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Originalism and Structuralism

Guido Calabresi[*]

I want to talk about originalism and structuralism. Let me begin by saying that I was a law clerk to Justice Black, the original originalist. And so, I begin very much from an originalist point of view. Black believed that the language of a constitution and its original meaning were terribly important, because as you slide down—making precedents, on precedents, on precedents—it is terribly useful to be able to go back and look at the original meaning, and then to be able to ratchet oneself back and say, *what was this really about?* He cared a lot about double jeopardy and thought that double jeopardy had been undercut.[1] He would say, "but it says 'nor shall any person be . . . twice put in jeopardy';[2] let's go back there." So, I start very much from that point of view.

But Black was also very sophisticated about what words did tell you and did not tell you and what was original and what was not. He was as worried about people using false history to claim that something was original as, later on, Justice Scalia was about using legislative history.[3] You know, you can almost always find a historian who will say X, just as you can almost always find a senator or a congressperson who says something of that sort about legislation. And that is a terrible danger.

That is, Black did not for a moment believe that originalism was a way of restraining judges. He thought it had merit in itself. But the position that we should be originalists because it keeps judges from imposing their own views doesn't work. And neither does language work that way, because we're all too good at language. I joke and say that the judge who claims originalism and language as restraining devices is a little bit like somebody who says we should

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1. *See, e.g.*, Bartkus v. Illinois, 359 U.S. 121, 150–64 (1959) (Black, J., dissenting).
2. U.S. CONST. amend. V.
3. *See, e.g.*, Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment).

use the gold standard rather than judicious control of the economy because with the gold standard—whatever its problems—the economy is out of human control. Well, sure, but such a statement doesn't make much sense when the person who says it owns the gold mines. And all too often we are the ones who own the gold mines of history and of language. That doesn't mean originalism doesn't have value. But we should be very careful, and know that originalism is just as susceptible to wrongness and willfulness as anything else.

Black also thought that as a practical matter, the structural requirements of our Constitution sometimes made what was original no longer feasible to follow. It's about that, and several examples of that sort, that I would like to talk today. Even clear originalism and literalism are not adhered to by their allegedly devoted followers in certain situations. And these deviations almost always occur when adhering to the original intent would create a result that doesn't fit well with the structure of our whole system of government.

There are examples of this where what is structurally required is compatible with, but not explicitly stated in, the Constitution's text. In such cases we effect a broadening without any specific contradiction with original intent. One example is the Dormant Commerce Clause. Now, there's no constitutional text that says the Dormant Commerce Clause should be there, and yet the courts have created and followed this doctrine for a very long time.[4] Why? Because as a practical matter, keeping states from unduly burdening interstate commerce in a tariff type of way is structurally very important. And the question becomes, just what is the appropriate starting point? If the starting point is that states can favor their own economically unless Congress prohibits it, then to stop the tariffs, one would need to get the Senate to say "no, this favoritism is improper." And the individual states are too powerful in the Senate and could block any such prohibition.

If the starting point instead is that when there is a protectionist law of this sort, the courts say no, then, if such a law is wanted, Congress, the House as well as the Senate, must say so. The structure of our country, with a Senate that represents the states and where each senator has great power, led courts to develop this starting point. This isn't inconsistent with originalism. There's just nothing in the Constitution about it.

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4. *See* Guy v. Baltimore, 100 U.S. 434, 443 (1880) (early articulation of the Dormant Commerce Clause). *See generally* Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 368–69 (2023) (tracing the doctrine's application).

Another example that I care about a great deal is the whole business of diversity jurisdiction. There's nothing in the Constitution's text that requires federal courts to hear diversity cases. But early on, Congress saw that given the structure of our country, it would happen that lower state courts trying cases would favor their own citizens and that such favoring was structurally undesirable. And so, we built up diversity jurisdiction.[5] This, however, combined with *Erie*'s requirement that federal courts apply state decisional law in diversity cases, created a different structural problem: what happens when federal courts inevitably botch what state law is because they don't know it? And so we developed certification.[6] Now, I happen to be big on certification.[7] (The Chief Judge of New York, working with me, once said that I was a certified certifying certificator!)

And there it was. All this was a way of saying no, we can't have local courts who are just deciding between you and me rule in favor of me because I am a citizen of the court's state. But the states do have a right to set their own law, and in doing so they can make laws that favor the citizens of their states (within the guidelines of a Dormant Commerce Clause). And it isn't up to the federal courts to say we want it otherwise. All of that is what diversity, combined with *Erie* and certification, achieves. That's now become quite popular, especially in my circuit, but also in some others. Once again, there's nothing textually originalist about it. Yet, if you look at the federalist structure of our Constitution, diversity jurisdiction and certification fit well. And that's relatively easy.

More difficult are cases where courts have, following structural demands, gone beyond what could possibly have been meant originally. The most dramatic example of this is the power of the President under the Commander-in-Chief Clause.[8] The notion, though repeated a thousand times, that because the President is the Commander in Chief of the armed forces, the President can do all the things that today we say the President can do, is absurd. That language was put in originally because George Washington—a soldier—wanted to remain commander of the armed forces. Perfectly

5. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78; *see also* 28 U.S.C. § 1332.

6. *See, e.g.*, Kidney v. Kolmar Lab'ys, Inc., 808 F.2d 955, 956 (2d Cir. 1987) ("This appeal represents the inaugural use of a valuable device for cooperation among the federal and state courts within this Circuit—certification by this Court of a question of state law to the highest court of the relevant State.").

7. *See, e.g.*, Gutierrez v. Smith, 702 F.3d 103, 116 (2d Cir. 2012) (Calabresi, J.) ("Certification is an important and highly desirable way for federal courts to give deference to state courts in establishing what state law is.").

8. U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . .").

sensible. But that language and that desire couldn't possibly in themselves support the President having full power in everything having to do with foreign affairs, with immigration, and with any number of things that today we take for granted. I don't think anybody would say that because the Chief Justice is the Chief Justice of the United States, that means that John Roberts can go and do justice in the state of Connecticut, according to Connecticut law, on his own. And yet the title would give him about as much power to do that as the fact that the President is Commander in Chief has given him the powers that the President has today.

That doesn't mean that an expansive reading of the President's power is wrong. There are very strong structural reasons, in the way our Congress works and the way our federalism works, that suggest that the President must have very significant powers. But the reason for this cannot be found in an original statement or in an original meaning. It has to be found by looking at our whole system of government and saying there are things that only the President can do. And therefore we must stretch Article II—yes, stretch to inconsistency—and that isn't wrong. The only problem, and I'll come back to this later, is if we are not aware that we are doing this, we don't think about what the limits on such stretching should be.

Another inconsistency of the same sort is the power to make war. The language is absolutely clear. Congress shall declare war.[9] And, in some ways, that doesn't work. So, strangely, despite that language, right from the beginning, the President was allowed to send troops hither and yonder to fight.[10] Now then, what does Congress's power to make war mean? Is that power still there? Again, I believe if you think about it, you may find meaning in the language that gives Congress the power to make war, and yet conclude that, structurally, the President must be able to send off troops immediately. You can find some ways which are more consistent with originalism than if you act as if the power to make war wasn't with Congress. One could say, for example, that the President has the power to send troops. But unless war is declared by Congress, civil rights may not be limited. There are certain things that we must accept in wartime. This will be so when Congress has said we are at war. But such things can't be done even though troops have been deployed

9. U.S. CONST. art. I, § 8, cl. 11 ("The Congress shall have power . . . To declare war . . . .").

10. *See* Henry P. Monaghan, *Presidential War-Making*, 50 B.U. L. REV. 19, 26 (1970) (citing more than one hundred instances where "presidents have both deployed the armed forces abroad and committed them to actual hostilities without explicit congressional authorization").

unless Congress has also acted. I'm just using that as an example, that if you think about what is being done for structural reasons, and not because it was originally meant, the results may be better.

There are also some recent examples where there is direct inconsistency with original intent and language. One is the Voting Rights Act.[11] There is no doubt that the Voting Rights Act, when it was passed and held to be constitutional,[12] was meant to do just what it did. It treated some states differently from other states because of a history of discrimination.[13] And yet, structurally, that is a troublesome thing, because to treat any state differently from any other state is not something that fits well in a federalist system.[14]

So we had something which was passed and held to be constitutional because it fit with the original intent of the Fifteenth Amendment, which clearly gave Congress the power to do what it did.[15] But this was at war with the structural requirement that all states be treated the same way. So, the Supreme Court did something, in striking down that section of the Voting Rights Act, that had a strong structural basis.[16] But because they didn't do it knowing what they were doing, they didn't deal with the problem as well as they could have.

The most dramatic recent example of deviating from originalism is the Court's treatment of the Fourteenth Amendment's Anti-Rebellion Clause.[17] Now that clause wasn't a joke. The clause was put in at the time of a Civil War, because the country was very conscious that a majority of people in the land might, at some point, vote for

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11. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

12. South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966).

13. *See* Shelby Cnty. v. Holder, 570 U.S. 529, 536–40 (2013).

14. *See* Nw. Aus. Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009) (describing a "historic tradition that all the States enjoy 'equal sovereignty'" (quoting United States v. Louisiana, 363 U.S. 1, 16 (1960))).

15. U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation."); *see also Shelby Cnty.*, 570 U.S. at 536 ("The Fifteenth Amendment was ratified in 1870, in the wake of the Civil War. It provides that '[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude,' and it gives Congress the 'power to enforce this article by appropriate legislation.' . . . Inspired to action by the civil rights movement, Congress responded in 1965 with the Voting Rights Act." (first alteration in original)).

16. *See Shelby Cnty.*, 570 U.S. at 556–57.

17. U.S. CONST. amend. XIV, § 3 ("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.").

somebody who had been a rebel, and in that way move things back to before the Civil War in which so many people had died.[18]

People were keenly aware of this danger. And if you look at the history of that clause, and why it was there, it was there because people were seriously worried in a constitutional sense that a former rebel would represent a state or be elected President.

The problem with that, though, is that structurally we cannot have each state decide for itself who can or cannot be President. That would be absurd. It just would not work, structurally. If Colorado were allowed to say, Mr. Trump is a rebel and cannot be President, that would mean that any state could say that somebody else is a rebel. And that just wouldn't work. The Supreme Court got out of the problem, in effect, by killing the clause.[19] By giving it to Congress to decide, it killed the clause. And that, from an originalist point of view, was both wrong and undesirable.[20]

Significantly, if we think about it and realize that we must do things which deviate from an original intent because the structure of our Constitution requires it, then we are much more likely to do such things correctly. So, as I said, with respect to the war power, we might be able to say, here is what it stands for: Congress, through its power to declare war—and to fail to do so—should have the right to say when the basic system of liberties remains untouched, even though a President can send troops.

When we come to the Voting Rights Act, if the Court had looked at it that way, it could have said: "This is the original intent, but it is structurally unacceptable to have different states be treated differently. Therefore you, Congress, must solve this, and do it not in twenty-five years when this law is going to die, but in a decent period of time." (The funny thing is that in an earlier opinion, Chief Justice Roberts tried to do something of that sort, but didn't do it openly. And so Congress did not understand.)[21] Such an approach

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18. *See* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605, 608–09 (2024).

19. *See* Trump v. Anderson, 601 U.S. 100, 106 (2024) (per curiam) ("[T]he Constitution makes Congress, rather than the States, responsible for enforcing Section 3 against federal officeholders and candidates . . . .").

20. *See, e.g.*, William Baude & Michael Stokes Paulsen, Commentary, *Sweeping Section Three Under the Rug: A Comment on* Trump v. Anderson, 138 HARV. L. REV. 676, 711 (2025) ("*Trump v. Anderson* was not a faithful application of the original meaning of the Constitution. It does not adhere to the objective, original meaning of the constitutional text . . . . Instead, it invents—contrives—an escape hatch that flatly contradicts the text, structure, and historical intention of Article II's assignment of power to states in presidential elections.").

21. *See* Nw. Aus. Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 211 (2009) ("More than 40 years ago, this Court concluded that 'exceptional conditions' prevailing in certain parts of the country justified extraordinary legislation otherwise unfamiliar to our federal

would have involved taking something from what European courts—first the Italian Constitutional Court, then the German and the Austrian courts—do when they say: "There are laws that are heading towards unconstitutionality; and it is up to the legislature to fix them within a certain time, or we will have to."[22] Now had our Court done that, it is likely that Congress, so pressured, would have said, "okay." They might have said, "we do away with that part of the Voting Rights Act," or, more likely, they might have said, "it applies as much to New York as to Georgia." And the latter would have been an interesting way of making original intent consistent with structural needs. But because they weren't really conscious that they were doing something for structural reasons, the Court didn't focus on it, and so did not do it right.

My next example of doing it right is the Anti-Rebellion Clause. In its original meaning the clause is structurally impossible because giving the power to the states to decide who are electors, then having each state decide for itself who can run for President and who is a rebel, cannot work. That again is structurally impossible. It would destroy the presidency and, hence, is not acceptable. But if we were thinking that way, we might very well have come up with a solution that maintained the original meaning and power of that clause, without the structural problem. The Court might have said: "Colorado, you are perfectly free to decide who is a rebel for purposes of who is a congressperson, who is a senator, who is a district attorney. That's your business. But when it comes to the President, that can only be decided nationally. Only we, the Supreme Court, can find the facts." It might be that the facts are easy, so that when Colorado might say Guido can't be President because he wasn't born in the United States, that's perfectly obvious. But where the facts are in doubt, it would have to be the Supreme Court appointing special masters (perhaps the chief judges of several of the circuits) to determine whether this is a case of a rebel or not.[23] The clause and its purpose would have been retained for when it might be needed in the future, who knows when, if ever. But the people who passed

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system. In part due to the success of that legislation, we are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today." (citation omitted) (quoting South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966))).

22. *See* Riccardo Serafin, *Suspended Declarations of Invalidity: A Comparative Perspective*, 17 J. COMPAR. L. 115, 116–18 (2022).

23. Incidentally, by the time the Supreme Court had done its fact finding, the election would have been over. And there wouldn't have been any problems with respect to that issue politically today.

it thought it had a meaning. And as originalists we should have found a way of retaining its force.

Now you might say, but how could the Supreme Court have done this? The answer is that the Supreme Court has in fact already done something very much like it. That is what they did in *Bush v. Gore*.[24] And whether they did it right or wrong in that particular case, they exercised the very power I just described. They said: "When it comes to the election of a President, in the end, we are the only ones nationally who can say what happened!"[25]

And they did it again, perhaps not fully conscious of what they were asserting, when the question was whether each state legislature can decide who will be presidential electors, or whether state supreme courts control such legislatures?[26] In that case the Supreme Court said: state supreme courts can control state legislatures.[27] That's a matter of local law. But then added: unless they go too far.[28] It was that part of the decision which again said, *structurally*, when you're talking about the President, it can only be us who decide.

When the Court did these things, they were neither saying, "we are not originalists and so we do whatever we want," nor were they holding, "we are originalists and we never deviate from original intent." They acted as originalists who accept structural requirements. But they weren't sufficiently conscious of the consequences of when a structural demand required them to deviate from originalism. And that's unfortunate. It is why I am suggesting that we should dig more deeply than I can in one little lecture about when it is the structure of our Constitution that compels a legal result.

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24. 531 U.S. 98 (2000) (per curiam).

25. *See id.* at 111 ("None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.").

26. *See* Moore v. Harper, 600 U.S. 1, 9–10 (2023) (deciding whether the Elections Clause "vests state legislatures with authority to set rules governing federal elections free from restrictions imposed under state law").

27. *See id.* at 22 ("The Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review.").

28. *See id.* at 34 ("Although we conclude that the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law, state courts do not have free rein. . . . As in other areas where the exercise of federal authority or the vindication of federal rights implicates questions of state law, we have an obligation to ensure that state court interpretations of that law do not evade federal law.").

There's another thing that is going on today that is troublesome to me from a structural point of view. This is not substantive—as my previous examples were—but is concerned with process, with who does what among courts. A very, very good district judge recently said that the job of trial judges is to decide the case before them. They're on the firing line; they have a specific issue before them. Who wins? Who loses? Who is hurt? Who is not? And that's it. And the job of appellate courts, and of the Supreme Court more than any other court, is to get it right; to get the law right. The trial court on the firing line decides, and it may well decide the law wrong. But it decides the case. The job of the appellate court, three or more years later in a different setting, is to say what the law is. Now recently—and again I want to be very clear, I have my views of the merits, but they're completely irrelevant to what I am now saying—for various reasons, many district judges have been going beyond deciding the particular case. When a court issues a nationwide injunction, it does something which goes beyond the particular case before it.[29] There may be situations in which this is necessary. But boy, one should be careful as a district judge from going beyond deciding the specific case the judge faces.

District judges have been doing this with some frequency recently. And what has been the reaction of the Supreme Court? The Supreme Court, in its shadow docket, has been acting like a district court.[30] It's doing precisely what the district court does. And rather than saying, "no, no, no, the district courts may get it wrong, but they rule best in a particular case, and only when it comes to us three years later do we decide what the law is," the Supreme Court has instead been deciding the particular case itself.[31]

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29. *See* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1071–80 (2018) (identifying a trend of courts "issu[ing] nationwide injunctions with increasing frequency"). In *Trump v. CASA, Inc.*, the Supreme Court sharply limited the authority of district judges to issue such injunctions. 606 U.S. 831, 837–38 (2025).

30. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3 (2015) ("Outside of the merits cases, the Court issued a number of noteworthy rulings . . . . In important cases, it granted stays and injunctions that were both debatable and mysterious. . . . It has also continued its long-debated practice of summary reversal of lower-court decisions.").

31. Years ago, Justice Frankfurter, citing Justice Holmes and Chief Justice Taft, made this point. He severely criticized hurried actions by the Supreme Court prompted by a desire to correct errors in a particular case rather than resolving correctly significant legal issues. *See* Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, 112 (1959) (Frankfurter, J., dissenting) ("Congress . . . free[d] this Court from reviewing the great mass of federal litigation in order to enable the Nation's ultimate tribunal adequately to discharge its responsibility for the wise adjudication of cases 'involving principles the settlement of which is of importance to the public, as distinguished from that of the parties.'" (citation omitted) (quoting Layne & Bowler Corp. v. W. Well Works, Inc., 261 U.S. 387, 393 (1923) (Taft, C.J.))); *id.* at 113 (again citing *Layne & Bowler* and stating that "the Court does not [generally] review

I think there is a serious problem here. When you get courts doing something which structurally they are not meant to do, it is very dangerous. I understand the problems currently involved. But it worries somebody like me to see both district judges reaching out beyond their scope, and the Supreme Court reaching down and acting all too often like a trial court deciding the case.

I'll end by telling a story of a case that I had, which exemplified what I have been talking about. In 1991, there was a terrible, terrible racial riot in Brooklyn. What happened was very unfortunate, as were all the things that led to it. But at a certain point in the riot an African American kid, a young man, was beating up on an Orthodox Jewish shopkeeper and the police came. The shopkeeper tried to hold on to him. And the kid, to get away, stabbed him and ran. The shopkeeper was terribly medically malpracticed and died. The kid was tried for murder. And for certain civil rights reasons, the case was in federal court. It had failed in various state courts. The district judge, who had been a professor, decided that the thing to do, in the case, was to make sure that the jury had on it both a significant number of African Americans and a significant number of Orthodox Jews. And so he expressly put them in and got agreement by the parties to his doing so.

One side loses, and it comes to us on appeal two years later. I was presiding and wrote an opinion that said you can't do that; it is "jurymandering" (a bad pun).[32] I held that the jury belongs to the nation, not to the parties. And so stacking the jury, even with agreement of the parties, is reversible error. The district judge, who was a friend, said, "Guido, do you think you're smarter than I am?" I said, "no, look, had I been in your situation, I might well have done what you did. You were on the firing line; there was tremendous heat locally; you needed to do something in that case and you did it. But we are structured to have a court of appeals decide the law afterwards, two or three years later, when things are calmer, and to

cases involving merely individualized circumstances"); *id.* at 111 ("We do not grant a certiorari to review evidence and discuss specific facts." (quoting United States v. Johnston, 268 U.S. 220, 227 (1925) (Holmes, J.))). Justice Frankfurter also made this point in another case. *See* Rogers v. Mo. Pac. R.R., 352 U.S. 521, 541 (1957) (Frankfurter, J., dissenting) ("This is not the supreme court of review for every case decided 'unjustly' by every court in the country."); *id.* at 547–48 ("The judgments of this Court are . . . . especially dependent on ample time for private study and reflection in preparation for discussion in Conference. Without adequate study, there cannot be adequate reflection; without adequate reflection, there cannot be adequate discussion; without adequate discussion, there cannot be that full and fruitful interchange of minds that is indispensable to wise decisions and persuasive opinions by the Court. Unless the Court vigorously enforces its own criteria for granting review of cases, it will inevitably face an accumulation of arrears or will dispose of its essential business in too hurried and therefore too shallow a way.").

32. United States v. Nelson, 277 F.3d 164, 201 (2d Cir. 2002).

look to the underlying structure. And that is why I ruled as I did." He was more than mollified.

In the end, of course—and this is where I started—there is nothing that is sufficient to control judges. Originalism, with or without consideration of structure, won't do it because judges can, if they want to, be aggressive and do what they want. (This is an argument I had with my beloved friend Dick Posner, a predecessor in this lecture series who has been much more aggressive than I am as a judge.) As Alex Bickel said to me, when he looked back on both Black's attempt to control judges by language to some extent, and Frankfurter's attempt to control judges in a different way: neither of these works in the end.[33] It is only if judges realize that we are not Hercules, as Ronnie Dworkin would have had us be,[34] but that we are and must be moderate and listen to each other, that judges can be controlled. If, with that always in mind, we look to what the original meaning of our Constitution may have been and why the structure of our Constitution may cause us to deviate from that meaning, then we can do our job well.

33. *See* Alexander M. Bickel, *Applied Politics and the Science of Law: Writings of the Harvard Period*, *in* FELIX FRANKFURTER: A TRIBUTE 164, 187 (Wallace Mendelson ed., 1964) (discussing Justice Frankfurter's "abhorrence of absolutes" in the context of the Court's "proper function . . . in the area of individual rights"); Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71, 81 (1988) ("One can characterize the division between Frankfurter and his allies as against the Black/Douglas view in several ways—restraint versus activism, process versus results, or even Harvard against Yale . . . .").

34. *See* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1083 (1975).

What Is "the Rule"? Quotation Marks and the Role of Courts and Lawyers as Performers of the Common Law

Kathryn N. Boling[*]

Must lawyers and judges use quotation marks when they recite legal rules verbatim from a cited source in their legal practice documents? It is a question that lawyering skills faculty hear often when training first-year students to enter the legal writing genre. The advice of many is to use quotation marks to avoid plagiarism, but that advice arises from a conflation of academic and legal writing and a small number of inapplicable cases in which courts have issued reprimands (or worse) to attorneys caught copying large portions of other sources without sufficient "attribution." This Article, therefore, undertakes a rigorous defense of the verbatim recitation of a rule from a cited source without quotation marks in legal practice documents. As this Article shows through a multidisciplinary exploration of linguistics, professional ethics, speech act theory, and neuroscience, that choice is legitimate and often desirable.

What is often forgotten about legal rules (particularly in the common law) is that it is the day-to-day recitations of rules by lawyers and judges in the handling of cases that perpetuate the rules from the past into the present and thereby keep them in force for use in the future. Through an application of J.L. Austin's speech act theory to this activity, this Article explains why the social offense of plagiarism is not applicable, distinguishing the genre of academic writing from legal practice writing in multiple respects. It also explains how, with fear of plagiarism out of the picture, a legal practitioner in certain circumstances can harness rhetorical benefits from reciting a verbatim rule from an authoritative (and cited) source in their own written "voice," without quotation marks. By preserving the wording

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verbatim, the practitioner ensures the integrity of the rules themselves and enjoys a sense of belonging from verifying a communal understanding of the common law. Moreover, doing so through indirect quotation (i.e., without quotation marks) conveys the concepts with more ease for the reader, more seriousness by the writer, and more efficiency than direct quotation can.

INTRODUCTION

Can a legal practitioner state the rule for a case *too accurately*? Is it possible to *steal* it?

This Article addresses a specific writing decision that all legal practitioners face when they write practice documents containing legal analysis[1]: when they are reciting[2] an applicable legal rule verbatim from a binding case, should they put it in quotation marks in addition to citing the case?[3] From a linguistic point of view, there are competing interests at play. On the one hand, putting verbatim

1. By "legal practitioner," I refer to both lawyers and judges at all levels, all of whom write documents containing legal analysis for actual legal cases. The documents to which I refer are not limited to litigation-related briefs, orders, and opinions, but the examples and hypotheticals discussed in this Article will tend to focus on the litigation context because of its public-facing nature. Nonetheless, nearly all legal practitioners regularly write or read legal memoranda or other types of documents containing legal analysis written for a legal audience. And, in nearly all such documents, they will use some form of an "IRAC" structure in which the "R" is the recitation of the applicable legal "rule." In this respect, I refer to the same types of documents referenced by Professors Alexa Chew and Mark Osbeck in their articles about legal writing style. *See* Alexa Z. Chew, *Stylish Legal Citation*, 71 ARK. L. REV. 823, 826 & n.5 (2019) (citing Mark Osbeck, *What Is "Good Legal Writing" and Why Does It Matter?*, 4 DREXEL L. REV. 417, 421 n.18 (2012)).

2. I will use the verb "to recite" throughout this Article to include written delivery of rules even though it is a verb typically used to describe an oral practice. There is much to explore in the historical changes of the legal profession from an oral discourse to a written one over time, but this Article does not do so.

3. This Article takes the citation as a given because it provides needed *authority* for the rule being recited. *See infra* Section III.A.

wording into quotation marks, otherwise known as "direct quotation," can bring many benefits, including explicitness about the source of the exact wording, emphasis, and vividness.[4] However, it also comes with baggage. Alterations must be marked with punctuation that interrupts the text, and those interruptions compound as rules are recursively quoted over time.[5] Several legal commentators have argued that conventions like this can be counter-productive because they make legal writing pedantic, difficult to read, and costly to produce.[6] Those arguments are corroborated by psycholinguistic theory and even emerging neuroscience showing that direct quotation requires more processing effort for information exchange to a reader than indirect quotation does.[7] Thus, the question of whether to use quotation marks for rules seems to merit serious consideration of whether it is really "worth it" in any given scenario.

The problem with conversations about this decision to date, though, is that many legal writing educators use a nonlinguistic concept—plagiarism—to resolve it.[8] Under this framework, direct quotation is categorically required for verbatim rules, even if the source is cited. This requirement largely reflects a conflation of the legal practice genre with academic writing and its emphasis on "attributing" one's sources, which several scholars have criticized.[9]

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4. *See, e.g.*, Bo Yao & Christoph Scheepers, *Inner Voice Experiences During Processing of Direct and Indirect Speech*, *in* EXPLICIT AND IMPLICIT PROSODY IN SENTENCE PROCESSING 287, 289 (Lyn Frazier & Edward Gibson eds., 2015) (noting that "linguists have also recognized the 'theatrical' nature of direct speech, meaning that it tends to carry more vivid paralinguistic information than indirect speech during communication").

5. *See infra* Section V.B.3.

6. *See, e.g.*, Susie Salmon, *Shedding the Uniform: Beyond a "Uniform System of Citation" to a More Efficient Fit*, 99 MARQ. L. REV. 763, 795–96 (2016); Chew, *supra* note 1, at 868–69; Jack Metzler, Essay, *Cleaning Up Quotations*, 18 J. APP. PRAC. & PROCESS 143, 147 (2017); RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENTS 236 (2d ed. 2003).

7. *See* Franziska Köder, Emar Maier & Petra Hendriks, *Perspective Shift Increases Processing Effort of Pronouns: A Comparison Between Direct and Indirect Speech*, 30 LANGUAGE COGNITION & NEUROSCIENCE 940, 945 (2015); Anita Eerland, Jan A. A. Engelen & Rolf A. Zwaan, *The Influence of Direct and Indirect Speech on Mental Representations*, PLOS ONE, June 2013, at 1, 8; Bo Yao, *Mental Simulations of Phonological Representations Are Causally Linked to Silent Reading of Direct Versus Indirect Speech*, J. COGNITION, 2021, at 1, 6.

8. *See* DeCarlous Y. Spearman, *Citing Sources or Mitigating Plagiarism: Teaching Law Students the Proper Use of Authority Attribution in the Digital Age*, 42 INT'L J. LEGAL INFO. 177, 218–19 (2014); Chad Baruch, *Everything You Wanted to Know About Legal Writing but Were Afraid to Ask*, 17 J. CONSUMER & COM. L. 9, 15 (2013); Hollee S. Temple, *Tripped Up by Electronic Plagiarism*, 14 NO. 2 PERSPS. 114, 114 (2006); Alison Craig, *Failing My ESL Students: My Plagiarism Epiphany*, 12 NO. 2 PERSPS. 102, 102 (2004); Terri LeClercq, *Failure to Teach: Due Process and Law School Plagiarism*, 49 J. LEGAL EDUC. 236, 237 (1999); M. C. Mirow, *Confronting Inadvertent Plagiarism*, 6 NO. 2 PERSPS. 61, 61 (1998); Jaime S. Dursht, Note, *Judicial Plagiarism: It May Be Fair Use but Is It Ethical?*, 18 CARDOZO L. REV. 1253, 1253–56 (1996).

9. *See* Andrew M. Carter, *The Case for Plagiarism*, 9 U.C. IRVINE L. REV. 531, 534–35 (2019); Megan E. Boyd & Brian L. Frye, *Plagiarism Pedagogy: Why Teaching Plagiarism*

But, the fear of plagiarism in legal writing is also informed in part by a small number of cases in which courts have issued reprimands (or worse) to attorneys caught copying large portions of other sources—including judicial opinions—without sufficient "attribution."[10]

This Article does not broadly argue that copying without attribution in *any* form should be embraced by legal practitioners, as others have.[11] Rather, it focuses specifically on the practice of indirectly quoting *rules* from *past* cases in documents about *current* cases, where both the copier and the copied party are practitioners in the legal system. The previously mentioned cases reprimanding lawyers suggest that judges may be starting to expect the same level of attribution or "credit" for their descriptions of the law as a scholar has for their academic work. This expectation may be buoyed by the proliferation of judicial "style" literature recently examined by Professor Nina Varsava, which urges judges to "sound like individuals, with their own distinct personalities and voices."[12] This Article argues that judicial reciters of rules in binding case decisions are *not* entitled to such credit and argues that instead, when it comes to quotation conventions in legal practice, both lawyers and judges are empowered to recite rules from a case either by direct quotation or in their own "voice" through indirect quotation.

Consider this example of the specific practice that this Article addresses and which many courts already embrace. In 2014, Justice Charles Johnson of the Supreme Court of Washington authored an opinion deciding whether a conversation was "private" for purposes of the Washington Privacy Act.[13] In doing so, he stated a rule from an earlier case, writing as follows:

Should Be a Fundamental Part of Legal Education, 99 WASH. U. L. REV. ONLINE 1, 6 (2021); Diana J. Simon, *Cross-Cultural Differences in Plagiarism: Fact or Fiction?*, 57 DUQ. L. REV. 73, 85–87 (2019); Carol M. Bast & Linda B. Samuels, *Plagiarism and Legal Scholarship in the Age of Information Sharing: The Need for Intellectual Honesty*, 57 CATH. U. L. REV. 777, 803–05 (2008); Simon Stern, *Copyright Originality and Judicial Originality*, 63 U. TORO. L.J. 385, 402 (2013); Mark A. Lemley & Lisa Larrimore Ouellette, *Plagiarism, Copyright, and AI*, 10/24/25 U. CHI. L. REV. ONLINE 1, 20 (2025); Peter Friedman, *What Is a Judicial Author?*, 62 MERCER L. REV. 519, 538 n.85 (2011).

10. *See infra* Section II.A.

11. *See* Carter, *supra* note 9, at 536–38; Rebekah Hanley, *Yes, We Can: Embrace* The Case for Plagiarism *to Enhance Access to Justice*, 5 STETSON L. REV. F. 1, 1–2 (2022); Boyd & Frye, *supra* note 9, at 1–6; Simon, *supra* note 9, at 85–87; Jason G. Dykstra, *Beyond the "Practice Ready" Buzz: Sifting Through the Disruption of the Legal Industry to Divine the Skills Needed by New Attorneys*, 11 DREXEL L. REV. 149, 199–205 (2018); Bast & Samuels, *supra* note 9, at 803–05.

12. Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, 59 HOU. L. REV. 103, 109 (2021).

13. State v. Kipp, 317 P.3d 1029, 1030–31 (Wash. 2014) (en banc).

> Ultimately, the intent or reasonable expectations of the participants as manifested by the facts and circumstances of each case controls as to whether a conversation is private. *Clark*, 129 Wash.2d at 224–27, 916 P.2d 384.[14]

In the *Clark* case cited in *Kipp,* authoring Justice Phil Talmadge had set forth the same privacy rule in this passage:

> In *Kadoranian*, we determined the "intent or reasonable expectations of the participants as manifested by the facts and circumstances of each case" controls as to whether a conversation is private. *Kadoranian*, 119 Wash.2d at 190, 829 P.2d 1061 (quoting *State v. Forrester*, 21 Wash.App. 855, 861, 587 P.2d 179 (1978), *review denied*, 92 Wash.2d 1006 (1979)).[15]

These passages use very different quotation methodology for the same rule. Both use the same twenty-five-word phrase from a previous source, i.e., that the "intent or reasonable expectations of the participants as manifested by the facts and circumstances of each case controls as to whether a conversation is private."[16] And yet, one used quotation marks, and the other did not.

The difference between the *Kipp* and *Clark* approaches to quoting this rule is one of direct versus indirect quotation (also known as direct or indirect reporting). A classic linguistic illustration of the difference appears in these excerpts from a Monty Python skit in an article by prominent psycholinguists Herbert Clark and Richard Gerrig:

> Compare two reports, one by Matt and the other by Beth, of a customer talking to a clerk selling ants (in a Monty Python skit):
>
> (1) she says 'well I'd like to buy an ant'
>
> (2) and she tells him uh that she wants to buy an ant[17]

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14. *Id.* at 1034.
15. State v. Clark, 916 P.2d 384, 392 (Wash. 1996) (en banc).
16. Indeed, all four cases that appear in these two excerpts (*Kipp*, *Clark*, *Kadoranian*, and *Forrester*) use the same seventeen-word phrase, "intent or reasonable expectations of the participants as manifested by the facts and circumstances of each case." *Kipp*, 317 P.3d at 1034; *Clark*, 916 P.2d at 392; Kadoranian *ex rel.* Peach v. Bellingham Police Dep't, 829 P.2d 1061, 1067 (Wash. 1992) (en banc); State v. Forrester, 587 P.2d 179, 184 (Wash. Ct. App. 1978), *abrogated by*, Miller v. Alabama, 567 U.S. 460 (2012).
17. Herbert H. Clark & Richard J. Gerrig, *Quotations as Demonstrations*, 66 LANGUAGE 764, 764 (1990) (footnote omitted).

The first of these examples is direct quotation, and the second is indirect. While Monty Python used *both* methods over the course of the skit, presumably to emphasize the humorous absurdity of the statement,[18] most legal practitioners choose just one or the other when reciting a rule from a cited case.

This Article undertakes a multidisciplinary defense of the "indirect" quotation method for common law rules, explaining both that it is not plagiarism and that it can achieve significant benefits in some circumstances. The analysis will progress as follows. Part I provides a brief explanation of the linguistic vocabulary of quotation and introduces the relationship between quotation and plagiarism in the academic writing genre. Part II then describes how antiplagiarism has thus far been inserted into legal discourse by both the legal writing academy and courts, and reviews the pushback that has occurred thus far from practice and scholars.

Part III takes a step back and undertakes a detailed exploration of what legal practitioners are really doing when they recite common law rules in legal practice documents. It begins with a detailed definition of the word "rule" for purposes of this discussion, then discusses the roles and duties of legal practitioners when they recite them, particularly in light of the fluid nature of common law rules. It then situates their recitation of rules within speech act theory, which originates from the work of J.L. Austin, a philosopher of language who began observing that some utterances appeared to be accomplishing more than just saying something.[19] This Article uses

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18. Another example of the use of both indirect and direct quotation for humor and emphasis appears in actor Steve Carell's tribute speech to Jon Stewart at the 2022 Mark Twain Prize event, describing Stewart's reaction to a recorded interview Carell did for the Daily Show with a man who "ran a venom research facility" in a mobile home filled with snakes:

> John loved the interview. As he watched it, he jokingly said over and over that it would have been great if I'd actually been bitten by the snake. I remember him saying, quote, "that would have been great if you'd been bitten by one of those snakes. I would have loved that. That would have been so funny." Do you remember that, John?

Video posted by The Trump Kennedy Center, FACEBOOK, *Steve Carell on Jon Stewart | 2022 Mark Twain Prize* (July 6, 2022), https://www.facebook.com/watch/?v=1120719191843955&rdid=Uc1jC5WXOPu1ozc2 (on file with the Duquesne Law Review).

19. *See* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962). Legal scholars have already begun exploring the potential applications of their ideas on various legal issues. *See, e.g.*, Susan E. Provenzano, *Can Speech Act Theory Save Notice Pleading?*, 96 IND. L.J. 1157, 1162–63 (2021); Bradley J. Pew, Comment, *How to Incite Crime with Words: Clarifying* Brandenburg*'s Incitement Test with Speech Act Theory*, 2015 BYU L. REV. 1087, 1088; Alexandra J. Roberts, *How to Do Things with Word Marks: A Speech-Act Theory of Distinctiveness*, 65 ALA. L. REV. 1035, 1040 (2014); Ross Charnock, *Overruling as a Speech Act: Performativity and Normative Discourse*, 41 J. PRAGMATICS 401, 401–02 (2009); Monica R. Cowart, *Understanding Acts of Consent: Using Speech Act Theory to Help Resolve Moral Dilemmas and Legal Disputes*, 23 LAW & PHIL. 495, 496–97 (2004); Peter Meijes Tiersma, Comment, *The Language of Offer and Acceptance: Speech Acts and the Question of Intent*, 74 CALIF. L. REV. 189,

the formulation of speech act theory offered by Austin's protégé John R. Searle[20] to identify practitioners' day-to-day recitations of common law rules as Declarative and Directive speech acts that not only perpetuate rules from the past into the present but also keep them in force for use in the future. In other words, practitioners play a critical role in maintaining the heart and soul of stare decisis itself—the principle of "stand[ing] by things decided"[21]—for the sake of the law and the legal system itself, both of which are communal in nature.

Given that framework, Part IV explains why the social offense of plagiarism is not applicable to this indirect quotation practice, distinguishing the genre of academic writing and its genre-specific evils: dishonesty, unjust enrichment, and harm to the copied author. A legal practitioner who recites a verbatim rule in writing without quotation marks is not dishonest because existing genre-specific citation rules specifically allow the practice. Even if a legal reader misinterpreted a written rule statement to be the practitioner's original formulation of the idea, however, there would be no unjust enrichment to the practitioner because legal reasoning is stronger when rules originate in authority than when they do not. And, there is no harm to the quoted judicial authors because they have neither moral nor legal right to attribution as an academic or artistic author would.

Finally, Part V describes several reasons why a legal practitioner might want to recite a rule verbatim from a cited source without quotation marks. First, it explains how, by not undertaking to put a rule in one's own words, a legal practitioner is participating in a performance of the common law system itself. The performance is beneficial not only to the integrity of the law and the rules themselves, but also to the cohesion and sense of belonging of each participant in the system. Next, it explains how, by not using direct quotation, the practitioner is making a legitimate and often desirable rhetorical choice to focus on the concepts rather than the viewpoint of the quoted author. Indirect quotation is easier to absorb, conveys more responsibility on the part of the speaker, and is more efficient, conserving both the writer's and the reader's attention for the real questions in dispute. Of course, the Article does not advocate for using this practice in all situations, as both direct quotation

189 (1986); Michael Hancher, *Speech Acts and the Law*, *in* LANGUAGE USE AND THE USES OF LANGUAGE 245, 245–47 (Roger W. Shuy & Anna Shnukal eds., 1980).

20. JOHN R. SEARLE, EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS (1979).

21. *Stare decisis*, BLACK'S LAW DICTIONARY (12th ed. 2024).

and substantive paraphrasing have many benefits, so Part V closes with a description of some sample scenarios where indirect quotation makes the most sense.

Exploration of legal writing issues like this is important in light of several complicating forces at play today. One is that, at the same time that judges are embracing their power as the writers of opinions and admonishing lawyers for copying them, lawyers are notably experiencing more and more feelings of powerlessness and distress in their work. Psychologist Krystia Reed and others have documented that attorneys "report high levels of dissatisfaction, mental health problems (e.g., depression, stress, substance abuse), marital/family problems, and job burnout."[22] The 2025 annual Mental Health Survey of lawyers and legal staff at law firms—conducted by ALM and Law.com Compass—showed that 43% of its 3,100 respondents felt that "mental health problems and substance abuse are at a crisis level in the legal industry."[23] 68.7% reported having anxiety themselves, 62.24% reported having "physical and mental overwhelm and fatigue," and 33.02% reported feeling "detached" and "alone in the world."[24] Not surprisingly, these types of distress can have a negative impact back onto the legal system, including professional lapses like neglect of cases or clients.[25] Reed has suggested that it is the number of decisions that attorneys have to make in practice, creating an "extreme pressure to make the 'right' decisions . . . [that] likely has a major impact on the high levels of attorney distress."[26]

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22. Krystia Reed, *The Experience of a Legal Career: Attorneys' Impact on the System and the System's Impact on Attorneys*, 16 ANN. REV. L. & SOC. SCI. 385, 395, 395–97 (2020) (citing Patrick R. Krill, Ryan Johnson & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46 (2016); Krystia Reed & Brian H. Bornstein, *A Stressful Profession: The Experience of Attorneys*, *in* STRESS, TRAUMA, AND WELLBEING IN THE LEGAL SYSTEM 217 (Monica K. Miller & Brian H. Bornstein eds., 2012)).

23. ALM Staff, *Mental Health by the Numbers: The 2025 Survey Infographic*, LAW.COM: AM. LAW. (May 13, 2025, at 05:38 ET), https://www.law.com/americanlawyer/2025/05/13/mental-health-by-the-numbers-the-2025-survey-infographic/?slreturn=20250725233403 (on file with the Duquesne Law Review).

24. *Id.*; *see also* Anna Stolley Persky, *Craving Connection*, ABAJOURNAL (Aug. 1, 2025, at 01:40 CT), https://www.abajournal.com/magazine/article/craving-connection-lawyers-who-face-stress-and-adversarial-work-experience-more-isolation-than-many-professionals (on file with the Duquesne Law Review).

25. Reed, *supra* note 22, at 397 (citing SUSAN SWAIM DAICOFF, LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES (2004); Reed & Bornstein, *supra* note 22).

26. *Id.* at 398. Reed was commenting specifically on litigating attorneys at the time, particularly in trial work, but the primary reason for that focus was that most of the research had been in that area. *Id.*

Another disorienting force is, of course, the technology of generative artificial intelligence, which can almost instantly produce written text with any content, in any style, and at any length upon the entry of a simple prompt. Although legal professionals are not yet reliably competent in their use of this technology to do legal writing,[27] the trends suggest that the technology is nonetheless here to stay. Writers in the legal discipline, like all others, must now grapple with the role of both originality and human effort in their text generation and the social norms that should apply in this new world.

In a way, this Article has become somewhat of a love letter to stare decisis, which is not entirely intended. As is explained in Part III below, it is the changeable nature of the common law system for rules that makes it both fragile and empowering. This Article focuses on the fragility, but it in no way means to undermine the empowerment that the common law provides to practitioners to intentionally pursue just changes. In fact, it argues that developing a practitioner's sense of deep responsibility regarding one side of the stare decisis coin necessarily increases their sense of responsibility for the other. The problem is that when a practitioner's goal *is* to preserve and apply the law as is, a fear of plagiarism is a trap that falsely constrains the ways that they can achieve that goal. For students, lawyers, and judges who are conscientious and thoughtful in the ways they want to use the law to impact people's lives, pedantic and exclusionary constraints on the use of precedent are the opposite of what legal education should be pushing. Practitioners should have a full range of rhetorical devices that are supported by the law at their disposal.

I. SOME BASICS ON QUOTATION AND ITS RELATIONSHIP TO PLAGIARISM

One of the complexities underlying this topic is the breadth of ways that one can "quote." A well-recognized list of the major quotation types according to prominent linguistic scholar Wolfram Bublitz includes:

- pure (or metalinguistic) 'quotes' ("She" is a pronoun),

27. *See, e.g.*, *AI Hallucination Cases*, DAMIEN CHARLOTIN, https://www.damiencharlotin.com/hallucinations/ [https://perma.cc/ENJ8-4GPB] (last visited Apr. 4, 2026) (documenting cases admonishing attorneys for inclusion of AI-generated hallucinations in their briefs).

- direct quotes (She said: "I hate deadlines"),
- indirect quotes (She said that she hated deadlines),
- mixed quotes (She said that this handbook "tops all handbooks"),
- echo quotes (John: "I hate deadlines" – Mary: "I hate deadlines – is that all you have to say?"),
- scare quotes (She said that this "handbook" is neither comprehensive nor up to date), with which quoters distance themselves from someone else's words, often in an ironical and 'sneering' way).[28]

This Article focuses on only two of these quotation types: direct and indirect quotation or indirect reporting. Linguists treat these as separate from other types of quotation because the quoted language is being used in the same way.[29] Both are recognized as incorporating the following linguistic "sub-acts":

> A quoter
>
> 1. takes up another person's (or their own) source text (T1) and shifts it from its original, prior context (C1) to the present context (C2) as a target text (T2), and in doing so
>
> 2. draws the recipient's attention to T2, thus disrupting ongoing discourse,
>
> 3. and puts T2 in a new (evaluating) perspective either explicitly (verbally) or implicitly (prosodically or kinesically).
>
> Accordingly, quoting is changing in three ways: change of context, change of focus and change of perspective.[30]

In other words, regardless of the punctuation, the writer who quotes directly or indirectly is always reporting *both the source and the content* of the source statement and thereby doing two things simultaneously: (1) diverting the reader's attention away from their

28. Wolfram Bublitz, *Introducing Quoting as a Ubiquitous Meta-Communicative Act*, *in* THE PRAGMATICS OF QUOTING NOW AND THEN 1, 9 (Jenny Arendholz, Wolfram Bublitz & Monika Kirner-Ludwig eds., 2015).

29. *Id.* at 4. Mixed quotation also falls into this category but is outside the scope of this Article.

30. *Id.* (footnote omitted).

own words to the words of another and (2) claiming the words in some way that is made clear by the context.[31]

In the typical legal quotation context, a legal writer states a proposition articulated by an outside source and identifies that source with a citation.[32] The purpose of the quotation is typically to provide authority for the norms being asserted, otherwise known as a "credentializing" purpose.[33]

Thus, when it comes to a writer's choice between direct and indirect quotation, both can accurately report the content of the speaker's statement, but they do so from different viewpoints.

Direct quotation with quotation marks (or block quote formatting for longer quotes) is, of course, the most precise way to denote the words of another. As Ruth Finnegan has put it, "[t]o surround words by quote signs signifies that we have someone's exact written or spoken words and excludes the possibility that it might merely be a paraphrase, surmise or reinterpretation."[34] In the listed example of direct quotation above—"She said: 'I hate deadlines'"—the writer's quote is enclosed in quotation marks and uses the first-person pronoun "I" to reflect the viewpoint of the quoted speaker, rather than the writer's own. It also uses the present tense given that the statement portrays the hatred of deadlines that the speaker had at the time of the statement.

Indirect quotation, by contrast, is a grammatical mechanism for reporting the content of another's speech from the viewpoint of the reporter. The indirect reporting example above—"She said that she hated deadlines"—uses the third-party pronoun "she," reflecting the third-party viewpoint of the statement by the writer. It also

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31. *See* RUTH FINNEGAN, WHY DO WE QUOTE? THE CULTURE AND HISTORY OF QUOTATION 261, 263 (2011) (describing the "paradoxical duality" of quotation, which "is both to distinguish the words and voices of others and to make them our own, both distancing and claiming"); Michael Johnson, *Quotation Through History: A Historical Case for the Proper Treatment of Quotation*, *in* THE SEMANTICS AND PRAGMATICS OF QUOTATION 281, 293 (Paul Saka & Michael Johnson eds., 2017) ("[I]n quoting, we do not merely *repeat* the words of someone, but we *re-use* them.").

32. Linguistically speaking, both the terms "quotation" and "citation" belong in the field of "intertextual reference," both being methods to denote reference to another source. Monika Kirner-Ludwig & Iris Zimmermann, *Quoting and Plagiarizing – Concepts of Both Now and Then?*, *in* THE PRAGMATICS OF QUOTING NOW AND THEN, *supra* note 28, at 291, 291. While the meanings of those terms have changed significantly over time, today the term "quotation" is generally about denoting the *contents* of speech that is not one's own, and "citation" is about denoting the *location* of the other source. This Article focuses on the former, but always on the assumption that the source is identified, not hidden.

33. Bublitz, *supra* note 28, at 12.

34. FINNEGAN, *supra* note 31, at 102; *see* Emar Maier, *The Pragmatics of Attraction: Explaining Unquotation in Direct and Free Indirect Discourse*, *in* THE SEMANTICS AND PRAGMATICS OF QUOTATION, *supra* note 31, at 259, 259–60.

uses the past tense because the speaker's hatred of deadlines was something being expressed before the writer wrote it down.

In their 1990 piece *Quotations as Demonstrations*, Clark and Gerrig argued that the fundamental difference between indirect and direct quotation is that the first is a *description* of what the speaker said, and the second is a *demonstration* of the speaker's actual statement, i.e., an "illustrat[ion] by exemplification."[35] As they put it, "[w]hen we hear an event described, we interpret the speaker's words and imagine the event described."[36] But, "when we hear an event quoted, it is as if we directly experience the depicted aspects of the original event."[37]

In academic settings, indirect quotation of researched sources is essentially prohibited because it can allow a student or scholar to take credit for another's thought as their own by blurring the lines between the two. The current *MLA Handbook* designates "copying someone's unique wording without giving proper credit" as plagiarism,[38] and the proper way to give proper credit is through use of quotation marks around verbatim language, even if the source is cited.[39] Indeed, according to the very first style manual by the Modern Language Association of America (MLA), "[t]he most blatant form of plagiarism is reproducing someone else's sentences, more or less verbatim, and presenting them as your own."[40] When the phrasing is "particularly apt" or appropriate to the purpose or occasion, the expectation of attribution is even higher.[41]

While not all scholars agree,[42] there is some sense to this formulation of plagiarism in the academic context. On the one hand, scholars are expected to ground their work in the previous work of others to show engagement with a scholarly conversation or body of knowledge. Nonetheless, according to the MLA, a "key component

35. Clark & Gerrig, *supra* note 17, at 764 & n.2; *see also* Manfred Harth, *Quotation and Pictoriality*, *in* UNDERSTANDING QUOTATION 195, 197 (Elke Brendel, Jörg Meibauer & Markus Steinbach eds., 2011).

36. Clark & Gerrig, *supra* note 17, at 793.

37. *Id.*; *see also* WILLARD VAN ORMAN QUINE, MATHEMATICAL LOGIC 26 (Harper & Row rev. ed. 1962) (1940) ("A quotation is not a *description*, but a *hieroglyph*; it designates its object . . . by picturing it.").

38. THE MOD. LANGUAGE ASS'N OF AM., MLA HANDBOOK § 4.1, at 96 (9th ed. 2021) [hereinafter MLA HANDBOOK] ("Why Plagiarism Is a Serious Matter").

39. *See, e.g.*, *Plagiarism and Academic Integrity Tutorial,* CSUSM: UNIV. LIBR. (Jan. 16, 2026, at 13:05 ET), https://libguides.csusm.edu/academic_honesty/direct_quotation [https://perma.cc/7MTF-5T9C].

40. WALTER S. ACHTERT & JOSEPH GIBALDI, THE MLA STYLE MANUAL 4 (1985).

41. *See id.*

42. *See, e.g.*, Brian L. Frye, *Plagiarism Is Not a Crime*, 54 DUQ. L. REV. 133, 138 (2016); John McWhorter, *We Need a New Word for 'Plagiarism,'* N.Y. TIMES (Jan. 23, 2024), https://www.nytimes.com/2024/01/23/opinion/plagiarism-claudine-gay-ackman-oxman.html (on file with the Duquesne Law Review).

of academic integrity" is "ensur[ing] that academic writers can clearly distinguish their ideas from the ideas of others."[43] The audience for academic writing is already deeply familiar with the subject matter, such as a professor or community of scholars in the field. After all, "[a]cademic writing is a conversation" where "[s]cholars write for their peers" and "incorporate, confirm, modify, correct, or refute the work done by previous scholars."[44] For students, the academic work is an assessment of the student's own learning and understanding, and for scholars, the academic work must contribute something new to the discipline in the eyes of scholarly peers.[45] In either case, students and scholars produce "original" works that reap benefits that "c[an] be either tangible, as when the work is of commercial value or fulfills a requirement for an academic degree or tenure, or intangible, as when it adds to the plagiarist's personal or professional reputation."[46] Thus, the idea of using someone else's words to demonstrate one's own learning or thinking is an impermissible shortcut to the milestones that academia provides.

The word for this norm is *plagiarism*, the shorthand for which has become "copying without attribution,"[47] but which *Black's Law Dictionary* more precisely defines as "[t]he deliberate and knowing presentation of another person's original ideas or creative expressions as one's own," "the act of stealing passages from someone else's compositions, either verbatim or in substance," and "literary theft."[48] In this formulation, which this Article adopts, "attribution" does not merely reference the practice of *citing* another's work, although some scholars have used the term that way.[49] Rather, the concept of "attribution" through a plagiarism lens includes other aspects of one's "presentation" of others' work in a way that gives

43. MLA HANDBOOK, *supra* note 38, § 4, at 96 ("Documenting Sources: An Overview").

44. *Id.* § 4, at 95.

45. *See* Carter, *supra* note 9, at 539–40 (analyzing the features of academic work under Posner's "detrimental reliance" theory of plagiarism in RICHARD A. POSNER, THE LITTLE BOOK OF PLAGIARISM 19–20 (2007)).

46. Laurie Stearns, Comment, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CALIF. L. REV. 513, 519 (1992).

47. Frye, *supra* note 42, at 141.

48. *Plagiarism*, BLACK'S LAW DICTIONARY (12th ed. 2024); *see also Plagiarize*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/plagiarizing [https://perma.cc/7RXZ-BLZB] (last visited Apr. 4, 2026) (defining "plagiarize" as "to steal and pass off (the ideas or words of another) as one's own," to "use (another's production) without crediting the source," "to commit literary theft," or to "present as new and original an idea or product derived from an existing source").

49. *See, e.g.*, Boyd & Frye, *supra* note 9, at 5 (stating "a passage copied from a judicial opinion should be attributed, not to avoid plagiarism but because the attribution establishes the authority of the passage").

them "credit" for it, such as using quotation marks around verbatim wording.

Many commentators have noted that "plagiarism is not a legal wrong" in the United States, at least not in most settings.[50] Other countries have adopted laws that effect a collection of creator's moral rights known as the *droit moral*: the right to attribution, the right of disclosure (the "determination of how and when a work is first made public"), the right of "integrity ([the] prevention of deforming changes)," and the right of "disavowal (withdrawal of a work)."[51] These countries have long urged the United States to do the same, but Congress has repeatedly declined to do so.[52]

Instead, plagiarism is generally "a social wrong, defined and enforced extra-legally by different social groups in different ways."[53] Nonetheless, the social and academic consequences imposed on those who engage in this type of academic plagiarism can be grave. As the MLA states:

> When writers and public speakers are exposed as plagiarists in professional contexts, they may lose their jobs and are certain to suffer public embarrassment, diminished prestige, and loss of credibility. One instance of plagiarism can cast a shadow across an entire career because plagiarism reflects poorly on a person's judgment, integrity, and honesty and calls into question everything about that person's work.[54]

Indeed, the MLA even asserts that these doomsday consequences for individual plagiarists extend to society as well because

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50. Frye, *supra* note 42, at 141; *see also* Stearns, *supra* note 46, at 514.

51. Stearns, *supra* note 46, at 530–31 (citing Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 558–65 (1940)).

52. *See* REG. OF COPYRIGHTS, U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 9, 24–25 (2019), https://www.copyright.gov/policy/moralrights/full-report.pdf [https://perma.cc/6NCN-PEWH] (recommending continuation of Congress's decision not to adopt a generally applicable moral rights provision in federal copyright law in favor of "patchwork" protection of the rights of attribution and integrity through specific federal and state laws).

53. Frye, *supra* note 42, at 141.

54. MLA HANDBOOK, *supra* note 38, § 4.1, at 97. One recent example of this phenomenon led to the heavily publicized resignation of Harvard University's president, Dr. Claudine Gay. *See* Jennifer Schuessler, Anemona Hartocollis, Michael Levenson & Alan Blinder, *Harvard President Resigns After Mounting Plagiarism Accusations*, N.Y. TIMES (Jan. 2, 2024), https://www.nytimes.com/2024/01/02/us/harvard-claudine-gay-resigns.html (on file with the Duquesne Law Review). For a detailed description of five examples from the passages "lift[ed] . . . verbatim" or only slightly paraphrased from other scholars, see Anemona Hartocollis & Sheelagh McNeill, *Excerpts from Dr. Claudine Gay's Work*, N.Y. TIMES (Dec. 21, 2023), https://www.nytimes.com/2023/12/21/us/claudine-gay-harvard-president-excerpts.html (on file with the Duquesne Law Review).

plagiarism "erodes public trust in information."[55] Of course, it does not elaborate on what types of information this concern covers, but it would seem to pertain mostly to novel insights or discoveries rather than information already known.

II. ANTIPLAGIARISM IN JUDICIAL OPINIONS AND LEGAL EDUCATION

Despite the nonlegal nature of plagiarism, plagiarism has become a concern in legal writing, both from the courts and from the legal writing academy. This Part will describe the manifestations of those concerns through legal writing guides, cases, and scholarship.

A. Antiplagiarism Overreach in the Legal Writing Academy

Some legal writing educators and scholars have also tended to express concerns about plagiarism in practice-based legal writing, including through quotation practices.[56] For example, the ABA *Legal Writing Sourcebook* states the following:

> Students may not realize that cutting and pasting from a judicial opinion or other legal authority without using quotation marks and proper attribution . . . qualifies as plagiarism. . . . But the extent to which courts continue to admonish practicing lawyers for plagiarizing in legal briefs suggests that law schools in general, and LRW faculty in particular, must do more to address the issue.[57]

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55. MLA HANDBOOK, *supra* note 38, § 4.1, at 97.

56. *See* Spearman, *supra* note 8, at 189–202; Richard H. Underwood, Commentary, *Something Bad in Your Briefs?*, 37 AM. J. TRIAL ADVOC. 369, 369–74 (2013); Kim D. Chanbonpin, *Legal Writing, the Remix: Plagiarism and Hip Hop Ethics*, 63 MERCER L. REV. 597, 606–09 (2012); Douglas E. Abrams, *Plagiarism in Lawyers' Advocacy: Imposing Discipline for Conduct Prejudicial to the Administration of Justice*, 47 WAKE FOREST L. REV. 921, 922–23 (2012); Temple, *supra* note 8, at 114; Gerald Lebovits, *Legal-Writing Ethics—Part II*, N.Y. ST. BAR ASS'N J., Nov./Dec. 2005, at 64, 58 ("To quote accurately, lawyers must use quotation marks, even if the lawyer omits or changes some words. Lawyers must use ellipses to note omissions and put changes in brackets. The key to honest writing is to use quotation marks when quoting even a few key words and then to cite. That's the difference between scholarship and plagiarism." (footnote omitted)); Craig, *supra* note 8, at 102; LeClercq, *supra* note 8, at 245; Mirow, *supra* note 8, at 61.

57. A.B.A., LEGAL WRITING SOURCEBOOK 127–28 (3d ed. 2020) [hereinafter LEGAL WRITING SOURCEBOOK] (footnotes omitted) (citing Liberty Towers Realty, LLC v. Richmond Liberty, LLC, 569 B.R. 534, 542 n.6 (E.D.N.Y. 2017); A.L. v. Chi. Pub. Sch. Dist. No. 299, No. 10 C 494, 2012 WL 3028337, at *6 (N.D. Ill. July 24, 2012); United States v. Bowen, 194 F. App'x 393, 402 n.3 (6th Cir. 2006); Consol. Paving, Inc. v. Cnty. of Peoria, No. 10-CV-1045, 2013 WL 916212, at *6 (C.D. Ill. Mar. 8, 2013); Lohan v. Perez, 924 F. Supp. 2d 447, 458 (E.D.N.Y. 2013)).

In another passage, the *Sourcebook* recommends "associating academic integrity with professional responsibility" because "students learn that the professionalism and ethical behavior expected of them in law school are precursors to the standards of behavior expected within the legal profession."[58]

In a similar vein, the Legal Writing Institute's 2003 brochure for students entitled *Law School Plagiarism v. Proper Attribution* begins by acknowledging differences between expectations in legal practice compared to academic environments, but it nonetheless advises that any verbatim text used from another source should be punctuated with quotation marks or as a block quote.[59] Indeed, the brochure describes attribution expectations in law school as even higher than in an undergraduate environment because "[c]ommon knowledge," which does not require citation in undergraduate school, "generally derives from case law or statute and must be cited."[60] Overall, the brochure advises that "[t]he overriding constant should be a diligent and meticulous attention to detail; writers should err on the side of providing, rather than omitting, reference information."[61] The brochure's "Rules for Working with Authority" are these:

> 1. Acknowledge direct use of someone else's words.
>
> 2. Acknowledge any paraphrase of someone else's words.
>
> 3. Acknowledge direct use of someone else's idea.
>
> *Careful scholarship, which is especially important in an academic setting, requires adhering to two additional rules:*
>
> 4. Acknowledge a source when your own analysis or conclusion builds on that source.
>
> 5. Acknowledge a source when your idea about a legal opinion came from a source other than the opinion itself.[62]

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58. *Id.* at 74.

59. *See* LEGAL WRITING INST., LAW SCHOOL PLAGIARISM V. PROPER ATTRIBUTION 3–4, 7, 9 (2003), https://www.tsulaw.edu/student_affairs/docs/plagiarism.pdf [https://perma.cc/B8WX-LA9G]. The LWI Brochure is referenced with a link at the LWI's website, although the link was broken in 2024, 2025, and 2026 when the author attempted it. *Plagiarism*, LEGAL WRITING INST., https://www.lwionline.org/plagiarism [https://perma.cc/S8CH-RWGD] (last visited Apr. 4, 2026). Nonetheless, the website also stated during the same period, "[p]lease note: This brochure is in the process of being updated." *Id.*

60. LEGAL WRITING INST., *supra* note 59, at 3.

61. *Id.*

62. *Id.* at 4.

The brochure then provides a series of exercises in which a simulated "student memorandum" attempts to incorporate information from various sources, asking the student to "determine whether the student has avoided committing plagiarism and explain why or why not."[63] The last question in the exercise involves use of verbatim language from a primary source, *Whiteside v. Griffis & Griffis, P.C.*, 902 S.W.2d 739, 744 (Tex. App. 1995), without quotation marks.[64] In the "Answer" to the question, the brochure states:

> **Incorrect.** Most of the second sentence *(the court held that an agreement imposing a reasonable cost on departing partners who compete with the firm in a limited area is enforceable)* is a direct quote from *Whiteside*. To avoid an allegation of plagiarism, that text should be punctuated with quotation marks, followed by a citation to *Whiteside*. Better yet, when discussing the facts, reasoning, and holding of a case, use your own words, followed by a proper citation.[65]

According to several educators in the legal writing academy, "we actually have a two-tiered system of attribution: one system—citations—for summaries and paraphrases; a second system—quotation marks and citations—for direct quotes."[66] In other words, a citation to the described source is sufficient if the legal writer is providing a summary or paraphrase "in their own words,"[67] but not if the language used is verbatim of what the cited source stated. The latter is punished as plagiarism.[68]

Few legal writing educators appear to believe that students *intend* to deceive or mislead their readers when they recite verbatim language from court opinions without quotation marks. To prevent "inadvertent" plagiarism, therefore, these educators tend to emphasize legal readers' purported desire for originality:

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63. *Id.* at 5.
64. *Id.* at 5, 7.
65. *Id.* at 9.
66. Craig, *supra* note 8, at 102; *see also* Temple, *supra* note 8, at 114; Chanbonpin, *supra* note 56, at 610; Spearman, *supra* note 8, at 204, 205.
67. Paraphrasing has been understood since the 1960s as referring to "sentences or parts of sentences taken to have the same cognitive meaning" as a referenced source, i.e., "[t]he meaning of a sentence considered in abstraction from affective or emotive meaning, stylistic nuances, the meaning of word order in specific contexts, and whatever else is deemed or assumed to be irrelevant to it." P. H. MATTHEWS, THE CONCISE OXFORD DICTIONARY OF LINGUISTICS 287, 63 (3d ed. 2014).
68. Craig, *supra* note 8, at 102; *see also* Temple, *supra* note 8, at 114; Chanbonpin, *supra* note 56, at 610; Spearman, *supra* note 8, at 204, 205.

> You should generally quote more sparingly from case law. Supervising attorneys and judges are primarily interested in your original synthesis of case law and your analysis of the facts within the legal framework. They are not impressed by your demonstrated ability to cut and paste page-long passages written by others.[69]

Others in the legal writing academy attribute copying of legal language as a failure of intellect or a lack of confidence:

> Plagiarism of an opinion is a common temptation. Students often believe that courts express the law so much better than they can that it doesn't make sense to invest the time necessary to develop a synthesized interpretation of the case. Furthermore, they believe, plagiarizing the case will avoid the possibility that they will misstate the law. Here, students must be made aware of their own intellectual abilities, told that they too can write in the tradition of the common law and express the law with clarity and accuracy.[70]

B. Plagiarism Admonishment in the Courts

Over the last fifty years, court opinions in United States jurisdictions have occasionally called negative attention to lawyers whose submissions to the court have copied other sources, with either absent or inadequate citations to the copied source. This Section provides an analysis of forty-five such opinions in which attorneys have been disciplined, sanctioned, admonished, denied attorney fees, or warned for this type of conduct.[71] Notably, none of these cases

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69. CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 309 (5th ed. 2006).

70. Mirow, *supra* note 8, at 61.

71. In reverse chronological order, they are: Ruhumuriza v. Higgins, Civil Action No. 25-109, 2026 WL 587636, at *8 n.6 (D.D.C. Mar. 3, 2026) (admonishing counsel); Goggins v. ALM Printers, LLC, Case No. 3:24-cv-00321, 2026 WL 66981, at *11 n.22 (M.D. Tenn. Jan. 8, 2026) (admonishing counsel); Kelly v. Tow, G064417, 2025 WL 1982214, at *2 n.4 (Cal. Ct. App. July 17, 2025) (strong warning of potential sanctions); Manier v. Dalpra, No. 3:20-CV-00329, 2023 WL 2018462, at *1 n.1 (S.D. Ill. Feb. 15, 2023) (strong warning); Matthews v. Kijakazi, Cause No. 2:21-CV-193, 2022 WL 3025887, at *7 n.7 (N.D. Ind. Aug. 1, 2022) (cautioning attorney); Commonwealth v. Knight, 241 A.3d 620, 627–29 (Pa. 2020) (holding that claims argued solely through copying of another attorney's brief in another case were waived); Lystn, LLC v. FDA, Civil Action No. 19-cv-01943, 2020 U.S. Dist. LEXIS 167382, at *13 n.8 (D. Colo. Sep. 14, 2020) (expressing disapproval); United States v. Flynn, 411 F. Supp. 3d 15, 27–28 (D.D.C. 2019) (admonishing counsel); Disciplinary Counsel v. Turner, 154 Ohio St. 3d 322, 324, 2018-Ohio-4202, 114 N.E.3d 174, 176–77, at ¶ 8 (finding misconduct); Old Republic Nat'l Title Ins. Co. v. Fakhuri (*In re* Fakhuri), 583 B.R. 915, 919 n.3 (Bankr. N.D. Ill. 2018) (requiring attorney to appear to explain why his fees should not be disgorged); Liberty Towers Realty, LLC v. Richmond Liberty, LLC, 569 B.R. 534, 541 n.6 (E.D.N.Y. 2017) (warning of sanctions); Ayala v. Lockheed Martin Corp., 67 V.I. 290, 310–15 (V.I. Super. Ct. 2017)

declare or even hint that my proposal—verbatim recitation of a rule from a precedential source with a citation to that source but no

(warning of sanctions); Est. of Williams v. City of Milwaukee, 274 F. Supp. 3d 860, 893 n.28 (E.D. Wis. 2017) (admonishment), *vacated and remanded on other grounds sub nom.*, Est. of Williams *ex rel.* Rose v. Cline, 902 F.3d 643 (7th Cir. 2018); Petro-Ryder v. Pittman, CIVIL ACTION NO. 15-2908, 2015 WL 8731623, at *5 n.38 (E.D. Pa. Dec. 11, 2015) (expressing disapproval); Rossello v. Avon Prods., Inc., Civil No. 14–1815, 2015 WL 5693018, at *2 n.4 (D.P.R. Sep. 28, 2015) (warning of sanctions); Goza v. City of Ellisville, No. 15-CV-775, 2015 WL 4920796, at *2 n.4 (E.D. Mo. Aug. 18, 2015) (admonishing counsel); Pick v. City of Remsen, 298 F.R.D. 408, 412 n.1 (N.D. Iowa 2014) (admonishing counsel); Consol. Paving, Inc. v. Cnty. of Peoria, No. 10-CV-1045, 2013 WL 916212, at *5–6 (C.D. Ill. Mar. 8, 2013) (withholding attorney fees); Lohan v. Perez, 924 F. Supp. 2d 447, 458–60 (E.D.N.Y. 2013) (issuing monetary fine); A.L. v. Chi. Pub. Sch. Dist. No. 299, No. 10 C 494, 2012 WL 3028337, at *6 (N.D. Ill. July 24, 2012) (reducing plaintiff's request for fees by 90%); State Farm Fire & Cas. Co. v. Harris, Civil Action No. 3:11-36, 2012 WL 896253, at *1 n.3 (E.D. Ky. Mar. 15, 2012) (admonishing counsel); *In re* Mundie, 453 F. App'x 9, 11 (2d Cir. 2011) (public reprimand); United States v. Sypher, Criminal Action No. 3:09-CR-00085, 2011 WL 579156, at *3 n.4 (W.D. Ky. Feb. 9, 2011) (admonishing counsel); Iowa Sup. Ct. Att'y Disciplinary Bd. v. Cannon, 789 N.W.2d 756, 760 (Iowa 2010) (public reprimand); Venesevich v. Leonard, Civil Action No. 1:07-CV-2118, 2008 WL 5340162, at *2 n.2 (M.D. Pa. Dec. 19, 2008) (issuing a "direct rebuke" that attorney violated Rule 8.4(c) of the Pennsylvania Rules of Professional Conduct); Denton v. Rievley, No. 1:07-CV-211, 2008 WL 4899526, at *2 n.2 (E.D. Tenn. Nov. 12, 2008) (admonishing counsel); *In re* Petition of Reid, 569 F. Supp. 2d 220, 221 n.1 (D.D.C. 2008) (admonishing counsel); Schultz v. Wilson, Civil Action No. 1:04-CV-1823, 2007 WL 4276696, at *6 n.13 (M.D. Pa. Dec. 4, 2007) (expressing a "strong disfavor of the practice" (quoting United States v. Lavanture, 74 F. App'x 221, 223 n.2 (3d Cir. 2003))); Keeney v. State, 873 N.E.2d 187, 190 (Ind. Ct. App. 2007) (admonishing attorney and alluding to court's authority to (1) limit attorney fee, (2) strike the brief, (3) report attorney to the bar for discipline, and (4) hold attorney in contempt); Shodeen v. Petit (*In re* Burghoff), 374 B.R. 681, 687 (Bankr. N.D. Iowa 2007) (issuing sanctions); Hartford Fire Ins. Co. v. Socialist People's Libyan Arab Jamahiriya, Civ. No. 98-3096, 2007 WL 1876392, at *6 n.3 (D.D.C. June 28, 2007) (warning counsel); Columbus Bar Ass'n v. Farmer, 111 Ohio St. 3d 137, 140–42, 2006-Ohio-5342, 855 N.E.2d 462, 467–68, at ¶¶ 18–23 (finding ethical violation); Reyes de Perez v. Contract Freighters, Inc., Civil Action No. 06-cv-02, 2006 WL 3053400, at *6 n.2 (S.D. Tex. Oct. 26, 2006) (warning counsel); United States v. Bowen, 194 F. App'x 393, 402 n.3 (6th Cir. 2006) (admonishing counsel); Kilburn v. Republic of Iran, 441 F. Supp. 2d 74, 77 n.2 (D.D.C. 2006) (warning counsel); Vasquez v. City of Jersey City, No. 03-CV-5369, 2006 WL 1098171, at *8 n.4 (D.N.J. Mar. 31, 2006) (expressing displeasure with counsel); *Lavanture*, 74 F. App'x at 223 n.2 (noting "strong disfavor" of the practice); *In re* Ayeni, 822 A.2d 420, 421 (D.C. 2003) (per curiam) (affirming violation of D.C. Rule of Professional Conduct 8.4 and sanctions); Iowa Sup. Ct. Bd. of Pro. Ethics & Conduct v. Lane, 642 N.W.2d 296, 299–302 (Iowa 2002) (suspending attorney's license for six months); Pagan Velez v. Laboy Alvarado, 145 F. Supp. 2d 146, 160–61 (D.P.R. 2001) (finding copying "intolerable" and warning of sanctions); Kingvision Pay Per View, Ltd. v. Wilson, 83 F. Supp. 2d 914, 916 n.4 (W.D. Tenn. 2000) (admonishing counsel); United States v. Jackson, 64 F.3d 1213, 1219 n.2 (8th Cir. 1995) (expressing disapproval); Dewilde v. Guy Gannett Publ'g Co., 797 F. Supp. 55, 56 n.1 (D. Me. 1992) (expressing condemnation); Gibbs v. State, 426 N.E.2d 1150, 1158–59 (Ind. Ct. App. 1981) (referring attorney to the Indiana bar for investigation); Frith v. State, 325 N.E.2d 186, 188–89 (Ind. 1975) (warning of potential lowering of fee award).

This analysis does not include cases in which the disfavored attorney copying occurred in a piece of writing produced for a purpose outside of the attorney's legal practice, although they were at times cited in the cases listed above. *E.g.*, *In re* Steinberg, 620 N.Y.S.2d 345, 346 (N.Y. App. Div. 1994) (per curiam) (copying another attorney's memorandum in a writing sample submitted with a job application); *In re* Petition of Zbiegien, 433 N.W.2d 871, 875 (Minn. 1988) (per curiam) (copying law review articles in a law school academic paper); *In re* Lamberis, 443 N.E.2d 549, 550 (Ill. 1982) (copying from academic books in LLM thesis).

quotation marks—is plagiarism. Nonetheless, a review of the body of the cases usefully illuminates the underlying motivations of these courts in policing plagiarism. The "evils" identified by the courts fall into three categories: (1) fraud and dishonesty, (2) incompetence, and (3) failure to "attribute" large segments of copied writing to their actual source.

To start, let us separate out the cases in which the court was adjudicating actual discipline against an attorney who submitted copied work. In all of those cases, the lawyers charged their clients fees for hours not actually spent on the briefs in question.[72] In that respect, they all involved clear dishonesty that was actionable under legal ethical rules.

It is also useful to separate out those cases where the attorney's copying directly affected their competence and effectiveness on the issue being litigated. For example, in *Matthews v. Kijakazi*, a district court stated that an attorney's copying of various unpublished district court opinions "raise[d] other questions about plagiarism" but also "potentially undermin[ed] . . . [his client's] position" because it erroneously included facts and reasoning from other cases and made the arguments "difficult to assess."[73]

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72. *Turner*, 154 Ohio St. 3d at 323, 2018-Ohio-4202, 114 N.E.3d at 175–76, at ¶ 4 (attorney accepted $1,000 to file motion for judicial release of inmate, but merely submitted the exact same documents (other than the signature block and contact information) that client's previous counsel had filed two years before and which had been denied); *Lane*, 642 N.W.2d at 300 (attorney "copied the entire portion of his legal argument out of a book and then claimed it took him eighty hours to write the brief" in application for attorney fees); *Farmer*, 111 Ohio St. 3d at 140–43, 2006-Ohio-5342, 855 N.E.2d at 466–69, at ¶¶ 17–28 (analyzing attorney's verbatim copying of a brief in a prior unrelated matter in context of broader claim of excessive flat fees); *Cannon*, 789 N.W.2d at 757–58 (noting underlying court's order that attorney disgorge overcharged fees for work on two briefs, where one of which consisted almost entirely of verbatim and unattributed excerpts from an online article and the other included no additional authority (referencing *Burghoff*, 374 B.R. at 683–85)); *Ayeni*, 822 A.2d at 421 (attorney filed a brief virtually identical to an earlier brief filed by his client's codefendant but requested payment for nineteen hours of research and writing for it).

73. *Matthews*, 2022 WL 3025887, at *4 & n.2; *see also Mundie*, 453 F. App'x at 18, 20, 16–17 (finding that while not plagiarism, attorney's inadequate editing of another attorney's brief "had the potential to prejudice his client" where he failed to address the most significant distinction between the two cases, included references to evidence not in the administrative record, and misstated the petitioner's name and gender as well as the issues raised); *Sypher*, 2011 WL 579156, at *3 n.4 ("[T]he court reminds counsel that Wikipedia is not an acceptable source of legal authority in the United States District Courts."); *Manier*, 2023 WL 2018462, at *1 n.1 (noting that "the plagiarized material in this brief contained descriptions of nonbinding precedent that . . . was quite dated" and "marginally instructive, if at all"); *Knight*, 241 A.3d at 628 (noting that the court had not granted the relief requested in the case copied from, so "Appellant's reliance on the arguments of the parties in those cases is not helpful to his position"); *Ayala*, 67 V.I. at 314 ("Written motions in which the authority cited and the conclusions drawn do not support the relief requested serve no purpose to clients, courts, or counsel."); *Consol. Paving*, 2013 WL 916212, at *5 ("Perhaps the most confounding part of Plaintiff's counsel's behavior is that despite copying pages of material from that opinion, most of which only lend relatively weak support to his claim, he missed the most compelling parts

It is the remaining cases, then, where the courts focused their accusations of misconduct solely on the lack of "attribution" to the copied source, that will receive the most attention for my purposes.

The sources being copied in these cases fall into three categories: (1) secondary sources like treatises, articles, or American Law Reports (A.L.R.);[74] (2) prior briefs written by the same or other attorneys;[75] and (3) judicial opinions.[76] Interestingly, courts seem most apt to talk explicitly about the need for "attribution" when the source being copied is a nonprecedential case at the same level as the court or, in some cases, written by the same judge.[77]

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of . . . [the opinion] . . . ."); *Lohan*, 924 F. Supp. 2d at 458 n.6 (agreeing with opponent's claim that copied brief was "rife with irrelevant discussion, . . . did not meaningfully address a single case cited by the [defendants] in support of their motion to dismiss, cited a case without disclosing it had been reversed, and essentially ignored every argument made by the [defendants]" (alterations in original)); *Lavanture*, 74 F. App'x at 223 n.2 (noting that "by simply reprinting the Sixth Circuit's work out of its original context, certain statements in . . . [counsel's] brief are inaccurate"); *Velez*, 145 F. Supp. 2d at 161 (noting that the copied brief "was a disservice to . . . [the attorney's] client, and this court, as it did not fully address all the arguments raised in Defendants' motion for summary judgement"); *Gibbs*, 426 N.E.2d at 1158–59 (referring attorney to state bar for investigation because of competence concern after he copied seventy-six pages from a codefendant's brief, which included a "vigorous assertion of his client's guilt"); *Frith*, 325 N.E.2d at 188–89 (page in counsel's brief referenced nonexistent appendices and had incompletely erased page numbers from the previous brief they were copied from).

74. *Lystn*, 2020 U.S. Dist. LEXIS 167382, at *13 n.8; *In re Petition of Reid*, 569 F. Supp. 2d at 221 n.1; *Kelly*, 2025 WL 1982214, at *2 n.4; *Manier*, 2023 WL 2018462, at *1 n.1; *Liberty Towers Realty*, 569 B.R. at 541 n.6; *Lohan*, 924 F. Supp. 2d at 458; *Sypher*, 2011 WL 579156, at *3 n.4; *Cannon*, 789 N.W.2d at 757–58; *Burghoff*, 374 B.R. at 683; *Lane*, 642 N.W.2d at 300; *Kingvision*, 83 F. Supp. 2d at 916 n.4; *Frith*, 325 N.E.2d at 188.

75. *Flynn*, 411 F. Supp. 3d at 27–28; *Knight*, 241 A.3d at 627–28; *Turner*, 154 Ohio St. 3d at 323, 2018-Ohio-4202, 114 N.E.3d at 175–76, at ¶ 4; *Lohan*, 924 F. Supp. 2d at 458 n.6; *Farmer*, 111 Ohio St. 3d at 140–43, 2006-Ohio-5342, 855 N.E.2d at 466–69, at ¶¶ 17–28; *Ayeni*, 822 A.2d at 421; *Dewilde*, 797 F. Supp. at 56 n.1; *Gibbs*, 426 N.E.2d at 1158.

76. *Ruhumuriza*, 2026 WL 587636, at *8 n.6; *Petro-Ryder*, 2015 WL 8731623, at *5 n.38; *Goza*, 2015 WL 4920796, at *2 n.4; *Hartford Fire*, 2007 WL 1876392, at *6 n.3; *Kilburn*, 441 F. Supp. 2d at 77 n.2; *Reyes de Perez*, 2006 WL 3053400, at *6 n.2; *Goggins*, 2026 WL 66981, at *11 n.22; *Matthews*, 2022 WL 3025887, at *4; *Rossello*, 2015 WL 5693018, at *2 n.4; *Old Republic Nat'l Title*, 583 B.R. at 919 n.3; *Ayala*, 67 V.I. at 310–11; *Est. of Williams*, 274 F. Supp. 3d at 893 n.28; *Consol. Paving*, 2013 WL 916212, at *5; *A.L.*, 2012 WL 3028337, at *6; *Venesevich*, 2008 WL 5340162, at *2 n.2; *Denton*, 2008 WL 4899526, at *2 n.2; *Schultz*, 2007 WL 4276696, at *6 n.13; *Keeney*, 873 N.E.2d at 190; *Bowen*, 194 F. App'x at 402 n.3; *Vasquez*, 2006 WL 1098171, at *8 n.4; *Lavanture*, 74 F. App'x at 223 n.2; *Velez*, 145 F. Supp. 2d at 160–61; *Jackson*, 64 F.3d at 1219 n.2.

77. *See, e.g.*, *Ruhumuriza*, 2026 WL 587636, at *8 n.6; *Petro-Ryder*, 2015 WL 8731623, at *5 n.38; *Goza*, 2015 WL 4920796, at *2 n.4; *Hartford Fire*, 2007 WL 1876392, at *6 n.3; *Reyes de Perez*, 2006 WL 3053400, at *6 n.2; *Goggins*, 2026 WL 66981, at *11 n.22; *Matthews*, 2022 WL 3025887, at *7 n.7 (requiring "proper attribution" when copying from unpublished district court opinions); *Old Republic Nat'l Title*, 583 B.R. at 919 n.3 (requiring "appropriate attribution" when copying from published Bankruptcy Court opinion); *Est. of Williams*, 274 F. Supp. 3d at 893 n.28 (requiring "proper attribution" when copying from published district court opinion); *A.L.*, 2012 WL 3028337, at *6 (requiring "appropriate attribution" when copying from published and unpublished district court opinions); *Denton*, 2008 WL 4899526, at *2 n.2 (requiring attribution when copying from an unpublished district court opinion); *Schultz*, 2007 WL 4276696, at *6 n.13 (requiring "clear attribution" when copying from

Many of these opinions made explicit connection between the concept of plagiarism and ethical prohibitions on dishonesty, fraud, deceit, or misrepresentation, although with varying levels of nuance. Some courts have acknowledged features of the plagiarism concept that do not fit neatly into a legal context:

> We recognize that the term "plagiarism" is something of a scarlet letter that imposes a brand on a wide variety of behaviors. We do not believe our ethical rules were designed to empower the court to play a "gotcha" game with lawyers who merely fail to use adequate citation methods. This case, however, does not involve a mere instance of less than perfect citation, but rather wholesale copying of seventeen pages of material. Such massive, nearly verbatim copying of a published writing without attribution in the main brief, in our view, does amount to a misrepresentation that violates our ethical rules.[78]

Other courts have clearly asserted that any plagiarism in a legal filing is an ethical violation without any closer analysis or explanation.[79]

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unpublished district court opinion (quoting *Lavanture*, 74 F. App'x at 223 n.2)); *Lavanture*, 74 F. App'x at 223 n.2 (requiring "clear attribution" when copying from Sixth Circuit opinion in brief to Third Circuit); *see also Venesevich*, 2008 WL 5340162, at *2 n.2 ("The one-page standard of review section also mirrors that frequently employed by our colleague, the Honorable Sylvia H. Rambo, with suspicious equivalence. . . . [Y]et . . . [the attorney] has not quoted or cited any of these cases for the content reproduced from them."); *Vasquez*, 2006 WL 1098171, at *8 n.4 (noting counsel's "unprofessional submission" which "plagiarized" from the same judge's prior opinion "without reference or citation"); Pick v. City of Remsen, 298 F.R.D. 408, 412 n.1 (N.D. Iowa 2014) (characterizing attorney's "attempt to pass off" the same judge's previous analysis "as his own work . . . [as] lazy, obnoxious and unprofessional"); State Farm Fire & Cas. Co. v. Harris, Civil Action No. 3:11-36, 2012 WL 896253, at *1 n.3 (E.D. Ky. Mar. 15, 2012) ("Citation to authority is absolutely required when language is borrowed." (quoting *Bowen*, 194 F. App'x at 402 n.3)); *Bowen*, 194 F. App'x at 402 n.3 (rejecting counsel's explanation that "he did not cite the [copied] case because it d[id] not constitute binding precedent in this circuit" and stating that "citation to authority is absolutely required when language is borrowed"); *Jackson*, 64 F.3d at 1219 n.2 (disapproving of brief that "appropriate[d] both arguments and language" from a published district court opinion "without acknowledging their source"); *cf. Keeney*, 873 N.E.2d at 190 (state appellate court requiring "proper attribution" when copying from published district court opinion).

78. *Cannon*, 789 N.W.2d at 759; *see also Bowen*, 194 F. App'x at 402 n.3 ("While our legal system stands upon the building blocks of precedent, necessitating some amount of quotation or paraphrasing, citation to authority is absolutely required when language is borrowed.").

79. *See, e.g.*, *Flynn*, 411 F. Supp. 3d at 27 ("The Court notes that Mr. Flynn's brief in support of his first *Brady* motion lifted verbatim portions from a source without attribution. . . . The District of Columbia Rules of Professional Conduct apply to the proceedings in this Court."); *In re Petition of Reid*, 569 F. Supp. 2d at 221 n.1 ("The petitioner's attorney extensively plagiarizes her "Legal Discussion" section. . . . The court reminds counsel that such conduct is actionable by the bar's disciplinary committee."); *Kelly*, 2025 WL 1982214, at *2 n.4 ("[T]he unattributed use of another attorney's material is of concern to this court. It is a serious breach of ethics and a violation of rule 8.4 of the Rules of Professional Conduct . . . ."); *Liberty Towers Realty*, 569 B.R. at 541 n.6 ("Federal courts have sanctioned attorneys for

Of the cases involving copying of judicial opinions, only two involved copying of *precedential* decisions (i.e., published appellate decisions in the same jurisdiction), the type of source of interest for this Article. As with many of the other cases, the problem in the courts' eyes was the lack of any citations to the decisions, but the courts' comments on why the citations were needed are illuminating.

In the first, *Consolidated Paving, Inc. v. County of Peoria*, a district court in Illinois decreased an attorney fee award for an attorney whose petition for fees had "lifted" "[f]ive [out of thirteen] pages of material . . . nearly verbatim from the Seventh Circuit's opinion in *Dupuy v. Samuels*" without citing the copied case.[80] The court stated that "[p]lagiarism is a serious issue" and "Plaintiff's counsel is warned that future filings in this Court must follow commonsense and ethical standards, including citing work that is from another source."[81] With regard to the type of source that had been copied, the court stated, "[c]ase law is meant to support an attorney's arguments, but borrowed analysis, and especially quoted material, must be cited."[82] The court warned counsel that more severe consequences might be imposed "if he ever attempts to plagiarize again."[83]

In the second case involving copying of precedential opinions, *Venesevich v. Leonard*, a district court judge in Pennsylvania complained that "[a]pproximately five of the eight pages of discussion are copied verbatim from judicial opinions issued by the United States Court of Appeals for the Third Circuit, this court, and our sister court for the Eastern District of Pennsylvania" without any citations to the copied sources.[84] The court did not suggest that the attorney's brief was erroneous or incomplete in the content of the

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plagiarism, which violates rules of professional conduct in jurisdictions including New York."); *Consol. Paving*, 2013 WL 916212, at *6 ("Plagiarism is a serious issue, and several courts have found such behavior unacceptable and a violation of the Rules of Professional Conduct that govern attorneys' behavior."); *Sypher*, 2011 WL 579156, at *3 n.4; *Venesevich*, 2008 WL 5340162, at *2 n.2 ("[S]everal courts have recognized that plagiarism violates the prohibition that state ethics codes place on misrepresentation and deceit."); *Burghoff*, 374 B.R. at 684 ("Plagiarism, which is '[t]he deliberate and knowing presentation of another person's original ideas or creative expressions as one's own,' *Black's Law Dictionary* (8th ed. 2004), is a form of misrepresentation." (alteration in original)); *Lane*, 642 N.W.2d at 300 ("Plagiarism itself is unethical. 'Plagiarism, the adoption of the work of others as one's own, does involve an element of deceit, which reflects on an individual's honesty.'" (quoting *In re* Petition of Zbiegien, 433 N.W.2d 871, 875 (Minn. 1988) (per curiam))).

80. *Consol. Paving*, 2013 WL 916212, at *5–6 (citing Dupuy v. Samuels, 423 F.3d 714 (7th Cir. 2005)).

81. *Id.* at *6.

82. *Id.* at *5.

83. *Id.* at *6.

84. *Venesevich*, 2008 WL 5340162, at *2 n.2.

law described. Rather, the court was most troubled by the fact that "none of the legal research contained in Attorney Bailey's brief appears to be his own work product, yet he has not quoted or cited any of these cases for the content reproduced from them."[85] Under those circumstances, the district court judge issued a "direct rebuke" that the attorney's plagiarism was "professional misconduct," "misrepresentation," and "a violation of Rule 8.4(c) of the Pennsylvania Rules of Professional Conduct."[86]

Overall, the quantity of opinions bemoaning plagiarism by attorneys in briefs is substantial enough to warrant analysis but hardly pervasive enough to constitute a majority rule.[87] The jurisdictions from which these opinions come have a notable geographic concentration in the Midwest and mid-Atlantic regions of the United States, and the total number of cases is very small.[88] And, when it comes to the most relevant segment of the cases for the purposes of this Article—those where the alleged copying was from judicial opinions—the courts' admonishments appear to have been animated not just by a desire for attribution for sister courts, but also by a legitimate desire to be reassured that the attorneys' research *process* was competent.[89]

C. Pushback Against Antiplagiarism Norms in Legal Settings Thus Far

In recent years, some scholars have argued that plagiarism is an inherent and appropriate part of legal practice that should be embraced rather than avoided.[90] Andrew Carter, for one, has argued that plagiarism should be embraced because, when competently done, it "saves time and money."[91] Unlike academic settings, where an antiplagiarism norm "makes good sense" "because originality

85. *Id.* The court also stated that "[the attorney's] plagiarism is particularly troubling because this court previously issued an admonition about such conduct in a case in which he participated." *Id.* (citing Schultz v. Wilson, Civil Action No. 1:04-CV-1823, 2007 WL 4276696, at *6 n.13 (M.D. Pa. Dec. 4, 2007)).

86. *Id.*

87. Compare the less than forty cases covered here, decided over a period of fifty years, to the nearly 150 U.S. cases from the last two years admonishing attorneys for inclusion of AI-generated hallucinations in their briefs. *AI Hallucination Cases*, *supra* note 27.

88. As the preceding citations demonstrate, there have been only a handful of such opinions in the Northeast and outer territories but none in either the South or West regions other than *Kelly v. Tow*, G064417, 2025 WL 1982214, at *2 n.4 (Cal. Ct. App. July 17, 2025), a recent case in the California Court of Appeal.

89. *See infra* Section III.B.

90. *See* Carter, *supra* note 9, at 536–37; Hanley, *supra* note 11, at 1–2; Boyd & Frye, *supra* note 9, at 1–6; Simon, *supra* note 9, at 85–87; Dykstra, *supra* note 11, at 199–205; Bast & Samuels, *supra* note 9, at 803–05.

91. Carter, *supra* note 9, at 536.

has a unique value," legal writing does not involve sufficiently weighty interests—whether of the courts, the client, or the plagiarized author—to justify a rule against plagiarism.[92]

Professors Megan E. Boyd and Brian L. Frye have gone one step farther and claimed that "[a]s a practicing lawyer, if you aren't plagiarizing, you're committing malpractice."[93] For that reason, "[l]egal writing instruction should include teaching law students how to plagiarize effectively."[94]

At least one bar association has rejected a generalized conclusion that copying is per se deceptive even after review of these cases:

> Our opinion that copying without attribution is not *per se* deceptive is based on our view of the norms of litigation practice and the purposes of litigation filings. Over time, courts will continue to express opinions on the propriety of copying without attribution, and it is possible that these decisions will coalesce into a clear judicial consensus that copying without attribution is *per se* deceptive for certain kinds of sources or when a certain volume of material is copied. If that consensus emerges (or if courts in New York issue an authoritative rule or ruling), we would need to revisit this opinion. To fail to cite a source, despite having knowledge that the court expects that source to be cited, would constitute a lack of candor and, in all likelihood, an act of deliberate deception in violation of Rule 8.4(c). As of now, however, we do not believe such a consensus exists in New York.[95]

III. COMMON LAW RULE RECITATIONS AS SPEECH ACTS IN LEGAL PRACTICE

> Law relies on language and particularly, it relies on the performative nature of language use. . . . By uttering words, one

92. *Id.* at 534, 554.

93. Boyd & Frye, *supra* note 9, at 1.

94. *Id.* at 2.

95. Ass'n of the Bar of the City of New York Comm. on Prof. Ethics, Formal Op. 2018-3 (2018) (discussing the "ethical implications of a lawyer's verbatim use of another's writing in a brief or litigation filing); *see also* 1 ROY D. SIMON, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED § 8:4:29 (2020–2021 ed. 2020); K.K. DuVivier, *Nothing New Under the Sun—Plagiarism in Practice*, COLO. LAW., May 2003, at 53, 54 (arguing that "there is no reason to sanction attorneys who borrow language or ideas in developing . . . an argument for the benefit of others," as long as they remain "responsible for understanding the source in the context of the client's situation and customizing the . . . argument accordingly"); Peter A. Joy & Kevin C. McMunigal, *The Problems of Plagiarism as an Ethics Offense*, *in* LEGAL STUDIES RESEARCH PAPER SERIES 56, 56 (2011) (arguing that attorney copying without attribution in litigation should not be a per se ethics violation).

> accepts public and private legal responsibilities and assumes legal roles and qualities . . . .[96]

Rules have a special place in modern Anglo-American legal tradition.[97] No matter what variation of the conventional paradigm one uses for legal analysis or argumentation, there is always a place for "rules."[98] This Part will explain why and how rules are expected to be recited by both lawyers and judges as a precursor to their arguments about or explanations of how the law applies to individual cases.[99] Specifically, it will show those recitations to be declarative and directive speech acts that, because of the nature of a common law system, keep the rules themselves "alive."

A. A Definition of the Word "Rule"

Before moving forward, I must clarify the vocabulary terms here: what is meant by the word "rule" in a common law system, and why is recitation of rules important? This Section will explain this Article's formulation of a common law "rule" as a legal standard, either general or specific, that can be applied to future cases using syllogistic reasoning and which has been previously articulated in the present tense by a court with binding authority.

Most modern legal writing texts agree that a "rule" is a legal standard that can be applied to future cases using syllogistic reasoning.[100] Rules articulate societal norms about human behaviors

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96. Deborah Cao, *Legal Speech Acts as Intersubjective Communicative Action*, *in* INTERPRETATION, LAW AND THE CONSTRUCTION OF MEANING 65, 65 (Anne Wagner, Wouter Werner & Deborah Cao eds., 2007).

97. *See* Sullivan v. Chafee, 703 A.2d 748, 752 (R.I. 1997) ("[L]aws and courts have their origin in the necessity of rules and means to enforce them, to be applied to cases and controversies within their jurisdiction . . . ." (quoting G. & D. Taylor & Co. v. Place, 4 R.I. 324, 337 (1856))).

98. The "R" stands for "Rule" in IRAC, CRAC, IREAC, CREAC, and all their variations. Alissa Bauer, *Teaching Cases: How Legal Writing Textbooks Approach the Rule Support Section*, 29 LEGAL WRITING 127, 133 & n.8 (2025) (collecting sources); *see* HELENE S. SHAPO, MARILYN R. WALTER & ELIZABETH FAJANS, WRITING AND ANALYSIS IN THE LAW 121 (7th ed. 2018); CHRISTINE COUGHLIN, JOAN MALMUD ROCKLIN & SANDY PATRICK, A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS 95 (3d ed. 2018); JOHN C. DERNBACH ET AL., A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD 219–20 (7th ed. 2021); MARY BETH BEAZLEY & MONTE SMITH, LEGAL WRITING FOR LEGAL READERS: PREDICTIVE WRITING FOR FIRST-YEAR STUDENTS 128 (3d ed. 2022); *see also* LAUREL CURRIE OATES ET AL., THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING 168 (9th ed. 2025); Andrew Turner, *Let's Not Be Creative: "Rigid IRAC" and the Hidden Power of Formalistic Legal Writing*, 72 J. LEGAL EDUC. 283, 283 (2024).

99. In the remainder of this Part, this Article will use the term "case" to refer not only to cases as a whole, but to any individual legal dispute that may arise in the context of a case, for example, a specific motion or an individual element of a claim or defense.

100. *See* Bauer, *supra* note 98, at 135 (synthesizing various legal writing textbooks); Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 VILL. L.

and allow imposition of legal consequences. The structure of a rule typically identifies a particular type of fact and assigns a particular legal significance to it with either an express or implied "if-then" assertion.[101] To complete a syllogistic analysis in an actual case, therefore, the actor need only complete three steps: recite the rule, identify whether the operative fact is present, then conclude with the legal significance that follows.[102] This is in the realm of the "logos" of legal argument, or "what one thinks of as the heart of legal analysis," applying the law to facts to reach a result.[103]

Rules may be either general or specific. When they are specific, rules may actually identify the dispositive inquiry or facts for the issue at hand, as in an interpretative definition of a word in the governing doctrine. For example, a definition of the "open and notorious" requirement for adverse possession in Washington is as follows: "Possession is open and notorious if either the title owner had actual notice of the adverse use or if the claimant used the land in a manner that would make a reasonable person believe the claimant owned it."[104] Rules like these could be called "tests" and may be referenced by practitioners as the answer to the question, "what is *the rule* here?" However, rules can also be so general as to merely weigh in favor of one party or the other without being dispositive, as in policy rules or standards of review that require the court to favor the inferences of one side over the other. For example, the same *Zonnebloem* case described the lens through which the court needed to review whether substantial evidence supported the trial court's findings of fact: "We view the evidence and all reasonable inferences therefrom in the light most favorable to the prevailing party, and we do not review the trial court's credibility determinations."[105] Regardless of the specificity of the rule, however, what all rules offer (or try to offer) is a clear invitation for syllogistic

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REV. 305, 308 (2003) (citing RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 38–39 (1990)); Carlos L. Bernal, *A Speech Act Analysis of Judicial Decisions*, 1. EUR. J. LEGAL STUD. 391, 404 (2007).

101. A "rule" is a general legal standard that "tell[s] people what they must or can do, what they must not or should not do, or what they are entitled to do under certain circumstances." COUGHLIN, ROCKLIN & PATRICK, *supra* note 98, at 61; *see also* HEIDI K. BROWN, THE MINDFUL LEGAL WRITER: MASTERING PREDICTIVE AND PERSUASIVE WRITING 27 (2016) (describing "rules" as the "substantive legal rules about parties' entitlements and obligations").

102. Huhn, *supra* note 100, at 309; *see also* Bernal, *supra* note 100, at 394.

103. Rachel Croskery-Roberts, *It's About Time: Kairos as a Dynamic Frame for Crafting Legal Arguments and Analyzing Rhetorical Performances in the Law*, 33 S. CAL. INTERDISC. L.J. 57, 65 (2023).

104. Zonnebloem, LLC v. Blue Bay Holdings, LLC, 401 P.3d 468, 473 (Wash. Ct. App. 2017).

105. *Id.*

reasoning of some kind, even if the conclusion does not fully resolve the dispute at hand.

Beyond this basic concept, this Article homes in on another important quality of a "rule": that it has previously been articulated as a current legal standard in a binding authority that is cited. In other words, rules are neither naturally self-evident nor subjectively asserted by individual legal speakers. Rather, a legal standard is a "rule" only if it is created and perpetuated by people and institutions following certain constituent procedures and rules in the legal system.[106] For example, rules may be found in statutes, regulations, court rules, or published appellate case decisions.

This Article focuses on rules originating in case law for reasons discussed below. What gives those rules the force of law is the tradition of stare decisis, where courts generally "stand by" things previously decided to ensure consistent application of the laws to all.[107] Admittedly, common law courts did not always undertake to pronounce rules as often as they do now. Several scholars have raised questions about the extent to which courts *should* create explicit rules and expect them to be binding in the same way that statutes are.[108] While these questions are worth exploring, this Article does not do so, instead taking the status of published appellate cases as binding sources of legal rules as a given.

Common law or judge-made rules are typically articulated as normative truths about hypothetical parties in the present tense.[109]

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106. *See* Paul Amselek, *Philosophy of Law and the Theory of Speech Acts*, 1 RATIO JURIS 187, 194–95 (1988) ("To recognize an utterance as an utterance of a legal rule is to recognize or imply that it has formed the subject of a speech act by a public authority in and for the exercise of its function of regulating human order.").

107. *Understanding Stare Decisis*, A.B.A. (Dec. 16, 2022), https://www.americanbar.org/groups/public_education/publications/preview_home/understand-stare-decisis (on file with the Duquesne Law Review). One professor has nicknamed the doctrine "institutionalized nostalgia." Alexander M. Sanders, Jr., *Newgarth Revisited: Mrs. Robinson's Case*, 49 S.C. L. REV. 407, 409 (1998). Admittedly, this is a rule with exceptions and inconsistent application as explored below and as Professor Amy Griffin has pointed out. *See* Amy J. Griffin, Essay, *"If Rules They Can Be Called,"* 19 LEGAL COMMC'N & RHETORIC 155, 158 (2022).

108. *See, e.g.*, Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 219–23 (2010); Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L.J. 765, 765–66 (2004); Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619, 1678 (2020). In fact, some commentators have even proposed alterations to judicial decisionmaking to undermine increasing textualism. *See* Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 965 (2009); Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 308–12 (2009).

109. For example, take this definition of "reasonable reliance" in the context of the federal entrapment by estoppel defense: "[R]easonable reliance *occurs* if 'a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries.'" United States v. Lynch, 903 F.3d 1061, 1077 (9th Cir. 2018) (emphasis added) (quoting United States v. Batterjee, 361 F.3d 1210, 1216–17 (9th Cir. 2004)). Note also how, even though statutes and regulations tend to state rules in the *future* tense, courts tend to put them into present tense when they paraphrase them. *Compare* 15

Their present- or future-focus is what makes them a rule; they exist as standards in the present even though they derive from actions taken by rule-creators in the past.[110] If such a rule-like statement was used in the past but has since been replaced or abandoned, it is no longer a "rule."[111]

For the same reason, the term "rule" as used in this Article does *not* encompass mere descriptions of themes, patterns, or principles discovered or asserted by a practitioner from the resolution of past cases. Such assertions are invaluable in legal analysis because they help tee up analogic reasoning, another rhetorical device commonly used for analyzing cases under the stare decisis tradition. Indeed, legal writing faculty spend a great deal of their instructional time on drafting such assertions, perhaps far more time than on drafting rules, because developing these kinds of assertions requires the writer to deeply understand and synthesize the authorities at hand to glean principles from them that are unstated. Synthesizing principles and using analogic reasoning are among the most difficult skills that legal novices are exposed to. Nonetheless, these principles do not have the same force as a "rule" because they do not explicitly invite syllogistic reasoning in all future cases based on the patterns identified.[112] They must therefore have another name, such as "thesis statement," "topic sentence," "hook," "subrule," or a "proposition about how the law works."[113]

U.S.C. § 1125(c)(3)(C) ("The following *shall not be actionable* as dilution by blurring or dilution by tarnishment under this subsection: . . . Any noncommercial use of a mark."), *with* Jack Daniel's Properties, Inc. v. VIP Prods. LLC, 599 U.S. 140, 145 (2023) ("The trademark law provides that the 'noncommercial' use of a mark *cannot count* as dilution." (emphasis added) (quoting 15 U.S.C. § 1125(c)(3)(C))).

110. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 635 (1995) (characterizing "rules, principles, standards, canons, maxims, and, of course, laws" as "norms reaching beyond particular events and individual disputes").

111. Reciting rules is typically not a "history lesson" that focuses on how the law developed over time. Rather, practitioners recite rules as normative truths, often with no reference to where the proposition came from until a citation in a separate sentence or clause. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION B1.1, at 3–4 (Columbia L. Rev. Ass'n et al. eds., 22d ed. 2025); CAROLYN V. WILLIAMS, ASS'N OF LEGAL WRITING DIRS., ALWD GUIDE TO LEGAL CITATION R. 34.1, at 364–67 (7th ed. 2021).

112. *See* Huhn, *supra* note 100, at 315 (discussing how analogic reasoning can be employed with either formalism or realism).

113. *See* Bauer, *supra* note 98, at 172 & n.177, 171 n.170 (citing various legal writing textbooks). Sometimes a principle-based "thesis" about case law can morph over time into a rule when a binding court formally states the thesis as a *requirement* for future cases. Nonetheless, the thesis is not a "rule" until this happens.

B. Roles and Duties of Legal Practitioners when Reciting Rules in Cases

This Section explains the roles and limitations that judges have when they state rules in their decisions and that lawyers have when they submit rules to judges with their arguments.

The core purpose of courts is to resolve cases and controversies.[114] As Professor Varsava recently put it, "the job of judges is to resolve disputes between parties who raise and frame the disputes themselves, to interpret legal rules, and to apply those rules to disputes in an impersonal and impartial manner."[115] Put another way, all judges are expected to have (if not always articulate) "reasons" for their decisions[116] that are consistent with the law[117] and the product of the judge's own independent judgment.[118] Their decisions, when

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114. *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 818 (1997) (stating that the "case-or-controversy" limitation in Article III is "fundamental to the judiciary's proper role in our system of government" (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 37 (1976))); Sullivan v. Chafee, 703 A.2d 748, 752 (R.I. 1997) ("[*O*]*ur whole idea of judicial power is, the power of the [courts] to apply the [laws] to the decision of those cases and controversies*." (alterations in original) (quoting G. & D. Taylor & Co. v. Place, 4 R.I. 324, 337 (1856))); McKneely v. Superior Ct., 309 Cal. Rptr. 3d 119, 126 (Cal. Ct. App. 2023) ("A core function of the judiciary is to resolve specific controversies between the parties." (quoting Perez v. Roe 1, 52 Cal. Rptr. 3d 762, 766 (Cal. Ct. App. 2006))); Smith v. UHS of Lakeside, Inc., 439 S.W.3d 303, 312 (Tenn. 2014) ("The essential purposes of courts and judges are to afford litigants a public forum to air their disputes, and to adjudicate and resolve the disputes between the contending parties." (citations omitted)); *see also* Varsava, *supra* note 12, at 114–15.

115. Varsava, *supra* note 12, at 114; *see also* Sarah L. Desmarais et al., *Public Opinion About Judicial Roles and Considerations: A Latent Profile Analysis*, 49 LAW & HUM. BEHAV. 206, 206 (2025) (reporting on national survey of public perceptions regarding judicial roles and factors that could be considered in decisionmaking, demonstrating that over 86% of the 4,861 jury-eligible adults surveyed valued legal standards, expert knowledge, and public safety).

116. Although outside the scope of this Article, some scholars have questioned whether a court must always be required to publicly *articulate* their reasons. *See, e.g.*, Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 489–96 (2015); Schauer, *supra* note 110, at 633–35. *But see* Richard H. Fallon, Jr., Essay, *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2292–93 (2017) (stating that "minimal . . . judicial candor" demands that a judge "strive conscientiously to make it intelligible to a reasonable reader who was acquainted with relevant law, including conventions of legal reasoning, how they could regard the reasons that they adduce in support of a decision as legally adequate under the circumstances").

117. MODEL CODE OF JUD. CONDUCT Canon 2, r. 2.2 (A.B.A. 2010) ("A judge shall uphold and apply the law . . . ."). "'Law' encompasses court rules as well as statutes, constitutional provisions, and decisional law." *Id.* terminology. To that end, "[c]ompetence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office." *Id.* Canon 2, r. 2.5 cmt. 1.

118. Stern, *supra* note 9, at 388 ("[I]n the judicial context, independent creation is associated with the judge's impartiality: in composing her own legal analysis, the judge is taken to show that she has considered the issues from a neutral perspective."); Varsava, *supra* note 12, at 115–16; *see also* Bright v. Westmoreland Cnty., 380 F.3d 729, 732 (3d Cir. 2004) ("[T]he linchpin in using findings of fact, even when they are verbatim adoptions of the parties' proposals, is evidence that they are the product of the trial court's independent judgment.");

written in opinions, tend to follow an IRAC-type organization that identifies the issue (I), then the rule (or rules) (R), then the court's analysis of how the law applies to the facts (A), and finally the conclusion (C).[119]

When judges put those reasons down in written opinions, they do not own those opinions. The judge's signature "certif[ies] the document as an official product of the court—that is, . . . show[s] who is responsible for the judgment."[120] But, they are not considered "authors" of their opinions under copyright law because of the "government edicts" doctrine, which provides that "officials empowered to speak with the force of law cannot be the authors of—and therefore cannot copyright—the works they create in the course of their official duties."[121] As the U.S. Supreme Court stated in its 1888 decision against copyright protection for nonbinding, explanatory legal materials created by judges:

> Judges . . . can themselves have no . . . proprietorship, as against the public at large, in the fruits of their judicial labors. . . . The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute.[122]

Of course, the use of rules by American *appellate* courts is particularly impactful because those opinions are generally required to be

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Smith, 439 S.W.3d at 316 ("In the final analysis, the ultimate concern is the fairness and independence of the trial court's judgment."); Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1334 (2008).

119. *See* Varsava, *supra* note 12, at 119 (stating that what belongs in a judicial opinion is a "specifically *legal* explanation, which amounts to a justification for the legal conclusion that the court reached and not a full-fledged causal explanation for why the case came out the way it did, which might involve many factors that are extraneous for legal purposes and have no place in an opinion").

120. Stern, *supra* note 9, at 404.

121. Georgia v. Public.Resource.Org, Inc., 590 U.S. 255, 259 (2020). Because copyright protection so clearly does not apply to the copying of court opinions, which is the focus of this Article, it will not dwell on the differences between plagiarism and copyright, which have been illuminated by other scholars. *See, e.g.*, Carter, *supra* note 9, at 547–52; Stern, *supra* note 9, at 386–88; Stearns, *supra* note 46, at 524–25; Frye, *supra* note 42, at 147–49.

122. Banks v. Manchester, 128 U.S. 244, 253 (1888). Note that in the case of the federal courts, the "government works" exception provides a separate basis to reject copyright protection for judicial works. *See* 17 U.S.C. § 105(a) ("Copyright protection under this title is not available for any work of the United States Government . . . ."); *id.* § 101 (defining a "work of the United States Government" as "a work prepared by an officer or employee of the United States Government as part of that person's official duties"); Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 668 (1834) (establishing the government works exception and denying copyright protection to the official reporter of its cases).

in writing and can be used as binding authority in future cases.[123] Appellate courts have an increasing inclination over the last 150 years to create explicit rules that are then repeated and applied in future cases on the same issue.[124] Even in this context, though, judges do not own their opinions and legal practitioners do not tend to refer to them by their author.

The lawyer's role when reciting rules in a brief is also regulated from a variety of angles. At the foundation of the job, lawyers are fiduciaries to their clients and "must provide the client with not only 'complete and undivided loyalty,' but also with advice [and advocacy] that will 'protect the client's interests.'"[125] Failing to bring a pertinent legal rule to the court's attention can create serious consequences for a client, for example the waiving of an alleged error on appeal. Thus, lawyers who do not competently research and use the law to their client's benefit can be subject to discipline by courts or the bar, malpractice suits by their clients, or conclusions that their representation was constitutionally ineffective.

Moreover, the law regulates how much lawyers can "spin" the law. On the one hand, lawyers are "not required to make a disinterested exposition of the law" when acting as advocates for their clients.[126] Many court rules regarding brief-writing merely require that the lawyer's brief include citations to the authority that the lawyer is *relying* on for their argument.[127] However, lawyers must disclose "authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."[128] They are also presumed to have access to all the binding law,[129] and their "legal contentions" must be "meritorious," i.e., "not frivolous."[130]

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123. *See* Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1226, 1233 (2007).

124. *See id.* at 1247–57; Varsava, *supra* note 12, at 114 & n.45.

125. *See* Delaney v. Dickey, 242 A.3d 257, 268 (N.J. 2020) (quoting State *ex rel.* S.G., 814 A.2d 612, 616 (N.J. 2003)); *see also* MODEL RULES OF PRO. CONDUCT r. 1.2(a) (A.B.A. 1983) (scope of authority between attorney and client). Clients must be consulted as to the means that the attorney will use to accomplish their objectives, even though the client will generally defer to the "special knowledge and skill of their lawyer" with respect to "technical, legal and tactical matters." *Id.* r. 1.2 cmt. 2.

126. *See* MODEL RULES OF PRO. CONDUCT r. 3.3 cmt. 4 (A.B.A. 1983).

127. *See, e.g.*, FED. R. APP. P. 28(a)(8)(A).

128. *See* MODEL RULES OF PRO. CONDUCT r. 3.3(a)(2) (A.B.A. 1983).

129. *See id.* r. 1.1 cmt. 5 ("Competent handling of a particular matter includes inquiry into and analysis of the . . . legal elements of the problem . . . ."); *id.* cmt. 8 ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law . . . [and] engage in continuing study and education . . . .").

130. *See id.* r. 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . ."); *see also* FED. R. CIV. P. 11(b)(2) (signature on a brief in a civil case certifies that "legal

Under these circumstances, lawyers in practice are never, as some scholars have suggested, working on "an interpretive project of their own" with the law, nor is a lawyer "a peer with the law."[131] It is true that lawyers often make their strategy decisions about how to use precedent alone, but not because they are creating original works. Rather, lawyers' duty of confidentiality generally prevents them from revealing information relating to the representation of a client to others.[132] There is no duty to cite all cases in the controlling jurisdiction that *support* the client's position, much less every case that has stated a particular rule. For that reason, selection of the cases to cite is a strategy decision that is generally protected as confidential under the work product doctrine.[133]

Yet, despite the structural limitations on lawyers' identities as authors, they still have tremendous value for the legal system as a whole: it is the lawyer's role to bring law to the judge's attention so justice can be done.[134] As the ABA itself has recognized, "[t]he underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case."[135] In this context, judicial opinion-writing is a collaborative process with lawyers' arguments.[136] Courts very often base their rulings on the arguments and authorities presented by the parties rather than on their own research.[137] In fact, prominent judges have expressed how the lawyer's compliance with Model Rule of Professional Conduct

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contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law").

131. Chanbonpin, *supra* note 56, at 636 (quoting Debra M. Schneider, Refashioning Legal Pedagogy After the Carnegie Report: Something Borrowed, *Something New* 51 (Sep. 2009) (unpublished manuscript) (no longer available online)).

132. MODEL RULES OF PRO. CONDUCT r. 1.6(a) (A.B.A. 1983).

133. FED. R. CIV. P. 26(b)(3)(B) (civil); United States v. Nobles, 422 U.S. 225, 236–38 (1975) (criminal).

134. *See, e.g.*, Perkins Coie LLP v. U.S. DOJ, 783 F. Supp. 3d 105, 119–20 (D.D.C. 2025) ("Congress may legislate, the President may implement, and courts may adjudicate, 'but only the lawyers can prepare and submit the great issues of human justice under law in such manner and form that courts, in the ultimate, may be effective.'" (quoting Williams v. Beto, 354 F.2d 698, 706 (5th Cir. 1965))).

135. MODEL RULES OF PRO. CONDUCT r. 3.3 cmt. 4 (A.B.A. 1983) ("Candor Toward the Tribunal").

136. *See* Friedman, *supra* note 9, at 519–20; Bast & Samuels, *supra* note 9, at 803; Anderson v. City of Bessemer City, 470 U.S. 564, 572 (1985) (approving trial court practice of signing findings of fact and conclusions of law drafted by the prevailing party's attorney).

137. *See, e.g.*, United States v. El Paso Nat. Gas Co., 376 U.S. 651, 656–57 (1964) (holding that district judge's findings of fact and conclusion of law, which were "adopted verbatim" from submissions from counsel for the winning party, were "formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence" even though "[findings] drawn with the insight of a disinterested mind are . . . more helpful to the appellate court" (citing United States v. Crescent Amusement Co., 323 U.S. 173, 184–85 (1944); 2B WILLIAM W. BARRON & ALEXANDER HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1124 (Charles Alan Wright ed., 1961))).

3.3(a)(2) (Candor Toward the Tribunal) helps them discharge their own duties under the Model Code of Judicial Conduct to be faithful to and competent in the law and to maintain confidence in the legal system.[138] After all, as Judge Adrienne Nelson has explained, judges can make the best decisions in a dispute when they are aware of all the cases that apply to it.[139] The ultimate goal of the legal system is to provide an accurate picture of the law for the court and thereby obtain justice and serve stare decisis, and in that respect the court and lawyers have the same ethical responsibility.[140]

C. The Fluidity of Common Law Rules

The reason that this Article focuses on rules that originate in case law rather than enacted law is the unique way that such "common law" rules are maintained over time. Statutes and regulations are enacted at a specific moment in time in a process designed to create legal entitlements and obligations that bind society indefinitely. In that sense, every word and phrase used by the enacting body matters and must be revisited whenever interpretive questions arise. By contrast, judicially made law is constantly being remade over time. As Professor Marianne Constable once stated, judicial opinions are not merely "static texts from which students extract noun-like rules"; law is something that "happens" as "part of an event in which judges actively state rules."[141] This aspect of common law impacts both the content of the law itself and the roles of the practitioners (both judges and lawyers) who use it in cases.

As entrenched as the stare decisis tradition is in the Anglo-American common law system, the presumption that courts should decide like cases in the same way has a great deal of flexibility built into it.[142] Courts deciding common law issues always have the

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138. *See, e.g.*, *Podcasting the Model Rules of Professional Responsibility - Rule 3.3*, A.B.A., https://players.brightcove.net/1866680404001/mgE0LY1p8_default/index.html?videoId=6363437540112 (on file with the Duquesne Law Review) (last visited Jan. 26, 2026) ("Ethics in 10" segment moderated by Paula Frederick with guest, U.S. District Court Judge Adrienne Nelson); *see also* MODEL CODE OF JUD. CONDUCT Canon 2, r. 2.5 (A.B.A. 2010); *id.* pmbl., para. 1.

139. *Podcasting the Model Rules of Professional Responsibility - Rule 3.3*, *supra* note 138.

140. *Id.*

141. Marianne Constable, *Law as Claim to Justice: Legal History and Legal Speech Acts*, 1 U.C. IRVINE L. REV. 631, 639 (2011).

142. Much has been written on this subject, which this Article will not attempt to describe comprehensively. As one commentator once wrote:

> In practice, the doctrine of stare decisis appears downright flexible. The standards used to determine when precedent can be ignored are multiple and inconsistent, and the application of . . . [stare decisis] itself is sporadic. It has been said to be nothing more than a "doctrine of convenience," and to operate with "the randomness of a lightning bolt."

power to change rules when the application of them reveals a fairness reason to do so.[143]

In a system where common law rules can be changed in individual cases, the way that rules get and keep their force is through repeated recitation and application to cases over time.[144] After all, a rule-like statement by a court (i.e., a normative statement with express or implied legal consequences, articulated in the present tense) that is only stated or applied once, then forgotten, does not carry much weight as a binding rule in future cases; if raised again decades later, it is likely to be interpreted as dicta or mere reasoning underlying the specific result in that case. By contrast, there are many common law rules that are so pervasively used that the legal profession expects lawyers to have working knowledge of them before even being admitted to the profession; we call these rules, which fill bar review subject-matter outlines each year, "black letter law." Overall, the amount of weight or authority that a common law rule has can depend on how often it is used both by lawyers and judges.[145]

What is critical to remember, however, is that even when rules are well-established and used regularly, each new case in a sense presents an opportunity for the practitioners involved to revisit whether those rules are still just.[146] If they are not, they can be

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Pintip Hompluem Dunn, Note, *How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis*, 113 YALE L.J. 493, 506–07 (2003) (footnotes omitted) (first quoting Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORN. L. REV. 401, 402, 405 (1988); and then quoting Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 743 (1988)).

143. *See, e.g.*, Rogers v. Tennessee, 532 U.S. 451, 467 (2001) (recognizing "a routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense"); *Understanding Stare Decisis*, *supra* note 107.

144. *See* Constable, *supra* note 141, at 637 ("When law becomes speech act, history tells stories of law as happenings and events, verbings and doings . . . ."); Dick W.P. Ruiter, *Legal Powers*, *in* NORMATIVITY AND NORMS: CRITICAL PERSPECTIVES ON KELSENIAN THEMES 471, 477 (Stanley L. Paulson & Bonnie Litschewski Paulson eds., 1999).

145. Indeed, Professor Ronald J. Krotoszynski, Jr. has argued that on some issues the existence of strong judicial protection of a given right, such as the freedom of speech in elections, is far more important than the existence of a source text like the First Amendment in the Bill of Rights. *See* RONALD J. KROTOSZYNSKI, JR., FREE SPEECH AS CIVIC STRUCTURE: A COMPARATIVE ANALYSIS OF HOW COURTS AND CULTURE SHAPE THE FREEDOM OF SPEECH 169 (2024).

146. *See* MODEL RULES OF PRO. CONDUCT r. 3.1 cmt. 1 (A.B.A. 1983) ("The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change."); *see also* JUSTIN DESAUTELS-STEIN, THE JURISPRUDENCE OF STYLE: A STRUCTURALIST HISTORY OF AMERICAN PRAGMATISM AND LIBERAL LEGAL THOUGHT 42 (2018) ("[T]he jurist *always* has a decision to make about what to do with the situated materials, which materials to read, which materials to ignore, which materials to read closely, and so on. It is because

changed. Or, if the unjust rule is general and nondispositive, practitioners could choose to simply stop including it in their recitations, letting it fall into obsolescence. In this respect, practitioners—lawyers and judges—are often the ones who decide on a case-by-case basis whether the rules are still worth preserving in the law. Put another way, practitioners are constantly in rhetorical situations in which they must decide whether the time is right to try to change the law.[147]

This Article does not focus on cases where a party decides to pursue a good-faith change to the law, but rather the cases where they decide not to. There are many cases where the parties do not disagree about what "the rule" is but instead disagree about what the facts are or how the rule applies to the facts.[148] As the next Section will demonstrate, in these cases, speech act theory is helpful to explain *why* legal practitioners recite rules in this type of scenario, which can inform a genre-specific approach to *how* they can or should do so in writing.

D. Speech Act Theory and Rules Recitation—A Balance of Assertive and Performative Functions

Speech act theory originates from the work of J.L. Austin, a philosopher of language who began observing that some utterances appeared to be accomplishing more than just saying something; they actually accomplished actions by the mere fact that they had been uttered. For example, when a man utters the sentence "I . . . take this woman to be my lawful wedded wife" in the course of a marriage ceremony, that sentence is not a description or report of something true or false; it actually effects the event that the words invoke.[149] Austin and his philosophical descendants unsurprisingly tended to use many examples of such "speech acts" from the legal system.[150] This Section will lay out the basic concepts underlying the theory and apply them to the recitation of rules by legal practitioners to show that the practice has a unique illocutionary purpose

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the jurist *always* faces such decisions that we sense the resonance of Sartre's remark: 'We are condemned to be free.'").

147. The concept of "kairos" in legal rhetoric is an exciting area of newer scholarship in recent years. *See, e.g.*, Croskery-Roberts, *supra* note 103, at 59–62; LINDA L. BERGER & KATHRYN M. STANCHI, LEGAL PERSUASION: A RHETORICAL APPROACH TO THE SCIENCE 31–38 (2018). In short, "kairos" is "a concept of time that moves beyond chronology and into the realm of 'right' or 'opportune' moments." Croskery-Roberts, *supra* note 103, at 68.

148. Cases like these are numerous and likely constitute the majority of legal disputes.

149. AUSTIN, *supra* note 19, at 4–6.

150. *E.g.*, *id.* at 19.

that distinguishes it from other genres of writing where plagiarism is villified.

Under Austin's formulation, any particular utterance may have up to three attributes.[151] The first (which nearly all utterances have) is its locutionary force, which is its "sense and reference," "roughly equivalent to 'meaning' in the traditional sense."[152] The second attribute is its potential "illocutionary force," which refers to what the speaker is using the utterance to *do* (e.g., promising, requesting, thanking).[153] Finally, the utterance's "perlocutionary" force is the consequential effect it has upon the feelings, thoughts, or actions of the audience or others (e.g., persuading, deterring, surprising).[154] Speech act theory, however, focuses primarily on the second of these attributes: the illocutionary force.

Initially, Austin attempted to divide utterances into two categories: "constatives," which were mere statements, and "performatives," which were actions accomplished by the utterance itself.[155] Performatives were not subject to criticism based on their truth or falsity; they were either successful ("happy") or unsuccessful ("unhappy") in accomplishing the action, which depended more on whether they complied with accepted conventional procedures or occurred under unconventional circumstances.[156] In other words, the same sentence could be "performative" in one occasion and merely "constative" in another.[157] Nonetheless, even Austin conceded that the distinction between performatives and constatives was not so pure and "ha[d] to be abandoned in favour of more general *families* of related and overlapping speech acts."[158]

Austin's legacy was shortly thereafter taken up by John R. Searle, who formally discarded the performative/constative distinction and proposed an alternative five-category taxonomy of illocutionary acts: (1) Assertives, by which we "tell people how things are"[159]; (2) Directives, by which "we try to get them to do things"; (3) Commissives, by which "we commit ourselves to doing things"; (4) Expressives, by which "we express our feelings and attitudes"; and (5) Declarations, by which "we bring about changes in the world

151. *Id.* at 98–100.
152. *Id.* at 108.
153. *Id.*
154. *Id.*
155. *Id.* at 4–6.
156. *See id.* at 14–15.
157. *Id.* at 67.
158. *Id.* at 149.
159. SEARLE, *supra* note 20, at viii, 12–20. These are similar to Austin's "expositives." AUSTIN, *supra* note 19, at 151, 162.

through our utterances."[160] Searle observed that one of the primary ways in which these categories differ is in the "direction of fit" the speech act has between the words used and the world.[161] For example, Assertives "have as part of their illocutionary point to get the words (more strictly, their propositional content) to match the world";[162] in other words, they are descriptive of the world. Others, by contrast, "get the world to match the words" by creating something new in the world.[163]

My argument focuses on three of these speech act categories as relevant to the recitation of rules by legal practitioners: Assertives, Directives, and Declaratives. Each one has its own set of "felicity conditions" that make for a successful speech act.

The purpose or "essential rule" of an Assertive is that the speaker commits himself to a belief in the truth of the expressed proposition.[164] To be an Assertive, the expressed proposition must not be obviously true to both the speaker and the hearer in the context of utterance; in other words, it must not be obvious that the hearer already knows or does not need to be reminded of the proposition.[165] And, the speaker must be in a position to provide evidence or reasons for the truth of the expressed proposition.[166] In other words, it will be evaluated by the hearer by its truth or falsity.

By contrast, a Declarative occurs "where one brings a state of affairs into existence by declaring it to exist" as in these examples provided by Searle:

> [I]f I successfully perform the act of appointing you chairman, then you are chairman; if I successfully perform the act of nominating you as candidate, then you are a candidate; if I successfully perform the act of declaring a state of war, then war is on; if I successfully perform the act of marrying you, then you are married.[167]

In general (if not always), Declaratives require the existence of an "extra-linguistic institution" in which the speaker and hearer occupy special places.[168] There are often also various other

160. SEARLE, *supra* note 20, at viii.
161. *Id.* at 3.
162. *Id.*
163. *Id.*
164. *Id.* at 12, 62.
165. *Id.* at 62; JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 66 (1969).
166. SEARLE, *supra* note 20, at 62.
167. *Id.* at 16–17.
168. *Id.* at 18.

constitutive rules governing when a Declarative is successful.[169] When it is, the declarative speech act becomes its own "institutional fact."[170]

Notably, both Austin and Searle noted that many Declaratives overlap with Assertives where the speaker is charged with ascertaining facts pursuant to a certain fact-finding procedure and then laying down a decision as to the facts that has the force of a Declarative.[171] Many legal examples come to mind in this vein, including jury verdicts and judicial findings of fact, but Austin and Searle also note nonlegal examples such as appraisals, estimates, and calls of balls and strikes in baseball by an umpire.[172] At any rate, these "assertive declarations" are required by certain institutions "in order that the argument over the truth of the claim can come to an end somewhere and the next institutional steps which wait on the settling of the factual issue can proceed."[173]

Finally, there are Directives, which constitute attempts by the speaker to get the hearer to do something.[174] For such a speech act to be successful, the hearer must be able to perform the requested action, and the speaker should want the hearer to do it.[175] Notably, the degree of illocutionary *force* of this category of speech acts can vary greatly as it includes everything from binding orders to mere suggestions.[176] Directives can also be performed indirectly through a statement that is also an Assertive. For example, saying "you could be a little quieter" may be a literal assertion of a proposition that can be evaluated as true or false, but the *primary* illocutionary act performed in the utterance is a request that the hearer actually *be* quieter.[177]

Applying this theory to the legal practice context, the recitation of rules by practitioners in a legal case emerges as a "speech act" that not only Asserts the correctness of that rule but also commits the practitioner as either a Declarative or a Directive to the application of that rule for purposes of the case and, by extension, the perpetuation of that rule's use into the future.

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169. *Id.*
170. *Id.* at 178.
171. *Id.* at 19.
172. AUSTIN, *supra* note 19, at 88, 150 (discussing "verdictives"); SEARLE, *supra* note 20, at 19.
173. SEARLE, *supra* note 20, at 19–20.
174. *Id.* at 13, 44.
175. *Id.* at 44.
176. *Id.* at 5; *see* DICK W.P. RUITER, INSTITUTIONAL LEGAL FACTS: LEGAL POWERS AND THEIR EFFECTS 54, 59 (1993); Bernal, *supra* note 100, at 401.
177. *See* SEARLE, *supra* note 20, at 33–34.

As a preliminary matter, there is no doubt that recitation of rules by lawyers and judges is an Assertive. Specifically, the recitation signifies that the rules constitute "the correct interpretation of the law to rule the actual case"; in doing this, practitioners are "describing the world," or at least the principles existing in the legal world.[178] Both lawyers and judges make themselves accountable for the rule being accurately supported by the authority cited for it and representing an actual state of affairs in current, applicable legal norms.[179] The recitations may also have a persuasive purpose as well, which falls under the scope of Assertives; the lawyer or judge may try to persuade the judge or public that the rule is not only the existing norm for the scenario, but also the *best* norm to apply.[180]

Nonetheless, there are other nonassertive speech acts being performed when judges and lawyers recite rules in the course of handling cases.

When courts recite rules in opinions, it has the illocutionary force of a Declarative. In a limited way, Professor Carlos Bernal has already shown this to be true.[181] He was analyzing a situation in which an appellate court was adopting a new rule, which is clearly declarative.[182] But he also recognized another declarative quality to the statement of the rule even aside from its newness: that the court was declaring that the rule would be used as the main premise in the syllogism for resolving the case.[183] This declarative quality is present for any judge deciding a legal case, whether at the trial court or appellate level.

Going beyond this observation, this Article submits that recitation of an existing rule by a court that is applying it is declarative in a more systemic way; every time that a particular rule is "declared" in order to be applied, the stronger force it has under stare decisis. Dick W.P. Ruiter has described "[t]he capacity to convey validity to a norm by declaring it valid" as a "legal power," which

178. *See* Bernal, *supra* note 100, at 404 (analyzing judicial decisions).

179. Those legal norms are all human-made fictions, of course, so critics may note Searle's conclusion that fiction is not an illocutionary act. SEARLE, *supra* note 20, at 64. Nonetheless, illocutionary statements in the form of "serious discourse" can be made *about* fiction after it is created. "Because the author has created these fictional characters, we on the other hand can make true statements about them as fictional characters." *Id.* at 70–71.

180. On the persuasive purpose of judges, see Stephen M. Johnson, *The Changing Discourse of the Supreme Court*, 12 U. N.H. L. REV. 29, 33 (2014); Nancy A. Wanderer, *Writing Better Opinions: Communicating with Candor, Clarity, and Style*, 54 ME. L. REV. 47, 49 (2002). *But see* Varsava, *supra* note 12, at 125 ("Persuasion is not among the fundamental purposes of opinions . . . .").

181. Bernal, *supra* note 100, at 406.

182. *Id.*; *see also* Dunn, *supra* note 142, at 499.

183. Bernal, *supra* note 100, at 406; *see also id.* at 409 (finding declarative illocutionary force in court's conclusion about the facts of the case).

"derives from a 'power-conferring norm.'"[184] And, the "legal acts" created by these power-conferring norms are "specific declarative speech acts" that can create "institutional facts" that exist independently of and transcend any individual lawyer or judge.[185] These powers render a judicial opinion much more than "an individualized and subjective expression of the law" as suggested by Professor Kim Chanbonpin.[186] The statement of a rule in an appellate opinion literally makes it law that then becomes binding on all within the reach of the court's jurisdiction, including the authoring judge.

Recitation of rules by lawyers in their briefs and arguments is no less performative, although in a directive way rather than in a declarative way.[187] A lawyer's assertion that a rule applies is insufficient to make it so, so they must make an appeal to a court, which is capable of making a declaration that the rule applies.[188] A lawyer's purpose in writing a brief to a court is generally to ask the court to apply selected rules to their client's case. But, in leading the court to common law rules that lead to the desired conclusion, the lawyer is also indirectly asking the court to perpetuate those rules and keep them "alive" for other parties to access in future cases.

To summarize, there is a metaphorical machinery of speech acts that perpetuates the common law. One court's declarative speech act that a certain rule is the law becomes the support for a subsequent attorney's directive speech act that it should remain the law and a subsequent court's declarative speech act that it still is. Each successive speech act is both present-focused (asserting that the rule exists and is valid) and future-focused (it should continue to be the rule going forward). In other words, it is practitioners' recitation of rules that allows for the desired consistency and predictability of

184. Ruiter, *supra* note 144, at 472–73.

185. *Id.* at 474, 477; *see* Vasquez v. Hillery, 474 U.S. 254, 265–66 (1986) (recognizing that even though the doctrine of stare decisis is not an "inexorable command," it still has the societal benefit of "permit[ting] society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals"); *see also* Margie Alsbrook, *Strong Democracies Need Reliable Citations*, 57 ARIZ. ST. L.J. 1, 17 (2025) (arguing that "[w]hen judges and lawyers push . . . boundaries" of "reliability and transparency" in their use of legal precedent, the "entire judicial system suffers," which in turn endangers stable democracies).

186. Chanbonpin, *supra* note 56, at 632.

187. Susan Provenzano has addressed the implications of speech act theory for lawyers' work in the context of their allegations in complaints. *See* Provenzano, *supra* note 19, at 1165–74. Her conclusion is similarly that factual allegations in a complaint can be directive as well as assertive, although most of her analysis is not directly analogous to the rules context.

188. Ruiter, *supra* note 144, at 472–73.

the common law to be achieved.[189] And, the present- and forward-looking nature of those speech acts is what ultimately helps to develop a workable view of how recitation of rules can and should be done in writing.

IV. THE MISMATCH BETWEEN NOTIONS OF PLAGIARISM AND QUOTATION IN LEGAL PRACTICE

Given the features of common law rule recitation described above, this Part argues that notions of plagiarism have no bearing on a legal practitioner's decision of whether to put quotation marks around verbatim language from a cited appellate case. Unlike in academic settings, where setting out verbatim language without quotation marks would be considered plagiarism, the realities of legal practice void all of the perceived evils of plagiarism. As a preliminary matter, a practitioner who recites a verbatim rule in writing without quotation marks is not dishonest because genre-specific citation rules specifically allow it. Even if a reader misinterpreted the sentence to be the practitioner's original formulation of the idea, though, there would be no harm to the quoted judicial authors from the practice because they have neither moral nor legal right to attribution as an author for their precise wording (as opposed to the concept it represents). Moreover, there would be no unjust enrichment to the practitioner because legal reasoning is stronger when it originates in authority than when it does not.

A. A Lack of Dishonesty or Misrepresentation

To many, the primary evil of plagiarism is the misrepresentation and dishonesty of portraying another's writing as one's own.[190] But in the context of reciting verbatim rules in a legal practice document with a citation to the source where the rule appears, there is no such misrepresentation; the context and strong citation conventions would make it clear to the legal audience that the rule was directly stated in the cited source, even though the practitioner's quotation was indirect. In other words, when a lawyer states a legal rule and cites her source without any signal, she is not claiming that the words are hers rather than those of the source; the words could very

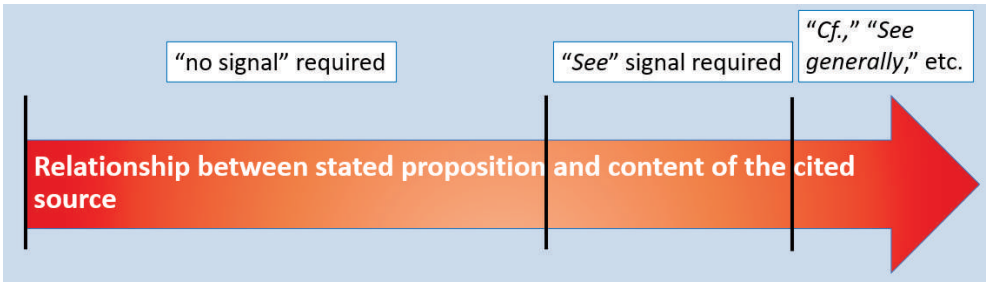
189. *See* DESAUTELS-STEIN, *supra* note 146, at 42 ("The meaningful existence of the legal language could only be found in its 'adumbrations' for and 'solicitations' of the jurist's consciousness.").

190. *See, e.g.*, Frye, *supra* note 42, at 141 ("[T]he essence of plagiarism is misattribution . . . .").

well be those of the source. In this context, there is no misrepresentation of authorship.

To prove this point, we must consider the provisions of legal citation manuals like *The Bluebook: A Uniform System of Citation*. *The Bluebook*, now in its twenty-second edition,[191] was originally created in the 1920s by law students serving as leaders of several leading law reviews.[192] While *The Bluebook* has always covered numerous citation conventions, this Article focuses on its system of introductory signals, which make specific and defined representations to a legal reader about the practitioner's *purpose* for including the citation and the relationship between the stated proposition and the content of the cited authority.

Consider this graphic portraying a spectrum of options that a practitioner has when it comes to the relationship between a lawyer's stated proposition and the source they cite for it. Legal signals essentially comprise a hierarchical framework for the strength of a legal writer's citations in the eyes of a legal reader.[193] On the left side is a citation that has a very close relationship to the stated proposition (which makes it stronger support), and on the right is a citation that has a very attenuated relationship between the two and the practitioner is using some creativity to glean what the support is (which indicates weaker support):

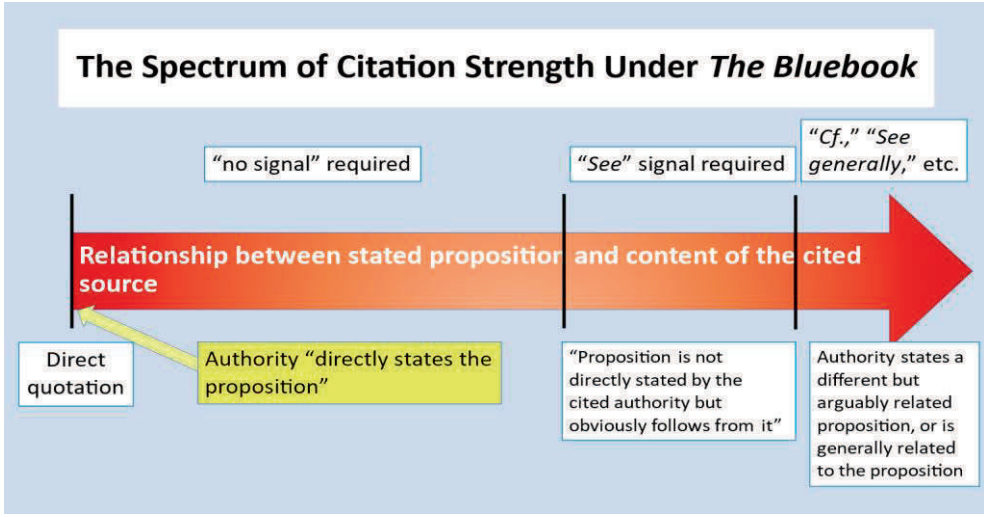


The practice I address here falls into the category where no signal is required. Providing a citation with no signal is the strongest way to support a proposition. As the figure below illustrates, a direct quote from the cited source falls under this umbrella, and logically represents the epitome of closeness between a stated proposition and the cited source from which it comes:

191. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, *supra* note 111.

192. A UNIFORM SYSTEM OF CITATION: ABBREVIATIONS AND FORM CITATION (Harvard L. Rev. Ass'n et al. eds., 1st ed. 1926).

193. *See, e.g.*, Alexa Z. Chew, *Citation Literacy*, 70 ARK. L. REV. 869, 883 (2018); ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 123–24 (2008).



At this extreme, the words unequivocally come entirely from the cited source.

But, direct quotation is not the only way to avoid needing to use an introductory signal. *The Bluebook* also allows a citation to have no signal whenever the authority "directly states the proposition."[194] Alexa Chew has aptly described this standard as follows:

194. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, *supra* note 111, B1.2, at 4. This has been the standard in nearly all the versions going all the way back to 1955, when the ninth edition said that no signal was used before a case "which directly upholds the statement of *law* in text." A UNIFORM SYSTEM OF CITATION: FORM OF CITATIONS AND ABBREVIATIONS 38 (Columbia L. Rev. Ass'n et al. eds., 9th ed. 1955). The one exception was the sixteenth edition of *The Bluebook*, which allowed for a citation with no signal only where the "[c]ited authority (i) identifie[d] the source of a quotation, or (ii) identifie[d] an authority referred to in text," and required a "*See*" signal when the cited authority "directly state[d] or clearly support[ed] the proposition." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2, at 22 (Columbia L. Rev. Ass'n et al. eds., 16th ed. 1996), *quoted in* A. Darby Dickerson, See*ing Blue: Ten Notable Changes in the New* Bluebook, 6 SCRIBES J. LEGAL WRITING 75, 76, 77 (1997) [hereinafter Dickerson, See*ing Blue*]. This change to the introductory signal system was quickly abandoned in the seventeenth edition of *The Bluebook* in 2000 after great outcry in the legal writing community. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at 22 (Columbia L. Rev. Ass'n et al. eds., 17th ed. 2d prtg. 2000); Salmon, *supra* note 6, at 780–82; *see* A. Darby Dickerson, *An Un-Uniform System of Citation: Surviving with the New Bluebook (Including Compendia of State and Federal Court Rules Concerning Citation Form)*, 26 STETSON L. REV. 53, 67–68 (1996) [hereinafter Dickerson, *An Un-Uniform System*]; Dickerson, See*ing Blue*, *supra*, at 78–80.

Notably, the *Bluebook* editions before 1955 did not contradict the thesis of this Section either; the early editions of *The Bluebook* took an entirely different approach to introductory signals altogether, based primarily on the distinction between "holding" and "dicta" rather than the current "textualized" understanding of judicial authorities. *See* Dickerson, *An Un-Uniform System*, *supra*, app. C-1. I intend to elaborate on this historical context in a subsequent article.

"[T]he reader could look at the cited authority and point to text that says the same thing as the proposition."[195]

Under this framework, there is nothing misleading about a lawyer making a proposition with no quotation marks that is followed by a citation with no signal to a source that says the same thing verbatim. Legal readers know that the cited source directly states the proposition, which can include the same verbatim wording. The linguistic label for the practice is indirect quotation. Even though rule recitation often lacks a textual clause introducing the source (e.g., "The Ninth Circuit has held that . . . ."),[196] the source is clearly identified in the in-line citation that follows. And, like any other indirect quotation, the proposition itself "gives us the content (but not the form) of the original utterance event."[197]

There is no problem created by the variability extending *too close* to the source text. That would essentially result in a gap in the spectrum of strength for a citation even though the gap is not about the actual strength of the cited source's support for the proposition.

B. A Lack of Unjust Enrichment

Another evil that is seen as accompanying plagiarism is that "it is a form of cheating that allows the plagiarist an unearned *benefit*."[198] The benefit received is typically reputational and often economic: the plagiarist receives praise and/or compensation for the plagiarized work after falsely conveying that it was their own work. The previous Section has already established that no false representation has occurred when a practitioner recites verbatim rules from a cited source without quotation marks. Nonetheless, legal practitioners gain no unjust enrichment even if they arguably conceal the authorship of rules. Concealment of the original source's authorship would make the practitioner's work less valuable, not more, in the eyes of a legal audience.

In nonlegal contexts, unjust enrichment comes in when an artist or scholar merely repackages another's words as their own without communicating that they have done so with explicit tools like quotation marks. The creator's intellectual work must be their own to justify its value to its intended audience. Of course, an academic's work may rightfully build on a foundation or inspiration from another's work, but in those cases they take on a duty to make it clear

195. Chew, *supra* note 1, at 863.
196. *See* Maier, *supra* note 34, at 260.
197. *Id.* at 262.
198. Stearns, *supra* note 46, at 519 (emphasis added).

which portions of the work are new contributions; even with a citation to the source, the reader will assume that the words are the author's own "spin" on the cited source and give the author "credit" for that contribution. In this context, quotation marks are needed to clearly distinguish one academic's work from another's.

By contrast, in the context of reciting rules to be applied in legal practice, there is no premium placed on the originality of legal rules. As Professor Diana Simon once observed, "[i]nterestingly, Rule 11 contains a list of representations when a lawyer signs a pleading . . . . Nowhere in this list is a claim of originality of authorship."[199] Instead, underlying the very concept of legal reasoning is the notion of both the author and the reader being collectively bound by certain legal authorities containing rules.[200] Moreover, the purpose of reciting the law in a written document is to educate the reader on what "the law" is because they are generally assumed not to know it. Both the writer and the reader have moved past the stage of their careers where they must clear individual academic milestones and have moved on to putting the law into use for clients as part of a legal system. In this context, legal practitioners may put their own "spin" on the rules, but when they do it it is for the purpose of increasing the clarity or persuasiveness of their legal reasoning in the case at hand, not to distinguish themselves from other practitioners for originality's sake.

C. A Lack of Legitimate Harm

Finally, when authors whose words are copied complain of a lack of attribution, they claim to have suffered a moral wrong akin to a kidnapping of their efforts or, more precisely, their words' "abduction into servitude" "for the plagiarist's own ends."[201] In industries where original works are "the coin of the realm" such as academia, creators may suffer very real losses of reputation and professional opportunity as a result of these thefts. In plagiarism scenarios in the arts, the plagiarized creator may also lose out on actual

199. Simon, *supra* note 9, at 86 (footnote omitted).

200. *See supra* Part III; *see also* Carter, *supra* note 9, at 554 ("The genius of the common law, of course, is that, to be sound, the analysis of any legal issue must be deeply informed by legal principles presented in earlier texts . . . .").

201. Stearns, *supra* note 46, at 517; *see* THOMAS MALLON, STOLEN WORDS: FORAYS INTO THE ORIGINS AND RAVAGES OF PLAGIARISM, at xiii–xiv (1989). Professor Frye has described how "[a]cademic plagiarism norms create some of the most expansive 'attribution rights,' by prohibiting the use of any expression, fact, or idea without attribution." Frye, *supra* note 42, at 137.

remuneration if a plagiarist gets to market with the product before the creator.[202]

Nonetheless, actual harm is illusory when the author is a judge articulating rules in a precedential appellate opinion. First, there is no loss of control of the work because judges never have control or ownership over the common law in the first place. Even when a court adopts a new rule in a particular case, the authoring judge is not writing that rule as if it was the original insight of a scholar or investigator of scientific truth.[203] Rather, the words are written, after significant input from the parties, as declarations of binding law for the purpose of applying that law to the case at hand and to subsequent cases, until such time when a future court may change that rule.

Second, courts do not offer any sort of promotions, awards, or other status benefits to judges who "write better" or formulate their thoughts more "originally" than their peers. To the contrary, the rules governing judges require them only to follow the law.[204] Professor Varsava has shown how there is a countervailing body of style literature on judicial opinion-writing that "caters to judges' egos and reads as a kind of how-to guide on building a reputation and attracting a fan base."[205] Nevertheless, she makes a good case that the "freewheeling and artistic" approach to writing judicial opinions advised in those sources is inappropriate, shortsighted, and can lead to bad judicial work.[206]

In addition, this increased "personal" approach to judicial opinion-writing may cause judges to think that their writing is "art," that they have a moral right to "attribution" for it, and that copying it is plagiarism. In reality, a judge's "authorship function is oriented not around credit so much as responsibility."[207] Practitioners use the language of the cited source for *authority* supporting the overall argument, not to give credit to judges as authors.[208]

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202. *See* Stearns, *supra* note 46, at 533–34.

203. *See* Varsava, *supra* note 12, at 103 (arguing against "the kind of colorful and aesthetically pleasing judicial writing style that commentators widely encourage, and that many judges adopt" because it "makes for professionally irresponsible opinions").

204. *See supra* Section III.B.

205. Varsava, *supra* note 12, at 112.

206. *Id.* at 124; *see id.* at 113–52; *see also* Meg Penrose, *Overwriting and Under-Deciding: Addressing the Roberts Court's Shrinking Docket*, 72 SMU L. REV. F. 8, 17 (2019) (advocating for eliminating signed majority opinions to address "the notoriety incentive" by judges).

207. Stern, *supra* note 9, at 390.

208. As this author intends to explore in a future article, use of another's words for authority is a much older purpose than for attribution, demonstrating that it is possible to have just that purpose without the other.

One of the biggest indications that a moral right of attribution does not make sense in the case of common law judicial decisions is its existence alongside other elements of the *droit moral* that are entirely inconsistent with a judicial role. The right of "disavowal" (also known as the right of withdrawal)[209] could never be given to judges because functioning judicial systems require finality of decisions, and a judge, having authored and published a binding opinion, cannot withdraw that opinion unilaterally. The opinion may be later abrogated or overruled by another source, but, given the declarative purpose of judicial opinions, cannot be disavowed by the authoring judge.

Similarly, the right of "integrity" (the "prevention of deforming changes")[210] is also inconsistent with the fluid nature of the common law and the fact that judges can never expect the precedent they set to remain binding indefinitely. Some scholars have bemoaned that plagiarism is a practice that "severs the connection between the original author's name and the work."[211] But in a legal context, the common law system of precedent does that regardless.

Overall, then, there is no valid harm to appellate judges whose rule statements in opinions are recited verbatim by later practitioners without quotation marks.

V. BENEFITS OF INDIRECT QUOTATION OF RULES IN LEGAL RHETORIC

With fear of plagiarism out of the picture, all that remains is to describe the reasons why a legal practitioner might consider reciting a rule verbatim from a cited source without quotation marks as a valid style choice. That is what this Part will do, with the caveat that it does not advocate for using this practice in all situations. Direct quotation has many benefits. Substantive paraphrasing does as well. However, this Part argues that there is a place for indirect quotation of verbatim rules without quotation marks on the "menu" of options. It lays out several benefits of using such a style instead of the false dichotomy between direct quotation and putting the rule "in one's own words," particularly in situations where neither party is expected to dispute that the rule should apply.

What pervades all these reasons is the concept that the decision of whether and how to quote a rule "is a matter not of objective

209. *See* Stearns, *supra* note 46, at 530–31.
210. *See id.*
211. *Id.* at 529.

measurement but of social relationships."[212] And the question really comes down to what is gained by allowing a legal practitioner to recite a rule "as is" but in their own "voice," without all the explicit distancing signals of direct quotation.

A. By Not Paraphrasing, the Practitioner Is Participating in a Beneficial Performance of the Common Law System Itself

There are many benefits when practitioners recite rules verbatim instead of putting them into their own words, including accuracy and consistency. In addition, reciting verbatim language for rules can contribute to communal cohesion in the legal system as a whole, which should be embraced.

1. Benefits to the Integrity of Common Law Rules Over Time

In terms of the accuracy of legal rules being argued and applied in cases, it is not difficult to see how forcing practitioners to choose between direct quotation and substantive paraphrasing could lead to inadvertent errors in legal documents that undermine the quality of the work product overall. Professor Luedeman's study illuminates both the existence of such inadvertent errors at even the highest levels and the types of disruption that they can create.[213] For example, he described a Third Circuit case in which the court attempted to state a familiar rule in the inverse, materially changing the standard without any apparent intent to do so.[214] In scenarios like this, where the appellate court appears to have inadvertently misstated the law in a binding, published case, practitioners in subsequent cases are forced into the difficult ethical choice of whether to embrace or ignore its new statement of what the law is.[215] The uncertainty may manifest in disagreements between parties on which version of the rule is correct, accruing attorney fees for clients and unnecessary acrimony for all involved.

This scenario is the perfect illustration of the fact that common law rules are fragile. The system must be flexible enough to

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212. FINNEGAN, *supra* note 31, at 238.

213. *See* Richard Luedeman, *The Flubs That Bind: Stare Decisis and the Problem of Inadeliberate Doctrinal Misstatements in Appellate Opinions*, 75 SMU L. REV. 725, 727–29 (2022).

214. *Id.* at 735 (comparing standard for qualified immunity as articulated by *Good v. Dauphin County Social Services for Children & Youth*, 891 F.2d 1087, 1092 (3d Cir. 1989), and *Abdul-Akbar v. Watson*, 4 F.3d 195, 202 (3d Cir. 1993)). Notably, this particular example involves misleading *direct* quotation rather than imprecise paraphrasing, but there are far more plentiful examples of the latter.

215. *Id.* at 744–46.

accommodate principled, intentional changes in the rules for fairness's sake, but changes caused by unprincipled chaos are harmful to the integrity of the system itself. In cases where none of the participants believe that existing rules are unjust, it is legal practitioners—lawyers and judges—who are, in effect, responsible for maintaining their consistent application to all in society, and they do so through their affirmative Directive and Declarative speech acts in cases. When common law rules are seen in this light of endangerment and communal responsibility, it becomes more clear that practitioners *should* allow accepted rules to converge into common wording over time.[216] In other words, the primary purpose of reciting accepted rules in cases is the forward-looking purpose of perpetuating their use into the future rather than any backwards-looking purpose of giving credit.

In the law school context, many law students who complain about the inability to state rules verbatim in their legal writing assignments argue that they are afraid that they will inadvertently get the law "wrong" in their effort to paraphrase,[217] and rightly so. This fear does not reflect a lack of independent judgment or sense of responsibility; it is a manifestation of these virtues that is well-suited to practice.[218] In fact, in a "real life" legal scenario, where the intended reader of a legal document does not already know the applicable rules, history shows there is a good chance that reader would prefer to be educated on the rules "as is" so they can best evaluate the arguments that follow.[219] A practitioner who is "caught" copying a rule verbatim from an authoritative source does not suffer a loss

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216. *See* Stern, *supra* note 9, at 385–86 ("The bland, repetitive, and often formulaic cadences of legal writing in general and judicial writing in particular can be explained in large part by a commitment to the neutral and consistent application of the law."); Felipe Jiménez, Essay, *Some Doubts About Folk Jurisprudence: The Case of Proximate Cause*, 08/23/21 U. CHI. L. REV. ONLINE 1, 1 (2021) (explaining that "[t]he legal system is a governance structure characterized by an artificial, highly technical, and relatively arcane form of practical reasoning" that is inconsistent with "folk concepts," which he illustrates as "armchair analytic philosophy and experimental jurisprudence").

217. *See* Mirow, *supra* note 8, at 61.

218. As important as it is for students to understand the rules they are applying in legal writing assignments, legal writing faculty can better assess that understanding in students' analysis (the "A" of IRAC) rather than in their description of the rules themselves (the "R").

219. *See* Helen A. Anderson, Essay, *Changing Fashions in Advocacy: 100 Years of Brief-Writing Advice*, 11 J. APP. PRAC. & PROCESS 1, 4 (2010) ("[S]ome aspects of brief-writing advice have remained remarkably consistent over the years. The authors plead for clarity, logical organization, *accuracy*, and conciseness." (emphasis added)); Henry S. Redfield, *The Brief on Appeal*, *in* BRIEF MAKING AND THE USE OF LAW BOOKS 5, 6–7 (Nathan Abbot ed., 1906) ("[T]he primary purpose of a brief is to aid the appellate court in reaching a correct decision. . . . [C]are and honesty should be exercised in the citation of authorities with the aim of rendering the greatest possible assistance to the court in its efforts to ascertain the rule or rules which should control its decision." (footnote omitted)).

of credibility, but an increase in confidence because the practitioner has avoided a reckless misstatement of the law.[220]

Professor Varsava argues that excessive "styling" of opinions by judges not only calls their professionalism into question but "could create undesirable inequities in the law" as later courts choose which opinions to cite in their resolution of other cases.[221]

Lawyers are also not different from judges and should not be shut out of reciting verbatim rules in their own voice.[222] There is no professional prohibition on getting the law "too right"; in fact, the duties of candor and competence suggest that all participants in the legal system should be striving towards getting the law as "right" as possible. There is room for creativity and pushing boundaries when needed, but the fact is that it is not always needed. Parties and judges should not need to spend unnecessary time fighting about what the law is before getting to the actual dispute in the case. In that respect, it is both more efficient[223] and more effective for lawyers as well as judges to avoid substantively paraphrasing accepted rules.

2. Benefits to Civility and Belonging in the Legal Profession

Finally, it promotes civility and belonging in the legal profession to embrace the existence of communal knowledge in legal cases whenever possible. Litigation is acrimonious enough that many legal organizations have already recognized a need to instill greater civility in legal practice,[224] and minimizing the instances where parties are in open disagreement about what the law is can only further this goal. A sense of proverbial collectivism with what the law is cannot perhaps occur in every case (maybe not even in most cases), but in an era when 62.24% of 3,100 legal professionals who

220. *See* Joy & McMunigal, *supra* note 95, at 58 ("Rather than focusing on *originality*, ethics authorities investigating allegations of inappropriate copying in litigation should focus on the *quality* of the filing, how well it serves its function.").

221. Varsava, *supra* note 12, at 159–60.

222. *See* Linda H. Edwards, *Once upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 885 (2010) ("[I]f rhetorical analysis is limited to judicial opinions, it starts at least one step too late, missing a critical point of influence. To fully understand the rhetorical situation, rhetorical analysis should start with the advocates' briefs." (footnote omitted)).

223. Several commentators have pointed out the cost- and time-savings that copying other sources can provide to clients, most beneficially to clients who cannot afford to pay for a brief that is wholly original. Carter, *supra* note 9, at 536–38; Hanley, *supra* note 11, at 5; Boyd & Frye, *supra* note 9, at 4.

224. *See, e.g.*, *Our Vision, Mission, and Strategic Goals*, AM. INNS CT., https://www.innsofcourt.org/AIC/About_Us/Our_Vision_and_Mission/AIC/AIC_About_Us/Vision_Mission_and_Goals.aspx?hkey=27d5bcde-8492-45da-aebd-0514af4154ce [https://perma.cc/3Q32-C5UA] (last visited Apr. 4, 2026).

responded to a mental health survey reported having "physical and mental overwhelm and fatigue" and 33.02% reported feeling "detached" and "alone in the world,"[225] any moment of communal connection between legal practitioners is something to be welcomed.[226]

B. By Not Using Quotation Marks, the Practitioner Is Productively Focusing on Concepts Rather than Authors

While the previous Section focused its attention on why legal practitioners might want to avoid paraphrasing legal rules and instead recite them verbatim, this Section will flesh out the benefits to doing so without quotation marks. In short, if "legal persuasion results from making and breaking mental connections,"[227] there are situations in which practitioners benefit from avoiding these "breaks" in the connection between a rule and the argument for which it is provided. Indirect quotation is easier for the reader to absorb, conveys more seriousness by the writer, and is more efficient for all involved.

1. Indirect Quotation Content Is Easier to Absorb than Direct Quotation Because It Places the Focus on Content Rather than Specific Words or Sources

This Subsection will demonstrate, using the work of prominent psycholinguists Herbert H. Clark and Richard J. Gerrig, how the practice of reciting rules without quotation marks actually makes the simple transmission of legal concepts more effective than direct quotation.

As stated at the outset of this Article, Clark and Gerrig theorized that the fundamental difference between indirect and direct quotation is that the first is a *description* of what the speaker said, and the second is a *demonstration* of the speaker's actual statement.[228] According to Clark and Gerrig, "[d]emonstrations and descriptions are fundamentally different methods of communication"[229] and

225. ALM Staff, *supra* note 23.

226. In 2020, after reviewing research literature from the social sciences on the influence of the legal system on attorneys, psychologist Krystia Reed suggested that the number of decisions that attorneys have to make in practice, often in combination, creates an "extreme pressure to make the 'right' decisions . . . [that] likely has a major impact on the high levels of attorney distress." Reed, *supra* note 22, at 398.

227. BERGER & STANCHI, *supra* note 147, at xi.

228. Clark & Gerrig, *supra* note 17, at 764 & n.2; *see also* Harth, *supra* note 35, at 197.

229. Clark & Gerrig, *supra* note 17, at 764. The third method of communication they identified was "indicating," which "work[s] by locating things." *Id.* at 765. In the case of rules recitation by legal practitioners, the citation to authority is the "indicate" method, which allows the reader to perceive the rule's location and weight of authority directly. Such

"contrast in whose perspective the addressees are to get *engrossed* in."[230] A novelist may have the goal "to engross readers in the characters' world," in which case "that might demand direct quotation."[231] But, if the novelist's purpose is "to engross readers in the narrator's thoughts and actions, they should use indirect quotation."[232]

In an emerging field of study, psycholinguistics and neuroscience scholars have been able to confirm Clark and Gerrig's theory by studying the different mental processes undertaken by the brain upon silent reading of direct and indirect quotation. In one of the earliest such studies, participants silently read a number of short written stories, some depicting events with direct quotation and others with indirect quotation, all while their eye movements and brain activations were monitored via fMRI technology.[233] What the study found was that there was no significant difference in the accuracy of the participants' comprehension upon reading direct and indirect quotations, but when the participants read direct quotation accounts, there was greater activation "in voice selective areas of the right auditory cortex" of the brain.[234] The researchers concluded that readers of direct quotations are "more likely to engage in perceptual simulations (or spontaneous imagery) of the reported speaker's voice" than when they read meaning-equivalent indirect speech statements.[235]

Clark and Gerrig specifically addressed the issue of quotations of speech acts, positing that when a speaker undertakes a

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communication by "indication" is a fixture in legal writing but is always accompanied by either a description or a demonstration of the rule itself in the textual sentence that precedes it.

230. *Id.* at 793.

231. *Id.* at 794. Because of this difference in experience for the audience, Clark and Gerrig recognized that direct quotations "should be useful for any purpose that is well served by such a direct experience." *Id.* at 793. For example, they pointed out that it is generally easier to demonstrate (rather than describe) "emotion, urgency, indecision," "sarcasm," "formality," and "disfluencies." *Id.*

232. *Id.* at 794.

233. Bo Yao, Pascal Belin & Christoph Scheepers, *Silent Reading of Direct Versus Indirect Speech Activates Voice-Selective Areas in the Auditory Cortex*, 23 J. COGNITIVE NEUROSCIENCE 3146, 3146–47 (2011).

234. *Id.* at 3149.

235. *Id.* at 3146. Another study showed that direct speech evoked this kind of extra brain activity even when it was read out loud in a monotone; even with actual auditory information to work with, the right auditory cortex of the brain still activated more than with indirect quotation readings, leading the researchers to conclude that the participants subconsciously were compelled to process "the discrepancies between the expected vivid acoustic information and the perceived monotonous acoustic information of the direct speech utterances." Bo Yao, Pascal Belin & Christoph Scheepers, *Brain 'Talks Over' Boring Quotes: Top-Down Activation of Voice-Selective Areas While Listening to Monotonous Direct Speech Quotations*, 60 NEUROIMAGE 1832, 1840 (2012).

demonstration (direct quotation) of a speech act, the illocutionary purpose of the quoted speech is generally depicted along with it.[236] For our purposes, the speech act being depicted would be an appellate court's prior recitation of a rule, which is a Declarative occurring at the time of that decision that the rule was applicable and binding. The actual normative truth of the rule, the propositional expression, is depicted in the quotation as well, but from the perspective of the court that said it, not the practitioner reciting it.

Recently, researchers have uncovered evidence that there are costs to using direct speech because the "perspective shift" involved "increases the processing effort" required for the listener.[237] While acknowledging previous studies showing that Dutch speakers understood *stories* better when they contained direct speech,[238] the researchers ultimately concluded that "[t]he increased processing effort associated with the perspective shift in direct speech explains why, in the *information-exchange context* of our experiment, the use of direct speech is clearly dispreferred."[239]

Overall, the change in perspective that direct quotation forces with its depiction of the quoted statement triggers parts of the brain that are not inherently necessary for rule comprehension or syllogistic reasoning.[240] Rules are norms or standards and as such have little to do with narration of events, where "vividness" is desirable. None of the psycholinguistic studies found any loss in comprehension from participants engaged in silent reading of indirect quotation instead of direct.[241] And, the added layers of perspective-taking

236. *See* Clark & Gerrig, *supra* note 17, at 779.

237. Köder, Maier & Hendriks, *supra* note 7, at 945.

238. *Id.* at 944–45 (citing Rimke Groenewold et al., *The Effects of Direct and Indirect Speech on Discourse Comprehension in Dutch Listeners with and Without Aphasia*, 28 APHASIOLOGY 862 (2014)). The authors also acknowledged studies showing that children appear to learn direct speech before they learn indirect speech. *Id.* at 940 (citing Franziska Köder, *How Children Acquire Reported Speech in German and Dutch: A Corpus Study*, *in* PERSPEKTIVEN: DISKUSSIONSFORUM LINGUISTIK IN BAYERN/BAVARIAN WORKING PAPERS IN LINGUISTICS 2, at 15 (Daniel Klenovšak ed., 2013); Asa Nordqvist, *The Use of Direct and Indirect Speech by 1 ½-to 4-year-olds*, 5 PSYCH. LANGUAGE & COMMC'N 57 (2001)).

239. Köder, Maier & Hendriks, *supra* note 7, at 944–45; *see also* Yao, *supra* note 7, at 6, 10 (concluding that "tongue-twister reading times were significantly longer in direct speech than in indirect speech" and suggesting that direct speech prompts increased phonological activation because it is layering "mental simulations of *more detailed* phonological representations in addition to '*default*' phonological processing in silent reading").

240. For another example of the use of neuroscience findings to inform choices in legal rhetoric, see generally Kristin Gerdy Kyle, *What's in a Name? The Implications of Strategic Naming Choices in Legal Advocacy*, 49 LAW & PSYCH. REV. 99 (2025).

241. *See, e.g.*, Yao, Belin & Scheepers, *supra* note 233, at 3149; Eerland, Engelen & Zwaan, *supra* note 7, at 8.

to the reader's cognitive load are sometimes more harmful than helpful.[242]

2. A Practitioner Takes a More Serious Action Quoting Indirectly Rather than Directly

This Section's discussion of Clark and Gerrig's philosophical distinctions between direct and indirect quotation has thus far ignored a major principle in their dichotomy: the idea that indirect quotation is "serious" and direct quotation is "nonserious."[243] This principle is critical to any discussion of legal rhetoric because of its intimate connection with the speech acts required from legal practitioners and ethos, an ancient pillar underlying persuasion.

According to Clark and Gerrig and their philosophical predecessors, a "serious" action is "real or actual" or "really or actually or literally occurring."[244] By contrast, "nonserious" actions are "'transformations' of serious actions" that are "patterned on" the serious action "but seen by the participants to be something quite else."[245]

A demonstration is a good example, therefore, of a nonserious action; as Clark and Gerrig explained, "[d]emonstrations belong to a family of nonserious actions that includes practicing, playing, acting, and pretending."[246] Because direct quotations are the quoter's demonstrations or depictions of speech instead of their own actual speech, they are, in this framework, nonserious.[247] The quoter "take[s] responsibility only for presenting the quoted matter—and then only for the aspects they choose to depict. The responsibility for the depicted aspects themselves belongs to the source speaker."[248] By contrast, because indirect quotations are descriptions, their *speakers* "take responsibility for their wording"[249] by describing another's speech in their own voice even though the words are another's.[250]

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242. *See also* Daniel Gutzmann & Erik Stei, *Quotation Marks and Kinds of Meaning. Arguments in Favor of a Pragmatic Account*, *in* UNDERSTANDING QUOTATION, *supra* note 35, at 161, 184 ("[S]ince . . . [quotation marks] increase the markedness of an expression, they pragmatically block the stereotypical interpretation of that expression . . . .").

243. Clark & Gerrig, *supra* note 17, at 766, 770 (citing ERVING GOFFMAN, FRAME ANALYSIS 43–47 (1974)).

244. *Id.* at 766 (quoting GOFFMAN, *supra* note 243, at 47).

245. *Id.* (quoting GOFFMAN, *supra* note 243, at 43–44).

246. *Id.*

247. *Id.* at 770.

248. *Id.* at 792.

249. *Id.*

250. *See also* Sarah-Jane Conrad, *Disquotational Indirect Reports in Focus*, *in* UNDERSTANDING QUOTATION, *supra* note 35, at 59, 63 (stating that when indirect quotation is used, "sentence meaning will in any case be judged against the background of speaker meaning").

The notion of practitioners' *responsibility* in using legal propositions from precedent is critical. Part III above outlines the many duties and roles attending a practitioner's use of the law in cases, including competence, candor, and meritoriousness of claims and contentions. For judges, a duty of impartiality and an expectation of independent judgment are added to the list. All of these duties require legal practitioners to be responsible for their Assertive, Declarative, and Directive speech acts about the law, regardless of whether the speech acts are "depictions" or "descriptions."

Indeed, the theme that runs through the line of plagiarism cases discussed in Section II.B. of this Article is the craving by the courts for seriousness or ownership on the part of the admonished lawyers.[251] The same is true for judges admonished for "mechanically" adopting factual findings submitted by counsel.[252] Even the commentators criticized by Professor Varsava may be seen as urging judges to adopt more of a sense of responsibility into their writing when advising them to "speak with their own tongue"[253] and bring "intellectual excitement"[254] to their opinions.

For a practitioner, reciting a legal rule without quotation marks but with a citation is a linguistic way to truly display their sense of responsibility over their speech acts about what the law is. The

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251. *See, e.g.*, Commonwealth v. Briggs, 12 A.3d 291, 342–43 (Pa. 2011) (holding that counsel waived an argument by raising it through merely incorporating another party's brief by reference and attaching it as an appendix); Commonwealth v. Knight, 241 A.3d 620, 627–29 (Pa. 2020) (holding that counsel waived an argument where brief merely quoted at length another party's brief in another case making the same argument and was "devoid of original argument"); Ayala v. Lockheed Martin Corp., 67 V.I. 290, 314 (V.I. Super. Ct. 2017) ("In this instance, however, what is more troubling, beyond simply copying and pasting someone else's research, is that counsel also copied and pasted someone else's reasoning. . . . [I]f counsel did reach the same conclusion as [a judge] . . . then counsel should have conveyed that sentiment in his own words."). This attitude is also reflected in judges' hatred of block quotes. *See, e.g.*, SCALIA & GARNER, *supra* note 193, at 128.

252. *See, e.g.*, United States v. El Paso Nat. Gas Co., 376 U.S. 651, 656 (1964) (stating that even though "'mechanically adopted'" factual findings are reviewable on appeal, "[t]hose drawn with the insight of a disinterested mind are . . . more helpful to the appellate court" (quoting United States v. Forness, 125 F.2d 928, 942 (2d Cir. 1942))); Douglas R. Richmond, *Unoriginal Sin: The Problem of Judicial Plagiarism*, 45 ARIZ. ST. L.J. 1077, 1077–78 (2013) (describing trial court's adoption of prevailing plaintiff's "grossly inadequate" findings of fact and conclusions of law as "invit[ing] concern that she was an unreliable jurist who could not be trusted to correctly decide other cases" and "appeared to be lazy and inattentive"). Kansas courts have repeatedly noted that this practice, which is not per se erroneous, is not encouraged because it is "susceptible to abuse." *E.g.*, Breedlove v. State, 445 P.3d 1101, 1106 (Kan. 2019) (citing Stone v. City of Kiowa, 950 P.2d 1305, 1308 (Kan. 1997)). As Professor Stern has noted, "[j]udicial opinions are also expected to exhibit skill, judgment, and intellectual effort." Stern, *supra* note 9, at 387.

253. Richard A. Posner, *Judges' Writing Styles (and Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1430 (1995) (describing the "impure" judicial writing style).

254. Daniel A. Farber, *Missing the "Play of Intelligence,"* 36 WM. & MARY L. REV. 147, 153 (1994) (praising an opinion by Judge Posner)

author is able to infuse the material with a "conversational implicature"[255] of personal confidence and command of the concepts involved.[256] In this respect, one way to view excessive direct quotation is that it demonstrates a misunderstanding of how a practitioner should build their own ethos for persuasion and effectiveness in legal practice. The concept of ethos, one of Aristotle's pillars of persuasion, involves "establishing oneself as trustworthy and believable" to one's audience.[257] On the one hand, ethos may be garnered "from the sources the rhetor uses to build the argument,"[258] but this is not the only way to garner it. As this Subsection demonstrates, directness and independent ownership are also hallmarks of trustworthiness because of the responsibility taken on by the speaker. A legal practitioner reciting rules without quotation marks embraces their role not just as a reporter of past legal assertions but also as a full participant in the legal system.

Using indirect speech for rules does not necessarily mean that the assertion is forceful; it can simply create a tone of common knowledge or acquiescence.[259] As linguist Alessandro Capone put it, "[p]roffering an indirect report that is very close to the literal act amounts to a surrender" to the speaker's original wording, but at the same time it does not hide from the ambiguities in the language.[260] Instead, the use of indirect quotation rather than direct "get[s] the hearer involved in settling the ambiguity, requiring an investment in responsibility."[261] In other words, an indirect but verbatim statement of a rule functions as a more organic jumping-off point into the facts and arguments.

In a way, the participatory and organic nature of indirect quotation helps to solve a conundrum about legal writing identified by Professor Varsava in arguing for a more restrained judicial opinion-writing style. She notes that comparative law scholars sometimes argue a "false dichotomy" between "formalis[m]" and "transparency" in legal writing, with the latter being a beneficial, democratically accountable feature of the U.S. common law system compared

255. Conrad, *supra* note 250, at 74 (citing PAUL GRICE, STUDIES IN THE WAY OF WORDS (1989)).

256. In this respect, the practice fulfills the advice of Ross Guberman that legal writers avoid "sterili[ty]" and instead "let . . . [their] writing live and breathe." ROSS GUBERMAN, POINT TAKEN: HOW TO WRITE LIKE THE WORLD'S BEST JUDGES 132 (2015) (ebook).

257. Croskery-Roberts, *supra* note 103, at 64.

258. *Id.*

259. *See* SEARLE, *supra* note 20, at 5 (explaining how there may be varying degrees of strength or commitment along the same dimension of illocutionary point or purpose).

260. ALESSANDRO CAPONE, THE PRAGMATICS OF INDIRECT REPORTS: SOCIO-PHILOSOPHICAL CONSIDERATIONS 2 (2016).

261. *Id.*

to the French civil law systems.[262] She posits that "[i]t is possible to have legally transparent and illuminating opinions that nevertheless strike a respectful, sober tone and speak in a formal, institutional voice," but does not offer any examples of how courts can balance these priorities.[263] Indirect quotation instead of direct quotation for verbatim rules is one way to convey a legal author's genuine engagement with the concepts while staying true to their institutional meaning.

3. The Efficiency and Simplicity of Indirect Quotation Conserves Both the Writer's and the Reader's Attention for the Real Questions in Dispute

In a way, the thesis of this Article is joining a recent movement to simplify quotation practices in legal writing. As others have documented, the legal profession is regrettably susceptible to pedantry, particularly when it comes to use of authority.[264] This Subsection will describe how until recently, modern legal conventions for quotations have required a level of fastidiousness that is not present in any other discipline and creates real costs for both legal writers and readers. Recent developments, including the "cleaned up" movement and new rules about quotation alterations in the twenty-second edition of *The Bluebook* released in May 2025, reflect the increasing awareness that in many instances, detailed mechanical requirements of direct quotation are simply not worth the effort to implement and read.

The standards for explicit precision in direct quotation have been higher than other disciplines in recent decades.[265] For example, under the twenty-first edition of *The Bluebook*, when a practitioner wishes to quote language but make a minor alteration like changing a letter from a capital to lower case, changing punctuation, or adding words for clarity, the changes must be enclosed in brackets.[266] In addition, any word that is removed, no matter how

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262. Varsava, *supra* note 12, at 170–71 (citing MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 1 (2004)).

263. *Id.* at 171.

264. *See* ALDISERT, *supra* note 6, at 236; Salmon, *supra* note 6, at 795–96 (critiquing the "fetishization" of *Bluebook* skills as a signal of "membership in an elite club").

265. *See* THE UNIV. OF CHI. PRESS, THE CHICAGO MANUAL OF STYLE 715, 717 (17th ed. 2017) (noting additional obligations when it comes to showing alterations to direct quotes in legal writing compared to "most types of works"); *see also* Chew, *supra* note 1, at 871 n.274 (noting the same distinction in the fifteenth edition of *The Chicago Manual of Style*).

266. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 5.3(b), at 86–87 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020).

inconsequential, must be replaced with an ellipses.[267] When a passage being quoted was itself quoting another source, the writer must mark the quote-within-a-quote with an additional set of "internal" quotation marks and add a parenthetical to the citation that follows, identifying the source that source was quoting.[268] And, in these quote-within-a-quote scenarios, alterations can proliferate as the writer must layer the alterations added in each recursion of quotation.

The layering and recursion of alterations and internal quotation marks in legal quotations can create a known "clutter" problem in the legal writing community, not just because of the detailed skills required to execute them but also because of the difficulty of reading them. Jack Metzler, an appellate attorney in Washington, D.C., published an essay on the subject after encountering a judicial opinion in which the court "quoted an earlier decision which quoted an earlier-still decision, resulting in a distracting mess of brackets, ellipses, and parenthetical indications *that obscured the point that the court intended to make* by quoting the earlier authority."[269] He rightly questioned whether clients should "pay for their lawyers to write around or fiddle with brackets, ellipses, quotation marks, and parentheticals" "simply because another judge used brackets too generously."[270] Professor Alexa Chew has also critiqued the length that is added to citations themselves when a quoted passage is quoting another source, referring to excessive citing and quoting parentheticals as "a mess."[271] In general, she explains that excessive citation, which she also refers to as "hypercitation or 'citationitis,'" "drain[s] reader energy, just like any other unnecessary passage of writing."[272]

Notably, others have offered solutions to the problem of unnecessarily cluttered quotations, although they still function as direct quotation. Jack Metzler's essay introduced the "cleaned up" parenthetical, which practitioners use after a citation for a direct quote that "drop[s] superfluous material like brackets, ellipses, quotation

267. *See id.*

268. *See, e.g.*, *id.* R. 5.2(e)–(f), at 85–86. Even the explanation of this practice is too complicated to be absorbed easily!

269. *See* Metzler, *supra* note 6, at 143 n.a1 (emphasis added).

270. *Id.* at 147; *see also* Salmon, *supra* note 6, at 798–802 (critiquing the impact of inefficiencies created by exacting citation standards like these as an issue of access to justice).

271. Chew, *supra* note 1, at 869.

272. *Id.* at 835 (defining "citationitis" as occurring "when the quantity of citation in a document exceeds the quantity necessary to support the propositions in the prose" and citing Judge Ruggero Aldisert's description of excessive citation as "one of the 'three mighty horsemen running against' the advocate's purpose of selling an argument to the reader" (quoting ALDISERT, *supra* note 6, at 236)).

marks, internal citations, and footnote references."[273] According to Metzler's proposal, the "cleaned up" parenthetical "signal[s] that such material has been removed and that none of it matters for either understanding the quotation or evaluating its weight."[274] The most recent edition of *The Bluebook* includes a somewhat similar tactic, providing the following:

> When a quotation includes material quoted from another source, the quotation may, for clarity, be stripped of internal quotation marks, brackets, ellipses, internal citations, and footnote reference numbers; the original sources of quotations within the quotation need not be cited parenthetically; and capitalization may be changed without brackets. Indicate these changes parenthetically with "(citation modified)."[275]

These quotation innovations have been and will likely continue to be controversial. There is, after all, a justification for enhanced quotation duties in legal writing: the fact that minute word choices can make the difference in some legal matters, as legal writing professors love to point out to their students. There is certainly merit to the notion that a "cleaned up" parenthetical following an important quotation could "dampen[]" its persuasive value to a legal reader in the sense that the parenthetical is essentially a confession that the quotation is not a complete or accurate depiction of the cited court's statement as it appeared.[276]

In this respect, indirect quotation is a useful alternative technique to "cleaned up" or "citation modified" because it avoids the representation that the statement is a "depiction" of the cited court's statement at all. Any legal reader would understand that the cited source "directly states the proposition," although not necessarily in verbatim language.[277] Thus, it does not require *any* display of one's alterations to the cited text, just as a paraphrase does not. In addition, the technique does not require a parenthetical after the citation for where the cited court got the rule from.

Overall, the important takeaway in terms of legal writing style is that in cases where the origin of specific wording choices is not

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273. Metzler, *supra* note 6, at 147.

274. *Id.*

275. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, *supra* note 111, B5.3, at 9.

276. Alsbrook, *supra* note 185, at 35. Of course, if a practitioner uses "cleaned up" or "citation modified" parentheticals to cover a knowing alteration to the *words* of the quotation, that is dishonest and a violation of Rule of Professional Conduct 3.3(a) under the terms of those mechanisms. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, *supra* note 111, B5.3, at 9; Metzler, *supra* note 6, at 149 n.25.

277. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, *supra* note 111, R. 1.2(a), at 66.

critical, excessive citation practices are seen by legal readers as an ineffective "pseudo-academic show-and-tell."[278] Excessive direct quotation may be useful in academic contexts to elevate one's status,[279] but when it inhibits reader understanding, it is a poor style choice in the legal context.[280]

C. The Circumstances Where Indirect Quotation Makes Particular Sense

As suggested at the beginning of this Part, this Article does not propose that indirect quotation of rules is *always* the best style choice. Direct quotation of rules can be a very effective way to emphasize the words of a prior court, evoke the emotion underlying a court's prior statement of a rule, or rehabilitate a practitioner's ethos that may have been recently undermined, to name a few. Nonetheless, this Section will attempt to describe circumstances that would particularly support a choice of indirect quotation of a rule:

- The rule, although relevant to the case at hand, is general, routine (i.e., repeated often in cases), and/or not at the crux of the dispute;
- The citation accompanying the rule is unassailably among the best binding cases available (i.e., the most recent, published decision of the applicable appellate court);
- If writing as an attorney, the case is located in a trial court or lower appellate court (i.e., not traditionally authorized to unilaterally overrule existing higher precedents);
- The rule statement does not contain any notable emotional inflections or vivid imagery; and
- The writer does not expect any of the parties to dispute that the rule applies to the case (which can occur for any number of reasons).

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278. ALDISERT, *supra* note 6, at 236.

279. *See* Klaus P. Schneider, *Manufacturing Credibility: Academic Quoting Across Cultures*, *in* THE PRAGMATICS OF QUOTING NOW AND THEN, *supra* note 28, at 209, 209 (describing differences in quotation practices "between older and younger researchers ('doing seniority' versus 'doing juniority'), and between famous and less famous scholars ('doing superiority or eminence' versus 'doing modesty')"). This type of stratification of writing styles by experience level is antithetical to the notion that all legal professionals can be competent to handle cases regardless of their experience level. *See* MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 2 (A.B.A. 1983).

280. Chew, *supra* note 1, at 830; *see also* Friedman, *supra* note 9, at 529 ("In a brief, as in an opinion, utility as persuasion is all that matters; thus, attribution is purely a function of whether the attribution makes the argument more persuasive. If attribution does not do so, then the attribution is entirely unnecessary.").

In these circumstances, a legal practitioner should feel particularly safe in the belief that they can satisfy their many legal responsibilities to the parties, the court, and the legal system by reciting the rule in their own voice, with a citation but not quotation marks.

This list of circumstances reminds us that many lawyers have successful practices where they rarely quibble about what the law is; they spend the vast majority of their time applying well-worn legal rules to client fact patterns, sometimes at a high volume. In fact, more and more specialty courts are also being created where only a small sliver of "law" is ever used.[281] Thus, while much of the attention and scholarship about working with precedent focus on the legal work that occurs at the U.S. Supreme Court, that context does not represent the experience of most legal practitioners. Supreme courts with only discretionary review, by their nature, only take cases where the rules could use some clarifying or reinterpreting, and stare decisis in that setting will always be at its weakest. Thus, while practice at the highest courts is certainly relevant to understandings of precedent and the roles of courts and lawyers, it is a mistake to limit that understanding to that context.[282]

VI. PROPOSALS

Ruth Finnegan has said that "[t]he practice of quoting is also governed, and very effectively too, through the conventions of genre."[283] The legal writing genre is at a crossroads when it comes to the range of possibilities for quotation methods that are acceptable for rules, and legal writing scholars and educators have an important role to play. This Article has attempted to contribute to the genre's consciousness of this issue by taking a rigorous look at one particular type of "copying" that comes up in almost any first-year legal writing assignment: a practitioner's recitation of rules from cases that are cited but not directly quoted. While this is only one of many legitimate issues that come up in the debate about plagiarism in legal writing, it is enough, in my view, to justify a revision of the LWI's brochure on plagiarism in law school.[284]

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281. *See* NAT'L TREATMENT CT. RES. CTR., TREATMENT COURTS ACROSS US STATES/TERRITORIES (2024) (2025), https://ntcrc.org/wp-content/uploads/2025/07/2024_NTCRC_TreatmentCourt_Count_Table.pdf [https://perma.cc/9644-XSMP].

282. *See, e.g.*, Tara Leigh Grove, Essay, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1558 (2021) ("[T]he narrow emphasis on the Supreme Court overlooks the broader reality of the federal judiciary.").

283. FINNEGAN, *supra* note 31, at 244.

284. LEGAL WRITING INST., *supra* note 59.

The LWI brochure should very clearly split its "rules" about avoiding plagiarism into two categories: (1) rules for written assignments assessing practice-based writing skills and (2) rules for academic written assignments assessing learning of a specific substantive topic. A handful of rules would appear in both contexts, like a rule against copying any other student's work in completing the assignment (at least outside of any collaborative exercises assigned by the professor). But the rules for practice-based writing assessments should advise, first, that the decision of whether to directly quote a binding legal authority is a style question that will depend on circumstances like the ones identified in Section V.C., which impact how much rhetorical distance the student (in their practice-based role of intern or lawyer) may want to have between themselves and the court or case they are citing. Second, it should remind students that at the end of the day, the real limitations on a practitioner's description of the law are their responsibilities to be competently well-informed, candid, and nonfrivolous.[285]

Some may argue that this proposal might be introducing too much nuance and complexity into what is already a bewildering set of standards for first-year law students to master, but the effort is worth it. Several scholars have written about the need for legal education to empower students to understand when and how they can change unjust laws with the arguments they make.[286] Allowing students to state rules in their own voices helps break down the "veneer of logical neutrality" that otherwise surrounds legal reasoning in law school and causes the "frozen imagination" problem identified by Professor Susan A. McMahon.[287] When a student is allowed

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285. For inspiration on why and how the legal writing community is particularly well-suited to communicate these ethical duties to law students, see generally Charles W. Oldfield, *Entertaining and Embracing Professional Identity Development in the 1L Legal Writing Curriculum*, 59 TULSA L. REV. 415 (2024).

286. *See* Doron Samuel-Siegel, *Reckoning with Structural Racism in Legal Education: Methods Toward a Pedagogy of Antiracism*, 29 CARDOZO J. EQUAL RTS. & SOC. JUST. 1, 49–50 (2022) (recommending, inter alia, that law teachers decline to "imply[] a sense that the law . . . [students] study in school is the culmination of a now-settled narrative," and instead "help students understand how they will use legal analysis to impact the law and its future progress, to shape the narrative's future"); Susan A. McMahon, *What We Teach when We Teach Legal Analysis*, 107 MINN. L. REV. 2553, 2553–55 (2023) (advocating for having students argue for what the rule *should* be with support from authority, which "helps students better understand how they can use the flexibility of precedent to support new rules" because it "requires students to look deeper, to see how a case's facts, holding, or reasoning could support a completely different articulation of the law"); Frank Tuerkheimer, *A Short Essay on the Editing of Cases in Casebooks*, 58 J. LEGAL EDUC. 531, 531–32 (2008) (bemoaning that the editing out of lawyers' names (but not those of judges) in casebooks suggests that law students are not taught how lawyers in past cases "had a sense of injustice, a sense of wrongness about the system, and then used their lawyering skills to bring about a change").

287. McMahon, *supra* note 286, at 2529–30.

to decide whether to directly or indirectly quote, they have a more meaningful opportunity to consider whether the rules they are reciting are just with fresher eyes and more intellectual and professional ownership.

CONCLUSION

In the classic "IRAC" formulation for legal analysis, the "rule" (R) should in theory be the easiest to master. After all, in doctrinal law school classes and on the bar exam, budding lawyers must simply memorize and regurgitate the rules, then show their real worth in applying (A) the memorized rules to facts and reaching a well-reasoned response to the assessor's questions (C).

And yet, as this Article has attempted to show, where students are asked to perform some form of IRAC the way a real legal practitioner would, the R shows itself to contain any number of bugaboos. It is no wonder that the following questions regularly arise from students:

- Is a "rule" something I come up with or the court?
- Why do we have to state this rule again when we know the reader has seen it a hundred times?
- Should I put it into my own words to make it more interesting?
- If not, do I have to put it in quotation marks?

These questions go to the deep cultural and traditional heart of why and how legal practitioners use precedent in their work of handling cases for nonlawyer parties. This Article has explicitly taken on the last one: whether a legal practitioner reciting a rule verbatim from a cited case must put it into quotation marks. But as is shown above, answering this question, which involves concerns about plagiarism, rhetorical style, and precedent itself, must address the others alongside it.

According to influential linguist Michael Johnson, "[w]hen we quote someone, we don't just produce words they previously produced, and consider those words as some uninterpreted formal object. We *use* those words. . . . We use them in our context, and we are responsible for providing them with sufficient context to be interpretable."[288] What do we use another's words for? The potential

288. Johnson, *supra* note 31, at 294.

uses are endless in a theoretical sense, regardless of whether the quotation is direct or indirect.

Yet, in the case of a legal practitioner's quotation of accepted common law rules from binding cases, the use is clear: they are used as authority to show what the law is. The law is communally owned and binding on all involved, and yet it is nowhere memorialized in a permanent sense; it takes the continued recitation of the legal profession's participants to preserve it. In this context, this Article has shown that there is no particular need for a practitioner to distinguish their recitation from those of others before, and plagiarism therefore has no place in their decision of how to recite rules that need reciting. Instead, practitioners should base their decisions on their duties to parties, the courts, and the legal system itself, emphasizing their responsibility to remain faithful to all three. When the circumstances are right, they should not shut themselves out of the belonging that comes with being able to recite rules in one's own voice.

In future work, I aim to go even deeper into exploring these themes, primarily by putting them into historical context. Doing so will not only give context to the job lawyers and judges are doing with the common law, but it may help enlighten what to do with new technologies like generative AI when it comes to using text with or without attribution, including quotation marks.

Federal Control of State Structure

Joseph S. Diedrich[1]

The conventional narrative holds that the federal Constitution mandates a tripartite separation of powers at the federal level but says nothing about state government structure. States, rather, have free rein to organize themselves as they wish.

This Article challenges the conventional narrative as reductive and largely wrong. True, no constitutional provision explicitly controls state structure. The closest is the Republican Guarantee Clause, which has not been understood to control state structure in any enforceable way.

Yet as this Article catalogues, several other federal constitutional provisions and doctrines have the effect of controlling state structure. Rooted in the enforcement of federal individual-rights guarantees, these doctrines are not necessarily about state structure. But they all have the collateral consequence of requiring states to separate either legislative power from nonlegislative power, executive power from nonexecutive power, or judicial power from nonjudicial power.

Considered all together, these various doctrines require, as a matter of federal constitutional law, that states maintain a tripartite separation of powers. They also set forth standards for policing the required separation in accordance with federal law. And, because they ultimately derive from individual-rights guarantees, they are judicially enforceable.

In sum, this Article constructs a theory of federal control of state structure based on existing constitutional doctrines. In addition to exposing the conventional narrative of federal–state interaction as (at best) incomplete, the theory also has further implications. For one, it may help explain perceived tensions between modern structure-controlling doctrines, on the one hand, and constitutional history, on the other. It may also suggest a gravitational-pull reading of the Republican Guarantee Clause that preserves a role for that Clause in constitutional discourse, even if not in constitutional adjudication. And it may offer a useful, theoretically grounded way of

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interpreting and applying Moore v. Harper*'s reference to "ordinary judicial review" in the election-law context.*

INTRODUCTION

Is it true that "states are free to structure their governments as they see fit"?[2] The "widely accepted" and conventional narrative says yes.[3] This Article says no. A thorough review and reconstruction of seemingly disparate strands of constitutional jurisprudence shows that federal law exerts significant influence on—and control over—state structure.

2. Z. Payvand Ahdout & Bridget Fahey, *Layered Constitutionalism*, 124 COLUM. L. REV. 1295, 1297 (2024).
3. *Id.*

The structural distribution of government power is central to the American constitutional order. Power within the federal government, for example, is horizontally distributed among discrete branches. Borrowing heavily from Montesquieu,[4] the framers of the Constitution viewed a *tripartite* separation of powers as "essential to the preservation of liberty."[5] To that end, the framers "built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[6] The "very structure" of the Constitution vests each of the three branches of the federal government with distinct powers.[7] Congress gets "[a]ll legislative Powers";[8] the President, "[t]he executive Power";[9] and the courts, the "judicial Power."[10] While any separation of powers serves as a "bulwark against tyranny,"[11] the Constitution's tripartite organization "exemplifies the concept of separation of powers"[12] and, in so doing, "diffuses power the better to secure liberty"[13] and promotes the rule

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4. *See* Gerhard Casper, *An Essay in the Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 213 (1989) (describing Montesquieu as "the most frequently cited" theorist of the separation of powers). Madison called Montesquieu the "oracle" of separation-of-powers philosophy. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

5. THE FEDERALIST NO. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring); *see* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 645 n.163 (1996) (citing W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 101–02 (1965)).

6. Clinton v. Jones, 520 U.S. 681, 699 (1997) (alteration in original) (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976)).

7. Miller v. French, 530 U.S. 327, 341 (2000) (quoting INS v. Chadha, 462 U.S. 919, 946 (1983)); *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 559 (1992). *Compare* U.S. CONST. art. I, *with id.* art. II, *and id.* art. III.

8. U.S. CONST. art. I, § 1. Congress "commands the purse" and "prescribes the rules by which the duties and rights of every citizen are to be regulated." THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

9. U.S. CONST. art II, § 1, cl. 1. The President "dispenses the honors" and "holds the sword of the community." THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). "In the late-eighteenth century," when the Constitution was ratified, "someone vested with the executive power and christened as the chief executive enjoyed the power to control the execution of law." Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 819.

10. U.S. CONST. art. III, § 1. The courts "interpret[] the law and apply[] it retroactively to resolve past disputes." *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring). *Compare* Trump v. CASA, Inc., 606 U.S. 831, 856–59 (2025) (majority III.C), *with id.* at 921–41 (Jackson, J., dissenting) (debating case-deciding and law-declaring models of judicial power).

11. United States v. Brown, 381 U.S. 437, 443 (1965).

12. *Miller*, 530 U.S. at 341 (citing *Chadha*, 462 U.S. at 946); *see also* Humphrey's Ex'r v. United States, 295 U.S. 602, 629–30 (1935) ("So much is implied in the very fact of the separation of the powers of these departments by the Constitution . . . .").

13. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

of law.[14] This separation of powers directed by the "very structure" of the Constitution, through its Vesting Clauses, applies only to the federal government, not to states.[15]

Like the horizontal separation of powers, vertical federalism is a core feature of the Constitution "designed to safeguard individual liberty and prevent the abuse of government power."[16] Despite giving up some of their powers to the federal government upon ratifying the Constitution, the states retained significant residual sovereignty.[17] This dual-sovereignty federalism, "central to the constitutional design," holds that "both the National and State Governments have elements of sovereignty the other is bound to respect."[18]

"One of the essential features of sovereignty is the ability to decide how to arrange a government and allocate power among its various bodies."[19] To that end, "state structural disuniformity" is "embedded in the Constitution."[20] From the Founding, states have chosen various approaches for setting up their governmental structures. In 1789, for instance, many states had a significantly less stringent structural separation of powers than the federal government and than many state governments have today.[21] Moreover, while the Republican Guarantee Clause requires "every State in this Union" to have a "Republican Form of Government,"[22] all the original states were admitted into the original Union with their then-existing structural arrangements.[23] The Republican Guarantee Clause, in fact, has never been used to hold a state's structure unconstitutional in court.[24]

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14. *See* Manning, *supra* note 5, at 645–47; Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 434 (1987).

15. *Miller*, 530 U.S. at 341 (quoting *Chadha*, 462 U.S. at 946).

16. Anthony J. Bellia Jr. & Bradford R. Clark, *Constitutional Federalism and the Nature of the Union*, 66 WM. & MARY L. REV. 281, 285 (2024).

17. *Id.* at 289.

18. Arizona v. United States, 567 U.S. 387, 398 (2012).

19. F. Andrew Hessick & Elizabeth Fisher, *Structural Rights and Incorporation*, 71 ALA. L. REV. 163, 167 (2019) (citing JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 132, at 73–74 (Thomas P. Peardon ed., The Liberal Arts Press 1952) (1690)); *see also id.* at 192 ("[P]reserving state power to arrange government is an important background principle of the Constitution.").

20. Ahdout & Fahey, *supra* note 2, at 1351.

21. *See infra* notes 258–262 and accompanying text. As to the general variety of state structures, see United Beverage Co. of S. Bend v. Ind. Alcoholic Beverage Comm'n, 760 F.2d 155, 158 (7th Cir. 1985); Ahdout & Fahey, *supra* note 2, at 1344–45; 53 THE COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES (2021), https://issuu.com/csg.publications/docs/bos_2021_issuu (on file with the Duquesne Law Review).

22. U.S. CONST. art. IV, § 4.

23. *See infra* notes 258–260 and accompanying text.

24. *See infra* notes 61–64 and accompanying text.

Given that the Constitution's horizontal separation of powers governs only the federal government, given federalism's respect for state sovereignty, and given the Republican Guarantee Clause's apparent impotence, it is a longstanding and oft-repeated refrain that states "are free to structure their governments as they see fit."[25] States have this freedom, the conventional narrative further repeats, because the Constitution "nowhere requires the states to have a tripartite system of government"[26] and does not otherwise "prescribe governmental institutions that the states must adopt."[27] As a capstone, the conventional narrative also assumes that "the Court has not found justiciable limits on the states' choice of governmental structures."[28]

This Article challenges that conventional narrative as reductive and, to a large extent, wrong. Even if the federal Constitution might contain no provision explicitly *about* state structure, that is far from conclusive on the question of whether it controls state structure in any way. The upshot: it does.

As this Article catalogues, myriad doctrines of federal constitutional law have the *effect* of controlling state structure.[29] Consider, as but one example at the outset, the case of *Coolidge v. New Hampshire*,[30] which held that under the Fourth and Fourteenth Amendments, probable cause must be decided by a state "judicial officer, not by" a state executive officer, such as "a policeman or

25. Ahdout & Fahey, *supra* note 2, at 1297; *see, e.g.*, Berger v. N.C. State Conf. of the NAACP, 597 U.S. 179, 183 (2022) ("Within wide constitutional bounds, States are free to structure themselves as they wish."); Dreyer v. Illinois, 187 U.S. 71, 84 (1902) ("Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state."); Hessick & Fisher, *supra* note 19, at 187 ("The Framers preserved in the Constitution the sovereign power of the states to arrange their own governments."); *cf.* Garcia v. S.A. Metro. Transit Auth., 469 U.S. 528, 549 (1985) ("[T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments." (alterations in original) (quoting Erie R.R. v. Tompkins, 304 U.S. 64, 78–79 (1938))); Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("Through the structure of its government . . . a State defines itself as a sovereign.").

26. *United Beverage*, 760 F.2d at 158.

27. Hessick & Fisher, *supra* note 19, at 187

28. Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51, 52 (1998).

29. Very recently, Payvand Ahdout and Bridget Fahey articulated a similar topline conclusion: "[I]n many different substantive areas, the Supreme Court has elaborated a body of *federal* constitutional rules that directly and indirectly govern *state* structure—a set of doctrinal rules more pervasive than previously understood." Ahdout & Fahey, *supra* note 2, at 1297. In certain ways, this Article starts from the same basic premise as Ahdout and Fahey. That said, while from time to time drawing on their work, this Article avoids overlap and canvasses different doctrines, ultimately for different purposes.

30. 403 U.S. 443 (1971).

Government enforcement agent."[31] By holding that a state cannot endow the same governmental actor with both executive-power functions (criminal investigation and prosecution) and judicial-power functions (probable-cause determination, warrant issuance), *Coolidge* requires states to have a structure that separates, at least to some degree, state executive power from state judicial power.[32] And it enforces, as a matter of federal law, a standard for maintaining that structural separation and ensuring that state executive actors do not impermissibly exercise the judicial functions.[33] The doctrine advanced in *Coolidge* is one of many that, to varying degrees, require states to separate either legislative power from nonlegislative power, executive power from nonexecutive power, or judicial power from nonjudicial power.

Cumulatively, the doctrines catalogued in this Article control state structure in significant ways. Of particular note, the doctrines conspire to require—as a matter of federal constitutional law—states to have a *tripartite* separation of powers, complete with a structurally separated legislative branch, executive branch, and judicial branch.[34] The doctrines come with standards for policing and maintaining the required separation between those branches.[35] Thus, it is wrong to say, as Judge Richard Posner once did, that the Constitution "nowhere requires the states to have a tripartite system of government."[36]

Ultimately, this Article presents a constructed theory of federal control of state structure. While not obvious from any single constitutional provision or case, a constellation of federal constitutional doctrines imposes significant requirements and limitations on states' structural organization. By no means are states required to mimic the federal government's structural organization or separation of powers, but the conventional narrative—that states "are free to structure their governments as they see fit"[37]—is, at best, overly simplistic.

The doctrines that contribute to federal control of state structure, moreover, are not merely aspirational, theoretical, or political. They instead implicate justiciable questions and are judicially

31. *Id.* at 449 (quoting Johnson v. United States, 333 U.S. 10, 13–14 (1948)).
32. *See infra* Section II.B.1.
33. *See infra* Section II.B.1.
34. *See infra* Section II.D.
35. *See infra* Section II.D.
36. United Beverage Co. of S. Bend v. Ind. Alcoholic Beverage Comm'n, 760 F.2d 155, 158 (7th Cir. 1985).
37. Ahdout & Fahey, *supra* note 2, at 1297.

enforceable, including by private litigants[38]—quite unlike the Republican Guarantee Clause.[39] It is thus also wrong to say, as Michael Dorf once declared, that "the Court has not found justiciable limits on the states' choice of governmental structures."[40]

The doctrines are judicially enforceable because, in the main at least, they derive from individual-rights guarantees in the Constitution, most notably the Due Process Clause of the Fourteenth Amendment.[41] The doctrines' structure-controlling effects, then, are a collateral but unavoidable consequence of enforcing individual rights.

The doctrines' roots in individual-rights guarantees help explain—and explain away—any apparent tensions between federal control of state structure, on the one hand, and federalism[42] or history,[43] on the other. It can be true that when the states gave up some of their sovereignty to form the Union, they retained residual sovereignty "to decide how to arrange a government and allocate power among its various bodies."[44] And it can be true that those original states were all admitted into the Union, despite at the time lacking tripartite structural separation or the other structural features the doctrines discussed in this Article require.[45] That is because that understanding of federalism, and that historical story, is incomplete. While states may have had, and may have in fact exercised, substantial discretion to order their governments however they preferred at the Founding, that discretion was significantly curtailed after the adoption of the Fourteenth Amendment, which "expand[ed] federal power at the expense of state autonomy" and "fundamentally altered the balance of state and federal power struck by the Constitution."[46] The conventional narrative, then, is also anachronistic.

Finally, this Article devotes attention to two additional implications of its theory of federal control of state structure. First, it explains how the individual-rights doctrines doing the work in open view possibly also act as a backdoor revival of a robust understanding of the Republican Guarantee Clause. On this view, it is

38. *See infra* notes 238–239 and accompanying text.
39. *See infra* notes 238–239 and accompanying text.
40. Dorf, *supra* note 28, at 52.
41. *See infra* Part II, Section III.A.
42. *See infra* Section III.C.
43. *See infra* Section III.D.
44. Hessick & Fisher, *supra* note 19, at 167–68, 185–86 (citing LOCKE, *supra* note 19, § 132, at 73–74).
45. *See infra* Sections III.C, III.D.
46. Trump v. Anderson, 601 U.S. 100, 108 (2024) (per curiam) (alteration in original) (quoting Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996)).

conceivable that the Clause, although nominally nonjusticiable, exerts its gravitational pull in cases through other doctrines.[47] Second, the theory offers a way of understanding *Moore v. Harper*'s reference to "ordinary judicial review."[48] Rather than the many arcane or overly political proposed tests to have come out of the academy so far, reading "ordinary judicial review" as a form of federal control of state structure, informed by this Article, situates *Moore*'s future application comfortably in the heartland of preexisting understandings of the structural separation of powers.[49]

Part I opens by briefly examining the Republican Guarantee Clause, perhaps the most natural place to start for finding a constitutional hook for federal control of state structure. That Clause's limitations, however, quickly cause it to lose luster. Part II then catalogues several federal constitutional doctrines that have the effect of controlling state structure, culminating in the ultimate theory that defines this Article's thesis: multiple federal-law doctrines conspire to mandate, as a matter of federal constitutional law, a particular structural separation of powers in state governments. Specifically, federal law requires that states adhere to a tripartite separation of powers and to certain baseline standards that police those structural boundaries. Part III then considers fallout. It addresses questions flowing from the theory of federal control of state structure, including its relationship to individual-rights enforcement and its potential to enforce a robust understanding of the Republican Guarantee Clause by other means. It also examines potential tensions with important federalism concerns and historical facts. Finally, Part III also offers a structure-based way to read the Supreme Court's reference to "ordinary judicial review" in the recent landmark case of *Moore v. Harper*.[50]

I. REPUBLICAN GUARANTEE CLAUSE

To review if and how federal law controls state structure, perhaps the most obvious place to start is "[t]he only provision in the original Constitution bearing on the organization of state government"[51]: the Republican Guarantee Clause.[52] Under that provision of the Constitution—Article IV, Section 4—the federal government "shall

47. *See infra* Section III.B.
48. 600 U.S. 1, 37 (2023).
49. *See infra* Section III.E.
50. 600 U.S. at 37.
51. Hessick & Fisher, *supra* note 19, at 187.
52. U.S. CONST. art. IV, § 4.

guarantee to every State in this Union a Republican Form of Government."[53]

Although the Republican Guarantee Clause's textually broad sweep prompted Senator Charles Sumner to call it a "sleeping giant" of the Constitution,[54] the Clause's meaning has proven "historically elusive."[55] The Clause does not define "republican." According to James Madison, a republican government was one that "derives all its powers directly or indirectly from the great body of the people."[56] Fellow founder James Wilson concurred.[57] A century later, the Supreme Court declared the "distinguishing feature" of the republican form to be "the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies."[58] At bare minimum, then, the Republican Guarantee Clause ensures self-government and representative democracy, while precluding monarchy and aristocracy.[59] Whether it does *more* is open to at least some debate.

Under what might be called a "thin" view, the Republican Guarantee Clause assures *only* the bare minimum of self-government and representative democracy. The Clause, two eminent scholars have maintained, "does not dictate the particular form of republican government that the states must adopt," instead "leav[ing] the precise form of republican government to the states."[60] In other words, a "republican form of government" does not entail any particular structure or separation of powers.

The thin view enjoys significant historical and precedential support. In *Minor v. Happersett*, the Supreme Court reasoned that

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53. *Id.*

54. CONG. GLOBE, 40th Cong., 1st Sess. 614 (1867).

55. Alejandro J. García, Note, *The Republican Guaranty Contract*, 109 GEO. L.J. 191, 223 (2020).

56. THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961).

57. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 457 (1793) (opinion of Wilson, J.) (stating a "short definition" of a republican form of government as "one constructed on this principle, that the Supreme Power resides in the body of the people"), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

58. Duncan v. McCall, 139 U.S. 449, 461 (1891).

59. Alex Zhang, *Separation of Structures*, 110 VA. L. REV. 599, 657 n.292 (2024); Jack M. Balkin, *Republicanism and the Constitution of Opportunity*, 94 TEX. L. REV. 1427, 1432 (2016); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 758 (1994). There is ongoing debate about whether the Republican Guarantee Clause, by ensuring representative democracy, placed limits on direct democracy (and if so, what those limits are). *See, e.g.*, Jacob M. Heller, Note, *Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions*, 62 STAN. L. REV. 1711, 1761 (2010); Amar, *supra*, at 756–59; G. Edward White, *Reading the Guarantee Clause*, 65 U. COLO. L. REV. 787, 795, 797–98 (1994).

60. Hessick & Fisher, *supra* note 19, at 188.

because all state governments existing in 1789 were "accepted precisely as they were," they all were satisfactorily "republican," whatever the full extent of that term.[61] To that end, "[n]o particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated."[62] Building on this reasoning, the Court has since repeatedly rejected arguments that state delegations of legislative powers (for example, rate-making functions) to executive administrative agencies (such as commissions) violate the Republican Guarantee Clause.[63] At least with respect to the Republican Guarantee Clause, the Court has long treated state structure as a matter within state law's domain, not federal law's.[64]

By contrast, a "thick" view of the Republican Guarantee Clause posits that "republican" requires some—even if minimal—structural separation. Before its turn to the since-prevailing thin view, the Supreme Court early on described a "republican . . . government[ ]" as one that "prohibits an heterogeneous union of the legislative and judicial departments."[65] More recently, Judge Posner asserted that "republican" requires "at least two branches, legislative and executive."[66] After all, as one commentator put it, it seems hardly controversial to assert that a "core characteristic of republican governance is a separation of powers among coequal branches of government."[67] Were the thick view prevailing law, then, the Republican Guarantee Clause would place in federal hands some degree of control over state structure.

Still, even the thick view of the Republican Guarantee Clause would not impose on states any highly particularized structural

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61. 88 U.S. (21 Wall.) 162, 175–76 (1875).

62. *Id.* at 175.

63. Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 611–12 (1937); Forsyth v. City of Hammond, 166 U.S. 506, 519 (1897); Reagan v. Farmers' Loan & Tr. Co., 154 U.S. 362, 393–94 (1894) (citing The Railroad Commission Cases, 116 U.S. 307 (1886)).

64. Ann Woolhandler, *State Separation of Powers and the Federal Courts*, 31 WM. & MARY BILL RTS. J. 633, 636–37 (2023); *see Forsyth*, 166 U.S. at 519 ("[W]henever the supreme court of a state holds that under the true construction of its constitution and statutes the courts of that state have jurisdiction over such matters, the federal courts can neither deny the correctness of this construction nor repudiate its binding force as presenting anything in conflict with the federal constitution."); *Highland Farms Dairy*, 300 U.S. at 612 ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.").

65. Olney v. Arnold, 3 U.S. (3 Dall.) 308, 314 (1796).

66. United Beverage Co. of S. Bend v. Ind. Alcoholic Beverage Comm'n, 760 F.2d 155, 158 (7th Cir. 1985).

67. Heller, *supra* note 59, at 1720. After all, "[s]eparation of powers was seen as a necessary prerequisite for governments to ward off tyranny and was therefore a core component of republican government." *Id.*; *see also* WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 21–22, 72 (1972).

requirements or a separation of powers that mirrors that of the federal government. The thick view is instead much more modest, recognizing merely that a point exists at which a state government's structure can become so out-of-constitutional-whack that it "exchange[s] republican for anti-republican" form.[68]

One of the most strident rejoinders to the thick view "is embedded in the value of republicanism itself."[69] Because a baseline of republicanism is self-government, this argument goes, it follows that a republican government must indulge "[a] people's *structural* self-determination."[70] As Deborah Jones Merritt set forth in an influential article, rather than *enable* federal control over state structure, the Republican Guarantee Clause actually "restricts the federal government's power to interfere with the organizational structure and governmental processes chosen by a state's residents."[71] For a government to be "republican," it must be "responsible to its voters rather than to any outside agency"—including another government.[72]

Whatever its actual contours, the Republican Guarantee Clause performs little function today, at least on the pages of judicial decisions. Although the Supreme Court in earlier cases adjudicated the merits of Guarantee Clause disputes (and thereby began to elucidate its meaning),[73] it has since "several times concluded . . . that the Guarantee Clause does not provide the basis for a justiciable claim."[74] Questions arising under the Clause are instead political questions for the other branches to decide.

To be sure, not all agree with the Supreme Court's current approach treating all Republican Guarantee issues as categorically nonjusticiable. Erwin Chemerinsky, for example, has argued that questions under the Clause should be justiciable, in no small part because of the close relationship between governmental structure

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68. THE FEDERALIST NO. 43, at 275 (James Madison) (Clinton Rossiter ed., 1961).

69. Ahdout & Fahey, *supra* note 2, at 1352.

70. *Id.* (emphasis added).

71. Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 41 (1988).

72. *Id.* Critically, Merritt's argument is about only the Republican Guarantee Clause; "[o]ther constitutional provisions impose a variety of restrictions on a state's freedom to structure its governmental processes." *Id.* at 44.

73. *See* New York v. United States, 505 U.S. 144, 184 (1992) ("In a group of cases decided before the holding of *Luther* was elevated into a general rule of nonjusticiability, the Court addressed the merits of claims founded on the Guarantee Clause . . . ."); Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1932 (2015).

74. Rucho v. Common Cause, 588 U.S. 684, 718 (2019); *see, e.g.*, Baker v. Carr, 369 U.S. 186, 223 (1962); Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 612 (1937); Ohio *ex rel.* Bryant v. Akron Metro. Park Dist. for Summit Cnty., 281 U.S. 74, 79–80 (1930); Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849).

and the protection of individual rights.[75] Others have raised similar claims.[76] But whatever these scholars may wish, their views do not represent the current state of play. Under current law, rather, Republican Guarantee Clause issues are categorically—almost categorically?[77]—nonjusticiable. As explained, even when the Supreme Court did reach the merits in earlier eras, it hewed to the thin view.

In sum, the Republican Guarantee Clause appears to impose little to no structural requirements on states. But that Clause is only the beginning.

II. A THEORY OF FEDERAL CONTROL OF STATE STRUCTURE

The meat of this Article, this Part examines in detail multiple federal constitutional doctrines that have the effect of controlling state structure. The first set of doctrines requires states to separate legislative power from executive and judicial power. The second set requires states to separate executive from judicial power. A third set of additional doctrines does clean-up work. All sets include standards for enforcing and policing the required separation. Together, these seemingly disparate doctrines conspire to mandate, as a matter of federal constitutional law, that states have a *tripartite* separation of powers—and that that separation be maintained according to judicially enforceable standards.

A. Separating the Legislative Power from the Executive and the Judicial

This Section examines two categories of federal doctrines that control state structure by requiring separation between state legislative power and state nonlegislative power. The first is the void-for-vagueness doctrine. The second is due process's prohibition on legislatures taking judicial action, especially as expressed through the Constitution's Bill of Attainder and Ex Post Facto Clauses.

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75. Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 869 (1994).

76. *See* Thomas C. Berg, Comment, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. CHI. L. REV. 208, 208–09 (1987); Thomas A. Smith, Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 YALE L.J. 561, 561 (1984); Heller, *supra* note 59, at 1749–52.

77. *See* Democratic Party of Wis. v. Vos, 966 F.3d 581, 589 (7th Cir. 2020) ("We do not interpret *Rucho* or any other decision by the Supreme Court as having categorically foreclosed all Guarantee Clause claims as nonjusticiable, even though no such claim has yet survived Supreme Court review.").

1. Delegation and Vagueness

Begin, for a moment, in the federal system. Congress is separate from the other branches, and the nondelegation doctrine supplies a modest standard for maintaining that separation. Article I of the U.S. Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[78] Based on this text, the Supreme Court has for centuries held that Congress "may not transfer to another branch 'powers which are strictly and exclusively legislative.'"[79] At the same time, "the Constitution does not 'deny[ ] to the Congress the necessary resources of flexibility and practicality [that enable it] to perform its function[s].'"[80] Under what has become known as the nondelegation doctrine, "a delegation is constitutional so long as Congress has set out an 'intelligible principle' to guide the delegee's exercise of authority."[81] There is lively scholarly[82] and judicial[83] debate about the scope and extent of

78. U.S. CONST. art. I, § 1.

79. Gundy v. United States, 588 U.S. 128, 135 (2019) (plurality) (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825)); *see also* Field v. Clark, 143 U.S. 649, 692 (1892) ("That [C]ongress cannot delegate legislative power to the [P]resident is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the [C]onstitution.").

80. *Gundy*, 588 U.S. at 135 (alterations in original) (quoting Yakus v. United States, 321 U.S. 414, 425 (1944)).

81. *Id.* at 145 (quoting J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)); *see id.* at 146 ("[A] delegation is permissible if Congress has made clear to the delegee the 'general policy' he must pursue and the 'boundaries of [his] authority.'" (quoting Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946))). The Supreme Court has only twice held a statute unenforceable on nondelegation grounds. *See* Pan. Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). This has led Cass Sunstein to quip that the doctrine "has had one good year, and 211 bad ones (and counting)." Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000). That said, even Sunstein recognizes that the doctrine indirectly maintains structural limits through other means. *See id.* at 315–17.

82. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 278–82 (2021); Ilan Wurman, Feature, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1493–98 (2021); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 332 (2002); Joseph S. Diedrich, Essay, *Delegation Running Ratchet*, 104 TEX. L. REV. ONLINE 205, 211–15 (2026); *cf.* Nathan S. Chapman & Michael W. McConnell, Essay & Feature, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1672 (2012) (drawing connections between due-process and separation-of-powers principles); Donald A. Dripps, *Delegation and Due Process*, 1988 DUKE L.J. 657, 657–60 (1988) (similar).

83. In 2025, the Supreme Court rejected a nondelegation challenge in *FCC v. Consumers' Research*, 606 U.S. 656, 662–64 (2025); *see* Christopher J. Walker, *What* FCC v. Consumers' Research *Means for the Future of the Nondelegation Doctrine*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (June 28, 2025), https://www.yalejreg.com/nc/what-fcc-v-consumers-research-means-for-the-future-of-the-nondelegation-doctrine/ [https://perma.cc/T5AV-CU3Z]. *Consumers' Research* involved somewhat far-afield questions about the "private nondelegation doctrine" and "combination" or "double-layered" delegation. The most recent true nondelegation case was *Gundy*, decided by an eight-justice Court. Justice Gorsuch dissented, joined by Chief Justice Roberts and Justice Thomas. While Justice Alito did not join the dissent, he expressed interest in revisiting the current permissive nondelegation doctrine in an

the doctrine. In all events, though, because it is based on the U.S. Constitution's structural framework for the federal government, the nondelegation doctrine does not control state government structure.[84]

But the nondelegation doctrine is not the only federal constitutional doctrine that enforces separation between legislative and nonlegislative power. The federal void-for-vagueness doctrine accomplishes many of the same purposes—and has many of the same effects—as the nondelegation doctrine. Unlike the nondelegation doctrine, however, the void-for-vagueness doctrine also constrains *state* structure, as will be seen.

The void-for-vagueness doctrine reflects the notion that "[i]n our constitutional order, a vague law is no law at all."[85] The Supreme Court has long held unenforceable statutes that are "vague, indefinite, and uncertain, and . . . fix[ ] no immutable standard of guilt, but leave[ ] such standard to the variant views of the different . . . [parties] which may be called on to enforce it."[86] The void-for-vagueness doctrine has most often been deployed to declare criminal laws

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appropriate case. *See Gundy*, 588 U.S. at 148–49 (Alito, J., concurring in the judgment). Separately, Justice Kavanaugh has signaled interest in doing so, too. *See* Paul v. United States, 589 U.S. 1087, 1087 (2019) (mem.) (Kavanaugh, J., respecting the denial of certiorari) (noting that "Justice GORSUCH's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases"). Justice Barrett also "may be willing to rethink non-delegation doctrine in limited settings, but not join in a blanket revision." Jim Saksa, *Barrett, with Scalia as Model, May Be a Moderate on Regulation*, ROLL CALL (Oct. 8, 2020, at 06:00 ET), https://rollcall.com/2020/10/08/barrett-with-scalia-as-model-may-be-a-moderate-on-regulation/ [https://perma.cc/JP9J-9E8S]; *see also* Amy Coney Barrett, *Suspension and Delegation*, 99 CORN. L. REV. 251, 255–56, 325–26 (2014) (arguing that limits exist on Congress's power to delegate certain authority under the Suspension Clause).

84. Although "a fairly long tradition holds that the nondelegation doctrine does not apply to the states as a matter of either due process or the guarantee clause," one view holds that the Republican Guarantee Clause, if justiciable, would enforce a nondelegation requirement on states. Berg, *supra* note 76, at 232–35 (citing JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980)); *see also* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 80–81 (2012) (arguing that, at least in some ways, the Fourteenth Amendment effectively incorporated the Republican Guarantee Clause against the states); Dorf, *supra* note 28, at 52 (suggesting the Republican Guarantee Clause might impose certain separation-of-powers rules on states).

85. United States v. Davis, 588 U.S. 445, 447 (2019).

86. United States v. L. Cohen Grocery Co., 255 U.S. 81, 87 (1921). Although it did not speak in explicit "vagueness" terms, the Court's first void-for-vagueness case was *United States v. Reese*, 92 U.S. 214 (1875). *See* Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 280 n.1 (2003). There, the Court held unenforceable the Enforcement Act of 1870 as outside Congress's Fifteenth Amendment powers. *Reese*, 92 U.S. at 220–22. "Penal statutes," the Court reasoned, "ought not to be expressed in language so uncertain," because "[e]very man should be able to know with certainty when he is committing a crime." *Id.* at 220.

unenforceable. That said, Supreme Court opinions strongly suggest that the doctrine also applies to civil laws.[87]

The void-for-vagueness doctrine serves two principle aims. First, it "guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes."[88] Second, it "guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges."[89] While the first aim focuses on rules being too vague for a regulated party to understand, the second focuses on rules being too vague for other government actors (enforcers and adjudicators) to understand. In sum, a law is unconstitutionally vague if it either "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "authorizes or even encourages arbitrary and discriminatory enforcement."[90]

The void-for-vagueness doctrine ultimately derives from the Due Process Clause.[91] The "first essential of due process of law," the Court has explained, is "violate[d]" by "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and

87. *See* Sessions v. Dimaya, 584 U.S. 148, 156–57 (2018) (plurality); *id.* at 183–88 (Gorsuch, J., concurring in part and concurring in the judgment); *see also* Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 499–500 (1982) (applying test to ordinance that "nominally impose[d] only civil penalties" and was "quasi-criminal"); Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966) ("So here this state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague."). It remains an open question, however, whether the Constitution demands less clarity from a civil law than from a criminal law. For present purposes, because the Supreme Court has not specifically articulated separate standards for criminal and civil laws, this Article assumes that the standards articulated in criminal cases apply equally to civil laws. As to what the difference is between a criminal and civil law, both opinions in *Ellingburg v. United States* provide a good and recent entry. 146 S. Ct. 564 (2026).

88. *Dimaya*, 584 U.S. at 155–56 (plurality) (quoting Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972)); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

89. *Dimaya*, 584 U.S. at 156 (plurality); Johnson v. United States, 576 U.S. 591, 597 (2015). Courts examine whether a legislature "establish[ed] minimal guidelines to govern law enforcement." Kolender v. Lawson, 461 U.S. 352, 358 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)).

90. Hill v. Colorado, 530 U.S. 703, 732 (2000) (citing City of Chi. v. Morales, 527 U.S. 41, 56–57 (1999)); *see also* United States v. Williams, 553 U.S. 285, 306 (2008) ("What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.").

91. United States v. Davis, 588 U.S. 445, 451 (2019); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); Arjun Ogale, Note, *Vagueness and Nondelegation*, 108 VA. L. REV. 783, 788 (2022) ("The vagueness doctrine originates from the Due Process Clauses of the Fifth and Fourteenth Amendments."). *But see Dimaya*, 584 U.S. at 206 (Thomas, J., dissenting) ("I continue to harbor doubts about whether the vagueness doctrine can be squared with the original meaning of the Due Process Clause . . . .").

differ as to its application."[92] The doctrine also enforces a structural separation of powers, because "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis."[93] Indeed, "[c]onsiderations of separation of powers help us to understand [the void-for-vagueness] doctrine."[94] The connection between the void-for-vagueness doctrine and the separation of powers—and, in particular, the nondelegation doctrine—has been observed again and again by jurists[95] and scholars.[96]

Because "[t]he vagueness doctrine originates from the Due Process Clauses of the Fifth *and* Fourteenth Amendments,"[97] it also constrains *states* and state law. The doctrine's twin rationales—fair notice and nonarbitrary enforcement—apply with equal force to

92. *Connally*, 269 U.S. at 391.

93. *Grayned*, 408 U.S. at 108–09; *see also Davis*, 588 U.S. at 451 ("Our doctrine prohibiting the enforcement of vague laws rests on the twin constitutional pillars of due process and separation of powers."); *Dimaya*, 584 U.S. at 156 (plurality) (observing that the void-for-vagueness doctrine serves as "a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not").

94. Chapman & McConnell, *supra* note 82, at 1806.

95. *See* Gundy v. United States, 588 U.S. 128, 168 (2019) (Gorsuch, J., dissenting) ("[M]ost any challenge to a legislative delegation can be reframed as a vagueness complaint . . . ."); *Dimaya*, 584 U.S. at 175–83 (Gorsuch, J., concurring in part and concurring in the judgment); *id.* at 216 (Thomas, J., dissenting) (offering that "perhaps the vagueness doctrine is really a way to enforce the separation of powers—specifically, the doctrine of nondelegation").

96. *See, e.g.*, Todd Gaziano & Ethan Blevins, *The Nondelegation Test Hiding in Plain Sight: The Void-for-Vagueness Standard Gets the Job Done*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE 45, 45 (Peter J. Wallison & John Yoo eds., 2022); Brief Amicus Curiae of Pacific Legal Foundation in Support of Reversal at 19–22, Gundy v. United States, 588 U.S. 128 (2019) (No. 17-6086); Ogale, *supra* note 91, at 788; Sunstein, *supra* note 81, at 320 (explaining that the nondelegation and void-for-vagueness doctrines both "provide fair notice to affected citizens" and "discipline the enforcement discretion of unelected administrators and bureaucrats"); Eli Nachmany, *Bill of Rights Nondelegation*, 49 BYU L. REV. 513, 515–18, 546 (2023); F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 334–36 (2021); Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 VA. L. REV. 2051, 2053 (2015). That said, while the nondelegation doctrine is concerned with the transfer of legislative power to executive regulators, the void-for-vagueness doctrine is concerned with the transfer of legislative power to executive enforcers. Although that distinction may seem arbitrary (and likely does not hold water when tested against first principles), it is nonetheless a distinction the Court has indulged. Sean G. Herman, *A Clean Water Act, If You Can Keep It*, 13 GOLDEN GATE U. ENV'T L.J. 63, 79 (2021). Vagueness in a statute can be cured by an administrative agency's substantive *rules* limiting the scope of the statute. *See* Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 504 (1982) (holding that a challenge to a law regulating economic activity cannot succeed if "administrative regulations . . . sufficiently narrow potentially vague or arbitrary interpretations of the . . . [law]").

97. Ogale, *supra* note 91, at 788 (emphasis added); *accord* Planned Parenthood of Ind. & Ky., Inc. v. Marion Cnty. Prosecutor, 7 F.4th 594, 598 (7th Cir. 2021) ("The Supreme Court has long held that overly vague laws are unconstitutional under the Due Process Clause of the Fifth and Fourteenth Amendments.").

both the federal and state governments. To that end, the Supreme Court has repeatedly declared state laws to be unconstitutionally vague.[98] Perhaps most famously in *Papachristou v. City of Jacksonville*,[99] the Court struck down Florida's public vagrancy law, which made it illegal to be a "wanton and lascivious person[ ]" or to "stroll[ ] around from place to place without any lawful purpose or object."[100] The law was unconstitutionally vague because it—cue the oft-repeated phrase—"fail[ed] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," gave law enforcement "unfettered discretion," and "encourage[d] arbitrary and erratic" enforcement and adjudication—primarily against "poor people, nonconformists, dissenters, [and] idlers."[101]

When the doctrine is applied to state law, its structure-controlling effects come with it. Just as the doctrine enforces a structural separation in the federal government, so too does it impose a modest separation requirement on states.[102] Four decades ago, Judge Richard Posner recognized how the federal void-for-vagueness doctrine constituted a "special context[ ]" in which a federal rule controlled state structure.[103] "One of the premises of the void-for-vagueness doctrine," he explained for a panel of the Seventh Circuit, "is that an excessively vague statute promotes arbitrary and discriminatory law enforcement by delegating (too much) power to law-enforcement officers."[104]

Premises like Judge Posner's have been affirmed time and again. "Vague statutes," the Supreme Court has said, "threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide."[105] Stitching

98. *See, e.g.*, *Grayned*, 408 U.S. at 108 nn. 3–4 (collecting cases); Winters v. New York, 333 U.S. 507, 519–20 (1948); Lanzetta v. New Jersey, 306 U.S. 451, 458 (1939); Collins v. Kentucky, 234 U.S. 634, 638 (1914).

99. 405 U.S. 156 (1972).

100. *Id.* at 156–58, 156 n.1.

101. *Id.* at 162, 168, 170.

102. *See* Daniel Epps, *Checks and Balances in the Criminal Law*, 74 VAND. L. REV. 1, 21 (2021) ("[S]ome federal constitutional constraints—such as . . . the Fourteenth Amendment Due Process Clause's rule against vague criminal statutes—effectively impose some separation-of-powers rules on state governments." (footnotes omitted)).

103. United Beverage Co. of S. Bend v. Ind. Alcoholic Beverage Comm'n, 760 F.2d 155, 158 (7th Cir. 1985). In the same opinion, Judge Posner explained that "there is no independent federal constitutional doctrine of excessive delegation of state legislative power." *Id.* at 159. No "independent doctrine," sure, but by his own assessment, another doctrine that accomplishes much the same ends.

104. *Id.* at 158.

105. United States v. Davis, 588 U.S. 445, 451 (2019); *see* Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) ("A vague law impermissibly delegates basic policy matters to

together several authorities, Justice Neil Gorsuch explained that "legislators may not 'abdicate their responsibilities for setting the standards of the criminal law,'"[106] either by "leaving to judges the power to decide 'the various crimes includable in [a] vague phrase,'"[107] or by "transfer[ring] legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions."[108] Nathan Chapman and Michael McConnell have likewise argued that "[v]ague statutes have the effect of delegating lawmaking authority to the executive," because "any individual enforcement decision will be based on a construction of the statute that accords with the executive's unstated policy goals, filling the gaps of the legislature's policy goals."[109] Decades earlier, Alexander Bickel wrote similarly: "A vague statute delegates to administrators, prosecutors, juries, and judges the authority of *ad hoc* decision, which is in its nature difficult if not impossible to hold to account, because of its narrow impact."[110]

Notably, all these affirmations draw from due process principles and are stated in general terms. Despite being thematically about structure, they do not depend upon or uniquely apply to the Constitution's structural arrangement of federal power. They instead detail what the Due Process Clauses demand of any rule-of-law government.[111] Fundamentally, the notion of enforcing the void-for-vagueness doctrine against states necessarily presumes—and thereby requires—that states will structurally separate legislative power, on the one hand, from executive and judicial power, on the other. The doctrine further imposes a limitation on a legislature's ability to delegate or otherwise share its power with others. In sum, by enforcing due process, the void-for-vagueness doctrine—a federal rule—imposes structural limitations on state governments.

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policemen, judges, and juries for resolution on an ad hoc and subjective basis . . . ."); Kolender v. Lawson, 461 U.S. 352, 358 (1983) ("[T]he more important aspect of vagueness doctrine 'is not actual notice, but . . . the requirement that a legislature establish minimal guidelines to govern law enforcement.'" (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974))).

106. Sessions v. Dimaya, 584 U.S. 148, 181 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (quoting *Smith*, 415 U.S. at 575).

107. *Id.* (alteration in original) (quoting Jordan v. De George, 341 U.S. 223, 242 (1951) (Jackson, J., dissenting)).

108. *Id.* at 182 (citing *Grayned*, 408 U.S. at 108–09).

109. Chapman & McConnell, *supra* note 82, at 1806.

110. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 151 (1962).

111. *Cf.* Olney v. Arnold, 3 U.S. (3 Dall.) 308, 314 (1796) ("But if any doubt shall exist upon the subject, the construction should be in favour of that general principle, in the policy of all well regulated, particularly of all republican, governments, which prohibits an heterogeneous union of the legislative and judicial departments.").

What's more, while the void-for-vagueness doctrine nominally takes aim at legislative acts, its structural *effects* are reciprocal. As explained, the doctrine assesses whether a legislative act is too vague, requires separation between legislative and nonlegislative actors, and sets a standard for determining whether that separation is adequate. But the doctrine is not limited to checking the legislature: it acts equally in the other direction, with mirror-image effects on either side of the separation-of-powers ledger. Just like a legislature cannot enact a too-vague law, an executive or judicial actor cannot *enforce* such an enactment. The doctrine thus polices structural lines between legislative and nonlegislative powers in both directions: an executive or judicial actor cannot enforce a vague enactment; if they do, they violate the doctrine and effectively exercise legislative power. And a legislature cannot enact a vague law; if it does, it violates the doctrine and effectively delegates legislative power to nonlegislative actors.

2. Bills of Attainder and Ex Post Facto Laws

The void-for-vagueness doctrine is not the only federal doctrine that requires separation between state legislative and nonlegislative power. According to Chapman and McConnell, a core promise of due process is that it prohibits acts by a legislature that are, in effect, judicial.[112] Through the Fourteenth Amendment, the federal Constitution requires states to afford due process. As a matter of federal constitutional law, then, any state structure that allows a state legislative body to exercise judicial power would be unlawful.

Two specific permutations of this general rule appeared in the original Constitution and bound states directly, even before the Fourteenth Amendment several decades later.[113] First, the Constitution bans both the federal government and all state governments from enacting bills of attainder.[114] A "bill of attainder" is "a law that legislatively determines guilt and inflicts punishment upon an

112. *See* Chapman & McConnell, *supra* note 82, at 1727–40. So too has the Supreme Court—albeit not as a matter of due process—reiterated the related premise that a legislature may not effectively decide a pending case. *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 146–47 (1872); Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 439 (1992) (explaining that a statute is invalid if it "fail[s] to supply new law, but direct[s] results under old law"); Bank Markazi v. Peterson, 578 U.S. 212, 225 n.17 (2016); Patchak v. Zinke, 583 U.S. 244, 266 (2018) (Roberts, C.J., dissenting); William D. Araiza, *The Once and (Maybe) Future* Klein *Principle*, 74 WASH. & LEE L. REV. ONLINE 383, 398–99 (2018).

113. Chapman & McConnell, *supra* note 82, at 1718–19. Chapman and McConnell also identify the Contracts Clause as a third clause that operated directly against states. *Id.* The Contracts Clause, however, is slightly afield from the other two and is less directly relevant to the issues at hand.

114. U.S. CONST. art. I, §§ 9, 10.

identifiable individual"—or group—"without provision of the protections of a judicial trial."[115] Second, the Constitution also bans all governments from enacting ex post facto laws.[116] An "ex post facto" law is "any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'"[117] Like the Due Process Clause, these prohibitions are regarded as individual rights.[118]

The Supreme Court has recognized the structural significance of these twin prohibitions. "[T]he Bill of Attainder Clause was intended not as a narrow, technical . . . prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature."[119] "[B]y banning bills of attainder the framers of the Constitution sought to guard against such a hazard by limiting the legislature to its task of rule making, with the application of those rules being left to some other department of government."[120] And the ex post facto clause, for its part, "also upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law."[121] By applying directly to states and "prevent[ing] . . . state legislatures from executing the laws they enact,"[122] Daniel Epps has observed, these "federal constitutional constraints . . . effectively impose some separation-of-powers rules on state governments."[123] Indeed, by limiting the power of state *legislatures* to exercise the *judicial power* of determining guilt and imposing punishment, the federal Constitution controls state structure.[124]

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115. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468 (1977); *accord* Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1866).

116. U.S. CONST. art. I, §§ 9, 10.

117. Weaver v. Graham, 450 U.S. 24, 28 (1981) (quoting *Cummings*, 71 U.S. (4 Wall.) at 325–26).

118. *See, e.g.*, Boumediene v. Bush, 476 F.3d 981, 993 n.13 (D.C. Cir. 2007) (collecting cases), *vacated and remanded on other grounds*, Al Odah v. United States, 282 F. App'x 844 (D.C. Cir. 2008) (per curiam); Aaron H. Caplan, *Nonattainder as a Liberty Interest*, 2010 WIS. L. REV. 1203, 1238; Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 374 n.227 (2006); Thomas B. Griffith, Note, *Beyond Process: A Substantive Rationale for the Bill of Attainder Clause*, 70 VA. L. REV. 475, 483 (1984).

119. United States v. Brown, 381 U.S. 437, 442 (1965).

120. Mones v. Austin, 318 F. Supp. 653, 657 (S.D. Fla. 1970) (citing *Brown*, 381 U.S. at 446).

121. *Weaver*, 450 U.S. at 29 n.10 (citing Ogden v. Blackledge, 6 U.S. (2 Cranch) 272, 277 (1804)).

122. Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 309 (1989).

123. Epps, *supra* note 102, at 21.

124. *But see Brown*, 381 U.S. at 473 (White, J., dissenting).

B. Separating the Executive and Judicial Powers

The doctrines discussed in Section II.A, above, require separation between those who set the rules, on the one hand, and those who enforce and adjudicate the rules, on the other. But those doctrines say nothing about separation between those who enforce the rules and those who decide whether the rules have been broken. For that separation, other doctrines come into play.

This Section considers federal constitutional doctrines that require separation between state executive power and state judicial power. Among them are multiple criminal-procedure safeguards that preserve judicial independence against executive encroachment, as well as related precedent that limits the authority of state executive-branch administrative agencies.

1. Criminal Investigation and Sentencing

Consider *Coolidge v. New Hampshire*.[125] At one time in New Hampshire, justices of the peace could issue warrants.[126] And anyone—including a prosecutor—could serve as a justice of the peace.[127] While investigating a murder, police officers obtained a warrant from a justice of the peace, who happened to also be the New Hampshire attorney general and later the prosecutor in that case.[128] The Supreme Court held that this arrangement violated the Fourth and Fourteenth Amendments.

These amendments, the Court reasoned, require that probable cause be decided by (and a warrant issued by) only "a judicial officer, not by" an executive officer, such as "a policeman or Government enforcement agent" "engaged in the often competitive enterprise of ferreting out crime."[129] "[T]he whole point" of requiring a judicial officer to make that determination is to ensure neutrality, because "prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations."[130] And this neutrality principle, in other words, requires a certain level of independence and separation between the executive power, on the one hand, and the judicial power, on the other.

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125. 403 U.S. 443 (1971). Parts of *Coolidge* commanded only a plurality, and part of that holding was modified by *Horton v. California*, 496 U.S. 128 (1990). These nuances are immaterial for the discussion here.

126. *Coolidge*, 403 U.S. at 447.

127. *Id.* at 447, 450.

128. *Id.* at 447.

129. *Id.* at 449 (quoting Johnson v. United States, 333 U.S. 10, 13–14 (1948)).

130. *Id.* at 450.

The New Hampshire Supreme Court, in ruling otherwise, had "relied upon the theory that even if the warrant procedure here in issue would clearly violate the standards imposed on the Federal Government by the Fourth Amendment, it is not forbidden the States under the Fourteenth."[131] But the U.S. Supreme Court rejected that argument.[132] Insofar as the Fourth Amendment imposes a certain structural separation requirement on the federal government, it likewise imposes that same requirement on state governments through the Fourteenth Amendment.[133]

The Court's holding in *Coolidge* necessarily presumes—and thereby requires—that states will structurally separate executive power from judicial power. And it enforces, as a matter of federal law, a standard for ensuring that the actor exercising state executive power (such as a prosecutor or police officer) does not exercise power that is indisputably judicial in nature, at least when it comes to issuing constitutionally compliant warrants under the Fourth Amendment.[134]

Along similar lines, "[t]he Supreme Court has often invalidated" other "state government structures that endanger the due process rights to a fair trial and an impartial judge."[135] Take the principle, announced by Justice Benjamin Cardozo for a unanimous Court in *Hill v. U.S. ex rel. Wampler*,[136] that "[t]he only sentence known to the law is the sentence or judgment entered upon the records of the court."[137] Because sentencing is a "judicial function,"[138] any purported sentence (or sentence extension or condition) imposed by a nonjudicial actor (in *Wampler*, a court clerk) amounts to no

131. *Id.* at 451.

132. *Id.* at 453.

133. *See id.* at 451–53. The Court has also recited the "due process guarantee that 'no man can be a judge in his own case,'" *e.g.*, Williams v. Pennsylvania, 579 U.S. 1, 9 (2016), drawing from the venerable common-law maxim *emo iudex in causa sua*, *see* 1 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND § 212 (1628).

134. *See also* Nachmany, *supra* note 96, at 544 ("The Fourth Amendment's particularity requirement is a rule of nondelegation."). *See generally* Ruth W. Grant, *The Exclusionary Rule and the Meaning of Separation of Powers*, 14 HARV. J.L. & PUB. POL'Y 173 (1991) (observing connection between enforcement of Fourth Amendment remedies and the separation of powers).

135. David A. Martland, Note, *Justice Without Favor: Due Process and Separation of Executive and Judicial Powers in State Government*, 94 YALE L.J. 1675, 1679 (1985) (citing Connally v. Georgia, 429 U.S. 245 (1977); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Turner v. Louisiana, 379 U.S. 466 (1965); Jackson v. Denno, 378 U.S. 368 (1964); Tumey v. Ohio, 273 U.S. 510 (1927)). *But see id.* (collecting further cases going the other way).

136. 298 U.S. 460 (1936).

137. *Id.* at 464.

138. *Id.*

sentence at all and cannot authorize postconviction custody.[139] The Second Circuit, in a 2006 opinion joined by then-Judge Sonia Sotomayor, applied *Wampler*'s rationale to a state interbranch dispute.[140] In particular, the court held that the New York Department of Correctional Services lacked authority to modify the length of a sentence imposed by a court.[141] Indeed, "New York's Department of Correctional Services has no more power to alter a sentence than did the clerk of the court in *Wampler*."[142] By doing so, it violated the Due Process Clause of the Fourteenth Amendment.[143] The altered sentence violated due process *because* a judge did not impose it: "The imposition of a sentence is a judicial act; only a judge can do it. The penalty administratively added by the Department of Corrections was, quite simply, never a part of the sentence."[144] "Any addition to that sentence not imposed by the judge was unlawful."[145]

Similar to *Coolidge*, then, *Wampler* and *Earley* contribute to federal control of state structure. They require states to maintain courts (which perform the "judicial function" of imposing a sentence) separate from executive actors (which carry out judicially-imposed sentences). If a state impermissibly combines those two functions in the same branch—such as New York did with its executive Department of Correctional Services—then it violates the federal due process guarantee.

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139. *See id.* at 464–65; Earley v. Murray (*Earley I*), 451 F.3d 71, 75 (2d Cir. 2006) ("Only the judgment of a court, as expressed through the sentence imposed by a judge, has the power to constrain a person's liberty.").

140. *Earley I*, 451 F.3d at 74. *But see, e.g.*, Carroll v. Daugherty, 764 F.3d 786, 788 (7th Cir. 2014) (arguing that "*Earley* misinterprets *Wampler*").

141. *Earley I*, 451 F.3d at 74–76.

142. *Id.* at 76.

143. *Id.* at 76 n.1; *accord* Earley v. Murray (*Earley II*), 462 F.3d 147, 148 (2d Cir. 2006) (denying petition for rehearing and explicitly mentioning "Due Process Clause of the United States Constitution"); *id.* at 150 ("[A]s *Wampler* requires the custodial terms of sentences to be explicitly imposed by a judge, any practice to the contrary is simply unconstitutional and cannot be upheld."); *see also* MONTESQUIEU, THE SPIRIT OF THE LAWS 159, 157 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds. & trans., Cambridge Univ. Press 1989) (1748) (stating that "[i]f the legislative power leaves to the executive power the right to imprison," then "there is no longer any liberty" and "[a]ll would be lost").

144. *Earley I*, 451 F.3d at 76.

145. *Id.* at 75. Denying a rehearing petition, the court made clear that "[a] judicially-imposed sentence includes only those elements explicitly ordered by the sentencing judge." *Earley II*, 462 F.3d at 149. Thus, it did not matter that a state statute may have mandated a different sentence or purported to authorize the Department of Correctional Services to administratively extend a sentence. *Id.* at 149 ("[T]he only sentence known to the law is the sentence imposed by the judge; any additional penalty added to that sentence by another authority is invalid, regardless of its source, origin, or authority until the judge personally amends the sentence. . . . [A] sentence cannot contain elements that were not part of a judge's pronouncement. The fact that New York law mandates a different sentence than the one imposed may render the sentence imposed unlawful, but it does not change it. The sentence imposed remains the sentence to be served unless and until it is lawfully modified.").

2. Administrative Agencies

A related issue is the authority of executive administrative agencies to exercise judicial power. At the federal level, recent Supreme Court precedent interpreting the Seventh Amendment's civil jury trial right and the Due Process Clause has limited federal administrative agency power in that regard. At the state level, conventional wisdom would suggest that no similar limits apply, save for state-specific rules. But not so fast: federal law here, too, may impose direct limits on the power a state executive administrative agency may wield.

In the "earthshattering"[146] case of *SEC v. Jarkesy*,[147] the Supreme Court held that the Seventh Amendment entitles a defendant to a jury trial in a court when the Securities and Exchange Commission (SEC) seeks civil penalties against him for securities fraud. Since its creation, the SEC could bring enforcement actions in federal court to seek civil monetary penalties for alleged securities fraud.[148] With the Dodd-Frank Act, Congress empowered the SEC to also impose such penalties "through its own in-house proceedings" before an administrative-law judge (ALJ), with administrative review by the SEC.[149] In 2013, the SEC brought an in-house enforcement proceeding against George Jarkesy, Jr. and his firm seeking civil penalties for alleged securities fraud; an ALJ issued a decision, which the SEC reviewed and finalized, ultimately imposing a civil penalty of $300,000—all without the involvement of a court or jury.[150]

The Supreme Court held that the SEC's order was unlawful. To begin, the Court held that the Seventh Amendment—which states that "[i]n Suits at common law . . . the right of trial by jury shall be preserved"[151]—applied and entitles defendants like Jarkesy to a jury trial in a court.[152] "The Seventh Amendment extends to a

146. According to the dissent, at least. SEC v. Jarkesy, 603 U.S. 109, 201 (2024) (Sotomayor, J., dissenting). Others disagree. *E.g.*, Mark Tushnet, *Today's Supreme Court and the Administrative State,* BALKINIZATION (July 9, 2024, at 13:37 ET), https://balkin.blogspot.com/2024/07/todays-supreme-court-and-administrative.html [https://perma.cc/PS5M-KTWD].

147. SEC v. Jarkesy, 603 U.S. 109 (2024).

148. *See id.* at 115–17.

149. *Id.* at 118 (citing Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(a), 124 Stat. 1376, 1862–1864 (2010) (codified in relevant part as amended at 15 U.S.C. §§ 77h-1(g), 78u-2(a), 80b-3(i)(1))). The Dodd-Frank Act "ma[de] the SEC's authority in administrative penalty proceedings coextensive with its authority to seek penalties in Federal court." H. R. REP. NO. 111–687, at 78 (2010).

150. *Jarkesy*, 603 U.S. at 118–19.

151. U.S. CONST. amend. VII.

152. *Jarkesy,* 603 U.S. at 120.

particular statutory claim if the claim is 'legal in nature.'"[153] "To determine whether a suit is legal in nature," courts "consider the cause of action and the remedy it provides."[154] In *Jarkesy*, the SEC's allegations were analogous to common-law fraud, and the remedy it sought—monetary penalties—were a "prototypical common law remedy" and historically enforced in courts of law with a jury.[155]

After deciding that the Seventh Amendment applied, the Court also reasoned that the so-called "'public rights' exception to Article III jurisdiction" did not apply.[156] Under the public-rights exception, Congress may "assign an action" respecting a public right—as opposed to a private right—"to an agency tribunal without a jury, consistent with the Seventh Amendment."[157] Although the Court did not define the full scope of what disputes qualify for the public-rights exception, it offered a list of examples (which may well be exhaustive): revenue collection, customs duties, Indian relations, public-lands administration, and public benefits (including payments to veterans, pensions, and patent rights).[158] The SEC's enforcement action against Jarkesy, alleging fraud and seeking monetary penalties, did not fall within the public-rights exception.[159]

Ultimately, because the Seventh Amendment applied, and because the public-rights exception did not apply, the SEC could not itself impose a monetary penalty against Jarkesy through agency adjudication. The SEC instead had to pursue its enforcement action against Jarkesy in court with a jury trial. It did not matter that Congress had purported to endow the SEC with authority to adjudicate its fraud claims in its own in-house tribunals. "Even when an action 'originate[s] in a newly fashioned regulatory scheme,' what matters is the substance of the action, not where Congress has

153. *Id.* at 122 (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53 (1989)). For a contrary (or at least different) view of how to determine the Seventh Amendment's contours, see generally Samuel L. Bray, *Equity, Law, and the Seventh Amendment*, 100 TEX. L. REV. 467 (2022).

154. *Jarkesy*, 603 U.S. at 122–23.

155. *Id.* at 123.

156. *Id.* at 120. The public rights exception, although often discussed in the Seventh Amendment context, is actually an "exception to Article III jurisdiction." *Id.* Or, maybe not: the exact nature and theoretical basis of the exception is subject to debate. For the current debate on the exact nature and theoretical basis of the exception, see generally Note, *Unlinking the Seventh Amendment and Article III*, 138 HARV. L. REV. 588 (2024); Martin H. Redish & Samy Abdelsalam, *The Seventh Amendment Right to Jury Trial in the Administrative State: Recognizing the Dangers of the Constitutional Moment*, 99 NOTRE DAME L. REV. 1743 (2024).

157. *Jarkesy*, 603 U.S. at 119.

158. *Id.* at 128–31.

159. *Id.* at 134.

assigned it."[160] Congress cannot "concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch"; to do so would be "the very opposite of the separation of powers that the Constitution demands."[161]

Justice Gorsuch concurred, joined by Justice Thomas,[162] to emphasize the "other constitutional provisions" underlying the decision.[163] Rather than "work alone," the Seventh Amendment "operates together with Article III and the Due Process Clause of the Fifth Amendment to limit how the government may go about depriving an individual of life, liberty, or property."[164] Specifically, "[t]he Seventh Amendment guarantees the right to trial by jury. Article III entitles individuals to an independent judge who will preside over that trial. And due process promises any trial will be held in accord with time-honored principles."[165] As William Baude echoed, after *Jarkesy*, the proper analytical framework proceeds as follows: the first question is whether the Due Process Clause entitles a defendant to adjudication *in court* (or whether agency adjudication is fine); that's the proper place for the public rights analysis. (In the federal system, Article III defines what a court is.) The second question is whether a *jury* is required under the Seventh Amendment (or whether an Article III *judge* can adjudicate in equity).[166]

Justice Gorsuch's observations have implications beyond mere theory. By viewing the Due Process Clause as doing significant work, *Jarkesy* logically extends beyond agencies seeking to impose *legal* remedies, but also those seeking to impose *equitable* remedies.[167] Consider, for example, an order of the Federal Mine Safety

160. *Id.* (alteration in original) (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 52 (1989)).

161. *Id.* at 140; *see also* AT&T, Inc. v. FCC, 149 F.4th 491, 494 (5th Cir. 2025) (applying *Jarkesy* to vacate FCC forfeiture order), *cert. granted*, 223 L. Ed. 2d 498 (U.S. Jan. 9, 2026) (No. 25-406).

162. *Jarkesy*, 603 U.S. at 141 (Gorsuch, J., concurring).

163. *Id.*

164. *Id.*

165. *Id.*

166. Will Baude & Dan Epps, *Hope Springs Eternal*, DIVIDED ARGUMENT (June 30, 2024), https://www.dividedargument.com/episodes/hope-springs-eternal [https://perma.cc/S5BT-HY67]; *see also* William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1570–71 (2020).

167. *See, e.g.*, Intuit, Inc. v. FTC, No. 24-60040, 2026 WL 787527, at *6 (5th Cir. Mar. 20, 2026) (holding that *Jarkesy* required FTC to pursue cease-and-desist order for alleged deceptive advertising in federal court, because order was akin to "traditional remedies . . . available in courts of equity"—even though no jury-trial or Seventh-Amendment issue was implicated); Matthew Strada, *The Unfolding Meaning of* Jarkesy, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (Apr. 27, 2025), https://www.yalejreg.com/nc/the-unfolding-meaning-of-jarkesy-by-matthew-strada/ [https://perma.cc/CDU9-J66T] (setting forth contours of issue).

and Health Commission requiring a mine to abate an alleged violation by taking certain action.[168] An order requiring abatement constitutes an equitable remedy.[169] Although the Seventh Amendment does not afford a jury right in cases in equity, that means only that a defendant has no *jury*; it says nothing about whether Congress can remove the dispute from *court*. The Due Process Clause, though, requires the government to pursue equitable remedies *in court*, not elsewhere.[170] In sum, Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty."[171] So long as the dispute concerns private (as opposed to public) rights,[172] a party has a right to have its dispute decided in an Article III court by an Article III judge—regardless of whether the Seventh Amendment applies.[173] Allowing an executive administrative agency to award equitable relief would violate due process and the separation of powers.[174]

Although relying at least in part on individual rights, *Jarkesy* is also a separation-of-powers case that enforces structural

168. *See* 30 U.S.C. § 814(a), (d).

169. *See, e.g.*, 66 C.J.S. *Nuisances* § 142 (2025).

170. *See Jarkesy*, 603 U.S. at 149–50 (Gorsuch, J., concurring). (At least when private rights are at issue.) Because that clause ensures the government may not deprive anyone of "life, liberty, or property, without due process of law," U.S. CONST. amend. V, and because it is the "'the peculiar province of the judiciary' to safeguard life, liberty, and property, due process often mean[s] *judicial* process," *Jarkesy*, 603 U.S. at 150 (Gorsuch, J., concurring) (quoting 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES, editor's app. at 358 (1803)). "That is, if the government sought to interfere with those rights, nothing less than 'the process and proceedings of the common law' had to be observed before any such deprivation could take place. In other words, '"due process of law" generally implie[d] and include[d] . . . *judex* [a judge], regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings.' This constitutional baseline was designed to serve as 'a restraint on the legislative' branch, preventing Congress from 'mak[ing] any process "due process of law," by its mere will.'" *Id.* (alterations in original) (citations omitted) (first quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1783, at 661 (1833); then quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 280 (1856); and then quoting *Murray's Lessee*, 59 U.S. (18 How.) at 276).

171. *Jarkesy*, 603 U.S. at 148 (Gorsuch, J., concurring) (quoting *Murray's Lessee*, 59 U.S. (18 How.) at 284). Article III, for its part, grants federal courts jurisdiction over "*all Cases* . . . in Law *and Equity*." U.S. CONST. art. III, § 2, cl. 1 (emphasis added); *see* 28 U.S.C. § 1331.

172. *See Jarkesy*, 603 U.S. at 119.

173. *Id.* at 127 ("[W]e have repeatedly explained that matters concerning private rights may not be removed from Article III courts."). So held the Third Circuit in *Sun Valley Orchards, LLC v. United States Department of Labor*, 148 F.4th 121, 127–29 (3d Cir. 2025). There, the court relied on *Jarkesy* to hold unlawful the Department of Labor's imposition of civil penalties and back wages through administrative processes alone. *Id.* "But because Sun Valley's complaint did not allege a violation of the Seventh Amendment," the court "consider[ed] only its challenge under Article III." *Id.* at 128 n.3. In other words, Article III alone—regardless of the Seventh Amendment—requires the Department of Labor to pursue civil penalties and back wages for regulatory violations in a court.

174. *See Jarkesy*, 603 U.S. at 141 (Gorsuch, J., concurring).

principles.[175] After all, the Seventh Amendment is a "structural right[ ]" that "limit[s] executive power by adjudicating civil suits brought by the government against individuals."[176] *Jarkesy*, in sum, recognizes and operationalizes not only the Seventh Amendment's *individual rights* protections (jury trial versus nonjury trial) but also its *structural* and *separation-of-powers* protections (jury trial versus executive "adjudication").

On its face at least, *Jarkesy* was about federal rights, federal administrative agencies, federal courts, and federal structure.[177] But *Jarkesy* may very well have impending—or even extant—effect in and against the states, providing yet another doctrinal basis for federal control of state structure.

First, unlike the overwhelming majority of the rights in the Bill of Rights,[178] the Seventh Amendment jury trial right has not been expressly incorporated against the states.[179] The Supreme Court, in

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175. *See id.* at 127, 140 (majority opinion). As William Yeatman put it, *Jarkesy* was "about our dynamic system of checks and balances." William Yeatman, SEC v. Jarkesy*: The Past, Present, and Future of Administrative Adjudication*, 2024 CATO SUP. CT. REV. 57, 71 (2023–2024); *see also* Leading Case, *Administrative Law – Separation of Powers – Public Rights Doctrine* – SEC v. Jarkesy, 138 HARV. L. REV. 405, 405 (2024) (repeatedly characterizing *Jarkesy* as a "separation-of-powers" case); *cf.* Jed H. Shugerman, A Historical Case for a Robust but Non-Remedial Seventh Amendment 3 (July 11, 2025) (unpublished manuscript) (on file with the Duquesne Law Review) (commenting on the relative influence of Seventh Amendment and separation-of-powers concerns in *Jarkesy*).

176. Hessick & Fisher, *supra* note 19, at 183.

177. *Jarkesy*'s rationale extends well beyond the SEC to other agencies enforcing similar antifraud provisions and imposing civil penalties in administrative proceedings. *See Jarkesy*, 603 U.S. at 199–200 (Sotomayor, J., dissenting). "[T]here are at least two dozen agencies that can impose civil penalties in administrative proceedings today, including CFPB, CFTC, EPA, FCC, FDA, FMC, FMSHRC, FRA, DOJ, DOT, FERC, HHS, HUD, MSPB, OSHA, Treasury, USDA, and USPS." Christopher J. Walker, *What* SEC v. Jarkesy *Means for the Future of Agency Adjudication*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (June 27, 2024), https://www.yalejreg.com/nc/what-sec-v-jarkesy-means-for-the-future-of-agency-adjudication/ [https://perma.cc/8PJB-AKF3]. (It *does not extend* to agencies that indisputably adjudicate public rights—including the Social Security Administration.) For many, this is salutary; for others, "destructive." Richard J. Pierce, Jr., Essay, *The Supreme Court's Opinion in* SEC v. Jarkesy *Has the Potential to Be Extremely Destructive*, 109 MINN. L. REV. HEADNOTES 21 (2024).

178. "With only 'a handful' of exceptions," the Supreme Court has held that "the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States." Timbs v. Indiana, 586 U.S. 146, 150 (2019) (quoting McDonald v. City of Chi., 561 U.S. 742, 765 (2010)).

179. This reason was sufficient for the Vermont Supreme Court to reject any reliance on *Jarkesy*, even for persuasive value. "Despite developer's intimations to the contrary, the Seventh Amendment is not applicable to state courts, and *Jarkesy* is therefore nonbinding on this Court." *In re* Investigation Pursuant to 30 V.S.A. Sec. 30 & 209, 2024 VT 58, ¶ 31, 327 A.3d 789, 805, *cert. denied*, 145 S. Ct. 1139 (2025); *see also* EFG Am., LLC v. Ariz. Corp. Comm'n, 569 P.3d 806, 808 (Ariz. Ct. App. 2025); Par. of Jefferson v. Fayard, 24-432, p. 14 (La. App. 5 Cir. 2/26/25), 407 So. 3d 879, 890; Blue Beach Bungalows DE, LLC v. Del. Dep't of Just. Consumer Prot. Unit, C.A. No.: S24A-04-001, 2024 WL 4977006, at *13–14 (Del. Super. Ct. Dec. 4, 2024), *aff'd in part*, *rev'd in part*, *remanded sub nom.*, Blue Beach Bungalows DE, LLC v. State, No. 14, 2025, 2025 WL 3768232 (Del. Dec. 30, 2025).

fact, has never addressed whether modern doctrine incorporates the Seventh Amendment against the states, and decisions that predate the modern era of incorporation do not preclude consideration of that question.[180] Prevailing wisdom says that it will be[181]—or already has been, under certain theories of constitutional law.[182] If and when[183] the Seventh Amendment is incorporated against the

180. Although earlier Supreme Court precedent held that the Seventh Amendment's civil jury trial right does not apply against the states, *see* Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211, 217 (1916), that precedent predates the Court's modern incorporation doctrine, *McDonald*, 561 U.S. at 765 n.13, 758–59.

181. "Evidence at the time of the founding through the adoption of the Fourteenth Amendment demonstrates that the Seventh Amendment was a fundamental right and thus was incorporated against the states under the due process clause of the Fourteenth Amendment." Suja A. Thomas, *Nonincorporation: The Bill of Rights After* McDonald v. Chicago, 88 NOTRE DAME L. REV. 159, 194 (2012); *see id.* at 191–96 (setting forth evidence of the civil jury trial right's "long, significant history"); Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241, 1273–74 (2014) (arguing for incorporation of the Seventh Amendment); *cf.* Jay S. Bybee, *The Congruent Constitution (Part One): Incorporation*, 48 BYU L. REV. 1, 26–30 (2022) ("The Court's failure to incorporate the Seventh Amendment may be the best evidence of the awkwardness of its congruence principle."). *But see* Hessick & Fisher, *supra* note 19, at 193 ("Structural rights [including the Seventh Amendment] should not be incorporated against the states because they interfere with the principle of preserving state control over state government."); Samuel Bray, *Incorporate the Seventh Amendment Civil Jury Trial Right?*, DIVIDED ARGUMENT (May 22, 2025), https://blog.dividedargument.com/p/incorporate-the-seventh-amendment [https://perma.cc/249P-M9YL] (advocating against incorporation of the Seventh Amendment for multiple reasons, including due to federalism concerns).

182. At oral argument in *Timbs*, Justice Kavanaugh asked: "Isn't it just too late in the day to argue that any of the Bill of Rights is not incorporated? . . . [A]ren't all—all the Bill of Rights at this point in our conception of what they stand for, the history of each of them, incorporated?" Oral Argument at 28:15, Timbs v. Indiana, 586 U.S. 146 (2019) (No. 17-1091), https://www.oyez.org/cases/2018/17-1091 (on file with the Duquesne Law Review). Justice Gorsuch expressed a similar view. *See id.* at 27:50 ("[M]ost of these incorporation cases took place in like the 1940s. . . . And here we are in 2018 . . . still litigating incorporation of the Bill of Rights. Really?"). Also worth considering is the Privileges or Immunities Clause, which provides that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1. Notwithstanding contrary Supreme Court precedent in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), there is an established cross-ideological scholarly consensus that *Slaughter-House* "blatantly" misinterpreted the Privileges or Immunities Clause, *see, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1320–31 (3d ed. 2000); CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 55 (1997); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 177 (1986); Richard A. Epstein, *Further Thoughts on the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 1096, 1098 (2005); Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 123 n.327 (2000). There is also an emerging judicial recognition "that the 'privileges or immunities of citizens of the United States' include, at minimum, the individual rights enumerated in the Bill of Rights." *Timbs*, 586 U.S. at 157 (Gorsuch, J., concurring) (citing *McDonald*, 561 U.S. 742, 805–58 (2010) (Thomas, J., concurring in part and concurring in the judgment)); *accord* Ramos v. Louisiana, 590 U.S. 83, 132 (2020) (Thomas, J., concurring in the judgment) (opining that federal constitutional rights apply against the states via the Privileges or Immunities Clause).

183. The Supreme Court recently denied certiorari in a case posing the question whether to incorporate the Seventh Amendment's civil jury trial right. In a statement, Justice Gorsuch reported "a number of 'vehicle' problems" that, at least in part, caused the denial.

states, *Jarkesy* would have an immediate impact on state structure. Whatever *Jarkesy* said requires a jury in a federal court in a federal dispute would likewise require a jury in a state dispute—and in a court, at least if, as Justice Gorsuch believes, the Due Process Clause also plays a role in channeling disputes to *courts*, regardless of juries.[184] State legislatures could not empower state administrative agencies (or other state executive actors) to impose legal remedies in private-rights disputes through in-house proceedings. *Jarkesy*'s rule would thereby regulate structure and enforce a certain separation-of-powers floor on *state governments* in the same way it does vis-à-vis the *federal government*.

Second, regardless of incorporation, nearly every state has a state constitutional guarantee preserving a jury trial right in civil cases.[185] And several states interpret their own state constitutional jury trial right similarly to—or the same as—the Seventh Amendment and federal court interpretations thereof.[186] In those states, while *Jarkesy* is not controlling, it nonetheless does substantial work as persuasive precedent. *Jarkesy* thus could instigate state courts to adopt a *Jarkesy*-like rule based on their respective state constitutions. In that sense, there is no actual federal control of state structure; but rather, developments in federal law would catalyze adjustments in state control of state structure.

Third, it may be that even without incorporation of the Seventh Amendment, *Jarkesy* already acts directly as a mechanism of federal control of state structure. As mentioned, the *Jarkesy* majority

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Thomas v. Humboldt Cnty., 146 S. Ct. 27, 27 (2025) (mem.) (Gorsuch, J., respecting the denial of certiorari). "[I]t is hard to imagine," Justice Gorsuch nevertheless added, "how the Seventh Amendment might not be among those rights the Fourteenth Amendment secures against the States." *Id.*

184. *See supra* notes 162–166 and accompanying text; *cf.* Keith Bradley, *Does the Seventh Amendment Limit State Administrative Adjudication?*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (July 18, 2024), https://www.yalejreg.com/nc/does-the-seventh-amendment-limit-state-administrative-adjudication-by-keith-bradley/ [https://perma.cc/E5AJ-E4GA] ("If, indeed, the Seventh Amendment eventually applies to the States, the question whether it independently requires a jury trial will arise fairly swiftly.").

185. Eric J. Hamilton, Notes, *Federalism and the State Civil Jury Rights*, 65 STAN. L. REV. 851, 855–56 (2013).

186. *See id.* at 873–78. For example, in Wisconsin, "[t]he right to a jury trial in civil cases that is guaranteed by Article I, § 5 of the Wisconsin Constitution is substantially similar to that right guaranteed by the Seventh Amendment to the United States Constitution . . . . The Seventh Amendment jury-trial right does not apply to the states. Nevertheless, we may be guided by the federal cases interpreting that provision." Markweise v. Peck Foods Corp., 556 N.W.2d 326, 333 (Wis. Ct. App. 1996) (citation omitted); *see also* Rao v. WMA Sec., Inc., 752 N.W.2d 220, 232 (Wis. 2008) ("This Court, in construing Article I, Section 5 of the Wisconsin Constitution, may look for guidance to federal decisions interpreting the Seventh Amendment."). *Contra, e.g.*, EFG Am., LLC v. Ariz. Corp. Comm'n, 569 P.3d 806, 808 (Ariz. Ct. App. 2025) (declining to follow *Jarkesy* and affirming denial of jury trial—and administrative decision—for violations of the Arizona Securities Act).

opinion most heavily and directly relied on the Seventh Amendment to reason to its conclusion.[187] Yet lurking under the surface of the majority opinion—and stated overtly in Justice Gorsuch's concurring opinion—is the indispensable role of the Due Process Clause in reaching *Jarkesy*'s outcome.[188] True, Justice Gorsuch was speaking of the Fifth Amendment. But the Fourteenth Amendment includes a Due Process Clause, too, that acts directly against the states. To the extent that *Jarkesy* (or parts of it) depend on the Due Process Clause, that reasoning already applies against the states and constitutes a form of federal control of state structure. For Justice Gorsuch, although the Due Process Clause on its own does not necessarily require a *jury*, it does require a *court* to adjudicate all private-rights disputes.[189] So even now, at minimum, *Jarkesy* imposes the same *court* requirement in states as it does in the federal government, even if it does not require those state courts to be outfitted with juries. For disputes like those covered by *Jarkesy* (at least private-rights disputes involving legal remedies, and probably also those involving equitable remedies[190]), a *court and jury* are required in federal court; a *court but not a jury* is required in state court.[191]

To the extent that any of the three points above is correct, *Jarkesy* would still only require state courts to adjudicate private-rights disputes—not public-rights disputes. The next question becomes, is what counts as a public right different in state courts than federal? The answer depends on the nature of public rights, which is open for debate.[192] If they are an exception to the Seventh Amendment,

187. *See supra* notes 151–155 and accompanying text.
188. *See supra* notes 162–166 and accompanying text.
189. *See supra* notes 162–166 and accompanying text.
190. *See supra* notes 156–158, 167–174 and accompanying text.
191. Still, there might be a chicken-and-egg issue with the Due Process Clause. Assume, as Chapman and McConnell have persuasively argued, that the Due Process Clause enforces the separation of powers. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 275 (1856) (explaining that the Article III challenge before the Court could "best be considered" as raising a due process question). At the federal level, the Due Process Clause would mean private-rights disputes must be decided by a *court*. But is that only *because* of federal structure? Put differently, if the federal branches were not separated in the way they are, would due process itself demand a court? If *because* of federal structure, then the Due Process Clause of the Fourteenth Amendment might not demand a court at the state level, *unless* a state *already* has a structure that separates powers in a way similar to the federal government. This chicken-and-egg problem may be academic, as most or all states *do* separate sufficiently for the Due Process Clause to operate in this way. It also may be that, even if the Due Process Clause does not enforce separation as thickly as it does in the federal system, it may operate more thinly—but still meaningfully—to set a floor on procedures and structures in state executive adjudication (for example, by demanding certain amounts of neutrality and procedure).
192. Note, *supra* note 156, at 591–92.

then unless and until the Seventh Amendment is incorporated, states can define public rights under state law however they want; the same would be true if "public rights" are an Article III issue. But if the public-rights exception is really determined by the Due Process Clause, then the definition remains a matter of federal law regardless of forum—and the definition must be the same in both federal and state court. The due-process understanding of public rights makes the most sense, because due process is about when a court is needed; and the public-rights exception is about when a court is not needed.

None of the foregoing observations necessarily depends on *Jarkesy*. Building blocks were in place even before it.[193] That said, just like it does for the federal system, *Jarkesy* moves the needle and brings to the fore for state governments the import—and constitutional requirement—of recognizing and enforcing certain structural safeguards. In the federal system, *Jarkesy* makes pellucid the limitations on the legislative and executive branches to allow noncourt, nonjury adjudication of private-rights disputes. Its implications for states may be pregnant (awaiting only express incorporation), persuasive (as persuasive authority for state interpretation of state constitutional rights), or already in place (through federal due-process guarantees).

At base, *Jarkesy* and its building blocks will or do require states to separate judicial and nonjudicial powers and impose a modest federal standard for policing that separation. This matters in the real world, as states have been "routing more common-law cases outside the judicial system."[194] "The expansion of administrative enforcement throughout the states, tracking the expansion in the federal government, has increasingly removed common-law claims from a jury's view,"[195] to the point where "[m]any states deny juries in cases that would likely require one under this Court's Seventh Amendment jurisprudence."[196]

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193. *See, e.g.*, Tull v. United States, 481 U.S. 412, 418–19 (1987) ("Actions by the Government to recover civil penalties under statutory provisions therefore historically have been viewed as one type of action in debt requiring trial by jury.").

194. Petition for a Writ of Certiorari at 19, Thomas v. Cnty. of Humboldt, 146 S. Ct. 27 (2025) (mem.) (No. 24-1180), 2025 WL 1448713.

195. *Id.* (citing Bradley, *supra* note 184 ("Myriad state regulatory statutes implement enforcement by administrative adjudication. Courts in multiple states have rejected jury demands in such matters, sometimes by use of the expansive description of 'public rights' in *Atlas Roofing*, and sometimes based on the functional description of adjudication from *Atlas Roofing*.")).

196. *Id.* at 20 (citing State *ex rel.* Weiser v. Ctr. for Excellence in Higher Educ., Inc., 2023 CO 23, ¶¶ 54–56, 529 P.3d 599, 610; Nationwide Biweekly Admin., Inc. v. Superior Ct., 462 P.3d 461, 489–90 (Cal. 2020); Ridlon v. N.H. Bureau of Sec. Regul., 214 A.3d 1196, 1201 (N.H. 2019); State *ex rel.* Cherry v. Burns, 602 N.W.2d 477, 485 (Neb. 1999); Md. Aggregates Ass'n,

C. Additional Separation Doctrines

Beyond the above doctrines, there are additional ways in which federal law controls—or at least influences—state structure.

Judge Posner once compiled a list of specific federal doctrines and rules he considered to control state structure. In addition to the void-for-vagueness doctrine, the list includes: (1) the "doctrine that forbids a state, pursuant to a collective bargaining agreement with a union of its employees, to force them to contribute money to the union's political and ideological causes"; (2) "[c]ases involving procedural safeguards that the courts, being unwilling to countenance broad delegations of the power to regulate speech and other expression, have insisted accompany efforts to control pornography or otherwise regulate in the neighborhood of the First Amendment"; (3) "state action impinging on specific federal constitutional rights such as free speech and freedom from racial discrimination should be evaluated more skeptically the lower the defendant is in the state hierarchy"; and (4) certain cases involving "[s]tate or local referenda."[197]

Recent work by Z. Payvand Ahdout and Bridget Fahey adds more still.[198] Though their article in the *Columbia Law Review* takes a different approach to identifying and analyzing the relevant Supreme Court caselaw, it reaches a similar thematic conclusion to the one here—namely that "the federal Constitution shapes state structure by requiring compliance with federal constitutional rights."[199] Textual,[200] doctrinal,[201] and thematic clues work together, revealing "eclectic and unexpected ways that federal constitutional law regulates and speaks to state structural choices."[202]

Along similar lines, in a reexamination of state regulatory cases, Ann Woolhandler recently shed light on the Supreme Court's

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Inc. v. State, 655 A.2d 886, 897–98 (Md. 1994); Nat'l Velour Corp. v. Durfee, 637 A.2d 375, 379–80 (R.I. 1994); Comm'r of Env't Prot. v. Conn. Bldg. Wrecking Co., 629 A.2d 1116, 1122 (Conn. 1993); Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 450 (Tex. 1993); Ala. Dep't of Env't Mgmt. v. Wright Bros. Constr. Co., 604 So. 2d 429, 433–34 (Ala. Civ. App. 1992); McHugh v. Santa Monica Rent Control Bd., 777 P.2d 91, 100 (Cal. 1989) (in bank); Dep't of Transp. v. Del-Cook Timber Co., 285 S.E.2d 913, 919–20 (Ga. 1982)).

197. United Beverage Co. of S. Bend v. Ind. Alcoholic Beverage Comm'n, 760 F.2d 155, 158–59 (7th Cir. 1985) (citing cases).

198. Ahdout & Fahey, *supra* note 2.

199. *Id.* at 1302.

200. *See id.* at 1360 ("The Guarantee Clause, the Supremacy Clause, the Bill of Rights, and the Reconstruction Amendments all bound state structure textually . . . .").

201. *See id.* at 1297 ("[I]n many different substantive areas, the Supreme Court has elaborated a body of *federal* constitutional rules that directly and indirectly govern *state* structure . . . ."); *id.* at 1301 ("State institutions are shaped not just by their own constitutions but by the terms and doctrines of the federal Constitution.").

202. *Id.* at 1299.

approach to state structure in the late-nineteenth and early-twentieth centuries.[203] Many Supreme Court cases of this era, Woolhandler found, employed separation-of-powers reasoning when discussing state structure.[204] And although "federal courts' treatment of state separation of powers confirms that such issues were largely a matter for state constitutions and statutes," the Court also "use[d] its own characterizations of state institutions to prevent state legislatures from delegating the power to act without reference to standards and evidence—whether the delegation was to commissions, the executive, private parties, or even in some cases to the legislature itself."[205] For example, the Supreme Court held that when states delegate legislative power to executive agencies like railroad commissions, they are required to provide for judicial review of railroad rate reasonableness.[206] Decisions like that require at least a functional separation between legislative power and judicial power at the state level.[207] Ultimately, "the Court used separation of powers reasoning in service of other constitutional rights—Fourteenth Amendment protections of property from confiscation and requirements of equal protection, Fourteenth Amendment procedural due process protections of liberty and property, and First Amendment protections for speech and association."[208]

A few final items deserve mention. Consistent with the First Amendment's Establishment Clause, for example, states may not delegate governmental power to a religious organization.[209] Nor may states delegate governmental power to private organizations, at least generally speaking.[210] These rules are less about the *internal* structure of state government, however, but rather more about governmental versus nongovernmental authority.

D. The Theory, Fully Constructed

The thesis of this Article, succinctly stated, is that several doctrines of *federal* constitutional law require *state governments* to

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203. Woolhandler, *supra* note 64.
204. *See id.* at 634, 641.
205. *Id.* at 665.
206. *Id.* at 638–39 (citing, e.g., Chi., Milwaukee & St. Paul Ry. v. Minnesota *ex rel.* R.R. & Warehouse Comm'n, 134 U.S. 418, 456–58 (1890)).
207. *See, e.g.*, *id.* at 645–47 (citing, e.g., Boom Co. v. Patterson, 98 U.S. 403, 404 (1879)).
208. *Id.* at 634 (footnote omitted).
209. *See, e.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122–27 (1982).
210. *See* Washington *ex rel.* Seattle Title Tr. Co. v. Roberge, 278 U.S. 116, 121–22 (1928); Eubank v. City of Richmond, 226 U.S. 137, 144–45 (1912). *But cf.* Alexander Volokh, *The Myth of the Federal Private Nondelegation Doctrine*, 99 NOTRE DAME L. REV. 203, 256 (2023) (doubting existence of constitutional prohibition on delegations to private entities).

separate certain governmental powers and functions into discrete state governmental bodies. Specifically, federal law requires states to maintain a *tripartite* separation of powers and to adhere to certain baseline standards for maintaining those structural boundaries in accordance with federal standards.

To summarize: first, certain doctrines require structural separation between state legislative power, on the one hand, and state executive and judicial power, on the other—and they include certain baseline standards for maintaining that required separation.[211] Most prominently, the void-for-vagueness doctrine mandates that the legislative actor making the rules not also enforce or adjudicate violations of the rules.[212] It works bilaterally, preventing nonlegislative actors from exercising legislative powers and legislative actors from allowing them to do so.[213] The doctrine also sets forth standards for determining when those powers have been insufficiently separated. Similarly, at least one theory of due process (a federal guarantee applicable to the states under the Fourteenth Amendment) prohibits a legislature from acting judicially.[214] The Constitution's bill of attainder and ex post facto prohibitions likewise do the same, at least for issues of criminal guilt and punishment.[215]

Second, certain doctrines require structural separation between the executive power and the judicial power—and they include certain baseline standards for maintaining the required separation.[216] *Coolidge v. New Hampshire* held that under the Fourth and Fourteenth Amendments, a state cannot combine executive criminal investigation and prosecution functions with judicial functions.[217] *Hill v. U.S. ex rel. Wampler* and its progeny similarly require states to maintain courts separate from executive authorities for purposes of criminal sentencing.[218] Further, especially after *SEC v. Jarkesy* (but arguably before), the Seventh Amendment and due process prevent executive authorities, outside the context of public rights, from exercising judicial power to decide that a law violation occurred or to impose at least some remedies for such a violation[219]—

211. *See supra* Section II.A.
212. *See supra* notes 85–96 and accompanying text.
213. *See supra* notes 91–96 and accompanying text.
214. *See supra* note 112 and accompanying text.
215. *See supra* notes 113–124 and accompanying text.
216. *See supra* Section II.B.
217. *See supra* notes 125–133 and accompanying text.
218. *See supra* notes 136–145 and accompanying text.
219. *See supra* notes 146–161 and accompanying text.

a conclusion which either does or imminently will bind states.[220] These doctrines, too, include standards for determining when the powers are insufficiently separated.

Third, certain additional doctrines enhance the first two categories.[221]

All together, these doctrines require a tripartite separation of powers. Anything short of a tripartite separation might comply with one doctrine but would run afoul of another. For example, if a state combined its executive and judicial powers, that arrangement might comply with the void-for-vagueness doctrine. Other doctrines, however, would render such a combination unlawful. Nor is it enough for states to simply maintain mere nominal separation: the separation must comport with the specific federal doctrinal standards that add meat to the bones of what sufficient separation looks like.

These doctrines may have a greater or lesser effect depending on a particular state's departure from what is required. In marginal cases, the federal doctrines will *assume* a preexisting state structural capacity to absorb any reconfigurations that they demand. These are cases in which a state may have deviated slightly, and the federal doctrines will require only a minor adjustment of power from one existing state actor to another. But in other cases, the state may be so far out of bounds, leaving the federal doctrines without any option for a minor adjustment. In these cases, the required reordering may well be tectonic.

None of this is to say that the federal doctrines that give rise to this Article's thesis require state structural separation to mimic—or even necessary resemble—federal structural separation. After all, "the due process clause of the Fourteenth Amendment"—the foundation of many of the doctrines discussed in this Article—"has not been interpreted to compel the states to imitate the structure of the federal government."[222] While certain separation-of-powers principles are core features of due process and republicanism and therefore impose federal standards on state structure, they alone are not responsible for the entirety of the federal separation of powers. In addition to the doctrines discussed above, the federal government must comply with structural constraints that do not apply to states, first and foremost the Vesting Clauses. At bottom, while "the doctrine of separation of powers embodied in the Federal

220. *See supra* notes 178–191 and accompanying text.

221. *See supra* Section II.C.

222. United Beverage Co. of S. Bend v. Ind. Alcoholic Beverage Comm'n, 760 F.2d 155, 158 (7th Cir. 1985).

Constitution is not mandatory on the States,"[223] *some less complete version* of it is. States retain substantial room to experiment with different permutations of structural organization and separation and, for example, could even entertain a fourth branch.

In the mine run of cases, state law and conduct will make resort to federal constitutional control unnecessary. State constitutions will set up a tripartite separation of powers; state common law will create doctrines to police those structural boundaries; state legislatures, executives, and courts will act within the confines of their powers; and state courts will remedy any structural departures. Yet the federal superstructure will exist in the background, encouraging states to conform to the federal constitutional doctrines that implicate state structure. And in that small class of cases where state governmental structure "does too little to protect rights" or truly "goes off the rails," then the federal "superintending government" can "step in."[224]

III. IMPLICATIONS

With the basic outline of federal control of state structure in tow, several follow-up issues arise. This Part begins to consider the implications of this Article's core thesis. First, it reflects on what might have been obvious but so far has not received extended attention: the multiple doctrines that contribute to federal control of state structure all stem from the enforcement of federally guaranteed individual rights. Second, this Part considers whether such individual-rights enforcement—and the control of state structure that comes along with it—constitute a backdoor method of judicially enforcing the Republican Guarantee Clause. Next, it addresses potential counterarguments that the theory of federal control of state structure set forth above is in tension with federalism and history. Finally, this Part presents a way of understanding *Moore v. Harper*'s reference to "ordinary judicial review" as a structural safeguard informed by this Article's theory of federal control of state structure.

A. A Collateral Consequence of Enforcing Individual Rights?

As explained in Part I, the Republican Guarantee Clause lies dormant. Although perhaps a promising textual foothold, that

223. Whalen v. United States, 445 U.S. 684, 689 n.4 (1980).
224. Heller, *supra* note 59, at 1724 (citing Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1601 (2010)).

Clause's meaning and application have long been considered nonjusticiable.[225] So regardless of its meaning, it does not provide a judicially enforceable basis for federal control of state structure.

Apart from the Republican Guarantee Clause, the Constitution (both in its original and post-Civil War versions) lacks any other obvious direct textual support for the kind of federal control of state structure described above (save for the prohibitions on bills of attainder and ex post facto laws).[226] Instead, the multiple doctrines catalogued above that contribute to federal control of state structure all derive from federal guarantees of individual rights, most significantly due process (plus the prohibitions on bills of attainder and ex post facto laws). The theory of federal control of state structure set forth in this Article—specifically, the federal requirement of tripartite structural separation and the attendant standards for maintaining that separation—flows from those doctrines. At least one way to understand federal control of state structure, then, is as a collateral consequence of enforcing individual rights guaranteed by the Constitution.

This understanding should come as little surprise. If it seems at all odd to say that the enforcement of individual rights affects government structure, consider how well-trod the ground is in the opposite direction: government structure undeniably affects individual rights. Indeed, from Ancient Greece through Blackstone's England and beyond, philosophers and political theorists have recognized that "[a] government of diffused powers . . . is a government less capable of invading the liberties of the people."[227] Madison wrote that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many," "may justly be pronounced the very definition of tyranny."[228] And even if all three are not accumulated, any two would also be nearly

225. *See supra* notes 73–74 and accompanying text.

226. *Cf. infra* notes 263–265 and accompanying text; Ahdout & Fahey, *supra* note 2, at 1302–08 (cataloguing constitutional provisions that nonobviously and indirectly implicate state structure); Chapman & McConnell, *supra* note 82, at 1727–29 (similar).

227. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring); *see also* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 488 (1989).

228. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST NO. 48, at 308–12 (James Madison) (Clinton Rossiter ed. 1961); THE FEDERALIST NO. 51, at 320–24 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[T]here is no liberty if the power of judging be not separated from the legislative and executive powers." (quoting 1 MONTESQUIEU, SPIRIT OF LAWS 181 (10th ed. 1773))).

as worrisome.[229] To that end, tripartite separation in particular is "essential to the preservation of liberty."[230]

Because "the structure of government is so tied up with individual rights,"[231] it takes only a small leap to recognize that individual-rights enforcement would affect governmental structure. The notion that due process, for example, was concerned with the structure of government is not new, and it was not new at the Founding.[232] As Chapman and McConnell have argued, due process has long guarded against acts by a legislature that are in effect judicial acts.[233]

From there, it likewise requires only a small leap to conclude that individual-rights enforcement under the post-Civil War Constitution would affect *state* governmental structure. At least after the Fourteenth Amendment, "the federal Constitution shapes state structure by requiring compliance with federal constitutional rights."[234] If Chapman and McConnell are correct about due process's content and effect, for example, then by virtue of the Fourteenth Amendment, those due-process guardrails are federally enforceable against the states and have the same collateral consequences on state structure. As Judge Posner observed, "[d]elegation" under a state law "can violate [federal] due process in a quite elementary sense," such as in a case where "the state delegated to a mob the decision whether to punish a person for crime."[235] This observation appears unassailable.

In the end, it proves little to recognize that federal control of state structure is largely, if not entirely, a collateral consequence of enforcing individual rights. But the converse is remarkable. If one rejects this Article's theory of federal control of state structure—or accepts it but advocates for its undoing—then the upstream materials from which it derives must also fall. Put differently, to reduce or eliminate federal control of state structure, one must also reduce or eliminate the enforcement of federal individual rights against state infringement.

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229. *See, e.g.*, THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) ("[T]here is no liberty if the power of judging be not separated from the legislative and executive powers." (quoting 1 MONTESQUIEU, SPIRIT OF LAWS 181 (10th ed. 1773))).

230. THE FEDERALIST NO. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961); *see Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring).

231. Heller, *supra* note 59, at 1724.

232. *See* Chapman & McConnell, *supra* note 82, at 1727.

233. *See id.* at 1727–29.

234. Ahdout & Fahey, *supra* note 2, at 1302.

235. United Beverage Co. of S. Bend v. Ind. Alcoholic Beverage Comm'n, 760 F.2d 155, 159 (7th Cir. 1985) (citing Moore v. Dempsey, 261 U.S. 86 (1923) (Holmes, J.)).

B. Backdoor Enforcement of the Republican Guarantee Clause?

As explained above, one understanding of the Republican Guarantee Clause—the "thick" view—interprets "republican" to entail some measure of structural separation.[236] Yet the Republican Guarantee Clause is nonjusticiable.[237] Even so, that nonjusticiability may not necessarily mean that federal courts have failed to impose, through other doctrines, what the thick view of that Clause envisions.

Indeed, the federal control of state structure described in this Article can be understood as backdoor judicial enforcement of the thick view of the Republican Guarantee Clause. Assuming that the Republican Guarantee Clause requires states to adhere to a structural separation of powers, then that requirement is already being enforced through other doctrines—the individual-rights doctrines catalogued above.

Whether those separate doctrinal tracks reach the same substantive outcomes is beyond the scope of this Article. It seems likely, though, that doing the work through enforcement of individual-rights guarantees achieves greater structural separation and imposes more stringent standards for maintaining that separation than even the thickest view of the Republican Guarantee Clause would. At any rate, doing the work through the former doctrines makes at least one enormous difference: unlike the nonjusticiable Republican Guarantee Clause, the individual-rights doctrines are judicially enforceable.[238] Private and governmental litigants can shape—and have shaped—state governmental structure through litigation enforcing federal constitutional individual rights.[239] And they can do so not merely in state courts, but also in federal courts with federal causes of action.

Even if the judicial unenforceability of the Republican Guarantee Clause makes the answer unknowable, it is still interesting to pose the question: has the federal courts' enforcement of individual rights imposed structural separation requirements on states coincidentally, wholly divorced from the Republican Guarantee Clause? Or has that Clause been lurking in the background, influencing the contours of individual-rights doctrines and their downstream effects on state structure? And if the latter is true, would it be more

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236. *See supra* notes 65–68 and accompanying text.

237. *See supra* notes 73–74 and accompanying text.

238. Doing the work judicially under any doctrine, it should be noted, comes with political risk for the federal courts. *See* Ahdout & Fahey, *supra* note 2, at 1358.

239. *Cf.* 42 U.S.C. § 1983; *Ex parte* Young, 209 U.S. 123, 166–68 (1908).

honest to acknowledge the gravitational pull of the Clause, instead of repeatedly intoning its supposed nonjusticiability?

Acknowledging the role of the Republican Guarantee Clause, if such a role does exist, would vindicate at least two preeminent scholars' theories. "As John Hart Ely has argued, enforcement of the nondelegation principle against the states is appropriate because policy making by elected officials is close to the 'core meaning' of the guarantee clause."[240] And Akhil Amar, for his part, has argued that at least in some ways, the Fourteenth Amendment effectively incorporated the Republican Guarantee Clause against the states.[241]

The counterweight, as mentioned earlier, is Merritt's view that the Republican Guarantee Clause "restricts the federal government's power to interfere with the organizational structure and governmental processes chosen by a state's residents."[242] On this view, rather than backdoor enforce the Republican Guarantee Clause, the doctrines discussed in this Article actually run counter to it. Whether or not Merritt is correct about the Republican Guarantee Clause, her position does implicate a related and more generalized concern: the tension between state and federal power.

C. Tension with Federalism?

Enter federalism and the Tenth Amendment. Like the separation of powers, federalism is a feature of the American constitutional setup "designed to safeguard individual liberty and prevent the abuse of government power."[243] Upon independence, the colonies became "Free and Independent States,"[244] each with its own sovereignty. Then, in the Constitution, the states alienated *some* of their sovereign rights and powers to the new national government, while retaining other aspects of sovereignty for themselves.[245] Although scholars debate its precise nature,[246] the notion of some measure of

240. Berg, *supra* note 76, at 234 (quoting ELY, *supra* note 84, at 240–41 n.78).
241. *See* AMAR, *supra* note 84, at 80–81.
242. Merritt, *supra* note 71, at 41.
243. Bellia & Clark, *supra* note 16, at 285.
244. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776); Bellia & Clark, *supra* note 16, at 313–14.
245. Bellia & Clark, *supra* note 16, at 289.
246. *See* Jud Campbell, *Four Views of the Nature of the Union*, 47 HARV. J.L. & PUB. POL'Y 13, 33–35 (2024); Ryan C. Williams, *Federalism, the Law of Nations, and the Excluded Middle*, 1 J. AM. CONST. HIST. 721, 756–57 (2023); Martin S. Flaherty, *Peerless History, Meaningless Origins*, 1 J. AM. CONST. HIST. 671, 718–19 (2023); David S. Schwartz, *The International Law Origins of Compact Theory: A Critique of Bellia & Clark on Federalism*, 1 J. AM. CONST. HIST. 629, 667–68 (2023); Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 837–43 (2020).

"dual sovereignty" has been and remains the prevailing view.[247] Indeed, "both the National and State Governments have elements of sovereignty the other is bound to respect."[248]

At a basic level, it hardly seems debatable that a sovereign political entity is free to organize its internal structure in the way it sees fit.[249] That is part of what it means to be sovereign, for "[o]ne of the essential features of sovereignty is the ability to decide how to arrange a government and allocate power among its various bodies."[250] The Tenth Amendment, moreover, provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[251] The Amendment reserves to the states the power to organize their governments.[252]

To that end, Andrew Hessick and Elizabeth Fisher have argued that because the enforcement of at least certain federal constitutional rights against the states directs "*how* a state must organize its government,"[253] such enforcement "intrudes" on "state sovereignty."[254] No doubt, the federal control of state structure described in these pages limits the ability of "states to serve as laboratories for experimentation for different forms of government."[255] If the

247. David Schwartz is perhaps the most well-known outlier. *See* Schwartz, *supra* note 246, at 667.

248. Arizona v. United States, 567 U.S. 387, 398 (2012).

249. Hessick & Fisher, *supra* note 19, at 185 (citing LOCKE, *supra* note 19, § 132, at 73–74).

250. *Id.* at 167 (citing LOCKE, *supra* note 19, § 132, at 73–74). "How the people choose to arrange their government reflects the values and views of the people, and it can have significant effect on the decisions that the government makes." *Id.* at 167–68.

251. U.S. CONST. amend. X.

252. *Cf.* THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."). By "internal order," it appears Madison was referring to "order" in a police-powers sense, but it is also possible he was referring to the internal order*ing* of state governments.

253. Hessick & Fisher, *supra* note 19, at 167.

254. *Id.*; *see also* Bray, *supra* note 181 (advocating against incorporation of the Seventh Amendment for multiple reasons, including due to federalism concerns); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2183 (1998) ("Because the Constitution requires that states exist and that state governments perform legislative, executive, and judicial functions, courts should also enforce substantive limits on Congress's ability to burden the organs of state government, possibly by prohibiting federal commandeering of state legislative functions."); *id.* at 2246–55 (developing idea). The Anti-Federalists, for their part, "believed the [bills of attainder] clause infringed on state sovereignty." Nathan Ristuccia, *In Praise of Attainder*, 56 ST. MARY'S L.J. 621, 634 (2025).

255. Hessick & Fisher, *supra* note 19, at 168; *see* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

states do retain sovereignty, one might ask, how could it be that the federal government can control a state's internal structure?

The answer, this Article posits, involves recognizing that the question does not pose a binary choice. Whatever the normative value of federalism may be, it is the current Constitution and the doctrines built upon it that actually dictate the descriptive account of federal control of state structure this Article seeks to illuminate. As explained above, the Fourteenth Amendment gave the federal government new powers to protect and enforce individual rights—and, as a collateral but unavoidable consequence of doing so, to develop rules for protecting and enforcing those rights that depend on certain expectations and demands about the structure of government and the separation of powers. It is the very essence of the Fourteenth Amendment that it acts directly on states. That Amendment "expand[ed] federal power at the expense of state autonomy" and "fundamentally altered the balance of state and federal power struck by the Constitution."[256] In short, by granting the federal government power to *directly* protect individual rights against state abuse, the Fourteenth Amendment also gave the federal government power to *indirectly* control the internal structure of states. After the Fourteenth Amendment, lesser power to control structure was "reserved" to the states, to use the language of the Tenth Amendment. From that textually cohesive angle, the Tenth Amendment concern amounts to little. One can advocate for the preservation of important federalism values while also conceding the correctness of the descriptive account of federal control of state structure set forth in this Article.[257]

D. Tension with History?

Federal control of state structure may also appear at odds with history. "[A]t the time the Constitution was adopted many of the states had virtually a one-branch government—the one branch being the legislature . . . ."[258] Some state governments in 1789, indeed, had significantly less stringent separation than the federal government and than many state governments do in 2025.[259] Yet all these

256. Trump v. Anderson, 601 U.S. 100, 108 (2024) (per curiam) (alteration in original) (quoting Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996)).

257. As one commentator concluded, "federalism limits, but does not bar, due process scrutiny of state separation of powers schemes." Martland, *supra* note 135, at 1686.

258. United Beverage Co. of S. Bend v. Ind. Alcoholic Beverage Comm'n, 760 F.2d 155, 158 (7th Cir. 1985).

259. The history of that time period is complicated. Although "[i]n the heady flush of Revolutionary republicanism, Americans flirted with the idea that governmental structure should be simple, allowing the unmediated will of the people to be transmuted into public

states were admitted into the original Union.[260] And, presumably, all these states had governments that qualified as "republican"—or else the Republican Guarantee Clause would make no sense.[261] This historical reality underscores how "state structural disuniformity" is "embedded in the Constitution."[262] Based on this history, one could reasonably argue that the federal control of state structure described in this Article is inconsistent with the original Founding.

That argument, however, is subject to a major caveat. The original Constitution refers to state "legislatures,"[263] state "executives" or "executive authorities,"[264] and state "judges."[265] Based on these references, one can read the original Constitution as contemplating—if not requiring—some form of tripartite organization of state governments. Still, although these constitutional references at least envision three different categories of actors, they do not necessarily imply any structural separation between them.

More to the point, the historical story does not end with the original Constitution. The federal control of state structure described in this Article is a consequence of the enforcement of federal constitutional individual-rights guarantees.[266] These rights were not guaranteed to persons against state infringement until the Fourteenth Amendment.[267] Perhaps, then, there is no historical tension: whereas the original Constitution did not impose much in the way of federal control over state structure, the current Constitution does. Even if certain state structures were "republican" (at the time

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policy," by "the mid-1780s, the 1776 belief that a government could rest upon the freely exercised republican virtues of the people through a more or less direct democracy gradually yielded to calls for a more robust separation of powers"—and a corresponding flourish of state constitutional reform. Chapman & McConnell, *supra* note 82, at 1703–06; *see also id.* at 1730 ("In pre-independence America, colonial legislatures frequently exercised the same judicial powers (subject, of course, to revision by the Privy Council and Board of Trade). After Independence, however, under the influence of Montesquieu, every state constitution adopted some version of separation of powers and assigned the ordinary judicial functions to an independent judicial department." (footnotes omitted)); David Rossman, *"Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518, 529–39 (1990).

260. While these states were admitted as "republican," they were not without significant criticism for perceived insufficiencies in structural separation. *See* Chapman & McConnell, *supra* note 82, at 1704–05 (cataloguing Founding-era concerns about insufficiently separated state governments).

261. *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175–76 (1875).

262. Ahdout & Fahey, *supra* note 2, at 1351.

263. U.S. CONST. art. I, § 2, cl. 1; *id.* § 3, cl. 1; *id.* cl. 2; *id.* § 8, cl. 17; *id.* art. II, § 1, cl. 2; *id.* art. IV, § 3, cl. 1; *id.* § 4; *id.* art. V; *id.* art. VI, cl. 3.

264. *Id.* art. IV, § 2, cl. 2; *id.* § 4.

265. *Id.* art. VI, cl. 2; *see also* Ahdout & Fahey, *supra* note 2, at 1304; Jackson, *supra* note 254, at 2246–47.

266. *See supra* Section III.A.

267. *See supra* note 234 and accompanying text.

of the Founding, or even now), it does not logically follow that they complied or comply with due process and other individual-rights guarantees (once those guarantees were imposed on the states via the Fourteenth Amendment).[268]

That understanding of the Fourteenth Amendment, however, is tempered by *Dreyer v. Illinois*.[269] In that case, a person argued that his state conviction violated the Illinois Constitution's separation of powers.[270] The Supreme Court declined to answer that question under state law, adding that "[a] local statute investing a collection of persons not of the judicial department, with powers that are judicial, and authorizing them to exercise the pardoning power which alone belongs to the governor of the state, presents no question under the Constitution of the United States."[271] Although that unremarkable conclusion could have ended the case, the Court went on to suggest that the Fourteenth Amendment never controls the structural organization of state governments:

> The right to the due process of law prescribed by the 14th Amendment would not be infringed by a local statute of that character. Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state. And its determination one way or the other cannot be an element in the inquiry, whether the due process of law prescribed by the 14th Amendment has been respected by the state or its representatives when dealing with matters involving life or liberty.[272]

A so-called "*Dreyer* doctrine" has influenced cases since.[273]

On the one hand, it is easy to dismiss the *Dreyer* Court's comments as mere dicta, which they undoubtedly were. It is also possible to downplay them as over a century old and made prior to many,

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268. *Cf.* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 118 (2008) (reporting that, at the time of the Fourteenth Amendment, at least "three-quarters of the states provided for the division of government into three separate departments," and suggesting that as a result, the Fourteenth Amendment may protect such tripartite division as a substantive individual right).

269. 187 U.S. 71 (1902).

270. *Id.* at 83.

271. *Id.* at 83–84.

272. *Id.* at 84.

273. Martland, *supra* note 135, at 1680–81.

if not all, the cases discussed above that supply the doctrinal building blocks of a federal requirement of state tripartite separation. Yet on the other hand, the Supreme Court's *Dreyer* comments were made post-Reconstruction and dilute some of the force of an argument that the Fourteenth Amendment enabled or invigorated federal control of state structure.

E. An Understanding of Moore v. Harper*'s "Ordinary Judicial Review"?*

As a final point, the federal control of state structure discussed in this Article may offer a way of understanding a somewhat cryptic phrase in *Moore v. Harper*, the recent Supreme Court decision considering the so-called "independent state legislature" theory.[274] The Elections Clause of the U.S. Constitution provides that "the Legislature" of each State shall prescribe "[t]he Times, Places and Manner of" federal elections.[275] In *Moore*, after the North Carolina Legislature drew congressional districts, the North Carolina Supreme Court "struck down the legislature's map" as an overly partisan gerrymander in violation of the North Carolina Constitution.[276]

At the U.S. Supreme Court, challengers argued that the North Carolina Supreme Court violated the federal Constitution by exercising authority that the Elections Clause gave exclusively to state "legislatures."[277] Their theory, in short, was that *only* state *legislatures* could exercise the power granted by the Elections Clause, and that other state government actors lacked power to review the state legislature's action—regardless of state constitutional directives.[278] For example, even if a state legislature violated the state constitution in exercising the power granted by the federal Constitution, a state court lacked the authority to review that exercise of power.[279]

The Supreme Court largely rejected the challengers' independent state legislature argument, holding that "[t]he Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review."[280] This result followed from precedent and established "historical practice" that "state legislatures remain bound by state constitutional restraints when exercising authority

274. 600 U.S. 1 (2023).
275. U.S. CONST. art. I, § 4, cl. 1.
276. *Moore*, 600 U.S. at 7–9.
277. *See id.* at 26.
278. *See id.* at 26–27.
279. *See id.*
280. *Id.* at 22.

under the Elections Clause."[281] State legislatures are, after all, "bound by the provisions of the very documents that give them life"—state constitutions.[282]

At the same time, the *Moore* Court made clear that "state courts do not have free rein."[283] Although primarily a question of state structure and state law, *federal* law still ensures that "state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections."[284] "[S]tate courts," in other words, "may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures."[285]

The majority studiously avoided adopting "any" test for policing this boundary or illuminating what constitutes either "ordinary judicial review" or "arrogat[ing] to themselves the power vested in state legislatures."[286] Justice Kavanaugh concurred, suggesting an approach by which federal courts review state court interpretations of state law "deferential[ly]," possibly based on Chief Justice Rehnquist's opinion in *Bush v. Gore*.[287] Scholars have begun to opine on possibilities for what a test might look like, and what it means more broadly.[288]

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281. *Id.* at 32.
282. *Id.* at 27.
283. *Id.* at 34.
284. *Id.* at 36.
285. *Id.* at 37.
286. *Id.* at 36. The Court recently denied a cert petition that would have shed light on the matter. *See* Genser v. Butler Cnty. Bd. of Elections, 325 A.3d 458 (Pa. 2024), *cert. denied*, 145 S. Ct. 2778 (2025).
287. *Moore,* 600 U.S. at 38–39 (Kavanaugh, J., concurring).
288. *See, e.g.*, Connor J. Morgan, Note, *Judging the Ordinary Bounds of Judicial Review: A Proposal for How Federal Courts Should Review State Courts' Interpretations of State Election Laws Under* Moore v. Harper, 62 HARV. J. ON LEGIS. 471, 493 (2025) (suggesting that "[t]o vindicate the narrow federal entitlement protected by the Elections Clause, *Moore* review allows a federal court to determine whether a state court adhered to its methodological precedents in election-related cases"); Ahdout & Fahey, *supra* note 2, at 1331 ("In short, if the state court reviews election laws in a manner that is qualitatively different from the way it treats laws in any other context, the Supreme Court may conclude that the state court is not acting in good faith and pull back on its posture of deference. The suggestion appears to be to defer to states unless they seem to be acting in bad faith."); Scott L. Kafker & Simon D. Jacobs, *The Supreme Court Summons the Ghosts of* Bush v. Gore*: How* Moore v. Harper *Haunts State and Federal Constitutional Interpretation of Election Laws*, 59 WAKE FOREST L. REV. 61, 85–89 (2024); Michael Weingartner, *Second-Guessing State Courts in Election Cases: Arrogation and Evasion Under* Moore v. Harper, 56 ARIZ. ST. L.J. 1971, 1974–78 (2024); Robert F. Williams, *From Rights Arguments to Structure Arguments: The Next Stage of the New Judicial Federalism*, 2023 WIS. L. REV. 1615, 1622–23 (2023); Leah M. Litman & Katherine Shaw, *The "Bounds" of* Moore*: Pluralism and State Judicial Review*, 133 YALE L.J. F. 881, 884–95 (2024); Blake L. Weiman, Note, Moore *to Come: The Impending Independent State Legislature Departure Standard*, 26 N.Y.U. J. LEGIS. & PUB. POL'Y 517, 561 (2024).

One way to understand this part of the Court's opinion is as a form of federal control of state structure, at least somewhat akin to the other doctrines discussed in this Article. The Court appears to be enforcing—and perhaps even imposing for the first time—a modest *federal-law* requirement of separation between state legislative power and state judicial power, at least in the Elections Clause context. As a matter of federal law, *Moore* requires state judicial actors to be separate from state legislative actors—and it prohibits the former from exercising state legislative power. The exact standard for maintaining that separation may remain unclear, but "ordinary judicial review" can be understood as a rough synonym for "judicial power." So, while *Moore* rejects the independent state legislature theory and reiterates that "state legislatures remain bound by state constitutional restraints," it also suggests that if those "state constitutional restraints" allow a state court to exercise state legislative power (at least the state legislative power conferred by the Elections Clause), then that violates *federal law*.[289]

Viewed through this lens, it is difficult to say that *Moore* pushed boundaries. Some have made such an accusation.[290] But if the accusation is merely that *Moore* introduced a standard for federal oversight of state governmental structure, then that oversight fits comfortably within a class of several other longstanding federal-law doctrines that indirectly and collaterally control state structure. Any objection based solely on the fact that *Moore* may control state structure would also have to contend with the void-for-vagueness doctrine, *Coolidge v. New Hampshire*, and the rest.

Yet a more nuanced objection may remain. Compared to the cases and doctrines discussed elsewhere in this Article, *Moore* bears at least one distinctive trait. Unlike the other doctrines, *Moore*'s structure-controlling effects do not clearly derive from the enforcement of an individual-rights guarantee. Instead, the Court locates the "ordinary judicial review" standard in the Elections Clause itself.[291] That alone, however, seems unsatisfying: if the Elections Clause does not support the "independent legislature theory" as pressed by the *Moore* challengers, how can it nevertheless restrain state courts as a matter of federal law? There does not appear to be an obvious articulable principle. This underdeveloped connection raises

289. *See Moore*, 600 U.S. at 32, 26–37.

290. *See, e.g.*, Weingartner, *supra* note 288, at 1980 ("To the extent that *Moore*'s anti-arrogation principle imposes a narrow separation-of-powers rule on state governments in the context of election laws, it charts new constitutional ground."); *see also* Litman & Shaw, *supra* note 288, at 893–94; Morgan, *supra* note 288, at 480–81 (collecting views).

291. *See Moore*, 600 U.S. at 36–37.

questions about whether *other* constitutional provisions are actually supplying the "ordinary judicial review" standard—either in addition to, or instead of, the Elections Clause. Perhaps, for instance, due process is doing work in the background; that would certainly make *Moore* more commensurate with the other doctrines catalogued in this Article. Or, perhaps the Republican Guarantee Clause is playing a role. As Vikram Amar put it shortly after *Moore* was decided, "state-court rulings concerning state separation-of-powers or state-law individual rights that are so far-fetched and unforeseeable as to not count as good-faith interpretations of state law would also violate the due process, fair notice, and rule-of-law concerns embodied in the Fourteenth Amendment (and, I would argue, also in the Guarantee Clause and elsewhere in the Constitution)."[292]

CONCLUSION

The conventional narrative is way off-base. It is reductive to say that "states are free to structure their governments as they see fit."[293] It is misleading to assert that nothing "requires the states to have a tripartite system of government."[294] And it is downright wrong to claim that "the Court has not found justiciable limits on the states' choice of governmental structures."[295]

While the Supreme Court has not expressly dictated the governmental structure or separation of powers a state must adhere to, its enforcement of federal individual-rights guarantees accomplishes the same thing indirectly. Indeed, federal law requires states to maintain a *tripartite* separation of powers and to adhere to certain baseline standards for maintaining those structural boundaries in accordance with the federal Constitution.

That said, the federally mandated baseline standards do not require states to duplicate federal structure or separation of powers. Significant daylight exists between the federal floor that controls

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292. Vikram David Amar, *The* Moore *the Merrier: How* Moore v. Harper*'s Complete Repudiation of the Independent State Legislature Theory Is Happy News for the Court, the Country, and Commentators*, 2023 CATO SUP. CT. REV. 275, 295; *cf.* Anna K. Jessurun, David H. Gans & Brianne J. Gorod, Moore v. Harper*, Evasion, and the Ordinary Bounds of Judicial Review*, 66 B.C. L. REV. 1295, 1343–44 (2025) ("*Moore* recognized the Court's longstanding but narrow power to review and, if necessary, displace state court decisions on state law when state courts are evading federal interests, and it made clear that the Elections Clause is not exempt from that framework.").

293. Ahdout & Fahey, *supra* note 2, at 1297.

294. United Beverage Co. of S. Bend v. Ind. Alcoholic Beverage Comm'n, 760 F.2d 155, 158 (7th Cir. 1985).

295. Dorf, *supra* note 28, at 52.

state structure and the additional federal doctrines that control *federal* structure. To be sure, state constitutions often address state structure and often do so more explicitly than the federal Constitution addresses federal structure. And some states impose stricter separation requirements than the federal government imposes on itself. Especially in those states, federal control of state structure might do very little work.[296] But it remains a judicially enforceable backstop against abuse when a state's governmental structure "does too little to protect rights" or truly "goes off the rails."[297]

296. Of course, even if federal law might not result in a court holding an aspect of state structure unlawful, it might nevertheless influence a court by influencing the way it *understands* existing state structure—including by acting as a canon of construction designed to avoid federal constitutional doubt. *Cf.* Sunstein, *supra* note 81, at 316–18, 329–30 (observing similar phenomenon in federal delegation cases).

297. Heller, *supra* note 59, at 1724 (citing Ginsburg & Posner, *supra* note 224, at 1601).

Plyler's Praxis & Promise

Whitney Holmes[*]

In 1982, the United States Supreme Court handed down its landmark decision in Plyler v. Doe. *Some Court watchers praised the decision as a past-due extension of civil rights protection in the humanitarian spirit of the Warren Court. Others reacted with alarm—taking issue with the cocktail of legal principles offered in* Plyler*'s majority opinion and the Court's failure to apply a well-defined standard of review. There were valid points on both sides.*

Drawing on the capabilities framework advanced by philosopher and legal scholar, Martha Nussbaum, this Article argues that we can harmonize Plyler*'s morally satisfying result with its doctrinally dissatisfying analysis by applying a capabilities-informed nondomination framework to the equal protection controversy at the center of that case. This Article also briefly considers whether doing so might ultimately open the door to broader constitutional recourse for members of groups that face the type of entrenched subordination that the Fourteenth Amendment was enacted to proscribe.*

[*] Associate Professor of Law, Baylor Law School. I am grateful for the love and support of my family (particularly Courtney for helping with Fifer); the encouragement from my colleagues; and the excellent research assistance provided by Greyson Addicott and Cassidy Tresidder. I am also grateful to the editors at the *Duquesne Law Review* for their excellent editorial assistance. All errors are my own.

INTRODUCTION

The Supreme Court's 1982 decision in *Plyler v. Doe* marked a pivotal moment in Fourteenth Amendment jurisprudence. Lauded by some for its humanitarian impulse and criticized by others for its doctrinal ambiguity, *Plyler* showcases the promise and peril of constitutional efforts to dismantle entrenched subordination against members of historically disadvantaged groups. Relying on philosopher and legal scholar Martha Nussbaum's capabilities framework, this Article contends that Texas's attempt to impede the intellectual development of undocumented school-age children in the state by inhibiting a critical path to capability development was constitutionally invalid because such an action facilitated the present and future domination of those children.

To support that claim, this Article explores how capability development—and underdevelopment—have played an important role in the creation and maintenance of systemic asymmetries in power that hinder substantive justice. Ultimately, this Article urges that courts should apply a capabilities-informed nondomination framework (a nondomination standard) when adjudicating controversies that arise under the Fourteenth Amendment's Equal Protection Clause because such a standard would more effectively combat enduring structural inequality due to its attentiveness to systemic power imbalances.

Part I examines *Plyler v. Doe*—providing relevant background, discussing the applicable analytical legal frameworks, and reviewing the Court's majority opinion and the responses it generated. Part II introduces the "Capabilities Approach" and explains how the challenged legislation in *Plyler* constitutes a textbook effort to undermine capability development. Part III demonstrates how "capability cartels" have long served as a vehicle for supporting asymmetrical power relationships between historically advantaged and historically disadvantaged groups and offers the school choice movement as a contemporary example of a capability-blocking campaign. Part IV introduces the nondomination framework and urges its adoption as a governing standard for Equal Protection Clause cases. Part V explains how the nondomination framework serves as a harmonizing agent, capable of providing an analytical bridge between *Plyler*'s ultimate outcome and the overarching goals of the Fourteenth Amendment's Equal Protection Clause. A brief conclusion follows Part V.

Although many have called the Court's decision in *Plyler* "sui generis" and written off any potential future precedential value,[1] this Article considers whether we might be able to discern a workable precedential principle by viewing *Plyler* through a different lens of constitutional possibility.

I. *PLYLER V. DOE*

Plyler v. Doe[2] is a special case in the canon of Fourteenth Amendment jurisprudence. With so many doctrinal and policy issues to unpack, it is a law teacher's dream. In addition to providing an opportunity to walk through the technical applications of the legal frameworks at issue, the case also calls on us to consider more meta issues that animate the doctrine—issues of personhood, the value of citizenship, and the limits of sovereignty. The case also concerns group-based subordination—a constant specter in this corner of constitutional study. On top of all of that, *Plyler* is unique in that both cheerers and jeerers of the case's ultimate outcome agree that the Court's analysis produced more questions than answers. This Part briefly discusses *Plyler*'s historical moment, relevant background, and key doctrinal frameworks before summarizing the case opinions, subsequent scholarly treatment, and open questions.

A. Background

In 1975, the Texas legislature enacted Section 21.031 of the Texas Education Code (Section 21.031) against a backdrop of increasing national focus on immigration, which ultimately culminated with Congress passing the Immigration Reform and Control Act in 1986 (the IRCA).[3] The Texas legislature's enaction of Section 21.031, however, took place just as the seeds of the movement that would lead to the IRCA's enactment were starting to sprout.[4] Section 21.031 reflected a broader trend in state-level efforts to restrict services to undocumented individuals following the passage of

1. *See* MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: *PLYLER V. DOE* AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN 92 (2012).

2. 457 U.S. 202 (1982).

3. *See* OLIVAS, *supra* note 1, at 9; Aristide R. Zolberg, *Reforming the Back Door: The Immigration Reform and Control Act of 1986 in Historical Perspective*, *in* IMMIGRATION RECONSIDERED: HISTORY, SOCIOLOGY, AND POLITICS 315, 315 (Virginia Yans-McLaughlin ed., 1991) (stating that "the Immigration Reform and Control Act of 1986 is the culmination of a reform process that began after World War II").

4. *See* Zolberg, *supra* note 3, at 320–22 (noting how latent restrictionism in the immigration reforms of the early 1960s developed into patent restrictionism during the 1960s and 1970s due in part to rising "public concern about the economic and social consequences of the illegal flow").

federal immigration reforms in the 1950s and 1960s that purported to discourage people without a documented legal status from immigrating to the United States.[5]

Section 21.031 "authorized local school districts to deny enrollment in their public schools to children not 'legally admitted' to the country" and withheld "from local school districts any state funds for the education of" such children.[6] The statute effectively allowed public schools to charge tuition to undocumented children, making it financially prohibitive for many of those children to attend primary and secondary school.[7]

Following Section 21.031's enactment, implementation varied across the state's independent school districts (the districts). Some districts excluded children without a documented legal status; others did not.[8] Some districts charged annual tuition for children without a documented legal status; others did not.[9] Of those that charged tuition, annual rates varied.[10] Tyler Independent School District (Tyler ISD), located in East Texas's mostly rural Smith County, charged an annual, per-child tuition rate of $1,000.00 for children without a documented legal status to attend the public schools within its district.[11] In 1977,[12] school officials informed the parents of the plaintiff children (the Plaintiffs) that Plaintiffs could not attend school without providing proof of legal immigration status or paying the tuition fee.[13]

The *Plyler* litigation began in September 1977 when Plaintiffs—school-age children of Mexican origin residing in Smith County, Texas—were unable to prove legal admission into the United States and were denied enrollment to public school due to their undocumented status and inability to pay tuition; Plaintiffs filed a class action lawsuit in the United States District Court for the Eastern District of Texas (the District Court) contending that Section 21.031

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5. *See id.* at 319–21.

6. *Plyler*, 457 U.S. at 205 (quoting TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1981)).

7. *See id.*

8. *See* OLIVAS, *supra* note 1, at 9–10

9. *See id.*

10. *See* Felipe Flores, Robert F. Kane & Felix Velarde-Munoz, *Right of Undocumented Children to Attend Public Schools in Texas*, 4 CHICANA/O LATINA/O L. REV. 61, 62 (1977) (noting that Houston Public Schools charged $90.00 a month tuition, while in Austin Independent School District, tuition ranged from $1,300 a year for elementary students to $1,728 a year for senior high school students).

11. OLIVAS, *supra* note 1, at 9–10.

12. Though enacted in 1975, enforcement of the policy did not pick up until the start of the 1977 school year. *Id.* at 10–11.

13. Doe v. Plyler, 458 F. Supp. 569, 574–75 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *aff'd*, 457 U.S. 202 (1982).

unlawfully discriminated against them based solely on their immigration status.[14] Plaintiffs argued that such discrimination constituted an unconstitutional denial of equal protection under the Fourteenth Amendment.[15] Plaintiffs sought injunctive and declaratory relief to end their exclusion from Texas's public schools.[16]

In September 1978, the District Court held that Section 21.031 violated the Equal Protection Clause of the Fourteenth Amendment (EPC) "[b]y virtue of its lack of rationality" and issued a permanent injunction against its enforcement.[17] The United States Court of Appeals for the Fifth Circuit upheld the District Court's injunction and affirmed the District Court's equal protection analysis, ultimately concluding that Section 21.031 was unconstitutional.[18] In 1981 the U.S. Supreme Court noted probable jurisdiction.[19] The central issue before the Court was whether Texas could deny undocumented children access to free public education without violating the EPC.[20]

B. Relevant Legal Frameworks

To examine the Court's opinion in *Plyler*, it is helpful to review the relevant legal frameworks at play and identify the analytical tools employed by the Court in that case. With respect to the Fourteenth Amendment, which is the constitutional provision under which Plaintiffs brought their claims, both the Due Process Clause (DPC) and the EPC are relevant. Additionally, a key component of each of those strands of analysis is identifying the level of scrutiny that the Court applies.

1. Fourteenth Amendment

Enacted in 1868, the Fourteenth Amendment to the U.S. Constitution extends citizenship to "[a]ll persons born or naturalized in the United States" and provides the tools necessary for people under the jurisdiction of the United States to, inter alia, insist upon a base level of dignity in the context of their relationship with

14. *Doe*, 458 F. Supp. at 571. Behind the Plaintiffs' efforts was their legal team, led by the Mexican American Legal Defense and Educational Fund (MALDEF). *See* OLIVAS, *supra* note 1, at 10.

15. *Doe*, 458 F. Supp. at 578–79.

16. *Id.* at 571.

17. *Id.* at 593.

18. Doe v. Plyler, 628 F.2d 448, 450 (5th Cir. 1980), *aff'd*, 457 U.S. 202 (1982). However, the Fifth Circuit disagreed with the District Court's finding of federal preemption. *Id.*

19. Plyler v. Doe, 451 U.S. 968, 968 (1981) (mem.).

20. Plyler v. Doe, 457 U.S. 202, 205 (1982).

government.[21] The Fourteenth Amendment, collectively with the Thirteenth Amendment and the Fifteenth Amendment, are known as the "Reconstruction Amendments."[22] The Reconstruction Amendments explicitly rebuked the attitudes and actions that sustained chattel slavery in the United States—advancing a liberatory mandate that gave constitutional force to the Emancipation Proclamation.[23]

Arguably, the most robust protections provided by the Reconstruction Amendments are found in Section 1 of the Fourteenth Amendment. Section 1 of the Fourteenth Amendment is a preemptive strike against prejudicial attitudes within the demos that can be weaponized via the political process through law and policy.[24] Section 1 contains four clauses: the citizenship clause; the privileges or immunities clause; the DPC; and the EPC.[25] The Subsections which follow will focus on the DPC and the EPC, which were relevant to the Court's analysis in *Plyler*.

a. Due Process

i. Procedural Due Process

The DPC provides that no state shall deprive "any person of life, liberty, or property, without due process of law"[26] and is interpreted to accomplish two functions. The first is to guarantee that adequate procedural rights attach to government action which would result in deprivation of a person's life, liberty, or property.[27] The DPC does not define what constitutionally adequate procedures entail, but the Court has held that a balancing of the relevant interests must be conducted in each case to determine whether a challenged process was constitutionally adequate.[28] Here, however, we are

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21. *See* U.S. CONST. amend. XIV, § 1.

22. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 307–08 (6th ed. 2019).

23. *See id.* at 307–11.

24. *See* Mario L. Barnes & Erwin Chemerinsky, Essay, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1067–68 (2011) ("The Fourteenth Amendment also sounded an additional structural note by directing that all persons born in the United States were citizens. This language negated the decision in Dred Scott . . . ." (footnote omitted)).

25. U.S. CONST. amend. XIV, § 1.

26. *Id.*

27. *Id.* In this Article, references to "person" or "persons" include entities if and as applicable.

28. Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (""'([D])ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' '(D)ue process is flexible and calls for such procedural protections as the particular situation demands.'" (citation omitted) (first quoting Cafeteria & Restaurant Workers Union,

primarily concerned with the DPC's second function, which concerns the most enigmatic of the three expressly protected interests—liberty.

ii. Substantive Due Process, Generally

The reference to "liberty" in the DPC is the fount from which the doctrine of substantive due process flows. The doctrine of substantive due process is one of the most convoluted in the study of constitutional law. The Supreme Court's 1905 decision in *Lochner v. New York*[29] stands in infamy as the case that established the doctrine. Much ink has been spilled complaining about the constitutional quagmire that *Lochner* created;[30] however, for our purposes, it is sufficient to note that *Lochner* interpreted the DPC's reference to "liberty" broadly to establish that it included, not just procedural protection, but substantive constitutional protection for certain unenumerated yet fundamental rights.[31] While the doctrine of substantive due process may be cerebrally unsatisfying in many respects,[32] it is currently the path that anyone asserting constitutional protection for rights that are not expressly enumerated in the text of the Constitution must plot.

b. Equal Protection

The EPC provides that "[n]o State shall make or enforce any law which . . . den[ies] to any person within its jurisdiction the equal

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Local 473 v. McElroy, 367 U.S. 886, 895 (1961); and then quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972))).

29. Lochner v. New York, 198 U.S. 45, 53 (1905), *abrogated by*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). In *Lochner*, the Supreme Court defended an individual's right to contract freely, which implicates not only procedural rights but also substantive liberty. *See id.* at 53.

30. *See, e.g.*, Paul Kens, Lochner v. New York*: Tradition or Change in Constitutional Law?*, 1 N.Y.U. J.L. & LIBERTY 404, 404–05 (2005) (noting that *Lochner* has become "the ultimate symbol of judicial overreaching" and is commonly identified as "a prime example of judicial malfunctioning"); David E. Bernstein, Lochner's Legacy*'s Legacy*, 82 TEX. L. REV. 1, 2 (2003) (stating that "[a]voiding Lochner's mistake is the 'central obsession' of modern constitutional law" (quoting Gary D. Rowe, Lochner *Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221, 223 (1999))).

31. *Lochner*, 198 U.S. at 53 ("The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution."). This should not have been a ground-breaking finding given the Ninth Amendment's plain indication that the enumeration of certain rights in the Constitution does not foreclose the existence of other (presumably, fundamental) rights to which people are entitled. *See* U.S. CONST. amend. IX.

32. *See* James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 315 (1999) (enumerating a few of the criticisms grumbled by the doctrine's detractors in the introduction to his article).

protection of the laws."[33] The EPC is "a key provision for combating invidious discrimination and for safeguarding fundamental rights."[34] To be sure, differential treatment between and among individuals and groups is an inevitable function of many laws and does not always rise to the level of constitutional concern—namely because, in certain instances, there may be a good reason for a law to prescribe differential treatment.[35] Accordingly, the EPC is not aimed at preventing *any* discrimination authorized by state or local law; rather, the EPC has been interpreted to prevent discrimination only when it is arbitrary, invidious, or infringes upon the exercise of a fundamental right.[36]

Yet, even in those circumstances where the EPC's application is appropriate and consistent with the aims of its enactment, courts have deployed their authority to invalidate laws based on alleged violations of the EPC with timidity. Ultimately, this demonstrated commitment to a narrow and, arguably, counterproductive interpretative method has severely curtailed the impact of this central feature in the equal protection framework. Accordingly, notwithstanding its wide-reaching mandate, plaintiffs seeking redress under the EPC must carefully articulate their claim to activate the EPC's protections. Step one is establishing that the law which causes differential treatment (i) intrudes upon the exercise of a fundamental right or (ii) draws a constitutionally impermissible classification.[37] Each of these bases is discussed below in turn.

i. Fundamental Rights

Laws that intrude upon the exercise of a fundamental right can be challenged under the EPC. Fundamental rights may be enumerated or unenumerated.[38] Enumerated rights include, for example, the freedoms of speech, press, assembly, and religion all set forth in the First Amendment; the right to bear arms contained in the Second Amendment; protections against unreasonable searches and seizures set forth in the Fourth Amendment; protections against self-incrimination set forth in the Fifth Amendment; the right to a jury trial in certain cases as provided by the Sixth and Seventh

33. U.S. CONST. amend. XIV, § 1.
34. CHEMERINSKY, *supra* note 22, at 724.
35. *See* McGowan v. Maryland, 366 U.S. 420, 425 (1961) ("[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective.").
36. *See* CHEMERINSKY, *supra* note 22, at 731, 732–33, 744.
37. *Id.* at 731, 725.
38. *Id.* at 859.

Amendments; and the right to be free from cruel and unusual punishment set forth in the Eighth Amendment.[39]

The Court has also recognized the existence of unenumerated fundamental rights via substantive due process. Those rights include, for example: the right to marry;[40] the right to privacy[41] and the right to contraception that derives from it;[42] the right to interstate travel;[43] the right to procreation;[44] and the right to control the upbringing of one's children.[45] If a right is deemed fundamental under the U.S. Constitution—whether explicitly (i.e. enumerated) or implicitly (i.e., unenumerated)—the state will have a more difficult burden to meet to justify any law that infringes upon that right.[46]

ii. Classifications

Even when no fundamental right is at issue, a law may still be challenged under the EPC if it draws a constitutionally impermissible classification. A classification may violate the EPC when that classification "exists on the face of the [applicable] law" or if a challenger "demonstrate[s] that a facially neutral law has a discriminatory impact and a discriminatory purpose."[47] Classifications fall into three categories: (1) suspect; (2) quasi-suspect, and (3) nonsuspect. Suspect classifications include race,[48] religion,[49] national origin,[50] and alienage.[51] Quasi-suspect classifications include sex[52]

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39. U.S. CONST. amends. I, II, & IV–VIII.
40. Zablocki v. Redhail, 434 U.S. 374, 382–83 (1978).
41. Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965).
42. *Id.*
43. Saenz v. Roe, 526 U.S. 489, 501–04 (1999).
44. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
45. Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality).
46. When "a right is deemed fundamental under [the EPC or the DPC] . . . [g]overnment infringements are subject to strict scrutiny." CHEMERINSKY, *supra* note 22, at 731; *see, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (noting that the classification at issue in that case had to be "judged by the stricter standard" because "the classification . . . touche[d] on the fundamental right of interstate movement"). "Strict scrutiny is virtually always fatal to the challenged law." CHEMERINSKY, *supra* note 22, at 727.
47. CHEMERINSKY, *supra* note 22, at 726–27. Also, because of the difficulty of proving discriminatory purpose, sustaining an equal protection claim with respect to facially neutral legislation is practically unavailable. *See id.* at 771 ("[P]roving discriminatory purpose is very difficult; rarely will such a motivation be expressed, and benign purposes can be articulated for most laws. Therefore, many laws with both a discriminatory purpose and effect might be upheld simply because of evidentiary problems inherent in requiring proof of such a purpose." (footnote omitted)).
48. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
49. *Id.*
50. *Id.*
51. Graham v. Richardson, 403 U.S. 365, 371–72 (1971).
52. Craig v. Boren, 429 U.S. 190, 197–98 (1976).

and nonmarital parentage.[53] Nonsuspect classifications include any classification that is not suspect or quasi-suspect.[54]

Once a "constitutionally cognizable classification"[55] (in the case of a classifications analysis) or a "constitutionally cognizable infringement"[56] (in the case of a fundamental rights analysis) has been identified, the court will proceed by determining the level of scrutiny to apply.

2. Levels of Scrutiny

Under the prevailing interpretation of the U.S. Constitution, the judiciary is responsible for interpreting and applying federal law, including the Constitution, in disputes concerning federal law.[57] In discharging this duty, the judiciary should refrain from substituting its own judgment for the judgment of democratically elected legislators.[58] Professor Daniel Solove has referred to this self-restraint imperative as the deference principle.[59] Solove defines deference as "the practice of accepting, without much questioning or skepticism, the factual and empirical judgments made by the decisionmaker under review"[60] and identifies the deference principle "as one of the most powerful normative guideposts of the judicial function."[61] Accordingly, when conducting an inquiry regarding a law's constitutionality, judges conduct their review with acute attention to employing the appropriate measure of deference to the applicable political branch.

Although deference is arguably the appropriate judicial posture in many controversies, it is not the appropriate judicial posture in every case. Therefore, courts apply a tiered framework to determine

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53. Clark v. Jeter, 486 U.S. 456, 461 (1988).

54. *See* CHEMERINSKY, *supra* note 22, at 846 ("There is an infinite variety of ways that governments can draw distinctions among people. . . . Each, of course, would be subjected only to rational basis review, unless the discrimination was with regard to race, national origin, gender, alienage, or legitimacy. Thus far, these are the only types of discrimination for which the Supreme Court has approved either intermediate or strict scrutiny.").

55. Libertarian Party of Colo. v. Buckley, 8 F. Supp. 2d 1244, 1248 (D. Colo. 1998).

56. *See* Illinois v. Caballes, 543 U.S. 405, 409 (2005) (using an intrusion onto a respondent's privacy expectations to illustrate the limits of a "constitutionally cognizable infringement").

57. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

58. *See* Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 943 (1999) (defining the "deference principle" as the Court's often articulated rhetoric that it "should not attempt to 'second-guess' or 'substitute' its judgment for the judgment of another decisionmaker or pass on the 'wisdom' of a policy or law").

59. *Id.*

60. *Id.* at 946.

61. *Id.* at 953.

the level of scrutiny (i.e., deference) that is appropriate to apply when analyzing Fourteenth Amendment controversies. In making that determination, courts consider both the nature of the right at stake (i.e., is the right fundamental?) as well as the classification, if any, that the challenged legislation draws (i.e., is the line that the challenged legislation draws suspicious or otherwise concerning in light of our claimed constitutional commitments?).[62]

The Supreme Court has officially recognized three levels of scrutiny—strict scrutiny, intermediate scrutiny and rational basis review. For laws that infringe upon fundamental rights, courts apply strict scrutiny (described further in Section I.B.2.a below), which is the most searching degree of scrutiny. For classifications, the level of scrutiny that a court applies will depend on the level of suspicion that attaches to the classification at issue. In determining the appropriate level of scrutiny for any of the myriad classifications that a law might produce, courts consider the "traditional indicia of suspectness,"[63] which include: (i) immutability of the characteristic at issue;[64] (ii) "the ability of the group [claiming to be harmed by the classification] to protect itself through the political process";[65] (iii) "[t]he history of discrimination against the group";[66] and (iv) whether the group's distinguishing characteristic keeps its members from meaningfully contributing to society.[67]

Correctly calibrating the level of scrutiny is critical because the level of scrutiny that a court deploys in analyzing challenged legislation can be outcome determinative.[68] Once a court has identified the appropriate level of scrutiny, it proceeds to consider both (x) the *importance* of the objective of the challenged legislation (also referred to as the state's interest) and (y) *how finely-tuned* the challenged legislation is to accomplishing the stated objective.[69]

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62. *See* CHEMERINSKY, *supra* note 22, at 725–29, 861.

63. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978) (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part).

64. CHEMERINSKY, *supra* note 22, at 728.

65. *Id.*

66. *Id.*

67. *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

68. *See* Christina E. Wells, *Beyond Campaign Finance: The First Amendment Implications of* Nixon v. Shrink Missouri Government Pac, 66 MO. L. REV. 141, 160 (2001) ("Thus, while strict scrutiny ostensibly allows a court to uphold a law if it is necessary to meet a compelling state interest, that standard almost always results in the law's demise. Hence, the saying that strict scrutiny is "'strict" in theory and fatal in fact.' Similarly, the Court almost never strikes down a law using rational basis review, which has become equated with total judicial deference. In effect, the categorization of a law as subject to either strict or minimal scrutiny is outcome determinative . . . ." (footnotes omitted) (quoting Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972))).

69. *See id.* at 159.

a. Heightened Scrutiny: Strict Scrutiny and Intermediate Scrutiny

i. Strict Scrutiny

Strict scrutiny applies to laws that discriminate based on suspect classifications (e.g., race or national origin) or that infringe upon fundamental rights (e.g., the right to vote or the First Amendment right to free speech).[70] To withstand strict scrutiny, the interest that the state seeks to achieve must be compelling (i.e., a very important objective) and the law must be narrowly tailored (i.e., very finely tuned) to achieve that compelling state interest[71]—meaning that the compelling interest cannot be achieved by less restrictive means than the means in controversy.[72] The burden of establishing that the law meets the two-prong importance/tuning test rests entirely on the government.[73] In other words, when courts apply strict scrutiny, the government's purpose must be "vital"[74] and the challenged law "must be shown to be 'necessary' as a means to accomplishing the end"[75] for the law to survive a constitutional challenge. Even if the government establishes that its interest is sufficiently "vital," the law will still fail under a strict scrutiny analysis unless the government can demonstrate that the challenged legislation is "the least restrictive or least discriminatory alternative."[76] Strict scrutiny is a high, but not insurmountable,[77] bar that must be cleared for challenged legislation to pass constitutional muster.

ii. Intermediate Scrutiny

Intermediate scrutiny is "employed only in limited circumstances when legislation is not facially or constitutionally invidious but nonetheless gives rise to some recurring constitutional difficulties."[78] Under this standard, a law must achieve an important government interest and be substantially related to achieving that

70. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 743 (2007).
71. McCullen v. Coakley, 573 U.S. 464, 478 (2014).
72. *See id.* at 490–91.
73. *See* CHEMERINSKY, *supra* note 22, at 727.
74. *See id.* at 588.
75. *Id.* at 588–89.
76. *Id.* at 589.
77. *See id.* at 589.
78. 16B AM. JUR. 2D *Constitutional Law* § 853 Westlaw (database updated Feb. 2026).

important government interest.[79] The Supreme Court has applied intermediate scrutiny to classifications involving gender or nonmarital parentage.[80] For intermediate scrutiny, the importance/tuning test is less stringent than is required under strict scrutiny, but the burden is still a significant one. As is true with strict scrutiny, "[t]he party seeking to uphold a restriction . . . carries the burden of justifying it"[81] when intermediate scrutiny applies.

b. Rational Basis Review

Of the three tiers of scrutiny that the Supreme Court has recognized, rational basis review is the most deferential. For a law to survive rational basis review, the government's objective must be legitimate and the challenged law must be rationally related to achieving that legitimate government interest.[82] A law that is not arbitrary or irrational will satisfy the rational relation requirement.[83] When rational basis is the standard of review, "[c]ourts accept uncritically the factual and empirical evidence of the government supporting its laws and policies,"[84] effectively shifting the burden to the challenger to establish that the government's interest is not legitimate or that the law is not rationally related to accomplishing that interest.[85] It bears emphasizing that the threshold for satisfying rational basis is extremely low. In his authoritative treatise on U.S. constitutional law, Erwin Chemerinsky described the rational basis standard as "enormously deferential to the government."[86]

Although U.S. Supreme Court jurisprudence has officially recognized three tiers of scrutiny, some commentators have suggested the existence of a fourth potential level of scrutiny that is more stringent than rational basis but less stringent than intermediate

79. CHEMERINSKY, *supra* note 22, at 587.

80. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (nonmarital parentage); Craig v. Boren, 429 U.S. 190, 198 (1976) (sex); CHEMERINSKY, *supra* note 22, at 588.

81. CHEMERINSKY, *supra* note 22, at 588 (first alteration in original) (citing Edenfield v. Fane, 507 U.S. 761, 770 (1993)).

82. *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973).

83. *See* Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 463 (1988) (noting that, in the absence of a fundamental right or suspect classification, plaintiffs "failed to . . . demonstrate[e] that the challenged statute is both arbitrary and irrational" as was needed to establish the challenged statute did not meet rational basis scrutiny).

84. Solove, *supra* note 58, at 953.

85. *See Kadrmas*, 487 U.S. at 463 (confirming the applicability of rational basis review, noting that appellants "failed to carry the 'heavy burden' of demonstrating that the challenged statute is both arbitrary and irrational").

86. CHEMERINSKY, *supra* note 22, at 587.

scrutiny, known as rational basis "with bite."[87] The Supreme Court has never acknowledged the use of such a standard; however, in practice, the levels of scrutiny do appear to have some flexibility that is more indicative of a spectrum of scrutiny, instead of rigid levels.[88] Having considered the relevant legal frameworks, we are better equipped to discuss and deconstruct the Court's analysis in *Plyler*.

C. The Decision

1. Majority Opinion and Concurrences

Justice Brennan opened the majority opinion in *Plyler* by announcing the central question in the case: "The question presented by these cases is whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, Texas may deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens."[89] Having identified the relevant doctrinal framework as the EPC, Justice Brennan observed that "[t]he Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation."[90] To analyze this question under the EPC, the Court considered three key questions: first, whether persons in the United States without a documented status were entitled to protection under the EPC (they were);[91] second, whether laws that disadvantage such persons constituted a "suspect classification" subject to heightened scrutiny (they did not);[92] and third, whether the benefit deprived (here: access to a free public education) was a federal constitutionally protected fundamental right (it was not).[93]

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87. *Id.* at 729.

88. *Id.* ("[A]lthough the Court articulates three tiers of review, the reality is a range of standards.").

89. Plyler v. Doe, 457 U.S. 202, 205 (1982).

90. *Id.* at 213.

91. *Id.* at 215 ("Use of the phrase 'within its jurisdiction' thus does not detract from, but rather confirms, the understanding that the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State's territory. That a person's initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the States's territorial perimeter. Given such presence, he is subject to the full range of obligations imposed by the State's civil and criminal laws. And until he leaves the jurisdiction—either voluntarily, or involuntarily in accordance with the Constitution and laws of the United States—he is entitled to the equal protection of the laws that a State may choose to establish.").

92. *Id.* at 223.

93. *Id.*

After dispatching the first inquiry addressing whether Plaintiffs could avail themselves of any protection at all under the EPC, the Court moved on to "[t]he more difficult question" of whether Section 21.031 violated the EPC.[94] With respect to the fundamental right question, the Court held that the U.S. Constitution does not recognize a fundamental right to education.[95] In the absence of a fundamental right, rational basis is the appropriate standard of scrutiny unless the classification drawn is suspect or quasi-suspect.[96]

With respect to the classification question, the Court "reject[ed] the claim that 'illegal aliens' are a 'suspect class'"[97] but did not explicitly state whether a facial classification that disadvantages immigrants without a documented legal status is or is not a quasi-suspect classification. Importantly, however, the Court declined to extend protected class status to Plaintiffs, even while it acknowledged that alienage can constitute a basis for recognizing a protected class in *Graham v. Richardson*.[98] While preeminent constitutional scholars such as Dean Erwin Chemerinsky have concluded that laws which burden "undocumented alien children" constitute a quasi-suspect classification,[99] the Court's own language deployed in its first pass on the issue invokes rational basis scrutiny.[100]

This was not dispositive, of course, particularly in light of the Court's deployment of language typically associated with rational basis, intermediate scrutiny, and strict scrutiny in its analysis (as well as some formulations that are not commonly associated with any of these in contemporary DPC and EPC analysis);[101] however, at no point did the Court announce that the burdensome treatment visited upon Plaintiffs by Section 21.031 constituted a suspect or quasi-suspect classification. Absent such an announcement, fidelity to the EPC's doctrinal framework would have compelled the Court to conclude that rational basis was the appropriate level of scrutiny for purposes of analyzing the classification drawn by the challenged legislation—regardless of whether that is the standard the Court *actually applied*.

After failing to establish a basis for applying heightened scrutiny based on the existence of a suspect or quasi-suspect classification or

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94. *Id.* at 215.
95. *Id.* at 221 (citing S.A. Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35–36 (1973)).
96. *See* CHEMERINSKY, *supra* note 22, at 727–28.
97. *Plyler*, 457 U.S. at 219 n.19.
98. *See* 403 U.S. 365, 374 (1971).
99. *See* CHEMERINSKY, *supra* note 22, at 588.
100. *See Plyler*, 457 U.S. at 220 ("It is thus difficult to conceive of a *rational* justification for penalizing these children for their presence within the United States." (emphasis added)).
101. *See* discussion *infra* Section I.C.1.

the implication of a fundamental right, the Court proceeded to analyze the burden that Section 21.031 visited upon Texas's undocumented school children. In doing so, the Court mixed and matched the elements of the various two-prong scrutiny tests for each degree of scrutiny.[102] In determining the appropriate standard, the majority spent a substantial portion of the opinion reflecting on concerns that fall roughly into three categories: (1) Section 21.031's present impact on Plaintiffs and others similarly situated (the Plaintiff Class); (2) Section 21.031's future impact on the Plaintiff Class; and (3) Section 21.031's impact on society at large.

First, regarding Section 21.031's present impact on the Plaintiff Class, the Court expressed substantial anxiety about Plaintiffs' overall vulnerability as children as well as the fact that Plaintiffs were not responsible for their presence in the United States or their undocumented status.[103] The Court identified the law's impact on children as an "area of special constitutional sensitivity"[104] and questioned the reasonableness of "acting against . . . children"[105] to "control the conduct of adults,"[106] and ultimately concluded that doing so "d[id] not comport with fundamental conceptions of justice."[107] In light of these concerns, the Court concluded that it was "difficult to conceive of a *rational* justification for penalizing these children for their presence within the United States,"[108] given their complete lack of control over that circumstance.

Second, regarding Section 21.031's future impact on the Plaintiff Class, the Court repeatedly expressed concern that the challenged legislation would create an "underclass"[109] and a "permanent

102. *See Plyler*, 457 U.S. at 216 ("In applying the . . . [EPC] to most forms of state action, we thus seek only the assurance that the classification at issue bears some *fair relationship* to a *legitimate public purpose*." (emphasis added)). While this deviates somewhat from the commonly recited rational basis standard that state action be "rationally related to a legitimate government interest," it is the standard to which it most nearly approximates. *But see id.* at 216–17 ("[W]e have treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.' With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been *precisely tailored* to serve a compelling governmental interest." (emphasis added) (footnotes omitted)); *id.* at 217–18 ("In addition, we have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a *reasoned judgment consistent with the ideal of equal protection* by inquiring whether it may fairly be viewed as furthering a substantial interest of the State." (emphasis added)).

103. *See id.* at 219–20.

104. *Id.* at 226.

105. *Id.* at 220.

106. *Id.*

107. *Id.*

108. *Id.* (emphasis added).

109. *Id.* at 219.

caste."[110] The Court worried about the "lasting impact" that being deprived of an education would have "on the life of the child,"[111] going on to note that "education provides the basic tools by which individuals might lead economically productive lives"[112] and "advance[] on the basis of individual merit."[113] "[B]y depriving the children of any disfavored group of an education," the Court observed, "we foreclose the means by which that group might raise the level of esteem in which it is held by the majority."[114] The Court bemoaned the "enduring disability"[115] that would result from Section 21.031's implementation and concluded that such disability would take an "inestimable toll . . . on the social, economic, intellectual and psychological well-being" of the Plaintiff Class.[116]

Lastly, regarding Section 21.031's impact on the community, state, and nation in which the Plaintiff Class may continue to reside, the Court noted that it could not "ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."[117] The Court goes on to mention Section 21.031's impact on the nation at least three more times in its opinion.[118] Notably, the Court declined to "accept uncritically"[119] Texas's approximation of the "savings" achieved by charging Plaintiffs tuition as a condition to attend the state's public schools.[120] Such uncritical acceptance is a defining characteristic of rational basis review.[121]

The Court then returned to the question of the proper level of scrutiny to apply, and, notwithstanding its announcements that "undocumented aliens cannot be treated as a suspect class"[122] and "education [is not] a fundamental right,"[123] the Court applied

110. *Id.* at 218–19.
111. *Id.* at 221.
112. *Id.*
113. *Id.* at 222.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 221.
118. *Id.* at 223 (indicating that Section 21.031 will "foreclose any realistic possibility that . . . [Plaintiffs] will contribute in even the smallest way to the progress of our Nation"); *id.* at 224 (noting it is appropriate to take into account the "costs to the Nation."); *id.* at 230 (noting the potential for Section 21.031 to add "to the problems and costs of unemployment, welfare, and crime" and concluding that, whatever savings Texas aims to achieve by the statute's enactment, they are "wholly insubstantial in light of the costs involved to these children, the State, and the Nation").
119. Solove, *supra* note 58, at 953.
120. *Plyler*, 457 U.S. at 230.
121. Solove, *supra* note 58, at 953.
122. *Plyler*, 457 U.S. at 223.
123. *Id.*

something more than rational basis scrutiny—noting, somewhat cryptically, that "more is involved" in this case.[124] The Court confusingly continued: "In determining the *rationality* of § 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing concerns, the discrimination contained in § 21.031 can hardly be considered *rational* unless it furthers some *substantial* goal of the State."[125] Recall from Section I.B.2 that "rational" is the tuning test for rational basis review, and "substantial" is the tuning test for intermediate scrutiny, yet here, the Court used "substantial" to describe the *importance* of the "goal of the State" (rather than its calibration to the objective). By announcing that it was "determining the rationality" of the challenged legislation, the Court seemed to proceed down the path of rational basis review; however, by comingling elements of the rational basis tuning test with elements of the intermediate scrutiny tuning test (but using it to describe how important the state interest has to be) the Court left unresolved many questions about the standard that it actually applied. Ultimately, the Court never expressly admits to applying more demanding scrutiny than rational basis and plainly indicates that Section 21.031 is not a rational exercise of state authority.[126]

In their concurrences, Justice Marshall and Justice Blackmun were more straightforward in concluding that some form of heightened scrutiny was appropriate. Justice Marhsall advanced his view that "an individual's interest in education is fundamental"[127] and therefore protected by the U.S. Constitution (which would authorize the application of heightened scrutiny) and emphasized his oft-expressed view in favor of "an approach that allows for varying levels of scrutiny depending upon the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."[128] In his concurring opinion, Justice Blackmun concluded that "something more than rational basis" review was required[129] because the challenged legislation "allocate[ed] rights in a fashion inherently contrary to any notion of equality," leaving the Plaintiff Class in a position of "permanent and insurmountable competitive disadvantage."[130] In his separate concurring opinion, Justice Powell

124. *Id.*
125. *Id.* at 223–24 (emphasis added).
126. *Id.* at 224.
127. *Id.* at 230 (Marshall, J., concurring).
128. *Id.* at 231.
129. *Id.* at 235 (Blackmun, J., concurring).
130. *Id.* at 234.

followed the majority's lead and declined to identify the level of scrutiny he thought applicable—appealing, instead, to the less technical notion of the Fourteenth Amendment's "fundamental purpose[]."[131]

2. Dissent

In breaking with the majority, Chief Justice Burger attacked the majority opinion on two fronts, criticizing both its technical analysis and alleged failure to exercise judicial restraint. Regarding the majority's legal analysis, Chief Justice Burger criticized the majority for deviating from established equal protection jurisprudence by improvising a quasi-suspect class/quasi-fundamental rights analysis that was not grounded in prior precedent.[132] Chief Justice Burger (correctly) argued that, in light of the Court's finding that (a) education was not a fundamental right and (b) no suspect or quasi-suspect classification was discernible, the Court should have applied rational basis review.[133] Chief Justice Burger chastised the majority for applying an ill-defined heightened level of scrutiny that lacked a clear constitutional foundation[134] and warned, "the Court's opinion rests on such a unique confluence of theories and rationales that it will likely stand for little beyond the results in these particular cases."[135]

Regarding his view that the Court failed to limit itself to the judicial function, the Chief Justice offered the obligatory lament for the inescapable complexity of social issues,[136] proceeded to accuse the Court of policy-making tantamount to judicial activism,[137] and warned that such judicial overreach could weaken democratic processes by resolving complex social and political issues through judicial fiat rather than through the deliberative processes of elected representatives.[138] This, he argued, undermined the role of the legislature and could lead to an erosion of public confidence in the

131. *Id.* at 239 (Powell, J., concurring).
132. *See id.* at 244 (Burger, C.J., dissenting).
133. *See id.*
134. *Id.* ("[B]y patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis, the Court spins out a theory custom-tailored to the facts of these cases.").
135. *Id.* at 243.
136. *See id.* at 242–43.
137. *See id.* at 242.
138. *See id.* at 253 ("Moreover, when this Court rushes in to remedy what it perceives to be the failings of the political processes, it deprives those processes of an opportunity to function. When the political institutions are not forced to exercise constitutionally allocated powers and responsibilities, those powers, like muscles not used, tend to atrophy.").

judiciary's impartiality.[139] In one of his more dramatic accusations, Chief Justice Burger accused the majority of "abus[ing] . . . the Fourteenth Amendment in an effort to become an omnipotent and omniscient problem solver."[140] "The solution to this seemingly intractable problem," Chief Justice Burger closes, "is to defer to the political processes, unpalatable as that may be to some."[141]

3. Scholarly Criticism

The extensive scholarship generated by the *Plyler* decision has amplified and expanded Chief Justice Burger's technical critiques of the majority's reasoning in the case. While many scholars applaud the decision's outcome—ensuring access to free, public education for children without a documented legal status—they often question the legal rationale employed to reach it.[142] Like Chief Justice Burger, critics argue that the Court failed to apply a coherent and contained standard of review and, instead, relied on an ad-hoc blend of legal principles that did not fit neatly within the confines of the traditional EPC analysis.[143] This doctrinal ambiguity has led to concerns about the decision's long-term stability and its ability to serve as a meaningful precedent in future cases.[144]

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139. *See id.*
140. *Id.* at 243.
141. *Id.* at 254.
142. *See, e.g.*, Jason H. Lee, *Unlawful Status as a "Constitutional Irrelevancy"?: The Equal Protection Rights of Illegal Immigrants*, 39 GOLDEN GATE U. L. REV. 1, 1 (2008) (calling the decision a "complex and internally incoherent opinion" while arguing that the protections it afforded should be fortified through the future application of strict scrutiny to laws that disadvantage persons without a documented legal status).
143. *See* Michael A. Olivas, Lecture, *The Political Efficacy of* Plyler v. Doe*: The Danger and the Discourse*, 45 U.C. DAVIS L. REV. 1, 18–19 (2011) ("Plyler was always a close call: the decision was surprising, inasmuch as it followed the hapless experience of Rodriguez. Plyler never commanded widespread constitutional attention or gained the weight accorded other doctrinal developments. It is widely understood to be one of a kind, perhaps high moral ground, iconic but limited in its application. Peter Schuck, among the case's most thoughtful observers, noted that '[s]ome of the manifest difficulties of devising a new constitutional order in an area of law that has long defied one are revealed in Plyler v. Doe, in which the Court felt obliged to turn conventional legal categories and precedents inside out in order to reach a morally appealing result.'" (alteration in original) (quoting Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 82–83 (1984))).
144. Both Rachel Moran and Matthew Patrick Shaw advance property-based accounts that seek to shore up *Plyler*'s result by reconceptualizing its underlying rights framework. Drawing on property and personhood theory, they contend that *Plyler* should be reanalyzed so that its protection for undocumented children's access to public education can better withstand renewed constitutional scrutiny. *See* Rachel F. Moran, Essay, *Personhood, Property, and Public Education: The Case of* Plyler v. Doe, 123 COLUM. L. REV. 1271, 1273–74 (2023); Matthew Patrick Shaw, *The Public Right to Education*, 89 U. CHI. L. REV. 1179, 1180–1192 (2022).

a. Departure from Established Standard of EPC Analysis

As previously explored, under conventional Equal Protection doctrine, the fact that Plaintiffs' challenge did not implicate a fundamental right or a suspect classification should have led the Court to apply rational basis scrutiny.[145] Yet, notwithstanding interspersed references to the law's rationality,[146] the Court ultimately applied a novel and ambiguous standard that blended elements of multiple tiers of scrutiny.[147] This departure from established doctrine has fueled ongoing debate about the legitimacy of the ruling.[148] Critics argue that by failing to adhere to a clear analytical framework, the Court left *Plyler* vulnerable to erosion or reversal in future cases.[149]

b. Imprecise Level of Scrutiny

One of the most significant sources of uncertainty in *Plyler* is the level of scrutiny the Court actually applied. The decision contains language that could suggest the application of heightened scrutiny,[150] but at the same time, it includes phrases that signal rational basis review.[151] To further muddy the doctrinal waters, the Court interrogates, and ultimately finds insufficient, Texas's proffered justifications for Section 21.031 in a way that is consistent

145. *See supra* Section I.B.2.b.

146. *See Plyler*, 457 U.S. at 222 ("It is thus difficult to conceive of a rational justification for penalizing these children . . . ."); *id.* at 223–24 ("In determining the rationality of § 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.").

147. Linda E. Carter, *Intermediate Scrutiny Under Fire: Will* Plyler *Survive State Legislation to Exclude Undocumented Children from School?*, 31 U. S.F. L. REV. 345, 371–79 (1997).

148. *See id.* at 345–46.

149. *See e.g.*, Scott David Livingston, Plyler v. Doe*: Illegal Aliens and the Misguided Search for Equal Protection*, 11 HASTINGS CONST. L.Q. 599, 601 (1984) (concluding that the validity of *Plyler*'s holding is "unclear" and positing that "[i]n light of settled constitutional precedents and compelling policy concerns which counsel against judicial intervention, the decision in *Plyler* may represent an unsound and inconsistent judicial mandate").

150. For example, the opinion stated "[i]n sum, education has a fundamental role in maintaining the fabric of our society." *Plyler*, 457 U.S. at 221. This gestures, albeit loosely, toward strict scrutiny, which is implicated when a classification infringes upon the exercise of fundamental right or fundamental interest (but, not necessarily a fundamental role). *See supra* Section I.B.2.a. The Court closed its opinion by concluding that the state needed to show that the denial of education to Plaintiffs "further[ed] some *substantial* state interest," *Plyler*, 457 U.S. at 230 (emphasis added), again indicating the application of heightened (here, intermediate) scrutiny.

151. *Plyler*, 457 U.S. at 229 ("It is thus difficult to conceive of a *rational* justification for penalizing these children for their presence within the United States." (emphasis added)).

with the application of heightened—strict or intermediate—scrutiny but not rational basis scrutiny.[152]

The confusing web woven by the majority includes a reference to an "intermediate" standard in a footnote,[153] suggesting an intentional shift away from traditional rational basis review, and also a statement that the Texas statute "can hardly be considered rational unless it furthers some substantial goal of the State."[154] These two references in the majority opinion introduce elements of both rational basis and intermediate scrutiny, making it difficult to situate the decision within a clear doctrinal framework. Some scholars have tried to split the difference by identifying the standard of review applied in *Plyler* as rational basis "with bite"—a heightened form of rational basis scrutiny speculated to have been applied in some cases that involved discriminatory treatment of marginalized groups.[155]

c. Justifications for Heightened Scrutiny Questioned

Seemingly aware of its departure from standard EPC analytical protocol, the majority attempted to buttress its decision by emphasizing the unique vulnerabilities of children without a documented legal status.[156] The Court reasoned that these children, unlike their parents, did not voluntarily enter the country and should not be penalized for their parents' actions.[157] However, as Ruth Jones argues in *Plyler v. Doe—Education and Illegal Alien Children*, this justification is analogically problematic for several reasons.[158] First, the Court analogized to illegitimacy cases, where intermediate scrutiny had been applied to protect children from discrimination based on their birth status.[159] As Ruth Jones points out, however, privacy considerations in illegitimacy cases were central to the Court's reasoning, whereas such concerns were absent in *Plyler*.[160]

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152. *See* discussion *supra* Section I.B.2.b.
153. *Plyler*, 457 U.S. at 218 n.16.
154. *Id.* at 224.
155. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 635–36 (1996) (striking down a Colorado amendment targeting LGBTQ+ individuals); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) (invalidating a zoning ordinance that discriminated against individuals with disabilities); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 538 (1973) (invalidating laws that discriminated against households with unrelated members as unconstitutional).
156. *See Plyler*, 457 U.S. at 223–24.
157. *Id.* at 220.
158. Ruth Jones, Plyler v. Doe—*Education and Illegal Alien Children*, 8 NAT'L BLACK L.J. 132, 133 (1983).
159. *Id.* at 134.
160. *Id.* at 135.

Second, the decision fails to offer a principled reason for why children of undocumented immigrants deserve heightened protection under the EPC, while other groups facing economic and social disadvantages do not.[161] Arguably, by this logic, many children of individuals who do not belong to a protected class could be entitled to a higher level of constitutional protection than their parents based on such children's lack of "fault" in their circumstances. For example, in *San Antonio Independent School District v. Rodriguez*, children in lower-income areas, who lived in underfunded school districts due to their parents' economic status, were not afforded heightened protection despite their lack of responsibility for their parents' financial condition.[162] If the Court's reasoning in *Plyler* was applied to the *Rodriguez* case, those children might similarly be entitled to more robust constitutional protections due to their lack of fault in their parents' socioeconomic circumstances.[163]

Ultimately, the scholarly criticism of *Plyler* converges around the view that by failing to clearly identify the level of scrutiny applied as well as relying on inapt analogies, the Court weakened the doctrinal foundation of its ruling, leaving the decision vulnerable to future legal challenges. Despite its doctrinal weaknesses, however, *Plyler* has remained good law for over forty years.[164] One of the reasons for *Plyler*'s endurance may be that it is widely perceived to reach the right result despite its wrong reasoning—embodying the ongoing tension between notions of equality, sovereignty, personhood, and politics.

Plyler speaks directly to the question of how the core principles of democratic government instruct us to navigate the social and political space between "concentrated power" and "diffuse political authority" that necessarily exists in "[e]very democracy worthy of the name."[165] The power in *Plyler*, that of the Texas state legislature, is formidable. On the other hand, the Plaintiffs, due to both their status as minors and their undocumented status, lack not only political power, but also the social and economic power to defend themselves against the State. In this way, the case also forces us to confront the

161. *Id.* at 134.
162. 411 U.S. 1, 54–55 (1973).
163. *Id.*
164. *See* AMANDA WARNER, GEO. MASON UNIV. INST. FOR IMMIGR. RSCH 7 (2022) ("*Plyler* was undoubtedly the most profound federal policy that protects the rights of undocumented immigrant children and mandated that they not be left out of entitlement to FAPE ["free and appropriate education"]. The *Plyler* case is easily one of the most important protectors of the rights of school-aged children to K-12 education and on par with the passage of section 504 of the Rehabilitation Act . . . ." (citation omitted)).
165. Paul Gowder, *What the Laws Demand of Socrates—and of Us*, 98 MONIST 360, 360 (2015).

role of moral considerations in constitutional law. In *Plyler*, these moral considerations complicate an otherwise straightforward EPC analysis and provide a platform for the Court to express apprehension about the implications of Texas's attempt to deny undocumented children access to a free public education. Part II explores why Texas's effort to sever the connection between human beings and their human development proved so unsettling. [166]

II. CAPABILITIES

This Part details Professor Martha Nussbaum's articulation of a theory of human well-being and development known as the Capabilities Approach (the CA). The CA was developed by Professor Nussbaum, Professor Amartya Sen, and the Human Development and Capability Association (collectively, the HDCA)[167] and is the theory upon which the proposal advanced in Part IV of this Article relies. This Part summarizes the CA; expounds upon the concept of "capabilities"; considers how we might discern critical central capabilities from general capabilities; and submits that support for capability development is a matter of constitutional consequence, particularly with respect to the EPC, because capability development is a defense against the type of asymmetrical domination that offends both basic human dignity and the liberatory mandate of the Fourteenth Amendment.

A. The Capabilities Approach

The CA was developed by the HDCA as a counterapproach to the gross domestic product (GDP) measure of human well-being.[168] The impetus for the CA's creation was the HDCA's view that a theory of human well-being such as the GDP, which is almost exclusively concerned with economic output, is deficient in critical respects.[169] First, it fails to account for individual satisfaction and qualitative well-being and, second, by failing to account for economic stratification within a society, does not address whether and to what extent any such stratification results from historic patterns of

166. *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1877 (1987) (cautioning against the dehumanization that can result by estranging people "from their essential human capacities").

167. *See* MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 17–18 (2011) [hereinafter NUSSBAUM, CREATING CAPABILITIES].

168. *Id.* at 15 ("The Capabilities Approach set out to be an alternative to the GDP approach that would incorporate . . . important virtues.").

169. *See id.* at 48–50.

marginalization and subordination that have been widely condemned, particularly in advanced economies.[170]

Nussbaum posits that "the real purpose of development is *human development*"[171] and our assessment of well-being in any society should be based on the degree to which the society's members are able to secure certain core capabilities that are likely to support a fuller realization of what each individual can do and what each individual can be.[172] Ultimately, Nussbaum argues that an assessment of the capabilities that individuals in a given society can secure provides a more honest and useful assessment of overall human well-being in that society than does an aggregate economic measure like GDP.[173]

Nussbaum's theory, however, is more than just an alternative method for measuring well-being. It is an account that advances what she refers to as a "theory of minimal justice."[174] "The basic intuition from which the . . . [CA] begins, in the political arena, is that certain human abilities exert a moral claim that they should be developed."[175] To translate this seemingly inward-facing concern of capability development into the outward facing political imperative of justice, Nussbaum contends that capability development is directly implicated in the pursuit of "substantive freedom[s]."[176]

Substantive freedom extends from capability development. When robust capability development is stifled, those who suffer the limitation are precluded from realizing the full measure of what they *can* do and be. Significantly, however, those so limited still do a great deal of doing and being. Instead of doing and being at their own self-direction, however, such persons are relegated (or, at the very least, are perpetually vulnerable to being relegated) to structurally subordinate social positions characterized by domination by others. Nussbaum describes such an experience as "be[ing] no more than an appendage of someone else."[177]

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170. *See id.* at 18–19.

171. *Id.* at 185.

172. *Id.* at 18 (identifying the "key question" of the CA as "What is each person able to do and to be?").

173. *See id.* at 47–50 (interrogating the GDP approach to human well-being and highlighting how the human development approach addresses key flaws in the GDP approach).

174. *Id.* at 59.

175. MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 83 (2000) [hereinafter NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT].

176. NUSSBAUM, CREATING CAPABILITIES, *supra* note 167, at 20 (quoting AMARTYA SEN, DEVELOPMENT AS FREEDOM 74 (Knopf Doubleday 2011) (1999)).

177. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 175, at 83. Nussbaum goes so far as to characterize the foreclosure of human capability development as "a type of death." *Id.*

Nussbaum's appendage metaphor invokes the absence of freedom and might offend sensibilities in the public law arena where the Constitution sits—where fairness, equivalence and collectivity are emphasized. It is less scandalous in the privately ordered, eat-what-you-kill arena, where most people earn the money they need to meet their day-to-day needs—which centers situational efficiency and has a healthy tolerance for hierarchy. While the governance mechanisms in each of these arenas may differ, their outcomes can be interrelated. Where basic subsistence is not available as a matter of right, a lack of power in the private order can correlate directly with a lack of power to access the full measure of constitutional guarantees.[178] Therefore, capability development, by augmenting the tools one uses to achieve upward mobility in social and economic arrangements, promotes substantive freedom in that it builds and fortifies the skills and abilities that can serve as defenses against fixed relationships of subordinance and dominance in the private arena, which can entrench the very inequalities that the Constitution guards against.

B. What Are Capabilities?

The central inquiry in the CA is "[w]hat are people actually able to do and to be? What real opportunities for activity and choice has society given them?"[179] According to Nussbaum, by taking account of the central capabilities a person is able to achieve, we are able to discern the scope of "real opportunities" that are available to a person.[180]

Combined capabilities exist at the intersection of internal development and external conditions. With respect to internal development, combined capabilities are realized through antecedent basic capabilities and internal capabilities, which are key preconditions in the development of combined capabilities.[181] With respect to external conditions, combined capabilities require the existence of certain circumstances "in the political, social, and economic

178. *See* Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 FORDHAM URB. L.J. 629, 638 (2008) (concluding that "the Court's categorical immunization of social or economic legislation" has effectively deconstitutionalized poor people's claims).

179. NUSSBAUM, CREATING CAPABILITIES, *supra* note 167, at 59.

180. *See* NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 175, at 84 (explaining that "promoting appropriate development of . . . internal powers" and "preparing the environment so that it is favorable for the exercise of practical reason and the other major functions" are each necessary to realize certain combined capabilities).

181. *See id.*

environment"[182] which facilitate the expression of internal capabilities. You might conceive of basic capabilities as *equipment*, internal capabilities as *training* to use the equipment, and combined capabilities as the *opportunity to deploy* that training. Once a person is possessed with equipment, training, and opportunity, combined capabilities become accessible.

Once a person has combined capabilities, "functioning" becomes possible. A particular "functioning" is realized when a person makes the choice to deploy combined capabilities to achieve the desired functioning.[183] The distinction between combined capabilities (hereinafter referred to as "capabilities" for ease of reference) and functionings is an important one. Functionings are the "active realization[s] of one or more capabilities."[184] Put differently, while capabilities are *opportunities* to achieve certain developmental outcomes, functionings occur only when an individual's internal ability, opportunity, *and choice* intersect. Functionings, therefore, are the actual outcomes a person realizes by capitalizing on that person's capabilities.[185] Strong functioning, which is generally understood to facilitate success in privately ordered arenas, is therefore predicated on the robust development of capabilities.

C. The Constitutional Relevance of Capabilities

When not coupled with positive economic and social rights, political rights alone are an incomplete defense against the type of perpetual susceptibility to disenfranchisement, dispossession, and

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182. NUSSBAUM, CREATING CAPABILITIES, *supra* note 167, at 20.

183. In *Claims and Capabilities*, Paul Weithman offers the following summary:

> In *Women and Human Development*, Nussbaum distinguishes three kinds of capabilities. What she calls "basic capabilities" are "the innate equipment of individuals that is the necessary basis for developing the more advanced capabilities, the ground of moral concern." Examples are the human capability for seeing and hearing, and the newborn's capability for speech and language. "Internal capabilities" are "developed states of the person herself that are, so far as the person herself is concerned, sufficient conditions for the exercise of the requisite functions." These are . . . "mature conditions of readiness" that are developed "with support from the material and social world." Finally, "combined capabilities" are "internal capabilities combined with suitable external conditions for the exercise of the function" in question.

Paul Weithman, *Claims and Capabilities*, *in* THE LIBRARY OF LIVING PHILOSOPHERS (forthcoming) (footnote omitted) https://www3.nd.edu/~pweithma/My%20Papers/Claims%20and%20Capabilities.pdf [https://perma.cc/Y3FT-5S37].

184. NUSSBAUM, CREATING CAPABILITIES, *supra* note 167, at 24–25.

185. As discussed further in note 198, the line between capabilities and functionings is not always a bright one. Jonathan Wolff and Avner de-Shalit have written about the difficulty in navigating "the gap" between capabilities and functionings and interrogating the nuances of choice implicated in the discourse. *See generally* Jonathan Wolff & Avner de-Shalit, *On Fertile Functionings: A Response to Martha Nussbaum*, 14 J. HUMAN DEVELOPMENT & CAPABILITIES 161 (2013).

domination that the Reconstruction Amendments were enacted to reject.[186] The Court's state-action doctrine[187] has functionally deregulated the discrimination that facilitates subordination in many nonpublic contexts, allowing actors with economic and social power to achieve counter-constitutional outcomes by routing that power through purportedly private arrangements.[188]

The Reconstruction Amendments impart into the U.S. Constitution an express, structural acknowledgement that "all people have some core entitlements just by virtue of their humanity";[189] however, protection for these "core entitlements" is limited to the public domain. By contrast, in the private domain, distributive outcomes are not matters of entitlement; rather, outcomes are attributed to "differences in individuals' deserts derived from their hard work or effort."[190] Therefore, capabilities serve as the connective tissue between conceptual constitutional guarantees and the concrete environments in which those guarantees matter.

Without constitutional attention to protecting capability development—which is necessary to participate as a peer in the economic and social spheres where people live their day-to-day lives—the guarantee of equal protection risks becoming little more than "words on paper."[191] Accordingly, constitutional sensitivity must attach to any attempts by states to foreclose pathways to capability development. Challengingly, however, in the context of human development, capabilities are innumerable and, therefore, difficult to protect in a politically durable way.[192] As a practical matter, then, it is useful to identify particular capabilities that might rise to the level of institutional concern.[193] Accordingly, deployment of the CA in the constitutional context requires a principled way to single out those capabilities whose protection bears most directly on the realization of the antidomination commitment of the Reconstruction Amendments.[194]

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186. *See* NUSSBAUM, CREATING CAPABILITIES, *supra* note 167, at 62.

187. *See, e.g.*, Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 505 (1985) ("From its earliest days . . . the Burger Court has been hostile to any relaxation of the state action requirement.").

188. *See* MICHEL FOUCAULT, PANOPTICISM (1975), *reprinted in* THE FOUCAULT READER 206, 212 (Paul Rabinow ed., 1984).

189. NUSSBAUM, CREATING CAPABILITIES, *supra* note 167, at 62.

190. Joan L. McGregor, *Free Markets, Bargaining Power, and the Rules of Exchange*, 5 PUB. AFFS. Q. 353, 357 (1991).

191. NUSSBAUM, CREATING CAPABILITIES, *supra* note 167, at 65.

192. *See id.* at 27–28 (discussing the challenge of ascribing valuations to capabilities in the "normative law and public policy" context).

193. *See id.* at 28, 29.

194. *See id.* at 28 ("The Capabilities Approach is not a theory of what human nature is, and it does not read norms off from innate human nature. Instead, it is evaluative and ethical

Nussbaum refers to this class of the most consequential capabilities as "central capabilities."[195] Nussbaum acknowledges that a fixed and universally satisfactory list of central capabilities would be impossible to develop[196] but urges that we can still attempt to identify and protect "really valuable [capabilities] . . . that a minimally just society will endeavor to nurture and support"[197] because of their objective importance to human development. One strategy for identifying a class of capabilities that rises to the level of constitutional consequence is to identify (a) capabilities whose successful development facilitates the positive development of other capabilities—which will be referred to as "fertile competencies"[198]—and (b) capability failures that are likely to impede or foreclose the positive development of other capabilities—which will be referred to as "corrosive disadvantages."[199]

Fertile competencies exert strong, positive influence on the development of other capabilities and support the types of functionings that exert a strong, positive influence on the realization of a wider

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from the start: it asks, among the many things that human beings might develop the capacity to do, which ones are the really valuable ones, which are the ones that a minimally just society will endeavor to nurture and support?"); *id.* at 29 ("How would we begin selecting the capabilities on which we want to focus? Much depends on our purpose. . . . [I]f our aim is to establish political principles that can provide the grounding for constitutional law and public policy in a nation aspiring to social justice (or to propose goals for the community of nations), selection is of the utmost importance.").

195. *Id.* at 19.

196. *Id.* at 40 (acknowledging that her proposed list of capabilities is "rather abstract" and that specificity would have to be provided "by each nation's system of constitutional law, or its basic principles if it lacks a written constitution").

197. *Id.* at 28.

198. The terms "fertile functionings" and "corrosive disadvantages" are contributions to the disadvantage discourse advanced by Jonathan Wolff and Avner de-Shalit in their book *Disadvantage*, and, although Nussbaum incorporates the terms into her discussion of central capabilities, there is some disagreement between Nussbaum, on the one hand, and Wolff and de-Shalit, on the other hand, regarding the importance of the distinction between capabilities and functionings in the context of assessing "fertility." While Wolff and de-Shalit are in alignment with the general principles advanced in Nussbaum's articulation of the CA, and do, in fact, draw heavily from the CA in developing their taxonomy of disadvantage, they are not in precise alignment with Nussbaum's articulation of the CA when it comes to terminology. As noted above, for Nussbaum, functionings are distinct from capabilities in that capability development paves the way for achieving desirable functionings—capabilities are opportunities and functionings are outcomes. *See supra* Section II.B. For Wolff and de-Shalit, the utility of distinguishing between capabilities and functionings, at least when it comes to the issue of identifying "fertility," is less important, and, potentially, theoretically confusing. *See* JONATHAN WOLFF & AVNER DE-SHALIT, DISADVANTAGE 75–76, 84 (2007). Notwithstanding this discrepancy in terminology, the two theories are deeply synergistic, and both recognize that opportunities are not "isolated atoms," but rather "interact and inform one another." NUSSBAUM, CREATING CAPABILITIES, *supra* note 167, at 98. Resolving this discrepancy in terminology is beyond the scope of this Article, but to avoid confusion and because Nussbaum's framework is the one most thoroughly integrated within the model proposed herein, this Article will use the term "fertile competencies" rather than "fertile functionings."

199. NUSSBAUM, CREATING CAPABILITIES, *supra* note 167, at 44.

array of desirable functionings.[200] Corrosive disadvantages, on the other hand, are "types of capability failure that lead to failure in other areas."[201] Predictably, access to education is a fertile competency because it is the means by which we develop the basic skills necessary to navigate the world and to operate within it "as free and equal, possessed of a certain status and self-respect, each able to make our own choices, without fear or deference or dependence on the benevolence of another."[202] On the other side of that coin, lack of access to education is a corrosive disadvantage because it severely limits the scope of future opportunities for which a person is eligible.[203] Because (i) education is a fertile competency and its absence is a corrosive disadvantage, and (ii) education is widely understood to be a necessary predicate to meaningful civic participation (as evidenced by its guarantee under each of the fifty states' constitutions),[204] its designation as a central capability for purposes of identifying "central capabilities" deserving of acute constitutional attention has the potential to be widely resonant.

This Article urges that courts should adopt an analytical framework that would reveal a doctrinal pathway for courts to account for the consequential nature of central capability development when conducting an EPC analysis. Specifically, this framework would require controversies arising under the EPC to be evaluated through an antidomination lens to take adequate account of the ways that control of capability development has been marshalled to create and sustain status hierarchies in a manner that is inconsistent with the liberatory mandate of the Fourteenth Amendment. The next Part considers general and specific practices of capability capture and control and traces how those practices have operated—and continue to operate—in a way that entrenches durable structures of domination.

III. CAPABILITY CARTELS

This Part demonstrates the political relevance of capability development by examining how historically dominant groups maintained their positions of privilege by constructing substantively

200. *See id.*
201. *Id.* at 99.
202. Oisin Suttle, *The Puzzle of Competitive Fairness*, 21 POL. PHIL. & ECON. 190, 211 (2022).
203. WOLFF & DE-SHALIT, *supra* note 198, at 142–44.
204. SCOTT DALLMAN & ANUSHA NATH, FED. RSRV. BANK OF MINNEAPOLIS, EDUCATION CLAUSES IN STATE CONSTITUTIONS ACROSS THE UNITED STATES 1 (2020) ("The U.S. Constitution is silent on the subject of education, but every state constitution includes language that mandates the establishment of a public education system.").

counter-constitutional arrangements while maintaining procedural compliance. These "capability cartels" simultaneously gave dominant groups a monopoly on key opportunities and limited marginalized groups' access to advancement-facilitating resources. For marginalized groups, capability cartels increased their risk of experiencing domination in key political, economic, and social arenas. The opportunity monopolies enjoyed by dominant groups were buttressed by legislative mechanisms (such as Jim Crow-style disenfranchisement statutes) and political mechanisms (such as the increasing commitment to business-first agendas that prioritized corporate interests over broader egalitarian concerns), but some of the most consequential support came from the courts. Although landmark federal legislation such as the Civil Rights Act of 1964 was enacted to smother prejudice through proscription, by shifting their adjudicatory focus from justice to efficiency and embracing legal formalism, courts gave prejudice the oxygen it needed to survive—allowing dominant groups to remain just that.

A. Law and Economics and the Courts

Between the mid-1950s and the mid-1970s, federal legislation enjoined discrimination on the basis of race, disability, and sex in business and government. The Civil Rights Act of 1964, which prohibited discrimination in public accommodations and employment on the basis of race, color, religion, sex, or national origin; the Voting Rights Act of 1965, which eliminated barriers to voting for racial minorities; and Section 504 of the Rehabilitation Act of 1973, which barred disability discrimination in federally funded programs (together, the Civil Rights Legislation) are all illustrative examples from the era.[205] These legislative interventions built upon the momentum of a series of U.S. Supreme Court decisions that eroded the notorious separate but equal doctrine.[206]

Prior to these legislative and judicial interventions, dominant groups in the U.S. wielded the power to promote discriminatory outcomes to the detriment of nondominant groups in the public and private spheres. This prejudice prerogative was wielded under the color of law across various capability-relevant domains such as education, training, employment and even access to basic

205. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394.

206. *See, e.g.*, Sweatt v. Painter, 339 U.S. 629, 635 (1950); McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 642 (1950); Henderson v. United States, 339 U.S. 816, 824–25 (1950); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

necessities.[207] Although the Civil Rights Legislation was a giant leap toward moving the nation closer to a fuller realization of the promise of its founding ideals, those prohibitions were not accompanied by "a range of positive state programs"[208] that would counteract and compensate for the capability-undermining conduct of the pre-Civil Rights era.[209] Without a program that included the affirmative provision of capability-developing resources necessary to facilitate economic and social advancement for groups pushed to the margins by (now-decried) discriminatory conduct, proscribed prejudice simply consolidated within the private sphere—operating under the cloak of ostensibly neutral participation requirements.

The continuation of gendered, ableist, and racialized hierarchies in the economic and social spheres even in the absence of the law's explicit endorsement should have given rise to a more searching inquiry by the judiciary when those hierarchies were challenged as pretext for prohibited discrimination. This was not farfetched given the Warren Court's consistent rejection of formalistic equality between 1953 and 1969;[210] however, just as the Warren Court era was drawing to a close, neoliberal economic theory was gaining a foothold in the ivory towers. It eventually made its way to the courts in the form of the law and economics interpretive standard and has maintained a devastating stranglehold on the judiciary ever since.[211]

Under the mantra of personal responsibility, neoliberals demanded that jurists substitute the market's judgment for that of the courts' and worked to cut social programs that might provide a bridge to upward social and economic mobility for those previously

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207. *See* Carlton Waterhouse, *Follow the Yellow Brick Road: Perusing the Path to Constitutionally Permissible Reparations for Slavery and Jim Crow Era Governmental Discrimination*, 62 RUTGERS L. REV. 163, 167 (2009) (noting, with respect to discrimination against Black Americans, that many experienced "open racial exclusion, mistreatment and discrimination at all levels of government and much of the private sector" and that "millions of black adults and children were denied educational, political, and economic opportunities").

208. NUSSBAUM, CREATING CAPABILITIES, *supra* note 167, at 66.

209. *See* Waterhouse, *supra* note 207, at 167 (noting victims of Jim Crow era segregation who had been "denied opportunities based on their race . . . were left without viable relief for the educational and economic deficiencies that resulted").

210. *See* Elizabeth Mensch, *The History of Mainstream Legal Thought*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 23, 44 (David Kairys ed., 3d ed. 1998) ("[T]he Warren Court . . . extend[ed] the scope and expand[ed] the content of personal liberty and equality rights as had no other Supreme Court in U.S. history. During the Warren Court period the federal courts revolutionized criminal procedure law, created modern antidiscrimination law, recaptured the First Amendment from the shambles of McCarthyism, and restructured American politics through reapportionment.").

211. *See* MEHRSA BARADARAN, THE QUIET COUP: NEOLIBERALISM AND THE LOOTING OF AMERICA 158–61 (2024).

denied such opportunities.[212] In doing so, those who had historically enjoyed the benefit of robust capability development (and the fuller civic participation that such development facilitates) were able to preserve the unfair advantage they had gained by preventing others from enjoying the same.[213] The widespread embrace of law and economics theory in the courts became the loaded dice that dominant groups used to keep the game rigged in their favor.[214] Contrary to neoliberals' claims, free markets did not make discrimination disappear; quite to the contrary, "neoliberal dogmas"[215] and the judicial embrace of the law and economics theoretical framework made sure that discrimination remained perfectly acceptable.

B. "Cartel Conduct"

1. Past

In *Reproducing Racism*, Professor Daria Roithmayr explains how systems of sanctioned discrimination, such as Jim Crow, along with a number of other public and private exclusion mechanisms, constituted anticompetitive measures that allowed the beneficiaries of such systems to gain a monopoly on opportunity.[216] This monopoly on opportunity provided immediate benefits (in the form of higher wages, better housing, and more well-resourced schools) as well as long-term benefits that materialized in the form of gains earned whilst those advantages compounded over time.[217] This actuality contradicts the oft-proclaimed (but never proven) proposition embraced by neoliberals that unfettered markets would naturally eliminate discrimination because it illustrates at least one circumstance in which it was both rational and profitable to discriminate—collective discrimination.

As Dr. William Darity, Jr. has observed in his extensive scholarship on stratification economics: "There are *material benefits* that redound to dominant groups that motivate their efforts to maintain

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212. *Id.* at 215 ("Under the guise of 'cutting the deficit,' neoliberals privatized public programs and eliminated benefits . . . .").

213. *See id.* at 175–76 (noting the United States' "history of racial hierarchy embedded in market advantage and disadvantage that Law and Economics reproduced indefinitely").

214. *See id.*

215. *Id.* at xxiv.

216. *See* DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE 6 (2014).

217. *See id.* at 6–7. As each individual's success strengthened the communities in which those individuals were members, and the aggregate success for each community led to greater success for its individual members, they created positive, self-reinforcing "feedback loops." *Id.* at 24.

privilege."[218] Accordingly, "discriminatory practices to preserve privilege are likely to persist rather than fade out, even in market-based economies, in the absence of conscious policy intervention to address them."[219] Concerningly, it was these very same "conscious policy interventions" that neoliberals insisted were incompatible with free markets.[220]

Concurring with Darity's conclusion that privilege-preserving practices do not naturally die out in a market-based economy, Professor Roithmayr conceptualizes such group-based privilege preserving practices as "cartel conduct."[221] In advancing the "lock-in" model of discrimination, Roithmayr elegantly demonstrates how past cartel conduct can create a "competitive advantage [that] can begin to automatically reproduce itself over time until the advantage eventually becomes insurmountable."[222] Importantly, the advantage continues to reproduce even after the cartel conduct ceases.[223] This insight is crucial in explaining why the Civil Rights Legislation, without the "conscious policy intervention[s]" nodded to by Darity, was unsuccessful in dismantling the targeted social hierarchies.[224] Moreover, it demonstrates the symbiotic relationship between capability-blocking conduct and positions of domination.

To reiterate, if discriminatory "cartel conduct" stopped at the moment that the Civil Rights Legislation was passed, in the absence of structural interventions to disrupt the prevailing social hierarchy of the day, we would still be experiencing the patterns of hierarchy present in the pre-Civil Rights Era today because of the influence of early discriminatory inputs.[225] That is bad news. The worse news

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218. William Darity, Jr., *Stratification Economics: The Role of Intergroup Inequality*, 29 J. ECON. & FIN. 144, 144 (2005).

219. *Id.*

220. *See* Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 804 (2003) ("Well-organized and well-funded lobbying by organized capital and corporate interests helped drain political support for government antipoverty programs, for example by promoting policies shifting more of the tax burden for welfare programs from corporations and capital owners to low and moderate income workers.").

221. ROITHMAYR, *supra* note 216, at 29 (defining a "cartel" as "a group of actors who work together to extract monopoly profits by manipulating price and limiting competition").

222. *Id.* at 5.

223. *Id.* at 157 (explaining that "[t]he lock-in model explains why historical monopoly reproduces itself generation after generation, long after bad behavior has stopped").

224. Darity, *supra* note 218, at 144. And perhaps, why those who benefitted from the maintenance of such hierarchies opposed safety net programs and judicial interventions that might consciously intervene to disrupt discriminatory practices.

225. ROITHMAYR, *supra* note 216, at 6 (attributing this phenomenon to whites' "unfair advantage, acquired early in our nation's history, [which] has now become self-reinforcing and cumulative").

is that cartel conduct did not only continue then; it continues today. Indeed, cartel conduct appears to be enjoying a renaissance in the form of renewed efforts to restrict critical paths of capability development for vulnerable populations. The contemporary school choice movement offers an instructive example.

2. Present

The school choice movement exemplifies the contemporary commitment to opportunity hoarding and rings in a similar register as *Plyler*. School choice programs "allow parents to use taxpayer dollars to cover some of the costs of sending their children to a private school."[226] Although the structure varies from state to state, program funds are administered to some families with school-age children in the form of publicly funded vouchers or education savings accounts (ESAs).[227] Families can then use the program funds to pay for tuition at nonpublic schools, and ESA recipients can apply program funds toward a wide range of approved educational expenses, like private tutoring, school supplies, and home-schooling costs.[228] As of May 2025, thirty-five states and Washington D.C. have enacted some form of school choice legislation.[229]

While supporters insist that school choice programs benefit children of all socioeconomic backgrounds, the reality is that the purported benefits aggregate within areas of historic advantage—urban and suburban dwellers; those who have a demonstrated track record of academic ability or normative behavioral compliance; and the nondisabled.[230] Poor families; families that live outside of urban

226. Jaden Edison, *School Choice, Vouchers and the Future of Texas Education*, TEX. TRIBUNE (Jan. 23, 2025), https://www.texastribune.org/2025/01/23/texas-vouchers/#how-they-work [https://perma.cc/ZEB3-S8VA].

227. *See id.*

228. *See id.*

229. REBECCA R. SKINNER & ISOBEL SORENSON, CONG. RSCH. SERV., IF10713, OVERVIEW OF PUBLIC AND PRIVATE SCHOOL CHOICE OPTIONS 2 (2025).

230. In 2025, the Dallas Observer reported that "158 of 254 Texas counties do not have a private school for parents to send their children to if they wanted to." Kelly Dearmore, *Do Texas School Vouchers Cover Average Private School Tuition?*, DALL. OBSERVER (Feb. 10, 2025), https://www.dallasobserver.com/news/do-texas-school-vouchers-cover-average-private-school-tuition-21702118 (on file with the Duquesne Law Review). Moreover, private schools have substantially more discretion to deny admittance to student applicants than do public schools, so even when a private school is geographically accessible to a family and financially accessible (because the family can come up with the difference in tuition), private schools are still inaccessible for children denied admission. The same is true for students who require special services or programs that their local private schools are not required to provide. *See, e.g.*, *Issue Explainer: Vouchers*, NAT'L EDUC. ASS'N (Mar. 3, 2025), https://www.nea.org/advocating-for-change/action-center/our-issues/vouchers (on file with the Duquesne Law Review) ("Unlike public schools, private and religious schools can—and do—discriminate in admissions on the basis of gender, religion, sexual orientation, ability,

and suburban centers; families with students who might be more likely to be denied admission to private programs (perhaps due to past academic or behavioral performance); and families with students who require special services have significantly more limited school choices than their relevant counterparts. Urban children in income-limited households also face constrained "school choice" because the program funds available to them are less likely to bring the cost of private school within reach given the higher cost of attendance in major metropolitan areas.[231] Concerningly, these are the same student populations who are likely to have faced constrained choices *prior to* the school choice era due to the concentration of low-quality and failing schools in poor communities.[232]

School choice implicates capabilities in obvious and nonobvious ways. A core pillar of the school choice movement, as articulated by Texas Governor Greg Abbott, is that such programs "help . . . students unlock their full potential and achieve success."[233] The unstated assumption of this position is that students are either unable or less able to unlock their full potential and achieve success in the public education environments to which they would otherwise be relegated in the absence of school choice programs. Yet, proponents have little to say about those students who are effectively precluded from participation in school choice programs for any of the reasons stated above. For families that cannot choose their way out of underproductive educational environments, the transition to school choice delivers a one-two punch.

First, as noted above, there are a number of preconditions that must exist before a family can convert vouchers and ESAs into

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behavioral history, prior academic achievement, standardized test scores, interviews with applicants and parents, and income.").

231. For example, the Houston Chronicle reported that in Houston, "[t]he average tuition for all private schools for the 2023-2024 year was $25,674, according to data compiled by the Houston-based General Academics consulting company." Elizabeth Sander, *At Houston's Most Expensive Private Schools, Tuition Exceeds $30k for the 2024-25 Year*, HOU. CHRONICLE (Apr. 8, 2024), https://www.houstonchronicle.com/news/houston-texas/education/article/houston-private-schools-tuition-ranking-19387743.php (on file with the Duquesne Law Review). In February 2025, the Dallas Observer reported that "the annual tuition for the best private schools in Dallas soar[s] well above the state averages," meaning that "[l]ow-income families in Dallas . . . who may want to put their . . . [ESA] toward private school tuition will . . . have to settle for schools well outside of the upper tier of schools." Dearmore, *supra* note 230.

232. *See* Jason E. Saltmarsh, *Unwritten Ground Rules of School Choice: Excavating Capital as a Regulator of Access to Educational Goods*, 23 POL'Y FUTURES EDUC. 202, 212 (2025) ("[P]arents with limited political capital have been unable to resist district changes and may, consequently, sacrifice new sources of social or cultural capital. In these urban contexts, class- and race-based segregation has increased with the spread of choice policies.").

233. Greg Abbott (@GregAbbott_TX), X (Feb. 17, 2025, at 16:51 ET), https://x.com/GregAbbott_TX/status/1891606547706359982 [https://perma.cc/T6BU-SNFH].

better educational choices. Families that lack the financial wherewithal, geographic proximity, and/or the desired academic or behavioral profile are relegated to under-resourced schools (the poor performance of which are what ostensibly necessitates the development of a school choice program in the first place) and are essentially out of the race before it starts—stuck in the very resource-challenged and opportunity-limited educational environments. Meanwhile, better positioned families are able to take advantage of the better-resourced educational environments that tend to produce an upward cascade of productive opportunities where those resources can be deployed.

Second, as better-positioned families move their children from public to private schools, already under-resourced public schools are likely to face diminishing funding as headcounts decrease.[234] This dynamic undermines the ability of public schools to provide equitable, high-quality education, effectively lowering the quality of education for children who remain in the public system and do not have the option to leave,[235] ultimately leaving "neighborhood public schools with even less resources than they had to begin with."[236] This assumes, however, that neighborhoods are left with any public schools at all. In February 2026, in the face of significant community opposition, Houston Independent School District's state-appointed Board of Managers unanimously voted to permanently close twelve of the district's public schools, citing "years of consistent enrollment declines."[237]

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234. According to a 2024 article published by Raise Your Hand Texas, a public school advocacy organization: "Enrollment numbers . . . play a critical role in determining a school district's budget. Funding formulas are largely based on student attendance, so a decline in enrollment directly translates to less funding." *Why Texas School Districts Are Filing Deficit Budgets*, RAISE YOUR HAND TEX. (Aug. 7, 2024), https://www.raiseyourhandtexas.org/why-texas-school-districts-are-filing-deficit-budgets/. [https://perma.cc/Y76R-MBBW].

235. *See* T. Jameson Brewer, *School Vouchers and the Efforts to Undermine Public Education*, SPLC: LEARNING FOR JUST. (June 5, 2025), https://www.learningforjustice.org/magazine/school-vouchers-and-the-efforts-to-undermine-public-education [https://perma.cc/TH8Q-KELT].

236. Dearmore, *supra* note 230 (quoting Texas Rep. Ron Reynolds).

237. Bianca Seward, *Houston ISD Board Votes to Close 12 Schools, Angering Audience at Meeting*, HOU. PUB. MEDIA (Feb. 26, 2026, at 21:38 ET), https://www.houstonpublicmedia.org/articles/education/2026/02/26/544580/houston-school-closures-hisd-board/ [https://perma.cc/76E5-BTL4]. The article quotes state-installed superintendent Mike Miles:

> I have resisted bringing something to the board for three years, and the reason why is because I feel that schools should be community schools . . . . But they've been losing enrollment for a long time, and the facility isn't working. I can't justify keeping kids in a school with some of the pictures you're seeing, or that has, you know, an air conditioning unit that goes out all the time [or] can't be heated.

Id. (second alteration in original).

Ultimately, students in choice-challenged families can wind up trapped in educational environments that practically ensure their inability to compete with their peers who have real, meaningful choice. Reduced resources for these students mean fewer opportunities for capability development, and fewer opportunities for capability development heighten their risk of future domination.

School choice represents one of the ways that cartel conduct has been forced to evolve in law's facially neutral era. Instead of outright denial or exclusion with respect to opportunities that support capability development, contemporary capability cartels have hoarded opportunities by fixing the price for admission to such opportunities at rates that are increasingly accessible only to the privileged. Moreover, because market gains are easily convertible to political gains, those whose interests may be harmed by capability hoarding campaigns like school choice programs often lack the political power to challenge them.

By locking in the ill-gotten gains from the pre-Civil Rights era and continuing to build on those gains by using law and politics to divert public funding to private coffers, historically dominant groups have operated, and, in many arenas, continue to operate, capability cartels resulting in the creation of potentially unassailable dominance both in and out of the economic context. Preventing the perpetual, preferential transmission of advantages in ways that track historically stubborn patterns of applied prejudice requires a principle that will disable discrimination at the "root" rather than play whack-a-mole with its symptoms. An adequate equal protection framework must therefore confront not only overt exclusion and group-based subordination, but also these more subtle mechanisms of capability capture and control.

IV. AN ANTIDOMINATION STANDARD

The EPC is the primary avenue of constitutional redress for groups challenging discriminatory treatment under law, and its directive is one of the U.S. Constitution's most powerful weapons against entrenched subordination. The EPC's operational potency, however, is a function of not just its mandate, but also the way the mandate is interpreted and applied. Two competing standards have dominated the discourse on how analysis under the EPC should proceed—the (currently embraced) anticlassification standard and the (counter-positioned) antisubordination standard. Ultimately, this Part argues that a different interpretive standard—an

antidomination standard informed by the CA—is necessary to vindicate the EPC's anticaste mandate.

A. The Anticlassification and Antisubordination Standards

1. The Anticlassification Standard

According to proponents of the anticlassification standard, any differential treatment drawn on the basis of certain protected characteristics (such as race, for example) offends the EPC's mandate of equal protection of the laws.[238] Under an anticlassification standard, these "suspect classifications" carry a strong presumption of unconstitutionality whether the law is put forth as an ameliorative or invidious measure.[239] Despite its dominance, the anticlassification standard is severely flawed in at least two key respects. First, the anticlassification standard lacks credibility as a good-faith attempt to realize the goals of the EPC because it is counterproductive to the equal protection mandate of the EPC and ultimately injurious to the interests the EPC was enacted to vindicate; and second, even if the anticlassification standard was benign, it is still inapt because it provides a prescription for sameness, not equality.

Regarding its counterproductive character, the anticlassification standard is, at best, a misplaced exercise in ideal theory—assuming ideal conditions to interpret instructions that specifically respond to nonideal conditions. Indeed, it would be fair to say that the raison d'être of the Fourteenth Amendment is to recognize and redress nonideal conditions.[240] Preeminent historian Eric Foner has referred to the enactment of the Reconstruction Amendments as the nation's "Second Founding" and puts it like this:

> This was a country with strong belief in liberty but with a strong racial barrier excluding nonwhites from enjoyment of many of those liberties. And so Reconstruction is an effort to shatter those boundaries and to create a new . . . republic. I mean, that's why I call it the "Second Founding." It really

238. Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1058 (1986).

239. *See id.*; *see also* Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, *supra* note 210, at 115, 125 (criticizing "the idea that the traits of subordinated groups, rather than the dynamics of subordination, are the normatively important thing to notice").

240. The text of each amendment expressly prohibits specific nonideal conditions—slavery, U.S. CONST. amend. XIII, selective citizenship, U.S. CONST. amend. XIV, § 1 (directly overruling the infamous *Dred Scott* decision), and the racialized denial of the franchise, U.S. CONST. amend. XV.

> transforms the Constitution . . . to try to implement this principle of equal rights for all Americans.[241]

By hallucinating an environment without entrenched racial and status hierarchies into an environment built upon them, the anticlassification standard fails to recognize (and, therefore, fails to remedy) the very conditions the Reconstruction Amendments were enacted to confront. That is why, in addition to being counterproductive, the anticlassification standard is not credible. Decisions reached by applying the anticlassification model compel the law to turn a blind eye to the enduring patterns of subordination that made civil rights interventions necessary in the first place.[242] By denying both the reality and the relevance of long-sustained campaigns of unequal treatment that have served as a consistent feature of the legal, political, social, and economic fabric of the United States for centuries, the anticlassification standard preserves and amplifies the structural inequality that the EPC was meant to abolish.[243]

Beyond its lack of credibility and its counterproductive character, the anticlassification standard is unworkable in the EPC context because it misunderstands equality as sameness. In a pluralistic society, equality is not uniformity; it is not the opposite of difference. Equality is the opportunity to develop and exercise basic capabilities within the same institutional and civic framework as others—to learn, work, and participate as peers with outcomes that vary as much as the people who produce them. While the anticlassification standard fixates on surface difference, it undermines the core function of the EPC, which is to destabilize "*systemic* difference."[244] Although systemic difference may function by attaching itself to the presentation of some surface (i.e., inconsequential but

241. Terry Gross, *'Second Founding' Examines How Reconstruction Remade the Constitution*, NPR (Sep. 17, 2019, at 13:23 ET), https://www.npr.org/2019/09/17/761551835/second-founding-examines-how-reconstruction-remade-the-constitution [https://perma.cc/Z4U8-HW6E].

242. *See* Lihi Yona & Maayan Sudai, *Beyond Classification and Subordination: A Case for Anti-Essentialism*, HARV. L. REV.: BLOG (June 8, 2025), https://harvardlawreview.org/blog/2025/06/beyond-classification-and-subordination-a-case-for-anti-essentialism/ [https://perma.cc/P632-9LW3] ("In this emerging landscape [dominated by the anticlassification commitment], the central question is no longer *who holds power*, but merely *whether identity was considered*. The result is a vision of equality that erases context, denies history, and treats all claims of discrimination as formally indistinguishable.").

243. *See* Abigail Nurse, Note, *Anti-Subordination in the Equal Protection Clause: A Case Study*, 89 N.Y.U. L. REV. 293, 300 (2014) "[A]nti-classification can only purport to take a neutral approach to the . . . [EPC] by ignoring race."); *id.* at 297 ("[T]he farce that anti-classification theories are correct. . . . permits advocates to avoid confronting, and thereby challenging, the real harms—oppression and subordination.").

244. ANNE PHILLIPS, UNCONDITIONAL EQUALS 17 (2021).

apparent) characteristic, the construction of systemic difference itself is the sorting mechanism that channels some people into durable patterns of subordination while channeling others into positions of domination. It is this entrenchment of a permanent subclass that the EPC is concerned with abolishing, and an anticlassification standard is of no use in that project. Given its significant flaws, an alternative standard of interpretation is required to achieve the anticaste objectives of the EPC.

2. The Antisubordination Standard

In EPC analysis, the currently embraced anticlassification standard is commonly positioned as a countertheory to the antisubordination standard. "Antisubordination analysis moves beyond formal equality to examine whether a law advances *substantive* equality by analyzing 'the concrete effects of government policy on the substantive condition of the disadvantaged.'"[245] "Courts making use of this theory would consider the tangible impact of government policy to determine whether true equality is being furthered, rather than simply concentrating on blatant, outright discrimination."[246] In other words, the antisubordination standard does not satisfy itself with the surface difference inquiry that resolves EPC controversies under the anticlassification standard. Instead, the antisubordination standard interrogates whether a law entrenches or dismantles group-based hierarchy—"reject[ing] policies, even if facially neutral, that perpetuate the historical subordination of groups, while embracing even facially differentiating policies that ameliorate subordination."[247] This focus on status hierarchies has made antisubordination attractive to those who embrace the EPC's anticaste function.

At first glance, antisubordination logic seems to support the constitutionality of programs such as affirmative action because of their ameliorative, hierarchy-disrupting intent—and some courts

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245. Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 320 (2009) (emphasis added) (quoting Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1454 (1991)).

246. Kyle P. Nodes, Note, *Equal Dignity and Unequal Protection: A Framework for Analyzing Disparate Impact Claims*, 68 DUKE L.J. ONLINE 149, 154 (2019).

247. Colker, *supra* note 238, at 1003; *cf.* Justin Driver, *The Strange Career of Antisubordination*, 91 U. CHI. L. REV. 651, 657–58 (2024) (explaining that the antisubordination approach has demonstrated some degree of resonance with scholars and jurists who *oppose* corrective measures under the EPC such as affirmative action, and that they have wielded it in ways that reinforce rather than dismantle hierarchical structures of inequality).

have deployed antisubordination logic to reach just such a result.[248] Yet, as Professor Justin Driver has observed, some scholars and jurists with hostile postures toward projects such as affirmative action have deployed the antisubordination standard to *reject* the constitutionality of race-based and race-conscious admissions policies on the basis that such policies convey "'stigma and caste,' and place[] 'a stamp of inferiority' on Black and brown students by suggesting they 'cannot make it on their individual merit.'"[249]

The fact that competing articulations of what produces stigma can produce such polar conclusions betrays a deeper problem with the antisubordination standard—namely that the antisubordination standard renders equality "overly prescriptive"[250] because it forces the law to tether its analysis to one articulation of the relevant injury. Professor Anne Phillips cautions against this particular understanding of equality, noting that a fixed conception of equality makes equal treatment available "only on condition of conforming to a prior norm."[251] In a pluralistic society, this can be an acute, yet underappreciated, threat to substantive equality because it demands conformity before it extends protection.

Because true equality must support plurality, it would be difficult, if not impossible (and, perhaps, of limited utility) to identify what "equal" looks like in the legal context. "[W]hat matters is not so much being able to delineate equality or justice as being able to identify *in*equality and *in*justice."[252] Antisubordination is not the tool best suited for that because it deprives some people of their agency to define their own injury even while purporting to pursue equality-promoting outcomes. The antidomination model, however, holds greater promise as a tool for dismantling enduring social hierarchies.

3. The Antidomination Standard

An emergent model in the EPC discourse is the antidomination standard. Under an antisubordination approach, "[t]he relevant inquiry is whether the categorization subordinates individuals in the group,"[253] but, under the antidomination approach, the relevant inquiry is whether power is being wielded in a way that can facilitate

248. *See* Nurse, *supra* note 243, at 307–14 (collecting cases).
249. Driver, *supra* note 247, at 657 (quoting DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting)).
250. PHILLIPS, *supra* note 244, at 92.
251. *Id.* at 93.
252. *Id.* at 17.
253. *See* Nurse, *supra* note 243, at 301.

domination.[254] Rather than centering an ex ante judgment about whether a policy "subordinates" a particular group, an antidomination standard directs courts to identify and interrogate loci of power that have the capacity to undermine an individual's freedom—including, but not limited to, freedom from subordination.[255] This shift matters because it moves EPC analysis from a narrow focus on formal classifications and preconceived formulations of harm to a more candid appraisal of how concentrated, entrenched power can hollow out constitutional guarantees even when the law appears neutral on its face.

B. Domination, Capabilities, and the Constitution

1. The Constitutional Implications of Domination

Freedom from the arbitrary control of others is a central tenet of republican government.[256] Yet this principle does not preclude all forms of interference, regulation, or control. Indeed, regulation of private prerogatives is generally perceived as inevitable, acceptable, and even necessary in a constitutional democracy. The critical distinction lies in whether such interference is nonarbitrary—that is, constrained by publicly known, reliably enforced rules that reflect equal status.[257]

Domination, by contrast, arises when power becomes fixed and asymmetric—when "the entrenchment of power, which occurs when power is concentrated in a single agent or institution," leaves some persons vulnerable to another's will.[258] Entrenched domination is antithetical to core constitutional commitments such as liberty, equality, and self-determination because it deprives some people of their power to function in society as self-governing equals. This power to deprive (or to control or influence) is illegitimate when the

254. *See* Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1484–85 (2008) ("Under the antidomination model, the principal role of the courts is to minimize domination and the appearance of domination in the processes through which democracy is designed.").

255. *See id.* at 1439 ("[T]he normative dimension of the antidomination model has argued that the pathologies that affect the democratic system are best described as instances of domination; that is, they have at their core an illegitimate exercise of public power. We can determine whether legislative action amounts to domination or the threat of domination by considering . . . the entrenchment of power, which occurs when power is concentrated in a single agent or institution . . . .").

256. *See* Kip M. Hustace, *Education, Antidomination, and the Republican Guarantee*, 30 WM. & MARY BILL RTS. J. 91, 91 (2021).

257. Dawood, *supra* note 254, at 1430 (describing "good laws" that are nonarbitrary as "general, promulgated, intelligible, and consistent").

258. *Id.* at 1439.

interference caused by the dominating agent is arbitrary, that is, "not subject to effective and reliable constraints that are common knowledge to all persons or groups concerned."[259] Importantly, domination does not require actual interference with another person's choices; it can exist "whether or not . . . [the dominating agent] in fact choose[s] to interfere."[260]

Too often, contemporary constitutional discourse takes the position that securing "freedom from" state interference resolves the question of what the Constitution requires.[261] On this prevailing view, as long as the state refrains from directly interfering with formally recognized fundamental rights, the *legal* requirements of constitutional liberty are satisfied.[262] Once those formal requirements are met, the view proceeds, harms that flow from domination which occur in the various planes where day-to-day life happens—the marketplace, the workplace, and social spaces—are no longer cognizable as constitutional injuries. Instead, these harms are purported to lie beyond the reach of constitutional governance with remedies limited to the political process and private ordering.

Unsurprisingly, a political order built atop entrenched inequalities is more likely to reproduce than to remedy such entrenched inequalities in the absence of affirmative, equalizing interventions,[263] which ultimately compounds, rather than disrupts, the asymmetrical power dynamics that facilitate constitutionally intolerable domination. When left unchecked and allowed to compound, "insuperable asymmetries" in power across various consequential domains coalesce to construct "a sort of counterlaw"[264]—an informal but patterned regime of norms, institutional practices, and discretionary decisions that hollow out public legal guarantees while appearing to comply with them.[265] The counterlaw is pharisaical in nature—boasting empty, technical compliance that masks inner

259. Hustace, *supra* note 256, at 116–17 (quoting FRANK LOVETT, A REPUBLIC OF LAW 115 (2016)).

260. Suttle, *supra* note 202, at 211.

261. Susan Bandes, a critic of this prevailing view, describes "the conventional wisdom [that] distinguishes between negative rights to be free from governmental interference and positive rights to have government do or provide various things" as having a "tenacious grip" on contemporary constitutional interpretation. Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2274, 2308 (1990).

262. In *Bowers v. DeVito*, Judge Richard Posner concluded: "The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services." 686 F.2d 616, 618 (7th Cir. 1982).

263. *See* discussion *supra* Part III (discussing capability cartels).

264. FOUCAULT, *supra* note 188, at 212.

265. *See id.* (describing panopticism's counterlaw as "operat[ing] . . . on the underside of the law" in a way that "supports, reinforces [and] multiplies the asymmetry of power and undermines the limits that are traced around the law").

corruption while neglecting the substantive demands of justice that the law is meant to serve.[266]

Counterlaw is a matter of constitutional concern because it constrains who can meaningfully use their formal rights. By equalizing the practical conditions under which people can exercise their rights, capability development counters counterlaw by promoting substantive liberty—bridging the gap between liberty on paper and liberty in practice so that the guarantees of liberty can be deployed in useful ways. For those who are subjected to the burdens of governance but denied its protection, capabilities provide a pathway to realizing the constitutional promise of equality.

Capability development is therefore a critical facet of analysis under the EPC because counterlaw is impervious to anemic articulations of negative liberty. Any meaningful challenge to domination must understand that liberty is more than a pronouncement; "[l]iberty is . . . a power—the capacity to act according to one's own reason and free choice."[267] Accordingly, any credible analysis under the EPC must recognize that constitutional injury can be caused not only by state interference with respect to the exercise of individual liberty, but also when legal maneuvers and political arrangements entrench insuperable asymmetries that force some persons under the arbitrary and functionally inescapable power of others.

When political, legal, and economic structures suppress people's opportunities to develop basic capabilities, they are not neutral background conditions; they are liberty-diminishing, domination-enabling instruments that undermine and offend constitutional guarantees that should be rigorously protected. True liberty requires the development of basic capabilities that bring the productive exercise of guaranteed rights within reach. Accordingly, a capabilities-informed, nondomination framework is a necessary constitutional constraint—one that limits what political majorities may do and requires institutions—centrally, courts—to secure real, capability-grounded freedom for holders of constitutional rights.

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266. *See Matthew* 23:23–26 (New International Version) ("Woe to you, teachers of the law and Pharisees, you hypocrites! You give a tenth of your spices—mint, dill and cumin. But you have neglected the more important matters of the law—justice, mercy and faithfulness. You should have practiced the latter, without neglecting the former. You blind guides! You strain out a gnat but swallow a camel. Woe to you, teachers of the law and Pharisees, you hypocrites! You clean the outside of the cup and dish, but inside they are full of greed and self-indulgence. Blind Pharisee! First clean the inside of the cup and dish, and then the outside also will be clean.").

267. Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 527 (1991).

2. Antidomination as an Analytical Instrument

The judiciary has a duty to ensure democracy's promise is meaningful to those who find themselves outside of the scope of concern for the popular majority, particularly when promoting the interests of marginalized groups is not "electorally rewarding"[268] or when the aggrieved lack meaningful access to the political system.[269] While some might reflexively oppose such a proposal as an antidemocratic judicial intervention that thwarts the will of people (as articulated through their elected representatives),[270] such criticisms are misguided because they situate courts as external, rather than integral, to the democratic process. Courts are charged with ensuring that legislative majorities do not violate civil liberties or undermine the democratic process itself. A central purpose of the Fourteenth Amendment was to constitutionalize protection for fundamental rights and to require the states to protect those rights for all persons, a purpose that necessarily implicates courts in monitoring and addressing domination that majority politics predictably overlooks.[271]

Yet courts have too often abdicated this responsibility, frequently insisting that structural injustices are for the legislature to handle[272] and, even when engaging, importing a cost-benefit calculus better suited to market regulation than to rights adjudication.[273] The misplaced reliance on law and economics frameworks in rights-

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268. STEVEN LEVITSKY & DANIEL ZIBLATT, TYRANNY OF THE MINORITY: WHY AMERICAN DEMOCRACY REACHED THE BREAKING POINT 29 (2023).

269. *See* Austin Sarat, *Going to Court: Access, Autonomy, and the Contradictions of Liberal Legality*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, *supra* note 210, at 97, 97–98 ("An independent judiciary, responsive to constitutional norms and solicitous of minority rights, stands at the symbolic center of those legal systems committed to liberal values. . . . At the center of liberal legality is the ideal of legal autonomy, of law above and outside politics, but also of law's openness and availability to socially and politically disadvantaged groups, to those seeking redress for injuries inflicted, protection from future harm, or vindication of their membership in the community. . . . Courts . . . are in a critical position to vindicate liberal legality's promise of rights. They give meaning to the claim that law provides a terrain of contestation on which the powerless can hold the powerful to account by insisting that their legitimating rhetoric be turned into action.").

270. *See generally* Jeremy Waldron, Essay, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) (criticizing judicial review as "democratically illegitimate").

271. *See* Steven Levitsky & Daniel Ziblatt, *When Should the Majority Rule?*, 36 J. DEMOCRACY 5, 10 (2025) (stating that while "[l]egislative majorities should be able to pass regular laws," the judiciary has a role to play in ensuring that "such laws do not violate civil liberties or undermine the democratic process").

272. *See* Nice, *supra* note 178, at 632 ("Poor people are trapped: the courts reflexively deny their claims that the political branches have infringed upon their equality or liberty, and poor people otherwise lack the economic or political leverage to persuade the political branches to end such infringements.").

273. *See id.* at 638–44 (criticizing judicial "deference to governmental action designed primarily to reduce the costs of protecting those most economically vulnerable").

based cases has allowed the dogma of efficiency to breach its banks, legitimizing the status quo by treating the price of justice as too high whenever it would significantly burden those who have benefited from unjust arrangements. Justice, however, must not be delimited by what the unjustly enriched are willing to pay for it because their support will inevitably be limited to that which "pose[s] no real threat to their affluence."[274] Courts must resist analytical frameworks that turn substantive constitutional guarantees into negotiable variables in a cost-benefit analysis.

Under an antidomination model, "[t]he role of courts . . . is to ensure that the procedures by which the ground rules of democracy are determined, and the rules themselves, are not distorted by domination"[275] or the threat of domination. This role requires more than "lofty formalism" that "stand[s] at a considerable distance from the facts of the case and the history of struggle that they frequently reveal."[276] Instead, under an antidomination model, courts are called upon to exercise what Nussbaum describes as "perception" or "experienced imagination" in their decisionmaking—an informed, historically grounded understanding of "how people are really placed" and identification of the "obstacles [that] stand between them and the substantive, not merely nominal, exercise of their powers."[277] By bringing this perceptive, power-attentive lens to EPC analysis, courts can begin to identify and dismantle insuperable asymmetries that entrench domination—giving real force to the liberatory mandate of the Reconstruction Amendments.

To see what this kind of adjudication looks like in practice, we can turn to *Plyler v. Doe*, where the Court briefly illuminated the path that an antidomination, capabilities-attentive EPC analysis might take. Rather than proceed down the path of detached "lofty formalism,"[278] the Court evaluated the Plaintiffs' EPC claims through a nondomination analytical lens—applying a perceptive wisdom that rightly recognized the constitutional significance of Texas's attempt to deny undocumented schoolchildren access to education.

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274. MATTHEW DESMOND, POVERTY, BY AMERICA 116 (2023).

275. Dawood, *supra* note 254, at 1416.

276. Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 26 (2007) [hereinafter Nussbaum, *Constitutions and Capabilities*].

277. *Id.* at 15.

278. *Id.* at 26.

V. *PLYLER* IN FOCUS

For some, the idea of a "gap between justice and law"[279] is inharmonious with the contiguous relationship that is typically imagined to exist between the two concepts. Yet, courts often recognize that applying the law produces something short of justice. Indeed, many judicial opinions wax poetic about justice in the dicta while committing to something short of justice in the holding that will live on as the law.[280]

Part of the reason that *Plyler* has been widely characterized as morally satisfying notwithstanding its doctrinal disorderliness may be due in part to the fact that the Court's ultimate conclusion bridges the uncomfortable gap between law and justice. In *Plyler*, the Court dutifully engaged in the equal protection analysis that the law required—first, determining that children without a documented legal status are "persons" entitled to Fourteenth Amendment protection; second, determining that persons without a documented legal status are not a suspect class for purposes of the relevant equal protection analysis; and third, announcing that education is not a constitutionally protected fundamental right.[281] In light of these conclusions, the law directed the Court to apply the highly deferential and minimally probative rational basis scrutiny to the Plaintiffs' claims. As discussed above in Section I.B.2.b, this would typically result in the applicable law being sustained against a constitutional challenge because the state's burden under rational basis review is exceedingly easy to satisfy.

But rather than allow the letter of the law to undermine its spirit, the Court exercised perception in the pursuit of justice—declining to divorce legal reasoning "from questions of social fact and ethical value."[282] The majority opinion in *Plyler* brought principles of self-

279. BARADARAN, *supra* note 211, at xviii.

280. *See, e.g.*, S.A. Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30 (1973) ("[Education] is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (dictum))). But ultimately, the Court found no fundamental right to adequate education and no constitutionally cognizable classification—therefore endorsing Texas's unequal school funding system. *See id.* at 18.

281. *See supra* Section I.C.1.

282. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 814 (1935) ("The divorce of legal reasoning from questions of social fact and ethical value is not a product of crusty legal fictions inherited from darker ages. Even in the most modern realms of legal development one finds the thought of courts and of legal scholars trapezing around in cycles and epicycles without coming to rest on the floor of verifiable fact.").

determination, competition, fairness, and equality out of the shadow of dicta and into the sunlight of constitutional protection. In trying to navigate the gap between law and justice, the Court seemingly sacrificed doctrinal coherence to bring these two concepts into closer connection. Viewing *Plyler* through a capabilities-informed nondomination framework, however, both (1) renders the opinion doctrinally coherent even when rational basis is the appropriate level of scrutiny and (2) suggests more general tools for resisting domination in education cases going forward.

A. Capabilities

A first step in discerning a more coherent, and, therefore, potentially durable, rationale for the Court's decision in *Plyler* is to recognize the ways in which the majority opinion centers capability development. The *Plyler* Court framed the importance of education in terms of human capabilities.[283] In light of education's "special place in equal protection analysis,"[284] the majority and concurring opinions express concerns about Section 21.031 that track the formulations of "fertile competencies" and "corrosive disadvantages" embraced by Nussbaum. [285]

Education is a fertile functioning of the highest order in that it "play[s] a profound role in shaping human abilities."[286] The Court expressly recognized the necessity of education, noting that "education provides the basic tools by which individuals might lead economically productive lives"[287] and facilitates "advancement on the basis of individual merit."[288] Citing approvingly to *Brown*, the Court noted:

> Today, education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[289]

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283. *See* NUSSBAUM, CREATING CAPABILITIES, *supra* note 167, at 32–34 (discussing central capabilities).
284. Plyler v. Doe, 457 U.S. 202, 233 (1982) (Blackmun, J., concurring).
285. *See* NUSSBAUM, CREATING CAPABILITIES, *supra* note 167, at 44.
286. *Id.* at 134.
287. *Plyler*, 457 U.S. at 221.
288. *Id.* at 222.
289. *Id.* at 222–23 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

With respect to corrosive disadvantage, the Court also recognized the concentric adversities attendant to being denied an education. The Court characterized the challenged legislation as a penalty[290] and worried about the "lasting impact of its deprivation on the life of the child."[291] Speaking squarely to the concept of corrosive disadvantages, the Court noted that "by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority."[292]

The Court's analysis demonstrated the type of perceptive reasoning urged by Nussbaum. The Court recognized Plaintiffs' particular vulnerabilities and refused to take a narrow view of the broader contextual concerns—pointing not just to the impact of the deprivation on Plaintiffs in the short term, but also Plaintiffs' long-term prospects such as "employment options and political power."[293] Although the Court did not use the term "capabilities," its reasoning expressly recognized the importance of safeguarding opportunities for human development. Through its demonstrated commitment to thoroughly considering all the harms that Section 21.031 visited on Plaintiffs, the Court implicitly recognized education as a central capability.

B. Antidomination

The asymmetric power relationships at play in *Plyler* played a central role in the majority opinion. The Court repeatedly referenced concepts such as "underclass"[294] and "permanent caste,"[295] which reflects the Court's understanding that being deprived of an education was not an isolated injury, but more likely a prelude to a lifetime of subjugating harms. The Court expressed a particularized concern for the powerlessness that Plaintiffs faced because they were children. This concern, however, was not limited to Plaintiffs' status as minors. Indeed, the Court identified new frontiers of domination that could surface after Plaintiffs reached adulthood. Specifically, the Court pointed out that a lack of access to education left Plaintiffs vulnerable to exploitation as "cheap labor" in the

290. *See id.* at 220; *see also id.* at 238–39 (Powell, J., concurring) ("These children . . . have been singled out for a lifelong penalty and stigma.").
291. *Id.* at 221 (majority opinion).
292. *Id.* at 222.
293. NUSSBAUM, CREATING CAPABILITIES, *supra* note 167, at 153.
294. *Plyler*, 457 U.S. at 219.
295. *Id.* at 218–19.

future,[296] reflecting a broader concern for the destructive impacts of domination, even putting aside the special focus on children.

Beyond these temporal harms, *Plyler* also gestured toward the structural mechanisms of domination that might serve to keep Plaintiffs confined in subordinate roles. Notably, Justice Powell's concurrence observed that "entry [to the United States] remains inviting" and "the power to deport is exercised infrequently."[297] By contrasting (x) the ease of entry and laxity of enforcement with (y) the statute effectively "deny[ing] . . . [Plaintiffs] the ability to live within the structure of our civic institutions,"[298] the concurrence suggests that Section 21.031 actually operated as a trap for the Plaintiff Class. The imagery of a trap—a device or enclosure designed to catch and retain[299]—brings the Court's embedded concerns about domination into sharp focus.

By looking at history and contemporary context and by considering the gravity of the harm faced by Plaintiffs, the Court embraced an antidomination standard that honored the commitment to human equality that the Fourteenth Amendment was enacted to promote. The Court spoke directly to this, stating: "[W]e would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard."[300] Ultimately, in overturning Section 21.031, the *Plyler* majority declined to engage in lofty formalism by refusing to permit "systemic asymmetries" in power which undermine "people's capacity to act and their capacity to participate in determining the rules that govern them."[301]

While the Court repeatedly highlighted its concern for the injury that Section 21.031 worked on Plaintiffs, the Court also spent a substantial portion of the majority opinion in *Plyler* discussing the injury that Section 21.031 would visit on the state and the nation. The Court's concern for the national well-being speaks to one of the indicators of domination—the failure of the dominating agent to track "the welfare and world-view of the public."[302] By its consistent attention to the harm that Section 21.031 would visit on the public, the Court emphasized how suppressing capability development

296. *Id.* In its discussion of subclasses and castes, the Court observed that some of the undocumented children will be "encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available" to others. *Id.* at 219.

297. *Id.* at 240–41 (Powell, J., concurring).

298. *Id.* at 223 (majority opinion).

299. *Trap*, OXFORD ENGLISH LANGUAGES DICTIONARY (2d ed. 1989).

300. *Plyler*, 457 U.S. at 216.

301. Dawood, *supra* note 254, at 1431.

302. *Id.* at 1430 (quoting PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 56 (1997)).

with respect to education could trigger broader concerns about domination because it did not track the interest of the public in promoting an educated, informed, and engaged citizenry[303] (but may instead have reflected the motives of self-interested political actors who sought to build upon existing opportunity monopolies or ensure their incumbency).[304]

C. Plyler *and Beyond*

Plyler is on fragile footing in fraught times. In light of *Plyler*'s doctrinal weakness and the strong likelihood of a challenge to *Plyler* reaching a hostile Supreme Court in the coming years,[305] an alternative rationale for the outcome is worth developing—and there are some good options.

1. Establishing a Fundamental Right to Education

In 2016, a federal lawsuit was filed on behalf of Detroit school children arguing that the conditions in their school district denied them the opportunity to attain literacy[306]—raising again the question of whether education (here, specifically, the level of education

303. *See supra* notes 117–121 and accompanying text. Notwithstanding Plaintiffs' undocumented status, Justice Powell noted that Plaintiffs may very well be "future citizens and residents." *Plyler*, 457 U.S. at 239 (Powell, J., concurring).

304. *See* Dawood, *supra* note 254, at 1440 ("There are powerful incentives for political elites to manipulate the rules of the game in order to forward their personal or partisan ambitions at the expense of the public interest."). Regarding the "public interest," one of the most striking features of the historical record concerning Section 21.031 is its paucity. According to the late Michael Olivas, a law professor and legal scholar, "[t]he legislature held no hearings on the matter, and no published record explains the origin of . . . [the] revision to the school code." OLIVAS, *supra* note 1, at 9. Given the vigor and volume that tends to characterize the contemporary discourse on issues such as immigration, this might be hard to imagine. But by all accounts, the revision to Section 21.031 that formed the basis of the *Plyler* plaintiffs' constitutional claim rode in on a whine, not a war cry. *See also* Heyman, *supra* note 267, at 528 (defining civil liberty as "natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public" (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *123)).

305. According to Cassandra Zimmer, Immigration Policy Analyst at the Niskanen Center:

> For the first time in over four decades, the constitutional protections guaranteeing undocumented immigrant children the right to attend public school are facing a coordinated and credible threat. Since early 2025, lawmakers in six states have introduced legislation aimed at restricting or denying public education to undocumented immigrant children . . . . These efforts . . . are part of a broader strategy . . . to provoke a judicial reconsideration of *Plyler v. Doe* . . . .

Cassandra Zimmer-Wong, *The Price of Denial: State Lawmakers' Efforts to Undermine* Plyler v. Doe *and the Fiscal Fallacy of Exclusion*, NISKANEN CTR. (June 18, 2025), https://www.niskanencenter.org/the-price-of-denial-state-lawmakers-efforts-to-undermine-plyler-v-doe-and-the-fiscal-fallacy-of-exclusion/ [https://perma.cc/B7L2-BFDY].

306. Gary B. v. Whitmer, 957 F.3d 616, 620–21 (6th Cir. 2020), *vacated en banc*, 958 F.3d 1216 (6th Cir.).

needed to develop literacy) is a fundamental right protected by the U.S. Constitution. In 2020, a three-judge panel of the United States Court of Appeals for the Sixth Circuit recognized, for the first time, a federal right to literacy and the level of education needed to attain literacy.[307] This potentially groundbreaking precedent was ultimately nullified on procedural grounds after Michigan Governor Gretchen Whitmer settled with the *Gary B.* plaintiffs[308]—a resolution that resulted in vacatur of the Sixth Circuit's decision and eliminated its precedential effect; however, the Sixth Circuit's recognition of a "right to literacy" is an indication that lower courts are willing to advance claims of a fundamental right to education, which the Supreme Court may ultimately have to address.

Outside of the courts, much legal scholarship is in alignment with Justice Marshall's position in *Plyler*'s concurrence that education is a fundamental right which, if recognized, could safeguard the outcome in *Plyler*.[309] In *The Public Right to Education*, Professor Matthew Patrick Shaw advances a compelling proposal for establishing a federal right to education by identifying a regulatory property interest grounded in the right to education guaranteed by each U.S. state's constitution.[310] Professor Shaw then situates a federal right to that state-derived regulatory property in the DPC's prohibition

307. *Id.* at 662.

308. Before the case went up on appeal, however, Michigan Governor Gretchen Whitmer sought to settle the case with the plaintiffs. Plaintiffs eventually accepted a settlement pursuant to which, among other things, Governor Whitmer authorized an immediate payment of $2.7 million to the plaintiffs' district for its literacy programs and promised to seek another $94.4 million in education funds from the state legislature in the upcoming term. *See* Press Release, State of Michigan Office of the Governor, Governor Whitmer and Plaintiffs Announce Settlement in Landmark Gary B. Literacy Case (May 14, 2020), https://www.michigan.gov/en/whitmer/news/press-releases/2020/05/14/governor-whitmer-and-plaintiffs-announce-settlement-in-landmark-gary-b--literacy-case [https://perma.cc/NGE5-DA96]. After the settlement, the Sixth Circuit granted sua sponte en banc review of the decision. Gary B. v. Whitmer, 958 F.3d 1216 (6th Cir. 2020) (en banc). Granting en banc review resulted in the prior panel decision being vacated per the applicable procedural rule. *Id.* The plaintiffs moved to dismiss the case following the settlement, and the court granted the dismissal on the grounds that the settlement rendered the case moot. Alyssa Evans, *The Other Branch: Outcomes of* Gary B. v. Snyder, EDUC. COMM'N OF THE STATES (July 15, 2020), https://www.ecs.org/the-other-branch-outcomes-of-gary-b-v-snyder/ [https://perma.cc/DH97-2SXD]. The fact that the court took the case up for review nullified the precedent establishing a constitutionally protected "right to literacy."

309. Plyler v. Doe, 457 U.S. 202, 230–31 (1982) (Marshall, J., concurring); *see, e.g.*, Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1063 (2019); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334 (2006). Also, note that the due process clause, which hosts the vehicle of substantive due process, applies to "persons" and so would have extended to the *Plyler* Plaintiffs notwithstanding their undocumented status. U.S. CONST. amend. XIV, § 1.

310. *See* Shaw, *supra* note 144, at 1180–92; DALLMAN & NATH, *supra* note 204, at 1 ("The U.S. Constitution is silent on the subject of education, but every state constitution includes language that mandates the establishment of a public education system.").

against property deprivation.[311] Impressively, because Shaw grounds his proposal in the DPC's protection of property instead of liberty, he avoids the central difficulty of most unenumerated-rights projects—molding "liberty" into the image of the substantive right one seeks to establish as fundamental. Shaw's proposal also avoids running afoul of the letter of the law in *San Antonio Independent School District v. Rodriguez* (which held there is no federal right to education) because in *Rodriguez*, the Court analyzed education as a liberty interest, not a property interest.[312] By relying on the express fundamental right to education guaranteed by *state* constitutions and the substantive protection of property in the *Federal* Constitution, Shaw advances a credible and compelling avenue by which *Plyler* could potentially be preserved.[313]

In the antidomination space, Professor Kip Hustace advances the position that "[a] justiciable, nondomination-centered republican guarantee would have been an apt device with which to strike down [Section 21.031]"[314] and argues that public education is constitutionally fundamental because it equips people with the institutional tools to resist domination.[315] For Professor Hustace, freedom from domination represents a "universal, materialist freedom through law" that is at the "core of republicanism."[316] This guarantee, Hustace argues, is "republicanism's organizing principle."[317] Eschewing a rights-focused framework, Hustace situates the authority for this antidomination approach in the U.S. Constitution's Guarantee Clause (rather than any particular rights-based provision such as the EPC).[318] Although Hustace's arguments are persuasive, preserving *Plyler*'s outcome via the Guarantee Clause would require the unsettling of long-established precedent concerning the

311. *See* Shaw, *supra* note 144, at 1209–20. No state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

312. *See* S.A. Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 2 (1973) (noting that the Texas school-financing system does not "impermissibly interfere with the exercise of a 'fundamental' right or liberty").

313. A potentially important limitation to Shaw's approach is that by locating the genesis of the public right in state constitutions, the federal right would be limited to the scope of the state right for each applicable state. While a comprehensive fifty-state survey of state constitutional treatment of persons without a documented status is beyond the scope of this Article, it is important to note that the full scope of protection afforded by *Plyler* can only be achieved under Shaw's approach if and to the extent each state's education guarantee extends to children without a documented legal status.

314. Hustace, *supra* note 256, at 149.

315. *See id.* at 129–30.

316. *Id.* at 127.

317. *Id.*

318. *See id.* at 150; U.S. CONST. art. IV, § 4.

justiciability of the Guarantee Clause[319]—rendering this avenue of preservation unlikely.

Another alternative to preserve *Plyler* is the recognition of a fundamental right to capability development for central capabilities. Nussbaum herself insists that "[l]iberal states should regard their obligation to secure the minimal material preconditions of the basic human capabilities to be a basic constitutional duty."[320] As already acknowledged, given the Court's demonstrated reluctance to recognize new fundamental rights, this approach is unlikely to come to fruition. Additionally, jurisprudential inquiry has largely surrendered itself to accepting that rights are negative.[321] It is rendered even more unlikely by the fact that constitutional protection for capabilities has not made its way to the mainstream discourse in legal scholarship.

If recognized, however, a fundamental right to central capability development would raise the level of scrutiny in cases where legislation is alleged to impede the development of central capabilities (however that category may be defined), thereby requiring courts to perform a more searching examination of a state's proffered objective and proposed rationale. The requirement of this more searching examination would make it harder for states to justify legislation that impedes the development of central capabilities. In this context, the antidomination standard might be marshalled as support for discerning a fundamental right to capability development.[322]

Each of these proposals is compelling and develops a doctrinally solid alternative to *Plyler*'s ultimate outcome; however, they each require a structural shift in the Court's approach to the EPC. In light of the Court's longstanding resistance to such shifts, together with its current composition, these proposals are, ultimately, unlikely vehicles for preserving *Plyler*. The nondomination analytical framework, however, may hold more promise because it effects a more moderate, but still meaningful, shift from within the existing analytical structure of the EPC.

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319. The Supreme Court "has consistently held that a challenge to state action based on the Guaranty Clause presents no justiciable question." Baker v. Carr, 369 U.S. 186, 224 (1962).

320. Robin West, *Rights, Capabilities, and the Good Society*, 69 FORDHAM L. REV. 1901, 1903 (2001) (citing NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 175, at 74).

321. *See, e.g.*, Heyman, *supra* note 267, at 508–12.

322. *See* Hustace, *supra* note 256, at 112 (supporting the view that capability development advances a historically grounded freedom from domination).

2. Strengthening Rational Basis Review

If the Court is unwilling to recognize new fundamental rights or revive the Guarantee Clause, a more modest but powerful alternative is to make rational basis review genuinely nonarbitrary by incorporating a nondomination inquiry into the "importance" and "fit" prongs. By marshalling the nondomination standard in this way, the approach has the potential to generate equality-promoting effects in the education context and beyond.

As discussed in Section I.B., when a law is challenged under the EPC, a court will consider both (x) the importance of the objective of the challenged legislation and (y) how finely-tuned the challenged legislation is to accomplishing the stated objective.[323] When rational basis is the standard of review, the law only has to address a "legitimate" state interest (importance) and must merely be "rationally related" to achieving that interest (tuning).[324] This two prong importance/tuning test is easy to meet because states can accomplish compliance through the simple tactic of enacting legislation which, facially, avoids intruding upon a very narrowly drawn class of fundamental rights and uses only nonsuspect classification language.[325] An antidomination standard in EPC adjudication can directly confront this obstructive maneuver by requiring a more searching inquiry into the motives of laws that have the effect of entrenching arbitrary power and, in doing so, extend more meaningful, substantive protections to groups who have historically been denied such protections because of the Court's commitment to perfunctory treatment of claims entitled to only rational basis scrutiny.

Recall from Section IV.B that domination rises to the level of constitutional concern when it is characterized by an *illegitimate* exercise of power over another. Illegitimacy is measured by the arbitrariness of the exercise.[326] An action is arbitrary when the interfering agent is not "forced to track the interests and ideas of the person suffering the interference"[327] and this holds "whether or not . . . [the

323. *See* discussion *supra* Section I.B.

324. CHEMERINSKY, *supra* note 22, at 734.

325. *See* Jefferson v. Hackney, 406 U.S. 535, 575 (1972) (Marshall, J., dissenting) ("The record contains numerous statements by state officials to the effect that AFDC [Aid to Families With Dependent Children] is funded at a lower level than the other programs because it is not a politically popular program. There is also evidence of a stigma that seemingly attaches to AFDC recipients and no others. . . . Yet, both the District Court and this Court have little difficulty in concluding that the fact that AFDC is politically unpopular and the fact that AFDC recipients are disfavored by the State and its citizens, have nothing whatsoever to do with the racial makeup of the program.").

326. Dawood, *supra* note 254, at 1429.

327. *Id.* (quoting PETTIT, *supra* note 302, at 55).

interfering agent] in fact choose[s] to interfere."[328] In equal protection doctrine, laws that are "arbitrary and irrational" fail rational basis review because they are not *rationally* related to a legitimate state interest.[329] On this view, a nondomination inquiry does not add a new requirement to rational basis; it makes credible the existing one by giving content to what counts as "arbitrary" in the rational-relation test.

In the classifications context (where state legislatures most blatantly thwart the EPCs requirement of equal treatment through pretextual formulations that achieve technical compliance), the EPC has been interpreted to prevent arbitrary or invidious discrimination.[330] By conducting the EPC analysis with a capabilities-informed antidomination standard in mind, courts could justify striking down pretextually drawn legislation that ultimately facilitates the domination of groups or individuals by finding such legislation arbitrary and therefore irrational—failing the second prong of the rational basis importance/tuning test.

Returning to *Plyler*, while the Court's opinion had all the elements of a capabilities-informed nondomination standard, the Court did not explicitly adopt that approach. If it had, the Court could have held Section 21.031 unconstitutional, even applying a rational basis standard, based on Section 21.031's failure to satisfy the tuning prong of the rational basis scrutiny test.

The argument might proceed, schematically, as follows: (i) the method Texas chose to accomplish its presumably legitimate interest in "cost savings" forecloses a path of critical capability development for Plaintiffs—namely, an access to education;[331] (ii) access to education is a "fertile competency" when present and a "corrosive disadvantage" when absent, so blocking this path to capability development leaves Plaintiffs vulnerable to domination;[332] (iii) we can

328. Suttle, *supra* note 202, at 211.

329. *See* Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 463 (1988) (noting that, in the absence of a fundamental right or suspect classification, plaintiffs "failed to . . . demonstrat[e] that the challenged statute is both arbitrary and irrational" as was needed to establish the challenged statute did not meet rational basis scrutiny).

330. *See* CHEMERINSKY, *supra* note 22, at 733.

331. *See* Plyler v. Doe, 457 U.S. 202, 218–19 (1982) (expressing concern that the challenged legislation would create an "underclass" and a "permanent caste"). The Court also worried about the "lasting impact" that being deprived of an education would have "on the life of the child," going on to note that "education provides the basic tools by which individuals might lead economically productive lives" and "advance[] on the basis of individual merit." *Id.* at 221, 222.

332. *See id.* at 222 (expressing concern that by "depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority"); *see also id.* at 218–19 (expressing concern about

satisfy ourselves that this is an instance of domination, rather than mere interference, because foreclosing this pathway to capability development for Plaintiffs tracks neither the interest of Plaintiffs nor the interests of the public;[333] (iv) when an action "is not subject to effective and reliable constraints that are common knowledge to all persons or groups concerned," that action is arbitrary;[334] (v) even though rational basis, which is "the most relaxed and tolerant form of judicial scrutiny,"[335] is the applicable standard given the absence of both (x) a recognized fundamental right and (y) a suspect classification, legislation will not be upheld if it is unreasonable or arbitrary;[336] accordingly, (vi) because Section 21.031 is an arbitrary exercise of state power, it is not rationally related to achieving the legitimate interest the state claims and cannot withstand Plaintiffs' constitutional challenge.

On this logic, the Court would have had no need to thread the elements of heightened scrutiny into its opinion, thereby clouding the analysis. Instead, the Court could have (without vacillating between elements of rational basis and intermediate scrutiny) held Section 21.031 unconstitutional because it constituted an arbitrary and, therefore, irrational exercise of the state's power. This provides us with one additional avenue to fortify *Plyler* against challenges that may be imminent.

As discussed throughout this Article, a nondomination standard informed by a commitment to safeguarding capability development can bring doctrinal coherence to *Plyler*'s outcome. Also worth recognizing, however, is that the exceedingly low threshold that has characterized rational basis review has essentially deconstitutionalized many claims of poor and marginalized people for whom, due to their limited political influence, the Court is their only recourse.[337] This is not just an affront to basic equality: it is incompatible with the basic philosophical premise of constitutional government. Applying a capabilities-informed nondomination

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Plaintiffs' vulnerability to being exploited in the future, which brings the Court's embedded concerns about domination to the fore).

333. *See id.* at 230 (recognizing Section 21.031's potential to add "to the problems and costs of unemployment, welfare and crime" and concluding that whatever savings Texas aims to achieve by the statute's enactment are "wholly insubstantial in light of the costs involved to these children, the State, and the Nation"); *supra* note 118.

334. Hustace, *supra* note 256, at 116–17 (quoting LOVETT, *supra* note 259, at 115).

335. City of Dall. v. Stanglin, 490 U.S. 19, 26 (1989).

336. Reed v. Reed, 404 U.S. 71, 76 (1971) ("A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . .'" (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920))).

337. *See* Nice, *supra* note 178, at 632.

standard in EPC analysis can give members of those groups a tool to more effectively challenge unjust treatment by requiring the courts to engage in a more substantive analysis when rational basis scrutiny is the applicable standard.

CONCLUSION

"[T]oday's world contains inequalities in basic life chances that seem unconscionable from the standpoint of justice."[338] *Plyler*'s legacy lies in its refusal to endorse a law *because* that law was unconscionable and unjust. Although the Court did not embrace the language of "capabilities" and "nondomination," we can. Doing so helps us move beyond procedural formalism and market-first logic toward a more functional, substantive conception of justice.

Such a shift demands vigilance against judicial tendencies toward abstract reasoning divorced from historical and social realities, and a commitment to addressing systemic domination in all its forms by identifying and dismantling the structural barriers to realizing a more equal society. As opportunity hoarding persists through legal, political, and economic practices, courts must reorient their analysis to safeguard central capabilities as a bulwark against entrenched inequality and a weapon in the fight to resist domination. If we do that, *Plyler*'s promise may be fully realized—not merely as a singular case of educational access but as a beacon for a transformative constitutional praxis that affirms the dignity and inclusion of all. As the nature of coercive power evolves, so too must the way we wield our constitutional tools to fight it. *Plyler v. Doe* serves as a point of departure for sketching the contours of what the first step of that evolution might look like.

The Court's current approach to EPC controversies is misguided and destructive to the Fourteenth Amendment's core functions. By denying the oppressive nature of existing hierarchy, the Court gives credence to the idea that the inequality experienced by members of marginalized groups, and the powerlessness that flows from that inequality, are tolerable, and even appropriate, consequences informed by individual choice. Rather than continuing to counsel those who have been served a steady diet of legal, social, economic, and political hazards to accept the results of the purportedly merit-based system grounded in farcical pronouncements of formal equality, the nondomination standard invites jurists to apply a perceptive wisdom when evaluating claims under the EPC, characterized

338. NUSSBAUM, CREATING CAPABILITIES, *supra* note 167, at 115.

by a commitment to seeing "how people are really placed" and identifying the "obstacles [that] stand between them and the substantive, not merely nominal, exercise of their powers."[339]

339. Nussbaum, *Constitutions and Capabilities*, *supra* note 276, at 15.

Spoliation of Electronically Stored Information: A Suggested Approach for Evaluating and Curing Prejudice

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Employee sues Employer in a United States District Court alleging her year-end bonus was significantly lower than comparably performing male employees. Employer denies the allegation, contending that decisions regarding bonuses were based on merit and unaffected by sex. The parties make their initial disclosures and exchange discovery requests. Following several months of haggling about email and text messages on employer-provided devices, Employer acknowledges that all potentially relevant items were inadvertently destroyed pursuant to its document retention policy. Employer explains the policy was not modified following receipt of a letter from Employee's attorney stating that litigation was forthcoming and asking Employer to preserve all bonus-related hard copy documents and electronically stored information (ESI).[1]

After confirming the email and text messages are not available from other sources, Employee asks the district court to impose spoliation sanctions pursuant to Rule 37(e)(1) of the Federal Rules of Civil Procedure[2] because her ability to prevail has been compromised. In particular, she asks the court to impose two sanctions—first, the denial of any dispositive motion based on a claimed gap in her evidence on the issue of pretext; and second, the opportunity to present evidence at trial regarding the loss and then argue during closing that the jury can infer pretext based on all the evidence,

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1. The term "electronically stored information" refers to "information that is stored electronically, regardless of the media or whether it is in the original format in which it was created, as opposed to stored in hard copy (i.e., on paper)." *The Sedona Conference Glossary: eDiscovery & Digital Information Management, Fifth Edition*, 21 SEDONA CONF. J. 263, 303 (2020). The term is defined "expansive[ly]" for purposes of the Federal Rules of Civil Procedure to ensure it is "broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments." FED. R. CIV. P. 34(a) advisory committee's note to 2006 amendment.

2. Rule 37(e) establishes the standard for sanctions, and delimits the range of possible sanctions, flowing from the loss or destruction of ESI. Rule 37(e) provides in full:

> (e) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.

FED. R. CIV. P. 37(e). The rule "creates a two-tiered sanctions regime—with lesser sanctions under Rule 37(e)(1) and more severe sanctions under Rule 37(e)(2)." Skanska USA Civ. Se. Inc. v. Bagelheads, Inc., 75 F.4th 1290, 1311 (11th Cir. 2023). The first tier focuses on the "*effect*" of a violation (prejudice to another party), while the second tier focuses on the "*cause*" of the violation (intent to deprive another party of access to evidence). *Id.*

including the evidence regarding the loss.[3] Employee explains these sanctions are justified because the email and text messages would reflect the individual decision maker's unvarnished perspectives, and would be the best source of evidence supporting pretext.[4] In response, Employer admits its mistake but argues that Employee's contention about the evidentiary value of the lost email and text messages is speculative and that any perceived prejudice can be cured by taking the depositions of the individual decision makers and asking them about the decision making process. Employer also argues that Employee's proposed relief would deprive it of the ability to bring the case to an early end, and, worse, result in a "sideshow" at trial that would confuse the jury and invite rank speculation during deliberations.

The judge conducts an evidentiary hearing and, after listening to all the witnesses, finds that Employer had a duty to preserve the email and text messages; that Employer breached this duty when it failed to modify its document retention policy following receipt of the preservation letter from Employee's attorney; that the email and text messages do not exist in other locations or on other devices; and that deposition testimony would not be an adequate substitute for the lost evidence.[5] The judge additionally finds that the individual decision makers likely used email and text messages to share their thoughts regarding bonus amounts given their testimony that they regularly communicate about their work and Employer's business by email and text (even though they denied specific recollections of using them to communicate about bonuses).

The judge concludes that spoliation occurred and that a sanction may be appropriate. But the judge is concerned about whether she can make principled findings regarding the existence and extent of the prejudice to Employee—after all, the evidence that would allow

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3. The employee in many workplace discrimination cases must establish that her employer's legitimate, nondiscriminatory reason for an adverse action is a pretext for unlawful discrimination. *See, e.g.*, Rutledge v. Bd. of Cnty. Comm'rs, No. 22-3081, 2023 WL 4618335, at *5 (10th Cir. July 19, 2023).

4. *See, e.g.*, Oakley v. MSG Networks, Inc., 792 F. Supp. 3d 377, 388 (S.D.N.Y. 2025) ("Courts have regularly recognized that 'private statements [in text messages] may reflect [a party's] views unfiltered for publication' and thus 'provide a different perspective on his state of mind than those he made publicly.'" (alterations in original) (quoting United States v. Hunt, 534 F. Supp. 3d 233, 246 (E.D.N.Y. 2021))).

5. The judge's findings cover the predicate facts of spoliation. *See, e.g.*, BHI Energy I Power Servs. LLC v. KVP Holdings, LLC, 730 F. Supp. 3d 308, 319–20 (N.D. Tex. 2024) (identifying four "predicate elements" under Rule 37(e): ESI should have been preserved; ESI has been lost; ESI was lost because a party failed to take reasonable steps to preserve it; and ESI cannot be restored or replaced through other discovery).

her to make these findings is gone.[6] And assuming she makes these findings, the judge is separately concerned about whether she can reach a defensible conclusion about which sanction best returns Employee to the position she would have occupied but for the loss. The judge consults relevant case law and learns the federal courts have not established a uniform approach for evaluating prejudice from the loss of ESI, or even an agreed-upon set of facts or factors that should influence the analysis.[7] The judge decides her better option is to defer a decision until the end of discovery when she can evaluate these issues on a fully developed discovery record.[8] The judge recognizes that doing so creates uncertainty for the parties, but perhaps the uncertainty will motivate them to reach a negotiated resolution, thus eliminating the need for a decision altogether.

The challenge confronted by the hypothetical judge is obvious. Making findings of fact regarding the existence and extent of prejudice, as well as selecting a remedy that cures any perceived prejudice, are no small tasks when the very evidence that would reveal relevance and probative value is gone.[9] The challenge is not new, of course.[10] The federal courts have confronted the spoliation of physical evidence for generations,[11] and prejudice and cure are familiar

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6. As one court candidly acknowledged: "When the spoliation involves ESI, the related issues of whether a party properly preserved relevant ESI and, if not, what spoliation sanctions are appropriate, have proven to be one of the most challenging tasks for judges, lawyers, and clients." Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 516 (D. Md. 2010).

7. *See infra* notes 75–175 and accompanying text.

8. *See, e.g.*, Two Canoes LLC v. Addian Inc., Civil Action No. 21-cv-19729, 2024 WL 2939178, at *10 (D.N.J. Apr. 30, 2024) (deferring whether sanctions are appropriate until trial at which time the court "will be in a better position to evaluate Two Canoes' evidence and determine what the missing WeChat messages could plausibly establish").

9. *See* Alexander v. Nat'l Farmers Org., 687 F.2d 1173, 1205 (8th Cir. 1982) ("Obviously, the relevance of and resulting prejudice from destruction of documents cannot be clearly ascertained because the documents no longer exist."); Karlyg v. City of N.Y., 20 CV 991, 2024 WL 4333858, at *7 (E.D.N.Y. Sep. 28, 2024) ("Here, the evidence suggests that the spoliated ESI could support the defendants' case, but it could equally support plaintiff's case."); Buddenberg v. Est. of Weisdack, 711 F. Supp. 3d 712, 821 (N.D. Ohio 2024) ("Obviously, no one can know what evidence that no longer exists might show."); Burns v. Medtronic, Inc., Case No. 15-cv-2330-T-17, 2017 WL 11633269, at *5 (M.D. Fla. Aug. 9, 2017) ("In the context of spoliation of ESI, determining what has been lost and the possible probative value of such information is an often difficult, even impossible, task.").

10. The earliest federal case appears to be *The Pizarro*, 15 U.S. (2 Wheat.) 227, 242 (1817), a prize proceeding in which the captain threw overboard various documents concerning the vessel's cargo.

11. The two classic physical evidence scenarios involve destructive testing, and the loss of a product claimed to possess a manufacturing defect. *See, e.g.*, Graff v. Baja Marine Corp., 310 F. App'x. 298, 302 (11th Cir. 2009) (finding that spoliation sanctions were warranted due to destructive testing, as tested specimens did not satisfy accepted size requirements and remaining material was too small for reliable additional testing); Walters *ex rel.* Walters v. Gen. Motors Corp., 209 F. Supp. 2d 481, 491–93 (W.D. Pa. 2002) (finding sanctions warranted due to destruction of vehicle alleged to possess manufacturing defect).

concepts.[12] But calling balls and strikes with respect to the spoliation of ESI is different and more challenging. The potential for loss is greater given the ease with which it can be destroyed when compared to physical evidence.[13] And the impact of the loss is far from clear given the disparate content stored on personal and workplace devices, along with the ever-present possibility that seemingly "lost" information may ultimately be "found" on a distant server or unexpected device.

This Article reviews and evaluates the approaches used by the federal courts when asked to adjudicate claims of prejudice from the loss of ESI. The Article acknowledges there is not a "right" approach—right in the sense that one infallibly differentiates between those situations in which relief is justified and those in which it is not. The absence of the evidence requires the court to make findings of fact on an inherently incomplete record. The Article nevertheless contends that these various approaches suffer from one or more deficiencies that increase the potential for inequitable outcomes, either by denying relief when it is deserved or by granting relief when it is not. The Article therefore suggests an alternate approach, backstopped by specific sanctions, which would allow for a more accurate and even-handed adjudication of prejudice and by extension the merits of the case.[14]

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12. For example, federal courts consider prejudice to the plaintiff when deciding whether to provide relief from the entry of defendant's default or a default judgment. *See, e.g.*, Shepard Claims Serv., Inc. v. William Darrah & Assocs., 796 F.2d 190, 194 (6th Cir. 1986) (stating that resolution of motion to set aside default, or to set aside a default judgment, requires consideration of whether plaintiff will be prejudiced if the defendant is given relief).

13. *See* 1 JAY E. GRENIG & WILLIAM C. GLEISNER, III, eDISCOVERY & DIGITAL EVIDENCE § 12:1, Westlaw (database updated Nov. 2025) ("Unlike paper documents, which require an overt act like shredding to be destroyed, electronically stored information can be and often is destroyed or modified by routine computer use. Simply turning on a personal computer can destroy slack and temporary files, cause electronically stored information to be overwritten, or alter metadata (for example, data showing when a file was created or modified). Just clicking on a file can change its last-accessed date, inviting a suggestion that it has been altered."); FED. R. CIV. P. 37(e) advisory committee's note to the 2006 amendment ("Many steps essential to computer operation may alter or destroy information . . . . As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information . . . .").

14. The suggested approach and remedy maintain consistency with the current rule because the suggested approach is just that—a suggestion—and the judge would retain discretion to use a different approach, or impose a different remedy, when appropriate. *See* FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment ("Determining the content of lost information may be a difficult task in some cases . . . . In other situations, however, the content of the lost information may be fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties. . . . *The rule leaves judges with discretion to determine how best to assess prejudice in particular cases*. Once a finding of prejudice is made, the court is authorized to employ measures 'no greater than necessary to cure the prejudice.' The range of such

With respect to adjudicating a claim of prejudice, the Article suggests a burden-shifting approach in which the party claiming prejudice must initially provide an evidence-backed suggestion regarding the content of the lost ESI and how the loss adversely affects its chance of success. This should reveal whether there is reason to believe a fair resolution of the case has been jeopardized. If this showing is made, the party disclaiming prejudice must then establish, on a more-probable-than-not basis, that the loss is harmless (perhaps because the lost ESI is not relevant, is not probative, is not admissible, or is needlessly cumulative of other extant evidence). The ultimate burden would rest with the party disclaiming prejudice because it has superior access to—and typically control over—those who created the now-lost ESI. It is therefore better positioned to investigate and report on the content of the lost ESI and is ultimately the party that should bear the risk of an erroneous decision given it created the problem in the first place.

With respect to remedying the prejudice flowing from the loss, the Article suggests two sanctions when the loss interferes with the aggrieved party's ability to prevail on the merits. First, the court should deny any dispositive motion based on a claimed gap in the evidence supporting an essential element of the aggrieved party's claim or defense when a reasonable jury could infer its existence from all the evidence (which evidence would include evidence about the loss as well as evidence about the content of the lost ESI).[15] Second, the court should allow the parties to present evidence at trial regarding the loss and then argue during closing whether all the evidence (including evidence about the loss) supports one or more inferences about the facts. The parties would make their arguments from a jury instruction tailored to the specific loss and the needs of the case. These remedies would increase the likelihood that "the truth will out" by giving the jury the final say regarding the impact of the loss on the merits of the case.[16]

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measures is quite broad if they are necessary for this purpose. . . . *Much is entrusted to the court's discretion*." (emphasis added)).

15. The distinction between drawing an inference from "all the evidence" and drawing an inference from "the fact of loss" ensures the relief for the prejudicial loss of ESI does not evade Rule 37(e)'s prohibition on the use of adverse inference instructions except when the loss of evidence is precipitated by an intent to deprive another party's ability to use the ESI. *See id.* ("Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation.").

16. S*ee, e.g.*, Hicks v. Milton, Case No. 22-cv-00166, 2025 WL 2029488, at *4 (D. Utah July 21, 2025) ("Whether spoliation sanctions are warranted in this case turns on credibility determinations regarding the cause and impact of the loss of messages from Peter's phone. Where these issues are more appropriate for resolution by a jury, it makes sense to reserve these issues for a potential jury determination.").

The Article is divided into three Parts. Part I briefly reviews the common law of spoliation, the events leading to the 2006 and 2015 amendments to Rule 37(e), and the creation of a separate, standalone regime for imposing sanctions for the loss of ESI. This Part demonstrates that the drafters of the current version of Rule 37(e) focused primarily on curtailing remedies for the nonnefarious loss of ESI and, specifically, permitting severe sanctions only in those situations in which the loss was precipitated by a party's intent to deprive another party of access to (and use of) the evidence. This Part demonstrates the drafters were much less focused on how or when prejudice might flow from the loss of ESI, a failing that appears to stem from a belief that the loss of ESI in one location, or from one source, would be offset by the presence of the same ESI somewhere else.

Part II then reviews and evaluates the approaches used by the district courts when asked to adjudicate claims of prejudice from the loss of ESI. This Part characterizes the approaches based on their key attributes: (i) the "loss equals prejudice" approach, pursuant to which prejudice exists when the party seeking relief shows the lost ESI would have likely resolved a contested issue; (ii) the "plausible suggestion of content and consequence" approach, pursuant to which prejudice exists when the party seeking relief provides a plausible suggestion about the content of the lost ESI and the impact of the loss on its ability to prevail; (iii) the "critical evidence" approach, pursuant to which prejudice exists when the party seeking relief demonstrates the lost ESI was critical or essential to its case; and (iv) the "prejudice absent a showing of harmlessness" approach, pursuant to which prejudice exists unless the party disclaiming prejudice demonstrates the loss was harmless.

Part III then describes an alternate approach for adjudicating claims of prejudice. This Part describes a burden-shifting approach that requires the party claiming prejudice to initially provide an evidence-backed suggestion about the content and consequence of the loss, but which ultimately places responsibility on the party disclaiming prejudice to prove the loss was harmless. This Part also describes the remedies that are well suited—in the context of the adversarial system—to ameliorate merits-based prejudice from the loss of ESI. This Part concludes that the suggested approach to adjudicating claims of prejudice, coupled with the suggested remedies for demonstrated prejudice, increases the likelihood that deserving litigants will not be stymied by the loss of evidence, while simultaneously decreasing the chance that undeserving litigants go unrecognized.

I. THE BACKGROUND TO CURRENT RULE 37(E)

A. The Spoliation Doctrine and Its Application to Evidence Prior to 2006

Rule 37(e) of the Federal Rules of Civil Procedure traces its origin to the common law doctrine of spoliation which allows courts to sanction litigants for the destruction or significant alteration of evidence.[17] The sanction, historically based on the courts' inherent power to manage and supervise cases,[18] protects "the integrity of the judicial system and prevent[s] abuses of the judicial process."[19] As one court explained: "[O]ur adversarial system relies upon the presentation of evidence to separate the wheat from the chaff, and to reveal the truth of the matter. Tampering with the completeness of the necessary evidence may require court action to ensure judicial integrity."[20]

Consistent with this policy of protecting the adjudicative process, relief from spoliation often focuses on returning the adversely affected party to the position it would have occupied but for the loss or alteration of evidence.[21] But it can also be used as a tool to punish those who destroy evidence as well as to deter others from similar

17. *See, e.g.*, Rehn v. City of Seattle, Case No. 23-cv-01609, 2025 WL 1207668, at *1 (W.D. Wash. Apr. 25, 2025) ("Spoliation is the destruction or significant alteration of evidence, or the failure to preserve evidence, in pending or reasonably foreseeable litigation."); Duron v. Costco Wholesale Corp., 773 F. Supp. 3d 324, 339 (W.D. Tex. 2025) ("Spoliation occurs when evidence is destroyed or significantly altered.").

18. *See, e.g.*, Garavaglia v. Comm'r, 521 F. App'x 476, 480 n.3 (6th Cir. 2013) ("The ability of a court to sanction litigants for spoliation is part of a court's inherent authority . . . ."); Trigon Ins. Co. v. United States, 204 F.R.D. 277, 285 (E.D. Va. 2001) ("[T]he inherent authority to control litigation empowers a court to sanction the spoliation of evidence even absent an antecedent order.").

19. Smith v. Borg-Warner Auto. Diversified Transmission Prods. Corp., No. IP 98-1609-C-T/G, 2000 WL 1006619, at *6 (S.D. Ind. July 19, 2000).

20. Knight v. Boehringer Ingelheim Pharms., Inc., 323 F. Supp. 3d 837, 844 (S.D. W. Va. 2018) (citation omitted); *see also* Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001) ("The policy underlying this inherent power of the courts is the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth.").

21. *See, e.g.*, Mosaid Techs., Inc. v. Samsung Elecs. Co., 348 F. Supp. 2d 332, 335 (D.N.J. 2004); *see also* United States v. Koch Indus., Inc., 197 F.R.D. 463, 483 (N.D. Okla. 1998) ("[S]anctions attempt to compensate the non-spoliating party by redressing the imbalance caused by the spoliator's destruction of relevant evidence.").

conduct.[22] The selection of a particular sanction[23] therefore ebbs and flows based on the extent of the prejudice to one party as well as the culpability of the other.[24]

As increasing amounts of ESI were created in the early years of the twenty-first century,[25] increasing amounts were lost and requests for sanctions followed.[26] Losses often resulted from the negligent failure to halt the deletion of ESI pursuant to a document retention policy,[27] but instances of more culpable loss were not

22. *See* Stedeford v. Wal-Mart Stores, Inc., Case No. 14-cv-01429, 2016 WL 3462132, at *6 (D. Nev. June 24, 2016) ("[A]n adverse inference instruction punishes a party for wrongdoing and is intended to deter others from destroying relevant evidence."); Io Grp. Inc. v. GLBT Ltd., No. C-10-1282, 2011 WL 4974337, at *8 (N.D. Cal. Oct. 19, 2011) ("Here, a lesser sanction, such as an adverse inference instruction, could both punish Defendants and deter others similarly tempted."); Shaffer v. RWP Grp., Inc., 169 F.R.D. 19, 25 (E.D.N.Y. 1996) ("An adverse inference charge serves the dual purposes of remediation and punishment.").

23. The available sanctions include, among others, "dismissal of a claim or granting judgment in favor of a prejudiced party; suppression of evidence; an adverse inference, referred to as the spoliation inference; fines; and attorneys' fees and costs." *Mosaid Techs.*, 348 F. Supp. 2d at 335 (footnotes omitted).

24. *See*, *e.g.*, Austin v. City & Cnty. of Denver, Civil Action No. 05-cv-01313, 2006 WL 8460351, at *3 (D. Colo. July 13, 2006) ("In exercising its discretion to fashion an appropriate sanction for spoliation, the court must consider the culpability of the responsible party and whether the evidence was relevant to prove an issue at trial."); Broccoli v. Echostar Commc'ns. Corp., 229 F.R.D. 506, 510 (D. Md. 2005) ("The court should . . . take into account the blameworthiness of the offending party and the prejudice suffered by the opposing party.").

25. George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 1, 10 (2007) ("[T]he amount of information in business has increased by thousands, if not tens of thousands of times in the last few years. In a small business, whereas formerly there was usually one four-drawer file cabinet full of paper records, now there is the equivalent of two thousand four-drawer file cabinets full of such records, all contained in a cubic foot or so in the form of electronically stored information. This is a sea change." (footnote omitted)).

26. *See* Dan H. Willoughby, Jr., Rose Hunter Jones & Gregory R. Antine, *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 828 (2010) ("Sanction motions and sanction awards for e-discovery violations have been trending ever-upward for the last ten years and have now reached historic highs."). A representative sample of these cases includes: Inventory Locator Serv., LLC v. PartsBase, Inc., No. 02-2695-MaV, 2005 WL 6062855, at *1 (W.D. Tenn. Oct. 19, 2005) (denying sanctions due to overwriting server); *Broccoli*, 229 F.R.D. at 512 (granting sanctions due to deletion of emails); DIRECTV, Inc. v. Fowler, Case No. 04-5313, 2005 WL 8181209, at *1 (W.D. Wash. July 15, 2005) (granting sanctions due to erasure of hard drive); E*Trade Sec. LLC v. Deutsche Bank AG, 230 F.R.D. 582, 592–93 (D. Minn. 2005) (granting sanctions due to erasure of hard drives, deletion of emails, and deletion of telephone recordings); *Mosaid Techs.*, 348 F. Supp. 2d at 339–40 (granting sanctions due to loss of email messages); Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 439–40 (S.D.N.Y. 2004) (granting sanctions due to destruction of emails); Thompson v. U.S. Dep't of Hous. & Urb. Dev., 219 F.R.D. 93, 104–05 (D. Md. 2003) (granting sanctions for deletion of emails); Metro. Opera Ass'n, Inc. v. Local 100, 212 F.R.D. 178, 229 (S.D.N.Y. 2003) (granting sanctions for destruction of emails).

27. *See, e.g.*, Durdin v. Kuryakyn Holdings, Inc., No. 06-C-0039, 2006 WL 6040466, at *1 (W.D. Wis. Nov. 7, 2006) ("Defendant's policy is to destroy all e-mail after thirty days and it has continued this practice during this lawsuit."); Consol. Aluminum Corp. v. Alcoa, Inc., 244 F.R.D. 335, 342 (M.D. La. 2006) ("The Court also finds that Alcoa has potentially spoiled relevant evidence through its failure to override its standard document destruction policies when this litigation became reasonably foreseeable . . . .").

uncommon.[28] The district courts adapted to the changed environment remarkably well, applying earlier spoliation precedent to this new form of evidence. These courts evaluated requests for sanctions in relation to prejudice and culpability[29]—just as before—and the outcomes of individual cases were neither unusual nor unexpected. Not surprisingly, the district courts acknowledged the challenge confronted by litigants that created large volumes of ESI in their day-to-day activities, emphasizing that the obligation to preserve ESI in anticipation of future litigation was not unlimited and that perfection was not required.[30]

Notwithstanding the seeming successful application of existing law to ESI, business litigants voiced concern about the burden and expense of preserving this newer form of evidence for litigation purposes. These protests focused on the cost of preserving large volumes of ESI in anticipation of future litigation that might never mature into actual litigation (or that might materialize into actual litigation, but on fewer issues than originally assumed).[31] These

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28. *See* ValuePart, Inc. v. Clemens, No. 06-2709, 2006 WL 8460312, at *12 (N.D. Ill. Oct. 30, 2006) ("Defendants used virtually every means available to them to destroy evidence that they were usurping ValuePart's business opportunities . . . ."); *Broccoli*, 229 F.R.D. at 512 ("Echostar clearly acted in bad faith in its failure to suspend its email and data destruction policy . . . ."); Leon v. IDX Sys. Corp., No. C03-1158, 2004 WL 5571412, at *4 (W.D. Wash. Sep. 30, 2004) ("Under the most lenient interpretation, Dr. Leon's behavior amounts to willful spoliation of evidence . . . ."); *Zubulake*, 229 F.R.D. at 436 ("UBS acted willfully in destroying potentially relevant information . . . ."); GE Harris Ry. Elecs., L.L.C. v. Westinghouse Air Brake Co., Civil Action No. 99-070, 2004 WL 5702740, at *4 (D. Del. Mar. 29, 2004) ("Kull's destruction was clearly motivated by an intent to eliminate evidence that could potentially incriminate Wabtec . . . .").

29. *See* Bakhtiari v. Lutz, Case No. 04CV01071, 2006 WL 8431689, at *3 (E.D. Mo. Aug. 11, 2006) ("[T]he Court finds that Plaintiff's assertion of prejudice is insufficient and unpersuasive."); Mastercard Int'l, Inc. v. Moulton, No. 03 Civ. 3613, 2004 WL 1393992, at *5 (S.D.N.Y. June 22, 2004) ("[A]lthough we infer that the missing e-mails likely contained information favorable to plaintiff on some of the issues in this case . . . it is evident that plaintiff possesses ample evidence pertinent to those questions . . . and plaintiff has not shown that its ability to litigate those issues has been meaningfully impaired."); Wiginton v. Ellis, No. 02 C 6832, 2003 WL 22439865, at *7 (N.D. Ill. Oct. 27, 2003) ("[I]n order to draw an inference that the documents favored Plaintiff, we must first find that the documents were destroyed in 'bad faith.'").

30. *See, e.g.*, Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) ("Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, 'no'. Such a rule would cripple large corporations, like UBS, that are almost always involved in litigation.").

31. *See* LEE H. ROSENTHAL, ADVISORY COMM. ON THE FED. RULES OF CIV. PROC., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 83 (2005) [hereinafter 2005 REPORT OF THE CIVIL RULES ADVISORY COMMITTEE] ("There is considerable uncertainty as to whether a party – particularly a party that produces large amounts of information – nonetheless has to interrupt the operation of the electronic information systems it is using to avoid any loss of information because of the possibility that it might be sought in discovery, or risk severe sanctions."); *see also E*Trade Sec. LLC*, 230 F.R.D. at 591 ("Discovery of electronic data presents unique problems that do not exist for the discovery of paper documents. Requiring a large company to undergo a firm wide halt to the destruction of all documents 'would cripple large

litigants advocated for a rule that would more precisely define their obligation to preserve ESI in anticipation of litigation, and that would limit their exposure to severe sanctions when their efforts came up short. These concerns found a friendly ear within the Judicial Conference, which began to evaluate the utility of a new rule that would protect reasonable efforts to preserve information in anticipation of future litigation.

B. The 2006 Amendment to Rule 37 and the Creation of a "Safe Harbor" for the Loss of ESI

The Advisory Committee on Civil Rules, a subject-matter committee of the Judicial Conference tasked with responsibility for studying and recommending changes to the Federal Rules of Civil Procedure, spent nearly four years considering an amendment that would address "a unique and necessary feature of computer systems—the automatic recycling, overwriting, and alteration of electronically stored information."[32] The resulting rule, initially located in Rule 37(f) but later moved to Rule 37(e),[33] established a safe harbor[34] that protected litigants from sanctions when ESI was lost due to the good faith operation of a document management system.[35] The new rule provided:

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corporations.'" (citations omitted) (quoting *Zubulake*, 220 F.R.D. at 217)); *Zubulake*, 220 F.R.D. at 214 ("Finding a suitable sanction for the destruction of evidence in civil cases has never been easy. Electronic evidence only complicates matters. As documents are increasingly maintained electronically, it has become easier to delete or tamper with evidence (both intentionally and inadvertently) and more difficult for litigants to craft policies that ensure all relevant documents are preserved.").

32. JUD. CONF. COMM., REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 23 (2004).

33. Se. Mech. Servs., Inc. v. Brody, No. 08-CV-1151-T-30, 2009 WL 2242395, at *2 n.6 (M.D. Fla. July 24, 2009) ("The text of Rule 37(e) was originally added as subsection (f) but subsequently moved to subsection (e).").

34. Nieman v. Hale, No. 12-cv-2433-L-BN, 2014 WL 1577814, at *4 (N.D. Tex. Apr. 21, 2014) (describing Rule 37(e) as a "safe harbor"); Coburn v. PN II, Inc., No. 07-cv-00662, 2010 WL 3895764, at *3 (D. Nev. Sep. 30, 2010) ("Rule 37(e) provides a 'safe harbor' from sanctions to a party who fails to provide electronically stored information."); Keithley v. Home Store.com, Inc., No. C-03-04447, 2008 WL 3833384, at *4 (N.D. Cal. Aug. 12, 2008) ("Rule 37(e) provides a limited safe harbor from sanctions . . . .").

35. 2005 REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, *supra* note 31, at 83 ("Proposed Rule 37(f) responds to a distinctive feature of electronic information systems, the routine modification, overwriting, and deletion of information that attends normal use. The proposed rule provides limited protection against sanctions for a party's inability to provide electronically stored information in discovery when that information has been lost as a result of the routine operation of an electronic information system, as long as that operation is in good faith."); *see also Nieman*, 2014 WL 1577814, at *5 ("Rule 37(e) protects Defendants from sanctions based on the record before the Court. Plaintiff has shown nothing more than that the electronically stored information sought was 'lost as a result of the routine, good faith operation of an electronic information system'" (quoting FED. R. CIV. P. 37(e) (2006) (repealed 2015))).

> (f) ELECTRONICALLY STORED INFORMATION. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.[36]

The advisory committee note that accompanied the rule explained that "[m]any steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation."[37] As such, relevant ESI—sometimes even highly relevant ESI—might be lost without any awareness of the loss, much less any culpability in bringing about the loss. The new rule therefore protected litigants that acted in good faith even when their efforts to preserve evidence were less than perfect.[38] The safe harbor was not impenetrable, however. The rule allowed the district courts to impose sanctions in "exceptional circumstances,"[39] specifically, when the loss of ESI caused "serious prejudice" to another party.[40]

The anticipated benefits from the new rule never materialized because of the limited protection it provided,[41] the courts' continued ability to impose sanctions based on inherent authority,[42] and the

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36. FED. R. CIV. P. 37(f) (2006) (repealed 2015).

37. FED R. CIV. P. 37(f) advisory committee's note to 2006 amendment; *see also* Tomasian v. C.D. Peacock, Inc., Case No. 09 C 5665, 2012 WL 13208522, at *6 (N.D. Ill. Nov. 8, 2012) ("This subdivision recognizes the risk that some computer operations may routinely alter or destroy information, so that a party may lose potentially discoverable information without culpable conduct on its part.").

38. A party could establish good faith, for example, by implementing a "litigation hold." *See* FED. R. CIV. P. 37(f) advisory committee's note to 2006 amendment ("Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation.").

39. *Id.*

40. *Id.* ("The change to a good-faith standard is accompanied by addition of a provision that permits sanctions for loss of information in good-faith routine operation in 'exceptional circumstances.' This provision recognizes that in some circumstances a court should provide remedies to protect an entirely innocent party requesting discovery against serious prejudice arising from the loss of potentially important information.").

41. *See* Willoughby, Jones & Antine, *supra* note 26, at 828 ("[T]he safe harbor was intended to provide limited protection, and it has. Parties or counsel seeking refuge from the increasing sanction-motion practice will be able to reach Rule 37(e)'s refuge only in very limited situations. Since the rule's adoption, approximately two cases per year have met its requirements.").

42. DISCOVERY SUBCOMM., ADVISORY COMM. ON CIV. RULES, DISCOVERY SUBCOMMITTEE REPORT RULE 37(E), at 16 (2014) [hereinafter DISCOVERY SUBCOMMITTEE REPORT RULE 37(E)] (stating that Rule 37(e) did not provide meaningful relief because it applied "only [to] 'sanctions' 'under these [federal] rules,' providing no guidance for the exercise of inherent authority"); *see also* Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 517 (D. Md. 2010) (explaining that sanctions can be imposed pursuant to either the district court's inherent authority or pursuant to an applicable rule of procedure).

conflicting standards for imposing severe sanctions.[43] The Second Circuit—with a substantial caseload of high-end, discovery-intensive cases—authorized severe sanctions for the negligent loss of ESI,[44] while other courts authorized severe sanctions only upon a finding of bad faith.[45]

The absence of meaningful protection from sanctions, coupled with differing standards for imposing severe sanctions, caused members of the business community (particularly those members with operations in multiple states and litigation in multiple fora) to structure their affairs to conform to the most exacting preservation standard to ensure they would be protected regardless of where they might become involved in litigation.[46] And, to comply with the most exacting standard, they continued to spend considerable sums to preserve ESI in anticipation of future litigation.[47] The Advisory

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43. *See* COMM. ON RULES OF PRAC. & PROC., JUNE 2012 STANDING COMMITTEE MINUTES 33 (2012) ("Currently, there is substantial dispute among the circuits on what level of culpability gives rise to sanctions for failure to preserve. The prevailing standards now range from mere negligence to wilfulness or bad faith."). *Contrast* Hawley v. Mphasis Corp., 302 F.R.D. 37, 47 (S.D.N.Y. 2014) ("It is well-established that bad faith is not required to merit sanctions. In this Circuit, ordinary negligence will suffice . . . ." (citation omitted)), *with* Se. Mech. Servs., Inc. v. Brody, No. 08-CV-1151-T-30, 2009 WL 2242395, at *3 (M.D. Fla. July 24, 2009) ("Rule 37(e) sanctions have been deemed inappropriate where . . . there is no evidence that the system was operated in bad faith.").

44. *See, e.g.*, Alexander Interactive, Inc. v. Adorama, Inc., 12 Civ. 6608, 2014 WL 12776440, at *3 (S.D.N.Y. June 17, 2014) ("[T]he 'culpable state of mind' element may be satisfied by a showing of ordinary negligence, as well as gross negligence or bad faith."); Orbit One Commc'ns, Inc. v. Numerex Corp., 271 F.R.D. 429, 438 (S.D.N.Y. 2010) ("In this circuit, a 'culpable state of mind' for purposes of a spoliation inference includes ordinary negligence.").

45. *See* Federico v. Lincoln Mil. Hous., LLC, No. 12-cv-80, 2014 WL 7447937, at *9 (E.D. Va. Dec. 31, 2014) ("Defendants have not shown that Plaintiffs acted in bad faith by failing to preserve text messages during a time when their preservation was feasible."); E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 803 F. Supp. 2d 469, 509 (E.D. Va. 2011) (stating that a sanction of an adverse inference instruction "requires a finding of bad faith, or a finding that the party willfully deleted or destroyed evidence known to be relevant to an issue in the litigation"); *In re* Delta/AirTran Baggage Fee Antitrust Litig., 770 F. Supp. 2d 1299, 1313 (N.D. Ga. 2011) ("At most, Delta's failure to act more quickly in the face of the CID [(Civil Investigative Demand)] constitutes negligence, which is insufficient to support spoliation sanctions under the law of this circuit."); Olson v. Sax, No. 09-C-823, 2010 WL 2639853, at *3 (E.D. Wis. June 25, 2010) ("There is no evidence that Goodwill engaged in the 'bad faith' destruction of evidence for the purpose of hiding adverse evidence."); Murrell v. Casterline, CIVIL ACTION NO. CV03-0257-A, 2010 WL 11681365, at *2 (W.D. La. Apr. 29, 2010) (finding sanctions inappropriate because videos were not overwritten in bad faith).

46. *See* DISCOVERY SUBCOMMITTEE REPORT RULE 37(E), *supra* note 42, at 2.

47. *See* MARK R. KRAVITZ, ADVISORY COMM. ON FED. RULES OF CIV. PRO., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 26 (2011) [hereinafter 2011 REPORT OF THE CIVIL RULES ADVISORY COMMITTEE] ("As a very general matter, it seems clear that many are concerned that preservation obligations may often seem far too broad, and that huge expense has resulted from that overbreadth, particularly because the standard for severe sanctions is unpredictable and inconsistent across the nation."); Alexander Nourse Gross, *A Safe Harbor from Spoliation Sanctions: Can an Amended Federal Rule of Civil Procedure 37(E) Protect Producing Parties?*, 2015 COLUM. BUS. L. REV. 705, 709–10 (2015) ("[B]ecause of a circuit

Committee on Civil Rules took note and began to reconsider the utility of the existing rule and the potential benefits of a new or amended one.[48]

C. The 2015 Amendment to Rule 37(e) and the Creation of a New Sanctions Regime

The Advisory Committee on Civil Rules spent another four years[49] considering other approaches to sanctions,[50] including a possible rule that would apply to all evidence and not just ESI.[51] The Advisory Committee eventually settled on one that (i) applied to ESI only,[52] (ii) authorized some sanctions only when the loss was precipitated by culpable intent, and (iii) permitted other sanctions when the loss was not similarly motivated but nevertheless adversely affected another party.[53] The Advisory Committee

split . . . businesses over-preserve information to avoid subsequently being sanctioned . . . . Over-preservation imposes large costs on companies with litigation exposure and, since many of the potential actions for which a company retains documents are never litigated, it can be an inefficient use of the company's resources.").

48. *See* 2011 REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, *supra* note 47, at 29. The Advisory Committee initially considered variations on one or more rules that would cover the duty to preserve (including specific provisions regarding when the duty is triggered, the scope of information that must be retained and for how long, as well as how many custodians should be subject to a litigation hold). *See id.* at 29–51. The Advisory Committee ultimately jettisoned efforts to create a rule establishing the metes and bounds of preservation and instead focused on a rule governing remedies when the existing common law standard was not satisfied. *See* CIVIL RULES ADVISORY COMM., MINUTES, MARCH 22–23, 2012, at 20 (2012) ("[T]he Subcommittee should focus first on sanctions, and should focus on tangible as well as intangible information.").

49. The Advisory Committee began work in earnest toward the end of 2009 and continued until mid-2014. *See* MARK R. KRAVITZ, ADVISORY COMM. ON FED. RULES OF CIV. PRO., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 6 (2010) ("The [Discovery] Subcommittee has begun work on preservation and spoliation issues."); DAVID G. CAMPBELL, ADVISORY COMM. ON CIV. RULES, REPORT OF ADVISORY COMMITTEE ON CIVIL RULES 2 (2014) [hereinafter 2014 REPORT OF ADVISORY COMMITTEE ON CIVIL RULES] (submitting proposed amendment to Rule 37(e) to the Standing Committee on Rules of Practice and Procedure).

50. For example, the Advisory Committee attempted to craft a rule that distinguished between "curative relief" and "sanctions," with the dividing line dependent largely on whether the loss of evidence was precipitated by willfulness or bad faith. *See* DAVID G. CAMPBELL, ADVISORY COMM. ON FED. RULES OF CIV. PRO., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 13–14 (2012) [hereinafter 2012 REPORT OF THE CIVIL RULES ADVISORY COMMITTEE].

51. The Advisory Committee initially considered a rule applicable to all evidence and not just ESI. *See* 2011 REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, *supra* note 47, at 29–51 (alternate text for a draft rule for all evidence and for ESI only). The Advisory Committee ultimately abandoned a broader rule, however. *See* 2014 REPORT OF ADVISORY COMMITTEE ON CIVIL RULES, *supra* note 49, at 40 ("[T]he difficulty of writing a rule that covers all forms of evidence, and an appropriate respect for the spoliation law that has developed over centuries to deal with the loss of tangible evidence, all persuaded the Advisory Committee that the new Rule 37(e), like present Rule 37(e), should be limited to ESI.").

52. *See* 2014 REPORT OF ADVISORY COMMITTEE ON CIVIL RULES, *supra* note 49, at 39–40.

53. *See id.* at 41–42 ("This proposal preserves broad trial court discretion to cure prejudice caused by the loss of ESI . . . . [while reserving severe measures (such as adverse

concluded that such a rule would provide litigants with greater certainty about potential consequences when their efforts to preserve ESI came up short (and, in so doing, potentially alleviate the need to overpreserve ESI in anticipation of litigation).[54] As adopted, the rule provided:

> FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or

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inferences instructions)] only on a finding that the party 'acted with the intent to deprive another party of the information's use in the litigation.' This intent requirement is akin to bad faith . . . .").

54. *See id.* at 35 ("Two goals have inspired this work. One has been to establish greater uniformity in the ways in which federal courts respond to a loss of ESI. . . . The other goal has been to relieve the pressures that have led many potential litigants to engage in what they describe as massive and costly over-preservation."); *see also* DISCOVERY SUBCOMMITTEE REPORT RULE 37(E), *supra* note 42, at 3–4 (listing one purpose for limiting sanctions as "the goal of reducing the costly over-preservation that had been emphasized by many"); DAVID G. CAMPBELL, ADVISORY COMM. ON FED. RULES OF CIV. PRO., REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES 35 (2013) ("The fundamental thrust of the proposal is . . . to amend the rule to address the overbroad preservation many litigants and potential litigants felt they had to undertake to ensure they would not later face sanctions."); 2012 REPORT OF THE CIVIL RULES ADVISORY COMMITTEE , *supra* note 50, at 6 ("A central objective of the proposed new Rule 37(e) is to replace disparate treatment of preservation/sanctions issues in different circuits with a single standard."); *id.* at 9 ("The proposed amendment is designed to provide more significant protection against inappropriate sanctions, and also to reassure those who might in its absence be inclined to over-preserve to guard against the risk that they would confront serious sanctions."); DAVID G. CAMPBELL, ADVISORY COMM. ON FED. RULES OF CIV. PRO., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 3 (2011) ("The theory underlying this approach is that it speaks directly to the subject of greatest concern and greatest disagreement among federal cases – sanctions – and will indirectly relieve much uncertainty about the trigger and scope of the duty to preserve.").

(C) dismiss the action or enter a default judgment.[55]

The rule established a step-by-step process for evaluating whether a sanction was appropriate, and, if so, which one. First, the district court must decide whether spoliation occurred. In this regard, the party seeking sanctions must prove four facts by a preponderance of the evidence[56]: (i) the lost evidence qualifies as ESI;[57] (ii) the party that lost the ESI was obligated to preserve it;[58] (iii) the loss of the ESI resulted from a failure to take reasonable steps to preserve it;[59] and (iv) the lost ESI cannot be restored or replaced through additional discovery.[60]

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55. FED. R. CIV. P. 37(e). The rule became effective December 1, 2015.

56. *See* Jim S. Adler, P.C. v. McNeil Consultants, LLC, No. 19-cv-2025-K-BN, 2023 WL 2699511, at *14 (N.D. Tex. Feb. 15, 2023) ("The Court . . . will assess Adler's required showings under Rule 37(e) against the preponderance of the evidence standard."); Fast v. GoDaddy.com LLC, 340 F.R.D. 326, 339 (D. Ariz. 2022) ("The Court finds by a preponderance of the evidence that the prerequisites to sanctions under Rule 37(e) are satisfied . . . ."). The district courts typically place the burden of establishing these predicate facts on the party claiming prejudice. *See, e.g.*, Webb v. Daymark Recovery Servs., Inc., 21CV424, 2022 WL 17832160, at *3 (M.D.N.C. July 26, 2022) (stating that movant has the burden of proving four predicate facts under Rule 37(e)).

57. *See, e.g.*, Leidig v. Buzzfeed, Inc., 16 Civ. 542, 2017 WL 6512353, at *8 (S.D.N.Y. Dec. 19, 2017) ("The websites, metadata, and emails all constitute ESI."); Coward v. Forestar Realty, Inc., CIVIL ACTION FILE NO. 15-CV-0245, 2017 WL 8948347, at *7 (N.D. Ga. Nov. 30, 2017) ("Rule 37(e) applies to the videos at issue."); First Am. Title Ins. Co. v. Nw. Title Ins. Agency, LLC, Case No. 15-cv-00229, 2016 WL 4548398, at *5 (D. Utah Aug. 31, 2016) ("Files on the thumb drive are ESI . . . ."); Living Color Enters., Inc. v. New Era Aquaculture, Ltd., Case No. 14-cv-62216, 2016 WL 1105297, at *3 (S.D. Fla. Mar. 22, 2016) ("[T]ext messages constitute electronically stored information . . . .").

58. *See, e.g.*, Nurmagomedov v. Legionfarm, Inc., 23 Civ. 6683, 2024 WL 4979235, at *3 (S.D.N.Y. Dec. 4, 2024) ("The record before the Court is unequivocal: a duty to preserve arose at least as early as April 11, 2022. On that date, plaintiff's counsel sent defendant a textbook demand letter . . . ."); Pable v. Chi. Transit Auth., No. 19 CV 7868, 2024 WL 3688708, at *6 (N.D. Ill. Aug. 7, 2024) ("The record demonstrates that litigation was reasonably foreseeable . . . when plaintiff reached out to lawyers about a potential claim . . . ."); Donofrio v. Ikea US Retail, LLC, CIVIL ACTION No. 18-599, 2024 WL 1998094, at *19 (E.D. Pa. May 6, 2024) ("In an employment discrimination case, the duty to preserve arises at the earliest time litigation is reasonably anticipated, and, at the latest, when the opposing party receives notice of the EEOC charge."); Kean v. Brinker Int'l, Inc., Case No. 22-cv-00885, 2024 WL 1815346, at *9 (M.D. Tenn. Apr. 25, 2024) (holding that duty to preserve attached when plaintiff articulated suspicion that his termination was age-related and, if not, then it attached two days later when he "threatened litigation" and stated that he would get his attorney involved); Kohn v. Camden Cnty. Sch. Dist., CIVIL ACTION NO. 21-cv-108, 2024 WL 1354573, at *4 (S.D. Ga. Mar. 28, 2024) (finding that defendant was on notice of future litigation based on parents' statements to school superintendent following child's suicide).

59. *See, e.g.*, Ocasio v. City of Canandaigua, 18-CV-6712, 2025 WL 1064721, at *6 (W.D.N.Y. Apr. 9, 2025) ("Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy[.]" (alteration in original) (quoting Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 431 (S.D.N.Y. 2004))); Collins v. AutoZone, Inc., Case No. 22-cv-00316, 2024 WL 1054684, at *5 (D. Nev. Mar. 11, 2024) (finding that defendant, as a sophisticated litigant, should have known of its obligation to download surveillance video of percipient events to avoid deletion).

60. *See, e.g.*, Rehn v. City of Seattle, Case No. 23-cv-01609, 2025 WL 1207668, at *2 (W.D. Wash. Apr. 25, 2025) (holding that other discovery, including CAD log and MDT data, were

Second, assuming the party seeking sanctions proves these predicate facts, the district court must then decide whether the loss resulted from an intent to deprive another party of access to the evidence.[61] If the district court finds the required intent, then it can provide relief—and in this context, the relief can be a severe sanction such as the entry of dismissal or default, the use of an adverse jury instruction, or a presumption.[62] Importantly, a finding of intent negates the need to show the loss adversely affected another party because prejudice is assumed.[63]

Third, assuming an absence of intent, the district court must evaluate whether the loss harmed another party.[64] If the court finds

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not adequate substitutes for lost recording of 911 call); O.W. v. Cabell Cnty. Bd. of Educ., Case No.: 24-cv-00070, 2025 WL 978596, at *4 (S.D. W. Va. Apr. 1, 2025) ("Other discovery, such as depositions or written discovery, is not likely to replace the lost footage because it was the only objective recording of the events in question as they occurred."); Jonathan R. v. Justice, Case No.: 19-cv-00710, 2024 WL 1339522, at *8 (S.D. W. Va. Mar. 28, 2024) (stating that witnesses' "memory of the emails could never be considered as accurate as the emails themselves").

61. The "intent" to deprive another party's ability to use information can be shown directly or circumstantially. *See* Conley 360 LLC v. Torrey Pines Dev. Grp. LLC, No. CV-23-01078, 2025 WL 218382, at *4 (D. Ariz. Jan. 16, 2025) (finding intent circumstantially because losses occurred before and after litigation was commenced). A party's "intent" is determined using a preponderance standard. *See, e.g.*, Hoffer v. Tellone, 128 F.4th 433, 440 (2d Cir. 2025) ("[W]e hold that a party seeking sanctions under Rule 37(e)(2) must establish the requisite elements—including that the party act with 'intent to deprive'—by a preponderance of the evidence.").

62. *See, e.g.*, Barker v. La. Sch. for Math, Sci. & the Arts, CIVIL DOCKET NO. 21-CV-04419, 2024 WL 1667726, at *10 (W.D. La. Mar. 8, 2024) (finding that plaintiff was entitled to adverse jury instruction that deleted text messages would have shown that defendant's executive director instructed other employees how they were to testify at their depositions, that the employees testified in accordance with those instructions, and the testimony given at their depositions reflected the instructions given to them); Advanced Magnesium Alloys Corp. v. Dery, No. 20-cv-02247, 2024 WL 244931, at *4–6, 9 (S.D. Ind. Jan. 23, 2024) (entering default judgment against one defendant due to loss of external hard drives "thrown out or taken to an electronics recycler during a move to a new home"; a cell phone left "at a Chinese restaurant"; and emails that could not be accounted for).

63. *See, e.g.*, Jones v. Riot Hosp. Grp. LLC, 95 F.4th 730, 736 (9th Cir. 2024) ("Rule 37(e)(2) does not mention prejudice as a prerequisite to sanctions . . . . The Advisory Committee Notes explain that a finding of prejudice was not included as a requirement because 'the finding of intent required by [Rule 37(e)(2)] can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss . . . .'" (second alteration in original) (quoting FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment)); Ala. Aircraft Indus., Inc. v. Boeing Co., 319 F.R.D. 730, 743 (N.D. Ala. 2017) ("Where there is evidence of bad faith in the destruction of evidence, it may be inferred that missing evidence was unfavorable and that there was prejudice.").

64. Deltondo v. Sch. Dist. of Pittsburgh, 22-cv-350, 2024 WL 4870539, at *5 (W.D. Pa. Nov. 22, 2024) (finding that defendants were prejudiced by the deletion of plaintiff's Facebook post because, while they may have a screenshot of its contents, they cannot "investigate who may have received it, re-shared it or commented on it"); Kosher Ski Tours Inc. v. Okemo Ltd. Liab. Co., 20 CV 9815, 2024 WL 3905742, at *4 (S.D.N.Y. Aug. 22, 2024) (finding that loss of emails from two participants in weekly meetings prejudiced plaintiff because they would have documented "the contemporaneous reasoning behind Okemo's decision to terminate the

the loss caused prejudice, it can impose a sanction that is "no greater than necessary to cure the prejudice"[65] (and then only so long as the sanction does not involve dismissal, default, adverse jury instructions, or a presumption).[66] The district courts thus possess wide, but limited, discretion when fashioning a remedy.[67]

Unfortunately, the text of the rule and the accompanying advisory committee note do not provide meaningful guidance regarding the process for adjudicating claims of prejudice. The advisory committee note hints at this, but only at a high level of generality. It acknowledges, for example, that "[d]etermining the content of lost information may be a difficult task in some cases,"[68] but that "[i]n other situations . . . the content of the lost information may be fairly evident."[69] That of course may be true—a lost video of a slip and fall accident may reveal what happened, but the fact of loss says nothing about whether the content of the video favored one party or the other. Instead, the committee note cryptically states that "[t]he rule leaves judges with discretion to determine how best to assess prejudice in particular cases."[70]

The rule's "legislative history" does not provide much help either. The Advisory Committee (and its Discovery Subcommittee) appear to have believed that prejudice from the loss of ESI would be infrequent because ESI is ubiquitous and the loss of an item from one source would likely be offset by a duplicate from another.[71] As the

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Lodging Agreement—information that is relevant to the breach of contract claim"); Trade Grp., Inc. v. BTC Media, LLC, No. 23-cv-00555, 2024 WL 3513475, at *4 (N.D. Tex. July 23, 2024) ("BTC's ability to put forth their case has undoubtedly been impacted by a swath of who knows how many missing text messages, and the Court finds they have been prejudiced accordingly.").

65. FED. R. CIV. P. 37(e)(1).

66. *See* FED. R. CIV. P. 37(e)(2) (making certain sanctions available "only" upon a finding of intent); Leidig v. Buzzfeed, Inc., 16 Civ. 542, 2017 WL 6512353, at *7 (S.D.N.Y. Dec. 19, 2017) ("Rule 37(e) amended the traditional spoliation rule as it related to ESI in a number of ways—most significantly, by providing that the harsh sanctions listed in Rule 37(e)(2) were to be applied only in cases in which a party acted with 'intent to deprive' another of ESI." (quoting FED. R. CIV. P. 37(e)(2) advisory committee's note to 2015 amendment)); O'Berry v. Turner, Civil Action No. 15-CV-00064, 2016 WL 1700403, at *3 (M.D. Ga. Apr. 27, 2016) ("The only limitations on the sanctions available to the court are that the measure ordered must be no greater than necessary to cure the prejudice, and the court may not impose the severe measures that are set out in Rule 37(e)(2).").

67. The rule "forecloses reliance on inherent authority or state law to determine when certain measures should be used." FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

68. *Id.*

69. *Id.*

70. *Id.*

71. *See* DISCOVERY SUBCOMMITTEE REPORT RULE 37(E), *supra* note 42, at 19 ("Although it may be impossible to know exactly what the lost information was—it is not truly lost if an exact duplicate exists—proportionality is as important here as elsewhere. A sense that the

Discovery Subcommittee explained: "The massive scope of electronic information . . . means that ample information for effective litigation often remains available even when it is not possible to know with certainty what information was contained in the lost source."[72] And a member of the Subcommittee noted: "ESI, like cockroaches and styrofoam, is something you cannot get rid of."[73] That is not the case, as subsequent cases amply demonstrate.[74]

II. ESTABLISHING PREJUDICE FROM THE LOSS OF ESI

The district courts commonly use one of four approaches when asked to evaluate the existence of prejudice from the loss of ESI. These can be characterized as follows: (i) the "loss equals prejudice" approach, pursuant to which prejudice is found when the lost ESI would have likely resolved a contested issue; (ii) the "plausible suggestion of content and consequence" approach, pursuant to which prejudice is found when the party seeking relief can provide plausible suggestions regarding the content of the lost ESI and the impact of the loss on its chance of success; (iii) the "critical evidence" approach, pursuant to which prejudice is found when the party seeking relief demonstrates the lost ESI was critical to its case; and (iv) the "prejudice absent a showing of harmlessness" approach, pursuant to which prejudice is deemed to exist unless the party that lost the ESI shows the loss was harmless. Each of these approaches is addressed in turn.

A. The "Loss Equals Prejudice" Approach

A number of district courts apply a "loss equals prejudice" approach when the lost ESI would have likely resolved a contested

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lost information likely was not important, particularly when much information is available from other sources, may justify accepting the loss and moving on with the case.").

72. *Id.* at 4–5; *see also* FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment ("Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere.").

73. CIVIL RULES ADVISORY COMM., MINUTES, APR. 11–12, 2013, at 24 (2013).

74. The rule was substantially rewritten very late in the process, with "prejudice" taking on unique significance in the final draft. Earlier drafts provided for sanctions in the event evidence was lost and (i) the loss caused "'substantial prejudice' coupled with willfulness or bad faith," or (ii) "the loss irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation." DISCOVERY SUBCOMMITTEE REPORT RULE 37(E), *supra* note 42, at 8. The text was revised just before submission to the Standing Committee on Rules of Practice and Procedure. The version advanced to the Standing Committee provided that "upon finding prejudice to another party from loss of the information, [the court may] order measures no greater than necessary to cure the prejudice." 2014 REPORT OF ADVISORY COMMITTEE ON CIVIL RULES, *supra* note 49, at 41.

issue of fact.[75] These courts do not require a showing that one party's loss adversely affected another party's chance of success—instead, "the nature of the evidence itself"[76] establishes the requisite prejudice.[77] This approach is often used when the loss involves video footage of a key event, such as a slip and fall in a store or the use of force by law enforcement or correctional officers.[78] In these instances, courts find prejudice because the loss involves "the best evidence, both neutral and objective, of just what happened."[79] But this approach is not limited to cases involving video evidence. It also

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75. *See, e.g.*, Rehn v. City of Seattle, Case No. 23-cv-01609, 2025 WL 1207668, at *3 (W.D. Wash. Apr. 25, 2025) ("The content and context of the 911 audio call is relevant to the case's central issue of whether the officers' conduct was reasonable. The absence of this contextual information prejudices Plaintiff's ability to demonstrate that Defendants . . . acted unreasonably . . . ." (citation omitted)); C.G. v. Cabell Cnty. Bd. of Educ., Case No.: 23-cv-00373, 2024 WL 3071071, at *5–6 (S.D. W. Va. June 20, 2024) ("CCBOE's spoliation of video . . . clearly prejudices Plaintiff's ability to prove her case. . . . The video . . . is undoubtedly material to the . . . claims. It was the only objective evidence of what occurred . . . . Without the video, it is impossible to state with certainty what occurred.").

76. N. Am. Sci. Assocs., LLC v. Conforti, Case No. 24-cv-287, 2024 WL 4903753, at *15 (D. Minn. Nov. 27, 2024).

77. *See* Leidig v. Buzzfeed, Inc., 16 Civ. 542, 2017 WL 6512353, at *13 (S.D.N.Y. Dec. 19, 2017) (finding that disabling websites was prejudicial to defendant because "their very existence would have likely helped Buzzfeed establish that plaintiffs were public figures" in connection with defamation claim); Yoe v. Crescent Sock Co., Case No. 15-cv-3, 2017 WL 5479932, at *13 (E.D. Tenn. Nov. 14, 2017) ("The deletion of the data has adversely affected Crescent's ability to find and prove the extent of the data that Plaintiffs took and had available. . . . The spoliation may significantly hamstring Crescent's efforts to show the reconstruction costs were unnecessary or, at least, exaggerated.").

78. Whitmore v. Kroger Ltd. P'ship I, 779 F. Supp. 3d 757, 768–69 (W.D. Va. 2024) ("Whitmore is unquestionably prejudiced by the lack of video evidence in this case. . . . At trial, it is Whitmore's word versus the word of . . . [defendant's employees and agents]. In this light, Whitmore is severely prejudiced by Kroger's failure to preserve any video footage of the store's premises from the relevant timeframe."); Zeiter v. Walmart Inc., Case No. 21-cv-00061, 2024 WL 3028259, at *11 (D. Nev. June 17, 2024) ("There is no substitute for the video because no one witnessed Buchna fall, Buchna was unable to explain why he fell, and the parties dispute why he fell. . . . Additionally, the video may have shown the condition of the area where Buchna was walking, including whether there were cracks or holes in the concrete or a slippery substance on the ground."); Collins v. AutoZone, Inc., Case No. 22-cv-00316, 2024 WL 1054684, at *7 (D. Nev. Mar. 11, 2024) (precluding defendant from arguing at trial that lost video did not corroborate plaintiff's version of events and stating that sanction "will prevent AutoZone from gaining an advantageous position by asserting that the video fails to support the Plaintiff's narrative"); Hargis v. Overton Cnty., Case No. 22-cv-00011, 2023 WL 8604139, at *13 (M.D. Tenn. Dec. 12, 2023) (finding that plaintiff was prejudiced from loss of video evidence that may have established the conduct of particular individuals prior to decedent's death); Su v. NAB LLC, Case No. 21-cv-00984, 2023 WL 9494449, at *4 (D. Nev. Dec. 4, 2023) (finding that plaintiff was prejudiced by the loss of video evidence in wage and hour case because it "was the only reliable evidence available showing the actual hours Defendants' employees worked"); Wall v. Rasnick, Civil Action No.: 17cv00385, 2023 WL 7490862, at *38 (W.D. Va. Nov. 13, 2023) (finding that the loss of video evidence in excessive force case prejudiced plaintiff and stating that "the court will find that the loss of the use of this video evidence to either corroborate or contradict the testimony of the defendants does prejudice Wall").

79. Storey v. Effingham Cnty., CV415-149, 2017 WL 2623775, at *4 (S.D. Ga. June 16, 2017).

applies to cases involving misappropriation of trade secrets and other business torts in which one party's possession of specific ESI would likely establish a material fact.[80]

Jenkins v. Woody[81] and *Quetel Corp. v. Abbas*[82] illustrate this approach. *Jenkins* arose out of the death of a pretrial detainee.[83] Although a camera outside the detainee's cell captured her movements in the hours before death, the footage was overwritten shortly thereafter.[84] Plaintiff sought sanctions, arguing, among other things, that the lost footage was the only "neutral and unbiased depiction of what happened" and the loss allowed defendant to provide "a functionally unchecked version of events."[85] Defendant opposed sanctions, contending that her "contemporaneous Logbook entries and her reports afterward" provided an adequate substitute for the lost video and offset any perceived harm.[86]

The district court found prejudice and concluded that sanctions were appropriate. The district court explained:

> Deputy Beaver argues against the timeless principle that a picture is worth a thousand words. When presented to a jury, testimony and Logbook entries provide poor substitute for audio and images of Ms. Jenkins while she was still alive. Testimony about an inmate talking to herself, feeding her imaginary daughter ripped-up pieces of toilet paper, and using a toilet paper roll as a telephone likely would impact a jury entirely differently than if the jury actually watched the video of an inmate experiencing those same auditory and visual hallucinations in an isolation cell. Great impact also would flow from video depicting the frantic moments as others tried to revive Ms. Jenkins. Most importantly though, without the video, Plaintiff loses the best and most objective evidence of whatever happened on August 1, 2014. Even assuming—which the Court does not one way or the other—that the information on the Video Data would have confirmed rather than contradicted

80. *See, e.g.*, Virtual Studios, Inc. v. Stanton Carpet Corp., CIVIL ACTION FILE NO.: 15-CV-0070, 2016 WL 5339601, at *10 (N.D. Ga. June 23, 2016) ("The Court finds that the loss of the e-mails is prejudicial to Stanton. Virtual Studios contends that it communicated the one-year use limitation . . . to Stanton, while Stanton argues that Virtual Studios never communicated that information to Stanton. Certainly, the e-mails at issue would be helpful in evaluating the merits of the Parties' positions.").

81. Civil Action No. 15cv355, 2017 WL 362475 (E.D. Va. Jan. 21, 2017).

82. Civil Action No. 17cv0471, 2017 WL 11380134 (E.D. Va. Oct. 27, 2017).

83. *Jenkins*, 2017 WL 362475, at *1.

84. *Id.* at *2.

85. *Id.* at *3 (citation omitted).

86. *Id.* at *4.

> Deputy Beaver's testimony and Logbook entries, the Video Data would still remain the "best," and not cumulative, evidence.[87]

The district court continued:

> The Court must repeat its finding that, by making the Video Data unavailable, Sheriff Woody has deprived Plaintiff of the best and most compelling evidence of what happened in cell 3A1 in the evening of August 1, 2014. The Video Data would have been the only unbiased and dispassionate depiction of events that occurred between 5:00 p.m. and 10:48 p.m. on August 1, 2014, when Ms. Jenkins collapsed, was taken to the hospital, and ultimately died. Plaintiff's prejudice is immense.[88]

The court imposed multiple sanctions: allowing the parties to present evidence and argument at trial regarding the loss; instructing the jury that "it may consider . . . [the loss,] along with all the other evidence in the case, in making its decision;" and prohibiting defendants from offering evidence that the video corroborated its version of events.[89]

Quetel involved claims of copyright infringement and misappropriation of trade secrets arising out of a former employee's alleged use of plaintiff's proprietary source code to develop a competing software product.[90] Plaintiff learned that defendant installed a "source code control system" on a now-discarded computer.[91] The source code control system retained all prior versions of a program's source code and therefore allowed developers to review prior iterations of their code.[92] In the context of the parties' dispute, the source code control system would show how defendant developed his code and whether he relied on any of plaintiff's code when doing so.[93]

A magistrate judge found prejudice from the loss because the computer, together with the source code control program, would have allowed plaintiff to perform a line-by-line comparison of source code for purposes of determining whether unlawful copying occurred—in effect, potentially providing plaintiff with direct

87. *Id.* at *16, 18.
88. *Id.* at *18.
89. *Id.*
90. Quetel Corp. v. Abbas, Civil Action No. 17cv0471, 2017 WL 11380134, at *3 (E.D. Va. Oct. 27, 2017).
91. *See id.* at *3–4.
92. *See id.* at *3.
93. *Id.*

evidence of copying.[94] Instead, plaintiff would be required to develop its case circumstantially.[95] The magistrate judge reasoned:

> [P]laintiff has been prejudiced by defendants' misconduct. Had defendants preserved the computer used to develop CaseGuard, plaintiff would know how long the source code control system was used and it could conduct a line-by-line comparison of earlier versions of the code in order to determine whether the CaseGuard code was derived from the TraQ Suite 6 code. This would be true even if the source code control system had only been used for one or two months as testified to by Abass [sic] since it would have captured the version of the source code in existence at that time. Instead of having this direct evidence, plaintiff is required to build a substantially circumstantial case through the use of expert testimony which cannot match the strength of a case built on a direct comparison of the code as it was being developed by the defendants.[96]

Importantly, the magistrate judge did not find the lost evidence favored plaintiff,[97] acknowledging the lost evidence "could have provided direct evidence supporting or undermining plaintiff's claims."[98] Nevertheless, the magistrate judge recommended sanctions.[99]

Cases like *Jenkins* and *Quetel* are not unique.[100] They represent a line of decisions in which courts find prejudice because the lost evidence would likely resolve a key issue rather than because the loss unfairly tips the evidentiary balance. The district courts appear to view prejudice—albeit without saying so—through the prism of prejudice to the adjudicative process rather than prejudice to a particular party. *Jenkins* emphasized that the lost video allowed one of the defendants to provide unchecked testimony about the key event,

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94. *Id.* at *6.
95. *Id.*
96. *Id.* (citations omitted).
97. *Id.* ("Moreover, if defendants had properly preserved the computer used to develop CaseGuard it may have supported their argument that Abbas did not employ a source code control system for any significant period of time, even though it would have provided some evidence of prior versions of the source code.").
98. *Id.* at *8.
99. *Id.* at *6.
100. *See, e.g.*, Cotton v. Medina, Case No. 22-cv-00568, 2025 WL 1707232, at *1, 9 (E.D. Cal. June 18, 2025) (holding, in the context of factual dispute about whether prison guard was in vicinity of plaintiff and therefore could have intervened to help plaintiff following release of toxic gas to break up fight involving other prisoners, that the dispute would have been definitively resolved if prison had retained footage from guard's body camera, and finding prejudice because defendant's failure to preserve video resulted in the loss of "arguably the most decisive evidence as to this important dispute of fact").

while *Quetel* acknowledged that the lost evidence could have helped either party. These decisions also suggest—again without saying so—that certain evidence is uniquely objective, highly probative, possibly dispositive, and that any loss is prejudicial without a showing that the aggrieved party's chance of success has been compromised.[101]

But while the outcomes in *Jenkins* and *Quetel* seem commonsensical, they are not tethered to the text of the rule. Rule 37(e)(1) refers to prejudice "to another party" rather than prejudice to the adjudicative process.[102] The video footage of a jailhouse incident, or the information stored on a computer, may qualify as relevant evidence (even highly relevant evidence), but the loss—without more—says nothing about whether it adversely impacts the aggrieved party's case. The courts should require some showing of merits-based adverse impact; otherwise, any remedy could result in an undeserved windfall.[103]

B. The "Plausible Suggestion of Content and Consequence" Approach

Other district courts apply what can be characterized as the "plausible suggestion of content and consequence" approach—the party claiming prejudice must provide plausible suggestions about the content of the lost ESI and how the loss affects its case.[104] For

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101. Perhaps for these reasons, a common remedy in cases involving unique and highly probative—but uncertain—evidence is to allow the parties to present evidence and argument at trial and then allow the jury to consider the loss, along with all the other evidence, in reaching a verdict. *See infra* note 207 and accompanying text.

102. FED. R. CIV. P. 37(e)(1).

103. That Rule 37(e)(1) focuses on prejudice to a party is confirmed by the fact that the remedies described in the advisory committee note are merits-related remedies. *See* FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment ("In an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court, such as forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies. . . . [I]t may be appropriate to exclude a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence.").

104. The courts use various words and phrases to express this approach. *See, e.g.*, GN Netcom, Inc. v. Plantronics, Inc., 930 F.3d 76, 83 (3d Cir. 2019) ("When a party moving for spoliation sanctions cannot offer 'plausible, concrete suggestions as to what [the lost] evidence might have been,' there should be no finding of prejudice.'" (alteration in original) (quoting Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 80 (3d Cir. 1994))); Manley v. MGM Resorts Int'l, Case No. 22-cv-01906, 2025 WL 1423852, at *4 (D. Nev. May 15, 2025) ("[T]he moving party 'must . . . show that the evidence would have been helpful in proving its claims or defenses.'" (quoting Reinsdorf v. Skechers U.S.A., Inc., 296 F.R.D. 604, 627 (C.D. Cal. 2013))); Handy v. Del. River Surgical Suites, LLC, CIVIL ACTION No. 19-cv-1028, 2025 WL 1599140, at *3 (E.D. Pa. May 1, 2025) ("Prejudice . . . requires a showing the spoliation

these courts, a showing of relevance is necessary but insufficient. Instead, these courts also require a reason to believe the lost ESI would have helped the aggrieved party,[105] perhaps because it would have supported a claim or defense[106] or corroborated other, extant evidence.[107] These courts emphasize that the showing must be "plausible" rather than "probable,"[108] acknowledging that the party seeking relief should not be held to an unrealistic standard "lest the spoliator . . . profit from its destruction" of evidence.[109] The plausible reason can be established by producing other evidence from which a fair inference can be drawn about what the lost evidence might have shown.[110] For example, emails between the key players before

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'materially affect[ed] the substantial rights of the adverse party and is prejudicial to the presentation of his case.'" (second alteration in original) (quoting Magnetar Techs. Corp. v. Six Flags Theme Park Inc., 886 F. Supp. 2d 466, 481 (D. Del. 2012))); O.W. v. Cabell Cnty. Bd. of Educ., Case No.: 24-cv-00070, 2025 WL 978596, at *5 (S.D. W. Va. Apr. 1, 2025) ("[T]he moving party must demonstrate a likelihood that the lost evidence would have been favorable to the moving party's case." (quoting Wall v. Rasnick, Civil Action No.: 17cv00385, 2023 WL 7490862, at *37 (W.D. Va. Nov. 13, 2023))); Gordon v. Hyatt Corp., Civil Action No. 22-cv-00092, 2025 WL 1214859, at *8 (S.D. Tex. Feb. 18, 2025) ("Rule 37(e)(1) sanctions . . . require proof that the loss of evidence was prejudicial, *i.e.*, that the loss impairs the other party's ability to present its claim or defense.").

105. *See, e.g.*, Capricorn Mgmt. Sys., Inc. v. Gov't Emps. Ins. Co., 15-cv-2926, 2019 WL 5694256, at *12 (E.D.N.Y. July 22, 2019) ("Courts in this Circuit generally require some proof that the lost 'evidence was not only probative, but that it would affirmatively support the movant's claim.'" (quoting Ungar v. City of N.Y., 329 F.R.D. 8, 15 (E.D.N.Y. 2018))).

106. *See, e.g.*, *Manley*, 2025 WL 1423852, at *5 (finding that lost text messages would have provided further support to plaintiff's claim that defendants were aware of his intoxication when they extended him additional credit to continue gambling).

107. *See, e.g.*, Baker v. O'Reilly, CASE NO. C21-361, 2025 WL 1635253, at *7 (W.D. Wash. June 9, 2025) ("Baker will be greatly prejudiced without the video evidence. Baker's claim turns decisively on his credibility . . . . Given the fact that Baker and his witness bear a stigma as incarcerated individuals . . . it is exceedingly likely that their credibility will be questioned more closely by the jury . . . [than defendants], who are current or former State employees. . . . Without neutral evidence of the incident, the jury has been deprived of material, relevant evidence whose absence prejudices Baker."); Man Zhang v. City of N.Y., 17-CV-5415, 2019 WL 3936767, at *8 (S.D.N.Y. Aug. 20, 2019) (finding that spoliated video footage could have corroborated that decedent was in pain in the months preceding his death from heart disease).

108. The distinction between the two is emphasized in federal court pleading practice, which requires a claimant to allege a plausible claim as part of its showing of entitlement to relief pursuant to Rule 8(a)(2) of the Federal Rules of Civil Procedure. In the pleading context, "[t]he plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant acted unlawfully." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007)).

109. *Gordon*, 2025 WL 1214859, at *8 (quoting Quantlab Techs. Ltd. (BGI) v. Godlevsky, Civil Action No. 09-cv-4039, 2014 WL 651944, at *11 (S.D. Tex. Feb. 19, 2014)).

110. *See, e.g.*, Bonilla v. Gerlach, No. CIV 23-1060, 2025 WL 1287757, at *3 (W.D. Okla. May 2, 2025) ("Plaintiff has more than enough extrinsic evidence to demonstrate that the video surveillance would have been favorable to his position."); Prelvukaj v. Naselli, 19-CV-05939, 2023 WL 3570659, at *9 (E.D.N.Y. May 18, 2023) (finding that where plaintiff and passenger testified that defendant's truck struck plaintiff's car, "it is plausible that the [lost] SmartDrive video and data could have supported Plaintiff's case, by showing either the impact directly or the circumstances surrounding it").

and after the loss of other emails between them might plausibly suggest the content of the intervening communications.[111] Regardless, the plausible suggestions must be supported by evidence; speculation will not do the trick.[112]

Moody v. CSX Transportation, Inc.[113] and *Oakley v. MSG Networks, Inc.*[114] illustrate this approach. In *Moody*, plaintiff crawled under a stationary train car in a rail yard.[115] The train began to move and dragged plaintiff approximately twenty feet, causing significant physical injuries.[116] Plaintiff alleged that defendant failed to provide a warning before the train began to move.[117] The train was equipped with an "event recorder" that collected information regarding, among other things, the use of the train's bell and horn.[118] Defendant retrieved the data from the event recorder after the accident, but subsequently lost it.[119] Plaintiff sought sanctions, arguing the lost data "would have conclusively resolved the central issue of whether the locomotive's horn or bell sounded prior to train movement."[120] Defendant opposed sanctions, arguing that plaintiff's ability to present her case was not affected because the remaining evidence (the testimony of the percipient witnesses) would allow the jury to determine who was telling the truth about whether the horn or bell sounded.[121] Defendant also argued that "there . . . [was] no way of knowing whether the event recorder data would have supported . . . [plaintiff's] version of events," and that the event

111. *See, e.g.*, Ocasio v. City of Canandaigua, 18-CV-6712, 2025 WL 1064721, at *8 (W.D.N.Y. Apr. 9, 2025) ("The Court finds that Plaintiffs have plausibly shown . . . how the contents of Mr. Scriven's mailbox could have helped their case. . . . The existing emails to and from Mr. Scriven directly address these [important] topics, and it is plausible that the purge of Mr. Scriven's mailbox deprived Plaintiffs of additional emails that would have been probative of their theory . . . .").

112. *See, e.g.*, Pugh-Ozua v. Springhill Suites, No. 18-CV-1755, 2020 WL 6562376, at *4 (S.D.N.Y. Nov. 9, 2020) ("Plaintiff has not provided any evidence—aside from her own speculation—to support her argument that the text messages and emails would have corroborated her claims."); MB Realty Grp., Inc. v. Gaston Cnty. Bd. of Educ., DOCKET NO. 17-cv-00427, 2019 WL 2273732, at *5 (W.D.N.C. May 28, 2019) ("Plaintiffs rely on 'mere speculation' that Defendant Roberts's text messages between May 2017 and August 2017, several months after Defendant Roberts published the alleged libel in February 2017, would benefit them . . . ."); CIGNEX Datamatics, Inc. v. Lam Rsch. Corp., C.A. No. 17-320, 2019 WL 1118099, at *5 (D. Del. Mar. 11, 2019) ("Lam's suggestion as to the potential contents of the lost emails appears to be speculation.").

113. 271 F. Supp. 3d 410 (W.D.N.Y. 2017).

114. 792 F. Supp. 3d 377 (S.D.N.Y. 2025).

115. *See* 271 F. Supp. 3d at 414.

116. *See id.*

117. *See id.*

118. *See id.* at 422.

119. *See id.* at 422–23.

120. *Id.* at 423.

121. *See id.* at 424.

recorder would just as likely have supported defendant's version of events.[122]

The district court began its analysis by stating that "it would be unreasonable and unfair to require . . . [plaintiff] to demonstrate that the event recorder would have been favorable to her."[123] Instead, it was sufficient for her to provide a "plausible, concrete suggestion as to what [the destroyed] evidence might have been."[124] From this, the court reasoned:

> Here, as defendants' counsel acknowledged at oral argument, the event recorder data would have conclusively determined whether the horn or bell . . . were sounded prior to movement. That critical and irreplaceable data was within defendants' complete control to review and produce, but they failed to take simple, reasonable steps to preserve it. [Plaintiff] . . . has identified testimonial evidence (her own and that of her friend . . .) that the bell and/or horn were not sounded prior to train movement. Under these circumstances, it is plausible that the data from the event recorder would have supported . . . [plaintiff's] case.[125]

The court therefore found prejudice from the loss.[126]

In *Oakley*, plaintiff alleged various tort claims arising out of his forcible removal from a sports arena, ostensibly because of his inappropriate behavior.[127] Defendants learned that plaintiff failed to preserve any preexisting text messages when he replaced his phone, and they accordingly sought sanctions for the loss of evidence.[128] Plaintiff acknowledged that he failed to preserve the text messages when he replaced his phone and that some of the now-lost messages related to his removal from the arena and were created immediately afterward.[129] Plaintiff nevertheless contended he did not purposefully destroy the text messages and that, in any event, their loss did not harm defendants.[130] The district court conducted

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122. *Id.*
123. *Id.* at 430.
124. *Id.* (alteration in original) (quoting TLS Mgmt. & Mktg. Servs. LLC v. Rodriguez-Toledo, Civil No. 15-2121, 2017 WL 1155743, at *1 (D.P.R. Mar. 27, 2017)).
125. *Id.*
126. *Id.* The court additionally found "sufficient circumstantial evidence from which to infer that . . . [defendants] intended to deprive . . . [plaintiff] of the relevant data." *Id.* at 432. The court therefore imposed a sanction pursuant to Rule 37(e)(2)— specifically, the use of an adverse inference instruction at trial. *Id.*
127. *See* Oakley v. MSG Networks, Inc., 792 F. Supp. 3d 377, 381 (S.D.N.Y. 2025).
128. *Id.* at 381–82.
129. *See id.* at 382.
130. *See id.*

an evidentiary hearing, at which defendants produced metadata obtained from plaintiff's cell service revealing that plaintiff sent and received 1,113 and 6,658 text messages, respectively, during the three-week period following his removal from the arena.[131] Although the metadata revealed the number of potential messages, it did not reveal any of their content.[132]

The court quickly found each of the predicate facts of spoliation and turned its attention to whether the loss of the text messages adversely affected defendants.[133] The court began its analysis by reciting that the party seeking sanctions "need only 'provide[ ] evidence that plausibly suggests that the spoliated ESI could support its case.'"[134] The court then found that "MSG has amply demonstrated that it was prejudiced by the loss of Oakley's text messages because it is more than plausible that such text messages would have supported MSG's defenses."[135] The court explained:

> Oakley sent *at least* 826 text messages in the three weeks following his removal from MSG, which amounts to an approximate average of thirty-nine text messages per day. In fact, Oakley sent at least sixty-four text messages in the first twenty-four hours following his removal and forty more messages over the course of the next day. The AT&T records further revealed that the average number of text messages that Oakley sent increased over 250% in the three-week period following his removal as compared to the days leading up to the incident. This increase was even more pronounced during the first full day after the incident, which supports the inference that Oakley sent text messages related to the claims at the heart of this case. Indeed, Oakley himself ultimately admitted that he texted about his removal and specifically identified at least thirteen individuals with whom he texted about the incident.[136]

The court emphasized the text messages could undermine plaintiff's version of events because they "generally memorialize unguarded communications and contemporaneous observations that cannot be

131. *See id.* Defendant reduced these totals to 866 and 4,233 after considering the possibility of duplication of identical messages. *See id.*

132. *See id.*

133. *See id.* at 384–87.

134. *Id.* at 387 (alteration in original) (quoting Charlestown Cap. Advisors, LLC v. Acero Junction, Inc., 337 F.R.D. 47, 66 (S.D.N.Y. 2020)).

135. *Id.*

136. *Id.* at 387–88 (citations omitted).

replicated through other forms of discovery."[137] The court continued, explaining there was good reason to believe the text messages would be favorable to defendant because plaintiff's contemporaneous statements that he slipped and fell were inconsistent with his later litigation position that security guards pushed him to the ground.[138] And, even assuming none of the messages related to plaintiff's removal from the arena, the court reasoned this too would be probative: plaintiff's "failure to discuss an assault in the over 800 text messages that he sent following his removal [would] support[ ] the inference that no such assault occurred."[139] From this, the court found prejudice and authorized defendants to present evidence at trial regarding the loss as an appropriate sanction.[140]

Moody is paradigmatic. Plaintiff suggested the lost information would have revealed the bell/horn did not sound prior to the train's movement.[141] And her suggestion was plausible (and not speculative) because it was supported by her own testimony and that of a friend who was present at the time.[142] She also plausibly suggested how this loss of evidence negatively impacted her case—she was deprived of evidence that demonstrated breach as a matter of law.[143]

Oakley is in accord. Defendant suggested the lost text messages would have revealed that plaintiff had not been mistreated when he was removed from the arena.[144] This suggestion was plausible given plaintiff's contemporaneous statements that he slipped and fell to the ground.[145] And defendants plausibly suggested how the loss impacted their case—they were deprived of evidence corroborating other evidence regarding their response to plaintiff's alleged inappropriate behavior.[146]

The "plausible suggestion of content and consequence" approach increases the likelihood that a finding of prejudice is justified and that relief is warranted. A plausible showing of content ensures there is sufficient heft to the claim of prejudice to warrant consideration of possible relief. And by requiring a plausible showing of prejudice (rather than a probable or conclusive showing of

137. *Id.* at 388 (quoting Declaration of Philip Favro at 13, Oakley v. MSG Networks, Inc., 792 F. Supp. 3d 377 (S.D.N.Y. 2025) (No. 17-cv-6903)).
138. *See id.*
139. *Id.*
140. *See id.* at 389.
141. *See* 271 F. Supp. 3d 410, 423 (W.D.N.Y. 2017).
142. *See id.* at 430.
143. *See id.*
144. *See* 792 F. Supp. 3d at 387–88.
145. *See id.* at 388.
146. *See id.* at 387–88.

prejudice), the bar is not set so high that deserving claims will go unremedied. This approach also increases the likelihood of equitable outcomes in cases in which the content of the evidence is opaque. For example, the loss of email and text messages can create problems because individual items may not relate to the case or may not have an obvious outcome-impact (in contrast to a video of a fistfight) because of the vast and unpredictable range of topics discussed in them. The impact from the loss of these items would be entirely speculative, absent some other evidence plausibly connecting them to the issues in the case. A showing of both plausible content and plausible consequence allows the court to draw reasonably supportable inferences about whether the loss adversely impacted another party's case.

This approach suffers, however, because it focuses entirely on the aggrieved party and what she must show. It fails to provide the despoiler with a defined responsibility or any guidance about how it can defeat sanctions. *Karsch v. Blink Health Ltd.*[147] demonstrates this pickle. The district court criticized the despoiling party for failing to produce evidence supporting its contention that the loss was harmless:

> [Defendants] have come forward with 'plausible, concrete suggestions as to what [the destroyed] evidence might have been,' while plaintiff – the only party with actual *knowledge* as to what was in those emails – has come forward with nothing but legal argument, premised almost entirely on defendant's inability to prove that which plaintiff's misconduct has prevented the Court from determining with any certainty.[148]

Plaintiff may have foot-faulted by relying solely on argument, but there is nothing in the approach that spells out what he should have done differently to defeat relief. A more clearly defined approach would eliminate potential confusion in this regard, ensure both parties make their best pitches to the court, and allow the court to decide the issue on a fully developed record.

C. The "Critical Evidence" Approach

Still other district courts apply what can be called a "critical evidence" approach—the party claiming prejudice must show the lost

147. 17-CV-3880, 2019 WL 2708125 (S.D.N.Y. June 20, 2019).

148. *Id.* at *21 (second alteration in original) (citation omitted) (quoting *Moody*, 271 F. Supp. 3d at 432).

ESI was "crucial" or "essential" to its claim or defense.[149] For these courts, the possibility of adverse impact is insufficient; a much stronger showing of consequence is required.

Pappalardo v. Walgreen Co.[150] illustrates this approach. In *Pappalardo*, plaintiff initiated a premises liability action alleging she tripped and fell on an uneven sidewalk adjacent to defendant's store.[151] Plaintiff sought sanctions when she learned defendant failed to preserve certain video footage of the sidewalk where she fell.[152] Defendant opposed sanctions, arguing the lost footage was not crucial to plaintiff's prima facie case of liability.[153] Defendant acknowledged the lost footage showed plaintiff arriving at and departing from the store, but explained it did not show her fall because of inadequate ambient lighting.[154] Defendant supported this contention with comparator footage from the same camera under comparable conditions.[155]

The court recited the standard for sanctions, noting that the moving party must prove the lost evidence was "crucial" to its prima facie case,[156] invoking authority stating that "only outcome-determinative evidence constitutes 'crucial' evidence."[157] From this, the court reasoned that plaintiff failed to show essentiality because she could establish a prima facie case of liability through her own testimony and that of her husband (who was with her at the time of the fall).[158] The court explained:

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149. *See, e.g.*, Cooper v. Balt. Gas & Elec. Co., Civil Case No.: 23-cv-03116, 2025 WL 1416943, at *5 (D. Md. May 16, 2025) (defining the prejudice required by Rule 37(e)(1) as "preventing one's opponent from presenting evidence essential to a claim or defense"); Cannon v. Roundtree, CV 124-035, 2025 WL 903833, at *4 (S.D. Ga. Mar. 25, 2025) ("Plaintiff has the burden of proving 'the evidence was crucial to [the movant] being able to prove [his] prima facie case.'" (alterations in original) (quoting Marshall v. Dentfirst, P.C., 313 F.R.D. 691, 697 (N.D. Ga. 2016))); *In re* Skanska USA Civ. Se. Inc., 340 F.R.D. 180, 187 (N.D. Fla. 2021) ("Rule 37(e)'s prejudice requirement mirrors the requirement in non-ESI spoliation cases that the evidence be 'crucial' to the moving party's claims or defenses."); Schmalz v. Vill. of N. Riverside, No. 13 C 8012, 2018 WL 1704109, at *3 (N.D. Ill. Mar. 23, 2018) ("To suffer substantive prejudice due to spoliation of evidence, the lost evidence must prevent the aggrieved party from using evidence essential to its underlying claim." (quoting *In re* Old Banc One S'holders Sec. Litig., No. 00 C 2100, 2005 WL 3372783, at *4 (N.D. Ill. Dec. 8, 2005))).

150. Case No.: 18-cv-1256-Orl-40, 2019 WL 13488507 (M.D. Fla. Apr. 4, 2019).

151. *See id.* at *1.

152. *See id.*

153. *See id.* at *2.

154. *See id.* at *3.

155. *Id.* at *1 n.1.

156. *Id.* at *2.

157. *Id.* at *3 (quoting Long v. Celebrity Cruises, Inc., Case No. 12-22807-Civ, 2013 WL 12092088, at *5 (S.D. Fla. July 31, 2013)).

158. *See id.*

> Plaintiff and her husband were the only witnesses to the incident. As such, their testimony about how and where the fall occurred is uncontroverted, at least on the record currently before the Court. In addition, it appears to be undisputed that Plaintiff entered and exited the store around the time of the incident, that Plaintiff was injured in the area of the damaged sidewalk, and that Defendant's employees called an ambulance to help Plaintiff. . . . Given the foregoing, the Court finds that the video footage was not "crucial" to Plaintiff's case, and Plaintiff has failed to demonstrate otherwise. . . . Plaintiff has not demonstrated that she was unable to obtain other sufficient evidence regarding the lighting at the scene of the incident or that the video footage was otherwise "crucial" with regard to the lighting.[159]

The court denied plaintiff's motion.[160]

This approach weeds out claims lacking merit to be sure. But it potentially handicaps deserving parties who already possess sufficient evidence to satisfy their burden of production (and thus defeat a motion for summary judgment and get to trial) but who would benefit from additional evidence supporting their claim. After all, a jury can be swayed by the quantum of the evidence in support of a factual proposition and not just the quality of that evidence. This approach also creates problems for parties who claim prejudice but ultimately fail to secure relief: by claiming that evidence was critical or essential to their claim, they open the door to arguments that they lack sufficient evidence to survive a dispositive motion and expose their expert witnesses to otherwise avoidable cross-examination when their opinions rise (or fall) on permissible inferences from the evidence. And it applies awkwardly to defendants who claim prejudice from a plaintiff's loss of evidence but who do not assert a counterclaim or affirmative defense because they cannot claim that any piece of evidence is "critical" or "essential" to their position. These defendants can prevail at trial without offering any evidence (and, in fact, by remaining mute throughout the trial) simply by arguing during closing that plaintiff did not satisfy its burden of proof. It would be bizarre to deny relief simply because these defendants have a path to victory that does not require any evidence (much less any lost ESI).[161]

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159. *Id.*

160. *Id.* at *5.

161. The decisions in this line of cases are particularly inconsistent regarding criticality and essentiality. *Contrast* Schmalz v. Vill. of N. Riverside, No. 13 C 8012, 2018 WL 1704109,

D. The "Prejudice Unless Harmlessness Shown" Approach

Finally, some district courts use a "prejudice unless harmlessness shown" approach that places the burden on the party that lost the evidence to show the loss is harmless.[162] These courts still require the party seeking relief to establish the predicate facts of spoliation, but the burden then shifts to the other party to show the loss did not cause any prejudice. This approach places responsibility on the party with the best access to those who created the lost ESI to investigate the loss, determine its content, and then report its results to the court.

Laub v. Horbaczewski[163] illustrates this approach. Plaintiffs sued defendants for breach of contract and fraud, alleging they engaged in a scheme to steal the idea for a televised drone racing league.[164]

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at *4 (N.D. Ill. Mar. 23, 2018) (finding that the availability of deposition testimony did not negate essentiality of lost ESI), *with* Marshall v. Dentfirst, P.C., 313 F.R.D. 691, 699 (N.D. Ga. 2016) ("[A]ny claimed prejudice Plaintiff suffered by the alleged spoliation is mitigated by her opportunity to depose the DentFirst employees who reported, and investigated, Plaintiff's misconduct. Plaintiff fails to show that critical information existed but was destroyed . . . ." (citation omitted)); *see also* Sky Jet M.G. Inc. v. VSE Aviation Servs., LLC, Case No. 23-cv-2210, 2025 WL 1664002, at *6 (D. Kan. June 12, 2025) (finding that defendant suffered prejudice because expert witness could not use lost ESI to support its report or opinions).

162. *See, e.g.*, 3D Sys., Inc. v. Wynne, Case No.: 21-cv-1141, 2024 WL 3896454, at *6 (S.D. Cal. Aug. 21, 2024) ("3D Systems has established by a preponderance of the evidence [the predicate facts for the imposition of sanctions] . . . . The burden thus shifts to Wynne and Tanner to show their deletion of the OnShape documents and elements did not prejudice 3D Systems."); Bungie, Inc. v. AimJunkies.com, C21-0811, 2023 WL 7184427, at *7 (W.D. Wash. Nov. 1, 2023) ("Defendants argue that Plaintiff 'has identified little if any prejudice' caused by their spoliation. This argument, however, mistakes the burden of proof as to prejudice once spoliation has been proven. Plaintiff does not have the burden of showing the spoliated evidence was prejudicial. Rather, Defendants bear the burden . . . ." (citation omitted)); Hunters Cap., LLC v. City of Seattle, C20-0983, 2023 WL 184208, at *8 (W.D. Wash. Jan. 13, 2023) ("Having found that the City spoliated the officials' deleted text messages . . . . [t]he City bears the burden to show that Plaintiffs have not been prejudiced by the City's conduct."); Youngevity Int'l v. Smith, Case No.: 16-cv-704, 2020 WL 7048687, at *3 (S.D. Cal. July 28, 2020) ("[I]f spoliation is proven, the burden shifts to the spoliating party to prove the lost information is not prejudicial."); Mfg. Automation & Software Sys., Inc. v. Hughes, No. CV 16-8962, 2018 WL 5914238, at *12 (C.D. Cal. Aug. 20, 2018) ("Because Plaintiff has not carried its burden to establish that there was no prejudice to Defendants from the loss of emails between August 1, 2016 and November 2016, the Court finds that an award of monetary sanctions is appropriate . . . ."); Coward v. Forestar Realty, Inc., CIVIL ACTION FILE NO. 15-CV-0245, 2017 WL 8948347, at *8 (N.D. Ga. Nov. 30, 2017) ("Plaintiffs' arguments concerning the Forestar Defendants' failure to show prejudice are not persuasive, as courts have concluded that the party accused of spoliating evidence, not the party moving for spoliation sanctions, bears the burden of showing the lack of prejudice." (citing Ala. Aircraft Indus., Inc. v. Boeing Co., 319 F.R.D. 730, 742 (N.D. Ala. 2017))).

163. Case No. CV 17-6210, 2020 WL 9066078 (C.D. Cal. July 22, 2020).

164. Third Amended Complaint for 1) Breach of Oral Contract Breach of Written Contract Breach of Implied-in-Fact Contract 4) Quantum Meruit 5) Fraud 6) Breach of Fiduciary Duties 7) Intentional Interference with Prospective Economic Advantage 8) Promissory Estoppel at 7, Laub v. Horbaczewski, Case No. CV 17-6210, 2020 WL 9066078 (C.D. Cal. July 22, 2020), 2018 WL 11392317.

Plaintiffs failed to produce text messages, ostensibly because each of them purchased a new phone and failed to save the messages on the old one.[165] One plaintiff eventually produced some text messages (although messages from key periods were missing).[166] Defendants sought sanctions.[167] Plaintiffs opposed relief, contending that sanctions were not appropriate given that defendants "failed to identify any concrete extrinsic evidence indicating that the spoliated text messages . . . were relevant and admissible" and that any claimed prejudice "ha[d] been ameliorated by the texts that were recovered" by the one plaintiff.[168]

The court awarded sanctions.[169] The court began by stating that, once the predicate facts of spoliation have been established, "[t]he burden of proof . . . shifts to the guilty party . . . to show that no prejudice resulted from the spoliation."[170] The court then addressed plaintiffs' contentions and rejected each in turn. The court disposed of the admissibility argument, reasoning the text messages were sought for the purpose of obtaining plaintiffs' responses to messages prompted by others (and hence qualified as admissible nonhearsay).[171] The court then addressed plaintiffs' argument that any perceived prejudice was remedied by the production of text messages from one plaintiff (and defendants' possession of text messages between themselves and plaintiffs).[172] The court rejected this argument as well:

> Plaintiffs have produced very few texts between Plaintiff Laub and third parties about DRL, despite there appearing to have been a large number of third party inquiries, and the few responses from Plaintiff Laub that were produced are relevant to Defendants' defense. The texts between the two Plaintiffs and between Plaintiffs and Defendants are, without a doubt, important evidence. However, Plaintiff Laub's understanding of the existence and substance of any agreement is also represented by his texts with third parties.[173]

165. *See Laub*, 2020 WL 9066078, at *1.
166. *See id.*
167. *Id.* at *2.
168. *Id.* at *7.
169. *Id.* at *9.
170. *Id.* at *6.
171. *See id.* at *7
172. *See id.* at *8.
173. *Id.*

The court concluded: "On the record before it, the Court cannot say that Plaintiff Laub has carried his burden to show *no* prejudice resulting from his spoliation."[174]

This approach reduces the potential unfairness from the information asymmetry in the lost evidence context. Between the parties, the despoiler is better positioned to investigate and determine how the loss may have affected the case. It typically has access to, and often control over, those who created the lost ESI. It can make relevant inquiries, assemble the answers, and then provide the results to the court, which can then assess the impact of the loss. Of course, the court may be required to assess the despoiler's credibility, but trial courts make this assessment regularly and should not be hard-pressed to do so in this context. It also avoids the "Catch 22" that can arise in the lost evidence context. The party claiming foul is sometimes limited to guesses (albeit perhaps informed guesses) about what the lost evidence contained and how the loss affects its side of the case. But even when it makes reasonably well-educated guesses, it is still making a guess and subjects itself to claims of speculation. The courts obviously should not countenance this sort of trap, and the "prejudice unless harmlessness shown" approach eliminates it by placing responsibility on the party that lost the evidence to demonstrate how and why the loss was not consequential.[175] But it suffers, however, because it places a burden solely on the party that lost the ESI. This creates the possibility that a party seeking relief receives a windfall when harmlessness cannot be shown. Absent some showing of relevance and probative value by the party seeking relief, it seems unfair to require another party to establish harmlessness.

III. A SUGGESTED APPROACH FOR DETERMINING PREJUDICE AND PROVIDING RELIEF

This Article suggests an alternate approach for evaluating claims of prejudice from the loss of ESI (and a suggested remedy when the loss adversely affects the aggrieved party's chance of success).[176]

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174. *Id.*

175. The approach also creates an incentive to take preservation obligations seriously (and in so doing, avoid responsibility in subsequent litigation to prove harmlessness).

176. The suggested remedy would not apply when the loss of ESI causes litigation inefficiencies, such as motion practice and redundant deposition discovery. In such circumstances, an award of fees and costs remedies the prejudice. *See* O.W. v. Cabell Cnty. Bd. of Educ., Case No.: 24-cv-00070, 2025 WL 978596, at *7 (S.D. W. Va. Apr. 1, 2025) (allowing plaintiff to recover attorneys' fees and costs associated with motion for sanctions for loss of evidence); Clayton Int'l, Inc. v. Neb. Armes Aviation, LLC, 21CV309, 2025 WL 579040, at *6–7 (D. Neb. Feb. 21, 2025) ("The court finds that Plaintiff should be awarded reasonable attorneys' fees

Taken together, this approach allows the adjudicative process to correct for the loss of ESI, ensures a robust evaluation of the likely content of the lost ESI, and ultimately allows the jury to assess the loss when deliberating a verdict. These objectives are promoted in the first instance by assigning specific responsibilities to the parties when issues of spoliation and prejudice arise—which, when discharged properly, provide the district court with a meaningful record upon which to make findings of fact regarding the existence and extent of prejudice. These objectives are then backstopped by suggested sanctions that increase the likelihood that deserving litigants are not stymied by the loss of evidence and instead have their "day in court."

With respect to determining the existence and extent of prejudice, the district courts should use a burden-shifting approach pursuant to which:

- The party claiming prejudice must initially provide a plausible, evidence-backed suggestion about the content of the lost ESI that is sufficient for the court to draw a reasonable inference about the impact of the loss on the aggrieved party's ability to succeed on the merits.

- The party that lost the ESI must then demonstrate, on a more-probable-than-not basis, that the content is not as claimed, that it is not relevant or admissible, or that the loss is otherwise harmless.

The party that lost the ESI would possess the ultimate burden of proof on the existence of prejudice, but its obligation in this regard would be triggered only upon a threshold showing of plausible content.

With respect to imposing sanctions, the district courts should impose two sanctions when the loss of ESI interferes with the aggrieved party's chance of success:

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and costs [specifically, the cost of preparing for and participating in discovery conferences and preparing the motion for sanctions] that it would not otherwise have incurred but for Ogle's failure to preserve the hard drive."); Edwards v. PJ Ops Idaho, LLC, Case No. 17-cv-00283, 2024 WL 2060503, at *5–6 (D. Idaho May 7, 2024) (allowing plaintiff to recover the cost of giving notice to class members by publication as a sanction for defendant's failure to preserve contact information for its former employees); Jonathan R. v. Justice, Case No.: 19-cv-00710, 2024 WL 1339522, at *12 (S.D. W. Va. Mar. 28, 2024) (ordering defendants to reimburse plaintiffs for fees and costs associated with the motion for sanctions); Gorman v. Douglas Cnty. Sheriffs' Off., No. 21-cv-01622, 2024 WL 1211798, at *8 (D. Or. Mar. 21, 2024) ("[To] remediate the prejudice suffered as a result of the spoliation, Defendants are entitled to attorney fees related to the unpreserved and unproduced ESI . . . .").

- The district court should deny any motion for summary judgment (or judgment as a matter of law) when the motion is based on a claimed gap in the evidence supporting an essential element of the aggrieved party's claim or defense so long as a reasonable jury could infer the existence of the challenged element from the evidentiary record as a whole (which would include evidence about the loss as well as evidence about the content of the lost ESI).

- The district court should allow the parties to present evidence at trial about the loss, as well as evidence about the content of the lost ESI, and then argue during closing whether all the evidence supports one or more inferences about the facts. The district court would provide the jury with an instruction tailored to the specific situation, which would make clear that the jury can draw inferences about the facts that are supported by all the evidence.

Once prejudice is established, the party that lost the ESI would be unable to use the loss to obtain an early end to the case, and the jury would be fully informed about the loss and allowed to consider it when deliberating a verdict.

A. The Approach to Determining Prejudice

1. The Party Claiming Prejudice Must Satisfy an Initial Burden

The party claiming prejudice must initially provide a plausible, evidence-backed suggestion about the content of the lost ESI that is sufficient for the district court to draw a reasonable inference about the impact of the loss on that party's chance of success.[177] The bar is not high—the focus at this stage is on whether there is reason to believe the lost ESI *could be as claimed* and whether its loss *could adversely affect* the party's chance of success.[178] The party claiming prejudice operates largely in the dark regarding the content of the lost ESI and can reasonably be expected to shed only limited light

177. Although the aggrieved party is required to provide plausible suggestions about content *and* consequence, a plausible showing about the content of the lost ESI will often reveal how the loss adversely affects its chance of success.

178. The claimed adverse impact can come in several forms. The lost ESI could, for example, fill an evidentiary gap in the party's proof, limit the party's ability to argue that the weight of the evidence supports its position, or limit the party's ability to undermine another party's credibility.

on the matter.[179] Although argument, conclusions, and speculation are insufficient,[180] the party claiming prejudice cannot fairly be required to do much more.

The evidence suggesting the content of the lost ESI must be admissible, of course. But beyond that, it can come in any form. Testimony about the potential content of a digital recording would do the trick, as would a compilation of extant emails that indicates the potential content of lost emails.[181] The case law reveals other ways through which the potential content of lost evidence can be established.[182] But regardless, the evidence must be sufficient to allow the district court to draw a reasonable inference that the lost ESI would have increased the aggrieved party's chance of success.

The initial burden should be easily satisfied by litigants with credible claims of prejudice. At the same time, it is sufficiently substantial to block those who possess nothing more than speculation or argument about content and harm (and who may be using the loss of ESI as a sword to advance an otherwise weak claim or defense). Put differently, the initial burden allows the court to satisfy

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179. *See e.g.*, Hollis v. CEVA Logistics U.S., Inc., 603 F. Supp. 3d 611, 623 (N.D. Ill. 2022) ("Establishing prejudice can be a dicey proposition because the ESI is gone.").

180. *See, e.g.*, Pugh-Ozua v. Springhill Suites, No. 18-CV-1755, 2020 WL 6562376, at *4 (S.D.N.Y. Nov. 9, 2020) ("Plaintiff has not provided any evidence—aside from her own speculation—to support her argument that the text messages and emails would have corroborated her claims."); MB Realty Grp., Inc. v. Gaston Cnty. Bd. of Educ., DOCKET NO. 17-cv-00427, 2019 WL 2273732, at *5 (W.D.N.C. May 28, 2019) ("Plaintiffs rely on 'mere speculation' that Defendant Roberts's text messages between May 2017 and August 2017, several months after Defendant Roberts published the alleged libel in February 2017, would benefit them . . . ."); Burns v. Medtronic, Inc., Case No. 15-cv-2330-T-17, 2017 WL 11633269, at *6 (M.D. Fla. Aug. 9, 2017) ("Plaintiff's blanket and conclusory statements about what could have existed does not compel a finding of prejudice."); Living Color Enters., Inc. v. New Era Aquaculture, Ltd., Case No. 14-cv-62216, 2016 WL 1105297, at *5 (S.D. Fla. Mar. 22, 2016) (characterizing plaintiff's contention that text messages would have established one defendant's involvement in a scheme to misappropriate its customers as "an extremely conclusory statement that really does not establish any prejudice to Plaintiff").

181. *See, e.g.*, Spencer v. Lunada Bay Boys, Case No. CV 16-02129, 2017 WL 11527978, at *14 (C.D. Cal. Nov. 29, 2017) ("The few text messages exchanged between codefendants that Plaintiffs were able to recover from other sources contain communications that appear to be highly relevant to the action, suggesting that other text messages exchanged between codefendants would also contain relevant content."); Matthew Enter., Inc. v. Chrysler Grp. LLC, Case No. 13-cv-04236, 2016 WL 2957133, at *4 (N.D. Cal. May 23, 2016) (finding that deposition testimony of one of plaintiff's employees suggested that lost emails could have included reasons why customers chose to purchase cars elsewhere).

182. *See, e.g.*, Mfg. Automation & Software Sys., Inc. v. Hughes, No. CV 16-8962, 2018 WL 5914238, at *11 (C.D. Cal. Aug. 20, 2018) (finding that former employees' "suspicious conduct" after leaving plaintiff's employment, coupled with plaintiff's "deliberate shortening of its email retention period," justified inference that relevant emails were likely destroyed); Davis v. Healthcare Servs. Grp., Inc., CIVIL ACTION NO. 16-cv-2401, 2017 WL 11723674, at *4 (E.D. Pa. Sep. 5, 2017) (noting that plaintiff's production of photographs of text messages sent by defendant appeared to exclude intervening messages from plaintiff, thus distorting whether defendant's messages were harassing or welcomed).

itself that there is sufficient heft to the claim of prejudice to justify a response from the other party, and justifies the allocation of judicial resources to resolve the claim (which often requires an evidentiary hearing to decide which party is "in the right").

Divining prejudice is always challenging. It is even more so when the lost ESI is comprised of emails, text messages, or other evidence that has no obvious outcome-impact (in contrast to a video of a fist-fight or a black box recording of the actions taken immediately before a key event). Requiring an initial showing of plausible content and consequence—supported by admissible evidence—increases the likelihood that the court will be able to differentiate between situations in which evidence is both relevant and probative and those in which it is neither.[183]

2. The Party Opposing Relief Must Satisfy a Responsive Burden

The deck is not stacked against the party that lost the ESI and disclaims prejudice. It can avoid sanctions by establishing, on a more-probable-than-not basis,[184] that the loss was harmless. It can accomplish this requirement, for example, by establishing that the lost ESI is not relevant, is not admissible, is unnecessarily cumulative, or is available from other sources.[185] The responsive burden,

183. *See, e.g.*, CIGNEX Datamatics, Inc. v. Lam Rsch. Corp., C.A. No. 17-320, 2019 WL 1118099, at *5 (D. Del. Mar. 11, 2019) ("Whether the burden here is on Lam to show prejudice from the loss of these emails, or whether the burden is on CIGNEX to show Lam has not suffered prejudice from the loss, the Court concludes that there is insufficient evidence either way. Lam's suggestion as to the potential contents of the lost emails appears to be speculation.").

184. This standard is compatible with the standard applicable to most issues in most civil cases, including sanctions for discovery misbehavior. *See, e.g.*, Hoffer v. Tellone, 128 F.4th 433, 439 (2d Cir. 2025) ("[A] party seeking discovery sanctions on the basis of spoliation must show the requisite elements by a preponderance of the evidence.").

185. The party opposing sanctions can prove the lost ESI is not as claimed or is otherwise not relevant. *See, e.g.*, Newberry v. Cnty. of San Bernardino, 750 F. App'x 534, 537 (9th Cir. 2018) ("The plaintiffs maintain that the County destroyed emails between Rohleder and Moreno that might have demonstrated that County officers were more closely involved in planning the Edgehill search than they admitted. But the district court reasonably concluded that the missing emails caused no prejudice to the plaintiffs, as the existing record adequately demonstrated that the County officers played only a minor role in the search, the details of which they learned on the day it occurred."); *Living Color Enters., Inc.*, 2016 WL 1105297, at *6 (finding that defendant established missing text messages "would not have been relevant . . . [to] th[e] case"). Alternatively, it can prove the party claiming prejudice secured the same evidence from another source. *See, e.g.*, Harley Marine NY, Inc. v. Moore, 23-cv-00163, 2025 WL 1345632, at *6 (N.D.N.Y. May 8, 2025) (finding allegation that plaintiff spoliated evidence concerning his transfer of certain information to a third party was entirely speculative, as to the extent plaintiff transferred the relevant information, "it would appear likely to be available on . . . [a third party's] devices and systems"); United States v. Semenza, Case No. 22-cv-02059, 2024 WL 5294520, at *3 (D. Nev. Dec. 19, 2024) ("[T]he Court does not find that the United States has demonstrated prejudice . . . . The United

coupled with the preponderance standard, requires this party fully to investigate the content of the lost ESI and then provide an appropriately detailed report of the results (presumably in the form of declarations from those who created the now-lost ESI along with an accompanying memorandum summarizing the results). Of course, the district court would have to guard against overly self-serving presentations, but it is fully equipped to make credibility

States has the emails, albeit not from Mr. Schaad. And the United States has not demonstrated that it is prejudiced by not receiving these emails directly from Mr. Schaad, as opposed to another source."); Lokai Holdings LLC v. Twin Tiger USA LLC, 15cv9363, 2018 WL 1512055, at *13 (S.D.N.Y. Mar. 12, 2018) ("As is clear from Lokai's own submissions, however, the discovery it has been able to obtain, both from Defendants and from third parties, via subpoenas, provides Lokai with meaningful evidence with which to support its claims and challenge the counterclaims."). Alternatively, it can prove the loss can be mitigated by other discovery or reliance on other evidence. *See, e.g.*, These Ponies Are Miserable v. City of L.A., Case No. 23-cv-08330, 2025 WL 3248690, at *8 (C.D. Cal. Nov. 7, 2025) ("[T]he prejudice for most of these issues of spoliation is significantly mitigated by the reams of other, arguably more objective evidence of Plaintiffs' protest activities . . . ."); Spiegel v. Goldin Auctions, LLC, Civil No. 23-1202, 2025 WL 3033804, at *6 (D.N.J. Oct. 30, 2025) ("The record reveals that Plaintiffs have ample evidence—beyond the alleged spoliated communications—upon which to establish [their claim] . . . ."); Cannon v. Roundtree, CV 124-035, 2025 WL 903833, at *4 (S.D. Ga. Mar. 25, 2025) ("[A]ny prejudice is mitigated significantly by Plaintiff's ability to obtain discovery through other means. Plaintiff can testify himself because he was an eyewitness to the Parker Incident, and he may propound discovery requests to, and conduct depositions of, Defendants, RCSO, Deputy Parker, and the inmate."); Wali Muhammad v. Mathena, CASE NO. 14CV00529, 2017 WL 395225, at *3 (W.D. Va. Jan. 27, 2017) (adopting magistrate judge's report and recommendation that plaintiff can compensate for the loss of video evidence through testimony, including his own); Marshall v. Dentfirst, P.C., 313 F.R.D. 691, 699 (N.D. Ga. 2016) ("Because the focus is on Defendant's belief and its investigation of the facts underlying the complaints, any claimed prejudice Plaintiff suffered by the alleged spoliation is mitigated by her opportunity to depose the DentFirst employees who reported, and investigated, Plaintiff's misconduct."); Shaffer v. Gaither, DOCKET NO. 14-cv-00106, 2016 WL 6594126, at *2–3 (W.D.N.C. Sep. 1, 2016) (noting that although text messages were lost, "it appears that a relatively large number of people, including defendant, read the texts and that the best evidence as to the content of those texts may be found in the testimony of those who read them."). Or it can prove the lost ESI is unnecessarily cumulative of other, available evidence. *See, e.g.*, *In re* TelexFree Sec. Litig., MDL No. 14-md-2566, 2025 WL 2371354, at *7 (D. Mass. Aug. 15, 2025) ("[T]he showing of prejudice is far from compelling. According to Plaintiff, he has amassed evidence of TelexFree's extraordinarily problematic practices . . . ."); Drummond Co. v. Collingsworth, Case No.: 11-cv-3695, 2025 WL 1450707, at *9 (N.D. Ala. May 20, 2025) ("Again, although certain evidence that should have been preserved was deliberately discarded, the court has questions about whether Drummond has established the requisite prejudice. As the court has already noted, through a painstaking and expensive process, Drummond has been able to compile considerable evidence (1) that Defendants paid witnesses, (2) that those witnesses changed their testimony after being paid, and (3) even worse, that Defendants lied about how many witnesses were paid and the extent of those witness payments. One question is this: there is plenty of evidence of wrongdoing that Drummond can point to at trial, so has Drummond truly been prejudiced?"); Welsh v. Martinez, 22-cv-216, 2025 WL 1095355, at *4 (M.D. Fla. Apr. 11, 2025) ("Welsh's counsel boasts that even without the [lost] communications, Welsh can demonstrate . . . fraud. So, any additional information in the . . . communications would likely be cumulative or superfluous.").

determinations in this regard or, in an appropriate case, give the issue to the jury for resolution at trial.[186]

Placing the ultimate burden on the party that lost the ESI is procedurally fair. It will often have unfettered access to (and complete control over) those who created the now-lost evidence, the devices on which it was created, and the locations where it was stored.[187] It is obviously less costly, and more efficient, for this party to investigate the loss than for the party seeking relief to pursue expensive, time-consuming depositions of hostile witnesses who will be motivated—as witnesses often are—to disclaim general and specific recollections about relevant matters.[188] And, because it bears the ultimate burden on the issue of prejudice, the party that lost the ESI will have every incentive to dig deeply to determine what was lost.[189]

Moreover, placing the ultimate burden on the party that lost the ESI does not *unfairly* require it to "prove a negative." A party in a defensive position can often prevail simply by poking holes in a claimant's evidence and then arguing that relief is unjustified. This makes intuitive sense, but this intuition assumes the two parties have full and fair access to whatever evidence and other materials may be relevant to resolving the issue. That is not the case in the spoliation context, where the claimant does not have such access and instead may possess only bits and snippets of information that suggest what the lost ESI might show. In this circumstance, it is entirely fair to require the party that lost the ESI, and that has superior access to the sources of the lost ESI, ultimately to negate prejudice on a more-probable-than-not basis.

Placing the ultimate burden on the party that lost the ESI is also substantively appropriate. This party should bear the risk of an

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186. *See, e.g.*, Hicks v. Milton, Case No. 22-cv-00166, 2025 WL 2029488, at *4 (D. Utah July 21, 2025) ("Whether spoliation sanctions are warranted . . . turns on credibility determinations regarding the cause and impact of the loss of messages from Peter's phone. Where these issues are more appropriate for resolution by a jury, it makes sense to reserve these issues for a potential jury determination.").

187. *See, e.g.*, Hollis v. CEVA Logistics U.S., Inc., 603 F. Supp. 3d 611, 619 (N.D. Ill. 2022) ("Burdens of proof generally fall on the party with better access to the information.").

188. This is not to suggest that the party seeking relief cannot pursue discovery regarding the loss, only that the burden of producing information about the loss rests with the party that lost it.

189. Placing the burden on the party that lost the evidence will also eliminate reflexive arguments that the party seeking relief is engaged in inappropriate "discovery on discovery." *See, e.g.*, LKQ Corp. v. Kia Motors Am., Inc., 345 F.R.D. 152, 158 (N.D. Ill. 2023) ("Discovery on discovery concerns the process by which a party engaged in its discovery obligations."); *see also* Allergan, Inc. v. Revance Therapeutics, Inc., Civil Action No. 23-cv-00431, 2025 WL 2182325, at *2 (M.D. Tenn. July 18, 2025) ("[S]o-called 'discovery on discovery' is not automatic and courts typically disfavor it.").

incorrect determination regarding the content of the lost ESI or the impact of the loss on the case—after all, it created the problem in the first place. As explained in *Dorchester Financial Holdings Corp. v. Banco BRJ S.A.*:

> [T]he spoliation doctrine is designed to equitably resolve uncertainties about the nature and scope of lost evidence. Courts almost always possess imperfect information about what, precisely, a party's spoliation has destroyed. That creates a risk that the Court will err in weighing—and correcting—the effect of the spoliation on the opposing party. The spoliation doctrine functions to "place the risk" of such error "on the party who wrongfully created the risk."[190]

Dorchester Financial reflects sound policy. The party that lost the evidence (and thus could have avoided the pickle in which the district court and the parties find themselves) should be the one at risk of any error in judgment.

In the same vein, placing the ultimate burden on the party that lost the ESI should promote better document retention practices. A person or business entity that knows it may be required to negate prejudice in litigation will have a keen incentive to implement appropriate controls and protocols to avoid loss when it becomes aware of reasonably foreseeable litigation. While the district courts acknowledge that perfection is not required with respect to the preservation of ESI,[191] that should not be a license for sloppy document handling practices that could undermine the fair resolution of controversies.

B. An Approach for Curing Prejudice

A finding of prejudice does not end the district court's work; it must then select an appropriate remedy. While the district courts have broad discretion when fashioning remedies for prejudice, those courts should deploy two particular sanctions when the loss of ESI interferes with the aggrieved party's chance of success—one that provides relief before trial and another that provides relief at trial.[192] Taken together, these sanctions increase the likelihood that

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190. 304 F.R.D. 178, 184 (S.D.N.Y. 2014) (quoting West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999)).

191. *See, e.g.*, Frame v. Erie Metro. Transit Auth., Case No. 22-cv-326, 2024 WL 4366967, at *4 (W.D. Pa. Sep. 30, 2024) ("The Court is also mindful that perfection in preserving all relevant ESI is neither possible nor required under the rule.").

192. The advisory committee note to the 2015 amendment explains that the "range of . . . measures is quite broad"; that there is "no all-purpose hierarchy of the severity of various

deserving litigants will get their "day in court" and that a jury will be able to decide their fate on a more informed basis.

1. Before Trial—Denying Motions for Summary Judgment

The district courts should deny motions for summary judgment based on a claimed gap in the evidence supporting an essential element of the nonmoving party's claim or defense when a jury *could reasonably infer* the existence of the challenged element *from the evidentiary record as a whole* (which would include evidence about the loss and evidence about the content of the lost ESI). The party that lost the ESI should not be allowed to exploit the loss by claiming another party lacks evidentiary support for an essential element when there is reason to believe the lost evidence, along with the extant evidence, could support the challenged element. The jury should be allowed to call balls and strikes with respect to this matter to ensure the aggrieved party's constitutional right to trial by jury is fully effectuated.[193]

The italicized text in the above paragraph underscores the judge's obligation to consider what a jury *could reasonably infer* from the record to ensure she does not improvidently displace the jury's role in the decision-making process. A judge accomplishes this objective, as she would in any summary judgment context, by viewing the evidence in the light most favorable to the nonmoving party and by also drawing all reasonable inferences from the evidence in favor of that party.[194] The italicized text also reminds the judge to consider *all the evidence* (not just the fact of loss) to ensure she does not provide a remedy reserved for the culpable destruction of evidence under Rule 37(e)(2).[195] This relief backstops the suggested approach for resolving claims of prejudice. A party claiming prejudice should be able to avoid an early end to her case when she can provide credible evidence-backed suggestions about the content and

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measures"; and that the "severity of given measures must be calibrated in terms of their effect on the particular case." FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

193. U.S. CONST. amend. VII.

194. This is consistent with the way in which the judge would proceed when resolving any motion for summary judgment. *See, e.g.*, Redo v. State Farm Fire & Cas. Co., Case No. CIV-23-455, 2025 WL 1287740, at *1 (W.D. Okla. May 2, 2025) ("In evaluating a motion for summary judgment, a district court must consider the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences from those facts in favor of that party.").

195. *See* FED. R. CIV. P. 37(e)(2) (stating that "only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation" can the district court "presume that the lost information was unfavorable to the party" that lost the information or "instruct the jury that it may or must presume the information was unfavorable to th[at] party").

consequence of the lost ESI and the party that lost the evidence cannot demonstrate the loss was harmless.

Guess v. TJX Cos.[196] illustrates the application of this sanction. Plaintiff initiated a premises liability action alleging she slipped and fell on a plastic clothes hanger while shopping at a department store.[197] Defendant made a motion for summary judgment, contending plaintiff could not produce any evidence that it had actual or constructive notice of a dangerous condition (an essential element of plaintiff's claim under state law).[198] Plaintiff opposed the motion, arguing summary relief was inappropriate "based on TJX's spoliation of evidence"—specifically, the loss of video footage from the day of the incident.[199] The district court construed plaintiff's response as a motion for sanctions under Rule 37(e) and evaluated the two "motions" through that lens.[200]

After finding the predicate facts of spoliation, the district court turned to whether the loss of the video footage adversely affected plaintiff's chance of success (even after taking into consideration testimony from one of defendant's employees that the lost footage did not capture plaintiff's fall).[201] The court found prejudice, explaining:

> TJX's failure to preserve the video recordings also prejudices Guess. Because TJX failed to preserve the videos, Guess will never have the benefit of knowing precisely what the videos showed or did not show. Bates may be telling the truth that the videos did not capture Guess's fall, but that does not mean that the videos did not contain relevant information. For example, the videos may have captured whether a hanger was on the floor immediately preceding Guess's fall or may have captured whether store employees found the hanger that Guess claims she slipped on after her fall.[202]

The court then pivoted and considered relief for the loss of this evidence on the key issue of actual or constructive notice:

> Given the evidentiary gap that results from TJX's failure to preserve the video recordings, the Court finds that denial of

196. Case No. 24-cv-30, 2025 WL 1243899 (E.D. Tenn. Apr. 29, 2025).
197. *See id.* at *1.
198. Defendant The TJX Companies, Inc.'s Memorandum of Law in Support of Summary Judgment at 3–5, Guess v. The TJX Cos., Case No. 24-cv-30 (E.D. Tenn. Apr. 29, 2025).
199. *Guess*, 2025 WL 1243899, at *2.
200. *Id.*
201. *See id.* at *3.
202. *Id.* at *4.

> its motion for summary judgment is an appropriate sanction. TJX has moved for summary judgment arguing, among other things, that there is nothing in the record showing that TJX employees had actual or constructive notice of a hanger on the ground of the store or that TJX employees caused the coat hanger to be on the ground. Nonetheless, there is reason to believe that surveillance recordings from the date of Guess's fall would have captured evidence creating a genuine issue of material fact as to whether TJX employees had actual or constructive knowledge that there was a hanger on the ground or creating a genuine issue of material fact as to whether a TJX employee caused a hanger to be on the ground.[203]

This outcome makes sense. Plaintiff testified about the existence of a dangerous condition and her testimony suggested the video footage could reveal the ambient conditions at the store—perhaps corroborating plaintiff's testimony that a hanger was on the floor, revealing how long it had been on the floor, and whether one of defendant's employee passed by and failed to act.[204] Based on such evidence, a jury could reasonably infer notice of a dangerous condition at the time of plaintiff's fall, thus justifying denial of defendant's motion.[205]

2. At Trial—Allowing Evidence and Argument About the Loss and Its Impact on the Case

The district courts should also allow the parties to present evidence at trial regarding the loss of evidence and allow them to argue during closing about whether all the evidence (which would include evidence about the loss and evidence about the content of the lost evidence) supports an inference about one or more facts.[206] This

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203. *Id.* (footnote omitted) (citation omitted). The court noted that additional sanctions could be appropriate if the case went to trial, such as allowing the parties to present evidence and argument to the jury regarding the loss. *Id.* at *4 n.3.

204. *See id.* at *1 (noting that defendant's employee testified video is preserved only when it shows "an actual accident happening").

205. Other courts have imposed similar relief. *See* Maziar v. City of Atlanta, Civil Action No. 21-cv-02172, 2024 WL 2928534, at *5 (N.D. Ga. June 10, 2024) ("The Court will . . . deny the City's motion for summary judgment as a sanction. This is narrowly tailored to cure the prejudice at this stage because the City's spoliation prevents Maziar from contextualizing the cropped text message and deprives Maziar of access to other evidence that may have created disputed issues of material fact. Summary judgment for the City is thus inappropriate.").

206. Consistent with the suggested pretrial sanction of denying motions for summary judgment, the district court would likewise deny trial and posttrial motions for judgment as a matter of law when the motion is based on a claimed gap in the aggrieved party's evidence supporting an essential element of a claim or defense.

gives the jury the "final say" regarding the impact of the lost evidence on the merits of the case. Admittedly, the trial judge may need to establish "metes and bounds" regarding the scope of evidence the parties can offer regarding the lost evidence (although she should give the parties reasonable latitude to decide how best to present their evidence on this issue to ensure a fair adjudication). To ensure the jury understands why they are hearing evidence about the loss of evidence along with other evidence regarding the merits of the dispute (and to ensure the jury understands the loss was not intentional), the trial judge could provide the jury with one or more preliminary instructions before opening statements and interim instructions at appropriate points during trial.

This remedy ensures the jury learns about the loss and thus hears the "whole story." It ensures the parties have an opportunity to tell their side of the story regarding the loss and, in so doing, educate the jury about whether the loss was harmful or harmless. One party should not be required to go to trial with less than the full quantum and quality of evidence that may support its case, and the other party should not be required to stand by while an opponent brands it a despoiler that made a volitional decision to hide evidence. A full and fair fight on the lost evidence issue increases the likelihood that the jury's verdict will be as informed as possible and that neither party is unfairly disadvantaged due to the loss.[207]

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207. *See, e.g.*, Cooper v. Balt. Gas & Elec. Co., Civil No. 23-cv-03116, 2025 WL 2774847, at *4–5 (D. Md. Sep. 30, 2025) (adopting magistrate judge's report and recommendation authorizing defendants to explore at trial plaintiff's failure to preserve evidence along with a jury instruction emphasizing that the jury should consider all the evidence in determining whether a party satisfied its burden of proof); PharmacyChecker.com LLC v. Nat'l Ass'n of Bds. of Pharmacy, 19-cv-7577, 2025 WL 2731508, at *8 (S.D.N.Y. Sep. 25, 2025) (authorizing defendant to present evidence at trial regarding plaintiff's loss of evidence and "an appropriate jury instruction about the lost data, the wording and scope of which will be at the discretion of the trial judge"); Ohio *ex rel.* Yost v. Jones, Civil Action 22-cv-2700, 2025 WL 2249595, at *6 (S.D. Ohio Aug. 7, 2025) ("Plaintiff should be permitted to introduce evidence at trial of Defendant Roy Cox's failure to preserve his WhatsApp messages with Defendant Bridge. Plaintiff may argue for whatever inference it hopes the jury will draw. Defendant Cox should also be permitted to present evidence on the matter and argue that the jury should not draw any inference from his failure to retain the WhatsApp messages."); Stacey v. Cnty. of Madison, Case No. 23-cv-00119, 2025 WL 2240790, at *18 (D. Idaho Aug. 6, 2025) (authorizing an instruction to the jury about the loss of video evidence because "it balances the importance of the video with the degree of the County's fault and the extent of prejudice to Plaintiffs"); Milton v. Rehman, 19-CV-2770, 2025 WL 2625966, at *14 (S.D.N.Y. July 31, 2025) (allowing plaintiff to present evidence at trial regarding the defendant's failure to preserve video evidence and the video's relevance to his claim); Safelite Grp., Inc. v. Lockridge, Case No. 21-cv-4558, 2024 WL 4343038, at *9 (S.D. Ohio Sep. 30, 2024) ("Safelite will be permitted to introduce evidence at trial of the August 27 Letter and of Lockridge's failure to preserve his text messages. Safelite may also argue for whatever inference it hopes the jury will draw. Lockridge will also be permitted to present evidence on the matter, and argue that the jury should not draw any inference from his failure to retain his text messages."); Kosher Ski Tours Inc. v. Okemo Ltd. Liab. Co., 20 CV 9815, 2024 WL 3905742, at *5 (S.D.N.Y. Aug. 22,

Nor should there be any real concern about potential misuse or misunderstanding of this information by the jury. A twenty-first century juror, armed with personal experience about the creation and deletion of data on personal devices, should be well-positioned experientially to understand the evidence regarding the loss and make reasoned distinctions between losses that are harmful and those that are not. To ensure the jury is properly oriented, the judge can give a final jury instruction about the role of the lost evidence in the decision-making process. The judge will need to emphasize that the jury must consider all the evidence when deliberating a verdict (and avoid words or phrases that imply the jury can infer a fact from the loss of evidence alone, as this would constitute one of the remedies reserved for the culpable destruction of evidence under Rule 37(e)(2)).[208] One court gave the following helpful instruction:

> You have heard testimony about certain . . . emails that Plaintiff did not produce because the documents were deleted and are not recoverable. You may consider the evidence presented by the parties regarding the deletion of these emails, along with all the other evidence in this case, in making your

2024) ("The Court will (i) allow the parties to present evidence to the jury about the loss of the ESI and the likely relevance thereof, and (ii) instruct the jury that it may consider that evidence in making its decision."); Domus BWW Funding, LLC v. Arch Ins. Co., Case No. 23-cv-00094, 2024 WL 3761737, at *6 (E.D. Pa. Aug. 12, 2024) ("[T]o the extent that this case proceeds to trial, I will permit Domus to introduce evidence of Arch's failure to preserve Mr. McGowan's emails, and I will craft appropriate jury instructions at the time of trial to ensure that this sanction does not collapse into the adverse inferences available only under Rule 37(e)(2)."); Kalejaiye v. Quality Investigations, Inc., Civil Action No.: 19-02647, 2024 WL 1213322, at *6 (D.D.C. Mar. 21, 2024) ("The Court holds that 'permitting the parties to present evidence and argument to the jury regarding the loss of information,' and allowing the jury to make inferences therefrom, is the appropriate measure that is 'no greater than necessary to cure the prejudice' from the loss of the records . . . ." (quoting FED. R. CIV. P. 37(e)(1) advisory committee's note to 2015 amendment)); Mork v. Russell, Case No. 21-cv-00077, 2024 WL 578990, at *7 (D. Nev. Feb. 12, 2024) ("[P]roviding a future jury with information they would have learned from the [lost] photo is an appropriate measure to cure that prejudice. If this case goes to trial, the Court will consider language communicating to the jury that Naughton took a photograph of Mork's rash on April 16, 2020, and describing the nature and extent of the rash at that time."); Hargis v. Overton Cnty., Case No. 22-cv-00011, 2023 WL 8604139, at *15 (M.D. Tenn. Dec. 12, 2023) ("The Court finds that the parties should be allowed to present evidence regarding the deletion of the Booking Camera footage and that the following jury instruction regarding the deleted Booking Camera footage should be given: Overton County had a duty to preserve all the Booking Camera footage that showed the events leading to Hargis's death and negligently failed to do so. Such footage, which is now permanently deleted, would have shown those events from a different angle than the available video footage and may have provided a better view of the way in which individual actors restrained Mr. Hargis, including whether those actors used force and, if so, what amount of force they used. You may give the fact of the lost video footage any weight you deem appropriate as you consider all of the evidence presented at trial." (footnote omitted)).

208. FED. R. CIV. P. 37(e)(2).

> decision. You may give the evidence regarding the deletion of the emails whatever force or effect that you think is appropriate under all the facts and circumstances.[209]

Such an instruction should obviate any concern that the jury will misunderstand its responsibility or believe it can draw an adverse inference from the loss of evidence alone.[210]

CONCLUSION

The district courts regularly confront motions for spoliation sanctions based on the loss of ESI. These motions often include a contention that the loss prejudicially affected the movant's chance of success. This Article suggests that the district courts should evaluate the existence and extent of prejudice in this context using a burden-shifting approach pursuant to which the party claiming prejudice must provide a plausible, evidence-backed suggestion about the content of the lost ESI and how the loss adversely affects its chances. Assuming this showing is made, the burden then shifts to the party that lost the evidence to prove, on a more-probable-than-not basis, that the lost ESI is irrelevant or inadmissible, needlessly cumulative, or otherwise harmless. The ultimate burden therefore rests with the party that lost the evidence because it has superior access to those who created the now-lost evidence (and is therefore better positioned to get to the bottom of what was lost), and because it is the party that should, in fairness, bear the risk of an erroneous decision given that it created the problem in the first place.

This Article also suggests that the district courts should impose two sanctions when the loss adversely affects an aggrieved party's chance of success on the merits. First, the district courts should deny any dispositive motion based on a claimed gap in the evidence supporting an essential element of the aggrieved party's case when a reasonable jury could infer the challenged element from the evidentiary record as a whole (including evidence about the loss and

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209. Final Jury Instructions at 15, N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc., No. 17-cv-5495, 2025 WL 368805 (E.D.N.Y. Jan. 31, 2025). As an aside, defendants prevailed at trial notwithstanding this instruction. Verdict Form at 1, 7, 11, N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc., No. 17-cv-5495, 2025 WL 368805 (E.D.N.Y. Jan. 31, 2025).

210. *See also* Intex Recreation Corp. v. Bestway USA Inc., Case No. 16-cv-03300, 2025 WL 2020012, at *8 (C.D. Cal. July 14, 2025) ("You should take into account that Plaintiff had the ability to maintain Mr. Lin's electronically stored information ("ESI"), but did not do so. You may consider what effect, if any, the unavailability of such information to Bestway has had on its ability to support the positions that it has advanced during this trial. If you conclude that it has had such an effect, you may consider it when evaluating the evidence in accordance with the other instructions that I will read to you about how you are to do so.").

evidence about the content of the lost evidence). Second, the district courts should allow the parties to present evidence regarding the loss at trial and then argue at closing whether all the evidence justifies one or more inferences about the facts. The parties would make this argument from an instruction tailored to the specific loss of ESI and the needs of the case.

The suggested approach for evaluating prejudice, coupled with the suggested sanction when prejudice is found, best ensures the adversarial system functions to the extent possible notwithstanding the loss of evidence. More to the point, it decreases the likelihood that one party will be disadvantaged because it must go to trial armed with less than the full quantum and quality of evidence that could support its side of the case, and decreases the likelihood that another party will be advantaged by its failure to preserve relevant evidence. Put simply, a full and fair fight on this issue increases the likelihood the "truth will out" and that the jury's verdict will be as informed as possible.

Facilitating Mortgage Modification to Save Homes and Mitigate Lender Losses

*Julia Patterson Forrester Rogers**

Homeowners in financial distress or whose homes have been damaged by natural disaster may avoid foreclosure if their lender agrees to modify the loan to reduce payments. Commercial loans may also be modified to avoid foreclosure or in response to changed circumstances or changing market conditions. Although loan modifications are generally beneficial to both borrowers and lenders, barriers to modification exist. The Consumer Financial Protection Bureau (CFPB) has addressed some of the roadblocks to residential loan modifications by regulating the procedures that mortgage servicers must follow in dealing with delinquent borrowers, but the CFPB and its regulations are at risk under the current administration. Furthermore, uncertainty in the law governing modification remains a barrier in most states. Unresolved legal issues affecting mortgage loan modifications include loss of priority caused by a modification, the need for recording a modification agreement in the real property records, and loss of the security interest if a modification is found to be a novation. Although recording a modification may not be a great expense for a commercial borrower, a residential borrower in distress may be overwhelmed by the requirement of obtaining an acknowledgment necessary for recordation.

This Article recommends that the CFPB continue to regulate servicer procedures for dealing with delinquent residential borrowers and recommends that states adopt the new Uniform Mortgage Modification Act, a Uniform Law Commission project for which I served as reporter. The Uniform Mortgage Modification Act addresses

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many of the legal issues raised by modifications and clarifies the law, reducing transaction costs that are passed along to borrowers and facilitating modifications to avoid foreclosure. The Act creates a list of safe harbor modifications—common modifications that do not generally prejudice a junior lienholder. For safe harbor modifications, the modified mortgage continues to secure the debt, retains its priority, and is not a novation. In addition, recording a modification agreement is not necessary to retain the priority of the mortgage. By removing barriers to modification, homeowners and commercial borrowers may avoid foreclosure, and lenders may mitigate losses for delinquent loans.

INTRODUCTION

An estimated 3.8 million homes were lost to foreclosure in the United States during the Great Recession and its aftermath.[1] Modification of home mortgage loans to reduce payments might have saved many of those homes, but numerous roadblocks prevented modification.[2] More recently, many homeowners are unable to make their mortgage payments after fires, hurricanes, or other natural disasters have damaged or destroyed their homes. Federal regulations promulgated by the Consumer Financial Protection Bureau (CFPB) have overcome some barriers to servicers modifying home mortgage loans.[3] However, other barriers remain, and CFPB regulations, their enforcement, and the CFPB itself are at risk under the current administration.[4]

For commercial real estate loans, delinquency rates have increased in recent years, particularly for loans secured by office buildings, which lost tenants due to remote and hybrid work

1. SHARADA DHARMASANKAR & BHASHKAR MAZUMDER, THE FED. RSRV. BANK OF CHI., LETTER NO. 370, HAVE BORROWERS RECOVERED FROM FORECLOSURES DURING THE GREAT RECESSION? 1 & 5 n.1 (2016) (citing "data from the Federal Reserve Bank of New York Consumer Credit Panel/Equifax (CCP) and statistics from RealtyTrac (as cited in http://blog.credit.com/2015/04/boomerang-buyers-is-there-homeownership-after-foreclosure-114803/)"), https://www.chicagofed.org/publications/chicago-fed-letter/2016/370 (on file with the Duquesne Law Review). The authors included foreclosures from 2007 through 2010 because, although the Great Recession ended in 2009, the high rate of foreclosures continued through 2010. *Id.* at 5 n.1.

2. *See infra* notes 40–44 and accompanying text.

3. *See infra* Section I.A.

4. *See infra* notes 62–65 and accompanying text.

policies.[5] More recently, the United States General Services Administration has terminated federal office leases,[6] with a negative impact on the commercial real estate market.[7] Banks have modified commercial real estate loans to mitigate their losses,[8] but modifications can be slower and more costly than necessary because of uncertainty in the law.

Barriers to loan modification include uncertainty in the law governing the effect of modification on the priority of a mortgage[9] and uncertainty as to whether a modification agreement must be recorded in the land records to maintain priority.[10] Lenders are concerned about retaining priority as against junior lienholders because mortgage priority determines who will be paid from foreclosure proceeds in the event of foreclosure.[11] Uncertainty in the law regarding whether a loan modification will cause a loss of priority creates delay and increases transaction costs for both residential and commercial borrowers and may discourage a lender from agreeing to a loan modification.

Recording a modification agreement in the real property records can be a barrier to modification particularly for residential

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5. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-107282, COMMERCIAL REAL ESTATE: TRENDS, RISKS, AND FEDERAL MONITORING EFFORTS 1, 3, 9 (2024) [hereinafter GAO CRE REPORT]; Diana Olick, *Delinquencies in Commercial Mortgage-Backed Securities Are on the Rise. Here's What's Happening*, CNBC (Feb. 11, 2026, at 09:44 ET), https://www.cnbc.com/2026/02/11/delinquencies-commercial-mortgage-backed-securities-rise.html [https://perma.cc/988T-XRCH].

6. The Department of Government Efficiency (DOGE) initially ordered termination of 7,500 federal office leases. Meg Kinnard & Joshua Goodman, *Trump and Musk Demand Termination of Federal Office Leases Through General Services Administration*, AP (Feb. 4, 2025, at 14:00 ET), https://apnews.com/article/trump-musk-gsa-terminate-office-leases-f8faac5e2038722f705587c8dd21ab26 [https://perma.cc/9W7Y-G7HD]. However, many of those proposed lease cancellations were subsequently walked back. David A. Fahrenthold, Madeleine Ngo & Jeremy Singer-Vine, *On Its Website, DOGE Deletes More than 100 Government Leases It Said Were Canceled*, N.Y. TIMES (Mar. 20, 2025), https://www.nytimes.com/2025/03/20/us/politics/doge-canceled-leases.html (on file with the Duquesne Law Review). The DOGE website showed 264 lease terminations finalized as of January 1, 2026. *See* DEPT. OF GOVT. EFFICIENCY: SAVINGS (Jan. 1, 2026), https://doge.gov/savings (on file with the Duquesne Law Review).

7. *See* Soon Hyeok Choi & Cameron LaPoint, Pricing Government Contract Risk Premia: Evidence from the 2025 Federal Lease Terminations 1 (Mar. 15, 2026) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5328951 (on file with the Duquesne Law Review); Deborah Blumberg, *DOGE's Lease Cancellations Are Already Hitting the Commercial Real Estate Market*, YALE INSIGHTS (Aug. 22, 2025), https://insights.som.yale.edu/insights/doges-lease-cancellations-are-already-hitting-the-commercial-real-estate-market [https://perma.cc/H9Y4-YBHF].

8. GAO CRE REPORT, *supra* note 5, at 9–10.

9. *See* UNIF. MORTG. MODIFICATION ACT prefatory note (UNIF. L. COMM'N 2024); Vicki Been, Howell Jackson & Mark Willis, *Essay: Sticky Seconds—The Problems Second Liens Pose to the Resolution of Distressed Mortgages*, 9 N.Y.U. J.L. & BUS. 71, 81–83, 96–97 (2012).

10. *See* UNIF. MORTG. MODIFICATION ACT prefatory note (UNIF. L. COMM'N 2024).

11. *Id.*

borrowers. A document must be acknowledged by a notary public before it can be recorded.[12] According to data from a government sponsored enterprise (GSE), 11% of homeowners who were approved in 2024 for a modification to reduce payments on loans held or securitized by the GSE failed to return an executed modification agreement necessary to finalize a loan modification.[13] These homeowners had gone through the process to become eligible for a modification and had made three monthly trial payments at the reduced payment level.[14] Signing and returning the modification agreement would have been the last step for these borrowers to permanently reduce loan payments, and by not returning the modification agreement, these borrowers would likely have lost their homes.[15] Anecdotally, servicers believe that a major roadblock for homeowners to return an executed modification agreement is the requirement that it be notarized.[16]

Despite barriers, modifications of both residential and commercial real estate loans are common.[17] The reasons for modifying a mortgage loan vary. For home mortgage loans, a lender may agree to modify the loan in response to a borrower's financial distress or default in making payments or after a home is damaged by natural disaster.[18] Commercial borrowers and lenders may reach an agreement for a "workout" if the borrower is in financial distress.[19] A construction loan may be converted to a longer-term loan after

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12. *See* DALE A. WHITMAN, ANN M. BURKHART, R. WILSON FREYERMUTH & TROY A. RULE, THE LAW OF PROPERTY § 11.1, at 707 (4th ed. 2019).

13. E-mail from undisclosed source at a government sponsored enterprise (on file with author).

14. *Id.*

15. *Id.*

16. *Id.* Other reasons for not completing a modification include a sale of the home. But servicers believe that most of the unreturned modification agreements resulted in foreclosures. *Id.*

17. RESTATEMENT (THIRD) OF PROP.: MORTGS. § 7.3 cmt. a (A.L.I. 1997).

18. *See* FANNIE MAE, SERVICING GUIDE: FANNIE MAE SINGLE FAMILY § D2-3.2-06, at 344–45 (Dec. 17, 2025) [hereinafter FANNIE MAE SERVICING GUIDE], https://singlefamily.fanniemae.com/media/44576/display (on file with the Duquesne Law Review); *Rationale for Servicer Loss Mitigation Activities,* FREDDIE MAC SINGLE-FAMILY: SELLER/SERVICER GUIDE § 9201.1 (Sep. 10, 2025) [hereinafter *Freddie Mac Loss Mitigation Rationale*], https://guide.freddiemac.com/app/guide/section/9201.1 [https://perma.cc/XQL8-HYG8]; *Options to Stay in Your Home*, FANNIE MAE, https://yourhome.fanniemae.com/get-relief/options-to-stay-in-your-home (on file with the Duquesne Law Review) (last visited Apr. 17, 2026); *Understanding Options to Stay in Your Home*, FREDDIE MAC: MY HOME, https://myhome.freddiemac.com/getting-help/options-to-stay [https://perma.cc/RLS9-3DYT] (last visited Mar. 3, 2026).

19. With workers shifting to remote or hybrid work during and after the COVID pandemic, commercial real estate loans secured by office buildings have faced increasing delinquencies, but banks have worked with borrowers to modify their loans to reduce delinquencies and defaults. *See* GAO CRE REPORT, *supra* note 5, at 1, 3, 9–10.

completion of construction.[20] In addition, commercial credit facilities may be modified periodically to reflect changing conditions in debt markets or to substitute debt tranches.[21]

Loan modifications are consensual agreements between borrowers and lenders and are generally beneficial to both parties. Removing barriers to modification can save time and money for borrowers and lenders, both residential and commercial, and will facilitate modification as an alternative to foreclosure.[22]

This Article will proceed in four parts. Part I will discuss modifications of mortgage loans in the residential and commercial context. Part I will also explore the harms of foreclosure to homeowners, lenders, and society in general and the benefits of modification as an alternative to foreclosure. Part II will focus on legal issues raised by modifications, including priority, whether a modification agreement must be recorded, and the problem of novation.

Part III will discuss the new Uniform Mortgage Modification Act. The new Act addresses barriers to modification caused by uncertainty in the law for both residential and commercial mortgage loans. The Act resolves the legal issues discussed in Part II for safe harbor modifications, which are common modifications that should not cause a loss of priority because they generally do not prejudice a junior lienholder. For safe harbor modifications, the mortgage continues to secure an obligation as modified, modification will not cause a loss of priority, a modification agreement does not need to be recorded to preserve priority, and the modification is not a novation.[23] The safe harbor includes typical modifications made in response to a borrower's financial distress.[24]

Part IV will recommend that states adopt the Uniform Mortgage Modification Act. The Act will facilitate loan modification by clarifying the law, thus saving time and money for both borrowers and lenders, avoiding foreclosures, and mitigating lender losses caused by foreclosure.[25] Part IV also recommends that the CFPB continue to regulate the procedures that home mortgage servicers must follow for delinquent borrowers. By overcoming barriers to home loan

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20. UNIF. MORTG. MODIFICATION ACT prefatory note (UNIF. L. COMM'N 2024).

21. *Id.* ("Some credit facilities are updated periodically to reflect changing market conditions or to substitute portions of debt."); RESTATEMENT (THIRD) OF PROP.: MORTGS. § 7.3 cmt. a (A.L.I. 1997) ("[A] senior mortgagee may consent to an extension of the mortgage obligation to enable the mortgagor to deal with market conditions in a setting in which the mortgagor's business condition is clearly healthy.").

22. *See infra* Part IV.

23. UNIF. MORTG. MODIFICATION ACT § 4(a) (UNIF. L. COMM'N 2024).

24. *See infra* Section III.A.

25. *See infra* Section I.C.3 (discussing how foreclosures cause losses for lenders).

modifications by servicers, homeowners can avoid foreclosure, and lenders can mitigate their losses for delinquent home mortgage loans.

I. MORTGAGES AND MODIFICATIONS

To evidence a mortgage loan, the borrower typically executes a promissory note, eNote, or credit agreement that creates an obligation to pay.[26] To secure repayment of the obligation, the borrower grants the lender a security interest in real property by executing a mortgage.[27] This Article, like the Uniform Mortgage Modification Act, will use the term mortgage to include the various types of agreements that create a consensual interest in real property to secure an obligation, including not only mortgages but also deeds of trust, trust deeds, and the like.[28] A mortgage may also secure other monetary obligations,[29] but this Article will focus on mortgages to secure a loan.

The terms of a mortgage loan include the principal amount, the interest rate, payment terms, and maturity date.[30] Also typically included are prepayment terms, financial covenants, requirements for maintaining insurance, and covenants requiring payment of taxes, among other terms.[31] Parties may subsequently agree to modify the terms of the mortgage itself, the promissory note

26. *See* Julia Patterson Forrester Rogers, *eMortgage and Crypto-Mortgage in Home Finance*, 52 PEPP. L. REV. 1, 7 (2025) [hereinafter Forrester Rogers, *eMortgage*]; Julia Patterson Forrester Rogers, *Mortgage Theory*, *in* 4A REAL ESTATE FINANCING § 3.01[2] (2026) [hereinafter Forrester Rogers, *Mortgage Theory*].

27. GRANT S. NELSON, DALE A. WHITMAN, ANN M. BURKHART & R. WILSON FREYERMUTH, REAL ESTATE FINANCE LAW § 1.1, at 1, § 1.6, at 10 (6th ed. 2015). In most states the interest in real property created by a mortgage is a lien, but in a few "title theory" states, a mortgage, at least theoretically, transfers title to the lender. *See* Julia Patterson Forrester, *Still Crazy After All These Years: The Absolute Assignment of Rents in Mortgage Loan Transactions*, 59 FLA. L. REV. 487, 493 (2007).

28. *See* UNIF. MORTG. MODIFICATION ACT § 2(4) (UNIF. L. COMM'N 2024).

29. Any obligation that can be reduced to a monetary value can be secured by a mortgage. RESTATEMENT (THIRD) OF PROP.: MORTGS. § 1.4 (A.L.I. 1997); NELSON ET AL., *supra* note 27, § 2.2, at 20.

30. *See, e.g.*, FANNIE MAE & FREDDIE MAC, MULTISTATE FIXED RATE NOTE—SINGLE FAMILY—FANNIE MAE/FREDDIE MAC UNIFORM INSTRUMENT, FORM 3200 (2021), https://sf.freddiemac.com/tools-learning/uniform-instruments/2021-updated-instruments [https://perma.cc/BEE6-N82F].

31. *See* Forrester Rogers, *Mortgage Theory, supra* note 26, § 3.09; *see also, e.g.*, FANNIE MAE & FREDDIE MAC, CALIFORNIA—SINGLE FAMILY—FANNIE MAE/FREDDIE MAC UNIFORM INSTRUMENT, FORM 3005 (2021) [hereinafter CALIFORNIA UNIFORM INSTRUMENT], https://sf.freddiemac.com/tools-learning/uniform-instruments/2021-updated-instruments#security-instruments [https://perma.cc/4YGY-WQHL]; FANNIE MAE & FREDDIE MAC, TEXAS—SINGLE FAMILY—FANNIE MAE/FREDDIE MAC UNIFORM INSTRUMENT, FORM 3044 (2024) [hereinafter TEXAS UNIFORM INSTRUMENT], https://sf.freddiemac.com/tools-learning/uniform-instruments/2021-updated-instruments#security-instruments [https://perma.cc/4YGY-WQHL].

evidencing the loan, or other documents evidencing the borrower's obligations or creating additional security for the loan.[32]

A mortgage modification does not create a new security interest in the real property to secure an obligation[33] but rather modifies existing agreements with the intent that the existing mortgage should secure the obligations as modified. In fact, most mortgages have a provision to the effect that the mortgage will continue to secure any modifications, amendments, extensions, and restatements of the loan obligations.[34]

A. Residential Mortgage Loan Modifications

Residential loan modifications are typically made in response to the borrower's default, financial distress, or damage to the home. Modifications are usually designed to allow the borrower to stay in the home and avoid foreclosure. These modifications can be beneficial to the investor in the loan as well as to the borrower.[35] Loss mitigation strategies, such as loan modification, "can improve overall profitability for investors by reducing servicer costs, increasing the rate at which borrowers resume making payments, and reducing foreclosures, which are often costly for investors."[36]

Common modifications for residential borrowers in distress include extending the maturity date of a loan, lowering the interest rate, fixing the rate on an adjustable-rate loan, and capitalizing unpaid interest.[37] Extending the maturity date can reduce the

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32. *See* UNIF. MORTG. MODIFICATION ACT § 2(5) (UNIF. L. COMM'N 2024) (defining "mortgage modification").

33. *See* CL Howard Invs. I, LLC v. Wilmington Sav. Fund Soc'y, FSB, 911 S.E.2d 384, 390 (N.C. Ct. App. 2024) ("[A] loan modification is not an instrument to convey title on its own like a deed of trust and does not exist separate and apart from the instrument it modifies.").

34. *See, e.g.*, CALIFORNIA UNIFORM INSTRUMENT, *supra* note 31, at 4; TEXAS UNIFORM INSTRUMENT, *supra* note 31, at 4; *see also* VA. CODE ANN. § 55.1-318.1 (West, Westlaw through the 2025 Reg. and Reconvened Sessions) (protecting a senior mortgage against loss of priority only if it has a clause to the effect that it continues to secure the obligation as modified).

35. *See* Streamlining Mortgage Servicing for Borrowers Experiencing Payment Difficulties; Regulation X, 89 Fed. Reg. 60204, 60205 (proposed July 24, 2024) (to be codified at 12 C.F.R. pt. 1024); *Freddie Mac Loss Mitigation Rationale*, *supra* note 18; JOSEPH TRACY, RSCH. INST. FOR HOUS. AM., MORTGAGE DESIGN, UNDERWRITING AND INTERVENTIONS: PROMOTING SUSTAINABLE HOMEOWNERSHIP 15 (2024), https://www.mba.org/docs/default-source/research---riha-reports/26678-riha-sustainable-homeownership-paper.pdf?sfvrsn=c4c7c73a_2 [https://perma.cc/AL2J-NW7L].

36. Streamlining Mortgage Servicing for Borrowers Experiencing Payment Difficulties; Regulation X, 89 Fed. Reg. at 60205.

37. *See What Is a Mortgage Loan Modification?*, CONSUMER FIN. PROT. BUREAU (Sep. 4, 2020), https://www.consumerfinance.gov/ask-cfpb/what-is-a-mortgage-loan-modification-en-269/ [https://perma.cc/GU6J-K6YP]; *Flex Modification*, FREDDIE MAC SINGLE-FAMILY, https://sf.freddiemac.com/working-with-us/servicing/products-programs/freddie-mac-flex-

monthly payment as can reducing the interest rate.[38] Capitalizing unpaid interest and escrow payments allows the borrower to pay past due amounts over time rather than immediately, in order to cure a default.

Most residential mortgage loans are originated by one lender and transferred for securitization, with investors holding securities backed by a pool of residential loans.[39] A servicer typically collects payments that are passed through to investors less a percentage retained by the servicer as a fee. When a loan is in default, it is the servicer that usually conducts a foreclosure or engages in loss mitigation strategies, including loan modification.

The 2007–2009 mortgage crisis brought to light disincentives of servicers to modify loans.[40] Monetary incentives for servicers favored foreclosure over modification.[41] Some servicing agreements prohibited or limited modifications.[42] Even when modifications were not prohibited, servicers apparently had concerns about investor lawsuits.[43] Furthermore, the mortgage servicing industry lacked a standardized approach to dealing with delinquent loans at a time when the number of delinquencies was overwhelming.[44]

In response, in 2009, the Obama Administration created the Home Affordable Modification Program (HAMP), which set servicing standards for residential loan modifications and provided financial incentives to servicers for loan modifications.[45] The program did

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modification [https://perma.cc/C9MQ-GAMM] (last visited Mar. 3, 2026); *see also* Been, Jackson & Willis, *supra* note 9, at 75 ("Options that may help distressed borrowers retain their homes include refinancing at a lower rate or modifying the terms of the mortgage by lowering the rate, extending the period for amortizing the principal, reducing the principal due, or deferring payment of some of the principal due.").

38. *See* Fraction v. Jacklily, LLC (*In re* Fraction), 622 B.R. 642, 651 (Bankr. E.D. Pa. 2020), *aff'd*, Civil No. 5:20-cv-05997, 2021 WL 4037508 (E.D. Pa. Sep. 3, 2021).

39. *See* Forrester Rogers, *eMortgage*, *supra* note 26, at 15–16.

40. *See* Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755, 762 (2011); Alan White, *Saving Home? Bankruptcies and Loan Modifications in the Foreclosure Crisis*, 65 FLA. L. REV. 1713, 1713 (2013).

41. *See* Thompson, *supra* note 40, at 776–80 (providing a cost-benefit analysis of foreclosure as compared to modification and concluding that "there are more incentives in favor of a foreclosure than against").

42. *Id.* at 784.

43. *Id.* These concerns were unfounded as investors instead questioned the failure to modify loans as an alternative to foreclosure. *Id.* at 784–85.

44. Streamlining Mortgage Servicing for Borrowers Experiencing Payment Difficulties; Regulation X, 89 Fed. Reg. 60204, 60206 (proposed July 24, 2024) (to be codified at 12 C.F.R. pt. 1024).

45. *See* Thompson, *supra* note 40, at 826; White, *supra* note 40, at 1718–19.

not generate as many modifications as was hoped[46] and it was not extended upon its expiration at the end of 2016.[47]

In 2013, the CFPB promulgated rules intended to decrease the number of home foreclosures and promote fairness by standardizing loss mitigation procedures and implementing servicing safeguards.[48] The rules, applicable only to mortgage loans secured by a borrower's principal residence,[49] became effective on January 10, 2014.[50]

The CFPB regulations establish requirements for informing borrowers of loss mitigation options, including loan modification, when a borrower is delinquent on a mortgage payment.[51] A servicer must establish or make good faith efforts to establish live contact with a delinquent borrower by the thirty-sixth day of their delinquency.[52] In addition, a servicer must give written notice of loss mitigation options within forty-five days.[53] Servicers must maintain policies and procedures that reasonably aim to provide delinquent borrowers with access to personnel that can answer their questions and assist with available loss mitigation options.[54]

The regulation establishes a timeline to prevent hasty foreclosures by providing borrowers sufficient time to apply for a loan

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46. *See* OFF. OF THE SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, Q. REP. TO CONGRESS 10–11 (Jan. 26, 2011) (addressing servicer noncompliance); Jean Baucher, *Humpty Dumpty and the Foreclosure Crisis: Lessons from the Lackluster First Year of the Home Affordable Modification Program (HAMP)*, 52 ARIZ. L. REV. 727, 733 (2010); Thompson, *supra* note 40, at 761; White, *supra* note 40, at 1715. The program was also not as successful as hoped. *See* OFF. OF THE SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, Q. REP. TO CONGRESS 179–80 (Apr. 24, 2013) (discussing redefaults after HAMP modifications).

47. *See* Christopher K. Whelan, *The End of the Home Affordable Modification Program and the Start of a New Problem*, 83 BROOK. L. REV. 1469, 1472 (2018); Renae Merle, *After Helping a Fraction of Homeowners Expected, Obama's Foreclosure Prevention Program is Finally Ending*, WASH. POST (Dec. 30, 2016), https://www.washingtonpost.com/news/business/wp/2016/12/30/after-helping-a-fraction-of-homeowners-expected-obamas-foreclosure-prevention-program-is-finally-ending/?utm_term=.7c48beef27a9 (on file with the Duquesne Law Review).

48. *See* 12 C.F.R. §§ 1024.39–1024.41 (2026). Fannie Mae and Freddie Mac are also regulated by the Federal Housing Finance Agency (FHFA). 12 U.S.C. § 4511.

49. 12 C.F.R. § 1024.30(c)(2).

50. CONSUMER FIN. PROT. BUREAU, SUMMARY OF THE FINAL MORTGAGING SERVICING RULES 1 (2013), http://files.consumerfinance.gov/f/201301_cfpb_servicing-rules_summary.pdf (on file with the Duquesne Law Review).

51. 12 C.F.R. § 1024.39.

52. *Id.* § 1024.39(a). The servicer must also attempt to make live contact by the thirty-sixth day after each payment due date while the borrower remains delinquent. *Id.*

53. *Id.* § 1024.39(b).

54. *Id.* § 1024.40(a). Personnel should remain assigned to the borrower until the borrower has made, without a late charge, two consecutive mortgage payments consistent with a permanent loss mitigation agreement. *Id.* Personnel should have access to all information provided by the borrower to the servicer and should provide that information to those responsible for evaluating the borrower for loss mitigation options. *Id.* § 1024.40(b).

modification and giving servicers time to review the application.[55] A servicer may not give the first notice or make the first filing required for a foreclosure until a borrower is more than 120 days delinquent.[56] The regulation further prohibits servicers from "dual tracking"—preparing to foreclose while evaluating a borrower for a loan modification.[57] Proposed amendments would have changed early intervention requirements and given all borrowers foreclosure protection as soon as they requested loss mitigation assistance.[58]

The CFPB regulations are procedural—they do not require that servicers modify a loan or undertake another loss mitigation option,[59] thus leaving servicers with significant discretion. Servicers must, however, comply with the procedures set forth in the regulations, and borrowers have a private cause of action to enforce the requirements.[60]

The CFPB regulations have addressed disincentives for servicers to modify home mortgage loans as an alternative to foreclosure. The proposed amendments would have streamlined procedures and offered additional safeguards for borrowers while leaving servicers with the discretion as to whether to offer a loan modification.[61] However, the CFPB has been ordered not to enforce regulations.[62] Proposed amendments were pulled back,[63] and the regulations may, of course, be otherwise amended. Furthermore, the CFPB is currently

55. *Id.* § 1024.41(b)–(c).

56. *Id.* § 1024.41(f). Although small servicers are exempt from most of the requirements of the regulation, they are not exempt from this prohibition. *Id.* § 1024.41(j).

57. *Id.* § 1024.41(f).

58. Streamlining Mortgage Servicing for Borrowers Experiencing Payment Difficulties; Regulation X, 89 Fed. Reg. 60204, 60205–06 (proposed July 24, 2024) (to be codified at 12 C.F.R. pt. 1024).

59. 12 C.F.R. § 1024.41(a) ("Nothing in § 1024.41 imposes a duty on a servicer to provide any borrower with any specific loss mitigation option. Nothing in § 1024.41 should be construed to create a right for a borrower to enforce the terms of any agreement between a servicer and the owner or assignee of a mortgage loan, including with respect to the evaluation for, or offer of, any loss mitigation option . . . .").

60. *Id.*; Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10696, 10790 (Feb. 14, 2013).

61. *See* Streamlining Mortgage Servicing for Borrowers Experiencing Payment Difficulties; Regulation X, 89 Fed. Reg. at 60205–06.

62. *See* Memorandum from Russell T. Vought, Acting Dir., Consumer Fin. Prot. Bureau, to DL CFPB AllHands (Feb. 8, 2025) (on file with the Duquesne Law Review).

63. *See id.*; Stephan Bisaha, *1 Year into Trump's New Term, an Agency That Protects Your Finances is 'Hanging by a Thread,'* NPR (Jan. 21, 2026, at 05:00 ET), https://www.npr.org/2026/01/21/nx-s1-5683060/cfpb-consumer-watchdog-agency-trump-second-term [https://perma.cc/F33U-VX9H].

all but dormant, with funding for the agency cut dramatically,[64] and the possibility that the agency may be eliminated altogether.[65]

Other barriers to modification remain as well. Borrowers in financial distress and facing foreclosure may be overwhelmed by the need to find a notary public to acknowledge their signatures on a modification agreement as required for the document to be recorded.[66] In addition, the existence of a junior lien raises priority concerns for a senior lender that might otherwise be willing to modify a loan.[67]

Junior liens are common on residential properties.[68] For residential loans, the Garn-St Germain Depository Institutions Act of 1982 provides that a lender may not accelerate the loan based on "the creation of a lien or other encumbrance subordinate to the lender's

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64. *See* Stacy Cowley, *Consumer Bureau Leader Requests $145 Million for Agency He Wants to Eliminate*, N.Y. TIMES (Jan. 9, 2026), https://www.nytimes.com/2026/01/09/us/politics/cfpb-vought-funds.html (on file with the Duquesne Law Review); Stephanie Dhue, *What Dramatic Cuts at the Consumer Financial Protection Bureau Could Mean for Consumers*, CNBC (Apr. 29, 2025, at 11:24 ET), https://www.cnbc.com/2025/04/29/what-cfpb-cuts-could-mean-for-consumers.html [https://perma.cc/2SWB-M594]; Ken Sweet, *Senate Republicans Move to Slash Consumer Bureau Funding by Half, Risking Hundreds of Job Cuts*, AP (June 27, 2025, at 16:17 ET), https://apnews.com/article/big-beautiful-bill-cfpb-warren-trump-cuts-cbfa977da0b1cada1bf4348aa4e05cc0 [https://perma.cc/EK6G-P428].

65. *See* Cowley, *supra* note 64; Nandita Bose, Doina Chiacu & Douglas Gillison, *White House Budget Director Plans to Shut US Consumer Finance Watchdog Within Months*, REUTERS (Oct. 15, 2025, at 15:46 ET), https://www.reuters.com/business/world-at-work/white-house-budget-director-vought-says-over-10000-federal-workers-could-be-laid-2025-10-15 (on file with the Duquesne Law Review).

66. *See supra* notes 12–16 and accompanying text.

67. Lenders and servicers may believe that consent of a second lienholder is necessary for a modification of the senior loan. *See* Been, Jackson & Willis, *supra* note 9, at 83, 97. In addition,

> [a]mbiguity about how much authority servicers have to negotiate with (or ignore) second lien holders may have prevented efficient resolutions of distressed mortgages. Vague PSAs [pooling and servicing agreements] and *uncertain legal standards* left many first lien servicers reluctant to engage in modifications or other resolutions that they feared could trigger legal liability to investors by jeopardizing the first lien's priority. . . . The resulting timidity may have led servicers to require second lien holders to resubordinate their liens when resubordination was unnecessary, increasing the costs of resolving distressed mortgages.

Id. at 96–97 (emphasis added) (footnote omitted).

68. *See id.* at 77–78; Julia Patterson Forrester, *Mortgaging the American Dream: A Critical Evaluation of the Federal Government's Promotion of Home Equity Financing*, 69 TUL. L. REV. 373, 379–81 (1994) [hereinafter Forrester, *Mortgaging the American Dream*]. Homeowners may obtain a home equity loan or home equity line of credit to finance home improvements, to pay college expenses, or for other purposes. Been, Jackson & Willis, *supra* note 9, at 79. In addition, a second lien may be a nonconsensual lien such as a judgment lien or mechanics' lien, although state homestead laws generally protect at least a portion of a homeowner's equity as against a judgment lien. *See* Julia Patterson Forrester, *Home Equity Loans in Texas: Maintaining the Texas Tradition of Homestead Protection*, 55 SMU L. REV. 157, 159 (2002) ("[S]tatutory or constitutional homestead provisions of most states protected the homestead from the reach of general creditors. Therefore, a creditor cannot execute upon a debtor's homestead in satisfaction of a judgment.").

security instrument which does not relate to a transfer of rights of occupancy in the property."[69] Because the lender may not enforce a due-on-encumbrance clause, residential borrowers can and often do obtain subordinate financing such as a home improvement loan, a home equity loan, or a home equity line of credit. Therefore, the retention of priority in connection with a modification is an important consideration for a lender in determining whether to offer a modification.

B. Commercial Real Estate Loan Modifications

Commercial lenders are not prohibited from enforcing a due-on-encumbrance clause.[70] Therefore, most commercial mortgages have a due-on-encumbrance clause, and many also prohibit secondary financing without the lender's consent.[71] When a lender does consent to secondary financing, the two lenders typically enter into an intercreditor agreement that defines the rights and obligations of the lenders with respect to each other.[72] The parties may agree that certain modifications to the first lien loan do or do not cause a loss of priority or, if the junior lender has some bargaining power, the senior lender may agree not to modify the senior loan without the junior lender's consent. In the absence of an agreement regarding modification, default rules provided by common law or statutory law apply.

For modifications of commercial loans, the lender may require a legal opinion from the borrower's counsel.[73] Because of uncertainty in the law, attorneys are hesitant to give an unqualified opinion as to priority of the mortgage after modification.[74] Lenders also frequently require recordation of a modification agreement and an endorsement to the lender's title policy.[75] If the mortgaged property is

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69. 12 U.S.C. § 1701j-3(d)(1).

70. *See id.* (applying only to residential loans).

71. *See* Forrester Rogers, *Mortgage Theory*, *supra* note 26, § 3.09[13], [19].

72. Kenneth Ayotte, Anthony J. Casey & David A. Skeel, Jr., *Bankruptcy on the Side*, 112 NW. U. L. REV. 255, 257 (2017); Edward R. Morrison, *Rules of Thumb for Intercreditor Agreements*, 2015 U. ILL. L. REV. 721, 721–22.

73. BROOK BOYD, REAL ESTATE FINANCING § 22.02[3][p] (2025); Lydia Stefanowicz, *Legal Opinions and Loan Modification Transactions*, A.B.A. (Aug. 26, 2024), https://www.americanbar.org/groups/real_property_trust_estate/resources/opinions-matters/2024-summer/legal-opinions-loan-modification-transactions/?abajoin=true (on file with the Duquesne Law Review).

74. *See* Stefanowicz, *supra* note 73.

75. *See* Laurence S. Tauber, *Mortgage Modification Agreements*, *in* 4C REAL ESTATE FINANCING, *supra* note 26, §§ 3H.04, 3H.19; BOYD, *supra* note 73, § 22.02[3][g], [k].

encumbered with a junior lien, questions as to priority may arise.[76] These barriers can cause delay and extra expense, usually paid by the borrower, and may discourage lenders from considering a modification.[77]

C. Foreclosure Harms and Modification Benefits

1. Homeowners

Foreclosure is financially, psychologically, and even physically devastating for homeowners and their families.[78] Financial issues include the loss of any equity that the homeowner may have had in the home and, in many states, the possibility of a deficiency judgment if foreclosure sale proceeds are insufficient to satisfy the debt.[79] One study estimates that homeowners have positive equity in about a third of home mortgage foreclosures.[80] Because foreclosure sales rarely generate a sales price close to the fair market value of the home, foreclosure means the loss of equity,[81] and home equity may be a homeowner's only source of household wealth.[82]

After loss of the home, families may be homeless or may be forced to live with friends or relatives. Obtaining an apartment may be

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76. The lender may require subordination or consent from holders of subordinate liens or other subordinate interests, s*ee* Tauber, *supra* note 75, § 3H.01; BOYD, *supra* note 73, § 22.02[3][w], whether necessary or not, *see supra* note 67; *infra* Section II.A.

77. *See* UNIF. MORTG. MODIFICATION ACT prefatory note (UNIF. L. COMM'N 2024).

78. *See* Julia Patterson Forrester, *Still Mortgaging the American Dream: Predatory Lending, Preemption, and Federally Supported Lenders*, 74 CIN. L. REV. 1303, 1315 (2006) [hereinafter Forrester, *Still Mortgaging the American Dream*]; Forrester, *Mortgaging the American Dream*, *supra* note 68, at 385–86.

79. *See* Alex M. Johnson, Jr., *Critiquing the Foreclosure Process: An Economic Approach Based on the Paradigmatic Norms of Bankruptcy*, 79 VA. L. REV. 959, 966–67 (1993).

80. *See* TRACY, *supra* note 35, at 1 ("[F]oreclosure auction data indicates that many homes sold in foreclosure are in positive equity and that this category likely makes up around a third of defaults."). Most foreclosures are the result of both negative equity in the home and a liquidity shock. *Id.* at 1, 13. A liquidity shock may either be a shock to income, such as loss of a job, or a shock to expenses, such as unexpected medical debt or an increase in the monthly mortgage payment on an adjustable-rate mortgage. *See id.* at 4, 12. "Survey and foreclosure auction data suggest that liquidity constraints alone may account for roughly a third of foreclosures." *Id.* at 13. Strategic defaults, those by borrowers who can afford to pay their mortgage but choose to default because of negative equity, are not common. *Id.* at 9–10.

81. Melissa B. Jacoby, *The Value(s) of Foreclosure Law Reform*, 37 PEPP. L. REV. 511, 512 (2010); Johnson, *supra* note 79, at 959; Debra Pogrund Stark, *Facing the Facts: An Empirical Study of the Fairness and Efficiency of Foreclosures and a Proposal for Reform*, 30 U. MICH. J.L. REFORM, 639, 651–52 (1997). Homeowners with equity would be much better off to sell their homes prior to foreclosure, thus retaining excess proceeds of a market-value sale. *See* TRACY, *supra* note 35, at 12. But for various reasons, many homeowners with equity do not put their homes on the market. *Id.*

82. Mejda Bahlous-Boldi, *Foreclosures and Their Costs: Could They Have Been Avoided? The Case of California During the Mortgage Crisis*, J. STRUCTURED FIN., Summer 2020, at 9, 10.

difficult because the foreclosure itself damages a person's credit rating.[83] A low credit score after foreclosure may also make it difficult for the foreclosed homeowner to obtain financing and insurance and may even make it harder for the homeowner to get a job.[84]

Foreclosure also has psychological impacts. Homeowners and their families facing foreclosure are more likely to experience mental illness, suicide, crime, sadness, sleep loss, and anger.[85] They are more likely to suffer from depression and anxiety.[86] The shame of being unable to pay bills and provide for the family is an additional factor affecting mental health, deepening feelings of failure and leading homeowners to hide their situation from friends and family

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83. *Id.*; *see also* G. THOMAS KINGSLEY, ROBIN E. SMITH & DAVID PRICE, METRO. HOUS. & CMTYS. CTR., THE IMPACTS OF FORECLOSURES ON FAMILIES AND COMMUNITIES: A PRIMER 2 (2009), https://www.urban.org/sites/default/files/publication/30431/411910-The-Impacts-of-Foreclosures-on-Families-and-Communities-A-Primer.PDF (on file with the Duquesne Law Review) ("Homeowners in foreclosure see their credit ratings plummet, making it difficult to purchase or rent another home.").

84. *See* Bahlous-Boldi, *supra* note 82, at 10 ("Landlords, lenders, and society at large often see someone with a poor credit score as untrustworthy."); KINGSLEY, SMITH & PRICE, *supra* note 83, at 2 ("Poor credit ratings can also affect the terms and prices charged for services such as insurance and may impede efforts to get jobs, because some employers check credit ratings for new hires.").

85. *See* Janelle Downing, *The Health Effects of the Foreclosure Crisis and Unaffordable Housing: A Systematic Review and Explanation of Evidence*, 162 SOC. SCI. & MED. 88, 95 (2016); Katherine A. Fowler et al., *Increase in Suicides Associated with Home Eviction and Foreclosure During the US Housing Crisis: Findings from 16 National Violent Death Reporting System States, 2005–2010*, 105 AM. J. PUB. HEALTH 311, 314–15 (2015); Cyleste C. Collins & LeaAnne DeRigne, *Losing Hold of the American Dream: A Qualitative Exploration of the Relationship Between Foreclosure and Psychological and Physical Health*, 42 J. FAM. ISSUES 695, 698, 702–06 (2021); Jason N. Houle & Michael T. Light, *The Home Foreclosure Crisis & Rising Suicide Rates, 2005 to 2010*, 104 AM. J. PUB. HEALTH 1073, 1077 (2014); Forrester, *Mortgaging the American Dream*, *supra* note 68, at 386 (citing *Mortgage Foreclosures: Hearings Before the Subcomm. on Fin. Insts. Supervision, Regul. & Ins. of the H. Comm. on Banking, Fin. & Urb. Affs.*, 98th Cong. 276 (1983) (statement of John J. Sheehan, Dir. of Legis., United Steelworkers of Am.); Marc Fried, *Grieving for a Lost Home: Psychological Costs of Relocation*, *in* URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 359, 359–61 (James Q. Wilson ed., 1966)). Fowler's review of suicide deaths across sixteen states found more than 900 eviction- or foreclosure-related suicides between 2005–2010, with the most significant increases occurring at the time of the housing crisis. Fowler, *supra*, at 314. For most of these individuals, eviction or foreclosure was the only contributing factor or one of only two contributing circumstances. *Id.* at 315. In Collins's and DeRigne's qualitative study, 48% of study participants reported symptoms of depression, including feelings of sadness, hopelessness, guilt, and more. Collins & DeRigne, *supra*, at 704. One mother described crying silently at night to hide her feelings from her children. *Id.*

86. *See* Abdulaziz Alhenaidi & Tim Huijts, *The Adverse Effects of Foreclosure on Mental Health in the United States After the Great Recession: A Literature Review*, 35 J. HOUS. & BUILT ENV'T 335, 343 (2019); Dawn E. Alley et al., *Mortgage Delinquency and Changes in Access to Health Resources and Depressive Symptoms in a Nationally Representative Cohort of Americans Older than 50 Years*, 101 AM. J. PUB. HEALTH 2293, 2295–96 (2011); Downing, *supra* note 85, at 95. In a study comparing mortgage delinquent and nondelinquent individuals, Alley found that 22% of mortgage delinquent participants developed depressive symptoms over a two-year period whereas just 3% of nondelinquent participants developed the same. Alley et al., *supra*, at 2295.

who might otherwise be able to provide monetary or psychological support.[87] In addition, homeowners' identity and sense of self-worth may be tied to their home, further exacerbating the impact of foreclosure on mental health.[88] Upon loss of the home, homeowners will lose ties to their neighborhood, and children may be forced to change schools—often to lower-performing schools.[89]

Homeowners facing foreclosure are also more likely than the general population to have medical issues such as high blood pressure.[90] The foreclosure process itself may exacerbate existing health

87. *See* Cyleste C. Collins & Kristen A. Berg, *Losing a Little Part of Yourself: Families' Experiences with Foreclosure*, 40 J. FAM. ISSUES 1832, 1843 (2019); Collins & DeRigne, *supra* note 85, at 705–06; Cyleste C. Collins et al., *Family, Identity, and the American Dream: Service Providers' Perspectives on Families' Experiences with Foreclosure*, 99 FAMS. SOC'Y 16, 21–22 (2018); Jeffrey Gentes, *An Efficient Reduction of Homeowner Humiliation*, 74 BUFF. L. REV. (forthcoming 2026) (manuscript at 24) (on file with author) (citing Collins & Berg, *supra*, at 1843). According to Collins's and DeRigne's study, 48% of participants reported experiencing anxiety or fear. Collins & DeRigne, *supra* note 85, at 705–06. Among the many psychological effects of the foreclosure process, participants described experiencing panic attacks, hair loss, and insomnia. *Id.* Several also reported hiding their situation from their children, family, and friends. *Id.* One participant expressed fear that a foreclosure sign would be put in his front yard for neighbors to see. *Id.* In other qualitative interviews, service providers described that their clients faced social pressure to be a homeowner, noting that home ownership is closely tied to the American Dream. Collins et al., *supra*, at 21–22. Service providers described the loss of a home as "embarrassing" and "devastating" for many clients. *Id.*

88. *See* Collins & DeRigne, *supra* note 85, at 696; Collins et al., *supra* note 87, at 21–24; Gentes, *supra* note 87 (manuscript at 24) (citing Collins & Berg, *supra* note 87, at 1841). A common theme in qualitative interviews with service providers was that the foreclosure process threatened individuals' sense of self and pursuit of the American Dream, leading many to fight to keep their homes even when doing so was not a sound financial decision. Collins et al., *supra* note 87, at 21–24. Providers described home ownership as the "quintessential marker of success." *Id.* at 22. Collins and DeRigne described a person's home as a "haven, a sanctuary, and a refuge from the rest of the world." Collins & DeRigne, *supra* note 85, at 696. They further described that loss of a home can be a "shocking change in status and to well-being manifest by changes in mental and physical health." *Id.*

89. *See* Vicki Been et al., *Does Losing Your Home Mean Losing Your School?: Effects of Foreclosures on the School Mobility of Children*, 41 REG'L SCI. & URB. ECON. 407, 408–14 (2011); Laryssa Mykyta, *Housing Crisis, Hardship and Safety Net Support: Examining the Effects of Foreclosure on Households and Families*, 34 HOUS. STUD. 827, 827–30 (2019). Been found that in schools with the highest concentrations of students living in buildings that received foreclosure notices, reading and math test scores were significantly lower than in other schools. Been, *supra*, at 410. Additionally, Been found that students who changed schools following a foreclosure tended to end up at a school with lower average proficiency rates on math and reading tests—although this trend was also true for students who moved for reasons other than a foreclosure. *Id.* at 412–13.

90. *See* Collins & DeRigne, *supra* note 85 at 706–11; Downing, *supra* note 85, at 94; Dayna E. Keene et al., *Fragile Health and Fragile Wealth: Mortgage Strain Among African American Homeowners*, 118 SOC. SCI. & MED. 119, 122–23 (2014); Craig Evan Pollack et al., *A Case–Control Study of Home Foreclosure, Health Conditions, and Health Care Utilization*, 88 J. URB. HEALTH 469, 473–75 (2011). In a case-control study on the impacts of foreclosure on health, Pollack found that 41.3% of people undergoing foreclosure experienced hypertension (i.e., high blood pressure) as opposed to just 35.6% of people in the control group. *Id.* at 472–74. Those undergoing foreclosure were also more likely to have other health issues, including renal disease. *Id.* Participants in Collins's and DeRigne's qualitative study reported serious physical impacts resulting from the stress of foreclosure. Collins & DeRigne, *supra*

problems,[91] and the financial problems associated with foreclosure may cause homeowners to forgo healthcare.[92]

Although the financial distress preceding a loan modification may result in some of these psychological and medical issues, the lower payments resulting from a modification and the retention of the home relieve some of the stress on the homeowner. Children may never be aware that foreclosure was a possibility. A family does not lose neighborhood ties, and children can continue to attend the same schools.[93]

2. Externalities

Foreclosure also creates externalities because neighbors and neighborhoods may be affected by vacant homes, decreases in property values, and increased crime.[94] A study by the Center for Responsible Lending found that homes located near a foreclosed home declined in value, on average, by 8.8%.[95] Vacant homes are more likely to be vandalized or occupied by squatters.[96] And when home

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note 85, at 707–08. One participant attributed his need for a quadruple bypass to the toll foreclosure had taken on his health. *Id.* at 708. Others said they were prescribed heart and blood pressure medication for the first time. *Id.* And one woman reported being diagnosed with an autoimmune disease, which she believed was triggered by stress from a foreclosure. *Id.*

91. *See* Collins & DeRigne, *supra* note 85, at 706–09; Keene et al., *supra* note 90, at 123.

92. *See* Collins & DeRigne, *supra* note 85, at 706–11; Downing, *supra* note 85, at 94; Pollack et al., *supra* note 90, at 473–75. In Collins's and DeRigne's qualitative study, one single father reported avoiding medical care for his physical health issues due to a lack of insurance. Collins & DeRigne, *supra* note 85, at 707. Another participant described making the decision to treat her physical health issues but neglecting treatment for her mental health. *Id.*

93. Of course, commercial borrowers see similar benefits to modification of a delinquent loan. For commercial borrowers, modification as an alternative to foreclosure means that the borrower retains ownership of the property and avoids a possible deficiency judgment.

94. *See* Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 CONN. L. REV. 355, 358–59 (2006); Forrester, *Still Mortgaging the American Dream*, *supra* note 78, at 1315 (citing U.S. DEPT. OF HOUS. & URB. DEV., U.S. DEPT. OF THE TREASURY, CURBING PREDATORY HOME MORTGAGE LENDING 25 (2000), https://www.huduser.gov/portal//Publications/pdf/treasrpt.pdf [https://perma.cc/2TNT-8WZ7]; *Problems in Community Development Banking, Mortgage Lending Discrimination, Reverse Redlining, and Home Equity Lending: Hearings Before the S. Comm. on Banking, Hous., & Urb. Affs.*, 103d Cong. 254 (1993) (statement of Scott Harshbarger, Att'y Gen., Commonwealth of Mass.)).

95. CTR. FOR RESPONSIBLE LENDING, 2013 UPDATE: THE SPILLOVER EFFECTS OF FORECLOSURES 1 (2013), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/2013-crl-research-update-foreclosure-spillover-effects-final-aug-19-docx.pdf [https://perma.cc/BSQ4-Q48P]; Bahlous-Boldi, *supra* note 82, at 11.

96. *See* Lauren C. Porter et al., *Understanding the Criminogenic Properties of Vacant Housing: A Mixed Methods Approach*, J. RSCH. CRIME & DELINQ. 378, 401–05 (2019). Participants in the Porter study said that abandoned homes in a neighborhood attracted squatters and homeless people. *Id.* at 402. They also observed that abandoned houses were easy targets for theft and vandalism, with one community member describing offenders throwing rocks

values decline, cities lose tax revenue.[97] Similarly, foreclosed commercial buildings result in harm to the neighborhood and tax base.[98] However, homeowners and neighborhoods are not the only losers.

3. Lenders

Lenders generally incur losses when a loan secured by real property is foreclosed rather than paid.[99] The loss begins with delinquency when the borrower stops making payments of principal and interest, and if the borrower fails to pay taxes and insurance premiums, the lender will pay to avoid loss of the collateral for the loan.[100] A residential lender must generally wait 120 days after the borrower's default before commencing a foreclosure action,[101] and unpaid interest will accrue during this time, increasing the debt. The lender will also incur legal fees and other costs of collection and foreclosure.[102] A third-party bidder is unlikely to pay the full fair market value of the home. The lender is often the successful bidder at foreclosure and will become the owner of the property, which is then called "real estate owned" or REO.[103] The lender will then be responsible for all expenses of ownership, including taxes,

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through the windows of vacant homes. *Id*. at 403. The study concluded that the removal of abandoned houses from a neighborhood led to a reduction in crime. *Id*. at 405.

97. Engel, *supra* note 94, at 359.

98. *See* Joe Rennison & Julie Creswell, *Office Building Losses Start to Pile Up, and More Pain is Expected*, N.Y. TIMES (June 6, 2024), https://www.nytimes.com/2024/06/06/business/office-building-foreclosures-losses.html (on file with the Duquesne Law Review) ("A sustained drop in the value of commercial real estate could sap property tax revenue that cities like New York and San Francisco rely on to pay salaries and provide public services. Empty and nearly empty office buildings also hurt restaurants and other businesses that served the companies and workers who occupied those spaces.").

99. *See* TRACY, *supra* note 35, at 14; Bahlous-Boldi, *supra* note 82, at 12; *Freddie Mac Loss Mitigation Rationale, supra* note 18 ("Freddie Mac wants the Servicer to pursue alternatives to foreclosure whenever possible because they benefit not only the Borrower but also the Servicer, Freddie Mac and other interested parties in the Mortgage by: [e]liminating the staff time and expense the Servicer incurs to service a delinquent Mortgage or a Mortgage in foreclosure[;] [r]einstating the Servicing fee income the Servicer earns if a Mortgage Delinquency is cured or reinstating part or all of the Servicing fee income if a Mortgage is modified[;] [i]mproving the Servicer's relationship with the Borrower[;] [m]inimizing Freddie Mac's credit losses[; and] [r]educing an MI or guarantor's claim payment, when applicable[.] Even after the Servicer has initiated foreclosure, it should still pursue alternatives to foreclosure to mitigate potential credit losses, whenever possible.").

100. Bahlous-Boldi, *supra* note 82, at 12.

101. *See* 12 C.F.R. § 1024.41(f)(1)(i) (2026); *see also supra* notes 55–56 and accompanying text.

102. Bahlous-Boldi, *supra* note 82, at 12. "The Mortgage Bankers Association estimates these costs to be 5% of the value of the home." *Id.*

103. In recent years, successful bids by third parties have been more common. *See* TRACY, *supra* note 35, at 13. However, a market downturn could result in more foreclosures with negative equity at which third party bidders are not common. *See id*.

insurance premiums, and maintenance.[104] The property may need significant repairs before it can be sold, and the lender will be responsible for costs of sale including real estate broker fees.[105] During the time before the sale of an REO property, the lender is still without the interest payments that were its expected return on the loan. "But the most significant cost to the lender is the discount at which the REO home sells compared to a non-REO sale."[106] A study of home foreclosures in California during the mortgage crisis in 2008 found that lenders lost, on average, almost $90,000 on each home foreclosure.[107]

A study conducted by the Research Institute for Housing America and supported by the Mortgage Bankers Association compared lender losses from foreclosure, from a successful intervention, and from an unsuccessful intervention that ultimately resulted in foreclosure.[108] The study found that a successful intervention produced a smaller loss than a foreclosure, but an unsuccessful intervention ultimately resulting in foreclosure produced a greater loss than a foreclosure without an intervention.[109] The study compared redefault rates for early intervention with a loan modification and late intervention, concluding that early intervention was less likely to result in redefault.[110]

Thus, a successful mortgage loan modification, rather than a foreclosure, clearly benefits both borrowers and lenders and avoids harmful externalities. However, existing legal issues create barriers to modification.

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104. Bahlous-Boldi, *supra* note 82, at 12.

105. *Id.*

106. *Id.*

107. *Id.* at 27. Note that California does not permit collection of a deficiency judgment after a home foreclosure, which may have increased the number of strategic defaults. *See id.* at 13.

108. *See* TRACY, *supra* note 35, at 14.

109. *Id.* at 15.

110. *Id.* at 25. "[T]he redefault rate for borrowers jumps from 44 percent for those that were 30-DD [days delinquent] at the start of a repayment plan to 70 percent for those 90-DD." *Id.* The study stated:

> Early intervention will also help to preserve the borrower's credit rating and limit the likelihood of a financial problem growing more serious. In addition, it is helpful for borrowers to continue to pay what they can afford during a stress period, as opposed to not making any payments. This reinforces the borrower's on-going debt obligation, limits increases in the borrower's indebtedness and reduces the expected losses from an intervention thereby increasing the likelihood that an intervention will dominate foreclosure.

Id.

II. LEGAL ISSUES RAISED BY MORTGAGE LOAN MODIFICATIONS

A. Priority

Recording a mortgage in the local real property records perfects the security interest and establishes the priority of the mortgage as against other interests in the property.[111] Priority determines the order in which lenders are paid from proceeds of a foreclosure sale.[112] A loss of priority means that a lender is less likely to be paid in full out of foreclosure sale proceeds.[113] Lenders thus want to retain their mortgage priority in connection with a modification.

The primary legal issue that modification of a mortgage loan raises is whether the modification causes a loss of priority as against the holder of a junior interest in the property, usually a junior lienholder. The rule as stated in the Restatement of Property (Mortgages) is that "the mortgage as modified retains priority as against junior interests in the real estate, except to the extent that the modification is materially prejudicial to the holders of such interests."[114] Courts apply the material prejudice rule, sometimes using different terminology with similar effect.[115] For example, courts may apply a test of substantial impairment or adverse effect.[116] Regardless of terminology, courts must determine whether a modification is materially prejudicial, and the results are not always clear, leading to confusion as to when a modification causes a loss of priority.

Some types of modifications, such as reductions in the interest rate or forgiveness of principal, are clearly beneficial to a junior lienholder. A reduction in the monthly payment makes foreclosure

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111. *See* WHITMAN ET AL., *supra* note 12, § 11.9, at 766–67.

112. UNIF. MORTG. MODIFICATION ACT prefatory note (UNIF. L. COMM'N 2024).

113. If a senior lien loses its priority entirely, the previously junior lien will not be extinguished by foreclosure of the modified mortgage. With a partial loss of priority, the junior lien will be paid before the foreclosed lien is paid in full. *See infra* notes 129–131 and accompanying text.

114. RESTATEMENT (THIRD) OF PROP.: MORTGS. § 7.3(b) (A.L.I. 1997).

115. *See, e.g.*, Bank of Am., N.A. v. Castillo, 210 N.Y.S.3d 763, 767 (N.Y. App. Div. 2024) ("substantially impairs," "caused it prejudice," "injured"); Fraction v. Jacklily, LLC (*In re* Fraction), 622 B.R. 642, 650 (Bankr. E.D. Pa. 2020), *aff'd*, Civil No. 5:20-cv-05997, 2021 WL 4037508 (E.D. Pa. Sep. 3, 2021) ("materially prejudice"); Burney v. McLaughlin, 63 S.W.3d 223, 231, 232, 233 (Mo. Ct. App. 2001) ("substantially impaired," "materially prejudiced," "materially impaired"); Rush v. Alaska Mortg. Grp., 937 P.2d 647, 650 (Alaska 1997) (requiring "paramount equities" in favor of the junior lienholder for subordination); Lennar Ne. Partners v. Buice, 57 Cal. Rptr. 2d 435, 439, 440 (Cal. Ct. App. 1996) ("substantial," "prejudicing," "materially affected," "impair," "adversely affect"); Shultis v. Woodstock Land Dev. Assocs., 594 N.Y.S.2d 890, 893 (N.Y. App. Div. 1993) ("create substantial prejudice or . . . seriously impair"); Guleserian v. Fields, 218 N.E.2d 397, 401 (Mass. 1966) ("adverse effects").

116. *See, e.g.*, *Castillo*, 210 N.Y.S.3d at 767 ("substantially impairs"); *Guleserian*, 218 N.E.2d at 401 ("adverse effects").

less likely,[117] and a reduction in the senior indebtedness increases the equity available for a junior lienholder. Reductions in the interest rate and forgiveness of principal are common modifications for a homeowner in financial distress or in a commercial loan workout scenario. Because these modifications benefit, rather than prejudice a junior lienholder, they should not cause a loss of priority.

The Restatement position and the holding of most courts is that the extension of the maturity of a loan, a very common modification, does not cause a loss of priority.[118] The reasoning is that an extension of the maturity is usually beneficial to a junior interest holder because it reduces the likelihood of a foreclosure of the senior mortgage that would extinguish the junior mortgage.[119] However, courts occasionally hold otherwise.[120]

Modifications that are materially prejudicial and thus cause a loss of priority include an advance of additional principal,[121] an increase in the interest rate,[122] and an advance in the maturity of the loan.[123] An advance of additional principal prejudices a junior lienholder because it reduces the borrower's equity in the property, making it less likely that debts secured by the property will be paid in full.[124] An increase in the interest rate increases the payment

117. *In re Fraction*, 622 B.R. at 651.

118. *See* RESTATEMENT (THIRD) OF PROP.: MORTGS. § 7.3 cmt. c (A.L.I. 1997); *In re Fraction*, 622 B.R. at 651; CL Howard Invs. I, LLC v. Wilmington Sav. Fund Soc'y, FSB, 911 S.E.2d 384, 393 (N.C. Ct. App. 2024); *Burney*, 63 S.W.3d at 232–33; *Lennar Ne. Partners*, 57 Cal. Rptr. 2d at 439; *Shultis*, 594 N.Y.S.2d at 892–93; *Guleserian*, 218 N.E.2d at 401–02.

119. *See* RESTATEMENT (THIRD) OF PROP.: MORTGS. § 7.3 cmt. c (A.L.I. 1997).

120. *See* Citizens & S. Nat'l Bank of S.C. v. Smith, 284 S.E.2d 770, 772 (S.C. 1981) (per curiam) (holding that extension of mortgage caused loss of priority as against junior lienholder).

121. *See* Nikooie v. JPMorgan Chase Bank, N.A., 183 So. 3d 424, 432 (Fla. Dist. Ct. App. 2014); *Lennar Ne. Partners*, 57 Cal. Rptr. 2d at 440; Skaneateles Sav. Bank v. Herold, 376 N.Y.S.2d 286, 290 (N.Y. App. Div. 1975); Bowling Green Sports Ctr., Inc. v. G.A.G. LLC, 2017 IL App (2d) 160656, ¶ 15, 77 N.E.3d 728, 732; Nature's Sunshine Prods., Inc. v. Watson, 2007 UT App 383, ¶ 14, 174 P.3d 647, 652. Other cases discuss material prejudice in the context of equitable subrogation for a refinancing lender with an increase in principal. *See, e.g.*, Nationstar Mortg., L.L.C. v. Bowman, 889 N.W.2d 243 (Iowa Ct. App. 2016) (unpublished table decision).

122. *See Burney*, 63 S.W.3d at 233; *Lennar Ne. Partners*, 57 Cal. Rptr. 2d at 440; *Shultis*, 594 N.Y.S.2d at 893; Gluskin v. Atl. Sav. & Loan Ass'n, 108 Cal. Rptr. 318, 321 (Cal. Ct. App. 1973); Shane v. Winter Hill Fed. Sav. & Loan Ass'n, 492 N.E.2d 92, 95–97 (Mass. 1986).

123. *See Gluskin*, 108 Cal. Rptr. at 321; Remodeling & Constr. Corp. v. Melker, 65 N.Y.S.2d 738, 741 (N.Y. Sup. Ct. 1946), *aff'd*, 64 N.Y.S.2d 175 (N.Y. App. Div.) (mem.).

124. *See Lennar Ne. Partners*, 57 Cal. Rptr. 2d at 440. If an increase in the principal of a senior mortgage is based on capitalization of unpaid interest or other delinquent amounts rather than an advance of new principal, courts have found that a junior lienholder is not prejudiced because the mortgage already secures the delinquent amounts. *See* Fraction v. Jacklily, LLC (*In re* Fraction), 622 B.R. 642, 650–51 (Bankr. E.D. Pa. 2020), *aff'd*, Civil No. 5:20-cv-05997, 2021 WL 4037508 (E.D. Pa. Sep. 3, 2021); Bank of Am., N.A. v. Castillo, 210 N.Y.S.3d 763, 767 (N.Y. App. Div. 2024). Thus, the senior lender does not lose priority. *In re Fraction*, 622 B.R. at 652; *Castillo*, 210 N.Y.S.3d at 767.

amount, which increases the amount of debt secured by the property and makes default and foreclosure more likely, thus prejudicing a junior lienholder.[125] And if the term of a loan is made shorter, the borrower must pay the principal earlier, also making default more likely.[126] A partial release of a portion of the mortgaged property can also be prejudicial to a junior lienholder[127] as can a release of or change in borrowers or guarantors.[128]

When a modification results in a loss of priority, courts usually hold that the loss of priority is only to the extent that the modification prejudices a junior lienholder.[129] For example, if a senior lender advances additional principal, the senior lender will retain its priority to the extent of the original amount, the junior lienholder's debt will have second priority, and the senior lender will have third priority to the extent of the increase.[130] Of course, it is not an easy task to determine the extent of the prejudice.[131]

A recent case illustrates the priority issues and the context in which priority issues arise. In *Fraction v. Jacklily, LLC* (*In re Fraction*), homeowners, the Fractions (Debtors), argued that the claim of Jacklily, a second lienholder, should be disallowed as a secured claim in bankruptcy and treated as an unsecured claim because the claim of the first lienholder, SLS, exceeded the value of the home; Jacklily, on the other hand, argued that it had a partially secured claim because it had gained priority over a portion of the first lien after modification of the first mortgage loan.[132]

In 2006, Debtors obtained a first mortgage loan from JPMorgan Chase.[133] In 2012, the parties modified the loan, extending the

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125. *See Castillo*, 210 N.Y.S.3d at 766–67; *Shultis*, 594 N.Y.S.2d at 893.

126. *See Gluskin*, 108 Cal. Rptr. at 321.

127. *See* Pongetti v. Bankers Tr. Sav. & Loan Ass'n, 368 So. 2d 819, 823–24 (Miss. 1979).

128. *See infra* Section III.C.

129. *See, e.g.*, Nikooie v. JPMorgan Chase Bank, N.A., 183 So. 3d 424, 432 (Fla. Dist. Ct. App. 2014); Burney v. McLaughlin, 63 S.W.3d 223, 233–34 (Mo. Ct. App. 2001); *Lennar Ne. Partners*, 57 Cal. Rptr. 2d at 442; *Shultis*, 594 N.Y.S.2d at 892–93; Skaneateles Sav. Bank v. Herold, 376 N.Y.S.2d 286, 290–91 (N.Y. App. Div. 1975); Shane v. Winter Hill Fed. Sav. & Loan Ass'n, 492 N.E.2d 92, 97 (Mass. 1986); Bowling Green Sports Ctr., Inc. v. G.A.G. LLC, 2017 IL App (2d) 160656, ¶ 13, 77 N.E.3d 728, 732. *But see* Nature's Sunshine Prods., Inc. v. Watson, 2007 UT App 383, ¶ 15, 174 P.3d 647, 652 (holding complete loss of priority).

130. Thus, if the senior lender forecloses, proceeds of the foreclosure sale will be paid first to the senior lender to pay costs of sale and its first-priority debt, then to the junior lienholder, and finally to the senior lender to pay the remainder of its debt if proceeds are sufficient.

131. *See, e.g.*, Sovereign Bank v. Gillis, 74 A.3d 1, 10 (N.J. Super. Ct. App. Div. 2013) (remanding to the trial court for a determination of the appropriate cap on the senior lender's priority as between the original senior loan amount, the balance at the time of the second lien loan, or the balance at the time of refinancing).

132. 622 B.R. 642, 644 (Bankr. E.D. Pa. 2020), *aff'd*, Civil No. 5:20-cv-05997, 2021 WL 4037508 (E.D. Pa. Sep. 3, 2021).

133. *Id.* at 647.

maturity date, capitalizing unpaid interest and escrow payments, and lowering the interest rate and monthly payments.[134] In 2016, Debtors obtained a second lien loan from Jacklily.[135] In 2017, Debtors and SLS, assignee of the Chase loan, modified the loan, once again extending the maturity date, capitalizing unpaid interest and escrow payments, and lowering the interest rate and monthly payments.[136] At the time that the Debtors commenced their bankruptcy case, the unpaid balance of the SLS loan exceeded the fair market value of the home.[137]

The court discussed whether each of the types of modification prejudiced Jacklily. With regard to capitalization of unpaid interest and escrow payments, the court found that the increased principal was not a new advance, but was rather a restructuring of debt already owed and secured by the mortgage.[138] The court found that lowering the interest rate and monthly payments did not prejudice Jacklily but in fact put Jacklily in a better position by reducing the amount of the indebtedness over time.[139] Finally, the court cited the Restatement view, without adopting it, that an extension of the maturity of a senior loan benefits a junior lienholder by making foreclosure of the senior loan less likely.[140] Because the loan modifications did not prejudice the junior lienholder, the court held that the modifications of the first mortgage did not cause it to lose priority, and, therefore, that Jacklily's claim was unsecured.[141]

Another recent case illustrating the priority issue in the context of a common modification is *Bank of America, N.A. v. Castillo*.[142] The borrower, Castillo, had first and second lien loans secured by mortgages on his property.[143] Castillo and the senior lender modified the senior loan to capitalize arrears owed by Castillo.[144] Subsequently, the junior lender foreclosed its mortgage, purchased the property at the foreclosure sale, and conveyed the property to

134. *Id.* at 647–48.
135. *Id.* at 648.
136. *Id.*
137. *Id.* The first lien SLS loan was thus "underwater."
138. *Id.* at 650–51.
139. *Id.* at 651.
140. *Id.* (citing RESTATEMENT (THIRD) OF PROP.: MORTGS. § 7.3 cmt. c (A.L.I. 1997)). Regarding the various types of modifications, the court cited but did not adopt section 7.3 of the Restatement because an earlier Pennsylvania case had not adopted the section. *See id.* at 650. However, its holding was consistent with both the Restatement and an old Pennsylvania case, *Ter-Hoven v. Kerns*, 2 Pa. 96 (1845).
141. *In re Fraction*, 622 B.R. at 652.
142. 210 N.Y.S.3d 763 (N.Y. App. Div. 2024).
143. *Id.* at 765.
144. *Id.*

Windward.[145] Later, Bank of America, as holder of the senior mortgage, commenced a foreclosure action against Castillo and Windward.[146]

Windward argued that the senior mortgage was subordinated because the modification "substantially impaired Windward's equity in the property."[147] However, the court found that Bank of America had not advanced new funds in connection with the modification.[148] The increase in the principal balance was the result of the capitalization of unpaid amounts owed by Castillo.[149] The arrearages were added to principal but were not to accrue interest.[150] The arrearages were to be paid as a balloon payment at the maturity of the loan.[151] The court concluded that the loan modification did not prejudice the junior lienholder and therefore found no loss of priority.[152]

The *Fraction* and *Castillo* cases are well-reasoned and reach the correct result. Legislation, however, would make the law clearer and in many cases make litigation unnecessary.

A few states have adopted legislation addressing the priority issue. For example, a New Jersey statute provides that a modification will not affect mortgage priority unless the loan amount is increased above the maximum stated principal plus interest and other obligations secured by the mortgage.[153] Thus, it protects priority for common modifications such as extensions of maturity and interest rate reductions. And it even protects the priority of new advances if they do not cause the loan to exceed the maximum stated principal and protects increases in the interest rate. Construction loans are excluded from the operation of the New Jersey statute.[154]

Delaware and Maryland have similar statutes that protect the priority of a recorded mortgage regardless of any type of modification other than a modification that increases the maximum

145. *Id.*
146. *Id.*
147. *Id.* at 767.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. N.J. STAT. ANN. § 46:9-8.2 (West, Westlaw through L.2025, c. 176 and J.R. No. 12).
154. *Id.* § 46:9-8.1(a).

principal amount stated in the mortgage.[155] Construction loans are not excluded from the Delaware and Maryland statutes.[156]

A Virginia statute addresses mortgage modifications for commercial transactions.[157] The Virginia statute protects extensions of the maturity date of a loan only if the maturity date is not stated in the recorded mortgage.[158] Like the New Jersey and Delaware statutes, the Virginia statute is drafted as a general rule that mortgage modifications do not affect priority subject to certain exceptions, rather than as a list of modifications protected by safe harbors.[159]

These statutes and others[160] clarify the rules for priority for the transactions to which they apply but are not uniform in their application or operation. Furthermore, modifications raise issues other than priority.

B. Recording

Every state has a recording act that is designed to strongly encourage recording of conveyances of real property interests in publicly maintained title records and thereby give notice of the property interests.[161] Recording acts reverse the common law rule of first in time, first in right. Under common law, a party may not transfer a greater interest in property than the party owns; however, recording acts create an exception to that rule, invalidating an unrecorded

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155. DEL. CODE ANN. tit. 25, § 2118 (West, Westlaw through ch. 236 of the 153rd Gen. Assemb. (2025-2026)); MD. CODE ANN., REAL PROP. § 7-111 (West, Westlaw through all legis. from the 2025 Reg. Sess. and 2025 1st Spec. Sess. of the Gen. Assemb.).

156. DEL. CODE ANN. tit. 25, § 2118 (Westlaw); MD. CODE ANN., REAL PROP. § 7-111 (Westlaw).

157. *See* VA. CODE ANN. § 55.1-318.1 (West, Westlaw through the 2025 Reg. and Reconvened Sessions). The Virginia statute applies only to modifications of loan documents that include language to the effect that the mortgage will continue to secure the obligation as modified, *id.*, which is a provision usually found in a mortgage, *see supra* note 34 and accompanying text.

158. § 55.1-318.1 (Westlaw).

159. *Id.*

160. *See, e.g.*, IDAHO CODE ANN. § 45-116(2) (West, Westlaw through the First Reg. Sess. of the Sixty-Eighth Idaho Leg.) (applying only to changes in the interest rate or capitalization of unpaid obligations "where the terms of the obligation provide that the interest rate, payment terms, or balance due on the loan may be indexed, adjusted, renewed or renegotiated and the mortgage instrument received for recordation discloses that fact"); IND. CODE ANN. § 32-29-1-10(a)(2) (West, Westlaw through all legis. of the 2025 First Reg. Sess. of the 124th Gen. Assemb.) (preserving priority for "future modifications, extensions, and renewals of any indebtedness or obligations secured by the mortgage if and to the extent that the mortgage states that the mortgage secures those future advances, modifications, extensions, and renewals"); OR. REV. STAT. ANN. § 86.095 (West, Westlaw through laws of the 2025 Reg. Sess. of the 83rd Legislative Assemb.) (listing safe harbor modifications, such as changes in the interest rate, capitalization of interest, and extension of the term, that do not cause a loss of priority).

161. *See* WHITMAN ET AL., *supra* note 12, § 11.9, at 765.

interest as against a subsequent purchaser or creditor who meets the requirements of the act.[162] Recording acts are classified generally as race statutes requiring that the purchaser record first to overcome the common law rule,[163] notice statutes requiring that the purchaser be a good faith purchaser for value,[164] and race-notice statutes requiring that the purchaser both record first and be a good faith purchaser for value.[165] If a conveyance is not recorded, then a subsequent purchaser or creditor meeting the requirements of the state's act has priority over the unrecorded interest. Recording acts do not impose any requirement that conveyances be recorded, but their operation makes recording essential to maintain priority as against subsequent interest holders.

Because of recording acts, mortgage lenders require that mortgages be recorded immediately upon closing of the mortgage loan. Title insurance companies insuring a mortgage also have an obvious interest in recording the mortgage. But modification of a mortgage loan raises the issue of whether a modification agreement should be recorded to maintain priority or for other reasons.[166]

Many mortgage loan modifications change only those loan terms that are in the promissory note or other agreement creating the financial obligation rather than in the mortgage itself. The interest rate and payment terms are rarely stated in the mortgage.[167] If a modified term is not in the recorded mortgage, then recordation of a modification agreement should not be required.

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162. *See* EDWARD E. CHASE, JR., JULIA PATTERSON FORRESTER ROGERS & W. KEITH ROBINSON, PROPERTY LAW: CASES, MATERIALS, AND QUESTIONS 606 (3d ed. 2023).

163. *See, e.g.*, N.C. GEN STAT. ANN. § 47-18(a) (West, Westlaw through S.L. 2025-97 of the 2025 Reg. Sess. of the Gen. Assemb.). Only Delaware, Louisiana, and North Carolina have race statutes. WHITMAN ET AL., *supra* note 12, § 11.9, at 768.

164. *See, e.g.*, TEX. PROP. CODE ANN. §13.001 (West 2025).

165. *See, e.g.*, CAL. CIV. CODE § 1214 (West 2007). About half of the states have notice statutes, and about half have race-notice statutes. WHITMAN ET AL., *supra* note 12, § 11.9, at 767–68.

166. In an abundance of caution, practitioner-oriented treatises recommend recording. *See, e.g.*, BOYD, *supra* note 73, § 22.02[3][g] ("The lender will generally want to record a mortgage modification agreement setting forth the new maturity date, principal amount and other material modifications to its mortgage loan."); *Tauber*, *supra* note 75, § 3H.04 ("Mortgage modification agreements should be recorded."). For a commercial borrower, the cost of recording may be insignificant, but for homeowners, a requirement to record may pose an impediment to modification. *See supra* notes 12–16 and accompanying text.

167. *See, e.g.*, CALIFORNIA UNIFORM INSTRUMENT, *supra* note 31; FANNIE MAE & FREDDIE MAC, NEW YORK—SINGLE FAMILY—FANNIE MAE/FREDDIE MAC UNIFORM INSTRUMENT, FORM 3033 (2021) [hereinafter NEW YORK UNIFORM INSTRUMENT], https://sf.freddiemac.com/tools-learning/uniform-instruments/2021-updated-instruments#security-instruments [https://perma.cc/JZ6A-U5DX]; TEXAS UNIFORM INSTRUMENT, *supra* note 31.

Sometimes a modified term is in the recorded mortgage. For example, the maturity date of a loan is often stated in the mortgage.[168] The recorded mortgage thus gives notice to third parties of the maturity date. A lender may wish to record a modification agreement to give notice of an extended maturity date to parties who might acquire an interest in the real property in the future.[169] But a purchaser or a lender contemplating a second lien would be wise to inquire about any modifications because loans are so frequently extended. Only a release of the mortgage should give a purchaser or lender the right to assume that the mortgage has been paid.

The court in *In re Fraction*, discussed above,[170] addressed the recordation issue.[171] In that case, Jacklily acquired its second lien in 2016 after the senior mortgage was modified in 2012.[172] In discussing the effect of the modifications, the *Fraction* court found it doubtful that it needed to consider the 2012 modifications at all, stating that "any reasonable underwriting inquiry by Jacklily would have revealed the full extent of the Debtors' obligation on the senior mortgage—including the terms of the debt as modified."[173] In other words, the recorded senior mortgage gave the potential junior lender notice of the prior mortgage, and the junior lender should have obtained information about any modifications.

A recorded mortgage gives constructive notice of the existence of a lien. Mortgage loans are frequently modified. Regardless of modification, a delinquent borrower can accrue substantial additional obligations for unpaid interest and escrow payments and for sums paid by the lender, such as taxes and insurance premiums, to protect the property. Therefore, a wise lender will obtain information about an existing senior loan before making a loan secured by a junior lien.

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168. *See, e.g.*, CALIFORNIA UNIFORM INSTRUMENT, *supra* note 31, at 1; NEW YORK UNIFORM INSTRUMENT, *supra* note 167, at 1; TEXAS UNIFORM INSTRUMENT, *supra* note 31, at 1. In a number of states, the right to enforce a mortgage or the obligation it secures may expire within a statutorily prescribed period after the maturity date as stated in the recorded mortgage. *See* ARIZ. REV. STAT. ANN. § 33-714(A) (Westlaw through legis. of the First Reg. Sess. of the Fifty-Seventh Leg. (2025)); TEX. CIV. PRAC. & REM. CODE ANN. § 16.036 (West 2025); *see also infra* Section III.D.

169. In states with an "ancient mortgages" statute or statute of limitations based on the maturity date as stated in the public land records, lenders will require recordation of an extension agreement or some type of notice of the extended maturity date. *See infra* Section III.D.

170. *See supra* notes 132–141 and accompanying text.

171. Fraction v. Jacklily, LLC (*In re* Fraction), 622 B.R. 642, 650 n.8 (Bankr. E.D. Pa. 2020), *aff'd*, Civil No. 5:20-cv-05997, 2021 WL 4037508 (E.D. Pa. Sep. 3, 2021).

172. *Id.* at 647–48.

173. *Id*. at 650 n.8.

C. Continued Security and Novation

When a mortgage loan is modified, the parties intend that the mortgage will continue to secure the obligation as modified. Generally, both the mortgage[174] and the modification agreement[175] will have a provision to that effect. Occasionally, however, a court will find that a modification is so substantial that it is a novation.[176] In the context of a mortgage loan, a novation is "a replacement of the existing obligation with a new obligation."[177] A court should find a novation only if the parties so intended,[178] but courts may imply that intent from circumstances or the conduct of the parties.[179] If a modification is determined to be a novation, a court may find that the mortgage no longer secures the obligation.[180] Although a rare problem, the loss of security for a loan would be a quite serious loss for a lender, leaving the lender with an unsecured loan. Thus, novation remains a lender concern.

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174. *See supra* note 34 and accompanying text.

175. *See* BOYD, *supra* note 73, § 22.02[4][w][i] ("[T]he lender and the borrower should expressly confirm that the liens and security interests securing the existing loan are not extinguished or terminated, and instead remain in full force and effect, and continue to secure the new loan." (citing Carl S. Bjerre & Stephen L. Sepinuck, *Spotlight on* In re Fair Finance Co.*, 834 F.3d 651 (6th Cir. 2016)*, A.B.A.: BUS. L. TODAY (Jan. 15, 2018), https://businesslawtoday.org/2018/01/spotlight-on-in-re-fair-finance-co-834-f-3d-651-6th-cir-2016/ (on file with the Duquesne Law Review))).

176. *See, e.g.*, Bash v. Textron Fin. Corp. (*In re* Fair Finance Co.), 834 F.3d 651, 667–70 (6th Cir. 2016).

177. UNIF. MORTG. MODIFICATION ACT § 4 cmt. 5 (UNIF. L. COMM'N 2024); *see also* CL Howard Invs. I, LLC v. Wilmington Sav. Fund Soc'y, 911 S.E.2d 384, 393 (N.C. Ct. App. 2024) ("A novation may be defined as a substitution of a new contract or obligation for an old one which is thereby extinguished." (quoting Wachovia Realty Invs. v. Hous., Inc., 232 S.E.2d 667, 674 (N.C. 1977))).

178. *See CL Howard Invs. I*, 911 S.E.2d at 393 (citing *Wachovia Realty Invs.*, 232 S.E.2d at 674); Superior Auto. Ins. Co. v. Maners, 199 S.E.2d 719, 722 (S.C. 1973) (per curiam).

179. *See Bash*, 834 F.3d at 667 (citing Nat'l City Bank v. Reat Corp., 580 N.E.2d 1147, 1149 (Ohio Ct. App. 1989)).

180. *See, e.g.*, *id.* at 667–68.

III. THE NEW UNIFORM MORTGAGE MODIFICATION ACT

The Uniform Mortgage Modification Act was approved by the Uniform Law Commission[181] in 2024.[182] The Act has been enacted in Utah,[183] Nevada,[184] and Wyoming[185] and has been introduced in a number of other states.[186] The Act creates a list of safe harbor modifications and, for the modifications in the list, resolves the legal issues discussed above. For the safe harbor modifications: "(1) the mortgage continues to secure the obligation as modified; (2) the priority of the mortgage is not affected by the modification; (3) the mortgage retains its priority regardless of whether a record of the mortgage modification is recorded in the [public land records]; and (4) the modification is not a novation."[187]

The Act defines the terms "modification"[188] and "mortgage modification"[189] broadly to include various formats for changes to loan documentation and to include modifications to the various documents that evidence, secure, or enhance a mortgage loan. Although these definitions are broad, the effect of the Act is limited to the listed safe harbor modifications.[190]

Although most mortgages have a provision to the effect that the mortgage continues to secure an obligation as it is modified,[191] some may not. Under the Act, for modifications within the safe harbor,

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181. The Uniform Law Commission is a nonprofit association established in 1892 that "provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law." *About Us*, UNIF. L. COMM'N, https://www.uniformlaws.org/aboutulc/overview [https://perma.cc/W8N8-3AJV] (last visited Apr. 17, 2026). Each state, as well as the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, appoints commissioners, who must be attorneys, to study the law to determine areas that should be uniform and to draft uniform and model acts. *Id.* "[T]he ULC can only propose—no uniform law is effective until a state legislature adopts it." *Id.*

182. *Mortgage Modification Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?communitykey=5c724df8-d5a1-4bc8-be3b-0191302a6a8d (on file with the Duquesne Law Review) (last visited Apr. 17, 2026).

183. *See id.*; S.B. 294, 66th Leg., 2025 Gen. Sess. (Utah 2025).

184. *See Mortgage Modification Act*, *supra* note 182; Assemb. B. 192, 83d Leg., 2025 Reg. Sess. (Nev. 2025).

185. *See Mortgage Modification Act*, *supra* note 182; S. File 31, 68th Leg., 2026 Budget Sess. (Wyo. 2026).

186. *See Mortgage Modification Act*, *supra* note 182.

187. UNIF. MORTG. MODIFICATION ACT § 4(a)(1)–(4) (UNIF. L. COMM'N 2024) (bracketed language in original).

188. "'Modification' includes change, amendment, revision, correction, addition, supplementation, elimination, waiver, and restatement." *Id.* § 2(3) (UNIF. L. COMM'N 2024).

189. "'Mortgage modification' means modification of: (A) a mortgage; (B) an agreement that creates an obligation, including a promissory note, loan agreement, or credit agreement; or (C) an agreement that creates other security or credit enhancement for an obligation, including an assignment of leases or rents or a guaranty." *Id.* § 2(5).

190. *See id.* § 4.

191. *See supra* note 34 and accompanying text.

the mortgage continues to secure the obligation regardless of whether the mortgage contains such a provision.[192]

As noted, the Act provides that modifications within the safe harbor do not cause a loss of priority for the mortgage.[193] Because the safe harbor modifications are ones that generally do not prejudice a junior lienholder,[194] the Act is consistent with the common law in dictating that safe harbor modifications will not cause a loss of priority.[195] Although consistent with common law, the Act creates greater certainty.

Under the Act, for safe harbor modifications, recording a modification agreement in the public land records is not required to maintain priority.[196] However, recording may be necessary or desirable for other reasons.[197] For example, in some states a statute of limitations for enforcement of an obligation or a mortgage may begin to run on the maturity of the obligation as stated in the public land records.[198]

Finally, the Act provides that safe harbor modifications do not constitute a novation of an obligation.[199] The modifications within the safe harbor are ones that should not be so substantial as to be a novation under common law, but the Act adds certainty.

A. Safe Harbor Modifications

The safe harbor modifications were selected because they are common modifications that generally do not prejudice a junior lienholder.[200] This Section provides a discussion of each of the safe harbor modifications.

1. Extension of the Maturity Date

Extending the maturity date of a loan is common in loan modifications when a distressed borrower is in default,[201] when a loan

192. *See* UNIF. MORTG. MODIFICATION ACT § 4(a)(1) (UNIF. L. COMM'N 2024).
193. *See id.* § 4(a)(2).
194. *See infra* Section III.A.
195. *See supra* Section II.A.
196. *See* UNIF. MORTG. MODIFICATION ACT § 4(a)(3) (UNIF. L. COMM'N 2024).
197. *See infra* Section III.D.
198. *See infra* Section III.D.
199. *See* UNIF. MORTG. MODIFICATION ACT § 4(a)(4) (UNIF. L. COMM'N 2024).
200. *Id.* prefatory note.
201. *See* RESTATEMENT (THIRD) OF PROP.: MORTGS. § 7.3 cmt. a (A.L.I. 1997); *Freddie Mac Flex Modification Overview, Eligibility and Requirements*, FREDDIE MAC SINGLE-FAMILY: SELLER/SERVICER GUIDE § 9206.1 (Sep. 10, 2025) [hereinafter *Freddie Mac Loan Modification*], https://guide.freddiemac.com/app/guide/section/9206.1 [https://perma.cc/87MN-GWDU].

matures and the parties wish to continue the relationship, or when a construction loan is converted to a permanent loan. As noted above, most courts hold that an extension of the maturity date does not prejudice a junior lienholder.[202] As noted, the Restatement view is that an extension of the maturity of a loan usually benefits a junior lienholder because it makes foreclosure less likely.[203] A foreclosure of a senior lien will extinguish a junior lien and the junior lienholder will rarely receive foreclosure proceeds sufficient to pay the debt and frequently will receive no proceeds at all. When an extension is part of a modification as an alternative to foreclosure, the modification certainly benefits a junior lienholder. If a senior lien is maturing, the loan must be paid off or refinanced. An extension does not put the junior lienholder in a worse position, and the Restatement view is that even a refinancing lender has the same priority as the lien being refinanced.[204] Although junior lienholders may argue that the value of the property could decline during the extended period, courts have almost always been unreceptive to junior lienholder arguments that they are materially prejudiced by an extension of the maturity date.[205] In fact, courts are more likely to find that a junior lienholder is "taking the risk of a postponement (frequently an advantage to a second mortgage) of the date of payment of the whole or part of the senior mortgage debt."[206] Thus, an extension of the maturity date is within the safe harbor list.[207]

2. Decrease in the Interest Rate

Among the safe harbor modifications is a decrease in the interest rate of the secured obligation.[208] A loan modification may lower a fixed interest rate, or for a floating or adjustable interest rate, a modification may decrease the margin between the rate and the index to which the rate is pegged. In either case, the decrease in the interest rate will decrease the amount of interest accruing each payment period and thus will decrease the amount of the payment. Less interest means less debt, and a lower payment makes a default less likely, both of which will benefit a junior lienholder,[209] thus

202. *See supra* notes 118–119 and accompanying text.
203. RESTATEMENT (THIRD) OF PROP.: MORTGS. § 7.3 cmt. c (A.L.I. 1997); *see also supra* notes 118–119 and accompanying text.
204. RESTATEMENT (THIRD) OF PROP.: MORTGS. § 7.6 cmt. e, illus. 23, 26 (A.L.I. 1997).
205. *See supra* notes 118–119 and accompanying text.
206. Guleserian v. Fields, 218 N.E.2d 397, 401–02 (Mass. 1966).
207. UNIF. MORTG. MODIFICATION ACT § 4(b)(1) (UNIF. L. COMM'N 2024).
208. *Id.* § 4(b)(2).
209. Fraction v. Jacklily, LLC (*In re* Fraction), 622 B.R. 642, 651 (Bankr. E.D. Pa. 2020), *aff'd*, Civil No. 5:20-cv-05997, 2021 WL 4037508 (E.D. Pa. Sep. 3, 2021).

making a decrease in the interest rate an obvious safe harbor modification.

3. Certain Other Changes in the Interest Rate

Other changes to the interest rate of an obligation are more complex. However, several categories of changes are included in the list of safe harbors provided "the change does not result in an increase in the interest rate of an obligation as calculated on the date the modification becomes effective."[210]

The first such protected modification applies if an interest rate index becomes unavailable and is changed to a "readily available" and "verifiable" index that is "beyond the control" of the lender.[211] In recent years, when the London Inter-Bank Offered Rate (LIBOR) was discontinued, lenders who used LIBOR in their loan documents needed to change the index against which interest rates for floating or adjustable-rate loans were calculated.[212] Although many well-drafted loan documents already provided for a substituted index in the event the index was discontinued, other loans needed modification. Most lenders changed to a new published rate, the Secured Overnight Financing Rate (SOFR).[213] The Act includes a safe harbor designed to deal with a similar occurrence.[214] A related safe harbor modification allows "a change in the differential between the index and the interest rate"[215] because the new index may run higher or lower than the original. If the parties intend to maintain roughly the same interest rate, the differential between the new index and the rate must also be changed. Because it would be impossible to know whether the interest rate as linked to the new index could ever be higher than with the soon-to-be-unavailable index, the determination that the interest rate is not being increased is made on the date the modification becomes effective.[216]

A common modification for residential borrowers in distress who have an adjustable-rate mortgage loan is to set a fixed interest rate,[217] and this modification is within the safe harbor list.[218] A fixed

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210. UNIF. MORTG. MODIFICATION ACT § 4(b)(3) (UNIF. L. COMM'N 2024).
211. *See id.* § 4(b)(3)(A); *id.* § 2(9) (defining "recognized index").
212. *See* Gary A. Goodman & Alice F. Yurke, Feature, *The Death of LIBOR and the Afterlife*, PROB. & PROP., January/February 2020, at 8, 9.
213. *See id.* at 11.
214. *See* UNIF. MORTG. MODIFICATION ACT § 4(b)(3)(A) (UNIF. L. COMM'N 2024).
215. *Id.* § 4(b)(3)(B).
216. *See id.* § 4(b)(3).
217. *See* FANNIE MAE SERVICING GUIDE, *supra* note 18, § D2-3.2-06, at 346; *Freddie Mac Loan Modification*, *supra* note 201.
218. *See* UNIF. MORTG. MODIFICATION ACT § 4(b)(3)(C) (UNIF. L. COMM'N 2024).

rate gives the borrower certainty about the amount of each monthly payment due over the term of the loan. Fixed-rate home mortgage loans are less likely to go into default.[219] Because it is not possible to determine at the time of modification whether the new rate will result in more interest or less interest paid over the same period, the determination as to whether the interest rate is being increased is calculated as of the date the modification becomes effective.[220] It is not simply the interest rate *on* the date of the modification, but the interest rate calculated on the date of the modification. This language is designed to prevent gamesmanship, such as a modification that reduces the interest rate for a month, then increases it above the original rate—a change that would not be protected under the safe harbor.

With a commercial loan, a borrower and lender might change the interest rate from fixed to floating in connection with a loan extension. Similar to a change from floating to fixed interest, the change is within the safe harbor if it does not result in an increase as calculated on the date the modification is effective.[221]

Although each of these types of interest rate changes could, in hindsight, result in more interest due over the same period, they are included in the safe harbor list. The changes are unlikely to cause material prejudice (with an emphasis on "material") because the safe harbor is limited to those changes that do not increase the interest rate as calculated on the date of the modification. In fact, some state statutes protect priority for any modification of the interest rate including modifications that increase the interest rate of a loan.[222] The Act creates certainty as to priority when a loan is modified rather than looking back in hindsight years later.

4. Capitalization of Unpaid Interest or Other Unpaid Obligations

When a borrower is behind in making payments, a common modification is the capitalization of unpaid interest or other unpaid amounts.[223] A borrower who is in default in making payments is

219. *See* TRACY, *supra* note 35, at 4 ("Mortgage designs that build in potential upward payment shocks, allow negative amortization, or assume that the borrower can easily refinance after a few years can create default risk.").

220. *See* UNIF. MORTG. MODIFICATION ACT § 4 cmt. 8, ex. 6 (UNIF. L. COMM'N 2024).

221. *See id.* § 4(b)(3)(D).

222. *See supra* notes 153–155 and accompanying text.

223. *See* UNIF. MORTG. MODIFICATION ACT § 4 cmt. 6(d) (UNIF. L. COMM'N 2024); *Freddie Mac Loan Modification*, *supra* note 201; Fraction v. Jacklily, LLC (*In re* Fraction), 622 B.R. 642, 648 (Bankr. E.D. Pa. 2020), *aff'd*, Civil No. 5:20-cv-05997, 2021 WL 4037508 (E.D. Pa. Sep. 3, 2021); Bank of Am., N.A. v. Castillo, 210 N.Y.S.3d 763, 767 (N.Y. App. Div. 2024).

unlikely to be able to bring the loan current immediately, and by capitalizing arrearages, the borrower can catch up over a long period of time, particularly if the capitalization is made in connection with a reduction in the interest rate or an extension of the loan term. In addition to capitalization of unpaid interest, other sums that may be capitalized include unpaid escrow payments, late charges, and taxes or insurance premiums that the lender has paid. Another benefit of capitalizing arrearages is that it can cure the default, ending the accrual of additional late charges and default interest.

Junior lienholders may argue that any increase in the principal amount owed is materially prejudicial.[224] However, arrearages are already owed and are not new advances.[225] When a loan is modified to capitalize arrearages, the borrower is no longer in default, late charges and default interest stop accruing, and foreclosure proceedings cease, all of which benefit junior lienholders. Even if interest is charged on the newly capitalized amounts, the benefit of avoiding a foreclosure should outweigh any increase in the obligation. Thus, capitalization of delinquent amounts is not materially prejudicial, if prejudicial at all, and is included as a safe harbor modification.[226]

5. Forgiveness, Forbearance, or Reduction of an Obligation

In residential loan modifications as an alternative to foreclosure or in commercial loan workouts, reduction of the principal of a loan is not uncommon.[227] If a lender agrees to forgive or reduce an obligation, more equity is available in the mortgaged property to satisfy a junior lien, making it a benefit to a junior lienholder. Therefore, forgiveness of debt or reduction of the obligation is in the safe harbor list.[228]

Forbearance means that the lender agrees not to foreclose for some period despite a delinquency.[229] Forbearance, as an

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224. *See, e.g.*, *In re Fraction*, 622 B.R. at 644 ("Jacklily contends that its mortgage has priority over a portion of the senior mortgagee's mortgage because, after Jacklily recorded its mortgage, the first mortgagee and the Debtors modified that mortgage and increased the loan principal without Jacklily's consent, thereby prejudicing its lien position."); *Castillo*, 210 N.Y.S.3d at 766 ("Windward contends that the plaintiff's 2014 modification of the senior mortgage [capitalizing arrears] substantially impaired Windward's equity in the property.").

225. *See In re Fraction*, 622 B.R. at 650; *Castillo*, 210 N.Y.S.3d at 767.

226. *See* UNIF. MORTG. MODIFICATION ACT § 4(b)(4) (UNIF. L. COMM'N 2024).

227. *See Freddie Mac Loan Modification*, *supra* note 201.

228. *See* UNIF. MORTG. MODIFICATION ACT § 4(b)(5) (UNIF. L. COMM'N 2024).

229. *See* Deutsche Bank Nat'l Tr. Co. v. Williams, 879 N.Y.S.2d 552, 553 (N.Y. App. Div. 2009) ("[A] mortgagee that enters into a forbearance agreement merely refrains from immediately exercising the remedies it may have and grants the mortgagor an extension of time for the repayment of his or her debt.").

alternative to foreclosure, also generally benefits a junior lienholder because foreclosure will extinguish a junior lien.[230] Therefore, forbearance is also in the safe harbor list.[231]

6. Changes to Escrow or Reserve Account Requirements

When a mortgage loan is modified, the parties may agree to impose, remove, or change a requirement to escrow funds for payment of taxes and insurance premiums. A delinquent borrower may be required to escrow funds in connection with a modification to avoid foreclosure. If the mortgaged property needs repairs, the lender may require, in connection with a modification, that funds be placed in a reserve account to pay for those repairs. These common modifications do not materially prejudice a junior lienholder and are included in the safe harbor list.[232]

7. Changes to Insurance Requirements

The safe harbor list includes modifications to requirements for acquiring or maintaining insurance.[233] In connection with a modification, a lender may impose new insurance requirements or change existing insurance requirements based on changes in the loan or the mortgaged property. For example, a lender might require flood insurance if the property has been newly designated as being in a flood-prone area. Changes to insurance requirements would not materially prejudice a junior lienholder even if insurance requirements are relaxed. Junior lienholders should and do impose their own insurance requirements in their loan documents[234] and can thus protect themselves against a casualty loss rather than relying on requirements of a senior lender.

8. Modification of an Existing Condition to Advance Funds

Some loans, such as a purchase money loan, are advanced at the time of execution of loan documents. Others, such as construction loans and revolving credit loans, are advanced periodically over

230. Although a junior lienholder may argue that the senior debt is increasing due to unpaid interest while a senior lender forbears, the junior lienholder with such a concern may conduct a foreclosure of its own mortgage. A well-drafted junior mortgage would provide that a default under a senior mortgage is a default under the junior mortgage.

231. *See* UNIF. MORTG. MODIFICATION ACT § 4(b)(5) (UNIF. L. COMM'N 2024).

232. *See id.* § 4(b)(6).

233. *See id.* § 4(b)(7).

234. *See* Forrester Rogers, *Mortgage Theory*, *supra* note 26, § 3.09[9] (discussing mortgage provisions requiring insurance).

time, usually with conditions that must be satisfied before the lender is obligated to advance funds.[235] Lenders sometimes modify or waive those conditions. For example, in a construction loan, construction may be delayed, causing cost overruns and causing the loan to be "out of balance." Or more funds than anticipated may be needed to reach a particular milestone in construction. If a condition to an advance is not met, construction may stop, which does not benefit the borrower, the lender, or contractors and subcontractors.[236] The lender may waive a condition, advancing funds that will allow construction to continue. The interests of junior and senior lienholders are generally aligned regarding the continuation of construction.

Some states still distinguish between obligatory and optional advances, holding that a lender loses priority for those advances that are optional.[237] Cases in some of those jurisdictions hold that waiver of a condition to an advance makes the advance an optional rather than an obligatory advance, causing a loss of priority.[238] The Act is designed to change that result because continuing construction benefits all parties and because a junior lienholder should have no expectation of priority above the entire amount of the loan once disbursed.[239] Even with waiver of a condition to advance funds of a revolving credit loan rather than a construction loan, a junior lienholder should have no expectation of priority over the maximum disbursed principal balance.[240] The funds are not a new advance but one contemplated under the original loan. As a result, a modification of an existing condition to advance funds is included in the safe harbor list.[241]

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235. *See* NELSON ET AL., *supra* note 27, § 12.7, at 1091–92.

236. *See id.* § 12.1, at 1030 ("If the construction is not completed or is completed late or defectively or if the project's value on completion is less than anticipated, the construction lender may find itself in the unhappy position of being inadequately secured. This situation is even more precarious for junior lienors . . . .").

237. *See id.* § 12.7, at 1095.

238. *See, e.g.*, Planters' Lumber Co. v. Griffin Chapel M.E. Church, 128 So. 76, 78–79 (Miss. 1930); Countrywide Home Loans, Inc. v. BancFirst, 2011 OK CIV APP 111, ¶¶ 5–6, 264 P.3d 1262, 1264; *see also* NELSON ET AL., *supra* note 27, § 12.7, at 1099–1100.

239. *See* UNIF. MORTG. MODIFICATION ACT § 4 cmt. 6(g) (UNIF. L. COMM'N 2024).

240. Some state statutes protect priority of advances up to the maximum stated principal. *See* DEL. CODE ANN. tit. 25, § 2118 (West, Westlaw through ch. 236 of the 153rd Gen. Assemb. (2025-2026)); MD. CODE ANN., REAL PROP. § 7-111 (West, Westlaw through all legis. from the 2025 Reg. Sess. and 2025 1st Spec. Sess. of the Gen. Assemb.); *see also supra* note 155 and accompanying text.

241. *See* UNIF. MORTG. MODIFICATION ACT § 4(b)(8) (UNIF. L. COMM'N 2024).

9. Modification of a Financial Covenant

A financial covenant is "an undertaking to demonstrate an obligor's creditworthiness or the adequacy of security."[242] "Examples of financial covenants include requirements for a borrower, guarantor, or other obligor to maintain a certain level of income or net worth, for maintenance of a certain loan-to-value ratio or debt-service ratio, for furnishing financial records, [and] for production of tax returns . . . ."[243] Financial covenants in commercial loans are often changed in connection with a modification. These changes should not materially prejudice a junior lienholder because junior lienholders can include financial covenants in their own documents to protect themselves against the borrower's deteriorating financial condition. Therefore, modification of a financial covenant is included as a safe harbor modification.[244]

10. Change to Payment Amount or Schedule Caused by Other Safe Harbor Modification

If the maturity date of a loan is extended, the interest rate is reduced, or unpaid interest is capitalized, the amount and schedule of periodic payments will change. The fact that a safe harbor modification results in a change in the payment amount or schedule does not cause the modification to materially prejudice a junior lienholder. Thus, the Act makes clear that a change to the amount or schedule of payments resulting from another safe harbor change is also within the safe harbor.[245]

B. Modifications Not Within the Safe Harbor

Modifications that are not in the safe harbor list are governed by other law.[246] Under common law, a mortgage that is modified retains its priority except to the extent that it materially prejudices junior interest holders.[247] Thus, modifications that fall outside the safe harbor list may, but do not necessarily, lose priority. They are simply not governed by the Act.

Some loan modifications may include both safe harbor modifications and modifications that fall outside the safe harbors. The safe

242. *Id.* § 2(2).
243. *Id.* § 2 cmt. 2; *see also id.* § 4 cmt. 6(h) (similar).
244. *See id.* § 4(b)(9).
245. *See id.* § 4(b)(10).
246. *See id.* § 4(c).
247. *See supra* Section II.A. Increases in the principal of a loan, increases in the interest rate, and reductions in the term of a loan cause a loss of priority. *See supra* Section II.A.

harbor modifications are covered by the Act and will not result in a loss of priority. If the modifications that are not within the safe harbor do not materially prejudice a junior lienholder, the lender should retain its priority under common law.[248]

C. Excluded Transactions

Certain types of modifications are expressly excluded by the Act.[249] If a type of modification is excluded, the modification is governed by other law,[250] as with modifications that are not in the safe harbor list.[251]

The Act does not apply to "a release of, or addition to, property encumbered by a mortgage."[252] A release of collateral securing a loan may prejudice a junior lienholder and may be governed by the common law doctrine of marshalling.[253] For example, if an obligation is secured by a lien on two properties and one of the properties also has a junior lien, a release of the other property by the senior lienholder will likely prejudice the junior lienholder because less property is available to satisfy the senior debt.[254] Conversely, an addition of collateral may benefit a junior lienholder. Other law governs whether the modification causes a loss of priority.[255] In addition to the priority issue, the Act addresses the necessity of recording a modification agreement, providing that for safe harbor modifications, a modification agreement need not be recorded to retain priority.[256] A mortgage on new real property collateral, however, should be recorded to establish priority,[257] and a deed of reconveyance or release of lien for a portion of the collateral should be recorded as well to clear title to the property.

The Act also excludes "a release of, addition of, or other change in" a borrower, mortgagor, or guarantor.[258] Such a change may or

248. *See* UNIF. MORTG. MODIFICATION ACT § 4 cmt. 8, ex. 7 (UNIF. L. COMM'N 2024).
249. *See id.* § 3(c).
250. *Id.* § 3 cmts. 9–11.
251. *See supra* Section III.B.
252. UNIF. MORTG. MODIFICATION ACT § 3(c)(1) (UNIF. L. COMM'N 2024).
253. *See* RESTATEMENT (THIRD) OF PROP.: MORTGS. § 8.6 reporters' note (A.L.I. 1997).
254. *See* Pongetti v. Bankers Tr. Sav. & Loan Ass'n, 368 So. 2d 819, 823–24 (Miss. 1979) (applying marshalling principles to hold that where a senior lender released one of two mortgaged tracts without consideration, the senior lender was required to credit the value of the released tract against its loan, leaving the remaining tract to satisfy the junior lien). *But see* BankcorpSouth Bank v. Brantley, 156 So. 3d 822, 835 (Miss. 2014) (limiting the rule of *Pongetti* to cases of a senior lender with actual notice of the junior lien).
255. UNIF. MORTG. MODIFICATION ACT § 3 cmt. 9 (UNIF. L. COMM'N 2024).
256. *See id.* § 4(a)(3).
257. *See supra* note 111 and accompanying text.
258. UNIF. MORTG. MODIFICATION ACT § 3(c)(2) (UNIF. L. COMM'N 2024); *see also id.* § 2(7) (defining "obligor").

may not prejudice a junior lienholder and under common law may or may not cause a loss of priority. For example, the release of a borrower from liability without consideration might prejudice a junior lienholder if the remaining borrower is more likely to default in payment, and the addition of a guarantor might benefit a junior lienholder.

Finally, the Act excludes "an assignment or other transfer of a mortgage or an obligation."[259] An assignment is generally not a mortgage modification as defined in the Act.[260] For example, a promissory note is a negotiable instrument that may be transferred by endorsement and delivery.[261] An assignment does not modify the agreement creating the obligation, and the mortgage follows the note without the necessity of a modification of the mortgage.[262] Furthermore, courts have not treated an assignment as a modification.[263] The Uniform Commercial Code (UCC) governs the assignment of the ownership of and the right to enforce a negotiable promissory note,[264] and the UCC, other statutes, or common law govern assignment of other obligations.[265] Numerous lawsuits following the financial crisis of 2007–2010 clarified the law governing assignment of a promissory note,[266] and the Act does not affect that law. The assignment of a loan does not affect its priority.

In some cases, a loan may be modified in connection with an assignment of the loan. If the modifications are within the safe harbor, the modifications will not cause a loss of priority.[267]

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259. *Id.* § 3(c)(3).

260. *Id.* § 2(3).

261. *See* U.C.C. §§ 1-201(b)(21)(A), 3-104, 3-301 (A.L.I. & UNIF. L. COMM'N 2022); Forrester Rogers, *eMortgage*, *supra* note 26, at 17–19.

262. *See* U.C.C. § 9-203(g); RESTATEMENT (THIRD) OF PROP.: MORTGS. § 5.4(a)–(b) (A.L.I. 1997).

263. *See, e.g.*, Fraction v. Jacklily, LLC (*In re* Fraction), 622 B.R. 642, 650–52 (Bankr. E.D. Pa. 2020) (discussing extension of maturity, interest rate reduction, and capitalization of unpaid interest as being modifications, but not treating the assignment of the loan as a modification), *aff'd*, Civil No. 5:20-cv-05997, 2021 WL 4037508 (E.D. Pa. Sep. 3, 2021).

264. *See* U.C.C. §§ 3-301, 9-101 cmt. 3(a) (A.L.I. & UNIF. L. COMM'N 2022); PERMANENT ED. BD. FOR THE UNIF. COM. CODE, APPLICATION OF THE UNIFORM COMMERCIAL CODE TO SELECTED ISSUES RELATING TO MORTGAGE NOTES 2–4, 8 (2011), https://www.ali.org/sites/default/files/2024-09/PEB-Nov-2011.pdf [https://perma.cc/5LDX-9LQ5].

265. *See* NELSON ET AL., *supra* note 27, § 5.28, at 375–76 (discussing transfer of the right to enforce a nonnegotiable note under the common law of contracts); Forrester Rogers, *eMortgage*, *supra* note 26, at 17 n.94, 29–31, 38–40 (addressing assignment of a transferable record, a controllable electronic record, and other rights to payment).

266. *See* Dale A. Whitman, *What We Have Learned from the Mortgage Crisis About Transferring Mortgage Loans*, 49 REAL PROP. TR. & EST. L.J. 1, 2–4 (2014).

267. *See* UNIF. MORTG. MODIFICATION ACT § 3 cmt. 11 (UNIF. L. COMM'N 2024).

D. Recording a Modification Agreement

For safe harbor modifications, the mortgage retains its priority regardless of whether a modification agreement is recorded in the public land records.[268] However, a lender may require that a modification agreement be recorded for other reasons.

In many states, an "ancient mortgages" statute or statute of limitations for enforcement of a mortgage or secured obligation is based on the maturity date of the obligation as stated in the recorded mortgage.[269] Therefore, if a modification extends the maturity of a loan, a modification agreement or other notice of the new maturity must be recorded in order to extend the right to enforce the obligation or the mortgage.[270] Many of these statutes do not require that the modification agreement itself be recorded, and an affidavit or notice of the new maturity will suffice.[271] If the statute requires that the modification agreement itself be recorded, lenders will require an agreement in recordable form with an acknowledgement by a notary. In those states, the legislature should consider amending their statute to permit the lender to record a notice or affidavit of extension rather than the extension agreement itself, thus

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268. *See id.* § 4(a)(3).

269. *See* ARIZ. REV. STAT. ANN. § 33-714(A) (Westlaw through legis. of the First Reg. Sess. of the Fifty-Seventh Leg. (2025)); FLA. STAT. ANN. § 95.281 (West 2017); IOWA CODE ANN. § 614.21 (West, Westlaw through the 2025 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 260, § 33 (West, Westlaw through Ch. 65 of the 2025 1st Annual Sess.); MONT. CODE ANN. § 71-1-210 (West, Westlaw through the end of the 2025 Reg. Sess. of the Montana Leg., with the exception of Senate Bill 437); N.C. GEN. STAT. ANN. § 45-36.24(b) (West, Westlaw through S.L. 2025-97 of the 2025 Reg. Sess. of the Gen. Assemb.); N.D. CENT. CODE ANN. § 35-03-14 (West, Westlaw through the 2025 Reg. Sess.); TEX. CIV. PRAC. & REM. CODE ANN. § 16.035 (West 2025); VA. CODE ANN. § 8.01-241 (West, Westlaw through the 2025 Reg. and Reconvened Sessions).

270. *See* ARIZ. REV. STAT. ANN. § 33-714(A) (Westlaw); FLA. STAT. ANN. § 95.281 (West 2017); IOWA CODE ANN. § 614.21 (Westlaw); MASS. GEN. LAWS ANN. ch. 260, § 33 (Westlaw); MONT. CODE ANN. § 71-1-210 (Westlaw); NEV. REV. STAT. § 106.240 (2024); N.C. GEN. STAT. ANN. § 45-36.24(c) (Westlaw); N.D. CENT. CODE ANN. § 35-03-15(1)(f) (Westlaw); TEX. CIV. PRAC. & REM. CODE ANN. § 16.036(b)(2) (West 2025); VA. CODE § 8.01-241; *see also* Housman v. LBM Fin., LLC, 952 N.E.2d 418, 423 (Mass. App. Ct. 2011) (concluding that mortgage was discharged by the Massachusetts "Obsolete Mortgages" statute five years after original maturity date because extension agreement was not recorded); Pro–Max Corp. v. Feenstra, 16 P.3d 1074, 1077–78 (Nev. 2001) (per curiam) (holding that Nevada statute operated to extinguish any debt secured by a deed of trust ten years after maturity in the absence of a recorded extension); Willow Tree Invs., Inc. v. Wilhelm, 465 N.W.2d 849, 850–52 (Iowa 1991) (holding that lender could not foreclose because Iowa statute prohibits foreclosure of a mortgage that is more than twenty years old unless an extension is recorded).

271. *See* ARIZ. REV. STAT. ANN. § 33-714(A) (Westlaw); MASS. GEN. LAWS ANN. ch. 260, § 33 (Westlaw); MONT. CODE ANN. § 71-1-210 (Westlaw); N.C. GEN. STAT. ANN. § 45-36.24(c) (Westlaw); N.D. CENT. CODE ANN. § 35-03-15(1)(f) (Westlaw).

eliminating any requirement that a borrower must obtain an acknowledgment from a notary to modify a loan.[272]

IV. FACILITATING LOAN MODIFICATION

A. The Uniform Mortgage Modification Act Facilitates Modification

Loan modifications can benefit both borrowers and lenders,[273] but the common law governing modifications is not clear,[274] presenting a barrier to modification. Existing uncertainty in the law can delay loan modifications and cause unnecessary transaction costs that are passed on to borrowers.[275] The legal uncertainty may cause a lender to deny a borrower's reasonable request for modification even if the lender has determined that the modification would benefit both parties.[276] Lenders are not obligated to modify a loan as an alternative to foreclosure, but if a lender chooses to do so, uncertainty in the law should not stand in the way.

The Uniform Mortgage Modification Act resolves uncertainty in the law by providing that safe harbor modifications do not cause a loss of priority.[277] Certainty in the law has benefits for junior lienholders as well as for senior lenders because a lender will know before making a subordinate loan that an existing mortgage may be modified without loss of priority. And certainty in the law will make litigation unnecessary for safe harbor modifications.

The Act is consistent with current common law that protects the interests of junior lienholders.[278] It protects the priority of a modified mortgage only for modifications that generally do not materially prejudice a junior lienholder, thus striking a fair balance between predictability and the interests of junior lienholders.[279]

In addition to addressing the priority issue, the Act makes clear that recordation of a modification agreement is not necessary to

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272. *See supra* notes 12–16 and accompanying text (discussing the difficulty that residential borrowers may face in obtaining an acknowledgment).

273. *See supra* Section I.C.

274. *See supra* Part II.

275. *See* UNIF. MORTG. MODIFICATION ACT prefatory note (UNIF. L. COMM'N 2024); *Tauber*, *supra* note 75, § 3H.01 ("If in doubt as to the effect of a proposed modification, a cautious mortgagee should obtain the consent of all junior lienors."); *id.* § 3H.04 ("Mortgage modification agreements should be recorded.").

276. *See* UNIF. MORTG. MODIFICATION ACT prefatory note (UNIF. L. COMM'N 2024); *Tauber*, *supra* note 75, § 3H.01 ("If these junior lienholders refuse to consent, the prudent action would be not to pursue the modification.").

277. *See* UNIF. MORTG. MODIFICATION ACT § 4(a)(2) (UNIF. L. COMM'N 2024).

278. *See id* § 4; *supra* Section III.A.

279. *See supra* Section III.A.

preserve priority for safe harbor modifications.[280] If residential borrowers are not required to obtain an acknowledgement in connection with the execution of a loan modification, they should be more likely to finalize the modification offered by their servicer and thus avoid foreclosure.[281]

The Act also makes clear that for safe harbor modifications the mortgage continues to secure the obligations as modified regardless of whether the mortgage has a provision to that effect.[282] And it provides certainty that those modifications are not so substantial as to constitute a novation.[283]

The Act will save time and reduce transactions costs of loan modifications. Transactions costs are generally passed on to the borrower. In the residential context, borrowers may no longer be required to pay for the cost of recording. For commercial loans, attorney opinion letters and title insurance endorsements may no longer be required, and if required can be more easily obtained. The Act should resolve confusion over the need for consent from a junior lienholder.[284]

Included within the list of safe harbor modifications are the most common modifications that reduce a borrower's payments and avoid foreclosure.[285] For homeowners, foreclosure is financially devastating and causes serious psychological and even physical harm.[286] Lenders typically lose when a loan is foreclosed rather than modified,[287] and externalities of foreclosure harm neighbors and neighborhoods.[288] Therefore, the Act facilitates those modifications that will save homes and commercial properties and will mitigate lender losses.

B. CFPB Regulation of Residential Mortgage Servicing for Delinquent Borrowers

CFPB regulations facilitate residential loan modifications as an alternative to foreclosure. Existing regulations do not require a servicer to modify a loan, but they do provide procedural safeguards that give a borrower information about loss mitigation options and the opportunity to finalize a loan modification offered by their

280. *See* UNIF. MORTG. MODIFICATION ACT § 4(a)(3) (UNIF. L. COMM'N 2024).
281. *See supra* notes 12–16 and accompanying text.
282. *See* UNIF. MORTG. MODIFICATION ACT § 4(a)(1) (UNIF. L. COMM'N 2024).
283. *See id.* § 4(a)(4).
284. *See supra* note 67 and accompanying text.
285. *See Freddie Mac Loan Modification*, *supra* note 201.
286. *See supra* Section I.C.1.
287. *See supra* Section I.C.3.
288. *See supra* Section I.C.2.

servicer without the threat of an imminent foreclosure.[289] Proposed amendments would have streamlined procedures and offered additional safeguards for residential borrowers while leaving servicers the discretion as to whether to offer a loan modification.

These regulations, their enforcement, and the CFPB itself are at risk.[290] The CFPB was created in response to the financial crisis of 2007–2010 which resulted in many home foreclosures and the Great Recession which affected the entire country.[291] The regulations that encourage servicers to explore mitigation options with borrowers not only save homes from foreclosure but also prevent unnecessary losses incurred by investors when foreclosures occur.[292] Consumer protection laws, such as the CFPB loss mitigation rules, can help avoid another mortgage crisis like the one we experienced in 2007–2010.[293] Thus, the CFPB should continue to regulate procedures for servicing residential loans that are delinquent and should continue to enforce those regulations. If the CFPB ceases enforcement of the regulations, investors in home mortgage loans should require their servicers to continue with loss mitigation strategies that save homes and mitigate losses for the lenders and investors.

CONCLUSION

Loan modifications are consensual agreements between borrowers and lenders. They benefit both borrowers and lenders, and when loan modifications prevent foreclosure, they benefit society as well. Servicer disincentives and uncertainty in the law create barriers to modification. To best facilitate beneficial mortgage loan modifications, the CFPB should continue to regulate procedures for servicing delinquent home mortgage loans, residential servicers should continue to pursue loss mitigation strategies regardless of regulation, and states should adopt the Uniform Mortgage Modification Act to clarify the law governing loan modification.

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289. *See supra* Section I.A.

290. *See supra* notes 62–65 and accompanying text.

291. *See* Consumer Financial Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1955 (codified as amended in scattered sections of 12 U.S.C.); Julia Patterson Forrester, *Foreword: Perspectives on Mortgage Lending Regulation*, 69 SMU L. REV. 585, 585, 587 (2016).

292. *See supra* Section I.C.3.

293. *See* Jeff Sovern, *Preventing Future Economic Crises Through Consumer Protection Law or How the Truth in Lending Act Failed the Subprime Borrowers*, 71 OHIO ST. L.J. 761, 820–31 (2010) (proposing heightened disclosure requirements).

Discursive Footnotes

Daniel Yeager[*]

This Essay offers a comprehensive account of the past forty years of scholarship on footnotes within law. Not just any old footnotes, but footnotes that are discursive in form, that is, those with an expressive rather than bibliographic function. After contrasting the function of discursive footnotes in judicial opinions with those in academic legal literature, this Essay identifies and decodes a comparatively hidden avant-garde footnotes literature. Borrowing from techniques of literary criticism, that literature, properly understood, provides a foundation for our making more subtle judgments about both the relation of primary to secondary texts and the allocation of responsibilities between readers and writers.

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INTRODUCTION

My interest in footnotes comes from a recent coincidence. Student law-review editors were puzzled by my distinction between "arguing" and "trying to convince." (They saw the two locutions as the same.) When pressed, I explained the distinction in the margins of our track-changes colloquy, after which the editors suggested we publish the explanation in a footnote. Whether to elaborate in a footnote (a reasonable suggestion on the editors' part), in the text, or not at all is a question that registered with me only because I was then reading Louis Menand's *The Free World: Art and Thought in the Cold War* (2021), an anti-anti-communist tract on the intersection of containment and art history. There, in a chapter entitled "The Free Play of the Mind," Menand brings up a 100-paged footnote entitled *Border Lines*, which is Jacques Derrida's below-the-line counter-text to Derrida's above-the-line *Living On*.[1] A hundred pages? Why would Derrida make such a heavy demand on his readers? This Essay is an attempt to take from this recent coincidence something worth seeing, something perhaps latent, about the function of footnotes.

As essays about footnotes go, this may be the first to tell no footnote jokes.[2] To write about footnotes is to write about writing. To write about writing (which is at once to write about whatever writing is about) is serious business. In Herman Melville's *Moby Dick* (1851), the whiteness of the whale is a stand-in for, among other things, the whiteness of the blank page that confronts a blocked writer.[3] Likewise, Joseph Conrad's *Heart of Darkness* (1899) is two tales: one a character's (Marlow's), the other an artist's (Conrad's); the first about the hypocrisy of liberal imperialism, the second about the creation of a work of modern art, the tellers of both tales aware of the pros and cons of indeterminacy in the telling.[4] One could say that this Essay is about itself.

At the highest level of generality, the controlling purpose of this Essay—this writing about writing—is to analyze legal scholars' and judges' habit of annotating their own work, a practice basically

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1. *See* LOUIS MENAND, THE FREE WORLD: ART AND THOUGHT IN THE COLD WAR 504 (2021) [hereinafter MENAND, ART AND THOUGHT].

2. *See, e.g.*, ANTHONY GRAFTON, THE FOOTNOTE* A CURIOUS HISTORY 25 (1999) ("A slew of recent articles and a few books discuss footnotes at length. But most of their authors are interested less in studying . . . what footnotes have done and what they have suffered, than in making fun of them.").

3. *See* ELIZABETH RENKER, STRIKE THROUGH THE MASK: HERMAN MELVILLE AND THE SCENE OF WRITING 44–48 (Johns Hopkins Paperbacks ed. 1998).

4. *See* LOUIS MENAND, DISCOVERING MODERNISM: T.S. ELIOT AND HIS CONTEXT 101–13 (2d ed. 2007) [hereinafter MENAND, MODERNISM].

unheard of in literature and in sacred texts, where annotations are provided by editors, not by the writers themselves.[5] To that end, this Essay offers a comprehensive account of the past forty years of scholarship on footnotes within law: a survey of "the best that has been thought and said"[6] on the unstable relation between what is above the line (primary text) and what is below the line (secondary text). More specifically, this Essay analyzes not just any old footnotes, but primarily footnotes that are discursive in form, that is, those with an expressive rather than bibliographic function.

After Part I of this Essay studies the function of discursive footnotes in judicial opinions, Part II studies the quite different function of discursive footnotes in academic legal literature. Part III then makes much of the significance of the physical (typographical, topographical) features of footnotes. Those features can be best understood by an attentive reading of the self-consciously avant garde footnotes literature of Jacques Derrida, Jack Balkin, and Ruthann Robson, which to this point has gotten less than its due as crucial to legal writers' "self-exegesis"[7] and legal citologists'[8] evaluations of that activity. Ultimately, the intention of this Essay is to provide a foundation for our making more subtle judgments about the allocation of responsibilities between readers and writers.

I. DISCURSIVE FOOTNOTES IN JUDICIAL OPINIONS

A. Three Types of Footnotes

Most footnotes are "bibliographic."[9] They serve two populations: readers who are looking to verify a writer's claim, and writers who are looking to avoid stepping on another's work. For example, to point here to Chief Justice Warren's pronouncement on June 20, 1966 for a divided Supreme Court in *Johnson v. New Jersey*—that

5. *See* Jacques Derrida, *This Is Not an Oral Footnote*, *in* ANNOTATION AND ITS TEXTS 192, 194–95 (Stephen A. Barney ed., 1991) [hereinafter Derrida, *Oral Footnote*].

6. MATTHEW ARNOLD, CULTURE AND ANARCHY AND OTHER WRITINGS, at xx (Stefan Collini ed., Cambridge Univ. Press 1993) (1869).

7. John Updike, *Notes*, NEW YORKER, at 28 (Jan. 26, 1957), https://www.newyorker.com/magazine/1957/01/26/notes-3 (on file with the Duquesne Law Review).

8. *See* J.M. Balkin & Sanford Levinson, *How to Win Cites and Influence People*, 71 CHI.-KENT L. REV. 843, 843 (1996) (identifying Fred Shapiro as "the founding father" of this "new and peculiar discipline: 'legal citology'").

9. *See* Mark E. Steiner, *Without Precedent: Footnotes in Judicial Opinions*, 12 APP. ADVOC. 3, 3 (1999) ("Bibliographic footnotes contain the same information that ordinarily . . . [is] in citation sentences."). What I call "bibliographic," others call "probative," *see* Michael C. Plaxton, *But Is It Worth Citing?*, 29 QUEEN'S L.J. 424, 434 (2003) (book review), or "reference," *see* William B.T. Mock, *When a Rose Isn't "Arose" Isn't Arroz: A Guide to Footnoting for Informational Clarity and Scholarly Discourse*, 34 INT'L J. LEGAL INFO. 87, 88–91 (2006).

Miranda v. Arizona would apply "only to persons whose trials had not begun as of June 13, 1966" (the date *Miranda* came down)—calls for a footnote that cites the reporter where both cases appear.[10] That this convention of bibliographic footnoting can be taken too far in legal writing is a truism not to be belabored here,[11] apart from by registering these three supporting nuggets: 1) in 1953, Federal District Judge Paul Leahy dismissed a complaint alleging an illegal monopoly in the cellophane industry in a ruling with 1,715 footnotes;[12] 2) in 1987, a BigLaw partner reclaimed his footnotes record (1,247), which had been broken by Dean Jesse Choper (1,611), by dropping 4,824 in an article on insider trading;[13] and 3) a 1988 article on the right of publicity had 574 footnotes, 444 of them "*id.*"[14] Some 99% of the footnotes in the above three examples, one court opinion and two academic articles, are bibliographic. Even if unacclimated readers are annoyed by the rhythm of legal writing,[15] which calls for an authority to be cited for every single assertion,[16]

10. Johnson v. New Jersey, 384 U.S. 719, 734 (1966) (citing Miranda v. Arizona, 384 U.S. 436 (1966)).

11. It is belabored elsewhere. *See, e.g.*, Samuel Fox Krauss, *Pincites*, 98 N.Y.U. L. REV. 888, 891 n.7 (2023).

12. Abner J. Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647, 650 (1985) [hereinafter Mikva, *Goodbye*] (citing United States v. E.I. du Pont de Nemours & Co., 118 F. Supp. 41 (D. Del. 1953)). That is a lot of footnotes for a court opinion, especially one that preceded affordable word processors, which "make the mechanics of writing, and of footnote production, so easy." W. Lawrence Church, *A Plea for Readable Law Review Articles*, 1989 WIS. L. REV. 739, 741. Those same mechanics, however, also make editing, inserting, redacting—and therefore avoiding the need to write footnotes "simply to avoid having to retype or restructure the entire text"—easy too. *See* Derrida, *Oral Footnote*, *supra* note 5, at 199.

13. *See* Mary Coombs, *Lowering One's Cites: A (Sort of) Review of the University of Chicago Manual of Legal Citation*, 76 VA. L. REV. 1099, 1099 n.4 (1990) (book review); Kenneth Lasson, Commentary, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 937–38 (1990); Arthur Austin, *Footnote Skulduggery and Other Bad Habits*, 44 U. MIA. L. REV. 1009, 1011 n.17 (1990) [hereinafter Austin, *Skulduggery*]; Arthur D. Austin, Essay, *Footnotes as Product Differentiation*, 40 VAND. L. REV. 1131, 1141 n.45 (1987) [hereinafter Austin, *Product Differentiation*]. Two decades after publication of his *An Analysis of Section 16 of the Securities and Exchange Act of 1934*, 32 N.Y. L. SCH. L. REV. 209 (1987), record-holder Arnold Jacobs was interviewed about his accomplishment, of which he is openly proud. *See* Erik Lundegaard, *Q&A with Arnold S. Jacobs*, SUPER LAWS. (Sep. 17, 2008), https://www.superlawyers.com/articles/new-york/qa-with-arnold-s-jacobs/ (on file with the Duquesne Law Review).

14. Austin, *Skulduggery*, *supra* note 13, at 1030 (citing Catherine Louise Buchanan, *A Comparative Analysis of Name and Likeness Rights in the United States and England*, 18 GOLDEN GATE U. L. REV. 301 (1988)).

15. *See* Plaxton, *supra* note 9, at 435–36 ("For fear of missing some crumb of critical data, the reader may well feel the need to check every footnote. In that context, the citation she finds may come as a disappointment.").

16. *Cf.* Richard A. Posner, Essay, *Goodbye to the Bluebook*, 53 U. CHI. L. REV. 1343, 1350 (1986) ("Cite authority for every proposition, however obvious . . . ."), *quoted in* Joan Ames Magat, *Bottomheavy: Legal Footnotes*, 60 J. LEGAL EDUC. 65, 72 (2010); James W. Harper, *Why Student-Run Law Reviews?*, 82 MINN. L. REV. 1261, 1268 (1998) ("Consistent with editorial zeal, some student editors ask for footnotes to support every factual assertion and reference to doctrine."); Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1335

such a convention is not a matter for one to take seriously or not. Bibliographic footnotes just, well, are. Best to think of them as technical, not creative, phenomena: unavoidable red tape for writers, optional for readers.

Footnotes that veer slightly from this bibliographic function I call "semibibliographic." The *Johnson* case mentioned above, which denied retroactive application of *Miranda* to eight-year-old murder confessions taken from Sylvester Johnson and Stanley Cassidy, features an example: "A third defendant, Wayne Godfrey, was also found guilty and sentenced to death. His conviction was subsequently overturned by a federal court . . . . Upon retrial for felony murder, he . . . was sentenced to life imprisonment."[17] It's not as though Godfrey's case is entirely tangential to Johnson's and Cassidy's; a case's procedural history is never far afield. Yet, because Godfrey was by then a nonparty, to speak of him at all is to veer at least a little from the immediate matter at hand regarding his two codefendants, whose cases were still very much alive in the Supreme Court. Accordingly, the Court referred to Godfrey's fate not in the text, but more appropriately in a semibibliographic footnote.

The semibibliographic variety does have a vice that the bibliographic variety does not: length. Bibliographic footnotes themselves can run long. When they do, it is from piling on supporting authority in "string cites." For a Supreme Court opinion to string together fifteen or more authorities in a single footnote to support a single proposition is not unusual.[18] But rarely are bibliographic footnotes long like semibibliographic footnotes, which, by embellishing

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(2002) ("In most law reviews, even the most obvious of statements is presumed to need adornment; editors have demanded support for claims that Plato was an 'influential philosopher' or that '[o]ne of the values of American life is equality.'" (alteration in original) (first quoting Rosa Ehrenreich, *Look Who's Editing*, LINGUA FRANCA, Jan./Feb. 1996, at 56, 61; and then quoting E-mail from Cynthia Epstein, Professor, Dep't of Socio., CUNY, to Deborah L. Rhode (Nov. 13, 2001, at 12:12 ET) (on file with the Harvard Law School Library))); Richard A. Wise et al., *Do Law Reviews Need Reform? A Survey of Law Professors, Student Editors, Attorneys, and Judges*, 59 LOY. L. REV. 1, 17 (2013) (stating that law reviews demand citations "even for the most obvious fact"). On what to do with claims too "obvious," "obscure," or "false . . . to support using references to the existing literature," see Orin S. Kerr, *A Theory of Law,* 16 GREEN BAG 2D 111, 111 (2012).

17. Johnson v. New Jersey, 384 U.S. 719, 725 n.3 (1966).

18. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 150 n.3 (1938); Mapp v. Ohio, 367 U.S. 643, 652 n.7 (1961); Ker v. California, 374 U.S. 23, 50 n.4 (1963) (Brennan, J., dissenting in part); Miranda v. Arizona, 384 U.S. 436, 519 n.17 (1966) (Harlan, J., dissenting); Roe v. Wade, 410 U.S. 113, 118 n.2 (1973), *overruled by*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); California v. Ramos, 463 U.S. 992, 1026 n.13 (1983) (Marshall, J., dissenting); Maine v. Moulton, 474 U.S. 159, 189 n.4 (1985) (Burger, C.J., dissenting); Perry v. New Hampshire, 565 U.S. 228, 246 n.7 (2012); Riley v. California, 573 U.S. 373, 405 n.* (2014) (Alito, J., concurring in part and concurring in the judgment); Edwards v. Vannoy, 593 U.S. 255, 305 n.7 (2021) (Kagan, J., dissenting); *Dobbs*, 597 U.S. at 265 n.48.

citations with explanatory prose, can get bloated, like Justice Joseph Story's 6,166-word whopper—on piracy—in an opinion of just 3,626 words of text.[19] Unlike the citations in bibliographic footnotes, the prose in semibibliographic footnotes is neither unavoidable red tape for writers nor optional for readers. If it's "on the page" (a Richard Posnerism),[20] either above or below the line, and it's not just a citation, then one ignores it at one's own risk. Still, the semibibliographic footnote is not meaningfully more controversial than the bibliographic footnote is. Both are too conventional, too tied to the matter at hand, and neither sufficiently revelatory—about anything—to be the subject of praise *or* blame for which the writer must accept responsibility.

The footnote of concern here, both in and out of court opinions, is a writer's more severe veering off the path, into the realm of the discursive (explanatory, narrative, speaking, substantive, textual) footnote. An example is *Edwards v. Vannoy* (2021), where the Supreme Court again refused to retroactively apply one of its new rules,[21] this one requiring unanimous verdicts in criminal cases. Justice Kagan dissented. In a footnote, she denied Justice Kavanaugh's accusation for the majority that she was out of order to "impugn" the Court's six–three ruling.[22] Kagan also dissented in the case announcing the new rule, *Ramos v. Louisiana* (2020).[23] Read together, Kagan's two dissents provoked Kavanaugh, who wrote a separate concurrence in *Ramos* to lobby for the new rule to apply to petitioners like Ramos—whose direct appellate remedies were unexhausted—but to apply otherwise prospectively.[24] Kavanaugh read Kagan's willingness in *Edwards* to backdate the new rule to benefit a violent criminal whose case was no longer on direct appeal as a philosophical inconsistency, given that in *Ramos* she was willing to affirm convictions entered over not-guilty votes from two members of a Louisiana jury.[25] Kavanaugh expected Kagan to vote

19. *See, e.g.*, United States v. Smith, 18 U.S. 153, 163 n.h (1820), *cited in* John Townsend Rich, *The Longest Footnote?*, 8 GREEN BAG 2D 135, 135 (2005).

20. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 352 (1996).

21. 593 U.S. at 258.

22. *Id.* at 275 ("[I]t is of course fair for a dissent to vigorously critique the Court's analysis. But it is another thing altogether to dissent in *Ramos* and then to turn around and impugn today's majority for supposedly shortchanging criminal defendants."); *id.* at 308 n.8 (Kagan, J., dissenting).

23. 590 U.S. 83, 93 (2020) (Gorsuch, J.).

24. *See id.* at 129–131 (Kavanaugh, J., concurring in part).

25. *Ramos* ruled that Louisiana and Oregon—the only states permitting criminal convictions in serious cases to be entered on nonunanimous verdicts based on as few as ten out of twelve votes to convict—were violating the Sixth and Fourteenth Amendments. *See id.* at 87, 93 (Gorsuch, J.).

dependably to help *or* hurt an accused, but not vote to help the accused in *Edwards* after voting to hurt the accused in *Ramos*.[26]

Footnote eight of Kagan's *Edwards* dissent offered this rebuke to Kavanaugh, who

> treats judging as scorekeeping—and more, as scorekeeping about how much our decisions, or the aggregate of them, benefit a particular kind of party. I see the matter differently. Judges should take cases one at a time, and do their best in each to apply the relevant legal rules. And when judges err, others should point out where they went astray. No one gets to bank capital for future cases; no one's past decisions insulate them from criticism. The focus always is, or should be, getting the case before us right.[27]

In *Ramos*, Kagan felt boxed in by fifty years of precedent allowing nonunanimous verdicts; once the *Ramos* Court had pushed these limiting precedents aside, she felt the Court's breakthrough met its exacting standards for retroactive application of its new ruling to claims no longer on direct appeal.[28] Footnote eight is not just a compressed lecture on the technique of case-by-case adjudication. It is also representative of discursive footnotes in judicial opinions: a veering from the bibliographic or semibibliographic nuts and bolts of a controversy into matters expressive of a writer's sensibility, but the veering in judicial opinions is, as veerings go, pretty tame.

B. The Precedential Value of Footnotes

Judicial-opinion writing is more constrained than academic-journal writing. The difference between the two is *not* in terms of audience. It's not that the masses consume court opinions, while niche audiences consume academic journals. In actuality, the audiences are the same.[29] Instead, the difference is one of *authority*. Judges' words bind their audience. Yet by relegating a judicial pronouncement to below the line, the opinion raises the question whether anyone is actually bound by the pronouncement, which a judge might

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26. *See Edwards*, 593 U.S. at 275 ("To properly assess the implications for criminal defendants, one should assess the implications of *Ramos* and today's ruling *together*. And criminal defendants as a group are better off under *Ramos* and today's decision, taken together, than they would have been if Justice KAGAN's dissenting view had prevailed in *Ramos*.").

27. *Id.* at 308 n.8 (Kagan, J., dissenting).

28. *See id.* at 295 n.1.

29. *See* Richard A. Posner, *Against Footnotes*, CT. REV., Summer 2001, at 24, 24.

bury specifically *to* render it inoperative.[30] (If you type derivations of "buried in a footnote" or "tucked away in a footnote" into Westlaw, you'll get thirteen hits from the Supreme Court alone,[31] plus another 307 hits from law reviews.)[32] For judges to create doubt about what counts as the operative text of their opinions contravenes a principle of legality, which requires that law be "expressed in understandable terms."[33] It is hard to know what we are to understand about the authority of what is below the line in an opinion.

By contrast, there is no sense we can give to being bound by academic writing, other than a sense in which academic writers bind themselves, rather than their readers, by writers' word being their bond.[34] Liberated from the responsibility of binding others with their word, academic lawyers take more license in their speech communities. In the 1980s, a former professor of my then-co-clerk told a constitutional-law class at Yale that he "approved of" The Enlightenment. It is safe to say you are not going to hear such an utterance from a judge, not even within what Justice Scalia called the "silly extravagances . . . of thought and expression" found in dissenting opinions, which bind no one.[35] Scalia did come close, however, in a footnote to a dissent where he wrote that the majority's opinion made him want to "hide . . . [his] head in a bag."[36]

Whether footnotes in judicial opinions have any weight has come up,[37] most notably in Judge Abner Mikva's *Goodbye to Footnotes*

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30. *Cf.* Lewis v. City of New Orleans, 415 U.S. 130, 137 (1974) (Blackmun, J., dissenting) ("[I]t is no happenstance that in each case the facts are relegated to footnote status, conveniently distant and in a less disturbing focus.").

31. *See, e.g.*, Ramos v. Louisiana, 590 U.S. 83, 154 (2020) (Alito, J., dissenting); Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 65 (2015) (Alito, J., concurring); Groh v. Ramirez, 540 U.S. 551, 578–79 (2004) (Thomas, J., dissenting); Labrador v. Poe *ex rel.* Poe, 144 S. Ct. 921, 924 (2024) (mem.) (Gorsuch, J., concurring).

32. *See, e.g.*, Aditya Bamzai & Saikrishna Bangalore Prakash, Essay, *How To Think About the Removal Power*, 110 VA. L. REV. ONLINE 159, 163 (2024); Lauren van Schilfgaarde, *(Un)Vanishing the Tribe*, 66 ARIZ. L. REV. 409, 436 (2024); Isabel Jones, Note, *Reproductive Control as a Carceral Tool of the State - Understanding Eugenics in a Post-*Roe *Society*, 112 CALIF. L. REV. 969, 991 (2024).

33. *See* Mark Jia, *Illiberal Law in American Courts*, 168 U. PA. L. REV. 1685, 1707 n.130 (2020); *see also* David S. Louk, *The Audiences of Statutes*, 105 CORN. L. REV. 137, 152 n.48 (2019); *id.* at 152 ("[A] critical starting point for any theory of a functional legal system is that those susceptible to the law are able to follow it." (citing LON L. FULLER, THE MORALITY OF LAW 106 (rev. ed. 1969))).

34. *See* STANLEY CAVELL, A PITCH OF PHILOSOPHY: AUTOBIOGRAPHICAL EXERCISES 103 (1994) ("[Is] the plain moral of 'the plain saying that *our word is our bond*' . . . [that] sometimes . . . our word is *no more than* our bond, that our bond is sometimes forfeit?").

35. *See* Obergefell v. Hodges, 576 U.S. 644, 719 (2015) (Scalia, J., dissenting).

36. *Id.* at 719 n.22.

37. *See* Robert A. James, *Are Footnotes in Opinions Given Full Precedential Effect?*, 2 GREEN BAG 2D 267, 267 (1999); Jack L. Landau, Feature, *Footnote Folly*, 67 OR. ST. BAR BULL. 19, 24 (2006); Steiner, *supra* note 9, at 3.

(1985).[38] Mikva's case against footnotes is an *hommage* to Professor Fred Rodell's notorious *Goodbye to Law Reviews* (1937).[39] As *hommages* go, Mikva's captures Rodell's crabby tone,[40] which Rodell kept up twenty-five years later in *Goodbye to Law Reviews—Revisited*.[41] Mikva too would recycle his position on footnotes in *For Whom Judges Write*,[42] three years after *Goodbye to Footnotes*. It is no exaggeration to say that these efforts on Mikva's part kick-started writing about footnotes as a hobby-horse for academics.

In *Goodbye to Footnotes*, Mikva swears off footnotes altogether from his court opinions.[43] That is an understandable objective in an activity like opinion writing, where bulky, internal citations are the norm.[44] But Mikva also generalizes that his no-footnotes approach "may apply . . . wherever they may be found."[45] And that didn't happen. *Goodbye to Footnotes* itself had just two footnotes: one biographical,[46] the other a joke about a famous footnote.[47] The next year, Mikva cranked out thirty-two footnotes for the published version of a nine-paged speech he gave at American University,[48] plus seventy-five more in seventeen pages in the *Stanford Law Review*;[49] five years after that it was 109 footnotes in a twenty-one paged law-review essay with a forty-six source string-cite.[50] In all three publications, Mikva excuses his lapse on the ground that it produced

38. Mikva, *Goodbye*, *supra* note 12.

39. Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936).

40. To call Rodell "crabby" as I have here is one thing. To call him an "embittered nihilist," as someone else has, is another. Neil Duxbury, *In the Twilight of Legal Realism: Fred Rodell and the Limits of Legal Critique*, 11 OXFORD J. LEGAL STUD. 354, 358 (1991), *quoted in* Ken Vinson, *Fred Rodell's Case Against the Law*, 24 FLA. ST. U. L. REV. 107, 119 (1996).

41. Fred Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279 (1962).

42. Abner J. Mikva, The Lester W. Roth Lecture, *For Whom Judges Write*, 61 S. CAL. L. REV. 1357, 1367 (1988).

43. Mikva, *Goodbye*, *supra* note 12, at 651 ("I quit using footnotes in my opinions several years ago. I quit cold turkey and it was—and sometimes still is—very painful.").

44. *Cf.* Betsy Brand Six, *In Defense of the Stick-in-the-Mud: A Case for In-Text Footnotes*, 85 J. KAN. BAR. ASS'N 12, 12 (2016) ("A writer who puts the source and perhaps date of every citation in the text makes their writing cluttered and clumsy.").

45. Mikva, *Goodbye*, *supra* note 12, at 647.

46. *See id.* at 647 n.a1. On the biographical footnote in legal academia, see Keerthana Nunna, W. Nicholson Price II & Jonathan Tietz, *Hierarchy, Race, and Gender in Legal Scholarly Networks*, 75 STAN. L. REV. 71, 81–86 (2023).

47. *See* Mikva, *Goodbye*, *supra* note 12, at 653 n.4 (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

48. *See* Abner J. Mikva, Speech, *How Should Courts Treat Administrative Agencies?*, 36 AM. U. L. REV. 1 (1986) [hereinafter Mikva, *Administrative Agencies*].

49. *See* Abner J. Mikva, Comment, *The Changing Role of the Wagner Act in the American Labor Movement*, 38 STAN. L. REV. 1123 (1986) [hereinafter Mikva, *Wagner Act*].

50. *See* Abner J. Mikva & Jeff Bleich, *When Congress Overrules the Court*, 79 CALIF. L. REV. 729, 748 n.103 (1991).

footnotes that were "[n]othing of substance,"[51] read: bibliographic only. And there is something to be said for that: no veering from the rhythm of assertion/authority does justifiably tend to immunize one's footnotes from criticism.

One justification Mikva gives for getting out of the footnotes business in his opinions is that "rules about the precedential significance of judicial footnotes are very fuzzy."[52] So fuzzy, in fact, that we end up with judicial footnotes declaiming that footnotes are only dicta (a remark that itself is only dictum).[53] A consequence of fuzziness, Mikva goes on, is that for "legalists," "footnotes are part of the opinion and entitled to full faith and credit."[54] Judge Posner was one such legalist. He dutifully read but did not write footnotes,[55] at least not in his opinions.[56] There are footnoting judges, however. The Supreme Court of Maryland's Glenn Harrell reported in a foreword on the judiciary that he is "proudly . . . known in certain circles as the 'Crown Prince of Footnotes.'"[57] (Harrell's foreword managed fourteen footnotes in three pages.) The Third Circuit's Edward Becker not only writes footnotes—which he has received "much positive feedback about"[58]—he writes *about* them too. His thirteen-paged, lightly annotated essay, *In Praise of Footnotes* (1996), seems to find the likelihood that law will be made in a footnote to be low;

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51. *See* Austin, *Product Differentiation, supra* note 13, at 1154 n.104 (quoting Mikva, *Administrative Agencies*, *supra* note 48, at 1 n.**); Mikva & Bleich, *supra* note 50, at 729 n.d; Mikva, *Wagner Act*, *supra* note 49, at 1123 n.a.

52. Mikva, *Goodbye*, *supra* note 12, at 649; *cf.* Shop Talk, *How Much Does a Footnote Weigh?*, 95 J. TAX'N 319, 320 (2001) ("We are interested in whether readers are aware of a footnote by one court that has been given substantial weight by other courts.").

53. *See* Steiner, *supra* note 9, at 4 (quoting Young v. State, 826 S.W.2d 141, 145 n.5 (Tex. Crim. App. 1992) (en banc) ("As is generally true with footnotes, we regard this footnote as dictum.")); *see also* Ira Brad Matetsky, *The Footnote Argument—Sustained at Last?*, 6 GREEN BAG 2D 33, 35 & n.16 (2002) (citing judicial footnotes that deny footnotes any precedential value).

54. Mikva, *Goodbye*, *supra* note 12, at 649.

55. *See* Matetsky, *supra* note 53, at 33 (quoting POSNER, *supra* note 20, at 352 ("[A] court's holdings are authoritative wherever they appear on the page.")); Stewart Jay, *The World According to Judge Posner*, 73 GEO. L.J. 1507, 1519 (1985) (book review) ("Judge Posner himself, like several other well known circuit judges, does not use any [footnotes] in judicial opinions.").

56. *See, e.g.*, Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998) (law review article featuring a trim 148 footnotes in seventy-two pages); Richard Posner, *Jurisprudential Responses to Legal Realism*, 73 CORN. L. REV. 326 (1988) (law review article featuring an even trimmer three footnotes in five pages).

57. *See* Glenn T. Harrell, Jr., *Foreword*, 38 U. BALT. L. REV. 1, 3 (2008). After eight years on the Maryland Court of Special Appeals, Justice Harrell sat for sixteen years on what is now the Supreme Court of Maryland. *Glenn T. Harrell, Jr.*, MD.: MD. ST. ARCHIVES, https://msa.maryland.gov/msa/mdmanual/29ap/former/html/msa11681.html [https://perma.cc/U4P5-LY9B] (last visited Apr. 6, 2026).

58. *See* Edward R. Becker, Essay, *In Praise of Footnotes*, 74 WASH. U. L.Q. 1, 1 (1996).

his position on that question, however, is too undeveloped to assess.[59]

Some evidence supports that Supreme Court justices not only footnote liberally, but feel bound by footnotes too. Here I am referring only to nonbibliographic footnotes, that is, footnotes that Judge Mikva would deem "of substance."[60] As for their liberal use, Professor Jay Wexler, a former clerk to Justice Ruth Bader Ginsburg, estimated in 2009 that in the first fifteen of her twenty-seven years on the Court, RBG wrote in the neighborhood of 1,500 footnotes,[61] none of them purposely funny,[62] all of them subject to classification in one of nine buckets of Wexler's design.[63] To pen 100 footnotes per Term, many of them nonbibliographic, would be a poor, even indulgent, use of a judge's time if footnotes had no more precedential value than a dissenting opinion.

The year after publication of Wexler's *Justice Ginsburg's Footnotes*, practitioner William Ramsey's *Taking Note of Footnotes: The Precedential Value of Footnotes in Judicial Opinions* (2010) found that a judge's time spent writing footnotes *is* well-spent.[64] Weight is given footnotes not only in some lower courts,[65] Ramsey summarizes, but also in the Supreme Court. To illustrate, a separate opinion of Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, noted: "[F]ootnotes are part of an opinion, too."[66] (Ramsey omits Roberts's hedge that a footnote might not be "the most likely place to look for a key jurisdictional ruling.")[67] Naming O'Connor,

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59. *See id.* at 6 ("[F]ootnotes sometimes play an important role in our common law system by planting the seeds for major developments in legal principles.").

60. *Cf.* Thomas Haggard, *In Defense of the Lowly Footnote*, 8 SCRIBES J. LEGAL WRITING 173, 174 (2002) ("[T]he prevailing judicial attitude is . . . that if something is worth saying, say it in the text; otherwise, omit it. On closer reflection, however, the objection is not to footnotes as such. The objection is to lengthy *textual* footnotes. And the objection is well founded.").

61. Jay D. Wexler, *Justice Ginsburg's Footnotes*, 43 NEW ENG. L. REV. 857, 861 (2009).

62. *See id.* at 862.

63. *Id.* at 862–63 ("(1) cite authority or quote directly from a source; (2) provide further detail about the case history of the case under review; (3) describe the position of lower courts on some issue; (4) explain why the Court is taking some action; (5) indicate that the Court will not take a position on or will not decide some question or issue; (6) mention or explain a point of law established by the Court; (7) provide additional background information about the case; (8) respond to an argument advanced by a party in the case; and (9) reply to a point made by another Justice in some other opinion in the case.").

64. William A. Ramsey, Feature, *Taking Note of Footnotes: The Precedential Value of Footnotes in Judicial Opinions*, RES GESTAE, September 2010, at 10.

65. *Id.* at 19 ("A footnote is as important a part of an opinion as the matter contained in the body of the opinion and has like binding force and effect." (quoting Melancon v. Walt Disney Prods., 273 P.2d 560, 561 n.* (Cal. Dist. Ct. App. 1954))).

66. *Id.* at 16 (quoting United States v. Denedo, 556 U.S. 904, 921 (2009) (Roberts, C.J., concurring in part and dissenting in part)).

67. *Denedo*, 556 U.S. at 921 (Roberts, C.J., concurring in part and dissenting in part).

Scalia, Breyer, Roberts, and Alito, Ramsey notes justices' "practice of dissenting from specific footnotes in the majority opinion."[68]

And it really is a practice. Between his text[69] and footnotes,[70] Ramsey names seven cases where justices explicitly refused to join footnotes. My research picked up another three from the Court before his 2010 publication date,[71] and nine more since.[72] One of the nine is *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017), which begins: "Chief Justice ROBERTS delivered the opinion of the Court, except as to footnote 3."[73] Justice Thomas concurred in all but footnote three.[74] Justice Gorsuch, who also concurred in all but footnote three, explained that the footnote rendered the scope of the ruling, which found Missouri's administration of a school grant program to violate a church's First Amendment rights, too narrow.[75]

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68. Ramsey, *supra* note 64, at 16. Ramsey gives the particulars below:

> In *Thornton v. United States*, Justice O'Connor's refusal to join in a footnote rendered that footnote the only part of [Chief] Justice Rehnquist's opinion that did not constitute the opinion of the Court. Similarly, in *Williams v. Taylor* Justice Scalia's refusal to join in a footnote written by Justice O'Connor rendered that footnote the only part of Part II that was not the opinion of the Court. Justice Breyer, with Chief Justice Roberts and Justice Alito, has even joined in the second paragraph of a footnote while not joining in the footnote's first paragraph.

Id. (footnotes omitted).

69. *See id.*

70. *See id.* at 22 n.44.

71. Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 459 (2007) (Alito, J., concurring) ("Justice ALITO, with whom Justice THOMAS and Justice BREYER join, concurring as to all but footnote 14."); Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co., 522 U.S. 479, 482 n.* (1998) ("Justice SCALIA joins this opinion, except as to footnote 6."); Pope v. Illinois, 481 U.S. 497, 507 (1987) (Brennan, J., dissenting) (joining Justice Stevens's dissent, except as to footnote 11).

72. Griffin v. HM Florida-ORL, LLC, 144 S. Ct. 1, 1 (2023) (mem.) ("Statement of Justice KAVANAUGH, with whom Justice BARRETT joins except as to footnote 1 . . . ."); Johnson v. Guzman Chavez, 594 U.S. 523, 547 (2021) (Thomas, J., concurring in the judgment) ("Justice THOMAS, with whom Justice GORSUCH joins, concurring except for footnote 4 and concurring in the judgment."); McGirt v. Oklahoma, 591 U.S. 894, 938 (2020) (Roberts, C.J., dissenting) ("Chief Justice ROBERTS . . . with whom Justice THOMAS joins except as to footnote 9, dissenting."); Scialabba v. Cuellar de Osorio, 573 U.S. 41, 81 (2014) (Sotomayor, J., dissenting) ("Justice SOTOMAYOR . . . with whom Justice THOMAS joins except as to footnote 3, dissenting."); Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 453 (2017) ("Chief Justice ROBERTS delivered the opinion of the Court, except as to footnote 3."); Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 548 n.* (2014) ("Justice SCALIA joins this opinion except as to footnotes 1–3."); Sandifer v. U.S. Steel Corp., 571 U.S. 220, 222 n.** (2014) ("Justice SOTOMAYOR joins this opinion except as to footnote 7."); Levin v. United States, 568 U.S. 503, 505 n.* (2013) ("Justice SCALIA joins this opinion, except as to footnotes 6 and 7."); Wall v. Kholi, 562 U.S. 545, 561 (2011) (Scalia, J., concurring in part) ("I cannot join footnote 3 of the Court's opinion . . . .").

73. 582 U.S. at 453.

74. *Id.* at 468 (Thomas, J., concurring in part) ("I do not, however, join footnote 3 . . . .").

75. *See id.* at 470 (Gorsuch, J., concurring in part) ("I am unable to join the footnoted observation that '[t]his case involves express discrimination based on religious identity with respect to playground resurfacing.'" (alteration in original) (citation omitted)).

We can count this practice as an indication that footnotes in court opinions cannot necessarily be treated like background noise.

Professor Peter Hoffer's book, *The Supreme Court Footnote: A Surprising History* (2024), pledges to assess the weight of High-Court footnotes in eight cases that span 1793–2022.[76] One thing you will not find in Hoffer's 223 pages is an answer to whether it would be error for a lower court to flout a Supreme Court footnote, any Supreme Court footnote.[77] Instead, after the final case study, a forty-pager on the "bottomheavy"[78] *Dobbs v. Jackson Women's Health Organization* (2022),[79] Hoffer concludes:

> [A] footnote to the Supreme Court opinion is still a footnote, an appendage to the opinion, no matter how extensive it is, how scholarly, how argumentative, how relevant to today or to tomorrow, until it is incorporated in the body of later opinions. Some notes will never attain this high station. But others will. Studying them will help us understand the logic and appreciate the contribution of the opinion itself. For the footnote, more than the body to which it is attached, opens the door to a conversation with the justice. For the footnote, more than the opinion, is addressed to the community of legal scholars, inviting them to share and to comment.[80]

Hoffer seems to mean that judicial footnotes are scholarly discourse that become more than that when they move above the line in subsequent cases. Until then they are, for Hoffer, just dicta. But of course, even after that they can still be dicta; much that is above the line is.

To depict just how partial a glimpse Hoffer gives us of the precedential value of Supreme Court footnotes, consider his study of *United States v. Carolene Products Co.* (1938).[81] Hoffer attributes to Justice Harlan Fiske Stone's fourth footnote: 1) the raising of "still unanswered questions," 2) the provoking of a never-ending "battle . . . in law reviews," and 3) a failure to ever really catch on with the Court.[82] Hoffer then points to the "field day" scholars have had with

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76. *See* PETER CHARLES HOFFER, THE SUPREME COURT FOOTNOTE: A SURPRISING HISTORY 19–20 (2024).

77. Hoffer makes clear that the footnotes of at least one of his principal cases known for its footnotes are *not* law. *See, e.g.*, *id.* at 152 (citing District of Columbia v. Heller, 554 U.S. 570 (2008)).

78. I lifted this term from Joan Ames Magat. *See* Magat, *supra* note 16.

79. 597 U.S. 215 (2022) (featuring five opinions and 157 footnotes).

80. HOFFER, *supra* note 76, at 196.

81. 304 U.S. 144 (1938).

82. HOFFER, *supra* note 76, at 100–02.

footnote four as the best "proof that a footnote can become law, even when the precedent is amended or discarded."[83] For Hoffer, scholarly commentary on a footnote indicates that the footnote is law, not background noise. That, however, takes matters a bit far. Scholarly commentary can become law. Such occurrences (some of which happen to depend on footnotes) are rare,[84] but in no instance can scholarship by itself confer the status of law on a footnote.

For many judges, footnotes *are* background noise; for that cohort, footnotes "are just footnotes."[85] Judges of the up-or-out, that is, above-the-line-or-forget-about-it mind, are easy to find.[86] To name just two: Judge Michael B. Hyman of the Illinois Appellate Court, claiming to speak for others, claims also to "abhor footnotes."[87] Justice Donald C. Wintersheimer of the Kentucky Supreme Court, who finds discursive footnotes "foolish," has bragged that for ten years he wrote none.[88]

Doubt about the usefulness of footnotes in court opinions goes to the highest level. Charles Evans Hughes, who served a decade as Supreme Court Chief Justice, "was wont to say, '[f]ootnotes do not really count.'"[89] That is the recollection of Justice William O. Douglas, whose service on the Court overlapped from 1939–1941 with that of Hughes.[90] It is worth noting the irony in Hughes's having had a hand in *Carolene Products*' footnote four,[91] which Justice Lewis Powell called "the most celebrated footnote in constitutional law."[92]

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83. *Id.* at 102.

84. *See, e.g.*, Daniel Yeager, *Fiduciary-isms: A Study of Academic Influence on the Expansion of the Law*, 65 DRAKE L. REV. 179, 210–15 (2017) (examining how over-readings of academic literature led to judicial recognition that teachers are students' fiduciaries, even though teachers manage nothing resembling a trust *res*).

85. Mikva, *Goodbye*, *supra* note 12, at 649.

86. *E.g.*, HOFFER, *supra* note 76, at 15 ("Many appeals court judges still refuse to use footnotes in their opinions."); Landau, *supra* note 37, at 24 ("If the message is so important, shouldn't it be worked into the text? And, if it is not important enough to put in the text, why say it at all?").

87. Michael B. Hyman, *Down with Footnotes*, 19 SCRIBES J. LEGAL WRITING 139, 139 (2020).

88. *See* Austin, *Product Differentiation*, *supra* note 13, at 1134 n.14.

89. Tidewater Oil Co. v. United States, 409 U.S. 151, 174 n.1 (1972) (Douglas, J., dissenting).

90. *See* Barry Cushman, *The Hughes Court Docket Books: The Late Terms, 1937–1940*, 55 AM. J. LEGAL HIST. 361, 370–71 (2015). Douglas joined the Court on April 17, 1939; Hughes retired from the Court on July 1, 1941. *Id.*

91. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). For a discussion of Hughes's influence on footnote four, see Peter Linzer, *The* Carolene Products *Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMMENT. 277, 282–85 (1995), and HOFFER, *supra* note 76, at 95–100.

92. Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982). Runner-up should go to *Brown v. Board of Education*. 347 U.S. 483, 494 n.11 (1954).

Chief Justice Rehnquist purportedly once asked his clerk, future Chief Justice John Roberts, to move what Rehnquist took to be surplusage from a draft opinion to the footnotes, and from there to the trash.[93] Justice Breyer, having been sold on footnote abstinence by Justice Arthur Goldberg, for whom he had clerked,[94] concurred with Rehnquist's negative stance toward footnotes.[95] Goldberg's influence was not immediately felt, however. Breyer used footnotes for his first nineteen months on the First Circuit before dropping them for good in his opinions, though not without exception.[96] From then on, Breyer would pack all supporting authority above the line with internal citations like a brief-writer would.[97]

The fact that Breyer's own footnote abstinence did not stop him from refusing to join half of a Scalia footnote for the majority (yes, half a footnote) indicates that footnotes might not be nothing.[98] Indeed, for a court opinion to repudiate a footnote's content is to confirm rather than deny the footnote's precedential value. So suggests Judge Alex Kozinski, who lamented a Second Amendment case in which he wrote for an otherwise unanimous three-judge panel[99]: "Alas, my two colleagues on the panel repudiated my footnote, so it

93. *See* Adam J. White, *'The Supreme Court Footnote' Review: Law at the Margins*, WALL ST. J. (Sep. 13, 2024, at 10:58 ET) (book review), https://www.wsj.com/arts-culture/books/the-supreme-court-footnote-review-law-at-the-margins-bb40962b (on file with the Duquesne Law Review).

94. *See Supreme Court Justice Steven Breyer to Retire*, PBS NEWS (Jan. 26, 2022, at 12:49 ET), https://www.pbs.org/newshour/nation/supreme-court-justice-stephen-breyer-to-retire (on file with the Duquesne Law Review); Arthur J. Goldberg, *The Rise and Fall (We Hope) of Footnotes*, 69 A.B.A. J. 255, 255 (1983) ("Footnotes, in my experience, cause more problems than they solve.").

95. *In Justice Breyer's Opinion, a Footnote Has No Place*, N.Y. TIMES (July 28, 1995), https://www.nytimes.com/1995/07/28/us/in-justice-breyer-s-opinion-a-footnote-has-no-place.html (on file with the Duquesne Law Review) ("[E]ither a point is sufficiently significant to make, in which case it should be in the text, or it is not, in which case, don't make it.").

96. *See* Stephen R. Barnett, Letter to the Editor, *Breyer on Footnotes Needs a Footnote*, N.Y. TIMES (Aug. 4, 1995), https://www.nytimes.com/1995/08/04/opinion/l-breyer-on-footnotes-needs-a-footnote-881295.html (on file with the Duquesne Law Review). Breyer's *Dobbs* dissent, joined by Sotomayor and Kagan, has thirty-one footnotes. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 359–417 (2022) (Breyer, J., dissenting).

97. On whether bibliographic cites are best installed in the body of the text rather than in footnotes (they aren't), see Alexa Z. Chew, *Stylish Legal Citation*, 71 ARK. L. REV. 823, 832–40 (2019).

98. *See* Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 192 (2007) (Breyer, J., concurring in part and concurring in the judgment) ("I therefore concur in the Court's judgment, and I join Parts I and II-A and the second paragraph of footnote 2 of the Court's opinion."), *cited in* Ramsey, *supra* note 64, at 16 & 22 n.47.

99. *See* United States v. Gomez, 92 F.3d 770, 778 (9th Cir. 1996) (Hall, J., concurring) ("I concur in Judge Kozinski's opinion, with the exception of footnote 7 . . . ."); *id.* at 779 (Hawkins, J., concurring) ("I concur in all of Judge Kozinski's excellent opinion save for footnote 7 . . . .").

did not become part of the law of the Ninth Circuit . . . ."[100] And if footnotes were just gas, then it would have been unnecessary for the Supreme Court to "sound[] the death knell" four decades ago for "the most famous tax footnote" of all time.[101] But it did just that in *Commissioner v. Tufts* (1983).[102] According to Westlaw, fourteen published court opinions and seventy-seven law review articles have referred to a footnote as "controversial."[103] Still, for a Court whose footnotes go all the way back to 1793,[104] some of which have been cited in over 1,000 court opinions,[105] evidence of its position on the precedential value of those footnotes—either way—is frustratingly thin.

II. DISCURSIVE FOOTNOTES IN ACADEMIC COMMENTARY

In a world separate from the up-or-out injunctions issued by judges are those issued by academic lawyers.[106] To illustrate, consider these three related injunctions from Professor Joan Ames Magat: 1) "Above the line, loosen up; below the line, lighten up"; 2) "Avoid discursive footnotes and tangents"; and 3) "Any writer with

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100. Alex Kozinski, Address, *Who Gives a Hoot About Legal Scholarship?*, 37 HOU. L. REV. 295, 308–09 (2000).

101. *See* Christian C. Day, Commissioner v. Tufts*: The Fall of Footnote 37; the Confirmation of the Functional Relationship*, 45 U. PITT. L. REV. 803, 806 (1984) (discussing Comm'r v. Tufts, 461 U.S. 300 (1983), and Crane v. Comm'r, 331 U.S. 1, 14 n.37 (1947)); *id.* at 804 n.3.

102. *See id.* at 845 ("The speculation about the inner meaning(s) of footnote 37 ha[s] finally been put to rest.").

103. Westlaw, "controversial-footnote!", 14 results (Mar. 28, 2026) (on file with the Duquesne Law Review) (filtered by "Cases"); Westlaw, "controversial-footnote!", 77 results (Mar. 28, 2026) (on file with the Duquesne Law Review) (filtered by "Secondary Sources", "Law Reviews & Journals").

104. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI. Alexander James Dallas, the volunteer reporter for the Supreme Court, converted Justice James Wilson's marginalia into twenty-five footnotes (twenty-four bibliographic, one semibibliographic) at the end of a long opinion. *See* HOFFER, *supra* note 76, at 24–27, 36–37. *But see* Gerald Lebovits, *The Bottom Line on Footnotes and Endnotes*, N.Y. ST. BAR ASS'N J., January 2003, at 64, 64 n.1 (identifying the Supreme Court's first footnotes—some of them in French—as Justice Horace Gray's in *Viterbo v. Friedlander*, 120 U.S. 707 (1887)).

105. *E.g.*, Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985) (1,164 cites on Westlaw to footnote 14's definition of a "pattern of racketeering activity" for RICO purposes). Westlaw, "473 U.S. 479" (Apr. 6, 2026) (on file with the Duquesne Law Review) (filtered by "Citing References", "Cases", "Search Within results": FN FN! note end-note n. +4 14 & "pattern of racketeering").

106. *See, e.g.*, Larry A. DiMatteo, *Human Capital and the Search for Originality*, 16 BERKELEY BUS. L.J. 267, 299 (2019) (stating six basic footnote rules, number five being: "If an explanatory point in a footnote is crucial to understanding the text, then put it in the text"); Bryan A. Garner, *Clearing the Cobwebs from Judicial Opinions*, CT. REV., Summer 2001, at 4, 4 (arguing that discursive footnotes are to be avoided; bibliographic footnotes are not).

rapier wit should be wielding it in the text."[107] Objections to discursive footnotes are for the most part directed by and at law professors, for whom, unlike judges, elaborating below the line is *de rigueur*, and whose word binds only themselves. An example of heavy discursive footnoting is Professor Guido Calabresi's *Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)* (1991),[108] a long foreword with 229 largely semibibliographical and discursive footnotes, seven of them over 500 words, one over 1,000.[109] That's almost 5,000 words in just seven footnotes. In light of such considerable capital being expended on writing footnotes, it is not out of order to ask what purpose writers could have for annotating *their own* work.

In literature, as in sacred texts, annotations are provided by editors, not by the authors themselves.[110] Consider, for example, the last couplet of Matthew Arnold's *Dover Beach*, published in 1867, composed as early as 1849: "Swept with confused alarms of struggle and flight,/Where ignorant armies clash by night."[111] It would be odd for Arnold *himself* to tell us in the poem's margins the background of this allusion to Thucydides's *History of the Peloponnesian War*. Thucydides's point is that the warring Syracusans and Athenians could not tell friend from foe by the light of the moon, a problem compounded by the armies' similar *paeans*. It bears emphasizing that the Thucydides cite is supplied below the line not by poet Arnold, but by editors Charles Coffin and Gerrit Roelofs, who compiled the anthology in which *Dover Beach* appears.[112]

Decades later, by adding six pages of footnotes to the fourteen pages that constitute *The Waste Land* (1922),[113] T.S. Eliot's deviation from this standard division of labor is almost as talked about as the poem itself.[114] Reacting to *The Waste Land* and two others' poems of "self-exegesis," poet/novelist John Updike was aghast that

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107. Magat, *supra* note 16, at 98, 97, 98.

108. Guido Calabresi, Foreword, *Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80 (1991).

109. *Id.* at 85 n.13 (538 words); *id.* at 87 n.17 (1,063); *id.* at 112 n.94 (620); *id.* at 115 n.106 (739); *id.* at 116 n.108 (674); *id.* at 120 n.131 (665); *id.* at 147 n.220 (568).

110. *See* Derrida, *Oral Footnote*, *supra* note 5, at 194–95. In Mark Musa's translation of Dante's *Inferno*, for every page of text is roughly one page of notes, collected at the end of each of the poem's thirty-four cantos, followed by a thirty-eight-paged glossary. See DANTE, THE DIVINE COMEDY, VOL. I: INFERNO (Mark Musa trans., Penguin Books 1984).

111. MATTHEW ARNOLD, DOVER BEACH (1867), *reprinted in* THE MAJOR POETS: ENGLISH AND AMERICAN 390, 392 (Charles M. Coffin & Gerrit Hubbard Roelofs eds., 2d ed. 1969).

112. *See id.*

113. T.S. ELIOT, THE WASTE LAND (1922), *reprinted in* T.S. ELIOT: THE COMPLETE POEMS AND PLAYS (1909–1950), at 37, 37–55 (1935).

114. *See, e.g.*, MENAND, MODERNISM, *supra* note 4, at 89–91, 200 n.38 (discussing, inter alia, whether Eliot's notes to *The Waste Land* are part of the poem rather than just "a skit").

any poet would explain their own allusions rather than let their art speak for itself to presumptively self-sufficient audiences, who are to make of an art object what they will.[115] Updike was just not prepared to consider *The Wasteland*'s notes as part of the poem.

Unlike writers of literary or sacred texts, academic writers do regularly annotate their own work, and not just to avoid plagiarism. But why? Professor Arthur Austin's *Footnotes as Product Differentiation* (1987),[116] and its follow-up, *Footnote Skulduggery and Other Bad Habits* (1990),[117] see footnotes as advertisements that careerist law professors place in journals, ranked on what Disraeli would call a "greasy pole."[118] Enabled by student editors, what professors are playing for are competitive market advantages: tenure and a big reputation. Professors win those advantages by making their work stand out both visually (the contrast between number of lines below and above the line, known as an article's "density factor"),[119] and intellectually (by citing cool stuff,[120] esoterica,[121] or baseball[122]). Austin is on to something about the politics of footnotes.[123] My four tenure articles,[124] if they are at all a sign, had a hefty 336, 269, 364,

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115. *See* Updike, *supra* note 7, at 28–29 ("The dangers of self-exegesis are: (1) a race of soft readers, spoon-fed on identified allusions, and (2) a race of poets more interested in annotating their works than in writing them.").

116. Austin, *Product Differentiation*, *supra* note 13.

117. Austin, *Skulduggery*, *supra* note 13.

118. JOHN BARTLETT, FAMILIAR QUOTATIONS 435 (Justin Kaplan ed., 16th ed. 1992).

119. *See* Austin, *Product Differentiation*, *supra* note 13, at 1139, 1144–45; DiMatteo, *supra* note 106, at 304–11.

120. *See* Rhode, *supra* note 16, at 1335 ("Some authors seek to advertise their erudition by decorating their footnotes with gratuitous references to Grand Theory and 'fugitive sources,' such as personal letters or obscure transcripts that only the most 'ferocious archaeologist' could ever unearth again." (quoting Paul M. Barrett, *To Read This Story in Full, Don't Forget to See the Footnotes*, WALL ST. J., May 10, 1988, at A1)).

121. *See* Austin, *Skulduggery*, *supra* note 13, at 1018–20.

122. *See* Austin, *Product Differentiation*, *supra* note 13, at 1147–48; Austin, *Skulduggery*, *supra* note 13, at 1018–20; *id.* at 1019 ("Sports fanatics are no longer excluded—they can write about the infield fly rule, while titillating readers with references to George Brett, Billy Martin, and the relationship between art and baseball." (footnote omitted)); Arthur Austin, Essay, *A Primer on Deconstruction's "Rhapsody of Word-Plays,"* 71 N.C. L. REV. 201, 215 (1992) ("Anticipating George Will's effort to intellectualize baseball, [Stanley] Fish deconstructed [baseball players] Dennis Martinez and Earl Weaver." (footnote omitted)).

123. *See also* Gerald Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1571 (1990) ("If we handle the bottom of the page correctly, we demand that our readers grant us attention and authority.").

124. *See* Daniel Yeager, *Rethinking Custodial Interrogation*, 28 AM. CRIM. L. REV. 1 (1990) (336 footnotes); Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1 (1993) (269 footnotes); Daniel B. Yeager, *Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, 84 J. CRIM. L. & CRIMINOLOGY 249 (1993) (364 footnotes); Daniel B. Yeager, *Categorical and Individualized Rights-Ordering on Federal Habeas Corpus*, 51 WASH. & LEE L. REV. 669 (1994) (338 footnotes). A fifth item in my tenure file, Daniel Yeager, *Marlowe's Faustus: Contract as Metaphor?*, 2 U. CHI. L. SCH. ROUNDTABLE 599 (1995), an essay of eighteen pages, had 140 footnotes.

and 338 footnotes that fell into, or set, every single one of the self-promoting traps that Austin describes.

Apart from their career benefits, footnotes "are the accepted forum for risk-taking" in an otherwise "notoriously risk averse discipline."[125] One risk writers take below the line is to try to be funny.[126] Professor Thomas E. Baker's *A Compendium of Clever and Amusing Law Review Writings* (2002) records that the urge to amuse, in and out of footnotes, shows itself in more legal writing (especially from the 1990s) than one might think.[127] The risk is that attempts at humor, whether in a journal or on a stage, might fall flat.[128] Even if trying to be funny in legal writing is generally a no-no,[129] legal writing remains a "solitary occupation" that plays by "rigid conventions" from which writer and reader alike deserve some relief, if done sparingly.[130] In this same vein, Chuck Zerby's *The Devil's Details: A History of Footnotes** (2003) advises readers to be "grateful" for footnotes' "gifts," which he lists as "[a]musement, charm, a chance to rest."[131]

What is not so amusing is that at their worst, footnotes can be taken for little more than a written record of a writer's unfiltered consciousness,[132] which ends up vainly on display to no good end.[133]

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125. Austin, *Product Differentiation*, *supra* note 13, at 1153.

126. *Cf.* Becker, *supra* note 58, at 7–8 ("[F]ootnotes can even be used to inject some humor into an opinion or to offer an interesting aside. Judges are . . . professional writers, and there is no reason why their work product should not be . . . enjoyable." (footnote omitted)).

127. *See* Thomas E. Baker, Legal Commentary, *A Compendium of Clever and Amusing Law Review Writings*, 51 DRAKE L. REV. 105 *passim* (2002).

128. *See, e.g.*, Hyman, *supra* note 87, at 141 ("[D]on't ever try to be funny, footnotes or no footnotes."); *id.* at 141 n.18 (unless you're a witty judge); Marshall Rudolph, Note, *Judicial Humor: A Laughing Matter?*, 41 HASTINGS L.J. 175, 177 (disapproving of judicial humor). It is hard to stop humor in legal writing. *See* Baker, *supra* note 127, at 115 (citing Ridgely Schlockverse III, *Mad Dogs and Englishmen:* Pierson v. Post *[A Ditty Dedicated to Freshman Law Students, Confused on the Merits]*, 17 NOVA L. REV. 857 (1993)) (a spoofy poem "replete with witty footnotes"). For an argument that what legal writing needs is *more* humor, see generally J.T. Knight, Comment, *Humor and the Law*, 1993 WIS. L. REV. 897.

129. Hyman, *supra* note 87, at 141.

130. *See* Paul F. McAloon, *Defending the Lowly Footnote*, N.Y. ST. BAR ASS'N J., April/May 2001, at 64, 64 (making this assertion about brief-writing).

131. CHUCK ZERBY, THE DEVIL'S DETAILS: A HISTORY OF FOOTNOTES* 5 (Touchstone 2003).

132. *See* Plaxton, *supra* note 9, at 436–37 ("Just as lawyers discover interesting and shocking things when preparing a case, a scholar learns things, when preparing an argument, only tangentially connected to it. When this happens—that is, when a researcher unearths a nugget—he may experience an irresistible temptation to share it with the world. He understands it is not *exactly* on point. Nonetheless, he wants to show what he knows, perhaps to educate, perhaps to give the impression . . . that he has not wasted his time . . . . A scholarly paper, however, is not a pile of nuggets.").

133. *See* J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 276–77 (1989); *cf.* Mikva, *Goodbye*, *supra* note 12, at 651 (footnotes are for "kitchen sink" arguments made by lawyers who can't make choices); Austin, *Skulduggery*, *supra* note 13, at 1020 (calling out some footnotes as "cute," others as the work of "the pompous and the *poseur*"); Lebovits, *supra* note 104, at

These displays "interrupt"[134] the flow of an argument by falling into "digression or afterthought."[135] You can't just write whatever pops into your head and expect readers to play along. Of the writing style of a Queen Elizabeth II biographer, Rebecca Mead recently observed that "[h]is attention settles here before hopping there, like a pigeon in Trafalgar Square alighting on a statue's arm before fluttering up to its head."[136] That is not a compliment. Readers deserve better, the argument runs, than to be jerked around by a *sauter du coq à l'âne* approach to academic narrative.[137]

Yet we do it anyway, though beneficially too. For legal citologist Fred Shapiro, discursive footnotes are "where the action is"[138]—where "the really interesting scholarly conversation is taking place."[139] To instigate that action, one must kick oneself loose from writing conventions, even if the result can be a bit all over the place. Writers' rebellious tendencies are captured by Wexler, RBG's former clerk: "Footnotes allow the writer to break away from the main text, to use a different tone, to consider tangents—basically to carry on two conversations with the reader at once, or at least one-and-a-half."[140] The result, Wexler posits, is a writer who can "break out of the linearity of the text and mirror the fractured nature of reality in his work."[141] It would not be a stretch to reread Wexler to say that the above-the-line/below-the-line relation is, in Freudian

61 ("Footnotes or endnotes should not be written merely to show that you are scholarly."); Becker, *supra* note 58, at 11 ("The principal appeal [of the footnote] is to the author . . . . [I]t spares him the pain of having to discard anything he considers to have some value or interest, and it enables him to show, or at least pretend, that he is hard-working, learned and scrupulous." (first and second alterations in original) (quoting David Margolick, *The Footnote in Judicial Opinions*, N.Y. TIMES, Jan. 4, 1991, at B14 (quoting Judge Posner))); Steiner, *supra* note 9, at 3 ("Substantive footnotes are misnamed because they hardly ever contain any substance."); Herma Hill Kay, Essay, *In Defense of Footnotes*, 32 ARIZ. L. REV. 419, 419 (1990) (a reviewer of Kay's book chapter described the "peculiar form" of law review articles as "two articles divided by the footnote line at the bottom of each page. Probably half its length consists of footnotes. I see this as an editing problem rather than a substantive one.").

134. ZERBY, *supra* note 131, at 3 (identifying interruption as the "main job" of footnotes).

135. Balkin, *supra* note 133, at 276; *see* Hyman, *supra* note 87, at 141; K.K. DuVivier, *The Footnote = An Interruption*, COLO. LAW., May 1997, at 47, 47; Lasson, *supra* note 13, at 940; Mikva, *Goodbye*, *supra* note 12, at 653; Haggard, *supra* note 60, at 174–75; Plaxton, *supra* note 9, at 437.

136. Rebecca Mead, *The Unrivalled Omnipresence of Queen Elizabeth II*, NEW YORKER (Sep. 30, 2024) (book review), https://www.newyorker.com/magazine/2024/10/07/q-a-voyage-around-the-queen-craig-brown-book-review (on file with the Duquesne Law Review).

137. In French, to jump from the rooster to the donkey is to be too prone to changing the subject.

138. Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 752 (1996).

139. *Id.*

140. Wexler, *supra* note 61, at 860.

141. *Id.* (attributing this utterance to David Foster Wallace).

terms, like the relation of a manifest dream to its latent content,[142] or like a palimpsest: a not-fully-erased inscription peeking through (as one's subconscious would) a superimposed writing.[143]

By Wexler's own account, Justice Ginsburg never took such license in her footnoting.[144] Of the nine buckets into which Wexler puts Ginsburg's footnotes, one is bibliographic, six are semibibliographic, and two are discursive[145]: one of those two is an occasion to "respond to an argument advanced by a party in the case"; the other is to "reply to a point made by another Justice in some other opinion in the case."[146] (Justice Kagan's eighth footnote in *Edwards v. Vannoy* would fit in this last bucket.)[147] None of the nine buckets implicate the authorial freedoms that make discursive footnotes controversial. The breaking free that Wexler describes above is therefore relative. Judges, whose majority opinions bind others, are constrained by their own authority from veering in ways that might be read as too subjective, too idiosyncratic, too indulgent to spring from the fountain of justice known as the common law.[148] Even "what may be the single weirdest footnote in the history of U.S. courts" is not all that weird.[149] "Over the top," yes; "foolish," no.[150] Professors, on the other hand, suffer no such constraints; and it shows in their footnotes.[151]

This freedom of "subdialogue"[152] creates what historian Anthony Grafton calls a double story, whereby writers "make clear the

142. *See* BASIC PSYCHOANALYTIC CONCEPTS ON THE THEORY OF DREAMS 28–39, 54–55 (Humberto Nagera et al. eds., 1969).

143. *See generally* R. John Williams, *Surface Writing*, 165 REPRESENTATIONS 1 (2024) (discussing Freud's paper on the *Wunderblock*, known in English as the Mystic Writing-Pad or Etch A Sketch).

144. *See* Wexler, *supra* note 61, at 862.

145. *Id.* at 862–63.

146. *Id.* at 863.

147. *See supra* notes 21–28 and accompanying text.

148. *Cf.* Omychund v. Barker (1744) 26 Eng. Rep. 15, 23; 1 Atk. Rep. 22, 34 (Mansfield, L.J.) ("[T]he common law, *that works itself pure* by rules drawn from the fountain of justice, is for this reason superior to an act of parliament.").

149. *See* Peter Linzer, *The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule*, 71 FORDHAM L. REV. 799, 821–22 (2002) (quoting L. Gordon Crovitz, *Saving Contracts from High Weirdness*, WALL ST. J., Aug. 3, 1988, at 16, *reprinted in* PETER LINZER, A CONTRACTS ANTHOLOGY 423 (2d ed. 1995) (citing Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 442 P.2d 641, 643 n.2 (Cal. 1968) (in bank) (Traynor, J.))).

150. *Id.* at 822.

151. *See, e.g.*, Linda Przybyszewski, *The Dilemma of Judicial Biography or Who Cares Who Is the Great Appellate Judge? Gerald Gunther on Learned Hand*, 21 LAW & SOC. INQUIRY 135, 151 n.75 (1996) (book review) (justifiably calling a Professor Gerald Gunther footnote "ridiculous" (quoting GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 695 n.103 (1994))).

152. Harper, *supra* note 16, at 1268–69 ("Authors are not innocent in the frenzy for footnotes. They often contribute to it by carrying on a subdialogue in footnotes, by various kinds of footnote 'padding,' or even by burying their best and most interesting points in footnotes."

limitations of their own theses even as they try to back them up."[153] One could also more cynically call this double story a sort of game-playing by writers. In one version of the game, writers make new law by stealth if it turns out footnotes really do count.[154] Apart from footnote four of *Carolene Products*,[155] one example is footnote fifty-nine of *United States v. Socony-Vacuum Oil Co.* (1940), where Justice Douglas set forth the standards for proving a price-fixing conspiracy under the Sherman Act;[156] another is footnote nine of *Superintendent of Insurance v. Bankers Life & Casualty Co.* (1971), where (again) Justice Douglas discovered a private right of action in the Securities and Exchange Commission's Rule 10b-5.[157] There are others.[158]

In a second version of the game, writers avoid responsibility for their above-the-line utterances by qualifying or "hedging"[159] them below the line; or, what is not the same, by counting on readers to shrug off whatever is below the line as a throwaway (if it turns out footnotes really don't count).[160] While having one's footnotes

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(footnote omitted)); *see also* Wendy J. Gordon, Exchange, *Counter-Manifesto: Student-Edited Reviews and the Intellectual Properties of Scholarship*, 61 U. CHI. L. REV. 541, 545 (1994) ("Because they provide an author the opportunity to conduct a sort of running dialogue with herself, footnotes sometimes give me the feeling that I am looking through a window into someone's head as she composes.").

153. GRAFTON, *supra* note 2, at 23.

154. Mikva, *Goodbye*, *supra* note 12, at 649.

155. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

156. 310 U.S. 150, 224 n.59 (1940).

157. 404 U.S. 6, 13 n.9 (1971), *quoted in* Fred R. Shapiro, *The Most-Cited Articles from the Yale Law Journal*, 100 YALE L.J. 1449, 1514 (1991)).

158. *See* Mikva, *Goodbye*, *supra* note 12, at 649–50 (cases cited therein). Here are five more: First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 780 n.15 (1978) (corporate personhood); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 n.34 (1976) (secondary effects); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976) (commercial speech); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 n.19 (1964) (protection for false speech); Brown v. Bd. of Educ., 347 U.S. 483, 494 n.11 (1954) (use of psychological research); *see also* Tobias A. Mattei, Trinity Lutheran v. Comer*: Footnote 3, Gorsuch's Opinion and Scalia's Legacy of a Law of Rules*, 121 PENN ST. L. REV. PENN STATIM 14, 15–17 (2018) (listing examples).

159. A "hedge" is defined as follows:

> In the text of the opinion, the court will make a broad pronouncement, followed by a footnote that substantially qualifies the broad pronouncement. The practice allows judges and lawyers in future cases to quote the text without the hedge or, conversely, the hedge without the text, as circumstances may require. The result is potential confusion as to precisely what the court's opinion stands for.

Landau, *supra* note 37, at 23–24; *see also* DAVID MELLINKOFF, LEGAL WRITING: SENSE AND NONSENSE 94 (1982) ("Often the footnoter is more devious than lazy. The footnote becomes, like its companion fine print, a means of concealment. Law that one hesitates to flaunt above the line sneaks into the footnote. Hedges against forthright statements in the text are squirreled away for a rainy day."), *quoted in* Austin, *Product Differentiation*, *supra* note 13, at 1133 n.7.

160. *See* G.W. Bowersock, *The Art of the Footnote*, 53 AM. SCHOLAR 54, 61 (1984) ("Over the years the footnote has regularly provided a safe refuge for untenable hypotheses. Writers

shrugged off is a fair expectation,[161] hiding an utterance in microprint below the line does not make it invisible. For Shapiro, law review audiences "often peruse the citation links (footnotes) with an occasional glance at the 'top of the page' text, rather than the other way around."[162] There may be no better place than the footnotes for readers to "glean important insights from the trivial."[163] There also may be no better place than the footnotes for readers to suss out soft spots—the "parapraxoi or blindspots"—of a writer's argument.[164] Below the line, attentive readers are most likely to find "slightly inconsistent rhetoric, less than perfect word selection, or contradictory information that the author has attempted to hide."[165] Probably unfairly, a single footnote implicated eighteenth-century philosopher David Hume as racist.[166] Much more recently, footnotes have gotten attorneys sanctioned[167] and professors fired.[168] It couldn't have come to that if footnotes were being uniformly shrugged off.

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are inclined to behave as if they will be held less accountable for indiscretions committed below the text than in it."). Likewise,

> explanatory footnotes . . . often mask assertiveness or lack of assertiveness in the body of the text. . . . More assertive suggestions or recommendations are delegated to the footnotes for further research. If an author is assertive in the text, then footnotes can be used to diminish the assertiveness. The author may modify, provide alternative explanations, or admit to a bit of uncertainty as to the bold assertion found in the text. Thus, replacing clarity of argument with equivocation.

DiMatteo, *supra* note 106, at 295–96 (footnote omitted).

161. *See* Royal Canin U.S.A., Inc. v. Wullschleger, 604 U.S. 22, 41–43 (2025) (refusing to be bound by "dictum" in "a two-sentence" "throwaway footnote[]").

162. Shapiro, *supra* note 138, at 752.

163. Balkin, *supra* note 133, at 305.

164. *See* Simon Critchley, *Derrida: The Reader*, 27 CARDOZO L. REV. 553, 554 (2005).

165. Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719, 1735 (1989).

166. *See* John Immerwahr, *Hume's Revised Racism*, 53 J. HIST. IDEAS 481, 481 (1992); DAVID HUME, OF NATIONAL CHARACTERS (1753), *reprinted in* DAVID HUME: POLITICAL ESSAYS 78, 86 n.f (Knud Haakonssen ed., 1994).

167. David D. Dodge, *Judgmental Criticism Not Recommended*, ARIZ. ATT'Y, June 2004, at 8, 8 (citing *In re* Wilkins, 777 N.E.2d 714 (Ind. 2002), *judgment modified on reh'g*, 782 N.E.2d 985 (Ind. 2003)).

168. *See* John K. Wilson, *The Footnote Police v. Ward Churchill*, INSIDE HIGHER ED (May 18, 2006), https://www.insidehighered.com/views/2006/05/19/footnote-police-vs-ward-churchill (on file with the Duquesne Law Review); *cf.* Darby Dickerson, *Citation Frustrations — and Solutions*, 30 STETSON L. REV. 477, 514–16 (2000) (listing twelve "red flags" of plagiarism, most relating to footnoting).

III. THE SIGNIFICANCE OF THE PHYSICAL FEATURES OF FOOTNOTES

A. Footnotes v. Endnotes

Yet the urge to shrug them off is strong. Footnotes are widely understood to place undue physical demands on readers, whose eyes strain from the microprint as their heads "bob and weave" from above the line to below the line and back.[169] Endnotes, which direct readers to the back of a document encumbered by a numbering system that starts anew each chapter, are for the most part adjudged even more "inconvenient and . . . frustrating" than footnotes.[170] Endnotes do have their defenders, though not many. One is Professor Magat, for whom endnotes "clean clutter from the bottom of text pages,"[171] and as such might be the best place for extended outside-the-text discourse.[172] In opposition, Judge Posner puts what he calls his "gripe" with endnotes this way: "I have not yet read a book in which I thought it made sense to put the notes at the end of the book rather than at the bottom of the pages."[173] A book of four hundred notes, Posner adds, "means that the conscientious reader will be turning to the back of the book four hundred times before he has finished."[174] That's a lot for a writer to ask of a reader.

At the back of Jacques Derrida's 316-paged *Of Grammatology* (1967) are 330 endnotes, most of them lengthy, meandering, and discursive.[175] Regardless of a writer's intention, endnotes, even if not as taxing as Derrida's, are taken by readers as optional. Magat, with support from no less than Jean-Jacques Rousseau, sees a potential payoff in discursive endnotes being read as an independent text in a separate sitting.[176] An alternative fix Magat recommends

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169. Balkin, *supra* note 133, at 276; *see* Hyman, *supra* note 87, at 140–41; Rodell, *supra* note 39, at 41; Mikva, *Goodbye*, *supra* note 12, at 647–48.

170. *See* Wetlaufer, *supra* note 123, at 1571 n.69; Becker, *supra* note 58, at 12 ("Reading endnotes involves fingers, mouth and neck—fingers for turning pages, mouth for licking fingers, and neck for head-twisting—an effort much more cumbersome than the head-bobbing that footnotes require.").

171. Magat, *supra* note 16, at 66.

172. *See id.* at 94–95 ("Ultimately, 'give[n] the annoyance and physical strain, the reader is apt to avoid the endnotes altogether.' But if the author cannot resist luxuriating in discursive footnotes, this is where they belong." (alteration in original) (footnote omitted) (quoting Becker, *supra* note 58, at 12)).

173. *See* Richard A. Posner, *Medieval Iceland and Modern Legal Scholarship*, 90 MICH. L. REV. 1495, 1499 (1992) (book review).

174. *Id.*

175. JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri Chakravorty Spivak trans., The Johns Hopkins Univ. Press 1st Am. ed. 1976) (1967) [hereinafter DERRIDA, OF GRAMMATOLOGY].

176. *See* Magat, *supra* note 16, at 76.

is bibliographic endnotes (optional for readers) and discursive footnotes (mandatory for readers).[177] Meanwhile, the physical demands that endnotes inflict on readers are a reality of online legal research, much of which converts footnotes to endnotes. Nothing will make a legal researcher run for the U.S. Reports in the library stacks faster than Westlaw's depiction of footnotes in a case decided by a divided Supreme Court with nine separate opinions.[178]

B. There Is No Outside-Text: Avant Garde Footnotes Scholarship

1. Jacques Derrida's This Is Not an Oral Footnote

Any assessment of the physical demands that footnotes place on readers must also take into account the *physicality* of the footnotes themselves. Some background may be in order. In Menand's *The Free World: Art and Thought in the Cold War*, a chapter entitled "The Free Play of the Mind" offers a précis of Derrida's critical analysis known by his neologism: deconstruction.[179] In the CliffsNotes version, deconstruction "is all about interrogating apparently unproblematic terms in a medium, language, that bases its claim to determinate meaning on a fiction."[180] For Derrida, deconstruction is not "a method or some tool that you apply to something from the outside."[181] Instead, it "brings to light what is already at work in the texts he deconstructs."[182]

In his précis, Menand mentions a 100-paged footnote entitled *Border Lines*, which is Derrida's below-the-line counter-text to Derrida's above-the-line text, entitled *Living On*.[183] *Living On/Border Lines* is in a collection of five essays by Yale professors, each to offer a reading of Percy Bysshe Shelley's 547-line, fragmentary poem *The Triumph of Life*.[184] If the above-the-line *Living On* is at all a reading

177. *Id.* at 95. An example is MENAND, ART AND THOUGHT, *supra* note 1 (deploying short discursive footnotes sparingly, bibliographic endnotes more often and expansively).

178. *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972) (per curiam). In this well-known death-penalty case in which all nine justices wrote separate concurring or dissenting opinions, only Justice White's concurrence and Justice Rehnquist's dissent have no footnotes, that is to say, no endnotes. Justice Marshall's concurrence has 165. *Id.* at 314 (Marshall, J., concurring).

179. *See* MENAND, ART AND THOUGHT, *supra* note 1, at 501–11.

180. *Id.* at 504; Elizabeth Mertz, Preface, *Alternative Paradigms for Legal Theory*, 83 NW. U. L. REV. 1, 7 (1989) ("The deconstructive approach of Derrida seeks to undermine fixed or determinate readings of texts, highlighting inconsistencies and challenging privileged interpretations.").

181. *See* PENELOPE DEUTSCHER, HOW TO READ DERRIDA 6 (2006) (quoting JACQUES DERRIDA, DECONSTRUCTION IN A NUTSHELL 9–10 (John D. Caputo ed., 1997)).

182. *Id.* at 28.

183. MENAND, ART AND THOUGHT, *supra* note 1, at 504.

184. DECONSTRUCTION & CRITICISM (Continuum 1979).

of Shelley's poem, then the below-the-line *Border Lines* demands that any such reading reckon with Blanchot, Rousseau, more Derrida, Spenser, Dante, more Shelley, and maybe the rest of the Western Canon. What one cannot say of *Border Lines* is that it explains *Living On* in the way that a semibibliographic footnote explains a text utterance in legal writing.

Border Lines undermines, or to use a term of deconstruction, "supplements" *Living On*. *Border Lines* does this by rendering *Living On* complete by demonstrating, by the very fact of *Border Lines*' existence, *Living On*'s incompleteness. That's what supplements *do*: simultaneously establish the contradiction of completeness and incompleteness, plentitude and lack.[185] An illustration from law texts is Professor Wayne LaFave's six-volume treatise, *Search and Seizure*, justifiably known at 6,000 pages for being exhaustive and up to date like *Encyclopedia Britannica*.[186] But even *Britannica*'s system of "continuous revision," begun in 1932,[187] produces a book that "is obsolete the minute that you print it," even after going entirely digital as of 2012.[188] Every year, LaFave dependably publishes a *Search and Seizure* pocket part: a skinny packet of paper that slides into the back cover of each volume of the treatise.[189] No doubt the pocket part, like all supplements, *adds to* the treatise by contributing pages, cases, and commentary, all published after the treatise and its predecessor pocket parts. The logic of "supplementarity" in Derridean terms is to demonstrate the contradiction that the pocket part is not merely "outside" the treatise (which is the original), but is also essential to the treatise's identity, which is as a book from which nothing is missing.[190] The completeness that characterizes the bulky blue *Search and Seizure* treatise comes from its pocket part, the existence of which puts the completeness of the treatise in a constant state of "deferral," in that there will always be another pocket part, without which the treatise can make no claim to completeness. As a supplement, therefore, the pocket

185. *See* DEUTSCHER, *supra* note 181, at 38 (discussing Derrida's notion of "undecidables").

186. 1 WAYNE R. LEFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (6th ed. 2024).

187. Michael Levy et al., *Corporate Change*, BRITANNICA (Oct. 22, 2025), https://www.britannica.com/topic/Encyclopaedia-Britannica-English-language-reference-work/Corporate-change (on file with the Duquesne Law Review).

188. *Encyclopaedia Britannica to End Print Editions*, CBS NEWS (Mar. 13, 2012, at 21:07 CT), https://www.cbsnews.com/chicago/news/encyclopaedia-britannica-to-end-print-editions/ (on file with the Duquesne Law Review).

189. *E.g.*, 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (5th ed. Supp. 2013–14).

190. *See* DERRIDA, OF GRAMMATOLOGY, *supra* note 175, at 281.

part not only *adds to* the treatise, but by becoming the very basis of its completeness, also *substitutes for*, that is, *displaces* it.

The relation of *Living On* to *Border Lines* provoked Menand to riff on Derrida's pronouncement—*il n'y a pas de hors-texte*—a pun that invites us to meditate on what might constitute a text or outside-text.[191] The pun is that the utterance—there is no outside-text—plays on the fact that in French, an outside-text is a work's preface, introduction, table of contents, dedication, index, appendix, blank page, or, in a book of William Blake poetry, engravings.[192] *Il n'y a pas de hors-texte* posits not that such texts are nonexistent in a literal sense, but rather, posits the impossibility of ever excluding an outside-text (of which pocket parts and footnotes are examples) from the meaning and operation of its primary, original, unsupplemented text. For example, Bertrand Russell's preface to Wittgenstein's *Tractatus* is, as all prefaces must be, an outside-text.[193] But is it *really*, *merely* outside? For Derrida, whatever differentiates the *Tractatus* from its preface gives the preface a sort of presence in, not just absence from, the *Tractatus*. To be sure, the preface is not the *Tractatus*; but nor is the *Tractatus* self-contained, since whatever the *Tractatus* is can be understood only by what it is not, including its preface, which, ironically, Wittgensteinians tend to warn readers off of. In Derrida's world, the preface is neither inside nor outside the text "because no text can ever be disentangled from others."[194]

Derrida's *This Is Not an Oral Footnote* is the last of ten essays organized by Stephen A. Barney for a book published by Oxford, titled *Annotation and Its Texts* (1991). There, Derrida calls footnotes a "subspecies" of "annotation," which in turn is a "species" within the "general field of . . . 'secondary' discourses (commentary, interpretation, exegesis, etc.)."[195] Unlike annotations, footnotes are often written by the text's author, "who . . . subordinates himself to himself, who becomes his own auxiliary and hierarchizes his own text."[196] A footnote thus is not a merely linguistic, rhetorical, or semantical act of speech or writing.[197] Instead, it performs

191. *See* MENAND, ART AND THOUGHT, *supra* note 1, at 504–05; DERRIDA, OF GRAMMATOLOGY, *supra* note 175, at 158.

192. *See* MENAND, ART AND THOUGHT, *supra* note 1, at 505.

193. Bertrand Russell, *Introduction* to LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS, at ix (D.F. Pears & B.F. McGuinness trans., Routledge & Kegan Paul Ltd. 1961) (1921).

194. Steven Wilf, *Law/Text/Past*, 1 U.C. IRVINE L. REV. 543, 550 (2011).

195. Derrida, *Oral Footnote*, *supra* note 5, at 202.

196. *Id.* at 193–94.

197. *Id.* at 194.

"movements in the space" that give it both "a paradoxical independence, a freedom, an autonomy," plus a status as "a text unto itself, rather detached, relatively decontextualized or capable of creating its own context."[198] This physical/typographical feature of footnotes—a feature Derrida also calls "topographical"—helps explicate the essay's title, which is based on Derrida's sense that "oral footnote" is just a figure of speech[199]:

> [T]he status of a footnote implies a normalized, legalized, legitimized distribution of the space, a spacing that assigns hierarchical relationships: relationships of authority between the so-called principal text, the footnoted text, which happens to be higher (spatially and symbolically), and the footnoting text, which happens to be lower, situated in what could be called an inferior margin.[200]

This hierarchical "framing" allows Derrida in his own writing to steer readers first to his footnotes, where he places his polemics, which, when read before the primary text, invert the primary text/secondary text hierarchy.[201] This inversion can render the main text "an auxiliary pretext for the footnote."[202] In this way, the physical features of footnotes cannot be severed from their semantics.

2. Jack Balkin's The Footnote

The first academic lawyer to see Derrida as a way in to understanding the potentials and limits of discursive footnotes is Professor Jack Balkin (the first, that is, in a nonjokey way).[203] In 1989, *Northwestern Law Review* published Balkin's *The Footnote*, a Derridean tract not only about footnotes (generally) and Justice Stone's fourth footnote of *Carolene Products* (specifically), nor only about texts (generally) and judicial opinions (specifically), but also about the human costs of judicial minimalism[204]: the risks posed by

198. *Id.*
199. *Id.* at 193.
200. *Id.*
201. *Id.* at 194.
202. *Id.* at 198.
203. *See generally* Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated*, 96 MICH. L. REV. 461 (1997) (parodying interdisciplinary scholarship within law); Arthur D. Austin, *Why Haven't the Crits Deconstructed Footnotes?*, 17 NOVA L. REV. 725 (1993) (same).
204. On the operation of "minimalist" courts, which are "less democratically legitimate, but not less fallible, than decisionmaking by the political branches," see Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1459–60 (2000); *see*

excessive deference to legislatures. Balkin upends any sense of direction we might have had about the relation of footnote to text—about which takes precedence, which is subordinate. On the one hand, Balkin observes that a *foot* is a "lowly organ which spends its life . . . in the dirt"; likewise, a foot*note* is "dropped" (like garbage).[205] On the other hand, "the body cannot stand or move without feet."[206] So are footnotes important or not? It may even be the case that importance is not all that important.[207]

Like Derrida, Balkin keeps his readers off-balance. Then-law student Elizabeth Mertz describes Balkin's technique:

> [S]cholars working in the Derridean tradition attempt to demonstrate their theory not so much through explicit propositions as *in the writing,* which can be frustrating to those who prefer a more straightforward exposition. The goal of such a method is a text that itself demonstrates the approach to text advocated theoretically.[208]

In a Derridean vein, Balkin plays typographical/topographical tricks to further destabilize the footnote/text relation. Specifically, *The Footnote*'s very first character *precedes* its topic sentence. That character is a superscripted [4], which seems to depict the entire article as a footnote.[209] The *Footnote*'s first line of text on page one looks like this above the line:

> [4] I would have liked to have written an essay about the relationship of law to literature—to deconstruct the opposition between them and, in the process, to say a few words about deconstructive techniques in general.[210]

But Balkin's essay *is* about the relationship of law to literature and *does* deconstruct. And that very Derridean move that Mertz describes above—*teaching* philosophy by *doing* philosophy, explicating Derrida by demonstrating his methods—is how Balkin both

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also Cary Franklin, Roe *as We Know It*, 114 MICH. L. REV. 867, 886 & n.94 (2016) (book review) (citing CASS R. SUNSTEIN, ONE CASE AT A TIME 4–6, 50 (1999)).

205. Balkin, *supra* note 133, at 276.

206. *Id.* at 301.

207. J.L. AUSTIN, PRETENDING (1957), *reprinted in* PHILOSOPHICAL PAPERS 253, 271 (J. O. Urmson & G. J. Warnock eds., Oxford Univ. Press 3d ed. 1979) (1961) ("I am not sure importance is important: truth is." (footnote omitted)).

208. Mertz, *supra* note 180, at 7–8.

209. Balkin, *supra* note 133, at 275 ("Perhaps this article should be considered as a footnote to a sentence I have not yet written.").

210. *Id.*

begins and ends *The Footnote*, an article of 104 consecutively numbered footnotes that ends like this above the line:

> The texts await us, offering unbounded opportunities. We lack only the entrepreneurs.[4]

Accordingly, the last two footnotes of the article look like this below the line:

> [104] PLATO, *Euthydemus*, in THE COLLECTED DIALOGUES OF PLATO 385 (E. Hamilton & H. Cairns eds. 1961).
>
> [4] [Note to the editors of the Law Review—place the entire text of this Article (including this footnote with these instructions) in this footnote. If this causes a problem of infinite regress, improvise].

Not coincidentally, Plato's *Euthydemus* is in today's terms a Derridean dialogue in which two Sophists engage Socrates on the topic of, among other things, the uncertainty of language (lifeless words).[211] If Northwestern's student editors had taken Balkin's advice, then all forty-five above-the-line pages of *The Footnote* would have appeared below the line. There would in such case have been no primary text, only secondary text. While Balkin's intention in installing the entire article below the line is not entirely clear, even to get us to *ask* about the intention is to make the "missing" text present in its absence,[212] while getting us closer to discovery or agreement about the relation of footnotes to their primary texts.

Another Derridean move of Balkin's is an above-the-line quotation of the below-the-line footnote four of *Carolene Products*, situated next to a paragraph from the opinion's corresponding above-the-line text.[213] In that side-by-side presentation, Balkin demonstrates the codependency of the *Carolene Products* text and famous footnote, which together leave readers "moving our eyes from one to the other, and listening to the conversation between them."[214] Such codependency is obscured by the normal above-the-line/below-the-line setup, which Balkin says "distracts the eye, which must move up and down from the top of the page to the bottom."[215]

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211. PLATO, EUTHYDEMUS 287d (Rosamond Kent Sprague trans.).

212. *Cf.* Balkin, *supra* note 133, at 301 ("[I]n every economic due process case the logic of the footnote is deferred yet present, silent yet secretly evoked."). Derrida has a word for this liminal space between presence and absence: *différance*.

213. *Id.* at 288.

214. *Id.*

215. *Id.* at 276. "There is nothing more tedious," Balkin goes on, "than bobbing one's head like a pogo stick only to discover that the footnote contains nothing of substantive worth,

Balkin's side-by-side layout is a double gesture of equality between texts and equality between social classes. In his own words: "As we read these words, laid side by side, we suddenly realize that we are confronted not with a text and a footnote, not with a major thesis and a throwaway remark, but with an organic theory of democratic life, a comprehensive conception of politics"; that comprehensive conception of politics, Balkin goes on, is deferential to legislatures (which need only act rationally), except in narrowly defined emergency circumstances (which put laws under "strict scrutiny").[216] Balkin gets this across by setting up oppositions of inclusion/exclusion, legislative/judicial, and for our purposes here, what can be said 1) in a text (legislative deliberations deserve deference),[217] 2) *only* in a footnote (civil rights can transcend legislative deliberations),[218] or 3) nowhere at all (unequal ex ante distributions of wealth make legislative participation illusory for *all* have-nots).[219]

Carolene Products is a case about impurities. "Milnut," a concoction of skim milk and coconut oil, was being shipped across state lines in violation of the federal Filled Milk Act, which insisted on whole milk and cream.[220] Depending on your perspective, the statute either favored the dairy farmers' lobby by eliminating competition, or protected low-income consumers from a cheaper but less nutritious substitute for milk and cream.[221] It was a classic haves (dairy farmers) v. have-nots (nonaffluent customers) standoff.[222] For Balkin, the case was not about impure milk as much as other impurities: judicial threats to the will of a homogenous body

except perhaps for a citation, an irrelevant bibliographic excursion, or the ubiquitous '*Id.*'" *Id.*

216. *See id.* at 290.

217. *See id.* at 297 ("In the new constitutional regime, a strong presumption of constitutionality of majoritarian acts and a low level of judicial scrutiny would prevent the judiciary's intervention into controversial value choices that were properly the concern of the democratic process.").

218. *See id.* at 300 ("The body of the opinion discusses the (deferential) role of the Court in the usual case, while the discussion of the abnormal, exceptional case of a defective process is placed in a footnote.").

219. *See id.* at 310 ("[T]he true cause of political powerlessness of minorities might be disparities in economic status which are the effects of previous prejudice or previous exclusions from the political process."); *id.* at 299 ("Yet the task Stone set for the judiciary . . . was to perpetuate that myth, and where economic rights were involved, to disguise every prejudice as a principle, every adulterated action as the servant of the public interest."); *id.* at 309 ("Within Justice Stone's list of the causes of failures of democratic process, no mention is made of what seems today to be the most obvious cause of all—disparities in political power caused by differences in economic power.").

220. *Id.* at 282–83.

221. *Id.* at 291–92 (contrasting "naughty" and "nice" interpretations of the Filled Milk Act).

222. *Id.*

politic,[223] but also, prejudice against certain elements of heterogeneity, which footnote four limits to "discrete and insular minorities."[224] This opposition of purity/impurity is, by the way, right out of Derrida.[225]

Balkin characterizes his above-the-line juxtaposition of footnote and text as a "struggle against marginalization."[226] His moving Justice Stone's footnote four from below to above the line is an ironical attempt "to marginalize . . . the process of marginalization itself," as opposed to Judge Mikva's banishment of footnotes, which is an attempt to further marginalize the already marginalized.[227] Boiled down, Balkin's reading of *Carolene Products* demonstrates that "[t]he marginalization of a footnote is always incomplete."[228] That too is Derridean.

Balkin could not then have known of Derrida's *This Is Not an Oral Footnote*, which came out just after Balkin's *The Footnote*. But Balkin did know of Derrida's *Glas* (1974),[229] 262 pages printed in two columns of different type sizes: the left column on G.W.F Hegel, the right on Jean Genet. By Derrida's own account, *Glas* as a "text has no beginning and no end, no hierarchy."[230] Moreover, "[i]t is an absolutely secondary text, twice secondary (Hegel and Genet, for example) . . . but it is at the same time not secondary."[231] "The two columns face each other and annotate each other," Derrida explains, "but they are both equally principal texts without any relation to each other, as if they did not belong to the same book: a deconstruction of the unity of the book."[232] *Glas* is by no means Derrida's first use of "typographical layouts, topographies that prohibited one from deciding what was the principal text and what was secondary."[233] But *Glas* is the most extreme example set for Balkin.

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223. *Id.* at 283–84.
224. *Id.* at 299.
225. *See* JACQUES DERRIDA, DISSEMINATION 128 (Barbara Johnson trans., Univ. of Chi. Press 1981) (1972); DEUTSCHER, *supra* note 181, at 1–5, 108–11.
226. Balkin, *supra* note 133, at 279.
227. *Id. But cf.* Rafi Reznik, Essay, *The Auteur as Editor*, 73 STAN. L. REV. ONLINE 11, 12–13 (2020) (calling into question whether *The Bluebook* really is worth subverting).
228. Balkin, *supra* note 133, at 282.
229. JACQUES DERRIDA, GLAS (John P. Leavey, Jr. & Richard Rand trans., Univ. of Neb. Press 1986) (1974). Balkin finds *Glas*'s subject matter to have "never precisely been determined." Katherine C. Sheehan, *Caring for Deconstruction*, 12 YALE J.L. & FEMINISM 85, 133 n.233 (2000) (quoting J.M. Balkin, Essay, *Transcendental Deconstruction, Transcendent Justice*, 92 MICH. L. REV. 1131, 1134 n.7 (1994)).
230. Derrida, *Oral Footnote*, *supra* note 5, at 204.
231. *Id.*
232. *Id.* at 205.
233. *Id.* at 203–04 (citing examples).

3. Ruthann Robson's Footnotes: A Story of Seduction

Balkin is the first legal scholar explicitly to trade on Derrida in writing about the relation of footnotes to their primary texts. Others could be said to have done so since, albeit implicitly. Professor Herma Hill Kay's ten-pager, *In Defense of Footnotes* (1990),[234] begins as a demonstration that she can get the gist of a law-review article simply by reading its footnotes. To that end, Kay reproduces sixteen footnotes from an article with 330 by Professor Sharon Rush on the subject of collegiate-athlete compensation.[235] Kay found Rush's footnotes sufficiently telling about Rush's text for Kay to ask her readers to perform that same experiment on Kay's own work.[236] The first half of Kay's experiment is made up of thirty footnotes, most of them semibibliographic.[237] From there, after some joshing around, Kay presents the second part: roughly two pages of text followed by a handful of numbered footnotes, most of which float free with no corresponding number in the text.[238] As parodies go, Kay's is quite clever. Funny too. As an interrogation of the relation of primary and secondary texts, however, not a lot is brought out.

The same can be said of Lori McPherson's *Law Review Articles Have Too Many Footnotes* (2019),[239] which McPherson holds out as "the shortest law review article ever written."[240] All that is above-the-line is the seven-word title; all that is below the line is a 1,723-word footnote about the shortcomings of footnotes.[241] Like Kay, McPherson seems to have intended the spectacle of the imbalanced page as a parody (that's how I took it).[242] If nothing else, McPherson's piece, and we could say this of Kay's too, does tap into what Professor Mary Coombs must have meant when she noted that in today's world of legal scholarship, "footnote has become text."[243]

The only instance of legal scholarship since Balkin's *The Footnote* to successfully perform the Derridean task of destabilizing the

234. Kay, *supra* note 133.

235. *Id.* at 419–22 (citing Sharon Elizabeth Rush, *Touchdowns, Toddlers, and Taboos: On Paying College Athletes and Surrogate Contract Mothers*, 31 ARIZ. L. REV. 549 (1989)).

236. *Id.* at 422.

237. *Id.* at 422–25.

238. *Id.* at 425–29.

239. Lori McPherson, *Law Review Articles Have Too Many Footnotes*, 68 J. LEGAL EDUC. 457 (2019).

240. *Id.* at 457 n.a1.

241. *See id.* at 457 n.1.

242. *See id.* at 457 n.a1 (thanking "forebears for the development of the genre of legal satire"). There are others. *See, e.g.*, Miriam A. Cherry & Anders Walker, *The Infinite Citation*, 2 J.L. 493 (2012) (featuring 11 words of text followed by a brief biographical footnote plus two footnotes to nowhere: one a supra, the other an infra).

243. Coombs, *supra* note 13, at 1100.

primary/secondary text hierarchy is Professor Ruthann Robson's *Footnotes: A Story of Seduction* (2007).[244] Above the line, Robson's article has four parts, each a stick-figure heading (Introduction, Background, Body, Conclusion) followed by four blank lines. Below the line are twenty-seven mostly discursive footnotes totaling about 2,500 words so personal that they could be said to manifest Robson's subconscious.[245] Read consecutively, her footnotes, which have no corresponding number in the empty text, are a rebuke of the nonexistent primary text.

Some history here. In 1957, *The New Yorker* published poet/novelist John Updike's spoofy *Vernal Pride*, a "sonnet" with fourteen pompous footnotes and no primary text; the reader's job assigned by Updike was to "imagine[] the poem" that would fill the space between the title and the first footnote.[246] Decades later, Kay, and decades after that, McPherson, pulled off similar spoofy projects. *A Story of Seduction*, however, is avant garde, Derridean-influenced legal writing—no spoof—although Joan Ames Magat has mistaken it for one.[247] To settle my difference of opinion with Professor Magat over the seriousness of *A Story of Seduction*, we might ask Robson whether she intended it as a spoof; but Robson's answer would be just an item of evidence on, not dispositive of, whether it actually is a spoof.[248] To my mind, evidence of *A Story of Seduction*'s sincerity is abundant.

The rebuke of the nonexistent primary text begins when editors asked Robson, then a junior professor, to drop a footnote defining "lesbian."[249] She resisted the request as too limiting, then relented, albeit in language more literary than scientific.[250] Robson's literary answer is informed by *Carolene Products*' footnote four, which she sees as an instance of the Supreme Court's failure to obey a basic injunction: "Footnotes are not supposed to impose."[251] To her

244. Ruthann Robson, *Footnotes: A Story of Seduction*, 75 UMKC L. REV. 1181 (2007).

245. These revelations in Robson's footnotes include a harrowing account of her cancer misdiagnosis that only her peculiar combination of intellect and stubbornness prevented from killing her. *See id.* at 1186 n.23 (citing Ruthann Robson, *Notes from a Difficult Case*, CREATIVE NONFICTION, no. 21, 2003, at 6, *reprinted in* IN FACT: THE BEST OF CREATIVE NONFICTION (Lee Gutkind ed., 2005)).

246. *See* Updike, *supra* note 7, at 28–29.

247. *See* Magat, *supra* note 16, at 103 (describing Robson's *Footnotes: A Story of Seduction* as a "spoof: all footnotes, no text").

248. *Cf.* MENAND, MODERNISM, *supra* note 4, at 89 ("We cannot understand the poem without knowing what it meant to its author, but we must also assume that what the poem meant to its author will not be its meaning.").

249. Robson, *supra* note 244, at 1186 n.1.

250. *See id.*

251. *Id.* at 1186 nn.8–10.

delight, footnote four *does* impose.[252] Numerous Derridean oppositions/double meanings can be found in Robson's footnotes. They include 1) claims of strength (any animal when cornered will attack)[253] adjacent to acknowledgments of susceptibility (her wounds from battles with the Right are raw);[254] 2) a play on two quite different senses of "discrete";[255] and 3) a play on two quite different senses of the *Bluebook* signal "see."[256]

But we can see only what someone shows us. Because some utterances pose what Robson dubs "a threatening reality for reality,"[257] she can make them only below the line.[258] Recall that in *The Footnote*, Balkin said that to denounce legislative processes as incapable of reversing laws unfair to "discrete and insular minorities" was too radical at the time for above the line in *Carolene Products*.[259] Robson's footnotes prioritize *eros* ("My body. Her body. Our bodies together.")[260] as embedded in her intellectual, not just physical, being. If the question editors put to Robson as junior professor was whether defining one's sexual self is footnote material, then her answer must be that it can *only* be footnote material. This reading, which is based on my sense of Robson's hiddenness, makes sense of her claim that a footnote is both "friend"[261] and "shield."[262] To say in an academic context that we are *defined* by *eros* must include an acknowledgment that to say as much is to veer from a primary law-text, even if in fact it is merely to state what is right under our noses, but we somehow fail to see. And how does Robson depict this truth about *eros*? By repeatedly holding herself out as a "chanting and enchanting"[263] blank slate subject to and capable of seduction in the Platonic, i.e., erotic *and* intellectual senses.

Robson's affair with the footnote began in a pre-word-processing world as a physical phenomenon. Not in the way that footnotes are physical for Derrida and Balkin—typographically/topographically—but in a tactile way. Speaking in a footnote of her attraction to footnotes, Robson recalls writing her first law-review article in

252. *Id.* at 1186 n.11.
253. *Id.* at 1186 n.18.
254. *Id.* at 1186 nn.11–16.
255. *Id.* at 1186 n.11.
256. *Id.* at 1186 nn.5–6.
257. *Id.* at 1186 nn.1–2 (quoting NICOLE BROSSARD, THE AERIAL LETTER 121 (Marlene Wildeman trans., 1988)).
258. *Id.* at 1186 nn.15–17.
259. *See* Balkin, *supra* note 133, at 284.
260. Robson, *supra* note 244, at 1186 nn.19–21.
261. *Id.* at 1186 n.16.
262. *Id.* at 1186 n.17.
263. *Id.* at 1186 nn.1, 5, & 11 (quoting BROSSARD, *supra* note 257, at 121).

pencil on a white legal pad, which sat next to a yellow legal pad on which she scribbled footnotes to that article.[264] In a Proustian rêverie, she recalls falling for the *action* of writing, the pen scratching across the paper. Robson found the physical gesture—which she likens to sculpture—seductive.[265] Robson's story is not just a lesbian's seduction by the activity of writing, but by the activity of writing *footnotes*, footnotes which allow a writer to telegraph that they are veering, and to ask that the reader ride along. In this way I read Robson as having been seduced by the *freedom* of the footnote, which functions as a space to reveal oneself without violating the norms of the "professions"[266] she holds in high regard, law among them.

Despite these revelations, Robson somehow remains hidden in *Footnotes: A Story of Seduction*; and that may be the point. With no facts or explanatory parenthetical, she cites the appeals of Marsha Lovercamp and Linda Wynashe, escapees from a Southern California narcotics rehabilitation center, where they endured ten weeks of compulsory treatment before going AWOL for fear of rape by a menacing group of ten to fifteen women inmates.[267] To compare that bare citation with Robson's publicly accessible résumé is plausibly to take the citation as an allusion to her first on-point article as a law professor, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*.[268] The citation is about prison violence; the article, however, is not. Yet Robson's published student note, *Criminal Law: Federal Escape Statute—Jury's Discretion or Judge's Law?*, is in a sense about prison violence, though there Robson presents the facts of *Lovercamp* only below the line.[269] *Footnotes: A Story of Seduction*'s cryptic cite to *Lovercamp* suggests a nostalgic return to a writer's personal/professional awakening. To appreciate Robson's intention—that we "see" her (to cite her here is to acknowledge her)[270]—takes some digging, not just by reading her

264. *Id.* at 1186 nn.5–6.
265. *Id.* at 1186 nn.5–7.
266. *Id.* at 1186 nn.4, 6, & 25 (citing law, history, sculpture, excluding dentistry).
267. *See id.* at 1186 n.5 (citing People v. Lovercamp, 118 Cal. Rptr. 110 (Cal. Ct. App. 1974)).
268. Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567 (1990).
269. Ruthann Robson, Note, *Criminal Law: Federal Escape Statute—Jury's Discretion or Judge's Law?*, 8 STETSON L. REV. 428, 439 nn.66–67 (1979).
270. According to Westlaw, *Footnotes: A Story of Seduction* has been cited four times in eighteen years. One cite is in a bibliography calling it a "spoof." *See* Magat, *supra* note 16, at 103. A second is by Robson herself. *See* Ruthann Robson, *Sexual Justice, Student Scholarship and the So-Called Seven Sins*, 19 LAW & SEXUALITY 31, 46 & n.111 (2010) ("Footnotes may be pleasurable."). A third is on a list of items of evidence that make Robson "an exceedingly accomplished author of fiction, poetry, and creative nonfiction." *See* Nancy Levit, *After*

footnotes, which come off aphoristic in the style of the later Nietzsche,[271] but by reading *into* them too, as an analyst would. Perhaps the strained eyes and neck are not for naught after all.

CONCLUSION

This Essay about footnotes—which has sought to incite by "hounding down the minutiae"[272]—has 273 of its own, seven-ish per page, none of them discursive. If the absence of discursive footnotes in an essay on discursive footnotes seems purposeful (and therefore needs justification), in this case it's not (and it doesn't). Any intention here to keep it all above the line, if intention there be, must be below the level of consciousness. If tempted subconsciously to convert a brief veering utterance into a discursive footnote, here the urge somehow ends up sublimated into an above-the-line aside, indicated by parentheses.[273]

Here or elsewhere, if a veering utterance stretches out the way a brief aside might become a protracted soliloquy or monologue on stage, then whether a writer is to pursue the matter above the line, below the line, or not at all is in the end quite personal. Writers cultivate their own relationships with readers. Who is responsible for what is a matter worked out through implicit prodding (by writers) and resisting (by readers) within a potentially dysfunctional partnership. Writers have the liberty to compose subdialogues, to subvert, to supplement their own primary texts by tinkering with the physical features of the page. While I am tempted to say that it is a reader's job just to go along, I cannot go quite that far, knowing as I do that the exercise of *any* liberty—including a writer's liberty to invert textual hierarchies in the Derridean way that Balkin reveals *Carolene Products*' footnote four to have done—can be taken too far.

For a writer to ask too much of a reader is to run the risk of alienating when one should be cultivating. (It is this sense of being asked to do too much that explains my never having finished a

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Obergefell*: The Next Generation of LGBT Rights Litigation*, 84 UMKC L. REV. 605, 613 (2016). And the fourth is a brilliant fragmentary paraphrase. *See* Reznik, *supra* note 227, at 13 n.15 (calling it "a footnote-only essay exploring lesbian passion in and for the margins").

271. FRIEDRICH NIETZSCHE, HUMAN, ALL TOO HUMAN: A BOOK FOR FREE SPIRITS (Marion Faber with Stephen Lehmann trans., Univ. of Neb. Press 1984) (1878).

272. J.L. AUSTIN, A PLEA FOR EXCUSES (1956), *reprinted in* PHILOSOPHICAL PAPERS, *supra* note 207, at 175, 175.

273. *See* Hyman, *supra* note 87, at 139 ("I have yet to come across something 'footnoteable' that could not be incorporated into the text, possibly set off in parentheses."); *cf.* Magat, *supra* note 16, at 74 ("Sources aside, a footnote is room for the text to stretch into parenthetical comment.").

William Gaddis novel.) In the end, there are no rules—no *Bluebook* to point to—for us to resolve the question for discursive footnotes: "up, down, or out?" But if there were any rules, then at the very least there should be this one: *vouloir dire*, that is, *to want to say*, which is *to mean*. To say what you want to say is at times to say what you must say. And that may be what your readers must hear, wherever you might say it.

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