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POLITICAL HACKTIVISM: DOXING & THE FIRST AMENDMENT

ALEXANDER J. LINDVALL†

“The intensity and complexity of life . . . have rendered necessary some retreat from the world . . . but modern enterprise and invention have, through invasions [of] privacy, subjected [people] to mental pain and distress, far greater than could be inflicted by mere bodily injury.”

—Louis Brandeis (1890)

I. INTRODUCTION

On December 16, 2016, Tanya Gersh answered her phone—on the other end, she heard nothing but gunshots. She hung up. Moments later, her phone rang again. “This is how we can keep the Holocaust alive,” the voice on the other end said. “We can bury you without touching you.” Several days later, Gersh received a voicemail saying, “You are surprisingly easy to find on the Internet—and in real life.”

Gersh was caught in the eye of a neo-Nazi “troll storm.”

These calls and messages marked the beginning of a months-long harassment campaign orchestrated by the Daily Stormer, the world’s largest neo-Nazi website. This campaign began after Sherry Spencer—the mother of the prominent neo-Nazi Richard Spencer—claimed Gersh was “spear heading” a campaign against the Spencers’ local

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3. Id.
4. Id.
business. Acting in the Spencers’ defense, Andrew Anglin posted Gersh’s name, address, and phone number on the *Daily Stormer*, urging the site’s readers to “hit ’em up.” It didn’t take long for the trolls to start swarming. “All of you deserve a bullet through your skull[s],” one email read. Another message contained a picture of Gersh’s twelve-year-old son superimposed over the gates of Auschwitz.

What happened to Gersh is known as **doxing**. Doxing is a form of cyber-harassment that involves “the public release of personal information that can be used to identify or locate an individual,” such as the person’s home address, email address, phone number, or other contact information. In a doxing campaign, the initial post will often be innocuous; it may only be a person’s name and their cellphone number. But the intent behind the post is often clear: it is a request for internet trolls to harass the named individual.

Gersh has a filed a first-of-its-kind lawsuit against Anglin in the District of Montana. Gersh’s complaint seeks general and punitive damages from Anglin for orchestrating this religiously-motivated troll storm. Anglin argues that doxing is protected by the First Amendment, thereby barring Gersh’s suit.

This article argues that the First Amendment does not prevent the States from enforcing well-crafted civil and criminal anti-doxing statutes. Part II of this article proposes two anti-doxing statutes—one civil, one criminal—that would likely survive a First Amendment challenge. Part III explains how existing precedent does not prevent the government from regulating and punishing doxing. Part IV addresses likely counter-arguments to this article.

“In the old days, Andrew Anglin would have burned a cross on [Tanya Gersh’s] front lawn,” said Richard Cohen, the President of the

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7. See Sherry Spencer, *Does Love Really Live Here?*, M EDIUM (Dec. 15, 2016). Since this article was authored, Medium has removed Ms. Spencer’s article because it violated the blogging website’s terms and conditions.


9. *Id.*

10. *Id.*


Southern Poverty Law Center. Today, however, neo-Nazis can threaten, degrade, and harass racial and ethnic minorities from the comfort of their own homes. Freedom of speech is undoubtedly a bedrock principle in our constitutional democracy; but it should not be interpreted in a way that protects speech that causes severe emotional harms, undermines equality, and decreases meaningful public discourse.16

II. PROPOSED ANTI-DOXING STATUTES

“Doxing is a prevalent problem that does not yet occupy an explicit space within criminal statutes or tort law.” This section proposes two anti-doxing statutes—one criminal, one civil—that would likely survive a First Amendment challenge.

A. CRIMINAL PROHIBITION OF DOXING

(a) It is unlawful to post another person’s personally identifying information online with the intention that others will use that information to harass the identified person, and the identified person is actually harassed.

(b) It is unlawful to post another person’s personally identifying information online with the intention that others will use that information to harass the identified person because of their race, religion, sex, or national origin, and the identified personal is actually harassed.

(c) For the purposes of this section,

(1) “Harass” is defined as any activity that causes the targeted person to suffer severe emotional distress.

(2) “Personally identifying information” includes only such information that would allow the identified person to be located, contacted, and harassed, including the person’s:

(A) home address;
(B) work address;


16. See Mary Ellen Gale, Reimagining the First Amendment, 65 St. John’s L. Rev. 119, 184 (1991) (arguing that the harms of “racism, sexism, and similar prejudices” are not taken seriously enough under existing free speech jurisprudence, and that the government should be able to “regulate speech to combat the harms done [by] speakers [who] perpetuate prejudice and repression,” such as “silencing the voices of targeted victims, undermining equality, and decreasing both individual liberty and democratic dialogue”).

(C) phone number;
(D) email address; or
(E) any other information that would allow the identified person to be located, contacted, and harassed.

(d) This section does not apply in any circumstance in which its application would substantially chill protected First Amendment activity. Whether applying this statute would substantially chill protected First Amendment activity is an issue for the trial judge.

(e) Any person who violates subsection (a) is subject to a maximum penalty of 30 days in jail, a fine of up to $1,000, or both.

(f) Any person who violates subsection (b) is subject to a maximum penalty of 90 days in jail, a fine of up to $5,000, or both.18

B. Civil Remedy for the Online Posting of Personally Identifying Information

(a) In a civil matter, the defendant shall be liable to the plaintiff if

1. the defendant posted the plaintiff’s personally identifying information on the internet with the intention that others would use that information to harass the identified person, and
2. the plaintiff suffered emotional or economic harm due to the defendant’s posting.

(b) For the purposes of this section, it is presumed that the defendant acted with the requisite mens rea if

1. the plaintiff is a member of a protected class, and
2. the defendant posted the plaintiff’s personally identifying information on a website that espouses the belief that one race is superior to others.

(c) For the purposes of this section,

1. “Harass” is defined as any activity that causes the targeted person to suffer severe emotional distress.
2. “Personally identifying information” includes only such information that would allow the identified person to be located, contacted, and harassed, including the person’s:
   (A) home address;
   (B) work address;
   (C) phone number;
   (D) email address; or
   (E) any other information that would allow the identified person to be located, contacted, and harassed.

(d) This section does not apply in any circumstance in which its application would substantially chill protected First Amendment activity.

Whether applying this statute would substantially chill protected First Amendment activity is an issue for the trial judge.

**C. THESE STATUTES WOULD LIKELY SURVIVE A FIRST AMENDMENT CHALLENGE**

These statutes contain three important themes: (1) heightened mens rea requirements; (2) specific definitions sections; and (3) exception clauses. The heightened mens rea requirements ensure the statutes cover only “true threats,” which receive no First Amendment protection. The definitions sections ensure these statutes punish only those who cause significant harm. And the exceptions clauses decrease the likelihood of a successful facial challenge.

1. **The Mens Rea Requirements**

   The First Amendment does not protect “true threats.” True threats are “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” These statutes’ mens rea requirements should allow them to fall into the First Amendment’s true-threats exception. In other words, these statutes, by their terms, only punish defendants that post personally identifying information “with the intention that others will use that information to harass the identified person.” This is meant to be a difficult standard to meet. And the “with the intention” requirement ensures that the statutes will cover only the “narrow class of true threats . . . [that] may be constitutionally proscribed.” By targeting only this narrow class of harmful speech, these statutes prevent emotional distress without unduly hampering public discourse.

2. **The Definition Sections**

   These statutes prohibit doxing only if harassment follows. And the statutes further define “harass[ment]” as “any activity that causes

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20. Black, 538 U.S. at 359 (emphasis added).

21. Whether doxing amounts to a true threat depends on context. Publishing the names and addresses of abortion providers on WANTED-style posters, for example, amounts to a true threat. Planned Parenthood v. Am. Coal. of Life Activists, 290 F.3d 1058, 1063 (9th Cir. 2002). Posting a Jewish person’s personal information on a neo-Nazi website should be considered a true threat. See Complaint, supra note 13. The touchstone is whether “a reasonable observer would construe [the communication] as a true threat to another,” United States v. Jeffries, 692 F.3d 473, 478 (6th Cir. 2012), and I believe any reasonable person would consider what happened to Tanya Gersh to be a true threat.

22. See Elonis, 135 S. Ct. at 2028 (Thomas, J., dissenting).
the targeted person to suffer severe emotional distress.” This language ensures the statutes proscribe activity only if it causes real-world harm. In *Virginia v. Black*, the Court noted that the true-threats exception “protects individuals from the fear of violence” and “from the possibility that the threatened violence will occur.” By banning only those internet postings that were intended to produce and actually produce emotional distress, these statutes fall within the boundaries of the First Amendment.

These statutes also only prohibit doxers from posting “personally identifying information” that would “allow the identified person to be located, contacted, and harassed.” This language ensures that the statutes will apply only when a person’s “substantial privacy interests are being invaded in an . . . intolerable manner.” By limiting the definition of personally identifying information in this way, the statute will likely be triggered only when the doxer infringes on the identified person’s protected privacy expectations.

3. *The Exceptions Clause*

Each statute also contains an exception clause, which states that the statute “does not apply in any circumstance [that] would substantially chill protected First Amendment activity.” If this section were not added, the statute would likely be susceptible to a facial challenge. But with this section, the courts are free to set aside the statute when stronger First Amendment values take precedence.

### III. EXISTING FIRST AMENDMENT PRECEDENT ALLOWS THE GOVERNMENT TO REGULATE DOXING

This section proceeds in two parts. Part A argues that existing precedent allows the government to regulate doxing, because doxing is—almost always—between private parties on matters of private con-

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25. See id. at 362-63 (acknowledging that the States can ban acts done with “the intent to intimidate”); *Elonis*, 135 S. Ct. at 2016 (Alito, J., concurring) (noting that speech that “cause[s] serious emotional stress” or may “lead to a violent confrontation” is not protected by the First Amendment).
27. See, e.g., *Burkert*, 174 A.3d at 998-99 (illustrating types of harassing conduct that receive no First Amendment protection); id. at 1002 (reading New Jersey’s anti-harassment statute narrowly to “save it from constitutional infirmity” under the First Amendment).
cern. Part B argues that anti-doxing legislation is consistent with the purposes underlying the First Amendment.

A. Cox Broadcasting Corp. v. Cohn and its Progeny Allow State Legislatures to Enact Well-Crafted Anti-Doxing Prohibitions

The United States Supreme Court has consistently held that members of the press cannot be held liable for accurately reporting publicly available information.29 In Smith v. Daily Mail,30 for example, the Court held that the government could not constitutionally punish a newspaper for publishing “truthful information about a matter of public significance” unless it had a “state interest of the highest order.”31 Before this standard will apply, however, two things must be true: (1) the defendant must be a member of “the press,” and (2) the information must be of public concern.32

The above-mentioned statutes do not offend this principle. In the overwhelming majority of cases, these statutes will not target members of the press, and the published information will not be of public concern. And the courts have consistently held that a defendant can be held liable for publicizing “highly offensive” information that is “not of legitimate concern to the public.”33 The typical case will look like Tanya Gersh’s case, as described in this article’s Introduction. It is difficult to imagine a case in which a person’s contact information would be of public importance. And if an unusual case arises—where the doxer is a press member and the posted information is of public concern—the statutes’ exception clause would allow the court to set the statute aside.

B. Anti-Doxing Legislation is Consistent with the Purposes Underlying the Free Speech Clause.

These statutes, moreover, would not offend any of the purposes underlying the Free Speech Clause. At its core, the First Amendment is meant to ensure “uninhibited, robust, and wide-open”34 debate on

33. See Restatement (Second) of Torts § 652(D) (Am. Law Inst. 1977).
matters that are “of public concern.”35 Consistent with that tradition, these statutes do not allow the government to “insulate itself from . . . critical views,”36 “drive certain ideas or viewpoints from the marketplace,”37 or suppress matters that are “of public importance.”38 The civil statute does no more than provide private parties a private remedy for private harms. And the criminal statute applies only when a person discloses another person’s contact information with the intention that others will harm the named individual, and when harm actually follows. These statutes are narrowly tailored to regulate only a narrow class of speech that brings real-world harm and has very little, if any, social value.

These statutes are also necessary because the harms of doxing cannot be cured through counter-speech.39 A troll storm is like quicksand: the more you fight it, the worse it becomes. A troll isn’t interested in what you have to say; he is interested in causing you mental pain and anguish. These statutes do not inhibit public discourse; they prevent participants in public discourse from being driven out of the marketplace of ideas by online harassers.

IV. COUNTER-ARGUMENTS CONSIDERED.

A. AREN’T THERE ALREADY FEDERAL STATUTES THAT CAN ADDRESS DOXING?

Response: No, not really. There are currently two federal statutes that could potentially address the problem of doxing: the Interstate Communications Statute40 and the Interstate Stalking Statute.41 These statutes, however, are all woefully inadequate to prevent doxing because their terms are underinclusive and they are rarely enforced.42

42. See generally MacAllister, supra note 11, at 2466–75; see also infra notes 44–57 and accompanying text.
1. The Interstate Communications Statute

Section 875(c) of the Interstate Communications Statute criminalizes the online transmission of “any communication containing any threat to kidnap . . . or . . . injure [a] person . . . .” By its terms, this statute is far too underinclusive to prevent doxing. The statute only criminalizes explicit threats to kidnap or injure a person. But in many instances of doxing, an actor may never convey an explicit threat to kidnap or injure, but the victim could still have good reason to be terrified. A dox may contain nothing more than the target’s name and a few pieces of contact information. But in certain contexts, that is more than enough to lead to incidents of harassment and true threats.

In January 2019, for example, several Covington Catholic High School students were ensnared in what was described as a “social media nightmare.” These students—who were unfortunately wearing “Make America Great Again” hats—were caught in a short video that appeared to show them harassing and bullying a Native American man participating in D.C.’s Indigenous Peoples March. It was later revealed, however, that this video was selectively edited and that the high school students were actually the ones being harassed. “You all are a bunch of Donald Trump incest babies,” said one of the Native American protesters. The protester then asked if there were any black students in the crowd, and when a black student stepped forward, the protestor called that student the “n-word.”

After the full video of the encounter surfaced (about three days later), several media outlets were forced to issue retractions, corrections, and apologies. Before the record was corrected, however, this

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44. MacAllister, supra note 11, at 2470. Additionally, this statute is more symbolic than enforceable, as many law enforcement officers are “simply unaware the statute exists.” Id. at 2472.
48. Id.
49. Id.
video went viral, and these teens were doxed and subsequently threatened with violence as part of what has been described as “the most sensational Twitter attack in the history of the internet.”

These teens should have the ability to hold their doxers accountable. These doxers went out of their way to gather a group of teenagers’ contact information and posted that information on the internet knowing full well that it would lead to harassment and potentially violence. And although doxing may be “therapeutic or cathartic” for these trolls, their activity is surely not protected by the First Amendment if it “cause[s] serious emotional stress” or “may lead to a violent confrontation.” This sort of activity is not—or at least it should not be—protected by the First Amendment, as it leads to real-world harm and contributes little, if anything, to public discourse.

2. The Interstate Stalking Statute

Section 2261A(2) of the Interstate Stalking Statute prohibits using any “interactive computer service” in a way that places a person in reasonable fear of death or serious bodily injury. This law, like the Interstate Communications Statute, could cover some instances of doxing. But this law is rarely enforced and it serves only as a hollow protection from online harassment. “We’re in the business of worrying about murder and terrorism,” one federal officer said, “we don’t enforce cyberstalking laws.” Over three million people are stalked over the internet each year; yet only three people are charged under § 2261A. This lack of federal enforcement means that the States must step in if doxing is to be reduced. The statutes proposed in this article—if adopted and enforced by the States—would help “fill the gap,” so to speak.


56. MacAllister, supra note 11, at 2474–75.
B. COUNTER-ARGUMENT: THE FIRST AMENDMENT ALLOWS RESTRICTIONS ON ONE-TO-ONE HARASSING SPEECH, BUT NOT ONE-TO-MANY HARASSING SPEECH

Response: This section is meant to rebut Eugene Volokh’s position in *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and “Cyberstalking”.* 57 There, Volokh argues the government can legitimately regulate harassing “one-to-one” speech (i.e., speech made “to a particular person”), but that the First Amendment prevents the government from regulating harassing “one-to-many” speech (i.e., speech “about a person”).58 In Volokh’s view, for example, the State could legitimately punish someone for calling an ex-spouse at three o’clock in the morning and yelling derogatory words into the phone; but the State could not punish that person for publishing derogatory comments about an ex-spouse on their blog. When the State punishes one-to-one speech, Volokh argues, it only slightly interferes with public discourse, because a one-to-one statement is highly unlikely to persuade or inform the public at large.59 But one-to-many speech, Volokh continues, should receive greater First Amendment protection because it has the capability to reach and inform many “potentially willing listeners.”60

I reject this rigid dichotomy. Speech should not receive full First Amendment protection just because it is communicated to more than one person. In fact, some speech is regulated precisely because of its capacity to incite mob violence.61 Speech that encourages or facilitates harassment should not receive constitutional projection just because it is communicated to the masses—the opposite is often true. If certain speech has the potential to cause serious emotional (and perhaps physical) harm, yet adds little (if anything) to public discourse, the government can legitimately regulate that speech, regardless of the potential number of listeners.62 As Justice Alito recently put it: Although “[i]t is true that a communication containing a threat may

58. Id. at 738–39 (emphasis added).
59. Id. at 742–43.
60. Id. at 743.
62. See *United States v. Sutcliffe*, 505 F.3d 944, 960–61 (9th Cir. 2007) (holding that the First Amendment does not protect true threats posted online); *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 50 Cal. Rptr. 3d 27, 39 (Cal. Ct. App. 2006) (finding that a website maintained by an organization opposed to animal testing was not protected under the First Amendment because the site contained information about a biopharmaceutical company’s employees, including their home addresses).
include other statements that have value and are entitled to protection,” that coincidence “does not justify constitutional protection for the threat itself.”

C. THE FIRST AMENDMENT OFTEN BARS CIVIL LIABILITY WHEN THE PLAINTIFF IS A PUBLIC FIGURE—DOES THAT MEAN PUBLIC FIGURES CANNOT SUE DOXERS?

Response: Perhaps in some circumstances. The statutes proposed in this article each contain an exception clause, which states that the statutes “do[ ] not apply in . . . circumstance[s] [that] would substantially chill protected First Amendment activity.” This acknowledges that there may be instances where the statutes must give way to overriding First Amendment values. Consider the following hypothetical post:

Yesterday, Senator Mitch McConnell, yet again, prevented common-sense gun-control legislation from reaching the Senate floor. Voice your disagreement with Senator McConnell’s do-nothing attitude by sending your letters to his private home: [private address]. Or call him directly at [private phone number].

Even if all the elements of the statutes were met in this case—i.e., the person made this post with the intention that people would harass Senator McConnell, and Senator McConnell actually suffered severe emotional distress from harassment—the First Amendment would likely bar any criminal or civil action because of the need to publicly criticize governmental officials. But in the vast majority of circumstances, the First Amendment will not be implicated.

V. CONCLUSION

“Despite the incredible injuries malicious doxing causes, few legal remedies for subjects exist.” This article proposes two anti-doxing statutes that would provide doxing victims with legal recourse. The First Amendment demands that these statutes have stringent requirements, and they will not apply in most cases of online harass-

66. MacAllister, supra note 11, at 2466.
ment. But as Tanya Gersh’s case illustrates, serious physical and emotional harms can stem from seemingly innocuous postings of personal information in certain contexts. If these proposed statutes are adopted (and enforced), victims like Tanya Gersh will have the ability to hold their harassers accountable.
SHOULD COURTS UPHOLD CORPORATE BOARD DIVERSITY STATUTES?

Creighton R. Meland, Jr.†

Corporate board diversity statutes impose demographic requirements on the boards of directors of publicly traded corporations. This Article evaluates whether these state statutes are valid under the United States Constitution1 and under the internal affairs doctrine. It concludes that any statute that establishes either or both of sex-based and race-based quotas concerning the composition of corporate boards of directors should be found unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Corporate board diversity statutes have interstate effects and their undue burdens on interstate commerce potentially violate the Dormant Commerce Clause. A case challenging these laws under the Dormant Commerce Clause will be one of first impression. The Dormant Commerce Clause outcome will be determined by the level of scrutiny applied to the statute and this Article argues that strict scrutiny should apply. A court applying strict scrutiny should invalidate each such statute under the Dormant Commerce Clause. By regulating the activities of corporations organized in states that do not impose demographic requirements, corporate board diversity statutes also interfere with the internal affairs of corporations. Internal affairs comprise a part of state conflict of laws principles. While corporate board diversity statutes interfere materially with corporate internal affairs, litigation outcomes under the internal affairs doctrine will vary depending on the jurisdiction hearing the case and the law to be applied. Corporate board diversity statutes present issues of litigant standing. Subject to certain limitations described below, potential litigants include (1) the affected corporation, (2) directors removed from office or denied positions under the quota system, and (3) shareholders2 of the affected corporation.

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1. This Article does not evaluate these statutes under any state constitution. While state constitutional scrutiny will be important in any constitutional challenge, it is not relevant to the analysis contained in this Article under the United States Constitution.

2. When specific references are made to Delaware corporations, “shareholders” will be referred to as “stockholders,” the term used in Delaware. For purposes of this Article, these terms are otherwise synonymous.
This Article proceeds in six sections: Section I describes the corporate board diversity statutes (both enacted and potential) and identifies the legal issues they create. Section II analyzes the validity of these laws under the Fourteenth Amendment by discussing the standards applicable to race and sex. Sections III and IV analyze the validity of these laws under, respectively, the Dormant Commerce Clause and the internal affairs doctrine. Section V identifies who may challenge these laws, including considerations of standing. Section VI evaluates the public policy consequences of corporate board diversity statutes. The statute critiqued is from California, which has recently enacted a corporate board diversity statute that creates sex-based quotas. This Article will also comment on the California legislative declarations and findings and will sometimes discuss related legislative activity in other states.

At the time of this writing, there are no race-based corporate board diversity statutes. In 2019, Illinois proposed a race and sex-based corporate board diversity statute, but modified it to include only reporting of diversity statistics and the creation of a state-run diversity ratings system, which has now been enacted into law. When discussing race-based corporate board diversity statutes, this Article refers to laws a legislature might enact that would mimic the California statute, but apply with respect to race. When this Article refers to a "corporate board diversity statute" it refers to a statute that requires a publicly traded corporation to maintain a fixed number of women and/or racial minorities on its board of directors and enforces violations by fines. This Article sometimes analyzes the Delaware General Corporation Law due to Delaware's status as the principal state of incorporation for publicly traded corporations.

I. WHAT ARE CORPORATE BOARD DIVERSITY STATUTES?

A. CORE PROVISIONS AND PURPOSE

Corporate board diversity statutes require certain classes of corporations to maintain a minimum number of female5 and/or racial minority directors. California affords a transition period in which to comply.6 The first phase of California's statute requires at least one

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6. The California Code requires at least one female director by the close of calendar year 2019 and then imposes a sliding requirement that is a function of board size, with minimums ranging from one to three. California Code §§ 301.3(a) and (b). See infra note 13. In 2019, corporations that have already solicited proxies and seated their
woman on each board by the end of calendar year 2019.\textsuperscript{7} After the passage of the relevant time period, the corporation must comply with the requirement then in effect; in California the designated director seat must be held for “at least a portion of the calendar year.”\textsuperscript{8} Failure to seat a director that meets statutory requirements results in a fine enforced by the Secretary of State.\textsuperscript{9} The California statute contains specific terms concerning what constitutes a director qualifying for the required status. California defines a “female” as an individual who self-identifies her sex as a woman, without regard to the individual’s designated sex at birth.\textsuperscript{10} This differentiates between sex given at birth versus gender identity made by the candidate. The California statute does not require a removal of existing directors and replacement with women, although this is an option for the affected corporation. Rather, the statute enables the corporation to expand the board,\textsuperscript{11} which corporations would be free to do in any case, but which will require approvals by the board of directors and in some cases by shareholders.\textsuperscript{12} The California law does not set out necessarily to result in a particular percentage of women to comprise the board of directors. Instead, it imposes a minimum absolute number. However, in California, this number increases when the board reaches a certain size.\textsuperscript{13} The effects of these absolute size requirements will be discussed.

boards in a non-compliant manner receive no interim relief and may need to adjust their boards prior to the next annual meeting, which introduces a measure of disruption.

7. California Code § 301.3(a).
9. California empowers its Secretary of State to impose “fines” for violations, with each unfilled board seat giving rise to a violation to which a fine may attach. The fine increases for a “second or subsequent” violation, likely meaning a subsequent measurement period. See California Code § 301.3(e)(1)(C).
10. California Code § 301.3(f)(1). This definition means that anyone who merely identifies as female would qualify. The statute does not stipulate what would be necessary to self-identify. This likely would be addressed in rules issued by the Secretary of State.
11. California Code § 301.3(a).
12. See, e.g., Del. Code Ann. tit. 8, § 141(b) (“The number of directors shall be fixed by, or in the manner provided in, the bylaws unless the certificate of incorporation fixes the number of directors, in which case a change in the number of directors shall be made only by an amendment to the certificate.”). Delaware, the leading state for incorporation of public companies, is highly relevant because the California statute reaches publicly traded Delaware corporations having California headquarters.
13. Under the California Code, by year end 2019, the affected corporation must have at least one female director. By the end of calendar year 2021, if the corporation has six or more directors, it must have at least three female directors; an affected corporation with exactly five directors must have at least two female directors and an affected corporation with four or fewer directors must have at least one female director. California Code §§ 301.3(a) and (b).
B. CORPORATIONS SUBJECT TO CORPORATE BOARD DIVERSITY STATUTES

Corporate board diversity statutes apply to only a limited class of corporations. They do not apply to privately held corporations. The California statute applies to “a publicly held domestic or foreign corporation whose principal executive offices, according to the corporation’s SEC 10-K form, are located in California . . . .”14 Importantly, the statute applies to corporations both organized in California and those organized outside the state but maintaining headquarters there. This Article sometimes refers to these corporations as “foreign corporations.” The California statute applies only to corporations. Publicly traded master limited partnerships, investment trusts and other publicly traded entities not organized as corporations are not subject to the law.15 As will be discussed, this attempt to regulate foreign corporations creates issues under the Dormant Commerce Clause and under the internal affairs doctrine. Under the California corporate board diversity statute, a “publicly held corporation” includes “a corporation with outstanding shares listed on a major United States stock exchange.”16 The California statute mandates a certain number of female directors without exceptions.

II. ANALYSIS OF CORPORATE BOARD DIVERSITY STATUTES UNDER THE FOURTEENTH AMENDMENT

The Fourteenth Amendment of the United States Constitution provides in pertinent part that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.17

The Fourteenth Amendment also vests Congress with the power to enforce its provisions by appropriate legislation.18 Fourteenth Amendment jurisprudence applies different standards to construe the meaning of “equal protection of the laws” depending on the subject matter, and different standards usually apply for race and sex. This Article first discusses how courts may conceptualize and address questions of diversity in corporate boards, followed by analysis of how the

14. California Code § 301.3(a).
15. See California Code § 301.3(f)(2).
16. Id. While not specified in the statute, the New York Stock Exchange, NASDAQ and NYSE/AMEX should constitute major stock exchanges.
17. U.S. Const. amend. XIV, § 1.
Fourteenth Amendment applies to corporate board diversity statutes. This proceeds in two Subsections, the first which discusses race, followed by a sex-focused analysis.

A. MEASURING AND CONCEPTUALIZING CORPORATE BOARD DIVERSITY STATUTES

At the time of this writing, the World Bank reports that there are 4,331 companies in the United States listed on a securities exchange. However, the actual number of publicly traded companies in the United States is materially lower—in the vicinity of 3,500 companies. This latter figure excludes exchange traded funds, closed end funds and other investment companies that trade publicly. Of relevance is not only the number of publicly traded companies, but their market capitalization, which equals the total market value of all outstanding shares of common stock. Much of the data concerning publicly traded companies in the United States lists companies in indices according to market capitalization or revenues. For purposes of the analysis contained in this Article, the Fortune 100, Fortune 500, Fortune 1000, and Russell 3000 will be most often discussed. The Fortune 100, Fortune 500, and Fortune 1000 rank America’s companies by revenue, in order of, respectively, the top 100, the top 500, and the top 1,000. Companies in the Fortune indices need not be publicly traded, but the vast majority are. Instead, the Fortune criteria are derived from businesses that are required to file publicly available reports with governmental bodies, the vast majority of which correlate to public company status brought about by registration of common shares with the United States Securities and Exchange Commission (“SEC”) and the filing of periodic reports with that agency. The Russell 3000 is a market-capitalization-based index maintained by FTSE Russell that contains 98% of the market capitalization of United States publicly traded shares. The percentage in the last sentence is of the public stock market’s capitalization and not the percentage of public company issuers. The number 3000 is also somewhat of a mis-
nomer. As of 2018, there were only 2,835 active companies (defined as companies trading on exchanges with active boards of directors) in the Russell 3000. Additionally, the number of companies in the index can fluctuate from time to time. For purposes of analysis, this Article will reference statistics applicable to the Russell 3000 and Fortune indices but, as explained above, the reader should note this does not include all publicly traded companies and some studies use other indices.

Based on the very inclusive Russell 3000 index, there are approximately 25,250 public company board seats. Data as to composition by race and sex are available for the Fortune 500 which, as noted, does not comprise the entire universe of public companies. For 2018, this Fortune 500 data is as follows:

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total men</td>
<td>4,392</td>
<td>77.5%</td>
</tr>
<tr>
<td>Total women</td>
<td>1,278</td>
<td>22.5%</td>
</tr>
<tr>
<td>Women and minorities</td>
<td>1,929</td>
<td>34.0%</td>
</tr>
<tr>
<td>Minority men</td>
<td>651</td>
<td>11.5%</td>
</tr>
<tr>
<td>Minority women</td>
<td>261</td>
<td>4.6%</td>
</tr>
<tr>
<td>Total minorities</td>
<td>912</td>
<td>16.1%</td>
</tr>
<tr>
<td>Total board seats</td>
<td>5,670</td>
<td></td>
</tr>
</tbody>
</table>

By race, the Fortune 500 director demographics are as follows:

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>African American/Black</td>
<td>486</td>
<td>8.6%</td>
</tr>
<tr>
<td>Asian/Pacific Islander</td>
<td>209</td>
<td>3.7%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>213</td>
<td>3.8%</td>
</tr>
<tr>
<td>Other</td>
<td>4</td>
<td>0.1%</td>
</tr>
<tr>
<td>White</td>
<td>4,758</td>
<td>83.9%</td>
</tr>
</tbody>
</table>


27. Id. at 19.
Because directors can and do hold multiple board seats, the number of board seats is less than the number of public company directors. Unlike admissions cases applicable to higher education, where a candidate can attend only one institution, directors may hold multiple positions. Multiple board positions are in fact desirable, both in validating qualifications and in attaining information and perspective on various industries and lines of business required to make a meaningful contribution to the board of directors. The rate at which directors hold multiple board seats across more than one company is referred to as the “recycle rate.”28 For example, if every board member served on only one board, the recycle rate would be one and if every director served on two boards the recycle rate would be two.29 Recycle rates are not evenly distributed by race and sex. African American men hold the highest recycle rate of any group—1.41.30 High recycle rates may suggest a dearth of qualified candidates or may evidence tokenism. Whatever their explanation, recycle rates above 1.0 mean the benefits of directorships will be concentrated in the hands of fewer persons than if each candidate held only one board seat.

Public companies face considerable shareholder pressure to add women and racial minorities to their boards of directors. Two examples concerning women include the California Public Employees Pension Fund and BlackRock, the former which has sent letters to public companies urging diversity as a means to improve performance and the latter which has asked companies with less than two women on their boards to explain their progress31 (but which apparently did not comment at that time on the racial makeup of those boards).

Whether attributable to investor and public pressure or other forces, the data show an emerging trend toward increasing numbers of board seats being held by women and racial minorities. The Alliance for Board Diversity has set a goal that women and racial minorities comprise 40% of board seats.32 According to this organization, at current rates of change, this goal will be met by 2024.33 The report does not state whether this percentage applies to the Fortune 500, the Fortune 100 or some other data base; however, it is being discussed in the context of the Fortune 500 and Fortune 100 and one may infer these are the reference points.

28. Id. at 24.
29. Id.
30. Id.
31. Id.
32. Id. at 6.
33. Id.
Given the considerable pressures already exerted on public companies to attain diversity, the trends noted above and benefits concentrated in an elite segment of society, enacting into law race and sex-based board diversity may be a solution in search of a problem. Director candidates are typically drawn from a narrow societal segment consisting of occupants of the executive suite. The benefits of corporate board diversity statutes will therefore overwhelmingly flow to those already holding positions of power who typically carry above average income and personal wealth. The Supreme Court of the United States has expressed concerns over ulterior purposes behind diversity laws34 and corporate board diversity statutes should heighten this review, given their limited benefit to a small and elite segment of society.

In addition to the intent to redress what is characterized as a problem, corporate board diversity statutes may be identified as leading to superior corporate outcomes. Supporters contend that corporations with diverse boards of directors perform better than those that lack diversity. The first problem with this thinking is that board quality is imperfectly correlated to corporate outcomes. Good businesses managed by the best managers perform best. Assuming for purposes of discussion that diversity at the board level improves results (a questionable conclusion), this benefit would largely amount to a subsidy to private enterprise. While business profit is generally better for society than business loss, this goal should not be one that enjoys constitutional approval. This has yet to be addressed by courts. A desire to aid private enterprise also evinces paternalism. If diversity truly improves performance, competent managers would pursue and attain diversity without government mandate. But because they do not, the state must act for their benefit. Under conventional microeconomic thought, if one accepts that diversity improves performance, then there would be no need for legal redress for a lack of diversity. Instead, companies would need only enlightenment to understand that by attaining diversity they better their bottom line. If diversity does not improve performance, then forcing firms to attain diversity either harms them or does no good. On the other hand, if diversity improves performance, the market will see this and solve the problem on its own. In that environment, any legal mandate will be needless and promote no state interest. Worse, a quota requirement could (1) simply serve the interest of a small industry of experts and professionals profiting from the diversity mandate and (2) foment resentment and stigmatic harm.35

35. See GAO Study, supra note 24, at 21.
How will the judiciary respond to corporate board diversity statutes? Should courts indulge in reviewing the evidence of whether race and sex-based diversity improve corporate results, they will find themselves navigating rock-strewn waters. There are now studies examining the effects of diversity on corporate results. There are multiple plausible explanations for superior corporate performance when accompanied by race and sex-based diversity. The first is that diversity for its own sake improves outcomes. Another rationale would be that companies that make the effort to be diverse are more enlightened and talented. This enlightenment and talent causes them to appoint diverse boards but those appointments are unrelated to success. What of companies lacking enlightenment? A corporate board diversity statute still would do nothing to promote better results because benighted management would gain no talent or insight by being forced to appoint a racially and sexually diverse board of directors. The mandate would not turn bad managers into good ones. It is possible the new, diverse directors would press for greater competency, but this would be to indulge in speculation. Yet another rationale would explain the superior performance by the fact that corporations that appoint racially and sexually diverse boards of directors have the resources to do so. They do so because they can. This third explanation also means there is a conflation of cause and effect. The superior performance causes the diversity; the diversity does not cause the superior performance.

B. CORPORATE BOARD DIVERSITY STATUTES: RACE-BASED ANALYSIS

1. The Present State of Fourteenth Amendment Jurisprudence

This subsection examines corporate board diversity statutes that would impose racial preferences. As noted, thus far, there have been only attempts to pass race-based statutes without actual enactment into law. The author expects these attempts will persist and ripen into passage of race-based corporate board diversity statutes. For this reason, they are, for now, momentarily discussed in a hypothetical setting. They are also useful in drawing a contrast to sex-based statutes.

The United States Supreme Court’s racial preference jurisprudence under the Fourteenth Amendment focuses on a variety of are-

nas including (among other things) education,\textsuperscript{37} voting districts,\textsuperscript{38} government contracting,\textsuperscript{39} employment,\textsuperscript{40} and jury selection.\textsuperscript{41} A race-based case will apply strict scrutiny to the statute or practice under review. Strict scrutiny requires the law or practice to advance a compelling state interest and be narrowly tailored to address the wrong sought to be corrected.\textsuperscript{42} The Supreme Court has struggled to furnish helpful guidance both as to what constitutes a compelling state interest and the contours of the tailoring necessary to advance that interest but not unduly harm those impacted in the non-minority community.

In the government contracting cases,\textsuperscript{43} federal courts have often invalidated reverse discriminatory laws and practices in the absence of demonstrated past discrimination. In contrast, \textit{Fulilove v. Klutznik},\textsuperscript{44} upheld a 10% minority set aside requirement for federal government contracts. The \textit{Fulilove} court assigned weight to Congress’ determination of the existence of past discrimination and Congress’ power to legislate under Section 5 of the Fourteenth Amendment.\textsuperscript{45} Corporate board diversity statutes involve state laws having no such federal constitutional authority as that upheld in \textit{Fulilove}. Nineteen years after \textit{Fulilove}, \textit{City of Richmond v. J.A. Croson Co.},\textsuperscript{46} invalidated a city minority contractor set aside.\textsuperscript{47} Lacking the


\textsuperscript{40} United States v. Paradise, 480 U.S. 149 (1987); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986); Hayes v. N. State Law Enf’t Officers Ass’n, 10 F.3d 207 (4th Cir. 1993); Conlin v. Blanchard, 890 F.2d 811 (6th Cir. 1989).


\textsuperscript{42} Adarand, 515 U.S. 200, 227.

\textsuperscript{43} \textit{Supra} note 39.

\textsuperscript{44} 448 U.S. 448 (1980).

\textsuperscript{45} \textit{Id.} at 499-502.

\textsuperscript{46} 488 U.S. 469 (1989).

\textsuperscript{47} \textit{Croson}, 488 U.S. 469.
congressional findings and powers on which the Court relied in *Fulilove*, the Court rejected the city’s generalized assertion of past discrimination that lacked any substantiation. Race-based quotas may be applied only in cases where there is sufficient evidence of past discrimination and must function as a remedy, narrowly tailored to address the past discrimination. This further means the school desegregation cases that remedied clearly demonstrated past discrimination are inapposite to the setting reviewed here. The first reverse discrimination case in education decided by the Supreme Court, *Regents of the University of California v. Bakke*, notes this important distinction and expressly refused to follow the school desegregation cases, reasoning that those cases involved clearly-determined constitutional violations. A properly-decided review of a corporate board diversity statute should therefore not look to guidance from the school desegregation cases.

In *Adarand Constructors, Inc. v. Pena*, the Supreme Court addressed a Fifth Amendment challenge to a Federal Small Business Act rule that mandated federal contracting with a certain percentage of “economically disadvantaged individuals.” The plaintiff, Adarand Constructors, Inc., was denied the contract despite its low bid. Instead, the contract was awarded to Gonzalez Construction Company by reason of its “economically disadvantaged” status. For this purpose, “economically disadvantaged individuals” included enterprises controlled by persons of African American, Asian, and Hispanic descent, together with women. In *Adarand*, the Supreme Court invalidated on Fifth Amendment grounds a racial preference regulation of the United States Department of Transportation. The case reaffirmed that any preference based on race must receive a most searching examination and that any classification that treats a person differently on account of race or ethnic origin is inherently suspect. In so doing, the Court rejected any notion that there are “benign” racial classifications such as those that might arise under reverse discrimination against whites. Additionally, the case overruled *Fulilove* to the extent it established a separate, federal racial classification. It further expressly overruled *Metro Broadcasting v. FCC*, a case that applied affirmative action to the granting of broadcasting licenses. In a con-

49. *Id.*
51. *Id.* at 295.
54. *Id.* at 226.
55. *Id.* at 235.
curring opinion in *Adarand*, Justice Scalia sharpened the attention on the stakes presented by racial quotas, noting that reverse discrimination will establish debtor and creditor races:

To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege, and race hatred. In the eyes of the government, we are just one race here. It is American.57

More recently, the United States Court of Appeals for the District of Columbia Circuit upheld a challenge to a Small Business Administration statute that accorded preferences to disadvantaged groups in government contracting. Pivotal to the court in *Rothe Development, Inc. v. United States Department of Defense*58 was the statute’s phraseology conferring its preferences to certain disadvantaged groups. While the statute used race-neutral language, the definition of disadvantaged groups was presumed to include various ethnic minorities and women merely by virtue of their status. What in effect amounted to a quota escaped strict scrutiny because of what, in the circuit court’s view, was a race and sex-neutral statute. The D.C. Circuit distinguished contrary precedent on these grounds. The court rejected the contractor’s challenge because the statute operated from the perspective of disadvantaged persons and did not stipulate contracting based on race or sex. The court also found a number of procedural ways to dispose of the case, noting that the contractor challenged only the statute and not underlying regulations. The decision leaves some unsatisfying and unresolved questions. First, the *Rothe* facts were largely indistinguishable from *Adarand*. In both cases, Congress and administrative agencies couched the laws in the form of a preference for disadvantaged groups. The *Rothe* certiorari petition noted that 99% of the contracts placed went to racial minorities, making the regime tantamount to a quota.59 But the petition failed to effectively connect the *Rothe* case to *Adarand*. The only way to doctrinally square *Rothe* with *Adarand* is to conclude the Supreme Court will indulge the doctrinal legerdemain of a quota parading under the banner of disadvantaged status in government contracting matters.

The disadvantaged group, when applied without regard to true disadvantaged status, is a racial quota in disguise. However, even under the form-over-substance regime of a quota clothed as a disadvantaged group, the fact remains that the Supreme Court has not vali-

57. *Adarand*, 515 U.S. at 239.
dated legal regimes that present themselves so baldly as quotas without a genuine finding of past discrimination. The author will explore these immediately below. Before doing so, the author reminds the reader that corporate board diversity statutes do not benefit disadvantaged persons; they benefit the privileged occupants of the executive suite and are phrased unambiguously to establish quotas by sex and race.

The Supreme Court has struggled to develop a coherent methodology for determining when a racial preference program in education amounts to nothing more than a disguised quota system. *Bakke* invalidated the race-based admissions criteria of the University of California at Davis Medical School. The policies of the medical school did not withstand scrutiny because no matter how strong a candidate’s qualifications, non-minorities would not be considered for specific admissions slots.\(^60\) This, the Court observed, amounted to unacceptable reverse discrimination for its own sake.\(^61\) The methodologies used in reverse discriminatory admissions criteria by institutions of higher learning call into question whether the program provides a narrowly tailored, minimally-intrusive solution.

A question that should arise is whether the reverse discrimination can survive an attack based on its contribution to a diverse environment in the relevant setting (here, higher education). *Gratz v. Bollinger*\(^62\) expressly rejected the notion that a “single characteristic automatically ensured a specific and identifiable contribution to a university’s diversity.”\(^63\) This reaffirmed that quotas are unacceptable. The *Gratz* Court invalidated the University of Michigan’s undergraduate admissions program that awarded points for minority status. Troubling to the Court was the award of points without reference to other factors such as underprivileged status independent of a suspect classification and of concern was the undue weight given to race. The Court construed the points system as tantamount to a racial quota because the race points tipped the scales so heavily to minorities without regard to any other considerations. Conversely, in *Grutter v. Bollinger*,\(^64\) the Court upheld the admissions policies of the University of Michigan Law School, holding that for strict scrutiny purposes a government interest in student body diversity in higher education is compelling.\(^65\) The Court observed that the Law School admissions program included race as a mere factor and not a classification that

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60. *Bakke*, 438 U.S. at 319.
61. *Id.* at 307.
64. 539 U.S. 306 (2003).
would insulate a racial minority from any competition by non-minority candidates. The Court also assigned near touchstone significance to Justice Powell’s reference to the Harvard University admissions program discussed approvingly in Bakke. More recently, a less-than-fully-constituted Supreme Court then upheld the undergraduate affirmative action admissions program at the University of Texas, as will be discussed in the next paragraph.

In Fisher v. University of Texas, the University of Texas operated a bifurcated undergraduate admissions criteria. This featured a substantially automatic offer of admission from anyone occupying the top 10% of his or her graduating high school class. This first tier applied without regard to race. The second tier of the bifurcation operated differently with respect to race as an admissions factor. Once the school had applied the top 10% criteria, it then applied an academic and personal achievement index to remaining candidates. The index categorically included palpably well-qualified applicants and rejected palpably unqualified applicants. For those falling in between these poles, the admissions criteria included race as one of its factors. Fisher II was preceded by an earlier Supreme Court decision in the same case that vacated the Fifth Circuit’s application of an overly deferential good faith standard to the question of the constitutionality of the admissions program. Fisher II contained plentiful admonitions underpinning the strict scrutiny the case purported to apply. Justice Kennedy warned that “[f]ormalistic racial classifications may sometimes fail to capture diversity in all its dimensions and when used in a divisive manner, could undermine the educational benefits the University values.” The opinion went on to condemn policies simply aimed at “enrolling a certain number of minority students.” The Court assigned weight to university studies showing stagnation in minority admissions and rejected Fisher’s argument that the top ten program sufficed to attain the diversity underlying the compelling state interest.

As Justice Alito warned in his dissent, in upholding the program, the case recognized the need for diversity without demonstrable evidence that the program attained that goal. While the university

66. Id. at 334. “[U]niversities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks.” Id.
67. Id.
68. 136 S. Ct. 2198 (2016).
70. Fisher II, 136 S. Ct. at 2210.
71. Id.
72. Id. at 2216.
produced studies, it did not explain and justify why diversity was a compelling state interest and whether it was attained. The dissent viewed the Court as too deferential to the admissions policies of institutions of higher learning. Statistical analysis affirms that this deference has led to findings inconsistent with case outcomes. One study demonstrated that the law school admissions methodology upheld in *Grutter* gave greater weight to race than the admissions program invalidated in *Gratz*. This caused the study’s authors to conclude that when it comes to affirmative action programs for admission in institutions of higher learning, the Supreme Court will not require the institutions to produce evidence of narrow tailoring and instead will largely defer to each school’s determinations. This further means the Court cares only for the appearance of the program as not constituting a quota and not the actual substance of the policy. Because the Court has never expressly stated this is all it will require, the schools, the lower courts, applicants, and the general public will lack guidance needed to operate (or challenge) these programs. With the jurisprudence now identified, this Article turns to the question of how courts should treat the corporate board diversity statutes under the Fourteenth Amendment.

2. *Fourteenth Amendment Analysis of Race-Based Corporate Board Diversity Statutes*

Despite the discord, critical to understanding the constitutional methodologies will be an ability to differentiate between racial favoritism and outright quotas. In circumstances of racial favoritism, strict scrutiny will require the government to use the smallest racial preferences necessary to attain a compelling governmental objective. However confused the racial favoritism cases may be, the present law remains that actions amounting to a quota (other than as a properly drawn remedy for discrimination) will not survive strict scrutiny. And even if a quota is justified, it must bear a relationship to the harm it corrects and be narrowly tailored. This is where race-based corporate board diversity statutes will suffer fatally under the Fourteenth Amendment. Race-based corporate board diversity statutes create board positions in which only racial minorities may compete. In so doing, they constitute an absolute bar to admission identical to that condemned in *Regents of the University of California v. Bakke* and therefore violate the Fourteenth Amendment. And societal disparities

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74. *Id.* at 559.
in the composition of a given community, standing alone, are insufficient evidence of past discrimination.\textsuperscript{76}

What if the statutes are couched as race-based remedial measures? In this case, the state must demonstrate past discrimination. In the government employment setting, a reviewing court may consider statistical differences in the labor pool by examining differences between those employed and those in the labor pool.\textsuperscript{77} Even if the court would permit these to be applied in the private sector, under-representation only exists if there are statistically significant disparities between the qualified director pool and those employed. But even if the court entertains these methods, the statute fails to narrowly tailor because the board addition does not equate to the required remedy. Instead, the minority candidate would be awarded a mechanistically-determined fixed number of quota-based positions. In the Supreme Court’s efforts to harmonize the outcome in \textit{Fulilove v. Klutznik}\textsuperscript{78} with \textit{City of Richmond v. J.A. Croson Co.},\textsuperscript{79} the Court noted the exceptions to the minority set asides for availability and price that existed in \textit{Fulilove}.\textsuperscript{80} No such exceptions exist with a strict quota that applies rigidly in all cases.

Having discussed the law, are there factual features of corporate board diversity statutes that may cause nuanced or different outcomes? Where should courts look for guidance in reviewing the constitutionality of race-based corporate board diversity statutes? The circumstances surrounding corporate boards resembles neither the educational affirmative action cases nor the government contracting cases. Corporate boards differ in admissions criteria and societal effects. Corporations are also not state actors. Courts must fashion new standards for what comprises a compelling governmental interest as well as what will constitute narrow tailoring. Any absolute mandate for appointment of minorities should, however, fail as an unconstitutional quota.

This analysis merits some attention to the question of narrow tailoring. Imposing a specific racial figure applying pervasively to all publicly traded concerns subject to the law’s jurisdiction fails to narrowly tailor the program. Instead of a thoughtful, evidence-based solution, the numeric assignment is one that merely applies at random.

\textsuperscript{76} See \textit{Wygant v. Jackson Bd. of Educ.}, 476 U.S. 267, 276 (1986) (rejecting the need for role models as a compelling state interest and reaffirming that societal discrimination alone has never justified a racial classification; societal discrimination is too amorphous a basis for a racially classified remedy).

\textsuperscript{77} \textit{Conlin v. Blanchard}, 890 F.2d 811, 816 (6th Cir. 1989).

\textsuperscript{78} 448 U.S. 448 (1980).

\textsuperscript{79} 488 U.S. 469 (1989).

\textsuperscript{80} \textit{City of Richmond v. J.A. Croson Co.}, 488 U.S. 469, 488-89 (1989).
One cannot deduce the sufficiency of such a methodology and this further means such a system cannot survive strict scrutiny. Some focus on the workings of director appointments will follow in the next paragraph.

While the appointment of corporate directors values high competency and other attributes, it does not form a market like the competitive bidding involved in the government contracting cases. Neither does it adhere to a set of relatively objective standards like academic performance and test scores seen in the education affirmative action cases. Instead, the director selection process is one of competency, relationship, and fit. The competency criteria means that most director candidates must hold offices in the executive suite or have experience there. The relationship criteria typically requires a relationship or high visibility with the chief executive officer or the nominating machinery of the enterprise. Insider directors are an example of relationship criteria but also may meet competency criteria by virtue of executive competencies and experience with the business. The fit criteria includes subjective factors such as temperament and ability to work in a collaborative setting. Fit also has an element of diversity, but not in the sense of race or sex. Instead, the diversity may feature critical perspectives. Industry experience is one example and if the enterprise is a conglomerate, a director with a perspective or experience on each business segment is a plus. Geography also adds to fit and if the enterprise has revenues in multinational markets, the enterprise may benefit from someone with experience in those markets.

There is also the critical criteria of technical functions such as law, accounting, finance, engineering, public relations, marketing, and similar categories. These criteria, which bear no relationship to race or sex, should furnish the foundations for director selection in a healthy enterprise. None of these traditional criteria lend themselves to mandating board selection by race. Accordingly, racial preferences contained in corporate board diversity statutes should not survive strict scrutiny and be invalidated as unconstitutional racial quotas. And if as the author postulates, decisions will turn on the superficial appearances of a racial preference program, racial quotas still fail because they do not project an appearance a reviewing court will uphold.

C. Corporate Board Diversity Statutes: Sex-Based Analysis

1. Present State of Fourteenth Amendment Jurisprudence

In contrast to the race-based cases, the sex-based Fourteenth Amendment cases most often do not concern affirmative action. While

81. See GAO Study, supra note 24, at 13.
they may address discrimination, unlike the race-based education cases, the discrimination generally does not involve competition for a finite number of admissions slots or government contracts. Instead, these cases challenge the constitutionality of sex-based distinctions in such areas as single-sex educational institutions, health and welfare benefits, age of majority, criminal justice and jury selection, immigration, family law, and property rights. In addition, *Personnel Administrator v. Feeney* upheld a challenge to a sex-neutral law that favored hiring of military veterans in the context of civil service hiring. Unlike the statutes making express sex-based distinctions, *Feeney* addressed the question of the consequences of having a sexually disparate impact, because the great majority of veterans were men. *Feeney* held that a facially sex-neutral statute that disproportionately benefitted men met the standards set out by the Fourteenth Amendment discussed in the next paragraph. In *Feeney*, the Court viewed the law merely as a preference for veterans of either sex over nonveterans of either sex.

In *Craig v. Boren*, the Supreme Court of the United States applied intermediate scrutiny to a challenge brought by male litigants that allowed Oklahoma women to consume 3.2% beer at age eighteen but allowed men to do so only at age twenty-one. Intermediate scrutiny lies between the strict scrutiny applied to race-based cases and the rational basis inquiry that would apply when suspect categories are not involved. The announced test requires a law or practice (1) to relate to an important governmental interest, and (2) advance that

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89. 442 U.S. 256 (1979).
91. 429 U.S. 190 (1976).
interest by means substantially related to the interest.\textsuperscript{92} The Court invalidated the statute and concluded the sex-based denial of equal access denied equal protection. The state introduced evidence in the form of statistics showing that young males were more prone to harm caused by excessive drinking. The Court rejected this evidence, observing that these were merely broad-based sociological propositions, which the Court characterized as “dubious business.”\textsuperscript{93}

In \textit{Mississippi University for Women v. Hogan},\textsuperscript{94} the Supreme Court again applied intermediate scrutiny to a challenge by a male applicant to an all-female nursing school. In invalidating the policy, the Court stated that parties seeking to uphold a statute that classifies by sex must carry a burden showing “exceedingly persuasive justification” for the classification.\textsuperscript{95} The practice must meet important governmental objectives with the discriminatory means substantially related to the attainment of those objectives. The Court rejected the school’s argument that the same-sex nursing school was intended to redress past discrimination. Any casual observer would know that nursing is a female-dominated field and therefore it is easy to understand why the Court rejected such post-hoc rationalizations. Similarly, the Court invalidated the all-male admissions policy of the Virginia Military Institute in \textit{United States v. Virginia}.\textsuperscript{96}

The level of scrutiny in sex-based cases also depends on whether the case involves affirmative action. A sex-based quota absolutely barring men from director positions should be viewed as an affirmative action program. Through the use of cast iron, numeric goals, a quota may either be overreaching or insufficient to redress the harms identified by the legislature. Viewed in this manner, rather than intermediate scrutiny, corporate board diversity statutes that establish positions for women should be reviewed under a strict scrutiny standard.\textsuperscript{97} As the following discussion will show, corporate board diversity statutes favoring women are constitutionally invalid under either intermediate scrutiny or strict scrutiny.

2. \textit{Fourteenth Amendment Analysis of Sex-Based Corporate Board Diversity Statutes}

Corporate board diversity statutes fit imperfectly into the jurisprudence that examines sex-based distinctions. The sex-based education cases implicitly recognize that physiological differences between

\begin{thebibliography}{99}
\bibitem{92} Craig, 429 U.S. at 197.
\bibitem{93} Id. at 204.
\bibitem{94} 458 U.S. 718 (1982).
\bibitem{95} Hogan, 458 U.S. at 724.
\bibitem{96} 518 U.S. 515 (1996).
\bibitem{97} Brunet v. City of Columbus, 1 F.3d 390, 403-04 (6th Cir. 1993).
\end{thebibliography}
men and women are, in general, irrelevant to higher education. In cases such as statutory rape, where physiological differences matter, the court may affirm different treatment of the sexes.⁹⁸ Corporate board diversity statutes do not invoke relevant differences between the sexes and, therefore, the results should be like the education cases, where the Court insisted on sex-neutral policies. In these rulings, the Court did not require the schools to attain percentages of participation by the formerly excluded sex. Rather, the rulings opened these institutions to participation by all sexes in a sex-neutral manner. For this reason, courts should invalidate the sex-based quotas imposed by the corporate board diversity statutes. Courts do not uphold quotas except in cases of discrimination by the affected body and come especially into relevance in cases of egregious transgressions.⁹⁹

One might liken an all-male board of directors to the all-male policies of the Virginia Military Institute or the all-female policies of the Mississippi University for Women, each of which were invalidated by the Court. There are differences. Government-controlled educational institutions are state actors subject to constitutional limitations on their actions. Private persons such as publicly traded corporations are not state actors and any regulation of their affairs respecting the Fourteenth Amendment could only be regulated by Congress under Section 5 of the Fourteenth Amendment. Indeed, Congress has legislated pursuant to these powers in the enactment of, among other things, federal employment and education discrimination laws.¹⁰⁰ States have no similar power to create an absolute bar to male participation in the candidate pool. There is another important difference between the segregated education cases and today's corporate board setting. In the education cases, the school was open exclusively to one sex. In contrast, there is no evidence that any public corporation makes a policy of excluding director candidates by race or sex. To the contrary, corporate America publicizes its attainment of diversity at all levels and applies considerable resources to attain diversity. Mere disparities in participation between men and women, standing alone, do not evidence discrimination. The education cases opened sexually segregated government institutions to integration and opportunities for the opposite sex to attend. They did not impose quotas to redress the harms brought about by previously segregated institutions.

As applied to sex, corporate board diversity statutes are unconstitutional under the Fourteenth Amendment. The practice does not meet important state interests with the discriminatory means substantially related to the attainment of those state interests. The state’s best argument to uphold the statutes under intermediate scrutiny is that diversity is an acceptable state interest and the quota, while imperfect, substantially relates to that interest. Under intermediate scrutiny, the reviewing court must take the state to task concerning state interest and not accept it at face value. It should ask first if the state interest is proper, second after a finding of propriety, if there are non-discriminatory means to attain the state interest and if not, if the discriminatory means actually attain the state interest. The main problems with the state interests are: (1) the goals of improved corporate performance must be proved and not conflate cause and effect, and (2) diversity for its own sake (including role models) may not be acceptable to the Supreme Court. 101 If the wisdom can be demonstrated, then a court should turn to the question of whether state interests can be attained by alternative means. This Article documents but a few of the very material influencers in the private sector driving publicly traded corporations to diversity. Courts should therefore easily find that there are alternative means to attain the goal. There is a final concern that these laws create harms—harms that would not exist with private market-based solutions that are now playing out very actively. The statute may actually work against its goals to the extent corporations merely fill a quota position, whereas without quotas, a corporation might otherwise go farther and thoughtfully consider many more female candidates. Harms also include resentment by classes that do not qualify for the special status and the inevitable stigma of being token appointees. While intermediate scrutiny does not require narrow tailoring, the quota methodology remains problematic. The quota bears little relation to the state interest (if accepted as a valid state interest) and therefore fails to meet the requirement that the means be substantially related to the state interest. A constitutionally-valid program would require the state to explain and justify the relationship between the problem and the numeric solution required.

The previous paragraph demonstrates that invalidity should take place under intermediate scrutiny. However, this writer contends strict scrutiny identical to that in race cases should also apply to corporate board diversity statutes because they create a pernicious quota regime. Viewed in that manner, the invalidity of these statutes would apply with even greater force, with the analysis proceeding as previ-

ously described with respect to race. A court’s application of the standard of scrutiny will be important procedurally as to how and what litigation findings are required. In any case, as is the case with the race-based corporate diversity statutes, sex-based quotas should be struck down under the Fourteenth Amendment under either methodology.

III. ANALYSIS OF CORPORATE BOARD DIVERSITY STATUTES UNDER THE DORMANT COMMERCE CLAUSE

A. DORMANT COMMERCE CLAUSE JURISPRUDENCE

Article I Section 8 of the United States Constitution grants to Congress the power to “regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.” 102 In addition to the grant of power to regulate interstate commerce, the Dormant Commerce Clause recognizes the limitations on a specific state’s regulation of interstate commerce in cases where Congress has not legislated. Much of the litigation of the Dormant Commerce Clause concentrates on taxation, 103 movement of goods, and transportation in interstate commerce. 104

A leading United States Supreme Court case involving a Dormant Commerce Clause challenge to a corporate statute is Edgar v. MITE Corp. 105 In Edgar, the court invalidated an Illinois corporate tender offer law as both preempted by the Williams Act 106 and violative of the Dormant Commerce Clause. The case involved a tender offer made by a Delaware corporation having its headquarters in Connecticut aimed at the shares of an Illinois corporation headquartered in Illinois and having 27% of its shareholders resident in Illinois. The Illinois tender offer statute applied because (among other reasons) the corporation met the statutory requisites based on shares held by Illinois residents. The Supreme Court ruled the Illinois law federally preempted because it frustrated and conflicted with the Williams Act. Rather than resolve the case solely under the preemption, the Court went further and found that the Illinois statute regulated corporate share control transactions across state lines. The State of Illinois’s interest in protecting resident shareholders did not justify the stat-

102. U.S. Const. art. I, § 8, cl. 3.
ute’s significant effects on interstate commerce and the Court invalidated the statute under the Dormant Commerce Clause.

Five years after Edgar, the Court changed course in CTS Corp. v. Dynamics Corp. of America. In CTS, the Court reviewed an Indiana takeover control statute applicable to an Indiana corporation under the Williams Act and the Dormant Commerce Clause. Distinguishing Edgar, the Court found the Indiana statute consistent with the Williams Act and therefore not preempted by it. The Court also found no Dormant Commerce Clause violation because it viewed the Indiana statute as one that simply concerned the internal affairs of an Indiana corporation. Unlike Edgar, which involved a statute with clear extraterritorial reach, the Indiana statute did not apply to out-of-state corporations. Under this view, the statute, while potentially having an effect on shareholders and other constituencies outside Indiana, did not offend the Dormant Commerce Clause. The Court rested its decision in part on the internal affairs doctrine, citing, among other things, Section 304 of the Restatement (Second) of Conflict of Laws. In Section IV, this Article will discuss the internal affairs doctrine as applied to the corporate board diversity statutes. Courts apply the internal affairs doctrine to attempts by states to regulate the internal affairs of foreign corporations doing business within their boundaries. These internal affairs cases generally decide whether or not the law of the place of incorporation should govern a matter. CTS did something different. The CTS Court imported this state corporate law doctrine to help resolve the issue under the Dormant Commerce Clause.

In actuality, CTS did not even involve an attempt by a state to regulate the internal affairs of a foreign corporation. The corporation involved was organized in Indiana and there was no attempt by any other state to regulate its internal affairs. CTS was not really about internal affairs, but the Court relied on the internal affairs doctrine to resolve the matter. In addition to its novel reliance on a state corporate law concept, CTS has been criticized for failing to examine the protectionist effects of the Indiana statute. However, the CTS opinion acknowledges that the Dormant Commerce Clause invalidates state statutes that “may adversely affect interstate commerce by subjecting activities to inconsistent regulations.”

108. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, at 93.
109. CTS, 481 U.S. at 89.
111. CTS, 481 U.S. at 88.
In the corporate arena, the 1980s surge in hostile corporate takeover activity prompted some states to enact legislation impeding hostile takeovers. This, in turn, invited additional attacks that invalidated state anti-takeover statutes as undue burdens on interstate commerce, many of which preceded CTS. In *TLX Acquisition Corp. v. Telex Corp.*,112 a Delaware corporation was the subject of a tender offer that triggered an Oklahoma control share acquisition statute that applied to corporations with principal offices or substantial assets in Oklahoma, together with the presence of at least one of the three following conditions: (1) more than 10% of shareholders reside in Oklahoma, (2) Oklahoma residents own more than 10% of the corporation’s shares, or (3) at least 10,000 of the corporation’s shareholders reside in Oklahoma.113 The Court held that by creating an impermissible risk of inconsistent regulation and imposing an indirect burden on interstate commerce that is excessive in relation to the state’s interest in protecting its residents, the Oklahoma statute violated the Dormant Commerce Clause.114 The Court focused on the frustration of shareholder voting rights, noting that state attempts to regulate voting rights in foreign corporations will be subject to the laws of more than one state. This, in the Court’s view, presented an impermissible risk of inconsistent regulations by different states that may adversely affect interstate commerce.115 An earlier Tenth Circuit case, *Mesa Petroleum Co. v. Cities Service Co.*,116 also invalidated the same Oklahoma statute under the Dormant Commerce Clause.

The takeover cases also looked behind state statutes that purported not to discriminate against interstate commerce. In *Mesa Partners II v. Unocal Corporation*,117 a bidder for corporate control challenged on Dormant Commerce Clause grounds an Oklahoma law that purported to regulate the transfer of energy properties. The law required approval by the Corporation Commission of Oklahoma for transfers of energy properties within the state. The law contained numerous exemptions, including transfers of properties valued at less than $75 million. The Court rejected the state’s arguments that the law regulated even-handedly, noting that “[a]ny true conservation legislation so riddled with exemptions, exceptions and limitations does not realistically seem to be structured with conservation as its main

115. Id. at 1030-31.
116. 715 F.2d 1425 (10th Cir. 1983).
The opinion noted both the adverse effects on interstate commerce and the statute’s improper, ulterior purposes. This is critical to the level of scrutiny the reviewing court will apply to the statute. In this case, because the regulation was not even-handed, the Court applied exacting scrutiny.

Dormant Commerce Clause jurisprudence can generally be reduced to cases involving statutes that discriminate against interstate commerce (whether facially, by their purpose or practical effects) and those that incidentally burden interstate commerce. In the first category, the Court should invalidate the statute unless the state can show it advances a legitimate local purpose that cannot be served by reasonable, non-discriminatory means. This is a form of strict scrutiny that usually results in the statute’s being invalidated. The second category and the legal standard applicable to it was announced by the Court in *Pike v. Bruce Church, Inc.*: “Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” This standard, referred to as “Pike balancing,” applies lesser scrutiny, and the reviewing court should uphold the statute unless it presents excessive burdens in relation to local benefits. The term “Pike balancing” is inapt, given that the case revolved around a statute’s discriminatory purpose, meaning there was nothing to balance. And there are many cases purporting to apply Pike balancing that do not actually do so that are in reality cases about discriminatory purpose. Nevertheless, as the discussion will show, Pike balancing will be relevant to the Dormant Commerce Clause scrutiny of corporate board diversity statutes.

119. *Colon Health Centers of America L.L.C. v. Hazel*, 813 F.3d 145, 152 (4th Cir. 2016). There is authority for a third classification, namely, that of extraterritorial reach. See *Pharm Res. & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 79 (1st Cir. 2001). The author believes these extraterritorial reach cases should be classified with the discrimination cases, and these matters should be subjected to the same scrutiny.
120. *Or. Waste Systems, Inc. v. Dept of Envt Quality*, 511 U.S. 83, 100-01 (1994). See also *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996) (invalidating a North Carolina intangibles tax that granted a deduction proportionate to the income generated in North Carolina by the companies creating the tax and rejected the state’s contention that the law served to develop a capital market in North Carolina; the statute was facially discriminatory and, citing *Oregon Waste*, the court noted that facially discriminatory statutes are *per se* invalid).
123. See *Regan, supra* note 104 at 1220.
B. APPLYING THE DORMANT COMMERCE CLAUSE TO CORPORATE BOARD DIVERSITY STATUTES

On a superficial level, the closest precedent to the corporate board diversity statutes involves the 1980s hostile takeover cases, discussed in Subsection A, which evaluate either or both of protectionist purpose or adverse effects on interstate commerce. Those cases differ from corporate board diversity statutes because in certain cases the states that passed the statutes did so in order to protect industry in their states. This further meant the cases applied the strict scrutiny required in cases of discriminatory statutes. While corporate board diversity statutes discriminate based on race and sex, this is not the concern of the Dormant Commerce Clause. These laws do not focus on procuring directorships for residents of any state; rather, they discriminate based on race and sex. The takeover cases remain relevant to the extent they examined the burdens of the statutes on interstate commerce. These burdens will be discussed in this Subsection. Before doing so, the author will describe in the next paragraph the scope of interstate commercial activities associated with corporate board diversity statutes and then explain why they impose considerable burdens on interstate commerce.

A threshold question is whether the composition of a board of directors and underlying voting rights affect interstate commerce. Director activities should be viewed as a service and, in a large number of cases, one that is arranged and rendered across state lines. This should suffice to constitute a service in interstate commerce. The solicitation and rendering of proxies of public companies involve the instrumentalities of interstate commerce, and shareholders reside in a multiplicity of jurisdictions. But there are even larger implications for interstate commerce. A court should also consider the full effects of corporate board diversity statutes on corporate governance. For example, a mandatory change in director composition could mean corporate prerogatives of an undefined nature could result from the mandated shift in board composition. As this Article will show, these effects could be serious and costly. By way of example, California will by operation of its sex-based director quotas tell foreign corporations how to govern their corporate affairs (or at least materially influence them). Whether viewed from the perspective of director placement or corporate governance generally, these statutes affect interstate commerce.

Corporate board diversity statutes fall into the second category of statutes that regulate interstate commerce even-handedly but which have adverse effects on interstate commerce. It is these effects that are the concern with corporate board diversity statutes. The cases
regulating interstate transportation\textsuperscript{124} and prices\textsuperscript{125} are of relevance to the Dormant Commerce Clause analysis of corporate board diversity statutes. Both \textit{Kassel v. Consolidated Freightways Corp.}\textsuperscript{126} and \textit{Southern Pacific Co. v. Arizona}\textsuperscript{127} invalidated state regulation of transportation, one case involving length limits on truck trailers and the other length limits on trains, in each case operating in interstate commerce. Both considered the burden on interstate commerce and concluded the practices imposed an undue burden, not justified by the local interest involved. In \textit{Brown Forman Distilling Corp. v. New York State Liquor Authority},\textsuperscript{128} the United States Supreme Court invalidated a New York liquor pricing law that required sale at a price no higher than any other state, reasoning that such law will affect prices in other states and therefore unduly burden interstate commerce.

To illustrate unreasonable burdens on interstate commerce, the author posits a hypothetical. This hypothetical will involve a corporation organized in State A with headquarters in State B, and more than 25\% of its business (measured by sales and assets) in each of States C and D. State A (like Delaware) has no corporate board diversity statute. States B, C, and D have corporate board diversity statutes and States C and D apply them to a corporation having more than 25\% of its business in the state. Because the corporation is headquartered in State B, that state also seeks to apply its statute. This means all noted states will view their laws as applicable. In this hypothetical, some states have a broad range of diversity statutes, including quotas based on sexual orientation. This means there are three corporate board diversity statutes for which compliance is needed (States B, C, and D) and failure to comply results in fines. The hypothetical corporation has six directors. The hypothetical states differ as to their diversity requirements and this is displayed as follows:

\textsuperscript{126} 450 U.S. 662 (1981).
\textsuperscript{127} 325 U.S. 761 (1945).
\textsuperscript{128} 476 U.S. 573 (1986).
State B prefers to add someone from each special category where State D, like California, requires only women. However, State D (like the California law after the passage of the requisite time period) requires three women for a board of directors of this size. Depending on the composition of the candidates, the corporation will be required to add between four and eight directors. Four can be attained if the three required women also satisfy another category of ethnicity and/or identify as LGBT.129 For example, this could occur with an Asian woman, African American woman, and an Hispanic lesbian. This would leave only the need for an indigenous seat. Eight additional directors will be needed if the three women happen to be white and do not identify as LGBT and if all the other directors are male. Here, the board additions would consist of an Asian male, an African American male, an Hispanic male, an indigenous male, a gay white male, and three white women.

If the existing directors of the corporation resign to make way for the new directors, then the corporation has undergone a change of control. If the corporation alternatively decides to expand the board, any addition of six or more directors will also result in a change of control. This may have a variety of consequences under shareholder agreements, provisions in classes of preferred stock, loan and lease covenants, and other material contracts. At a minimum, such a momentous event will require considerable due diligence and a determination of the effects of such an abrupt change. Capital markets and institutional shareholders may also react unfavorably to the event or, at a minimum, require explanations. These factors would, however, be relatively superficial compared to the fundamentally transition of the business brought about by the corporate board diversity statutes. The newly empowered board may unceremoniously sack a CEO with whom the shareholders are largely content. Or, more likely, the new directors, who may owe their positions to the CEO, will defend him

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129. This Article does not examine how LGBT classifications would be handled under the various legal regimes discussed. Instead, this is intended as an example of the potential breadth that corporate board diversity statutes may assume when taken to logical ends.
against legitimate shareholder\textsuperscript{130} criticism. This also potentially more than doubles director fees if the board opts to expand to accommodate new candidates and if compensation rates per director remain the same. These multi-state entanglements are the type of stifling effects that caused the Supreme Court to invalidate the interstate transportation statutes.

The foregoing illustration is but one of the Dormant Commerce Clause concerns presented by corporate board diversity statutes. There is at least one other important one to consider. Suppose a state having legally-cognizable contacts (e.g., shareholders, offices, or businesses) with the affected corporation passes a statute that requires corporations to exclude race and sex as criteria for board positions (“the equal opportunity statute”),\textsuperscript{131} Assume further that like the corporate board diversity statutes, violations are punishable by fines but also permit a private cause of action against the corporation by injured parties. In requiring the corporation to disregard race and sex, this law will conflict with corporate board diversity statutes. A corporation that complies with the corporate board diversity statutes will violate the equal opportunity statute, exposing it to liability no matter what course of action it takes. The corporation will then have no choice but to challenge one or both of the laws. The end result will be that one state or a handful of states will dictate the policies applicable to other states, a classic problem under the Dormant Commerce Clause and its concerns with extraterritorial reach.

In the context of takeovers and proxy contests, the above scenario also presents a problem. A bidder for corporate control may be unable to seat its desired slate of directors without incurring fines. This impedes the market for corporate control addressed in the takeover cases. The stakes, however, are much smaller than the takeover cases because the bidder or proxy contestant would only be required to pay fines. Also, the workings of these entanglements do not have an economically protectionist purpose. Rather, they discriminate on the basis of sex and race.

Whether these problems actually materialize is not relevant to a reviewing court. In other words, the situation need not ripen into a problem such as those described above for a court to invalidate a cor-

\textsuperscript{130} In doing this, corporate board diversity statutes may actually lessen shareholder influence because those advocating diversity may (incorrectly) assume the mission has been accomplished. This would require empirical study.

\textsuperscript{131} A state should be free to enact legislation to require race and sex neutrality. See Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291 (2014).
corporate board diversity statute on Dormant Commerce Clause grounds.132

Having demonstrated the considerable burden on interstate commerce, this Article now turns to the legal conclusion under the Dormant Commerce Clause. Under Pike balancing, the incidental but very material burden on interstate commerce would need to be weighed against the local state interest. The difficulty with this balancing analysis is it will involve determinations over two entirely different sets of considerations. Justice Scalia phrased this as akin to “judging whether a particular line is longer than a particular rock is heavy”133 and whether “three apples are better than six tangerines.”134 The impossibility of weighing the burdens against benefits, putative or otherwise, still means the court must arrive at a level of scrutiny over the state statute. Relevant considerations would be statutory goals and efficacy in attaining those goals. While the case law can be categorized, there is no controlling authority over the levels of scrutiny. Instead, the Supreme Court and the lower courts have demonstrated latitude to arrive at outcomes driven by particular circumstances. There is no evolving pattern or direction when courts must balance to attain results.

To resolve the question, the courts must identify the potential level of scrutiny that will apply. The options range from a highly deferential rational basis standard to one of heightened scrutiny. Under rational basis review, the courts will defer to the legislature’s determinations. This means it will accept at face value the wisdom of the statute. Likewise, in these cases, the courts will not examine the efficacy of the statute in any meaningful fashion because it will not be equipped to make findings. If rational basis review applies to corporate board diversity statutes, the statutes should be upheld under the Dormant Commerce Clause. The courts would accept the benefits to the state proffered, such as diversity, creating racial and gender role models, and improving business performance of companies headquartered in the relevant state. On the other hand, a searching level of scrutiny would review the motives and wisdom of the statute. Does it

132. See Wyoming v. Oklahoma, 502 U.S. 437, 453-54 (1992); Healy, 491 U.S. 324 (noting the dangers of reciprocal, restrictive legislation in neighboring states but not demanding proof of actual enactment of those statutes); TLX, 679 F. Supp. 1022, 1031 (stating that “[t]he actual existence of inconsistent regulation is not a prerequisite to constitutional infirmity.”).


intend to attain lofty goals, or is it merely a quest to empower specific identity groups? With respect to efficacy, the courts would consider whether other options that do not impinge on interstate commerce could be pursued. Assumptions that diversity improves corporate performance would require proof and a demonstration that cause and effect are not conflated. Could corporations be motivated to attain diversity on their own terms and timelines by requiring public disclosure of diversity data, as now supported by much of the investor community?135 Also, courts would need to consider stigmatic harm, potential for tokenism, inherent limitations presented by the quotas, and other adverse effects.

This Article argues that heightened scrutiny should apply because of the momentous equal protection questions presented by state regulation appearing in the form of race-based and sex-based quotas. Under this approach, the scrutiny would mirror whatever scrutiny is being applied under the Fourteenth Amendment. This would be strict scrutiny in the case of race and perhaps intermediate scrutiny in the case of sex. The author believes strict scrutiny should apply to both race and sex because the laws create quotas. Except for their guidance concerning corporate board diversity statutes’ effects on takeovers and proxy contests, the takeover cases are largely unhelpful. There is no Dormant Commerce Clause precedent. The danger of importing Fourteenth Amendment scrutiny to this realm is that it will bootstrap other bodies of precedent to an area of entirely different concern. According to this thinking, the Dormant Commerce Clause regulates state incursions into interstate commerce, and that should be the focus. Viewed in that manner, the statutes, which are invalid under the Fourteenth Amendment, could be upheld under the Dormant Commerce Clause. The author would invite the courts to apply strict scrutiny in the face of clear constitutional violations. This would enable the courts to treat these matters as sui generis without doing violence to precedents in other contexts. A ruling in such manner could be decided on narrow grounds. A strict scrutiny standard is appropriate because the benefits the state purports to attain are pursued by unconstitutional means.

IV. ANALYSIS OF CORPORATE BOARD DIVERSITY STATUTES UNDER THE INTERNAL AFFAIRS DOCTRINE

A. INTERNAL AFFAIRS JURISPRUDENCE

The internal affairs doctrine is a conflict of laws principle of corporate law. When operative, it requires that the internal affairs of a

135. See infra notes 212-14 and accompanying text.
corporation be governed by the laws of the place of its incorporation and no other. The purpose of the internal affairs doctrine is to eliminate intolerable confusion and uncertainties that will intrude on the domain of a state with a superior supervisory interest. Section 302 of the Restatement (Second) Conflict of Laws furnishes a general rule that the rights and liabilities of corporations are generally to be determined by the law of the state of incorporation. The comments to Section 302 attempt to put flesh on the general rule, stating that the rule would apply to matters “peculiar to corporations,” including internal affairs. “Internal affairs” include “relations, inter se of the corporation, its shareholders, directors, officers or agents.” The comments to Section 302 enumerate the activities that fall within the scope of Section 302, and this includes, among other things, “the election or appointment of directors.” Section 313 imposes a similar standard as to the circumstances in which courts should exercise their jurisdiction over an internal affairs matter. The comments to Section 313 provide, in relevant part, that “a court will not usually entertain a suit to annul by its decree an election, held outside its territory, of the directors of a foreign corporation . . . .” As a general rule, the nomination and election of corporate directors should be considered part of the internal affairs of the corporation.

While deferential to the laws of the state of incorporation, the Restatement leaves room for the laws of other states to apply, even in matters of internal affairs. There are no clear rules for when the laws of another state should apply. Instead, the Restatement furnishes a factors-based regime:

Application of the local law of the state of incorporation will usually be supported by the choice of law factors favoring the needs of interstate and international systems, certainty, predictability and unfairness of result, protection of the justified expectations of the parties and ease in the application of the law to be applied.

The Restatement does not weigh these factors, leaving them as mere considerations to be applied to the specific case. The sharehold-
ers of the business, who commit capital to it, may choose any number of jurisdictions in which to incorporate. Their justified expectation in forming and funding the corporation is that the law of the place of incorporation will govern its internal affairs. This is a critical consideration in making the decision to form the corporation.

B. The Internal Affairs Doctrine and Relevance to Corporate Board Diversity Statutes

1. Internal Affairs Issues Presented by Corporate Board Diversity Statutes

The internal affairs doctrine will be relevant to attempts to impose corporate board diversity statutes on a foreign corporation where the law of the state of incorporation would not impose the same diversity requirement. Because the corporate board diversity statutes merely impose fines, there is some question whether these statutes, applied to a corporation from a different state, would invoke internal affairs issues at all. Comment (e) to Section 302 of the Restatement clarifies this in the context of director appointments, noting this is not something that can be “determined differently in different states.” The state would contend that unless the fine is one that leaves no realistic choice, there may be no internal affairs issue. The choice of the law of the state of incorporation is not absolute. Whether to apply a law other than the law of the state of incorporation is also factor-dependent. Among the factors considered to apply another law are:

(1) the nature and extent of the corporation’s relationship with the state of incorporation, (2) the nature and extent of the corporation’s relationship with the state whose law is sought to be applied and (3) whether the act . . . cannot practically be governed by local law of more than one state.

A secretary of state or other governmental body of a state defending a corporate board diversity statute being applied to a foreign corporation might contend that the statute should survive an internal affairs challenge under these factors. Important to this argument would be the idea that the corporation is free to govern its affairs for a price: if it fails to comply it can still seat its board and must merely pay a fine. The secretary of state or other governmental body of a state would attempt to frame the argument in terms of a mere condition to doing business, with little or no bearing on internal affairs. The official would assert further that the state has a compelling and superior interest in the imposition of the diversity requirement.

144. Id.
145. Id.
When a foreign corporation seeks approval to do business in a state other than where it is organized, it must agree to a number of undertakings, including the appointment of an agent for service of process and submission to the taxing jurisdiction of the state. This would be merely one of a list of regulatory requirements having little relation to internal affairs.

A litigant defending the fine would contend that a fine frustrates the expectations of shareholders to an extreme, significantly limiting or curtailing altogether choice in the appointment of directors. And a nominating committee will have no choice but to appoint a less desirable candidate to avoid the fine. A decision may also rest with the size of the fine and its consequences. For public companies, reputational risk is among the most concerning to the enterprise. Paying a fine may take on a life of its own, forcing management to publicly defend its decision. Most managers will be loath to spend time doing this. If the fine results in debarment from government contracts or private sector boycotts, the law will function as an iron-clad requirement to appoint a director of the required sex and race. Material contracts will require representations of compliance with law that are periodically brought down to the present. These representations may be untrue, even if the corporation pays the fine. Breach of a representation in a material contract can result in a large number of adverse consequences for the corporation, so management will face immense pressures to re-shuffle the board at the point of a bayonet rather than merely pay the fine. Viewed in this manner, the statute presents a very real internal affairs issue that should be resolved in favor of invalidation or a defense to imposition of the fine. The magnitude and frequency of the fine should also be relevant.

2. Contrasting State Views

California’s corporate board diversity statute applies “to a foreign corporation that is a publicly held corporation to the exclusion of the law of the jurisdiction in which the foreign corporation is incorporated.” This statute resolves the question of how a California court would rule over an internal affairs issue. However, the contrasting views of the courts of California and Delaware remain relevant to the problem described above. In the leading Delaware case, *VantagePoint Venture Partners 1996 v. Examen, Inc.*, the Delaware Supreme Court

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146. The California statute defines its penalty as a “fine.” California Code § 301.3(o)(1). Debarment typically requires criminality or fraud. *See, e.g.*, 2 C.F.R. § 417.800 (2019).
147. California Code § 2115.5(a).
148. 871 A.2d 1108 (Del. 2005).
Court decided the question of whether different classes of stock were to approve a merger in aggregate across all classes or by a majority of each class voting separately. The case involved a corporation organized in Delaware and subjected to a California statute triggered by the corporation’s business and stockholder presence in California. If Delaware law applied, the merger could be approved by a mere majority of all classes voting collectively. If California law applied, each class would be required separately to approve the merger. This difference determined the outcome of the case. Invoking the internal affairs doctrine, the Delaware Supreme Court held that Delaware law applied, resulting in approval of the merger.¹⁴⁹ Like the California corporate board diversity statute, at issue was a law that imposed a California governance regime based on contacts with California. These contacts differed in several material respects from the California corporate board diversity statute and expressly excluded publicly traded companies. However, the corporate governance statute reviewed in Vantage-Point and the California corporate board diversity statute each contain express triggers to apply California law to foreign corporations based on contacts with California. When a state exerts its regulatory powers in this manner, a court will need to evaluate the competing considerations noted above under the Restatement. California courts must follow California’s clear statutory mandate and give effect to the California corporate board diversity statute in the event of an internal affairs challenge. Other states, including New York, have also exerted authority in areas that might arguably be deemed internal affairs of foreign corporations and many have upheld the additional regulation.¹⁵⁰

¹⁵⁰. See, e.g., Sadler v. NCR Corp., 928 F.2d 48 (2d Cir. 1991) (states are not prohibited from enacting laws more stringent than elsewhere, upholding a shareholder’s right to a Maryland corporation shareholder list under New York law); Norlin Corp. v. Rooney, Pace, Inc., 744 F.2d 255 (2d Cir. 1984); Republic Systems & Programming, Inc. v. Computer Assistance, Inc., 440 F.2d 996 (2d Cir. 1971); Tyco Int’l, Ltd. v. Kozlowski, 756 F. Supp. 2d 553 (S.D.N.Y. 2010), appeal denied, No. 02 Civ. 7317(TPG), 2011 WL 2038763 (S.D.N.Y. May 24, 2011) (rejected application of law of country of organization (Bermuda) to constructive fraud and forfeiture claims because New York had a greater interest in the outcome); Univ. of Montreal Pension Plan v. Banc of America Sec., L.L.C., 446 F. Supp. 2d 163 (S.D.N.Y. 2006) (rejected application of the law of corporate organization in a case where the corporation was dissolved; however, recognized in dicta that the internal affairs doctrine exists to prevent directors from facing conflicting demands); Resolution Tr. Corp. v. Gregor, 872 F. Supp. 1140 (E.D.N.Y. 1994); See also RS Invs., Ltd. v. RSM US, LLP, No. 1:17-2410, 2019 WL 1004690 (Ill. App. Ct. Feb. 28, 2019) (declining to apply internal affairs principles to shareholder claims against corporate accountants).
Delaware would rule differently, and there are numerous cases in Delaware and elsewhere upholding the internal affairs doctrine.151 Following VantagePoint, a Delaware court should view the selection of directors as the sole province of the state of incorporation. A properly decided Delaware case should ignore the California statute but to what effect? The corporation can constitute its board any way it wants in compliance with Delaware law—it must merely pay the fine for failure to attain diversity. Delaware courts likely will not want to adjudicate questions concerning the imposition of fines arising in other states, and there may be questions of personal jurisdiction over the state of California in Delaware. Beyond California, also relevant to any internal affairs determination will be whether the state attempting to regulate the foreign corporation has enacted a statute that gives effect to the law of the state of incorporation concerning internal affairs matters.152 This will tilt the scales toward respect for the law of the state of incorporation.

While corporate board diversity statutes interfere with corporate internal affairs, as the preceding contrast shows, whether a challenge to them under internal affairs theories prevails will be largely dependent on the jurisdiction where the case is heard, and the law the court chooses to apply.

V. STANDING AND WHO MAY CHALLENGE CORPORATE BOARD DIVERSITY STATUTES

This Section identifies what parties may bring an action to challenge a corporate board diversity statute and contains two main Subsections. Subsection A furnishes a general discussion of standing that will be required to enable any litigant to bring a challenge. Subsection B applies these principles to three classes of litigants that may be enabled to bring an action. Potential litigant classes include (1) the corporation, (2) directors removed from office or denied positions under the quota system, and (3) shareholders.

151. See, e.g., BBS Norwalk One, Inc. v. Raccolta, Inc., 205 F.3d 1321 (2d Cir. 2000) (applied Delaware law to breach of fiduciary duty claims applicable to corporation organized there); Kravetz v. Bridge to Life, Ltd., No. 16 CV 9194, 2017 WL 4074016 (N.D. Ill. Sept. 14, 2017); Rein v. ESS Grp., Inc., 184 A.3d 695 (R.I. 2018) (following VantagePoint to hold that stockholder meetings and maintenance of books and records of a Delaware corporation were internal affairs governed by Delaware law); Johnson v. Johnson, 272 Neb. 263 (Neb. 2006) (Supreme Court of Nebraska applied Delaware law over Nebraska law in oppression of minority shareholder case); VantagePoint, 871 A.2d 1108; McDermott Inc. v. Lewis, 531 A.2d 206 (Del. 1987) (favoring local law over the law of the state of incorporation will result intolerable confusion, inequalities, uncertainty and will intrude on the domain of a state with a superior interest and declining to follow Norlin Corp. v. Rooney, Pace, Inc., 744 F.2d 255).

Because of practical realities, standing will be among the most important factors to determine if a challenge is even brought. There are very considerable business disincentives for a corporation or an aggrieved director to bring an action. In the vast majority of cases, a corporation will opt either to pay the fine as a cost of doing business or create the necessary room on the board. The cost of bringing suit alone could exceed the fines and will needlessly distract management. More importantly will be the reputational risk brought on by a challenge. This risk to reputation is dependent on a number of factors, including company size and industry. Large, visible corporations in industries with high contact with the general public will be incentivized to avoid the attention of activist groups, whether representing consumers, employees, investors, or other constituencies. Public shaming, including conclusory labels of “racist,” “sexist,” and “misogynist” will assuredly follow. While courts can shrug off these forces, businesses cannot. In the great majority of cases, no competently managed business will challenge these statutes. Aggrieved directors, while assuredly harmed, will be even less likely to challenge the statutes. In their clubby world, one rarely wants to cultivate a reputation for litigiousness. Just as important will be the role and status of the typical director, who does not rely on the board position as his principal livelihood and instead does it to network and maintain visibility and relevance. Well-fed horses do not rampage and the same is true for well-paid directors. Anyone challenging a statute will be shut out of consideration for director spots and consigned to pariah status. This leaves the shareholders as the only class that can and will, in the real world, seek to challenge these laws.

A. THE STANDING REQUIREMENT

Judicial power extends to cases and controversies as set forth in Article III, Section 2 of the United States Constitution. The constitutional requirement of an actual case or controversy forms one of two requirements litigants must satisfy to have standing to bring a case or controversy. In addition to the requirement of a case or controversy, there exists a prudential requirement that there be a judicially-cognizable injury in fact and that the litigant seeks personal redress rather than recovery on behalf of another. An injury in fact requires an

allegation of (1) an injury that is concrete, particularized, and either actual or imminent, (2) a causal connection between the alleged injury and the defendant’s conduct, and (3) a likelihood that a favorable decision will redress the injury.\textsuperscript{156} As illustrated by the discussion in Subsections B through D, standing requirements will vary based on the possible theories under which a litigant may challenge a corporate board diversity statute. Standing requirements may differ depending on whether the case arises under the Fourteenth Amendment, the Dormant Commerce Clause, or the internal affairs doctrine. As noted, the three potential classes of litigants include: (1) the affected corporation; (2) directors asked to step down and director candidates passed over due to failure to meet the quota criteria; and (3) shareholders of the affected corporation. What may suffice to confer standing under a given theory for one class may not suffice for another.

B. Standing Under the Fourteenth Amendment

In \textit{Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville},\textsuperscript{157} the United States Supreme Court allowed to go forward a challenge to a municipal minority contractor set aside program, even though the plaintiff could not demonstrate that but for the offending statute, it would have been awarded the contract. This reasoning is relevant to corporate board diversity statutes, where the state may contend there was no harm from a reverse discriminatory practice, given that an alternative state of affairs cannot be firmly demonstrated. The opinion followed \textit{Regents of the University of California v. Bakke},\textsuperscript{158} which also did not require a rejected medical school applicant to demonstrate that the reverse discrimination was the but for cause of his injury. Corporate board diversity statutes should be construed in the same manner in a Fourteenth Amendment standing challenge.

1. Standing of the Corporation

Corporations are persons for purposes of the Fourteenth Amendment.\textsuperscript{159} The corporation should be able to allege that the imposition of the fines arising from a Fourteenth Amendment violation caused or


\textsuperscript{157} 508 U.S. 656 (1993).

\textsuperscript{158} 438 U.S. 265 (1978).

will cause the corporation to suffer concrete economic harm in the form of the fine. Even a compliant corporation will potentially face measurable injury. If the corporation, acting in its best interest, decides to expand the board to accommodate the directors required by the diversity quotas, it will incur additional director fees and recruiters’ fees to locate and place candidates. Additional expenses associated with this change include legal fees to prepare and implement board resolutions and possibly bylaw and charter amendments, together with filings with the Securities and Exchange Commission (“SEC”). Charter amendments will also entail payment of the fees to the secretary of state or other state body concerned with the organization and governance of the corporation. If, alternatively, the board removes directors to satisfy the quotas, they will still at a minimum incur the cost of SEC disclosures and legal fees to prepare board of directors resolutions and expenses of communications such as printing, telephone, and travel. As noted, on many occasions, placement fees must be paid to locate and seat the new directors. Less tangible but far more significant would be changes in governance practices and corporate direction brought about by the changes to the board. The corporation may also face a situation of potential non-compliance if various corporate board diversity statutes conflict with equal opportunity statutes. In that case, there is assured non-compliance and payment of a fine in one or more states, further inflicting certain monetary loss to the corporation. A declaration of invalidity of the relevant corporate board diversity statute would remediate these injuries. This should suffice to confer standing on the corporation to bring an action under the Fourteenth Amendment.

2. Standing of Director Candidates

If the corporation fails to expand its board of directors to accommodate the required number of women and racial minorities, it will need to remove sufficient numbers of directors to cause compliance. These removed directors have a cognizable grievance and standing to challenge the statute.160 Then there is the other circumstance where the corporation opts to expand its board of directors and retain all existing directors. In that case, under Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville,161 director candidates (other than sitting directors) who do not qualify based on race or sex have grievances at least sufficient to confer standing for the lost placement opportunity caused by a discrimi-

160. This Article does not examine rights of directors and obligations of corporations under employment law.
natory practice. Having standing does not mean such persons will prevail on the merits but rather means the courthouse door is open to hear their complaints.

3 Standing of Shareholders

By imposing race-based and sex-based quotas on the composition of the board of directors, corporate board diversity statutes limit a shareholder’s ability to elect the most worthy possible candidates. Incursions on the rights of shareholders to elect directors deprive shareholders of one of the most important rights available to the owners of the business. Therefore, shareholders are injured directly, and not derivatively, by corporate board diversity statutes. Corporate boards of directors serve at the pleasure of shareholders. While there is little doubt that limited director choice affects material shareholder rights, a defending state official may point out that other than in a proxy contest or where there are large insider share concentrations, shareholders of publicly traded corporations rarely locate and select a slate of directors. This instead is the role of the nominating committee of the board of directors or other appointing body within the corporation. The official might contend it would be the nominating committee that would need to bring the action on behalf of the corporation and that shareholders lack standing to assert the rights of others. This would be a question of fact, but if established as true, it would not affect the legal conclusion that the shareholder has been deprived of one of the most important rights associated with share ownership. Whether the shareholder nominates the candidate, the fact would remain that the shareholder has lost an opportunity to approve a board comprised of different and, in the view of the shareholder, better candidates. Shareholders approve directors in their sole discretion, without outside compulsion, for any reason or no reason. This well-established legal regime would collide with corporate board diversity statutes, when a longstanding director with whom the shareholder is pleased, is asked to step down to effectuate statutory compliance. Election of directors is a legally-recognized right, and losing the right to select one or more directors constitutes an actual and immediate injury. Shareholders, therefore, have standing to challenge corporate board diversity statutes under the Fourteenth Amendment.

162. See, e.g., RK Ventures v. City of Seattle, 307 F.3d 1045, 1057 (9th Cir. 2002) (finding that a shareholder will have standing under 42 U.S.C. § 1983 to bring an action for constitutional violations when the shareholder has been injured directly and independently from the corporation); Soranno’s Gasco, Inc. v. Morgan, 874 F.2d 1310 (9th Cir. 1989); Cooper v. McBeath, 11 F.3d 547 (5th Cir. 1994), cert. denied, 512 U.S. 1205 (1994).

163. See, e.g., DEL. CODE ANN. tit. 8, § 141(k).
If a court persists in viewing the right to challenge as vested in the nominating committee, the shareholder has an additional line of attack. While a party must generally assert his or her own legal rights and not those of others, this rule “assumes that the party with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation.”\textsuperscript{164} To qualify for this special status, (1) the litigant must have a close relationship with the person who possesses the right and (2) there must exist a hindrance to the possessor’s ability to protect its own interest.\textsuperscript{165} As to the first element, the shareholder has a close relationship with the nominating committee because the nominating committee determines the slate of directors under normal circumstances, and this relationship is crucial to shareholder welfare. To satisfy the second requirement requires a demonstration that the nominating committee, exercising its business judgment, will opt to appoint someone that meets the diversity requirement to avoid calumny and buy peace. This can be demonstrated. Additionally, the charter of the nominating committee may not authorize it to bring this sort of litigation. This exception clashes with notions of derivative shareholder rights, where shareholders must demand that the board of directors handle these matters and parties engage in endless squabbles over the need to make demand on the board and/or assert demand futility. This Article takes the position that the right to vote for directors is a fundamental one as concerns corporate matters and vests solely in the shareholder. It should not be necessary, therefore, to invoke the rights described in this paragraph, but even if the nominating committee is deemed the injured party, the shareholder can still bring the action under the exception because the shareholder has a vital relationship with the nominating committee, and the nominating committee is hindered in its ability to act for the shareholder’s benefit.

C. STANDING UNDER THE DORMANT COMMERCE CLAUSE

\textit{Franchise Tax Board v. Alcan Aluminum}\textsuperscript{166} addresses shareholder standing under the Commerce Clause. In \textit{Franchise Tax Board}, a shareholder challenged a taxation scheme under the Foreign Commerce Clause. The United States Supreme Court denied relief to foreign parent company Alcan Aluminum on other grounds but in dicta noted the aggrieved foreign parent company had standing to challenge the scheme because it had experienced an economic injury

\textsuperscript{164} Kowalski v. Tesmer, 543 U.S. 125, 129 (2004).
\textsuperscript{165} Id. at 130.
\textsuperscript{166} 493 U.S. 331 (1990).
in the form of a loss of value of its shareholdings. Under this view, **Franchise Tax Board** extends broader standing to shareholders than state law, which often relegates these claims to derivative actions. **Franchise Tax Board**, a Foreign Commerce Clause case, serves as influential precedent for Dormant Commerce Clause disputes. The Foreign Commerce Clause has at least the same breadth as the Commerce Clause, and several opinions speculate that it may have greater breadth. Any difference in breadth, however, should not affect questions of standing.

1. *Standing of the Corporation*

   The harms to the corporation described in the Fourteenth Amendment analysis will also confer standing under the Dormant Commerce Clause. An additional question is whether these damages occur in an activity involving interstate commerce. Incremental director's fees, placement fees, legal fees, publication costs, SEC filings, and the use of the instrumentalities of interstate commerce to attain them should normally be deemed incurred in interstate commerce. Material shifts in governance also affect interstate commerce.

2. *Standing of Director Candidates*

   Director standing for Dormant Commerce Clause grievances would need to rely on loss of a position for those directors making room for the special-status candidate or for denial of placement of someone competing for a director position that does not have special status in each case occurring in interstate commerce. The complaint should allege that the undue burdens on interstate commerce created by the corporate board diversity statutes have denied the candidate a placement opportunity through a categorical exclusion from consideration. This position is more strained than the one taken under the Fourteenth Amendment because the director is losing his position or not attaining one due to an undue burden on interstate commerce caused by reverse discrimination. This analytical leap presents a question whether directors or director candidates have standing to challenge a corporate board diversity statute under the Dormant Commerce Clause.

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3. Standing of Shareholders

Franchise Tax Board furnishes precedent for shareholder standing in connection with a Dormant Commerce Clause claim. That case recognized that the adverse effects on interstate commerce that injure the value of shareholdings will confer standing on shareholders experiencing such loss. The adverse effects on a shareholder’s right to elect a preferred slate of directors, and not one drawn from a quota, will remain cognizable under the Dormant Commerce Clause. Additionally, under the dicta contained in Franchise Tax Board, the shareholder may allege diminution in value of his or her shares associated with payment of fines or, alternatively, the appointment of substandard directors and incurrence of incremental costs to appoint them that the corporation must shoulder. These claims would be classic derivative claims under state corporation law, but can be asserted directly under the view set forth in Franchise Tax Board. Given that this authority comes in the form of dicta, the law remains unsettled on this question.

D. Standing Under the Internal Affairs Doctrine

Standing in an internal affairs-based challenge will be a question of the governing state conflicts rules to be applied. Rather than exhausting legal outcomes for all fifty states, this Article will concentrate on standing requirements of Delaware courts, which adjudicate a high percentage of these matters. Delaware courts and the courts of other states that apply Delaware law will normally accommodate internal affairs-based challenges made by affected corporations.

Though some of these cases involve directors and director liability, the cases have not been brought by directors. In order to have standing, Delaware stockholders were traditionally required to allege a special injury; this requirement can be satisfied by a particular right being asserted by the stockholder. Examples of these rights include the exercise of preemptive rights, determinations of corporate control, and other rights directly affecting the stockholder. In Tooley v. Donaldson, Lufkin, & Jenrette, Inc., the Delaware Supreme Court modified the special injury test and replaced it with the following formulation: “The stockholder’s claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate

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170. See, e.g., cases cited supra note 151.
173. 845 A.2d 1031 (Del. 2004).
that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation.\textsuperscript{174}

The \textit{Tooley} test does not alter the fact that stockholder rights will be directly and uniquely impaired by the operation of the corporate board diversity statutes and as explained in this Subsection, separate from the injury to the corporation. However, stating the legal test as triggered by breach of a duty is awkward in the setting of challenging an actual or threatened fine. Corporate board diversity statutes violate rights, but do not breach duties. Whether the Delaware Supreme Court intended this distinction between rights and duties has been clarified somewhat in a later appellate court case where the court stated that the \textit{Tooley} test considers: \textquote{\textit{(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)}\textsuperscript{175}} The \textit{Tooley} test plays a role in determining if a stockholder may bring an action directly or must do so derivatively. While this Article does not explore the use of derivative litigation in challenging corporate board diversity statutes, it recognizes that the \textit{Tooley} test will present questions of standing for the challenge brought by a stockholder. In every case, an internal affairs challenge can be brought only in the circumstance of a foreign corporation subject to conflicting requirements imposed by another state. There should be no internal affairs issue when the law of the state of incorporation imposes the requirement because the diversity quota would be encapsulated in the governance regime of the state of incorporation, resulting in no conflict of the laws. Therefore, the analysis below assumes each situation involves regulation of a foreign corporation by a state such as California that imposes a corporate board diversity statute.

1. \textit{Standing of the Corporation}

The previously-identified harms to the corporation associated with the directorship quotas imposed by corporate board diversity statutes should suffice for purpose of an internal affairs challenge. The corporation cannot manage among the most important of its affairs and responsibilities without assurances that its nominating committee may act without uncertainty and undue restraint. The injury experienced by the corporation is different from those incurred by the shareholder. The corporation loses the ability to function with the board of directors it nominates and incurs either costs or fines, as well as undergoing a change in governance. On the other hand, the share-

\begin{footnotesize}
\textsuperscript{175} El Paso Pipeline GP Co. v. Brinckerhoff, 152 A.3d 1248, 1260 (Del. 2016).
\end{footnotesize}
holders lose the ability to approve a board of directors of their choosing.

2. **Standing of Director Candidates**

Directors made to step down or excluded candidates for directorship suffer injury as already described. However, it is an open question whether this injury can be redressed through an internal affairs challenge. Many of the internal affairs cases concerning directors focus on which states should adjudicate their various misdeeds.176 Internal affairs law is intended to attach reliable and predictable bodies of law to internal corporate affairs and not to redress harms going beyond those goals. The best argument for director standing under an internal affairs theory is that the directors' fiduciary duties are compromised by the corporate board diversity statutes. Typically, the nominating committee of the board of directors presents a slate of candidates. By compromising director latitude in nominating candidates, corporate board diversity statutes force directors comprising that committee to breach fiduciary duties when forced to appoint a less than optimal candidate to satisfy the quota. It would seem to the author that such contention could be made only by the members of the nominating committee and not directors at large. Also, somewhat perversely, this claim could only be brought by those directors not removed by operation of the quotas. Removed directors would have been relieved of their fiduciary responsibilities to the corporation.

The discussion of director standing brings into focus the differences in standing that may exist for statutory claims versus constitutional claims. Constitutional claims may generally confer broader standing due to the need to redress the constitutional violation. Statutes, on the other hand, typically require the litigant to fall under the zone of interests protected by the statute. In this instance, the director would need to bring an action under the corporate law of the state of incorporation, which will be frustrated or even thwarted by the corporate board diversity statutes of another state. In the context of the Federal Administrative Procedure Act, the United States Supreme Court’s decision in *Sierra Club v. Morton*177 illustrates this potential different treatment for purposes of standing. In that case, the Supreme Court held that the Sierra Club lacked standing to allege a violation of the federal statute, concluding the Sierra Club experienced no legal harm and had instead a mere interest in the outcome. In doing so, the Court required (in addition to the customary Article III

177. 405 U.S. 727 (1972).
and prudential requirements) that an injury arising from a statutory violation fall within the zone of interests intended to be protected by the statute. 178 Due to the indeterminate identity of the statute on which a case would be brought, this Article makes no attempt to determine whether this conduct falls within the statutory zone of interests, which is also a question of the state law chosen to apply. This would be a case of first impression.

3. Standing of Shareholders

In states such as Delaware, even stockholders suffering tangible monetary injury may not bring actions in their own name to recover those losses. Instead, the stockholders must sue derivatively. This is the general rule in states that follow the Delaware line of thinking. In a derivative action, the stockholder sues to compel the board of directors to take appropriate action in the name of the corporation to redress the stockholder’s injury. To escape this requirement, the stockholder must meet the Tooley test of suffering injury independent of the corporation and receive the benefit of the remedy requested. A stockholder’s right to vote is a right conferred by statute on the stockholder179 and not the corporation. The interference with a stockholder’s right to vote presented by the corporate board diversity statutes is sufficient to satisfy the independent injury requirement and a defense to the fine or invalidation of the statute would redress the harm. This should confer standing to bring an internal affairs challenge, but the previously-discussed Tooley-required breach of duty versus violation of a right may remain an issue.

VI. PUBLIC POLICY CONSIDERATIONS

This Section discusses the public policy considerations pertaining to corporate board diversity statutes. This Section will show that corporate board diversity statutes advance no meaningful public policy and do harm. The analysis in Subsection A examines legislative findings concerning the California law, which vivify the questionable assumptions underlying corporate board diversity statutes. Subsection B identifies and analyzes key areas where corporate board diversity statutes either do not solve problems or actually cause problems. With respect to the California discussion, the California law creates quotas only for women and therefore the analysis only concerns women. While much of the logic will also apply to race, this Article does

not attempt to differentiate the two in Subsection A that immediately follows.

A. THE CALIFORNIA LEGISLATIVE FINDINGS AND DECLARATIONS: FACTS AND FALLACIES

This Subsection will identify and evaluate the legislative findings contained in Section 1 of the California Declarations and Findings. Section 1(a) provides:

More women directors serving of boards of directors of publicly held corporations will boost the California economy, improve opportunities for women in the workplace and protect California taxpayers, shareholders and retirees, including retired California state employees and teachers whose pensions are managed by CalPERS and CalSTRS. Yet studies predict that it will take 40 or 50 years to achieve gender parity, if something is not done proactively.\(^{180}\)

This California Declaration and Finding functions as a preamble. Section III of this Article analyzes corporate board diversity statutes under the Dormant Commerce Clause. It concludes corporate board diversity statutes do not discriminate against interstate commerce but have material adverse effects on interstate commerce. The California Declaration and Finding, which provides that the law protects California taxpayers, shareholders, and retirees, creates an issue of whether it does so in a manner that discriminates against interstate commerce. The author believes these protections to be illusory or incapable of proof in a legal sense and therefore should not be an issue under the Dormant Commerce Clause. And even if such benefits existed, it would be difficult to conclude a Dormant Commerce Clause violation results solely from these California-directed benefits. Instead, the Dormant Commerce Clause issues arise from the interstate entanglements created by the statutes. There is, however, another legal question. Advancing women in the workplace raises issues of director loyalty and whether the director acts for shareholders or employees. Directors who must answer to multiple constituencies will be conflicted and not serve exclusively the interests of shareholders. Apropos of shareholders, the references to California Public Employees’ Retirement System (“CalPERS”) and California State Teachers’ Retirement System (“CalSTRS”) arouse curiosity. These entities have considerable power over companies whose shares they hold and are perfectly capable of pressing for diversity, as they are now doing. The timetable of attaining gender parity and the wisdom of this goal is discussed below.

\(^{180}\) California Declarations and Findings, supra note 3, at § 1(a).
Section 1(c) of the California Declarations and Findings provides: Numerous independent studies have concluded that publicly held companies perform better when women serve on their boards of directors, including:

1. A 2017 study by MSCI found that United States' (sic) companies that began the five-year period from 2011 to 2016 with three or more female directors reported earnings per share that were 45 percent higher than those companies with no female directors at the beginning of the period.

2. In 2014, Credit Suisse found that companies with at least one woman on the board had an average return on equity (ROE) of 12.2 percent, compared to 10.1 percent for companies with no female directors. Additionally, the price-to-book value of these firms was greater for those with women on their boards: 2.4 times the value in comparison to 1.8 times the value for zero-women boards.

3. A 2012 University of California Berkeley study called “Women Create a Sustainable Future” found that companies with more women on their boards are more likely to “create a sustainable future” by, among other things, instituting strong governance structures with high levels of transparency.

4. Credit Suisse conducted a six-year global research study from 2006 to 2012, with more than 2,000 companies worldwide, showing that women on boards improve business performance for key metrics, including stock performance. For companies with market capitalization of more than $10 billion, those with women directors on boards outperformed shares of comparable businesses with all-male boards by 26 percent.

5. The Credit Suisse report included the following findings: (A) There has been a greater correlation between stock performance and the presence of women on a board since the financial crisis of 2008. (B) Companies with women on their boards of directors significantly outperformed others when the recession occurred. (C) Companies with women on their boards tend to be somewhat risk averse and carry less debt, on average. (D) Net income growth for companies with women on their boards averaged 14 percent over a six year period, compared with 10 percent for companies with no women directors.\textsuperscript{181}

This Article contends that corporate benefits alleged to spring from diversity conflate cause and effect. The data collected from the Russell 3000, which shows greater diversity in the larger companies in the index, suggests that diversity is a function of resources and suc-

\textsuperscript{181} Id. at § 1(c).
cess and not a cause of success. For example, in 2018, for the largest companies in the Russell 3000, women held 294 board seats, amounting to 25.3% of the total, which resulted in an average of just under three women directors per board. At the smallest end of the Russell 3000, 868 women held 13% of board seats, amounting to an average of one per company. The size contrast continues with initial public offerings (“IPOs”). In 2017, slightly less than half of IPOs occurred with no women on the boards. The lack of IPO diversity has been attributed to lack of pressure by securities underwriters to alter the composition of IPO boards. This makes sense. A large, seasoned public company functioning as a well-oiled machine with the bureaucracies to handle the administration of an ever-changing board is much better equipped to make room for newcomers than a start up or a smaller company struggling against brutal competition. The case of a dithering, diverse board of directors at Wells Fargo discussed below also explains the reluctance of venture concerns and IPOs to hand over governance of their businesses to untested and unfamiliar persons. Decisions at these concerns must be made quickly and nimbly. IPO underwriters will never risk their handsome fees with people unfamiliar with the business and who do not inspire their confidence. When stabilized and seasoned, the company can then experiment with newcomers. This is not to suggest that women and people of color are incapable of overseeing an IPO at the board level. Rather, the author is asserting that these businesses must remain focused and work with the people who built the business because of their intimate familiarity with it. Only when stabilized and seasoned, can firms transition to untested and less experienced newcomers. Inserting outsiders by legislative fiat may prove very harmful to these concerns or, at a minimum, add execution risk to a complicated and time-sensitive transaction. No underwriter will ever publicly admit this, but it is the reality.

As to the contention that women on boards cause superior performance, this Article has discussed the paternalistic nature of this position. But what of the studies cited? Besides conflation of cause and effect, the studies do not have clear and meaningful control mechanisms for performance factors such as size, industry, access to capi-
tal, and many other material factors. A consumer staples business will perform much better in a financial crisis than a manufacturer of heavy equipment or other economically-sensitive business. The studies do not adjust meaningfully for these factors and for this reason are unreliable. A better benchmark would be to compare results in the same company transitioning to diversity. If better results show after the change, this could be some evidence of influence, but it could also simply be a function of success, which breeds the capacity to bring in others.

Section 1(d) of the California Declarations and Findings provides:
Other countries have addressed the lack of gender diversity on corporate boards by instituting quotas mandating 30 or 40 percent of seats to be held by women directors. Germany is the largest economy to mandate a quota requiring that 30 percent of public company board seats be held by women; in 2003, Norway, was the first country to legislate a mandatory 40 percent quota for female representation on corporate boards. Since then, other European nations have legislated similar quotas include (sic) France, Spain, Iceland and the Netherlands.\(^{186}\)

This California Declaration and Finding is telling in its use of the word “quota,” thus admitting the law being proposed creates one. That Europe has imposed diversity quotas is not legally relevant or helpful. Europe does not have a Fourteenth Amendment. European corporate governance differs considerably from the American model and importing bits and pieces of it to America does not fit. Norway has had its laws on the books for more than fifteen years. The McKinsey Study\(^ {187}\) observes that Norway has not attained its goal of gender parity.\(^ {188}\) The author believes America should not look to Europe for guidance in these matters, but were it to examine Norway's sixteen year history of board quotas, it would find that its diversity measures have failed. What has resulted, instead, is what the author contends—benefits flowing to a small, elite group with no societal benefits. Following Europe is nothing more than an act of legislative mimicry, lacking in critical analysis.

Section 1(e) of the California Declarations and Findings provides:
One-fourth of California’s public companies in the Russell 3000 index have NO (sic) women on their boards of directors; and for the rest of the companies, women hold only 15.5 per-

\(^{186}\) California Declarations and Findings, supra note 3, at § 1(d).
\(^{188}\) Id. at 25.
A 2017 report prepared by Board Governance Research LLC, conducted by University of San Diego professor Annalisa Barrett, found the following:

1. As of June 2017, among the 446 publicly traded companies included in the Russell 3000 index and headquartered in California, representing nearly $5 trillion in market capitalization, women directors held 566 seats, or 15.5 percent of seats, while men held 3,089 seats, or 84.5 percent of seats.

2. More than one-quarter, numbering 117, or 26 percent, of the Russell 3000 companies based in California have no women directors serving on their boards.

3. Only 54, or 12 percent, of these companies have three or more female directors on their boards.

4. Smaller companies are much more likely to lack female directors. Among the 50 California-based companies with the lowest revenues, with an average of $13 million in 2015 revenues, only 8.4 percent of the director seats are held by women, and nearly half, or 48 percent, of these companies have no women directors. Among the 50 largest California companies, with an average of nearly $30 billion in 2015 revenues, 23.5 percent of the director seats are held by women. All of the 50 have at least one woman director.189

The importance of this legislative finding and whether it misleads depends on the measurement universe for publicly traded companies. If market capitalization is a proxy for importance, then (assuming solely for purposes of this limited discussion that gender parity is desirable) this is not a problem. As noted, women already hold more than a quarter of the board seats on the largest 100 companies in the Russell 3000.190 Women have lesser representation at smaller companies that may for any number of good and legal reasons, not want to tinker with the composition of their boards merely for the sake of change. The study also appears to include companies that do not trade publicly in any meaningful way, identifying the smallest group as averaging $13 million in revenues.

Section 1(f) of the California Declarations and Findings provides:

If measures are not taken to proactively increase the numbers of women serving on corporate boards, studies have shown that it will take decades, as many as 40 or 50 years, to achieve gender parity among directors, including:

1. A 2015 study conducted by the United State Government Accountability Office estimated that it could take

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189. California Declarations and Findings, supra note 3, at § 1(e).

190. See supra note 182 and accompanying text.
more than 40 years for the numbers of women on boards to match men.

(2) The 2017 Equilar Gender Diversity Index (GDI) revealed that it will take nearly 40 years for the Russell 3000 companies nationwide to reach gender parity—the year 2055.

(3) Nearly one-half of the 75 largest IPOs from 2014 to 2016 went public with NO (sic) women on their boards. Many technology companies in California have gone public with no women on their boards, according to a 2017 national study by 2020 Women on Boards.191

The Government Accountability Office study192 ("GAO Study") referenced in this California Declaration and Finding was derived from interviews with 19 "stakeholders" such as money managers, pension fund sponsors, institutional investors, corporate issuers, and other experts and specialists. The GAO Study considered data collected by Institutional Shareholder Services ("ISS") from the S&P 1500 index and various other components.193 The GAO Study states: "Some research has found that gender diverse boards may have a positive impact on a company's financial performance, but other research has not."194 While stakeholders generally agreed Securities Exchange Commission ("SEC") disclosure should expressly include information on board diversity, all but three stakeholders opposed government-imposed diversity quotas. The GAO Study states:

Several [stakeholders] suggested that quotas may have unintended consequences—boards may strive to meet the quota, but not exceed it; boards may appoint directors who are not the best fit for the board just to meet the quota; and there may be the perception that women did not earn their board seat . . . .195

The GAO Study also notes that CEOs are most frequently considered as part of the traditional pool of board candidates. Several stakeholders suggested that "boards recruit high performing women in other senior executive level positions, or look for qualified female candidates in academia or the nonprofit and governmental sectors."196 In so doing, the stakeholders admit there is a shortage of qualified candidates. The study fails to address the consequences of tapping talent from academia, nonprofits, and government. While such persons may

191. California Declarations and Findings, supra note 3, § 1(f).
192. GAO Study, supra note 24.
193. Id. at 2. The smaller universe of issuers resulted in an estimate of only 14,000 board seats. Id. at 28.
194. Id. at 5.
195. Id. at 21.
196. Id. at 18.
be competent in those spheres, they may lack entirely the experience and skill sets needed to serve as a director of a publicly traded, for-profit corporation. Public companies also face requirements to disclose if they have appointed to their audit committees “audit committee financial experts” which require specific competencies independent of sex or race.

Even more fundamentally perilous than the questionable justifications and damage done by directors attaining positions on factors other than merit, the California Declarations and Findings imply that gender parity should be the law’s objective. This collides with constitutional jurisprudence and is not workable as a matter of public policy. The most fundamental difficulty with this finding is that women’s participation should match that of men with no examination of the pool of qualified women in relation to men or consideration of material differences in interests to pursue a board position. It simply assumes women have the same qualifications and interests as men, which requires specific proof. A recent Wall Street Journal interview with Ilana Weinstein, a prominent recruiter of hedge fund talent, dramatizes this reality:

**WSJ:** Of the largest 50 U.S. hedge funds, only two have women as their top investment executives. Why is that?

**Ms. Weinstein:** It comes back to people needing to see people like themselves as role models. This creates a Catch 22.

I gave a lecture at Wharton a few years ago. There were probably 100 M.B.A.s in the room. Toward the end, a woman asked why there are so few women and what I was doing about it?

I turned to the class and said, “I want to ask the men, how many of you are interested in coming into the hedge fund industry?” I’d say 70%, 80% of the hands went up. Then I asked the women and it was three or four hands. I turned to her and said, “That’s the problem.”

Women comprise 47% of Wharton’s class of 2021. Ms. Weinstein’s response can be viewed at two levels. The first is that women

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198. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501 (1989) (stating that when special qualifications are required to fill specific jobs, comparisons to the general population—rather than the smaller group who possess the necessary qualifications—may have little probative value).
200. The Wharton School, *Wharton MBA Class Profile*, https://mba.wharton.upenn.edu/class-profile/ (last visited Sept. 16, 2019). Parenthetically, the author notes Wharton’s misleading 36% class composition for “U.S. students of color” includes Asians, and there is no further public refinement of racial or ethnic classification. The school’s approach is perfectly understandable, however. If it breaks out in a
require role models. If so, does someone appointed by force of law serve as a role model? On the second level, the response speaks loudly about differing interests between the sexes. Every Wharton graduate has numerous and exceptional career opportunities. If Wharton placement patterns differ by sex, attributing them to discrimination strains credulity. Some may explain this by differences in male and female socialization. If true, this is not discrimination and cannot be corrected by legislation (nor should it even be viewed as a problem). Moreover, there is nothing wrong with divergent interests and every woman who failed to raise her hand will assuredly be placed in an excellent position and nearly all will have multiple, attractive opportunities. But the proponents of corporate board diversity statutes believe directorships should be set with the mathematical exactitude of a quota, which has been rejected by the United States Supreme Court.\footnote{Local 28 of Sheet Metal Workers Int’l Ass’n v. EEOC, 478 U.S. 421, 494 (1986).}

While interests across race and sex may correlate, they do not move in lockstep. The law’s focus on directors and not the general populace also attracts concern. Why not impose a gender parity requirement to add women to the workforce of bricklayers or men to the workforce of nurses? Following the logic of the finding, the legislature should simply pass an omnibus gender parity law for all trades and professions. This raises the question of how far these laws could logically extend. On review, the appellate panel’s first question to counsel for the state might be: “Would a statute directing the corporation to have a diverse executive suite be constitutional?” To truly attain the statute’s purposes, a quota for executive suite members would then furnish (at least on paper) qualified candidates for positions as directors. The state should address the question whether the law could go this far and why it is not a better solution for the alleged dearth of women directors.

Section 1(g) of the California Declarations and Findings provides:

Further, several studies conclude that having three women on the board rather than just one or none, increases the effectiveness of boards, including:

Mass on Corporate Boards: Why Three or More Women Enhance Governance,” attaining critical mass going from one or two women directors to at least three women directors, creates an environment where women are no longer seen as outsiders and are able to influence the content and process of board discussions more substantially. (B) Boards of directors need to have at least three women to enable them to interact and exercise an influence on the working style, processes and tasks of the board, in turn positively affecting the level of organization within the firm they govern.

(2)(A) A 2016 McKinsey and Company study entitled “Women Matter” showed nationwide that companies where women are most strongly represented at board or top-management levels are also the companies that perform the best in profitability, productivity and workforce engagement. (B) Companies with three or more women in senior management functions score even more highly, on average, on the organizational performance profile, than companies with no women on boards or in the executive ranks. When there are at least three women on corporate boards with an average membership of 10 directors, performance increases significantly. 202

The critical mass theory posits that a single woman will be viewed as a token and three or more will not. But adding directors by force of law is the essence of tokenism, in which the position is not earned. Adding to the number of women to eliminate their being seen as tokens suggests other possibilities. Either the new group of women will form a faction, Balkanizing the board, or benighted male directors will experience a great awakening, suddenly embracing with open arms newcomers with whom there is little or no prior relationship. Permeating the California Declarations and Findings is the notion that there should be gender parity at the board level. At bottom, female status is not an accomplishment. The rest of the finding concerns improved performance, which has been discussed. As an anecdotal matter, the most director diverse company in the Fortune 500, Wells Fargo, 203 has some of the largest and most glaring deficiencies in board oversight. 204 Neither the diverse board nor diverse senior man-

202. California Declarations and Findings, supra note 3, at § 1(g).
203. MISSING PIECES REPORT (2018), supra note 26, at 25. Of Wells Fargo’s 19 directors, 7 are women, 2 African American, 1 Asian, and 3 Hispanic; broadest diversity is defined as having at least one director from each of the four major racial/ethnic groups defined by the census and at least one woman director. Id.
204. On February 8, 2018, Wells Fargo entered into a consent order with the Board of Governors of the Federal Reserve System (“FRB”) requiring the Wells Fargo board of directors to submit to the FRB a plan to enhance governance and oversight. On April 20, 2018, Wells Fargo entered into a consent order with the Consumer Financial Protection Bureau (“CFPB”) and the Office of the Comptroller of the Currency (“OCC”) to pay $1 billion in civil monetary penalties to resolve matters concerning Wells Fargo’s com-
agement teams at Wells Fargo were able to prevent its many failings and the board has now been identified as a contributor to the corporate malaise now affecting that institution.205

Concerning the authorities backing the California Declarations and Findings, the ninety-two page McKinsey Study,206 while laden with macroeconomic statistics and statements from luminaries, contains no concrete support for superior performance. Most of the data is global, not American and performance studies deal with soft skills like interpersonal behavior that cannot be measured in a meaningful way.207 But it is authoritative because McKinsey put its name on it. The report may be a helpful elucidation of barriers to diversity and solutions for same, but these do not support quota systems for corporate boards and was, therefore, used improperly by California lawmakers. The report also contains some internal inconsistencies. In one segment, it suggests gender parity as paramount and in others notes that women possess different career aspirations that affect their participation. The McKinsey Study assumes anything less than gender parity to be less than ideal without explaining that interests of men and women may differ for reasons other than oppression and discrimination. The study’s reference to “battlefield” conditions concerning pursuit of study and careers in science, technology, engineering, and mathematics encapsulates this bias: “[P]arity remains a battlefield in the scientific and technical sectors, with fewer women joining STEM disciplines . . . . “208 This hyperbolic phraseology from a serious firm like McKinsey suggests a bias toward equality of outcomes rather than equality of opportunity.

205. Rachel Louise Ensign & David Benoit, Top CEO Picks Reject Wells Fargo, WALL. ST. J., June 12, 2019, at A2 (noting the Wells Fargo board took weeks just to appoint a search firm to locate a new CEO).
206. MCKINSEY STUDY, supra note 187.
207. Id. at 13-15.
208. Id. at 12.
B. Public Policy Problems with Corporate Board Diversity Statutes

1. Corporate Board Diversity Statutes Do Not Attain Diversity

This Article examines two types of corporate board diversity statutes: ones that advance only women and ones that advance racial minorities (or a combination of both categories). With respect to racial minorities, what happens if only one minority is favored? For example, a statute that favors only African Americans. Excluded minorities would include Asians, Hispanics, and indigenous Americans. Beyond race, this disparity could also apply to special needs/disabled, veteran, as well as lesbian, gay, and transgender classifications. These additional classes are either statistically tracked or the subject of protective legislation. Yet this type of corporate board diversity statute offers no place for these other groups. In so doing, corporate board diversity statutes would fail to attain diversity in any meaningful sense by exclusion of minorities and other special classes of persons. This makes them very much unlike (and more insidious than) the statutes heretofore challenged under the Fourteenth Amendment, where women and a panoply of racial minorities were accorded disadvantaged status or selected under outright quotas. A reviewing court would be correct to conclude that rather than embody a sincere attempt to attain diversity, a limited corporate board diversity statute merely manifests the greater power of certain identity groups. If this were the case, a court should be hard pressed to conclude that the laws protect a disenfranchised minority or remediate past discrimination. And if this were the conclusion, then the laws lack any state interest—compelling or otherwise. Interpreted in this manner, corporate board diversity statutes favoring only one minority would cause harm by excluding other groups worthy of protection. Laws that impose quotas often result in harmful resentment and back-biting by excluded groups or groups that do not share in their benefits.209 Courts should assign weight to this reality and the likelihood it will occur.

2. The Private Marketplace Is Insisting on and Attaining Diversity

There are numerous examples of forceful efforts by institutional investors, proxy firms, corporate governance advisors, consultancies, and other professionals to impose their notions of diversity on the boards of directors of public companies. As noted, BlackRock has made specific requests of companies who fail to attain minimum acceptable standards. At March 31, 2019, BlackRock had approximately

209. See, e.g., GAO Study, supra note 24, at 21.
$6.52 trillion\textsuperscript{210} of assets under management, roughly half of which were comprised of equities of publicly traded companies. These assets place BlackRock as the world’s largest asset manager at the time of this writing.\textsuperscript{211} The Russell 3000 index, which comprises 98\% of the United States stock market as measured by market capitalization, is valued at approximately $30 trillion. As a major holder of this market capitalization, BlackRock alone can exert considerable influence and, in some cases, determine whether a slate of directors will be approved. Of course, neither corporate issuers nor institutional holders want a public fight over director selection, so changes will occur behind the scenes, with management and nominating committees poised to please. But rest assured, these forces have great influence and changes are occurring. The \textit{Missing Pieces Report},\textsuperscript{212} an annual study co-authored by Deloitte and the Alliance for Board Diversity, traces the progress of women and minorities in attaining directorships in companies comprising the Fortune 100\textsuperscript{213} and the Fortune 500.\textsuperscript{214} Because of various private market forces, diversity commands considerable attention in the executive suite. While these market forces may themselves foment conflict and resentment, they are merely the exercise of power conferred upon shareholders that have the right to hire managers like BlackRock that impose their will on companies comprising the portfolios they manage. These market forces work well. According to ISS Analytics, for the first half of 2019, women comprised 43\% of newly-elected directors in the Russell 3000.\textsuperscript{215} Through its lack of legitimacy and accountability, a legally-imposed diversity quota presents a different set of forces unrelated to underlying property rights.

3. \textit{The Quantum of Diversity Is Unclear and Cannot Be Ascertained}

One rejoinder to the problems identified in Subsection B(1) above is that some diversity is preferable to no diversity. This line of reasoning would acknowledge that corporate board diversity statutes are imperfect in their attempts to attain diversity, but nonetheless have


\textsuperscript{212} \textit{Missing Pieces Report} (2018), supra note 26.

\textsuperscript{213} The Fortune 100 is comprised of the 100 largest companies in America, as measured by annual revenues.

\textsuperscript{214} The Fortune 500 is comprised of the 500 largest companies in America, as measured by annual revenues. Subsumed within the Fortune 500 is the Fortune 100.

merit in making the incremental progress necessary to attain acceptable diversity. This reasoning has not been embraced by courts and also suffers from randomness. Some examples from the diversity industry may prove helpful in understanding this randomness. The Alliance for Board Diversity has set a goal that 40% of all board seats in the Fortune 500 be occupied by women and/or minorities by 2020.\footnote{16} The Alliance for Board Diversity does not explain how it arrived at this percentage. It makes no comparisons to the general population or to the population of qualified director candidates. Another organization, 2020 Women on Boards, has partnered with Equilar, a corporate governance consultant, to report diversity statistics for various classes of public companies. In its \textit{2020 Women on Boards Gender Diversity Index}\footnote{17} the authors set a goal for women to comprise 20% of all corporate boards by 2020. The report states: “Board diversity is not a social issue, it is a strategic imperative.”\footnote{18} The material in this report includes women and excludes racial minorities. This may explain the divergence of this goal from that articulated by the Alliance for Board Diversity. Also, the 20% is to be achieved by 2020 and so there is a temporal aspect to the goal. Nevertheless, no attempt is made to explain the purpose or desirability of the goal. It amounts to nothing more than a request for more.

\section*{4. Corporate Board Diversity Statutes Benefit a Privileged Few}

Corporate board diversity statutes benefit directly only a very small number of selected persons. Based on Russell 3000 data, the roughly 25,000 public company director seats\footnote{19} equals approximately half the student population at Michigan State University\footnote{20} or the population of a medium-sized suburb. If the seats are to be filled in proportion to each group’s percentage of the population at large, these numbers are about half that small number. These numbers are even further reduced by recycle rates, in which a single person hoards director positions, making the actual number of persons holding seats even smaller. What is more, the benefitted population is not a cross section of America. It is, instead an educated elite having considerable resources, both financial and influential. These persons are the antithesis of a disadvantaged group. In general, neither the wealth nor the standing of new directors will be affected in any material way by a board position. Laying bare these laws as to who benefits suggests an ulterior purpose to gather power for a particular class of per-

\begin{footnotes}
\footnotetext{16}{\textit{Missing Pieces Report} (2018), \textit{supra} note 26, at 11.}
\footnotetext{17}{\textit{2020 Women on Boards Report}, \textit{supra} note 23.}
\footnotetext{18}{\textit{Id.} at 1.}
\footnotetext{19}{\textit{See supra} note 25 and accompanying text.}
\footnotetext{20}{\textit{See MSU Facts,} \textit{Mich. State Univ.}, http://msu.edu/about/thisismsu/facts.php.}
\end{footnotes}
sons based on suspect categories. Such conditions, if realized, will be counterproductive to the diversity goal and do real harm. Because qualifications matter very much to board appointments and there is a limited supply, rather than adding more persons from the nominally protected class to boards, the more likely outcome is that existing directors from the special, protected class will simply take on additional assignments. If true, this means two things. First, the benefit will not extend to newcomers in any meaningful way. Second, already busy directors may be unduly burdened by the new responsibilities, diluting the quality of their contributions.

CONCLUSION

Through their imposition of race and sex-based quotas, corporate board diversity statutes are invalid under the Fourteenth Amendment. Corporate board diversity statutes impose unreasonable restraints on interstate commerce. Whether they are invalid under the Dormant Commerce Clause depends on the level of scrutiny assigned to purported state interests. A rational basis level of scrutiny will confer validity under the Dormant Commerce Clause but strict scrutiny will not. This Article argues that strict scrutiny should apply to the state’s interest in determining the outcome under the Dormant Commerce Clause. Corporate board diversity statutes interfere with corporate internal affairs. An internal affairs-based challenge to a corporate board diversity statute presents a question of conflict of laws. Outcomes will vary based on the forum where the case is presented and the law chosen to be applied. California courts will apply California law to any internal affairs challenge, while Delaware should not. While these inconsistent outcomes may be abhorrent as a doctrinal matter, this is the reality of the internal affairs question.

Three classes of litigants will potentially have standing: (1) the corporation, (2) director candidates passed over on the basis of race or sex and directors removed from the board because of their race or sex, and (3) shareholders. In practice, one would expect only shareholders will bring actions to challenge the statutes. All three injured classes have standing under the Fourteenth Amendment. Under the Dormant Commerce Clause, there is doubt whether removed directors and director candidates have standing, but shareholders and the corporation do. Internal affairs challenges also present unique issues of standing, with serious doubt whether directors would have standing.

Corporate board diversity statutes represent bad public policy for a number of reasons. First, they are unnecessary. Private market forces are already operating to cause desired diversity with far fewer collateral effects. The policy underpinnings that diversity improves
corporate performance are not proven and conflate cause and effect. Moreover, for purposes of establishing a governmental interest, corporate performance is not relevant to public policy for private enterprises in the hands of managers highly motivated to make a profit. Corporate board diversity statutes do real harm in the form of stigmatic injury to classes they purport to assist as well as fomenting deep-seated resentment by those pushed aside by their effects. Finally, corporate board diversity statutes benefit a privileged few and accordingly depart from remedial programs traditionally aimed at helping the disadvantaged.
AMONG JUSTICE JOHN PAUL STEVENS’S LANDMARK LEGACIES: TAHOE-SIERRA PRESERVATION COUNCIL, INC. V. TAHOE REGIONAL PLANNING AGENCY

D.O. MALAGRINÒ†

I. INTRODUCTION

In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,† Justice John Paul Stevens’s majority opinion made the Lucas v. South Carolina Coastal Council decision effectively immaterial because Justice Stevens treated partial, temporal regulatory takings the same as partial, spatial regulatory takings. And, by doing so, Justice Stevens refocused the doctrinal lens of takings law.

 Liberal jurists never liked the Lucas categorical test for regulatory takings, anyway. Justice Harry Blackmun’s dissenting opinion in Lucas (“[o]f missiles and mice”) equated Justice Antonin Scalia’s majority opinion to launching a missile to rid a mouse.3 Blackmun wrote,
“The Court makes sweeping and . . . misguided and unsupported changes in our takings doctrine . . . . Although it limits these changes to the most narrow subset of government regulation—those that eliminate all economic value from land—these changes go far beyond what is necessary . . . .”

He described the majority’s opinion in *Lucas* as having two components: (1) the Court’s new categorical rule (land use regulations that prohibit all economic uses of property are takings) and (2) the exception to it (unless the prohibited uses are common law nuisances).

Justice Stevens’s dissenting opinion in *Lucas* described the majority’s opinion as “lacking support in past decisions,” and the categorical rule as “wholly arbitrary.” He wrote that the *Lucas* approach to regulatory takings doctrine would “hamper the efforts of local officials and planners who must deal with increasingly complex problems in land-use and environmental regulation.”

And yet, it was *Lucas*’s very arbitrariness why it has become inconsequential: minimizing the obstacles to urban planning that it initially presented—that is, urban planners may better accomplish narrow scope suggests—not because he can intercept the Court’s missile, or save the targeted mouse, but because he hopes to limit the collateral damage the majority’s opinion causes. *Id.* at 1036–37.


5. *Id.* at 1046–47. “The Court . . . takes the opportunity to create a new scheme for regulations that eliminate all economic value. From now on, there is a categorical rule finding these regulations to be a taking unless the use they prohibit is a background common-law nuisance or property principle.” *Id.*

6. *Id.* at 1036. The Court reasoned:

In determining what is a nuisance at common law, state courts make exactly the decision that the Court finds so troubling when made by the South Carolina General Assembly today: They determine whether the use is harmful. Common-law public and private nuisance law is simply a determination whether a particular use causes harm.

*Id.* Further, the Court explained:

From now on, there is a categorical rule finding these regulations to be a taking unless the use they prohibit is a background common-law nuisance or property principle. . . . Once one abandons the level of generality of *sic utere tuo ut alienum non laedas* (use your own property in such a manner as not to injure that of another), ante . . . one searches in vain, I think, for anything resembling a principle in the common law of nuisance.

*Id.* at 1046–47.

7. *Id.* at 1063–64. “Although in dicta we have sometimes recited that a law ‘effects a taking if [it] . . . denies an owner economically viable use of his land,’ our rulings have rejected such an absolute position.” *Id.* (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

8. *Id.* at 1064. “In addition to lacking support in past decisions, the Court’s new rule is wholly arbitrary. A landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land’s full value.” *Id.*

9. *Id.* at 1070. “[T]hese officials face both substantial uncertainty because of the ad hoc nature of takings law and unacceptable penalties if they guess incorrectly about that law.” *Id.*
comprehensive zoning of uses for everyone’s mutual benefit by employing temporary regulations, which by definition will not be a complete destruction of property value.\textsuperscript{10} \textit{Lucas} often appears as one of the most important cases on regulatory takings law.\textsuperscript{11} But, as Justice Blackmun predicted then, rarely would regulatory programs wipe out all value altogether.\textsuperscript{12} So then, was \textit{Lucas} actually an insignificant decision, establishing a categorical rule of law that lacked any practical effect, as the reaction to it would be regulatory schemes that take some but not all value?\textsuperscript{13}

At the time, no one could know for sure; however, that question seemed on-target considering the majority opinion in \textit{Tahoe} directly interpreted \textit{Lucas},\textsuperscript{14} and in the years since 2002 local officials and urban planners have avoided \textit{Lucas} analyses altogether by incorporating non-permanent provisions in any regulatory scheme.\textsuperscript{15} In \textit{Tahoe}, the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{10} Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 335 (2002). The Court explained:
   A permanent deprivation of the owner’s use of the entire area is a taking of ‘the parcel as a whole,’ whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted. \textit{Tahoe-Sierra}, 535 U.S. at 332.
\item \textsuperscript{11} See James R. Rinehart & Jeffrey J. Pompe, \textit{Property Rights and Coastal Protection: Lucas and the U.S. Supreme Court}, 8 SOC’Y & NAT. RESOURCES 169, 169-76(2008). (“The case made its way to the U.S. Supreme Court, and became one of the most significant cases in U.S. planning history.”).
\item \textsuperscript{12} \textit{Lucas}, 505 U.S. at 1036 (Blackmun, J., dissenting). When the government regulation prevents the owner from any economically valuable use of his property, the private interest is unquestionably substantial, but we have never before held that no public interest can outweigh it. Instead the Court’s prior decisions uniformly reject the proposition that diminution in property value, standing alone, can establish a “taking”. \textit{Id}. (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 131 (1978)).
\item \textsuperscript{13} See e.g., Richard J. Lazarus, \textit{Putting the Correct “Spin” on Lucas}, 45 STAN. L. REV. 1411, 1427 (1993). “[B]ecause environmental protection laws almost never result in total economic deprivations, that categorical presumption will rarely apply. Instead, the negative implication of the category’s non-applicability will dominate the lower courts’ takings analyses. These courts will likely apply the opposite presumption that no taking has occurred.” \textit{Id}. \textit{See also Lucas}, 505 U.S. at 1051 (Stevens, J., dissenting). The court stated:
   Ultimately even the Court cannot embrace the full implications of its per se rule: It eventually agrees that there cannot be a categorical rule for a taking based on economic value that wholly disregards the public need asserted. Instead, the Court decides that it will permit a State to regulate all economic value only if the State prohibits uses that would not be permitted under background principles of nuisance and property law. \textit{Id}.
\item \textsuperscript{15} See e.g., Medical Marijuana Act, 35 PA. CONS. STAT. § 10231.1107 stating “In order to facilitate the prompt implementation of this act, the department may promulgate temporary regulations that shall expire not later than two years following the pub-
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majority held that under *Lucas*, for a regulation to be a “taking” (thus necessitating just compensation), the regulation must not only render the property devoid of all economically beneficial uses, but also must render the property valueless, recognizing that property is measured both spatially by metes and bounds, and temporally by duration.\(^\text{16}\)

This study will survey the impact *Tahoe* has had on regulatory takings doctrine since 2002, and will conclude that after *Tahoe*, *Lucas* became immaterial, and all regulatory takings cases now require a *Penn Cent. Transp. Co. v. N.Y.C.*\(^\text{17}\) analysis, as a result.\(^\text{18}\) Moreover, because regulatory takings doctrine highlights a deeply rooted prob-

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> [T]he court read our cases involving regulatory taking claims to focus on the impact of a regulation on the parcel as a whole. In its view a “planning regulation that prevents the development of a parcel for a temporary period of time is conceptually no different than a land-use restriction that permanently denies all use on a discrete portion of property, or that permanently restricts a type of use across all of the parcel.” In each situation, a regulation that affects only a portion of the parcel—whether limited by time, use, or space—does not deprive the owner of all economically beneficial use.


18. See Richard J. Lazarus, *Celebrating Tahoe-Sierra*, 33 ENVT. L. 1, 13 (2006) (noting *Lucas* has likely been relegated to a mere incidental footnote in takings law, and the Court’s earlier opinion in *Penn Central* is again the primary judicial text for adjudicating takings claims); see also, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537–39 (2005). The Court determined:

> Our precedents stake out two categories of regulatory action that generally will be deemed per se takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation. A second categorICAL rule applies to regulations that completely deprive an owner of “all economically beneficial use[s]” of her property. [The U.S. Supreme Court] held in *Lucas* that the government must pay just compensation for such “total regulatory takings,” except to the extent that “background principles of nuisance and property law” independently restrict the owner’s intended use of the property.
lem with takings clause analyses, this study goes further and suggests that takings clause analysis throughout its history improperly focuses on whether a governmental action is a “taking,” when what the courts’ really need to determine is what is the constitutionally-required just compensation for the governmental action.\(^{19}\)

**II. PRIMER ON THE LAW OF REGULATORY TAKINGS**

*Lucas*\(^{20}\) is immaterial after *Tahoe*\(^{21}\) because the government can totally evade a *Lucas*-required just compensation by limiting the duration of the regulation, thus making the regulation a taking of less than the complete value of the property and requiring every landowner who seeks just compensation to meet the *Penn Central*\(^{22}\) balancing test for the regulation to be considered a taking requiring just compensation. The result is that agencies no longer use permanent regulations since *Tahoe*.\(^{23}\) Therefore, regulatory schemes since 2002 have not rendered land valueless and thus have not been analyzed through the *Lucas* lens; the categorical test.\(^{24}\)

Outside these two relatively narrow categories (and the special context of land-use exactions . . .), regulatory takings challenges are governed by the standards set forth in *Penn Central*. The Court in *Penn Central* acknowledged that it had hitherto been “unable to develop any ‘set formula’” for evaluating regulatory takings claims, but identified “several factors that have particular significance.” Primary among those factors are “the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.” In addition, the “character of the governmental action”—for instance whether it amounts to a physical invasion or instead merely affects property interests through “some public program adjusting the benefits and burdens of economic life to promote the common good”—may be relevant in discerning whether a taking has occurred. The *Penn Central* factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules.

*Id.* (internal citations omitted).

19. “[N]or shall private property be taken for public use, without just compensation.” U.S. Const. amend. V. This provision is widely known as the “just compensation clause.” Also, widely known is the “takings clause,” which applies to each state through the Fourteenth Amendment. See Chicago, B & Q. R. Co. v. City of Chicago, 166 U.S. 226, 241 (1897).


23. See Lazarus, *supra* note 18, at 11 (stating, “In the relatively short time period since the Court’s *Tahoe-Sierra* ruling, its reaffirmance of the ‘parcel as a whole’ rule has had the greatest impact on pending litigation. Lower courts have seized on *Tahoe-Sierra* language to reject various landowner severance arguments and therefore their takings claims as well.”).

Further, the government ought to pay just compensation for losses accruing from the time a regulation effects a taking until the time the regulation is rescinded or amended.\textsuperscript{25} The U.S. Supreme Court presumably agrees with this notion;\textsuperscript{26} however, the case law has hovered around defining what is a taking, concluding that some regulations that logically are takings are somehow not takings requiring just compensation.\textsuperscript{27} Instead, the debate should focus not on whether a regulation is a taking but rather on what is the constitutionally-required just compensation for the taking. Additionally, the

\begin{quote}
Neither \textit{Lucas}, nor \textit{First English}, nor any of our other regulatory takings cases compels us to accept petitioners' categorical submission. In fact, these cases make clear that the categorical rule in \textit{Lucas} was carved out for the 'extraordinary case' in which a regulation permanently deprives property of all value; the default rule remains that, in the regulatory taking context, we require a more fact specific inquiry. Nevertheless, we will consider whether the interest in protecting individual property owners from bearing public burdens which, in all fairness and justice, should be borne by the public as a whole,\textit{Armstrong v. United States}, 364 U.S. at 49, justifies creating a new rule for these circumstances.\textit{Tahoe-Sierra}, 535 U.S. at 332.

25. \textit{See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles}, 482 U.S. 304, 321 (1987) ("We merely hold that where the government's activities have already worked a taking of all uses of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.").

26. \textit{See Ark. Game & Fish Comm'n v. United States}, 568 U.S. 23, 33 (2012) ("Ever since, we have rejected the argument that government action must be permanent to qualify as a taking. Once the government's actions have worked a taking of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.") (quoting \textit{First English}, 482 U.S. at 321); \textit{see also Nat'l Fuel Gas Distribution Corp. v. N.Y. State Energy Research & Dev. Auth.}, 265 F. Supp. 3d 286, 292 (W.D.N.Y. 2017) (reasoning "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective"); \textit{Knick v. Township of Scott}, 139 S. Ct. 2162, 2171 (2019) ("The government's post-taking actions (there, repeal of the challenged ordinance) cannot nullify the property owner's existing Fifth Amendment right: "Where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation.").") (quoting \textit{First English}, 482 U.S. at 321).

27. \textit{See Lingle v. Chevron U.S.A. Inc.}, 544 U.S. 528, 529 (2005) (finding that when a taking "does not substantially advance legitimate state interests" is not a valid takings test, but rather a substantive due process test); \textit{Covington v. Jefferson County}, 53 P.3d 828 (Idaho 2002) (determining that property owners did not allege they had been permanently deprived of all economic uses of their land to constitute a regulatory taking); \textit{Barefoot v. City of Wilmington}, 306 F.3d 113 (4th Cir. 2002) (discussing how residents did not have a takings claim because they had not shown actual harm or that the annexation went too far); \textit{Concrete Pipe & Prods. v. Constr. Laborers Pension Tr.}, 508 U.S. 602, 645 (1993) (discussing diminution in the value of property, stating "our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking"); \textit{Village of Euclid v. Ambler Realty Co.}, 272 U.S. 365, 384 (1926) (demonstrating approximately 75% diminution in value); \textit{Hadacheck v. Sebastian}, 239 U.S. 394, 405 (1915) (involving a 92.5% diminution in value).
courts should analyze this and all regulatory takings questions under *Penn Central*, where the *ad hoc* balancing test is used to determine what compensation is just, rather than what is a taking.

The Constitution requires just compensation. Does that not call for a *Penn Central* analysis for all takings anyway, looking at the economic impact of the property holder and the character of the government action to determine what is “just?” It is a multi-factor test, considering the social value of what the government has done and seeking a result that is fair and substantially just. Sure, the courts should liberally interpret what constitutes a taking. Unlike a common law nuisance—wherein the abstraction is that "you should have known that you cannot use your property in a way that will substantially and unreasonably interfere with your neighbor’s use of their property"—a regulatory change or new zoning ordinance that limits the previously-lawful use of your property actually by definition takes away something you would have had the right to do previously. Who can deny that nearly every law takes a stick out of the bundle? More importantly, though: what is the just compensation due when a regulation takes?

It is inconceivable to think that anything less than a regulation that stripped a fee simple of all value is a taking only if it meets the

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28. U.S. COnst. amend V. “[N]or shall private property be taken for public use, without just compensation.” Id.

29. *Penn Central*, 438 U.S. at 121–22. The Court explained:

The government “takes” property within the meaning of the Fifth Amendment when it uses its own property in such a way that it destroys private property,” enacts a regulation that “forces a property owner to submit to a permanent physical occupation or deprives her of all economically beneficial use of her property,” or “recharacterizes as public property what was previously private property.”

Thus, the federal Supreme Court has concluded that “the particular state actor is irrelevant,” and that “if a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.”


In sum, the Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking. To be sure, the manner of state action may matter: Condemnation by eminent domain, for example, is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, depending on its nature and extent. But the particular state actor is irrelevant. If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation. “[A] State, by ipse dixit, may not transform private property into public property without compensation.”

Penn Central requirements, especially considering Penn Central’s test for a compensable taking to be the distinct investment-backed expectations formulation. This formulation really is for the purpose of determining what would be just compensation, not what is a taking.

Further, under Lucas, if compensation is required, there arises the problem of determining just what interest the government has taken; although the regulation must presumably have taken all economic use of the land, or even more significantly under Tahoe have taken all value of the land, what happens when the regulation that has gone too far is later repealed? The title holder would have received an undeserved windfall if the just compensation truly had compensated for the permanent deprivation of all value of the prop-


31. See Penn Central, 438 U.S. 104, 121 (1978) (explaining when a regulation interferes with investment-backed expectations, the regulation can equate to a taking if it results in investors not being able to earn a “reasonable return” on their investment).

32. Consider: “While [prior] cases considered whether particular regulations had “gone too far” and were therefore invalid, none of them addressed the separate remedial question of how compensation is measured once a regulatory taking is established.” Tahoe-Sierra, 535 U.S. at 330.

33. Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922). “The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” Id. See Lucas, 505 U.S. at 1014–15 (“Nevertheless, our decision in Mahon offered little insight into when, and under what circumstances, a given regulation would be seen as going ‘too far’ for purposes of the Fifth Amendment. In 70-odd years of succeeding ‘regulatory takings’ jurisprudence, we have generally eschewed any ‘set formula’ for determining how far is too far, preferring to ‘engage in . . . essentially ad hoc, factual inquiries.’”).

34. Bailey v. United States, 78 Fed. Cl. 239, 270 (Ct. Cl. 2007). The Court of Claims provided that:

Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain. But “no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.” Bailey, 78 Fed. Cl. at 270 (quoting First English, 482 U.S. at 32).
property, that is if it contemplated infinite duration of the regulation. Yet, under Tahoe the compensation award must be for permanent losses.

In fact, what the cases since Tahoe have shown is that it is likely that most regulations, of course, will not deprive the property owner of the entire value of the property. These may, however, destroy use and enjoyment of the property just as effectively as physical occupation or destruction would do. The Lucas/Tahoe rules really afford very little protection against such regulatory takings; yet, does not justice require compensation for them? Yes.

In Tahoe, the Supreme Court held that temporary development moratoria do not automatically constitute regulatory takings requir-


The analysis of compensation rules encompasses two distinct issues. (1) The first is that the rules themselves affect the decisions of both government and landowners. The government’s appetite for private property is limited by the acquisition costs. The landowner’s investment in property improvements depends on the level of compensation if the land is taken. (2) The second is that the perceived fairness (equity) of the outcome depends on the compensation.

The importance of an equitable outcome is highlighted in the Supreme Court’s 1960 decision in Armstrong v. United States: “The Fifth Amendment’s guarantee [is] designed to bar Government from forcing some people alone to bear the public burdens which, in all fairness and justice, should be borne by the public as a whole.” Id. at 57 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

36. Tahoe-Sierra, 535 U.S. at 324 (noting treating all land use regulations as takings “would transform government regulation into a luxury few governments could afford”).

37. See e.g., Colony, 888 F.3d at 447 (discussing when the property owner has some value remaining in his title); Appolo Fuels, Inc. v. United States, 381 F.3d 1338 (Fed. Cir. 2004) (in which a coal producer sued the United States claiming temporary and permanent regulatory takings of surface mining leases; see also, Daniel L. Siegel, The Impact of Tahoe-Sierra on Temporary Regulatory Takings Law, 23 UCLA J. ENVTL. L. & POL’Y 273, 302 (2005); Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1361 (Fed. Cir. 2004) (finding that the lessors failed to show a compensable taking, stating: “The Act required complex regulatory decision making relating to the significant environmental and health hazards at the site, and thus the delay could not be deemed extraordinary as required to establish a compensable regulatory taking. Further, the government’s concern for the public welfare in protecting the public from the possible release of radioactive was a proper consideration in determining whether unwarranted delay in permitting drilling near the site resulted in an unconstitutional taking.”).

38. See 31 AM. JUR. PROOF OF FACTS 3d 563 (2018) (stating that “absent a physical occupation of a landowner’s property, an overly intrusive government regulation can have the same effect by destroying the use and enjoyment of private property. For example, a single-family zoning regulation aimed at preserving neighborhood character may serve a legitimate public purpose while depriving a landowner of all beneficial use of his property. In such an instance, courts have employed a balancing of interests test focusing on the nature and extent of the benefit derived for the public and the nature and extent of the loss occasioned on the landowner.”).
ing just compensation under the Fifth Amendment. Whether a takings claim requires compensation when a government enacts temporary regulation denying property owners all viable economic use of property is to be decided by applying factors of Penn Central.

I hasten to say: Justice Stevens in Tahoe probably misapplied the Lucas standard for meeting the categorical rule by stating that the Lucas test turned on the regulation having “wholly eliminated the value of Lucas’s fee simple title.” However, simply looking at the text of the majority opinion in Lucas, this test only calls for a regulation that denies “all economically beneficial or productive use” of the land to meet the categorical rule’s standard for compensation. Justice Stevens’s characterization of what happened in Lucas probably was not accurate because the land would have still had a market value, even if only on the prospect of eventual change in the law.

The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of per se rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by “essentially ad hoc, factual inquiries,” designed to allow ‘careful examination and weighing of all the relevant circumstances.”

It may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism. But given the fact that the District Court found that the 32 months required by TRPA to formulate the 1984 Regional Plan was not unreasonable, we could not possibly conclude that every delay of over one year is constitutionally unacceptable. Formulating a general rule of this kind is a suitable task for state legislatures. We conclude, therefore, that the interest in “fairness and justice” will be best served by relying on the familiar Penn Central approach when deciding cases like this, rather than by attempting to craft a new categorical rule.

The categorical rule that we applied in Lucas states that compensation is required when a regulation deprives an owner of “all economically beneficial uses” of his land. Under that rule, a statute that “wholly eliminated the value” of Lucas’ fee simple title clearly qualified as a taking. But our holding was limited to “the extraordinary circumstance when no productive or economically beneficial use of land is permitted.”

See United States v. Miller, 317 U.S. 369, 374 (1943) (discussing an owner’s property value increasing due to a government project on an adjacent land and knowledge that the land may be condemned as well).
I say “probably” because whether the phrase fairly captures what the Lucas rule was meant to cover depends on how one reads: “no productive or economically beneficial use of the land is permitted.” For example, in his dissent in Tahoe, Justice William Rehnquist said Lucas was about total deprivation of use, not total deprivation of value—the fact that the law could change may mean that the land has a market value even though the owner cannot use the land, regardless of whether the prohibition of use purports on its face to be temporary or permanent. However, we cannot ignore the observation that Justice Stevens was deliberate in his majority opinion in Tahoe when interpreting Lucas, rendering Lucas effectively inapplicable to all government regulations since, thus requiring all takings cases to be analyzed under Penn Central. But, do we analyze a case to determine

The basic legal standard for determining what constitutes just compensation is well established: the owner is entitled to the fair market value, in turn, refers to the amount that a willing buyer would pay a willing seller of the property, taking into account all possible uses to which the property might be put other than the use contemplated by the taker.

44. Lucas, 505 U.S. at 1017.

We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation. “For what is the land but the profits thereof[?]” Surely, at least, in the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply “adjusting the benefits and burdens of economic life,” in a manner that secures an “average reciprocity of advantage” to everyone concerned.

45. Tahoe-Sierra, 535 U.S. at 346–47.

Neither the Takings Clause nor our case law supports such a distinction. For one thing, a distinction between “temporary” and “permanent” prohibitions is tenuous. The “temporary” prohibition in this case that the Court finds is not a taking lasted almost six years. The “permanent” prohibition that the Court held to be a taking in Lucas lasted less than two years. The “permanent” prohibition in Lucas lasted less than two years because the law, as it often does, changed... Under the Court’s decision today, the takings question turns entirely on the initial! label given a regulation, a label that is often without much meaning. There is every incentive for government to simply label any prohibition on development “temporary,” or to fix a set number of years. As in this case, this initial designation does not preclude the government from repeatedly extending the “temporary” prohibition into a long-term ban on all development. The Court now holds that such a designation by the government is conclusive even though in fact the moratorium greatly exceeds the time initially specified. Apparently, the Court would not view even a 10-year moratorium as a taking under Lucas because the moratorium is not “permanent.”


The categorical rule that we applied in Lucas states that compensation is required when a regulation deprives an owner of “all economically beneficial uses” of his land. Under that rule, a statute that “wholly eliminated the value” of Lucas’ fee simple title clearly qualified as a taking. But our holding was limited to “the extraordinary circumstance when no productive or economically beneficial use of land is permitted.” The emphasis on the word “no” in the text
whether or not it is a taking requiring just compensation, or do we use that multi-factor test to determine what would be just compensation because clearly there had been something taken?

The Fifth Amendment provides “. . . nor shall private property be taken for public use without just compensation.” The clause has two requirements: (1) all takings must be for public use, and (2) even takings that are for public use must be accompanied by just compensation. As written, the Fifth Amendment necessitates an analysis of four distinct concepts: (1) private property, (2) taking, (3) public use, and (4) just compensation. The discourse on the law of regulatory takings has focused on what is and is not considered a taking requiring just compensation. To what is a taking, the Court has treated public use as the threshold requirement for a permissible taking rather than as a threshold requirement for determination of just compensation.

For a long period, the requirement was understood to mean that property could be taken only for use by the public; the fact that the taking was beneficial was not enough. Eventually, however, courts concluded that a wide range of uses could requisitely serve the public, even if the public did not in fact gain possession of the property post-
taking. The current jurisprudence has identified three types of takings. First, a forced acquisition of title [and/or physical occupation] is a taking and the market value is the measure of compensation. Second, a regulation that totally deprives a landowner of all economically beneficial use of the land is a taking and the market value is the measure of compensation. Third, a regulation not totally depriving a landowner of all economically beneficial use of the land may or may not be a taking, depending on the Penn Central factors. The Penn Central factors are: (1) the economic impact on the property-holder, particularly the interference with the owner's investment-backed expectations; (2) the character of the governmental action, under which the Court looks at (a) the way the action impacts the property (for example, is it like an acquisition, a physical invasion of the property?), and (b) the social value of the action. If the Court finds a regulation not totally depriving a landowner of all economically beneficial use of the land to be a taking, then the measure of compensation would be the market value of what has been lost. Note that there is not really a difference between what is happening to the owner's

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53. See Id. at 244 (“The [State’s] Act advances its purposes without the State’s taking actual possession of the land. In such cases, government does not itself have to use property to legitimate the taking; it is only the taking’s purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.”).

54. See United States v. Pewee Coal Co., 341 U.S. 114, 120 (1951) (“Market value, despite its difficulties, provides a fairly acceptable test for just compensation when the property is taken absolutely.”).

55. See Lucas, 505 U.S. at 1019 (1992) (discussing it is rare for a regulation to remove all of the economically beneficial use of the property). “[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.” Id. at 1019.

56. Tahoe-Sierra, 535 U.S. at 330; see Penn Cent., 438 U.S. at 105 (discussing the factors for a just taking).

57. See Penn Cent., 438 U.S. at 105 (discussing the factors for a just taking). For example, is it like an acquisition, a physical invasion of the property?

58. See Penn Cent., 438 U.S. at 105 (discussing the factors for a just taking). For example, regulations are more likely to be held takings if they are not reasonably necessary to effectuate a substantial public purpose.

59. Tahoe-Sierra, 535 U.S. at 330. “[A]sk whether there was a total taking of the entire parcel; if not, then Penn. Central was the proper framework.” Id.; see also Penn. Central, 438 U.S. at 124.

60. See Bauman v. Ross, 167 U.S. 548, 574 (1897).
rights in any particular instance because the stratification of takings is simply a separation in the degrees of magnitude of the taking, no less justifying an analysis of what is the proper just compensation under the fifth amendment to the landowner, although the Court has not followed this train of thought.

In Tahoe, the Supreme Court ruled that the moratoria at issue were not takings within the meaning of the Fifth Amendment; and, for this reason, the landowners were not entitled to compensation.61 The Court’s rationale rested on the temporary nature of the moratoria and the public purpose they served.62 The Court held: “[w]hether a temporary moratorium effects a taking is neither a ‘yes, always’ nor a ‘no, never;’ the answer depends on the particular circumstances of the case.”63

Come on. No matter what the circumstances, moratoria such as these take.64 Why then decline to recognize that they are takings re-

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[When part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition, as to be in itself of less value than before, the owner is entitled to additional damages on that account.

Id. See also Pewee Coal, 341 U.S. at 119–20.


Id.

61. Tahoe-Sierra, 535 U.S. at 303 (2002) (noting that the Court held the moratoria ordered by TRPA are not per se takings of property requiring compensation under the Takings Clause because the regulation was temporary and did not deprive the land owners of all economic use).

62. Id. at 332.

Hence, a permanent deprivation of the owner’s use of the entire area is a taking of ‘the parcel as a whole,’ whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.

Id.

63. Id. at 321.

64. See generally id. at 354 (Rehnquist, J., dissenting).

Resolution 83–21 reflected this understanding of the limited duration of moratoria in initially limiting the moratorium in this case to 90 days. But what resulted — a “moratorium” lasting nearly six years — bears no resemblance to the short-term nature of traditional moratoria as understood from these background examples of state property law. Because the prohibition on development of nearly six years in this case cannot be said to resemble any “implied limitation” of state property law, it is a taking that requires compensation.

Id.
quiring just compensation under the Fifth Amendment? The question should be what would constitute “just compensation,” which very well may be zero in some circumstances. Lucas and Tahoe, read together and interpreted since 2002, have set up a total deprivation versus partial deprivation distinction that is arbitrary in many ways.65

Why should an owner who loses ninety percent of all economically beneficial uses, including what may very well be one-hundred percent of all the uses he actually planned on pursuing, have his interest weighed against the social value of the regulation when deciding whether to compensate him at market value? Whereas an owner who loses one-hundred percent of uses gets to be compensated at market value without a court subjecting the owner to the balancing test.66

Further, why should an owner who loses one-hundred percent of beneficial uses under a regulation that purports to be temporary be treated differently from one who loses one-hundred percent of beneficial uses under a regulation that purports to be permanent, given that it is actually impossible to know what will prove temporary and what will prove permanent?67

But in drawing a distinction, as we historically have, between acquisitions and regulatory takings, we have already established a completely arbitrary distinction as the foundation for our takings law.68

To see why this is an arbitrary distinction it is important to understand how we conceive property.

III. BRIEF HISTORICAL SUMMARY OF CONSTITUTIONAL ANALYSES OF REGULATORY TAKINGS

When a community recognizes an individual to own some piece of the earth’s resources, what is it that she has? She has a bundle of powers and freedoms over that piece of the earth’s resources.69 The community’s regulations define what that bundle of powers and free-

65. See generally Lucas, 505 U.S. at 1029 (discussing just compensation requirement for a regulation depriving the property of all economic beneficial use); Tahoe-Sierra, 535 U.S. 302 at 342 (discussing a temporary regulation that does not require just compensation due to not depriving all economic value).
66. Cf. Palazzolo v. Rhode Island, 533 U.S. at 616 (2001) (invoking a property owner who failed to show he was deprived of all economically beneficial use of the property); Lucas, 505 U.S. at 1015–16 (1992) (invoking a state action which sought to sustain a regulation that deprived land of all economic and beneficial use effected a taking).
67. As of 2018, the thrilling conclusion to the lots referenced in Lucas, in Wild Dunes, Isle of Palms, SC., is that privately-owned, large, waterfront homes reside on each respective lot.
68. Physical acquisitions do not get weighed against the social value of the government action; they are always called takings and therefore market value compensation is always required. See Thomas J. Miceli and Kathleen Segerson, Regulatory Takings: When Should Compensation Be Paid, 23 J. LEGAL STUD. 749, 749–76 (1994).
doms are. They directly define how she can acquire the right to say that she owns that piece of the earth, and they both directly and indirectly define what that right lets her do—what powers and freedoms she actually has.

If at the time she acquires property, existing regulations limit what she can do with it, then the bundle of powers and freedoms she acquires—what counts as her right in the piece of earth she has acquired—does not include powers and freedoms to do the things those regulations prohibit. If regulations that existed at the time a property-holder acquired the property were invalid because they violated some other provision of the federal or state constitutions, for example the due process clause, then the property-holder could, of course, challenge them. But she could not seek compensation under the takings clause, because at the time she acquired the property, she just did not get any power or freedom that the regulations withheld, and the market price she paid presumably reflected that.

Almost all government action takes rights, value, power, and freedom from people’s property; likewise it increases the rights, value,
power, and freedom of other people. The government does not tax people for the gain of such action. Also, our founding fathers made it abundantly clear in the Constitution that whenever government deprives people of property, those people are to be given what justice requires: “Private property will not be taken for public use, without just compensation.” In fact, this clause is the only reference in the Constitution to a mandated remedy for the people.

Prior to 1922, the U.S. Supreme Court had held that regulation of land was not a taking. The Court opined that this was an exercise of the government’s police power to protect lives, safety, welfare, and morals. For instance, in 1915, in *Hadacheck v. Sebastian*, the Court held that a Los Angeles ordinance prohibiting the operation of a brick kiln or a brick yard within the city limits was a legitimate exercise of police power and was constitutional, even though the plaintiff claimed that the ordinance rendered his property valueless because it could only be used as a brickyard. Justice Joseph McKenna’s discussion in the majority opinion effectively states the Court’s reasoning as: “there must be progress, and if in its march, private interests are in the way, they must yield to the good of the community.” Justice McKenna also noted the ordinance did not amount to a complete denial of the use of Mr. Hadacheck’s property, and a brickyard, actually, was inconsistent with neighboring uses. Mr. Hadacheck could potentially use the clay on his land, of course for Mr. Hadacheck it would be “prohibi-

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75. See *First English*, 482 U.S. 304, 318 (discussing temporary regulatory takings require just compensation, as in any other kind of takings).

76. See infra note 105 and accompanying text for an analysis of taxation of increased property values under takings law.


79. 239 U.S. 394 (1915).

80. *Hadacheck*, 239 U.S. at 410. The Court stated:

To so hold would preclude development and fix a city forever in its primitive conditions. there must be progress, and if in its march private interests are in the way, they must yield to the good of the community. The logical result of petitioner’s contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground, and that if it grows at all it can only grow as the environment of the occupations that are usually banished to the purlieus.

Id.
tive from a financial standpoint,"81 in other words, more expensive to do so. Justice McKenna discussed establishing a nuisance-control measures test.82 This case was one of the first cases involving regulatory takings under zoning law. It recognized the city’s police powers and use of zoning ordinances whereby a city may enact regulations to protect the safety of lives and property, welfare, peace, and morals.

A. Current State of U.S. Supreme Court Interpretations of Regulatory Takings

In 1922, Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922),83 the U.S. Supreme Court held that a Pennsylvania state law called the Kohler Act84 was not a legitimate exercise of police power, and instead amounted to an unconstitutional taking of property rights without adequate and just compensation.85 Justice Oliver Wendell Holmes, Jr. discussed the Court’s decision and focused on the extent of the diminution in the value of the property in determining whether a regulatory

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81. Id. at 412. “This is not urged as a physical impossibility, but only, counsel say, that such transportation and the transportation of the bricks to places where they could be used in construction work would be prohibitive ‘from a financial standpoint.’” Id.
82. Id. at 413. To a certain extent the latter comment [that the business was not a nuisance] may be applied to other contentions; and, besides, there is no allegation or proof of other objectionable businesses being permitted within the district, and a speculation of their establishment or conduct at some future time is too remote.

Id.
83. 260 U.S. 393 (1922). Homeowners sought to enjoin a coal mining company from mining beneath their property. The homeowners purchased the surface rights of the property from the company some years prior with the deed expressly reserving the company the right to remove all coal underneath the land. The plaintiffs argued the Kohler Act, 1921 Pa. Laws 1198, extinguished any subsurface rights of the company. Ultimately the Court held the Kohler Act qualified as an unconstitutional taking of the defendant’s contractual and property rights due to the lack of just compensation. Mahon, 260 U.S. at 412–13.
84. Id. The statute forbids the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a human habitation, with certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person.
85. Id. at 414–15. The court reasoned:

It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case, “For practical purposes, the right to coal consists in the right to mine it.” What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does.

Id. (quoting Commonwealth v. Clearview Coal Co., 100 A. 820, 820 (Pa. 1917)) (citations omitted).
act constituted a taking. Holmes's oft cited passage in Pennsylvania Coal is, “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” Thus, deriving a diminution-of-value-test.

Courts have required that people are made whole again after a government deprives them of property—placed, so far as money can, where they would have been if the government had not deprived them of the property. Courts have made that standard ostensibly manageable by construing “takings of property” narrowly. Is this limited interpretation truly the intention of the founding fathers?

1. Developing a Doctrine Since Pennsylvania Coal

In Penn Central Transportation Co. v. New York City, the U.S. Supreme Court suggested that a balancing test is required when a regulation has taken any economic value or use from a parcel of land. In fact, the Court held that a regulatory takings claim re-

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86. Id. at 414.

As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.

87. Id. at 415; see also Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (“In Justice Holmes’ well-known, if less than self-defining, formulation, ‘while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking.’”); Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 326 (2002) (“In subsequent opinions we have repeatedly and consistently endorsed Holmes’ observation that ‘if regulation goes too far it will be recognized as a taking.’”); Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005) (“In Justice Holmes’ storied but cryptic formulation, ‘while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.’”).

88. Armstrong v. United States, 364 U.S. 40, 49 (1960) (holding government action effecting a taking of property rights implicates the constitutional obligation to pay just compensation); see also Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (citing Holmes, J.) (“[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).

89. Lucas, 505 U.S. at 1017 (construing a taking as a physical appropriation or when an owner of real property is denied all economically beneficial use of the land).

90. 438 U.S. 104 (1978). Restrictions prohibiting the construction of additional office space on top of the historic Grand Central Terminal qualify as a taking. The Court considered a variety of factors, including a regulations economic impact on the claimant, the extent to which a regulation interferes with landowner’s investment backed expectations, and the nature of the government’s action. Here, the restrictions substantially related to the promotion of general welfare, and although the restriction limited enhancements that could be made to the property, they did not deny the owners’ reasonably beneficial use. Ultimately, the Court held the restriction did not qualify as a taking as since it did not interfere with the owners’ present use of the building or significantly impact the claimants’ investment backed expectations. Penn. Cent., 438 U.S. at 124.

91. Id. at 124.
quires an “ad hoc, factual inquiry” where the “economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are . . . relevant considerations.” So, too, is the character of the governmental action.92 93

2. Drawing a Line Between Legislative Land Use Controls and an Unconstitutional Taking Without Just Compensation

The *Penn Central* multi-factor test, which takes account of the social value of what the government has done, makes sense only if we think the clause has the more broad purpose of compensation at the level of what justice requires.94 Justice is the goal under *Penn Central* and a strict market value analysis of what is considered just compensation falls short.95 If we think that the clause is solely about making the property-holder whole, then however good the government’s reason for removing a property right is, and however burdensome on the public finances market-value compensation would be, those factors would not be considered in deciding what the property-holder is due.96

Consider that the Court has always required that the most obvious category of takings—government acquisitions—be compensated

In engaging in these essentially ad hoc factual inquiries, the Court’s decisions have identified several factors of relevant significance. The economic impact of the regulation on the claimant, and particularly, the extent to which the regulation interfered with distinct investment-backed expectations are, of course, relevant considerations. So too is the character of the government’s action.92

92. *Id.* at 110.

While the law does place special restrictions on landmark properties as a necessary feature to the attainment of its larger objectives, the major theme of the law is to ensure the owners of any such properties both a ‘reasonable return’ on their investments and maximum latitude to use their parcels for purposes not inconsistent with the preservation goals.

93. *Id.* at 128 (“[G]overnment actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute ‘takings.’”).

94. *Id.* at 124 (examining how the Court identified several factors to be considered when evaluating whether an action qualifies as a taking. These factors include, the nature of the government’s action, the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations).

95. *Id.* (explaining when determining the market value of a property, courts have routinely adopted an impartial fair market value assessment of the property using comparable sales of similar properties under similar conditions).

96. *Id.* at 124 (explaining that when the Court considers whether a restriction requires just compensation, the Court weighs the interference with the property’s primary use and the resulting diminution value against the regulations impact on furthering a public interest).
Justice Stevens in *Tahoe* said that this jurisprudence is as old as the republic, and mostly involves the straightforward application of per se rules—presumably the market value of the interest acquired. Along this line, the *Penn Central* multi-factor test is not serving the goal of making the property owner whole; instead, it is serving a different goal—producing a just mediation between the property-holder’s interests and the society’s interests, having regard to some broader idea about social justice.

### B. Yet Unsettled Issues in Regulatory Takings

These different visions of what the takings clause is meant to accomplish are not truly different visions of what counts as a taking. Yet, the U.S. Supreme Court’s decisions debate these visions under the rubric of what counts as a taking. The debate should take place elsewhere, in the analysis of what is considered just compensation. These different visions of what the takings clause is meant to accomplish are different visions of what counts as just compensation.

Conservative jurists think that the goal of the clause is to make the owner whole—that amounts to reading just compensation as full comp-

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97. United States v. Causby, 328 U.S. 256, 267 (1946) (holding flights over property owner’s chicken farm by U.S. Military aircraft constituted a taking. On remand, the Court of Claims determined the property interests that were taken and further determined that compensation was based on the occupancy of the property interests).

98. Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 322 (2002). “Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part involves as straight forward application of the per se rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by ‘essentially ad hoc, factual inquires.’” *Tahoe-Sierra,* 535 U.S. at 322 (quoting *Penn Central,* 438 U.S. at 124).

99. *Penn. Cent.,* 438 U.S. at 124 (discussing the purpose of the multi-factor test when determining what “fairness and justice” demand when economic injuries are caused by state action, and ultimately determined it would rely on essentially ad hoc, factual inquiries regarding the circumstances of each particular case).

100. See *First English Evangelical Lutheran Church of Glendale v. Los Angeles County,* 482 U.S. 304, 322 (1987) (holding the complete destruction of the value of property constituted a taking under the Fifth Amendment even if that taking was temporary and the property was later restored); *Armstrong v. United States,* 364 U.S. 40, 49 (1960) (holding government action effecting a taking of property rights implicates the constitutional obligation to pay just compensation); see generally *Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1015 (1992) (holding a state regulation that deprived land of all economic and beneficial use effecting a taking).

101. Scholars have commented on the meaning of just compensation. One such scholar, Michelman, states:

[a] court, it seems, must choose between denying all compensation and awarding ‘just’ compensation; the loss is either a ‘taking’ of ‘property’ or it is not. If ‘just’ compensation is essentially incalculable, or if the cost of computing it is very high, the court may be led to classify a situation as non-compensable.

pensation.\textsuperscript{102} Liberal jurists think the goal of the clause is to be fair to the owner—to ensure he is not made to bear an unjust burden—but they do not assume that social justice requires all citizens to bear the burdens of the regulation equally.\textsuperscript{103}

Consider taxation, and let us go closest to home by considering property taxes that rise with value of the land, even though the services for which they pay are not provided proportionally to what has been paid.\textsuperscript{104} We do not say that progressive taxation must be fully compensated by spending most tax revenue on services for the rich. Instead, we permit governmental action that unevenly taxes people and spends on people so long as such action disparately impacts peoples’ property rights only in ways that our theory of social justice holds to be fair. “Taxing is just a species of taking.”\textsuperscript{105}

This way of understanding the takings clause also sheds light on the interest-on-trust accounts cases that had come before the Supreme Court in the years following \textit{Tahoe}.\textsuperscript{106} Regulations that require lawyers to deposit client trust money in government accounts are alleged by the petitioners to take the interest on that money without just compensation, even though if kept in myriad private trust accounts, the interest would be negligible or, net of bank fees, nothing.\textsuperscript{107} Under the analysis just proposed, the answer would be clear: of course there is a taking. A power, the “spite right” if you will, to deny others the interest even if one cannot have it, which the lawyer would otherwise

\begin{itemize}
\item \textsuperscript{102} See Thomas S. Ulen, \textit{Still Hazy After All These Years}, 22 \textit{Law & Soc. Inquiry} 1011 (1997).
\item \textsuperscript{103} See id.
\item \textsuperscript{104} See Wallace E. Oates, \textit{The Effects of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and the Tiebout Hypothesis}, 77 \textit{J. Pol. Econ.} 957, 959 (1969) (applying Tiebout model and concluding that “it is the present value of the future stream of benefits from the public services relative to the present value of future tax payments that is in this case important”).
\item \textsuperscript{105} We tolerate social arrangements that foster unequal distribution of the earth’s resources among us because we accept some theory under which the inequality can be justified. Government action in providing the law of contracts and property and torts helps create wealth but also helps concentrate wealth. Yet, we may have a theory of social justice under which somehow the uneven distribution of created wealth is fair. The same theory of social justice that is applied to decide when unequal taxation and government spending is fair should also be applied to decide when other takings of property rights are fair for purposes of the Takings and Due Process clauses. After all, exercise of the taxing power must also pass muster under the Takings and Due Process clauses, too.
\item \textsuperscript{106} See Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835 (9th Cir. 2001); Phillips v. Wash. Legal Found., 524 U.S. 156, 172 (1998) (holding that interest income generated by funds held in IOLTA accounts was the “private property” of the principal for the purposes of the takings clause.).
\end{itemize}
exercise on behalf of his or her clients over their money, is taken. But the good that is produced—funds for legal aid—and the lack of genuine harm mean that justice does not require compensation.108

As another example, civil rights laws prohibiting private businesses from discriminating against minorities took a freedom away from those businesses.109 The freedom to discriminate on grounds of race, sex, ethnicity, might plausibly have had economic value to those businesses if their patronage was built on exclusion.110 The civil rights laws were not just reflecting a new understanding of a constitutional requirement that had always been there—the Equal Protection clause only applies to government discrimination.111 Such regulations would never be viewed by the Court as takings, because of the moral force behind their enactment—Penn Central factor analysis would weigh the good served very heavily.112

Likewise, in Tahoe, as this line of reasoning goes, the regulations protecting the environment had a moral force behind them. Following Penn Central analysis, most environmental regulations should therefore, not be takings.114 Wrong. The discourse in these instances should concern when justice requires compensation rather than when a taking occurs.115 Of course a property right was a taking from the racist owners of public accommodations in the South when they were forced to admit folks they did not want on their premises.116 We are not going to pay them anything for the loss of that right, because we

108. See generally Risa I. Sackmary, IOLTA’s Last Obstacle: Washington Legal Found. v. Massachusetts Bar Found.’s Faulty Analysis of Attorney’s First Amendment Rights, 2 J.L. & POL’Y 187, 188 (1994) (“IOLTA accounts purpose is to give money to a worthwhile organization rather than to give an interest-free loan to a bank.”).
109. Katzenbach v. McClung, 379 U.S. 294, 305 (1964) (holding that the Civil Rights Act of 1964 prohibited restaurants from discriminating against interstate travelers); see also Holmes v. City of Atlanta, 350 U.S. 879, 879 (1955) (holding improper the City of Atlanta’s practice of operating a golf course that was open to different races on different days).
111. U.S. CONST. amend. XIV.
114. Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 334 (2002). “[A]part from the District Court’s finding that TRPA’s actions represented a proportional response to a serious risk of harm to the lake, petitioners might have argued the moratoria did not substantially advance a legitimate state interest.” Id.
115. Id. 535 U.S. at 356 (Thomas, J., dissenting). “To my mind, such potential future value bears on the amount of compensation due and has nothing to do with the question whether there was a taking in the first place.” Id.
116. Heart of Atlanta Motel v. United States, 379 U.S. 241, 262 (1964) (upholding a permanent injunction issued by the district court requiring the Heart of Atlanta Motel to receive business from clientele of all ethnicities).
are just not sorry for them. We do not think that justice requires compensation.

C. LOOKING AHEAD TO A LEGAL CHANGE IN FOCUS

The discourse between jurists regarding takings is not a fight about what counts as a taking. It is a fight about what justice in compensation requires. Once we recognize that property consists of the bundle of powers and freedoms that existing regulations allowed the property-holder to acquire by becoming a property-holder, then every subsequent restriction on one of the powers or freedoms in the bundle is a taking.

Consider Justice Brennan’s Penn Central\(^\text{117}\) analysis, which concludes that there was no taking. Of course, there was a taking. Prior to the landmarks law, Penn Central would have had the right to build a skyscraper. The landmarks law therefore, took that right out of Penn Central’s property bundle. Brennan’s analysis was really about whether doing justice required compensation, and if so, in what amount. That is, his multi-factor test is really an interpretation of “just compensation,” not of “taking.”

In Lucas,\(^\text{118}\) the Court established a categorical rule to be applied in a “total takings” situation.\(^\text{119}\) The court held, “when . . . a regulation that declares ‘off-limits’ all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.”\(^\text{120}\)

The Lucas test applies when the regulation deprives an owner of all the economically beneficial use of her property. The Penn Central test applies when the regulation causes the owner to lose something less.\(^\text{121}\) The Tahoe\(^\text{122}\) interpretation of the Lucas test has led to cur-


\(^{118}\) 505 U.S. 1003 (1992) (examining the idea of whether the State’s regulatory action, which denied the property owner all reasonable economically beneficial or productive use of the property, fit the existing categorical rule under the Takings Clause if effect of the regulation was the functional equivalent of a physical taking).

\(^{119}\) Lucas, 505 U.S. at 1015. Applicable circumstances of regulatory takings include when a regulation denies all economically beneficial or productive use of land, and when “regulations compel the property owner to suffer a physical ‘invasion’ of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we require compensation.” Id.

\(^{120}\) Id. at 1015 (determining whether compensation is required, the Court considers the following factors: the degree of harm to public lands and resources or adjacent private property posed by the claimant’s proposed activities; the social value of the claimant’s activities and their suitability to the locality in question; and, the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government).

\(^{121}\) Id. at 1078 n.8. (explaining an owner who is not denied all economically beneficial use, “might not be able to claim the benefit of our categorical formulation, but, as we
rent regulatory schemes “taking” less than all the economically beneficial use of one’s private property because municipalities can circumvent a Lucas analysis simply by adding a temporal component to all regulations that deprive an owner of the economically beneficial use of the private property. As such, regulations today appear to be less than permanent because of the expiration date or sunset provision, thus requiring any private owner seeking just compensation to meet the Penn Central threshold for it to even be considered a taking.

In Penn Central, the Court began its analysis by acknowledging that it “has been unable to develop any ‘set formula’ for determining when . . . economic injuries caused by public action” become a taking of property, and concluded that it will generally depend on the circumstances of the case. The Court, however, identified three factors, which are usually assessed when “engaging in these essentially ad hoc, factual inquiries.” “The economic impact of the regulation on the claimant and, particularly the extent to which the regulation had interfered with distinct investment-backed expectations are . . . relevant considerations. So, too, is the character of the governmental action.”

The Penn Central test is flexible. Individual courts must determine the relevant weight to accord each factor and then balance the competing interests. This “balancing” is highly case-specific, and an owner need not allege a total destruction of either property value or use to bring a takings claim under Penn Central.

Because courts generally find that the “character of the governmental action” is a legitimate exercise of police power, whether a regulation effects a taking of property will largely depend on the aggrieved owner’s ability to show a significant economic impact and clear inter-
ference with distinct investment-backed expectations.\textsuperscript{127} This framework for the analysis is misplaced.

IV. REFOCUSING THE DOCTRINAL LENS OF REGULATORY TAKINGS

Takings analysis should take place not to determine if something is or is not a “taking” in situations where the government has indubitably taken away a right that was an incident of property. In such circumstances, it is a taking and the analysis described in \textit{Penn Central}\textsuperscript{128} should be understood to determine what “just compensation” would be.

In \textit{Lucas},\textsuperscript{129} the court examined precedent and determined that a case specific inquiry has never been required when a regulation either compels a “property owner to suffer a physical ‘invasion,’”\textsuperscript{130} or “denies all economically beneficial or productive use of land.”\textsuperscript{131} The U.S. Supreme Court held that when a regulation intrudes so severely, market value compensation is always required.\textsuperscript{132} Because the trial court

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\item \textsuperscript{127} \textit{Penn Cent.}, 438 U.S. at 127 (stating that “Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a ‘taking.’”). \textit{Id.}
\item \textsuperscript{128} 438 U.S. 104 (1978).
\item \textsuperscript{129} 505 U.S. 1003 (1992).
\item \textsuperscript{130} \textit{Lucas v. S.C. Coastal Council}, 505 U.S. 1003, 1012 (1992). The Court reasoned: Without even so much as commenting upon the consequences of the South Carolina Supreme Court’s judgment in this respect, the Council insists that permitting Lucas to press his claim of a past deprivation on this appeal would be improper, since “the issues of whether and to what extent [Lucas] has incurred a temporary taking . . . have simply never been addressed.” Yet Lucas had no reason to proceed on a “temporary taking” theory at trial, or even to seek remand for that purpose prior to submission of the case to the South Carolina Supreme Court, since as the Act then read, the taking was unconditional and permanent. Moreover, given the breadth of the South Carolina Supreme Court’s holding and judgment, Lucas would plainly be unable (absent our intervention now) to obtain further state-court adjudication with respect to the 1988–1990 period. \textit{Lucas}, 505 U.S. at 1012 (internal citation omitted).
\item \textsuperscript{131} \textit{See id. at} 1015–18 (explaining regulations that leave the owner of land without economically beneficial or productive options for its use typically require land to be left substantially in its natural state because of the heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm). “As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation ‘does not substantially advance legitimate state interests or denies an owner economically viable use of his land.’” \textit{Id.} at 1016 (quoting \textit{Agins v. City of Tiburon}, 447 U.S. 255, 260 (1980)).
\item We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking. \textit{Id.} at 1019.
\item \textsuperscript{132} \textit{Id.} at 1029.
\end{enumerate}
\end{footnotesize}
found that the regulation had extinguished the economic value of Lucas's lots, the Court applied the categorical rule to his claim.\textsuperscript{133}

The \textit{Lucas} test is not flexible; market value compensation is owed when a regulation extinguishes the beneficial economic use of land, unless the restriction falls within a narrow exception.\textsuperscript{134} As such, a court that finds an owner has not suffered a total deprivation of economically viable use\textsuperscript{135} employs a partial takings analysis to determine if that owner has suffered a loss sufficient to warrant compensation. This analysis is what should happen in all cases, and it should be done through the lens of determining just compensation, regardless of whether there has been a partial or total deprivation of property.

We should concern ourselves with justice, not arbitrary classifications. In \textit{Lucas}, the Court did not examine whether Lucas had reasonable, distinct investment-backed expectations at the time he purchased the property.\textsuperscript{136} Instead, the Court's reasoning was simplistic: Lucas proved that the regulation had extinguished the economically beneficial use of his property,\textsuperscript{137} and therefore the regulation effected a taking.\textsuperscript{138} Indeed it did, but then the Court held

\begin{quote}
We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical “invasion” of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation \ldots . The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.
\end{quote}

\textit{Id.} at 1015.

\textsuperscript{133} \textit{Id.} at 1020. “The trial court found Lucas's two beachfront lots to have been rendered valueless \ldots . Under Lucas's theory of the case, which rested on our 'no economically viable use' statements, that finding entitled him to compensation.” \textit{Id.}

\textsuperscript{134} \textit{Id.} at 1027. “It is correct that many of our prior opinions have suggested that 'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation.” \textit{Id.} at 1022.


\begin{quote}
[O]ur holding was limited to “the extraordinary circumstance when no productive or economically beneficial use is permitted.” The emphasis on the word ‘no’ in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%.
\end{quote}


\textsuperscript{136} See \textit{Lucas}, 505 U.S. at 1015–32 (finding that because the trial court deemed the properties to be totally valueless, there was no need to examine or consider Lucas's investment-backed expectations).

\textsuperscript{137} \textit{Id.} at 1020. “The trial court found Lucas's two beachfront lots to have been rendered valueless by respondent's enforcement of the coastal-zone construction.” \textit{Id.}

\textsuperscript{138} See \textit{id.} at 1015–18. (explaining when the owner of real property has been called upon to sacrifice all economically beneficial uses, that deprivation is the functional equivalent of a physical appropriation).
an automatic right to market value compensation—the investment-backed expectation of the owner did not have to factor into the just compensation analysis because it was a “total” taking.\footnote{139}

Significantly, Justice Stevens attacked the categorical rule as being “wholly arbitrary,” because “[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land’s full value.”\footnote{140} The majority responded by acknowledging that a landowner who has not been deprived of all economically viable use “might not be able to claim the benefit of [The Supreme Court’s] categorical formulation;” however, the majority insisted that he would be able to bring a takings claim under the usual \textit{Penn Central} balancing test.\footnote{141}

\textit{Lucas} contains an exception to its own categorical rule.\footnote{142} If a regulation duplicates the result that could have been achieved in the courts by adjacent landowners under the State’s general law of private

\footnote{139. \textit{Id.} at 1030–31.}

The “total taking” inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant’s proposed activities, see, e.g., Restatement (Second) of Torts §§ 826, 827, the social value of the claimant’s activities and their suitability to the locality in question, see, e.g., id., §§ 828(a) and (b), 831, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, see, e.g., id., §§ 827(e), 829(c), 830.

\footnote{140. \textit{Id.} at 1064.}

The case at hand illustrates this arbitrariness well. The Beachfront Management Act not only prohibited the building of new dwellings in certain areas, it also prohibited the rebuilding of houses that were “destroyed beyond repair by natural causes or by fire.” Thus, if the homes adjacent to Lucas’ lot were destroyed by a hurricane one day after the Act took effect, the owners would not be able to rebuild, nor would they be assured recovery. Under the Court’s categorical approach, Lucas (who has lost the opportunity to build) recovers, while his neighbors (who have lost both the opportunity to build and their homes) do not recover. The arbitrariness of such a rule is palpable.

\footnote{141. \textit{See Lucas}, 505 U.S. at 1030–31 (explaining how the “total taking” inquiry required “will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things,” (1) “the degree of harm to public lands and resources, or adjacent private property, posed by the claimant’s proposed activities,” (2) “the social value of the claimant’s activities and their suitability to the locality in question,” and (3) “the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government or adjacent private homeowners, alike”) (internal citations omitted).}

\footnote{142. \textit{Id.} at 1029.}

Where a state seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the prescribed use interests were not part of his title to begin with.

\footnote{\textit{Id.}}
nuisance then no taking has occurred.\textsuperscript{143} No taking has occurred not because of a lack of investment-backed expectations, as the owner’s expectation is generally to make economically viable use of her property, but rather because background “principles of [state] nuisance and property law” demonstrate that the proscribed use was never part of the title.\textsuperscript{144} This analysis is consistent because nothing was taken from the titleholder, thus no analysis of what would be just compensation is necessary—unless state courts have evolved state nuisance law in the meantime to be more intrusive.\textsuperscript{145}

A. MANY MORE TAKINGS ARE HAD

Realistically, to be frank, in no way do we think that when courts interpret the common law in a new and different way that they are

\begin{itemize}
  \item \textsuperscript{143} Id. at 1029–30.
  \item A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts — by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise. Id.
  \item \textsuperscript{144} See id. at 1031–32.
  \item We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts — by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise. On this analysis, the owner of a lakebed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land’s only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was always unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit. Id. at 1029–30
  \item \textsuperscript{145} Id. at 1030.
  \item Such a regulatory action may well have the effect of eliminating the land’s only economically productive use, but it does not proscribe a use that was previously permissible under relevant property and nuisance principles . . . South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim, in prescribing all such beneficial uses, the Beachfront Management Act is taking nothing. Id. at 1030–32.
\end{itemize}
just newly discovering what it always was. On the contrary, they are simply changing it. Although one could say that rights are acquired against the backdrop of potential change in nuisance law, remember that rights are also acquired against the backdrop of potential change in legislation, too, and the U.S. Supreme Court skirts that issue.

And, the whole juridical perspective is to blame for this illogical analysis. Liberal jurists are mistaken to have the fight about just compensation under the rubric of takings. In doing so, they look conceptually incoherent. In each of these fights, of course a property interest—a power or freedom in the property bundle—is being taken. The interesting question is whether justice requires compensation.

Further, if the fight were had explicitly under the rubric of just compensation, then conservative jurists would look conceptually incoherent. Every new zoning ordinance, every law that imposes some new restriction on existing freedoms or powers over property takes. Even the most conservative minds must concede that compensation cannot be paid for all of these takings. Yet, the conservative view is that “just compensation” means “making the property owner whole.” This view, taken literally, requires market value compen-

146. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992). “The use of these properties for what are now expressly prohibited purposes was always unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.” Lucas, 505 U.S. at 1030.

147. See id. at 1030–31 (referencing how although the Court makes express reference to how rights are affected by nuisance principles, it fails to address how property rights can be affected by legislative change).

148. Of course, justice requires compensation.

149. “Every act of zoning is a ‘taking’ in a sense, because the state takes some rights of use away from the owner.” Town of Gurley v. M & N Materials, Inc., 143 So. 3d 1, 35 (Ala. 2012) (Parker, J., concurring). See e.g., Dryden Oaks, LLC v. San Diego Cty. Reg’l Airport Auth., 224 Cal. Rptr. 3d 333 (Cal. Ct. App. 2017). See also JESSE DUKEMINIER ET AL., PROPERTY 1107 (8th ed. 2014) (discussing zoning and takings, the court states, “Unsatisfied with private arrangements (servitudes) and nuisance law as the means of land use control, the government might and often does embark on more activist courses-leaving property in the hands of its owners but regulating its use, or taking, property from its owners and reallocating it to governmentally preferred uses. The first approach regulating, is illustrated by the method of zoning, the second approach, taking, is the method of eminent domain.”); Bernard Schwartz, Takings Clause—“Poor Relation” No More?, 47 OKLA. L. REV. 417, 428–32 (1994) (“In other words, if government deprives plaintiffs of their right to sell their eagle feathers, that is a taking, even if the owners still have the rights to possess and use the feathers.”) (discussing Andrus v. Allard, 444 U.S. 51 (1979)).


151. For a discussion on the “parcel as a whole theory,” see generally the majority opinion in Lucas, 505 U.S. 1003 (1992); see also Woffinden, supra note 113, at 628–33, stating:
sation whenever a power or freedom in the property bundle is restricted.152

Liberal jurists, on the other hand, could cheerfully concede that all such restrictions are takings but then say that justice does not always require compensation, and instead requires some measure to determine what compensation, if any, is just.153 When would justice require compensation, and in what amount? That necessarily depends on the unique relation between the property interest and the regulation at issue in any particular case.154 So, then, what factors might be relevant to the analysis? The same Penn Central155 factors, which consider: (1) the economic impact of the taking on the claimant; (2) the investment-backed expectations; and, (3) the character of the taking.156

B. What is Just About Compensation?

The U.S. Supreme Court constructs its own set of principles for deciding when justice requires compensation, and the Penn Central analysis is effectively the Court trying to do just that.158 It is a vague standard risking inconsistent application by courts,159 but having bright-line rules makes inconsistency of application even more visible, thus bringing the law into even greater disrepute. If we have a bright-

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152. See Lucas, 505 U.S. at 1027 (referencing the circumstance which an individual's rights can be removed from the property bundle without just compensation, the Court states, "[W]e think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords we think, with our 'takings' jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain new property.")

153. The majority opinion in Penn. Cent. penned by Justice Brennan identifies three central factors as definitive for determining whether there is a "taking": (1) economic impact of the taking on the claimant; (2) investment-backed expectations; and (3) the character of the taking. Penn. Cent., 438 U.S. at 124–25.


158. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 320 (2002) (Stevens, J., opining that when "[f]aced squarely with the question whether a taking had occurred, the Court held that Penn Central was the appropriate framework for analysis").

159. Which itself is unjust.
line rule, we can see the cases just on either side of the line.\textsuperscript{160} However, if we have a multi-factor standard, courts can look at what was awarded in one case, where a certain set of circumstances existed, and can consider how the circumstances in a case at bar differs; thus, over time, a common law of property takings would evolve. The courts could come up with a theory of justice, and, through the process of concrete application by common-law method, this theory of justice would acquire a predictable content, sensitive to the range of factors relevant to whether justice requires compensation and, if so, how much.\textsuperscript{161}

Conservative jurists are left with the problem that they must define “takings” more narrowly than “any restriction of a right or freedom in the property bundle,” because they plan on forcing the government to pay full, make-whole compensation for all takings.\textsuperscript{162} But, there is no principled other place to draw the “takings” line, so the conservative position ends up as arbitrary.\textsuperscript{163}

V. CONCLUSION

To recap, the Takings Clause assures Americans that they will not be forced to sacrifice their property for a public good without just compensation.\textsuperscript{164} A categorical rule applies when a property owner

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\item \textsuperscript{160} See generally Marc Lisker, Regulatory Takings and the Denominator Problem, 27 Rutgers L.J. 663 (1996).
\item \textsuperscript{161} See Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (referencing how the Court, in the interest of fairness and justice, adjusted the existing categorical rule to provide a remedy for an obvious economic injury resulting from a state action).
\item \textsuperscript{162} See Woffinden, supra note 113, at 628–33 (discussing Penn Central “make-whole” compensation theory for takings).
\item \textsuperscript{163} There are candidates for the line. Consider compensation anytime there is an existing market for the particular right that the government has removed or restricted. But why should the vagaries of market formation decide which deprivations get compensated? There may not be a market for the right to dance naked around your property (and, thus, no proxy for how much you value your right to do so), but if a government regulation restricts that right, why is it not a taking from anyone who does value that right?
\item Tahoe-Sierra, 535 U.S. at 321; see also United States v. Pewee Coal Co., 341 U.S. 114, 120 (1951) (explaining how a physical invasion of private property or a direct government appropriation requires compensation while referencing the government’s occupation of a coal mine to prevent a national strike effected a taking); Penn Cent., 438 U.S. at 124 (1978) (“We have recognized that this constitutional guarantee is designed to bar Government from forcing some people alone to bear public burdens which, in all fair-
has been denied all economically viable use of her property, while a balancing test applies when she loses something less.\textsuperscript{165} Determining just compensation is when we analyze policy, investment-backed expectations, etc., not to determine if something is a taking requiring just compensation. A total regulatory taking is analogous to a physical taking.\textsuperscript{166} The U.S. Supreme Court has generally held that physical invasions of any sort require market-value compensation.\textsuperscript{167} Fine, but any regulatory taking is analogous to a physical taking, too.

There is no principled distinction between outright acquisitions and regulatory takings—all are takings, and all should be subject to the \textit{Penn Central}\textsuperscript{168} factor analysis to determine what counts as just compensation, what justice requires as compensation.\textsuperscript{169} Justice may require compensation without necessarily measuring that compensation as the market value of the right taken at some particular time,\textsuperscript{170} particularly because, since \textit{Tahoe},\textsuperscript{171} takings themselves are identified by the \textit{Penn Central ad hoc} balancing test.

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\item \textsuperscript{165} See generally the majority opinion in \textit{Lucas}, 505 U.S. 1003 (1992).
\item \textsuperscript{166} See Meltz, supra note 51, at 537 (citing Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005)) (stressing the functional equivalence between regulatory takings and physical takings).
\item \textsuperscript{167} See Christopher Serkin, \textit{The Meaning of Value: Assessing Just Compensation for Regulatory Takings}, 99 NW. U. L. REV. 677, 678 (2005); see also Armstrong, 364 U.S. at 49 (discussing one of the principal purposes of the takings clause is, “[T]o bar government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole”).
\item \textsuperscript{168} 438 U.S. 104 (1978).
\item \textsuperscript{169} Dolan v. City of Tigard, 512 U.S. 374, 383 (1994). “The takings clause of the Fifth Amendment has been made applicable to the States through the Fourteenth Amendment.” See also Chicago B. & Q. R. v. City of Chicago, 166 U.S. 226, 228 (1897) (“[N]or shall private property be taken for public use, without just compensation.”); also consider \textit{Penn Central} factors and how those factors are evaluated when determining whether a State action qualifies as a “taking.”
\item \textsuperscript{170} See H. Dixon Montague, \textit{Market Value and All That Jazz: The Proof of the Pudding Is in the Eating}, 30 U. M. LAW. 631, 638–39 (1998) (discussing market value, “The Court has repeatedly held that just compensation normally is to be measured by “market value of the property at the time of the taking contemporaneously paid in money. Considerations that may not reasonably be held to affect market value are excluded. Deviation from this measure of just compensation has been required only, “[W]hen market value has been too difficult to find, or when its application would result in manifest injustice to owner or public.”).”
\item \textsuperscript{171} 535 U.S. 302 (2002).
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The independence of the federal judiciary has never been more important and has never gathered as much attention from the American public. Yet many, who have long been taught of the United States’ three separate and coequal branches of government, would be shocked to learn about the extraordinary power that the political branches have over the type of disputes that federal courts are permitted to adjudicate. The power of Congress to control the jurisdiction of the federal courts has been a fascination of scholars for years. And yet, an interesting and important inconsistency in the law poses a
problem that should put this purportedly vast power of Congress into question.

Suppose Congress were to pass and the President were to sign a bill that created a tribunal, housed under and subject to the oversight of the executive branch, responsible for adjudicating any and all emoluments-related disputes—the Block and Restrict Inappropriate Benefits and Emoluments Court (“the BRIBE Court”). BRIBE Court members could be selected by the President, though no advice or consent by Congress is needed, and the President is authorized to remove and replace members of the BRIBE Court at any time. Judges on the BRIBE Court are well-compensated, but their salaries, like their tenure, are subject to adjustment at the President’s discretion. Imagine that this statute gives the BRIBE Court the power to adjudicate any claims alleging that a federal elected official failed to comply with his or her obligations under the Emoluments Clause of the Constitution.¹ In creating this tribunal, however, suppose Congress also announced that the federal Article III district and circuit courts of the United States no longer had jurisdiction to hear emoluments-related cases, nor could they hear challenges to the constitutionality of the BRIBE Court. Similarly, Congress’s BRIBE Court statute proscribed that the United States Supreme Court’s appellate jurisdiction would not extend to such claims, including appeals from the BRIBE Court itself. In other words, the BRIBE Court would have exclusive jurisdiction over any claims of emolument violations, with no federal court oversight or review.

As to the first prong of this statute, the Supreme Court would certainly deem problematic the BRIBE Court’s jurisdiction over constitutional emoluments-related claims. Because the BRIBE Court was created by Congress and lacks the tenure and salary protections mandated by Article III, it would be considered a non-Article III court. The Court has held that Congress may not assign “Stern claims”—common law claims traditionally adjudicated by state courts or Article III courts—for final review by non-Article III courts because doing so

¹. U.S. Const. art. I, § 9. The “Foreign Emoluments Clause” in the United States Constitution reads: “No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office or Title, of any kind whatever, from any King, Prince or foreign State.” Id. art. I, § 6. The “Ineligibility and Emoluments Clause” reads: “No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such a time.” Id. Scholars have said that the term “emolument” is broad, but largely represents an advantage, payment, or remuneration. See Norman Eisen, Richard Painter, & Laurence Tribe, The Emoluments Clause: Its Text, Meaning, and Application to Donald Trump 11 (2016), https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf.
would disrupt the “purpose” of Article III and the “integrity of judicial decision making.” 2 The same is surely true for constitutional claims, as they too have traditionally been adjudicated by state courts or Article III courts. Congress has never passed legislation to grant a non-Article III court exclusive authority to adjudicate constitutional issues; 3 however, the Supreme Court would almost certainly view such constitutional claims akin to “Stern claims” and would see any efforts to reassign their adjudication to non-Article III courts as disrupting Article III. Because “the stuff of the traditional actions at common law” is part of the “judicial power,” which Article III of the Constitution vests in Article III courts, 4 the Supreme Court likely would hold that Congress’s BRIBE Court unconstitutionally encroached on the authority of the judicial branch to adjudicate constitutional questions, including those related to emoluments.

However, any effort by the Court to declare the tribunal problematic would be frustrated by the fact that in the very same statute Congress stripped it of jurisdiction to hear claims challenging the constitutionality of the non-Article III tribunal in the first place. Since, “a congressional grant of jurisdiction is a prerequisite to the exercise of judicial power,” 5 the Court may find itself powerless to issue a finding of unconstitutionality. Indeed, as the Court held over a century ago, “when [jurisdiction] ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” 6

The Supreme Court has stated, on several occasions, that Congress has plenary authority over the jurisdiction of Article III federal

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2. See Stern v. Marshall, 564 U.S. 462, 484 (2011) (holding that Congress’s grant to non-Article III bankruptcy courts of jurisdiction to adjudicate common law tort claims raised as compulsory counterclaims in bankruptcy proceedings was unconstitutional); see also Wellness Int’l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1941-42, 1946-47 (2015) (explaining the concept of a “Stern claim” based on the 2011 Supreme Court decision in Stern). For the past three decades, if not longer, the Court has been incredibly divided on the extent of Congress’s authority to create alternative forums for adjudicating claims, without granting adjudicators the life tenure and salary protections guaranteed to Article III judges. See infra Part I.B.

3. See Erwin Chemerinsky, A Framework for Analyzing the Constitutionality of Restrictions on the Federal Court Jurisdiction in Immigration Cases, 29 Mem. L. Rev. 295, 311 (1998) (explaining that part of the reason why there are no Supreme Court decisions explaining the consequences of an entire repeal of federal court jurisdiction is because the Court has always construed statutes as allowing some jurisdiction left for the federal courts).


This authority includes Congress's power not to grant the federal courts jurisdiction over a category of disputes altogether, without which federal courts may not hear a claim. Congress's authority extends, it appears, to any efforts to remove or "strip" jurisdiction previously vested in Article III courts, whether based on the estimated value of the claims (amount-in-controversy) or based simply on a subject matter that Congress no longer wishes for the federal courts to handle. By contrast, the Court has forcefully rejected the idea that Congress could grant non-Article III courts the power to adjudicate certain claims in certain contexts, a rule based on Article III's reservation of the "judicial power" for Article III courts.

Intuitively, based on the immense power that Congress has to assign, withhold, or remove jurisdiction of federal courts over any type of claim, one might also infer that Congress would be permitted to vest jurisdiction over those same claims in any adjudicatory body of its choosing. The power to give or not to give something to one party might instinctively seem to include the power to give that same thing to another. The Court, however, has treated these two rules for Congress's authority—its power to strip Article III courts of jurisdiction and its power to choose an entity in which to vest jurisdiction—very differently. The Court reads the Constitution as allowing Congress to give or remove jurisdiction for certain claims to Article III courts but not to give that same jurisdiction to non-Article III courts. It is not necessarily a logical fallacy to say that it is permissible to take something away from one party and impermissible to take that same thing and give it to another party. Yet, the Court's radically different treatment of Congress's power in these two areas is still inconsistent. This Article seeks to illustrate that inconsistency—found in the Court's holdings and in the underlying principles justifying the rules—and to explore possible reasons for the divergent treatment.

A great deal of scholarship has explored each of these two areas of the Court's jurisprudence, assessing whether the Court has identified

7. See Brotherhood of Railroad Trainmen v. Toledo, 321 U.S. 50, 63-64 (1944). The Court stated:

Congress, exercising its plenary control over the jurisdiction of the federal courts, has seen fit to withhold [one form of remedy]. With the wisdom of that action we have no concern. It is enough, for its enforcement, that it is written plain and does not transcend the limits of legislative power.

Id.

8. See Strawbridge v. Curtiss, 7 U.S. 267 (1806) (holding that, in the Judiciary Act of 1789, Congress did not grant jurisdiction to federal courts over disputes lacking complete diversity).

9. See Ex parte McCordle, 74 U.S. at 514 (stating, "The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of habeas corpus is expressly repealed . . . Without jurisdiction the court cannot proceed at all in any cause.").

10. See Stern, 564 U.S. at 484.
the correct rule based on constitutional text, historical practices, functional administrability in modern times, and structural constitutional principles.\textsuperscript{11} Even more scholarship analyzes separation of powers principles in the Constitution broadly, including the way in which the Court applies those principles in making determinations about Congress’s powers with respect to adjudications.

This Article takes a unique approach by examining jurisdiction-stripping and non-Article III court jurisprudence side-by-side, since both areas of law address the amount of power Congress should have over the judicial branch and adjudications as a whole. Looking at the Court’s rules and at the underlying separation of powers justifications for those rules, this Article assesses whether the Court has been logically consistent in its treatment of the two. This Article examines the seeming discrepancy of a court that is greatly troubled by the balance of power when considering Congress’s assignment of adjudicatory responsibilities to non-Article III courts but also is somehow quite comfortable with the balance of power when it considers Congress’s ability to strip the federal courts of jurisdiction to adjudicate altogether.

Particularly intriguing for this debate is the 2008 case \textit{Boumediene v. Bush},\textsuperscript{12} where the Court was faced both with a non-Article III court delegation by Congress, as well as its withdrawal of jurisdiction from Article III courts.\textsuperscript{13} This case might have served as the mechanism by which the Court would reconcile how Congress could permissibly control federal court jurisdiction and assign adjudicatory responsibility outside the Article III courts, both without violating separation of powers demands. Instead, the Court dodged that question in a lengthy but cryptic decision that appears to rely on due process requirements, rather than separation of powers principles, as the constitutional tool that restricts Congress’s control over the judiciary.\textsuperscript{14} As such, the law is left with two seemingly inconsistent rules regarding congressional power over the judicial branch.

The proper role of logical analysis in constitutional law is debated. There are those who believe that the law and the legal system can only be analyzed and assessed based on internal logical consistency.\textsuperscript{15} Others view the use of formal logic as an inappropriate application of

\textsuperscript{11} Gerald Gunther, \textit{Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate}, 36 STAN. L. REV. 895, 897 n.9 (1984). The scholarship on jurisdiction-stripping was perhaps best described by Professor William Van Alstyne in a letter to Professor Gerald Gunther when he said the literature was “choking on redundancy.” \textit{Id.}

\textsuperscript{12} 553 U.S. 723 (2008).

\textsuperscript{13} \textit{Boumediene} v. \textit{Bush}, 553 U.S. 723, 733, 736 (2008).

\textsuperscript{14} \textit{See infra} notes 56-59 and accompanying text.

\textsuperscript{15} \textit{See, e.g.}, Guido Calabresi, \textit{An Approach to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts}, 55 STAN. L. REV. 2113, 2114-22 (2003) (describ-
an overly formalistic approach to law, one that puts too much pressure on a diverse legal system with reasoning that requires consideration of numerous factors. This Article takes the view of philosophers and logicians who have long asserted that consistency is the basic test for rationality—that without predictable and unified rules, the result is not a system of governance, but chaos. An analysis based on logic is appropriate because, at its core, the United States’ common law system is based on an understanding that the law develops by building upon itself, by analyzing the unique circumstances of a given case, and by applying evolving yet consistent rules. The common law system depends on rationality.

As such, it is both fair and necessary to explore the internal inconsistency of two areas of law—particularly, as here, where the two areas of law are both rooted in a debate over the proper approach to a separation of powers among the branches of government. This Article therefore conducts a logical analysis comparing the consistency of the Court’s rules in these two areas. Finding them to be inconsistent, the Article proceeds to explore how and why such an inconsistency might have developed.

This Article is organized in three parts. Part I provides an overview of the case law and analysis of these two areas of jurisprudence related to Congress’s control of federal court jurisdiction and allocation of the judicial power, focusing on the justifications the Court has given for its rules. Part II explains the inconsistency of the Court’s approach to these two areas of law, specifically insofar as the Court relies on differing separation of powers principles for the analysis. Finally, Part III assesses several explanations for the Court’s inconsistency and evaluates the implications of these hypotheses.

II. CONGRESS’S AUTHORITY TO DEFINE THE JUDICIAL POWER

Two of the most heavily debated questions of structural constitutional law arise in the debate over Congress’s power to control the judicial branch and adjudications. One question asks about the extent of an approach to the law focused on internal coherence as “Doctrinalism” or “Autonomism”).

16. See, e.g., Jerome Frank, Mr. Justice Holmes and Non-Euclidean Legal Thinking, 17 CORNELL L.Q. 568 (1931).
17. See, e.g., Louis Brandeis & Samuel Warren, The Right to Privacy, 4 HARV. L. REV. 193, 193 (1890) (explaining the evolution of privacy rights as starting only with a protection from physical interference and expanding, based on consistent principles, to a protection of the “right to be let alone”).
18. See infra notes 117-135 and accompanying text.
19. See infra notes 136-213 and accompanying text.
of Congress’s power to assign—or more importantly, to withdraw—jurisdiction to and from the federal courts. The second question asks about the extent of Congress’s power to assign adjudicatory responsibilities to non-Article III courts, or “legislative courts,” created by Congress but staffed with judges who lack the salary and tenure protections of Article III.

Both questions arise under Article III of the Constitution, though neither is clearly answered by the text.20 As with most constitutional interpretation, the tools used by the courts and scholars to answer these questions include constitutional text, history, structure, function, and policy justifications.

This part explores these two questions about the scope of Congress’s control over assigning adjudicatory responsibility. For either question, this Article reviews the textual and historical arguments made by courts and scholars but largely focuses on how the Court has used separation of powers principles to justify each rule. Part I.A deals with the Court’s rules, case law, and separation of powers justifications when it comes to Congress’s power to assign or withdraw jurisdiction from federal courts.21 Part I.B addresses the Court’s rules, case law, and separation of powers justifications for Congress’s power to create and assign adjudications to non-Article III legislative courts.22 Together, Parts I.A and I.B demonstrate that the Court has relied on similar tools in defining the rules in these two areas, yet the rules themselves could not be further apart. In one area, the Court has determined that Congress has extensive, perhaps limitless, power to control the judicial branch. In another area, the Court has put substantial constraints on Congress’s power to exercise control.

A. The “Plenary” Jurisdiction-Stripping Power: Textual, Historical, and Structural Justifications

The United States Supreme Court has stated time and time again, even as recently as the 2018 Term, that Congress’s “control over the jurisdiction of the federal courts is plenary.”23 Despite this categorical declaration, Congress’s power to withdraw or “strip” jurisdiction from the federal courts has been the subject of inexhaustible

20. See infra notes 26-45 and 83-92 and accompanying text.
21. See infra notes 23-74 and accompanying text.
22. See infra notes 75-113 and accompanying text.
23. Patchak v. Zinke, 138 S. Ct. 897, 906 (2018) (quotations removed); see also Yakus v. United States, 321 U.S. 414, 465 (1944) (Rutledge, J., dissenting) (stating that “[s]o much may be rested on Congress’ plenary authority to define and control the jurisdiction of the federal courts”).
debate amongst scholars. 24  This robust scholarly collection helps to compensate for the relatively few Supreme Court cases that address this fundamental principle. Indeed, by way of precedent, scholars are left examining only a handful of foundational cases and three instances wherein the Court appears to have identified possible exceptions to this otherwise absolute and steadfast rule.

In determining where this “plenary authority over jurisdiction” rule came from, the inquiry is often divided into two parts: (1) why Congress has control over inferior federal court jurisdiction—that of federal district and circuit courts, and (2) why Congress has control over the Supreme Court’s (at least appellate) jurisdiction. 25

The text of Article III does not say that Congress can assign or withdraw jurisdiction to the inferior federal courts. 26 In fact, the language declaring that judicial power “shall be vested,” seems to require that federal courts be given the authority to adjudicate at least all of those categories of cases and controversies listed in Article III. 27 Justice Story made this very argument in Martin v. Hunter’s Lessee, 28 saying that the framing of Article III was “manifestly designed to be mandatory.” 29 He stated that the entire point of the Constitution was to establish three branches of government, with the judicial branch’s role to “expound and enforce” the laws written by the legislature. 30 If Congress were entitled to choose, for whatever reason, not to vest judicial power in the judicial branch, “they might defeat the constitution itself.” 31 That proposition defies reason. And yet, despite its abun-

24. See Gunther, supra note 11; see also Brian Fitzpatrick, The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State and Judicial Selection and Tenure, 98 VA. L. REV. 839, 839 (2012) (explaining that “[f]ew topics have captivated the attention of scholars of the federal judiciary like the question of how much power Congress can exercise over the jurisdiction of the federal courts”).


26. U.S. CONST. art. III, § 1. The relevant portion of Article III reads:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Id.


30. Martin, 14 U.S. at 329.

31. Id.
Rather than adhering to the seemingly mandatory language of Article III, the Court has instead implied Congress’s control over inferior federal court jurisdiction based on a greater-includes-the-lesser proposition—that “Congress’ greater power to create lower federal courts includes its lesser power to ‘limit the jurisdiction of those Courts.’”33 This reasoning dates back at least to the mid-19th century in *Sheldon v. Sill.*34 The Court explained that because the Constitution gives Congress the power of inferior federal court establishment, then either (a) the constituted inferior courts must have jurisdiction over “all the judicial powers not given to the Supreme Court,” or (b) Congress’s power to constitute courts includes the power to “define their respective jurisdictions.”35 The Court dismissed the first option, stating that lower courts could not have jurisdiction to match that of the Supreme Court since such a rule had never been asserted in precedent cases and “could not be defended by a show of reason.”36 Consequently, the Court held that Congress must have control over inferior federal court jurisdiction.37 The reasoning is an unsupported disjunctive syllogism, suggesting without basis that only two possible interpretations exist, and rejecting one in order to command the other.38 This flawed logic establishes the basis for Congress’s vast authority to control inferior federal court jurisdiction.

Article III’s language with respect to Congress’s power over the Supreme Court’s jurisdiction is more direct, albeit still not decisive.39 The language gives an impression of some control by Congress over interd rationality, Story’s argument has been treated as dicta, and the Court has departed from his Article III interpretations since then.32

32. See Clinton, supra note 27, at 751-52 n.21; see also Gunther, supra note 11, at 903 (indicating that “Justice Story’s statements are more plausibly read as exhortations regarding desirable policy than as expressions of constitutional commands”).
34. 49 U.S. 441 (1850).
37. *Id.*
38. One problem, of course, is that the *Sheldon* opinion provides no basis for how the two exclusive options were determined—certainly not a textual basis—and thereby commits a fallacy of false dilemma. Additionally, the Court’s explanation for rejecting the first proposition is based only on historical practice by the courts and Congress, a fact that is challenged by scholars. See, e.g., David Dow, *Is the “Arising Under” Jurisdictional Grant in Article III Self-Executing?*, 25 WM. & MARY BILL RTS. J. 1, 12 (2016) (arguing against the conventional view that the Judiciary Act of 1789 demonstrates that the Framers and the first Congress viewed Article III as not self-executing without statutory grant of jurisdiction). Moreover, though the Court says the proposition that the Constitution gave inferior federal courts jurisdiction over any powers not given to the Supreme Court “could not be defended with any show of reason,” there is actually nothing unreasonable about it. *Sheldon*, 49 U.S. at 449. The proposition is neither internally contradictory nor proven false by any other means.
39. Here, the relevant portion of Article III reads:
some aspect of the Supreme Court’s jurisdiction, but as scholars have pointed out, the scope of that control is far from clear.40 In addition, the clause that defines the scope of Congress’s control over Supreme Court jurisdiction—the Exceptions Clause—was added only after the Constitution had undergone several drafts and was not much discussed by delegates prior to its adoption.41 Nevertheless, since as early as Chief Justice John Marshall’s decision in Durousseau v. United States,42 the Court has treated the Exceptions Clause as giving Congress wide, if not limitless, latitude in assigning and withdrawing the Supreme Court’s appellate jurisdiction.43 Indeed, the Court in Ex parte McCardle44 looked at Congress’s authority under the Constitution and determined that “the power to make exceptions to the appellate jurisdiction of this [Supreme] court is given by express words.”45

Despite the seemingly boundless authority of Congress’s jurisdiction-stripping power that the Court reads into Article III, there are three cases that scholars point to as indicating some limits. In two of these cases, the only two such cases in the Court’s history,46 Congress’s attempt to strip the federal courts’ jurisdiction is held to be

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. Const. art. III, § 2, cl. 2. See also John Manning, Separation of Powers as Ordinary Interpretation, 124 Harv. L. Rev. 1939, 1944 n.17 (2011) (explaining that the Vesting Clauses, including Art. III, §1, are difficult to surmise based on “ordinary textual interpretation” due to “their relative indeterminacy”); but see Memorandum from John Roberts, then-Special Assistant to the U.S. Attorney General, Proposals to Divest the Supreme Court of Appellate Jurisdiction, http://www.washingtonpost.com/wp-srv/nation/documents/roberts_appellate_jurisdiction.pdf (stating that “[t]his clear and unequivocal language is the strongest argument in favor of congressional power and the inevitable stumbling block for those who would read the clause in a more restricted fashion”).

40. See, e.g., Akil Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. Rev. 205, 230 n.86 (1985) (noting that even his own interpretation is not “patently self-evident,” for, if it were, “the near orthodoxy currently enjoyed by the Hart school would be utterly inexplicable and mystifying”). The text could mean, for example, that Congress has the power only to adjust the Court’s appellate and original jurisdiction, not to withdraw jurisdiction altogether.

41. See Clinton, supra note 27, at 775.

42. 10 U.S. 307 (1810).

43. Durousseau v. United States, 10 U.S. 307, 314 (1810) “The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial and by such other acts as have been passed on the subject.” Durousseau, 10 U.S. at 314.

44. 74 U.S. 506 (1868).

45. Ex parte McCardle, 74 U.S. 506, 514 (1868).

unconstitutional. In the third case, Congress’s jurisdiction-stripping authority is upheld, but alternative justifications have been given as to why that was so. In all three, scholars debate whether these cases truly indicate limits on Congress’s power, or whether there are alternative justifications for each.

In the first notable case, *United States v. Klein*, the Court held that a statute, which required the Supreme Court to dismiss for want of jurisdiction if the claimant used a presidential pardon to demonstrate loyalty, did not validly withdraw jurisdiction from the Court. “It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.” *Klein* has been called “a confusing opinion” and even the Court has said that the reasons for part of its holding “were not entirely clear.” The Court’s decision appears to rest on “several strands.” For instance, it suggests that Congress cannot instruct the courts how to decide a specific case, or cannot use jurisdiction-stripping as a means-to-an-end. However, an alternative theory argues that the Court found the statute problematic because:

Through its selective employment of the federal courts to enforce only those claims made by ‘loyal’ citizens who did not rely on a presidential pardon to demonstrate loyalty, Congress commanded the courts to act in direct conflict with what they believed to be constitutionally mandated, namely that the effect of a presidential pardon on the recipient is to wipe the slate clean and render that person loyal.

The latter view might suggest that there are other constitutional limits, within and beyond Article III, that prevent an unlimited exercise of Congress’s jurisdiction control.

The case of *Boumediene v. Bush* is especially useful for present purposes, as it involved not only a challenge to Congress’s stripping of federal court jurisdiction, but also the granting jurisdiction to a non-Article III military tribunal. Pursuant to Congress’s Authorization for Use of Military Force (“AUMF”), the Department of Defense had established Combatant Status Review Tribunals to determine if individuals captured under the auspices of the government’s War on Terror

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47. 80 U.S. 128 (1871).
49. Fallon, supra note 46, at 1079.
51. Fallon, supra note 46, at 1079.
52. Id.
were “enemy combatants” subject to detention. Congress subsequently passed the Military Commissions Act of 2006 to remove most Article III court jurisdiction, including jurisdiction over any habeas claims brought by the detainees. The Court struck down the jurisdictional limitations as unconstitutional. Motivating Justice Kennedy’s decision, at the forefront, appears to be a worry about the political branches governing “without legal constraint.” However, the opinion is difficult to identify as a restriction on Congress’s jurisdiction-stripping authority because it relies in large part on the mandates of due process, as well as whether the Military Commissions Act unconstitutionally suspended the writ of habeas corpus. Because of these alternative constitutional concerns, it has been said that Boumediene may have “no necessary bearing on jurisdiction-stripping proposals outside the scope of [the Suspension Clause].” Nonetheless, the case is a challenge to Congress’s withdrawal of federal court jurisdiction, and therefore, like Klein, suggests that there may be some constraints to the otherwise so-called “plenary” power.

Finally, in Ex parte McCardle, the Court upheld the constitutionality of the Repealer Act, which stripped the Court of jurisdiction over a specific habeas claim midway through its appeal. The Court explained, “Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” The Court expressed no doubt as to the extent of Congress’s power to grant or revoke jurisdiction; yet, at the end of the opinion, the Court “reach[ed] out in dictum to deny that all aspects of its jurisdiction had been withdrawn.” The Court’s observation that the jurisdiction-stripping was not comprehensive, since litigants might still have reached the Supreme Court through another avenue, is pointed to as an indication that the Court might not have been so tolerant had Congress tried to strip all jurisdiction.

As the above cases demonstrate, there is inconclusive textual support for the proposition of Congress’s plenary power to strip federal jurisdiction.

56. Boumediene, 553 U.S. at 733-35.
57. See Tyler, supra note 53, at 110.
58. Boumediene, 553 U.S. at 765.
59. See id. at 781 (stating that “[t]he idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context”).
60. Fallon, supra note 46, at 1053.
61. See Hart & Wechsler, supra note 25, at 316.
62. McCardle, 74 U.S. at 514.
63. Hart & Wechsler, supra note 25, at 316.
64. See, e.g., Fallon, supra note 46, at 1078.
court jurisdiction. As such, the Court and scholars have occasionally looked to historical practice as a means to solidify the rule. The key historical evidence cited is the Judiciary Act of 1789, passed by the First Congress, which provided for extensive jurisdiction for the federal courts, though not the full extent authorized under Article III.\(^\text{65}\)

In *Durousseau*, the Court finds this history persuasive, noting that “[w]hen the first legislature of the union proceeded to carry the third article of the constitution [sic] into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the supreme court [sic].”\(^\text{66}\) Because the Judiciary Act of 1789 did not grant the federal courts comprehensive jurisdiction, it is argued that those legislators understood themselves to have control over federal court jurisdiction broadly.

History is perhaps the most difficult justification to overcome for those who disagree with a plenary control of jurisdiction by Congress.\(^\text{67}\) And yet, even here, scholars have contested the force of the explanation. For example, Professor Dow explains that the Judiciary Act of 1789, like most legislation, was “a compromise measure,” meaning that the language of that statute could not and should not definitively define the scope of Article III.\(^\text{68}\) He also points to contemporaneously proposed legislation and expressions about legislation as demonstrating that some members of the First Congress may not have understood themselves as having a jurisdiction-stripping power, but were so intent on limiting federal power that they supported the Judiciary Act anyway.\(^\text{69}\) Like a purely textual analysis, history seems an imperfect tool from which to draw a clear and precise rule on this question.

Finally, because the question of Congress’s control of federal court jurisdiction is a structural constitutional question, and because the Court puts significant—perhaps decisive—weight into them, it is im-

\(^{65}\) See Paul Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1031-32 (1982) (explaining that “[t]he First Judiciary Act, passed by a Congress whose membership included many of the Framers, created lower federal courts but gave them only a small portion of the federal judicial power”).

\(^{66}\) *Durousseau*, 10 U.S. at 314.

\(^{67}\) See Clinton, *supra* note 27, at 845-51 (challenging the strong reliance on the First Judiciary Act and early Court holdings on jurisdiction-stripping rules as “grossly oversimplifying the post-1789 history of the implementation of the judicial article”).

\(^{68}\) Dow, *supra* note 38, at 13. This, of course, is an argument against relying on the acts passed by the First Congress more broadly when defining and clarifying constitutional vagueness. *Id.*

\(^{69}\) See id. at 15; see also Amanda Tyler, *Assessing the Role of History in the Federal Courts Cannon: A Word of Caution*, 90 NOTRE DAME L. REV. 1739, 1743-49 (2015) (providing four examples of statutes passed by early congresses or actions taken by executives which have since been found highly problematic and occasionally unconstitutional).
important to understand the separation of powers principles that the Court applies in these cases. The cases upholding Congress’s “plenary” power to control federal court jurisdiction appear to raise two complementary separation of powers arguments. The first argument suggests that granting or withdrawing jurisdiction from the courts is a form of legislating, and therefore there would be a separation of powers concern if Congress were disallowed from performing this function. The Court in Patchak asserts this argument forcefully. There, the Court explained that, “with limited exceptions, a congressional grant of jurisdiction is a prerequisite to the exercise of power,” and that if the Court struck down a statute in which Congress stripped jurisdiction, that action would “undermine the separation of powers by elevat[ing] the judicial over the legislative branch.”70

The second separation of powers argument represents the corollary of the first: performance of judicial duty and exercise of the judicial power is simply the application of the laws set forth by Congress, including the laws as to the courts’ jurisdiction. In other words, a court exercises the judicial power when it faithfully applies Congress’s rules as to the constraints on its own jurisdiction to hear a case. This argument is captured in the McCardle Court’s affirmation of jurisdiction-stripping authority, and in particular its concluding reflection that “judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.”71

These separation of powers explanations are not formal or rigid arguments that strict lines must be drawn between branches; instead they take on an almost functionalist separation of powers quality. The two corollary concerns look at the type of determination being made—as to the scope of power that can be exercised by the judicial branch—and conclude that this determination itself is a “legislative” function. By contrast, a strictly formalist assessment might look only at whether the power of one of the branches is reduced from a rigid predetermined scope. In those cases where the Court proclaims a vast congressional jurisdiction-stripping power, the Court seems undeterred by arguments that such a substantial legislative power to deter-

70. Patchak, 138 S. Ct. at 907 (quoting Cary v. Curtis, 44 U.S. 236, 245 (1845)). The Court in Patchak faced the question of whether Congress could, by virtue of its jurisdiction-stripping authority, change the law as it related to a specific piece of land and thereby determine the outcome of an ongoing lawsuit. Patchak, 138 S. Ct. at 902-03. A plurality of the Court agreed that the withdrawal of jurisdiction was proper. Id. at 902. Justices Ginsburg and Sotomayor concurred in the judgement, believing that Congress had lawfully acted to reinstate federal sovereign immunity, but did not necessarily agree that the federal courts’ jurisdiction had been lawfully stripped. Id. at 912-13 (Ginsburg, J., concurring).

71. McCardle, 74 U.S. at 514.
mine the scope of the judicial branch’s authority to adjudicate altogether is an invasion or encroachment on the latter independent branch’s power.72

It is notable that the three cases with possible exceptions to the plenary jurisdiction control rule—Klein, Boumediene, and McCardle—do not necessarily take a differing view of separation of powers principles. These exception cases do not represent a change in the Court’s approach by, for example, suddenly justifying exceptions based on a formal or rigid application of separation of powers where each branch must stay within its carefully prescribed box.73 Rather, in Klein and Boumediene, the Court weighs other constitutional requirements as restricting the otherwise “plenary” power to strip jurisdiction from the courts.74 Had the Court in these cases rejected the earlier separation of powers principles used to justify Congress’s jurisdiction-stripping power, the Court might have gone further in crafting exceptions to Congress’s jurisdiction-stripping power. In other words, the Court may have held that harm is done to a strict separation of powers when one branch controls the authority and scope of authority of another. Instead, in all three exception cases, the Court made no effort to limit Congress’s authority to assign and withdraw jurisdiction from Article III courts.

B. The “Limited” Non-Article III Court Delegation Power: Textual, Historical, and Structural Justifications

The United States Supreme Court’s rule for Congress’s authority to create non-Article III courts and assign to them adjudicatory authority is less straightforward and less succinct than the rule for jurisdiction-stripping. In this area of law, the rules can be described as an evolution, especially with regards to the notion that “public rights” are

72. See, e.g., Patchak, 138 S. Ct. at 910 (rejecting the arguments of the dissent that Congress’s withdrawal of jurisdiction was a manipulation in order to exercise the judicial power rather than the legislative power).

73. The Court in Klein does use some “formalist” separation of powers language, such as its statement that “[i]t is the intention of the Constitution that each of the great co-ordinate departments of the government—the Legislative, the Executive and the Judicial—shall be, in its sphere, independent of the others.” Klein, 80 U.S. at 147. But, as noted above, Chief Justice Chase’s justification is somewhat convoluted, and is arguably based on a view that Congress may not put the federal courts in a position requiring them to participate in what they would interpret as a constitutional violation. See Tyler, supra note 53, at 108.

74. In Boumediene, the other constitutional considerations are the prisoners’ rights under the suspension clause, guaranteeing a right to seek habeas corpus absent suspension, and the due process clause as to the analysis of the procedural substitution for review that was offered. See Boumediene, 553 U.S. at 773, 779. In Klein, the constitutional consideration was the Court’s own prior determination on the effect of the presidential pardon, a power granted to the Executive under Article II, Section 2 of the Constitution. See Klein, 80 U.S. at 147-48.
some of those that can be adjudicated by non-Article III courts.\textsuperscript{75} Descriptively, the Court most recently said that its precedent gives Congress "significant latitude to assign adjudication" to non-Article III courts in certain cases.\textsuperscript{76} However, recent cases have substantially limited the breadth of the cases that can be brought before such tribunals.

As it currently stands, the doctrine is not entirely clear,\textsuperscript{77} but the current rules might be summarized with the following: absent a military tribunal or territorial tribunal, the Court applies a "public rights" framework when it assesses the types of claims that Congress can assign to a non-Article III court.\textsuperscript{78} This means that if the right asserted is one established and generally, though not always, defended against by the government, then Congress has the authority to allow such claims to be heard initially by courts that do not meet the tenure and salary protection requirements of Article III.\textsuperscript{79} Congress may not assign "Stern claims" —common law claims added to a public rights adjudication through ancillary jurisdiction—to non-Article III courts,\textsuperscript{80} or at least may not permit a non-Article III court to enter final judgment on such claim.\textsuperscript{81} However, a divided Court has held that the Stern rule does not apply if all parties to the suit consent to the adjudication by the non-Article III court.\textsuperscript{82}

The evolving line of rules outlined above are not mandated by the text of the Constitution. In terms of constitutional text, the Court looks to competing clauses from Article III and Article I in assessing how Congress may allocate adjudicatory functions. Article I grants that Congress may "constitute Tribunals inferior to the supreme Court."\textsuperscript{83} Meanwhile, Article III states that "[t]he judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and es-


\textsuperscript{77}. In the last Term, the Court reemphasized the point made decades ago that "[t]his Court has not 'definitely explained' the distinction between public and private rights." Id. (citing N. Pipeline, 458 U.S. at 69); see also Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 847 (1986) (noting for the Court that "our precedents in this area do not admit of easy synthesis").

\textsuperscript{78}. See N. Pipeline, 458 U.S. at 64-67.


\textsuperscript{81}. Executive Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2168 (2014). The role of finality in non-Article III courts' adjudications has been a concern of the Court's going back to Crowell v. Benson, when the Court held that there must be de novo review by an Article III court such as not to "sap the judicial power as it exists under the federal Constitution." Crowell v. Benson, 285 U.S. 22, 57 (1932).


\textsuperscript{83}. U.S. CONST. art. I, § 8, cl. 9.
tablish,” where the judges of the inferior and Supreme Court “shall hold their Offices during good Behavior” and receive “a Compensation, which shall not be diminished during their Continuance in Office.”

Perhaps because there are two different constitutional provisions neither of which clearly dictates how Congress may assign adjudicatory responsibilities, the Court is fickle in its textual analysis, occasionally relying on one or both of these clauses for support. For example, the Court has noted that Article I grants Congress the authority to create tribunals to administer the statutory schemes it devises, and suggests this supports the conclusion that Congress could assign certain claims to a non-Article III court. The Court sometimes points to the Necessary and Proper Clause as further Article I evidence of Congress’s authority when it comes to effectuating its legislative powers. In cases where it upholds Congress’s non-Article III tribunal assignments, the Court generally seems more willing to find that Congress’s Article I powers outweigh any Article III reservations.

However, in some cases the Court looks to the text of Article III and holds that it prescribes definite limits on Congress’s authority to assign jurisdiction to non-Article III courts because of the requirement in Article III that inferior court judges have tenure and salary protection. In Stern, the Court wrote that “[a]s its text and our precedent confirm, Article III is ‘an inseparable element of the constitutional system of checks and balances.’” Nonetheless, the Court has not always found the text of Article III to be so clear. In Commodity Futures

84. Id. art. III, § 1. A powerful argument has been made by Professor Pfander that the distinct usage of the terms “tribunals” in Article I and “courts” in Article III can be read to allow Congress to create tribunals without the salary and tenure protections required in Article III, so long as Congress provides for review such that the Supreme Court remains superior. See James Pfander, Article I Tribunals, Article III Courts, and the Judicial Power of the United States, 118 Harv. L. Rev. 643, 650-55 (2004). So far it seems that most of the Court’s cases that address both Congress’s Article I inferior tribunal-creation power and Article III inferior court-creation power do so in the way that Pfander described when he said: “Most observers have treated the words as synonyms.” Id. at 650; see, e.g., Thomas, 473 U.S. at 583 (“Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts”).

85. Thomas, 473 U.S. at 583. “Congress has the power, under Article I, to authorize an agency administering a complex regulatory scheme . . . without providing an Article III adjudication.” Id.

86. See Murray v. Hoboken Land & Improvement Co. (Murray’s Lessee), 59 U.S. 272, 281 (1855) (stating that Congress has power to collect and distribute revenue, “and to make all laws which shall be necessary and proper for carrying that power into effect,” which includes the power to designate persons responsible for revenue collection).


88. Stern, 564 U.S. at 482-83 (citing N. Pipeline, 458 U.S. at 58).
Trading Commission v. Schor, O'Connor wrote that the Court’s precedents on this question “do not admit of easy synthesis,” but nevertheless make clear that the issue “cannot turn on conclusory reference to the language of Article III.” Likewise, in Thomas v. Union Carbide Agricultural Products Company, O'Connor pointed out that “[a]n absolute construction of Article III is not possible in this area.”

Being that the text is not definitive, like with the question of Congress’s jurisdiction-stripping power, one might look to historical practice for guidance. Here, the Court has given historical considerations even less credence than in the jurisdiction-stripping context, only occasionally taking note of past practice. For example, in Northern Pipeline Construction Company v. Marathon Pipe Line Company, the Court pointed to the “historically recognized distinction” between matters that were judicial and those that could be dealt with exclusively by the political branches as underlying the public rights exception to non-Article III court adjudication. Nonetheless, scholars have pointed out that the practice of congressional grants of jurisdiction to non-Article III courts was not at all uncommon in early American legal history, and that history may actually support a fairly robust delegation power for Congress. For more than 200 years, Congress has been assigning adjudicatory responsibilities to legislative and administrative courts. Moreover, the First Congress assigned to the executive branch the responsibility of resolving veteran benefits and customs issues. Given this background, it is surprising that the hist-

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89. 478 U.S. 833 (1986).
90. Schor, 478 U.S. at 847.
92. Thomas, 473 U.S. at 583.
94. N. Pipeline, 458 U.S. at 68.
96. Id.
97. Richard Fallon, Of Legislative Courts, Administrative Agencies, and Article III, 101 Harv. L. Rev. 915, 919 (1988) [hereinafter Fallon, Of Legislative Courts]. These early non-Article III court-delegated claims are arguably distinct from common law or constitutional claims as creations of Congress, subject to its control. This distinction likely helped inform the “categories” of exceptions that Justice Brennan identified as excused from Art. III requirements. See N. Pipeline, 458 U.S. at 63-64 (describing “three narrow situations” where Congress is permitted to create legislative courts: territorial courts, courts-martial, and courts to adjudicate cases “involving ‘public rights.’”). Regardless of the distinction, the history shows that even early on, Congress faced “an honest struggle to provide tribunals for a range of matters that were seen, for a variety of reasons, as unfit for determination in Article III courts.” Pfander, supra note 84, at 698.
torical use of non-Article III courts plays such an insignificant role in the Court’s analysis of these questions, especially since practices of the First Congress are given considerable weight in the jurisdiction-stripping context.

Lastly, in turning to the Court’s approach to separation of powers concerns in this area, it is notable that although the overall rule in non-Article III court cases might be described as evolving over time, the separation of powers principles within those cases might better be described as oscillating between approaches. In *Northern Pipeline*, the Court insisted that separation of powers demanded a strict line be drawn around Congress’s non-Article III delegation power in order to “guard against ‘encroachment or aggrandizement’ at the expense of the other branches” and to protect “the constitutional guarantee of an independent Judicial Branch.” Four years later in *Schor*, the majority dismissed the idea that separation of powers principles somehow gave certain claims special status requiring Article III adjudication. The Court there went on to explain that the character of the claim matters to the separation of powers analysis because, depending on the historical treatment of the claim, a new method of adjudication could more or less substantially shift the balance of power. The *Schor* case is known for its introduction of balancing factors to determine the gravity of a power shift with any non-Article III court challenge.

The next big shift to the Court’s separation of powers principles for non-Article III courts came in *Stern*, as Chief Justice Roberts brought the Court back to a *Northern Pipeline*-like view of separation of powers demands, emphasizing that “the basic concept of separation of powers” is that those powers cannot be shared amongst the branches. *Stern* is notable for its strict formalist separation of powers.

98. See Peter Strauss, *Formal and Functional Approaches to Separation of Powers Questions: A Foolish Inconsistency*, 72 Cornell L. Rev 488, 489 (1987) (“The Supreme Court has vacillated over the years between using a formalistic approach to separation-of-powers issues grounded in the perceived necessity of maintaining three distinct branches of government . . . and a functional approach that stresses core function and relationship, and permits a good deal of flexibility when these attributes are not threatened.”).

99. *Northern Pipeline*, 458 U.S. at 74, 83 (citing *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)).

100. *Schor*, 478 U.S. at 853. In *Schor*, the Court analyzed whether the authority given by Congress to the Commodity Futures Trading Commission (“CFTC”) in the Commodity Exchange Act, allowing the CFTC to hear state law counterclaims, was a violation of Article III and separation of powers principles. *Id.* at 835-36.

101. See *id.* at 854.

102. *Stern*, 564 U.S. at 483 (quoting United States v. Nixon, 418 U.S. 683, 704 (1974)). The Court in *Stern*, as in *Northern Pipeline*, was again faced with challenges to Congress’s system for bankruptcy court counterclaim adjudications. *Id.* at 469. This
ers language, as well as its strict separation of powers logic. The act of entering “a final, binding judgement . . . on a common law cause of action” is “the most prototypical exercise of judicial power.” Taking away this authority from Article III courts, at least with respect to the claims not created by Congress, would “transform” Article III altogether, undermining its protections of individual liberties and the strict separation of each branch’s power. According to Chief Justice Robert’s opinion in Stern, similar to Justice Brennan’s opinion in Northern Pipeline, a critical demand of separation of powers is the type of claim in question; Chief Justice Roberts agreed with Justice Brennan that separation of powers principles are not offended when Congress redistributes adjudicatory authority over claims that Congress itself created.

The Court has made one more oscillation: a drift back toward functionalism in Wellness International Network Limited v. Sharif and, most recently, in Oil States Energy Services, LLC v. Greene’s Energy Group, LLC. Wellness International focused on a litigant’s ability to consent to non-Article III court jurisdiction, even over “Stern claims.” There, the Court focused less on drawing stark lines between branches, and, once again, appeared more concerned with the overall balance of power between them. “[S]eparation of powers concerns are diminished’ when, as here, ‘the decision to invoke [a non-Article III] forum is left entirely to the parties and the power of the

time, however, the Court assessed the constitutionality of the Bankruptcy Act of 1984, which had been Congress’s response to the Court’s Northern Pipeline decision. Id. at 486. As described by the majority, the revised Bankruptcy Act limited bankruptcy courts to entering final judgments only in “core” proceedings, but with respect to those “core” proceedings, the Act permitted the same wide range of functions by bankruptcy judges as had been authorized prior to the Court’s Northern Pipeline holding. See id.

103. Id. at 494.

104. Id. at 494-95. Although the Court in Stern did not expressly overrule Schor or Thomas, many would agree that the sharp turn away from a separation of powers balancing test to a formal line-drawing approach effectively overruled that precedent. See, e.g., Erwin Chemerinsky, Formalism without a Foundation: Stern v. Marshall, 2011 Surf. Cr. Rev. 183, 203 (2011) (“It is not possible to reconcile the functional approach in Thomas and Schor with the formalistic approach in Stern v. Marshall.”).

105. See Stern, 564 U.S. at 487 (distinguishing the state common law claim at issue from cases cited by the defendant that “were themselves federal claims under bankruptcy law, which would be completely resolved in the bankruptcy process”).


108. Wellness Int’l. Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1939 (2015). Wellness Int’l was yet another case involving the constitutionality of bankruptcy court adjudications. Id. The dispute between parties began in 2005, the respondent filed for Chapter 7 bankruptcy in 2009, and mid-way through an extensive proceeding, the Court issued its ruling in Stern. Id. at 1940-41. The respondent argued that, based on the ruling in Stern, the Bankruptcy Court’s order could only be considered “advisory.” Id. at 1941. The Court assessed whether respondent could and did waive the right to adjudication before an Article III court. Id.
federal judiciary to take jurisdiction’ remains in place.” Oil States, likewise, reaffirmed the applicability of the “public-rights doctrine” as permissible for adjudications by non-Article III courts.

Trending back toward a balancing treatment of non-Article III court adjudications, neither Wellness International nor Oil States disaffirmed the holding of Stern or the strict separation of powers principles underlying it. Wellness International addressed only the question of whether consent was a valid means to overcome an otherwise impermissible adjudication; the Court accepted the premise that certain claims cannot be adjudicated by non-Article III courts. Likewise, the Oil States plurality did not dispute that the non-Article III court in question was not permitted to exercise the judicial power of the United States. Instead, the Court there dealt only with whether the review of an existing patent was the type of claim to fit within the “public rights” exception. Because these most recent cases did not question the scope of authority that Congress could assign to non-Article III courts, Stern’s holding that Congress may not assign non-congressionally created claims to non-Article III courts for final judgment appears to represent the Court’s rule for non-Article III court adjudications.

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As the cases and reasoning above demonstrate, it is puzzling that the Court seems to have so little concern about the balance of power when it considers Congress’s ability to strip the judiciary of jurisdiction to adjudicate, but so much concern about the balance of power when considering Congress’s reassignment of adjudicatory responsibilities to non-Article III courts. The question is whether these rules are merely curious results of logical reasoning, or whether they represent inconsistent approaches by the Court.

109. Id. at 1945 (quoting Schor, 478 U.S. at 855).
110. Oil States Energy Servs. v. Greene’s Energy Grp., 138 S. Ct. 1365, 1372-73 (2018). In this most recent case addressing non-Article III court adjudications, the Court assessed the constitutionality of Congress’s assignment to the United States Patent and Trademark Office of the “inter partes review” process—the re-review and potential cancelation of existing, previously-issued patents. Id. at 1370.
111. Wellness Int’l, 135 S. Ct. at 1938-39. This Article does not address the lively debate over the role of consent vis-à-vis structural constitutional issues including the “right to an Article III tribunal.” Id. at 1956 (Roberts, C.J., dissenting) (quoting Justice Brennan’s dissent in Schor). However, there are very interesting questions as to how consent fits into the inconsistent separation of powers principles addressed herein. See supra Part II.
112. Oil States, 138 S. Ct. at 1372-73.
113. Id. at 1373.
III. THE LOGICAL INCONSISTENCY OF CONGRESS’S DISPARATE AUTHORITY

The rules for Congress’s power to strip federal court jurisdiction as compared to its power to assign adjudications to non-Article III courts seem paradoxical. In one respect, Congress appears to have tremendous authority over Article III federal courts, even to the point of being able to take away their core purpose—their ability to adjudicate claims. In another respect, Congress is severely limited in what types of claims it can assign for adjudication by non-Article III courts. This raises two questions: are these two rules consistent? And if not, why has the United States Supreme Court made such inconsistent determinations?

This section explores this inconsistency in three ways. Part II.A examines some of the conspicuously inconsistent language that the Court has used in its opinions.\(^\text{114}\) Part II.B evaluates how the two rules withstand an explicit logical analysis. Drawing on the law of non-contradiction, this section concludes that the two rules do not explicitly contradict one another on their face.\(^\text{115}\) However, Part II.C looks at the principles justifying the two rules, and collectively compares the consistency of the set of rules and justifications.\(^\text{116}\) As noted in Part I, the Court’s rule for Congress’s jurisdiction-stripping power rests on a separation of powers principle that is quite different from that which is used to justify the rule for Congress’s power to assign adjudicatory authority to non-Article III courts. When looking at these underlying principles, this section concludes that, although the rules themselves might not be facially contradictory, they are based on contradictory justifications. And therefore, based on these contradictory justifications, there is an implicit contradiction between the Court’s two rules.

A. INCONSISTENT LANGUAGE

The case law in the non-Article III court context is replete with language that reads as vastly inconsistent with the United States Supreme Court’s rule for jurisdiction-stripping, and vice-versa. In Murray v. Hoboken Land and Improvement Company (“Murray’s Lessee”),\(^\text{117}\) often cited for broadly laying down the fundamental principles in non-Article III cases, the Court stated definitively that “we do not consider congress [sic] can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the

\(^{114}\) See infra notes 117-126 and accompanying text.

\(^{115}\) See infra notes 127-132 and accompanying text.

\(^{116}\) See infra notes 133-135 and accompanying text.

\(^{117}\) 59 U.S. 272 (1855).
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common law, or in equity, or admiralty . . . .” 118 This, of course, is directly at odds with the Court’s general rule in jurisdiction-stripping cases that Congress has “plenary” power to withdraw Article-III court jurisdiction. 119

In Stern v. Marshall, 120 the Court’s language went even further, when it said that “[a] statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely.” 121 Examined in the context of jurisdiction-stripping, however, the Court’s statement here makes almost no sense, seeing as it has also declared that Congress does have the power to eliminate the judicial branch’s authority (almost) entirely. Even in Wellness International Limited v. Sharif, 122 where it arguably softened its otherwise formalistic approach to separation of powers concerns, the Court nonetheless stated that the lesson from precedent is that “[t]he entitlement to an Article III adjudicator is ‘a personal right’” in addition to serving a structural purpose. 123 If the right to be heard before a non-Article III court is, in fact, a “personal right” under the Constitution, then Congress should not have any authority to strip jurisdiction from Article III courts, since it is beyond even Congress’s legislative power to override constitutional requirements. 124

The same inconsistent language can be found in the Court’s jurisdiction-stripping cases. There, the Court’s language suggests such broad control of jurisdiction by Congress that it should also permit assigning disputes to non-Article III courts. Most recently, in Patchak v. Zinke, 125 the Court said that “Congress’ power over federal jurisdiction is ‘an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.’” 126 And yet the Court has put substantial restrictions on Congress’s ability to restrain the courts from acting by holding as unconstitutional Congress’s grant of adjudicative authority to non-Article III courts for so-called “Stern claims.” The Court’s language in

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118. Murray v. Hoboken Land & Improvement Co. (Murray’s Lessee), 59 U.S. 272, 284 (1855).
120. 564 U.S. 462 (2011).
124. See, e.g., Dickerson v. United States, 530 U.S. 428, 432 (2000) (“We hold that . . . a constitutional decision of this Court[] may not be in effect overruled by an Act of Congress.”).
these cases raises yet another flag that these two rules do not fit neatly together.

B. LOGICAL CONSISTENCY OF THE COURT’S RULES

The law of non-contradiction is a fundamental law of logic; this Aristotelian analytical principle has survived the test of time. Indeed, Aristotle suggests that without it, the human species could not know anything it purports to know. The law of non-contradiction states that a statement and its opposite cannot both be true at the same time. For example, the law of non-contradiction would reject the idea that “Person A always starts her meetings on time, but yesterday she began ten minutes late.” It is clear that both statements cannot be true. Or, to choose an example more pertinent to the topic at hand, the law of non-contradiction would not support a statement that “Person A is the supervisor with authority to direct Person B, but Person B does not take direction from Person A.” Because it is understood that a supervising relationship implies a reciprocal reporting relationship, these statements contradict one another and, together, the two statements cannot both be true.

Turning to the ostensible inconsistency at hand, we examine the following assertions derived from the analysis of the United States Supreme Court’s holdings detailed in Part I:

• It is permissible (constitutional) for Congress to take away the authority of Article III federal courts to hear ABC cases.
• But, it is not permissible (unconstitutional) for Congress to give authority over ABC cases to non-Article III courts.

As above, to demonstrate that these statements are explicitly, logically inconsistent, pursuant to the law of non-contradiction, it would need to be demonstrated that the second statement is the opposite or a direct denial of the first. Were that the case, then the Court’s declaration that both statements are true would be logically inconsistent on its face.

127. See W. Curtis Swabey, The Laws of Thought, 32 Phil. Rev. 211, 211-12 (1923) (describing the “historic tradition” of Aristotelian logic, including the fundamental law of thought called non-contradiction).
128. Id. at 212.
129. For the purposes of analyzing logical consistency, the two rules explained in Part I have been abstracted and summarized to be succinct and comparable. Obviously, much ink has been spilled to analyze the Court’s case law in each area, and there is much debate about the resulting rules. This Article recognizes that different formulations could be made to express the rules for Congress’s power to strip jurisdiction and its power to assign adjudications to non-Article III courts. As such, different rules could be substituted into the above analysis. If so done, it is likely that they would derive the same result as to the facial logical consistency.
Here, there is no such denial. Of course, the statement that Congress cannot give adjudicatory responsibility to non-Article III courts is not the opposite of saying that Congress can take away jurisdiction from Article III courts. Though the rules may, in some circumstances, result in puzzling outcomes, the statements themselves are not denials of the other.

For example, according to the Court’s holding in *Stern v. Marshall*, Congress may not write a statute allowing non-Article III courts to hear common law tort or contract claims. However, pursuant to the Court’s language and holdings in its jurisdiction-stripping cases, Congress could pass legislation stripping all inferior Article III federal courts of jurisdiction to hear the same common law tort or contract claims and stripping the Supreme Court of appellate jurisdiction. Though these two hypothetical acts by Congress would have essentially the same effect on Article III courts, the rules prohibiting and permitting them, respectively, are not directly opposite. It is not a denial to say that X has the power to take something from Y, but X cannot give it to Z. Despite peculiar outcomes, it is not a denial to say that Congress can take away jurisdiction from Article III courts but cannot give jurisdiction to non-Article III courts. However, a facial inconsistency is not the only form of inconsistency that can be used to challenge a set of rules.

C. LOGICAL INCONSISTENCY OF THE PRINCIPLES APPLIED

Before moving on to address the inconsistency between each rule’s justifying principles, it is necessary to introduce the concept of an inconsistent set. Rather than the two statements which refute or contradict one another examined in Part II.B, an inconsistent set recognizes the existence of three or more statements where all cannot be true at the same time. A common formulation of the inconsistent set is shown by saying “A is B, all B are C, but A is not C.”

Returning to the hypothetical used in Part II.B, some adjustments can be made to demonstrate an inconsistent set: (1) Person A supervises Person B and Person C. (2) In her supervisory position, Person A has unlimited authority to assign or withdraw any tasks from any supervisee. However, (3) Person A cannot assign any Person B-tasks to Person C. Though no two of these statements alone are contradictory, these three statements together cannot all be true. The

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131. *See* *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (admonishing that the purpose of Article III would fail “if the other branches . . . could confer the Government’s ‘judicial Power’ on entities outside Article III.”).
132. *See* *Ex parte McCardle*, 74 U.S. 506, 514 (1868) (explaining that when Congress strips jurisdiction, “the court [sic] cannot proceed at all in any cause.”).
three statements together logically imply that Person A has both limited and unlimited authority with respect to the tasks assigned to Persons B and C.

The concept of an inconsistent set can be applied to the United States Supreme Court’s rules on Congress’s power to control adjudications. Here, the assertions from Part II.B can be expanded upon to include the justifying principle for each rule, as outlined in Part I. Together, the four statements form a set:

- Rule 1: It is permissible (constitutional) for Congress to take away the adjudicative authority of Article III federal courts to hear ABC cases.
  - Rule 1 is true because separation of powers demands that Congress have authority over assigning and withdrawing jurisdiction since it is a legislative function.
- Rule 2: It is not permissible (unconstitutional) for Congress to give adjudicative authority over ABC cases to non-Article III courts.
  - Rule 2 is true because separation of powers dictates that Congress may not invade or encroach upon the authority of its coequal judicial branch.

Looking at the set as a whole, it becomes possible to spot the inconsistency. Statement number two explains a separation of powers principle that is incompatible with the separation of powers principle asserted in statement number four. Separation of powers cannot mean both that Congress must be permitted to legislate the scope of the judicial branch’s authority, including its ability to hear entire categories of cases, but also that Congress may not encroach on the authority of its coequal judicial branch.

Take, for example, the issue that faced the Court in Stern v. Marshall:133 whether Congress could assign to non-Article III bankruptcy courts the authority to adjudicate ancillary common law claims traditionally adjudicated by state courts.134 If the Court purported, as it did in that case, to answer the question by referring to separation of powers principles as a guide, it could not use both of the separation of powers principles listed above. Specifically, the Court could not find an answer to the question if it said that separation of powers demands that Congress have plenary authority to control adjudication assignments as part of its legislative power and that separation of powers demands that Congress not curtail the authority of the judicial branch. These two demands of separation of powers are opposites; they are contradictory. And requiring that a single decision be guided

133. 564 U.S. 462 (2011).
by both principles would be futile. Therefore, statements (2) and (4) above are facially inconsistent.

The idea of an inconsistent set is needed here in order to extrapolate the inconsistency between statements (2) and (4) to the rules in statements (1) and (3), which the two inconsistent separation of powers principles supposedly justify. As shown in Part I, these justifications are critical to the Court’s reasoning in each rule, particularly since the Constitution’s textual and historical directives as to Congress’s proper authority in each circumstance are vague at best. As such, the justifications in statements (2) and (4) above link themselves to the rules in statements (1) and (3) as the necessary explanation for the rules themselves. Because of the link of each justification to each rule, the four statements can be tested together as a set. And, as explained above, since the four statements cannot collectively be true, the set must be deemed inconsistent.

The above analysis shows that the two rules the Court has laid out for Congress’s power over Article III court jurisdiction and Congress’s power to assign non-Article III adjudications are based on inconsistent justifications and are therefore themselves inconsistent. But a final question remains as to why the Court has treated these two areas so differently.

IV. EXPLANATIONS FOR THE INCONSISTENCY

Consistency in constitutional interpretation is important. Justice Oliver Wendell Holmes is famously quoted as saying that “the life of the law has not been logic; it has been experience.” However, Justice Holmes also acknowledged that “the notion that the only force at work in the development of the law is logic” is a proposition that is “[i]n the broadest sense . . . true.” In logic, the existence of an inconsistent set of statements undermines the truth of each statement in the set. Indeed, the speaker loses legitimacy and the statements lose authority when they fail this basic test. And though the life of the law might evolve through experience, experience will never show that an inconsistent set of statements are all true.

135. By justification, this Article refers to the logical concept of ‘entailment.’ A premise entails a conclusion if the former requires the truth of the latter. Here, the truth of the separation of powers principle for each area of law entails the truth of the rule that it ‘justifies.’
As such, it is important to identify an inconsistent set when it happens—whether found in the United States Supreme Court’s constitutional analysis or elsewhere. It is also important to explore how the inconsistent set came to be. For present purposes, this invites an exploration of why the Court’s jurisprudence in the area of congressional power over Article III court jurisdiction developed inconsistently with its jurisprudence in the area of congressional power to assign adjudications to non-Article III courts.

This section begins in Part III.A by rejecting the simple explanations for the result—either that the inconsistency resulted because the Court followed clear textual directives in the Constitution, or that the resulting inconsistency was an oversight or lack of attention to logical demands. Parts III.B–E go on to present four alternative hypotheses to the question of why the Court has developed inconsistent rules for Congress’s authority in controlling adjudications. Each proposed explanation reveals how the Court may have, over time, issued decisions resulting in the above explained inconsistency. Although each hypothesis leaves holes in painting a complete picture, one stands out as the most valid explanation—particularly in light of the Court’s language in each of the cases and the underlying principles it applies.

A. SIMPLE EXPLANATIONS

One might propose a simple answer to the question of how the United States Supreme Court ended up with these inconsistent rules: the Court, as it is required to do, looked to the Constitution, which clearly proscribed the two inconsistent rules. This simple answer creates a new problem—what to do with an authoritative legal framework that itself contained an inconsistency. But, such an answer would at least explain the otherwise inconsistent result.

For better or worse, the Constitution is not so clear. In Part I, this article pointed to the imprecise constitutional text in Articles I and III, which lay out the powers of Congress vis-à-vis Article III courts and inferior tribunals. That Part demonstrated that it is difficult to argue that either the plenary jurisdiction-stripping rule or the limited non-Article III courts rule are derived by looking at the text alone. Moreover, Part I showed that the Court, for the most part, has not attempted to justify its decisions for non-Article III courts or jurisdiction-stripping by suggesting the constitutional text is perfectly

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knowledge about more rules, but to make what we already have more precise; it does not seek penultimate completeness, but internal consistency and clarification.” Id.

139. See supra Part I.A and I.B.
clear. As such, this Article proceeds on the conclusion that the inconsistency identified in Part II cannot be explained simply by pointing to constitutional text.

Nor can the inconsistency be dismissed by suggesting that it was merely an oversight by the Court or a lack of attention to logical consistency demands. For example, one might argue that, as the Court of last resort with its fingers in every part of the law, it is natural that the Court’s rules in some areas do not line up perfectly with its rules in other areas. After all, the Court is not a group of logicians. Maybe the Justices did not realize they were being inconsistent.

This simple explanation can be rejected by looking at several of the Court’s recent jurisdiction-stripping and non-Article III court cases, specifically the dissents. In his dissent in Wellness International Network, Ltd. v. Sharif about the ability of a litigant to consent to a non-Article III court, Chief Justice Roberts cites to a collection of several separation of powers decisions—those involving encroachment on the judicial power, including the jurisdiction-stripping case United States v. Klein, those involving encroachment on legislative power, and those involving encroachment on executive power. He uses these citations to emphasize the point that separation of powers demands are—or should be—consistent, regardless of which branch is being protected. The Chief Justice makes a similar point in his dissent in Patchak v. Zinke, a jurisdiction-stripping case, when he cites non-Article III court cases Northern Pipeline Construction Company v. Marathon Pipe Line Company and Stern v. Marshall to explain the role of judicial power.

These citations make clear that the Court was not blind to the fact that both areas of law—jurisdiction-stripping and non-Article III court adjudications—implicated separation of powers principles. And, given the Chief’s dissents, it cannot be said that the Court was unaware that it was presenting different and conflicting separation of

\[140. \text{See, e.g., Sheldon v. Sill, 49 U.S. 441, 448-49 (1850) (using a greater-includes-the-lesser argument and a disjunctive syllogism to surmise the answer about the proper interpretation of Art. III, § 1).}
142. 80 U.S. 128 (1871).
146. 564 U.S. 462 (2011).
147. See Patchak v. Zinke, 138 S. Ct. 897, 914 (2018) (Roberts, C.J., dissenting) (arguing that the assignment of the judicial power to the courts is essential to constitutional checks and balances).\]
powers requirements in each. It is interesting that the Chief Justice, whose dissents make bold and far-reaching statements about separation of powers demands, is himself not entirely consistent in his rules for jurisdiction-stripping and non-Article III courts. At first blush it might seem that Chief Justice Roberts has found a logical compromise for the two areas. After all, he does not want to see jurisdiction stripped from the federal courts (per his dissent in *Patchak*), nor does he want the adjudication of claims transferred to non-Article III courts (per his opinion in *Stern*).

However, his rules differ when examined at the claim-level. For non-Article III courts, Roberts follows the Brennan approach from *Northern Pipeline*, which said that Congress could not redistribute adjudicatory responsibility for claims other than those it created—specifically common law claims, and one might presume constitutional claims. However, for questions about Congress’s power to strip federal courts of jurisdiction, Roberts is mostly concerned that Congress not be permitted to “decide the outcome of . . . a case,” a role that he suggests separation of powers leaves entirely to the judicial branch. Thus, in the latter, the Chief Justice loses sight of the important distinction made by Justice Brennan—that separation of powers provides Congress wide latitude with respect to congressionally-created claims but limits its authority over others.

It is therefore not possible to rely on these simple explanations to account for the Court’s inconsistency—it can neither be said that the Court’s rules came from a pure textual analysis, nor were they just an unfortunate oversight. Because neither of these simple explanations account for the Court’s inconsistency, this Article next examines several other hypotheses that may help to better explain the choices made by the Court in these two areas.

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149. *Patchak*, 138 S. Ct. at 914 (Roberts, C.J., dissenting). The claim in *Patchak*—regarding whether the Secretary of the Interior had statutory authority under the Indian Reorganization Act to bring land into trust—would almost certainly be considered a claim over which Congress has broad latitude, as Congress was the author of the underlying statute. See id. at 903.

150. Chief Justice Roberts may understand separation of powers demands to be even stricter than he originally described in *Stern*—perhaps he has since adopted a “protect-the-courts-at-all-costs” approach. Such a view was certainly on display during the oral arguments for *Wellness International* when he said that consent to a non-Article III court adjudication would “still take[] out of the Federal courts our constitutional birthright to decide cases and controversies under Article III.” Oral Argument at 21:34, *Wellness Int’l. Network*, Ltd. v. Sharif, 135 S. Ct. 1932 (2015) (No. 13-935), https://www.oyez.org/cases/2014/13-935 (emphasis added).
The first hypothesis explored here is the idea that the United States Supreme Court actually has not been inconsistent in its holdings—rather, it has been focused on the separation of powers problems that are most pressing, and the more troubling jurisdiction-stripping questions have not yet been presented to the Court. Although the Court repeatedly echoes the mantra that Congress has plenary authority to control the jurisdiction of the federal courts, the Court has never had the opportunity to address, for example, the scenario where Congress strips Article III courts of jurisdiction over constitutional cases as in the case of the hypothetical BRIBE Court.

This explanation considers that the Court may, in fact, see limits to Congress’s control over federal court jurisdiction, and such limits may be perfectly consistent with its separation of powers principles in cases related to non-Article III tribunals. For example, if the Court was faced with a case where Congress tried to strip Article III courts of jurisdiction over “Stern claims,” perhaps the Court would find such conduct to be an impermissible encroachment on the judiciary and a limit to Congress’s jurisdiction-stripping power. This would then match the holding in *Stern v. Marshall* that Congress was not permitted to allow non-Article III courts to hear these common law “Stern claims.” Thus, this explanation says because of the realities of the case or controversy requirement and the Court’s limited certiorari capacity, the cases where the Court would announce more consistent rules have simply not yet presented themselves.

This hypothesis makes a great deal of sense if we take into account how few jurisdiction-stripping efforts by Congress have actually been successful. Professor Tara Leigh Grove argues that Article I constraints are to thank for the “rarely enacted jurisdiction-stripping legislation.” The explanation is even more powerful when compared to the much more numerous efforts by Congress to establish non-Article

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152. Article III courts may only adjudicate “cases or controversies.” *See* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). The Court has long treated this constitutional requirement as preventing it from issuing broad proclamations of law on issues not before the Court. Thus, if the question of Congress’s power to strip Article III courts of jurisdiction over constitutional issues has never been presented to the Court as a case or controversy, then a “rule” that Congress has plenary power over Article III court jurisdiction is only dicta—persuasive, but not binding. *Lujan*, 504 U.S. at 559-60.
III courts and give them authority over a broad array of claims. It is possible to imagine that the Court is more concerned with and pays closer attention to the circumstances in which Congress is actually exceeding its authority rather than those where it might.

The first and most obvious problem with this hypothesis, however, is the language the Court uses, continuing to describe Congress's power to strip jurisdiction as “plenary.” But even more concerning is the justification that the Court has used to explain this vast power—the separation of powers justification that directly contradicts the justification for the Court’s non-Article III courts rule. By explaining that Congress’s authority over Article III court jurisdiction must be plenary because it is a legislative power, the Court is not saving the hard jurisdiction-stripping questions for another day. Rather, it has strapped itself firmly into the fully contradictory rule based on contradictory justifications.

There is a second reason why this hypothesis fails. In the non-Article III court context, even where Congress is assigning adjudications to non-Article III courts, the Supreme Court maintains a good deal of control. Though admonished by some, the Court can and has reversed-course on constitutional decisions by overturning prior precedent. In the case of non-Article III courts, if the Court had maintained its trend after Commodity Futures Trading Commission v. Schor of a more expansive ability of Congress to assign adjudications to non-Article III courts, the Court could always later overrule its prior precedent if it felt Congress had really gone too far. By contrast, the language repeatedly used by the Court that Congress has “plenary authority” to strip jurisdiction, leaves no such protection once Congress strips the Court of jurisdiction. In such a case, the Court may not have left itself much room to reverse course because once jurisdiction has been stripped, “the only function remaining to the court is of announcing the fact and dismissing the cause.”

For these reasons, although a prioritization hypothesis might help to explain some aspects of the inconsistency, and though it makes


156. Patchak v. Zinke, 138 S. Ct. 897, 906 (2018). The Court used this language as recently as February 2018 in Patchak v. Zinke, though there at least used the caveat that the power is plenary “[s]o long as Congress does not violate other constitutional provisions.” Patchak, 138 S. Ct. at 906.

157. See Erie v. Tompkins, 304 U.S. 64, 77-78 (1938) (overruling Swift v. Tyson, 41 U.S. 1 (1842)).


159. Ex parte McCardle, 74 U.S. 506, 514 (1868).
sense given the types of cases frequently coming before the Court, it fails to address why the Court continues to repeat language that leaves these two areas in conflict, why it does so based on a separation of powers justification that is still inconsistent, and how it fails to consider the serious implications of these rules if extreme scenarios—like the BRIBE Court—ever were to come to pass.

C. MOTIVATION CONSIDERATIONS

The second hypothesis looks at whether the United States Supreme Court’s consideration of Congress’s motivation for enacting the given statute plays a role in the resulting inconsistency. Despite disagreements about the role motivation should play in the analysis\(^\text{160}\)—both between and within each category of cases—the Court nonetheless seems to deem Congress’s delegation of adjudicatory authority to non-Article III courts as more sinister and in need of stricter boundaries than Congress’s wielding of jurisdiction-stripping authority. Perhaps Congress’s motivations come into play and explain the Court’s inconsistent rules.

Descriptively, the hypothesis holds. Within each category of cases, the Court has both endorsed and disavowed the use of congressional intent in the analysis. In cases where the Court is faced with a non-Article III court challenge, and where it does consider Congress’s motivations for enacting the contested statute, the Court generally upholds Congress’s power to determine the proper distribution of adjudicatory authority. When the Court refuses to consider motivation in those cases, it restricts Congress’s ability to assign broader adjudicatory responsibility to non-Article III courts.

The cases where the Court is faced with a jurisdiction-stripping statute turn out the opposite. For starters, the Court will rarely consider Congress’s motivations for enacting the contested statute in these cases, and often explicitly refuses to do so.\(^\text{161}\) In such cases, the Court allows Congress to strip jurisdiction and reaffirms the “plenary power” principle. On the rare occasions when motivations have been considered in this context, the Court has then refused to uphold the

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\(^{160}\) This is obviously part of a much larger debate about the proper approach to statutory analysis and the important divide between those legal scholars adhering to formalism and those adhering to purposivism. Professor Fallon makes the following observation as to why the Court uses a purpose-based test sometimes and not others: “When important constitutional values are at stake, and it is difficult for the Supreme Court to agree on an alternative test of constitutional validity to protect those values, purpose tests provide a minimal protection against abuses of governmental power.” Fallon, supra note 46, at 1081.

\(^{161}\) McCordle, 74 U.S. at 514.
jurisdiction-stripping provision, limiting Congress’s power to redistribute adjudicatory authority.\(^\text{162}\)

The below matrix attempts to begin to illustrate the phenomenon:

<table>
<thead>
<tr>
<th></th>
<th>Court upholds Congress’s authority</th>
<th>Court denies Congress’s authority</th>
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<tbody>
<tr>
<td><strong>Non-Article III Courts</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Thomas(^\text{163}) – will consider motivation</td>
<td>No. Pipeline(^\text{166}) – will not consider motivation</td>
<td></td>
</tr>
<tr>
<td>Schor(^\text{164}) – will consider motivation</td>
<td>Stern(^\text{167}) – will not consider motivation</td>
<td></td>
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<tr>
<td>Wellness(^\text{165}) – will consider motivation</td>
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<tr>
<td><strong>Jurisdiction-Stripping</strong></td>
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<tr>
<td>McCordle(^\text{168}) – will not consider motivation</td>
<td>Klein(^\text{170}) – will consider motivation</td>
<td></td>
</tr>
<tr>
<td>Patchak(^\text{169}) – will not consider motivation</td>
<td></td>
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\(^{162}\) As noted in Part I, the justifications for these decisions (Klein and Boumediene) are debated, and it has been argued that the holdings are based on factors other than the scope of Congress’s power to strip the jurisdiction of Article III courts.

\(^{163}\) Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 590 (1985). “Given the nature of the right at issue and the concerns motivating the Legislature, we do not think this system threatens the independent role of the Judiciary in our constitutional scheme.” \textit{Id.}

\(^{164}\) Among the factors upon which we have focused are . . . the concerns that drove Congress to depart from the requirements of Article III.” See Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 851 (1986); contra Schor, 478 U.S. at 863 (Brennan, J., dissenting) (“Article III’s prophylactic protections were intended to prevent just this sort of abdication to claims of legislative convenience”).

\(^{165}\) Wellness Int’l. Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1945 (2015). “Finally, there is no indication that Congress gave bankruptcy courts the ability to decide Stern claims in an effort to aggrandize itself or humble the Judiciary.” \textit{Wellness Int’l}, 135 S. Ct. at 1945. Of course, \textit{Wellness International} merely addressed the question of whether a litigant could consent to a non-Article III court—it did not necessarily uphold a new exercise of Congress’s power to assign to non-Article III courts. However, the Court ruled in such a way as to allow more cases to be heard by non-Article III courts, and as such it falls into the bucket representing broader congressional control. \textit{Id.}

\(^{166}\) N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 73 (1982). The plurality rejects the argument that “Congress may create courts free of Art. III’s requirements whenever it finds that course expedient.” \textit{N. Pipeline}, 458 U.S. at 73.

\(^{167}\) Stern v. Marshall, 564 U.S. 462, 501 (2011) (citing INS v. Chadha, 462 U.S. 919, 944 (1983)). “It goes without saying that ‘the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.’” Stern, 564 U.S. at 501.

\(^{168}\) \textit{McCardle}, 74 U.S. at 514 (1868). “We are not at liberty to inquire into the motives of the legislature.” \textit{Id.}

\(^{169}\) Patchak v. Zinke, 138 S. Ct. 897, 910 (2018). “We doubt that the constitutional line separating the legislative and judicial powers turns on factors such as a court’s doubts about Congress’ unexpressed motives . . .” \textit{Patchak}, 138 S. Ct. at 910.

\(^{170}\) United States v. Klein, 80 U.S. 128, 147 (1871). “We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.” Klein, 80 U.S. at 147.

\(^{171}\) Boumediene v. Bush, 553 U.S. 723, 777 (2008). “[H]ere we confront statutes, the DTA and the MCA, that were intended to circumscribe habeas review. Congress’
The chart demonstrates that when motivations are considered in the non-Article III court context, the Court generally deems the delegation by Congress to be permissible, likely because Congress’s efforts to assign adjudications to non-Article III courts are seen as a means of making the overall judicial system more functional. On the other hand, in the jurisdiction-stripping context, when motivations are considered, the result is a step away from the rule that Congress has plenary power to strip jurisdiction. Though not articulated by the Court, the latter makes sense intuitively, since the act of withdrawing jurisdiction from the Article III courts is inherently about rebalancing power in favor of the political branches and away from the judicial branch.

Therefore, this hypothesis may help somewhat in explaining how the Court has found itself in the separation of powers contradiction described in Part II. If the holding in Stern and the holding in Patchak represent the most recent statements of the rule in each area, it is notable that in both circumstances the Court refuses to consider Congress’s motivation for crafting the underlying statute. This correlation seems to suggest that the Court’s refusal to consider Congress’s motivation may play a role in the resulting inconsistent rules in either context.

Purpose is evident not only from the unequivocal nature of the MCA § 7’s jurisdiction-stripping language . . . but also from a comparison of the DTA to the statutes at issue in Hayman and Swain.” Boumediene, 553 U.S. at 777.

Stern is illustrative of the split. Whereas the majority refuses to consider the reasons motivating Congress in constituting the bankruptcy adjudication scheme and therein finds the arrangement unconstitutional, the dissent comes out the opposite way by pointing to Congress’s practical justifications and wanting to uphold Congress’s authority. See Stern, 564 U.S. at 520-21 (Breyer, J., dissenting) (“[A] constitutionally required game of jurisdictional ping-pong between courts would lead to inefficiency, increased cost, delay and needless additional suffering.”).

Since there are relatively few successful instances of Congress stripping the Article III courts of jurisdiction, it is worth noting some of the jurisdiction-stripping attempts. The Hart & Wechsler textbook gives examples of bills introduced in the 1970s “to limit federal court jurisdiction to order bussing to remedy school segregation,” and efforts in the 1980s to restrict jurisdiction in cases involving abortion or school prayer. Hart & Wechsler supra note 25, at 297. These attempts point to some of the more perverse motivations that Congress might have in introducing jurisdiction-stripping legislation, an implicit attempt to insulate unconstitutional legislation from judicial review. Though these examples were not ever considered by the Court, one might expect that if they were, then congressional motive might play a more prominent role, at least in the minds of the justices if not in the ultimate holding.

See supra Part II. Patchak is the most recent jurisdiction-stripping case, decided in February 2018. Stern was decided more than eight years ago in June 2011. However, the Court recently purported to apply the Stern rule in Oil States just two months after Patchak: “consequently, Congress cannot confer the Government's ‘judicial Power’ on entities outside Article III.” Oil States Energy Servs. v. Greene’s Energy Grp., 138 S. Ct. 1365, 1372-73 (2018) (citing Stern, 564 U.S. at 484).
Nevertheless, there are at least two problems with this hypothesis. First, it actually does not explain why the rules in the two areas come out the way they do. The observation that there is a correlation in the cases where the Court considers motivation and where it allows for broader congressional control to distribute adjudicatory authority does not answer the question as to why the Court has crafted the rule it has in either context. The fact that the Court does not consider Congress's motivation does not answer the question of whether Congress has the power to withdraw jurisdiction from the federal courts, or if there are any restrictions on that power.

The reason that the motivation observation does not answer the questions of why the rules are inconsistent is because the hypothesis does not address the underlying inconsistent separation of powers principles that the Court relies on as justification for those rules. Instead, the observation about the Court's current choice on whether congressional motive plays a role in the analysis merely raises another aspect by which the Court has been inconsistent in these separation of powers cases—by applying an inconsistent approach to when and if it is appropriate to consider Congress's motivations. That the current Court views a functionalist analysis of the Constitution to be inappropriate, although it has in the past rejected the current formalist approach, does not explain why the Court has adopted two different and inconsistent separation of powers principles for crafting the rules.

D. JURISDICTION AND JUDICIAL POWER

Regardless of the mode of constitutional interpretation—be it formalist or functionalist—the meaning of the terms “judicial power” and “jurisdiction” matter a great deal in understanding the scope of power given to the federal courts by the Constitution and the extent of Congress’s authority to control the courts. Article III includes the terms “judicial power” and “jurisdiction” two and three times, respectively. “Judicial power” seems of primary importance, as it represents the power “vested” in the United States Supreme Court and any lower federal courts created by Congress with salary and tenure protections. “Jurisdiction,” however, may be of equal importance to the present in-

176. See supra Part II.C.
177. U.S. Const. art. III, § 1. The text of Art. III, § 1 states, “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” Id. art. I, § 1. The Article III text mirrors that of Art. I, § 1, which states, “All legislative Powers herein granted shall be vested in a Congress of the United States . . .” Id. art. II, § 1. It also mirrors Art. II, § 1, which states, “The executive Power shall be vested in a President of the United States of America.” Id.
This hypothesis considers whether the Court uses these concepts differently in these two separation of powers analyses and whether those different definitions result in the inconsistent rules and separation of powers principles. On occasion, it seems the Court has treated the terms as almost interchangeable. Other times, the Court suggests a relationship between the terms, but not always uniformly. Perhaps this lack of precision on the meaning of these terms has led the Court to its inconsistency.

The Court has made many conclusive, unhelpful, and sometimes counterproductive statements about the scope and commands of “judicial power,” beginning as early as the Marshall Court. In *American Insurance v. 356 Bales of Cotton* (“Canter”), the Court proclaimed that, unlike Article III courts, legislative non-Article III courts are simply “incapable of receiving” judicial power. This circular explanation for how to ensure that the judicial power is properly vested in Article III courts is what Professor Bator calls “purely metaphysical,” “not a satisfactory” justification, and he suggests that it provides “no coherent account” as to what differentiates judicial power from what is not judicial power. Contrast that with the Court’s more recent description of “judicial power” in *Stern v. Marshall*, in which the majority held that the non-Article III court had “exercised the judicial power of the United States by entering final judgment on a common law tort claim.” Thus, over time, the Court went from identifying the judicial power based on type of court exercising it to a definition based on the type of claim and finality of the adjudication.

Both of the above definitions of the judicial power in the non-Article III court context are further distinct from the definitions given in...
several of the jurisdiction-stripping cases, where the concept of "judicial power" is explained through its obverse concept of "legislative power." The Court in United States v. Klein, for example, rejected Congress's jurisdiction-stripping statute, saying that Congress had "inadvertently passed the limit which separates the legislative from the judicial power." As to where that line fell, the Court explained in Patchak v. Zinke that Congress "cross[es] the line from legislative power to judicial power" when it "usurp[s] a court's power to interpret and apply the law" or when it "compels findings or results under old law." The Patchak definition, drawing on precedent, provides some concrete examples to distinguish the two forms of constitutionally-granted power but still falls short of providing a workable definition because it remains unclear what actions fall into either bucket. Would not revoking the federal courts' authority to adjudicate a claim altogether be an usurpation of its power to apply the law?

It makes sense that the Court uses a comparative analysis when it describes the judicial power in the context of a jurisdiction-stripping question, at least in light of the Court's separation of powers principle for this area. Recall here that the Court has said that separation of powers requires that Congress be permitted to assign, restrict, or withdraw jurisdiction from Article III courts because doing so is part of its "legislative power." By contrast, in the non-Article III court context, where the Court has held that separation of powers requires that Congress not encroach on the judicial power, a definition that describes the type of claim or stage of adjudication may provide clearer lines to keep the branches in their own lanes. In other words, it might be that the two, contradictory separation of powers justifications are driving the Court to adopt different definitions of "judicial power" as well.

The same is true for the way the Court treats the term "jurisdiction" from Article III in the jurisdiction-stripping cases—often used as if "jurisdiction" is synonymous with "judicial power." In Ex parte McCordle, the Court said that jurisdiction is "power to declare the law, and when it ceases to exist, the only function remaining to the

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185. 80 U.S. 128 (1871).
189. See supra note 72 and accompanying text.
190. See, e.g., Stern, 564 U.S. at 493-94 (explaining that the "asserted authority" was not minimal, but was "substantive jurisdiction reaching any area of the corpus juris").
191. 74 U.S. 506 (1868).
court is that of announcing the fact and dismissing the cause.” The Court reiterated this principle in *Patchak* when it stated definitively that “a congressional grant of jurisdiction is a prerequisite to the exercise of the judicial power.” Again, these definitions for jurisdiction seem to result from the separation of powers principle that the Court has identified in this area—because assigning jurisdiction is a “legislative power,” there cannot be judicial power until jurisdiction is granted.

The disconnect caused by these differing definitions of jurisdiction and judicial power can be illustrated with the following example. Suppose that Congress was dissatisfied with the Court’s holding in *Stern* and wished to return to the pre-*Stern* world, in which bankruptcy courts staffed by non-Article III judges were authorized to adjudicate common law claims relevant to the bankruptcy estate. The Court has said that allowing bankruptcy courts to do so is allowing them to exercise the “judicial power” in violation of Article III. However, the Court has also said that jurisdiction is a prerequisite to any exercise of judicial power. Therefore, to return to a pre-*Stern* world, Congress need only strip the Article III courts of jurisdiction over the claims that it wishes to empower the bankruptcy courts to adjudicate. If jurisdiction has not been granted for Article III courts to hear these common law claims, then a bankruptcy court’s adjudication of those claims would no longer be the exercise of the “judicial power.”

This hypothetical is consistent with the Court’s jurisdiction-stripping separation of powers principle insofar as it allows Congress to use the “legislative power” to assign or strip jurisdiction. But it certainly does not satisfy the non-Article III courts separation of powers principle. The example above is Congress explicitly and intentionally “encroaching” on the judicial power of the Article III courts. It is stripping jurisdiction for the express purpose of not allowing the Article III courts to exercise the “judicial power.” There is a significant question underlying these terms and their rotating definitions—what aspects of adjudication define the judicial power reserved only for Article III courts, and how much may adjustments to jurisdiction divest that

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194. See *Dow*, supra note 38. The inverse could also be true. Some scholars have suggested that the “judicial power” that Article III vests in the judicial branch is self-executing, consisting of those cases and controversies outlined in Art. III, § 2.
195. U.S. Const. art. II, § 2, cl. 2. Bankruptcy judges are not entitled to the life-tenure and salary protection required for Article III judges, nor are they appointed pursuant to the Constitution’s Appointments Clause, requiring nomination by the President and advice and consent by the Senate. See *Stern*, 564 U.S. at 473. (explaining that bankruptcy judges are appointed by federal courts of appeals to 14-year terms).
power? As demonstrated in the hypothetical above, the Court has failed to provide a clear answer to the question.

The jurisdiction and judicial power hypothesis, unfortunately, suffers from the same obstacle as did the motivation hypothesis. Instead of explaining why the Court uses two contradictory explanations of what separation of powers principles demand, this hypothesis instead only offers yet another example of how the Court has treated these two areas inconsistently. The two hypotheses differ. The motivation hypothesis looks at a factor that could be considered in the Court’s overall analysis of its rules regarding Congress’s control over adjudicatory authority distribution. The jurisdiction and judicial power hypothesis circles back to the textual analysis question and examines if the different treatment of key terms helps understand why the inconsistent rules have developed. But neither hypothesis explains the root of the issue described in Part II—that the inconsistent rules the Court has drawn are a result of inconsistent separation of powers principles, which the Court suggests require these rules. The final hypothesis hopefully begins to address that issue.

E. Federalism Concerns

The fourth and strongest hypothesis is the federalism hypothesis, which suggests that although the cases do not explicitly address federalism concerns, such concerns are an unspoken driver of the inconsistency in these separation of powers cases.

The federalism concern goes like this: when Congress strips the Article III federal courts of jurisdiction over a certain type of claim, the state courts are beneficiaries, receiving the cases that would otherwise be adjudicated by those federal courts. This would be the effect whether Congress stripped the federal courts of a type of common law claim, of a federal statutory claim, or even a constitutional claim. In either case, the “back-up” court to adjudicate the claim—if the federal Article III court cannot—is the state court. By contrast, if Congress creates a non-Article III court to which it grants authority to adjudicate certain claims, and if those claims existed prior to the non-Article III court’s creation, then Congress’s action is redistributing ad-

196. This Article recognizes that not all state court judges would view the onslaught of additional cases as deeming them “beneficiaries” in this arrangement. Nonetheless, when jurisdiction is removed from the federal Article-III courts, the natural recipients of the claims are state courts. Indeed, this is the primary explanation given for the “Madisonian Compromise” —Article III was formulated to allow Congress to determine whether and when to constitute inferior federal courts and when instead to allow claims to be heard largely by state courts.
judicative authority, not just away from federal courts but also away from state courts.\textsuperscript{197}

If it is correct that, although it is not expressed in the written opinions,\textsuperscript{198} the United States Supreme Court is considering the demands of federalism in how it interprets Congress’s power to distribute or restrict adjudicative authority in the judicial system, then that would change the calculus of the originally identified inconsistency. Specifically, the set of statements analyzed in Part II that resulted in an inconsistent set would be adjusted to reflect the following:

Rule 1: It is permissible (constitutional) for Congress to take away the adjudicative authority of Article III federal courts to hear ABC cases.

Rule 1 is true because separation of powers demands that Congress have authority over assigning and withdrawing jurisdiction since that is a legislative function and because federalism concerns are not implicated.

Rule 2: It is not permissible (unconstitutional) for Congress to give adjudicative authority over ABC cases to non-Article III courts.

Rule 2 is true because separation of powers dictates that Congress may not invade or encroach upon the authority of its coequal judicial branch and because federalism concerns prohibit Congress from encroaching on state court authority.

This hypothesis may help a great deal. As we saw in Part II, when a rule is dictated by an explanation, and a second rule is dictated by the opposite of that explanation, the both the set and the rules are inconsistent.\textsuperscript{199} However, it is a different situation if the

\textsuperscript{197} The redistribution away from state courts could be partial—where state courts still have jurisdiction but expectedly see fewer cases, since many claims are voluntarily brought in the non-Article III tribunal—or could be whole—where Congress vests the alternate tribunal with exclusive jurisdiction.

\textsuperscript{198} Not only does the Court not cite to federalism rules as explanations for its holdings in either the jurisdiction-stripping or the non-Article III court cases, it has occasionally eschewed such considerations altogether. For example, in Schor, the Court stated “there is no reason inherent in separation of powers principles to accord the state law character of a claim talismanic power in Article III inquiries.” Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 853 (1986).

\textsuperscript{199} Some may argue that the original set of statements never accurately represented the Court’s reasoning. To be more specific, it might be contested that in neither the jurisdiction-stripping nor the non-Article III court context does the Court rely entirely on a separation of powers principle to justify the rule. Even if the text was not determinative, it might be argued that it has played a role in the Court’s analysis. Likewise, though history does not dictate the rule, it has been a consideration by the Court in both areas of law. Justice Holmes suggests this very point when he warns of the danger of suggesting that a legal system “can be worked out like mathematics from some general axioms of conduct.” Holmes, supra note 137, at 465. If it is true that the Court weighs several factors in its broader analysis of Congress’s power to distribute adjudicatory responsibility, this hypothesis supports the point by putting forward another unstated justification for the rules.
Court's explanation does not prescribe the rule but is rather one consideration of several that justifies the rule. If Rule 1 and Rule 2 (statements (1) and (3) above) are justified not only by separation of powers principles but also by silent federalism principles, then the set as a whole no longer suffers from the same logical inconsistency problem seen in Part II.

Sadly, there are still problems with this explanation of the rules. First, there is the issue of whether the federalism rule—that federalism concerns prohibit Congress from encroaching on state court authority—is actually binding law. Arguably, the Court has not always treated it as so. For example, in *Tafflin v. Levitt*,200 the Court made clear that Congress may prevent state courts from adjudicating a federal cause of action, despite the strong historical presumption that favors concurrent state jurisdiction.201 This suggests that federalism protections of state courts may not be outcome-determinative. If the federalism concerns represent only aspirational objectives, then it is less clear how much weight they should be given in the logical analysis of the statements above.

Secondly, the addition of a federalism justification for the two rules does not eliminate the inconsistent separation of powers principles that the Court is applying in each set of cases. Though the added justifications eliminate one aspect of the inconsistency because the rules are now justified by multiple factors, there is still an inconsistency in the principles embedded within the rules.

Consider the following statements: “Dogs are brave. They are brave because they chase cats and because they bark when the doorbell rings. Dogs are kind. They are kind because they do not chase cats and because they bark when the doorbell rings.” Here, it may be true that dogs are brave and dogs are kind, so long as it is shown that neither bravery nor kindness is dependent upon cat-chasing tendencies. However, the statements above leave open the issue of whether dogs chase cats, a supposed justification for dog bravery and kindness.

Likewise, if federalism concerns are added to the equation justifying the Court’s rules regarding Congress’s power to distribute adjudicatory authority, there is still the problem of the Court’s inconsistent explanation of what separation of powers demands. How important is it that Congress refrain from encroaching on judicial power, and is the control Congress exercises an inherent aspect of its legislative authority? For something as critical as the balance of power in our constitu-

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201. *Tafflin v. Levitt*, 493 U.S. 455, 459. “This deeply rooted presumption in favor of concurrent state court jurisdiction is, of course, rebutted if Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim.” *Tafflin*, 493 U.S. at 459.
tional system, the Court should not hold that separation of powers demands one thing and also the opposite.\footnote{202}

Lastly, this hypothesis is also weakened by the fact that it suggests a justification for the rules that the Court has not given. If concerns about federalism and the impact of Congress’s actions controlling and distributing adjudicative authority in the judicial system drive the rules in these cases, it would be sensible to expect that the Court would explain those factors. The Court certainly makes its federalism concerns known in other areas of the law.\footnote{203} It seems clear that federalism may play an important role in these cases given the discrepant impact that Congress’s control of adjudication distribution has on state courts. What is less clear is why the Court has not emphasized these concerns as part of the rules’ justifications.

Regardless of whether federalism is the cause of the inconsistency in the rules allowing Congress to control adjudication distribution, a resolution of the inconsistency will nonetheless require the Court to squarely address and reconcile competing principles. For example, if the Court ultimately determines that there are, in fact, limits to Congress’s ability to strip federal courts of jurisdiction, such a determination could be viewed as weakening the Madisonian Compromise and preventing Congress from using jurisdiction control to shift cases to state courts. On the other hand, if the Court fluctuated again in its non-Article III court jurisprudence and held that Congress was broadly empowered to assign adjudications to non-Article III tribunals (perhaps returning to the factor-based test from Schor), this could result in cases removed from state courts and assigned to non-Article III courts, potentially reducing state court power.

This dilemma is not unlike the dueling tensions the Court faced as it sorted out the proper constraints on federal courts’ use of federal or general common law.\footnote{204} Federal court common law-making raises separation of powers concerns, in that the judicial branch, by crafting rules, steps into a legislative role.\footnote{205} It likewise raises federalism concerns when the judicially-created federal common law infringes on

\footnotesize{202. For additional critiques of the Court’s separation of powers jurisprudence, see generally E. Donald Elliott, Why Our Separation of Powers Jurisprudence is So Abysmal, 57 Geo. Wash. L. Rev. 506 (1989).}


\footnotesize{204. For a description of the evolution of the “Swift doctrine” that developed prior to the Court’s decision in \textit{Erie}, see Anthony Bellia, Jr. & Bradford Clark, General Law in Federal Court, 54 WM. & MARY L. Rev. 655, 659-62 (2013).}

matters understood to be within a state's sovereignty. However, as it relates to the question of federal common law, these separation of powers and federalism concerns and principles seem to point in the same direction—the determination that the Court came to in *Erie R.R. v. Tompkins*. The Court's holding that "[t]here is no federal general common law"—though perhaps speciously adhered to—eliminates the "legislating" separation of powers problem by federal courts and also the invasions of state sovereignty federalism problem.

By contrast, the rule for Congress's ability to control federal court jurisdiction does not present such a clear compromise between separation of powers and federalism principles. The two demands are almost directly in conflict, at least as the rules are currently constructed. And because of that, it is difficult to say which principle—separation of powers or federalism—should prevail. The answer may be entirely guided by one's political persuasion, it might be influenced by an understanding of history, or it may fluctuate depending on the needs of the times. Or perhaps the solution might differ depending on the type of claim in question. Specifically, the Court could adopt a rule like the one outlined in *Northern Pipeline Construction Company v. Marathon Pipe Line Company* by Justice Brennan and in *Stern v. Marshall* by Chief Justice Roberts, that Congress has control over adjudications—both for controlling federal court jurisdiction and assigning adjudications to non-Article III courts—insofar as the claim is one created by Congress but has no control for claims that are not congressionally-created. Such a rule would require rearticulating the precise demands of separation of powers, but in so doing could eliminate the current inconsistency between Congress's control over federal court jurisdiction and Congress's control over non-Article III court adjudications. Further, it would balance separation of powers principles with federalism demands, since Congress's ability to redistribute to

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206. *Id.* at 1249-50.
207. 304 U.S. 64 (1938).
209. *See Clark, supra* note 205, at 1264 (stating, "Notwithstanding *Erie*’s embrace of judicial federalism, and its oft-quoted assertion that ‘[t]here is no federal general common law,’ the Supreme Court has subsequently recognized numerous ‘enclaves of federal judge-made law which bind the States.’" (quoting *Erie*, 304 U.S. at 78 and *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426-27 (1964))).
211. 564 U.S. 462 (2011).
213. Indeed, this change might make the Court's rule for jurisdiction-stripping consistent with its statement in *Murray's Lessee* that "we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the sub-
and from state courts would be limited to those claims that Congress has created. It might even prevent the problem posed by the hypothetical BRIBE Court, by ensuring that Congress could not use jurisdiction-stripping to assign common law or constitutional claims—including claims related to the Emoluments Clauses—for adjudication by judges without the tenure and salary protections meant to guarantee the independence of Article III judges.

V. CONCLUSION

The United States Supreme Court has created inconsistent rules to govern the extent that Congress may control Article III court jurisdiction and the extent that Congress may redistribute adjudicatory authority to non-Article III courts. Even individual justices have issued opinions that are conspicuously dissonant. These inconsistent rules stem from inconsistent separation of powers principles that the Court applies in these cases. Although there are several possible explanations for how the Court ended up with inconsistent rules, the one that most seems to drive the Court’s holdings is an unstated adherence to federalism demands.

The inconsistency identified in this Article presents problems for the reliability of the Court’s rules for Congress’s control over Article III courts and non-Article III courts alike. It is especially concerning that the Court relies on such dramatically inconsistent articulations of what separation of powers demands in two contexts involving Congress’s control over adjudications. And if, indeed, the Court is considering the federalism concerns and the distinct effect that either question has on state courts, it is important to an analysis of the law that the Court articulate those justifications. Most importantly, however, the Court should align its rules for Congress’s power over the judiciary—an independent and coequal branch of government—in order to protect the Constitution’s important structural provisions.

*ject of a suit at the common law, or in equity or admiralty . . .” Murray v. Hoboken Land & Improvement Co. (Murray’s Lessee) 59 U.S. 272, 284 (1855).
I. WHAT ROE DECIDED

In 1973, facing a lack of consensus on when human life begins, the United States Supreme Court decided in *Roe v. Wade*\(^1\) that before viability, where there is a right to privacy for the woman on one side, and there is no established right to life on the other side, the woman’s right to privacy—and abortion—must be protected.\(^2\) Before viability, the woman’s choice controls.\(^3\)

Decades after the decision, fixed abortion rights and *Roe v. Wade* now seem nearly synonymous. However, the truth is more nuanced. Attentive reading reveals conditionality and even latent humility within the decision which are seemingly forgotten.

The Court conceded that if the fetus is a person under the Fourteenth Amendment, there would be no right to obtain an abortion because the right to abortion would be superseded by the person’s right to life. In the words of the Court, “[i]f this suggestion of personhood is established, the appellant’s case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the Amendment.”\(^4\)

However, while the Court could not conclude that a fetus is a person under the Fourteenth Amendment,\(^5\) the Court inserted a fascinating point, almost a disclaimer. The Court acknowledged that its
opinion was the product of a specific moment in time, subject to possible “development” or evolution. The Court explained:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer. 6

In a fact- and time-sensitive move, the Court left open the possibility that if a sufficient consensus7 about the beginning of human life emerged, the parameters of abortion rights would have to shift with this consensus to protect human life in the womb.

In 1992, the Supreme Court further developed this assessment of abortion law through its ruling in Planned Parenthood of Southeastern Pennsylvania v. Casey.8 The plurality opinion acknowledged that a “change in Roe’s factual underpinning”9 or a change in the “understanding of [the relevant] facts,”10 could render “[Roe v. Wade’s] central holding obsolete.”11 However, the opinion concluded that neither of those changes had occurred.12 In reaching this conclusion, the Court engaged in a very limited review, noting only the factual developments that “advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973 . . . and

6. Roe, 410 U.S. at 159 (emphasis added).
7. The Court similarly looks to “national consensus” in its analysis under the Eighth Amendment to determine whether certain punishments applied to certain categories of people are considered “cruel and unusual,” and therefore, unconstitutional. Roper v. Simmons, 543 U.S. 551, 559-60, 564-68 (2005) (finding national consensus against imposition of the death penalty for juvenile offenders under the age of eighteen and concluding that the practice violated the Eighth Amendment); Atkins v. Virginia, 536 U.S. 304, 316, 321 (2002) (finding “national consensus ha[d] developed against” the imposition of death penalty for “mentally retarded offenders” and concluding that the practice violated the Eighth Amendment). After discerning whether there is a national consensus, the Court engages in its own analysis to determine whether the punishment “accord[s] with the dignity of man” or is excessive and violates that dignity. Gregg v. Georgia, 428 U.S. 153, 173 (1976). Both steps are relevant to a consensus analysis under Roe; the relevance of such cases and analysis is discussed below in the application section. See infra notes 235-240 and accompanying text.
9. Casey, 505 U.S. at 860; see also id. at 864 (explaining “changed circumstances may impose new obligations”).
10. See id. at 862-63 (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954) (illustrating a change in the understanding of segregation and the ramifications of this change evidenced in Brown v. Board of Education); see also id. at 864 (explaining “changed circumstances may impose new obligations”).
11. Id. at 860. The plurality opinion also conceded that if the relevant factual landscape changed, or assessment of the factual landscape changed, the strength of the state interest in protecting the developing embryo or fetus could increase. Id. at 858. With a sufficient increase then, the strength of that state interest could rise to the level of a compelling governmental interest in protecting new human life, supporting restriction of abortion. See id. at 858.
12. Id. at 864.
advances in neonatal care have advanced viability to a point some-
what earlier."^{13} The Court thus reiterated the dependence of the pa-
rameters of abortion rights on factual development and our
understanding of the relevant facts. Yet at the same time, the Court
still held to the shifting moment of viability as the moment when
the government may restrict (nontherapeutic) abortion. The unexplored
developments in the decades since *Roe* and since *Casey* now merit
attention.

*Roe* was decided in January 1973, almost five decades ago. Fol-
lowing the Court’s reasoning, if greater consensus develops that
human life begins by a certain point during pregnancy, the right to
privacy and to abortion after that point would be curtailed by the
rights of the new human life. Science and law have developed signifi-
cantly since *Roe*. The question begged attention—how have science
and law progressed in the past four and a half decades? I began ex-
ploring whether any greater consensus had developed since 1973 on
the issue of when human life begins. The search proved surprisingly
rewarding. The results merit attention.

To structure the analysis, this Article describes and explores sup-
port for the following positions: (1) the view that human life begins at
conception; (2) the view that human life begins just after implanta-
tion; (3) the view that human life begins with the coming of the heart-
beat; and (4) the view that human life begins when brain development
has reached a critical point. The article addresses developments in
state law, federal law, and international law. The article also notes
scientific developments, including technological development of the so-
nogram, accepted definitions of death, and the debunking of a persis-
tent scientific myth that has complicated embryological
understanding.

Finally, noting the arbitrariness suggested by Justice Blackman
in attributing significance to the moment of viability,^{14} this Article
applies the reasoning of *Roe* to the new factual and legal landscape.
Up-to-date application of *Roe*’s legal reasoning to current scientific
knowledge and legal precedent yields a groundbreaking conclusion
about abortion rights. We are failing in our fidelity to *Roe*. We are no
longer abiding by the Supreme Court’s reasoning in *Roe*.

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13. Id. at 860. Ironically, while the *Casey* plurality opinion focused on the impor-
tance of *stare decisis*, it departed somewhat from *Roe* by emphasizing an “undue bur-
den” standard—in place of *Roe*’s trimester framework—which allows for more
significant regulation of abortion practices, even before viability. Id. at 874.

14. See infra note 198 and accompanying text.
II. SCIENCE AND LAW SINCE ROE

A. FOUR POSITIONS ON THE BEGINNING OF HUMAN LIFE

To begin, we will explore developing support for four science-related positions on when (valuable/sacred/protectable) human life begins: a genetic view; an embryological or individuation view; a view based on the fetal heartbeat; and a neurological view (or views). This Article addresses when people conclude morally or philosophically valuable, dignity-bearing, protectable human life begins, something along the lines of personhood. Questions regarding when

15. While this article focuses on science, law, and consensus, rather than directly on philosophy, it is worth noting that scientists and others often do concede, properly, that they rely on philosophical arguments to reach their specific conclusions about personhood and protectable human life. See Scott F. Gilbert, When Does Human Life Begin?, in D e v B i o : A C O M P A N I O N T O D E V E L O P M E N T A L B I O L O G Y (8th ed. 2006) (available at http://science.jburroughs.org/mbahe/BioEthics/Articles/Whendoeshumanlifebegin.pdf) (noting that “[o]ne of the most popular positions among philosophers is the perspective that life begins at the point of gastrulation—that point at which the zygote is an ontological individual and can no longer become two individuals” and emphasizing philosophy in approaching the question from a neurological viewpoint); Harold J. Morowitz & James S. Trefil, The Facts of Life: Science and the Abortion Controversy 17 (1992) (“The connection between the definition [of humanness], whatever it is, and policy can come only from arguments that are outside science itself.”). Distinguishing between science and philosophy or religion, scientists and philosophers sometimes concede that human life (or membership in the species Homo sapiens) begins at conception, but distinguish the concept of personhood from human life, proposing that personhood could come later. See Morowitz & Trefil at 16, 152 (“In biology, an entity is a human being if it is a member of the species Homo sapiens . . . . For our purposes, we will say that a human being is someone who has recognizably human DNA . . . . In this context, one can say that a human being exists from conception on, but it does not follow that that a human being is a person or has a soul.”). Philosophy is important in understanding personhood, humanness, and human value, if not basic individual biological/genetic human life, but as we will see later, there may be problems with relying too heavily on philosophy to positively separate personhood and sacred or protectable human life from biological human life. See infra note 210. A precautionary principle may be useful in avoiding such a problem.

16. For one source which describes these positions, see Gilbert, supra note 15. See also Gilbert, When “Personhood” Begins in the Embryo: Avoiding a Syllabus of Errors, 84 Birth Defects Res. (Part C) 164, 168 (2008) (addressing some of the same views, but only addressing the latter neurological viewpoint). Gilbert subsequently stated in a talk (sponsored by Planned Parenthood and other organizations) that “I really can’t tell you when personhood begins, but I can say with absolute certainty that there’s no consensus among scientists.” Scott Gilbert, When Does Personhood Begin? Swarthmore College, https://www.swarthmore.edu/news-events/when-does-personhood-begin (last visited Oct. 28, 2019) (emphasis added). However, Gilbert asserts this simply based on the existence of multiple views, i.e. the observation that different scientists conclude that personhood begins at different points during pregnancy/development (such as at fertilization, at implantation or gastrulation, or with certain brain development), but he does not address the natural follow up question: what percentage of scientists adopts each position/conclusion? Likewise, he fails to consider how, as human development progresses to these various significant stages or markers, the number and percentage of individuals who can agree upon when personhood has begun may increase. In other words, he fails to consider that at a certain stage in human development, a consensus may be reached. This article addresses such unasked and unanswered questions.
philosophically-defined life, or personhood, begins may be distinct from the question of when biologically-defined human life begins. About the latter question, there is clear and overwhelming consensus among scientists that new individual biological human life begins upon fertilization. In addressing the more difficult ethical/philosophical/legal question, the views are briefly described at the outset. Then we explore scientific and legal support for each view.

Under the genetic view, human life is understood to begin at fertilization or conception, the unification of the genetic material of the egg and the sperm. The egg and the sperm each has half the genetic material that makes up a human being. Their unification at fertilization creates a new, unique (distinct from the mother and father), and complete human combination of genetic material that serves as the blueprint for development of the new, growing organism.

In the embryological (or individuation or implantation) view, human life is considered to begin around fourteen days after fertilization. By this time, the embryo is implanted in the uterus, gastrulation is occurring, and the “primitive streak” has formed, the beginning of the central nervous system. At this point, the embryo generally can no longer split to form twins.

In another view, the beginning of the fetal heartbeat marks the compelling point of development, and death can be detected from this point.

17. See, e.g., Steven Andrew Jacobs, Biologists’ Consensus on ‘When Life Begins’ 1 (Univ. of Chi., Div. of Soc. Scis., Dept of Comparative Human Dev. Working Paper, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3211703 (surveying 5,502 biologists and noting that 95% of them affirm the view that biological human life begins at fertilization); Michael S. Gazzaniga, ‘The Ethical Brain,’ N.Y. TIMES, June 19, 2005 (stating “[i]t is a given that a fertilized egg is the beginning of the life of an individual” but then questioning whether it is “right to attribute the same moral status to that human embryo that one attributes to a newborn baby or, for that matter, to any living human”).


19. See id.; see also Thomas A. Shannon & Allan B. Wolter, Reflections on the Moral Status of the Pre-Embryo, 51 THEOLOGICAL STUD. 603, 608-10, 623-25 (1990) (suggesting that personhood begins either at ontological individuation resulting from implantation and gastrulation during the third week or in the eighth gestational week when neurons have begun forming, reflexes occur, and the “biological presuppositions which enable [a rational] potency to exist” are in place). Another embryological view posits that human life begins around three weeks of development. See David B. Hershenov, Olson’s Embryo Problem, 80 AUSTRALASIAN J. PHIL. 502 (2002) (leaning toward a biological account of identity rather than a psychological account of identity and suggesting that “it is at the end of the third week that the operation of a primitive heart and circulatory system indicates the systematic interaction characteristic of an organism”).


Finally, there are varying versions of the neurological view, in which the beginning of human life depends on brain development and activity.22 According to the early neurological view, human life begins during week23 six or by week seven or week eight24 of development, when the early nervous system is in place, the brainstem is forming, electrical brainstem activity has been recorded, and spontaneous movement and reflexes to stimuli occur.25 Brainstem activity is dis-

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22. See Gilbert, supra note 15. For a helpful discussion of fetal brain development, as well as a provocatively poignant image of a embryo/fetus at Carnegie Stage 23, the end of the embryonic period (GW8), see Joan Stiles & Terry L. Jernigan, The Basics of Brain Development, 20 NEUROPSYCHOLOGY REV. 4, 327-48 (2010).

23. In this article, the age of the fetus is measured in weeks from conception, i.e. in developmental age. To convert to gestational age, two weeks are added to the developmental age. Likewise, to convert gestational age to developmental age, subtract two weeks. Gestational age generally is calculated from the first day of the last menstrual cycle, which is considered to occur about two weeks prior to conception.

24. Kirsten Rabe Smolensky, Defining Life from the Perspective of Death: An Introduction to the Forced Symmetry Approach, 2006 U. CHI. LEGAL F. 41, 70 (2006) (stating that “most researchers agree that the first electroencephalogram (‘EEG’) activity usually occurs in the brainstem approximately ten weeks after conception”—but then stating that this is ten weeks gestation—while acknowledging earlier finding of brain activity by another researcher) (citing R.M. Bergstrom and Lea Bergstrom, Prenatal Development of Stretch Reflex Functions and Brainstem Activity in the Human, 52 ANNALS CHIRURGII ET GYNAECOLOGII FENNIAE SUPP 1-21S (1963)). See note 25 below for sources identifying EEG activity during week six or by week seven of development.

25. See id.; see also Katrina Furth, Fetal EEGs: Signals from the Dawn of Life, CHARLOTTE LOZIER INST. (Nov. 27, 2018), https://lozierinstitute.org/fetal-eeeg-signals-from-the-dawn-of-life/ (describing the historic research detecting brain activity through EEGs at 45 days or 6.5 weeks of development and concluding that human life, and death, are detectable at this stage); K. E. Himma, A Dualist Analysis of Abortion: Personhood and the Concept of Self Qua Experimental Subject, 31 J. MED. ETHICS 48 (2005) (arguing that under a dualist view, soul and body cannot interact in any causal way until brain activity begins, concluding that moral considerations may dictate prohibiting abortion after ten weeks gestational age (eight weeks developmental age) when activity in the brainstem usually begins); Rolf Ahlers, Biotech and Theodicy: What Can and What Ought We to Do in Procreative Technology?, 65 ALB. L. REV. 679, 692-93 (2002); R. Joseph, Fetal Brain Behavior and Cognitive Development, 20 DEVELOPMENTAL REV. 81 (2000) (describing significant markers in the development and functioning of the brainstem but not reaching conclusions concerning personhood, etc.); John M. Goldenring, The Brain-Life Theory: Towards a Consistent Biological Definition of Humaneness, 11 J. MED. ETHICS 198, 199-200 (1985) (concluding that after eight weeks gestation, a fetus is a human life based on brain activity); Michael J. Flower, Neuromaturation of the Human Fetus, 10 J. MED. & PHIL. 237, 245 (1985) (reporting electrical brain activity arising from the brainstem at 6.5 weeks); Carol Tauer, Personhood and Human Embryos and Fetuses, 10 J. MED. & PHIL. 253, 255, 282-63 (1985) (identifying the beginning of personhood at about 6.5 weeks developmental age at which point electrical brainstem activity has been detected, citing Flower, supra, at 245 (Tauer incorrectly refers to gestational age, where Flower apparently was referring to developmental age—see his footnote 1), and stating, “I suggest that the human fetus attains significant personhood by the second half of the first trimester, and that from this time on, it ought to be given full moral status”); Thomasine Kushner, Having a Life
cernable by EEG at this point. Another perspective suggests that the defining moment occurs at approximately week eighteen or nineteen, when the thalamus region of the brain is forming and unifying the nervous system (possibly coinciding with pain sensation). Another neurological perspective proposes that the defining moment occurs during week twenty-two or twenty-three because at this point brain activity shows up on an electroencephalogram (EEG) in sustained patterns like those of a mature human brain.

1. Genetic View

From a genetic standpoint, at all points after conception the fertilized embryo is alive, is human, and is its own organism, genetically distinct from the mother and father. Through the process of conception or fertilization, the embryo inherits twenty-three chromosomes from the mother and twenty-three chromosomes from the father, creating a genetically unique new human composition. Further, the new

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26. Smolensky, supra note 24; Furth, supra note 25; Goldenring, supra note 25; Flower, supra note 25; Tauer, supra note 25. See also The Endowment for Human Development, Prenatal Form and Function: The Making of an Earth Suit, Unit 7: 6-7 Weeks (available at https://www.ehd.org/dev_article_unit7.php#brainwaves) (stating that “individualized brainwaves recorded via electroencephalogram (e-lek’tro-en-sef’a-\-lo-gram), or EEG, have been reported as early as 6 weeks, 2 days”).

27. See Gilbert, supra note 15 (identifying this as one possible view based on neurological development). Note that Gilbert generally uses gestational age rather than developmental age from conception; for consistency and clarity, I refer to developmental age in the present article, unless otherwise noted. See also Flower, supra note 25, at 244-46.

28. Whether or when there may be a fetal experience of pain, as opposed to responses to pain, is a matter of some controversy. Eleanor A. Drey et al., Fetal “Pain”—A Look at the Evidence, 13 Am. Pain Soc’y Bull. (2003). At least twenty-one states have prohibited abortions after twenty weeks based on the possibility of fetal pain. See Why is the House planning to vote on a 20-week abortion ban?, THINK PROGRESS (Oct. 2, 2017), https://thinkprogress.org/20-week-abortion-ban-99e44802bdd; see also Teresa S. Collett, Previability Abortion and the Pain of the Unborn, 71 Wash. & Lee L. Rev. 1211, n.8 (2014) (listing thirteen states and stating that the prohibition is “generally after nineteen weeks gestation” but focusing on twenty weeks gestation in the article’s conclusion). Several of these laws have been subject to legal challenge. Some have been struck down or preliminary injunctions have been granted based upon the application of Roe and Casey or state constitutional law.

29. See Gilbert, supra note 15; see also Morowitz & Trefil, supra note 15, at 152.

human organism will naturally develop into a mature member of the species, barring abnormal conditions. Therefore, the genetic view holds that a new human life exists – a life valuable and worthy of protection.

a. The Unborn Victims of Violence Act and Fetal Homicide Laws

Significantly, United States law now states that human life begins at conception, or at least by implantation, depending on how the law is interpreted. The Unborn Victims of Violence Act of 2004 (“UVVA” or “Laci and Connor’s Law”)[31] imposes criminal penalties on anyone convicted of causing the death of, or bodily injury to, an unborn child “at any stage of development” in the course of committing any of over sixty enumerated federal crimes.[32] The UVVA defines “unborn child” as “a member of the species homo sapiens, at any stage of development, who is carried in the womb.”[33] Unsurprisingly, the act contains an exception to preserve abortion rights, thereby avoiding constitutional challenge.[34] Notwithstanding that exception, the penalty imposed for harming the unborn child is the same as would apply if the death or injury were that of the mother.[35] Thus, the UVVA treats the unborn child as a full human being in terms of the penalty imposed for its harm.[36] If the unborn child is not a human life at some early stage of development, then defendants are being punished unfairly. But if the unborn child is a human life, then the degree of punishment is justified.

Consistent with this federal law, a majority of states have also enacted fetal homicide laws or similar laws to protect developing human beings in the womb throughout pregnancy.[37] Currently, thirty states protect the unborn through such laws from either the point of conception (twenty-eight states) or implantation (two states).[38] This

32. 18 U.S.C. § 1841(a), (b), (d).
33. 18 U.S.C. § 1841(d).
34. For this and a medical treatment exception, see 18 U.S.C. § 1841(c).
36. See Tara Kole & Laura Kadetsky, Recent Developments: The Unborn Victims of Violence Act, 39 HARV. J. ON LEGIS. 215, 235 (2002) (“While the Act disclaims its power to affect abortion rights, the substance of the UVV appears to contradict the fundamental premises of abortion law—that the Fifth and Fourteenth Amendments do not include fetuses in the definition of ‘person’—by punishing violence against fetuses by third parties as harshly as violence against human beings.”); infra notes 183, 190. See infra notes 174-187 and 190 for a further discussion of the UVAA.
37. See infra notes 131-147, 174-195 and accompanying text.
38. See State Laws on Fetal Homicide and Penalty-enhancement for Crimes Against Women, NAT’L CONFERENCE OF STATE LEGISLATURES (May 1, 2018), http://
is a key, consensus-indicating development discussed more extensively in its own section of this Article below. Significantly, Roe v. Wade specifically relied on the fact that criminal law, apart from the issue of abortion, had “been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth.”

Now, a clear majority of states protect human life in the womb by means of criminal law throughout pregnancy.

b. Popular Opinion

Over the decades, popular opinion appeared to indicate increasing agreement that human life begins quite early in development, even as early as conception. However, popular opinion may not be the precise type of consensus referred to by the Supreme Court in the context of constitutional decisions regarding human life and abortion.

Indeed, the Court has relied more on state legislative enactments and other “objective indicia of consensus” in other contexts, such as identifying cruel and unusual punishment under the Eighth Amendment. Nevertheless, the polls still may be informative. A June 2000 Los Angeles
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Times poll found that 53% of Americans believe human life begins at conception.43 A 2003 Fox News poll found that 55% of Americans believe that human life begins at conception.44 Additionally, an August 2008 Zogby International poll found that 59% of Americans believe human life begins at conception.45 These numbers show a noticeable increase over the 1973 Gallup poll which found that only 43% of Americans believed human life begins at conception.46 Even more strikingly, the 2000 Los Angeles Times poll found that 57% of Americans believe that abortion is murder.47 This, likewise, is a significant increase from a 1970 Harris poll, which found that only 41% of Americans believed abortion to be murder.48 Finally, a 1990 Gallup survey found that 77% of Americans believed that abortion, if not murder, is at least the taking of a human life.49 This development perhaps is surprising, given the fact that abortion is the law-of-the-land and given the normal teaching function of the law.

However, in the last couple of years, polling indicates that the percentage of Americans who believe human life begins at conception has again dipped below 50%. In January 2014, the Marist poll found that 53% of Americans believed human life begins at conception.50 In January 2015, the percentage was 51%.51 Then, in December 2017, the percentage dipped to 44%, and in January 2018, it increased to

46. Judith Blake, The Supreme Court’s Abortion Decisions and Public Opinion in the United States, 3 POPULATION & DEV. REV. 45, 54 (1977). In fact, the table provided in Blake’s article shows only the percentage of female respondents who believed that human life begins at conception (36%), the percentage of male respondents who believed the same (50%), the number of female respondents (735), the number of male respondents (775), and a total of 1510 respondents. Id. From these numbers, though, simple math yields the overall percentage of respondents (43%) who held this belief. See id. But note that because the poll included more male respondents than female respondents, the overall percentage produced by respondents in this poll is likely skewed slightly higher than it would be in the U.S. population as a whole based on distribution of males and females. Interestingly, in the same 1973 poll, 55% of men polled, and 73% of women, believed that human life begins by at least quickening. See id.
51. Id.
47%. Subsequently, in January 2019, the percentage was at 42%, followed by June 2019 where the percentage was at 38%. (Unlike the previous Marist polls, this last poll separately broke out those who believed human life begins within the first eight weeks of pregnancy or gestation, i.e. approximately the first six weeks of development.)

However, when combined with respondents who believed that human life begins in the first three months of pregnancy or gestation — i.e. approximately the first ten weeks of development — a majority of poll-takers, in every poll, believed that human life begins within the first three months of pregnancy. While most states have passed fetal homicide laws that define and protect human life from conception onward (as detailed further below), polls over the last two years complicate any simple narrative that majority-level consensus holds that protectable human life begins at conception.

These polls refer to “human life.” One might argue that the respondents’ understanding and use of the term may have differed somewhat from the sense in which it was used by the Supreme Court in *Roe v. Wade*, where reference to philosophy and theology (as well as medicine) added a moral aspect to the term and possibly imbued it with a meaning more akin to philosophical personhood. However, the results of an online poll conducted by ReligiousTolerance.org in 1999 offers some indication that the respondents’ use of the term “human life,” in the context of the previously cited abortion polls, also was close to the concept of personhood. The Religious Tolerance poll of 1,951 individuals found that 51% of respondents concluded personhood begins at conception. This 51% concluding that personhood begins at conception closely tracks the results of the roughly contemporaneous Los Angeles Times poll from 2000, which found that 53% of respondents believed that human life begins at conception. Interestingly, in the same Religious Tolerance poll, a total of 62% of respon-

52. Id.
55. Id.
56. Supra notes 50-55.
57. See infra note 142.
60. Id.
61. Supra note 43.
dents concluded that personhood begins at least by the time the heart begins to beat, which occurs around week four or five of development.62

There are other reasons to believe that those polled, when employing the term “human life,” attached moral and philosophical significance to the term as well, and not just biological and genetic meaning. If the respondents were only thinking about science, one would expect that a far higher, almost unanimous, percentage would have indicated that human life begins at conception, given that fertilization produces a new genetic human identity, distinct from the mother and the father. Further, the correlation in the 2000 Los Angeles Times poll between the numbers concluding that human life begins at conception and the numbers concluding that abortion is murder also suggest that respondents were using the term human life generally synonymously with person.

c. International Law and Human Rights Instruments63

A brief excursus in recent international human rights law may also prove rewarding. Perhaps unexpectedly, a measure of support for the genetic view of the beginning of human life can be detected in recent international human rights declarations and conventions, which point to the dignity of human life before birth. In 1997, the General Conference of the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) unanimously recognized the significance of the genetic basis of individual life in its Universal Declaration on the Human Genome and Human Rights (the “Declaration”).64 Article 1 states, “The human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity.”65 The United Nations General Assembly endorsed the Declaration in 1998.66

Under a straightforward reading, the Declaration locates the foundation of a human being’s inherent dignity and uniqueness, at least in part, in the human genome, with its variation from person to

62. See supra note 59. Regarding advent of the heartbeat, see infra note 115 for a Department of Health and Human Services regulation defining “dead fetus” to require absence of a heartbeat.

63. A comparison of U.S. law on abortion rights to that of other countries around the world is provided in Section II.A.4 infra, showing that the U.S is an outlier and deviates from consensus in permitting unrestricted abortion all the way until viability, or around week twenty-four.

64. See G.A. Res. 53/152, Declaration on the Human Genome and Human Rights (Dec. 9, 1998).

65. Id.

66. Id.
person, rather than in a macro, physical structure such as the brain.\textsuperscript{67} By doing so, the Declaration appears to place foundational value on the potential and uniqueness of the human genetic code, the design which makes possible human ability and achievement, and not merely on the later abilities that develop from the code. A positive result of such an approach is that human beings are then considered inherently equal in value. The Declaration thus arguably stands in opposition to any argument that differences in cognitive abilities lead to differences in the moral value of individuals. As history reminds us, such dehumanizing arguments have fueled, again and again, the most unspeakable crimes.

Pushed to the beginning point of individual human life, the Declaration suggests that the newly-conceived human being is of equal inherent value to other human beings, even before his or her unique, genetically-planned neurological abilities develop. One could argue that the Declaration need only be read to say that the human genome simply makes possible the dignity of the individual and of humanity, a dignity which arises at some point in development. However, the overall content of the Declaration reveals a commitment to the principle that the human genome itself, individually and collectively, is valuable and to be protected, logically and arguably giving rise at its individual inception to some individual human dignity.\textsuperscript{68}

\textsuperscript{67}. See, e.g., Nora O’Callaghan, Human Origins and Human Rights in the Genome Age, \textit{3 Ave Maria L. Rev.} 123, 134 (interpreting the Declaration as an effort “to give formal legal recognition to the view that it is the material human genome itself that is the basis for human rights and equality”); Federico Mayor, \textit{The Universal Declaration on the Human Genome and Human Rights}, \textit{326 Comptes Rendus Biologies} 1121, 1122 (2003) (emphasizing the uniqueness of the human genome and of the human being, stating, “The essential mutability and uniqueness of the genome were considered as characteristics leading to the right of non violation of the genome. I consider that uniqueness is particularly relevant not only as a scientific concept, but as a social concept because each human being is unique, not only biologically, in permanent evolution, but also from a social and cultural point of view. And these are the capacities that underlie a unique capacity of creativity, of thinking, of designing.”). The comment offered by the Vatican during the drafting process responded with constructive criticism to Article 1: “as formulated, the text would seem to mean that the genome is the foundation of the human being’s dignity. In reality, it is human dignity and the unity of the human family which confer value upon the human genome and require that it be protected in a special way.” See O’Callaghan, \textit{supra}, at 135.

\textsuperscript{68}. If so, does human dignity admit of degrees, with some individuals bearing more and some less? No—is the traditional answer in human rights law, and with reason, given the importance of the principle of human equality. An “important consequence of the meaning that ‘human dignity’ bears in international law is that basic rights are equal for all.” Roberto Andorno, \textit{Human Dignity and Human Rights as a Common Ground for a Global Bioethics}, \textit{34 J. Med. & Phil.} 223, 229 (2009) (emphasis in original); see also Andorno, \textit{The Paradoxical Notion of Human Dignity}, \textit{78 Rivista Internazionale di Filosofia del Diritto} 151 (2001) (“The references to human dignity in legal and ethical instruments concern an \textit{intrinsic} and \textit{universal} perspective: all individuals, by the mere fact of being ‘members of the human family’, are entitled to such a dignity.
Meanwhile, in the Western Hemisphere, the American Convention on Human Rights (the “Convention”) adopted after Roe, provides more explicit language protecting developing human life before birth. Article 4 of the Convention states: “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.” The Convention entered into force for ratifying states in 1978. The United States signed the Convention in 1977. However, the U.S. has not ratified the treaty. Taking note of the concept of human dignity, so prevalent in human rights law, the Supreme Court has invoked “the dignity of human life” in its 2007 decision upholding the federal Partial-Birth Abortion Ban Act of 2003 in Gonzales v. Carhart.

One other recent international development may be worth noting here. One country—Ireland—moved away from defining conception as the moment from which human life should be protected. In 2018, Ireland passed, by referendum, a constitutional amendment to allow the legislature to legalize abortion early in pregnancy. Previously, the Irish Constitution (as interpreted in judicial opinion and codified in law) had prohibited abortion except in cases where the mother’s life was in danger. However, the since-enacted legislation, which was initially proposed along with the constitutional amendment, did not allow for unrestricted abortion all the way up to viability (around week twenty-four), like United States law provides for under Roe. Rather, Irish law only allows abortion without restriction up to the end of week twelve of pregnancy/gestation, or approximately week ten of development. (This is more in line with European and other in-

It means that dignity is equal for all humans. Because it depends on the being of the person, and not on his behavior, it cannot be gained or lost; it does not allow for any degrees.”

69. 1144 U.N.T.S. 17955.
70. See id. (showing date of entry into force, signatories, and ratifications).
71. Id.
72. Id.
74. 550 U.S. 124, 157 (2007). It is also worth noting that the opinion refers to “the life within the woman,” “the life of the fetus,” and “respect for life, including life of the unborn,” rather than merely to “potential life.” Id. at 157-58.
77. Id. Regarding the 12 week limit, Dr. Elizabeth Dunn, in the Citizens’ Assembly Report in advance of the referendum, noted that by week twelve, most women know they are pregnant and, further, up to week twelve, abortions can be effected through medication rather than surgery. Papers Provided to Members as Part of the Deliberative Process, in 2 PAPERS AND PRESENTATIONS FROM CITIZENS’ ASSEMBLY SPEAKERS 934 (2017), https://www.citizensassembly.ie/en/The-Eighth-Amendment-of-the-Constitu-
ternational legislation than with U.S. law, which is something of an outlier.)\textsuperscript{78} The law allows abortion beyond that point only where there is risk to the life of or of serious harm to the health of the pregnant woman, or when the fetus will die before birth or within twenty-eight days after birth.\textsuperscript{79} Notably, the law also protects rights of conscientious objection of medical practitioners, protecting those who have a conscientious objection from being coerced into participating in an abortion against their will and conscience.\textsuperscript{80}

d. Summary

While this excursus in international human rights law may illuminate human dignity and raise the possibility of additional support for the genetic view of the beginning of human life, ultimately United States developments are most relevant and controlling for United States constitutional law. In particular, the federal Unborn Victims of Violence Act and similar state laws enacted in a majority of states signal a growing adherence to the genetic view of the beginning of human life. Popular opinion, however, while it had hovered around and above 50% in favor of this view, presently seems to be below that 50% level.

Summarizing the position that human life, or human beingness,\textsuperscript{81} begins at conception, the Subcommittee on Separation of the Judiciary Committee of the United States Senate wrote in 1981:

[C]ontemporary scientific evidence points to a clear conclusion: the life of a human being begins at conception. . . . Physicians, biologists, and other scientists agree that conception marks the beginning of the life of a human being. . . . There is

\textsuperscript{78} See infra notes 123-127 and accompanying text.
\textsuperscript{80} Id.
\textsuperscript{81} The term “life of a human being” in the quote above appears to be used synonymously with “human life.” On this point, see infra note 82. Further, the subcommittee report seems to be suggesting that it would be unreasonable and injudicious to decisively separate human life (or personhood) from inception of the human being. For a brief consideration of the attempt to positively separate initiation of “human life” or of “human beingness” from initiation of personhood, see infra note 210 and accompanying text.
overwhelming agreement on this point in countless medical, biological, and scientific writings. 82

Similarly, a pro-choice feminist author acknowledged in 1995 that “the death of a fetus is a real death,” and that the “humanity of the fetus” is also real and deserves recognition. 83

2. Embryological or Individuation View

Some legal and institutional pronouncements have added weight to the embryological view as well. For example, in the United Kingdom, the Human Fertilisation and Embryology Act of 1990 84 prohibits the use or keeping of embryos for research, or any other purposes, beyond fourteen days after fertilization or conception. Also, in the United States, the Guidelines for Human Embryonic Stem Cell Research (2005) developed by National Academies forbids research on embryos beyond fourteen days or formation of the “primitive streak,” whichever occurs first. 85

While these ethical injunctions do not di-

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83. Naomi Wolf, Our Bodies, Our Souls: Rethinking Pro-Choice Rhetoric, New Rep., Oct. 16, 1995, at 26. But note that with respect to her own experience taking the morning-after pill, the author uses words like “possible baby,” “potential baby,” “a possible someone else,” and “the being that might have been,” to describe the life which might have been conceived or which had just been conceived. Id. Wolf also comments perceptively on developments in science since Roe:

Since abortion became legal nearly a quarter-century ago, the fields of embryology and perinatology have been revolutionized—but the pro-choice view of the contested fetus has remained static. This has led to a bizarre bifurcation in the way we who are pro-choice tend to think about wanted as opposed to unwanted fetuses.

Id. Other women who were pro-choice at one time have stated their conclusion about human life more strongly: “Do you understand that I killed a life? ... Abortion is murder, regardless of what they say.” Walter Trobisch, I Married You 131 (1971). Murder may be too strong a term, though, generally speaking, because simultaneously there could exist both reasonable doubt that personhood has begun and consensus or likelihood that protectable human life or personhood has begun. Should you consult this last quote, take a look at the context to appreciate the note of grace and the compelling, human narrative.

84. Human Fertilisation and Embryology Act 1990 c. 37, § 3(UK).

rectly address abortion, inhering in them is the conviction that there is something more human, sacred, or worthy of protection about the individual human embryo after two weeks than before. Reflecting and contributing to this conviction is the perception that, as Gilbert writes, “One of the most popular positions among philosophers is the perspective that life begins at the point of gastrulation—that point at which the zygote is an ontological individual and can no longer become two individuals.” In terms of popular opinion, a 2003 Newsweek poll found that 58% of those surveyed believed that human life at least begins by implantation (which actually takes place a few days prior to day fourteen).

So what is the rationale behind the embryological or individuation view? One idea is that, according to a certain perspective, if the embryo can still divide to form twins, a rights-bearing individual human life or person is not present. But after implantation and gastrulation have occurred, according to this view, individual human life clearly exists because the embryo can no longer divide to form twins.

This reasoning raises a question. I consider myself to be a human being and a person, yet it is possible that I could be cloned, forming a genetically identical human being. However, this possibility does not negate my current status as a human being or eliminate my personhood. Why think differently about an embryo? Of course, if the logic of the embryological view fails, presumably one would fall back on the genetic view.

Guidelines for Human Embryonic Stem Cell Research 23 (2010) (providing that research on embryonic stem cells should not extend beyond fourteen days’ development).

86. Gilbert, supra note 15.

87. The Editor’s Desk, Newsweek (June 9, 2003), https://www.newsweek.com/editors-desk-98979. The same poll found that 56% of Americans believed that separate murder charges should be brought against someone who causes the death of a fetus in the womb, whether pre- or post-viability. Id. At the same time, in a Fox News/Opinion Dynamics/Roper Center for Public Opinion Research poll, 70% of respondents believed that an attacker who causes the death of a three-month-old fetus should be treated the same as one who causes the death of an eight-month-old fetus. See Ramsey, infra note 179 at n.33.

88. See, e.g., The President’s Council on Bioethics, Human Cloning and Human Dignity: An Ethical Inquiry 136 (2002) (arguing that the possibility that “twinning” may occur supports a conclusion that before implantation embryos are less than human beings or persons).

3. "When Thy Heart Begins to Beat"\textsuperscript{90}

Some conclude that human life is present when the heart begins to beat at about week four of development.\textsuperscript{91} In one international online survey from 2008, 24\% of respondents believed that human life begins with the fetal heartbeat;\textsuperscript{92} and together with the respondents who believed that human life begins earlier in development, approximately 74\% of all respondents believed that human life begins at least by the beginning of the fetal heartbeat.\textsuperscript{93}

There is some legal significance attached to the fetal heartbeat. First, it is interesting to note the definition of the term “quickening” provided in \textit{Roe v. Wade}: “the first recognizable movement of the fetus \textit{in utero},”\textsuperscript{94} signaling the presence of a living fetus. Prior to \textit{Roe}, aborting a quick fetus was generally illegal, either under American common law or under various state statutes.\textsuperscript{95} (However, \textit{Roe} contends that English common law, as opposed to American common law, was not settled in viewing abortion of a quick fetus as a crime.\textsuperscript{96}) William Blackstone, in his revered “Commentaries on the Laws of England”, wrote that “[l]ife is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother’s womb.”\textsuperscript{97} In the past,

\begin{itemize}
\item \textsuperscript{90} \textit{William Blake}, \textit{The Tyger}, in \textit{Songs of Experience} (1794).
\item \textsuperscript{91} \textit{Fetal Development}, \textit{Medline Plus}, http://www.nlm.nih.gov/medlineplus/ency/article/002398.htm (last updated July 31, 2019) (listing gestational age, and noting the heart beats regularly by the fourth or fifth week of development); see also Aimee Seungdamrong et al., \textit{Fetal Cardiac Activity at 4 Weeks After in Vitro Fertilization Predicts Successful Completion of the First Trimester of Pregnancy}, 90 \textit{Fertility and Sterility} 1711 (2008); but see Katie Heaney, \textit{Embryos Don't Have Hearts}, \textit{The Cut} (May 24, 2019), https://www.thecut.com/2019/05/embryos-dont-have-hearts.html (objecting to use of the term “heartbeat” at this early stage, preferring the term “cardiac activity”, as the heart is not fully formed during the embryo stage).
\item \textsuperscript{92} See T.A. Elliott et al., “When Does Life Begin?” Results of an Online Survey, 90 \textit{Fertility & Sterility} S65 (2008). The online survey asked the question—“When does life begin?”—to which 600 responses were obtained. \textit{Id.} The randomness of the survey is unclear from the article which summarizes an oral presentation at the 64th Annual Meeting of the American Society for Reproductive Medicine. See \textit{id.} The survey apparently was commissioned by Reproductive Biology Associates, an In Vitro Fertilization (IVF) clinic in Atlanta. See \textit{id}; see also Andy Coghlan, \textit{When Does Human Life Begin?}, \textit{New Scientist} (Oct. 2008), http://www.newscientist.com/article/dn15062-when-does-human-life-begin.html.
\item \textsuperscript{93} See Coghlan, supra note 92.
\item \textsuperscript{94} Roe v. Wade, 410 U.S. at 132 (1973).
\item \textsuperscript{95} Roe, 410 U.S. at 134-41.
\item \textsuperscript{96} \textit{Id.}
\item \textsuperscript{97} 1 \textit{William Blackstone}, \textit{Commentaries *125}. Blackstone continued:
\begin{quote}
An infant in ventre sa mere, or in the mother’s womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees with ours.
\end{quote}
\end{itemize}
according to Roe, quickening was considered to occur between the sixteenth and eighteenth week of pregnancy, when the mother could feel the movements of the fetus in the womb.98 According to other sources, though, “occasionally women feel movement as early as 12 weeks.”99 Moreover, given advances in modern technology, such as development of the fetal ultrasound,100 detection of the fetal heartbeat (or cardiac activity) and fetal movement now takes place much sooner. According to one study, “[t]he embryonic heart rate usually is identifiable by transvaginal sonography at 6 weeks’ gestational age” or four weeks’ developmental age.101 This detection may represent quickening in the modern world.

Second, apart from the definition of quickening, the fetal heartbeat may have legal significance because of the connection of the end of the heartbeat with death. According to the Uniform Determination of Death Act of 1980102 (“UDDA”), death may be determined by observing “irreversible cessation of circulatory and respiratory functions.”103 Once the heartbeat begins and is detectable, then it may follow that the death of the new human life may then be determined by detecting irreversible cessation of the heartbeat and the circulatory function. Consistent with this perspective, a Department of Health and Human Services regulation provides the following definition for “dead fetus”: “Dead fetus means a fetus that exhibits neither heartbeat, spontaneous respiratory activity, spontaneous movement of voluntary muscles, nor pulsation of the umbilical cord.”104 The definition

Id. at 126. Michael S. Paulsen explains the significance of quickening as follows: “For Blackstone, the unborn child was legally a person at the point that the existence of a new infant human life could be detected as actively alive in the womb.” Michael S. Paulsen, The Plausibility of Personhood, 74 OHIO ST. L.J. 13, 27 (2013) (further elaborating that “[i]n Blackstone’s formulation, there is no distinction—no wedge, so to speak—between biological human life and legal personhood; Blackstone treated them as one and the same in his description of the rights of persons”).
98. Roe, 410 U.S. at 132.
99. Quickening, Sex and Other Pregnancy Things: When Can You Feel the Baby move?, WebMD, https://www.webmd.com/baby/features/when-feel-baby-move (last visited Nov. 8, 2019) (though not specifying gestational or developmental age); see also Fetal Movement: Quickening, AM. PREGNANCY ASS'N, https://americanpregnancy.org/while-pregnant/first-fetal-movement/ (last visited Nov. 8, 2019) (stating that “[s]ome moms can feel their babies move as early as 13-16 weeks from the start of their last period” and thus measuring in gestational age, which would be as early as 11-14 weeks developmental age) (emphasis in original). As noted, most women do not feel fetal movement quite this early. Nevertheless, quickening, in this sense, can occur this early.
100. See infra note 161 (discussing invention of 3D fetal ultrasound/sonogram as a Time invention of the year in 2000).
103. Id. § 1.
refers to “fetus,” so one might guess that it would not apply until an “embryo” develops enough to be referred to as a “fetus,” which in common discussion, comes at the end of week seven or eight of development. However, that would be an incorrect assumption. The regulation defines “fetus” as “the product of conception from implantation until delivery.” Thus, under this definition, the cessation of the heartbeat would signal death, and the heartbeat itself, life.

Finally, consistent with the general biological definition of life, a human life may be defined as a human organism with “the ability to function as a coordinated organism rather than merely as a group of living human cells.” This ability to function as a coordinated organism arises prior to the fetal heartbeat; however, the beginning of the fetal heartbeat is compelling to people, in part because it provides clear evidence of such ability.

4. Neurological Views

Several forms of the neurological view have been proposed: one holds that human life has begun by week seven or eight with the beginning of brainstem activity; a second marks the beginning of human life around week eighteen or nineteen; a third marks human life at around week twenty-two or twenty-three with more mature neural activity. Recent legal development may direct support to the earliest of the neurological views.

As the definition of “brain death” crystallized, many came to conclude that the arbitrariness of a viability view is unsustainable and that human life has begun by at least the beginning of brainstem activity. Those who hold the neurological view often reason from the

105. Id. § 46.202(c).
107. See id. (“From the earliest stages of development, human embryos clearly function as organisms. Embryos are not merely collections of human cells, but living creatures with all the properties that define any organism as distinct from a group of cells.”).
108. See Gilbert, supra note 15 (noting this view though preferring to extend protection only upon more mature development of the brain); see also Kirsten Rabe Smolensky, Defining Life from the Perspective of Death: An Introduction to the Forced Symmetry Approach, 2006 U. CHI. LEGAL F. 41, 72 (2006) (concluding that acceptance of the whole brain death definition, contained in the UDDA, leads to acceptance of initiation of brain activity as the beginning of human life, and stating “if absence of electrical activity in the brain stem means that a person is legally dead for the purposes of organ donation, then the forced symmetry approach dictates that brain birth I [i.e., the beginning of brainstem activity] should be the legal definition of life.”); Ahlers, supra note 25, at 692-93 (“The redefinition of death had consequences for specifying a human being at birth . . . .”); Gary B. Gertler, Brain Birth: A Proposal for Defining When a Fetus is Entitled to Human Life Status, 59 S. CAL. L. REV. 1061, 1071 (1986) (arguing that “[t]he logical corollary to brain death as the functional equivalent of death is brain birth," but
definition of brain death for a human. The idea is that human death can be identified when the (whole) brain ceases to function, and similarly, until an embryo’s brain begins to function it is not human. Once brain activity or function begins, if the brain irreversibly ceases to function, science and law recognize a human’s death. This particular measure of death provided by the Uniform Determination of Death Act (‘UDDA’) (the UDDA also recognizes death upon irreversible cessation of the earlier-arising circulatory and respiratory functions, as mentioned above) would, in considering the neurological view, support the early version of the view. Alternatively, as we will see, the UDDA could instead further support the genetic view.

The UDDA identifies brain death as the “irreversible cessation of all functions of the entire brain, including the brainstem.” Note that the damage must be irreversible, and the entire brain must cease activity, not just a part of the brain. Using these criteria to identify the beginning of human life, under the neurological view, human life may be present by the end of week six, about when initial brainstem function begins, or by week eight of development according to other problematically locating “brain birth” at the beginning of neocortical brain activity rather than earlier brain activity, inconsistent with the definition of brain death which requires cessation of all brain function); Goldenring, supra note 25, at 199; M. C. Shea, Embryonic Life and Human Life, 11 J. Med. Ethics 205, 207, 209 (1985) (arguing that human life is present “when the newly developing body organs and systems begin to function as a whole” and then noting the connection to early brain development before concluding that abortion is ethically dubious even before the beginning of the fetal stage); Tauer, supra note 25, at 262-63 (identifying the beginning of personhood at about 6.5 weeks developmental age at which point electrical brainstem activity has been detected, and stating, “I suggest that the human fetus attains significant personhood by the second half of the first trimester, and that from this time on, it ought to be given full moral status.”); Kushner, supra note 25, at 5-6 (arguing “that the initiation of brain activity is the most reasonable time at which to fix the start of life); Brody, supra note 25, at 100-116 (approving the brain life theory and arguing it successfully establishes that human life must begin by at least sometime between the sixth and twelfth week of development); see also Church of Eng. Bd. for Soc. Responsibility, Personal Origins: Report of a Working Party on Human Fertilization and Embryology of the Board for Social Responsibility (2d ed. 1985) (establishing that the functioning nerve net developed at about 40 days’ gestation is considered “a necessary criterion for the beginning of personal life, paralleling the common acceptance of brain-death—as the mark of the end of physical life”); see also D. Gareth Jones, Brain Birth and Personal Identity, 15 J. Med. Ethics 173, 174 (1989) (reviewing Bernard Haring and concluding Haring located the beginning of personal life between days 25 and 40 gestation based on beginning cortical development).
researchers. Electrical brain activity arising from the brainstem has been recorded at six-and-one-half weeks, while whole body reflex responses facilitated by the brainstem occur at eight weeks.

After brainstem activity begins, the UDDA criteria for the absence of human life would not be present because: (1) part of the embryonic brain appears to be functioning, and (2) no irreversible brain damage to the new embryonic life has occurred. From that point, under the UDDA, death may be measured, and life is present. The precise moment specific brainstem development occurs may be subject to discussion, but logically the UDDA supports the early neurological view.

However, the UDDA may in fact support the genetic view. Arguably, the principle behind the act’s requirement of irreversible cessation of all brain functions is that as long as brain function may return or arise in the future, the human being is alive and must be protected. Under this reading, it would not be necessary that the brain had already begun functioning; it would be sufficient that brain function was on its way. Applying this standard in contemplating the beginning of human life, one would conclude that if the individual Homo sapiens in the womb will develop brain activity in the future, he or she is not dead or nonhuman, but rather is a human life, because the UDDA’s “irreversible cessation” requirement has not been met.

Either way, support for the UDDA is nearly universal. It was approved by the American Medical Association in 1980 and by the American Bar Association in 1981. The UDDA definition has been adopted in most states. According to the National Conference of Commissioners on Uniform State Laws (or “Uniform Law Commission”),

114. Furth, supra note 25; Flower, supra note 25, at 245.
115. Department of Health and Human Services regulations provide an alternative definition for death of a fetus: “Dead fetus means a fetus that exhibits neither heartbeat, spontaneous respiratory activity, spontaneous movement of voluntary muscles, nor pulsation of the umbilical cord.” 45 C.F.R. § 46.202(a). Under this definition, death may be measured even earlier in development, as some of the functions referred to in the regulation are present before brain activity appears. As stated before, the heart is beating regularly by at least week four or five of development. See supra note 91.
117. UNIF. DETERMINATION OF DEATH ACT, supra note 102.
thirty-seven states have adopted the act, as well as the District of Columbia and the U.S. Virgin Islands.\(^{118}\) The first state to adopt a brain death standard, Kansas, did so in 1970.\(^{119}\) By 1981, the Indiana Supreme Court stated this “concept of ‘brain death’ has gained virtually universal acceptance in the medical profession.”\(^{120}\)

The widespread adoption of the UDDA implies major support for the view that human life has at least begun by early neurological development—by approximately week seven or week eight when brain-stem activity has been recorded by various researchers.\(^{121}\)

Worldwide consensus also seems to disfavor adoption of a late neurological view. Other countries prohibit or limit abortions earlier in pregnancy/development than the United States does.\(^{122}\) Only seventeen of 199 countries, counted by the Center for Reproductive Rights, permit abortion without any restriction as to reason beyond week ten (twelve weeks gestational age).\(^{123}\) This amounts to only about 8.5% of the world’s nations, and one of the seventeen counted by

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121. See supra notes 25, 108, and 112 and accompanying text.

122. The Supreme Court “has referred to the laws of other countries and to international authorities” in the process of determining “cruel and unusual punishment” under the Eighth Amendment. See, e.g., Roper v. Simmons, 543 U.S. 551, 575 (2005). Similarly, when the Court in Roe v. Wade referred to consensus in “medicine, philosophy, and theology,” all of which are academic disciplines transcending prosaic political and territorial boundaries, it may have invited a broad analysis referencing the laws of other countries and international authorities. See generally Roe v. Wade, 410 U.S. 113, 159 (1973).

123. See The World’s Abortion Laws, CTR. FOR REPROD. RIGHTS (July 2014), http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/AbortionMap2014.PDF. The Center for Reproductive Rights (the “Center”) refers, in its fact sheet, to gestational age. According to its fact sheet, “[g]estational limits are calculated from the first day of the last menstrual period, which is considered to occur two weeks prior to conception.” In analyzing the data in the text above, I have instead referred to age from conception. The number of nations deciding the issue, reflected in the data from the Center, represents useful guidance. While it does not show the popular will of the world’s people, it is important to remember that even attempting to factor in the population of the respective countries could not do so either because many countries are not democracies—and therefore political decisions may or may not reflect the will of the people—and even in those that are, the decision may not be made democratically, as in the United States, where the decision was rendered initially by the Supreme Court. Instead, the numbers cited represent the number of times deliberative entities have reached one conclusion rather than another, an important consideration.
the Center for Reproductive Rights is Puerto Rico, a territory of the United States.\textsuperscript{124} Not counting Puerto Rico, 8.1\% of nations allow abortion without restrictions beyond week ten. Further, only nine of 199 countries permit abortion without restriction as to reason beyond week twelve (gestational age of fourteen weeks).\textsuperscript{125} This figure again includes Puerto Rico, adhering as it does to U.S. law.\textsuperscript{126} That amounts to only 4.5\% of the world’s nations, or 4.0\%, not counting Puerto Rico. This places the United States among nations such as China, North Korea, and Vietnam.\textsuperscript{127} Two of these countries, China and Vietnam, are communist countries which limit reproductive freedom. Another, North Korea, is a communist dictatorship not known as a haven of human rights. Besides those countries and the United States, the only others that allow abortion without any restrictions up to the point of viability, are the Netherlands, Canada, France, and Singapore (the last of which actually imposes some restrictions at twenty-four weeks gestational age or week twenty-two of development, which may precede viability).

B. ADDITIONAL DEVELOPMENTS IN SCIENCE AND LAW

1. Protecting Life Before Viability

Additional developments in science and law seem to reinforce and sometimes reflect the growing consensus that protectable human life begins well before viability. In 2004, as indicated earlier, the federal Unborn Victims of Violence Act\textsuperscript{128} ("UVVA") was passed by fairly wide

\begin{footnotes}
\item[124] CTR. FOR REPROD. RIGHTS, supra note 123.
\item[125] See id. The percentage of countries permitting abortion on demand, without restriction as to reason, beyond week six, according to the Center for Reproductive Rights, is 28\%. Id. Thus, 72\% of the world’s countries either prohibit abortion after week six entirely or permit abortions after that point only based on specific, limited justification(s).
\item[126] Id.
\item[127] Randy Beck, Gonzales, Casey, and the Viability Rule, 103 NW. U. L. REV. 249, 264-65 (2009). Randy Beck notes that:

Most of the nations that join the United States in permitting such unrestricted late-term abortions make for dubious company. Communist China’s efforts toward population control clash with the theory of reproductive rights underlying the Supreme Court’s abortion jurisprudence, and have led to coerced abortions in parts of that country. With respect to the other two Communist regimes on the list, Vietnam also places legal limits on family size, and North Korea is not viewed as a leader in human rights. The medical culture of the Netherlands appears to have generally less protective of fetal life than other nations, quite apart from the abortion issue. For instance, doctors in that country are much less willing than their European neighbors to provide life sustaining treatment to premature but potentially viable infants.

Id. (footnotes omitted).
\end{footnotes}
margins. The UVVA protects children before birth by imposing criminal penalties on someone who causes the death of, or bodily injury to, a child in the womb at any stage of development.

Even more importantly, a significant majority of states have also extended protection to unborn children through their murder, manslaughter, and wrongful death statutes or through other statutes which provide an interpretive gloss on murder statutes and other statutes. In fact, most of these state laws specifically extend the protection of criminal law to an unborn child at any stage of development in the womb.


132. See State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women, NAT’L CONFERENCE OF STATE LEGISLATURES (May 1, 2018), http://www.ncsl.org/issuesresearch/health/FetalHomicideLaws/tabid/14386/Default.aspx. This includes ALABAMA (defining “person” with respect to victims of criminal homicide or assault to include “a human being, including an unborn child in utero at any stage of development, regardless of viability”—Ala. Code § 13A-6-1(a)(3)); ALASKA (defining “unborn child” to mean “a member of the species Homo sapiens, at any stage of development, who is carried in the womb”—Alaska Stat. § 11.81.900(b)(65)); ARIZONA (applying law to “an unborn child in the womb at any stage in its development” Ariz. Rev. Stat. Ann. §§ 13-1102, 13-1103, 13-1104, 13-1105); ARKANSAS (defining “person” for relevant offenses to include “an unborn child in utero at any stage of development” and “unborn child” to mean “offspring of human beings from conception until birth”—Ark. Stat. Ann. § 5-1-102(13)); FLORIDA (defining “unborn child” to mean “a member of the species Homo sapiens, at any stage of development, who is carried in the womb”—Fla. Stat. Ann. § 775.021(3)(c)); GEORGIA (defining “unborn child” for crime of feticide to mean “a member of the species homo sapiens at any stage of development who is carried in the womb” Ga. Code Ann. §§16-5-80(a), 52-7-12.3(a)); IDAHO (stating a human being, as a victim of murder or manslaughter, includes “a human embryo or fetus”, and “embryo” or “fetus” is defined to mean “any human in utero”—Idaho Code §§ 18-4001, 18-4006, 18-4016); ILLINOIS (defining “unborn child” to mean “any individual of the human species from the implantation of an embryo until birth”—Ill. Rev. Stat. ch. 720 §§ 59-1.2, 59-2.1, 59-3.2); INDIANA (protects a fetus “in any stage of development”—Ind. Senate Enrolled Act 203, Ind. Code Ann. §§ 35-42-1-1, 35-42-1-3, 35-42-1-4); KANSAS (defining “person” and “human being” to include “unborn child” which is defined as “a living individual organism of the species homo sapiens, in utero, at any stage of gestation from fertilization to birth”—Kan. Stat. Ann. § 21-5419); KENTUCKY (defining “unborn child” to mean “a member of the species homo sapiens in utero from conception onward, without regard to age, health, or condition of dependency”—Ky. Rev. Stat. § 507A.010); LOUISIANA (defining “person” to include “a human being from the moment of fertilization and implantation and also includes a body of persons, whether incorporated or not” and defining “unborn child” as “any individual of the human species from fertilization and implantation until birth”—La. Rev. Stat. Ann. § 14:27, (11)); MICHIGAN (extending protection of criminal law to an “embryo or fetus”—Mich. Comp. Laws Ann. § 750.90a et seq.); MINNESOTA (defining “unborn child” to mean “the unborn offspring of a human being conceived, but not yet born”—Minn. Stat. § 609.266); MISSISSIPPI (defining “human being” to include “an unborn child at every stage of gestation from conception until live birth” and defining “unborn child” to mean “a member of the species homo sapiens, at any stage of development, who is carried in the womb”—Miss. Code Ann.
These laws are important to highlight. In identifying a lack of consensus about the beginning of human life, the Court in *Roe v. Wade* specifically relied on the fact that criminal law, apart from the issue of abortion, had “been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth.” That is no longer the case,

§ 97-3-37; MISSOURI (stating that “[t]he life of each human being begins at conception” and defining “unborn children” or “unborn child” to include “all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development”—Missouri Rev. Stat § 1.205); NEBRASKA (defining “unborn child” to mean “an individual member of the species Homo sapiens, at any stage of development in utero”—Neb. Rev. Stat. §§ 28-339, 28-396, 60-6, 198); NORTH CAROLINA (defining “unborn child” to mean “a member of the species homo sapiens, at any stage of development, who is carried in the womb”—N.C. Gen. Stat. § 14-23.1); NORTH DAKOTA (defining “unborn child” to mean “the conceived but not yet born offspring of a human being, which, but for the action of the actor would beyond a reasonable doubt have subsequently been born alive”—N.D. Cent. Code § 12.1-17.1-01); OHIO (defining “another’s unborn” or “such other person’s unborn” to mean “a member of the species homo sapiens, who is or was carried in the womb of another, during the period that begins with fertilization and that continues unless and until live birth occurs”—Ohio Rev. Code Ann. § 2903.09; see also § 2903.03 et seq.); OKLAHOMA (defining “human being” to include “an unborn child” and defining “unborn child” to mean “the unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth including the human conceptus, zygote, morula, blastocyst, embryo and fetus”—Okla. Stat. Ann. tit. 21 § 691, tit. 63 § 1-130; PENNSYLVANIA (defining “unborn child” and “fetus” to mean “an individual organism of the species homo sapiens from fertilization until live birth”—Pa. Cons. Stat. Ann. tit. 18 § 3203); SOUTH CAROLINA (defining “unborn child” to mean “a child in utero”, which is defined to mean “a member of the species homo sapiens, at any state of development, who is carried in the womb”—S.C. Code Ann. § 16-3-315); SOUTH DAKOTA (protecting from criminal homicide and battery an “unborn child”—S.D. Codified Laws Ann. §§ 22-16-1.1, 22-16-4, 22-16-7, 22-16-41, and 2012 Senate Bill 148); TENNESSEE (defining “another,” “individuals,” and “another person” to include “a human embryo or fetus at any stage of gestation in utero, when any such term refers to the victim of any act made criminal by this part”—Tenn. Code Ann. §§ 39-13-107, 39-13-214); TEXAS (defining “individual” to mean “a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth”—Texas Penal Code Ann. § 1.07(26)); UTAH (protecting from criminal homicide “another human being, including an unborn child at any stage of its development”—Utah Code Ann. § 76-5-201); VIRGINIA (protecting from homicide a “fetus”, without defining term, but defining “fetal death” in part with qualifying phrase “regardless of the duration of pregnancy”—Va. Code §§ 18.2-32.2, 32.1-249); WEST VIRGINIA (providing that “a pregnant woman and the embryo or fetus she is carrying in the womb constitute separate and distinct victims” and defining “embryo” to mean “the developing human in its early stages... commencing at fertilization and continuing to the end of the embryonic period and the beginning of the fetal period, which occurs eight weeks after fertilization or ten weeks after the onset of the last menstrual period” and defining “fetus” to mean “a developing human that has ended the embryonic period and thereafter continues to develop and mature until termination of the pregnancy or birth”—W.Va. Code § 61-2-5(b)); WISCONSIN (defining “unborn child” to mean “a human being from the time of conception until it is born alive”—Wis. Stat. § 940.04(6); see also § 940.05 et seq.). Although note that Illinois and Louisiana law refer to implantation.

as the federal UVVA and state law demonstrate. Such state laws are cataloged in the American Law Reports article, “Homicide Based on Killing of Unborn Child.”

California law, for example, specifies that “the unlawful killing of a human being, or a fetus, with malice aforethought” is murder. Thus, according to the California Supreme Court, a person may be found guilty of murder, in the case of an unborn child, once the “fetus has progressed beyond the embryonic stage of seven to eight weeks.”

Similarly, Missouri law states that “[t]he life of each human being begins at conception,” and further, that “[u]nborn children have protectable interests in life, health, and well-being.” Accordingly, the Missouri Supreme Court has held that unborn children are persons from conception for the purposes of the state’s involuntary manslaughter and wrongful death statutes. Also, Missouri’s Court of Appeals for the Western District has held that unborn children are persons from conception for purposes of the state’s first degree murder statute.

Likewise, Pennsylvania law protects unborn children, from conception to birth, by imposing penalties of first degree murder, second degree murder, third degree murder, voluntary manslaughter, and aggravated assault for killing or assaulting an unborn child. The Pennsylvania Supreme Court upheld its law in 2006 in the face of constitutional challenge.

The National Right to Life Committee (the “Committee”) tallies thirty states with fetal homicide laws protecting unborn children throughout pregnancy. This would not be the case if the fetus constituted human life”; Justice Clark’s factual assertion is, now, wholly obsolete).

134. Wasserstrom, supra note 131; see also Nat’l Conference of State Legislatures, supra note 132.
138. Conor v. Monkm Co., 898 S.W.2d 89 (Mo. 1995) (en banc) (discussing Missouri’s wrongful death statute); State v. Knapp, 843 S.W.2d 345 (Mo. 1992) (en banc) (discussing Missouri’s involuntary manslaughter statute).
142. State Homicide Laws that Recognize Unborn Victims, Nat’l Right to Life Comm’n (May 3, 2018), http://www.nrlc.org/federal/unbornvictims/statehomicide-laws092302 (listing thirty states, but possibly miscategorizing Virginia which criminalizes the killing of a fetus—this could be interpreted as applying throughout pregnancy or only after the embryonic stage of up to about week eight, though its separate defini-
tional states which protect unborn children through such laws for part of pre-natal development.143 Six of those eight states extend their protection of unborn children prior to viability.144 Thus, a total of thirty-six states—almost three-quarters of all states (72%)—protect unborn children through fetal homicide laws prior to viability.145

These laws tend to answer the question which Roe declined to answer: when does an embryo or fetus actually become a person or a human life?146 The laws generally assert, explicitly or implicitly, that human life begins at conception (as in Missouri, Pennsylvania, other states, and the federal UVVA), or at least by week seven (as, for example, under California legal precedent). In this area of law, determining the beginning of human life is foundational. Severe penalties reserved for murder are only warranted if the unborn victim is indeed a human life.147 If the interests being protected are merely those of the mother and father in having a child and not losing an opportunity for childbearing, rather than protecting (and vindicating the loss of) an existing human life, the penalties imposed by these laws should be less severe than murder penalties. The testimony of these laws is a strong body of evidence concerning widespread understanding of the beginning of human life and the value of human life.

2. Beyond Misunderstanding

The history of science has not been without myth.148 While the intertwining of myth with science concerning embryology has deterred...
understanding and consensus, the removal of myth should logically facilitate understanding and consensus. As recently as 2000, Stephen Jay Gould, in the context of evolution debate, found himself writing again to explain the widespread distortion promoted a century earlier by the German naturalist Ernst Haeckel. Haeckel, according to Gould, was:

the chief architect and propagandist for a famous argument that science disproved long ago but that popular culture has never fully abandoned, if only because the standard description sounds so wonderfully arcane and mellifluous: “ontogeny recapitulates phylogeny,” otherwise known as the theory of recapitulation or, roughly, the claim that organisms retrace their evolutionary history (or “climb their own family tree,” to cite an old catchphrase) during their embryological development.

Haeckel claimed, and people believed, that embryos/fetuses physically mirrored different animals during development in the womb, repeating the progress of evolution. Only toward the end of development was the final animal stage of the parent species reached. Thus, according to Haeckel, a human embryo/fetus would progress through various fish, reptilian, mammalian, and other animal stages before becoming a human baby. Haeckel even supported his theory with inaccurate and possibly manipulated drawings intended to show that embryological development of the human precisely matched stages of development of other organisms. Again, them, even to the point of neglecting refutations, whereas the critical attitude is one of readiness to change them—to test them; to refute them; to falsify them, if possible.”

Science, then, maintains a critical attitude to knowledge, not a dogmatic one. Popper stressed that science and scientists must engage in relentless testing and self-criticism of that which comes to be called science, as well as that which is on the frontiers of science. “We are not interested in establishing scientific theories as secure, or certain, or probable . . . we are only interested in criticizing them and testing them, hoping to find out where we are mistaken.”


See also Susan A. Greenfield, The Human Brain: A Guided Tour 96-97 (1997) (“At no time does a human fetal brain resemble, for example, that of a snake, where the regions associated with smell (olfactory tubercle) are particularly well developed. Rather, each brain has evolved for the individual lifestyle of a particular species.”).

150. Gould, supra note 149.

151. Id.; Tatjana Buklijas and Nick Hopwood, Making Visible Embryos: Forgery Charges, http://www.hps.cam.ac.uk/visibleembryos/s4_2.html (last updated 2014); see also Stephen Jay Gould, Ontogeny and Phylogeny 76-85 (1977) (outlining Haeckel’s argument “that evolutionary change occurs by the successive addition of stages to the end of an unaltered, ancestral ontogeny”).

152. Gould, supra note 149.

153. Id.

quoting Gould, “Haeckel had exaggerated the similarities by idealizations and omissions. He also, in some cases—in a procedure that can only be called fraudulent—simply copied the same figure over and over again.” 155

For the present discussion, the important point about Haeckel's mistaken theory is that if it were true, then abortion would presumably be valid until late in development when the fetus reached membership in the human species. Haeckel's theory merits discussion here because many have believed it, hindering understanding and agreement regarding the beginning of human life. As the theory dies out, former believers can reach more informed conclusions thereby possibly facilitating a more informed consensus on when human life begins.

The extent to which Haeckel's theory misled people may be surprising. Gould stated that “we have the right to be both astonished and ashamed by the century of mindless recycling that has led to the persistence of these drawings in a large number, if not a majority, of modern textbooks!” 156 A letter to Gould from Professor Michael Richardson in 1999 lamented, “I know of at least fifty recent biology texts which use the drawings uncritically.” 157 The fraudulent nature of Haeckel's drawings and the theory behind the drawings was newsworthy enough in 1997 to warrant coverage in the *Science* magazine article: “Haeckel's Embryos: Fraud Rediscovered.” 158 Even after such publicity, Christopher Hitchens surprisingly regurgitated the recapitulation fallacy in his book *God is not Great*. 159 In the critical years leading up to the *Roe* decision, one indication of the widespread reach of the recapitulation theory is its matter-of-fact inclusion in the 1968 edition of Dr. Spock's bestseller, *Baby and Child Care*:

Each child as he develops is retracing the whole history of mankind, physically and spiritually, step by step. A baby starts off in the womb as a single tiny cell, just the way the

156. *Id.*
157. *Id.*
159. Christopher Hitchens, *God is not Great: How Religion Poisons Everything* 221 (2007). Reflecting gross misunderstanding and insufficient fact checking, Hitchens writes, “As with evolution in general, therefore, in utero we see a microcosm of nature and evolution itself. In the first place we begin as tiny forms that are amphibian, before gradually developing lungs and brains (and growing and shedding that now useless coat of fur) and then struggling out and breathing fresh air after a somewhat difficult transition.” *Id.* Had he understood the biology correctly, it is likely his ultimate conclusion on when abortion could be justified and when it ought to be prohibited would have adjusted accordingly.
first living thing appeared in the ocean. Weeks later, as he lies in amniotic fluid in the womb, he has gills like a fish.\textsuperscript{160} With misunderstanding like this permeating the culture, it is unsurprising there could be no great consensus in 1973 on when human life begins.

3. Development of the Sonogram

Finally, another new development pushing its way into the discussion of prenatal development was the 3D ultrasound or sonogram, allowing three dimensional and real-time viewing of individuals before birth. \textit{Time} magazine named this one of the inventions of the year in 2000.\textsuperscript{161} Unborn children entered our increasingly image-based culture as living, moving participants, no longer out of sight. As Carolyn Ramsey notes:

\begin{quotation}
The personhood (or at least the human status) of the fetus has grown more difficult to deny due to the advent of medical technology that essentially renders the contents of the womb visible and audible. The heartbeat usually can be detected by the sixth week of pregnancy [fourth week of development], and Web commerce now makes fetal heartbeat monitors available to expectant parents over the Internet.\textsuperscript{162}
\end{quotation}

Likewise, Christopher Hitchens similarly observed,

\begin{quotation}
As a materialist, I think it has been demonstrated that an embryo is a separate body and entity, and not merely (as some really did use to argue) a growth on or in the female body. There used to be feminists who would say that it was more like an appendix or even—this was seriously maintained—a tumor. That nonsense seems to have stopped. Of the considerations that have stopped it, one is the fascinating and moving view provided by the sonogram.\textsuperscript{163}
\end{quotation}

One thinks too of the Pacific Life commercial, in which the song of humpback whales is played in the background, while a narrator dramatically states the impact of such recordings: “In 1968, as whaling continued worldwide, the first recordings of humpback songs were released. Public reaction led to international bans, and whale populations began to recover. At Pacific Life, the whale symbolizes what is possible when people stop and think about the future.”\textsuperscript{164} This, not

\begin{footnotes}
\textsuperscript{160}. See \textsc{Stephen Jay Gould}, \textsc{Ontogeny and Phylogeny} 76-85, 119 (1977) (quoting \textsc{Benjamin Spock}, \textsc{Baby and Child Care} 229 (1968)).
\textsuperscript{161}. See \textsc{Josh Tyrangiel}, \textit{What Will They Think of Next?}, \textit{Time}, Dec. 4, 2000 (describing the invention of the 3D real-time sonogram by Volumetrics Medical Imaging, Inc.).
\textsuperscript{162}. Ramsey, \textit{supra} note 179, at 749 (internal footnotes omitted).
\textsuperscript{163}. Hitchens, \textit{supra} note 159, at 220-21.
\textsuperscript{164}. See \textsc{Recordings}, \textsc{Pac. Life} (Sept. 3, 2010), https://www.facebook.com/pacificlife/videos/157811380895710/.
\end{footnotes}
surprisingly, could be happening with respect to the impact of the ultrasound/sonogram on public recognition of and concern for children before birth. One woman remembers:

I didn’t want to see it, but at the same time I didn’t think it would matter. . . . But once I saw it was a moving person with a heartbeat, I couldn’t do it. . . . I couldn’t even think about [abortion] again. I never realized how advanced they were so early. . . . They give you information in school and stuff, but never enough.165

In a culture as visually inclined as ours, seeing the living, moving fetus likely increases awareness and consideration of the existence and status of the unborn child.

III. APPLYING ROE TODAY

A. INTRODUCTION

As described above, developments in science and law indicate significant and increasing agreement that (protectable) human life and dignity begins early in human development. The federal Unborn Victims of Violence Act (“UVVA”),166 state fetal homicide laws and similar laws adopted in most states, prohibitions on using embryos for research after two weeks, the definition of “dead fetus” provided by the Department of Health and Human Services,167 and illumination of the definition of life provided by the Uniform Determination of Death Act (“UDDA”)168 all flow from and contribute to this conclusion. Particularly striking evidence comes from the UVVA and the strong majority of states which have passed fetal homicide laws and other similar laws to protect the lives of the unborn throughout pregnancy. This is important to recognize because the Supreme Court, in Roe v. Wade, specifically relied on the absence of such legal protection for the unborn in finding a lack of consensus on the issue of when human life begins.169

168. UNIF. DETERMINATION OF DEATH ACT, supra note 117.
169. See Roe v. Wade, 410 U.S. 113, 161(1973) (stating, “[i]n areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth”); see also Doe v. Bolton, 410 U.S. 179, 218 (1973) (Douglas, J., concurring) (quoting former Justice Clark, stating that “[n]o prosecutor has ever returned a murder indictment charging the taking of the life of a fetus. This would not be the case if the fetus constituted human life”; Justice Clark’s factual assertion is, now, wholly obsolete).
Others have remarked on some of these developments. Christopher Hitchens commented on the evolution in abortion debate in his inimitable way in 2007 in his book *God is Not Great*, noting that the embryo is demonstrably a separate and distinct body and entity.\(^\text{170}\) Naomi Wolf provided this conclusion: “Since abortion became legal nearly a quarter-century ago, the fields of embryology and perinatology have been revolutionized—but the pro-choice view of the contested fetus has remained static.”\(^\text{171}\) Even the Supreme Court has begun to use different language when referring to the unborn. Where it previously referred to “potential life,”\(^\text{172}\) it has begun referring to “the life within the woman,” “the life of the fetus,” and “respect for life, including life of the unborn.”\(^\text{173}\)

But is this growing consensus *sufficient* consensus, under *Roe*, to identify and protect new human life? The remainder of Part III will consider and question the significance of fetal homicide laws, explore the arbitrariness admitted by Justice Blackmun in the choice of viability as decisive, and finally apply the legal reasoning of *Roe* to the present factual context. This application of *Roe*’s legal reasoning will first employ a majority level consensus, followed by a heightened consensus standard. Further, in applying *Roe*, the article will consider the nature of the consensus standard, provide an analogy to Eighth Amendment consensus analysis, and respond to two potential objections to the conclusion drawn.

B. **Significance of Fetal Homicide Laws**

As noted above, a majority of states have enacted fetal homicide laws, wrongful death statutes or other similar laws protecting the unborn from the point of conception onward.\(^\text{174}\) These states almost invariably identify “person” or “unborn child” as encompassing any

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\(^{170}\) See Hitchens, *supra* note 159, at 220-21, stating:
As a materialist, I think it has been demonstrated that an embryo is a separate body and entity, and not merely (as some really did used to argue) a growth on or in the female body. There used to be feminists who would say that it was more like an appendix or even—this was seriously maintained—a tumor. That nonsense seems to have stopped. Of the considerations that have stopped it, one is the fascinating and moving view provided by the sonogram, and another is the survival of ‘premature’ babies of featherlike weight, who have achieved ‘viability’ outside the womb. This is yet another way in which science can make common cause with humanism. Just as no human being of average moral capacity could be indifferent to the sight of a woman being kicked in the stomach, so nobody could fail to be far more outraged if the woman in question were pregnant. Embryology confirms morality. The words ‘unborn child,’ even when used in a politicized manner, describes a material reality.

\(^{171}\) Wolf, *supra* note 83.

\(^{172}\) *Roe*, at 150, 154, 156, 159, 162.


\(^{174}\) See *supra* notes 131-145 and accompanying text.
member of the species *homo sapiens* at any stage of development in the womb, or some variation thereof.\(^{175}\) In 2004, the Unborn Victims of Violence Act ("UVVA")\(^{176}\) followed this trend on the national level. Enactment of these laws fundamentally changed the facts which had been relied on in *Roe*. The Supreme Court, in *Roe*, specifically relied on the absence of any such protection for the unborn in establishing a right to abortion extending late in pregnancy, until viability.\(^{177}\) With the passage of such fetal homicide laws, now present in a supermajority of state jurisdictions (as well as nationally), support for the ultimate conclusion in *Roe* regarding the parameters of abortion rights has eroded. Rather, these laws support a much earlier limit on abortion rights, as they generally protect and identify human life early in development—typically at conception.\(^{178}\)

Some may still argue that criminalizing intentional, knowing, reckless, or negligent harm to the unborn is not necessarily inconsistent with *Roe*.\(^{179}\) That may be partially true. The interests of the

\(^{175}\) See supra note 132 (listing and quoting state laws).


\(^{177}\) See *Roe v. Wade*, 410 U.S. 113, 161 (1976) (stating, “[i]n areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth”); see also *Doe v. Bolton*, 410 U.S. 179, 218 (1973) (Douglas, J., concurring) (quoting former Justice Clark, stating that “[n]o prosecutor has ever returned a murder indictment charging the taking of the life of a fetus. This would not be the case if the fetus constituted human life”; Justice Clark’s factual assertion is, now, wholly obsolete).

\(^{178}\) In addition to the twenty-eight states which specify conception or any stage of development, two states refer to implantation. *Supra* note 132. Two states begin protection after week seven or eight. *Supra* notes 142, 144. Two states begin protection with quickening. *Id.* One state begins protection after week twenty. *Id.* And a few begin protection at viability. Other than the majority of states which have enacted such fetal homicide laws, a few have enacted penalty enhancement legislation for offenses causing termination of pregnancy. *See supra* note 142. Often, these states provide significant protection throughout pregnancy.

\(^{179}\) See, e.g., Carolyn B. Ramsey, *Restructuring the Debate over Fetal Homicide Laws*, 67 Ohio St. L.J. 721 (2006). Ramsey’s attempt to reconcile the UVVA with abortion rights is essentially to assert that even if an unborn child is a person, a woman is justified in taking its life, should she choose. *See id.* at 743-44, 760-61, 765 ("No matter what legal status the fetus attains, the decision whether or not to prevent its birth is still best made by its mother . . . .") More starkly, Ramsey quotes Eileen McDonagh, “[e]ven if the fetus [is] a person, a woman is justified in killing it because of what it does to her when it imposes wrongful pregnancy, whatever might be her personal reasons for doing so."). Indeed, Professor Ramsey concedes the “popular, legislative, and judicial support for the view that a fetus is a human life capable of being wrongfully terminated.” *Id.* at 765. But, in her (Orwellian) vision, the woman’s autonomy trumps all other considerations, including the life of the new human. That would prove too much, for “autonomy” as a sacred value could be used to try to justify all kinds of horrible things. The next step in her slippery slope would be to condone the killing of older, dependent adults, when they are deemed to suck resources from others and limit autonomy. It should be noted that pregnancy-related constraints on a woman have arguably decreased since *Roe v. Wade*. The Pregnancy Discrimination Act of 1978 prohibits cer-
mother and father in having a son or daughter should be protected, and violence should not be condoned. But this analysis, while valid as far as it goes, is incomplete. As noted, most states specifically identify “person” or “unborn child” as encompassing any member of the species *homo sapiens* at any stage of development in the womb, or some variation thereof.\(^\text{180}\) For this reason, they provide for punishment of those who harm or kill unborn human life. For example, Texas law defines an “individual” as “a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth,” and it defines homicide as “intentionally, knowingly, recklessly, or with criminal negligence caus[ing] the death of an individual.”\(^\text{181}\) Likewise, Missouri law states that “[t]he life of each human being begins at conception,” that “[u]nborn children have protectable interests in life, health, and well-being” and that unborn children exist “from the moment of conception until birth at every stage of biological development.”\(^\text{182}\)

Further, it must be remembered that many of the laws protecting unborn children impose the same penalties for harm to the unborn as are imposed for harm to born persons. The UVVA, for example, provides that the punishment for injuring or killing an unborn child is the same as the punishment for injuring or killing the unborn child’s mother.\(^\text{183}\) The only exception, other than the necessary abortion exception, is that the death penalty is not imposed.\(^\text{184}\) To take another example, Minnesota law provides that anyone who commits first degree murder of an unborn child “must be sentenced to imprisonment

\(^{180}\) See supra note 132 (listing and quoting state laws).


\(^{182}\) See supra note 137 (providing citations to Missouri code).

\(^{183}\) See 18 U.S.C. § 1841(a)(2)(A) (2004). Amanda Bruchs notes that “[t]his is a significant change from the previous punishment scheme, which added only six months to the sentence for the crimes(s) committed against the mother as calculated under the Federal Sentencing Guidelines.” Amanda K. Bruchs, Note, *Clash of Competing Interests: Can the Unborn Victims of Violence Act and Over Thirty Years of Settled Abortion Law Co-exist Peacefully?*, 55 Syracuse L. Rev. 133, 140 (2004).

But if the unborn child is not a human life, or not a probable human life, then the penalties imposed are too severe, and defendants are being punished unfairly. 186

Others have noticed the implications of the UVVA in particular, noting that “[w]hile the Act disclaims its power to affect abortion rights, the substance of the UVV[A] appears to contradict the fundamental premises of abortion law—that the Fifth and Fourteenth Amendments do not include fetuses in the definition of ‘person’—by punishing violence against fetuses by third parties as harshly as violence against human beings.” 187 Similarly, the ACLU concluded that “[b]y creating a ‘separate offense’ for injury to a fetus,” the UVVA would “dramatically alter the existing legal framework by elevating the fetus to an unprecedented status in federal law.” 188 According to the ACLU, this “would undermine the principles underlying the right to reproductive choice.” 189 Thus, it is acknowledged that the definitions, the identification of a separate victim, and the penalties provided for in such laws protecting unborn children all reflect a judgment that it is human life being protected, not just some pre-human organism, unworthy of independent human value or dignity. 190

185. Minn. Stat. Ann. § 609.2661 (West 2019). Further, someone guilty of second degree murder of an unborn child may be sentenced to imprisonment for up to forty years, and someone guilty of third degree murder of an unborn child may be sentenced to imprisonment for up to twenty-five years. Id. §§ 609.2662-609.2663.

186. The relevant penalty for first degree murder provided for in the U.S. Code would be imprisonment for life. 18 U.S.C. § 1111(b) (2018); see also 18 U.S.C. § 1841(a)(2)(C) (2018) (referencing § 1111). The penalty for voluntary manslaughter can reach fifteen years’ imprisonment, and the penalty for involuntary manslaughter can reach eight years’ imprisonment. 18 U.S.C. § 1112(b) (2018); see also 18 U.S.C. § 1841(a)(2)(C) (referencing § 1112). The courts would have an option of a lesser penalty for manslaughter, however, as § 1112 allows for a fine as a penalty, either in addition to, or instead of, imprisonment. See also State v. Merrill, 450 N.W. 2d 318 (Minn. 1990) (Wahl, J., dissenting) (arguing the state statute violates substantive due process based on conflict with Roe).

187. Kole & Kadetsky, supra note 36, at 235. For this and other reasons, the authors suggest that the UVVA may “further compromise the right to abortion.” See id. at 228.

188. Legislative Analysis of the Unborn Victims of Violence Act, ACLU (Feb. 18, 2000), https://www.aclu.org/other/legislative-analysis-unborn-victims-violence-act (analyzing S. 1673/H.R. 2436 “The Unborn Victims Of Violence Act,” a version of the UVVA prior to the Congress in which it was ultimately enacted).

189. Id.

190. See, e.g., Jon O. Shimabukuro, Cong. Research Serv., RS 21550, The Unborn Victims of Violence Act of 2003 2-3 (2004) (noting that “[i]f personhood could be established for a fetus or embryo, such entities’ right to life under the Fourteenth Amendment would seem to be guaranteed”); Bruchs, supra note 183, at 133, 141, 148, 151 (stating that “as written, the Unborn Victims of Violence Act is in direct contradiction with over thirty years of settled law (since the Supreme Court’s ruling in Roe v. Wade) because it expressly grants legal personhood to both pre-viable and viable fetuses,” and further arguing that “the interests sought to be protected under ‘Laci and
Finally, to more fully appreciate the significance of the UVVA, it is important to note that Congress specifically rejected an amendment to the Act—the “Lofgren substitute”\textsuperscript{191}—which would have redefined the offense against the “unborn child” as simply another offense against the woman. Under the Lofgren substitute, an offense would have been established for violent action causing “an interruption in the normal course of the pregnancy resulting in prenatal injury (including termination of the pregnancy).”\textsuperscript{192} However, Congress deliberately chose to pass the UVVA—thus specifically protecting the “unborn child” or “child in utero” “at any stage of development”\textsuperscript{193}—rather than the alternative Lofgren amendment.\textsuperscript{194} Support for such legislation, enacted on both the federal and state levels, is revealing. As one writer commented about the UVVA specifically, “[t]he bill appears to contradict an important premise behind the constitutional right to seek an abortion: prenatal entities are not persons.”\textsuperscript{195}

C. ARBITRARINESS IN ROE V. WADE’S CONCLUSION

Had \textit{Roe v. Wade} been decided just a decade later, and had the Supreme Court been cognizant of the early developments noted above, such as the adoption of the Uniform Determination of Death Act (“UDDA”)\textsuperscript{196} in the 1970s and early 1980s, it is reasonable to believe that the Court would have drawn the line on unrestricted abortion much earlier in pregnancy, if it established unrestricted abortion rights at all. Indeed, Justice Blackmun’s first draft of the \textit{Roe} opinion simply found the Texas law void for vagueness and did not recognize any right to abortion.\textsuperscript{197} Later, Justice Blackmun wrote in a memorandum accompanying his second draft of the opinion in November, 1972: “You will observe that I have concluded that the end of the first trimester is critical. This is arbitrary, but perhaps any other selected


\textsuperscript{192} \textit{Id.}

\textsuperscript{193} 18 U.S.C. § 1841(d).


\textsuperscript{195} Alongi, \textit{supra}, note 191, at 287.

\textsuperscript{196} \textit{UNIF. DETERMINATION OF DEATH ACT}, \textit{supra} note 102.

\textsuperscript{197} Memorandum from Justice Blackmun to United States Supreme Court (May 18, 1972) (on file with the Library of Congress).
point, such as quickening or viability, is equally arbitrary." In the end, in the final opinion, Blackmun placed the "critical" moment three months later, at viability, around the end of the second trimester. It was incautious and unfortunate that the Court went as far as it did, not just striking down the Texas law for vagueness as initially contemplated, but establishing an unlimited right to abortion for about six months of pregnancy, up until the last trimester. Justice Blackmun was not the only person who thought that viability was an essentially arbitrary moment, and the selection of viability as pivotal has been widely criticized, as when the Eighth Circuit recently opined that "the Court's viability standard has proven unsatisfactory."199

Had the decision in Roe come only a decade later after the adoption of the UDDA, the justices who joined the majority opinion could have found a more logical, less arbitrary marker earlier in pregnancy—if they were determined to locate such a marker during the course of development to establish some right to abortion. Additionally, developments subsequent to the UDDA could have led the justices to a still more up-to-date decision. Yet moving beyond what could have been, courts must apply the legal reasoning of Roe v. Wade to the information, consensus, and legal context present today.

D. Applying Roe v. Wade’s Reasoning to Today’s Facts

1. Consensus Standard

The United States Supreme Court, in Roe v. Wade, did not explicitly state what level of consensus would be sufficient on this issue.201 The word "consensus" can mean simple majority-level...
agreement. The word can also sometimes mean essentially universal agreement. Or it might refer to some supermajority agreement when so specified. It is highly unlikely the Court meant universal agreement, as such agreement almost never exists, nor is expected to exist, in politics or even in constitutional law. Rather, the Court referred to "any consensus," as in "any agreement," suggesting it meant simply majority-level consensus.

This seems to parallel the Court's Eighth Amendment identification of consensus about "cruel and unusual punishment," as that jurisprudence appears to rely on simple majority-level consensus. For example, in Atkins v. Virginia, the Court found "a national consensus against the death penalty for the mentally retarded," where "30 States prohibited the death penalty" for such individuals; this included "12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach." Likewise, in Roper v. Simmons, the Court found a national consensus against the death penalty for juveniles under eighteen where the number of states prohibiting and allowing the death penalty for the category in question was the same as in Atkins. Thirty states makes a majority but not a supermajority. Particularly where a severe, life-or-death outcome is at stake, a majority consensus apparently is enough to preclude such an irreversible penalty.

For additional (related) reasons, arguably a modest, majority consensus should be determinative on the issue of when human life begins, rather than a more extraordinary level of consensus. This determination is consistent with the fabric of American law as well as


203. See Consensus, Merriam-Webster Online, supra note 202 (definition 1(a) “general agreement : UNANIMITY”).

204. Roe, 410 U.S. at 159.


207. Id.

208. Likewise, in Lawrence v. Texas, a simple majority of states was considered sufficient to identify a national consensus against sodomy laws, or at least the absence of a consensus in favor of such laws. See Lawrence v. Texas, 539 U.S. 558 (2003) (stating that at the time Bowers v. Hardwick was decided, a minority of states—"24 States and the District of Columbia had sodomy laws"—and concluding that "Bowers was not correct when it was decided, and it is not correct today").
international law. American legal precedent reflects a fundamental and deferential respect for human life, and if we were to permit destruction of a new life where most conclude that human life is present, this fundamental respect and value would be violently upended. In American criminal law, we know that a person cannot be found guilty, and certainly one cannot be sentenced to death, unless we—represented by the jury—are sure beyond a reasonable doubt that the person is guilty. In criminal law reasonable doubt is thus enough to save the accused. Similarly, the Declaration of Independence, the Bill of Rights, the Thirteenth Amendment, and the Fourteenth Amendment, teach about our respect for human life. As noted earlier, the Fifth and Fourteenth Amendments protect against government-sponsored taking of life without due process. Further, the Fourteenth Amendment adopts an equality principle which holds that one human life or “person” (in constitutional terms) is as valuable as another human life or person. To overcome this fundamental respect for and

209. See G.A. Res. 53/152, supra note 64, (“The human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity.”); International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 14668 (“[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . .”); G.A. Res. 1386 (XIV), Declaration of the Rights of the Child (Nov. 20, 1959) (“[T]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth . . .”); G.A. Res. 45/25, International Convention on the Rights of the Child (Nov. 20, 1989) (“[E]very child has the inherent right to life.”).

210. The Constitution was intended to protect all actual persons, so that if it comes to be recognized that a new human life is a person before birth, the intention would have been to protect those actual persons, not to withhold protection based on archaic information. Further, any attempt to infuse into law a separation between human life and personhood (understood here metaphysically, not constitutionally), and between human life and the value of a person, could conflict with the Establishment Clause. American law is designed to err on the side of protecting human life. To conclude that personhood begins some time later than human life begins, a court would have to endorse a view that overcomes the law’s reasonable design to err on the side of protecting human life. In doing so, a court would be deciding for others a largely moral and religious matter—when a human becomes a person or, in other terminology, when ensoulment occurs. Or the court would be taking a philosophical and religious position about the nature of reality—endorsing, for example, naturalism or materialism in order to deny the existence of the soul and locate the value of a human being in perceived abilities and functionality. That is a dangerous game. Indeed, this may be another principle supporting the genetic view or embryological view as opposed to the neurological view. See supra Sections II.A.1 and II.A.2. Arguably, the Establishment Clause would prohibit the adoption of such premises by a court. In fact, reliance on a strictly materialist or utilitarian philosophy may contradict the philosophy of the Constitution and Declaration of Independence. See, e.g., Jon Meacham, American Gospel: God, the Founding Fathers, and the Making of a Nation 19-27, 72-75 (2007); see also Andorno, supra note 68, at 34:

The reductionism of person to simple matter leads to the denial of its intrinsic dignity. . . . In fact, if we do not recognize any kind of spiritual element in the configuration of each individual, it seems extremely difficult, if not impossible, to support the idea of human dignity.
protection of human life there would have to be a majority (or supermajority?) position concluding that human life does not begin at conception.

Finally, federal preliminary injunction analysis arguably provides helpful guidance regarding the level of consensus that should be considered probative. Preliminary injunctions are designed to prevent irreparable harm and to render an initial order based on initial evidence and argument, permitting a considered opinion to be issued after a full trial on the merits. Providing an eloquent and precise explanation of the analysis whether to grant a preliminary injunction, Judge Posner has articulated the weighing process mathematically:

\[ \text{Grant the preliminary injunction if but only if } P \timesHp > (1 – P) \times Hd, \]

where P equals the probability that the plaintiff will succeed on the merits, 1 – P equals the probability that the defendant will succeed on the merits, Hp equals the probable harm to the plaintiff, and Hd equals the probable harm to the defendant.\(^{211}\)

If we apply this formula to the question of prohibiting an abortion, we see that because of the catastrophic likely harm to the fetus and the lesser (though real) harm to the woman, the probability that human life is present need not be great. A mere \(50\%\) probability of success on the merits, that human life is present, would suffice to tip the scale in favor of preventing the abortion and protecting the probable new human life or person. Even some probability less than \(50\%\) would suffice where the disparity in the comparative likely harms is so great, total destruction versus diminished liberty. Thus, the guidance provided by preliminary injunction analysis leads to the conclusion that the only consensus that should be required by the reasoning in \textit{Roe} is simple majority consensus rather than some more overwhelming or extraordinary degree of consensus. The preliminary injunction analysis is particularly relevant here because of the limits of

human knowledge, the inherent ingredient of some uncertainty, regarding the beginning of human life or personhood. Though we know much, and there is developing knowledge and consensus on this issue, any so-called “final decision” on the matter will partake in some measure of the quality of a preliminary injunction decision due to the inherent limitations of knowledge in science, philosophy, and religion.

2. Finding Consensus

Applying Roe, majority consensus arguably exists that human life begins by implantation (or soon after) or by the beginning of the fetal heartbeat (or fetal cardiac activity), if not by fertilization. The federal Unborn Victims of Violence Act (“UVVA”) protects new human life throughout pregnancy, defining “unborn child” to include an embryo or fetus carried in the womb at any stage of development, and imposing the same penalties for harm to the unborn child as for harm to the mother. This degree of punishment is justified only if the unborn child is a human life; otherwise, the punishment is too severe. Even more significantly, a majority of states have adopted fetal homicide laws protecting unborn children from criminal violence, with thirty states protecting the unborn from the point of conception (twenty-eight states) or implantation (two states). Almost invariably, these states identify “person” or “unborn child” as encompassing any member of the species homo sapiens at any stage of development in the womb, or some variation thereof. Implantation, however, seems to be the earliest point at which these criminal laws would have effect or application. As the National Right to Life Committee has explained, in order to win a conviction under the law, it would be necessary for the prosecution to (1) prove beyond a reasonable doubt that a member of the species homo sapiens existed and was ‘carried in the womb,’ which would be utterly impossible until after the embryo had implanted in the womb and sent out the chemical signals that announce his or her presence (i.e., after implantation) . . .”

214. See Nat’l Right to Life Comm., supra note 38; see also Nat’l Conference of State Legislatures, supra note 38 (but not counting Virginia as extending protection throughout pregnancy—the law refers to the killing of a fetus, which could be interpreted to apply only after the embryonic stage of week seven or eight, though its definition of “fetal death” applies “regardless of the duration of pregnancy”). Illinois and Louisiana law refer to implantation.
215. See supra note 132 (listing and quoting state laws).
In other words, it would have to be proven that the woman was pregnant, and such knowledge generally does not come before implantation. Thus, if one focuses on when these laws would have effect in terms of penalty, implantation would be a relevant marker. On the other hand, if one focuses on the definitions of “person,” “unborn child,” and “human being” contained in a majority of these laws, conception or fertilization would be the relevant marker.\textsuperscript{217}

In addition, as further support for finding consensus that human life begins by or just after implantation, biologist Scott Gilbert has written, “[o]ne of the most popular positions among philosophers is the perspective that life begins at the point of gastrulation—that point at which the zygote is an ontological individual and can no longer become two individuals.”\textsuperscript{218} Further, a 2003 \textit{Newsweek} poll found that 58% of those surveyed believed that human life at least begins by implantation.\textsuperscript{219} Though, admittedly, poll numbers can fluctuate over time and depending on framing of a question. (Also, most polls on the issue do not list implantation as one of the options to select.)

Even greater consensus exists that human life begins with the beginning of the fetal heartbeat or cardiac activity. Under the definition of death provided by the Uniform Determination of Death Act (“UDDA”) the heartbeat (or cardiac activity) arguably signals life under the law. The UDDA, enacted by a supermajority of states, provides that death can be determined by the “irreversible cessation of circulatory and respiratory functions,” indicating the presence of life before that point.\textsuperscript{220} Even more clearly, federal regulation issued by the Department of Health and Human Services defines “dead fetus” as “a fetus that exhibits neither heartbeat, spontaneous respiratory activity, spontaneous movement of voluntary muscles, nor pulsation of the umbilical cord,” with the term “fetus” defined to include “the product of conception from implantation until delivery.”\textsuperscript{221} Thus, the cessation of the fetal heartbeat, or cardiac activity, clearly constitutes

\textsuperscript{217} It could be argued that these laws have effect after implantation (rather than conception) simply because they are criminal laws with the corresponding burden of proof—beyond a reasonable doubt. The intent of these laws, it could be argued, is to recognize and protect human life from conception onward. Indeed, as noted before, most of these laws specifically identify “person” or “unborn child” as encompassing any member of the species \textit{homo sapiens} at any stage of development in the womb, or some variation thereof. See supra note 132.

\textsuperscript{218} See supra note 15.

\textsuperscript{219} See supra note 87; but see supra note 54 (indicating in a 2019 poll a cumulative total of 46% of respondents believed that human life begins within the first eight weeks’ gestational age or six weeks’ developmental age). This 2019 poll may have been somewhat of an aberration—as recently as 2015, a majority of poll takers opined that human life begins at conception. See supra notes 50-51, and accompanying text.

\textsuperscript{220} See supra notes 102-103.

\textsuperscript{221} See supra notes 104-105.
death under this regulation, indicating—to many—that once death may be determined, human life has begun.

If a majority consensus is not enough, arguably a supermajority consensus holds that human life has begun, at least, by the beginning of brain formation and brainstem activity. The UDDA makes clear that the irreversible cessation of the function of the entire brain (not just the later-developing cerebral cortex) constitutes death, so that life is considered present with the beginning of brainstem activity, under this test.222 Thus, by this point, under multiple UDDA criteria or tests, the fetus has (human) life, and death may be determined.223 Again, a supermajority of states have adopted the UDDA.224 Further, a supermajority of states—thirty-six—have adopted fetal homicide laws that protect new human beings before viability, and a strong majority of states—thirty-two—have adopted such laws protecting new human beings by at least the end of week seven or beginning of week eight of development.225

Given the consensus described above, abiding by Roe, a court probably would have to conclude that because of such consensus that human life begins early in pregnancy, a right to abortion has been superseded by the fundamental right of the new human to have its life protected. A simple majority consensus may warrant protection by implantation or by the beginning of the fetal heartbeat (or cardiac activity) if not at fertilization. A higher level of consensus warrants protection of new human life by the beginning of brain formation and brainstem activity, by approximately week seven or eight, depending on the studies relied on. At the very least, an even clearer supermajority believes that abortion itself should be limited to the first trimester. According to a 2018 Gallup poll, only 28% of Americans (and only 26% of women) believed that abortion should be generally legal after the first trimester.226 And according to a January 2019 Marist poll, 75% of Americans believed abortion should be limited to, at most, the first trimester.227 This supermajority position is

222. See supra note 111.
223. See id. This includes the irreversible cessation of the respiratory and circulatory functions and irreversible cessation of the functions of the entire brain, including the brainstem.
224. See supra note 118 and accompanying text.
225. See supra notes 142-145 and accompanying text. This includes even California. See supra notes 135-136.
227. See Marist Poll Finds 3 in 4 Americans Support Substantial Abortion Restrictions, KNIGHTS OF COLUMBUS (Jan. 15, 2019), http://www.kofc.org/en/news/polls-abortion-restrictions-supported.html (including in this percentage some who believe that abortions should be illegal by that stage but permissible in cases of rape, incest, or to save the life of the mother).
further supported by the supermajority of states which protect new human life in the womb through criminal law before viability. As noted before, thirty-two states protect new human life in this way by approximately week seven at least, and two more (i.e. thirty-four total) provide such protection by quickening, which can occur as early as week twelve, or the end of the first trimester. Thus, the current viability standard, which locates the critical moment at the end of the second trimester, is undoubtedly now an obsolete and anti-consensus position.

Interestingly, a state supreme court concurring opinion has already reached a conclusion concerning consensus along the lines of the analysis described above. In Hamilton v. Scott, a 2012 case before the Alabama Supreme Court, Justice Parker’s concurring opinion affirmed that “unborn children are protected by Alabama’s wrongful-death statute, regardless of viability.” Justice Parker wrote:

Since Roe was decided in 1973, advances in medical and scientific technology have greatly expanded our knowledge of prenatal life. The development of ultrasound technology has enhanced medical and public understanding, allowing us to watch the growth and development of the unborn child in a way previous generations could never have imagined. Similarly, advances in genetics and related fields make clear that a new and unique human being is formed at the moment of conception, when two cells, incapable of independent life, merge to form a single, individual human entity. Of course, that new life is not yet mature—growth and development are necessary before that life can survive independently—but it is nonetheless human life. And there has been a broad legal consensus in America, even before Roe, that the life of a human being begins at conception. An unborn child is a unique and individual human being from conception, and, therefore, he or she is entitled to the full protection of law at every stage of development.

Though unnecessary in reaching the specific holding of the case, the Alabama concurring opinion of four justices nicely summarizes

228. See Nat’l Right to Life Comm., supra note 38; Nat’l Conference of State Legislatures, supra note 38.
229. See id. The two states which provide such protection starting at quickening are Nevada and Washington. See id.
230. WKBMD, supra note 99; see also Am. Pregnancy Ass’n, supra note 99 (stating that “[s]ome moms can feel their babies move as early as 13-16 weeks from the start of their last period” and thus measuring in gestational age, which would be as early as 11-14 weeks developmental age) (emphasis in original).
231. 97 So. 3d 728 (Ala. 2012) (Parker, J., concurring specially).
233. Hamilton, 97 So. 3d at 746-47 (footnotes omitted).
and reinforces the conclusion that sufficient agreement exists that human life begins at early in development, superseding or terminating a right to privacy or abortion. Similarly, the United States Court of Appeals for the Eighth Circuit recently called on the United States Supreme Court to reevaluate its jurisprudence on abortion, noting that “the facts underlying Roe and Casey may have changed” and “the Court’s viability standard has proven unsatisfactory.”

Admittedly, a court might be reluctant to provide maximal protection for human life before birth, extending back to implantation or conception. After all, the Supreme Court’s adoption of a somewhat aberrant, outlying, or maximal (as explained above) viability rule in Roe ultimately contributed to political discord in the U.S. However, shifting from an arbitrary and outdated viability rule to one protecting human life based on a more consensus-based, biologically significant moment of development—the beginning of brain development—would be a moderate, well-supported decision. This level of protection, at a minimum, appears to be ultimately mandated by the reasoning of Roe itself, given the significant consensus detailed above. At the least, if a court did not directly identify a right to life at this moment of development, a court ought to conclude that states have a compelling governmental interest in protecting new human life from this point, thus enabling states to legislate appropriate protections in accordance with voters’ consensus. Further, one could imagine a court finding sufficient consensus to protect new human life by the beginning of brain activity (thus precluding nontherapeutic abortion after that point), while also recognizing a compelling governmental interest in protecting likely human life earlier as well. In other words, a court could conceivably bifurcate the identification of a compelling governmental interest in protecting probable persons and the identification of agreed upon new human life so that a compelling governmental interest arises even earlier in development. In this way, it would leave to legislatures the choice of protecting likely human life earlier in pregnancy, before the beginning of brainstem activity. Clearly, many states would choose to allow the maximum length of time possible for a woman to obtain an abortion in this scenario, while others might choose to protect probable persons earlier.

234. MKB Mgmt, Corp. v. Stenehjem, 795 F.3d 768, 773-76 (8th Cir. 2015), cert. denied, 136 S. Ct. 981 (2016). Despite this questioning of the reasonableness or justice of extending abortion rights up until viability, the panel felt bound by the Supreme Court’s precedent to affirm the lower court’s decision finding unconstitutional a state law banning abortion after the fetal heartbeat begins. Nevertheless, in light of the consensus documented in this article, arguably a court would be bound by the Constitution and by the reasoning of Roe to identify and protect the fundamental right to life of a new human being when that life exists, as Roe explicitly left open the question of when human life begins.
3. Protecting Human Dignity

Even apart from this consensus analysis, independent consideration of the human dignity of the fetus reinforces this conclusion that new human life must be protected early in development. Under the Supreme Court’s Eighth Amendment jurisprudence, after considering national consensus, the Court engages in its own assessment to protect a convicted person from excessive punishment that would violate human dignity. Here, basic protection of human dignity requires that the Court protect agreed-upon human life. (Of course, the life of the mother must be protected as well under this analysis, and there is undoubtedly consensus that abortion is permissible if necessary to protect the life of the mother.) A new, unique, individual, and irreplaceable human being exists following conception, and after implantation and gastrulation it cannot divide to form twins. The Universal Declaration on the Human Genome and Human Rights has rightly identified human dignity in the unique individual expression of the human genome possessed by every individual human being. Further, with the beginning of brain formation, neural development, and brainstem activity, the new individual human being is doubly unique and archetypically human. Not only does it possess its own unique genetic identity, it also is developing its own unique neural identity and capacity. Moreover, once brainstem activity begins, brain death as we define it can be discerned. Simply put, under the Constitution and the Supreme Court’s case law, human dignity requires the protection of agreed-upon human life.

Given the consensus described above and the requirement to prevent destruction of human life and dignity, it is incumbent on courts to apply Roe to protect agreed upon human life. Thus, by analogy, we see that state or lower courts have acted to preclude the death penalty even when it has been recommended by a jury and imposed by a judge. For example, in Roper v. Simmons, before arriving at the Supreme Court, the Missouri Supreme Court had set aside the death sentence of a seventeen-year-old juvenile, even where the Supreme Court had not yet overturned Stanford v. Kentucky to rule that application of the death sentence to juvenile offenders violates the Eighth and Four-

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235. Gregg v. Georgia, 428 U.S. 153, 173 (1976) (requiring consideration of whether the punishment “accord[s] with the dignity of man” or instead is excessive and violates that dignity); see also Roper v. Simmons, 543 U.S. 551, 563 (2005) (reaffirming “that the Constitution contemplates that in the end our own judgment [in addition to consensus analysis] will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment”); Atkins v. Virginia, 536 U.S. 304, 312 (2002) (same).

236. See supra note 65.

237. 492 U.S. 361 (1989) (holding that application of the death penalty to sixteen- or seventeen-year-olds was not contrary to consensus, or cruel and unusual, and did not violate the Eighth Amendment).
teenth Amendments. The Missouri Supreme Court concluded that “a national consensus has developed against the execution of juvenile offenders” and, pursuant to Supreme Court case law, it set aside the death sentence. The Supreme Court affirmed. Similarly, in the event that state or lower courts identify consensus, under Roe, that human life begins earlier than viability it will be incumbent on them to protect that new human life.

4. A Pro-Life and Pro-Choice Conclusion

Note that the conclusion above—particularly the analysis finding clear (likely supermajority) consensus at the beginning of brainstem activity (and undoubtedly by the end of the first trimester)—is a pro-choice conclusion as well as one that is pro-life. It would protect agreed-upon human life, as required by Roe. (Though arguably there is sufficient, though not as sizeable, consensus that human life has begun by implantation or by the beginning of the heartbeat or cardiac activity.) Yet, even given this conclusion, most abortions would continue. Approximately 65.4% of abortions occur before or during week six of development or week eight of gestation. Further, approximately 91% of abortions occur during the first trimester. Thus, it would be inaccurate to characterize this position as anti-abortion rather than pro-life (and pro-choice). Advocating for unrestricted abortion in the face of such national consensus would essentially be anti-consensus, and it might be anti-life as well.

5. Responding to Potential Objections

At this point, someone may object, noting that dicta in City of Akron v. Akron Center for Reproductive Health, Inc., described the decision in Roe as holding “that a State may not adopt one theory of

239. Id. (quoting State ex rel. Simmons v. Roper, 112 S.W.3d at 399).
240. Id.
241. Tara C. Jatlaoui et al., Abortion Surveillance – United States, 2015, 67 Surveillance Summaries 1, CTRS. FOR DISEASE CONTROL & PREVENTION (2018) (referring to gestational age rather than developmental age and finding that approximately 65.4% of abortions in the United States were performed before or during week six of development, eight of gestation, and 91.1% before or during week 11 of development, 13 of gestation). The numbers do not include abortions performed in California, Maryland, or New Hampshire. Id.
242. See id.; but see Saad, supra note 226 (stating that 89% of abortions occur during the first trimester).
when life begins to justify its regulation of abortions.”

However, this description of Roe is not entirely accurate in that it neglects context and articulates a broader rule than that articulated in Roe. The Roe decision explained that, because of the contemporaneous lack of consensus on when human life begins and the absence of any legal protection for rights of the unborn at the time, Texas could not at that time adopt a theory of when human life begins that could supersede the rights of the pregnant woman that were at stake. Given greater consensus and current legal protection of unborn children, this language in Roe no longer holds true. Further, while a state may not unilaterally adopt a position contradicting federal constitutional law, federal constitutional law may, and is obligated to, adopt protection for new human beings.

In addition, even if one believed that a court or legislature should not protect human life from abortion based on one theory of the beginning of human life, one must realize that from early in embryological development multiple theories of the beginning of human life support protection of human life from abortion. By week seven or eight, at least four theories of human life conclude that protectable human life is present: (1) the genetic view holds that human life begins at conception because of the unique, human genetic identity of the new life, and because the new life will naturally develop into a mature human being; (2) a two-week embryological view holds that human life has begun at two weeks development because the primitive streak has formed, the beginning of the central nervous system, and because by that time implantation has occurred and the embryo generally can no longer divide to form twins; (3) a three- or four-week embryological view connected to heart function holds that human life begins around week three or four of development because “the operation of a primitive heart and circulatory system indicates the systematic interaction characteristic of an organism”; and (4) the early neurological view

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245. Roe, 410 U.S. at 162 (“In view of [the lack of consensus on when human life begins as well as the absence of legal protection for fetal rights at that point], we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.”).
246. See Hershenov, supra note 19, at n.18 (leaning toward a biological account of identity rather than a psychological account of identity and suggesting that “it is at the end of the third week that the operation of a primitive heart and circulatory system indicates the systematic interaction characteristic of an organism”); see also 45 C.F.R. § 46.202(a), supra note 104 (“Dead fetus means a fetus that exhibits neither heartbeat, spontaneous respiratory activity, spontaneous movement of voluntary muscles, nor pulsation of the umbilical cord.”); but see Condic, supra note 106, at 52 (stating that a human embryo functions as an organism “[f]rom the earliest stages of development”).
holds that human life begins at about week six or seven when brainstem formation and activity have begun.

Moreover, in the face of legal and scientific developments since 1973, to choose viability as the moment human life becomes protectable, seems more like an unreasonable adoption of one theory of the beginning of human life. Protecting human life only at viability corresponds basically to a very late neurological view of when human life begins. Endorsing a late theory, coinciding with viability or birth, would unreasonably, unethically, unjustly, and non-progressively prop up a diminishing minority view on the issue, in conflict with the decisive majority favoring much earlier positions on when human life begins.

Finally, someone might argue that when Roe was decided a majority of states had adopted laws prohibiting abortion except in narrow circumstances, and therefore this indicates that, contrary to Roe’s express proviso regarding consensus and personhood, no amount of state legislative consensus could protect new human life.\textsuperscript{247} However, such an argument would be deeply unreasonable, cynical, contrary to Roe’s express statement or proviso, and incompatible with other Supreme Court precedent regarding consensus, particularly its jurisprudence concerning identification of cruel and unusual punishment. Further, in Roe, the Court specifically explained why it did not treat the then-existing anti-abortion laws as proof of national consensus that human life begins at conception.\textsuperscript{248} First, it noted that one motivation behind the then-existing abortion restrictions may have been simply to regulate and limit certain undesired sexual behavior perceived as immoral, though Texas did not advance that as a reason.\textsuperscript{249} Second, the Court emphasized that many of the laws were likely motivated by a desire to protect the health of the woman, as abortion, particularly later abortions, involve health risks.\textsuperscript{250} The Court added that “[t]he few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State’s interest in protecting the woman’s health, rather than in preserving the embryo and fetus.”\textsuperscript{251} Thus, nothing in Roe precludes identification of consensus based on a consensus in state legislation, similar to the Court’s analysis identifying excessive categories of punishment under the Eighth Amendment. Rather, Roe invites this analysis.\textsuperscript{252} Further, these two

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\item \textsuperscript{247} Roe, 410 U.S. at 118, 129, 139.
\item \textsuperscript{248} Id. at 147-52.
\item \textsuperscript{249} Id. at 148.
\item \textsuperscript{250} Id. at 148-50.
\item \textsuperscript{251} Id. at 151.
\item \textsuperscript{252} See, e.g., id. at 159 (providing a disclaimer by stressing that “[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to
asserted rationales are not at issue with respect to either the UDDA, which is about determining death, or federal and state fetal homicide laws, which are not necessary to protect the woman. The separate and severe penalties assigned by these laws are only warranted if the new human life is just that, a new human life.

IV. CONCLUSION

As one prominent writer has argued, “unless Roe v. Wade is overturned, politics will never get better.”253 I will leave political implications for others to discuss. However, as we have seen, protection of new human life would not require overturning Roe v. Wade254 in light of the consensus that now exists.

Almost five decades of development later, as we return to the reasoning in Roe, and reconsider the beginning of human life, we find surprising agreement that an unborn child is a new human life earlier in development than viability, entitled to protection and dignity. Abiding by Roe, a court probably would have to conclude that because of such agreement that human life begins early in pregnancy, a right to abortion has been superseded by the fundamental right of the new human to have its life protected. Possibly following implantation or the beginning of the fetal heartbeat (or cardiac activity), and with more certainty by the end of week seven or eight with the beginning of brainstem activity, the Fifth and Fourteenth Amendments to the Constitution cannot sanction abortion. Significantly, most states have adopted fetal homicide laws protecting unborn children, with thirty states protecting the unborn throughout pregnancy.255 Further, the federal Unborn Victims of Violence Act (“UVVA”)256 defines any embryo or fetus in the womb as an “unborn child,” and imposes the same penalties for harm to the unborn child as for harm to the mother.257 This degree of punishment is justified only if the unborn child is a human life from conception; otherwise, the punishment is too severe. Finally, the widely accepted Uniform Determination of Death Act (“UDDA”)258 provides that death can be determined upon irreversible

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255. See supra notes 142-143, 214. Or possibly twenty-nine states provide such protection throughout pregnancy, if Virginia law only applies after the embryonic stage. See id.
258. UNIF. DETERMINATION OF DEATH ACT, supra note 102.
cession of—and life by the presence of—the heartbeat or brainstem activity early in development. Similarly, under a Department of Health and Human Services regulation providing a definition for “dead fetus,” the cessation of the “heartbeat” can signal death, indicating it can also signal life. At least, the State now would appear to have a compelling governmental interest in protecting probable persons from implantation or the beginning of cardiac activity or, at the latest, from week seven or eight of development with the beginning of brainstem activity. As made clear, one person’s interest in liberty does not override another person’s interest in life.

Even if a court or legislature desired to rely on a heightened level of consensus, such heightened consensus could be found in the sum of those adhering to the genetic view, those adhering to the embryological or individualization view, those adhering to the view that human life begins when the heartbeat begins, and those adhering to the early neurological view. Thus, even applying a heightened consensus standard under the analysis, by the beginning of brain formation and brainstem activity, it appears the right to abortion has been superseded by the right to life of the new human, not to mention a compelling governmental interest in protecting human life. Following that point, abortion presumably would be justified only to protect the life of the mother.

Consistent with this degree of consensus related to the early neurological timeframe, and with worldwide consensus, public opinion appears to increasingly support restriction of abortion earlier in pregnancy while still appropriately allowing abortion to protect the life of the mother. According to a 2003 Gallup poll, of Americans

259. 45 C.F.R. § 46.202(a). Note that the term “fetus” is defined to apply even to the embryonic stage, beginning with implantation. Id. § 46.202(c).

260. The Supreme Court, in Planned Parenthood v. , also conceded that changed facts or assessment of the facts could lead to a compelling governmental interest in protecting the embryo or fetus and preventing abortion. 505 U.S. 833, 860, 864 (1992); see supra note 11 and accompanying text.

261. See Roe v. Wade, 410 U.S. 113, 156-57 (1973) (“If this suggestion of personhood is established, the appellant’s case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the Amendment.”). If this is true with respect to “persons” it would also be true with respect to “human life” understood or communicated as akin to personhood. See also supra note 210 and accompanying text (discussing human life versus personhood).

262. If, as held, the state has a compelling interest in protecting potential human life when it is “viable”—i.e., when the fetus can live outside the womb—then it follows that the state has an even more compelling interest in protecting the fetus that is understood to be actual human life. See id. at 183-84 (finding a compelling governmental interest in protecting “potential” human life at viability). In other words, if the government cannot prevent abortion once the fetus reaches viability to ensure completion of the last few months of pregnancy, then certainly it cannot do so earlier if it is now agreed that the fetus is a human life at that point. See Webster, 492 U.S. at 517-20 (1989) (plurality opinion); see also Planned Parenthood of Se. Pa. v. , 505 U.S. 833 (1992).
believed that abortion should be generally limited to the first trimester or week twelve of development. Similarly, in a 2018 Gallup poll, only 28% of Americans believed that abortion should be generally legal after the first trimester. And according to a January 2019 Marist poll, 75% of Americans believed abortion should be limited to, at most, the first trimester.

Note that if consensus is found to exist by the beginning of brainstem development and activity, this would still be a pro-choice, as well as pro-life result. Most abortions—65.4%—occur before the end of week six of development. Thus, in multiple senses, this consensus would be both pro-choice and pro-life. It is moderate, consensus-driven, and consensus-enabling. Being pro-choice need not mean being pro-abortion or anti-life. Each year in the United States, more than 638,169 abortions are performed (as reported to the CDC, not counting California, Maryland, or New Hampshire; or 926,200, as reported by the Guttmacher Institute), with approximately 34.6% of those performed after week six of development (week eight of gestation), after the heartbeat begins, and after brain development and activity is beginning, as described above. Up-to-date application of Roe generally would limit abortion by at least week seven or eight of development (while permitting those necessary to protect the life of the mother, of course). This would significantly reduce the number of unjust abortions—saving new lives (as society has concluded), reducing potential guilt, and increasing social justice and freedom. Clear explication of Roe will lead to behavior modification, e.g., increased use of contraception, increased joining of sex and marriage, increased valuing of parenting, courageous decisions not to abort. This change

264. Saad, supra note 226
265. See KNIGHTS OF COLUMBUS, supra note 227 (including in this percentage some who believe that abortions should be illegal by that stage but permissible in cases of rape, incest, or to save the life of the mother).
266. See supra note 241.
267. In fact, in the Marist poll cited above, 61% of those who identified as pro-choice believed that abortion either should be limited to the first trimester or should be available only in cases of rape, incest, or to protect the life of the mother; and only 39% who identified as pro-choice believed that abortion should be permitted either during both the first and second trimester or for all of pregnancy. See supra note 265 and accompanying text.
268. Jatlaoui et al., supra note 241 (referring to gestational age rather than developmental age). These totals do not include abortions performed in California, Maryland, or New Hampshire. Id. According to this report, approximately 65.4% of abortions in the United States were performed before or during week six of development, eight of gestation, and 91.1% before or during week 11 of development, 13 of gestation. Id. According to the most recent information published by the Guttmacher Institute, there are approximately 926,200 abortions each year in the U.S. Induced Abortion in the United States, GUTTMACHER INST. (Sept. 2019), https://www.guttmacher.org/sites/default/files/factsheet/fb_induced_abortion.pdf.
will occur because most people do strive to obey the law and act morally, especially on matters of such consequence. For those whom society considers unique and vulnerable new humans, whose lives are ending (as defined legally and scientifically by the UDDA) as we permit an obsolete status quo to persist, and for their relatives, the change cannot come soon enough. Those tempted to object to consistently protecting human life, as recognized by growing consensus, based on challenges faced by young or poor women, should instead focus their efforts on addressing those challenges rather than opposing just, life-protecting law.

Developments in science and law in the past four-and-one-half decades and greater appreciation of this progress indicate growing consensus that human life begins early in pregnancy. *Roe*, because of this rising consensus, now teaches that protection is constitutionally warranted for unborn children for most of pregnancy. If a supermajority level of consensus is required under *Roe*, this protection should apply by approximately week seven or eight of development, when a heartbeat has begun, the brain is developing, and neural activity has been detected via EEG. However, if a lower level of consensus (e.g., a majority level consensus) is adequate under *Roe*, then the contemplated right to life may arise immediately following implantation or the beginning of the fetal heartbeat (or cardiac activity). It is increasingly agreed that we are regularly killing our fellow human beings, the most defenseless members of the human family. If we permit old abortion policy to persist, given available knowledge, we risk severely damaging our conscience269 as well. It is past time to acknowledge this shift in abortion rights to protect new human life. At a minimum, to begin with, our public conversation (particularly in the media) needs to be informed and take into account these developments in science and law.

269. Cf. Wolf, *supra* note 83, at 28 (arguing that “[w]ith the pro-choice rhetoric we use now, we incur three destructive consequences—two ethical, one strategic: hardness of heart, lying and political failure”).
APPLYING THE PHYSICAL DISABILITY REASONABLE PERSON STANDARD UNDER NEGLIGENCE LAW TO PERSONS WITH AUTISM

I. INTRODUCTION

Autism Spectrum Disorders ("ASDs") have been greatly misunderstood throughout history. The physical disability reasonable person standard in negligence should apply to the physical symptoms that ASDs cause, rather than remaining in the past, when ASDs were considered only mental deficiencies. While science has evolved to allow for more consistent and accurate diagnostic criteria, albeit still not perfect, the law has had difficulty keeping up with evolving scientific data. Negligence law is mired in a time when people with ASDs were thought to be schizophrenic, psychopathic, and unintelligent. However, it is now understood that persons with ASDs have varying levels of intelligence like non-autism spectrum disorder ("ASD") individuals.

Over time, medical studies have shown that ASDs manifest...
themselves through a variety of symptoms, many of which do not correlate to mental deficiencies or lack of intelligence.6

This Note will discuss the prevailing importance of changing how ASDs are viewed under the reasonable person standard in negligence law.7 First, this Note will give an overview of negligence under the Second and Third Restatements of Torts (“the Restatements”).8 Then, this Note will examine case law in which the reasonable person standard for negligence has been applied to mental deficiencies and physical disabilities.9 Subsequently, this Note will provide an overview of ASDs through a discussion of the findings of various medical studies.10 Furthermore, this Note will discuss different symptoms that come with disabilities the courts have identified, or would likely identify, as physical disabilities.11 Finally, this Note will argue: (1) symptoms caused by ASDs are similar to symptoms present in physical disabilities that courts already recognize; (2) courts should apply a physical disability reasonable person standard when these symptoms give rise to a negligence claim; and (3) doing so will not undermine policy considerations.12

II. BACKGROUND

A. THE SECOND AND THIRD RESTATEMENTS OF TORTS ON NEGLIGENCE AND THE REASONABLE PERSON STANDARD

An individual is negligent when he or she deviates from the standard of care required to protect others in society.13 Currently and historically, the reasonable person standard looks to whether an individual exercises a reasonable level of care in instances when the individual’s own actions create a greater level of risk for physical harm than normal.14 Whether or not an individual acts as a reasona-

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6. See Mintz, supra note 1, at 46 (2017) (describing that symptoms such as epilepsy, sleep disorders, gastrointestinal disorders, motor development delays, and coordination deficiency are all common in persons with ASDs).
7. See infra notes 147-200 and accompanying text.
8. See infra notes 13-27 and accompanying text.
9. See infra notes 28-87 and accompanying text.
10. See infra notes 88-127 and accompanying text.
11. See infra notes 128-146 and accompanying text.
12. See infra notes 147-200 and accompanying text.
13. Restatement (Second) of Torts § 283 cmt. c (Am. Law Inst. 1965). When an unreasonable risk is created, there is a requirement that society puts on individuals to conform to a standard of care that is needed in order to protect other persons from unreasonable harm. Id.
14. Compare Restatement (Third) of Torts: Physical & Emotional Harm § 7(a) (Am. Law Inst. 2010) (stating an actor has a duty to exercise reasonable care when their actions create a risk), with Restatement (Second) of Torts § 283 (requiring that an individual act as a reasonable person under similar circumstances to avoid being found negligent).
ble person must be judged from an objective rather than a subjective standard.\textsuperscript{15} Courts should view the objective reasonable person as having qualities a community would require in an individual to protect society’s interest in others.\textsuperscript{16} Contributory negligence slightly alters the reasonable person standard; it requires the actor to have a reasonable level of prudence rather than requiring consideration in the protection of others.\textsuperscript{17} Both the Second and Third Restatements note there must be some flexibility in allowing for varying circumstances of different individuals.\textsuperscript{18}

Physical disabilities are one of the largest areas that have continuously been assessed for providing a variance to the reasonable person standard.\textsuperscript{19} The reasonable person standard is still present in cases of physical disabilities but is modified to inquire how a person with that physical disability would have acted under like circumstances.\textsuperscript{20} The hypothetical reasonable person should be identical to the actor, requiring physical disabilities to be looked at in a different light when determining the standard of care to which the reasonable person must conform.\textsuperscript{21} When taking into account specific physical disabilities, the disability must be verifiable and must significantly impact the man-

\textsuperscript{15} \textit{Restatement (Second) of Torts} § 283 cmt. c. A person’s judgment cannot be taken into account as everyone has to be treated in the same manner. \textit{Id}.

\textsuperscript{16} \textit{Id.} § 283 cmt. b. The qualities that society should require the reasonable person to possess are that of, “attention, knowledge, intelligence, and judgement,” when protecting others’ interests. \textit{Id}.

\textsuperscript{17} \textit{Id.} § 283 cmt. f. When looking to contributory negligence, the individual must only conform to the standard needed to protect themselves compared to ordinary negligence which is concerned with the safety of others. \textit{Id}.

\textsuperscript{18} Compare \textit{id.} § 283 cmt. c (noting that the apparent risk to the actor as well as the capacity for an individual to meet such a risk can be accounted for when determining what actions would have been reasonable under the circumstances), \textit{with Restatement (Third) of Torts: Physical & Emotional Harm} § 7 (providing that in countervailing circumstances recognizing public policy or principles can allow for limiting liability or modifying the standard of ordinary care).

\textsuperscript{19} Compare \textit{Restatement (Second) of Torts} § 283C (providing a variance for the reasonable person standard in cases of physical disabilities), \textit{with Restatement (Third) of Torts: Physical & Emotional Harm} § 11 (creating a modified standard for those with physical disabilities).

\textsuperscript{20} Compare \textit{Restatement (Third) of Torts: Physical & Emotional Harm} § 11 (requiring that a person with a physical disability only needs to be as careful as a reasonable person with the same disability would have), \textit{with Restatement (Second) of Torts} § 283C (providing that a person with a physical disability can avoid being negligent if that individual acts as a reasonable person with that disability would have acted in the same circumstances).

\textsuperscript{21} \textit{Restatement (Second) of Torts} § 283C cmt. a. The restatement treats physical impairments such as blindness, deafness, or weakness as being circumstances that a reasonable person must act under. \textit{Id}. It is not a different standard per se, just an application of the given circumstances to the situation. \textit{Id}.
ner in which an individual can act.22 For instance, while old age alone cannot be taken into account, due to uncertainty in the physical disabilities it will bring to each person, the physical disabilities that manifest in each person of age can be accounted for on a case-by-case basis.23

Under negligence law, the reasonable person standard regarding mental deficiencies has not changed in more than four hundred years.24 A person with a mental deficiency, in either a negligence action or a contributory negligence defense, is held to the same reasonable person standard of those without a physical disability or mental deficiency.25 While the Restatements discuss mental deficiencies and mental disabilities as a whole, there is an implied focus on insanity or lack of intelligence.26 The policy behind differentiating between physical disabilities and mental deficiencies is based on the underlying assumption that mental deficiencies are less certain and not as easily proven as physical disabilities.27

B. Case Law in Which a Mental Deficiency Has Been Found

1. The Supreme Court of Wisconsin Classified Bipolar Disorder as a Mental Deficiency

In Jankee v. Clark County,28 the Supreme Court of Wisconsin determined that a person suffering from bipolar disorder, also known as

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22. Restatement (Third) of Torts: Physical & Emotional Harm § 11 cmt. a. These disabilities must be viewed from an objective standpoint for purposes of convenience. Id.
23. Id. § 11 cmt. c. The Restatement (Third) provides an example of an eighty-year-old person who cannot run. Id. While the age of that individual cannot be accounted for in the reasonable person standard, the fact that the individual cannot run when there is an imminent danger can be taken into account when determining negligence. Id.
24. Compare Restatement (Second) of Torts § 283B (stating (in 1965) that persons with insanity and other mental deficiencies must conform to the typical reasonable person standard), and Restatement (Second) of Torts § 283B cmt. b (noting that the rule regarding mental deficiencies in tort law started in at least 1616, if not earlier), with Restatement (Third) of Torts: Physical & Emotional Harm § 11(c) (stating (in 2010) that a mental or emotional disability cannot be accounted for when determining if the conduct in question was negligent).
25. Compare Restatement (Second) of Torts § 283B (requiring that a person who is insane or has another mental deficiency conform to the same reasonable person standard as others), with Restatement (Third) of Torts: Physical & Emotional Harm § 11(c) (stating that mental and emotional disabilities cannot be considered under the negligence standard).
26. Restatement (Second) of Torts § 283B cmt. c. The Restatement (Second) makes clear that even in cases of insanity, stupidity, diminished intelligence, or clumsiness and when it is beyond the ability of the individual to act as the typical reasonable person, they must still be held to this standard. Id.
27. Restatement (Second) of Torts § 283C cmt. b. The Restatement (Second) also notes that there is a difference in how the public perceives physical and mental disabilities based on familiarity. Id.
28. 612 N.W.2d 297 (Wis. 2000).
manic depression, will be held to the same objective reasonable person standard as those without a mental disability.\textsuperscript{29} Emil and Mary Jankee sued Clark County ("the County") in the Circuit Court for Clark County, alleging that the County was negligent for the injuries Emil Jankee ("Jankee") received when trying to escape from the County Health Center because the County failed to supervise Jankee while he was in custody.\textsuperscript{30} Jankee had been diagnosed with bipolar disorder.\textsuperscript{31} He was admitted to the Clark County Health Care Center after an episode brought on by his bipolar disorder.\textsuperscript{32} Jankee attempted to escape through a window in his room.\textsuperscript{33} In the process, Jankee fell and was not discovered until several hours later.\textsuperscript{34} The fall broke his back, resulting in his inability to stand on his feet for long periods of time, thus requiring his use of a wheelchair.\textsuperscript{35} The circuit court granted summary judgment in favor of the County because Jankee was found contributorily negligent.\textsuperscript{36} The Jankees appealed to the Court of Appeals of Wisconsin; it reversed the circuit court's decision of contributory negligence because Jankee was incapable of controlling his conduct during the incident.\textsuperscript{37} The appellate court maintained that Jankee's conduct should be viewed under a subjective reasonable person standard.\textsuperscript{38}

The defendants appealed to the Supreme Court of Wisconsin, arguing that the subjective reasonable person standard was incorrectly

\textsuperscript{29} Jankee v. Clark County, 612 N.W.2d 297, 303, 318 (Wis. 2000). The court specifically declined to adopt the subjective standard of care for those with mental disabilities because the disability in question was foreseeable and treatable by medication. \textit{Jankee}, 612 N.W.2d at 318.
\textsuperscript{30} \textit{Id.} at 301. The Jankees also included Hammel, Green & Abrahamson, Inc. (an architecture firm), J.P. Cullen & Sons, Inc. (a building contractor), and Wausau Metals Corporation (a subcontractor) in the negligence suit. \textit{Id.}
\textsuperscript{31} \textit{Id.} at 303. Jankee had attempted suicide on a couple of occasions and was institutionalized multiple times for his condition. \textit{Id.} at 303-04.
\textsuperscript{32} \textit{Id.} at 304. The health center had several building code violations and was required to update its building. \textit{Id.} The windows were part of the renovation. \textit{Id.} Several issues occurred, including the locking mechanisms not properly working on the windows. \textit{Id.} at 305. A past escape had occurred due to the problematic design of the windows. \textit{Id.}
\textsuperscript{33} \textit{Id.} at 307. Jankee was able to escape by taking advantage of one of the defects of the new windows. \textit{Id.}
\textsuperscript{34} \textit{Id.} at 308. It was estimated that Jankee tried to escape sometime around 1 a.m. but was not discovered until nearly 6 a.m. \textit{Id.} at 307-08.
\textsuperscript{35} \textit{Id.} at 308.
\textsuperscript{36} \textit{Id.} at 301. The doctrine of contributory negligence barred the Jankees from being able to recover for Jankee's injuries. \textit{Id.} The architecture firm and contractors were granted summary judgement on the basis of government contractor immunity. \textit{Id.}
\textsuperscript{37} \textit{Id.} The court of appeals affirmed the other grants of summary judgment on the basis of immunity. \textit{Id.}
\textsuperscript{38} \textit{Id.}
applied to Jankee. The Supreme Court of Wisconsin agreed and reversed the court of appeals' decision. The court decided Jankee was required to conform to the ordinary reasonable person standard and found him contributorily negligent. The court reasoned that when considering two innocent parties and the liability of a mentally disabled person, it is better to hold liable the person who caused the injury. The court also considered the underlying policy for deinstitutionalizing the mentally disabled by requiring mentally disabled persons to conform to the standard of care and expectations of society. The rationale behind deinstitutionalization was that it would provide for stronger societal integration of those with mental disabilities by encouraging mentally disabled persons to seek treatment. The court ultimately decided because Jankee could have used medical treatment to modify and conform his conduct to that of a reasonable person without a mental disability, the Wisconsin courts would continue to uphold the objective reasonable person standard for negligence in regard to mental disabilities.

2. The Supreme Court of Wisconsin Classified Cerebral Palsy, Intellectual Disability, and Autistic Tendencies as Mental Deficiencies

In Burch v. American Family Mutual Insurance Co., the Supreme Court of Wisconsin certified that a person with cerebral palsy, an intellectual disability, and autistic tendencies must be held to the same reasonable person standard of care as a person without these disabilities. Paul Burch (“Burch”) filed suit against American Family Insurance in the Circuit Court for St. Croix County. Burch was

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39. Id. The Jankees and the County both appealed the grants of summary judgment given to the contractors on the basis of the government contractor immunity doctrine. Id.
40. Id. at 324.
41. Id. at 302. The Supreme Court of Wisconsin did not discuss the applicability of summary judgment for the contractors and architecture firm on the basis of immunity because Jankee’s contributory negligence barred recovery regardless. Id.
42. Id. at 312. The court also stated that not allowing persons to invoke mental disabilities as a defense will prevent those who commit torts from falsifying mental disabilities in order to escape liability. Id.
43. Id. The policy is thought to prevent courts from having to decipher degrees of intellect and character. Id.
44. Id. at 318. The court noted that this policy came from the idea that if mentally disabled persons cannot be absolved from liability due to their mental illness, then they will be encouraged to seek treatment and use the mental health system. Id.
45. Id. The court also believed that applying an objective standard would present difficulties for courts going forward. Id.
46. 543 N.W.2d 277 (Wis. 1996).
48. Burch, 543 N.W.2d at 278.
out with his fifteen-year-old daughter, Amy Burch, who had severe
developmental disabilities and functioned at the level of a
preschooler. Burch turned off his truck, but he left his daughter in
the truck with the keys in the ignition. Once Burch exited the vehi-
cle, his daughter started the ignition, causing the truck to roll back-
wards and injure her father. The jury found Amy Burch had not
been negligent but decided that Burch was negligent by leaving the
keys in the truck. Burch moved for a new trial, and the circuit court
granted the motion.

American Family Insurance appealed to the Court of Appeals of
Wisconsin, contesting the circuit court’s grant for a new trial. The
appellate court certified the case directly to the Supreme Court of Wis-
consin. The supreme court reversed the grant of a new trial but de-
termined that mental capacity cannot be taken into account when
determining what standard of care applies for negligence. There is
only one exception in Wisconsin allowing mental capacity as a de-
fense; the court reasoned that this exception was too narrow to be ap-
plied in this case. The exception allows a civil insanity defense for a
person who is mentally disabled, institutionalized, unable to appreci-
ate his or her actions, and injures a hired caretaker. The court ulti-
mately stated that any mentally disabled person did not meet this narrow
exception then the objective reasonable person standard must apply to
that individual, even if he or she suffered from a mental disability.

49. Id. Amy Burch was born with "mental retardation" and cerebral palsy. Id. Amy also exhibited "autistic tendencies." Id.
50. Id. Burch left the vehicle in reverse while it was off. Id. at 279.
51. Id. at 279. The vehicle had pinned Burch against a building. Id.
52. Id. Originally, the circuit court had granted the insurance company’s motion for summary judgment, reasoning that Amy Burch could not be capable of negligence given her diminished capacity. Id. The court of appeals reversed and remanded the grant of summary judgment on the basis that a jury needs to determine whether such incapacity was so severe as to prevent Amy Burch from being capable of negligence. Id.
53. Id. at 279-80. The new trial, granted by the circuit court, was not granted based on a perverse verdict or jury misconduct. Id. The circuit court specifically noted that there was enough evidence for a jury to come to this determination. Id. The new trial was granted anyways in “the interest of justice.” Id. at 280.
54. Id. at 278.
55. Id. at 280.
56. Id. at 280, 282. The court also stated that Amy’s mental capacity was not an issue for the jury to determine, but the jury could have reached their decision based on Burch’s contributory negligence. Id. at 280, 281.
57. Id. at 280.
58. Id. (citing Gould v. Am. Family Mut. Ins. Co., 543 N.W.2d 282, 283 (Wis. 1996)). Amy did not meet the necessary requirements for this exception. Id.
59. Id. The Supreme Court of Wisconsin stated that because Amy Burch did not meet the narrow exception, the objective reasonable person standard must be applied to her, even though at fifteen years old her cognitive capacity was only equivalent to that of a three to six-year-old. Id. at 280, 281.
C. CASE LAW IN WHICH COURTS HAVE RECOGNIZED PHYSICAL DISABILITIES

1. The Appellate Court of Illinois Classified Slower Movement Time Due to a Prior Injury as a Physical Disability

In *Borus v. Yellow Cab Company*, the Appellate Court of Illinois, First District, Fourth Division determined that slow and awkward movements of a person in his or her late fifties, caused by a prior injury, could be found to be a physical disability, and the issue would need to be decided by a jury. Rosalie Borus (“Borus”) filed a negligence suit in an Illinois trial court based on injuries she sustained when being dragged from a taxi cab. This suit was against Yellow Cab Company and Thomas Jamison. A motion for summary judgment was made by the defendants based on contributory negligence. Borus, fifty-nine years old at the time of the incident, had suffered a prior injury which slowed her ambulation and required her to walk with a cane. When exiting the cab, Borus closed the door and inadvertently caught her coat in the door. The taxi driver drove away, dragging Borus down the street. The trial court granted summary judgment for the defendants on grounds of contributory negligence. Borus appealed the grant of summary judgment in the defendants’ favor. The Appellate Court of Illinois reversed the trial court’s order, indicating that a jury needed to decide the issue of contributory

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63. *Id.* Thomas Jamison was the taxicab driver at the time of the incident for *Yellow Cab Company*. *Id.*
64. *Id.* The issue of contributory negligence was the main issue on appeal. *Id.*
65. *Id.* at 278-79. Ms. Borus had broken her hip, pelvis, and several ribs four years prior to the taxicab incident. *Id.*
66. *Id.* There is evidence that the taxi driver had dropped off Borus in an unsafe position that forced her to stand closer to the cab door upon exiting than she normally would have. *Id.* Borus had taken some time to exit the taxicab and was using her cane in an effort to exit more quickly. *Id.* Evidence showed that the cab driver knew Borus was slower in her movements because he had watched her get into the cab slowly. *Id.* The closing of the coat in the door became the main issue of contributory negligence. *Id.*
67. *Id.* Borus was dragged some distance until the cab driver stopped. *Id.* The cab driver immediately took Borus to the hospital. *Id.*
68. *Id.* at 280. The trial court had accepted the plaintiff’s version of the facts, as stated above, in coming to this decision. *Id.*
69. *Id.* The trial court also found that while Borus unknowingly caught the coat in the door, it was still this action that led to her being dragged and injured. *Id.* Thus, Borus’ actions were the proximate cause of the incident leading to her injuries. *Id.*
70. *Id.* at 278.
negligence based on Borus’ physical condition at the time of the incident. The court reasoned that in light of the facts, a jury could find Borus’ slow and awkward movements constituted a handicap. If a jury found Borus was indeed handicapped, then in determining contributory negligence the jury would have to decide if she conformed to the standard of care a reasonable person with her same disability would have. The court noted it was immaterial whether Borus requested help out of the taxi due to her handicap because, in light of the driver’s knowledge, the driver could have simply looked to see if Borus had stepped away from the taxi before driving away. The appellate court reversed and remanded the case because if a jury found the facts accurate and the handicap present as Borus described, then the jury would determine whether she acted as a reasonable person with that disability.

2. The Court of Appeal of Louisiana Classified Blindness as a Physical Disability

In Roberts v. State, Through Louisiana Health and Human Resources Administration, the Court of Appeal of Louisiana concluded that a blind man in a negligence case was acting as a reasonable blind person would have given the circumstances. William Roberts (“Roberts”) sued the State of Louisiana, through the Louisiana Health and Human Resources Administration in the Ninth Judicial District Court for Louisiana, based on a negligence claim through the theory of respondeat superior. Mike Burson (“Burson”), a blind individual, was working at a concession stand and not using a cane or other method of

71. Id. at 283. The court also stated that a jury would need to determine the effect of the location Borus was dropped off at and if a duty was owed to Borus. Id.
72. Id. at 282. If Borus was found to have a handicap, it could be possible that she was not negligent when she did not remove her coat from the door of the cab. Id.
73. Id. The court stated that if the handicap is true as alleged, a jury could find that Borus acted as a reasonable person with the same disability would have because she used a cane and how she reacted in the situation. Id.
74. Id. at 283. The driver described Borus as frail, elderly, and awkward. Id. This led the court to conclude the driver knew, or should have known, that there could be difficulty when Borus exited the taxi. Id.
75. Id. Whether the physical disability reasonable person standard would apply in this case would turn on whether a jury believed that Borus had the physical difficulties laid out in her affidavit. Id. at 282.
78. Roberts, 396 So.2d at 566. Burson, the blind man whose alleged negligent actions were what led to the suit, was not a party to the case. Id. at 567.
guidance when walking down a hall to the restroom. On his way to the restroom, Burson knocked down Roberts, causing Roberts to suffer a hip injury. The trial court judge dismissed the action, reasoning that there was no respondeat superior liability because there was no employer-employee relationship.

Roberts then appealed this dismissal to the Third Circuit Court of Appeal of Louisiana. The appellate court affirmed the district court’s decision to dismiss the case but in the process assessed the negligence standard as applied to Burson. The court deduced because Burson acted as a reasonable blind person would have acted, he was not negligent. In reaching this determination, the court reasoned that the correct standard of care was the standard for persons with physical disabilities rather than the typical, all-encompassing, reasonable person standard. When deciding Burson was not negligent, the court took into account Burson’s familiarity with the area and the ability to rely on his facial senses in finding his way around. The court ultimately found that a reasonable blind person would have acted in the same manner Burson did and would not have used a cane under the circumstances.

79. *Id.* Burson was also not using his hands to guide himself down the corridor. *Id.*

80. *Id.* Roberts was seventy-five at the time of the accident and only weighed approximately one-hundred pounds, while Burson was in his mid-twenties and nearly twice the size of Roberts. *Id.*

81. *Id.* Due to Burson not being part of the action itself, Roberts had to show that there was an employer-employee relationship in order to succeed on a negligence claim under respondeat superior. *Id.*

82. *Id.* at 566.

83. *Id.* at 567. The court assessed whether Burson was negligent because this factor was critical in determining whether the state would be liable for Burson’s actions. *Id.*

84. *Id.* Due to finding that Burson was not negligent, the appellate court found there was no need to discuss the liability of the State of Louisiana based on respondeat superior. *Id.* at 569.

85. *Id.* at 567. It was also noted that a person with a physical disability must act while considering the impairments their disability causes. *Id.* This can include taking precautions when it is known that there could be a difficulty in performing certain actions. *Id.* However, the real question becomes how a reasonably prudent blind person would have acted given the same circumstances. *Id.*

86. *Id.* at 569. Burson had been working at the concession stand for over three years. *Id.* Burson was walking at a normal speed and no evidence showed that he was not paying attention to where he was going. *Id.* Burson learned how to use facial senses in lieu of a cane when in familiar areas during mobility training at a school for the blind. *Id.* at 567.

87. *Id.* at 569. Other people also testified that given the short distance, it was not unreasonable for Burson to rely on facial senses rather than the use of a cane. *Id.*
NEGLIGENCE LAW

D. AUTISM AND THE PHYSICAL MANIFESTATIONS THAT DEVELOP IN RELATION TO AN AUTISM SPECTRUM DISORDER

1. Autism as a Social Disorder

ASDs are often classified by deficiencies in social communication and interaction.88 ASDs manifest through restrictive and repetitive behavioral activities and interests.89 Due to advances in science and medicine, ASDs are more accurately classified as neurobiological disorders.90 ASDs are still considered mental health disorders under the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (“DSM-5”).91 Rather than simply being thrown into the mental health classification, ASDs, amongst other things, are really a combination of genetics, neurophysiology, neurology, and immunology, which help explain the neurological-based developmental delays and behavioral tendencies that accompany ASDs.92

While there is a mental aspect to ASDs, as the DSM-5 denotes, there is a large range of different neurological symptoms that present themselves in persons with ASDs; these can lead to physical manifestations of the disorder, in addition to the mental aspect.93 Such neurological symptoms present themselves, not only in the common cognitive disorders that help to characterize ASDs but also in central

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88. Mintz, supra note 1, at 44.
89. Id.
90. See id. at 44-45 (noting the reason the medical community views ASDs as neurobiological conditions over mental health disorders is because of extensive neurodiversity and differing biological causes found in persons with ASDs, which the mental health classification tends to overlook).
91. Id. at 45. The DSM-5 requires that four criteria be met in order to have a diagnosis of autism, which are provided as follows:
   Persistent deficits in social communication and social interaction across contexts, not accounted for by general development delays, and manifested by all of the 3 following: 1) Deficits in social-emotional reciprocity; 2) Deficits in non-verbal communicative behaviors used for social interaction; 3) Deficits in developing and maintaining relationships;
   Restricted, repetitive patterns of behavior, interests, or activities as manifested by at least two of the following: 1) Stereotyped or repetitive speech, motor movements, or use of objects; 2) Excessive adherence to routines, ritualized patterns of verbal or nonverbal behavior, or excessive resistance to change; 3) Highly restricted, fixated interests that are abnormal in intensity or focus; 4) Hyper-or hypo-reactivity to sensory input or unusual interest in sensory input or unusual interest in sensory aspects of environment;
   Symptoms must be present in early childhood (but may not become fully manifest until social demands exceed limited capacities)
   Symptoms together limit and impair everyday functioning.
92. Id. at 50. Epigenetics, metabolomics, endocrinology, and gastroenterology also play a role in explaining ASDs and how these disorders affect individuals. Id.
93. See id. at 45, 46 (noting neurological symptoms include coordination deficiencies and increased risk of epilepsy).
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and autonomic or peripheral nervous system dysfunctions. Epilepsy and language impairments have been linked in persons with ASDs. Epilepsy and language impairments have been linked to causing gastrointestinal, immune system, hormonal, and metabolic deficiencies. There is a disconnect in the continuation of the DSM-5 classification of ASDs as mental health disorders because the DSM-5 does not account for the neurodiversity that ASDs present.

2. Motor Functioning and Perceptuomotor (Sensory-Motor) Problems in People with Autism Spectrum Disorders

There is a high presence of minor neurological dysfunctions (“MNDs”) in persons with ASDs. MNDs can include posture and muscle tone complications, involuntary movements and reflexes, and coordination and sensory difficulties, among other problems. A single function alone will not lead to a minor neurological dysfunction (“MND”) diagnosis. There are both simple and complex MNDs. MNDs impair sensory-motor performance and occur because of specific alterations to the way in which fibers connect in the central nervous system. Simple MNDs are more common in people with ASDs.

94. Id. at 46. Central nervous system dysfunctions include deficiencies in coordination, planning, and the motor system as a whole. Id. Autonomic nervous system dysfunctions show through over-responsivity or dysautonomia, which is characterized as weakness or numbness from nerve damage. Id.

95. Id. It has been reported that epilepsy in people with ASDs can account for causing as much as 85% of the intellectual disabilities associated with ASDs. Id. at 48. At least 44% and possibly as high as 83% of children with ASDs experience some sort of sleep disorder. Id. at 49.

96. Id. at 48. Non-observable seizures from epilepsy often disrupt speech patterns which lead to language impairments in persons with ASDs. See id. (noting that neuropsychological disruptions can be caused without having an observable seizure).

97. Id. at 46.

98. See id. (noting that when diagnosing ASDs according to the DSM-5, the diagnostic criteria does not account for or recognize diversity in ASDs which manifests themselves through an array of other symptoms).

99. Gabrile Tripi et al., Minor Neurological Dysfunctions (MNDs) in Autistic Children Without Intellectual Disability, 7 J. CLINICAL MED. 79, 82 (2018). In this study, nearly 97% of ASD participants had an MND of some sort. Id. Whereas, just under 16% of the control group exhibited an MND. Id.

100. Id. at 81. Low mineral bone density has been found in boys with ASDs and children with ASDs experience reduced cortical thickness. Laya Ekhlaspour et al., Bone Density in Adolescents and Young Adults with Autism Spectrum Disorders, 46 J. AUTISM & DEVELOPMENTAL DISORDERS 3387, 3387-88 (2016).

101. Tripi et al., supra note 99, at 81.

102. Id. at 80. Simple MNDs are thought to be typical, but “non-optimal brain wiring.” Id. On the other hand, complex MNDs are considered to be something comparable to cerebral palsy. Id.

103. Id.
than complex MNDs, but both forms are still significantly more prevalent in people with ASDs than those without.104

At least fifty percent of children diagnosed with an autism spectrum disorder show deficits in perceptuomotor skills, a combination of sensory and motor skills.105 These deficiencies exhibit themselves through postural control issues, gait or walking abnormalities, and poor bilateral coordination.106 Deficiencies in fine-motor control are also present in persons with ASDs.107 Studies and experiments have shown that persons with ASDs exhibit poor movement timing.108 Motor deficiencies and dysfunctions are present in children who have an ASD, regardless of their cognitive functioning level.109 Poor bilateral coordination in people with ASDs can be attributed to deficits in perception and action coupling, which results in fundamental movement control issues.110 Due to these deficiencies, motor dysfunctions and impairments should be considered a defining and integral aspect of ASDs.111

104. Id. at 82. Complex MNDs were found in just under 16% of ASD participants and not found in any of the neurotypical control group. Id. Over 80% of persons with ASDs showed simple MNDs. Id.

105. Kaur et al., supra note 5, at 80. Possibly up to 85% of children with ASDs experience this type of deficit. Id.

106. Compare id. (noting the deficiency in all of these areas for basic motor skills), with Michail Doumas et al., Postural Control Deficits in Autism Spectrum Disorder: The Role of Sensory Integration, 46 J. AUTISM & DEVELOPMENTAL DISORDERS 853, 858 (2016) (finding that sensory impairments affect postural control and that increasing sensory demands increased the amount of postural sway in persons with ASDs).

107. Kaur et al., supra note 5, at 80. Fine motor deficiencies include manual dexterity (the ability to grasp and manipulate objects with hand and finger movement), object control, visuo-motor problems (the coordinating of movement and visual stimuli within the brain), and integration skills. Id.

108. Compare id. at 80 (conducting an experiment that demonstrated the type of slower movement speed was similar to people with Parkinson’s disease), with Astrid M.B. Stoit et al., Grasping Motor Impairments in Autism: Not Action Planning but Movement Execution Is Deficient, 43 J. AUTISM & DEVELOPMENTAL DISORDERS 2793, 2799 (2013) (conducting two experiments showing action planning is not deficient, but that movement execution and speed in persons with ASDs is deficient; there were no significant differences in reaction times to cues given to persons with ASDs compared to typically developing individuals, but the movement times of participants with ASDs were slower).

109. Kaur et al., supra note 5, at 88. Some motor issues correlate with IQ in persons with ASDs, such as fine and gross motor skills. Id. Movement times, imitation-based tasks, bilateral coordination, and social-motor coordination deficiencies in ASDs do not correlate with IQ. Id. Even though fine and gross motor skills in ASDs show correlation with IQ and cognitive abilities, those with high functioning ASDs (with an IQ above 70) and those with low functioning ASDs (with an IQ of 70 or below) both scored significantly lower than their typically developing peers. Id.

110. Id. at 90. This can also be attributed to issues with poor visual motor coordination. Id. All of these deficiencies can also help explain social attention deficits in children with ASDs. See id.

111. Id. at 91. The study’s assertion is based on the fact that motor dysfunctions and impairments are so prevalent and common among persons with ASDs, regardless of
A study showed eye-hand coordination deficiencies in persons with ASDs can help to explain the reaction time deficits.\textsuperscript{112} When visual and manual processes are directed toward the same object, a larger disconnect occurs in a person with ASD, showing that eye-hand coordination is weaker in people with ASDs.\textsuperscript{113} When simply having to touch a button to indicate the location of an object, persons with ASDs and typically-developing peers showed no significant difference in response times.\textsuperscript{114} However, when participants had to touch the object with a stick to show the location, people who had an ASD showed weaker coordination evidenced by their accuracy and speed in hitting the target compared to their peers.\textsuperscript{115} Visual and motor connectivity issues due to ASDs also cause movement execution and speeds to be delayed as compared to those of typically-developing peers, but reaction times in persons with ASDs are still comparable.\textsuperscript{116} Such a disconnect between the visual and motor aspects of the brain lead to the inability to predict another person’s actions or movements.\textsuperscript{117}

Postural control is a person’s ability to regain his or her balance during motor activities.\textsuperscript{118} Persons with ASDs often exhibit poor postural control, which requires both sensory processing and motor con-

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\textsuperscript{112} Alessandro Crippa et al., \textit{Eye-Hand Coordination in Children with High Functioning Autism and Asperger’s Disorder Using a Gap-Overlap Paradigm}, 43 J. AUTISM & DEVELOPMENTAL DISORDERS 841, 841 (2013). Finding when more eye-hand coordination is needed, reaction times for persons with ASDs slows. \textit{Id}. This was discovered by measuring fixation latencies in conjunction with response times in visual detection tasks. \textit{Id}.

\textsuperscript{113} \textit{Id}. at 847. The ASDs and control groups were required to perform three separate tasks. \textit{Id}. at 843. The first task only required participants to look at the target and identify its characteristics. \textit{Id}. The second task required that participants hit a button with their finger indicating a target’s location. \textit{Id}. Finally, the third task required participants to touch the object with a stick, indicating the location of the target. \textit{Id}.

\textsuperscript{114} \textit{Id}. at 845.

\textsuperscript{115} \textit{Id}. The control group touched the object with the stick in an average of 924.7 ms compared to the ASDs group who had a 1,021.9 ms average time; whereas, the times to press the button only had an average difference of 9.6 ms between the control group and the ASDs group. \textit{Id}. at 846.

\textsuperscript{116} Stoit et al., \textit{supra} note 108, at 2798, 2802. While reaction times for the control group and persons with ASDs were similar and showed no significant difference, the ASDs group’s movement time was slower, averaging 677 ms compared to the control group at 568 ms. \textit{Id}. at 2798. There was a second experiment in this study that employed a different type of stimuli to counteract any effects that would occur by only a single stimuli type being used. \textit{Id}. at 2800. Similar results were found with the movement time for the ASDs group at an average of 752 ms compared to the control group at 590 ms. \textit{Id}.

\textsuperscript{117} \textit{Id}. at 2802. Such a disconnect between the two systems can also affect an individual with ASD from being able to understand others on a larger scale. \textit{Id}.

Postural control relies on sensory information from visual input, vestibular, and proprioception (the sensing of stimuli based on body position), which is then used to create muscle responses to account for environmental changes and differences. As sensory demands increase from adding more environmental stimuli, people with ASDs exhibit worsening postural control by displaying more postural sways. Poor postural control and instability were shown to increase with age, leading to more fall incidents.

3. Global Processing and Processing Speeds in People with Autism Spectrum Disorders

Persons with ASDs have slower processing speeds than those of neurotypical persons. A study was conducted comparing individuals with ASDs to a control group of neurotypical peers by using two different completion tasks: a fragmented picture task and an impossible/possible figures task. In the fragmented picture completion task, persons with ASDs required more fragments in a picture before being able to correctly name the object than the control group required. This finding suggests that people with ASDs experience reduced global processing and integration. In the impossible/possible identification task, individuals with ASDs showed significant impairments in identifying which images were possible and which were impossible to make into a 3D version.
ments in discriminating between the two types of figures when compared with the control group.\textsuperscript{127}

E. PHYSICAL DISABILITIES THAT HAVE SIMILAR PHYSICAL SYMPTOMS TO THOSE FOUND IN AUTISM SPECTRUM DISORDERS

1. Muscular Dystrophy

Muscular dystrophy is known for causing muscle weakness that progresses over time.\textsuperscript{128} Duchenne muscular dystrophy (“DMD”) is caused by a genetic mutation, often in the dystrophin gene.\textsuperscript{129} DMD is the most common form of muscular dystrophy, affecting more boys than girls.\textsuperscript{130} DMD creates a heightened risk of diminished cognitive functioning and language problems.\textsuperscript{131} Several initial symptoms that present themselves are similar to those displayed by persons with autism, such as delayed motor development.\textsuperscript{132} While initial symptoms help alert parents to a potential issue, a blood test can definitively diagnose DMD.\textsuperscript{133} Several other symptoms similar to those found in ASDs include gait or walking abnormalities.\textsuperscript{134} Speech and language delays, along with behavioral and learning difficulties, are also manifestations caused by DMD that are similar to certain symptoms of au-

\textsuperscript{127} Id. at 1403. This data was gathered by presenting sixteen geometric figures, half of which were considered possible to make in 3D and half of which were not. Id. at 1401.

\textsuperscript{128} Kristina Elvidge & Klair Bayley, Early Signs of Duchenne Muscular Dystrophy, 13 AUSTL. J. CHILD & FAM. HEALTH NURSING 16, 16 (2016).

\textsuperscript{129} Id. at 16. This accounts for about two-thirds of cases, whereas the remaining third is caused by random mutations in genes. Id.

\textsuperscript{130} Id. Approximately one in 3,500 boys are affected at birth, with girls being affected at a much lower rate. Id. In Australia alone, forty-five boys per year get a DMD diagnosis. Id. Two other common types of muscular dystrophy include Becker and Myotonic muscular dystrophies. Ann R. Punnoose, Muscular Dystrophy, 306 J. AM. MED. ASS’N. 2526, 2526 (2011).

\textsuperscript{131} Elvidge & Bayley, supra note 128, at 16. Cardiorespiratory and orthopedic complications also become evident in people with DMD. Id.

\textsuperscript{132} Id. This includes problems standing up and difficulty with steps, leading to frequent falling. Id. Persons with DMD tend to have enlarged calves. Id.

\textsuperscript{133} Punnoose, supra note 130, at 2526. A preliminary blood test is done to identify abnormally high levels of creatine kinase. Id. Creatine kinase is a protein that is released into the blood stream as muscle tissue breaks down. Id. Once this increased level of protein is detected, a definitive blood test can be administered to detect the precise genetic mutation causing DMD. Id.

\textsuperscript{134} Elvidge & Bayley, supra note 128, at 16.
tism. A large number of persons with DMD do not make it past their early twenties.

2. Sensory Impairments

Hearing loss, visual impairments, or other forms of interference with sensory pathways have been found to lead to balance instabilities in people. Motor development is often delayed in children who have a hearing impairment. A study of children with hearing impairments in both ears found that eighty percent of these children could possibly be diagnosed with a developmental coordination disorder. Hearing impaired children performed worse in complex tasks involving dynamic balance than in static balance tasks.

Persons with visual impairments are nearly six times as likely to fall. Both postural control and bilateral coordination are affected in visually impaired persons. Sensory processing is a major part of postural control, with vision playing one of the largest roles, explaining why blind individuals have poor balance as a result of their im-

135. Id. Out of the number of boys with this form of muscular dystrophy, approximately half will experience delays in speech and language. Id. at 17. At least a quarter, if not a third, of people with DMD display behavioral and learning difficulties and exhibit “autistic features.” Id. Oculopharyngeal muscular dystrophy also causes speech and voice issues. Amy T. Neel et al., Muscle Weakness and Speech in Oculopharyngeal Muscular Dystrophy, 58 J. SPEECH LANGUAGE & HEARING RES. 1, 1-2 (2015).

136. Punnoose, supra note 130, at 2526.

137. Samuel J. Wilson et al., The Influence of Multiple Sensory Impairments on Functional Balance and Difficulty with Falls Among U.S. Adults, 87 Preventive Med. 41, 41 (2016). When just one sensory impairment is present, there is over a 60% increase in the chance of falling. Id. at 44. When there are two or more sensory deficits present, this risk increased to five times that of a person without any sensory impairments. Id.

138. Matthäus J. Fellinger et al., Motor Performance and Correlates of Mental Health in Children Who Are Deaf or Hard of Hearing, 57 DEVELOPMENTAL MED. & CHILD NEUROLOGY 942, 942 (2015). Hearing impairments can also affect a person’s social, cognitive, and neuromotor development. Id. Over 50% of children who had a hearing impairment in both ears, scored in the bottom 5% in a motor development assessment. Id. at 944.

139. Id. at 942. A study of ninety-three children participants revealed 74% of them scored in the bottom 15% on a motor function test. Id. at 944.

140. Id. at 945. This is thought to be the result of damage to the inner ear affecting the vestibular (balance) apparatus because there is a close connection between the two. Id. This is known as the vestibular deficit theory. Id.

141. Wilson et al., supra note 137, at 44. Visually impaired persons are 5.59 times more likely to fall. Id.

142. Compare Parreira et al., supra note 118, at 162 (finding greater body sway in persons without sight), with Izabela Rutkowski et al., Bilateral Coordination of Children who are Blind, 122 PERCEPTUAL & MOTOR SKILLS 595, 605 (2016) (finding bilateral coordination in blind children to be significantly impaired).
Due to poor postural control and balance, blind individuals have slower reaction times than sighted persons. Visually impaired children tend to show delayed motor development. Visually impaired persons have trouble manipulating objects with both hands due to the lack of bilateral coordination.

III. ARGUMENT

This Note makes the claim that negligence cases arising from the physical symptoms of ASDs should be assessed under the physical disability reasonable person standard, rather than simply remaining classified as a mental deficiency. Both courts and the Restatements have recognized several disabilities that would be, and are, classified as physical disabilities under negligence, all of which exhibit similar physical symptoms to ASDs. Incidents arising from physical symptoms caused by ASDs should be viewed under the physical disability reasonable person standard. Adopting this standard will promote policy implications underpinning the different standard for persons with physical disabilities. Intellectual disabilities present in some persons with ASDs do not provide strong enough backing to prevent persons with ASDs, and all incidents arising from persons with ASDs, from being classified under the physical disability reasonable person standard.

A. AUTISM HAS SYMPTOMS THAT CREATE A PHYSICAL DISABILITY UNDER NEGLIGENCE

Courts or the Restatements have definitively classified blindness, deafness, and slow and awkward response times as physical disabilities under negligence. Should it come before the courts, muscular

143. Parreira et al., supra note 118, at 161. Vision is needed to interact with the vestibular system in order to maintain balance through anticipation and prediction of environmental changes. Id.
144. Id. at 162. In this study, the reaction time was the time from the auditory signal given until the person started moving. Id.
145. Rutkowska et al., supra note 142, at 596. Visually impaired individuals have trouble integrating both sides of their body at once, leading to poor coordination. Id.
146. Id. While bilateral coordination normally gets better as a person ages, visually impaired persons still performed well below average in bilateral coordination as their age increased. Id. at 604-05.
147. See infra notes 152-200 and accompanying text.
148. See infra notes 152-175 and accompanying text.
149. See infra notes 176-187 and accompanying text.
150. See infra notes 188-200 and accompanying text.
dystrophy would likely be considered a physical disability in negligence law. Like persons with ASDs, persons with muscular dystrophy, visual impairments, and hearing impairments tend to have delayed motor development. People with muscular dystrophy experience gait and walking abnormalities, like persons with ASDs. Persons with sensory disabilities and disorders, including visually or hearing impaired persons and persons with ASDs, have difficulty with balance and coordination. Reaction times are slower in persons with ASDs and can be slower in persons who are visually impaired, of greater age, or those who have had a prior injury.

These physical manifestations from ASDs and other physical disabilities can lead to claims of negligence or contributory negligence. As in Roberts v. State, Through Louisiana Health and Human Resources Administration, sensory disabilities can cause accidents with other persons, even when a person is comfortable with the layout

153. Compare Elvidge & Bayley, supra note 128, at 16 (stating that this disease is degenerative, shutting down a person’s organs overtime, and eventually requires the use of a wheelchair in order to get from place to place, while also noting that a simple blood and genetic test can lead to a diagnosis), with Restatement (Second) of Torts § 283C cmt. a (Am. Law Inst. 1965) (including deafness in a list of examples for physical disabilities).

154. Compare Elvidge & Bayley, supra note 128, at 16 (providing that one of the initial signs of muscular dystrophy is delayed motor development), and Rutkowska et al., supra note 142, at 596 (noting that delayed motor development is common in visually impaired persons), and Fellinger et al., supra note 138, at 942 (stating that motor development delays are a common occurrence for children with hearing impairments), with Kaur et al., supra note 5, at 80 (noting that at least 50%, possibly up to 85%, of persons with ASDs exhibit deficits in sensory and motor development).

155. Compare Elvidge & Bayley, supra note 128, at 16 (stating that a waddling gait is one of the more common initial symptoms of DMD), with Kaur et al., supra note 5, at 80 (providing that gait is one of the basic motor skills affected in persons with ASDs).

156. Compare Crippa et al., supra note 112, at 841 (finding hand-eye coordination deficiencies in persons with ASDs), and Doumas et al., supra note 106, at 855 (noting postural control deficiencies in ASDs contribute to lack of balance), with Wilson et al., supra note 137, at 41 (finding that as the number of sensory impairments increases, the instability of a person also increases), and Rutkowska et al., supra note 142, at 605 (stating that visually impaired children have below average coordination).

157. Compare Parreira et al., supra note 118, at 162 (noting that blind persons reacted to auditory cues slower than non-visually impaired persons), and Borus, 367 N.E.2d at 282 (finding that slow and awkward movements were due to age and a prior injury), with Crippa et al., supra note 112, at 841 (showing increased reaction times to tasks requiring more eye-hand coordination among persons with ASDs).

158. Compare Borus, 367 N.E.2d at 278-79 (where contributory negligence was at issue due to slow and awkward movements possibly causing the injury in question), with Stoit et al., supra note 108, at 2798-99 (noting movement execution and speeds are delayed in persons with ASDs).

Due to slight changes in a familiar environment and sensory impairments in persons with ASDs, postural control and balance deficiencies could cause an accident with another person.161 This physical manifestation of ASDs could likewise lead to a negligence claim.162 Postural control problems could lead to instability and a slower response to stimuli when there is a change in the environment.163 This could affect a person with an ASD, even though he or she is aware of difficulties in regaining balance and may take necessary precautions to correct his or her balance, because an accident may still occur.164 When taking necessary precautions that any other person with the same physical symptoms would, a person with an ASD could be found negligent whereas a blind person might not be.165

With respect to contributory negligence, slower reaction times in persons could lead to a greater likelihood of an accident, as in *Borus v. Yellow Cab Company*.166 For instance, in responding to a car coming towards a person with an ASD, the person may take longer to move out of the way than a non-ASD individual.167 Global processing deficiencies in persons with ASDs could present a similar incident due to slower processing times.168 A person with an ASD could have a chal-

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160. *See Roberts*, 396 So. 2d. at 567-68 (determining that the accident was caused by the blind individual’s inability to see the person he ran into, even though he was extremely familiar with his surroundings).
161. *Compare* Doumas et al., *supra* note 106, at 858, 859 (noting that when more sensory inputs are added to an environment, postural sway increases and balance decreases which leads to more falls), *with Roberts*, 396 So.2d at 569 (discussing that the blind individual was very familiar with the layout of the building, but adding a single person into the store changed the environment).
162. *Compare* Doumas et al., *supra* note 106, at 859 (finding postural control and instability cause more falls), *with Roberts*, 396 So.2d at 566 (finding a claim for negligence based on a fall incident).
163. Doumas et al., *supra* note 106, at 858, 859.
164. *See* Doumas et al., *supra* note 106, at 858 (noting that when persons with ASDs try and correct their postural balance, they often overcorrect in the process, causing the initial sways and balance deficiencies).
165. *Compare* Restatement (Third) of Torts: Physical & Emotional Harm § 11 (Am. Law Inst. 2010) (providing that mental and emotional instability will not be taken into account when determining negligence under the reasonable person standard), and *Burch v. Am. Family Mut. Ins. Co.*, 543 N.W.2d 277, 278, 280 (Wis. 1996) (assessing a person with “autistic tendencies” under the typical reasonable person standard), *with Roberts*, 396 So.2d at 567, 569 (iterating that a blind person was held to the physical disability reasonable person standard and because they acted as a reasonable blind person would have under like circumstances, the blind individual was not negligent).
166. *See Borus*, 367 N.E.2d at 279, 282 (indicating that the slow movements by the plaintiff due to a prior injury could have contributed to her own injuries).
167. *See* Stoit et al., *supra* note 108, at 2798, 2802 (finding that persons with ASDs have slower execution speeds and have a harder time predicting another person’s actions, both of which can be explained by a disconnect between the visual and motor portions of the brain in persons with ASDs).
168. *See* Doobay, *supra* note 5, at 2035 (finding slower processing speeds for persons with ASDs. Slower processing speeds can create difficulty in integrating information
lenging time deciphering what is occurring around him or her when
multiple stimuli are present. This could result in a different re-
action to environmental stimuli than how a person without an ASD
would respond to the same stimuli. Under contributory negligence,
a person with an ASD could have his or her entire claim barred for
physical symptoms outside of his or her control, whereas a person
without an ASD and with the same physical symptoms would not be
found contributorily negligent. 

Blindness, deafness, and slow or awkward movements have all
been found to be physical disabilities under the negligence stan-
dard. Muscular dystrophy would likely be included in the physical
disability classification. These physical disabilities include many
similar symptoms and manifestations to autism. Therefore, ASDs
and stimuli into a whole picture or view of what is occurring around a person who has
an ASD. See Booth & Happé, supra note 123, at 1404 (stating that persons with ASDs
have a hard time “integrating information into a meaningful whole”).

169. Compare Doumas et al., supra note 106, at 858 (finding when the number of
environmental stimuli grows so does the prominence of balance deficiencies relating to
postural control which shows a hyper-reactivity to stimuli), with Stoit et al., supra note
108, at 2802 (indicating a disconnect in sensory processing systems of persons with
ASDs, such as visual and motor aspects, can make it difficult for a person with ASD to
understand both others around them and what is occurring in their environment on a
larger scale).

170. Compare RESTATEMENT (THIRD) OF TORTS: PHYSICAL & E MOTIONAL HARM § 11
cmt. b (noting people with physical disabilities can have different reactions to stimuli by
using the example of a person missing a leg and not being able to run as a car ap-
proaches, even though this is how a fully abled person would react), with Crippa et al.,
supra note 112, at 845, 847 (noting a disconnect in persons with ASDs when visual and
manual processes are required and how it can create reaction time deficits in response
to environmental stimuli or requests).

171. Compare Borus, 367 N.E.2d at 282 (indicating if the jury affirmed disability by
way of slow and awkward movement due to prior injury, then there would likely be no
contributory negligence per the physical disability reasonable person standard), and
Jankee v. Clark County, 612 N.W.2d 297, 302 (Wis. 2000) (noting that contributory neg-
ligence completely bars recovery), with Crippa et al., supra note 112, at 45 (finding peo-
ple with ASDs have slower reaction times and poor coordination), and Burch, 543
N.W.2d at 278, 280 (finding a person with “autistic tendencies” subject to the typical
reasonable person standard because mental deficiencies cannot be accounted for).

566, 567 (La. App. Ct. 1981) (applying the physical disability reasonable person stan-
dard to a blind person), and Borus v. Yellow Cab Co., 367 N.E.2d 277, 282 (Ill. App. Ct.
1977) (stating that the physical disability standard could be applied to a person who
exhibited slow and awkward movements), with RESTATEMENT (SECOND) OF TORTS
§ 283C cmt. a (Am. Law Inst. 1965) (referencing deafness and blindness as examples of
physical disabilities).

173. Compare Elvidge & Bayley, supra note 128, at 16 (stating that DMD will even-
tually require use of a wheelchair and stating a blood test can show whether an individ-
ual has muscular dystrophy), with RESTATEMENT (SECOND) OF TORTS § 283C cmt. b
(distinguishing mental and physical disabilities, noting the public is more familiar with
physical disabilities and physical disabilities are also more easily proven).

174. Compare Kaur et al., supra note 5, at 80, 88 (providing that persons with ASDs
have gait abnormalities, motor deficiencies and delays, and experience poor bilateral
should be viewed as a physical disability under the negligence standard.  

B. AUTISM SHOULD BE VIEWED UNDER THE PHYSICAL DISABILITY REASONABLE PERSON STANDARD

For physical disabilities in negligence cases, a physical disability reasonable person standard is applied. In *Roberts v. State, Through Louisiana Health and Human Resources Administration*, in which the Court of Appeal of Louisiana assessed a blind person under the reasonable person negligence standard, the court asked what a reasonable blind person would have done given those circumstances. The court found Burson acted as a reasonable person because he conformed to the same standard of care other blind persons would have under those same circumstances. In *Borus v. Yellow Cab Company*, the Appellate Court of Illinois, First District, Fourth Division stated a jury would have to determine what a reasonable person with the same disability would have done under those circumstances. If this standard were applied, the court stated the taxi driver’s knowledge, or what the driver should have known, would need to be considered in determining contributory negligence.

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175. Compare *Jankee*, 612 N.W.2d at 312 (noting the emotional deficiency rule was created to prevent courts from considering variations of character, emotional instability, and intelligence), and *Restatement (Second) of Torts § 283B cmt. b1* (explaining the emotional deficiency standard is not taken into account because one cannot practically look to intellect, temperament, and emotional balance when determining whether an individual acted as a reasonable person), and *Roberts*, 396 So. 2d. at 567 (noting that society cannot require a person to conform to physical standards that are impossible for him to conform to), with *Mintz*, *supra* note 1, at 45, 50 (showing that ASDs are not a disorder that can be boiled down to simply emotional or intellectual deficiencies because physical symptoms, such as coordination, planning, seizures, and other neurobiological symptoms, are common manifestations of ASDs), and *Kaur et al.*, *supra* note 5, at 88 (noting many motor performance deficiencies in persons with ASDs are not correlated or connected with intellect).


179. *Roberts*, 396 So.2d at 567.


Since ASDs should be considered a physical disability under negligence, the physical disability reasonable person standard ought to apply to persons with ASDs.183 Thus, instead of inquiring whether a person with an ASD acted as a reasonable person generally, the question would be whether the person with an ASD acted as a reasonable person with an ASD and the same physical symptoms would have acted in similar circumstances.184 Due to different functioning levels and physical manifestations of ASDs, this standard could be tailored to meet those needs.185 By analogy to the Third Restatement, the mental effects of ASDs do not necessarily need to be accounted for, but the physical manifestations of ASDs need to be viewed under the physical disability standard.186 For example, if a claim was based on the reaction time of a person with an ASD, then the inquiry could be presented as what a reasonable person with a slower reaction time would have done under the same circumstances.187

C. INTELLECTUAL DISABILITIES IN PERSONS WITH AUTISM SHOULD NOT PREVENT THE CLASSIFICATION OF AUTISM AS A PHYSICAL DISABILITY UNDER THE REASONABLE PERSON STANDARD

Viewing mental deficiencies under a different light than physical disabilities is based on the policy that intellectual capabilities and emotional imbalances cannot practically be taken into account.188

183. Compare Crippa et al., supra note 112, at 845 (indicating persons with ASDs have slower reaction times and poor coordination), with Borus, 367 N.E.2d at 282 (determining the physical disability reasonable person standard should apply to cases where the disability consists of slow and awkward movements due to prior injury or old age).

184. Compare Restatement (Second) of Torts § 283C (Am. Law Inst. 1965) (stating a person with a physical disability must conform to the standard of a reasonable man with the same disability), with Roberts, 396 So.2d at 567 (determining that a blind man was not negligent because he acted as a reasonable blind person would have under the same circumstances).

185. Compare Kaur et al., supra note 5, at 88 (laying out the different functioning levels of ASDs to include low and high functioning ASD persons, measuring low functioning at an IQ of 70 or less and high functioning having an IQ above 70), and Mintz, supra note 1, at 45 (noting persons with ASDs experience a wide and diverse range of physical manifestations), with Restatement (Third) of Torts: Physical & Emotional Harm § 11 cmt. b (providing the negligence standard applies in tort law to account for the individual situation of the actor), and Restatement (Second) of Torts § 283C cmt. a (indicating the reasonable man is to be identical with the actor).

186. See Restatement (Third) of Torts: Physical & Emotional Harm § 11 cmt. c (indicating that old age cannot be looked to as a physical disability itself, but physical disabilities and manifestations caused by old age can be viewed under the physical disability reasonable person standard).

187. See id. (providing the example of an eighty-year-old no longer being able to run, yet not being negligent for the inability to run when an immediate hazard approaches; thus, accounting for the inability to run, but not the age in and of itself).

188. Compare Restatement (Second) of Torts § 283B cmt. b1 (deciding the reason for holding persons with mental deficiencies to the same reasonable person standard as
However, ASDs do not translate to intellectual disabilities or emotional imbalances; ASDs are social and sensory processing disorders with physical manifestations. Historically speaking, when the mental deficiency standard was created, ASDs were thought to be mental disabilities. However, there is a broad range of intellectual abilities on the autism disorder spectrum, including persons who have genius-level IQs. Based on evolving scientific evidence, viewing persons with ASDs in light of the physical disability reasonable person standard would not disrupt this policy. Persons with ASDs who have an average or above average IQ experience the same physical manifestations that are generally attributable to ASDs. Based on diagnostic criteria, ASDs cannot be exaggerated or falsely created by a person in a negligence claim because ASDs’ symptoms have to be present in early childhood for a diagnosis.

189. Compare Doobay et al., supra note 5, at 2029 (indicating that the methodology of this study only looked to persons with ASDs who had IQs of 130 and above), with Mintz, supra note 1, at 44, 45 (noting that ASD at its core is classified by social and communication interactions, and requiring hyper- or hypo-reactivity to sensory input to be diagnosed with an ASD, also providing the DSM-5 diagnosis criteria which do not include any reference to intellectual disability).

190. Compare Restatement (Second) of Torts § 283B cmt. b (stating the concept of the mental deficiency standard dates back to at least 1611), with Mintz, supra note 1, at 45 (indicating that many persons with ASDs were misdiagnosed with intellectual disabilities and that persons with intellectual disabilities were improperly diagnosed with ASDs).

191. Compare Kaur et al., supra note 5, at 88 (listing the two most basic breakdowns of functioning levels as high and low, with high having an IQ greater than 70 and low having an IQ of 70 or below), with Doobay et al., supra note 5, at 2035 (including in the study only persons with ASDs who had an IQ of 130 and above).

192. Compare Restatement (Second) of Torts § 283B cmt. b1 (providing that a policy behind the mental deficiency standard is that intellectual ability cannot be taken into account), with Kaur et al., supra note 5, at 88 (showing based on IQ scores differentiating high and low functioning ASDs that intellectual disabilities are not present in all persons with ASDs), and Mintz, supra note 1, at 45 (listing the diagnostic criteria for ASDs which does not include specific IQ cut-offs or possessing an intellectual disability as a requirement for a diagnosis).

193. See Kaur et al., supra note 5, at 88 (determining that movement times, imitation-based tasks, bilateral coordination, and social-motor coordination deficiencies do not correlate with IQ); see also Doobay et al., supra note 5, at 2035 (finding persons with ASDs who have IQs above 130 still exhibit slower processing speeds).

194. Compare Jankee, 612 N.W.2d at 312 (providing one of the policies behind mental deficiencies not being accounted for under the reasonable person standard was to prevent persons from pretending to have mental disabilities when charged with a negligence claim), with Mintz, supra note 1, at 45 (including the DSM-5 diagnosis requirement that symptoms must have been present since early childhood to be diagnosed with ASD).
Under negligence law, viewing people with ASDs within the physical disability standard promotes rather than hinders the policy behind the standard. The hypothetical reasonable person is supposed to be identical to the actor in question. The physical manifestations ASDs present are simply circumstances under which a person with ASD must act. This is only an application of those circumstances to the specific situation, as required by the Restatement. The physical manifestations of ASDs are objectively verifiable and significant. The application of the physical disability standard to ASDs would not account for the mental or emotional state of the actor but rather the physical symptoms caused by the disorder that are out of the actor's control.

IV. CONCLUSION

Negligence law needs to assess persons with ASDs under the physical disability reasonable person standard when physical symptoms caused by an ASD result in a negligence claim or contributory negligence defense. Physical disabilities such as blindness and deafness, as well as slow and awkward movements, have already been categorized by the courts and Restatements as disabilities to which

195. Compare Restatement (Second) of Torts § 283C cmt. a (explaining the reasonable man is identical to the actor), with Roberts v. State ex rel. La. Health & Human Res. Admin., 396 So.2d 566, 567 (La. App. Ct. 1981) (indicating a policy justification in explaining that a person with a physical disability cannot be required to conform to standards that are impossible for him or her to meet).

196. Restatement (Second) of Torts § 283C cmt. a.

197. See id. (indicating that physical disabilities are accounted for because they are “circumstances” under which the reasonable person must act).

198. See id. (accounting for physical disabilities is not a different reasonable person standard, but rather applying the reasonable person standard to the circumstances of that disability).

199. Compare Tripi et al., supra note 99, at 82 (finding 97% of persons with ASDs had some sort of MND, either simple or complex), and Kaur et al., supra note 5, at 80 (noting 50 to 85% percent of children with ASDs have perceptuomotor skill deficits), with Restatement (Third) of Torts: Physical & Emotional Harm § 11 cmt. a (requiring that a physical disability be significant and identifiable).

200. See Restatement (Third) of Torts: Physical & Emotional Harm § 11 cmt. c (allowing for the ability to separate a circumstance that cannot be taken into account for the reasonable person standard, such as age, from the physical disabilities that can be accounted for, such as an inability to run).

201. Compare Restatement (Third) of Torts: Physical & Emotional Harm § 11 (Am. Law Inst. 2010) (allowing a person’s physical disability to be accounted for when determining whether they acted as a reasonable person), with Mintz, supra note 1, at 46 (noting the array of physical symptoms that can present themselves in persons with ASDs including, but not limited to, motor delays, coordination issues, epilepsy, and over-responsive nervous systems), and Kaur et al., supra note 5, at 80 (noting persons with ASDs experience gait and walking abnormalities, bilateral coordination difficulties, and sensory motor performance deficits).
the physical disability reasonable person standard applies. However, due to the continuous classification of ASDs as solely mental disorders in the DSM-5, ASDs have not had as much success in being treated more appropriately as physical disabilities. Medical studies have continuously shown that persons with ASDs tend to exhibit similar symptoms to those that people with hearing and vision impairments, amongst other physical disabilities, experience. The reasoning behind mental deficiencies not receiving the same treatment as physical disabilities focuses on policy pertaining to intellectual ability and emotional stability—neither of these are defining characteristics of an ASD diagnosis.

Persons with physical disabilities already recognized by the courts receive a fair reasonable person legal standard. The same symptoms exhibited in persons with ASDs could lead to similar negligence claims brought against such persons, yet persons with ASDs would receive the typical reasonable person standard, which would be impossible for such persons to meet. This creates an imbalance of justice in the legal system and demonstrates biases based simply on the name of a person’s diagnosis rather than the symptoms and difficulties he or she must face. Persons with ASDs experience physical symptoms outside their control and cannot be cured simply through medication. People with ASDs often undergo years of extensive occupational and physical therapy to combat these challenges. Similar therapies have been used to help people who have a physical disability labeled as such by the courts. The legal principles applicable to per-

202. See Restatement (Second) of Torts § 283C cmt. a (Am. Law Inst. 1965) (stating blindness and deafness are physical disabilities that would be assessed under the physical disability reasonable person standard); see also Borus v. Yellow Cab Co., 367 N.E.2d 277, 282 (Ill. App. Ct. 1977) (determining slow and awkward movements need to be assessed under the physical disability reasonable person standard).

203. See Mintz, supra note 1, at 45 (providing the ASD diagnostic criteria presented in the DSM-5 and noting its lack of ability to account for the various other symptoms ASDs manifest).

204. Compare Kaur et al., supra note 5, at 80, 88 (stating persons with ASDs have gait abnormalities, motor deficiencies or delays, and exhibit poor bilateral coordination), with Fellinger et al., supra note 138, at 942 (indicating persons who are deaf or hearing impaired experience delays in motor performance), and Rutkowska et al., supra note 142, at 605 (finding that blind and visually impaired persons have poor bilateral coordination).

205. Compare Restatement (Second) of Torts § 283B cmt. b1 (stating the policy for holding persons with mental deficiencies to the same reasonable person standard as those without is because of the impracticality in accounting for intellect and emotional imbalances), with Mintz, supra note 1, at 45 (noting that ASDs are diagnosed by social and communication deficiencies while showing the DSM-5 diagnostic criteria which do not reference intellectual disability or emotional instability).
sons with ASDs must evolve with the medical field and must keep pace with scientific breakthroughs regarding ASDs.

-Jessica J. Patach '21
ARCE V. UNITED STATES: THE NINTH CIRCUIT CORRECTLY INTERPRETED § 1252(G) OF THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996 WHILE THE EIGHTH CIRCUIT IGNORED SUPREME COURT PRECEDENT IN SILVA V. UNITED STATES

I. INTRODUCTION

Solving the undocumented immigrant problem has plagued United States politics since the late nineteenth century. There have been countless attempts by the United States Congress in the past 150 years to curb undocumented immigration and to put procedures in place to aid those who seek to enter the country legally. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) in an attempt to respond to America’s immigration problem. The IIRIRA was an amendment to the Immigration and Nationality Act of 1952. One of the provisions of the 500-page congressional bill, § 1252(g), was designed to strip the federal district courts of jurisdiction to hear deportation appeals regarding certain actions by the Attorney General. Following the pass-
In Arce v. United States,11 Claudio Anaya Arce sought asylum in the United States.12 However, an asylum officer determined that Arce did not express enough fear of persecution if he returned to his home country.13 After an immigration judge affirmed the officer's findings, the Attorney General ordered Arce to be deported to Mexico.14 Arce filed an emergency petition for review and a motion for a stay of removal with the United States Court of Appeals for the Ninth Circuit.15 The Ninth Circuit granted Arce's motions, but just hours later, Arce was deported to Mexico by the Department of Homeland Security ("DHS").16 After Arce's return to the United States, he brought a tort action for wrongful removal against the United States.17 The Ninth Circuit determined that, while the action may

7. See Humphries v. Various Fed. U.S. Immigration & Naturalization Serv. Emps., 164 F.3d 936, 944-945 (5th Cir. 1999) (stating that Humphries' claims arose from the Attorney General's commencement of proceedings and adjudication of his case, thus district court was stripped of jurisdiction); see also Am.-Arab Anti-Discrimination Comm. v. Reno, 119 F.3d 1367, 1372 (9th Cir. 1997) [hereinafter Reno II] (noting that construing the statute to strip jurisdiction from all cases arising from the Attorney General's "commencement of proceedings, adjudication of case, or execution of removal orders" would strip federal district courts of all jurisdiction in every case and Congress could not have intended for such a result).
9. See Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 476 (1999) [hereinafter AADC II] (granting certiorari and clarifying that § 1252(g) only applies to the three categories listed within the statute and does not strip the federal district courts of jurisdiction entirely).
10. See Arce v. United States, 899 F.3d 796, 800 (9th Cir. 2018) (stating that the federal district courts had jurisdiction under § 1252(g) to hear cases challenging wrongful removal of undocumented immigrants); Silva v. United States, 866 F.3d 938, 942 (8th Cir. 2017) (stating that the federal courts did not have jurisdiction to hear cases challenging wrongful removal under § 1252(g) as the challenge arose from the Attorney General's execution of a removal order).
11. 899 F.3d 796 (9th Cir. 2018).
12. Arce, 899 F.3d at 798.
13. Id.
14. Id. at 798-99.
15. Id. at 799.
16. Id.
17. Id.
have arisen from the Attorney General’s execution of a removal order, the federal courts still retained jurisdiction to hear Arce’s claim.18

This Note will first examine the facts and holding of Arce.19 This Note will also discuss the importance of Judge Kelly’s dissenting opinion in Silva v. United States20 to the Arce decision.21 Next, this Note will dive into the background and precedent leading to the Arce and Silva decisions.22 Finally, this Note will analyze both the Ninth Circuit and the Eighth Circuit decisions and will conclude that Arce v. United States was correctly decided while Silva v. United States ignored United States Supreme Court precedent in order to advance the Eighth Circuit’s own interpretation of § 1252(g).23

II. FACTS AND HOLDING

In April 2014, Claudio Anaya Arce, a Mexican citizen, was detained by United States Customs and Border Patrol officers in Adelanto, California.24 Arce sought asylum, but officers did not believe he demonstrated a reasonable fear of persecution or torture in his home country.25 On February 4, 2015, an immigration judge affirmed the findings made by the asylum officer.26 Two days later, Arce filed an emergency petition for review and a motion for a stay of removal in the United States Court of Appeals for the Ninth Circuit.27 The order of removal was temporarily stayed by the Ninth Circuit on February 6, 2015.28 However, even though the Department of Homeland Security (“DHS”) was notified by both Arce’s attorney and the court through several faxes and phone calls, the stay was ignored Arce was deported to Mexico mere hours after the temporary stay was issued.29 Arce was returned to the United States pursuant to a court order issued from the Ninth Circuit on February 20, 2015.30

Arce filed a claim for wrongful deportation and removal with DHS.31 After DHS denied his claim, Arce brought claims of false ar-

18. See id. at 800 (stating that “[a] decision or action to violate a court order staying removal . . . falls outside of the statute’s jurisdiction-stripping reach.”).
19. See infra notes 24-58 and accompanying text.
20. 866 F.3d 938 (8th Cir. 2017).
21. See infra notes 59-65 and accompanying text.
22. See infra notes 66-197 and accompanying text.
23. See infra notes 260-78 and accompanying text.
25. Id. at 798-99.
26. Id. at 798-99.
27. Id.
28. Id.
29. See id. (noting that Arce was deported to Mexico on February 6, 2015 at 2:15 PM).
30. Id.
31. Id.
rest, false imprisonment, intentional infliction of emotional distress, and negligence against the United States under the Federal Tort Claims Act\(^\text{32}\) ("FTCA") in the United States District Court for the Central District of California.\(^\text{33}\) At the district court level, the United States argued that the federal courts did not have jurisdiction to hear Arce’s case.\(^\text{34}\) They stated that United States Supreme Court precedent under \(\textit{Reno v. American-Arab Anti-Discrimination Committee}\(^\text{35}\) ("AADC II") prohibited federal courts from hearing cases in which the Attorney General commenced proceedings, adjudicated cases, or executed removal orders.\(^\text{36}\) The defendant argued the federal courts could not hear Arce’s case as the controversy arose out of the Attorney General’s execution of Arce’s removal order.\(^\text{37}\)

The United States cited \(\textit{Lopez v. United States}\(^\text{38}\), in which a mother brought an action against the United States on behalf of her son who she claimed was wrongfully deported.\(^\text{39}\) Lopez argued that the deportation was wrongful because a mandatory stay of deportation was granted by statute and was acknowledged by Immigration and Customs Enforcement ("ICE") prior to his removal.\(^\text{40}\) Lopez’s son was later tortured and died in Honduras.\(^\text{41}\) In \(\textit{Lopez}\), the United States District Court for the Central District of California determined that the federal courts did not have jurisdiction to hear the plaintiff’s claim as her son’s deportation arose from the Attorney General’s decision to execute the deceased’s removal order.\(^\text{42}\) With this precedent in mind, the district court agreed with the defendant and dismissed Arce’s case for lack of jurisdiction under \(8 \text{ U.S.C. § 1252(g)}\) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996\(^\text{43}\) ("IIRIRA").\(^\text{44}\)

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\(^{33}\) \(\textit{Arce}, 899 F.3d at 799.\)
\(^{36}\) \(\textit{Id. at } *4.\)
\(^{37}\) \(\textit{Id. at } *5.\)
\(^{40}\) \(\textit{Lopez}, 2014 U.S. Dist. LEXIS 34623, at *1.\)
\(^{41}\) \(\textit{Id. at } *2.\)
\(^{42}\) \(\textit{Id. at } *3.\)
\(^{44}\) \(\textit{Lopez}, 2014 U.S. Dist. LEXIS 34623, at *3. The statute reads:
Except as provided in this section and notwithstanding any other provision of law (statutory or non-statutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against alien under this chapter."
Arce appealed the district court’s judgment to the Ninth Circuit.45 Once again, the United States argued that the language of § 1252(g) prohibits federal courts from obtaining jurisdiction over cases which arise from an Attorney General’s execution of a removal order.46 The United States argued it did not matter that the Attorney General violated the court’s stay of removal order because § 1252(g) extends broadly to any and all actions which stem from a removal order.47

The Ninth Circuit disagreed, positing that § 1252(g) is much narrower than the government painted it.48 Arce challenged the execution of the removal order, not its validity.49 The court explained that because the Ninth Circuit issued a stay of removal, there was no order for the Attorney General to execute.50 The Attorney General violated the Ninth Circuit’s stay of removal when he ordered Arce’s deportation to Mexico.51 As the deportation violated the Ninth Circuit’s order, the Attorney General had not acted within his authority to execute removal orders under § 1252(g).52

The court cited two United States Supreme Court cases, which state that § 1252(g) should be construed narrowly.53 In AADC II, the Supreme Court noted that § 1252(g) does not prohibit the federal courts from hearing cases that stem from the Attorney General’s removal authority.54 The Ninth Circuit determined that actions challenging the government’s violation of a stay of removal do fall within the federal courts’ jurisdiction.55 If § 1252(g) was as broad as the federal government argued, the federal courts would have no jurisdiction to exercise their own orders.56 The Ninth Circuit noted that subsection (g) had not been interpreted to broadly sweep jurisdiction away from the courts in cases merely arising from one of the Attorney Gen-

8 U.S.C. § 1252(g)

45. Arce, 899 F.3d at 799.
46. Id.
47. Id.
48. Id.
49. Id. at 800.
50. See id. (stating that “[Arce’s] claims arise not from the execution of the removal order, but from the violation of our court’s order.”).
51. Id.
52. See id. (noting, “Indeed, the stay of removal ‘temporarily suspend[ed] the source’ of the Attorney General’s ‘authority to act,’ resulting in a ‘setting aside of . . . [the] authority to remove Arce.’”) (quoting Nken v. Holder, 556 U.S. 418, 428-29 (2009)).
54. See id. (stating, “Thus, § 1252(g) does not strip the federal courts of jurisdiction over claims challenging the multitude of ‘other decisions or actions that may be part of the deportation process . . . ’”) (quoting AADC II, 525 U.S. 471, 482 (1999)).
55. Id.
56. Id. at 801.
eral's available actions.\textsuperscript{57} As this was not what Congress intended, the Ninth Circuit determined that the federal courts do have jurisdiction under § 1252(g) when the Attorney General violates stays of removal.\textsuperscript{58}

The Ninth Circuit also took some time to analyze and acknowledge Judge Kelly's dissent in \textit{Silva v. United States}\textsuperscript{59} from the United States Court of Appeals for the Eighth Circuit.\textsuperscript{60} In \textit{Silva}, the Eighth Circuit determined that § 1252(g) should be read broadly so as not to grant the federal courts jurisdiction to hear cases challenging wrongful deportations in violation of stays of removal.\textsuperscript{61} Judge Kelly respectfully dissented and argued that the Supreme Court's holding in \textit{AADC II} narrowed the scope of § 1252(g).\textsuperscript{62} As the Eighth Circuit issued a stay of removal, there was no order to execute, and the Attorney General had no authority to deport Silva under § 1252(g).\textsuperscript{63} The Ninth Circuit agreed with Judge Kelly's analysis and concluded that Arce's claims could proceed.\textsuperscript{64} The Ninth Circuit then reversed and remanded the case to the district court.\textsuperscript{65}

\section*{III. BACKGROUND}

\subsection*{A. THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996 AND § 1252(G)}

In 1996, the United States Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").\textsuperscript{66} The IIRIRA was introduced due to the findings of Speaker Newt Gingrich's Congressional Task Force on Immigration Reform ("Task Force").\textsuperscript{67} The Task Force defined undocumented immigration as an ongoing crisis that was among the most critical challenges facing the United States.\textsuperscript{68} Among other things, the Task Force recommended doubling

\begin{itemize}
\item \textsuperscript{57} \textit{Arce}, 899 F.3d at 800 (citing \textit{Jennings}, 138 S. Ct. at 841).
\item \textsuperscript{58} \textit{Id}.
\item \textsuperscript{59} 866 F.3d 938 (8th Cir. 2017).
\item \textsuperscript{60} \textit{Arce}, 899 F.3d at 801.
\item \textsuperscript{61} See id. (noting, "The \textit{Silva} majority held that § 1252/g) eliminated jurisdiction because the removal order 'still existed' in spite of the stay, thereby 'connecting' the FTCA claim 'directly and immediately' to the decision to execute the order.") (quoting \textit{Silva v. United States}, 866 F.3d 938, 940 (8th Cir. 2017)) (quoting \textit{Humphries v. Various Fed. U.S. Immigration & Nationalization Serv. Emps.} 164 F.3d 936, 943 (5th Cir. 1999)).
\item \textsuperscript{62} \textit{Silva}, 866 F.3d at 942 (Kelly, J., dissenting).
\item \textsuperscript{63} \textit{Id}.
\item \textsuperscript{64} \textit{Arce}, 899 F.3d at 801.
\item \textsuperscript{65} \textit{Id}.
\item \textsuperscript{66} 8 U.S.C. § 1252(g) (2005).
\item \textsuperscript{67} See generally H.R. REP. No. 104-469, at 512 (1996) (explaining the history of the IIRIRA and what led to its passing).
\item \textsuperscript{68} \textit{Id}.
\end{itemize}
the number of border patrol agents, targeting criminal aliens who repeatedly attempted to enter the United States, and increasing the number of Immigration and Naturalization Service ("INS") detention centers twofold.69 The IIRIRA was intended to be both generous and serve the needs of the American ideals of law and order.70 The IIRIRA amended a multitude of provisions in the Immigration and Naturalization Act ("INA"), including the federal district courts’ jurisdiction over deportation and removal cases.71

Section 1252(g) of the IIRIRA states that no federal district court shall obtain jurisdiction over cases of any undocumented immigrant which arise from the Attorney General’s decision to commence proceedings, adjudicate cases, or execute removal orders.72 On first glance, it may seem as though this statute swept federal jurisdiction away from all deportation and removal cases, as almost any action against an undocumented immigrant can be said to arise from the commencement of proceedings, adjudication of cases, or execution of removal orders.73 However, in Reno v. American-Arab Anti-Discrimination Committee II,74 ("AADC II") the United States Supreme Court stated that § 1252(g) is not a zipper clause which cuts off jurisdiction in all deportation and removal cases.75 Instead, the statute merely excludes jurisdiction from the federal district courts in the three instances listed in § 1252(g).76 These instances occur when the Attorney General has made a decision to commence proceedings, adjudicate cases, or execute removal orders.77 In Jennings v. Rodriguez,78 the United States Supreme Court affirmed AADC II and stated that the language in § 1252(g) should not be interpreted to mean that every claim somehow relating to one of the three actions taken by the Attorney General should be excluded in the federal courts.79

In Arce v. United States,80 the United States Court of Appeals for the Ninth Circuit faced the issue of whether, under the Federal Tort

69. Id.
70. Id. at 110-11.
71. 8 U.S.C. § 1252(g)
72. Id.
73. See Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999) (determining that § 1252(g) is not as broad as the two parties contended).
75. See AADC II, 525 U.S. at 482 (noting that a zipper clause is one which would make the federal district courts unable to hear any deportation claim under 1252(g)).
76. Id.
77. 8 U.S.C. § 1252(g)
80. 899 F.3d 796 (9th Cir. 2018).
Claims Act\(^81\) ("FTCA"), a wrongfully deported immigrant may bring a claim against the federal government.\(^82\) The FTCA allows persons to bring claims against the United States in the federal courts.\(^83\) The United States Courts of Appeals for the Eighth and Ninth Circuits have split on whether wrongfully deported claimants may bring actions against the United States for their removals.\(^84\) While the Supreme Court has not ruled specifically on whether federal courts have jurisdiction to hear FTCA claims brought by wrongfully deported individuals, the Court stated that federal courts do not lose jurisdiction just because an individual’s claim arises from the Attorney General’s commencement of their deportation or removal proceeding, adjudication of their case, or execution of their removal order.\(^85\)

B. Humphries v. Various Federal United States Immigration & Naturalization Service Employees

After the passing of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,\(^86\) ("IIRIRA") and prior to the United States Supreme Court’s ruling in Reno v. American-Arab Anti-Discrimination Committee II,\(^87\) ("AADC II") the United States Court of Appeals for the Fifth Circuit interpreted the meaning of § 1252(g).\(^88\) In Humphries v. Various Federal United States Immigration & Naturalization Service Employees,\(^89\) the Fifth Circuit determined that the federal district court did not have jurisdiction to hear Humphries’ retaliatory exclusion claim against the Immigration and Naturalization Service ("INS") under § 1252(g).\(^90\) In Humphries, Alexander Tito Humphries brought a pro se complaint alleging five causes of action

\(82\). Arce v. United States, 899 F.3d 796, 798 (9th Cir. 2018).
\(83\). 28 U.S.C. § 1346
\(84\). Compare Arce, 899 F.3d at 800 (holding the federal courts did have jurisdiction to hear FTCA claims), with Silva v. United States, 866 F.3d 938, 942 (8th Cir. 2017) (finding the federal courts did not have jurisdiction to hear FTCA claims).
\(85\). Compare AADC II, 525 U.S. at 482 (maintaining that "[i]t is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings.")., with Jennings, 138 S. Ct. at 840 (stating that interpreting "arising from" in a broad fashion would make most deportation and removal claims unreviewable).
\(89\). 164 F.3d 936 (5th Cir. 1999).
\(90\). See Humphries, 164 F.3d at 945 (determining that "[p]ursuant to § 1252(g), we therefore have no jurisdiction to entertain Humphries’ allegations . . . .").
against various INS employees. The United States District Court for the Northern District of Texas assigned the case to a magistrate judge who dismissed Humphries’ claims for being frivolous under *Heck v. Humphrey* precedent. The district court adopted the magistrate’s recommendation as its own ruling.

Humphries then appealed to the Fifth Circuit. As Humphries’ claims presented a case of first impression, the court appointed Humphries counsel in regard to the *Heck v. Humphrey* issue. Humphries’ claim of Sunday Ukwu’s entrapment was dismissed, as he did not have standing to bring a claim for Ukwu. Humphries’ breach of contract claim was also dismissed because the Federal Tort Claims Act ("FTCA") stripped the federal district courts of jurisdiction over breach of contract claims in excess of ten thousand dollars. However, as for Humphries’ claims of involuntary servitude, constitutional violations while in detention, and retaliatory exclusion, the court determined that it must examine if the federal district court had jurisdiction to hear the claims under § 1252(g).

To begin its analysis, the Fifth Circuit stated that § 1252 of the IIRIRA provides that judicial review for undocumented immigrants’ deportation claims may always be filed with the appropriate federal appellate court. The court also reminded the parties of § 1252(g) which states that federal district courts do not have the authority to hear any case which arises from the Attorney General’s commencement of proceedings, adjudication of cases, or execution of removal orders. The court narrowed the issue to whether Humphries’ claims arose from one of the Attorney General’s three proscribed actions. As Congress had not defined the meaning of *arising from*, the court looked to previous cases and precedent to interpret the phrase as writ-

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91. See id. at 939. The causes of action were: (1) depriving another man, Sunday Ukwu, of a fair trial, (2) violation of the 13th Amendment by forcing Humphries to work for the INS under threats of deportation, (3) constitutional violations while in detention awaiting deportation, (4) retaliatory exclusion after claiming entrapment, and (5) various breach of contract claims against INS. Id.
93. Humphries, 164 F.3d at 939.
94. Id.
95. Id. at 939-40.
96. Id. at 940.
97. Id. at 941.
99. See Humphries, 164 F.3d at 941 (noting the district court had no jurisdiction as Humphries’ claim for damages was $65,000).
100. Id. at 941.
101. Id. at 941-42.
102. Id. at 942.
103. Id.
However, the court ultimately refused to define the phrase as used in § 1252(g). Instead, the court painted the phrase as a spectrum. At one end of the spectrum, the phrase is an umbrella term which catches every remote event which may fall under one of the three actions of the Attorney General. On the other end, it is a very distinct phrase which only catches events which directly stem from one of the three listed actions.

With this spectrum in mind, the Fifth Circuit determined that the district court did have jurisdiction over Humphries’ claims of involuntary servitude and maltreatment while in detention. The court reasoned that, as the alleged involuntary servitude took place prior to Humphries’ deportation, the deportation had not yet commenced; thus, it would be impossible for servitude to occur within the timeframe of the Attorney General’s orders. As the injury occurred prior to the Attorney General’s commencement of the deportation proceeding, the federal district court possessed jurisdiction over the claim. Moving to the claim of maltreatment while in detention, the court determined that claim was too tenuously tethered to the Attorney General’s execution of a removal order to strip the federal district court of jurisdiction.

As for Humphries’ retaliatory exclusion claim, the court determined that the federal district court was stripped of jurisdiction under
§ 1252(g).

Humphries claimed that INS revoked his parole in retaliation for Humphries’ voicing his opinion about Sunday Ukwu’s alleged entrapment. The Fifth Circuit reasoned that, as Humphries’ revoked parole set off the chain of events which led to his deportation, the Attorney General’s commencement of proceedings was the direct cause of Humphries’ removal. As the Attorney General’s commencement of deportation proceedings, adjudication of those proceedings, and ultimate removal of Humphries directly arose from the revocation of his parole, the federal district court did not have jurisdiction to hear Humphries’ retaliatory exclusion claim.

C. Reno v. American-Arab Anti-Discrimination Committee

In Reno v. American-Arab Anti-Discrimination Committee II, the United States Supreme Court determined that § 1252(g) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) only deprives the federal courts of jurisdiction when a case directly results from one of three discrete actions of the Attorney General. These discrete actions are commencing proceedings, adjudicating cases, or executing removal orders. The American-Arab Anti-Discrimination Committee (“AADC”) sued United States Attorney General Janet Reno for allegedly targeting the group for deportation due to their affiliation with the Popular Front for the Liberation of Palestine (“PFLP”), a group classified by the United States government as a terrorist and communist organization. In 1987, the United States began deportation proceedings against members of the PFLP, and the AADC quickly sued the United States government.

After almost eight years of litigation in the United States District Court for the Central District of California, the district court enjoined the deportation of six of the eight AADC plaintiffs. As for the remaining two plaintiffs, Khader Hamide and Michel Shehadeh, the district court granted the government’s motion for summary judgment for reasons that would later be irrelevant after the IIRIRA was en-

114. Id. at 945
115. Id. at 939.
116. Id. at 945.
117. Id.
121. AADC II, 525 U.S. at 482.
122. Id. at 472-73.
123. See id. at 473 (stating the plaintiffs are Bashar Amer, Aiad Barakt, Julie Mugai, Amjad Obeid, Ayman Obeid, Naim Sharif, Khader Hamide, and Michel Shehadeh).
124. Id. at 475.
acted.\textsuperscript{125} The remaining six plaintiffs argued that their Fourteenth Amendment procedural due process and First Amendment freedom of speech rights were violated by the federal government.\textsuperscript{126} The district court determined that the federal courts had jurisdiction over the case as the six plaintiffs raised procedural claims.\textsuperscript{127} As for the due process claim, the district court reasoned that Supreme Court precedent has held that even undocumented immigrants are entitled to some constitutional rights of due process once they have entered the United States.\textsuperscript{128} The district court granted summary judgment in favor of the six AADC plaintiffs on their Fourteenth Amendment claim.\textsuperscript{129} However, the district court decided that it lacked the proper jurisdiction over the claims of plaintiffs Khader Hamide and Michel Shehadeh and denied their prayer for a preliminary injunction.\textsuperscript{130}

The government then appealed to the United States Court of Appeals for the Ninth Circuit, arguing that the district court did not possess jurisdiction as the claim was a political question, that such claims should be left for agencies or appellate courts, and that the claim brought by AADC was not ripe as the plaintiffs had not yet been deported.\textsuperscript{131} The Ninth Circuit determined that the district court did possess subject matter jurisdiction as it was not a political question, still had jurisdiction even though there were alternative mechanisms for review, and the claim was ripe.\textsuperscript{132} The appellate court reasoned that if the court were unable to hear this case as it was a political question, then undocumented persons would be unable to bring any claims in the federal courts where Immigration and Naturalization Service (“INS”) employees had retaliated against immigrants.\textsuperscript{133} Concerning the government’s alternative mechanisms for review argument, the court reasoned that the Supreme Court has stated that

\begin{itemize}
  \item Id.
  \item Id.
  \item AADC I, 883 F. Supp. at 1370.
  \item See id. at 1372 (stating, “[T]he Supreme Court noted that an alien seeking initial admission to the country has no constitutional rights, but recognized that ‘once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.”) (citing Landon v. Plasencia, 459 U.S. 21, 32 (1982)).
  \item See AADC I, 883 F. Supp. at 1379. The district court did not hear the jurisdictional claim as the IIRIRA was not passed until 1996. \textsuperscript{132} 8 U.S.C. \textsection{} 1101 (2005).
  \item Reno II, 119 F.3d at 1370.
  \item Am.-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1056 (9th Cir. 1995) \textit{[hereinafter Reno I].}
  \item Reno I, 70 F.3d at 1071.
  \item See id. at 1056 (determining, “If we were to decline jurisdiction on this basis . . . the courts [would] have no essential function in ensuring that aliens are not targeted by the INS in retaliation for exercising their acknowledged constitutional rights, and we would allow those rights to be forfeited without redress.”).
\end{itemize}
federal district courts may have the authority to hear cases brought by undocumented immigrants as the congressional language of the Immigration and Nationality Act was unclear. As for the government's contention that the AADC's claim was not ripe, the court looked to the two-prong test from *Abbott Laboratories v. Gardner* to determine if the AADC's claim was not ripe for an administrative agency to hear. The two-prong test from *Gardner* considers the fitness of the issues and the hardship of both parties. The Ninth Circuit determined that the issues were fit for review as the Immigration and Naturalization Service ("INS") does not have jurisdiction to review a selective enforcement claim. The court also stated that the issue was ripe as deportation could lead to undocumented immigrants facing irreparable injuries. The court affirmed in part and reversed and remanded in part for further review by the district court.  

The government sought certiorari to the Supreme Court. However, before the Supreme Court was able to grant or deny certiorari, the United States Congress passed the IIRIRA. Once Congress passed the IIRIRA, the government filed a motion in both the district court and the Ninth Circuit arguing that § 1252(g) retroactively deprived the federal district courts of jurisdiction to hear the AADC plaintiffs' claims. Even after IIRIRA was passed, on remand the district court kept the initial preliminary injunction in place and entered a preliminary injunction in favor of Hamide and Shehadeh. The district court concluded that the newly amended 8 U.S.C. § 1252(g) under the IIRIRA does not eliminate the federal district courts' jurisdiction to hear deportation cases.
The government once again appealed to the Ninth Circuit, claiming the district court no longer had jurisdiction under the IIRIRA. The government urged that the newly amended § 1252(g) deprived federal courts from hearing all deportation cases besides reviews of final deportation orders and thus applied to AADC retroactively. The Ninth Circuit affirmed the district court's ruling and reasoned that the provision did apply to AADC, but it did not deprive the court of jurisdiction. The court agreed with the government that § 1252(g) did apply retroactively. However, while § 1252(g) applied retroactively, the court determined that the language of § 1252(g) only limited jurisdiction when the Attorney General commenced proceedings, adjudicated cases, or executed a removal order. As the deportation cases against AADC were pending and the Attorney General had not yet issued any order of execution, § 1252(g) did not apply to the AADC plaintiffs.

After the Ninth Circuit’s decision in favor of the AADC plaintiffs, the government appealed to the United States Supreme Court, which granted certiorari after the government was denied a rehearing in front of the Ninth Circuit en banc. The Supreme Court narrowed the issue to whether the newly amended § 1252(g) of the IIRIRA or the previously controlling § 1105(a) of the Immigration and Nationalization Act of 1952 (“INA”) applied to this specific case. Section 1105(a) stated that the federal appellate courts had exclusive jurisdiction over deportation orders. Meanwhile, § 1252(g) of the IIRIRA limited jurisdiction in cases when the Attorney General commenced proceedings, adjudicated cases, or executed a removal order.

The government argued that § 1252(g) should be interpreted broadly to prohibit all claims brought in federal district courts by undocumented immigrants, besides final deportation orders, as the majority of claims would arise from commencing proceedings, adjudicating cases, or executing removal orders. The Court re-

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147. See id. at 1370-71 (arguing that AADC’s support of PFLP’s fundraising was sanctionable behavior and therefore the plaintiffs were able to face deportation).
148. Id. at 1371.
149. Id.
150. See id. at 1372 (finding, “We follow the D.C. and Seventh Circuits and conclude that subsection (g) applies retroactively.”).
151. Id.
152. Id.
153. AADC II, 525 U.S. at 476.
155. AADC II, 525 U.S. at 476.
156. Id.
157. Id. at 477-78.
158. See id. (noting both parties broadly interpreted § 1252(g)).
jected this interpretation as it created an interpretive anomaly. If the section was read as broadly as to strip jurisdiction from federal district courts in all deportation proceedings, then there would be no reason for Congress to pass § 309(c)(1) of the IIRIRA. Section 309(c)(1) describes the procedures for aliens who were in the midst of deportation proceedings at the time the IIRIRA was passed. If § 1252(g) was interpreted to exclude jurisdiction in all deportation cases, § 309(c)(1) would be useless as § 1252(g) incorporates all prior provisions of the IIRIRA.

Understanding this dilemma, the government argued that § 1252(g)’s language was meant to exclude § 1105(a) of the INA. The AADC, however, argued that § 1252(g) only applied to pending cases where the Attorney General has terminated the deportation proceedings and reinstated them under the newly amended § 1252(g). The Court rejected both of these arguments as implausible as they would invalidate sections of the IIRIRA.

The Court stated that § 1252(g) was much narrower than either party interpreted it to be. It was not a zipper clause which excluded jurisdiction in all deportation cases. Section 1252(g) plainly states that the section only applies when the Attorney General makes a decision or action to commence proceedings, adjudicate cases, or execute removal orders. The Court stated that these three actions do not apply to all deportation and removal actions. If they did, federal courts would be unable to hear any deportation cases, contrary to Congress’s intent when it passed the IIRIRA.

While the Court interpreted § 1252(g) to limit jurisdiction in only three instances, the AADC plaintiffs fell within one of those instances. The AADC plaintiffs brought suit against the United

159. *Id.*

160. *Id.* Sections 309(c)(1) and 1252(g) are identical across the two provisions. Section 309(c)(1) is found in the IIRIRA Amendment itself while § 1252(g) is found in the United States Code.

161. *AADC II*, 525 U.S. at 477 n.5.

162. *Id.* at 477-78.

163. *Id.* at 479.

164. *Id.*

165. See *id.* (stating the government’s argument would invalidate § 309(c)(1) while AADC’s argument would invalidate § 306(c)(1)).

166. *Id.* at 482.

167. *Id.*

168. 8 U.S.C. § 1252(g)


170. See *id.* (clarifying that “[i]t is implausible that the mention of three discrete events along the road to deportation . . . refer[s] to all claims arising from deportation . . . because that literary device is incompatible with the need for precision in legislative drafting.”).

171. *Id.* at 487.
States federal government challenging the commencement of proceedings against them. As commencing proceedings is one of the three discrete actions described in § 1252(g), the Court determined that the lower courts erred in granting the preliminary injunctions and reversed the Ninth Circuit.

D. SILVA V. UNITED STATES

In Silva v. United States, the United States Court of Appeals for the Eighth Circuit determined that Silva could not bring a claim against the government under the Federal Tort Claims Act ("FTCA") for wrongful deportation because the claim arose from the Attorney General’s decision to execute a removal order. In Silva, Jesus Eduardo Lopez Silva sued the government under the FTCA for the harms he suffered after being deported to Mexico. The United States District Court for the District of Minnesota determined that it did not have jurisdiction to hear Silva’s claim as it arose from the execution of a removal order by the Attorney General and granted the government’s motion to dismiss. The district court reasoned that, while Reno v. American-Arab Anti-Discrimination Committee II ("AADC II") interpreted § 1252(g) narrowly, the United States Court of Appeals for the Fifth Circuit in Humphries v. Various Federal United States Immigration & Naturalization Service Employees interpreted §1252(g) to include cases which arise from the Attorney General’s commencement of proceedings, adjudication of cases, or execution of removal orders.

Silva appealed to the Eighth Circuit claiming that the district court erred in granting the government’s motion to dismiss, as Silva’s claims did not arise from the execution of a removal order. Silva argued that his claims arose from the violation of a stay of removal. In the alternative, Silva argued that in the event his claims stemmed from the execution of a removal order, § 1252(g) was only intended to

172. Id.
173. Id. at 492.
174. 866 F.3d 938 (8th Cir. 2017).
177. Silva, 866 F.3d at 939.
180. 164 F.3d 936 (5th Cir. 1999).
182. Silva, 866 F.3d at 940.
183. Id.
apply to discretionary decisions.\textsuperscript{184} The Eighth Circuit rejected both of these arguments.\textsuperscript{185} First, the court asserted that claims connected directly and immediately to the execution of a removal order arise from that removal order.\textsuperscript{186} Dismissing Silva’s second argument, the court stated that there is nothing within § 1252(g) that distinguishes discretionary decisions from non-discretionary decisions.\textsuperscript{187}

The court then addressed Silva’s FTCA argument.\textsuperscript{188} Silva urged that the § 1252(g) jurisdiction limitations did not apply to claims brought against the United States under the FTCA as the jurisdiction limitations are not enumerated in the FTCA.\textsuperscript{189} Unswayed, the court stated that § 1252(g) specifically states that the jurisdiction limitations apply to any claim brought by an undocumented immigrant.\textsuperscript{190} The Eighth Circuit stated that the district court correctly granted the government’s motion to dismiss as Silva’s claims arose from the execution of a removal order.\textsuperscript{191}

Judge Kelly issued a dissenting opinion in Silva.\textsuperscript{192} She cited AADC II and stated that the United States Supreme Court rejected the notion that § 1252(g) acts as a zipper clause which strips jurisdiction from the federal courts in all deportation and removal cases.\textsuperscript{193} Instead, Kelly agreed with Silva’s argument that his claim did not arise from the execution of a removal order.\textsuperscript{194} The dissent reasoned that Silva’s claim arose from the violation of a stay of removal.\textsuperscript{195} Judge Kelly asserted that because a stay of removal invalidates an execution order, Silva’s claim could not have arisen from an execution order.\textsuperscript{196} Judge Kelly stated that she would reverse the district court’s motion to dismiss and rule in favor of Silva.\textsuperscript{197}

\begin{itemize}
\item \textsuperscript{184} Id.
\item \textsuperscript{185} Id.
\item \textsuperscript{186} Id. (citing Humphries, 164 F.3d at 943).
\item \textsuperscript{187} See Silva, 866 F.3d at 940 (stating that “[s]o long as the claim arises from a decision to execute a removal order, there is no jurisdiction.”) (citing Foster v. Townsley, 243 F.3d 210, 214-15 (5th Cir. 2011)).
\item \textsuperscript{188} See id. at 941 (noting that “Lopez Silva also contends that §1252(g) does not apply to claims under the FTCA . . . .”).
\item \textsuperscript{189} Id.
\item \textsuperscript{190} Id.
\item \textsuperscript{191} Id. at 942.
\item \textsuperscript{192} Id. (Kelly, J., dissenting).
\item \textsuperscript{193} Id. (citing Reno v. Am.-Arab Anti-Discrimination Committee, 525 U.S. 471, 482 (1999)).
\item \textsuperscript{194} Id. at 942.
\item \textsuperscript{195} Id.
\item \textsuperscript{196} See id. (maintaining that “[r]egardless of whether Silva’s claims are connected to his being removed from the United States, they cannot arise from the government’s execution of a removal order because there was no enforceable removal order to execute.”) (citing Nken v. Holder, 556 U.S. 418, 428 (2009); Garcia v. Attorney General, 553 F.3d 724, 729 (3d Cir. 2009)).
\item \textsuperscript{197} Id. at 943.
\end{itemize}
IV. ANALYSIS

In *Arce v. United States*, the United States Court of Appeals for the Ninth Circuit decided that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") did not strip the federal district court of jurisdiction over Claudio Anaya Arce's wrongful deportation claim against the United States federal government brought under the Federal Tort Claims Act ("FTCA"). On appeal, the Ninth Circuit reversed the United States District Court for the Central District of California's decision that it did not have jurisdiction under § 1252(g) of the IIRIRA. Section 1252(g) of the IIRIRA states that federal district courts do not have jurisdiction over deportation claims in which the Attorney General commenced proceedings, adjudicated cases, or executed removal orders. The Ninth Circuit reasoned that Arce's claim did not strip jurisdiction from the district court because it did not arise from the execution of the Attorney General's removal order. The court reversed and remanded.

First, this Analysis will establish that federal district courts have jurisdiction to hear any deportation and removal cases that are not listed in § 1252(g) of the IIRIRA. Next, this Analysis will argue that federal district courts do have jurisdiction over wrongful deportation claims brought by undocumented immigrants, as such claims do not fall within the three narrow categories spelled out in § 1252(g) of the IIRIRA. This Analysis will conclude by arguing that *Silva v. United States* was wrongfully decided by the United States Court of Appeals for the Eighth Circuit as it ignored precedent from the United States Supreme Court concerning the narrow applicability of § 1252(g). Finally, this Analysis will argue that *Arce v. United States* was rightly decided by the Ninth Circuit as wrongful deportation cases are not within the three distinct categories of § 1252(g).

198. 899 F.3d 796 (9th Cir. 2018).
201. *Arce v. United States*, 899 F.3d 796, 800 (9th Cir. 2018).
203. 8 U.S.C. § 1252(g).
204. *Arce*, 899 F.3d at 800.
205. *Id.* at 801.
206. See infra notes 211-19 and accompanying text.
207. See infra notes 220-37 and accompanying text.
208. 866 F.3d 938 (8th Cir. 2017).
209. See infra notes 238-53 and accompanying text.
210. See infra notes 254-59 and accompanying text.
Section 1252(g) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996\textsuperscript{211} ("IIRIRA") states that no federal district court may have jurisdiction to hear cases brought by an undocumented immigrant which arise from the Attorney General's decision to commence proceedings, adjudicate cases, or execute removal orders.\textsuperscript{212} All appeals of removal orders must be brought in the federal appellate courts.\textsuperscript{213} In \textit{Reno v. American-Arab Anti-Discrimination Committee II},\textsuperscript{214} ("AADC II") the United States Supreme Court stated that the language of § 1252(g) is not meant to cut off all federal jurisdiction over claims involving undocumented immigrants.\textsuperscript{215} Instead, the Court in \textit{AADC II} explained that § 1252(g) was much narrower than it seemed on its face.\textsuperscript{216} The Attorney General's powers to commence proceedings, adjudicate cases, and execute removal orders are three separate actions that do not cover every possible judicial proceeding involving the deportation of undocumented immigrants.\textsuperscript{217} For instance, in \textit{AADC II}, the Supreme Court determined that the federal district court did not have jurisdiction to hear the petitioners' claims under § 1252(g) as the Attorney General had already commenced deportation proceedings.\textsuperscript{218} Therefore, as § 1252(g) does not limit jurisdiction in all deportation cases, but just three distinct categories, federal courts have jurisdiction to hear cases outside of the Attorney General's decision to commence proceedings, adjudicate cases, and execute removal orders.\textsuperscript{219}

\begin{itemize}
\item \textsuperscript{211} 8 U.S.C. § 1252(g) (2005).
\item \textsuperscript{212} \textit{Id}.
\item \textsuperscript{213} \textit{Id. § 1252(b)(2)}.
\item \textsuperscript{214} 525 U.S. 471 (1999).
\item \textsuperscript{216} \textit{AADC II}, 525 U.S. at 482.
\item \textsuperscript{217} \textit{See id.} (noting that "[t]here are of course many other decisions or actions that may be a part of the deportation process . . . ").
\item \textsuperscript{218} \textit{See id.} at 473 (noting petitioners brought claim after deportation proceedings began in 1987); \textit{id.} at 472 ("Respondents' challenge to the Attorney General's decision to 'commence proceedings' against them falls squarely within § 1252(g) . . . ").
\item \textsuperscript{219} \textit{Compare id.} at 482 (stating that § 1252(g) only applies to three actions and reasoning, "[i]t is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings"), \textit{with Jennings v. Rodriguez}, 138 S. Ct. 830, 841 (2018) (clarifying that "[w]e did not interpret this language to sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General. Instead, we read the language to refer to just those three specific actions . . . ").
\end{itemize}
B. The Attorney General’s Actions that are Untouchable Under § 1252(g)

As the federal courts may hear cases that do not fall within one of the three categories listed in § 1252(g) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, federal courts may not hear cases which do fall within one of the three prescribed categories of § 1252(g). When the Attorney General commences proceedings, adjudicates cases, or executes removal orders, the federal courts do not have jurisdiction to hear removal cases brought by undocumented immigrants. In *Reno v. American-Arab Anti-Discrimination Committee II*, the United States Supreme Court determined that Attorney General Reno had commenced deportation proceedings, an action which falls under one of three categories proscribed by § 1252(g) of the IIRIRA. The Supreme Court’s decision in *AADC II* made it clear that federal district courts may not hear claims brought by undocumented immigrants that merely challenge the Attorney General’s decision to deport them.

As commencing proceedings is one of the three discrete actions taken by the Attorney General, the federal district courts may not obtain jurisdiction to hear claims challenging properly commenced deportations. While federal district courts may not obtain jurisdiction over claims which fall under one of the three proscribed categories of § 1252(g), the Supreme Court has stated that this should not be read as a blanket statement blocking jurisdiction from the courts as long as the claim arises from one of the three categories.

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221. Compare *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (stating §1252(g) is not a “‘zipper clause’ that says ‘no judicial review in deportation cases unless this section provides judicial review’”), with 8 U.S.C. § 1252(g) (stating “[n]o court shall have jurisdiction to hear any . . . claim . . . of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.”).
222. 8 U.S.C. § 1252(g)
224. *AADC II*, 525 U.S. at 492.
225. See *AADC II*, 525 U.S. at 487 (noting, “Respondents’ challenge to the Attorney General’s decision to ‘commence proceedings’ against them falls squarely within § 1252(g) . . . .”); id. at 490 (reasoning that challenging deportation proceedings in the federal district courts should not be permitted as “[p]ostponing justifiable deportation . . . is often the principal object of resistance to a deportation proceeding, and . . . could leave the INS hard pressed to enforce routine status requirements”).
226. Id. at 490.
227. Compare id. at 482 (stating §1252(g) is not “a shorthand way of referring to all claims arising from deportation proceedings”), *with Jennings v. Rodriguez*, 138. S. Ct. 830, 840 (2018) (explaining, “[i]nterpreting ‘arising from’ in this extreme way would also make claims of prolonged detention effectively unreviewable”).
In the Supreme Court case *Jennings v. Rodriguez*, Justice Alito explained that denying jurisdiction in all cases which arise from an attorney general's removal order would deny the federal courts jurisdiction over almost any claim an undocumented immigrant could bring against the United States.

The United States Court of Appeals for the Ninth Circuit in *Arce v. United States* interpreted the opinions from *AADC II* and *Jennings* to mean that wrongful deportations do not fall within the three proscribed categories listed in § 1252(g). The *Arce* court determined that the Attorney General’s violation of a court order falls outside of the three categories. The court also noted that if § 1252(g) was as broad as the federal government argued it to be, the federal courts would have no jurisdiction to exercise their own orders. This is a plausible interpretation of the Supreme Court’s precedent in *AADC II* and *Jennings* as the Court in both decisions acknowledged a myriad of instances in which deportation would arise from an act of the Attorney General and still be within the federal district courts’ jurisdiction. All of the instances described by the Court arise from one of the three categories listed in § 1252(g). In both *AADC II* and *Jennings*, the Supreme Court refused to accept the argument that § 1252(g) was a blanket provision which blocked jurisdiction in all cases which arise from deportation cases because doing so would practically prohibit undocumented immigrants from bringing any federal claim to the district courts. As § 1252(g) is not a blan-

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229. See *Jennings*, 138 S. Ct. at 840 (opining that interpreting the IIRIRA in this way “would lead to staggering results”).
230. 899 F.3d 796 (9th Cir. 2018).
231. *Arce v. United States*, 899 F.3d 796, 800 (9th Cir. 2018) (citing *Jennings*, 138 S. Ct. at 841; *AADC II*, 525 U.S. at 482).
232. See *Arce*, 899 F.3d at 800 (stating that “[a] decision or action to violate a court order staying removal similarly falls outside of the statute’s jurisdiction-stripping reach.”).
233. *Id.* at 801.
234. Compare *AADC II*, 525 U.S. at 482 (listing the following examples of instances which would result in federal district courts having jurisdiction: “[d]ecisions to open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include . . . provisions in the final order . . . and to refuse reconsideration of that order”), with *Jennings*, 138 S. Ct. at 840 (outlining examples of detained aliens alleging inhuman living conditions, aliens bringing claims of assault against guards, and aliens injured in a car accident during detention).
235. Compare *AADC II*, 525 U.S. at 482 (stating “[t]here are of course many other decisions or actions that may be a part of the deportation process . . .”), with *Jennings*, 138 S. Ct. at 840 (explaining “all those cases could be said to ‘arise[s] from’ actions taken to remove the aliens in the sense that the aliens’ injuries would never have occurred if they had not been placed in detention”).
236. Compare *AADC II*, 525 U.S. at 482 (noting Congress did not intend to strip jurisdiction away from federal courts concerning all claims brought by undocumented
ket provision to block jurisdiction of all deportation-related claims, the Ninth Circuit in *Arce* was justified in determining that a violation of a court’s stay of removal order was outside the scope of the Attorney General’s proscribed responsibilities.237

C. *Arce v. United States* was Rightly Decided While the Eighth Circuit Ignored Supreme Court Precedent in *Silva v. United States*

United States Supreme Court precedent is correctly interpreted to mean that § 1252(g) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996238 (“IIRIRA”) permits the federal district courts to obtain jurisdiction over cases involving the wrongful deportation of an undocumented immigrant after a federal appellate court has issued a stay of removal as this falls outside the scope of the Attorney General’s three proscribed categories of the IIRIRA.239 However, in *Silva v. United States*,240 the United States Court of Appeals for the Eighth Circuit determined that deportation claims brought by undocumented immigrants after the violation a stay of removal order did bar the federal district courts from obtaining jurisdiction.241 The Eighth Circuit decided that Silva could not bring a claim against the United States under the Federal Tort Claims Act242 (“FTCA”) as his claim arose from the Attorney General’s execution of a removal order.243

The Eighth Circuit relied on precedent from the United States Court of Appeals for the Fifth Circuit case *Humphries v. Various Federal United States Immigration & Naturalization Service Employ-
Decided on January 21, 1999, the Fifth Circuit in *Humphries* stated that claims which are connected directly and immediately to a removal order arise from that order and federal district courts may not obtain jurisdiction over them. The Eighth Circuit incorrectly applied *Humphries* to Silva’s wrongful deportation claim against the United States as the court in *Humphries* clearly stated that claims which are tenuously and remotely related to the Attorney General’s execution of removal orders should not be excluded from the federal district courts’ jurisdiction. Even if *Humphries* stated that claims arise from the actions of the Attorney General when they are connected directly and immediately, *Humphries* was decided one month prior to *AADC II*, and the Eighth Circuit should have utilized Supreme Court precedent to analyze Silva’s argument. Instead of following Supreme Court precedent, the Eighth Circuit dismissed Silva’s argument that *AADC II* required the court to narrow their interpretation of § 1252(g). The Eighth Circuit argued that the Supreme Court in *AADC II* did not state that § 1252(g) only applies to discretionary decisions. The Eighth Circuit’s focus is a detour from what the Supreme Court decided in *AADC II*, which is that federal district courts do have jurisdiction over cases that fall outside of the Attorney General’s decision to commence proceedings, adjudicate cases, and execute removal orders. The Eighth Circuit erred in not following *AADC II* precedent which stated that Congress was not attempting to block federal jurisdiction over

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244. 164 F.3d 936 (5th Cir. 1999).
245. See *Silva*, 866 F.3d at 940 (citing *Humphries* v. Various Fed. U.S. Immigration & Naturalization Serv. Emps., 164 F.3d 936, 944 (5th Cir. 1999)).
246. *Humphries*, 164 F.3d at 944.
247. Compare *Humphries*, 164 F.3d at 944 (noting “[t]hese claims bear no more than a remote relationship to the Attorney General’s decision to ‘execute [Humphries’] removal order’”), with *Silva*, 866 F.3d at 942 (stating that while the Attorney General violated the stay of removal order by deporting Silva, the federal district court did not have jurisdiction as the violation stemmed from the Attorney General’s original execution of Silva’s removal order before the stay was issued).
248. Compare *Humphries*, 164 F.3d at 943 (deciding on January 21, 1999, that on the other end of the arising from spectrum are claims which are connected directly and immediately to actions made by the Attorney General), with *AADC II*, 525 U.S. at 482 (determining on February 24, 1999, that § 1252(g) only applies to the three prescribed categories).
249. Compare *AADC II*, 525 U.S. at 482 (noting the three proscribed instances in § 1252(g) do not bar all claims brought by undocumented immigrants from being heard in federal district court), with *Silva*, 866 F.3d at 940-42 (acknowledging *AADC II* determined that § 1252(g) applied only to the three actions proscribed and did not apply generally, but still affirming the district court’s decision that it lacked jurisdiction to hear Silva’s claim as it arose from the Attorney General’s execution of a removal order).
250. *Id.* at 941.
251. *AADC II*, 525 U.S. at 482.
every potential claim brought under the IIRIRA. Judge Kelly correctly dissented in Silva because Silva's claims did not arise from the execution of a removal order as the appellate court issued a stay of removal.

In Arce v. United States, the United States Court of Appeals for the Ninth Circuit determined that the federal district court did have jurisdiction to hear Arce's FTCA claim as the Attorney General was not executing a removal order when the Attorney General violated the Ninth Circuit's stay of removal order by deporting Arce. The Ninth Circuit rightfully followed Supreme Court precedent by relying on AADC II and Jennings, which both state that Congress did not mean to sweep away jurisdiction from any and all deportation claims which arise from the Attorney General's decision to commence proceedings, adjudicate cases, or execute removal orders. Arce and Silva are distinct from AADC II because, while the claimants in AADC II were directly challenging their deportations by the Immigration and Naturalization Service and the Attorney General, the claimants in Arce and Silva were not challenging the deportations themselves, but the violations of the stay of removal orders. Ordering Arce's depor-

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252. See AADC II, 525 U.S. at 482 (noting that Congress did not intend for 1252(g) to bar jurisdiction in all claims involving deportation proceedings).

253. Compare Silva, 866 F.3d at 942 (Kelly, J., dissenting) (reminding the majority that "[r]egardless of whether Silva's claims are connected to his being removed from the United States, they cannot arise from the government's execution of a removal order because there was no enforceable removal order for the government to execute."). with AADC II, 525 U.S. at 482 (determining that § 1252(g) is narrow and only applies to the three proscribed actions), and Jennings, 138 S. Ct. at 840 (iterating that the three actions of the Attorney General listed in § 1252(g) do not preclude federal courts from obtaining jurisdiction over claims which arise from one of those three actions).

254. 899 F.3d 796 (9th Cir. 2018).

255. Compare Jennings, 138 S. Ct. at 840 (stating that the Court did not interpret § 1252(g) in AADC II to cover all claims which arise from the Attorney General's commencement of proceedings, adjudication of cases, or execution of removal orders), with AADC II, 525 U.S. at 482 (noting it would not be logical to interpret the IIRIRA so broadly that no court could hear any claim involving deportation proceedings), and Arce, 899 F.3d at 800-01 (declining to adopt a broad reading of § 1252(g) and determining that the federal district court did have jurisdiction to hear Arce's claim as the violation of the removal order fell outside of the three actions listed in § 1252(g)).

256. Compare AADC II, 525 U.S. at 482 (reasoning that § 1252(g) was not meant to apply to every aspect of a deportation proceeding), with Jennings, 138 S. Ct. at 840 (noting that § 1252(g) does not apply to claims which merely arise from one of the three proscribed actions).

257. Compare AADC II, 525 U.S. at 487 (determining that the claims fell squarely within the Attorney General's ability to commence proceedings under § 1252(g)), with Arce, 899 F.3d at 800 (stating that Arce was not challenging the deportation order itself, but instead claiming that the Attorney General had no power to remove him as the Ninth Circuit had issued a stay of removal), and Silva, 866 F. 3d at 940 (noting that "Lopez Silva . . . respond[s] that the alien's claims do not arise from a decision or action to execute a removal order, but rather from a violation of the stay of removal proceedings.").
tation fell outside of the Attorney General’s three proscribed actions in § 1252(g), as the Attorney General cannot execute a removal order which does not exist.258 Therefore, the Ninth Circuit decided Arce correctly, as federal district courts do have jurisdiction to hear wrongful removal cases in instances where the Attorney General has violated a stay of removal order and no removal order exists for the Attorney General to execute.259

V. CONCLUSION

Arce v. United States260 was a timely, correctly decided decision by the United States Court of Appeals for the Ninth Circuit.261 Claudio Anaya Arce sought asylum in the United States for fear of persecution and torture in his home country of Mexico but was deported by the Attorney General after the Ninth Circuit issued a stay of his removal.262 After Arce was brought back to the United States, he brought a civil action against the United States under the Federal Tort Claims Act263 ("FTCA") for claims surrounding his removal.264 After the United States District Court for the Central District of California dismissed the case for lack of jurisdiction under § 1252(g) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996265 ("IIRIRA"), Arce appealed to the Ninth Circuit.266 The Ninth Circuit reversed, reasoning that the federal district court does have jurisdiction to hear wrongful removal cases in instances where the Attorney General has violated a stay of removal order and no removal order exists for the Attorney General to execute.259

258. Compare Arce, 899 F.3d at 801 (stating that “[w]here the Attorney General totally lacks the discretion to effectuate a removal order, § 1252(g) is simply not implicated.”), with Jennings, 138 S. Ct. at 841 (observing that § 1252(g) does not apply to all claims which may arise from one of the Attorney General’s three actions), and AADC II, 525 U.S. at 482 (noting the federal courts only lack jurisdiction when the Attorney General commences proceedings, adjudicates cases, or executes removal orders).

259. Compare Arce, 899 F.3d at 801 (determining that the federal district court did have jurisdiction to hear Arce’s claim as § 1252(g) does not apply when the Attorney General lacked the ability to execute the removal order in question), with AADC II, 525 U.S. at 482 (noting that § 1252(g) only strips away jurisdiction when the Attorney General acts within one of the three proscribed categories and that the statute was not meant to strip away jurisdiction from every deportation proceeding), and Jennings, 138 S. Ct. at 840 (mentioning that the federal courts are not stripped of jurisdiction under § 1252(g) because a claim merely arises from one of the three proscribed actions of the Attorney General).

260. 899 F.3d 796 (9th Cir. 2018).

261. See supra notes 254-59 and accompanying text.

262. See Arce v. United States, 899 F.3d 796, 798 (9th Cir. 2018) (noting Arce filed an emergency petition for review and a motion for stay of removal in the Ninth Circuit after being denied asylum by an asylum officer and an immigration judge). However, just mere hours after the stay of removal was granted, the Department of Homeland Security deported Arce to Mexico. Arce, 899 F.3d at 799. Arce was returned to the United States a few weeks later pursuant to orders issued by the Ninth Circuit. Id.


264. See Arce, 899 F.3d at 798 (noting Arce’s claims included false arrest, false imprisonment, intentional infliction of emotional distress, and negligence).

jurisdiction over Arce’s claim as the Attorney General’s violation of a court order does not fall within the power to execute a removal order.266

The Ninth Circuit correctly decided Arce v. United States.268 First, this Note established the meaning of § 1252(g) as interpreted by the United States Supreme Court case Reno v. American-Arab Anti-Discrimination Committee II269 (“AADC II”).270 Then, this Note demonstrated that the Supreme Court in AADC II decided that § 1252(g) of the IIRIRA is not meant to be all-encompassing of every claim which may arise from the Attorney General’s commencement of proceedings, adjudication of cases, or execution of removal orders.271 Finally, this Note concluded that Arce v. United States was correctly decided by the Ninth Circuit while Silva v. United States272 was incorrectly decided by the United States Court of Appeals for the Eighth Circuit as it disregarded United States Supreme Court precedent.273

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 was the product of an increase in undocumented immigrants migrating into the country, politicians’ rallying cries for intensified border control, and the looming threat of terrorism from the Middle East.274 Section 1252(g) of the Illegal Immigrant Reform and Immigrant Responsibility Act was designed by Congress with the intent to strip the federal courts of jurisdiction over deportation appeals in order to streamline the deportation and removal process.275 While the IIRIRA may have streamlined deportation proceedings by removing the possibility of appeal in the majority of instances, Congress was unable to strip the federal courts of jurisdiction entirely.276 Even though, as of today, only the Ninth and Eighth Circuits have split

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266. See Claudio Anaya Arce v. United States, No. 15-2419, 2016 U.S. Dist. LEXIS 195340, at *6 (C.D. Cal. Oct. 3, 2016) (stating, “Plaintiff’s claims . . . arise entirely from Defendant’s decision to execute Plaintiff’s removal order and thus fall squarely within the ambit of §1252(g).”); Arce, 899 F. 3d at 799 (noting Arce appealed to the Ninth Circuit).
267. Arce, 899 F.3d at 799.
268. See supra notes 254-59 and accompanying text.
270. See supra notes 211-19 and accompanying text.
271. See supra notes 220-37 and accompanying text.
272. 866 F.3d 938 (8th Cir. 2017).
273. See supra notes 238-59 and accompanying text.
275. See H.R. REP. NO. 104-469(I), at 237 (1996) (“This subsection also provides that no court shall have jurisdiction to review a decision by the Attorney General . . . .”).
276. See Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999) (determining 1252(g) was not a zipper clause that stripped the federal district courts of jurisdiction over all deportation cases); Jennings v. Rodriguez, 138 S. Ct., 830, 840 (2018) (stating that federal district courts do have jurisdiction over claims which merely arise from one of the three proscribed actions of 1252(g)).
opinions on whether § 1252(g) deprives federal district courts of jurisdiction over cases involving wrongful removal, there is not any indication that this question will be resolved by the Supreme Court in the near future. Both Arce and Silva were decided by their respective federal district courts prior to President Trump beginning his administration in January 2017. With renewed and heightened fears concerning immigration and an influx in immigration lawsuits being filed in federal court under the Trump administration, clarifying § 1252(g) may no longer be on the Supreme Court’s agenda of primary concerns. Or, with this influx of immigration filings, this may be an essential time for the Supreme Court to further clarify the meaning of § 1252(g). Only time will tell. Whether undocumented immigrants can bring claims against the United States for wrongful removal will depend solely on which federal circuit they decide to build their new lives.

-Justice A. Simanek ’21


278. See Bill O. Hing, Entering the Trump ICE Age: Contextualizing the New Immigration Enforcement Regime, 5 Tex. A&M L. Rev. 253, 293 (2018) (iterating that “[s]ince President Trump’s election, reports of widespread fear in immigrant communities have been common.”); Emily C. Callan, A Funny Thing Happened on My Way to the Border . . . How the Recent Executive Orders and Subsequent Lawsuits Demonstrate a Need for Comprehensive Immigration Reform, 47 U. Balt. L. Rev. 1, 2 (2017) (concluding that “[a]s a direct result of these actions, multiple lawsuits have been filed challenging the presidential authority to take such steps affecting immigration laws and practice without the action, consent, or cooperation of Congress.”).