAT. ANN. tit. 26, § 617(3) (West 2015); MONT. CODE ANN. § 39-2-307(2)(b) (West 2023); OKLA. STAT. ANN. tit. 40, § 173.2(D)(1)(a) (West 2014).

177. GORDON ET AL., *supra* note 71.

serious hazards.[178] Thus, employers cannot lose the benefit of critical information in the investigation of matters like workplace violence and harassment.[179]

This requirement of workplace safety must be balanced with the important and necessary protections of employee and applicant social media privacy provided in password protection legislation. Privacy cannot be overprotected at the expense of workplace safety. Thus, legitimate employer needs and employee privacy must be balanced.[180] This balance is struck by allowing employers to use social media monitoring in active investigations. The drafter of the new Pennsylvania bill should adopt language from California's password protection legislation to capture this balance and mandate:

> [n]othing in this section shall affect an employer's existing rights and obligations to request an employee to divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations, provided that the social media is used solely for purposes of that investigation or a related proceeding.[181]

This exception would help Pennsylvania's password protection legislation better balance employer needs with employee and applicant privacy and, importantly, make the bill more palatable to employers, opponents in the legislature, and others generally opposed to password protection legislation.

b. Limiting Loopholes: Defining the Term "Other Means"

Second, the drafter of the new bill in Pennsylvania should define the term "other means" as used within the general protection statement.[182] House Bill 1130 prohibited an employer from requesting or requiring employees and applicants to disclose their social media

178. *Frequently Asked Questions*, U.S. DEP'T OF LAB., https://webapps.dol.gov/dolfaq/ (type "OSHA responsibility"; then click "SUBMIT"; then select the fourth hyperlink) (last visited Nov. 16, 2024). The Occupational Safety and Health Act (OSHA) was created by Congress in 1970 to ensure safe and healthy working conditions for employees. *About OSHA*, U.S. DEP'T OF LAB., https://www.osha.gov/aboutosha (last visited Nov. 16, 2024).

179. *Frequently Asked Questions*, *supra* note 178.

180. Megan Davis, *Too Much Too Soon? A Case for Hesitancy in the Passage of State and Federal Password Protection Laws*, 14 U. PITT. J. TECH. L. & POL'Y 253, 254 (2014) (advocating for a balance between "legitimate employer needs and an applicant's or employee's right to privacy" within password protection legislation and arguing against "rushed legislation").

181. CAL. LAB. CODE § 980(c) (West 2014).

182. H.R. 1130, 2013 Gen. Assemb., Reg. Sess. § 3(A)(1) (Pa. 2013).

passwords and from using "other means" to access these otherwise private social media accounts.[183] But it did not define the phrase "other means," thus providing room for motivated employers to bypass the legislation and access protected social media accounts.[184]

A very specific definition of "other means" should be added to a new bill to provide Pennsylvania employees and applicants with more comprehensive protection and to avoid the criticism that state laws containing similar phrasing have received. For example, Maryland's legislation has been criticized for leaving "other means" undefined.[185] Critics of Maryland's legislation have complained that "other means" is too broad and leaves employers with so much access that critics have questioned whether the legislation protects employee and applicant social media privacy at all.[186] Further, critics have demanded that "[a]ny attempt to eradicate the undesired conduct must effectively deter all methods of engaging in such conduct."[187]

The drafter of a new Pennsylvania bill should adopt language from Colorado's successful legislation and mandate:

> [a]n employer may not suggest, request, or require that an employee or applicant disclose, or cause an employee or applicant to disclose, any username, password, or *other means* for accessing the employee's or applicant's personal account or service through the employee's or applicant's personal electronic communications device. An employer shall not compel an employee or applicant to add anyone, including the employer or his or her agent, to the employee's or applicant's list of contacts associated with a social media account or require, request, suggest, or cause an employee or applicant to change privacy settings associated with a social networking account.[188]

By adopting this language, the Pennsylvania General Assembly will protect employees and applicants from the three most common forms of access that employers use to avoid violating the general password protection statements: (1) shoulder surfing,[189] (2) requiring "friending,"[190] and (3) requesting the alteration of account

183. *Id.*
184. *Id.* § 3(A).
185. Buckley, *supra* note 44, at 887.
186. *Id.* at 887–88.
187. *Id.* at 887.
188. COLO. REV. STAT. ANN. § 8-2-127(2)(a) (West 2023) (emphasis added).
189. *See supra* text accompanying note 143.
190. *See supra* text accompanying note 144.

privacy settings.[191] Further, by still including the term "other means," the protections could be interpreted to protect against additional less common methods of access.

c. Setting the Scene: Incorporating a Purpose Statement

Third, the drafter of the new bill in Pennsylvania should incorporate a declaration of purpose at the beginning of the bill, before the definition section. House Bill 1130 did not include a declaration of purpose.[192] However, one should be added to help inform statutory interpretation.[193] Although courts seek to interpret statutes according to the intent of the enacting legislatures, this can be a difficult task.[194] The House Office of the Legislative Counsel promotes that statements of purpose can be useful for clarifying the legislature's intent behind a complex provision.[195] Thus, if the Pennsylvania General Assembly provides a declaration of purpose, Pennsylvania's courts can be led by a clear statement of the legislature's intention when interpreting the legislation.

There is no example of declaration of purpose language that the drafter of the bill can adopt, because none of the existing twenty-seven forms of password protection legislation include a declaration of purpose.[196] Thus, the wording should be left to the drafter of the bill, but it should be written after the body of the bill and be composed of a paragraph stating what the law is intended to achieve.[197] The wording must stress that the intention of the bill is to strike a balance between employee and employer interests by protecting employee social media privacy while preserving an employer's

191. *See supra* text accompanying note 145.

192. H.R. 1130, 2013 Gen. Assemb., Reg. Sess. (Pa. 2013).

193. *Id.*

194. Linda D. Jellum, *The Art of Statutory Interpretation: Identifying the Interpretive Theory of the Judges of the United States Court of Appeals for Veterans' Claims and the United States Court of Appeals for the Federal Circuit*, 49 U. LOUISVILLE L. REV. 59, 61 (2010) (stating that interpreting statutes as intended is difficult for many reasons, one being that statutes are drafted and enacted by groups of individuals that all have potentially different interests).

195. *Drafting Legislation*, HOUSE OFF. OF THE LEGIS. COUNS., https://legcounsel.house.gov/holc-guide-legislative-drafting#VIA (last visited May 10, 2024); *see also* 101 PA. CODE § 13.12 (2024) ("Objectives in drafting") (stating the prime objective of the drafter is to express herself in form and language so that there is no doubt in a reader's mind as to what the drafter desires to accomplish).

196. H.R. 1130, 2013 Gen. Assemb., Reg. Sess. § 2 (Pa. 2013).

197. *Drafting Manual*, UTAH LEGIS., https://le.utah.gov/documents/ldm/draftingmanual.html (last visited Nov. 16, 2024); NEW YORK CITY COUNCIL, BILL DRAFTING MANUAL: A GUIDE TO RESEARCHING AND WRITING LEGISLATION FOR NEW YORK CITY 47 (2018), https://council.nyc.gov/legislation/wp-content/uploads/sites/55/2018/04/BDM-Final-2018-Version.pdf.

ability to use social media in certain instances to maintain necessary functions.

B. Why Pennsylvania Needs Password Protection Legislation Now

There are two reasons why password protection legislation is necessary in Pennsylvania now more than ever: (1) because the Covid-19 pandemic blurred the distinction between home and work and (2) because social media platform use consistently continues to increase.[198]

1. Post-Pandemic Blurry Boundaries: The Current Overlap Between Home and Work

The Covid-19 pandemic permanently changed the workforce and blurred the lines between home and work.[199] The abrupt closure of many workplaces in the early months of 2020 began a new era of remote work for millions of Americans.[200] According to the Conference Board's survey of employees with jobs that could be performed remotely, prior to the Covid-19 pandemic, 80% of employees rarely or never worked remotely, but at the end of 2020, 71% of employees worked remotely all or most of the time.[201] As of 2022, over half of the 71% of employees working remotely stated that they would prefer to continue working remotely following the end of the pandemic.[202]

Many employees who desired to continue remote work were given the opportunity to do so.[203] While the number of employees working remotely has decreased following the conclusion of the pandemic,

198. *See* discussion *infra* Parts III.B.1, III.B.2.

199. Kim Parker, Juliana Menasce Horowitz & Rachel Minkin, *How the Coronavirus Outbreak Has – And Hasn't – Changed the Way Americans Work*, PEW RSCH. CTR. (Dec. 9, 2020), https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt-changed-the-way-americans-work/; The Conference Board, *Survey: Remote Workers Struggle With Work-Life Boundaries, but Is a Return to the Workplace the Answer*, PR NEWSWIRE (Apr. 1, 2022, 12:00 PM), https://www.prnewswire.com/news-releases/survey-remote-workers-struggle-with-work-life-boundaries-but-is-a-return-to-the-workplace-the-answer-301515832.html.

200. Parker, Horowitz & Minkin, *supra* note 199.

201. *Id.* The Conference Board is a nonpartisan non-profit organization which provides business performance insights. *About Us*, THE CONF. BD., https://www.conference-board.org/about/ (last visited Nov. 16, 2024).

202. Parker, Horowitz & Minkin, *supra* note 199. Many employees enjoy the opportunity to work remotely, believing that it increases flexibility and improves work-life balance. The Conference Board, *supra* note 199.

203. Kim Parker, *About a Third of U.S. World Workers Who Can Work from Home Now Do So All the Time*, PEW RSCH. CTR. (Mar. 30, 2023), https://www.pewresearch.org/short-reads/2023/03/30/about-a-third-of-us-workers-who-can-work-from-home-do-so-all-the-time/.

41% of employees with jobs that can be conducted remotely are working a hybrid work schedule, meaning that these employees are working in the office some days and remotely on others.[204] Fifty-nine percent of hybrid employees work three or more days a week remotely.[205]

With millions of employees working from home, the boundaries between home and work are becoming increasingly blurry. With individuals conducting their personal lives and work lives from one space, the two separate lives have become intertwined. Fifty-eight percent of remote employees responded to the survey that they believe that their "work-life integration" increased during and after the Covid-19 pandemic due to remote work.[206] This overlap is unsettling to both employers and employees, and employees have raised concerns about the new blurred boundaries.[207]

Additionally, the shift to remote work removed the daily face-to-face interactions between co-workers that used to occur within the workplace.[208] Despite attending more meetings than ever, albeit many remotely, employees are reporting feeling an increase in isolation and a decrease in connection to co-workers.[209] Fifty-three percent of employees with a hybrid schedule stated that remote work has harmed their ability to feel connected with co-workers.[210]

But this lack of connectedness does not signal that workplace relationships are no longer important or that remote employees are no longer interested in these relationships.[211] Workplace relationships are still valuable because they impact the productivity and innovation of the workplace.[212] Employees who experienced decreased connectedness to the workplace following the Covid-19

204. *Id.*
205. *Id.*
206. The Conference Board, *supra* note 199.
207. *Id.* Some employees believe that the problematic integration may stem from the "unhealthy" expectation that when conducting remote work, an employee should be in the home office and working continuously. Gleb Tsipursky, *Does Remote Work Hurt Wellbeing and Work-Life Balance?*, FORBES, https://www.forbes.com/sites/glebtsipursky/2022/11/01/does-remote-work-hurt-wellbeing-and-work-life-balance/ (Nov. 2, 2022, 7:17 AM). Employees compare this to conducting work within the office, which includes built-in breaks throughout the day due to visiting with co-workers, using the printer, and walking between meetings. *Id.*
208. *See* Nancy Baym et al., *What a Year of WFH Has Done to Our Relationships at Work*, HARV. BUS. REV. (Mar. 22, 2021), https://hbr.org/2021/03/what-a-year-of-wfh-has-done-to-our-relationships-at-work (claiming that the shift to remote work has changed the nature of social capital in organizations, meaning the key informal interactions within the workplace have changed).
209. *Id.*
210. Parker, *supra* note 203.
211. Baym et al., *supra* note 208. *See also* Parker, *supra* note 203.
212. Baym et al., *supra* note 208. People who report feeling more productive also report stronger workplace connections. *Id.*

pandemic reported that they were less likely to be thinking strategically and collaborating with others.[213] Due to the importance of, and employee desire for, work relationships, employees are using tools to stay connected.[214] Remote employees are using online conferencing services like Zoom and WebEx, and messaging platforms like Slack and Google Chat to keep in close contact with co-workers.[215] In order to promote such relationships, reputable business magazine *Forbes* recommended that employers create virtual "water cooler channels"[216] for employees to discuss non-work related topics and play games.[217] In using these platforms, employers are encouraging, and even sometimes requiring, employees to use platforms very similar to social media platforms.[218] This sends mixed messages about social media usage, further blurs the line between work and home, and confuses employees as to what is appropriate social media usage in the workplace.

Pennsylvania specifically has been affected by the blurred boundaries between work and home.[219] In 2023, Pennsylvania ranked twenty-third in the country for percentage of males working remotely and twenty-second for females.[220] Pennsylvanian employees are feeling the effects of this blurring.[221] Brie Reynolds, a Pennsylvania remote career development manager, stated that working from home requires her to be an employee and a mother at the same time and observed that, "[p]hysically it kind of [feels] like my brain [is] trying to split into two pieces and do two separate things[.]"[222] One way that Pennsylvania can draw a much needed line between home and work is through password protection legislation, which would allow for one's online social life to be separate from their work life.

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213. *Id.*
214. Parker, Horowitz & Minkin, *supra* note 199.
215. *Id.*
216. "Water cooler channels" are online forums which employers can create to facilitate employee discussion, ice breakers, and games. Caroline Castrillon, *How to Stay Connected to Your Team While Working Remotely*, FORBES, https://www.forbes.com/sites/carolinecastrillon/2022/05/26/how-to-stay-connected-to-your-team-while-working-remotely/ (June 28, 2022, 2:31 PM).
217. *Id.*
218. *Id.*
219. *See* Avery Van Etten, *Survey Finds Majority of Parents Want to Continue Remote Work Post-Pandemic*, ABC 27, https://www.abc27.com/pennsylvania/survey-finds-majority-of-parents-want-to-continue-remote-work-post-pandemic/ (June 23, 2021, 10:17 AM).
220. Ed Gruver, *Where Does Pa. Rank Nationally in Working Remote?*, LEHIGH VALLEY BUS. (Sept. 12, 2023), https://lvb.com/where-does-pa-rank-nationally-in-working-remote/.
221. Van Etten, *supra* note 219.
222. *Id.*

2. The Prevalence and Persistence of Employee Social Media Privacy Invasion

Not every employee and applicant in Pennsylvania's workforce faces an invasion of their social media privacy. Still, some employees do face this invasion. For example, in *Eash v. County of York*, the Plaintiff, an employee of York County's emergency services, reported that his Human Resources Department requested that he show the contents of his social media platforms under threat of termination.[223] He responded by bringing an action in the United States District Court for the Middle District of Pennsylvania, asserting claims for a deprivation of liberty interest under 42 U.S.C. § 1983, a violation of his Fourth Amendment rights, intrusion upon seclusion, defamation, and wrongful termination.[224]

The passage of password legislation in Pennsylvania would provide two remedies to the kind of situation encountered in *Eash*. First, password protection legislation would set clear guidelines for employers and their Human Resources departments and personnel to follow, providing a standard for what employers may and may not request. Second, if an employee or applicant believes that an employer has committed a violation, the employee would have an available statutorily-provided remedy. In *Eash*, the Plaintiff had to bring multiple causes of action in federal court to obtain a remedy.[225] If Pennsylvania had password protection legislation, the Plaintiff would have a direct statutory remedy.[226]

The use of social media has increased in the last decade and is expected to continue to increase, making password protection legislation necessary to clear employer confusion and relieve the potential burden on the courts.[227] Further, social media typically reaches

223. 450 F. Supp. 3d 568, 573–74 (M.D. Pa. 2020).
224. *Id.* at 574.
225. *Id.*
226. In *Eash*, the Human Resources Department requested access to the Plaintiff's social media platforms as part of an investigation into sexual harassment in the workplace. *Id.* at 573–74. The United States District Court for the Middle District of Pennsylvania held that the Plaintiff's allegations were sufficient to state claims for deprivation of liberty interest, for violation of Fourth Amendment rights, for defamation, and for wrongful termination. *Id.* at 576, 578, 582, 583. Under the password protection legislation proposed in this article, the Human Resources Department's request in *Eash* would have fallen under an exception to password protection. *See* discussion *supra* Part III.A.2. Thus, the request would have been appropriate and not a violation of the law, and the Plaintiff would not have had a claim. *See* discussion *supra* Part III.A.2.
227. Experts estimate that, by 2029, there will be 342.6 million social media users—an increase of 27.84 million from 2023. Dixon, *supra* note 15.

a younger demographic.[228] As the current younger generation grows older, it is likely that they will continue, or even expand, their social media usage. The older generation, which is less likely to use social media, will be exiting the workplace and will be replaced by a new, younger, and more social media-embracing demographic.[229] Since the prevalence of social media is only expected to rise, it is foreseeable that social media privacy concerns in the workplace will also rise.[230] Therefore, the Pennsylvania General Assembly must act now to set clear boundaries and rules for employers as social media continues to grow.

IV. CONCLUSION

The concept of password protection legislation has been around for the past decade.[231] Maryland, the first state to enact password protection legislation, served as a model for the twenty-six states that followed.[232] However, the passage of time has allowed for legislators, employers, and the public to critique the existing legislation.[233] Further, after a decade, all are more cognizant of employer and employee needs and the changing workplace.[234] Now, there is an opportunity for a state to enact password protection legislation that combines the strengths of the different states' legislation while simultaneously addressing commonly cited concerns.[235] This state's legislation could serve as the new model for password protection legislation for the remaining twenty-two states that have yet to enact password protection legislation.[236]

Pennsylvania should take advantage of this opportunity and become the model state. The Pennsylvania General Assembly should enact password protection legislation modeled on former House Bill 1130 but with additional provisions added to include an exception

228. *See* Wong, *supra* note 21 (stating that social media usage is skewed to the younger generations, with 84% of individuals between eighteen to twenty-nine and 81% of individuals between thirty to forty being active on a minimum of one social media site).

229. See Breanne Ngo, *78% of Gen Z Workers 'Romanticize' Their Office on Social Media, New Standley Systems Study Shows*, BUSINESS WIRE (Oct. 31, 2024, 9:47 AM), https://www.businesswire.com/news/home/20241031360806/en/78-of-Gen-Z-Workers-%E2%80%98Romanticize%E2%80%99-their-Office-on-Social-Media-New-Standley-Systems-Study-Shows (explaining that currently, "Gen Z workers are ushering in new workplace norms as they step into the office, with nearly eight out of [ten] creating social media content that 'romanticizes' their workplace").

230. Wong, *supra* note 21.

231. Borman, *supra* note 7.

232. *Id.*

233. *See* discussion *supra* Part II.C.

234. *See* discussion *supra* Part III.B.1.

235. *See* discussion *supra* Part III.A.2.

236. *Privacy of Employee and Student Social Media Accounts*, *supra* note 11.

for employers conducting investigations, a definition of the term "other means," and a helpful declaration of purpose.[237] By doing so, the Pennsylvania General Assembly would be protecting Pennsylvania's employees and applicants from the situation that Mr. Collins faced over a decade ago and would be providing employees like the plaintiff in *Eash* with a well-defined state law claim.[238]

237. *See* H.R. 1130, 2013 Gen. Assemb., Reg. Sess. § 2 (Pa. 2013).

238. *See* Davis et al., *supra* note 1; *see also Eash v. County of York*, 450 F. Supp. 3d 568, 573–74 (M.D. Pa. 2020).

APPENDIX A

CAL. LAB. CODE § 980(b)(2) (West 2014) (preventing an employer from requiring employees to "[a]ccess personal social media in the presence of the employer"); CONN. GEN. STAT. ANN. § 31-40x(b)(2) (West 2016) (prohibiting employers from "[r]equest[ing] or requir[ing] that an employee or applicant authenticate or access a personal online account in the presence of such employer"); DEL. CODE ANN. tit. 19, § 709A(b)(2) (West 2015) (banning employer requests to "[a]ccess personal social media in the presence of the employer"); HAW. REV. STAT. ANN. § 487G-3(a)(1)(d) (West 2021) (stating that employers are prohibited from asking to "access the account in the presence of the employer in a manner that enables the employer to observe the login information for or content of the account"); 820 ILL. COMP. STAT. ANN. 55/10(6)(b)(1)(B) (West 2017) (preventing employers from "request[ing], requir[ing], or coerc[ing] an employee or applicant to authenticate or access a personal online account in the presence of the employer"); MICH. COMP. LAWS ANN. § 37.273(a) (West 2012) (banning an employer from "[r]equest[ing] an employee or an applicant for employment to grant access to, allow observation of, or disclose information that allows access to or observation of the employee's or applicant's personal internet account"); N.Y. LAB. LAW § 201-i(2)(a)(ii) (Consol. 2024) (prohibiting employers from requesting employees to "access the employee's or applicant's personal account in the presence of the employer"); OKLA. STAT. ANN. tit. 40, § 173.2(A)(2) (West 2014) (preventing employers from "[r]equir[ing] an employee or prospective employee to access the employee's or prospective employee's personal online social media account in the presence of the employer in a manner that enables the employer to observe the contents of such accounts . . ."); VT. STAT. ANN. tit. 21, § 495l(b)(2) (West 2018) (barring employers from requesting employees provide "access [to] a social media account in the presence of the employer"); WASH. REV. CODE ANN. § 49.44.200(1)(b) (West 2021) (prohibiting employers from "[r]equest[ing], requir[ing], or otherwise coerc[ing] an employee or applicant to access his or her personal social networking account in the employer's presence in a manner that enables the employer to observe the contents of the account"); W. VA. CODE ANN. § 21-5H-1(a)(2) (West 2016) (forbidding employers from "[r]equest[ing], requir[ing] or coerc[ing] an employee or a potential employee to access the employee or the potential employee's personal account in the presence of the employer"); WIS. STAT. ANN. § 995.55(2)(1) (West 2017) (preventing an employer from "[r]equest[ing] or requir[ing]

an employee or applicant for employment, as a condition of employment, to disclose access information for the personal Internet account of the employee or applicant or to otherwise grant access to or allow observation of that account").

APPENDIX B

ARK. CODE ANN. § 11-2-124(b)(2) (West 2014) (mandating that "[a]n employer shall not require a current or prospective employee to add another employee, supervisor, or administrator to the list of contacts associated with his or her social media account"); COLO. REV. STAT. ANN. § 8-2-127(2)(a) (West 2013) (requiring that an employer "shall not compel an employee or applicant to add anyone, including the employer . . ., to the employee's or applicant's list of contacts associated with a social media account or require, request, suggest, or cause an employee or applicant to change privacy settings associated with [an] account"); CONN. GEN. STAT. ANN. § 31-40x(b)(3) (West 2016) (prohibiting an employer from "[r]equir[ing] that an employee or applicant invite such employer or accept an invitation from the employer to join a group affiliated with any personal online account of the employee or applicant"); DEL. CODE ANN. tit. 19, § 709A(b)(5) (West 2015) (prohibiting an employer from requesting an employee or applicant "[a]dd a person, including the employer, to the list of contacts associated with the employee's or applicant's personal social media, or invite or accept an invitation from any person, including the employer, to join a group associated with the employee's or applicant's personal social media"); 820 ILL. COMP. STAT. ANN. 55/10(b)(1)(D) (West 2017) (barring employer from asking employees or applicants to "add the employer or an employment agency to the employee's or applicant's list of contacts that enable the contacts to access the employee or applicant's personal online account"); OR. REV. STAT. ANN. § 659A.330(1)(c) (West 2022) (prohibiting employers from "[c]ompell[ing] an employee or applicant for employment to add the employer or an employment agency to the employee's or applicant's list of contacts associated with a social media website"); VA. CODE ANN. § 40.1-28.7:5(B)(2) (West 2015) (banning employers from requiring current or prospective employees to "[a]dd an employee, supervisor, or administrator to the list of contacts associated with the current or prospective employee's social media account"); WASH. REV. CODE ANN. § 49.44.200(1)(c) (West 2021) (forbidding employers from "[c]ompell[ing] or coerc[ing] an employee or applicant to add a person, including the employer, to the list of contacts associated with the employee's or applicant's personal social networking account").

APPENDIX C

DEL. CODE. ANN. tit. 19, § 709A(b)(6) (West 2015) (mandating that employers may not request employees or applicants "[a]lter the settings on the employee's or applicant's personal social media that affect a third party's ability to view the contents of the personal social media"). *See* COLO. REV. STAT. ANN. § 8-2-127(2)(a) (West 2023) (prohibiting employers from "requir[ing], request[ing], suggest[ing], or caus[ing] an employee or applicant to change privacy settings associated with a social networking account"); HAW. REV. STAT. ANN. § 487G-3(a)(1)(C) (West 2021) (prohibiting employers from requiring employees to "[a]lter the settings of the account in a manner that makes the login information for or content of the account more accessible to others"); VT. STAT. ANN. tit. 21, § 495l(b)(4) (West 2018) (preventing employers from requesting that employees "change the account or privacy settings of the employee's or applicant's social media account to increase third-party access to its contents"); WASH. REV. CODE ANN. § 49.44.200(1)(d) (West 2021) (prohibiting employers from "[r]equest[ing], requir[ing], or caus[ing] an employee or applicant to alter the settings on his or her personal social networking account that affect a third party's ability to view the contents of the account").

APPENDIX D

See ARK. CODE ANN. § 11-2-124(e)(1) (West 2014) (mandating that the general protections do not prevent "an employer from complying with the requirements of federal, state, or local laws, rules, or regulations or the rules or regulations of self-regulatory organizations"); CONN. GEN. STAT. ANN. § 31-40x(e) (West 2016) (requiring that "[n]othing in this section shall be construed to prevent an employer from complying with the requirements of state or federal statutes, rules or regulations, case law or rules of self-regulatory organizations"); OR. REV. STAT. ANN. § 659A.330(4)(c) (West 2022) (requiring that nothing in the section prevents employers from "[c]omplying with state and federal laws, rules and regulations and the rules of self-regulatory organizations"); HAW. REV. STAT. ANN. § 487G-3(b)(2) (West 2021) (mandating that nothing in this section shall prevent an employer from"[c]omplying with a federal or state law, court order, or rule of a self-regulatory organization established by federal or state statute, including a self-regulatory organization . . ."); NEV. REV. STAT. ANN. § 613.135(3) (West 2013) (requiring that "[n]othing in this section shall be construed to prevent an employer from complying with any state or federal law or regulation or with any rule of a self-regulatory organization . . ."); N.Y. LAB. LAW § 201-i(5)(b) (Consol. 2024) (stating that this section does not prevent an employer from "complying with a duty to screen employees or applicants prior to hiring or to monitor or retain employee communications that is established under federal law or by a self regulatory organization . . ."; OKLA. STAT. ANN. tit. 40, § 173.2(E) (West 2014) (mandating that "[n]othing in this section shall be construed to prevent an employer from complying with the requirements of state or federal statutes, rules or regulations, case law, or rules of a self-regulatory organization"); VA. CODE ANN. § 40.1-28.7:5(F)(1) (West 2015) (requiring that nothing in this section "[p]revents an employer from complying with the requirements of federal, state, or local laws, rules, or regulations or the rules or regulations of self-regulatory organizations"); WASH. REV. CODE ANN. § 49.44.200(3)(d) (West 2021) (mandating that nothing in this section shall "[p]revent an employer from complying with the requirements of state or federal statutes, rules or regulations, case law, or rules of self-regulatory organizations"); W. VA. CODE ANN. § 21-5H-1(b)(2) (West 2016) (requiring that nothing in this section shall prevent employers from "[c]omplying with applicable laws, rules or regulations").

APPENDIX E

See ARK. CODE ANN. § 11-2-124(e)(2a) (West 2014) (requiring that the general protections do not affect "an employer's existing rights or obligations to request an employee to disclose his or her username and password for the purpose of accessing a social media account if the employee's social media account activity is reasonably believed to be relevant to a formal investigation" by an employer "of allegations of an employee's violation of federal, state, or local laws or regulations or of the employer's written policies"); CAL. LAB. CODE § 980(c) (West 2014) (mandating that "[n]othing in this section shall affect an employer's existing rights and obligations to request an employee to divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations," when "the social media is used solely for purposes of that investigation or a related proceeding"); CONN. GEN. STAT. ANN. § 31-40x(b)(3) (West 2016) (mandating that nothing in the section prevents an employer from "[c]onducting an investigation for the purpose of ensuring compliance with applicable state or federal laws, regulatory requirements or prohibitions against work-related employee misconduct based on the receipt of specific information about activity on an employee's or applicant's personal online account"); DEL. CODE. ANN. tit. 19, § 709A(c) (West 2015) (mandating that "[n]othing in this section shall affect an employer's rights and obligations under the employer's personnel policies, federal or state law, case law, or other rules or regulations to require or request an employee to disclose a username, password, or social media reasonably believed to be relevant to an investigation" for "allegations of employee misconduct or employee violation of applicable laws and regulations, provided that the social media is used solely for purposes of that investigation or a related proceeding"); HAW. REV. STAT. ANN. § 487G-3(b)(4)(B) (West 2021) (mandating that nothing in this section prevents an employer from "requesting or requiring an employee to share specifically identified content for the purpose of: [i]nvestigating an allegation, based on specific facts regarding specifically identified content"); OKLA. STAT. ANN. tit. 40, § 173.2(D) (West 2014) (requiring that "nothing in this section shall prevent an employer from: . . . conducting an investigation: . . .for the purpose of compliance with laws and regulations or investigating the unauthorized employee transfer of employer information to personal employee social media"); OR. REV. STAT. ANN. § 659A.330(4)(a) (West 2022) (mandating that nothing in this section

shall prevent an employer from "[c]onducting an investigation, without requiring an employee to provide a user name and password, password or other means of authentication that provides access to a personal social media account of the employee, for the purpose of ensuring compliance with applicable laws, regulatory requirements or prohibitions against work-related employee misconduct" via "receipt by the employer of specific information about activity of the employee on a personal online account or service"); VA. CODE ANN. § 40.1-28.7:5(F)(2) (West 2015) (requiring that nothing in this section "[a]ffects an employer's existing rights or obligations to request an employee to disclose his username and password for the purpose of accessing a social media account if the employee's social media account activity is reasonably believed to be relevant to a formal investigation or related proceeding" by an "employer of allegations of an employee's violation of federal, state, or local laws or regulations or of the employer's written policies"); W. VA. CODE ANN. § 21-5H-1(c) (West 2016) (mandating that nothing in this section shall prevent an employer from "[c]onducting an investigation or requiring an employee to cooperate in an investigation").

APPENDIX F

See CAL. LAB. CODE § 980(d) (West 2014) (requiring that "[n]othing in this section precludes an employer from requiring or requesting an employee to disclose a username, password, or other method for the purpose of accessing an employer-issued electronic device"); DEL. CODE ANN. tit. 19, § 709A(e) (West 2015) (mandating "[n]othing in this section precludes an employer from monitoring, reviewing, accessing, or blocking electronic data stored on an employer's network or on an electronic communications device supplied by or paid for in whole or in part by the employer"); N.Y. LAB. LAW § 201-i(5)(a)(iii) (Consol. 2024) (requiring that nothing in this section prevents an employer from "accessing an electronic communications device paid for in whole or in part by the employer where the provision of or payment for such electronic communications device was conditioned on the employer's right to access such device and the employee was provided prior notice of and explicitly agreed" to the circumstances); OKLA. STAT. ANN. tit. 40, § 173.2(F) (West 2014) (requiring "[n]either this section nor any other Oklahoma law shall prohibit an employer from reviewing or accessing personal online social media accounts that an employee may choose to use while utilizing an employer's computer system, information technology network or an employer's electronic communication device"); WASH. REV. CODE ANN. § 49.44.200(4) (West 2021) (mandating that "[i]f, through the use of an employer-provided electronic communications device or an electronic device or program that monitors an employer's network, an employer inadvertently receives an employee's login information, the employer is not liable for possessing the information but may not use the login information to access the employee's" account); W. VA. CODE ANN. § 21-5H-1(b)(3) (West 2016) (mandating that nothing in this section prevents an employer from "[r]equiring an employee to disclose a username or password or similar authentication information for the purpose of accessing an employer-issued electronic device").

APPENDIX G

See DEL. CODE ANN. tit. 19, § 709A(g) (West 2015) (mandating that "[n]othing in this section precludes an employer from viewing, accessing, or using information about an employee or applicant that is in the public domain"); HAW. REV. STAT. ANN. § 487G-3(b)(1) (West 2021) (commanding that nothing in the section shall prevent an employer from "[a]ccessing information about an employee that is publicly available"); N.M. STAT. ANN. § 50-4-34(C) (West 2023) (requiring that "[n]othing in this section shall prohibit an employer from obtaining information about a prospective employee that is in the public domain"); N.Y. LAB. LAW § 201-i(5)(c) (Consol. 2024) (mandating that nothing in this section prevents an employer from "viewing, accessing, or utilizing information about an employee or applicant that can be obtained without any required access information, that is available in the public domain . . ."); OR. REV. STAT. ANN. § 659A.330(5) (West 2022) (mandating that "[n]othing in this section prohibits an employer from accessing information available to the public about the employee or applicant that is accessible through an online account"); W. VA. CODE ANN. § 21-5H-1(b)(1) (West 2016) (ordering that nothing in this section shall prevent an employer from "[a]ccessing information about an employee or potential employee that is publicly available").

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